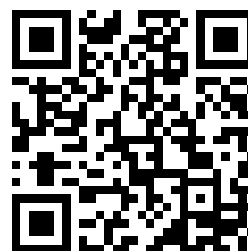
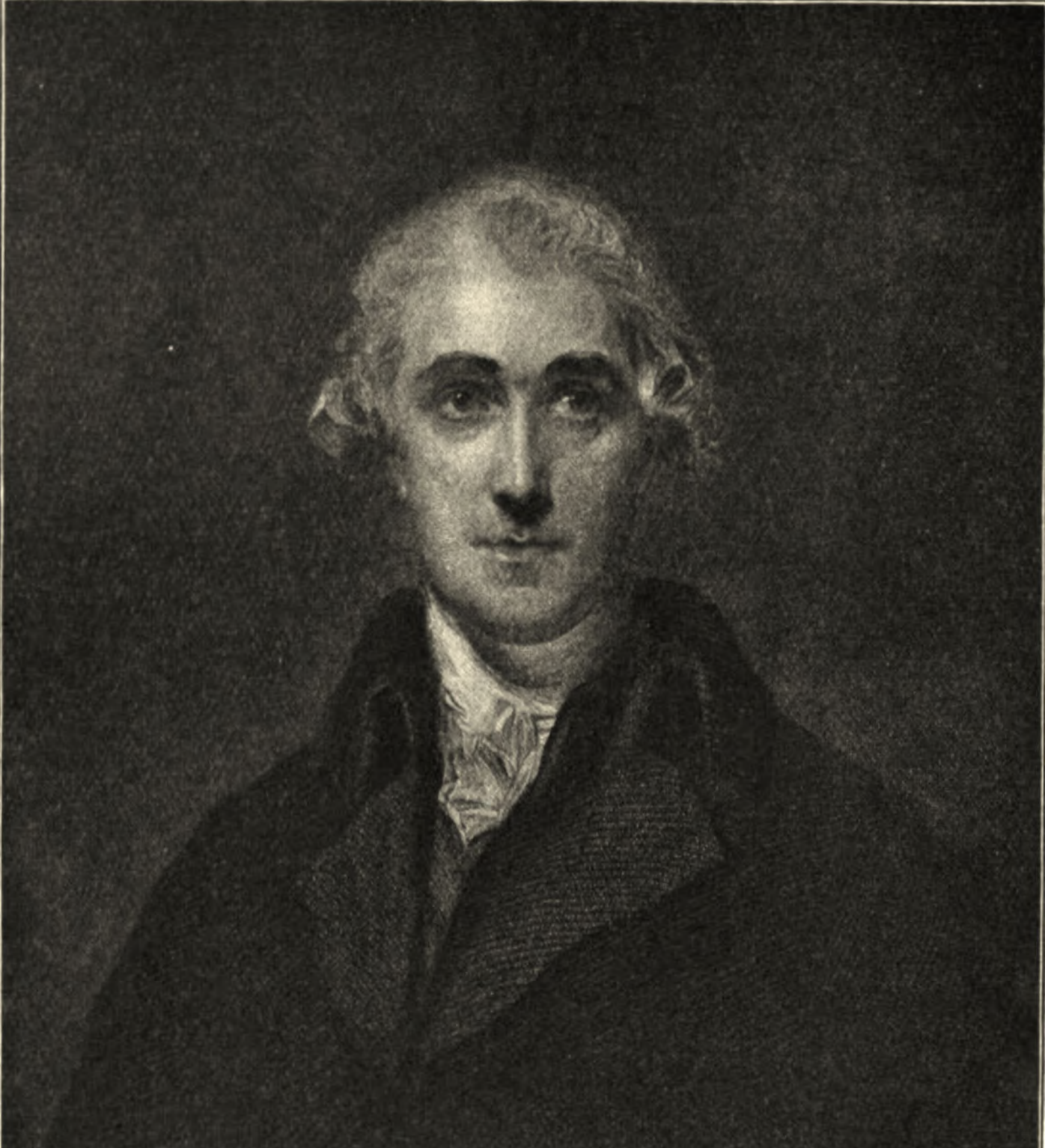

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The green bag

Horace Williams Fuller, Sydney Russell Wrightington,
Arthur Weightman Spencer, Thomas Tileston Baldwin

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EDITED BY THOS. TILESTON BALDWIN

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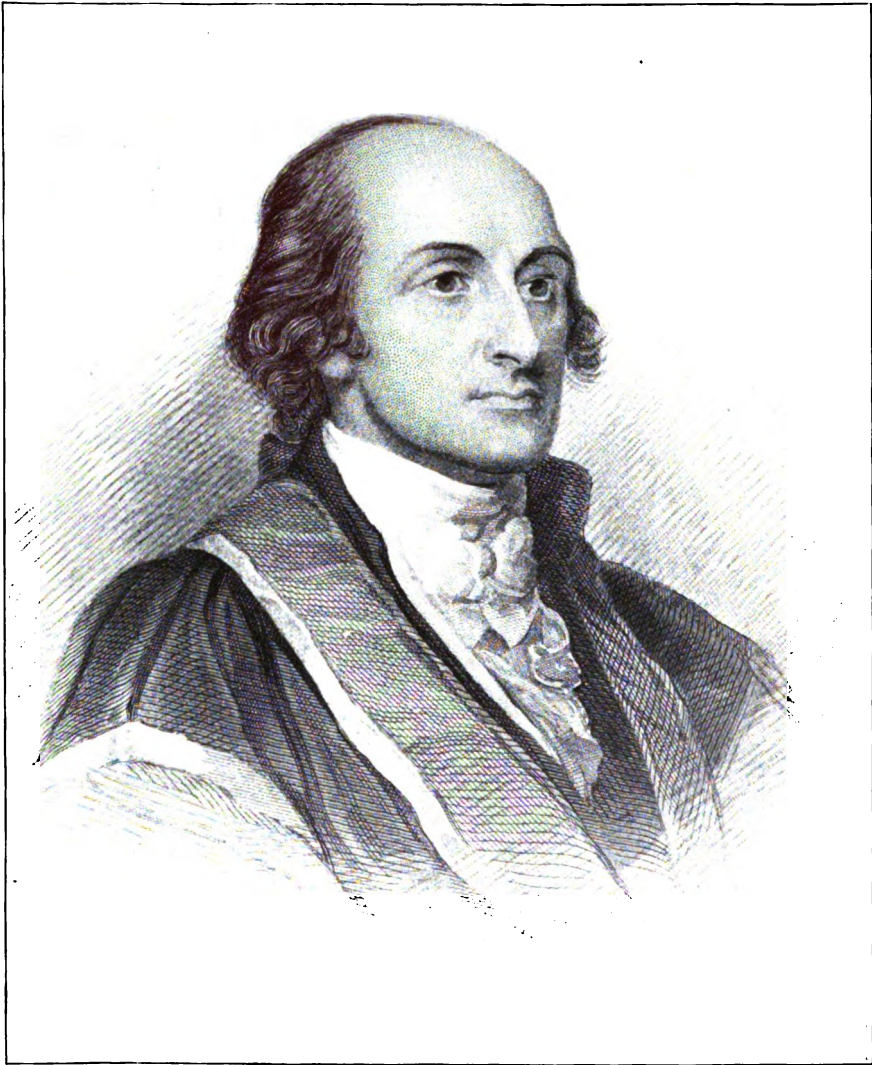
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John Jay —

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JOHN JAY.

BY FRANCIS R. JONES.

JOHN ADAMS, President of the United States, under date of December 19, 1800, wrote to John Jay, at that time governor of the State of New York, in reference to his unsolicited nomination and confirmation as Chief Justice of the United States for the second time: "I had no permission from you to take this step, but it appeared to me that Providence had thrown in my way an opportunity not only of marking to the public the spot, where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against its increasing dissolution of morals."

Some five years earlier, in the midst of the excited public demonstrations against the unpopular commercial treaty with England, which had been negotiated by John Jay, as special envoy to the Court of St. James, there appeared in large letters of white chalk around the enclosure of Mr. Robert Treat Paine the following apostrophe: "Damn John Jay! Damn every one that won't damn John Jay!! Damn every one that won't put lights in his windows and sit up all night damning John Jay!!!"

The man, who, under any circumstances, could inspire such diametrically opposite opinions, must have been exceptionally virile, and of an inspiring independence of mind and character. It is perhaps not too much to say that in Jay's life of eighty-three years he never courted a public popularity, however welcome, shirked a duty, however unpleasant, or refused to assume a responsibility, however great. As a member of a

revolutionary committee of New York, he banished Van Schaack, one of his classmates and most intimate friends. As minister to Spain he accepted bills drawn by the Congress to an amount which he was utterly unable to meet, and which threatened to ruin him, not only in purse, but in reputation as well. As negotiator of peace with England, he did not hesitate to ignore the instructions of his government, when he became convinced that to follow those instructions would be detrimental to the welfare of his country. As Chief Justice of the United States he protested against the constitutionality of the act of Congress requiring applications for pensions to be passed upon by the justices of the supreme court in their respective circuits, with an appeal from their decisions to an executive officer of the United States. As governor of the State of New York, he refused to follow the advice of Hamilton to call an extra session of the legislature in order to elect presidential electors, the election of which would properly be made by an incoming legislature with a hostile majority.

Almost from the time of his graduation from the then King's College in 1764, at the age of eighteen, and his entrance upon the study of law in the office of Benjamin Kissam, he was engaged in an influential manner in the agitation against the encroachments of the British king and parliament, in association with James Duane, Gouverneur Morris, R. R. Livingston, William Livingston and others of equal reputation. His terse and at the same time exquisite English

was employed in drafting patriotic addresses to his fellow citizens and to the British king and public. He was ever anxious for a strong central government and was the author of the first constitution of the State of New York, becoming under it the first chief justice of the State, when only thirty-two years old. He took a prominent part in the Continental Congress, and in December, 1778, was elected president thereof, a position which he retained until October, 1779, when he was sent as minister to Spain. On his return from abroad in 1784, he was elected secretary for foreign affairs by the Confederate Congress, an office which at that time was undoubtedly the most important in the government, and his influence was such that Otto, the French minister, wrote to Vergennes in January, 1786: "The political importance of Mr. Jay increases daily, and Congress seems to me to be guided only by his directions, and it is as difficult to obtain anything without the cooperation of that minister, as to bring about the rejection of a measure proposed by him." He was not a member of the Constitutional convention, being defeated therefor because of his well-known ultra-Federal opinions, but he gave to the instrument evolved by that body his most earnest support, and materially aided in having it adopted by the convention of the State of New York. His services, his ability and his character were such that Washington, long his friend, offered him any post in the new government within the gift of the President. He chose that of Chief Justice, and, as such, inaugurated the sittings of the Supreme Court of the United States, and for some five years maintained the dignity of that tribunal in a firm and becoming manner, until in 1795 he resigned to become governor of the State of New York.

His brief administration as Chief Justice is chiefly memorable for his protest against the right of Congress to exact the exercise of non-judicial functions by the Federal judiciary, already referred to (2 Dal. 409), and

for his judgment in *Chisholm vs. Georgia* (2 Dal. 419), in which he maintained the right of a citizen of one State to sue another State, a right which was, of course, taken away by the Eleventh Amendment. This case, although obsolete, is of such paramount importance historically, not only because it is the first authoritative enunciation of the supremacy of the Federal Constitution and the laws enacted under it, but also because it shows the sources of power from which the statesmen and jurists of that day believed that its authority was derived, that I venture to quote a pregnant paragraph from the Chief Justice's opinion:

"The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the

plenitude of it, they declared with becoming dignity, 'We, the people of the United States, do ordain and establish this "Constitution."' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. By this great compact, however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, etc." (2 Dal. 470.)

It is also worthy of note that, in 1794, at the February term of the Supreme Court, that tribunal sat with a special jury to try an issue of fact framed for it, and the Chief Justice delivered the charge. This is the only instance of a jury trial in the annals of that court. (3 Dal. 1.)

Upon the completion of his second term as governor of New York in 1801, he refused a second appointment as Chief Justice of the United States and retired to his estate in Bedford, where, upon occasion, his advice was sought by his old friends and political associates, and where he spent the remaining twenty-eight years of his life, serene in the happy consciousness of duty well done.

To enter into Jay's life more in detail would be to write the history of the nation struggling into consciousness, for of private, personal history there is none. The consistent and steady career herein briefly outlined is perhaps a better epitome of the character of the first Chief Justice of the United States than any attempt at a diagnosis thereof could well be. That a man, even in the amorphous times of the Revolution and early days of the government, could almost

constantly hold two offices, which, if not absolutely inconsistent with one another, at least interfered with the proper performance of the duties of one or the other, seems to us of the present day most extraordinary. To be at one time a member of the Continental Congress and also of the Provincial Convention of New York,—the attendance upon the latter of which precluded him from signing the Declaration of Independence; to be at another time chief justice of New York and president of the Confederate Congress; to be both Chief Justice of the United States and envoy extraordinary to Great Britain; to be a candidate for governor of New York while still Chief Justice of the United States; are instances both of the public activities in which Jay was engaged and of the regard in which he was held, at least by the great men of that time. To have been the confidential counsellor and friend of Washington, and to have had the confidence and love of Hamilton, to have had the utmost regard and affection of John Adams, to have maintained the steady friendship and respect of Franklin in the arduous negotiations which resulted in the Peace of Paris, and to many of which Franklin's judgment was adverse, are facts in Jay's life which show his ability, disinterestedness and earnestness, his equanimity and his dignity of character.

His conduct upon his defeat by a technicality for governor of New York in 1792, when it was conceded that he had a majority of votes, showed his perfect poise. That defeat he took with philosophical good nature, and in answer to an address delivered upon his home-coming at that time, he said: "Every consideration of propriety forbids that difference of opinion respecting candidates should suspend or interrupt the mutual good humor and benevolence which harmonize society and soften the asperities of human life." The same characteristic dignity was shown in his first charge as a Federal judge to the Grand Jury, in which he said: "Let it be remembered that civil liberty consists not in a right to every man to do

just what he pleases, but it consists of an equal right to all citizens to have and enjoy and do in peace, security and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good."

With regard to his peculiar qualifications for the Chief Justiceship, I am constrained to quote the valuable and judicious encomium of Judge Cooley:

"When the duty was devolved upon Washington to organize a government under the Constitution, no appointments he was called upon to make were more important to the country than those of the Justices of the Supreme Court. Especially was that of Chief Justice of first importance. An error in this regard might have brought into the Federal system mischiefs that in a little time would have become inveterate and irremediable. . . . When the time is considered, and the circumstances under which the duty of authoritative construction must be entered upon, one cannot fail to be impressed that peculiar qualifications were essential in the person who should preside over the body to whom that duty would be intrusted, and who would give direction to its thought. He ought certainly to be a learned and able lawyer; but he might be this and still fail to grasp the full significance of his task. . . . It required a statesman to understand its full significance as an instrument of government, instinct with life and authority. No other man prominent in the public councils, and generally known to the country, possessed in so eminent a degree the varied qualifications essential to the task

as did John Jay. . . . He was thus in a true sense a broad as well as an experienced statesman, jurist and diplomatist; and in no other position in the government were his great and varied attainments calculated for such eminent usefulness."

That a man of Jay's temperament should have remained, against his inclination, so long in the public service seems to show the greatness of his patriotism. Happy in his home life, of domestic tastes, retiring and self-contained, independent and courageous, with a calm and clear judgment, endowed with the happy faculty of seeing things as they are, and of absolute integrity both mental and moral, Jay apparently deserves a greater popularity with posterity than his name has attained. Not brilliant like Hamilton, or deep like Franklin, or cunning like Jefferson, and strangely devoid of all sense of humor, in character and in attainments he more resembled Washington than any other public man of his time. The mingled blood of his Dutch and Huguenot ancestry flowed strong in his veins for the true liberty of the citizen, a principle to which he unswervingly devoted the whole strength of his manhood. Yet much of his influence was due, no doubt, to the fortunate circumstances and time of his birth; associated, as he was, by strong social ties with the powerful New York families who, by their position and wealth and force of character, assumed the leadership in the Revolutionary agitations, and retained that leadership to build a stable government upon the cornerstone of the Constitution.

THE PSYCHOLOGY OF POISONING.

By J. H. BEALE, JR.

FLORENCE MAYBRICK was tried at Liverpool in the summer of 1889 for the murder of her husband. The deceased died after a six-days' illness following earlier ill turns; the symptoms were claimed to be those of arsenical poisoning, though in some respects more like those of disease naturally caused. A small amount of arsenic was found in the body, not enough of itself to cause death, but indicating the administration of an amount possibly sufficient to cause death. There was strong evidence that Mr. Maybrick had taken arsenic more or less regularly for several years.

Mrs. Maybrick had nursed her husband tenderly through the early stages of his illness, had sent seasonably for physicians and nurses, and had manifested great grief at his death. She had been seen changing medicine from one phial to another; but no arsenic was found in it. She had, however, been discovered putting arsenic into a bottle of beef extract intended for him; her explanation was that she did it (not knowing it to be arsenic) at his earnest request. Another bottle of medicine was found in his chamber, after death, containing arsenic; and enormous quantities of the drug were found in his dressing room. She had openly bought small quantities of arsenic at about the time of her husband's death, to use (as she explained) in a cosmetic lotion; her husband had opportunities of getting arsenic in large quantities.

Though her husband did not know the fact, Mrs. Maybrick was an adulteress, and feared discovery by him; three days before his death, she wrote to her paramour that Maybrick was "sick unto death" and that he might relieve his mind of "all fear of discovery now and in the future." This letter was intercepted, and first led to her being suspected of her husband's death.

The jury convicted Mrs. Maybrick; but the Home Secretary commuted the death-sentence to imprisonment for life, on the ground that, though she undoubtedly administered poison intending to kill, the evidence left it more than doubtful whether Maybrick died of the poison.

Probably no one accustomed to weighing facts could carefully examine the evidence introduced in the case without coming to the conclusion that it does not prove beyond a reasonable doubt either that Maybrick died of arsenical poisoning or that Mrs. Maybrick administered poison to him. Mr. Justice Stephen, however, in his charge laid before the jury another sort of evidence, and practically advised them to find their verdict on that. "You must not consider the case as a mere medical case in which you are to decide whether the man did or did not die of arsenic according to the medical evidence. . . . You must decide it as a great and highly important case, involving in itself not only medical and chemical questions, but involving in itself a most highly important moral question. And by that term moral question I do not mean questions of what is right and wrong in a moral point of view, but questions into which human nature enters, and on which you must rely on your knowledge of human nature in determining on the resolution you arrive at."

The considerations laid before the jury in this rather ambiguous language were, of course, inferences drawn from experience of human actions in similar cases in the past. Mr. Justice Stephen did not mean to tell the jury that because Mrs. Maybrick was immoral they should presume against her, though the jury may well so have understood his intemperate charge. But taking the language as it was meant, how far is it safe for a jury to consider the probable work-

ings of human nature? May they be swayed by such considerations, without evidence, as matters of common knowledge? Does every jurymen know by instinct what a woman would be likely to do, under the circumstances in which Mrs. Maybrick was known to have been placed? Obviously not. If there is no science of human action, it is impossible for a jury of men to judge the probable action of a woman so placed. If there is such a science it is for persons expert in the science, not for persons ignorant of it, to hold and express an opinion; and Mr. Justice Stephen's charge, in the absence of expert opinion on the point, was quite unjustifiable. If, however, upon proper study an expert opinion can be formed, it is important that we should know it.

In no way can the study of this science be better pursued than in the reports of judicial trials. The evidence of acts done in all circumstances of life is here preserved; and it is evidence protected, so far as possible, from the possibility of error. It is given under the solemnity of oath, and in open court; it is given under the penalties of perjury; and it is (in England and America) sifted by an immediate open cross-examination. Let us see how far it is possible, by an examination of similar reported trials, to give an expert opinion on the "moral question" involved in the Maybrick case. For that purpose it will be better to examine trials in more than one country, and in several centuries. The examination should cover all accessible cases of poisonings by women for a motive arising out of the passion of love.

In France in the seventeenth century no criminal was more famous than the Marquise de Brinvilliers. The murder of her father, her earliest exploit of the sort, is in point. She was in love with a young man, not her husband; her father objected to the scandal, and she determined to put him out of the way. She accompanied him to the country, and there administered to him a small amount of arsenic in a bowl of soup. He became sick in a few hours; she attended him

with anxious care, called a physician, finally traveled with him back to Paris, nursed him tenderly until he died after a lingering illness, and showed due grief for his death. The poison she obtained from her paramour. She was not suspected for many years. She was, however, driven by remorse or other feeling to write out a full confession of this and her other crimes, which was placed in a casket with an inscription begging the finder by all his hopes of heaven to burn it unread; and the casket was left with her lover. The lover having died suddenly, she manifested such anxiety to have the casket returned to her as her property that curiosity and suspicion were aroused, the casket opened, and her crimes discovered. She at first denied everything; but was tried and convicted, made a full confession, and met her end with so edifying a piety that she was acclaimed by those present at the execution as a saint! She had, among other crimes, poisoned her father and all her brothers, and attempted to poison her sister.

Marie Lafarge was tried in France in 1840 for the murder of her husband. He had been seized with illness while absent from home, after eating a tart sent him by his wife; he returned home and died after an illness of eleven days. The symptoms were consistent with death from arsenical poisoning or from disease. One examination of the body showed no trace of arsenic; another, by the famous chemist Orfila, showed a trace, barely enough to cloud a test-tube, too small to estimate the amount.

Mme. Lafarge had openly bought arsenic shortly before her husband's illness, to kill rats, and a powder had been used for that purpose; analysis, however, showed that the powder so used was not really arsenic. She was seen during his illness putting a white powder in his medicine; the evidence did not show this powder to be arsenic. She nursed him tenderly during his illness, and seemed to feel great grief at his death.

Lafarge was a man of lower social rank than his wife; she was almost dowerless, and

had consented to marry him without ever having seen him. After the marriage a feeling of loathing appears to have seized her, and she attempted to run away; there is no reason, however, to suspect that she loved any one else. Eventually she became reconciled to her husband, and even seems to have shown him considerable affection.

The theory of the defence was that either he had died from natural causes, or that he had been poisoned by a servant for the purpose of robbery. This servant had in fact bought the arsenic for the accused (and so might have handed to her the harmless powder found in the rats' potion, keeping the arsenic); he had taken the poisoned cake to Lafarge; and he had absconded before his evidence was called for at the trial. A valise of his master, containing a large sum of money, had disappeared during the return from Paris, while he was ill and in the care of the suspected servant.

The jury convicted Mme. Lafarge; but the sentence (which was not acceptable to most people) was commuted to imprisonment for life. Mme. Lafarge appeared always calm, pious and resigned, but she protested her innocence to the last. She died after a few years.

Mary Blandy was tried early in 1752, for the murder of her father. He undoubtedly died of arsenical poisoning, due to arsenic repeatedly put in his gruel, in small quantities, by his daughter. She tended him during his long illness carefully and lovingly, and appeared distracted with grief at his death.

Miss Blandy loved and desired to marry a certain young man; but her father, objecting to his character, absolutely forbade marriage. The lover sent her the arsenic as a "love-philter" to be given the father to secure his consent. She claimed to have administered it in entire ignorance of its nature. She also wrote a letter to her lover, saying "My father is so bad that . . . if you do not hear from me soon again, don't be frightened. . . . Take care what you write." The jury found her guilty of murder; educated persons much

doubted her guilt, but the populace held her responsible, and clamored for her death. The pardoning power is said to have contemplated a reprieve, but to have been overawed by the popular clamor. She was executed, protesting her innocence to the last.

A Scotch case tried in Glasgow in 1857 is in many respects similar. Madeline Smith, a girl of good family, had become intimate with a young French clerk named L'Angelier; the intimacy had gone so far that the parties were perhaps man and wife, under the Scotch law of marriage. Compromising letters, couched in the warmest terms, had passed between them. Finally, Miss Smith appears to have wearied of L'Angelier; and, being sought in marriage by another, desired him to return her letters. He declined to do so, reproached her with her coolness, and threatened to go with the letters to her father and demand her as his wife. She professed to be still in love with him, and desired him to come to her window at night for an interview; at the interview she made him a cup of chocolate, which he drank. He was found the next morning at the door of his lodging, suffering acutely, and soon afterwards died, undoubtedly from arsenical poisoning. An autopsy showed that he must have taken at least half an ounce of arsenic.

Before this time Miss Smith had bought two lots of arsenic, giving her own name as purchaser, alleging falsely as a reason for the purchase that she needed the poison to kill rats. At the trial she explained that her real reason was that she desired to use it as a cosmetic. L'Angelier also had had an opportunity to obtain arsenic in large quantities, and had often threatened to commit suicide. The arsenic Miss Smith bought was mixed, one lot with soot, the other with indigo; the soot could not possibly be removed, the indigo with great difficulty, by nice manipulation. No trace of soot or of indigo was found in L'Angelier's body.

Arsenic is dissolved in water in very small proportion, and little can be held in suspension. To have administered in chocolate the

quantity of arsenic L'Angelier had taken would have required his drinking at least a quart of chocolate at the midnight interview, in the intervals of their endearments.

The jury found a Scotch verdict, "not proven," which was received with general satisfaction. Miss Smith's demeanor at the trial was modest and composed. She is said afterwards to have married, and to have made an exemplary wife and mother.

There are many similar cases, but all have the same common features that are found in those that have been stated. In only one other case does the jury seem to have acquitted, and in that case they took the extraordinary and illegal step of adding to their verdict of "not guilty," that they strongly suspected the woman was guilty.

Supposing now that the verdicts were correct, let us study and compare the facts of these cases, and come to such general conclusions as the cases warrant. We may safely draw this deduction: That women desiring to kill from a motive that springs from love are very apt to use poison as the means of killing. The passion of anger is not aroused; the killing may be planned at leisure, stealthily, with the hope of escaping detection. Women who kill in this way seem to be absolute mistresses of themselves. They can put on the appearance of the warmest affection in dealing with their victim; they can pass calmly and without embarrassment through the ordeal of a trial, and they can meet death in an odor of sanctity. Such a woman planning the death of her victim appears naturally to select arsenic as the poison used. Antimony, a very similar poison, was used in one case; chloroform was the alleged poison in the case in which the defendant was acquitted; in all other recorded trials arsenic was used. For this selection one might suggest two reasons: There is obviously a notion widely prevailing among women that arsenic is of use as a cosmetic; the poison is, therefore, already, to a certain extent, familiar to the intending poisoner. It is also, on the whole, not difficult to pro-

curc. There may be a deeper reason for the choice. There seems to be something in the nature of the drug and of its effect upon the victim that adapts it for woman's use. Given in small doses it kills slowly and quietly, almost painlessly. Vegetable poisons, on the other hand, like strychnine, cause dreadful convulsions and a quick and painful death. The infliction of a quiet, lingering death is, perhaps, characteristic of women. One would look for it in the case of a sex by nature cautious and timid in act, if not in thought. Men, on the other hand, in the cases I have examined have used poison with a liberal hand, and have killed at once; there was no doubt of the symptoms in those cases, and no delay in the result. The great amount of arsenic found, in L'Angelier's body is the fact that throws most doubt on the guilt of Madeline Smith. Further investigation, however, might show that there is no such difference between the sexes in the administration of poison.

Another noteworthy fact is the tender care lavished by the woman upon her victim—if he was her victim. We cannot deny that in all the cases the circumstance which weighed most strongly against the defendant was the motive she had for removing the deceased. If the defendant was guilty, she must in each case have been a woman whose love and hate were unbridled. Yet we see her careful and tender of the victim she is slowly doing to death, weeping at his suffering, prostrated by the final result—but secretly gloating over his pains, and writing in triumph to the absent lover. Quite a piece with this exhibition is the behavior of each defendant at her trial. The modest, calm, and dignified demeanor of each in the face of the most dishonoring evidence is noteworthy. One can hardly conceive the torture of Madeline Smith, stared at by a promiscuous crowd while her letters to L'Angelier were read aloud; yet passionate and impetuous as she was by nature, she did not flinch. She must have gone through some terrible experience, one would think, to gain such control of herself.

Another surprising feature of these cases is the fact that in each of them some of the most important proof was furnished by the defendant herself. They confessed in writing, they wrote letters, and they bought arsenic without disguise. It seems extraordinary that Mrs. Maybrick and Miss Blandy should have written as they did to their lovers if they were innocent; it seems still more extraordinary if they were guilty. So it seems almost incredible that three of them should have bought arsenic in their own names just before the fatal act, if they were guilty of the act.

Finally, we must note as a remarkable fact the tendency of the jury to convict. In the case of most murders where the evidence is so evenly balanced and public opinion so strongly favors the defence, the jury almost invariably acquits; but the result of these cases, so far as it goes, justifies the inference of a bias in the jury against one accused of poisoning. So far as other cases have been examined, they strengthen this inference. In Miss Smith's case, where the verdict was "not proven," the jury were doubtless influenced by the popular dictum, if she did not poison him she ought. Bear in mind the fact that the defendants here were all attractive women, whose conduct at the trial was all in their favor, and their conviction is really extraordinary. It is probable that poison is so secret and so terrible an agent, that even a suspicion of its use prejudices a jury against the accused, and in fact though not in law shifts the burden of proof.

Conviction in these cases was the more remarkable because in most of them another probable agency of poisoning was pointed out by plausible evidence. It seems fair to say that in almost every case, taken by itself, the evidence introduced did not prove guilt beyond a reasonable doubt, and the verdict

of guilty was therefore not justified. If the crime under investigation had been committed by a less secret and dreaded agency than poison a verdict of not guilty would probably have been rendered in every case.

Shall we then be forced to conclude that the women who have thus suffered conviction were innocent? Probably not. Though in each case the crime was not proved beyond a reasonable doubt, in every case the scale of probability inclined toward guilt. Taken separately, the evidence in each case does not prove guilt; but when the cases are studied together the conviction of guilt is forced upon one.

The constant iteration of the typical circumstances indicates some law of action to which all conform; a law which must take its origin from some common spring and course of action in these women. So far as such a law can be regarded as established by the examples we have studied (which are confirmed by all the cases of arsenical poisoning by women that the author has been able to find reported), it furnishes a clue to the causes of phenomena observed in new cases.

If such a study had been made by an expert psychologist before the Maybrick case, and he could under the laws of evidence have given his opinion of the guilt of the defendant, he would doubtless have expressed it in the affirmative. He would have pointed out, first, that the woman was in love with a man not her husband, and feared detection; that she cared tenderly for her husband and always controlled herself, yet could not forbear writing to her lover; that the supposed poison was used in such small quantities as almost to defy detection. On such opinion evidence, if the judge could properly have left it to the jury, a conviction would have been justified.

A LEGAL MENU.

BY ROBERT P. CLAPP.

Written for the Second Dinner of the Bar Association of the County of Middlesex,
Massachusetts, December 5, 1900.

PERHAPS you are accustomed all, dear
brethren of the Bar,
To quench your thirst with cooling drinks at
Thompson's busy Spa;
But at our Annual Dinner, where Wit and
Wisdom shine,
'T were sacrilegious not to take a glass of
golden wine.

And so we have provided here, as soon you
may discern,
Not only some old *Sherry Pale*, but also
Haute Sauterne.
Of these drink very lightly, please; just taste
the *Mumm* that's dry;
Act now with prudence, and a case you may
to-morrow try.

Yet should the *Pom'ry* give one cause to feel
a trifle queer,
Or make a little boisterous fun, contempt he
needn't fear;
The Court is surely with us now, and all may
plainly see
Resolves and acts are both to-night *coram*
non judice.

A cause of *scire facias* is what we're first to
try,
And all the statement that's required to show
the reason why
(Reflect that each will eat and drink what
costs a good round Five)
Is that a dinner such as this the judgment
will revive.

By order of the Court we file a bill of items
true,
So as to jaded appetites to give the proper
cue.
Each course, the best that Young's affords,
will bring to all delight.
The *Menu* that is printed here is almost "out
of sight."

If one shall think the courses few, or void
of interest,
And criticise at all our work in making up
the list,
For answer let us cite a fact to which we
point with pride—
There's nothing on our short-list here not
ready to be tried!

I.

A fact by all admitted is, no dinner's started
right,
Unless begun with that which gives a zest
to appetite;
And nothing will this purpose serve, or do
it quite so well,
As half-a-dozen *Oysters Raw*, all ready on
the shell.

II.

See *Consomme Imperial* against *Green Turtle*
Soup,
A case quite often cited here, and yet not
found in Throop.
The *dicta*, too, are quite in point; compare,
and 't will be seen
That there, as in the case at bar, were *Olives*
called the *Queen*.

III.

We introduce in evidence some *Chicken Halibut*,
Prepared *à la Point Shirley* from a broad and tender cut.
It clearly is admissible; it will our case sustain,
If with it we connect *Croquettes*, made of *Potato* plain.

IV.

On which of these two counts you'll go — a *Roast* or nice *Fillet* —
All are to your election put, and that without delay;
The one of *Turkey Young* and sweet, the other *Beef* well done—
Some *Chestnut Dressing* has the fowl; the beef, *Sauce Trianon*.

V.

As evidence material, we also offer now *Croquettes of Sweetbreads, Macedoine*, delicious, you'll allow;
'T will have a bearing manifest; its weight, too, you'll declare,
If taken with some *Cassolettes, à la Financière*.¹

VI.

An interlocutory res will now be taken up,
While genial² *Tom and Jerry* fill the tall and brimming cup.
Of this the purpose is, you know, not solely for delay;
It opens up a case in which the Court, we think, will say:

VII.

"This cause came on for argument, and counsel all were heard:
We find *Roast Larded Quail* to be an appetizing bird;

¹ Compote of Peaches, Condé, excluded when offered, will now be admitted, all objections being withdrawn.

² i. e. frozen.

And when, as here, the bill recites *Salade of Lettuce* dressed,
With *Chips* from *Saratoga* brown, the bill must stand confessed."

VIII.

For speedy trial stand assigned — we trust you've room for some —
Rich *Neapolitan Ice Cream*, and *Frozen Pudding cum*,
Some extra fine *Madeira Jel.*, and sundry kinds of *Cake*;
Let some of them be "passed when reached"; 't will save, perhaps, an ache.

IX.

Some *Choses* now may be assigned,¹ *in action* though they be.
(Sincerely do we hope and trust they will with you "agree.")
Their coming now is heralded with perfume in the air —
Old Roquefort, fine as one could wish, and flowing *Camembert*.

X.

To these, of course, there be some things that are appurtenant,
To wit, the like of *Crackers* soft, or hard ones made by Bent,
Besides some *Nuts and Raisins* sweet — all good in "summing up" —
And then there'll be some *Coffee* black, served in a tiny cup.

XI.

Bananas, Grapes and *Oranges*: with these our eating ends;
But those who smoke may by themselves (or through non-smoking friends)
Obtain without an extra charge some fairly choice *Cigars*, —
As good, at least, as those you smoke when in the open cars.

¹ Stat., 1897; Ch. 402.

Look now for genial Reason's feast, with
 flow of Eloquence;
 When ended 't is, your verdict true (if with
 the evidence)
 We pledge our word will read like this:
 "Dear Middlesex, ss:
 In all respects your Dinner's been a very
 great success."

A *bona fide* promise this; and yet, to be quite
 frank,
 We shall, if any breach occur, cite *Hall* and
Chelsea Bank,¹
 Wherein a promise glibly made was held in
 law to be
 Just "a hopeful expectation, sounding in
 prophecy."

¹ 173 Mass. 19.

JUDICIAL SALARIES.

MR. C. D. MERRICK of Parkersburg, West Virginia, has made up a statistical table showing the salaries paid to judges of the higher courts in the different States. Each amount given below is the highest judicial salary paid in the respective States, if Mr. Merrick's figures are correct. According to these figures the highest salary paid to a State judge in this country is that of \$17,500, paid to the New York Supreme Court justices, elected in the city of New York, and the lowest salary in this list is that of \$1,800 paid to the West Virginia Circuit judges. New York leads all the States, paying in addition to the foregoing handsome salaries, a salary of \$10,500 to the chief judge of the Court of Appeals, and \$10,000 to the judges of that court. For second place New Jersey and Illinois appear on almost equal terms, the former paying to her chancellor \$10,000 and an equal amount to her Supreme Court judges, while Illinois pays her Cook County Supreme Court judges either \$7,000 or \$10,350, just which appears uncertain from Mr. Merrick's figures. Then follows Pennsylvania, with a salary of \$8,500 to her Chief Justice, and salaries of \$8,000 to her Supreme Court judges. It is a close matter between Massachusetts, with a salary amounting to practically \$7,000 to her Chief Justice and \$6,000 salaries to her Superior Court judges, and Michigan, with salaries of \$7,000 to her Supreme Court judges. Next comes Cali-

fornia, with a salary of \$6,000 to her Supreme Court judges. Rhode Island and Missouri are about on equal terms, the former paying her Chief Justice \$5,500, the latter her St. Louis Court of Appeals judges and Circuit Court of St. Louis judges \$5,500, and apparently expenses in addition. In a class by themselves are Colorado, with a Supreme Court salary of \$5,000, Minnesota with a Supreme Court salary of \$5,000, Kentucky with a Court of Appeals salary of \$5,000, Wisconsin with a Superior Court salary of \$5,000, Nevada with a Supreme Court salary of \$4,500, and Indiana with a Supreme Court salary of \$4,500. In a class a bit below are Connecticut, Ohio, Montana, North Dakota, Iowa, Texas and Washington, each with a top salary of \$4,000. In another class, with top salaries ranging from \$3,800 down to \$3,000, are Delaware, Alabama, Mississippi, New Hampshire, Oregon, Maine, Maryland, Tennessee, Florida, Arkansas and Georgia. Finally, with top salaries ranging from \$3,000 down come Vermont, Wyoming, Utah, South Carolina, Kansas, Idaho, Virginia, Nebraska, North Carolina and South Dakota. West Virginia apparently brings up the rear with a Supreme Court salary of \$2,200, but the term of office is twelve years, considerably longer than that in many of the States which pay larger salaries,—“Modern Instances,” in *Boston Transcript*.

CONSPIRACY AS A FINE ART.

BY ANDREW LANG.

CONSPIRACY, for its own sake and apart from the object aimed at, is naturally attractive to the human mind. All children are conspirators, and rejoice in the chief agreeable element of conspiracy, the keeping of a secret. Happily these young plotters have no worse design, as a rule, than to surprise a relation with a birthday or Christmas present. Mature mankind seldom conspires to do good and give unexpected pleasure: grown-up conspirators meditate nothing less than *agreeable* surprises. The secrets in whose possession they delight aim at kidnapping or murdering. There is no doubt that, up to a certain point, the plotters enjoy themselves hugely. They feel like gods, beings with special knowledge and mysterious unguessed-at powers, moving above and apart from mankind; controlling statesmen; overthrowing the great; moulding the fortunes of people and princes. These joys, with the additional element of gambling, are being savored at this hour by thousands of anarchic amateurs, who probably never expect their schemes to take form in action. One has often thought, rightly or wrongly, that many of the Phoenix Park gang of "Invincibles" did not look forward to any practical conclusion, and that their crime was carried out only by the unexpected energy and ferocity of one or two of their number, dragging the rest after them. It must have occurred to the mind of every student of conspiracies that these combinations are sadly stereotyped: both in their methods and their faults. The wretched Jameson enterprise was cast in the very mould of a hundred Jacobite plots. There was the very same inept attempt to give a commercial character to the incriminating correspondence. Fenian, Jacobite, and Jamesonian conspirators always use the same would-be cryptic terms in their letters,

while the allusions to "pens" (revolvers), "the muslin trade," or to company floating, in each case are transparent to the dullest reader.

Reflection on such themes was probably the ruin, three hundred years ago, of the young Earl of Gowrie, and of his brother, Alexander Ruthven, who was only nineteen. By studying the stereotyped faults of other conspiracies, they were induced to try a new method. The result was the celebrated Gowrie conspiracy of 1600. So elaborately silly was this device when put to the test, so aimless to all appearance, so clumsy, and so unconnected with any traceable purpose or motive or ally, that the country at the moment inclined to believe that there had been no plot at all. Either James VI., who was aimed at, lost his presence of mind, people said, and so caused a panic in which Gowrie and his brother were slain; or the plot was all on the king's own side: a royal conspiracy to ruin the Ruthvens. Occasionally these theories are reproduced even at the present day. But much the best solution of the historical mystery is that which regards the two brothers as conspirators with an unlucky taste for originality.

The key is to be found in the evidence of the Rev. William Couper, at that time minister in Perth, as reported by Archbishop Spottiswoode, the historian. Mr. Couper, a few days before the adventure, found Lord Gowrie reading a Latin work on conspiracies. The Earl observed that they were all foolishly mismanaged, "for he that goeth about such a business should not," said he, "put any man in his counsel." Of course such a system is inconsistent with the very etymology of *conspiracy*, which implies combination. Gowrie must have meant that the number of accomplices ought to be very strictly limited, and he carried his theory so

far that certain of his retainers did not know what was expected of them, or how they were intended to act. This ignorance caused the miscarriage of the scheme, and at the same time threw an impenetrable mystery over the whole affair. The two Ruthvens, Gowrie and his brother, were slain in the struggle: nobody alive could be implicated in the conspiracy.

So far, then, the plot was highly successful; as far, that is, as to avoid detection is the object of plotters. On the other hand, they had not attained their object, and had both joined the choir invisible. A blot, to be sure, was cast on the king's character, which from a Presbyterian point of view was good, as far as it went. The ministers declined to announce from the pulpit their belief in James's innocence. They would speak as they "found themselves moved by God's spirit."

So matters remained for about eight years; not exactly satisfactory to any one. But, in 1608, a certain attorney, named Sprot, indiscreetly boasted in his cups that he could say something "an he would." He was seized and put to the torture, and the truth, or part of it, came out. The conspiracy, if conspiracy there was, had seemed like an endless thread. Now the other end of the thread was discovered, but it lay in the fingers of two dead men, and of a third who has not been identified unto this day. The whole business was like a plot of a novel, and was probably suggested by an Italian romance about a nobleman of Padua. In Sprot's possession, in 1608, were found copies of letters, written in 1600, by Logan of Restalrig, the owner of that East Castle, on a cliff above the Northern Sea, which Scott used as the model of Ravenswood Castle in "The Bride of Lammermoor." This Logan, who died in 1606, had corresponded in 1600 with Lord Gowrie, and with another conspirator unknown. The letters were carried by an old man, Laird Bower, who could not read, and who in 1606 was also dead. This old gentleman's method was to carry the letters to the recipients, and

then bring them back and burn them before the eyes of the writers. The system is good, but Laird Bower, meeting Sprot, asked him to read the letters aloud to him. Sprot kept copies which, in 1608, he gave up under torture. Then the game was cleared up. James was to be inveigled to the Gowrie House in Perth, was to be put into a boat on the Tay, and carried by sea to East Castle, where the rest of the scheme was to be on the lines of the novel about the nobleman of Padua. But, hitherto, nobody has discovered that novel, doubtless one of the countless tales in the Italian collections from which Shakespeare used to borrow ideas of plays. Perhaps the king was to be walled up alive, as in Poe's "Cask of Amontillado." In any case it is certain that the death of the father of Gowrie was to be avenged. But, James already having sons to succeed him, the political advantage to be gained is not apparent. Again, the famous Casket Letters of Mary to Bothwell are known to have been in the last Lord Gowrie's possession, after which all trace of them is lost. Was the king to be "blackmailed" by aid of these letters? These points remain obscure. Clever as was the plot, it failed, precisely because Gowrie had kept the secret too well. It was necessary to inveigle James into the Gowrie House at Perth. This was managed by Alexander Ruthven, who told the king as he rode to a hunt at Falkland that he had in custody at Perth a prisoner with a pot of gold. James, after killing his buck, rode to Perth, but he took twenty nobles and gentlemen in his train. The conspirators had hoped that he would only bring two or three grooms. They had provided no dinner, but hastily procured one grouse, one hen, a shoulder of mutton, and strawberries. James dined apart, attended by the two conspirators; the nobles dined in the hall; a meagre meal they must have had. After dinner every one asked, "Where is the king?" Then came out the idiotic futility of the plot. Gowrie declared that James had ridden away across the Inch of Perth, leaving by the back door.

But Gowrie, true to his system, had not instructed his own porter, who swore that the king could not have left by the back door, of which he had the key. That was the first blunder. Had the porter been in the plot, he would have backed Gowrie's story; the nobles would have galloped away after the king, and the king would have been gagged, bound, placed in a boat and carried down the Tay, which flowed past the garden, and so to the open sea and to East Castle.

Meanwhile, as James's lords, puzzled by his absence, knew not where to look, the second blunder was at work. James had followed Alexander Ruthven through a suite of upper rooms into a turret, where he was to be shown the mythical prisoner with the pot of gold. Ruthven locked the door of each room in the suite behind him, and finally led James into a turret, where was no pot of gold and no prisoner, but a man in full armor. This man, in pursuance of the system, had not been told that he was to seize the person of the king; he had been informed that a Highland thief was to be secured. He therefore merely looked on in absolute perplexity and declined to take a hand in kidnapping his rightful king. He was a most respectable married man, whereas a thorough-going ruffian was needed for the part. Nobody was now more at a stand than Mr. Alexander Ruthven, that student of Italian romance. He was obliged to try to collar the king himself and bind his hands with a garter. But his Majesty got Mr. Ruthven's head "into chancery," pushed his own out of a window, and yelled "Murder!" The man in armor walked quietly away. James was overheard by young Ramsay, who entered the turret by a dark spiral staircase, of which the door had been foolishly left open to the court. Meanwhile the alarmed nobles had run up the great staircase, and were hammering vainly at the locked door which divided the turret from the long suite of rooms by which James

had entered it. They knew not what was happening in the turret, while James and Ruthven knew not who was hammering at the turret door. Dumas never invented so good a situation, but the master of it was young Ramsay. He had rushed into the turret from the spiral stair, with the king's hawk on his wrist. He threw down the hawk, and James, with the presence of mind of a sportsman, set his foot on its leash! He yelled to Ramsay to strike low, as Ruthven was wearing a secret coat of mail. Ramsay dirked Ruthven; James thrust the body down the spiral stairs, where Gowrie, arriving with five armed retainers, found his brother's corpse. Gowrie charged up the corkscrew steps, but the king, Ramsay, and Sir Thomas Erskine, who had joined them, were in a position of advantage. Blows and thrusts were exchanged, edge and point grated on the walls in the narrow pass. At last Ramsay's sword found a way to Gowrie's body, and he reeled back a dying man. But still Ramsay and James knew not who they were, friends or foes, that hammered on the inner door of the turret. A messenger by way of the spiral stair brought the truth of the matter, and James, when once he had pacified the mob of Perth,—no easy matter, for they took the side of Gowrie, their local superior,—was again "a free king." Two corpses lay at the foot of the turret stair, the two dead men could tell no tales, and the mystery was black indeed, till, eight years later, attorney Sprot babbled over his wine. He was executed, a victim to his own curiosity and to that of Bower, the messenger who could not read. So ended a conspiracy based on an Italian novel. The other partner, to whom Logan used to write, remains unknown. For reasons of my own I suspect that he was Napier of Merchiston, the inventor of logarithms! But that is only a wild hypothesis, part of the romance of mathematics.—*The Critic*.

THE LEGAL POSITION OF WOMEN IN CHINA.

BY R. VASHON ROGERS.

THE subjection of women in China is extreme. When a Chinaman has only daughters he is said to have no children. The woman is submissive in every state of life, as a daughter to her parents, as a wife to her husband, and as a widow to her sons, especially to her eldest son.

And yet for nearly forty years the too well-known Empress-Mother, Tsu Tsi, first conjointly with the Dowager-Empress, Tsu An, and for the last twenty years alone, has wielded a predominant influence in the government of the empire. So great had been her services and so much the Emperor, Kwang Shu, delighted to honor her that when, in 1894, she attained her sixtieth year he paid her the supreme compliment of adding two more ideographs to her already elongated title, so that it then ran as follows: Tzu-hsi-tuan-yu-kang-i-chao-chuang-chen-shu-kung-chin-hsien-chung-hsi. Nor is this the first time in Chinese history that there looms behind the throne one of those mysterious masterful types of Asiatic womanhood who, bursting asunder, by the subtle craft of their uncultured intellect and by the fierceness of their passions, all the trammels which Oriental custom and tradition impose upon their sex, get such a grip of power, when once they have been fortunate enough to seize it, as male rulers seldom acquire, even in the most autocratic states.

Disobedience to parents is a sin punishable by death, whether the offender is an infant or a full-grown son or daughter.

It is immodest for a woman to show her artificially distorted foot to a man, although small feet are their chief charm; it is even improper to speak of a lady's feet, and in decent pictures they are always concealed by the dress.

In deference to the prejudices of the god

of war, Kuan-ti, who was a confirmed misogynist, women are not allowed upon the walls of the city of Peking.

Nearly all the Chinese, robust or infirm, well formed or deformed, marry as soon as they have attained the age of puberty. Were a grown-up son or daughter to die unmarried, the parents would consider it a most deplorable event. So indispensable is matrimony deemed in the Flowery Kingdom that even the dead are married; the spirits of the males who die in infancy, or childhood, are in due time affianced to the spirits of females who have been cut off at a like early age.

In everything referring to the marriage of their children the parents are omnipotent. The betrothed couple may not even know each other, and often the wedding is the first occasion on which a man catches a glimpse of his intended's face. (Among some of the aboriginal tribes, however, the daughter's inclinations are nearly always consulted.) (Gray's China, Vol. I, pp. 186, 216; Vol. II, pp. 203, 393.)

If a Chinaman falls in love he must tell his father before he informs the object of his affections. If the parent permits preliminary matrimonial negotiations the suitor employs a go-between, and to this agent he entrusts a genealogical tree of his family. (This is to prevent persons of the same name uniting in matrimony.) If the young woman's family is disposed to respond to the advance their genealogical tree is produced. A mutual guarantee is then given against either family becoming allied with hereditary madness or crime.

Ta Tsing Leu Lee says (the Leu Lee is held in the highest veneration by all): When a marriage is intended to be contracted it shall be in the first place reciprocally explained and clearly understood by the families interested, whether the parties who

design to marry are or are not diseased, infirm, aged, or under age, and whether they are the children of their parents by blood or by adoption. If either of the families then object the proceedings shall be carried no further; if they approve, they shall then, in conjunction with the negotiators of the marriage (if such there be), draw up the marriage articles and determine the amount of the marriage presents. If, after the woman is thus regularly affianced by the recognition of the marriage articles, or by a personal interview and agreement between the families, the family of the intended bride shall regret having entered into the contract and refuse to execute it, the person among them who had authority to give her away shall be punished with fifty blows, and the marriage shall be completed according to the original contract; although the marriage articles should not have been drawn up in writing the acceptance of marriage presents shall be sufficient evidence of the agreement between the parties. (Ta Tsing Leu Lee, being the Fundamental Laws, etc., of China. By Sir G. S. Staunton, p. 108.) In practice each party after seeing the family-trees consults a fortune-teller; if the oracles prophesy good concerning the match the bridegroom prepares two large cards on which are written the particulars of the engagement, on one he pastes a paper dragon, and keeps it; the other, on which is a phoenix, he sends to the lady. (These rare creatures are the emblems of conjugal fidelity.) After this, more valuable presents pass between the households. When the happy day comes, the bride, surrounded by her friends, starts from her father's house in a sedan chair for her future home; when half-way she is met by the bridegroom's friends who escort her the rest of the road. The escort includes a band of music; gay lanterns, torches, umbrellas and fans add to the scene. An orange tree laden with golden fruit, emblematic of a large family; a goose and a gander, symbolic of conjugal fidelity, and a dolphin, meaning worldly prosperity, are generally introduced

into the procession. The color of all the paraphernalia is red, the hue of rejoicing. It is etiquette for every one to give way to the cortege, and in fact the penal code severely punishes any one who does not.

Before leaving her home the bride does kow-tow to her father and mother, drinks a large cup of wine, and kneeling listens to harangues from her parents on the new state of life on which she is now entering, and her duties therein. On alighting she is led with her head covered into the presence of her husband-that-is-to-be; silently they sit down side by side and each tries to get on a part of the other's dress; whoever wins in this dumb trial of skill will rule the house. After this they adjourn to the family altar and there worship heaven and earth and their ancestors. A glass of wine is then drunk together, and then for the first time the man sees the face of his chosen fair. This ends the ceremony; feasting and rejoicing among the friends follow.

The bride at the wedding feast must prostrate herself before her parents-in-law, to whom she gives wine. The mother-in-law, in her turn, presents the bride with a cup of wine. Three days after marriage a grand visit of ceremony is paid to the young wife's parents; servants laden with presents accompany the newly wedded pair.

Sometimes when the bride arrives at her intended's house a curious ceremony takes place; she is presented with a tray containing rice and betel nuts; she prostrates herself at the feet of her future lord to denote her complete submission to his will; then she unveils herself to his gaze for the first time.

If any one marries while his or her parents are in prison charged with a capital crime, he or she incurs a penalty of eighty blows; if, however, the marriage takes place at the request of the parents no punishment is imposed, provided the usual feasts and entertainments are omitted.

The Chinese strictly punish marriage within certain prohibited degrees. There are only

five hundred and thirty different surnames in the whole country; sixty blows are inflicted upon any one who marries a person of the same surname. Punishment for intermarriage of near relatives on the father's side is very severe, thus one who marries a grand-uncle, a father's first cousin, a brother or a nephew, is put to death. Besides these prohibitions there are others applying within a narrower range on the mother's side; one who marries his mother's sister, or his sister's daughter, is strangled. Less severe is the punishment for marrying his uterine half-sister. Eighty blows are given to one who marries his father's sister's daughter, mother's brother's daughter, or mother's sister's daughter. The penal code permits intermarriage between the children of brothers and sisters, or of sisters, but forbids it between those of brothers.

Marriage with a deceased brother's widow is punished with strangulation, whilst marriage with a deceased wife's sister is very common and has always been regarded as very honorable.

The Code also interdicts occasional intercourse with any of those relations with whom marriage is prohibited, the punishment in both cases being the same.

A Chinese woman on marriage alienates herself from her own family and is incorporated into that of her husband; hence children of brothers and sisters, and of sisters, may marry at pleasure, while those of brothers cannot be united under pain of death.

The polygamy of China is a legalized concubinage, and the law actually prohibits the taking of a second wife in the lifetime of the first. The first wife is usually taken out of a family equal in rank to that of the husband's, and the marriage, as we have seen, is attended with considerable ceremony, and the lady is entitled to all the rights and privileges of the mistress of the family. After this the man may espouse other women, but without the ceremonies and without consulting his friends; he may take them from any

class of society and bring them into his house as inferior wives, or concubines, or handmaidens, or whatever he chooses to call them. The first wife is invested with a certain amount of power over the concubines, who may not even sit in her presence without her special permission. She addresses her partner as "husband," they call him "master." A wife cannot be degraded into the position of a concubine, nor can a concubine be raised to that of a wife so long as the wife is alive, under the penalty in one case of a hundred, in the other, of ninety blows. It would seem that the concubine is usually taken with the consent of the principal wife when the latter is childless, the desire to have male children "to perpetuate one's name, and to burn incense before one's tablet after death, having great influence over the Chinese mind." The children of the inferior wives would appear to belong to the first wife. (Westermarck, *History of Human Marriage*, p. 445; Ta Tsing Leu Lee, p. 111.)

According to Abbe Huc, a man may strike his wife with impunity, may starve her, may sell her or rent her out for a longer or a shorter period; other authorities do not admit this.

A father-in-law, after the wedding, never again sees his daughter-in-law; he never visits her and if they chance to meet he hides himself.

The Code contains seven just causes and good reasons for divorce of wives, namely, barrenness, lasciviousness, inattention to parents-in-law, loquacity, thievishness, ill-temper, confirmed infirmity; and a husband, except for one of these reasons, may not put away his wife under pain of eighty blows. In practice, however, these pretexts are very elastic. In one Chinese book we read: "When a woman has any quality which is not good, it is but just and reasonable to turn her out of doors." Among the ancients a woman was turned away if she allowed the house to be full of smoke, or if she frightened the house-dog by a disagreeable voice

or noise. Nevertheless, according to some, divorce is rare in China. A woman cannot obtain a legal separation from her husband. (Westermarck, pp. 524, 525, 528.)

According to Ta Tsing Leu Lee (sec. 116), if a husband repudiates his wife without her having broken the matrimonial connection by adultery or otherwise, and without her having furnished him with any of the seven justifying causes of divorce, he shall be punished with eighty blows. Moreover, though one of the seven justifying causes should be chargeable against the wife, yet if any of the three reasons against divorce should exist, namely, (1), the wife having mourned three years for the husband's parents; (2), the family having become rich, after being poor previous to and at the time of their marriage; (3), the wife having no parents living to receive her back again: in these cases none of the aforementioned causes will justify a divorce, and the husband who puts away his wife on such grounds shall suffer punishment two degrees less than that last stated and shall be obliged to receive her again. If the wife has broken the matrimonial connection by an act of adultery or by any other act which, by law, not only authorizes but requires that the parties shall be separated, the husband shall receive a punishment of eighty blows if he retains his wife.

It is not considered proper for a widow to contract a second marriage and in genteel families such an event rarely, if ever, occurs. Indeed, a lady of rank by marrying a second time exposes herself to a penalty of eighty blows. (Gray's China, Vol. I, p. 215.)

The loyal woman who refuses to survive her husband receives great honor in China. However, if the widow is without fortune and does not die, another mate is generally her fate; she represents a value to her husband's heirs which they hasten to profit by, she is sold *nolens volens*; the child at the breast, if there is one, is included in the bargain. Yet the law will not allow the sale of a widow before the expiration of the time for mourning. If she desires to avoid a sec-

ond matrimonial venture her only way of escape is to become a bonzess, a priestess of Buddha.

Chinese legislation is relatively moderate in regard to adultery. In the first place the husband is expressly forbidden to lend, or let out, his wife under pain of twenty-four strokes of the bamboo. A Chinese woman can certainly be imprisoned for adultery, but the punishment is generally repudiation; in fact, the husband is liable to twenty strokes of the bamboo if he does not put her away. She can, also, be sold by her husband, or a judge, for this sin. The man who takes away the wife or the daughter of a freeman, to make her his wife by force, is punishable by imprisonment and death by strangulation. (Letorneau, *Evolution of Marriage*, p. 216.)

Criminal intercourse with either an unmarried or a married woman is severely punished. Rape is punished with death by strangulation; an assault with intent to commit rape is punished by one hundred blows and perpetual imprisonment. Criminal intercourse with any woman under twelve years of age is punishable as rape.

If a woman murders her husband she is chopped into seven pieces and is thrown out without proper burial; on the other hand, the husband, if he kills his wife, is only punished by three months' imprisonment. We may, however, remember that by a law not abolished until 1790, a wife in England, who murdered her husband, was publicly burnt to death alive.

If a woman runs away from her husband he may, if he catch her, give her one hundred strokes with the bamboo and sell her to any one willing to buy. (Letorneau, p. 241.)

Any person guilty of striking his mother, or his grandmother, had to suffer death by beheading; and the luckless wife who presumed to strike her husband's father, mother, paternal grandfather or grandmother, was punished in the same way.

Women, as well as men over eighty and boys under ten years of age, and cripples who have lost an eye or a limb, are entitled,

under the modern laws of China, to buy themselves off from punishment, except in a few cases of aggravated crimes. They are therefore, not allowed to appear as accusers, because they are enabled by this privilege to escape the penalties of false witness. (Staunton, Penal Code of China, ss. 20—22; 339.)

According to the Leu Lee, "Women convicted of offences punishable by strokes of the bamboo, are permitted to retain a single upper garment while the punishment is being inflicted, except in cases of adultery when they shall be allowed the lower garment only." (Ta Tsing Leu Lee, sec. 22.) Under these laws if the outraged husband discovered his wife committing adultery he could kill her or the adulterer, or both.

The law was so considerate of female offenders that, except in a few cases, they were not committed to prison when accused of any crime, but were allowed to remain with their husbands or relatives until the day of trial arrived.

Dower and dowry are unknown among the Chinese, although among the wild aboriginal tribes of the empire it is usual for the wives among the wealthy families to receive marriage portions. (Gray, China, Vol. II, p. 304.)

Tibet, "The Forbidden Land," was long subject to the empire of China. It is well known that the people of that strange land recognize as legal both polyandry and polygamy.

Landor, in his recent book, says that there is no such a thing known in Tibet as a standard of morality among unmarried women of the middle classes, and therefore from a Tibetan point of view it is not easy to find an immoral woman.

When, in Tibet, a young man's attentions are accepted he goes, accompanied by his father and mother, to the tent of the lady. There he is received by her relations, who have been notified of the intended call and are found seated on rugs and mats. After the usual salutations and courtesies, the young man's father asks on behalf of his son for the

young lady's hand; if the answer is favorable the suitor places a square lump of yak butter on the girl's forehead; she does the same to him; the marriage ceremony is then considered over, the buttered couple being now man and wife. If there is a temple near by, katas, food and money are laid before the images of the gods and saints, and the parties walk around the inside of the sacred place. If there be no temple at hand the new husband and wife make the circuit of the nearest hill, or in default of that, of the tent itself, always moving from left to right. This ceremony is repeated with prayers and sacrifices every day for a fortnight, during which time libations of wine and general feasting continue, and at the end the husband conveys his better half to his own tent.

The law of Tibet, though hardly ever obeyed, has strict clauses regulating the conduct of married men in their marital relations. So long as the sun is above the horizon no intercourse is permitted, and certain periods of the year, such as the height of summer and the depth of winter, are also proscribed.

A Tibetan girl in marrying does not enter into a nuptial tie with an individual, but with all his family, in the following somewhat complicated manner. If an eldest son marries an eldest sister, all the sisters of the bride become his wives. Should he, however, begin by marrying the second sister, then only the sisters from the second down will be his property. If he chooses the third then all from the third, and so on. At the same time, when the bridegroom has brothers, they are all regarded as their brother's wife's husbands, and they one and all cohabit with her, as well as with her sisters, if she has any.

Owing to the odd *savoir faire* of the women, and the absolute lack of honor and decency among males and females, this matrimonial arrangement seems to work as satisfactorily as any other kind of marriage would likely do.

If a man has married a second sister and

thus acquired marital rights over all her younger sisters, if another man married her eldest sister, the second man has to be satisfied with the one wife. If, however, the second sister becomes a widow and her husband had no brothers, then she becomes the property of her eldest sister's husband, and with her go all the younger sisters. When a wife's husband has several brothers, she generally manages to keep all but one away from home on one errand or another, the one at home being the actual husband *pro tem*. When an absent one returns the other goes off and becomes for a time a bachelor and so on by turns until all the brothers have, during the year, enjoyed for an equal period the sweets of married life with the single wife. Women in Tibet are in an enormous minority; they are (so Landor thinks) from fifteen to twenty males for each woman.

If a married man has two brothers and several children, the first child belongs to him, the second child to the first brother, the third to the second brother, and the fourth to the original husband; and so on, according to the number of the brothers and the children.

Divorce is difficult in this land of few wives, and when obtained involves endless complications.

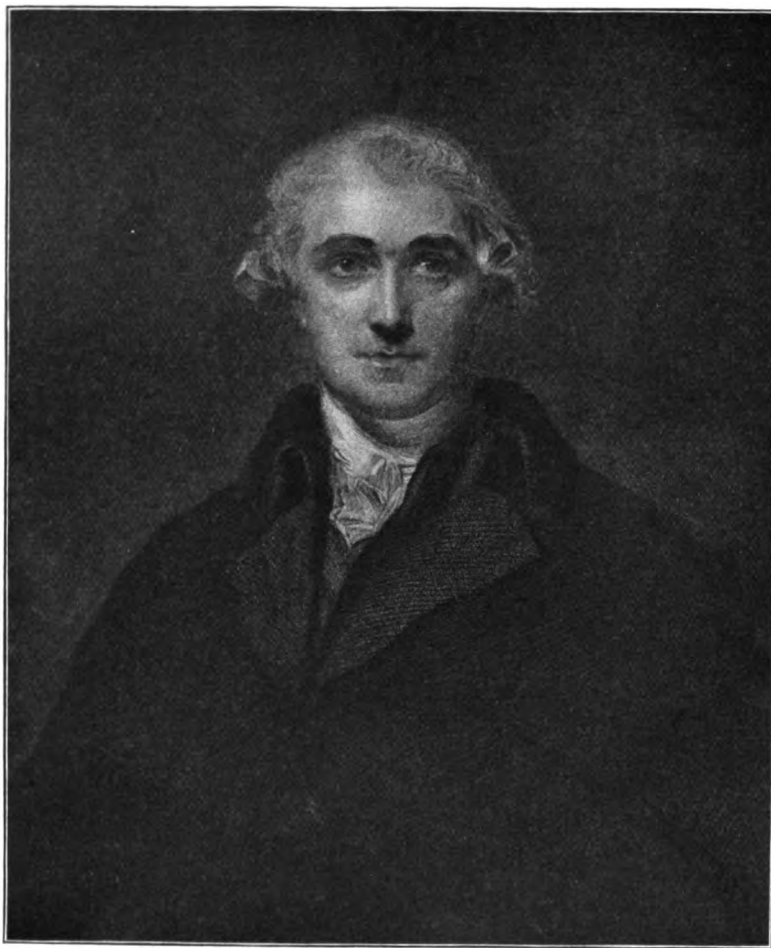
Intercourse with girls before marriage is illegal, and in some cases, not only are the parties made to suffer shame, but certain fines are inflicted upon the man, the most severe being that he must present the girl with a dress and certain ornaments. In the case of gentle folks any difficulty of this kind is generally solved by the man marrying the woman and presenting veils to her relations. An illegitimate child is the man's.

Sixteen in the case of women and eighteen or nineteen in that of men is regarded as the marriageable age.

If the wife of a high official elopes with a man of low rank, she is flogged (when caught), her husband disgraced, her lover, after being subjected to a painful surgical operation, is—if he survives—expelled from the town or encampment.

High officials and wealthy men are allowed to keep as many concubines as they can get and afford. In ("The Forbidden Land," A. H. Savage-Landor. Ch. LXV. See also Letourneau, pp. 78-80, 254.)





JOHN SCOTT,
AFTERWARDS LORD ELDON.

A CENTURY OF ENGLISH JUDICATURE.

I.

BY VAN VECHTEN VEEDER.

ALTHOUGH the fundamental principles of English law are matters of great antiquity, the complex legal system of the present day is to a very large extent the product of the nineteenth century. Much had been accomplished, it is true, in the eighteenth century. Blackstone, writing shortly after the middle of the century, had summarized, in the language of the scholar and the gentleman, the legal system of his day, and thus, for the first time, made the law available for purposes of general education. The genius of Lord Mansfield in common law and of Lord Hardwicke in equity had given a liberalizing and scientific impulse to the body of the law which forever marks their judicial service as the starting point of modern English jurisprudence. And as the nineteenth century dawned Erskine, at the bar, was instilling the principles of constitutional liberty in those matchless arguments which forever set at rest the notion that there was any incompatibility between legal acumen and literary taste. These impulses from the eighteenth century have in the nineteenth been disseminated throughout the law. In the application of old principles to new circumstances principles have been restated, refined and developed until the armory of nineteenth century case law generally suffices for practical needs. The mere bulk of nineteenth century precedents tells the story. When the eighteenth century closed there were only three hundred and four volumes of reports. The output of the last one hundred years, exclusive of duplicates, swells the total to a little more than twelve hundred volumes for England alone; for the United Kingdom the number probably exceeds twenty-three hundred.

The judicial history of the century falls

naturally into two periods of about equal length, the dividing line being the reforms contemporaneous with the Common Law Procedure Act of 1852. The first period is marked by the domination of Lord Eldon in equity and of Baron Parke in the common law—a period of great technical learning, in which, however, the spirit and aim of legal administration was far removed from the actual conditions and needs of the world of affairs. The second period is distinguished by the labors of those great minds whose genius and energy have transformed the procedure and developed the principles of the law into the practical administration of justice which prevails in England to-day.

FROM THE BEGINNING OF THE
CENTURY TO THE COMMON
LAW PROCEDURE ACT.

When the century opened a new era of commercial and industrial activity, it found the judicature of the country not only unable to cope with the development in business, but animated moreover by a spirit and method which belonged to the past.

Foremost was the traditional division between law and equity in courts having no common historical origin and administering justice on principles essentially unlike. This duplex system of procedure inevitably promoted expense and delay, and very often led to failure of justice. As far as this separation was based upon the principle of division of labor, by which distinct machinery may be accommodated to special subject matter, much could be said in its favor. But the distinction between law and equity went far beyond the requirements of any natural divi-

sion of labor. Law and equity applied divers rules of right and wrong to the same matters and afforded different remedies for similar wrongs. The common law refused to recognize claims and defences which equity allowed, and solemn judgments obtained from courts of law on one side of Westminster Hall were nullified by injunctions obtained from the equity courts on the other side of the Hall; indeed, a court would often be found giving judgment as a court of law on legal grounds at one term, and then at a later term of the same court, sitting in equity, enjoining the enforcement of that very judgment on equitable grounds. To obtain complete redress the suitor was driven backward and forward from law to equity, from equity to law, and even then often failed to attain it. The common law judges were deaf to equitable pleas, while, on the other hand, the court of equity, notwithstanding its maxim that it delights to do justice wholly and not by halves, frequently turned the suitor over to the law courts with his wrongs only partially redressed. Whenever it was sought to prevent a threatened injury, to preserve the subject matter of litigation intact, to discover documents, the common law was compelled to resort to equity to support even a legal claim. The court of chancery, in turn, was little adapted by its organization for the successful determination of questions of fact, and for such purposes constantly availed itself of the assistance of the common law courts. In theory the two jurisdictions were well defined, but in practice the suitor was often perplexed over the proper forum. Nevertheless, he was required to choose at his peril. Suits in chancery were constantly lost because it appeared at the hearing that the plaintiff might have had a remedy at law, just as plaintiffs were nonsuited at law because they should have sued in equity, or because some trust or partnership appeared in evidence. Adjective law properly exists for the sake of substantive rights, but under such a system the bewildered suitor was justified in believing that

legal procedure was expressly devised to produce uncertainty, expense and delay.

In the domain of the common law the three ancient superior courts flourished side by side. The Court of King's Bench still maintained jurisdiction of civil and criminal causes alike, and had supreme authority over all inferior tribunals with its weapons of mandamus and prohibition. The Court of Common Pleas retained jurisdiction over the few ancient forms of real actions that still survived; and the Court of Exchequer still retained in revenue, equity and a few other matters a separate jurisdiction. Although these courts had originally different functions, they had by means of various devices gradually acquired concurrent authority over personal actions, and no practical necessity remained for the maintenance side by side of three similar tribunals. Notwithstanding the vast increase in the wealth and commerce of the country, and the rapidly increasing litigation arising out of the industrial revolution, these courts stood stolidly on the ancient ways. In accordance with an antiquated system, they sat for the determination of legal questions during only four short terms of three weeks each, at the end of which all unfinished business went over until the next term.

The procedure of the law courts was based upon the system of special pleading. As a metaphysical system special pleading was truly admirable: one can understand how the schoolmen reveled in it. But however admirable as a species of dialectic, special pleading was little calculated to meet the requirements of a practical system of procedure for the realization of rights. It led inevitably to excessive technicality and the solution of mere legal conundrums, and the real merits of a controversy were apt to be lost sight of long before the contest over mere forms was determined. A system which based its claims to consideration upon its precision, it was honeycombed with fictions. The action of ejectment is an immortal example. The arbitrary classification of



LORD ELDON.

actions was a pitfall into which the most wary sometimes fell. Moreover, right was liable to be defeated by mistakes in pleading, by infinitesimal variances between the pleadings and the proof, and by the absence or presence of merely nominal parties. If a surprise occurred at *nisi prius* the court was unable to adjourn the proceedings beyond a single day. But the crowning paradox of the legal procedure of the time was the fundamental rule of evidence which excluded absolutely the testimony of all witnesses who had the remotest interest in the result. In other words, the rules of evidence were so carefully framed to exclude falsehood that very often truth itself was unable to force its way through the barriers thus created. Non-suits flourished, not because there was no cause of action, but because the law refused the evidence of the only persons who could prove the cause of action.

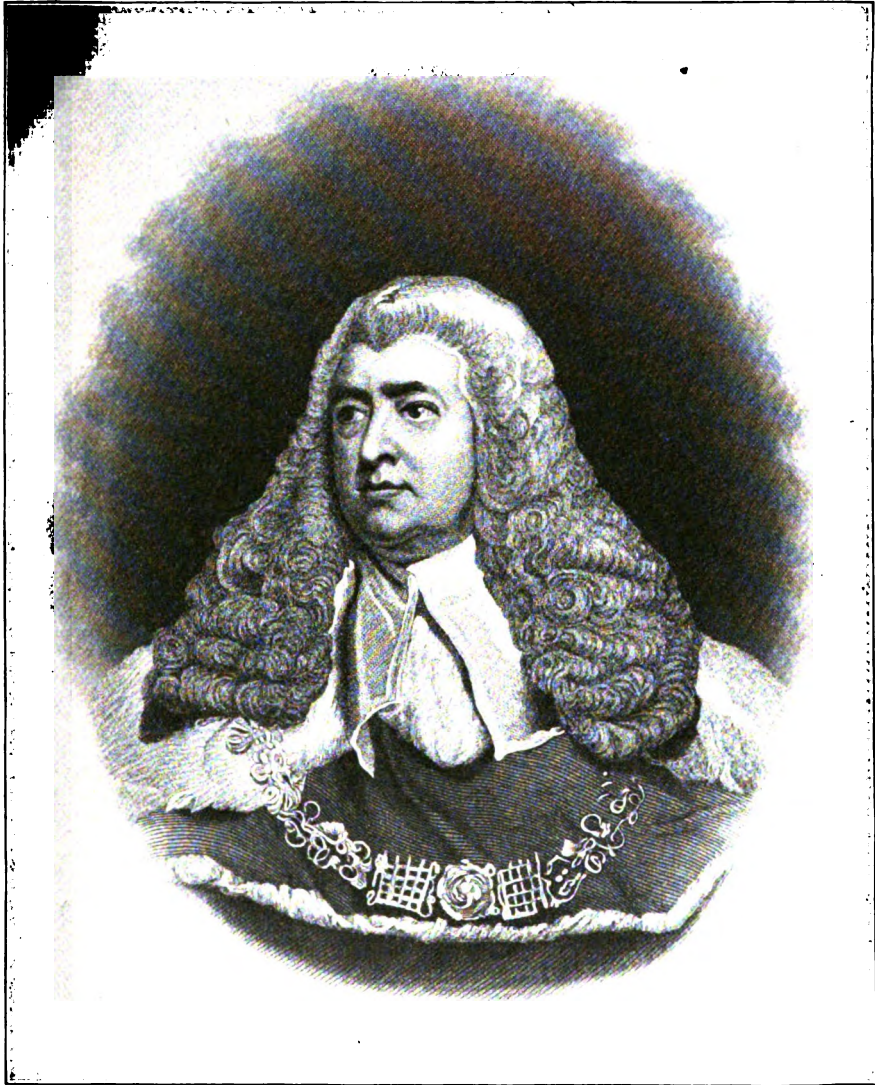
Chancery held out to suitors a lofty standard of right, but the suitor who became involved in its dilatory and vexatious procedure was apt to find it always just beyond his reach: it was a mirage which lured him on to further expense and delay. It applied a uniform procedure to contentious and administrative business alike, so that persons between whom there was really no dispute at all were compelled to engage in a useless contest. When the Court of Chancery applied to the law courts for assistance in determining questions of fact, the determination thus had was only raw material for the chancellor's conscience; he could send it back for another determination, or he could simply disregard it. The pleadings were marvelous specimens of tautology and technicality. Evidence was gathered by means of written interrogatories, and witnesses were cross-examined in ignorance of their direct testimony. The litigants were throughout the whole contest groping after one another in the dark. Moreover, as George Spence stated in 1839 in his work on the Equitable Jurisdiction of the Court of Chancery, "no man as things then stood, could enter into

a chancery suit with any reasonable hope of being alive at its termination, if he had a determined adversary." Everybody even remotely interested in the matter was a necessary party to the suit, and whenever one of these parties died pending suit bills of review or supplemental suits were necessary to restore the symmetry of the litigation. Plainly, equity was a luxury which all save the rich must eschew.

COMMON LAW COURTS.

FROM 1800 TO THE REFORM BILL.

During the first quarter of the century the Court of King's Bench practically monopolized common law litigation. Lord Ellenborough, the chief justice of this court at the beginning of the century (1802-18), was unquestionably the ablest judge among Lord Mansfield's immediate successors. He was a man of more general force than his predecessor, Kenyon, and his store of practical knowledge was quite as large. Although a judge of unquestioned integrity, he was nevertheless in many ways a reactionist. His strong political and religious opinions, which often influenced his judgment in criminal causes, savored of the past, and he was a sturdy opponent of the rapidly rising sentiment for reform. In ordinary civil litigation, however, he gave great satisfaction, and his clear and concise opinions are still held in high esteem. He served at a time when the Napoleonic wars gave rise to novel and intricate problems in commercial law, and the skill and judgment with which he determined these questions may be studied to advantage in Campbell's *nisi prius* reports. The following representative opinions will give a good idea of Lord Ellenborough's style and method: *Higham v. Ridgeway*, 1 East. 109; *Elwes v. Mawe*, 3 do. 98; *Wain v. Warlters*, 5 do. 10; *Vicars v. Wilcocks*, 8 do. 1; *Godsall v. Boldero*, 9 do. 72; *Horn v. Baker*, 9 do. 215; *Disbury v. Thomas*, 14 do. 323; *Roe d. Earl of Berkeley v. Archbishop of York*, 6 do. 101; *Erle v. Rowcroft*,



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8 do. 133; *Tanner v. Smart*, 6 Barn. & Cress, 604. His political prepossessions may be studied in the numerous state prosecutions over which he presided, reported in the collection of State Trials, volumes twenty-three to thirty-one. The most important of these

weight.¹ During the tenure of Lord Ellenborough's successor, Charles Abbott, afterwards Lord Tenterden (1818-32), this condition of affairs was largely reversed; the reputation of the court was then due in large measure to the puisnes. Lord Tenterden



LORD TENTERDEN.

are the trials of Peltier, Hardy, Horne-Tooke, Stone, Despard, Johnson, Hunt, Lambert and Watson.

It is noticeable that the popularity of the King's Bench during this time was due almost entirely to the energy and ability of its chief justice. His sole associate of first-rate ability was Bayley (1808-30), whose opinion in commercial cases carried great

was inferior to his predecessor in force of intellect and was surpassed by some of his associates in acuteness and learning. But he was a judge of liberal tendencies, moderation and good sense. These are the quali-

¹ *Doe d. Christmas v. Oliver*, 5 M. & R., 202; *Montague v. Benedict*, 3 B. & C. 673; *Cadell v. Palmer*, 1 Cl. & F. 411; and the Cases of *Harding v. Pollock* and *Forbes v. Cochjane* in the second volume of the State trials, last series.

ties that are most conspicuous in his clear and practical opinions, which, particularly in commercial cases, still command respect.¹ During this period the court was highly efficient. "I do not believe," says Lord Campbell, "that so much important business was

special pleading, and their labors, so far as they are capable of separation from an antiquated procedure, have stood the test of time. Justice Best, afterwards Lord Wynford, another associate of this time, whose almost unprecedented service in three courts



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ever done so rapidly and so well before in any other court that ever sat in any age or country." The labors of three distinguished puisnes, Bayley, Holroyd (1816-28), and Littledale (1824-41), contributed materially to this high standing. These three judges represent the best fruits of the system of

is noteworthy, served with credit if not with distinction.

CHANCERY COURTS.

During the first quarter of the century Lord Eldon (1801-6; 1807-27) reigned supreme in chancery. Erskine's brief chancellorship (1806-7) was unimportant and added nothing to his reputation. Time has been so busy with Lord Eldon's shortcomings

¹ See *Laugher v. Pointer*, 5 B. & C. 547; *R. v. Burdett*, 4 B. & Ald. 95; *Blundell v. Catterall*, 5 do 268; *R. v. Harvey*, 2 B. & C. 257; *Thomson v. Davenport*, 9 do 98.

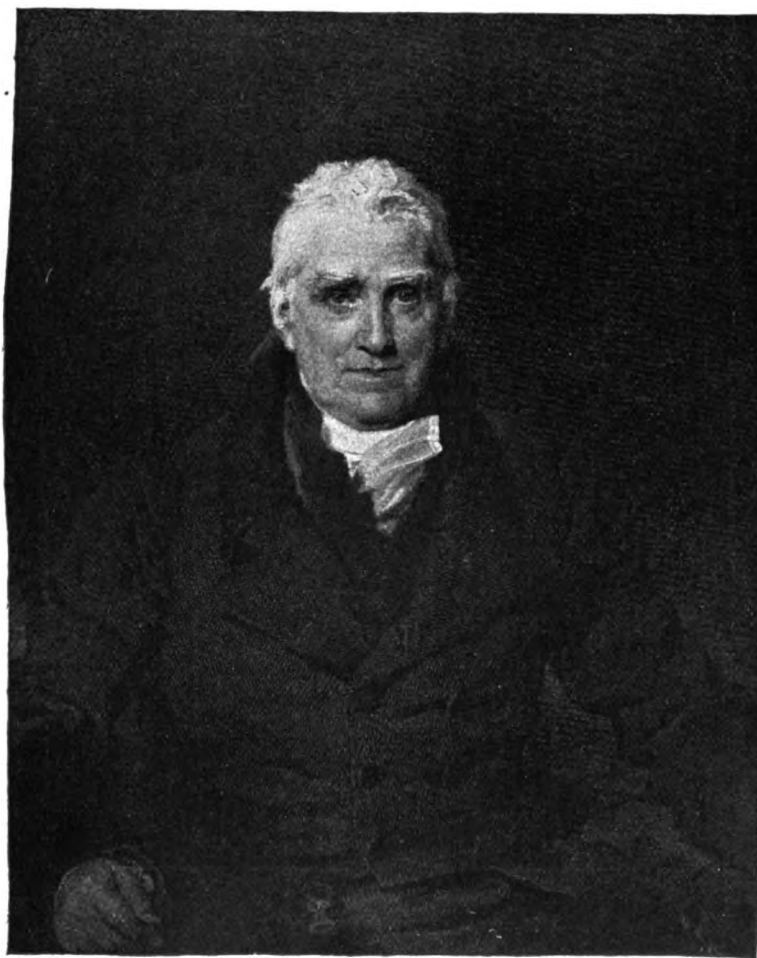
that there is danger of losing sight of his eminent abilities. He possessed in a degree seldom surpassed some of the highest qualities of judicial excellence: a quick and clear apprehension, retentive memory, vast technical learning, a judgment which neither perplexity nor sophistry could confound, and an industry never enervated by luxury nor disturbed by passion. His understanding was capable of feats of metaphysical acumen and subtlety that would have enlisted the admiration of the old schoolmen by whom equity was originally administered as an academic rather than a worldly system; but this was not in his case an advantage. Beyond his profession he was ill read, untraveled and without knowledge of the world. Aside from the performance of the political duties attached to his high office, he devoted himself to the law with entire singleness of purpose and indefatigable industry.

The vast arrears in chancery which accumulated during his administration is the most serious blot on his reputation. It would be an injustice to the memory of a really noble character to fix upon him the sole responsibility for that monstrous denial of justice. The chancery system had never been distinguished by despatch, and the rapid and sustained increase in litigation during Eldon's time accentuated the delay which has come to be associated with his name. The cause of the arrears in chancery was investigated by a Chancery Commission, before which so competent a witness as Mr. Bickersteth, afterwards Lord Langdale, testified; the delay arose, he said, from the general inability of the court to dispose of the business which came before it. This inability to cope with the work was due, in his opinion, to the state of the law and the mode of its administration, to the insufficiency of the time applied to judicial business and to the want of an adequate number of courts. Lord Eldon was a powerful political officer as well as a judge and during his time the quasi-political duties of his office were par-

ticularly onerous. The investigation of the Berkeley and Roxburghe peerage claims and the trial of Queen Caroline are illustrations of the extra-judicial demands made upon his time. Slight relief was eventually afforded by the appointment of a deputy speaker of the House; but the establishment of a Vice-Chancellor's Court, was not, as we shall see, an immediate success, and it was many years before the master of the rolls was enabled to render any effective assistance. Considering the vast political power that Lord Eldon exercised in the cabinet councils, it is, however, a deep and permanent reproach upon his reputation that he did practically nothing to remedy the system whose faults have been, in this sense, justly fastened upon his name.

And it must be admitted that Lord Eldon's judicial methods were dilatory in the extreme. No one was ever better qualified by nature and by training to arrive at a speedy decision; indeed, during his short term in the Court of Common Pleas he showed a capacity for prompt decision which contrasts curiously with his marked indecision in chancery. His indecision was really due, not so much to want of readiness in reaching a decision, as to dilatoriness in formulating his opinion. The fact that this delay was due in large measure to his extreme conscientiousness does not affect the result, although it does to some extent relieve his memory. It may be well to quote his own justification as given in his diary:

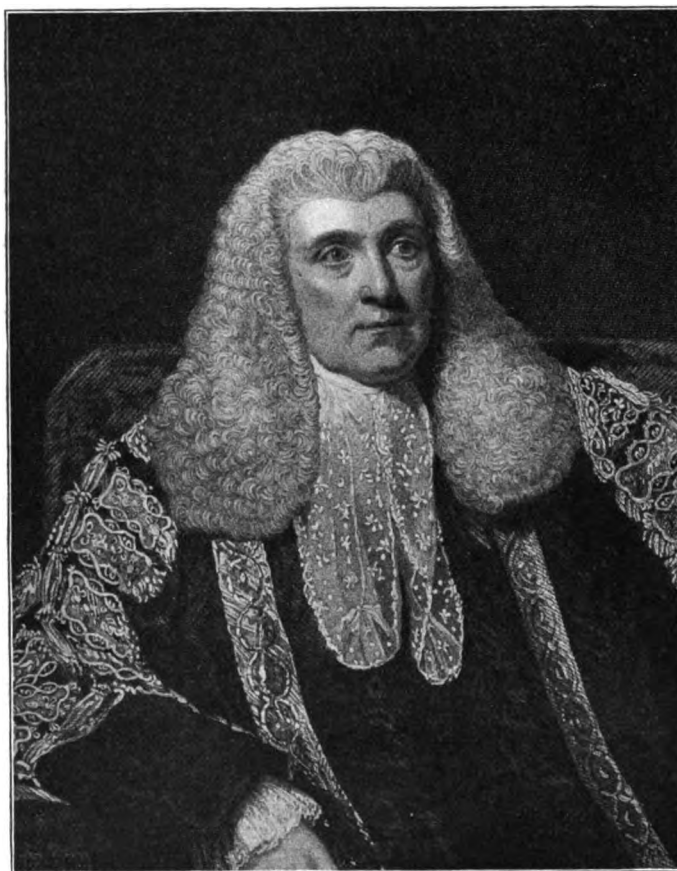
"During my chancellorship I was much, very much blamed for not giving judgment at the close of the arguments. I persevered in this, as some thought from obstinacy, but in truth from principle, from adherence to a rule of conduct, formed after much consideration, as to what course of proceeding was most consonant with my duty. With Lord Bacon, 'I confess I have somewhat of the cunctative mind,' and with him I thought that 'whosoever is not wiser upon advice than upon the sudden, the same man is no wiser at fifty than he was at thirty.' I con-



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less that no man had more occasion that I had to use the expression which was Lord Bacon's father's ordinary word, 'You must give me time.' I always thought it better to allow myself to doubt before I decided, than to expose myself to the misery of doubting

judgments had led to rehearings and appeals, than it was postponed when much and anxious and long consideration was taken to form an impregnable original decree. The business of the court was also so much increased in some periods of my chancellor-



SIR WILLIAM GRANT.

whether I had decided rightly and justly. It is true that too much delay before decision is a great evil. But in many instances delay leads eventually to prevent delay: that is, the delay which enables just decision to be made accelerates the enjoyment of the fruits of the suit; and I have some reason to hope that in a great many cases final decision would have been much longer postponed if doubts as to the soundness of original

ship that I never could be confident that counsel had fully informed me of the facts or of the law of many of the cases. There may be found not a few instances in which most satisfactory judgments were pronounced which were founded upon facts or instruments with which none of the counsel who argued the cases were acquainted, though such facts and instruments formed part of the evidence in the case."

Accordingly, he was given to reviewing a case in all conceivable aspects long after he had in fact exhausted the actual issue; and the reports are full of instances where in matters of difficulty he laboriously examined the whole volume of cases connected with

cal and over abundant in qualifications is all his work that one can appreciate the feelings of Horne-Tooke when he declared that he would "rather plead guilty on a second trial than listen to a repetition of John Scott's argument" in prosecution. This is



SIR THOMAS PLUMER.

the topic under consideration (see 6 Vesey 263; 14 do. 203; 1 Ves. & B. 59; 1 Rose 253; 1 Glyn & J. 384; 2 Swanst. 36; 2 Bligh P. C. 402). Hence his decrees and opinions are so overlaid with fine distinctions and limitations that the *ratio decidendi* is not always easy to find. At no stage of his career did he ever display any evidence of the perspicuities, much less the graces, of literary style. So inextricably parentheti-

cally a serious defect in any judge; and if the guiding principles of Eldon's judgments had been as clearly enunciated and in as general terms as those of Hardwicke, the volume of his decisions, the care with which he considered them, the weight of his authority and the force of his example, would have gone far to remove the blight of uncertainty which rested upon the law of his day.

But with all their involution in mere phraseology Lord Eldon's decisions, which extend through thirty-two volumes of reports, are, in substance, monuments of learning, acumen and the practical application of equity. His judgments were seldom

to the remedy of specific performance, and the exemplary liberality with which he construed charitable bequests.

Like many of his contemporaries, Eldon had very crude ideas of trade; the extent to which he pushed the ancient doctrines of



SIR JOHN LEACH.

appealed from and hardly ever reversed; and, except where the law has since been altered by statute, time has not materially impaired their authority. Out of the vast body of his work, covering the whole equitable jurisdiction, it will suffice to call particular attention to the refinement and precision which he gave to the administration of estates in chancery and in bankruptcy, to the equities of mortgagors and mortgagees,

forestalling and regrating seems, in this day, ridiculous. For instance, the case of *Cousins v. Smith*, 13 Ves. 542, contained the germ of the modern "trust." It appeared that, according to the usual course of the trade, fruit was imported largely in excess of the demand, and, in consequence of the risk from the perishable nature of the commodity, a society, called "The Fruit Club," was formed for the purpose of making purchases

of imported fruit and supplying the trade. The complainants, a firm of wholesale grocers, sought an injunction against the managing committee of the club; they claimed that the committee had formed a scheme to get exclusive possession of the

it was illegal. Nevertheless, Lord Eldon took occasion to denounce the organization in vigorous terms, saying that it was, first, a conspiracy against the vendors, and, secondly, a conspiracy against the world at large!



SIR ROBERT GIFFORD.

trade and compel all the dealers to buy from them, reciting that the committee had bought at low prices and resold at high prices, had refused to have further dealings with buyers who had bought of others without first applying to them, and had in this way obtained possession of the market. The plaintiff had made a purchase of the committee as a foundation for suit. Curiously enough, the committee conceded on behalf of the club that

His historical position must always remain conspicuous, for he definitely brought to a conclusion the work of binding down the chancellor's discretion. "The doctrines of this court," he said in *Gee v. Pritchard*, 2 Swanst. 414, "ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.

I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict or give me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot." From his time onward the development of equity has been effected mainly by strict deduction from the principles of decided cases; and the work of succeeding chancellors has been practically confined to tracing out these principles in detail and rationalizing them by repeated review and definition.¹

The inferior chancery tribunals were the Rolls Court and the Vice-Chancellor's Court. The judicial standing of the Rolls Court was established by Sir Wm. Grant (1801-18). Kenyon, the most prominent prior incumbent of the office, discharged the duties of the office with his customary ability and expedition, but he was not really in sympathy with the equitable jurisdiction and habitually decided his cases on the narrowest grounds, avoiding the enunciation of general principles.

Sir Wm. Grant dignified the office by his high character and eminent abilities. He was unquestionably the most eminent judge who sat in this court until the time of Jessel. Calm, deliberate, patient in hearing, and clear, luminous, subtle and comprehensive in judgment, his powerful intellect made a deep impression upon his contemporaries. This reputation was enhanced by his parliamentary service, which was even more dis-

¹ Lord Eldon's leading cases are: *Ellison v. Ellison*, 6 Ves. 656; *Mackreth v. Symmons*, 15-329; *Murray v. Ellbank*, 10-84; *Aldrich v. Cooper*, 8-382; *Brece v. Stokes*, 11-319; *Howe v. Dartmouth*, 7-137; *Huguenen v. Baseley*, 14-273; *Exparte Pye*, 18-140; *Seton v. Slade*, 7-265; *Agar v. Fairfax*, 17-533; *Murray's Benbow*, 4 St. N. 1410; *Lucena v. Crawford*, 2 Bos. & P. (N. R.) 317; *Duffield v. Elwes*, 1 Bligh (Ns.) 499; *Jeesson v. Wright*, 2 Bligh, 54; *Evans v. Bicknell*, 6 Ves. 174; *Booth v. Blundell*, 19 Ves. 494; *Callow v. Walker*, 7-1; *Southey v. Sherwood*, 2 Merin, 435; *Wykham v. Parker*, 19 Ves. 21; *Gee v. Pritchard*, 2 Swanst. 414; *Davis v. Duke of Marlborough*, 2 Swanst. 162; *Atty. Gen. v. Forstes*, 10 Ves. 342; *Lansdowne v. Lansdowne*, 2 Bligh, 86; *Gordon v. Majoribanks*, 6 Dow, 111.

tinguished than his service as a judge. His opinions, which are comparatively few in number, are mostly brief but comprehensive statements of his conclusion, giving but slight indication of that masculine reasoning which was the principal feature of his parliamentary oratory. *Agar v. Fairfax*, 17 Ves. 533, is a good example.

The office was at this time a modest one. The master of the rolls simply supplied the place of the chancellor when the latter's political duties required his presence elsewhere. On other occasions, when requested by the chancellor, he sat with the chancellor to give advice and assistance in cases argued before both. In order that he might assist the chancellor when present and supply his place during occasional absence, it was arranged that during the sitting of the chancellor the separate business of the master of the rolls should be transacted in the evening; and accordingly during the greater part of the judicial year the sittings of the master of the rolls in his own court were held in the evening. To prevent over-burdening either the master himself or the chancery counsel these evening sittings were neither long nor frequent.

The office at its best under Grant was not to be compared with its position in later times when the master ceased to sit as adviser to the chancellor, and was invested with a separate and, in some respects, independent judicial authority in his own court. This system continued with but little change during the short terms of Grant's immediate successors, Plumer (1818-24), Gifford (1824-26), Copley (1826-27) and Leach (1827-34). The office probably reached its lowest point under Leach, who was fitted neither by learning nor by temperament for judicial office.

The unbearable arrears in chancery during Lord Eldon's administration finally led to the appointment of a vice-chancellor in 1813. But as constituted the new court failed for many years to give satisfaction. The first incumbent, Plumer (1813-18) was

slower than Eldon himself; while his successor, Leach (1818-27), disposed of his cases with such speed that a witty counsel, comparing Leach's court with that of the chancellor, characterized the former as *terminer sans oyer* and the latter as *oyer sans terminer*, and suggested that Leach employ his spare

time by setting his decided cases back on the calendar and hearing the other side. Both Plumer and Leach were deficient in technical knowledge. Plumer was celebrated for his long opinions, while Leach's opinions had at least the merit of brevity.

CHAPTERS FROM THE BIBLICAL LAW.

THE CASE OF JEPHTHAH'S DAUGHTER.

BY DAVID WERNER AMRAM.

THE story of the sacrifice of Jephthah's daughter illustrates the relation of parent and child in the old patriarchal days. It also gives us a glimpse into the ideas of the ancients in relation to crime and its punishment, and of the extent of the patriarchal authority.

The story is recorded in the eleventh chapter of the Book of Judges, verses twenty-nine to forty. For the study of ancient law and custom, the Book of Judges and the Book of Genesis are the most important in the entire Bible. More especially in the former are found traditions hoary with age, reflecting conditions of law and society remotely anterior to the legislation found in the Pentateuch, and to the condition of society described in the Books of The Kings. Much of the Pentateuchal legislation, presupposes a well-organized society, differing materially from that which is thus described in the Book of Judges: "In these days there was no king in Israel; every man did that which was right in his own eyes."

The fate of Jephthah's daughter was determined by his success in his campaign against the Ammonites. After he entered the enemy's country, "Jephthah vowed a vow unto Jehovah and said: If thou wilt deliver the sons of Ammon into my hands, then shall it be that whatsoever cometh forth out of the

doors of my house towards me when I return in peace from the sons of Ammon, shall surely be Jehovah's; and I will offer it up for a burnt offering."

It was no uncommon thing among the ancients, the ancient Hebrews included, for men to seek to obtain the favor of the Deity by making vows, the performance of which depended upon the success of some contemplated undertaking. These vows were in the nature of contracts, the contracting parties being the Deity and the maker of the vow, whereby the latter agreed that in case success attended his enterprise, he would perform certain services or offer certain sacrifices or subject himself to certain penance pleasing to the Deity. These vows were made with solemn formality and were looked upon as absolutely binding and irrevocable, and, if the wish of the person making the vow was granted and his enterprise successful, the fear of offending the Deity by breaking the vow was the only sanction required to insure its fulfillment. Thus, Jacob on his way to Laban's house on the morning after he had his dream of the angels ascending and descending the ladder reaching to heaven, was filled with fear and he sanctified the place in which he had been sleeping by setting up a pillar there and consecrating it with oil. Conscious of the proximity of

the Deity, he entered into a contract with him which was expressed in these words (Gen. xxviii: 20-22): "And Jacob vowed a vow, saying, If God will be with me and will keep me in this way that I am going; and will give me bread to eat and raiment to put on, so that I come again to my father's house in peace, then shall Jehovah be my God, and this stone which I have set up for a pillar shall be a house of God; and of all that thou shalt give me, I will surely give a tenth unto thee."

When Jephthah made his vow and promised to offer up as a sacrifice whatever came forth to meet him from the doors of his house, it is quite unlikely that he had any idea that his daughter would be the first one to greet him. It is rather to be supposed that what he meant was that he would offer up as a sacrifice any one of the domestic animals, or even perhaps a slave that might have come forth from the gates of his house on his return; and his consternation and grief upon seeing his daughter come forth to meet him strengthens this view. At any rate, after having made his vow, "Jephthah passed over unto the sons of Ammon to fight against them, and Jehovah delivered them into his hands. And he smote them from Aroer even till thou come to Minnith, even twenty cities, and unto Abel Keramim with a very great slaughter: thus the sons of Ammon were subdued before the sons of Israel.

"And Jephthah came to Mizpeh unto his house; and behold, his daughter came out to meet him with timbrels and with dances; and she was his only child. Beside her, he had neither son nor daughter. And it came to pass when he saw her, that he rent his clothes and said: 'Alas, my daughter, thou hast brought me very low, and thou art one of them that trouble me. for I have opened my mouth unto Jehovah, and I cannot go back.'" So great was the fear of offending the Deity by breaking the vow, that Jephthah, this unconquered warrior, returning from a victorious campaign, master of a

great army, never thought of escaping the consequences of his vow, even though it involved the loss of his only child. He had opened his mouth unto Jehovah and he could not go back.

Furthermore, there may be seen here the extent of the *patria potestas*. There was no public tribunal before which matters affecting the family could be brought for decision; in each household the head of the family was absolute arbiter, from whose decision there was no appeal, and whose authority was absolutely indisputable. Public law took no cognizance of family matters; and family law, so far as it may be called law, was simply the expressed will of the head of the household. The fact that the case of Jephthah's daughter excites no comment on the part of the Biblical writer, even though she was offered up as a sacrifice by her father in fulfillment of a vow, is an indication of the fact that the writer accepted the view that Jephthah's right to kill his daughter was undisputed and indisputable.

It may be that if his daughter had pleaded for her life, Jephthah might have been induced to brave the wrath of God and break his vow; but her answer to him is not only an illustration of sublime resignation, but also a shining example of determination that a contract solemnly entered into must be fulfilled. She said unto him, "My father, if thou hast opened thy mouth unto Jehovah, do to me according to that which hath proceeded out of thy mouth; forasmuch as Jehovah hath taken vengeance for thee of thine enemy, even the sons of Ammon." It was not merely, therefore, that she urged him to fulfill his vow, but also that she called his attention to the fact that in the contract so-called, made between Jehovah and himself, Jehovah had fulfilled his part, and it now behoved him to do likewise. And she said unto her father: "Let this thing be done to me, and let me alone for two months that I may go up and down upon the mountains and bewail my virginity, I and my companions." This brief respite before the exe-

cution of his vow was granted to her, and at the end of that time, she returned to her father, "And he did unto her according to his vow which he had vowed."

Human sacrifice is several times alluded to in the Bible, and it required positive legislation to put an end to it. These laws were not passed until after the time when the theory of the rights and duties of the patriarchal family had undergone considerable modification. As long as the father was the master of his family, accountable to no man for his actions concerning it, there was no way in which his power could be limited. This theory remained in full force as long as the Hebrews lived a nomadic life, and even some time after they had settled in Palestine; but gradually the requirements of a milder civilization, and the influence of agricultural life which required men to dwell together in harmony and peace, modified the ancient rights of the patriarch. Public opinion became possible under such conditions, and eventually public opinion became law. The father could no longer put his children to death because public opinion would not permit it; and thus gradually the unrestricted right of the patriarch was modified, and the members of his family obtained a legal status and legal rights independent of him until eventually the individuality of each human being was respected and protected by the law.

The views of the Rabbinical authorities on the law of the case of Jephthah's daughter are very curious. The Rabbis were notably great lawyers, but they lacked one important qualification for the proper understanding of this case. They had no true historical perspective. They viewed the facts of Jephthah's case without regard to the time when it occurred, and hence were unable to understand the reasons and the motives behind it. It is exactly the same fault that modern lawyers have when they fill their briefs of argument with citations without regard to chronological or historical order. Their purpose is a practical one; to wit, to

strengthen a certain argument in the case in which they are interested, and in the pursuit of their practical ends, they lose sight of much that distinguishes the cases cited by them from the case in which they are cited.

The old Hebrew lawyers whose opinions are recorded in the Talmud looked upon the case of Jephthah's daughter as though it had occurred in their own days. They were oblivious of the fact that it is a record of an incident in a civilization that had entirely passed away, and that it reflects customs and laws that had been superseded and made obsolete a thousand years before their day.

The result is a curious confusion of ideas. For instance, there is a law that certain animals are unclean and therefore unfit for sacrifice; a law that was entirely unknown in Jephthah's day. But the Talmudist very pertinently, from his point of view, asks: Suppose an unclean animal had come out of Jephthah's house to meet him, would he have offered it as a sacrifice to the Lord? The reply was that as an unclean animal was unfit for sacrifice, Jephthah would not have offered it had it come forth to meet him. Another Talmudist raises a more important question. It was possible under the Talmudic law for a man to have his vow annulled if it was made under mistake or under duress,—a proceeding somewhat similar to the rescission of a contract in our own days, upon the ground of accident, mistake and the like. Of course, in Jephthah's day this refinement of the law was unknown; but the Talmudist to whom it was well known was unmindful or perhaps ignorant of the fact that the law was not the same in Jephthah's day as it was in his own; hence he asks: "Why did not Jephthah go to the high priest and have his vow annulled?" According to tradition, Phineas, the grandson of Aaron, was high priest in those days, and Jephthah might have applied to him as the supreme judicial authority to annul his vow and thus save his daughter's life. Another Talmudist answers that Jephthah must have had some special reason for not

making such application, or that Phineas must have had some special reason for not granting it, presuming that it was made. All this is obviously mere theory, and due to the fact that the case of Jephthah's daughter was not considered by these Talmudic lawyers in its true historical perspective. One of them went so far in his theorizing as to imagine soliloquies of Phineas and of Jephthah concerning this case. Phineas, being high priest, said: "If Jephthah wants his vow annulled, let him come to me." And Jephthah, being commander-in-chief of the army, was too proud to go to Phineas, and demanded that Phineas should come to him; and thus, between the pride of these two dignitaries, the girl was sacrificed. Then another lawyer who had listened to the discussion thus far, took a part in it, saying: "If it is true that Phineas and Jephthah in their pride permitted the girl to go to her death, then they were her murderers, and should have been held responsible, and ought to have been punished." Assuming the premises, the conclusion was perhaps not quite improperly drawn.

Now this *a priori* reasoning having resulted in a conclusion that the high priest and the commander-in-chief were guilty of a crime, it was necessary to find this fact recognized somewhere in the Bible. "Seek and ye shall find." The inquiring Talmudist found

in the Book of Chronicles, chapter nine, verse twenty, the following: "And Phineas, son of Eleazar, was *ruler over them in time past*, and the Lord was with him." This he interprets to mean that up to the time of this event the Lord was with him and on account of his act of refusing to annul Jephthah's vow, the spirit of God departed from him, and he ceased to be ruler. And the inquiring Talmudist furthermore found in the twelfth chapter of the Book of Judges, verse seven: "And Jephthah judged Israel six years. Then died Jephthah, the Gileadite, and *was buried in the cities of Gilead*." Therein is indicated his punishment for the crime in not having his vow annulled by Phineas. He died of a rotting away of his limbs; one of them falling away in each of the cities of Gilead that he visited; therefore, the Biblical text says that he was *buried in the cities of Gilead*, and not in any one of them.

The conclusion thus reached was the result of too much theorizing, and too little knowledge of ancient customs and law. Whenever the Talmudists argued a practical question of law upon a given state of facts, conclusions were invariably reached based upon justice and morality, and supported by the soundest logic; but when their fancy led them out of the realm of the practical, their lack of historical knowledge often brought them to conclusions absurdly incongruous.



THE JUDICIARY OF CUBA.

THE recently published *Census of Cuba*, taken under the direction of the War Department, contains the following interesting sketch of the judiciary of the island.

At the date of American occupation the jurisdiction of the Spanish government over court officials was exercised through the department of grace and justice, which, by the military decree of January 11, 1899, became the department of justice and public instruction, and by a decree of January 1, 1900, the department of justice. The duties which devolve on the department of justice are those which usually pertain to such departments, but in Cuba it has also supervision over the registers of property and notaries public, to which reference will be made further on.

The courts of Cuba were essentially insular, the judges being appointed either directly by the government or indirectly through its officials, and were of four classes or kinds, viz., municipal judges, judges of first instance and instruction, criminal *audiencias*, and territorial *audiencias*. The last named were reduced to three by a decree of June 15, 1899, giving all the *audiencias* the same civil and criminal jurisdiction. The municipal judges were distributed to the municipal districts, one or more in each, and were appointed by the presiding judges or presidents of the *audiencias* from among three persons nominated by the judges of first instance of the judicial districts; they held office for two years. At the same time a substitute was appointed, who performed the duties when from sickness or other cause the regular judge could not officiate.

The municipal judges receive no salary or allowances, and their services are required by fees, paid according to regular schedule.

They had and still have civil jurisdiction over all suits not involving more than two hundred dollars, and of suits to effect settle-

ments without trial; they take cognizance in first instance of cases involving the challenge of other municipal judges; they appoint the family council for the care of minors or incapacitated persons and commence the investigation of all cases of emergency requiring an immediate decision by a judge of first instance, when the latter is not available, to whom the record is sent for a continuance. In criminal cases they have jurisdiction over all misdemeanors where the penalty imposed does not exceed thirty days' confinement or a fine of three hundred and twenty-five *pesetas*. They make the preliminary investigation into all kinds of crimes, if urgent, and the judge of instruction is not present. The municipal judges also keep the civil registers of births, deaths, and marriages. Each municipal court has a public prosecutor (*fiscal*), and a substitute prosecutor, who are appointed by the fiscals of the territorial *audiencias*; a secretary appointed by the judge of first instance and instruction; and a bailiff or constable. All officials of the court were paid from court fees, according to schedule.

The judges of first instance and instruction are located at the seat of the judicial districts to which they are appointed, and there are as many judges as districts.

These judges are appointed by the governor-general and when unable to perform their duties are substituted by one of the municipal judges in the district. They are paid according to their classification, those in Habana receiving four thousand, five hundred dollars per annum, those in the cities of Puerto Principe and Santiago de Cuba two thousand, seven hundred and fifty dollars, those of Matanzas, Cardenas, Pinar del Rio, Guanajay, Santa Clara, Cienfuegos, and Sagua la Grande, two thousand, two hundred and fifty dollars, and those of Bejucal, Guanabacoa, Guines, Jaruco, Mari-

anao, San Antonio de los Baños, Marin, Alfonso XII, Colon, Guane, San Cristobal, San Juan de los Remedios, Sancti Spiritus, Trinidad, Baracoa, Bayamo, Guantanamo, Holguin, and Manzanillo, one thousand, eight hundred and seventy-five dollars per annum.

The judges of first instance have original civil jurisdiction in all cases where the amount involved exceeds two hundred dollars, and appellate jurisdiction from the municipal courts; they decide questions of competency arising between municipal judges of the same judicial district, take cognizance, in first instance, when the competency of other judges of first instance is in question, and of appeals in similar cases of municipal judges; they hear cases in bankruptcy and for the discharge of such commissions or other duties as may be devolved on them by superior courts or of courts of the same category of other judicial districts.

The other officials of a court of first instance are one secretary, four court or record clerks (*escribanos*), one physician, and two bailiffs or constables. The secretaries are appointed by the judges of first instance, while the clerks are appointed by the government on the recommendation in ternary of the *audiencias*. The secretaries and clerks are paid from fees according to a schedule established by the government and collected from litigants.

Prior to American occupation there were three criminal *audiencias* and three territorial *audiencias*. The criminal *audiencias* were located in Pinar del Rio, Santa Clara, and Puerto Principe, and each was composed of a presiding judge and two associate justices. They were appointed by the governor-general and paid as follows: Presiding judge, four thousand, two hundred and eighty dollars per annum; associates, three thousand, five hundred dollars. These courts had original and exclusive jurisdiction over all crimes committed in the island from chicken stealing to murder, until the establishment by General Wood of the special

criminal court (*Juzgado de Guardia*) of Habana, by a decree of February 1, 1900. The criminal *audiencias* had no civil jurisdiction.

The other officials of the criminal *audiencias* were one public prosecutor (*fiscal*) one deputy prosecutor, one secretary, one assistant secretary, and two clerks.

Territorial *audiencias* were established in the provinces of Habana, Matanzas, and Santiago, and had criminal jurisdiction in the provinces where located, and civil jurisdiction in the territory assigned them; thus, the *audiencia* of Habana had criminal jurisdiction in that province and civil jurisdiction over Pinar del Rio and Habana; the territorial *audiencia* of Matanzas had criminal jurisdiction over that province and civil jurisdiction over Matanzas and Santa Clara; the territorial *audiencia* of Santiago had criminal jurisdiction over the province of Santiago and civil jurisdiction over Santiago and Puerto Principe. Thus the territorial *audiencias* had a criminal chamber and a civil chamber or *sala*. The judges were appointed by the governor-general in council with the secretaries. The presiding judges of the *audiencia* of Habana received a salary of five thousand, seven hundred and fifty dollars; the nine associate judges, five thousand dollars; the other court officials were the same as for the criminal *audiencias* with the addition of an assistant deputy fiscal or public prosecutor.

By a decree of June 15, 1899, civil and criminal jurisdiction was conferred on the six *audiencias* within the provinces where established. Certain administrative functions and duties were also imposed on them, and the fees which were formerly paid to the secretaries of *audiencias* in stamped paper of the State were also suppressed.

Other court officials under the laws of Spain were the solicitors, who represented contending parties in civil and criminal causes. Formerly the office of solicitor was sold as a source of revenue to those who paid the highest price, the insular govern-

ment agreeing not to increase the number of such officials. Their intervention in law suits and practically in all legal proceedings was made obligatory, and the monopoly of their duties was left to a certain number in each town in consideration of the price paid for the office. Other officials, although not judicial, were the notaries, who were authorized to certify to contracts and other extrajudicial instruments in accordance with the notarial law of 1862. Solicitors are now appointed by the secretary of justice and their employment is no longer compulsory.

While attorneys are not, properly speaking, court officials, they had this character in Cuba because the laws made their intervention in a large majority of cases indispensable as counsel for the parties to civil and criminal suits. As a result, the qualification of the attorneys are regulated by the State, the diplomas being issued by the governor-general after an examination by boards of the university in the following subjects: Philosophy and law, metaphysics, general and Spanish literature, Spanish history, political economy, natural law, Roman law, canonical law, political law, penal law, civil law, administrative law, public treasury, history of Spanish law, law of civil and criminal procedure, and international law, public and private.

In all towns where there is a territorial *audiencia* there is a college of lawyers for the equitable distribution of offices, and to preserve order and discipline among the lawyers of the territory of the *audiencia*.

Other officials connected with the administration of real property are the registers of property, classified, according to the importance of the locality in which they reside, as first, second, and third class. They are appointed by the government and are required to give bond for the faithful performance of their duties; they charge the fees prescribed by law. It is the duty of registers to make a record of all acts and contracts, mortgages, etc., transferring, encumbering, or limiting the ownership or

administration of real estate or property rights or contracts; constituting, altering, or dissolving commercial associations, and transfers of vessels. They cannot be removed or transferred against their will except by judicial decision. They are entitled to a pension when, on account of their age or physical incapacity, they are prevented from performing the duties of their office, and this pension passes to the widow and children.

Such, in brief, is an outline of the Spanish courts as they were constituted on the first of January, 1899; and while the composition of the courts and the codes of law were no doubt sufficient for the needs of the island, the judiciary, as the creation of the government and existing at its pleasure, had but little independence, and the administration of the courts was characterized by arbitrary arrests, the *incommunicado*, exorbitant fees to court officials in both civil and criminal trials, and not infrequently by corrupt and dishonest practices. As a rule, the judiciary was monopolized by Spaniards, and no Cuban could hope for appointment to the bench, and a speedy and impartial trial where Cubans were concerned was quite unusual. Many of the prisoners found in the jails of the island at the time of American occupation had been in confinement without trial for years, and of those who had been tried only a few were serving sentence, although in some instances years had elapsed since their appearance in court.

If the impartial and speedy administration of justice is a reliable indication of good government, then it must be confessed that the government of Cuba lacked that attribute.

As a result of the withdrawal of Spain from Cuba a supreme court was established by a decree of General Brooke, April 14, 1899, to hear cases and appeals which under Spanish rule would have been sent to Spain for decision.

The court has its seat in Habana, and is composed of a president or chief justice, six associate justices, one *fiscal* or prosecuting

attorney, two assistant *fiscals*, one secretary, two deputy clerks, and other subordinate officials.

Another court, established by General Ludlow, military governor of Habana, January 6, 1899, was the police or correctional court of Habana.

While the action taken by General Ludlow does not appear to have received the formal approval of General Brooke, the court was continued as organized, and under the administration of Major W. L. Pitcher, Eighth Infantry, who succeeded Major Evans as supervisor of police, has proved of inestimable value in restraining and punishing the disorderly element in Habana. Recognizing its value, General Wood, on April 10, formally continued it in a decree of that date, and gave it jurisdiction over all offences known as *faltas* (light crimes), and all minor breaches of the peace; the trial and punishment of authors and publishers of all immoral or obscene literature, or false, malicious, or scandalous statements, whether printed or oral, tending to injure reputation or the professional, official, or private standing in the community; the punishments to be imposed not to exceed thirty dollars fine or thirty days in jail, or both, and the court to have authority to issue warrants, search warrants, and subpœnas; the trials to be oral and summary.

By a decree of April 14, the organization of the police court was modified so that all

trials except for libel and scandal are conducted by a single presiding judge designated by the military governor, and all other trials, when from the nature of the offence a greater penalty than ten dollars' fine and ten days' imprisonment should be imposed, are conducted by the full court, consisting of the presiding judge and two associate judges selected by lot from the municipal judges of Habana.

This system of police courts has been applied recently to the whole island, and is said to be a great improvement over the magistrate's courts, which have been suppressed in all but the chief towns of municipal districts. The municipal and police judges are now elected.

In addition to the establishment of these courts, other changes have been made and more are contemplated, having in view an administration of the courts more in accordance with American ideas of justice than those prevailing in Cuba heretofore. The main difficulty in the way is the Spanish law of procedure and the entire absence of remedial writs, which, like the writs of *habeas corpus*, *certiorari*, etc., are relied on in this country as a protection to personal liberty and against various kinds of injustice. These beneficent changes will no doubt follow if they do not precede the establishment of free government, toward which steady progress is being made.



The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG regrets much the retirement of Mr. Fuller from the editorial chair, after twelve years of faithful service. His well-trained legal mind, his excellent literary taste and judgment, his sense of humor, and his large and pleasant acquaintance among the men of his profession, have all been important factors in the success which has attended his work. Mr. Fuller had both the good fortune and the responsibility of taking editorial charge at the start, and of carrying out on original lines the attractive, but untried, plan of publishing a magazine devoted to the lighter side of the law. He has worked out this interesting experiment, shaping the course of the magazine with rare good judgment; and it is a pleasure to make hearty acknowledgment in the editorial columns of the important part which Mr. Fuller's work has taken in bringing about the success of THE GREEN BAG. How successful he has been in his task of giving to the profession an entertaining and readable magazine, a glance through the files will show.

THE policy of THE GREEN BAG, under its new editor, will continue to be the same, essentially, as it has been in the past. The deeper and more serious problems of the law are dealt with in admirable ways by many contemporary legal magazines and journals. Their province it is to aid the lawyer directly in his work: while our aim is to provide a magazine which shall be of interest to the intelligent lawyer in his leisure moments. We bespeak the help of the members of the profession in accomplishing this purpose; for while it is true that most of the time and the energy of the lawyer in active practice must be given, of necessity and rightly, to his professional work, it is equally true that many members of the bar (even some of its busiest

members) have the inclination, and, in some way, do find the time, for labor in the wide field of what may be called light legal literature. That is the field which this magazine aims to cover; and we beg our brethren at the bar to bear THE GREEN BAG in mind when they have ripe for publication any article, of a not too heavy or technical nature, which would prove of interest to other lawyers. Then, too, there are always current a goodly number of *bon mots*, witty stories and interesting anecdotes, which, for the credit and the gayety of the profession, should be preserved; to say nothing of the genuine historic value which attaches, oftentimes, to anecdotes of the leaders of the bench and bar. No one person, not even THE GREEN BAG, can hear, remember, or invent more than a very small number of such sayings, stories or anecdotes — though the seemingly inexhaustible supply of them kept on tap by some of our witty after-dinner speakers seems to disprove this statement; but if each of our readers, when one of these good things comes his way, will capture it, put it on paper, and send it to THE GREEN BAG, its editor and its readers will rise up and call him blessed.

THE question of the punishment and the reformation of persons committing minor offences is a perennial source of discussion in our State legislatures and among students of penology. There are indications, too, of an increasing public interest in this question. The present methods, varying in different States, of dealing with this problem, are nowhere producing very encouraging results; and there is a widespread doubt as to whether, in lessening the severe punishments inflicted not many years ago for this class of offences, we have not gone too far, swayed by misdirected sentiment, to the detriment not only of the community, but of the law-breaker himself. An interesting and brief discussion of this question is to be found in a report made a few months ago to the New Haven Congregational Club, by a committee of

which the Hon. Simeon E. Baldwin, of the Connecticut Supreme Court, was a member. In summing up, the report says: "The truth is that modern society, at least in the United States, has largely lost sight of the rights of the State as against the criminal, in humanely endeavoring to vindicate his rights as against the State." And it quotes with approval the statement of Sir William R. Kennedy, one of the justices of the High Court of Justice of England, in an address delivered in 1899 before the American Bar Association, that "the root idea of State punishment, its governing principle, was neither the reformation of the criminal nor the prevention of crime, but the fitness of suffering to sin—the relation which ought to exist between wickedness and crime." The recommendations of the committee are as follows:—

That the law should provide for moderate whipping, administered in private, as a mode of punishment to which juvenile offenders may be sentenced for petty offences, in lieu of imprisonment.

That whipping is also an appropriate mode of punishment for the ruffian class.

That fines can, in many cases, the better be worked out by outside labor, under suitable supervision, than by labor in jail.

That the efficiency of our police and justice courts could be increased by the employment of probation officers from whom the court might ask information, and who would keep watch of any who might be released under a provisional suspension of sentence.

That habitual and incorrigible wrong-doers, even in respect to petty offences, become thereby subject to the right of the State to restrain their liberty for the remainder of their lives, and to take such measures as will effectually cut them off from further opportunities of doing mischief to the community, as well as from perpetuating their kind in an unhappy offspring.

Some of these methods have been adopted in certain of our States, where their effect can be studied; and drastic as some of these recommendations may seem, they deserve the careful consideration of our law-makers.

MATTHEW ARNOLD, we believe, was fond of harping on the tendency of the Anglo-Saxon race

to act in important matters before giving the questions in hand the thoughtful consideration necessary to insure right action. The hasty and ill-considered nature of much of our American legislation is evidenced by the amendment or repeal which follows so quickly after the passage of many of the acts of our State legislatures, and is a striking example of the tendency to which Mr. Arnold referred. We had not expected, however, that the Negotiable Instruments Law, recommended in 1896 by the commission for promoting uniformity of legislation in the United States and already enacted in fifteen States, might have to be included in the class of hasty and ill-considered legislation. But in the December number of the *Harvard Law Review*, Professor Ames, while recognizing the zeal and the skill of the commissioners by whom this law was framed, and admitting that it contains a number of desirable changes in the law of Bills and Notes, calls in question a considerable number of its provisions, and points out, in more or less detail, the errors and imperfections in the law, which seem to him so numerous and so serious that he is led to say that "notwithstanding its many merits, its adoption by fifteen States must be regarded as a misfortune, and its enactment in additional States, without considerable amendment, should be an impossibility." The shortcomings of the law he lays to the lack of adequate criticism, both public and private, from widely different sources, before the final draft of the proposed law was issued. The recommendation which he makes is that, if practicable, the commissioners should "reconsider the present Negotiable Instruments Law and submit it, in a revised form, with their approval," and should also "suggest the form of supplementary legislation requisite to secure the necessary amendments in the States which have already passed" the law. Such criticism and suggestion from an expert in the law of negotiable instruments merit serious consideration.

THE so-called Philippine and Porto Rican cases (Fourteen Diamond Rings, *Pepke claimant, v. United States*, and *Goetze v. same*, argued in December: *De Lima v. United States*, and other Porto Rican cases, to be argued early in January) recall the times of Marshall and

Taney, when questions involving the fundamental principles of our theory of government were more often than now before the United States Supreme Court. The broad constitutional questions involved in these cases have been drawn, of necessity, into our politics, so that not since the income tax cases has there been such widespread interest in suits before that tribunal. The arguments in the Pepke case, by Charles H. Aldrich, formerly solicitor-general under the Harrison administration, for the plaintiff in error, and by the Attorney-General for the government, were worthy of the occasion; and doubtless the same thing will be true of the arguments in the De Lima case, in which former Secretary Carlisle is to represent the plaintiff. The Goetze suit may go off on a question of jurisdiction; but it is hard to see how in the Pepke case the court can escape deciding squarely whether or not the customs laws of the United States extend to the Philippines. An equally decisive opinion may be looked for in some one of the Porto Rican cases which come up for argument this month. It is to be hoped that the decisions will go far toward indicating, if not settling, what is the status, and what are the political rights, of the inhabitants of the islands which came to us under the treaty of Paris. The decision which does settle these two questions will take a place among the few supremely important decisions of our highest court. How these questions will be settled it is idle to speculate; but we are far from willing to admit, as Mr. Griggs would have us, that, should the contentions of the government be not upheld, the Constitution "is as misshaped as Richard the Hunchback, 'sent before his time into this breathing world, scarce half made up, and that so lamely and unfashionable that dogs bark at him as he halts by them.'"

RECENTLY a suit has been brought by the professor of music at Yale University against a local newspaper because of failure of the defendant to return a manuscript of the plaintiff's lecture on "Church Music," which manuscript, it is alleged, was lent to the defendant, with the understanding that it should be returned; and damages are laid in the sum of six thousand dollars. This case, interests us in its editorial,

rather than in its legal, aspect. Even in the best regulated sanctum, manuscripts may disappear. The office cat may have an epicure's taste that prefers six thousand dollar manuscripts to those of more modest value. In self-defence we ask our contributors, when sending such articles, to mark the value plainly in red ink on the first page, for it sometimes happens that the strawberry mark of great price in the manuscript itself is plainly visible to the author's discerning eye, while the editor, in his blindness, fails to note it.

THE legal profession may be pardoned for having a feeling of satisfaction at the showing it will make in the Hall of Fame. In the twenty-nine names chosen already it has eight representatives, — Marshall, Kent, Story, Webster, Lincoln, Jefferson, Clay and John Adams. Lest, however, we be unduly elated, it is well to bear in mind that, as compared with other professions, the law has had practically a double chance. The first three names quoted above doubtless were voted for under the group of "lawyers and judges"; while the five remaining names would seem to have been admitted in the class of "rulers and statemen." Webster, indeed, might well claim a place both as lawyer and as statesman. Who will be the lawyers and judges among the twenty-one names to be chosen during the present year? Will Chief Justice Taney and Chief Justice Shaw be named? Will John C. Calhoun be found among the statesmen?"

THE article on John Jay, in this present number, recalls the fact that formerly there was much speculation as to the origin of the first Chief Justice's robe. The following satisfactory explanation, however, has been made, an explanation which shows the thriftiness of the times. At the conclusion of the peace negotiations with England, Jay, together with Adams and Franklin, received the degree of Doctor of Laws from the University of Dublin. In 1790, the Chief Justice was honored with the same degree by Harvard College; and it was the gown of Doctor of Laws, with its cheerful salmon-colored facings, that he wore as his robe of office.

NOTES.

IN a recent case brought against the City of Boston for injuries received on the highway because of an accumulation of snow and ice, the plaintiff was a woman who had evidently been carefully coached by her attorney or had gathered from his discussion of the case two legal phrases which she used in the following way. She had a very rapid tongue, and it was impossible to stop her before she had done the damage.

After her attorney had asked her the usual introductory questions, he stood one side with an air of satisfaction and said, "Now, Mrs. —, tell the jury just how this accident occurred."

"Well, I left my house and walked down the street, using due care, and I stepped upon this ridge of hubbly ice and fell down."

There was considerable amusement in court when Samuel H. Hudson, who appeared for the city, began the cross-examination, which, in part, was as follows:

Q. Why do you say you were using "due care"?

A. Because I was.

Q. But why do you use that expression rather than "carefully" or "careful"?

A. Because I am accustomed to use it.

Q. You commonly use the expression "due care" in your family instead of the words "careful" or "carefulness"?

A. Yes; most always.

Q. How about the word "hubbly"; when did you first hear that word used?

A. I don't know.

Q. Wasn't it in Mr. —' office?

A. Why, I have used it all my life.

Q. What do you mean when you say "hubbly"?

A. Why, rough, of course.

Q. And do you use that word in your family when you mean "rough"?

A. Yes; most always.

Q. So you mean to give the jury to understand that when you speak to your children, you use the expressions "due care" and "hubbly" instead of "careful" and "rough"?

A. Yes, certainly.

Q. And I suppose when the children start for school, you say, "Now, children, use due care and do not play with any hubbly children."

The laughter in the court prevented an answer, and Mr. Hudson did not insist on the same when the presiding justice ordered him to proceed with the examination.

IN Scotland, says *The Law Times*, the body of a traitor must still be divided into four quarters, and, so divided, disposed of as the reigning sovereign should think fit. Before the act of 1814 the sentence upon traitors was (as described in the preamble to the Act) "that they be hanged by the neck, but not until they are dead, but that they should be taken down again, and that when they are yet alive their bowels should be taken out and burnt before their faces, and that afterwards their heads should be severed from their bodies," etc. The quartering would seem to have been so essential a part of a sentence that if it was omitted the sentence was wholly bad, and the offender escaped all punishment. . . . The statute 5 Eliz. c. 9, as printed in the second edition of the Statutes Revised, still punishes subornation of perjury, in default of fine paid, with half a year's imprisonment and an hour's pillory, while the perjurer himself in similar default is punished not only by the pillory, but by having both his ears nailed thereto, either without any express limit of time, or with a limit difficult to discover; and the well-known Lord's Day Act of Charles II condemns offenders against it, in default of a 5s. fine, to be "sett publicly in the stocks by the space of two hours."

IN 1809 a temperance society in New York passed a rule that any member getting drunk on any day other than Fourth of July and other legal holidays should be fined twenty-five cents. The members were denounced in the ensuing excitement caused by this radical step, as "temperance cranks," "fanatics," and in several instances their barns were burned, and their horses hamstrung. In 1812, the Methodist Church (as a denomination) took the advanced step of forbidding its ministers to engage in the liquor traffic.

LORD CAMPBELL relates the following anecdote of Lord Eldon on his ascent to the Bench in July, 1799, as Chief Justice of the Common Pleas, when he was likewise elevated to the

peerage: "In the midst of all these distinctions, one object for which Lord Eldon struggled he could not yet obtain. To please Lady Eldon, who had a just horror of the wigs with which judges were then disfigured in society, he prayed the king that when he was not sitting in court he might be allowed to appear with his own hair, observing that so lately as the reigns of James I and Charles I judicial wigs were unknown. 'True,' replied the king, 'I admit the correctness of your statement, and am willing, if you like it, that you should do as they did; for though they certainly had no wigs, yet they wore long beards.'" — (*Law Times*.) This other anecdote, concerning the Kent Club — that famous club which flourished for three years in New York about seventy years ago, having about forty members, the most prominent of the bar — seems to show that Lord Eldon himself may well have preferred "to appear in his own hair": Among the "archives," as they were called, of the club was the original old horse-hair wig of Lord Eldon. It was generally present at the meetings, and graced the head of some one of the learned pundits, its use being provocative of mock reverence and real merriment. It was very coarse and ugly, dreadfully heavy, and my lord must have had a strong cranium to have stood its pressure. — (Letter of James W. Gerard, in *Sketch of the Law Institute*.)

It is said that Congressman Littlefield, of Maine, tells this story, in which he himself was counsel for the plaintiff. A middle-aged gentleman, unmindful of his engagement to a woman of about his own age, married another, and younger girl; whereupon he was sued for breach of promise. The defendant left the court room when the jury retired, and when the jury returned the defendant was not present. The jury found for the plaintiff in eight hundred dollars' damages. The counsel for the plaintiff met the defendant in the lobby of a near-by hotel.

"Squire," asked the latter, "how did the jury decide?"

"Against you," was the reply.

"I did n't think they would do that," said the middle-aged gentleman musingly. "What are the damages?"

"That ain't so bad!" he exclaimed on being

told. "Why, squire, there's that much difference between the two women!"

IN Massachusetts, in 1781, and for some years later, the Chief Justice of the Supreme Judicial Court was paid an annual salary of three hundred and twenty pounds, and each of the four other justices a salary of three hundred pounds, "computed in silver at six shillings and eight pence per ounce, and payable either in silver or bills of publick credit equivalent thereto." The governor's salary at the same time was one thousand one hundred pounds. An act of 1787 fixed the justices' fees in that court at sums running from six shillings, for entering a petition and making an order thereon, for the sale or partition of real estates, down to one shilling, for proving a deed or taxing a bill of costs; but it carefully provided that the clerk of the court should "sometime in the month of December, annually, certify to the governor and council the sums by him so taken and received, and paid over to the said justices, that the same may be deducted from the last quarter of the said justices' yearly salary."

WHEN George M. Stearns was one of the leaders of the bar in western Massachusetts, one of the judges expressed to him the hope that sometime he should see Mr. Stearns himself on the bench.

"I would n't be on the bench," answered the latter, "and have to be so good as you are, for all your damned salary."

THE best definition of a trust is that given by Thomas B. Reed, who says that "A trust is a large body of capitalists, wholly surrounded by water."

THE severest penalty for bigamy is said to be two mothers-in-law.

THE excellent portrait of John Jay which is this month's frontispiece is reproduced under arrangement with Messrs. G. P. Putnam's Sons, from their illustrated edition of Irving's "Life of Washington"; and we take pleasure in acknowledging also their courtesy, as publishers of *The Critic*, in granting permission to print Mr. Andrew Lang's article.

NEW LAW BOOKS.

AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION. By *John S. Ewart*. Callaghan & Co., Chicago. 1900. Law sheep. \$5.00. (xlvi. + 548 pp.)

This is not a collection of headnotes from the reports, nor a reprint of judicial opinions, nor a paraphrase of preceding text-books; but it is obviously the author's own systematic statement of the law and of the principles underlying it.

The preface does not give an adequate impression of the attractiveness of the book; and it may even turn away some readers by creating the fear that the author adopts a new and grotesque nomenclature. For there can be no doubt that lawyers find little pleasure in reformed terminology, preferring familiar words, no matter how ambiguous they may be; and a justification of this apparent slovenliness is that the members of our intensely practical profession recognize the impossibility of displacing the expressions found in those old treatises and opinions which must always be accepted as classic. At any rate, justification or no justification, there is nothing more certain than that lawyers would rebel against "falsâvert" and "pithallactos" — words seemingly approved in Mr. Ewart's preface. Those odd words may do excellent service somewhere, and so may the clergymen who suggested them to Mr. Ewart; but such terminology is out of place in law books. Fortunately, the author, after discomposing the reader by his preface, fails to use those extraordinary words in his treatise. The new terms actually adopted are simply "estoppel-denier," for the person estopped and "estoppel-asserter," for the person profiting by the estoppel; and these two innovations — at least when viewed in juxtaposition with the distorted fancies, "falsâvert" and "pithallactos" — seem inoffensive.

After turning from the rather unpromising preface the reader finds that every page is lawyer-like. The charm of the book lies in the author's clearness and enthusiasm. His clearness deserves unqualified praise; but his enthusiasm appears not to be in all respects a blessing, for, although it has caused the author to do his work with vigor and originality, it has carried him into regions where most readers cannot follow him without doubts and fears. The treatise

is composed of two nearly equal parts. In the earlier half the author deals with the general principles of estoppel. Here he is at home, and his views, though expressed in a novel way, excite little opposition. In the other half the author passes outside the home jurisdiction and undertakes to prove that estoppel is the doctrine underlying great bodies of law, heretofore regarded as having doctrines of their own. In this half he is not so convincing. Two examples must suffice; negotiable instruments and agency.

In dealing with negotiable instruments, in chapter xxiv, the author contends that the law merchant is a native of England and is harmonious with the general doctrines of English law, and more specifically, that the incidents usually supposed to be attached to bills and notes by reason of peculiarities of the law merchant are really mere results of estoppel. Yet the author's enthusiasm and imagination cannot long make the reader forget the facts of legal history. A glance at any treatise upon the system of commercial law prevailing upon the continent of Europe will indicate clearly enough that England did not create the law merchant, and an examination of Mr. Ewart's own book will demonstrate that the phenomena of negotiability are older than estoppel.

Again, in the dealing with agency, in chapter xxvi, the author finds in estoppel the explanation of a principal's responsibility for an agent's unauthorized contracts within apparent authority. Now, if estoppel is the explanation, a good contract with the principal is obtained by the third person — or "estoppel-asserter" — who actually knows the way in which the business in question is generally transacted, and no contract with the principal is obtained by the third person who knows nothing of this course of business, — yet every lawyer knows that such knowledge or ignorance of the third person is not a matter of importance. Mr. Ewart sees this difficulty; and he tries to take care of it by a "general proposition" that "in cases in which the law assumes (from the nature of the duty to be performed, from the relation of the parties, or from aught else) the existence of certain powers, the public will be justified in making a similar assumption." Doubtless estoppel does protect any member of the public who acts with

knowledge of, and in reliance upon, a representation to "the public" that the agent has certain powers; but such personal knowledge and reliance are essential elements of estoppel as Mr. Ewart points out in chapters x and xi; and that such knowledge and reliance are not essential elements of responsibility for the contracts of an agent is demonstrated by the fact that a third person ignorant of the course of business and of the circumstances of the very employment, does hold the principal, whether disclosed or undisclosed, for contracts, whether desired or not desired, provided these contracts are within the agent's "apparent authority," to use the common but inappropriate phrase.

In short, notwithstanding Mr. Ewart's attractive theorizing, the reader will probably remain convinced that negotiable instruments and agency are not based upon estoppel. Nevertheless, the reader should be charitable enough to remember that Mr. Ewart is not the first author to indulge in the amiable weakness of attempting to enlarge the jurisdiction of a favorite subject. Besides, it is notorious that estoppel has peculiar fascinations. There have been writers who actually suggested treating the whole law of contracts as a branch of estoppel. Mr. Ewart has not done this; but he has done much,—and more, indeed, than can be pointed out here. He has, in fact, fallen a victim to an exaggerated impression of the importance of his subject.

What is the reason for the excessive attractiveness of estoppel? Partly, no doubt, the vagueness with which its doctrines are frequently apprehended — but this is not at all the explanation in the case of such a clear thinker as Mr. Ewart; — and partly the fact too seldom perceived but obvious enough, that estoppel, being unquestionably a doctrine in a business sense convenient and in a moral sense just, resembles closely the fundamental doctrines of many independent branches of the law. Estoppel is but one of a considerable number of doctrines of a secondary or derivative nature, — all of them flowing from the single primary doctrine that law must seek the public welfare by being convenient and just.

It is impossible, then, to acquiesce in the author's conception that estoppel is a wizard of substantially unlimited power, whose spell is found in unexpected places throughout the whole sphere of law. Yet it is possible, and necessary,

to say that every part of the book is entertaining, and that the parts with which one cannot agree are among the most entertaining of all. Clear argument is good reading, whether one agrees with it or not; and, besides, in the midst of even unconvincing argument Mr. Ewart places much matter of unquestionable value, such as discussions of what is meant by negotiability (pp. 375-385), of the futile distinction between general and special agents (pp. 474-483), and of the analogy between deceit and contract (pp. 499-501).

Both text and notes contain slips that can easily be corrected in a second edition. It would be ungracious to dwell upon these small defects, for they do not appreciably diminish the usefulness of the book; but it is impossible to refrain from protesting against the impossible Latinity of the form in which at pp. xvii, 257, 258, and 259, the author misquotes the maxim, *Cessante ratione legis, cessat ipsa lex*.

Finally, although it has been necessary to express dissent as to a great part of the theorizing of this book, its value as a stimulant to thought cannot be questioned. Here is, in truth, a treatise of unusual ingenuity and fervor; and upon discovering that the author assumes for estoppel a questionable supremacy over one great division of the law after another, the reader does not resent the usurpation, but is pleasantly reminded of Rienzi, when, as Bulwer pictures the scene, that enthusiast of long ago, at a ceremony rendered impressive by sincerity, first defied the powers of the earth to prove any claim to the sovereignty of Italy, and then, turning his sword hither and thither, said to each of the known regions of the globe, "In the right of the Roman people, this, too, is mine!"

THE AMERICAN STATE REPORTS, Vols. 74, 75, containing the cases of general value and authority decided in the courts of last resort of the several States. Selected, reported and annotated by A. C. Freeman. San Francisco: Bancroft-Whitney Company. 1900. Law sheep. \$4.00.

The especial value of this series of reports lies in its excellent notes. For example, in volume 74 before us, in connection with *Harding v. American Glucose Company*, 182 Ill. 551, is a valuable monographic note of forty pages on "What Combinations Constitute Unlawful

Trusts," the word trust being used to signify any combination, whether of producers or vendors of a commodity, for the purpose of controlling prices and suppressing competition. It is pointed out that to form an illegal trust, it is not necessary that a pure monopoly be effected; the test is whether the purpose and natural consequence of the agreement tends to create a monopoly. The conflict to be found in the decisions on the question of what trusts are unlawful arises in large measure, the author thinks, from a confusion of the doctrine against contracts in restraint of trade and that against restriction upon competition; as, for example, in *Anchor Co. v. Hawkes*, 171 Mass. 101, where the court ignored the question whether the combination was promotive of monopoly or not, and discussed the validity of the contract from the standpoint of whether the restraint upon trade was reasonably necessary to protect the party in whose favor it was made. The rule which seems to prevail in New York, and, as to railroads, in New Hampshire, of allowing a court to say how much competition is desirable, the writer of this note considers both uncertain and dangerous. The other notes in both volumes are good; for instance, in volume 75, the note entitled "Who is a Vice-principal."

RECEIVED AND TO BE REVIEWED LATER.

THE LAW AND PRACTICE OF BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898. By Wm. Miller Collier. Third edition revised and enlarged by James W. Eaton. Albany, N. Y.: Matthew Bender. 1900.

A TREATISE UPON THE LAW AND PRACTICE OF TAXATION IN MISSOURI. By Frederick N. Judson. Columbia, Mo.: E. W. Stevens, 1900.

HANDBOOK OF THE LAW OF BILLS AND NOTES. By Charles P. Norton. Third edition by Francis B. Tiffany. St. Paul, Minn.: West Publishing Co. 1900.

REGISTERING TITLE TO LAND. By Jacques Dumas, LL.D. Chicago: Callaghan & Co. 1900.

THE LAW OF INSURANCE. By John Wilder May. Fourth edition, by John M. Gould. 2 vols. Boston: Little, Brown & Co. 1900.

HISTORY OF THE JUDICIARY OF MASSACHUSETTS including the Colony of New Plymouth, the Colony and Province of Massachusetts, and the Commonwealth. By William T. Davis. Boston: Boston Book Co. 1900.

ENCYCLOPEDIc NOTES.

THE following is a review by Seymour D. Thompson, author of "Thompson on Corporations," etc.

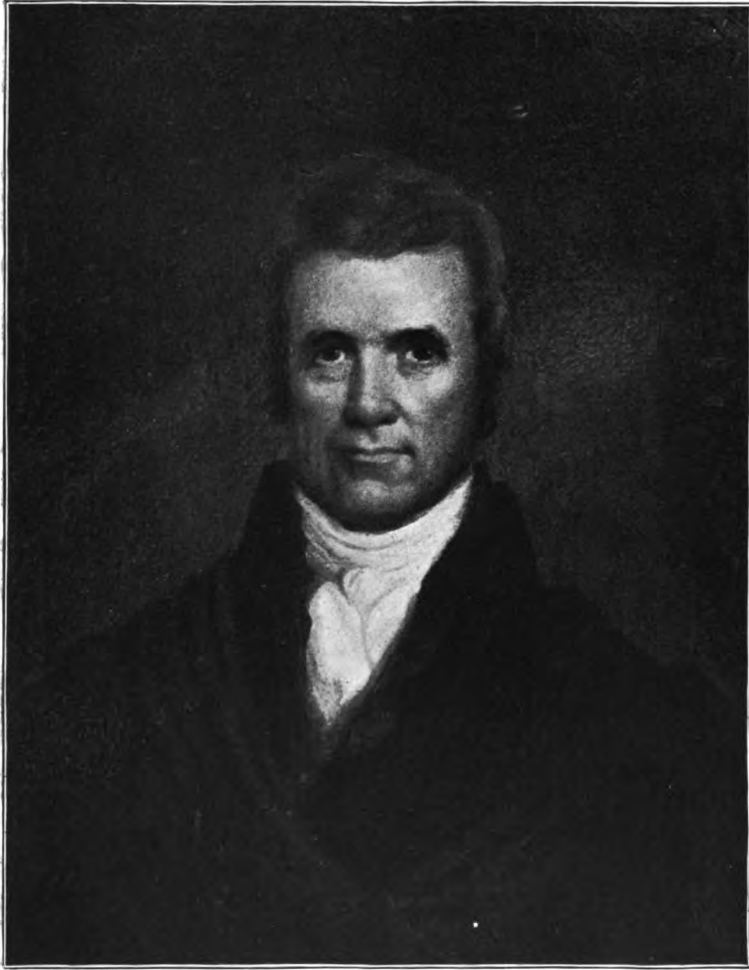
"I have made a careful examination of the article 'Accord and Satisfaction,' prepared for the *Cyclopedia of Law and Procedure*. I find it to consist of a codification of the rules, together with their exceptions, which are generally grouped under that title of the law, including rules of Pleading, Evidence, and Procedure which may be regarded as peculiar to it; the whole arranged on a closely analytical plan, such as facilitates search, brings like things together and separates unlike things from each other; knit together by a system of cross references so as to make the different rules interdependent and so as to make them qualify and explain each other; reduced to great brevity and precision of statement; the various rules and their exceptions and qualifications supported by great numbers of adjudged cases decided in the courts of Great Britain, of the United States, and of the various American States; arranged (where numerous cases are cited to a single proposition) alphabetically, according to States and countries, so as to be easy of access; to which are added in the notes such explanations, illustrations and applications as seem necessary to a clear understanding of the subject. I have examined many of the cases, especially where I thought I had reason to doubt the accuracy of the statements of law to which they were appended, and I find that these statements of law respond with great fidelity to the doctrines of the cases cited in support of them.

"The chief excellences of this work are:

1. A skillful analysis of the whole subject, and a classification of the supporting authorities such as will enable any one to ascertain quickly what the law in any particular jurisdiction is, with reference to any rule or principle embraced in it.
2. The great number of cases, which have been collected, examined and their doctrines stated.
3. Accuracy, fidelity and conciseness of statement.
4. The whole drawn, with careful fidelity, from the adjudged cases.
5. That the law of procedure, . . . including Pleading, Evidence, and Questions of Law and Fact, is stated in like manner,—thus making the article a succinct statement, both of the subjective and adjective law, relating to this title.

"Any criticism of a work of such evident merit would seem to be ungracious. I do not well see how the doctrines of so many adjudged cases could have been more clearly presented."

¹ Published by the American Law Book Company, 120 Broadway, New York.



John Marshall

The Green Bag.

VOL. XIII. No. 2.

BOSTON.

FEBRUARY, 1901.

JOHN MARSHALL.

BY FRANCIS R. JONES.

HE who reads the history of the foundation and early years of the government of the United States, and who studies the lives of the men prominent in public affairs at that time, is impressed more and more forcibly by their extraordinary talents, disinterested, unselfish and lofty patriotism. Indeed so little of frail human nature is attributed to them that we should hesitate to believe in their public histories, unless incontrovertibly attested. They seem far above common mortals, having no infirmities of private character. Lordly Agamemnon, the son of Atreus, and the much enduring Ulysses are more human and more real to us than Washington, Madison, Jay or Marshall. Hamilton is redeemed from being a lay figure by his passionate impetuosity, Jefferson by his cunning self-seeking, Adams by his infirmities of temper. But the others for the most part are mere names for great achievements and have no individuality for us. If there is material extant from which to reconstruct the real men with flesh and blood and human failings like mortals of today, the historians and biographers have carefully avoided its use. Yet to have wrought the work they did, to have inspired the love, the respect and admiration of their cotemporaries, as they did, they must have been singularly human, however exalted their ideals, and however paramount the influence of the stirring times in which they lived. Surely "the muse of history hath encumbered herself with ceremony, as well as her sister of the theatre. She, too, wears the mask and the cothurnus, and speaks to

measure." "I would have history familiar rather than heroic." I would rather have been in the hunting field with George Washington, than at Valley Forge; or pitching quoits with John Marshall at the Barbecue Club, than seen him presiding at the trial of Aaron Burr.

It is more agreeable to pass in silence over the weaknesses in the private character of a great public man than to state the truth. It is easier to bow in admiration before his genius and his talents and achievements, than to weigh the great with the little, the strong with the weak, the good with the bad, and strike a just equipoise. There is, too, a sense of gratitude added to that of admiration, which may well lull the most conscientious biographer into silence as to faults. Yet it is due to history; it is due to his cotemporaries and posterity; nay, more, it is due to the man himself, that the whole truth of his life and character should be known. The truth of history requires that the private characters of all men with whom it deals should be set forth, in order that their public acts may be intelligently estimated and interpreted. For no man has two separate existences or characters. His public career is part and parcel of his personality, as is also his private life. Yet in regard to the private lives of many of our most illustrious men history has recorded nothing but lavish and indiscriminate praise. It is both pleasant and possible to believe that some of the fathers of the Republic were paragons of domestic and social virtues and accomplishments, agreeable companions, stalwart

friends, affectionate husbands and fathers, slow to anger and of great mercy. But when this description is applied to nearly the whole generation of the Revolution, one is forced to suspect that at least in regard to some there has been a suppression of interesting facts. It is unfortunate that history, in bowing on bended knee in adoration, should have been blinded thus.

Whether or not there has been a suppression of facts in regard to the private character of John Marshall cannot now be determined. Of him history records nothing but good. His was a temperament affectionate and charitable, of the utmost good nature, equanimity and purity. Yet the insistence which is placed upon his great sweetness of temper gives rise to the suspicion that it may be a case of protesting too much. His pictured features with their low brow; sparkling, dark eyes; thin, firm lips, and rounded chin, betoken a man of passionate temper, of keen sensibility, of much dignity and great intellect; a thoroughly human individuality, with red blood pulsing in his veins and an ardent heart keeping company with an active brain. And one is led to believe that the portraits of him are true to the life from his many friendships and the respect with which he inspired his generation. However this may be, there can be no doubt that like many other great lawyers, both living and dead, Marshall was of an indolent disposition. " 'Even by his friends he is taxed with some little propensity to indolence,' says the Duc de Liancourt; and his friends, we suspect, were not unjust to him. In truth, he was something of a truant. But such were the vigor and comprehension of his mind that he could better afford than most men to indulge a fondness for social, and even convivial enjoyments."

Of Marshall's public career, however, there is and there can be no question. His political independence and fearlessness were equaled only by his judicial dignity and high character as a magistrate. His name has deservedly become the synonym for a great

and perfect judge. He sits enshrined in the hearts of lawyers with Holt, Hardwicke, Mansfield and Stowell. No words of praise are too great, no terms of admiration too eloquent, to justly describe his judicial career and the mighty work which he accomplished.

As the eldest son of a schoolmate of George Washington he derived from his father, perhaps, the earliest basis for his almost idolatrous affection for and faith in that great man. This influence, too, probably was the first cause for his political opinions, which by study and observation early became fixed convictions, to which he steadily adhered through life; enthusiastically supporting a strong central government, and earnestly defending the administrations of Washington and Adams against what now seem to us factious and ignorant attacks. And it was in this defence, conducted without partisanship, but with the weight of his incomparable and unanswerable logic, that he was schooled for the great work which was to engage the last thirty-four years of his life, give him undying fame, and win for him the gratitude, respect and admiration of all succeeding generations of the Republic. Although his political predilections were strong, he yet had no political animosities, except in the case of Jefferson, whom he mistrusted, if not misjudged, and whose virulent comments upon his conduct of the trial of Aaron Burr were such as to exasperate any man. With this exception, however, his political opponents were ever as ready to accord their affectionate testimony to both his character and ability, as he was to bestow upon them his consideration and praise.

The life of John Marshall is devoid of dramatic incident. It is the life of a great lawyer and a great magistrate, engrossed by the great questions of his profession. His political career was due to, and was the outgrowth of, his professional interests, and those interests were primarily in questions arising under the Constitution. Born on September 24, 1755, he grew to manhood in

the midst of the Revolutionary agitations prior to the Declaration of Independence. It was a stirring time, in which men's minds and passions and ideals were aroused and chastened and uplifted. They were years of patriotic ardor and sacrifice. They were years which brought out whatever unselfish devotion to principle, whatever courage to fight and, perchance, to die for those principles, and all the serene hope for the future, there were in man. It was a time that inspired men with almost supernatural abilities, and Marshall, with his healthy nature, brought up in a thinly populated district of northeastern Virginia, ardently drank in the spirit of the age. With the exception of a year, when he was fourteen, in which he was sent to school in Westmoreland County, where he began the study of Latin, and the succeeding year, when he had the advantage of a Scotch clergyman's tuition in Horace and Livy,

he had no instruction in his boyhood, except that which his father gave. At the age of eighteen he began the study of the law, but soon his energies were concentrated upon the grave public questions which were then coming to their crisis, and he forsook the study of jurisprudence for that of arms. In the spring of 1775 he entered the militia service of Virginia as a lieutenant and continued in military service until January, 1781, during which time he took his part as lieutenant or captain in the battles of Brandywine, Germantown, Monmouth and Stony

Point, and was one of the memorable army that endured the rigorous winter at Valley Forge. There his judicial abilities seem to have been recognized by his fellow officers and subordinates, as he was often asked to settle disputes. There, also, he acted as deputy judge-advocate, and as such came into personal relations with Washington and Hamilton. During the winter of 1779 and 1780, he was stationed at Williamsburg, where he attended lectures on law and natural philosophy at William and Mary

College, and within a year was admitted to practice. His rise in the profession was steadily consistent, and within a very short time he became the acknowledged leader of the Virginia bar. His rapid advancement was due not to any of the arts of the advocate, for he had neither "melody of voice, nor grace of gesture, nor elegance of style," but to his extraordinary intellectual force. He was, and he felt



JOHN MARSHALL.

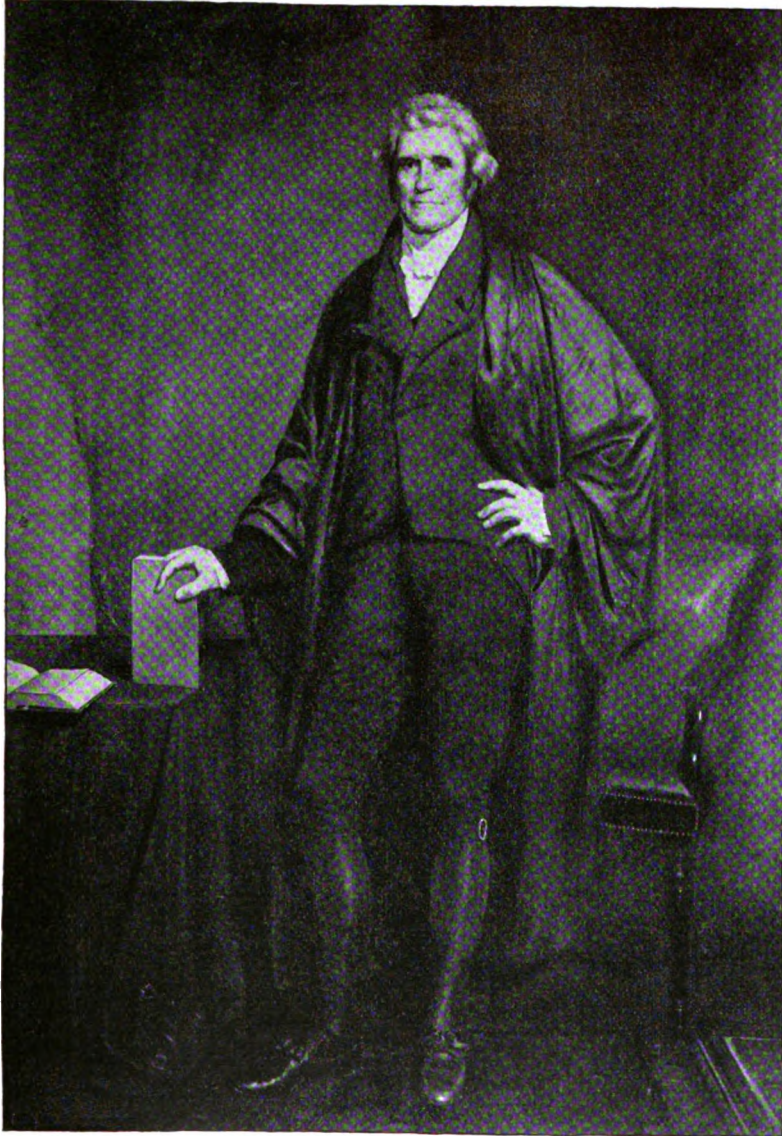
(At the age of 46. From a miniature.)

himself to be, pre-eminently a lawyer. The profession suited both his tastes and his talents, and it was only under pressure that he swerved from it to enter the political arena. He was elected to the Virginia legislature of 1782, and in the autumn of that year became a member of the executive council, which latter position he soon resigned, only to be elected to the legislature again in 1784. During these years his reputation as a lawyer steadily grew, and the conviction that a strong central government, capable of restoring and

maintaining the public credit, of managing national affairs, and of dealing with force and authority with international questions, became established; a conviction to which he adhered with warmth and constancy, and to which is probably due the confidence of Washington and Adams, and the life-long friendship of Hamilton. In 1788 he was a member of the Virginia Constitutional Convention, and therein acted as the lieutenant of Madison in the advocacy of the adoption of the National Constitution, and seconded that statesman's efforts to a material extent. His principal contributions to the deliberations were on the subjects of taxation, the power of the Congress to provide for the organizing of the militia, and the judicial power conferred upon the Federal government. After the adoption of the Constitution of the United States, the party opposed to it in Virginia was so strong that Marshall felt obliged to continue a member of the legislature for two years, where he did yeoman service in support of the administration of Washington. In 1795 he was again elected to the legislature, against his wishes and without his consent, where his support of the commercial treaty with England negotiated by John Jay, earned for him such a national reputation, that, upon the death of the attorney-general, Mr. Bradford, Washington tendered him the vacant place. This Marshall declined upon the ground that it would interfere with his engagements at the bar. The following year he was offered by Washington the embassy at Paris, but he again declined to enter the national service. In 1797, however, upon the rejection by France of Mr. Pinckney as minister to that country, President Adams named Marshall as one of the three commissioners to attempt to adjust the differences between the two countries. Marshall did not feel at liberty to decline this mission, and together with Pinckney and Gerry conducted the abortive negotiations at Paris with M. Talleyrand, which resulted in the infamous XYZ letters. That chapter is, perhaps, the most curious in

all our diplomatic history, and it is due to John Marshall, who wrote the unanswerable letters to M. Talleyrand, that our share in it was conducted with such dignity and spirit, that, although unsuccessful in the objects sought, it aroused so great public enthusiasm at home that the designs of France were absolutely checked. Mr. Marshall arrived at New York on his return on the seventeenth of June, 1798, where he was received with enthusiasm, and at Philadelphia a public dinner was tendered to him by both Houses of Congress, at which the sentiment was offered: "Millions for defence, but not a cent for tribute."

Marshall's reputation was now firmly established, and he returned to Richmond in the hope of resuming his practice at the bar, having declined the place upon the Supreme bench made vacant by the death of Mr. Justice Wilson, which place was afterwards offered to and accepted by Mr. Justice Washington. But his determination to remain at the bar was frustrated by the earnest solicitation of General Washington, who urged it upon him as a patriotic duty to stand for Congress. This he reluctantly consented to do, and he was elected after a campaign of much bitterness and calumny. Upon taking his seat in December he drafted the answer to the President's speech, as chairman of the committee appointed for that purpose, and on the nineteenth of December performed the melancholy duty of announcing to the House the death of Washington, whom he apostrophized as "The hero, the sage and the patriot of America; — the man on whom, in times of danger, every eye was turned and all hopes were placed." During this session of Congress he steadfastly supported the administration of President Adams, except in voting for the repeal of the clause of the sedition act relating to seditious libels, and he added materially to his reputation by his successful defence of the President's surrender to the British authorities of Thomas Nash, who had committed murder on the high seas on



JOHN MARSHALL.

board an English frigate. Congress adjourned upon the fourteenth of May, 1800. Without any intimation having been made to him, Marshall was nominated as Secretary of War on the seventh of May. This appointment he declined, but on the thirteenth he accepted the secretaryship of State, Mr. Pickering having been removed from that office by President Adams, and he continued to exercise the functions of secretary until March 5, 1801. The short time during which he held the portfolio of State was characterized by his successful correspondence with the English minister respecting the claims of British creditors and neutral rights. Upon the resignation of Mr. Chief Justice Ellsworth, Marshall advised the appointment of John Jay to the vacancy, and, upon the declination of that gentleman, he urged President Adams to raise Mr. Justice Paterson to the Chief Justiceship. Instead of sending the name of that judge to the Senate, however, the President, on January 31, 1801, appointed his Secretary of State to that high office. The appointment was immediately confirmed, and on February 4 Marshall took the oath of office and his seat upon the bench as Chief Justice of the United States. His commission was signed by Mr. Dexter, the Secretary of War, acting as Secretary of State at the request of the President, but Marshall continued to hold the office of secretary until the appointment of Mr. Madison by President Jefferson.

For the remaining thirty-four years of his life Marshall's whole energies were engaged upon his judicial work, except the time which he spent in writing the "Life of Washington" and in attendance upon the Virginia Constitutional Convention in 1829. His "Life of Washington" was undertaken at the solicitation of Mr. Justice Washington, who furnished the papers for and divided the profits of it. It was first published in a five-volume edition, with a long introduction on the history of the Colonies,—the first three volumes appearing in 1804, the fourth in 1805, and the fifth in 1807. It was

afterwards, in 1831, abridged to two volumes. The original work did not prove so acceptable to the public as had been anticipated. It is prolix and perhaps too comprehensive, and having been written in such a short space of time, while the weighty questions of his judicial position usurped his attention, it is not such a work as the public had the right to expect. It does justice neither to the author nor to the subject. Mr. Magruder in his "Life of Marshall," says of it: "In honesty it must be admitted that the censoriousness of the English critics came nearer to the truth than the friendly and courteous compliments of the popular author's countrymen. In the first place, the time had not come when the life of Washington could be properly written, so far at least as his administrations as President were concerned; the questions which had then arisen were too near; the partisanship was as fresh and as strong as ever; and even the judicial mind of Marshall could not escape such powerful present influences. Neither was Marshall altogether fitted to write a great book; he was not a literary man nor a scholar; he did not understand the art of composition, and of making a vivid, condensed, attractive narrative. He wrote a useful book, as a man of his ability could not fail to do when dealing with subjects with which he was thoroughly familiar, and in which he was deeply interested; he had further the advantage which arises always from personal acquaintance with the subject of the memoir and entire sympathy with him. For the student of American history the book must thus have a value; but general readers have long since forgotten it, and leave it neglected on the shelves of the old libraries."

No incident in the life of Marshall so well illustrates the veneration in which he was held as his attendance upon the Virginia Constitutional Convention of 1829. He was then seventy-four years old and had attained his unexampled reputation and authority as a great judge. He spoke seldom and briefly, but always in a conciliatory spirit, although

he earnestly deprecated any change in the scheme of government. Perhaps it is worth while to reproduce here some of his sentiments there expressed upon the independence of the judiciary. "I have grown old in the opinion that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting, between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the exercise of these duties he should observe the utmost fairness . . . The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life his all. . . . I have

always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary."

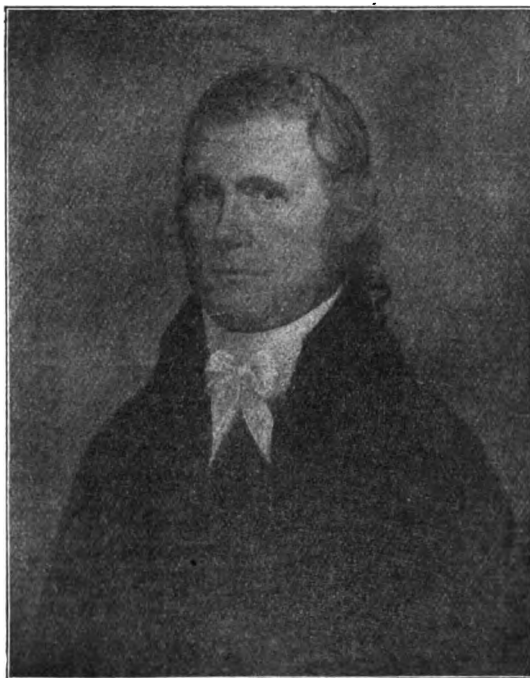
A vivid conception of the attitude of the Chief Justice towards the Convention and of the Convention towards him is derived from the remarks of Mr. B. Watkins Leigh: "Up gets the gentleman from Loudon, and thanks his honored and venerable and venerated friend from Richmond (Mr. Chief

Justice Marshall) for saying that he will vote for their proposition; and immediately after another gentleman from Loudon made an occasion to say, that his highly venerated friend was his political father, that he took delight in following his lessons and that it was gratifying to his heart to find that his very venerable friend from Richmond was willing to take what they proposed to give,

if he could not get what he preferred. But, sir, have we heard one word like a purpose to meet the generous spirit of that gentleman with a like generous spirit? Any, the least intimation, that if their proposition failed, they would accede to his? Not one word . . . The generous and affectionate disposition of the gentleman from Richmond they applaud and compliment; but they — they will yield nothing!"

We come now to a consideration of the judicial ca-

reer of the great Chief Justice, and it must be brief. No lawyer can approach it without a feeling of admiration and reverence. To adequately treat it a critical examination of all his opinions, including as they do judgments of the greatest moment upon questions of constitutional law, of equity jurisprudence, of the common law, of admiralty, of prize and international law is necessary. It would be a high and worthy task, and alone can sufficiently present to the profession and the world the greatness



JOHN MARSHALL (from an old painting).

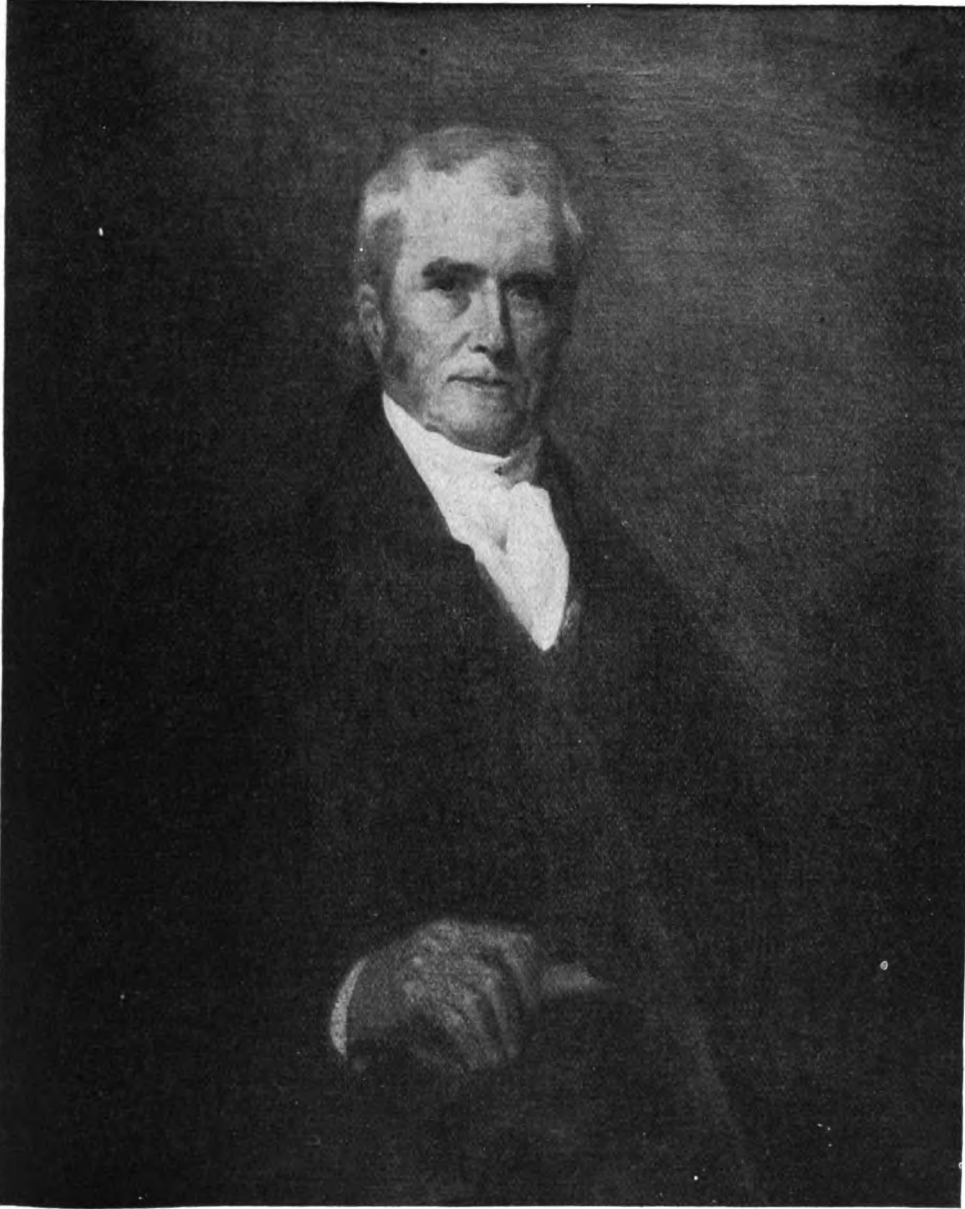
At about the age of 40.

of his intellect, the perfection of his magistracy. For thirty-four years he upheld the perfect type of the perfect judge, with ever increasing reputation and veneration and confidence. For thirty-four years he inspired the reverence not only of members of the bar, but of his associates on the bench, who, like Mr. Justice Story, held his friendship dearer even than their admiration for his genius. For thirty-four years he dominated with a benign, yet irresistible force of intellect the deliberations of the august tribunal over which he presided. In a peculiar and paramount manner for thirty-four years he was the Supreme Court of the United States. His opinions are contained in the thirty volumes of reports from 1 Cranch to 9 Peters, inclusive. In these volumes there are eleven hundred and six cases in which the opinions of the Court were filed, and of these opinions the Chief Justice wrote five hundred and nineteen, and he delivered in addition eight dissenting opinions, the most important of which was *Ogden v. Saunders*, 12 Wheat, 213; and his judgment in *Rose v. Himely*, 4 Cranch, 241, was overruled by *Hudson v. Guestier*, 6 Cranch, 281. Prior to the accession of Marshall to the Supreme Court there had been but six decisions upon questions of Constitutional law. During his magistracy there were sixty-two such decisions, in thirty-six of which he wrote the opinions of the Court. As is said by that accomplished gentleman and lawyer, Mr. Henry Hitchcock: "These details illustrate the relations which the Chief Justice bore to his associates. It is not strange, in view of his acknowledged intellectual supremacy, the exalted reputation which he had acquired in varied and highly important public service at home and abroad, and his singularly winning personal traits, that the history of his labors during that period should be in so great part the history of the Supreme Court itself. . . . In this his opportunity was not less exceptional than his great powers and his unprecedented task. That he felt it to be so is shown by

the nature and methods, as well as the magnitude of the work he did. Never dealing in abstract theories, . . . nor failing clearly to discern and steadfastly to insist upon the strict limits of the judicial power, he never neglected an opportunity for developing and presenting in all its aspects the great and novel political conception embodied in the Constitution,—a political conception at once profoundly simple and singularly complex; one people and many States, the government of each supreme in its own sphere; the strength and safety of each, and the prosperity of all, dependent upon and assured by the absolute supremacy of the fundamental law. . . . Thus, in fulfilling the highest duties of the judge, he exercised the noblest functions of the statesman. In doing this, he sought neither to enlarge nor restrict the meaning, but to ascertain and enforce the true intent of the Constitution and the law, to the sole end that its purposes might be fulfilled."

If it is necessary to mention briefly some small part of Marshall's great work as a judge, a cursory reference to the great principles of constitutional law which he propounded and established is all that can be done here.

As Jay had first declared in *Chisholm v. Georgia*, 2 Dal. 14, the supremacy of the Constitution of the United States, so Marshall in *Marbury v. Madison*, 1 Cranch, 137, declared an act of Congress void which was inconsistent with that Constitution, and in *United States v. Peters*, 5 Cranch, 115, and *Fletcher v. Peck*, 6 Cranch, 87, he likewise decreed laws of Pennsylvania and Georgia, respectively, null and void for the same reason. In *Cohens v. Virginia*, 6 Wheat, 264, the Chief Justice held an act of Virginia unconstitutional, which was incompatible with a constitutional act of Congress. By the decisions in *McCulloch v. Maryland*, 4 Wheat. 316, *Osborn v. Bank of United States*, 9 Wheat. 738, *Weston v. Charleston*, 2 Peters 449, it was established that the States have no power, by taxation or other-



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wise, to impede, burden or control in any manner, any means or measures adopted by the Federal government for the execution of its powers, and in *Gibbons v. Ogden*, 9 Wheat. 1, and *Brown v. Maryland*, 12 Wheat. 419, the paramount authority of Congress to regulate commerce with foreign nations and among the several States was upheld and established. In a series of cases beginning with *Fletcher v. Peck* and including *New Jersey v. Wilson*, 7 Cranch 164, *Sturges v. Crowninshield*, 4 Wheat. 122; *Dartmouth College v. Woodward*, 4 Wheat. 518, the inviolability of the obligation of contracts from impairment by any State was adjudged.

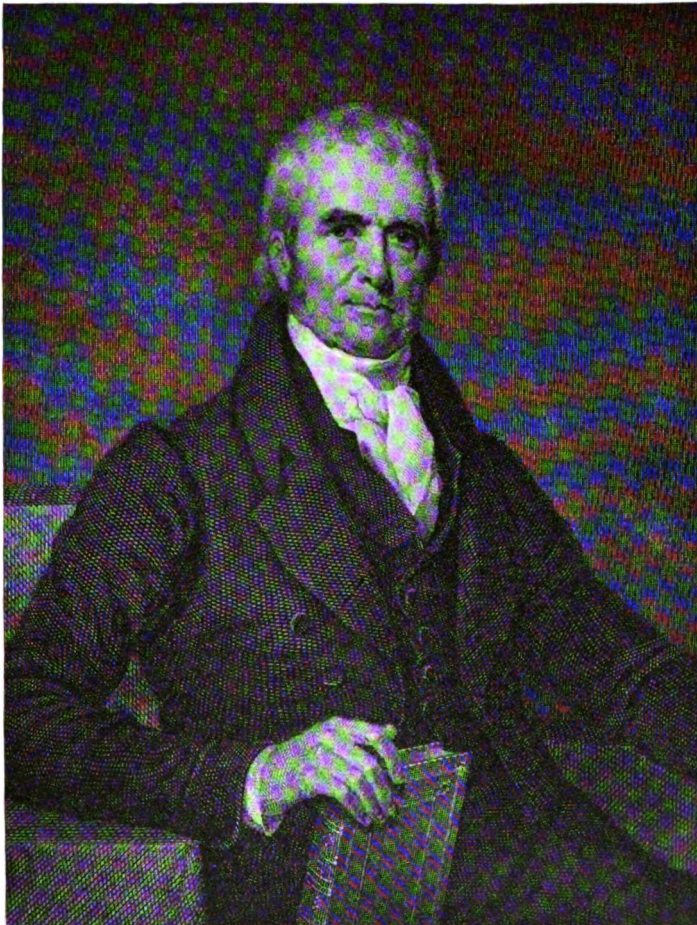
This meagre statement is trite, and seems not only axiomatic, but unimportant to us of to-day. It is like a statement of the law of gravity. But when it is reflected that nearly the whole structure of our constitutional law has been reared upon these foundations laid by Mr. Chief Justice Marshall, the magnitude and importance of these decisions cannot be too greatly conceived. As was so justly and eloquently said at Saratoga on August 21, 1879, by the Hon. E. J. Phelps, at the first meeting of the American Bar Association:

"A soldier of the Revolution, the companion and friend of Washington, as afterwards his complete and eloquent biographer, greatly distinguished at the bar and in the public service before he became Chief Justice, and then presiding in that capacity for so long a time, with such extraordinary ability, with such unprecedented success, if the field of his success had been only the ordinary field of elevated judicial duty, his life would still have been, in my judgment, one of the most cherished memories of our profession and best worthy to be had in perpetual remembrance. Pinckney [Pinkney] summed up his whole character, when he declared that Marshall was born to be the Chief Justice of whatever country his lot might happen to be cast in. He stood pre-eminent and

unrivalled, as well upon the unanimous testimony of his great contemporaries, as by the whole subsequent judgment of his countrymen. The best judicial fruit our profession has produced. . . . He was the central figure, the cynosure, in what may well be called the Augustan age of the American bar; golden in its jurisprudence, golden in those charged with its service and sharing in its administration. . . . He has been estimated as the lawyer and the judge without proper consideration of how much more he accomplished and how much more is due to him from his country and the world than can ever be due to any mere lawyer or judge. The assertion may, perhaps, be regarded as a strong one, but I believe it will bear the test of reflection, and certainly the test of reading in American history, that practically speaking we are indebted to Chief Justice Marshall for the American Constitution. . . . He was not the commentator upon American Constitutional law; he was not the expounder of it; he was the author, the creator of it. The future Hallam, who shall sit down with patient study to trace and elucidate the constitutional history of this country, to follow it from its origin through its experimental period, and its growth to its perfection, to pursue it from its cradle, not, I trust, to its grave, but rather to its immortality, will find it all for its first half century in those luminous judgments in which Marshall, with an unanswerable logic and a pen of light, laid before the world the conclusions of his court. It is all there, and there it will be found and be studied by future generations. The life of Marshall was itself a constitutional history of the country from 1801 to 1835. . . . I shall not try to depict, no poor words of mine could depict, the spectacle which that unassuming, but dignified tribunal presented during thirty-five years of time, while with unabated strength he continued to preside there until the snows of four-score winters had fallen on his head; surrounded by the associates and the circle of advocates I have referred to, dealing with

the greatest questions, the most important interests, in the light of the highest reason, the finest learning, the most elevated sentiment, and often with an affecting eloquence,

His life, strange to say, remains to be written. Lives enough have been thought worth writing that never were worth living, but the life of the great magistrate is unwritten still.



JOHN MARSHALL.

which in our busy day has disappeared from courts of justice to be heard there no more; and shined in the respect, the affection, the veneration of all his countrymen; no breeze of party conflict but was hushed in his presence, no wave of sectional quarrel but broke and subsided when it reached his feet.

Perhaps it is as well that it should be. Time was needed to set its seal upon the great lessons he taught; experience was requisite to show what was the result of following and what the result of departing from them. Some day the history of that life, that grand pure life, will be adequately written. But

let no prentice hand essay the task. He should possess the grace of Raphael and the color of Titian, who shall seek to transfer to

an enduring canvas that most exquisite picture in all the receding light of the days of the early Republic."

NOTE. — Through the kindness of Mr. Justice Gray, of the United States Supreme Court, in allowing a photograph to be taken of the very fine portrait of Chief Justice Marshall painted by Jarvis, which is now owned by Mr. Justice Gray, we are able to present as this month's frontispiece a copy of what is, we think, the best portrait of the great Chief Justice. We feel sure that our readers will appreciate, as fully as we do, the courtesy of Mr. Justice Gray.

With this portrait it is interesting to compare the miniature done in crayon by Saint Mémin (see page 55), and the excellent portrait (of which there are many copies) painted for the Law Association of Philadelphia by Henry Inman (see pages 61 and 63). The Saint Mémin miniature is said by Joseph P. Bradley (*Century*, v. 16, p. 779) to be regarded by the family "as the very best likeness ever taken of their honored ancestor." Bradley refers to the Jarvis painting as a "very fine portrait." The well-known full-length portrait of Marshall, owned by the Boston Athenæum, of which the Harvard Law School has a replica, is the work of Chester Harding (see page 57).

A few words concerning John Wesley Jarvis may not be out of place. He was born in the north of England in 1780, and was brought to this country as a child by his parents. He became known in the early nineteenth century as one of the foremost portrait painters in America. His home was New York, but he traveled extensively, as the portrait painters of that time usually did, and he painted many portraits in Baltimore, Charleston and New Orleans. Dun-

lap called him the best portrait painter in the city of New York for many years. Like many of our early painters, he began by being an engraver. His first teachers were Savage and Edwin. Henry Inman and Thomas Sully were his collaborators at various times. Jarvis was a nephew of the great Methodist, John Wesley, but he was a notoriously convivial character, and his bibulous exploits as a diner-out occupy an immoderate part of the attention of his biographer. He appears to have been famous, also, as the Chauncey Depew of his day, and our American Vasari, William Dunlap, in his gossiping "History of the Rise and Progress of the Arts of Design in America," quotes many of his after-dinner anecdotes and jests. As to Jarvis's eccentricities, it is curious to note that in 1830 he acquired the reputation of being singular by wearing, on Broadway, "a long coat trimmed with furs," "like a Russian prince or potentate from the North Pole," observes the parochial Dunlap. But, unfortunately, Dunlap, who had an eye for long coats trimmed with furs, and who was scandalized by the disorderly appearance of Jarvis's unscraped palette and unwashed brushes, has very little to say about the man's notable achievements in art. Among his other works, Jarvis painted a series of full length portraits of military and naval heroes for the New York City Hall. With Inman's aid, Jarvis was able to turn out about six portraits a week, for which he received from one hundred to one hundred and fifty dollars each. Jarvis died in 1840.—[*The Editor.*]

**THE RESTORATION OF WHIPPING AS A PUNISHMENT
FOR CRIME.**

BY HON. SIMEON E. BALDWIN, L.L.D.

ABOUT the middle of the last century a wave of humanitarian sentiment rolled over the civilized world. It began in the United States and ended in Europe. It brought with it many good things. It left behind it also a certain amount of sediment. Part of this sediment was a mushy conception of the relations of criminals to society. What was society to do with them? Were they, after all, very much in fault? Had they not been children of evil, by inheritance from ancestors for whose rascality or its consequences they ought not to be held responsible? What right had one man to punish another? Was that not an affair that belonged solely to God?

Under the influence of such considerations, whipping was struck out of the criminal codes of Southern Europe, and of most of the American States. Of late years, it has been reinstated in a few. Has it been rightly reinstated, and has little Delaware been wise in always retaining it?

I am one of those who would answer both these questions in the affirmative. I believe that human government exists by the permission of God and in some sort represents divine justice on earth. I believe that for grown men the main object of criminal punishment should be to punish, and that reformation is a secondary matter, and generally a hopeless task.

The moral sense of the community demands that he who has committed some act of criminal violence against his neighbor should be caught and made to smart for it.

The criminal is generally a utilitarian. He has committed the crime because it will bring him, he hopes, a certain good, and at worst can only entail upon him a certain evil. This possible evil is remote and contingent. The good is immediate. Society

must make the evil heavy enough and distasteful enough to outweigh the element of uncertainty and distance.

To measure out punishment in all cases of serious crime by so many months or years in jail is to use but a rough yard-stick.

A London magistrate of long experience, Sir Edward Hill, once said that long sentences make very little difference in their deterring influence upon criminals as compared with short ones for the simple reason that the criminal classes are devoid of imagination. They do not and cannot picture to themselves the dragging monotony, year after year, of prison toil, or month after month of prison idleness, with that vividness and sense of reality with which it strikes an industrious citizen. Whether they are sent up for two years or for twenty seems to them of slight account.

No sentence in a county jail, be it long or short, is greatly dreaded by a hardened criminal. It gives him in most cases an assurance of better housing and of better food than he is in the habit of gaining by any other mode of exertion. He has never taken into his soul the full measure of the good of liberty. It is not a good, except so far as its possessor knows how to make good use of it; and that to him was never known, or but half known.

On the other hand, whipping is dreaded by every one, man or child. We shrink from it first and most, because it hurts.

It is no degradation to a boy to be whipped by his father, or by his master at school. That is not his objection to it. He feels that it is a reasonable and natural consequence of misdoing, and leaves him better rather than worse. The sailor and the soldier, until recent years, met it in the same way, and with no loss of spirit or loyalty to their

flag. Custom, for them, had dissociated it from disgrace. It was simply retribution. In civil life, however, to the grown man, it is and always was a mark of degradation in the eyes of the community. But as a penalty for crime, it is a consequence of degradation, rather than a cause of it. It was the crime that really degraded.

The criminal dreads whipping mainly, as the boy does, because it hurts. A French physician at the head of the great prison hospital at Toulon, in a work on the characteristics of convicts, has said that the abolition of punishment accompanied by torture has resulted in greatly augmenting the number of homicides. A convict, whom he quotes, had been sentenced to fifty stripes. "Ah," said the man, "that is worse than fifty strokes of the guillotine. One suffers during it, and after it, too."

Let us admit that degraded as such a man is by his brutal act and the brutal heart behind it, he is further degraded by the whipping to which he may be sentenced. So far as concerns his relations to his particular friends and associates, he ought to be, and this, however we may deplore his fall in the eyes of the world at large, is a strong argument for the infliction of this particular penalty. The social sting often goes deepest. A man hates to lose caste among those with whom he associates familiarly. The term "jail-bird" shows how the community regards the man who has been once sentenced to imprisonment. But his mates often look upon him as none the worse for it. He has simply been unlucky. Let him be stripped and put under the lash, however, and he sinks in their estimation. It may, indeed, have another good tendency from that very fact. It may drive him from out of their company, into that of honest men again. But, be this as it may, to flog one criminal deters, by the very disgrace of it, hundreds from crime.

To boys it could bring little of discredit or disgrace. It is a remedy that the world has always recognized as belonging to their

time of life. In the great schools of England birching has been freely dealt out by the best teachers, and it brings no shame, unless there be a want of pluck to stand it bravely.

In Scotland whipping was strongly recommended as the general punishment for juvenile offenders, in a Parliamentary Report presented in 1895, by a Departmental Committee appointed to consider the subject. In 1893, three hundred and thirty-five boys had been thus flogged instead of being sent to jail; in 1894, two hundred and sixty-eight; but the effect of this report was such that in 1898, there were four hundred and sixty-eight sentences to whipping and only three hundred and thirty-eight to imprisonment, while there was a diminution of the total number of juvenile offenders convicted by one hundred and seventy-eight.

Virginia, in 1898, reverted to a similar policy by a statute authorizing whipping to be substituted for fine or imprisonment, at the discretion of the court, as the sentence upon a conviction for crime of any boy under sixteen years of age, provided the consent of his parent or guardian be first given.

Let any one familiar with the administration of criminal justice, and desirous to make it better, turn the light of his own experience on this subject; and as he looks back on the monotonous routine of the police court, with its sentence after sentence inflicted on the habitual rounder, to whom the jail has become a home, he must see cause to consider if one good whipping at the outset might not often have saved what has been not simply a wasted life, but a life that has wasted the property of the community and the peace of the State.

To replace whipping in the list of permissible punishments would not, of course, involve the restoration of the whipping post, nor is it a penalty appropriate to every case. Let it be inflicted in private, and, when upon grown men, for such offences only as involve the use or threat of great personal violence or indignity to another; unless, as in India,

it be added to the sentence of habitual criminals, upon a third or fourth conviction.

Nor should the cat-o'-nine tails or any similar instrument of torture be used. The birch or the leather strap will be sufficient for the purpose.

The country was horrified, a few weeks since at the threat of the scoundrels, who kidnapped young Cudahy in Omaha, to put out his eyes unless his father gave them twenty-five thousand dollars. It is doubtful if they would have been base enough to do it, had the ransom demanded not been paid; but to make such a threat deserves the lash, and to fulfil it might well justify a sentence to a dozen whippings, with suitable intervals of a few weeks for reflection and anticipation between.

A robber in another State recently burned an old man's feet with a red hot poker, to make him show where his little savings were hid. That ruffian would be insufficiently punished by a mere sentence to imprisonment. He needs the sting of something sharper.

Such crimes will increase as the wealth of the country increases, unless the consequences of conviction are made more disagreeable to the offender. The way I suggest is one, and it comes to us with the sauc-

tion of the approval of the whole world in all former generations down to within a hundred years.

Economy is also a matter worth some consideration.

Eugene Smith of the New York bar, in an address before the last meeting of the National Prison Association, estimated the taxes annually imposed in the United States for the repression and punishment of crime at two hundred million dollars. A large part of this goes to the maintenance of jails and prisoners. They probably cost the public (making due allowance for interest on what was laid out on buildings) not less than one dollar and a half a day for each convict, over and above all he can be made to earn by prison work. Instead of spending five hundred dollars to keep some kidnapper or wife-beater in jail a year, suppose that he were kept there but half that time, and given a dozen lashes at the end of each two months. A leather strap that costs a dollar would save two hundred and fifty dollars, and I venture to say that he would seldom be found to come up for a second offence. In Connecticut, where whipping was in use for two hundred years in criminal sentences, no white man was ever whipped twice.

KNICKERBOCKER GOLF AND OTHER FORBIDDEN SPORT OF NEW NETHERLANDS.

By LEE M. FRIEDMAN.

WE think of golf as a recent importation into the United States. We never imagine that it was a pastime of the burghers of New Amsterdam. When we think of these ancient Dutchmen of Manhattan taking recreation, immediately we picture a group of portly fellows lolling at their ease, smoking long-stemmed pipes, with tankards of ale within easy reach. Perhaps, if the

"Rip Van Winkle" legend has sufficiently corrupted our imagination, we associate a slow game of ten pins with the wild dissipation of the younger Knickerbockers.

The ancient records, however, throw a new light upon the subject and prove that these old Dutchmen were ardent golfers. In 1660 the Worshipful Commissary and Commissaries of Fort Orange and Village of

Beverwyck (Albany) "having heard divers complaints from the Burghers of this place, against playing at golf along the streets, which causes great damage to the windows of the houses, and exposes people to the danger of being wounded, and is contrary to the freedom of the Public Streets" did forbid all persons to play golf in the streets, "on pain of twenty-five florins for each person who shall be found doing so."

We have no records to show how this golf was played. We do not even know the traditions of the links, the name of the colonial champion golfer, or the record for the course. But we can imagine the little Indian caddies dragging the bag of clubs after the players as they walked the green fields overlooking the Hudson, and can picture to ourselves the glories of these varied links which now skirted the forests, and now came close to the water's edge as the river made round a sweeping bend, now ran through the winding village streets of Albany out into the open again and then across the many little brooks which led down to Fort Orange. Think of giving up these glories for the sake of a few windows and stray elderly women travellers! What a shame, especially that enormous fine of twenty-five florins, equal to six dollars.

Golf was not the only sport which met with the disapproval of the authorities of New Netherlands. In 1654 Peter Stuyvesant, then director general, pronounced the good old game of "Pull the goose" "an unprofitable, heathenish and Popish festival and a pernicious custom" and accordingly prohibited it. This "Pull the goose" was an ancient Shrovetide game introduced from the Vaaterland. The neck and head of a goose were smeared with oil or soap, and the goose was tied between two poles. Horsemen, riding at full tilt, would try to seize the head of the goose, and he who first succeeded was declared king of the festival. The prohibition of this sport led to a serious clash between the city officials of New Amsterdam and the director general and council

of New Netherlands. In spite of the ordinance against the game some of the farmers' servants "in contempt of the supreme authorities, violated the same. Whereupon, some delinquents were legally cited and summoned before the director general and council by their fiscal to be examined and mulcted for their contempt, as may be proper. Two or three of them behaving in an insolent and contumacious manner, threatening, cursing, deriding and laughing at the chief magistracy in the presence and hearing of the director general and council themselves, were therefore, as is customary, committed to prison." The burgomasters and schepens (aldermen) of New Amsterdam, feeling that the director general and council were encroaching upon their powers and jurisdiction, sent a delegation to attend upon them, with a formal remonstrance against the act of these officials. The honorable director general, Peter Stuyvesant, sent back this delegation with a "declaration of instructions" telling the burgomasters and schepens to mind their own business and that it was the particular power and duty of himself and his council "to enact any ordinances or issue particular interdicts especially those which tend to the glory of God, the best interests of the inhabitants, or will prevent more sins, scandals, debaucheries and crimes, and properly correct, fine and punish obstinate transgressors."

In 1655 the director general and council forbade, under a penalty of twelve guilders (four dollars and a half), the popular amusement of "Planting the May Pole," because they said that it had degenerated into a carousal and led to "an unnecessary waste of powder" in the firing of guns. It was provided that one-third of the fine was to go to the poor, one-third to the officer and the remaining third to the complainant.

Now while the youth of New Netherlands might sacrifice golf and might even cease to pull the goose yet they would not give up their May day celebration. So in spite of the heavy penalties, each succeeding May was sure to see the planting of the May Pole.

THE BARRISTER'S BENEFIT.

BY FRANCIS DANA.

WHEN the evening sun was creeping
To his occidental shelf,
One lone barrister sat weeping
For the brieflessness of self.
In pursuit of legal science
He'd allowed himself no ease,
But he hadn't any clients
And he hadn't any fees;
And he wondered in unmitigated
Grief from day to day
Why the populace that litigated
Never came his way.
As the shadows gathered thicker
He betook him to his room,
And consumed a sip of liquor
To dispel the inner gloom,
With a not at all extensive
But consolatory lunch;
And was growing gently pensive
Over pilot-bread and punch,
When all suddenly a vision
Was apparent to him there,
Sitting grinning in derision
On his broken-legged chair.
"How now, madam!" said the lawyer
"Only me, sir!" said the ghost.
"Hope my coming won't annoy a
Man so learned as my host.
I'm intruding, but the fact is,
I am here to tell you how
You can get a bigger practice
Than rewards your efforts now.
So, unless you wish to miss an
Opportunity to rise,
Hold an ear this way and listen
To the thing that I advise.
You want clients, haven't got 'em,
(Pardon if I treat of shop)
*Get a footing on the bottom
E'er you jump to reach the top!"*
"Haven't I?" he asked in wonder.
"No, you've not," responded she;

"You are hanging on like thunder
Somewhere part way up the tree.
If you wish to live in clover,
You must cultivate the sod,
So, come down, begin life over,
Chuck your books and take a hod,
Make acquaintances and muscle,
Know the heelers and the boys;
I will tell you when to hustle
And begin to make a noise!"
Then a rooster sang of dawning,
And the vision wasn't there,
But the barrister sat yawning
Vaguely at the empty air;
Then arose (it was a trick, odd,
But the odd trick's worth a trump),
Got a dinner-pail and brick-hod
And went jobbing on the dump;
Wore his overalls just muddied
In the manner then in vogue,
Smoked a rank T. D. and studied
At the accent of the brogue.
Two long years he spent in labors
And the joys that labor lends,
Till he got to know his neighbors
And accumulated friends;
Till again arose the phantom,
Crying, "Come along! don't tarry! Stir
Up the populace! Enchant 'em
By appearing as a barrister!"
Then he did as he was bidden
And his light, no longer dim,
Shone more bright for having hidden,
And illuminated him.
Fame, the crier, up and stuck her
Flaring posters near and far,
Roaring, "Lannigan, the mucker,
Is a member of the bar!"
Then the people to whose level
He had come to pick up fame,
Held the devil of a revel
In the honor of his name—

One of those enraptured shindies
 Where the merry barrels burst,
 And the wealth of all the Indies
 Wouldn't buy an inch of thirst—
 With unanimous facility
 Passed him beer and votes of thanks,
 Whose phenomenal ability
 Had upraised him from the ranks;
 Sang, made speeches, and told stories,
 From the twilight to the light;
 Parting, crowned the social glories
 By indulging in a fight;
 In the morning, flocked like ganders,
 Flocked like migratory birds,
 For assaults to sue, and slanders,
 Blows and actionable words.

Individual and faction
 Headlong rushed to legal war
 And retained in every action
 Was our counsellor-at-law.
 And the learning of the hodman
 Was a wonder in the land;
 Astor, Vanderbilt and Codman
 Put their shekels in his hand.

MORAL.

If you wish to drag a muffin
 From the dish that Fortune passes,
 Be an arrant ragamuffin
 And get solid with the masses.

CHAPTERS FROM THE BIBLICAL LAW.

THE CASE OF JOAB, OR THE RIGHT OF SANCTUARY.

BY DAVID WERNER AMRAM.

DURING the beginning of the reign of King Solomon, the question of the privilege of sanctuary came up several times for his decision. This privilege or right was successively claimed by Adonijah, the king's brother, Abiathar, the high priest, and Joab, one of the mighty men of King David, and one-time commander-in-chief of the army. The right of sanctuary which was claimed by these men, is one of the most ancient legal institutions recorded in the Bible. It arose with the very beginning of a belief in supernatural powers, or in God, and it was a direct appeal to them for protection.

Every altar, every sacred grove or pillar, and indeed every place that had been consecrated by the supposed presence of God, or that had been used as a place of worship, and therefore was impliedly a place at which God appeared, was sacro-sanct; and violence

committed in it was not merely an offence against the person injured or against established law or custom, but was likewise an insult to the Deity. Hence, in very earliest times, the sacred places became places of refuge for those who were pursued and in danger of their lives; and so great was the reverence and fear inspired by the supernatural, that this appeal for Divine protection was regarded as tantamount to obtaining that protection, and kept the avenging pursuer at a distance.

It appears that when King David had grown old and was about to die, one of his sons, Adonijah, apparently with the consent of the king, "exalted himself, saying I will reign," and he appeared before the people with chariots and horsemen, and generally conducted himself not merely as heir-apparent, but as though he were already king. He conferred with Joab, the king's com-

mander-in-chief, and Abiathar, the high priest, both of them devoted to King David, and they "following Adonijah, helped him" (1 Kings i, 5, etc.).

By a palace intrigue, Bath-Sheba, assisted by Nathan, the prophet, managed to obtain the old king's favor for her son Solomon, and under their influence King David directed that Solomon should be anointed and proclaimed king over Israel (1 Kings i, 32-34).

When Adonijah, who had been entertaining the princes and all the officers of the kingdom, heard that the crown had been given to Solomon, he feared that Solomon would put him to death. This was the manner in which Oriental potentates disposed of dangerous rivals, especially members of their own family, who by virtue of their blood relationship might pretend to a right to the throne. Adonijah sought refuge in the tent of the tabernacle where the Ark of the Covenant was resting and where the altar of God stood, and he caught hold of the horns of the altar; and he announced that he would not leave the place until King Solomon swore unto him that he would not put him to death. Solomon respected this appeal to the privilege of sanctuary, but declined to comply with Adonijah's request to grant him absolute immunity, merely saying, "If he will show himself a worthy man, there shall not a hair of him fall to the earth; but if wickedness shall be found in him, he shall die." This was tantamount to saying that if King Solomon came to the conclusion that Adonijah was a dangerous man, he would put him to death; and so Adonijah understood it and refused to leave the sacred premises. King Solomon then sent for him and "they brought him down from the altar" (1 Kings i, 50-53),—removed him by force.

Thereafter, King David died and Solomon sat on the throne of his father. After the death of the old king, Adonijah was guilty of a diplomatic blunder that cost him his life. In an interview with Bath-Sheba, the mother of King Solomon, he obtained from

her a promise to ask the king to give him as a wife Abishag, the Shunammite girl, who had waited upon King David during his last days. Had Solomon complied with this request, the people would have seen in this marriage a confirmation of the claims of Adonijah to succeed King David. It was customary for the successor of a deceased king as evidence *inter alia* of his right to succeed to the sovereignty to take possession of the harem of the dead king.

Solomon immediately saw the political bearing of this request, and he answered and said unto his mother, "And why dost thou ask Abishag the Shunammite for Adonijah? Ask for him the kingdom also, for he is mine elder brother" (1 Kings ii, 22); thereupon Solomon had Adonijah put to death on the same day.

Fearing the power of Abiathar and Joab, who had encouraged Adonijah and his pretensions, Solomon determined to rid himself of them. The privilege of sanctuary seems to have been enjoyed by the priest even when he was absent from the sacred place. The fact that he ministered at the altar and bore the Ark of the Lord on his shoulder, invested his very person with a certain sacredness which the king felt bound to respect. Instead, therefore, of putting Abiathar to death, the king banished him from the court and the capitol (1 Kings ii, 26-27).

Then came Joab's turn. He, having heard of these occurrences, fled into the tabernacle of the Lord, and caught hold of the horns of the altar. When this fact was reported to Solomon, he directed one of his officers to go into the tabernacle and put Joab to death. Solomon was evidently very much afraid of Joab, probably because of his influence over the army. His fear of Joab overcame his fear of the Lord, and he gave orders to have Joab killed even while he was holding on to the horns of the altar.

The situation is almost paralleled by the story of Henry II of England, and Thomas A'Becket. The king's officer, who had gone down to the tabernacle to execute the com-

mands of his royal master, was afraid to do as the king commanded, because of the sacrilege involved, and he therefore sought to induce Joab to come forth, but Joab said to him, "Nay, I will die here."

Rather than kill Joab by the side of the altar, the officer returned to the king and reported what had occurred. The king then felt that it was not only necessary that he should justify himself, but also that he should satisfy the scruples of his officer; hence, he deigned to give reasons for his command.

The true reason was a political one; it was Joab's participation in Adonijah's usurpation; but this reason was not strong enough to destroy Joab's right of sanctuary. The reason that Solomon gave to his officer was a different one. The king said unto him after he had reported that Joab had said "I will die here," "Do as he hath said and put him to death and bury him, that thou mayest take away the innocent blood which Joab shed from me and from the house of my father. And the Lord shall return his blood upon his own head, who fell upon two men more righteous and better than he, and slew them with a sword, my father David not knowing thereof, to wit: Abner, the son of Ner, captain of the Host of Israel, and Amasa, the son of Jether, captain of the Host of Judah. Their blood shall therefore return upon the head of Joab and upon the head of his seed forever; but upon David and upon his seed and upon his house, and upon his throne, shall there be peace forever from the Lord." (1 Kings ii, 31-33).

By this piece of hypocrisy the king sought to justify his command to kill Joab and to disregard the right of sanctuary; for it was the law that the privilege of sanctuary could not be claimed by a willful murderer.

This explanation satisfied the king's officer, and he thereupon returned to the tabernacle and killed Joab by the altar. Solomon was an Oriental despot, and it was not at all necessary for him to give reasons for his commands to his subordinates; but the terri-

ble nature of this command, which was apparently a defiance of God and a violation of his sanctuary, required some justification.

The sanctity of the altar or the temple, or any other sacred place, is historically connected with the sacredness of guest-friendship. Anciently every man's house was a temple, the threshold of which was a sacred place at which the family gods were worshipped, and the family sacrifices made; and every head of the family was a priest. Persons who crossed the threshold became *ipso facto*, for the time being, members of the family, and were entitled to all its rights and privileges. It was the sacred duty of every member of the family to defend every other one from danger, to ransom him when taken prisoner, and to perform certain other defined duties. The stranger who crossed the threshold, by a legal fiction having become invested with the family rights, had to be protected by the members of the family against any persons pursuing him. Thus, Lot protected two men who had come into his house and had partaken of his hospitality; and he even permitted his house to be besieged by the men of Sodom rather than give up the strangers to their vengeance (Genesis xix, 4-11). Similarly the citizen of Gibeah protected the two strangers from his townsmen, because he had lodged and fed them in his house (Judges xix, 22-23). Similarly Rahab protected the two spies sent out by Joshua to the City of Jericho. When the king of Jericho heard that these men were lodged at her house, he directed her to produce them; but she concealed them in her house and gave them the protection that guest-friendship required (Joshua ii, 1-7).

When, in the course of time, the union of various patriarchal families resulted in the formation of tribal organization, and public places of worship were recognized in addition to the sacred thresholds and altars of every man's house, the same sacred character was conferred upon them. The man who took refuge in the House of God which was

really the tribal or national house, was in the eye of the law, invested with certain rights which it was the duty of the entire tribe or nation to protect. Hence, merely crossing the threshold of sacred places, and especially standing by the side of the sacred altar or laying hold of the horns of the altar was sufficient to insure immunity, even though there were no physical barriers to prevent the seizure and punishment of the suppliant at the sanctuary. But the peace of the community was threatened by the privileges thus claimed and allowed, inasmuch as any man might commit a murder, safe in the assurance that he would be protected merely by taking refuge in some sacred place. Hence, we find in the oldest collection of laws in the Bible this proviso: "He that smiteth a man so that he die, shall be surely put to death; and if a man lie not in wait, but God deliver him unto his hand, then he will appoint a place whither he shall flee; but if a man come presumptuously upon his neighbor to slay him with guile, thou shalt take him from mine altar that he may die" (Exodus xxi, 12-14). Thus the willful murderer was deprived of the benefit of sanctuary; and thereafter, it was limited to protect the man-slayer from the hand of the avenging kinsman only if the murder was not committed "presumptuously or by lying in wait." In other words, no immunity was granted to him who had been guilty of "murder in the first degree."

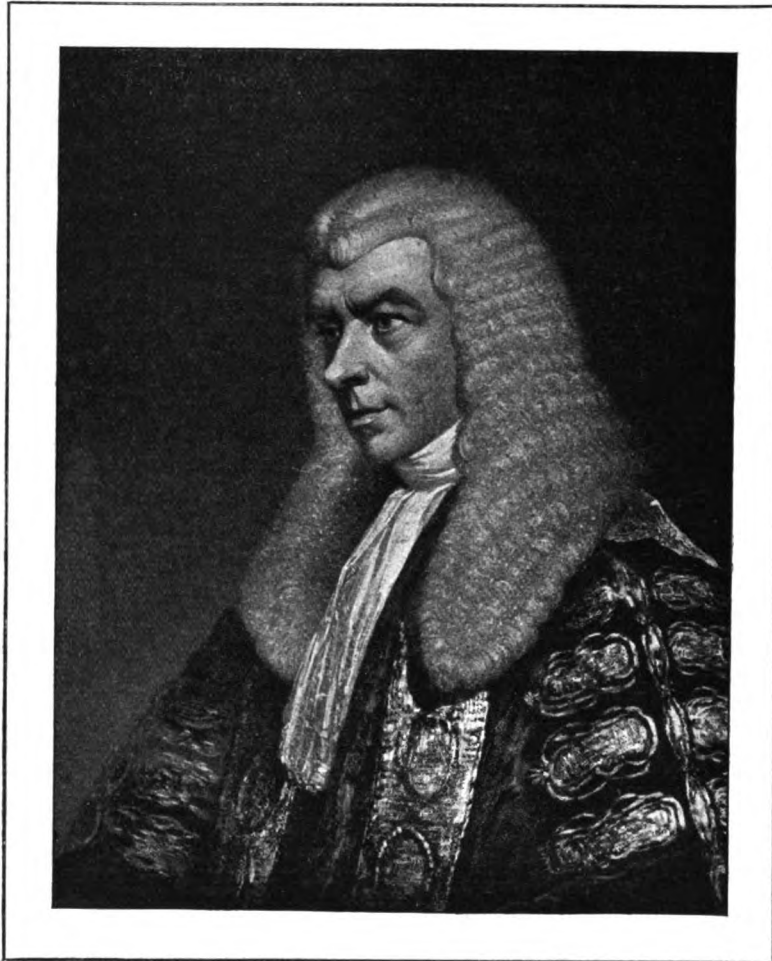
The Cities of Refuge which I described in the August, 1900, number of THE GREEN BAG were simply an extension of the right of sanctuary from a specific sacred place to an entire city. The sacred character of these cities is indicated by the fact that they were Levitical cities. The notion of the inviolability of the refugee, as soon as he crossed the boundary of the city and entered its gate, is a survival of the old notion of the sacredness of the threshold and the duties of guest-friendship to the stranger who passed through it.

The reasons for Solomon's action in the

cases of Adonijah, Abiathar and Joab can readily be distinguished. The only legal justification for his refusal to recognize the right of sanctuary is given in Joab's case; to wit, the charge that Joab had been guilty of willful murder, and therefore had deprived himself of the right of sanctuary. In Adonijah's case Solomon could set up no such reason, and hence did not feel justified in taking Adonijah's life, and was obliged to make him a promise of immunity. This promise is couched in such terms that it enabled the king shortly thereafter to take advantage of Adonijah's diplomatic folly and put him to death. In Abiathar's case, the sacredness of the office of high priest amply protected Abiathar from the king's vengeance, and Solomon was obliged to content himself with the deposition of Abiathar from his high office, and his exile to his patrimonial estate.

The juridical or legal character of the sanctuary is attested by many Biblical citations. The ark of testimony containing the tables of the law was kept in the sanctuary (Exodus xxxix, 35), and was placed in charge of the priests (Deuteronomy xxxi, 9). It was to the altar that men went for the purpose of having an oath administered to them (2 Chronicles vi, 22). So closely connected were the notions of sanctuary and administration of justice that the judges were known as Elohim, which is the Hebrew for God; and a case, therefore, was said to go before Elohim—that is to say, before the judges who represented God and who spoke judgment in his name.

At Common Law in England, the privilege of sanctuary survived until it was abolished by the statute, 21st James I, chapter twenty-eight, paragraph seven. It may be that the privilege from civil arrest enjoyed in our own times by parties, witnesses, attorneys, judges, jurors, and officers of the court, while attending court, and while going to and returning from court, is a survival of the right of sanctuary, though the reason for it now given is a different one.



LORD BROUGHAM.

A CENTURY OF ENGLISH JUDICATURE.

II.

BY VAN VECHTEN VEEDER.

FROM THE REFORM BILL TO THE COMMON LAW PROCEDURE ACT.

THE wave of reform precipitated by the Reform Bill stirred even the stagnant waters of the law. The Court of Exchequer Chamber was made a regular and permanent intermediate court of appeal from each of the superior courts of common law. The ancient and anomalous High Court of Delegates, which had been established in the reign of Henry VIII to take up the appellate jurisdiction in ecclesiastical matters theretofore exercised by the Pope, was at length abolished, and its appellate jurisdiction was conferred upon the judicial committee of the Privy Council, which was now made a definite and serviceable tribunal with a well-defined jurisdiction. By the Uniformity of Procedure Act the concurrent jurisdiction of the three superior courts of common law was officially recognized and a central criminal court was established. The antiquated and cumbrous machinery of fines and recoveries was finally abolished, and a general bankruptcy act ameliorated the condition of insolvent debtors. But the movement in favor of legal reform was not widespread and comparatively little was accomplished. In fact, if the quarter century following the Reform Bill can be called a distinct period, it is because it marks the rise and sway of the influence of Baron Parke in the common law courts.

COMMON LAW COURTS.

The King's Bench at the beginning of this period was still the ablest as well as the most prominent of the three courts of common law. Of the two chief justices during this time, Lord Denman (1832-50), the first was a great and good man, whose predis-

position to individual liberties was a new departure in a chief of this court. His judgment in *Stockdale v. Hansard* is a monument of learning and independence.¹ Compared with his immediate predecessors he could not be called a great lawyer or a strong judge, but his high character and attractive personality won universal high esteem. "To have seen him on the bench, in the administration of justice," said Charles Sumner, "was to have a new idea of the elevation of the judicial character."

Campbell (1850-59), his successor, whose character is much less to be admired, surpassed him in learning and efficiency. With a strong intellect, wide knowledge and untiring industry, Campbell made during his short term a lasting reputation.²

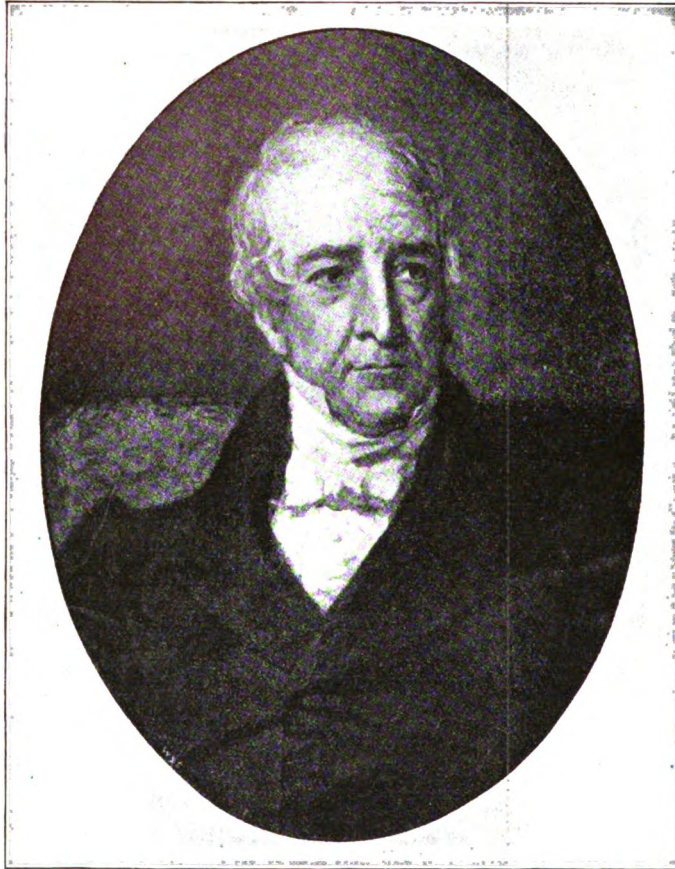
Of the most prominent puisnes of the court during this period, Littleton (1824-41), a learned but scholastic lawyer, held over from earlier time, and Parke (1828-34) spent

¹ See also *R. v. O'Connell*, Cl. & F., 155, R. v. Millis, 10, do. 534; *Wolveridge v. Steward*, 3 L. J., Ex. 360; *Neal v. Mackenzie*, 6 do. 263; *Nepean v. Knight*, 7 do. 335; *Muspratt v. Gregory*, 7 do. 385; *Rhodes v. Smethurst*, 9 do. 330; *Davies v. Lowndes*, 12 do. 506; *McCallum v. Mortimer*, 11 do. 429.

² *Hochster v. De la Tour*, 2 E. & B. 678; *Queen v. Bedfordshire*, 4 do. 535; *Levy v. Green*, 8 do. 575; *Brass v. Maitland*, 6 do. 70; *Humphries v. Brogden*, 20 L. J., Q. B. 10; *Harrison v. Bush*, 25 do. 25; *Wheelton v. Hardisty*, 26 do. 265; *In re Alicia Race*, 26 do. 169; *Humfrey v. Dale*, 26 do. 137; *Thompson v. Hopper*, 26 do. 18; *Queen v. Munneley*, 27 do. 345; *Lewis v. Levy*, 27 do. 282; *Knight v. Faith*, 19 do. 509; *Morton v. Tibbett*, 19 do. 382; *De Haber v. Queen of Portugal*, 20 do. 488; *Shallcross v. Palmer*, 20 do. 367; *Boosey v. Jeffries*, 20 do. 354; *Lynch v. Knight*, 9 H. L. Cas. 580; *Gibson v. Small*, 4 do. 352; *Brook v. Brook*, 9 do. 195.

a few years in this court before going to the scene of his more distinguished labors in the Exchequer. During the latter part of the period the court was further strengthened by the accession of Wightman (1841-63) and Erle (1846-59). Wightman was one of the

According to the unanimous voice of his contemporaries, Erle was one of the best of the earlier judges. He had that power of quickly grasping the essential features of a case which marks the legal mind; and although his mind lacked flexibility and subtlety, and



LORD DENMAN.

last of the great school of special pleaders; but he was besides a man of broad and practical views, and made an admirable judge. He sat in the Queen's Bench for twenty-three years, the trusted colleague of three chief justices.¹

¹ *Clift v. Schwabe*, 17, L. J., C. P., 2; *Howard v. Gossett*, 6 Sh. Fr. 105; *Chasemore v. Richards*, 7 H. L. Cas. 360; *Jeffreys v. Boosey*, 4 do. 842; *Lumley v. Gye*, 2 E. & B. 216.

he was extremely tenacious of his own views, the common sense which generally characterized his work made him a safe judge.²

But the ablest associate throughout the
² *Kennedy v. Brown*, 13 C. B., (N. S.) 677; *Ionides v. Universal Marine Association*, 14 do. 259; *R. v. Rowlands*, 5 Cox Cr. Cas. 406; *R. v. Rowton*, 10 do. 25; *Thompson v. Hopper*, 25 L. J., Q. B., 240; *Wheelton v. Hardisty*, 26 do. 265; *Ricket v. Metropolitan Ry.* 34 do. 257; *Ex parte Fernandez*, 30 L. J., C. P. 321; *Brand v. Ham-*

period was Patteson (1830-52). He sat in this court for twenty-one years; he was the strongest man in the court, and largely influenced its action. It was due mainly to his vigorous intellect and great learning that this court was able to maintain its standing

Coleridge (1835-58) was a very competent lawyer and a man of scholarly attainments. His opinions are among the most finished to be found in the earlier reports.²

His opinion in the case of *Lumley v. Gye*, as to the malicious procurement of a breach



MR. CHIEF JUSTICE ERLE.

during this period, in the face of the rapidly increasing reputation of the exchequer.¹

mersmith Ry. 36 L. J., Q. B. 139; *Gibson v. Small*, 4 H. L. Cas. 352; *Jeffreys v. Boosey*, 4 do. 842; *Lumley v. Gye*, 2 E. & B. 216; *Kay v. Wheeler*, 2 C. P. 302.

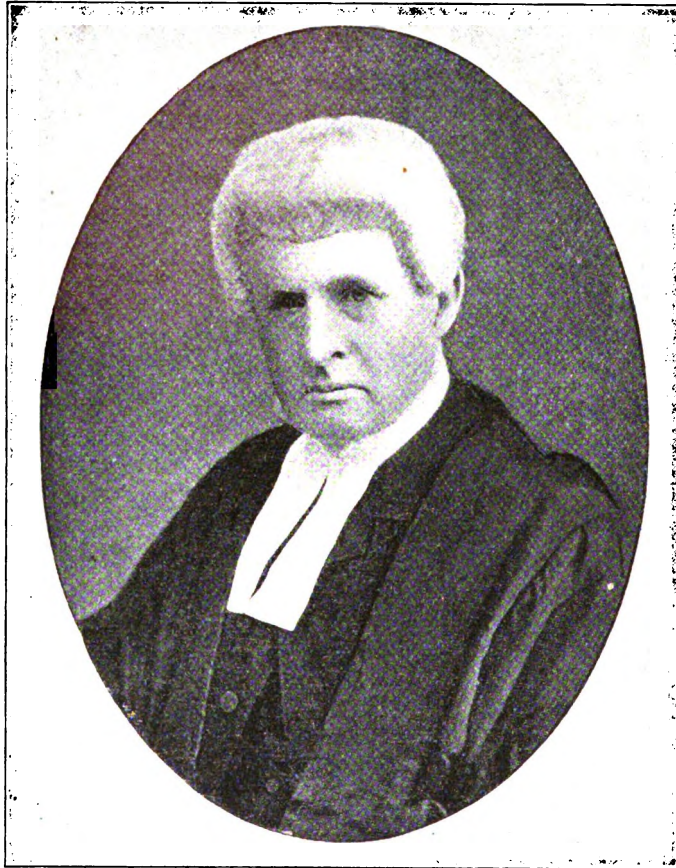
¹ *R. v. O'Connell*, 11 Cl. & F. 155; *Startup v. Macdonald*, 12 L. J., Ex. 477; *Clift v. Schwabe*, 17 L. J., C. P. 2; *East Counties Ry. v. Broom*, 20 L. J., Ex. 196; *Wright v. Tatham*, 5 Cl. & F. 670; *R. v. Rowlands*, 5 Cox Cr. Cas. 406.

of contract, is a good specimen of his style. In this case he was in the minority, and the prevailing view was, in his opinion, simply an

² Some of his best efforts are to be found in *Lumley v. Gye*, 2 E. & B. 216; *Mennie v. Blake*, 225, L. J., Q. B. 399; *Blackmore v. B. & E. Ry. Co.*, 27 do. 167; *Wilson v. Eden*, 19 do. 104; *R. v. Scott*, 25 L. J., Mag. Cas. 128; *Egerton v. Brownlow*, 4 H. L. 1; *Jeffreys v. Boosey*, 4 do. 842; *Wright v. Tatham*, 5 Cl. & F. 670; *Shore v. Wilson*, 9 do. 353.

example of the lengths to which courts of justice "may be led if they allow themselves in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness, as I conceive, of its limited

it for the juryman. Again, why draw the line between good and bad faith? If advice given *mala fide* and loss sustained entitle me to damages, why, though the advice be given honestly but under wrong information with a loss sustained, am I not entitled to them?"



MR. JUSTICE PATTESON.

powers, has imposed on itself of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how much of a free agent's resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is

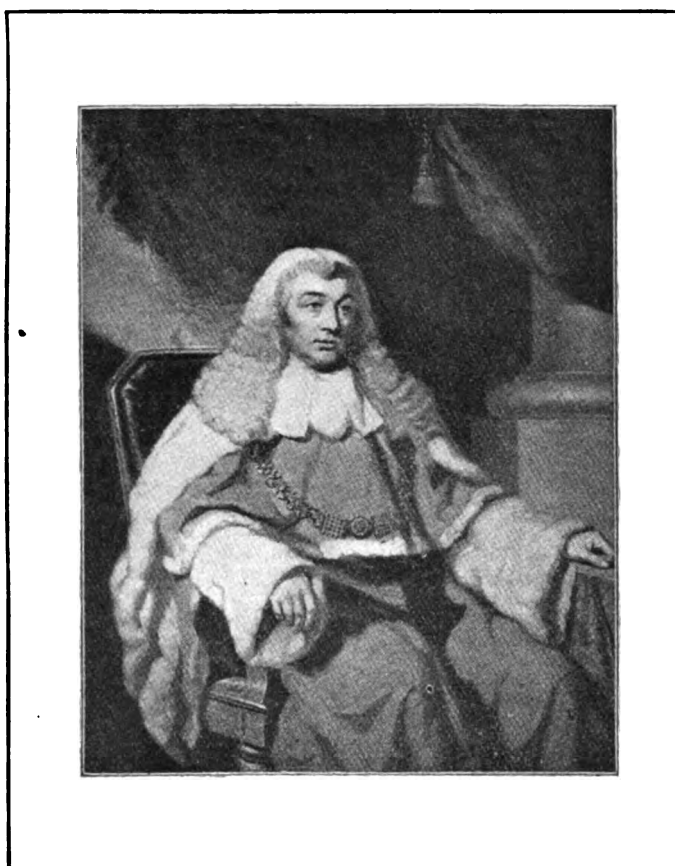
The courts are still struggling with these questions.

The work of the Court of Common Pleas was limited in amount during this period. Until 1841 it was a closed court, and only sergeants could argue cases there. It enjoyed the services, however, of some very able lawyers. Of its three chiefs, Tindal (1829-46), Wilde (1846-50) and Jervis (1850-56), Tindal and Jervis take high rank as magis-

trates. Clear sighted, sagacious and quick of apprehension, they were masters at *nisi prius*. Tindal was furthermore a profound lawyer, and his numerous opinions in this court and in the Exchequer Chamber display grasp of principle, accuracy of statement,

plodding lawyer whose subsequent elevation to the woolsack only served to detract by comparison from his good reputation as a common law judge.

Of the puisnes, Maule. (1839-55), who served through most of this period, was



MR. CHIEF JUSTICE TINDAL.

skill in analysis and wide acquaintance with precedents.¹ Wilde was a learned but

¹ *Acton v. Blundell*, 13 L. J., Ex. 289; *Marston v. Fox*, 8 do. 293; *Panton v. Williams*, 10 do. 545; *James v. Plant*, 6 do. 260; *Hitchcock v. Cocker*, 6 do. 266; *Scarborough v. Saville*, 6 do. 270; *Howden v. Simpson*, 8 do. 281; *Chanter v. Leese*, 9 do. 327; *Sadler v. Dixon*, 11 do. 435; *Whyte v. Rose*, 11 do. 457; *Collins v. Evans*, 13 L. J., Q. B. 180; *R. v. Frost*, 4 St. Tr. 130; *Charge to Grand Jury*, do. 1411; *R. v. O'Connell*, 11 Cl. & F. 155; *R. v.*

probably the most highly endowed. No one ever had a finer sense of the anomalies and incongruities of English law, and he never missed an opportunity to bring to bear on them his unrivalled powers of sarcasm and

Millis, 10 do. 534; *Shore v. Wilson*, 9 do. 353; *Coxhead v. Richards*, 2 C. B. 569; *Flight v. Booth*, 1 Bing. N. C. 377; *Cook v. Ward*, 4 M. & P. 99; *Kemble v. Farren*, 3 do. 425; *Margetson v. Wright*, 5 do. 606.

caustic humor. "As the rule is well established by decisions," he ironically remarks in *Emmens v. Elderton*, 4 H. L. Cas. 624, "it is not necessary to give any reasons in its support, or to say anything to show it to be a good and useful one." His subtle mind was balanced by good sense and entire freedom from technicality.¹ But his mental gifts were smothered in indolence, and he is chiefly remembered for his cynical humor. It was he who, while reading a novel in bed by candle light, set fire to his chambers and burned down a large section of the Temple.

Cresswell (1842-58) and E. V. Williams (1846-65) were the strong judges in this court during the latter part of the period.

Cresswell was an accomplished lawyer who afterwards added to his reputation in the probate and matrimonial court. He was essentially a broad-minded judge.

Williams, the second generation in a line of great lawyers of that name, was profoundly learned in the common law, and his concise and accurate if somewhat technical opinions have always been respected. He was somewhat labored in expression, but had great influence with his associates during his twenty-two years' service.²

The Court of Exchequer came into great prominence during this period. The first two chief barons, Lyndhurst (1831-34) and Abinger (1834-44), failed to sustain on the bench the great reputations they had made at the bar. Both were men of great gifts, but their success as advocates was due rather

¹ *R. v. Burton*, 1 Dears. C. C. 282; *Borrodaile v. Hunter*, 5 M. & G. 639; *M'Naghten's case*, 10 Cl. & F. 199; *Shore v. Wilson*, 9 Cl. & F. 353.

² *Earl of Shrewsbury v. Scott*, 6 C. B. (N. S.) 1; *Behn v. Burness*, 1 B. & S. 877; *Ex parte Swan*, 7 C. B. (N. S.) 400; *Johnson v. Stear*, 15 C. B. (N. S.) 30; *Spence v. Spence*, 31 L. J., C. P. 189; *Hall v. Wright, E., B. & E.* 1; *Cooper v. Slade*, 6 E. & B. 447; *Anderson v. Radcliffe*, 29 L. J., Q. B. 128; *Bamford v. Turnley*, 31 do. 286; *Penhallow v. Mersey Docks Co.*, 30 L. J., Ex. 329; *Shore v. Wilson*, 9 Cl. & F. 353; *Wright v. Tatham*, 5 do. 670; *Roddam v. Morley*, 1 De G. & J. 1; *Hounsell v. Smith*, 7 C. B. (N. S.) 731.

to their knowledge of men than to any mastery of legal principles.

Pollock (1844-56), on the other hand, who succeeded them in the middle of this period, brought to the bench the industry and general ability which had characterized his distinguished forensic career. He came from an hereditary race of lawyers, and combined brilliant scholarship with uncommon industry. There have been many more learned but few more useful judges. His high-toned personality is reflected in his scholarly and felicitous opinions, which, whether right or wrong in the result, are always interesting.³ Under his administration, with Parke (1834-55) and Alderson (1834-57) as associates, the exchequer reached its greatest influence.

It is undeniable that this reputation was largely made by Parke (1834-55). "Baron Surrebutter," as he was ironically named, was a modern Coke, profoundly learned in the common law and indefatigably industrious in its administration. He possessed that ability in grasping and fathoming a subject which is the supreme test of judicial power, and his extraordinary memory enabled him to draw at will upon his vast store of learning. It must be admitted that he was a man of high character and powerful intellect; no smaller man could have accomplished as much. For more than twenty years he was the ruling power in Westminster Hall. Considering the state of the law in his day and his fond adherence to its formalities and precedents, one's admiration for his undoubted ability gives way to surprise that he should have acquired such ascendancy over his brethren. Even so great a lawyer as Willes said that "to him the law was under greater obligations than to any judge within legal memory." For more than twenty years he

³ *Clift v. Schwabe*, 17 L. J., C. P. 2; *Attorney General v. Sillem*, 33 L. J., Ex. 92; *Hall v. Wright*, 29 L. J., Q. B. 43; *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Gibson v. Small*, 4 do. 352; *Jeffreys v. Boosey*, 4 do. 842; *Wood v. Wand*, 3 Ex. 774; *Molton v. Caurraux*, 4 do. 17; *Bellamy v. Major*, 7 do. 389; *Hudson v. Roberts*, 6 do. 697; *R. v. Abbott*, 1 Dears. C. C. 273.

bent all the powers of his great intellect to foster the narrow technicalities and heighten the absurdities of the system of special pleading. The right was nothing, the mode of stating it everything. Conceive of a judge rejoicing at non-suiting a plaintiff in an

impossible conditions, and expressed satisfaction in being able to do so. Broad-minded judges like Maule and Cresswell struggled in vain against his influence.

"Well," Maule would say, "that seems a horror in morals and a monster in reasoning.



J. PARKE, AFTERWARDS BARON PARKE.

undefended case, and reflecting only that those who drew loose declarations brought scandal on the law! Any attempt to change or ameliorate the law met with his uncompromising opposition. "Think of the state of the record," was his invariable response to every effort to escape from the trammels of technicality. He defeated the act of parliament allowing equitable defences in common law actions by the exaction of all but

Now give us the judgment of Baron Parke which lays it down as law." Parke stands at the head of the black-letter lawyers. It is related that once when one of his brethren was ill, Parke took him a special demurrer. "It was so exquisitely drawn," he said, "that he felt sure it must cheer him to read it." "He loved the law," as Bramwell said, "and like those who do so he looked with some distrust on proposals to change it." He sin-

cerely believed that the interests of justice were best served by a strict adherence to technical rules. The sixteen volumes of reports by Meeson and Welsby were his especial pride. "It is a lucky thing that there was not a seventeenth volume," said Erle, "for if there had been the common law itself would have disappeared altogether amidst the jeers of mankind."¹ In these pages, indeed, he may be seen at his best and his worst. He was one of the last of the judges who systematically delivered written opinions. They were prepared with great fulness and care, and do not fall far short of two thousand in number.

Alderson (1834-57) was a strong associate, learned, vigorous and efficient, and particularly capable as a criminal judge.²

Valuable assistance, particularly in its equitable jurisdiction, was rendered in this court by Rolfe (1839-50), who subsequently reached a higher station as Lord Cranworth.

¹ When asked once why he had not written a book he replied: "My works are to be found in the pages of Meeson and Welsby." These volumes are the best monuments of his industry. As most of the opinions are rendered by him, it is unnecessary to undertake to give a comprehensive selection. The following will suffice as examples: Norton *v.* Elain, 2 M. & W. 461; Langridge *v.* Levy, 2 do. 461; Nepean *v.* Knight, 2 do. 894; Doe d. Rees *v.* Williams, 2 do. 749; Harris *v.* Butler, 2 do. 539; Jackson *v.* Cummings, 5 do. 342; Evans *v.* Jones, 5 do. 77; Merry *v.* Green, 7 do. 623; Acton *v.* Blundell, 12 do. 324; King *v.* Hoare, 13 do. 494.

Among his leading opinions in the House of Lords and Privy Council are Atwood *v.* Small, 6 Cl. & F.; Shore *v.* Wilson, 9 do. 353; O'Connell's case, 11 do. 155; Gibson *v.* Small, 4 H. L. Cas. 352; Jeffreys *v.* Boosey, 4 do. 842; Chasemore *v.* Richards, 7 do. 349; Wicker *v.* Hume, 7 do. 165; Dolphin *v.* Robbins, 7 do. 390; Wing *v.* Angrave, 8 do. 183; Brook *v.* Brook, 9 do. 195; Lynch *v.* Knight, 9 do. 587; Barry *v.* Buttin, 2 Moo. P. C. 480; Calder *v.* Halket, 3 do. 28.

² Hadley *v.* Baxendale; Wood *v.* Leadbitter, 13 M. & W. 840; King *v.* Hoare, 13 do. 494; Skeffington *v.* Whitehurst, 1 Y. & C. 1; Startup *v.* Macdonald, 12 L. J., Ex. 477; Egerton *v.* Brownlow, 4 H. L. Cas. 1; Gibson *v.* Small, 4 do. 352; Jeffrey *v.* Boosey, 4 do. 842; O'Connell's case, 11 Cl. & F. 155; Wright *v.* Tatham, 5 do. 670.

CHANCERY COURTS.

The first competent successor to Eldon was Lord Cottenham. Lord Lyndhurst (1827-30; 1834-35; 1841-46) was a consummate orator; but he had no training in equity and shone principally in politics.³

Lord Brougham's chancellorship (1830-34) was only one incident in his varied career. As a statesman he has left an abiding mark on the English legal system. For nearly fifty years he struggled with indefatigable industry and extraordinary ability in the cause of reform. The vast scheme of law reform which he laid before parliament in 1828 bore ample fruit in after times. The overthrow of the cumbrous and antiquated machinery of fines and recoveries, the abolition of the Court of Delegates and the substitution for it of the Judicial Committee of the Privy Council, the institution of the Central Criminal Court and the Bankruptcy Act are a few of his herculean labors. Although he always upheld the cause of liberty and humanity, his character carried little moral force. His power was altogether intellectual. As chancellor he worked with extraordinary energy and expedited the work of the court in marked contrast with Eldon. But he had been trained in the common law, and was little fitted either by learning or by temperament for the judicial duties of the office. "If he had known a little law," said the caustic St. Leonards, "he would have known a little of everything."⁴

Waring *v.* Waring, 6 Moo. P. C. 341, is a characteristic specimen of his judicial style.

³ Small *v.* Atwood, 6 Cl. & F., 232; O'Connell's case, 11 do. 155; R. *v.* Millis, 10 do. 534; Shore *v.* Wilson, 9 do. 353; Egerton *v.* Brownlow, 4 H. L. Cas. 1.

⁴ Ferguson *v.* Kinnoul, 9 Cl. & F. 250; Stokes *v.* Herron, 12 do. 163; Birtwhistle *v.* Vardell, 2 do. 581; 7 do. 895; Cookson *v.* Cookson, 12 do. 121; O'Connell's case, 11 do. 155; R. *v.* Millis, 10 do. 534; Atwood *v.* Small, 6 do. 232; Wright *v.* Tatham, 5 do. 670; Purves *v.* Landell, 12 Cl. & F. 97; Egerton *v.* Brownlow, 4 H. L. Cas. 1; Greenough *v.* Gaskell, 1 Myln. & K.; McCarthy *v.* De Caix, 2 Russ. & Myln.; Cooper *v.* Bockett, 4 Notes of Cases, 685.

It is a forcible presentation of the old view of mental disease as affecting legal capacity. "We must always keep in view," he says, "that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible; that when

eral or partial insanity; but we may most accurately speak of the mind exerting itself in consciousness without cloud or imperfection but being morbid when it fancies; and so its owner may have a diseased imagination, or the imagination may not be diseased,



BARON ALDERSON.

we speak of its different powers or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments, whereas, in all accuracy of speech, we mean to speak of the mind acting variously, that is, remembering, fancying, reflecting, the same mind in all the operations being the agent. We cannot, therefore, in any correctness of language speak of gen-

and yet the memory may be impaired, and its owner be said to have lost his memory. In these cases we do not mean that the mind has one faculty, as consciousness, sound, while another, as memory or imagination, is diseased; but that the mind is sound when reflecting on its own operations, and diseased when exercising the combination termed imagining or casting the retrospect called recollecting." This doctrine was overthrown

by Chief Justice Cockburn in *Banks v. Goodfellow*, 5 Q. B. 549.

Lord Cottenham (1836-41; 1846-50) brought to the discharge of his duties a complete mastery of the existing principles and practice of the court of chancery, which

learned but plodding lawyer, left the court of Common Pleas, where he was serving with credit, to assume the chancellorship, for which he had no particular qualifications. He sacrificed his life in attempting to cope with the work.



SIR FREDERICK POLLOCK, AFTERWARDS BARON POLLOCK.

he regarded as the perfection of human wisdom. Outside this sphere his learning was limited; and his mind was vigorous and sound rather than broad and subtle. He was an able and painstaking, if somewhat cautious, judge.¹

His successor, Lord Truro (1850-52), a

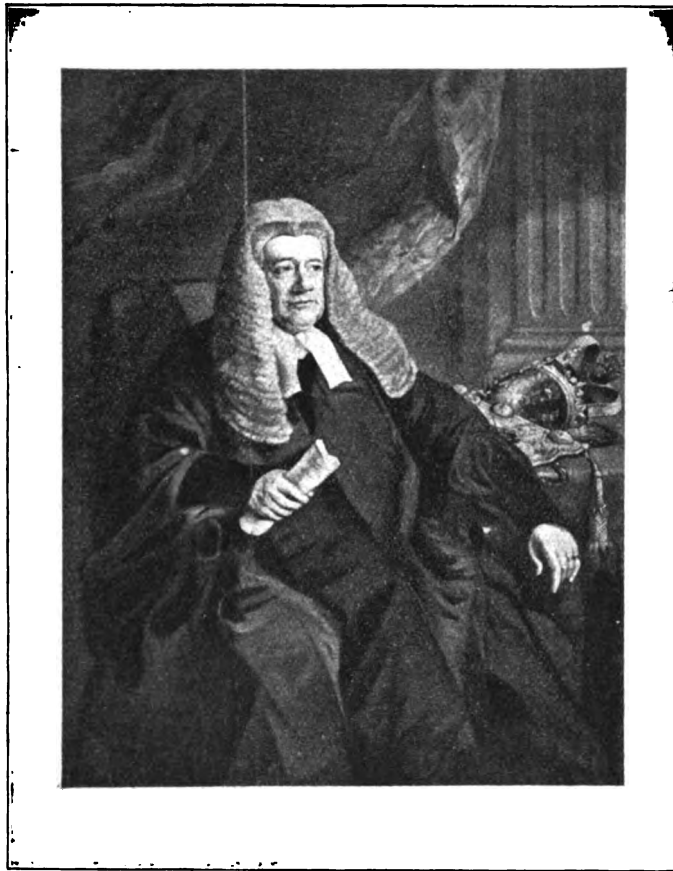
¹ *Auchterarder case*, 6 Cl. & F. 46; *O'Connell's case*, 11 do. 155; *Tullett v. Armstrong*; *Scarborough v. Borman*, 4 Myln & Cr. 120; *Cookson v.*

Lord St. Leonards (1852), who next held the seals for a brief period, within his limits

Cookson, 12 Cl. & F. 121; *Atwood v. Small*, 6 do. 232; *Shore v. Wilson*, 9 do. 353; *R. v. Millis*, 10 do. 534; *Stokes v. Heron*, 12 do. 163; *Dunlop v. Higgins*, 1 H. L. Cas. 351; *Wilson v. Wilson*, 1 do. 538; *Faun v. Malcomson*, 1 do. 637; *Thynne v. Earl of Glengall*, 2 do. 131; *Duke of Brunswick v. King of Hanover*, 2 do. 1; *Foley v. Hill*, 2 do. 28; *Piers v. Piers*, 2 do. 331; *Charlton's case*, 2 Myl. & Cr. 316; *Pym v. Locker*, 5 do. 29.

realized as nearly as possible the ideal of an infallible oracle of the law. In complete contrast to Brougham, who knew a little of everything, St. Leonards knew a great deal of one thing and little besides. In comprehensive and accurate knowledge of the law

more competent than any of his contemporaries to reform the law of real property, but he seems to have been quite contented with it as it was. He literally lived in the law during his lifetime and bequeathed to it a leading case upon his death. His will could



LORD TRURO.

of real property he stood for forty years without a rival. His judgments were always delivered promptly, without notes, and were seldom reversed. Yet it must be admitted that from the technical character of the subject and his apparent lack of general culture they are dry reading.¹ St. Leonards was

¹ *Egerton v. Brownlow*, 4 H. L. Cas. 203; *Maunsell v. White*, 4 do. 1037; *Jeffreys v. Boosey*, 4 do. 842; *Lumley v. Wagner*, 5 De G. & S. 485; *Grey*

not be found, and its contents were established by oral evidence.

Lord Cranworth (1852-58), whose professional training had been in chancery, came to the woolsack after his long experience as a baron of the exchequer, and thus com-

v. Pearson, 6 H. L. Cas. 61; *Brook v. Brook*, 9 do. 195; *Colyer v. Finch*, 5 do. 905; *Savery v. King*, 5 do. 627; *Bargate v. Shortridge*, 5 do. 297; *Jordan v. Money*, 5 do. 185.

bined a large acquaintance with both systems. He was a man of high character and a sound and acute judge. His extreme caution and timidity, however, limited the influence which his learning and experience would otherwise have had.¹

the test, or one of the tests whether a person not ostensibly a partner is, nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in



BARON ROLFE, AFTERWARDS LORD CRANWORTH.

Cranworth had a marked capacity for lucid statement. His discussion of the vexed question as to what constitutes a partnership, in *Cox v. Hickman*, 8 H. L. Cas. 267, is a good illustration: "It is often said that

profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that

¹ *Cox v. Hickman*, 8 H. L. Cas. 267; *Egerton v. Brownlow*, 4 do. 1; *Jeffreys v. Boosey*, 4 do. 842; *Oakes v. Turquand*, 2 do. 369; *Brook v. Brook*, 9 do. 195; *Ranger v. Great Western Ry.* 5 do. 72; *Ricket v. Metropolitan Ry.* 2 E. & I.

App. 174; *Rylands v. Fletcher*, 3 do. 330; *Shaw v. Gould*, 3 do. 55; *Startup v. Macdonald*, 12 L. J., Ex. 477; *Clift v. Schwabe*, 17 L. J., C. P. 2; *Money v. Jordan*, 2 De G., M. & G. 318; *Hills v. Hills*, 8 M. & W. 401; *Jones v. Lock*, 1 Ch. App. 25.

the trade has been carried on by persons acting in his behalf. When that is the case, he is liable to the trade obligations and entitled to its profits; or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other; namely, the fact that the trade has been carried on on his behalf; i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred and under whose management the profits have been made."

Cranworth was followed by two common law chancellors, Chelmsford and Campbell. Lord Chelmsford (1858-59; 1866-68) had shared with Sir William Follett the honors of the bar, and it has been customary to decry his judicial service on the general theory, apparently, that an eloquent lawyer is not apt to be a profound judge. Undoubtedly he would have taken a higher position on the common law bench; but a fair examination of his work shows that he was a very respectable judge. Certainly he discharged his duties with assiduity, and his numerous judgments are often instructive on account of his habit of reviewing prior authorities.¹

Lord Campbell's brief chancellorship (1859-61) is really a minor feature of his career, owing to the advanced age at which

¹ *Chasemore v. Richards*, 7 H. L. Cas. 360; *Peek v. Gurney*, 6 E. & I. App. 377; *Bain v. Fothergill*, 7 do. 170; *Hollins v. Fowler*, 7 do. 762; *Robinson v. Mallett*, 7 do. 802; *Rankin v. Potter*, 6 do. 83; *Overend v. Gurney*, 5 do. 480; *Daniel v. Metropolitan Ry.*, 5 do. 49; *Knox v. Gye*, 5 do. 656; *Duke of Buccleuch*, 5 do. 418; *Rickett v. Metropolitan Ry.*, 2 do. 174; *Shaw v. Gould*, 3 do. 55; *Hammersmith Ry. v. Brand*, 4 do. 171; *Lister v. Perryman*, 4 do. 521; *Gilbin v. McMullen*, 2 P. C. 318; *Steele v. No. Met. Ry.*, 15 W. R. 597.

he reached the woolsack. With his strong intellect and untiring industry he made a respectable equity judge, but his overbearing nature caused much friction where steady co-operation was most needed.

The inferior chancery tribunals were for the most part highly efficient during this period. Shadwell (1827-50) was an improvement on his predecessors in the vice-chancellorship, but the most efficient assistance in chancery began in 1841 with the appointment of Knight-Bruce (1841-51) and Wigram (1841-51) as additional vice-chancellors. At the same time the equitable jurisdiction of the Court of Exchequer was taken away. Knight-Bruce was a judge of great capacity who afterwards distinguished himself as a lord justice of appeal in chancery. Wigram was profoundly learned in technical equity, and his opinions have always been held in high esteem for their lucid exposition of equitable principles.

In the Rolls Court much was expected from the appointment of Pepys (1834-36); but he was soon advanced to the woolsack as Lord Cottenham. Improvement is noticeable soon after the advent of Lord Langdale (1836). From his time the decisions of the Rolls Court have been regularly reported in a separate series of reports, first by Keen (1836-38) and afterwards by Beavan (1838-66). Lord Langdale administered the duties of the office, at a time when its scope had been considerably enlarged, with industry and ability, as the few successful appeals from his judgment attest.

If his reputation as a judge fell somewhat below what was expected from his distinguished professional career, his lucid and methodical exposition of the facts with which he had to deal gave perfect satisfaction to those who were most interested in a just decision. His lofty character and absolute impartiality inspired the utmost confidence.

SIX FEET OF GROUND.

BY WM. ARCH. McCLEAN.

THE law doth hedge itself about man so completely that poor mortal, stretching his arms piteously toward the Sphinx, cries aloud in his bewilderment, "Was law made for man, or was man made for a plaything for law?" Law tracks man to cover before ever he was, accompanies him with hue and cry through life and at the end trees him in his six feet of ground. Before ever his cradle was fashioned, it concerns itself about his parents, whether they be joined in wedlock according to the provisions of the statutes in such cases made and provided. When, peradventure, human nature has not been able to keep within due legal channels, the law will seek to discover who has gone into the creation business contrary to the peace and dignity of the commonwealth.

Starting thus early, law keeps pace with man until the finish. In the days of his tender youth law is indulgent. The babe upon his high-chair is as great as the king upon his throne in the most absolute of monarchies. He knows no law. He is a law unto himself. He hurls the symbols of his sceptership after his vassals with impunity. He plays the part of a young bull whenever so inclined even in his mother's china closet. He commits the most willful indiscretions to the horror of the lords and ladies in his train. He makes a handmaiden of crime, yea, may do murder as imperiously as the sultan who shouts, "Off with his head." With all this, it is not in the mouth of man according to law to impute wrong to him, for the babe, like the king, can do no wrong.

There cometh a time, however, when the age of the babe doth lose its tenderness, a time when the law will permit the people to inquire into his indiscretions, provided the people assume the burden of proving that the infant doth know right from wrong. As long as right and wrong are but relative

terms to the infant, he is as sheik, sultan or emperor. As the numbering of his days proceeds, he gradually emerges from his barbaric condition, passes through a state of semi-civilization, until at length reaching the age where, knowing the right, he doth the wrong pursue, the law compels him to stand and deliver the first magna charta of the rights of fellow beings about him.

From that time until he reaches his majority man leads a dual legal life, goes into the Dr. Jekyll and Mr. Hyde business. On the one hand, he has reached his criminal manhood, while on the other, civilly, he is a suckling. Knowing right from wrong, he must answer for all violations of the penal code. Knowing, however, what estate he is possessed of, in what ways he desires to squander his patrimony, what contracts he would enter into and what promises he would make for a consideration or have made to him for a like reason, yet for all such purposes he is a helpless infant. It lies with him after majority to plead infancy civilly to all promises and contracts made before. If the infant is smart, he will do all his robbing civilly and eschew the criminal ways of robbery, and when the neighbors point the finger crying "thief," he will retort, "It is legal."

At length, when this two-faced being doth reach the age of voting, he is a peer among peers, he may sit upon a jury or have a jury sit upon him, civilly as well as criminally. He hath come into his full inheritance of accountability, which will dog his heels until the end of his days, provided he doth not become before that time an habitual drunkard or lunatic.

Then cometh the end, when man hath earned his six feet of ground, when he must hand in his resignation as the plaything of law, when he is aweary, carrying law like an

old man of the sea upon his shoulders. It is the point where he doth fade like a flower, where he will soon be cut down like the grass. A point where he realizes that he brought nothing into the world and can take nothing out of it. Realizing this, with a grim humor he writes his will, so that those he leaves behind may have as much fun in getting that which he must abandon as he is having in not being able to take it along.

Lastly, and in conclusion, man drops off satisfied that he is beyond the pale of the law, that he is at the end of its tether. To the man so dying death is a delusion and a snare, for the law will follow him into his tomb and sepulchre. The six feet of earth man hath esteemed as his in fee simple and inalienable, becomes the last stamping ground for law, where the nature and character of the rights of the corpse to its grave may be declared.

It has been judicially said that the law regards with favor the repose of the dead. Evidently the law takes no stock in ghosts, and would discourage the business. According to law, when you are dead it would be following the laws of nature and man to remain dead. This stalking about of the dead in their graveclothes has always been an unseemly exhibition, and it is a relief to feel that the law disapproves of these spectral performances. Let all spooks, sprites, mahatmas, banshees and the like take notice that any other condition than one of repose will meet with disfavor in the eyes of the law.

It has further been declared that the law will protect the repose of the dead in the place to which their mortal remains have been consigned, and will not permit their disturbance. It may be that the repose of the dead and the disturbance of the repose is only spoken of figuratively by courts, yet the language is suggestive. If courts are to protect the repose of the dead in every emergency, if they are to take equity jurisdiction in all cases wherein that repose is threatened to be disturbed, if the arm of the law is to be

thrown around the dead to keep them dead, what can be presaged of the time when Gabriel will arrive. May it not happen that, when he places his trumpet to his lips, he will be served with a bill asking for a preliminary injunction to restrain him from blowing a blast that will disturb the repose of the dead? And if such injunction be made perpetual, may not the dead be a long time dead?

At all events, the first legal proposition that the corpse in its six feet of ground can assure itself of is that the law favors the repose of the dead and will protect that repose from disturbance.

The next consolation for the dead is that there can be no property in a corpse. The body with the breath of life in it was a freeman. He was no slave. No one owned him. He was master of his goings and coming. The breath of life having escaped, the residue is no stuff that can be bartered and sold in the markets of the world. The corpse still owns himself or herself, is still master, and no one else has any property in it.

The corpse, being the owner of itself before it became a dead body, possesses certain rights over the remains when it has become a corpse. The first of these rights is the power to direct what shall be done with the remains. He may make a gift of his cadaver either orally, before reaching that state, or in writing. He may consign himself to the grave, a retort in a crematory, to the sea, or to some hospital for scientific purposes. As judicially declared, a person by will can determine absolutely what disposition shall be made of his remains. A testamentary request is only evidence of the wishes of the decedent. It has no higher import than the evidence of witnesses who have heard them expressed, and it follows that an adult has a legal right to dispose orally of his or her remains.

The element of uncertainty about this right of disposition of the body is that the corpse will not be able to see to it that his desires are carried out. He may have been

eccentric, and his relatives may discount his wishes along the lines of their inclinations after he is gone. This possibility ought to admonish one about to become a corpse, either to express wishes agreeable to his relatives, or to go on his way unconcerned about what may become of that which is left.

In a reported case, a girl, when sixteen years of age, went to live with a friend, and between them a feeling of affection grew up. After living with this friend seven years, the girl died. During these seven years she was entirely neglected by her parents. The girl had associated herself with the church of her friend, and before her death expressed her fears that her father would claim her body, and she would be deprived of the burial she desired. Before death she directed her friend how and where to bury her remains. After her death the father moved a court of equity to give him control of the dead body of his daughter for burial purposes, claiming such right as the next of kin. The court declared that there was no law which compelled the next of kin to perform the duties of burial. There could be no property in a corpse, and as the girl disposed of her remains orally, as she had a right to do, it was impossible to entertain the complaint of the father.

Notwithstanding, the corpse, while the breath was in the body, may not have given either written or oral directions as to the disposition of the remains, yet that does not affect the question that there can be no property in a corpse. No other person in the world may legally say, I own this cadaver and will do with it what I please. Blackstone says the heir has a property in the monuments and escutcheons of his ancestor, yet he has none in their bodies or ashes. If no one owns the corpse, or rather if the real owner has departed without directions as to what should be done with the remains, if the dead cannot bury the dead, the next inquiry must be, how is the corpse to become buried or burnt? Easily enough; the right of sepulture belongs equally to prince

and pauper. To each, society owes six feet of ground.

It has been declared that so universal is the right of sepulture that the common law casts the duty of providing it, and of carrying to the grave the dead body, decently covered, upon the person under whose roof the death takes place; for such person cannot keep the body unburied, or do anything which prevents Christian burial. He cannot, therefore, cast it out, so as to expose the body to violation or to offend the feelings or endanger the health of the living; and for the same reason he cannot carry the dead body uncovered to the grave. When the body is decently and properly buried, in an appropriate place, the claims of society have been entirely satisfied.

It is a singular condition that the law gives no civil remedy for the violation of sepulture; yet it is a logical position. There is no property in a corpse as to give any one the right to recover in a civil court for such violation. The only party possible to such an issue is the corpse; and as it is unfortunately unable to be on hand for such purpose, there is no wrong nor a remedy therefore. The Roman law gave a civil remedy, an action for the violation of sepulture, to the relatives for any unlawful disturbance of a sepulture. No such action has been recognized under the English law, or in this country, unless it be in Indiana, for the courts of that State alone seem to recognize that there is property in a dead Hoosier. The stealing of a dead body was not at common law a larceny; logically, it was not property, and hence could not be stolen. Stealing a dead body is and always has been indictable as a statutory misdemeanor, not as a violation of private property, but as being contrary to common decency and shocking to the general sentiments and feelings of mankind.

The fact that there is no civil remedy for the violation of sepulture presents certain novel situations. Civilly, when a corpse has been buried, it is earth to earth, ashes to ashes, dust to dust. It has become part of the

soil. It is no longer property, except as so much soil. Hence it follows that where a grave has been rifled, in the civil courts the remedy is by an action for breaking and entering the close. It is a trespass, for which the owner of the close may recover damages. One court has gone so far as to say that the fact that the soil has particular significance and value so as to make a trespass thereupon peculiarly harrowing would be an element in estimating the damages. It has been also held that an executor, or other person, who supplied the shroud and coffin, may have an action for damages against any one who takes them away or unlawfully interferes with them. To recover the shroud and coffin without the corpse would be like listening to the play of "Hamlet," with the vacillating Dane left out.

These cases suggest the possibility of complicated conditions. Suppose Jones goes to Egypt and purchases a mummy for speculative or other purposes. The tomb of some Rameses is rifled to furnish the mummy but Egypt has sunk to such depths that its decency is not shocked thereby. Jones reaches this country with his mummy and keeps out of Indiana. He has no property in it though he has paid for his mummy, because the law declares that there can be no property in a corpse. The corpse is the owner of the mummy even though he has been dead a few thousand years. Suppose a thief steals the mummy from Jones, what remedy will the law give Jones? He has no property in the corpse. He who owns the cadaver has been dead too long to intervene in the controversy; besides, it would likely make little difference to the mummy whether he is in the hands of one thief or another. It is no larceny to steal a corpse. No sepulchre is rifled in the stealing; and is it possible that the statutory offense covers the case? Will the courts say that there is an exception to the rule that there is no property in a corpse, when, instead of the remains being earth to earth, they are in the form of tanned leather? What, indeed, is Jones's remedy?

Really, I do not know the answer to the riddle, for neither the Sphinx nor the courts have yet spoken. I might venture to add that the next time Jones has a mummy stolen from him he had better arrange to have the shroud or a few ornaments taken along, so that there may be something in the case to carry the costs against the defendant.

Primarily the law imposes upon the executor or administrator of a deceased person the duty of burying the corpse decently in a proper place, and in a manner suitable to his estate. This duty must, however, be exercised with proper regard for the wishes of those who were nearest and dearest to the deceased in life and in accordance with the directions of the will, if any have been given. In absence of any testamentary provision, the duty devolves upon the next of kin. A stranger—a good Samaritan—may be obliged to perform this duty, if the deceased has died under his roof, and if no other provision exists for its performance.

It is undoubtedly the duty of the husband to bury the deceased wife, and of the wife to bury the deceased husband. The duty carries with it the right to determine the place of sepulture. The same duty applies to the relation of parent and child. This duty may, however, be controlled by other considerations. The husband and wife may have separated, or a child may have been adopted with the consent of the parents. It is safe to say, in such contingencies, that equity would not recognize the duty of the husband and natural father as against the wishes of the wife's relatives or adopted parents of the child.

While such is the law of the land as to who is originally entitled to bury a human body, yet there is a vast difference between that question and the question of the removal of that body subsequently to some other place of sepulture after it has been committed to the earth in the presence of sorrowing relatives and friends. After that the repose of the dead is to be protected and

the sorrow is to be respected, and is not to be compelled to go skipping over the country in search of its object.

As it has been expressed, although the husband or wife of a deceased person is primarily entitled to designate the place of burial, it by no means follows that the body, after it has been laid at rest in a suitable place by the consent of such husband or wife, can be afterwards disinterred and transported from place to place at the mere will or caprice of such husband or wife. When it comes to a burial, it ought to be done in a way that will be beyond the desire to undo. If the transportation business is likely, the corpse had better be reduced to a few ounces of ashes and kept in a vase on the parlor mantel, then they can always go along with the other household gods in the furniture van.

The cases involving the questions of removal of the dead body are of very rare occurrence, and still more rare are those cases deciding who is originally entitled to bury a human body; and for the sake of decency it is well that it is so. The cases on question of removal all agree upon the principle that the jurisdiction of subject belongs to equity, and that the chancellor will exercise it with great care; what is fit and proper to be done must depend upon the special circumstances of each case, having regard to what is due to the natural feelings and sensibilities of individuals, as well as to what is required by considerations of public propriety and decency. This is illustrated in the following cases:

A husband consented to the burial of his wife in a lot owned by another, but not freely nor with the intention or understanding that it should be permanent. The burial had been in a lot of two sisters of his wife at a time when the husband was in great distress of mind and worn out by caring for his wife during her last illness. The body of his wife was in a lot which he had no right to take care of, or adorn, or be buried in by her side. It was decided that a court of equity

may permit the husband to remove her body, and the coffin and tombstone furnished by him, to his own land, and may restrain interference with such removal.

A wife and child had been buried in a lot belonging to the wife's mother, and this was found to be with the consent, approval and satisfaction of the husband and father. After a lapse of three years an alienation occurred between the husband and his deceased wife's relatives. The former then sought to remove the remains of his wife and child. The court asks the question, ought he to be allowed to exhume their bodies and to carry them away to another place because of his alienation from his wife's family? He certainly has no property in them which would justify such a proceeding. His right to fix the spot where the remains of his wife and child should rest has been once exercised and cannot, after the lapse of three years, be recalled or altered, when its effects would be to harrow up the feelings of others and to disturb unnecessarily the bodies which should be left to repose in the graves to which they were consigned. In this case the mother of the deceased wife offered to permit the husband and father to adorn the graves as he might see fit, and also offered the right of burial for himself by the side of his wife. The court was of opinion that these conditions were proper, and decreed that upon the proper assurances being given the husband and father for the fulfillment of these conditions the bill asking removal of the remains would be dismissed.

In a New York case, where a son sought to remove the remains of his father which had been previously decently buried by the widow, he was not permitted to do so, because of the fact that the body had been buried in a proper place without dissent and that it ought not afterwards to be disturbed without the consent of all the parties interested. A proper respect for the dead, a regard for the tender sensibilities of the living, and the due preservation of the public health

require that a corpse should not be disinterred or transported from place to place, except under extreme circumstances of exigency.

A husband, because of representations made by his wife's relatives that according to the doctrines of her church her remains ought to be buried in consecrated ground, interred the body in a Roman Catholic cemetery, though owning a lot in another cemetery at the time. Afterwards he discovered that he could not be buried in consecrated ground beside his wife, and also learned that he could have a grave in the cemetery in which he owned a lot consecrated according to the ritual of his wife's church. He proposed to consecrate a new grave and remove the body thereto, so that he might be buried beside her. It was held that the husband may remove the body of his deceased wife from one burial lot owned by him to another owned by him, and that a court will not, upon application of a brother and sister of deceased wife, restrain such removal by injunction, without good cause, and that the religious reason was not a good cause, when a grave in the cemetery to which he proposed to remove the body could be consecrated so that the remains would be buried in accordance with the faith of the deceased wife.

In another case the deceased, at her request and with the concurrence of all her children, except one, was buried in her sister's lot. The one child who did not consent was absent in South America. Upon his return he paid all the expenses of the funeral of his mother, and shortly afterwards died, leaving a will directing the erection of a vault in a beautiful city cemetery in which he desired the remains of himself, his mother and others of his family to be placed. The executors built the vault and asked to remove the remains of the mother to it. This was objected to by the sister and a child. The court said that after interment all right of control over the remains is with the next living kin. It is only the living who can give

the protection or be burdened with the duty of protection from which the right springs. It is only the living whose feelings can be outraged by any unlawful disturbance of the deceased. It is a right in which all of the next of kin have an equal interest. It must be something more than sentiment or abstract right which will induce a court of equity to enforce the claim of the next of kin by the invasion of the burial place. The woman was buried where she desired to be, with the consent of her children. She is with her father, mother and first born. On the monument is inscribed her name. Beneath it their ashes have commingled. It is fitting they should remain undisturbed.

In a Rhode Island case the widow removed the body of her deceased husband from its former place of burial to another cemetery against the protests of the only child, and the court was of opinion that the body should be restored to the place of its first interment. The court said they would regulate the interment of a body as a sacred trust for the benefit of all who may from family or friendship have an interest in it, so as to interfere in case of improper conduct, such as preventing other relatives from visiting the place for the purpose of indulgence of feeling or of testifying their respect or affection for the deceased.

There is an interesting case which decides that where a body of a deceased husband had been buried for two years, and the widow desired to remove it, it could not be done; for after burial a wife had no right or control over the body of her deceased husband. The disposition of the remains belongs thereafter exclusively to the next of kin. The duty of the wife to bury the body of her deceased husband terminated with the actual interment in the first instance. As widow she had no right to it after the interment.

The court in this last case clinched their position with an odd question, one that other courts have been disposed to criticise. They ask this question: Suppose a woman has had three husbands who have all died leaving

her a widow, is she to be burdened with the duty and vested with the charge of their three bodies against the expressed wishes of the blood relatives and next of kin of each?

The court must have had in mind the woman who had been married seven times, of whom it was asked the Master, whose wife would she be in heaven. Remembering the answer, the court evidently concluded that it was foolishness to place upon the widow the duty of looking after the remains of all her husbands as there would be no reward afterwards for her labors. Or the court may have had in mind a canon law of Europe

which provided that a wife was to be buried with her last husband, and hence it only became her to concern herself about the remains of the last loved one. It is not to be wondered at, with such a premise, that any court might easily have led itself to believe that any able-bodied woman, who had been thrice married and thrice a widow, would undoubtedly have many more matrimonial adventures before her career was ended, so that it was too early in the game to look for the last one which would yield sepulture by his side.



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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.

THE consideration of the life of the great Chief Justice is a theme which rightly may challenge the highest efforts of the orators on John Marshall Day. Presiding over the Supreme Court for more than a third of a century at the formative period of our national existence, when, more than at any later time, fundamental principles of constitutional law came before that tribunal, Chief Justice Marshall exercised on the character of our government an influence so strong, so far-reaching, so permanent and so beneficial that he stands, and humanly speaking ever will stand, the greatest figure in our judicial history. So commanding is his position on the bench that one may fail to realize his eminent services in political life. During the twenty-one years between his admission to the bar and his elevation to the bench, he was almost constantly in public life, — not because he sought office, but because, first by his constituents, and afterwards by Washington and Adams, he was picked as a man pre-eminently fitted to grapple with the great political questions of the time. In the halls of legislation his was one of the strong influences, as on the bench it was the strongest influence, which impressed the Federalist ideas upon our form of government. And his eminent services as envoy to France, considered by themselves, entitle him to an honored place among American statesmen; for, as President Adams wrote, "He has raised the American people in their own esteem, and if the influence of truth and justice, reason and argument, is not lost in Europe, he has raised the consideration of the United States in that quarter." Washington, Lincoln, Hamilton and Marshall — these are the four greatest names in American history; and Marshall's right to a place in this illustrious group is beyond question.

IT is gratifying to note that the celebration of John Marshall Day, on February 4, bids fair to be worthy of the great event which it commemorates. A glance at the list of distinguished orators for that day makes it seem not unreasonable to hope that among the addresses there may be some which will rank with the masterly eulogies of Mr. Justice Story, and of the Honorable E. J. Phelps at the first meeting of the American Bar Association, in 1879. There can be no question that the interest in the occasion is deep and genuine, and that it is shared by the bench and bar throughout the country. And it is a pleasure to offer congratulations to the members of the committee of the American Bar Association having the celebration in charge, and especially to the officers of that committee on whom the active work has fallen; for to their energy and enthusiasm is due, in large measure, the success anticipated for the celebration.

The following is the list of orators on "John Marshall Day," so far as known to us:

Washington, D. C.: Hon. Wayne McVeagh, of Philadelphia. Addresses, also, by President McKinley and Mr. Chief Justice Fuller.

Boston, Mass.: Hon. Henry St. George Tucker, of Virginia. Addresses, also, by Mr. Chief Justice Holmes, of the Supreme Court of Massachusetts, and Hon. Richard Olney.

Harvard University, Cambridge, Mass.: Prof. James Bradley Thayer.

Yale University, New Haven, Conn.: Hon. Charles E. Perkins, of Hartford; Mr. Justice Chipman, of the United States Court, and Mr. Justice Baldwin, of the Supreme Court of Conn.

Albany, N. Y.: Hon. John F. Dillon, of New York.

Philadelphia, Pa.: Mr. Justice Mitchell, of the Supreme Court of Pennsylvania.

Wilmington, Del.: Prof. John Bassett Moore of Columbia University; Hon. George Gray, of the United States Court.

Baltimore, Md.: Hon. Charles Marshall, Hon. William P. Whyte, Hon. Charles J. Bonaparte.

Richmond, Va. : Mr. Justice Horace Gray, of the United States Supreme Court.

Parkersburg, W. Va. : Mr. Justice Brown, of the United States Supreme Court.

Nashville, Tenn. : Judge Horace Lurton.

Charleston, S. C. : Hon. Charles H. Simonton, of the United States Court.

New Orleans, La. : Hon. Joseph P. Blair.

Cleveland, Ohio : Prof. Hampton L. Carson, of the University of Pennsylvania.

Cincinnati, Ohio : Judge John F. Follett.

Columbus, Ohio : Mr. Chief Justice Shauck, of the Ohio Supreme Court.

Chicago, Ill. : Hon. Henry Cabot Lodge, United States Senator from Massachusetts.

Bloomington, Ill. : Hon. Isaac Phillips.

Springfield, Ill. : Hon. William Lindsay, United States Senator from Kentucky.

Indianapolis, Ind. : Hon. John C. Black.

Iowa City, Ia. : Hon. John M. Baldwin.

Detroit, Mich. : Hon. Luther Lafin Mills.

Milwaukee, Wis. : Hon. Neal Brown.

St. Louis, Mo. : Mr. Justice Thayer, of the United States Circuit Court of Appeals.

Yankton, So. Dak. : Hon. Bartlett Tripp.

Cheyenne, Wyo. : Mr. Chief Justice Potter.

Manchester, N. H. : Prof. Jeremiah Smith, of Harvard University; Mr. Justice Edgar Aldrich, of the United States Court; Mr. Justice Wallace, of the Supreme Court of New Hampshire.

THE sentiment which undoubtedly exists in many quarters in favor of the revival of whipping as a punishment for certain offences may find support in the provision in the new criminal code of Canada which allows flogging in the case of burglars found in the possession of weapons of offence. "Formerly," as the *Evening Post* points out, "this penalty might be applied when robbery was attended by violence; now it is extended to cases in which intended violence is to be presumed. The penalty is aimed particularly against the tramps who infest the country. For these gentry mere imprisonment is no deterrent to theft and violence. It is believed, however, that they value their skins, and that their moral natures may best be reached through their epidermises." The same reasoning applies to an appalling number of brutal and ruffianly crimes which

come constantly before the courts; for example, cases of rape in which the victim is a child of tender years. Or take a recent case in which it appeared that the prisoner had been imprisoned several times for assaulting his wife, in one of which assaults her jaw was broken, and that it was his practice to beat her each time he came out of jail after serving a sentence for maltreating her. In a case like this it is an absurdity to fear that whipping might have a brutalizing effect on the offender. Nor could it have such an effect on the public, if the flogging were administered in private. Clearly imprisonment had no deterrent effect. But the fear of sharp bodily pain might be effectual; and if, as we believe, it would have a restraining influence, we can see no reason why the threat of corporal punishment should not be held over the ruffian class in the community.

WITH the new year comes the first number of the *Columbia Law Review*, published by the law students of Columbia University. It is a pleasure to welcome the new-comer in the field in which the *Harvard Law Review*, for nearly fifteen years, has done remarkably good work; and if the initial number is the forerunner of later numbers equally good, the new review has already justified its existence. The leading article is by Professor Keener, who considers the question of "The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract," and reaches the conclusion that, in cases where equity will decree specific performance of a contract for the conveyance of real estate, payment for which is to be made at the time of conveyance or subsequently, the loss should fall on the vendee. This is in accord with the English decisions and those in a majority of the American States, but in disagreement with Professor Langdell and the courts of Massachusetts and Maine. Sir Frederick Pollock contributes an interesting and scholarly article on "The History of the Law of Nature," in which he traces its development from the conception of the Roman jurists down to the foundation of the modern Law of Nations by Grotius, and shows, too, that it is to be found even in the common law. The remaining article is by Edward B. Whitney, who discusses

"Another Philippine Constitutional Question—Delegation of Legislative Power to the President." He finds that "the courts, while repeating indeed the old maxim that legislative power cannot be delegated, have very nearly overthrown it [e. g. in *Field v. Clark*, 143 U. S., 649, and *Dunlap v. United States*, 173 U. S., 65,] and have done so because it was not based on sound reasoning and has always been impracticable in application. The maxim is, in fact, a restriction upon legislative power." The *Field* and *Dunlap* cases, he thinks, support the doctrine that "every statute is constitutional which evinces upon its face a legislative belief that some executive or legislative officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular result which Congress desires; . . . and perhaps it is not improbable that this principle may be held broad enough even to cover an entire subject such as the internal government of the Philippines," as, for example, under the Spooner bill. This bill, as Mr. Whitney points out, "in granting all legislative, as well as executive and judicial authority over the Philippines to the President, . . . is without a precedent." The only act which seriously can be suggested as a precedent is the Louisiana Act; but the difference between this act and the Spooner bill is radical, in that the former was an emergency measure, closely restricted in time, which "delegated little, if any, genuine legislative power to the President. It did not as is now proposed, delegate to him all the powers 'necessary to govern' the new territory, but only those powers actually 'exercised by the officers of the existing government of the same.' The President could grant no new power, although he had some vague authority to regulate the 'manner' of exercising the authority already existing." To our mind the minority opinion in *Field v. Clark* seems the sounder. The legislative power, or the legislative discretion, whichever it may be called, delegated to the President by the McKinley Tariff Act of 1890, seems to us too broad a power or discretion to be vested in the Executive, and we should look with regret upon such an extension in this direction as would result, if legislation like that contemplated in the Spooner bill were enacted and upheld. However, Mr. Whitney has written an able arti-

cle, which, like those of Professor Keener and Sir Frederick Pollock, to which we have referred already, will be read with interest by lawyers into whose hands this first number of the *Columbia Law Review* may come; and it is a creditable thing, alike to our law faculties and law students and to the profession, that our great law schools can publish law reviews which, like the magazine before us, have distinct and permanent legal value. That this is possible is due to the disinterested enthusiasm of many of the most scholarly men in the profession, who are willing to make these publications the medium for presenting the results of their studies.

PROFESSOR JOHN BASSETT MOORE'S admirable summary of "The Progress of International Law," contributed to the *Evening Post's* review of the nineteenth century, is refreshing reading to those of us whom the end-of-the-century wars have put in a pessimistic frame of mind,—a state of mind the more pessimistic, if it happens that one looks askance at the aims and the conduct of these wars. The mere enumeration of the important changes is impressive. On the sea, the rights of neutrals have been defined and protected; the duties of neutrals have been recognized and enforced. The freedom of vessels on the high seas from visitation and search in time of peace has been established. "It was the acknowledgment of this principle that made the seas really free and gave freedom to commerce." Paper blockades have been done away with. Privateering has been abolished. On land, the principle of freedom, "that new states and new governments are entitled to recognition on the ground of their *de facto* existence," has been established. Actual and effective occupation has become recognized as essential to the acquisition of new territory by occupation. A system of extradition has been developed. Arbitration in international disputes has been resorted to in at least one hundred and thirty-six cases, exclusive of pending cases. The laws of war have been made, in some degree, more humane. There has been international co-operation for humanitarian ends, and for the protection of property rights. All in all, the progress in international law is not the least of the achievements of the nineteenth century.

NOTES.

WHEN the son of a well-known judge argued his first case before the full bench of a State Court, some of the members of which were noted for badgering youthful counsel, the Chief Justice was particularly active, and began his questions before the counsel had finished stating the facts. When the young advocate came to the law thereof, he was constantly interrupted by comment and inquiry. "If it please your Honor," was the invariable reply, "I will come to that point later." Finally, the Chief Justice burst forth: "This is a most extraordinary proceeding, Mr. Blank. You say that it is a suit on a judgment recovered in New York for alimony. I never heard of such a proceeding. What is your authority for bringing such a suit?" "If it please your Honor," was the quiet reply, "my authority is, I admit, rather questionable and one that has often been impugned, being only the Constitution of the United States, Article 4, Section 1." The Chief Justice did not see fit to ask any more questions during the argument of that case.

LORD HERSHELL used to tell the following anecdote. When he was vice-chancellor, he gave judgment in a case argued before him against a very prosy and uninteresting, but eminent, queen's counsel, who appealed the cause. When it came on to be heard before the Court of Appeals, Sir George Jessel, master of the rolls, after exhausting all the means in his power to induce the learned advocate to be as brief as possible, at last resigned himself to the infliction of the tedious argument. After some time the queen's counsel stated a point, which at once awakened the master of the rolls from his state of apparent somnolence, and he asked sharply of the advocate why the point had not been argued before the vice-chancellor. "If it please your lordship," was the reply, "the learned vice-chancellor stopped me by fraudulently pretending to be upon my side."

CHARLES SUMNER, says Major J. B. Pond, in his *Eccentricities of Genius*, was an aristocrat. He was my father's ideal. After I had got back from Kansas and visited my father's home in Wisconsin, father said to me: "James, the

Honorable Charles Sumner is going to speak at R—. We must hear him."

So we arranged to go. We walked nine miles to hear him speak. My father never spoke of him without giving him his title. He had enjoyed that speech immensely. I do not know whether I did or not. Father occupied a front seat with the intention of rushing up to the platform and greeting him by the hand when he had finished, but the Honorable Charles was too quick for him. He disappeared, got to his hotel, and nobody saw him.

Father said: "James, the Honorable Charles Sumner is going to Milwaukee to-morrow morning, and we can ride with him a part of the way."

We were on the train early the next morning, and so was the Honorable Charles Sumner. He was sitting reading in the drawing-room car.

Father stepped up and said: "The Honorable Charles Sumner? I have read all your speeches. I feel that it is the duty of every American to take you by the hand. This is my son. He has just returned from the Kansas conflict."

Honorable Charles Sumner did not see father nor his son, but he saw the porter and said: "Can you get me a place where I will be undisturbed?"

Poor father! His heart was broken. During his last twenty-five years he never referred to the Honorable Charles Sumner.

THE following anecdote is quoted by the *Law Times* as illustrative of Lord Langdale's fastidious sense of honor. There was a little room in his chambers in the Temple, overlooking the gardens, a favorite of his in summer, but in which he could never sit in winter because the chimney smoked beyond endurance. On being made, later on, a king's counsel, he found it necessary to move to a more eligible position, and of course wished to let the chambers he then occupied, but conscientiousness kept him in a state of perpetual excitement lest the laundry-woman should not tell every person who applied for them that the chimney smoked. So he wrote in large letters on a sheet of paper and placed it over the mantelpiece in the room: "The chimney of this fire-place smokes incurably, and every experiment has been tried to remedy the evil and no expense spared."

THE Supreme Court in St. Petersburg, says the *Chicago Journal*, has before it one of the most curious cases on record. The tribunal is called upon to decide whether a will left on a graphophone cylinder is valid, or whether the strange "last will and testament" should be disregarded in the settlement of the estate. One of the wealthiest land proprietors near Smolensk died a few months ago, and after the funeral his heirs began to look for the will. Much to their surprise, they were unable to find the slightest trace of it.

The missing document, however, was found in a few days in the strangest place imaginable. A young man, happening to see a graphophone on a table in the library, put a record in it, which he supposed was that of some popular Russian song. To his amazement, however, instead of a song he heard the dead man's voice recite the words of the missing will.

The heirs were notified of this discovery, and they lost no time in examining the record containing the will. It was found to be flawless, and the question then arose whether such a will would be deemed valid by the courts. This question is now before the Supreme Court in St. Petersburg.

THE following resolution was recently introduced in the Lower House of the Colorado legislature:

Whereas, a statute exists in this State providing for the payment of a bounty on mountain lions' scalps, and

Whereas, Hon. Theodore Roosevelt, the Rough Rider, Vice-President of the United States, is now touring the State with the avowed purpose of slaughtering all the mountain lions therein found, and

Whereas, the slaughter thereof by the Vice-President of the United States supersedes the necessity of the bounty thus provided by law, therefore be it

Resolved, that upon the departure of the said Theodore Roosevelt, Rough Rider, Vice-President of the United States, with his knives so vividly portrayed in the newspapers of the United States, that the law providing for the payment of a bounty upon mountain lion scalps should be repealed for two reasons: First, as a matter of economy; second, because we must have mountain lions, and their multiplication should be encouraged to the end that the said Theodore Roosevelt, Rough Rider, Vice-President of the United States, may be induced to return to this State to repeat his act of daring and prowess and thereby add to the fame of the State.

THE salaries of English judges are set forth in *Whitaker's Almanack*. Some of the largest salaries are as follows: That of the Lord Chancellor is £10,000 a year. The Lords of Appeal in Ordinary receive £6,000 each. In the Court of Appeal, the Master of the Rolls receives £6,000, and the other judges £5,000 apiece; and in the Chancery Division, the Probate, Divorce and Admiralty Division, and the Queen's Bench Division each of the judges receives £5,000, except that, in the last mentioned Division, the Lord Chief Justice has a salary of £8,000.

AN instance of that legal courtesy which is a synonym of congressional courtesy, occurred in a Galesburg court room the other day. Attorney Jim McKenzie and a lawyer from East Galesburg became involved in a wordy discussion, in which each questioned the other's word. The East Galesburg legal light maintained his position, claiming that he could find his authority. He turned over the pages of the statute book, when quick as a flash Mac said:

"You'll find what you want on page—, section —."

The innocent attorney looked up the reference and found the law governing the running loose of jackasses.

And the court smiled. — (*Philadelphia Item*.)

IT is recorded by historians that a Lord Chancellor of England was decapitated and a Chief Justice of Ireland assassinated. No law lord has as yet been consumed by fire. But Lord Davey was within measurable distance of this uncomfortable fate not many days ago. It happened in this wise: There is in the "Prince's Chamber" in the House of Lords a large fireplace, protected by a tall fender. The latter is topped by a rail, upon which it is the natural instinct of politicians to seat themselves. Lord Davey was poised upon this piece of furniture in apparent security and comfort, when without a cry or word of warning, he fell backwards into the blazing coals. Happily help was at once forthcoming. Lord Shand and the Lord Chancellor rushed to the assistance of their colleague, and were able to rescue him from his disagreeable position before much harm had been done. — (*Daily Telegraph*.)

LITERARY NOTES.

By no means the least valuable of the many books which the possibility that the United States may become a colonial power, or the fact that it has become such already, — which shall we say? — has brought from the press is *The History of Colonization*,¹ by Henry C. Morris, of the Chicago bar. The plan of the book is excellent. After a preliminary chapter in which the essential elements of successful colonization are pointed out — power in the parent state; density of population, excessive competition, and surplus of labor, producing a desire for new fields of work; excess of capital; production greater than the demands of home consumption and of buyers in independent foreign lands, — there follows a rapid, but discriminating, review of the colonization of antiquity, — of the Phœnicians, whose aim was commercial development by peaceful means; of the Carthaginians, who were the first to act on the principle of conquest in colonial matters, and who sought to make their possessions a source of power as well as of wealth; of the Greeks, whose conquests were, as a rule, peaceful, and whose colonial system was a most efficient force in the spread of civilization; of Rome, whose victorious troops were followed by, or transformed into, the permanent occupants of conquered lands. Colonization of the Italian cities is next outlined; briefly, the early efforts of Amalfi and Pisa, and more fully, the ever-interesting struggles of Florence, Genoa and Venice. Monopoly of trade, the destruction of competition, an extremely harsh policy of protection, — this was the policy of the Italian republics.

Coming to modern times, the second half of the first volume is devoted to Portuguese, Spanish, Dutch and French colonization. Dutch methods receive deserved attention, especially the methods of the Dutch East India Company, — a company as Noël says, “without model in antiquity or in the middle ages, and destined to serve as a type for those which were to follow it.” To quote from the book before us, “Monopoly became the watchword of the Dutch, a craze in favor of extensive combinations prevailed. The tendency to exclusively privileged

¹ THE HISTORY OF COLONIZATION, from the Earliest Times to the Present Day. By Henry C. Morris. New York: The Macmillan Company, 1900. 2 vols. Cloth. \$4.00. (pp. xxiv + xiii + 842.)

associations was then as marked in the Netherlands as the inclination to trusts in the United States at the present time.” Yet, in a broad way, Dutch activity made for the freedom of trade, by leading in the attack on the doctrine of closed seas. Incidentally is noted the interesting fact that in 1672, when Louis XIV was menacing the independence of Holland, the Dutch, rather than submit, had resolved voluntarily and en masse to emigrate to Java and there reconstruct their state.

The first of these two volumes, interesting as it is, is, after all, but introductory to the more important part of Mr. Morris' work, namely, the narrative of English colonization. In modern times the colonial systems of Spain and of England exemplify the two leading types in this field of action, the underlying principle of the former system being “the right of the parent state to draw all possible benefit and advantage for itself from the colonies, irrespective of the interest of the latter,” while the aim of the English system has been to “construct, organize, never exhaust, but rather strengthen the dependency, let it cost the mother country what it may.” Particularly interesting, in view of the problems before the United States in Porto Rico and Hawaii, on the one hand, and in the Philippines, on the other, are the two chapters on later English colonization in the West Indies and in the Crown Colonies, respectively.

It remains to be said only that out of a large knowledge of his subject Mr. Morris has produced a work which, in a relatively small compass, gives a clear, concise and readable history of colonization. Especially to be commended as of value to those wishing to make a more detailed study, are the numerous notes with which the text is fortified, and the seemingly very full bibliography, of some thirty pages.

THERE is always an added interest in a book written by one who is, to use a slang phrase, “on the inside,” and this holds true of Dr. Farrelly's recent book¹ on the South African question. For the author, an advocate of the Supreme Court of Cape Colony, has had unusual opportunities to study the problem in his official

¹ THE SETTLEMENT AFTER THE WAR IN SOUTH AFRICA. By M. J. Farrelly, LL.D. New York: The Macmillan Company, 1900. (pp. xv + 323.)

capacity as advisory counsel to the Transvaal Republic on the legal questions arising under the Conventions with the Imperial Government. As a result of his study and investigations we have a valuable book. The history of the British and Dutch in South Africa is outlined; the vacillating attitude, in the past, of the Imperial Government towards the Boers calls forth the strong condemnation of the author. To this he lays much of the blame for the present serious trouble. While he treats, at some length, the wrongs of the Uitlanders, giving both versions, he finds that the real cause of the conflict does not lie there. For, in Dr. Farrelly's view, war was inevitable, sooner or later; the Boers had accepted with enthusiasm the so-called young Afrikander propaganda, which spread over South Africa immediately after the retrocession of the Transvaal, following the unavenged defeat of Majuba Hill. What this propaganda sought was nothing less than the complete expulsion of the British from South Africa, leaving them only a naval and army station, and the establishment, in their stead, of an independent Afrikander nation. Such a blow might threaten the stability of Imperial rule the world over; so that the present war became in fact a fight for the very existence of the British Empire. To our minds, this is the ground, if any, on which the war can be justified. And if, as the author holds, "the continued existence of the Empire turns on the inclusion or the exclusion of South Africa from its sphere of influence," he is clearly right in insisting on the necessity of finality in the settlement after the war is over; a settlement in which, he maintains, British supremacy must be established beyond question, by making, for some time at least, the two Boer Republics into a Crown Colony.

BOOKS RECEIVED.

THE MASQUE OF JUDGMENT. A Masque-Drama in Five Acts and a Prelude. By William Vaughan Moody. Boston: Small, Maynard and Company. 1900. Cloth: \$1.50 (pp. 127).

FORTUNE AND MEN'S EYES. New Poems with a Play. By Josephine Preston Peabody. Boston: Small, Maynard and Company, 1900. Cloth: \$1.50 (pp. 111).

CONCERNING CHILDREN. By Charlotte Perkins [Stetson] Gilman. Boston: Small, Maynard and Company. 1900. Cloth: \$1.25 (pp. 298).

NEW LAW BOOKS.

THE LAW OF INSURANCE AS APPLIED TO FIRE, LIFE, ACCIDENT, GUARANTEE, AND OTHER NON-MARITIME RISKS. By *John Wilder May*. Fourth edition, revised, analyzed, and greatly enlarged by *John M. Gould*. Little, Brown & Co., Boston. 1900. Two volumes. Law sheep. \$12.00. (xciv + vi + 1510 pp.)

May on Insurance first appeared in 1873. There has been a new edition every nine years. Here is an emphatic verdict by the profession that the book is useful.

The noticeable feature of the work is that it omits marine insurance. This omission, though thoroughly in accordance with the present taste of most American lawyers, indicates a great change in point of view since the time when marine insurance was much the most important application of the general doctrines of indemnity.

Insurance, as a branch of legal literature, has had an interesting history. The earliest English books into which one must look for the law upon this subject are hardly law books at all. They are books made for merchants. The most important of them are Malynes' *Lex Mercatoria* (1622), Molloy's *De Jure Maritimo* (1676), and Magens on Insurances (1755).

In early days lawyers and the ordinary courts had few dealings with the subject. Insurance was simply one of the incidents of foreign trade. Underwriting was in the hands of merchants—largely foreigners. Disputes were settled by arbitration, or at any rate in tribunals foreign to the common law. The principles applied were not local, but world-wide. Thus it happened that for several centuries after insurance was known in England, the topic was not conceived to be one on which some knowledge should be possessed by an English lawyer.

Even before 1756, however,—which was the beginning of Lord Mansfield's chief justiceship,—insurance cases became not unusual in the ordinary courts. This was because war with Spain and with France produced a great increase in marine underwriting and gave rise to many losses and disputes. After Lord Mansfield had been on the bench a few years, war with the United States and with the greater part of continental Europe led to a still greater amount of litigation. Then came lawyers' books on insurance.

The two best known early works of this class are Park on Marine Insurance (1787), and Marshall on Insurance (1802), which deal with marine questions almost exclusively, and, by reason of giving the only accessible reports of some early cases, still continue to be of considerable practical use. Until the middle of the nineteenth century, there were occasionally new editions of Park and Marshall. For many years, however, Arnould on Marine Insurance (1848), which is still kept alive by thorough revision, has been beyond comparison the chief English authority. The English books on fire and life insurance are of distinctly less importance. Indeed, in England, marine insurance is so much the most important branch, that on fire and life questions the American lawyer finds little of value in English decisions and treatises.

In America the history of bookmaking has been different. Upon marine questions there are three American works of high authority both in America and in England. It is probable that they are cited more often abroad than at home. They are Phillips on Insurance (1823), Duer on Marine Insurance (1845), and Parsons on Marine Insurance (1868). Phillips deals with all kinds of insurance to some extent; and came to a fifth edition in 1867. Duer and Parsons deal with marine insurance exclusively, and have never reached a second edition.

The fate encountered by Duer and Parsons harmonizes with the easily ascertained fact that since about the middle of the nineteenth century American courts have had comparatively little to do with marine questions. The vast bulk of insurance litigation involves fire, life, accident, and the beneficial orders. Few American lawyers participate in a marine insurance case in the course of even the longest lifetime at the bar. This is unfortunate. All kinds of insurance are related, and no kind can be mastered by itself. Marine insurance is the oldest of all the branches and the one most thoroughly developed. It is the natural gateway to the whole law of insurance; but the American lawyer of these days insists upon climbing in by some other way. Publishers and authors must be expected to satisfy the demand.

May on Insurance obviously aims to meet exactly the narrow view of our American lawyers. As the title-page says, it treats of "the

law of insurance as applied to fire, life, accident, guarantee, and other non-maritime risks." Within the limits set, the author worked very conscientiously. The original text painstakingly states the law in a readable form, giving the reasons, and seldom degenerating into a mere abstract of decisions.

The editorial additions, with welcome exceptions here and there, rather tend toward making the book a digest, as is almost inevitable when an editor is employed to bring a work down to date. The editor's text and notes contain a substantial number of slips. Thus on page 14, he cites *Sun Insurance Office v. Merz*, from the Supreme Court of New Jersey, although the decision had already been reversed by the Court of Errors, as reported in a number of the *Atlantic Reporter* cited in the same note. In many instances—among others, pages 16, 28, 77, 101, 116, 117, 128,—he has failed to add the official references for cases which the author was compelled to cite from periodicals exclusively. Although the editor has printed the Massachusetts standard form of fire policy, he has not given the New York form, which is in vastly greater use. There seems to be a doctrine of chances by which in every piece of literary work some slips are bound to occur.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898. By *Wm. Miller Collier*. Third edition, revised and enlarged by *James W. Eaton*. Albany, N. Y. Matthew Bender, 1900.

The first edition of this valuable work, following, as it did, hard upon the heels of the passage of the Act itself, gave evidence, naturally enough, of haste in preparation, though in plan and substance it was very welcome to practising attorneys, to many of whom bankruptcy under United States law was an entirely new field.

In the third edition, which appears after the Act has been in operation two and one half years, the general plan of the earlier editions has lent itself admirably to an exceedingly useful and comprehensive presentation of the decisions of the courts under the new law. In addition to the text of the law of 1867, there have been inserted the text of the present act as a whole, with an index, and the laws of 1800 and 1841.

A decided improvement in the third edition, which makes for the comfort of the reader and is in itself no slight compliment to the industry and skill of the editor, lies in the fact that the discussion of the various sections appears in large type, as large as that of the Act itself, while, notwithstanding the insertion of very generous extracts from the language of the courts in cases arising under the present law, and the additions mentioned above, this edition contains but one hundred and seventy pages more than are found in the second edition. The reading lawyer can much more readily come at the writer's point of view, if the keenest exercise of his thinking powers is not hampered by the physical straining of his eyes in reading page after page of most solid matter in fine type.

In this present edition the editor has been able to profit by the decisions of the courts, which, during the existence of the Act, have judicially construed most of the sections. Thus not only the discussion of the various sections is of greater value, but the liberal quotation of the exact language of the courts is, in many instances, sufficient to render further study of the reports themselves unnecessary, at least to the lawyer who reads the work in order to familiarize himself with the Act and its construction as a whole. For instance, in considering the question of the extent of the jurisdiction of the district courts conferred by Section 2, which appears to have "troubled the courts more than any other question arising in the administration of the Act of 1898," the editor has quoted to the extent of five pages from the exhaustive opinion of Mr. Justice Gray in *Bardes v. First Nat. Bank of Hawarden*, 178 U. S. 524, which has definitely settled the question.

Another instance, taken at random, serves further to illustrate the greater reliability of this present edition over the earlier issues, resulting from the judicial constructions of the courts. On the question of objection to a discharge owing to a failure to keep books of account, the author, discussing the section in the earlier edition, states that under the present law the fraudulent intent not to keep books must be proved, and "is not to be inferred (2d ed., p. 136). The judicial construction of this section by the courts has enabled the editor to

say, in this third edition, that the "intent is to be gathered from all the circumstances." This would seem a fair case of inference. Again, the stringency of proof is still further moderated by the statement that "where a person of intelligence keeps books in such a condition as to be suspicious on their face, a discharge will be denied" (3d ed., p. 168). The cases are, of course, cited.

The exemption laws of the various States are another helpful feature of the work, and the system of cross-referencing and indexing is careful and altogether commendable.

HANDBOOK OF THE LAW OF BILLS AND NOTES.
By *Charles P. Norton*. Third edition by Francis B. Tiffany. St. Paul, Minn.: West Publishing Co. 1900. Law sheep. \$3.75. (x + 553 pp).

On opening any one of the volumes of the "Handbook Series," of which the handbook before us was, in its first edition, the earliest volume, one is struck with the fitness of the general make-up of the book to the end in view, namely the providing of an elementary treatise on some one of the principal subjects of the law. The printing in heavy type, of a concise statement of the leading principles in the subject treated tends chiefly to impress the principles on the student's mind, thus laying a foundation for a more thorough study of particular points later; while the commentary following the short statement of a leading proposition is sufficiently full, in most cases, to make clear the reasons on which the principle rests.

In a single volume, avowedly elementary in its nature, anything approaching an exhaustive discussion of the principles of the law of Bills and Notes is impossible, of course; but within the limits imposed both by the scope and by the size of the book, the author has made a clear, concise and intelligent presentation of his subject, admirably suited to the purpose for which the work was undertaken.

At the end of the volume is given, in some sixty pages, the Negotiable Instruments Law, enacted in fifteen States within the last four years; the text is that of the New York statute, the modifications and additions of other States being indicated. The notes in the body of the

book contain references to this recent law; but it might not be out of place, in the next edition, to give along side of the law itself brief notes or comments pointing out the changes which it has worked, or was intended to bring about, in the law of Bills and Notes.

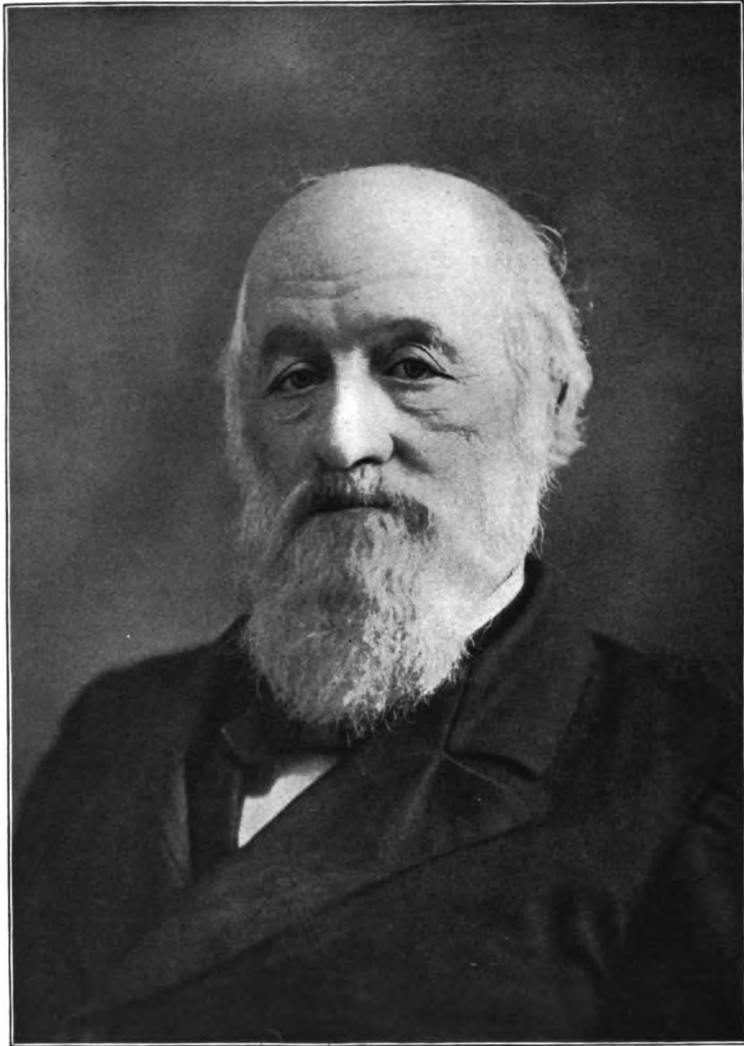
REGISTERING TITLE TO LAND. By *Jacques Dumas*, LL.D. Chicago: Callaghan & Co. 1900. Buckram. \$1.50. (106 pp.)

Within the last few years there has arisen in this country a widespread interest in the Torrens system of registering title to land — an interest which is especially strong among the members of the legal profession in Illinois, Ohio and Massachusetts, in which three States such a system has been adopted and has become the subject of judicial decision. Dr. Dumas's book, which contains the Storrs Lectures delivered by him at Yale University, opens with a brief but scholarly discussion of the general principles which underlie the registering of land titles. The three essential features in such a system are held to be, first, the grant of an absolute title; second, compulsion in registering title; third, compensation for errors. These three features, however, are to be found at the present time only in Austria (except the Tyrol), in a part of Germany — Prussia, Baden, Saxony and sixteen of the smaller German states, but not in Bavaria and Wurtemberg; in the Canton of Vaud in Switzerland; in the Australian colonies; in parts of Canada; and in the regency of Tunis. Yet even these systems, which agree in essentials, differ in many minor points; which fact makes necessary the separate discussion of these various local systems. Two chapters are devoted to the consideration of the English and of the French systems of registration, respectively. We venture to say that a perusal of this last mentioned chapter will add to the stock of knowledge of most American lawyers. All in all, this little book, written with a full knowledge of, and enthusiasm for the subject, is both readable and scholarly. It may be noted, by way of postscript, that a Torrens bill, for the District of Columbia, is pending in Congress, and that in Rhode Island a commission, appointed by the legislature, has the matter of registration under consideration.

ENCYCLOPÆDIC NOTES.

MUTTERINGS of the approaching conflict between the legal encyclopædias are becoming distinctly audible in law book circles, and the appearance of the first volume of the *Cyclopedia of Law and Procedure* is awaited with much interest. One cannot but marvel at the courage of the new comer in so boldly throwing down the gauntlet. It is a matter of more or less general knowledge that the battle is not always to the strong, and the publishers of the new work seem so confident of success that it would not be advisable to predict their defeat at this early stage of the contest. Napoleon on one occasion defeated three armies, each of which was numerically equal to his own, by merely following the principle of concentrating his forces at one point, and the same tactics are quite likely to prove equally effective in the manufacture of law books. That it is feasible to present in one set a treatment of all the law, adjective as well as substantive, together with citations to suitable forms is the contention of the American Law Book Company; and that it is eminently desirable there can be no question. If, therefore, such a devoutly wished for consummation is possible of achievement, and the work is carried to completion on the same high level reached by the articles already in print, then the triplicate system of the old concern is liable to find existence a more strenuous matter than hitherto. •

Another point that will count very materially in favor of the new publication is to be found in the promise of the publishers to keep their books up to date by an inexpensive system of annotation. All things else being equal, a book that annually renews its youth must ultimately prevail over one that is aging year by year. A query very naturally arises in the lawyer's mind as to the possibility of covering the whole field of the law in the space contemplated by the *Cyclopedia of Law and Procedure*. When, however, it is remembered that the combined strength of the opposition's three sets will reach some seventy odd volumes it is desirable to see the same matter compressed into thirty-two. Of course, in splitting up the law into three parts there must necessarily be much duplication and the saving of space in this respect will be very considerable; and the plan, of treating all of a subject in one place instead of scattering it around under numerous independent titles will also make for compactness as well as convenience. And after all, the problem is one that concerns the publishers alone, as the work is guaranteed complete in thirty-two volumes, and the consequences of a miscalculation will not fall upon the buyer — a truly unusual thing in the law book business, as is well known.



Mary Bingham

The Green Bag.

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MARCH, 1901.

HARRY BINGHAM.

BY HON. EDGAR ALDRICH, UNITED STATES DISTRICT JUDGE.

AN ADDRESS DELIVERED BEFORE THE SUPREME COURT AND THE BAR AT THE SEPTEMBER
ADJOURNED TERM, 1900, IN GRAFTON COUNTY, NEW HAMPSHIRE.

THE dark shadow of death is again thrown across our circle and we are called to mourn the loss of a member of our bar who has been a notable figure at this forum for considerably more than fifty years.

When one, who has for so many years exercised his great powers with immeasurable influence in a State, is removed by death, the announcement of the fact to the Court in which his labor has been performed, introduces an important proceeding, and one which involves a loss, not only to the Court and the bar, but a loss common to all the people of the State. But here, in this Court, where Mr. Bingham has labored so long, the loss can perhaps be best appreciated, for the Court and the bar know how great, how devoted, how thorough, how continuous, and how persistent his labors have been.

At the outset let me say, when we come to pay tribute of respect to the memory of the venerable Harry Bingham, we come not to pay tribute to the memory of an ordinary man. With him the gifts of nature were great, and to the abundant gifts of nature was added a long life devoted to unremitting and methodic industry. The foundation and the superstructure complete present a stupendous monument of strength and beauty. There were some sharp angles and some un-hewn edges, but these defects were technical and altogether lost in the breadth and towering proportions — in the greatness, the grandeur, the beauty of the wonderful whole.

Those who knew Judge Bingham as a lawyer only, knew but one feature of his many and diversified attainments. He was more than a great lawyer, he was a ripe scholar, a philosopher, a historian, a profound statesman and a jurist. He was nowhere wordy and superficial, but ever thorough and always on bed-rock.

He was a persistent reader. He did not read rapidly, but thoroughly, and with an understanding that surpassed even the understanding of the man who wrote the book. It was part of his reading process to pause to consider the reasons stated by the author, and to call up from the wonderful resources of a richly-stored mind all of value that he had ever read or seen or heard on the subject. The essence of everything he ever read or heard or saw he retained. This power to comprehensively and understandingly retain local and historic data, and all the shadows, and things of substance, from early youth to ripe old age, to my mind, was his most remarkable characteristic. It was not the data alone in the abstract, but what went with it; and this illustrates what I mean in saying that he read and retained understandingly. In his mind he arranged historic matter, and grouped events in their proper periods. If it were a ruler of the Jews or a Roman Emperor, the causes and events in the circle of the reign; or if a Shah of Persia, it was the same. So it would be if a ruler in Israel, or in ancient or modern China, in

ancient or modern Mexico, or in Peru, or Iceland, and the mental transition from Rome and Israel to any suggested place on the face of the earth while moderate, would be natural, graceful and easy.

It was my fortune, in the few remaining years after his retirement from active work in the profession, to see much of him. To him all subjects and all things were apropos. I do not remember ever introducing a topic of conversation that he did not at once take up familiarly the subject to which it related and add luster to what had been written or said by others. Perhaps it was my aim to draw him out. To get the richness of his learning and the fullness of his reminiscent power, it was necessary after introducing a subject, to listen well, and let him pull on in his own way, and as he recalled one event, that would suggest another, and before leaving the subject the ground would be thoroughly and intelligently covered. I remember one evening he asked me what I had been reading. I told him I had just finished the life of Thaddeus Stevens. "Well," said he, "Thaddeus Stevens was a remarkable man." Continuing, he said, "I remember the first time I ever heard of him. It was in 1830 or '31, at the time the anti-Masonic crusade was on. My father was a Mason, and my grandfather Wheeler was an anti-Mason. One morning father and I were weeding in the garden and talking, and I heard some one say, 'Good morning, Mr. Bingham.' I looked up, and there stood Grandfather Wheeler, with his arms folded, leaning against the garden wall. After passing the compliments of the day, Grandfather Wheeler said, 'I heard a great speech yesterday over at Peacham. It was the greatest speech I ever heard in my life, and it was against the Masons.' 'Was it?' said father. 'Who made it?' 'Young Thad. Stevens,' grandfather replied. I remember he said 'Young Thad. Stevens,' and I recall that I wondered at the time how young a man could be and make as great a speech as grandfather said that was." From this

Judge Bingham took up the subject and ran the whole gamut of the rise and fall of the anti-Masonic party in Vermont and the nation. He told who the candidates were, and the vote cast for the various candidates in the State and country. From this he followed the career of Thaddeus Stevens through the ante-bellum days, and through his great and signal service in Congress covered by the Civil War and the reconstruction period. At this point, in a spirit of playfulness, and to test his memory and his sublime and child-like simplicity and sincerity, I said, "Judge Bingham, I believe you said at the outset that you and your father were weeding in the garden in 1830 or '31 when your grandfather came along. What were you weeding?" Apparently unmindful of my playfulness, after a moment's reflection he replied, "We were weeding out the onion bed," and then, without being further diverted, continued on his course in the delineation of the character, strength and politics of Thaddeus Stevens.

After seeing Paris, Rufus Choate wrote, with a feeling apparently akin to sadness: "I have lost the Tuileries, and Boulevards, and Champs Elysees, and Seine, and Versailles, and St. Cloud, of many years of reading and reverie — a picture incomplete in details, inaccurate in all things, yet splendid and adequate in the eye of imagination — and have gained a reality of ground and architecture, accurate, detailed, splendid, impressive — and I sigh!" Such is the revelation which usually comes to man upon seeing with the eye that of which he has read; but not so with Mr. Bingham. His reading and reflection had been so thorough and analytical that the world and its great centres seemed to have no surprises for him. He knew the world's history, and in his mind's eye, though not actually, had seen all its structures. He seemed to have trod the streets of Rome, and walked beneath her imposing domes, within her galleries, her monasteries, and her churches, and to have wandered through the ruins of her ancient gardens and the dark

passageways of her catacombs, and to have stood upon the Seven Hills and viewed all the wonders and the glories of the eternal city. He seemed to have visited the castles of the Rhine, and to have walked the corridors of the libraries of ancient Alexandria. He was familiar alike with the architecture of ancient Jerusalem, and of modern Paris, and with the mountains of Italy and of Alaska. The source, the navigability, the color and the shade of the waters of the rivers of the world were in his mind and eye. The softness of the Italian sky, and the wonderful sunsets resplendently reflected by the ice-covered mountains of Switzerland, seemed a reality to him. The scenes enacted upon the great battlefields of the world were familiar to him, whether upon the ancient fields of Cannae, or of Thermopylae, or upon the fields of Borodino or of Waterloo, or of Saratoga or Gettysburg; or whether the savage battlegrounds of the Indian, were those of the ancient far east, or those of our own country in Rhode Island and Massachusetts, on the plains, or on the confines of our East, our South, or our West.

Mr. Bingham was a jurist by nature, and would have adorned the highest judicial seat in our land. But although judicial position was several times within his reach, he declined it. He made no secret of saying that the reason for turning proffered judicial position aside lay in his ambition for labor in the Senate of the United States. All agree that he was admirably equipped for usefulness in the deliberations of that great body, but his destiny in that respect was involved in the non-success of the Democratic party with which he early cast his lot, for the people of New Hampshire ordained that no one who was a Democrat, during the period covered by his life of activity, however eminent, however well equipped, should represent them in that body. All, however, agree that if his destiny had happened to be cast with that of the dominant party, whichever that should be, the people of New Hampshire would have early and quickly ordained that the place be-

longed to him during his natural life. Once there, all believe that his work would have reflected credit and honor upon the State and nation; that his courage, his industry, his persistence, his stately and dignified bearing, his well-stored brain, his rare philosophical and literary attainments, his deliberative mind, his gravity and power of speech—in a word, his statesmanlike qualities—would have made him prominent among the most prominent Senators of his day, and that he would have achieved a name as national as that of Sherman or Hoar, of Edmunds or Thurman.

Though a bachelor, he respected woman, and believed that the function woman exercises—her influence and her power in the home—is as important and useful as the function of man in the broad and open field of life, for the reason, as he believed, that great and powerful nations are impossible without great men, and that great men are possible only where great and good mothers preside over the childhood and the home.

His philosophy was such that to him the rose and the rock, the trickling brook and the broad ocean, the sunshine and the ominous darkness that precedes the storm and the lightning, the tiny blade of grass and the giant oak, the grain of sand and the towering mountain, the fitful flight of the humming bird and the unaltered and unalterable revolutions of the planetary system were alike a joy and things of beauty, because they are a part of nature, and a part of the eternal plan of the Almighty. And his philosophy was such, that to him, purpose, industry, and principle in man, were qualities to be admired, because they are qualities which most surely lead men to honorable success, and because wise and successful men raise the standard of civilization and of nations, and thereby advance the design of the Creator.

He believed profoundly in the genius of our institutions, and thought the men who assembled to lay the foundations of our government were as great as any set of men who ever assembled for such a purpose since the world began.

Among all the men who ever lived Washington was his ideal. He thought—all things considered—what he accomplished against the difficulties under which he labored, his inherent civic and military strength, the way in which he yielded power, and the way in which he surrendered it, the ruggedness and simplicity of his character, the peacefulness and serenity of his mind and of his private life, constituted him the greatest and most worthy type of manhood of ancient or modern times.

Of men of letters and dazzling genius, Shakespeare stood first, and was his greatest delight; yet he held in adoration Gray's *Elegy* and Milton's *Paradise Lost* as masterpieces of stately and inspiring verse, and was charmed by the sweet songs of Longfellow and Whittier.

With him the Bible, with which he was familiar, was the greatest of all books; and many of us recall the impressive manner in which he recited the twenty-third psalm as his peroration in the Whitman will case.

While he did not agree, at the time, to all that was written and said in the period preceding the Civil War against the institution of human slavery as established in our government, he believed that Harriet Beecher Stowe through her "Uncle Tom's Cabin" did more to prepare public sentiment for its final overthrow than any other one person.

He believed that the time has come when our nation should take its stand among the great nations of the world, and become a leader upon the great international questions necessarily presented by new and changed conditions. He believed that expansion in all life, and under all conditions, is a logical and necessary incident of growth and power. In this line I remember hearing him say, in connection with Washington's non-intervention policy: "Washington was a great man; he was great enough to comprehend the situation which confronted him in his day, and the whole of it. He could not have foreseen the conditions that confront us in our day. Steam and electricity

have made countries which were remote from each other in his day, near neighbors in our day, but he was so great that, if here, I have no doubt whatever, he would comprehend the condition that confronts us and the whole of it, and, comprehending, that he would do his duty."

In religion Judge Bingham was not a bigot. He was tolerant of the religion of Confucius, the ancient Chinese law-giver, who taught, that one should not do unto others, what he would not have others do unto him; and he accepted the teachings of our Saviour, that one should do unto others, as he would have others do unto him.

This is not the time for an extended sketch of the life of Judge Bingham as a lawyer. Upon a proper occasion some suitable person will delineate his great qualities as a lawyer, and his prominent career at the bar. I will only say that his name and his briefs appearing in the New Hampshire reports since *Ranlett v. Moore*, decided in 1850, reported in Vol. 21, down through and including Vol. 59, constitute a permanent monument to his memory as a lawyer.

Though gone from earth and having entered

"The undiscovered country from whose
bourne

No traveler returns,"

in memory we see him still, with the well-rounded and commanding head, poised upon broad, square-set shoulders, the sturdy oak-like pose, as if the feet were deeply and firmly rooted in mother earth, the erect figure, firm and steadfast, as if mysteriously bolted to New Hampshire granite and buttressed by her everlasting hills, the dignified and stately carriage, the large, brown, wide-open, ox-like, honest, listening eyes, a prominent feature of that grave and impressive face. And to complete the picture which hangs in our memory, we may well borrow a description of Donatello's famous statue of St. George, and say: "He stands there sturdily, with his legs somewhat striding apart, resting on both with equal weight, as

if he meant to stand so that no power should move him from his post."

The last time I saw Mr. Bingham to have conversation with him, which was only a few days before his death, his superb figure was sorely diseased and shattered, but his wonderful mind shone with unclouded and undiminished beauty and strength. In closing, let me reproduce, in its substantial features, what he said on this occasion, for it illustrates several characteristics to which I have referred. It illustrates the teachings of his philosophy of living and dying. It illustrates the accuracy of his memory. It illustrates his quaint humor, and it illustrates his patience and his thoughtfulness. He spoke of his age, and said that he had outlived by many years the period of three score years and ten allotted to man, that seventy-seven of these years had been comfortable and convenient, and that while the last two had been uncomfortable and painful, he ought not to complain. "And," said he, "while I am helpless, and while I am a burden to myself and to others, and while it is best that I should go, I shall remain on earth all the days allotted to me, and if you ever hear that I have done anything to shorten my days, you may know that it was because I was not myself. It is just as important," said he, "that one should die respectably as it is that one should live respectably," thus exhibiting more than the Roman spirit of another who, when informed that he must die, replied, "I like it well, I shall die before my heart is soft, and before I have said anything unworthy of myself." At this time I had just returned from my camp at the lakes, and to divert his mind I referred to my good luck with the rod. He asked me whether I fished on the lakes or on the brooks or rivers. I told him that I had my best luck on a little pond called Jaquith's pond; and, thinking that I might interest him by telling him something that he did not know, related that, according to tradition, years ago, a strange old man by the name of Jaquith went a mile or more into the un-

broken wilderness and cleared up a few acres of land near this pond, where alone he spent a considerable portion of his time for many years, frequently journeying through the north country driving a steer and a heifer. "Oh," said he, taking up the story, "I remember old Jaquith very well. The first time I ever saw him was in the winter of the year that I was eight years old. Our home was in Concord, Vt. I was reading a book in the kitchen, and mother was at work. Old Jaquith drove into the yard with a heifer and a steer harnessed to a sled. There were boards around the platform of the sled, and a little straw, a few sheep, and two or three pigs upon a platform. He came to the door and entered without rapping, and as I remember him he was rather a marked looking man, somewhat advanced in years, and without further introduction, he said, 'I am a preacher; I preach for a living. I preach the Gospel of St. Paul, and I preach after the manner of St. Paul. I preach an hour for a quarter of a dollar, a half hour for fifteen cents, and a quarter of an hour for ten cents;' and mother, who was busy, evidently did not catch what he first said, and inquired, 'What is it you do for that?' And he repeated, 'I am a preacher; I preach for a living. I preach the Gospel of St. Paul, and I preach after the manner of St. Paul. I preach an hour for a quarter of a dollar, a half hour for fifteen cents, and a quarter of an hour for ten cents. And, I forgot to say, that I take my pay in hay for my cattle and sheep, or in potatoes for my pigs.' Mother hesitated, and I never quite made up my mind whether it was because she was short of hay and potatoes, or whether she felt it would be trifling with a sacred subject. But, boy-fashion, I rather encouraged the preaching, and mother said, 'Well, you may preach for us for a while, and we will pay you in potatoes.' He went out to the sled and brought in a large iron kettle and set it down on the kitchen floor, raised his hand and head reverently, and was about to begin, when his hand fell, and he said, 'I forgot to

inquire whether I am to preach for a kettleful of potatoes, or half a kettleful.' And mother said, 'Well, while you are about it, you may as well preach for a kettleful.' Mr. Jaquith then began, taking for his text that passage of the sacred Scriptures which compares the Gospel to the waters of the running river, and he pointed out that both were inexhaustible and everlasting, and illustrated by saying that one might dip a pailful of water from the river to slake the thirst of his animals, 'but the river would run on undiminished, and so it is with the Gospel. There is enough Gospel to save the souls of all the living in the world, and then there would be just as much left.' Thus as he was nearing the end of his life's journey, he gave the dialogue and vividly recalled what I have re-

lated, and much more of the details of this scene of his childhood days, which quite likely had not been in his mind for more than seventy years.

Fearing that I might tax his strength too much, I rose and said, "I must go." "What?" he said, "You are not going now, are you?" I replied, "Yes, I must hold Court to-morrow, and I think I had better go." "Well," said he, "go out and hold your Court, and deal justly by all men; and, if on the morrow I find myself healed, and restored to youth and strength I shall attend your Court." Thus near the end, and as he stood upon the verge of the valley, he employed a happy, optimistic and poetic figure of speech, to convey the idea in his mind, that with him dissolution and transition were at hand.

NOTE.—Harry Bingham died at Littleton, N.H., Sept. 12, 1900. He was born in Concord, Vt., March 30, 1821, being descended from Thomas Bingham, 3d, who came from England to Norwich, Conn. Judge Bingham was educated in the academy at Lyndon, Vt., and at Dartmouth College, graduating from the latter in 1843. Later he studied law in Concord and Lyndon, Vt., and with Harry Hibbard, at Bath, N. H. He was admitted to the bar of New Hampshire in 1846, and in the same year began the practice of his profession in Littleton, N. H., where he had ever since resided.

The late Honorable George A. Bingham, twice a Justice of the Supreme Court of New Hampshire, was a brother. And the present Chief Justice of the Supreme Court of the District of Columbia, who at one time was a Judge in Ohio, is also a brother. Probably no contemporary lawyer in the State has been engaged in the trial of so many important cases as Mr. Bingham, prominent among them being the celebrated Concord railroad cases and the investigation into the administration of President Bartlett of Dartmouth College.

Mr. Bingham was from his youth a Jeffersonian Democrat. In 1861 he was elected to rep-

resent Littleton in the legislature, and was re-elected seventeen times. He also served two terms in the State Senate, 1883-1887. He was twice nominated for Congress and seven times named by his party's representatives in the legislature for the United States Senate. He was a delegate to the national conventions of 1872, 1880, 1884 and 1892, and candidate for elector in 1864, 1868, 1888 and 1896. He was named Chief Justice of the State Supreme Court in 1874 by Governor Weston, but was defeated by division in the Council. In 1880 he declined an appointment to the New Hampshire Supreme Court tendered him by Governor Head.

He was a member of the New Hampshire Constitutional Convention of 1876 and chairman of the committee on legislative department.

Dartmouth College conferred upon him the honorary degree of LL.D. in 1880.

He was a member of many learned societies, and, from 1893 until his death, was president of the Grafton and Coos Bar Association. Of late years he had made many important contributions to political, philosophical and historical literature. He was one of the gold Democrats who steadfastly refused from the first to support the Chicago platform.

THE PSYCHOLOGY OF POISONING.

II.

By J. H. BEALE, JR.

NINE years ago, Carlyle W. Harris was tried in New York for the murder of his wife. It appeared that he had been secretly married to a young girl, that the fact of the marriage had been discovered by the girl's relatives, and they were strenuously insisting that it should be acknowledged. Harris dreaded the effect of such an acknowledgment upon his prospects in life; but at last was forced to consent to a public marriage. A short time before the date set for the marriage, he procured of a druggist, and gave his wife, a box of capsules for headache. Mrs. Harris took the last capsule one evening just before going to sleep; she woke in about half an hour, numb and choking, and soon became unconscious. She remained unconscious, breathing slowly and heavily, until her death, twelve hours later. An examination of the body showed that she had died from the effects of a large dose of morphine. The jury had no difficulty in finding that it had been criminally administered by her husband; and he was convicted and executed.

Harris was a medical student, familiar with the nature of poisons; yet he performed his work so clumsily as to leave no doubt of his guilt, after suspicion had once fastened upon him as a result of his actions at the time of his wife's death. He had taken steps, however, intended to conceal his agency in the crime. Immediately after giving his wife the box of capsules, Harris left New York for Virginia, and only returned ten days later. If his wife had not by chance first taken the nine harmless capsules, Harris would have been absent at her death. As the capsules made up by the druggist contained morphine, suspicion of negligence in compounding them would naturally have rested upon him, rather than upon Harris.

About a year later, Robert W. Buchanan poisoned his secretly married wife under almost identical circumstances. He, too, was a physician, and used a single large dose of morphine to kill his wife; but he attempted to disguise the symptoms of morphine poisoning and thus obviate suspicion by giving also atropine, another vegetable poison which modifies and to a certain extent neutralizes the action of morphia. Buchanan confessedly imitated Harris, professing to be able to avoid the mistakes which had led to the detection of the latter; and his case is therefore not an independent example of poisoning. But in the events which led to suspicion he was of course an entirely independent actor; and in those events there were curious resemblances between the two cases. Both made quite unnecessary incriminating statements; Buchanan, for instance, saying to several strangers, during his wife's illness and before her physicians looked for her death, that "the old woman" would not live. Neither showed grief at his wife's death,—Buchanan, in fact, was scandalously happy; in sharp contrast with the conduct of the women whose cases have been considered in a previous article. Both Harris and Buchanan suggested and urged other causes of death than the true ones.

In Massachusetts, in 1861, George C. Hersey was tried for the murder of Miss Tirrell by poisoning her with strychnine. Hersey had seduced Miss Tirrell (a girl of unblemished reputation) under promise of marriage. The circumstances of the seduction were particularly distressing. Hersey had become engaged to a sister of Miss Tirrell. By her sudden death Hersey appeared to be so deeply affected that the girl's family proposed to him to live with them. He came,

and was treated and trusted like a son. Within a month of the death of his intended wife he had seduced her sister; in another month he had tired of her, and had become engaged to another girl; and at the end of four months he was guilty of murder of the woman he had wronged. Truly, as the Court said in passing sentence, there were no circumstances to mitigate the atrocity of the crime. Governor Andrew, whose objection to capital punishment was notorious, appears to have had no scruples against it in this case.

When Hersey's seduction of Miss Tirrell was likely to be discovered, poison occurred to him as a means of escape from his difficulties. He had read about the effect of poisons; claimed, in fact, to have made a study of them. At that time it was believed that a vegetable poison could not be detected in the dead body of a person killed by it. He went to a druggist, several miles distant, who did not know him, and bought strychnine "to kill a dog." He gave Miss Tirrell a large dose of this at night in a spoonful of jelly; and she died within an hour in frightful convulsions.

In this case, as in the two first stated, the murderer showed little grief at the death of his victim, and he brought suspicion on himself by his words and actions. The case as presented at the trial was a clear one. The defendant was convicted and was executed, after confessing the crime.

Two or three substantially similar cases have lately occurred in the West. The most noted is the murder of Pearl Bryan by her seducer, a medical student. She was poisoned in Cincinnati by cocaine, a vegetable poison; was carried across the river into Kentucky and decapitated. The purpose of the mutilation seems to have been the concealment of the crime, but it resulted in immediate discovery. The body was identified by a manufacturer's mark in the shoes, and the defendant arrested. He, too, talked to his harm; he also wrote an incriminating letter. Guilt was proved beyond question.

It is interesting to compare these cases

with others where the defendant was accused of poisoning an acknowledged wife; where the motive and the circumstances were not unlike those considered in the earlier article.

Sixty-five years ago John Earls, an unintelligent boor in the mountains of Pennsylvania, was convicted of the murder of his wife. He had, it appears, become infatuated with another woman. He succeeded in administering to his wife, just after the birth of a child, a large quantity of arsenic which caused her death in a few hours. One enormous dose he introduced into a pot of chocolate; when his wife, in agony from the dose, called for a drink, he slipped another lot of the drug into a basin of peppermint tea, and when the wife rejected that as bitter, and his mother prepared her another drink, he poisoned that, too. He had bought the arsenic openly in a place where he was known. His actions at the time of his wife's death aroused suspicion, and he made damaging statements afterwards. His crime was obvious, was in fact scarcely denied, and his conviction, confession and execution followed in due course.

Dr. Edward William Pritchard, an English physician and surgeon, began to practice at Glasgow in 1859. At the end of 1864 his wife became ill, with frequent vomitings; she went on a visit to her parents in Edinburgh, where she gradually recovered. Returning in good health about Christmas time, she was again seized with the former symptoms and rapidly became worse. In February, 1865, her mother, Mrs. Taylor, came to nurse her. She was a healthy woman of seventy. Two weeks later she was taken violently ill one evening, soon became insensible, and died in about three hours. She had in her pocket a bottle of medicine which she had been using for headache; it had been pure when bought, but on examination was proved to contain antimony and aconite. Dr. Pritchard filled out the death certificate, giving apoplexy as the cause of death, and there was no immediate suspicion. After Mrs. Taylor's death, Mrs. Pritchard's symptoms continued; she gradually grew weaker, and finally died on

the 18th of March, 1865, four months after the beginning of her illness.

Dr. Pritchard was at once suspected of having caused his wife's death; an examination was made of her body and large quantities of antimony, in the form of tartar emetic, were found. Mrs. Taylor's body was then examined and the same discovery made. In her case, however, the testimony showed that her death had been caused not only by antimonial poisoning, but by the addition to that mineral poison of the vegetable poisons, aconite and morphia. Dr. Pritchard, during the progress of the cases, made suspicious statements to the other physicians—for instance, that his wife was suffering from gastric fever. After his arrest he made other damaging statements. There was an attempt to show a motive for the crime in his hope of inheriting money from his mother-in-law; but not much was proved in that direction. He had without doubt formed an illicit connection with a young maid-servant.

The jury convicted; after a partial confession in the vain hope of a commutation of sentence, Dr. Pritchard made a full confession and was executed, universally execrated.

Here, then, are several cases in which men have been convicted of poisoning their wives or mistresses. May any general conclusions be drawn from them?

Comparing them with the cases studied in a previous paper, one notices at once the diversity of poisons used. The women who poisoned for love used in almost every case arsenic. These men have used several vegetable poisons, usually strychnine or morphia, and the mineral poisons, arsenic and antimony. The men had a wider knowledge of poisons, or a wider field of choice, or else there is some deep moral reason for the difference. They certainly shrank from no cruelty. The circumstances of each of these cases showed a disgusting and cowardly, might one not say ungentlemanly, breach of a most sacred trust. Each of the men had brought the woman he professed to love into

a condition of more than ordinary dependence upon his protection, and he had taken devilish advantage of the position; how should a little additional cruelty matter? If strychnine would do his work thoroughly he would use it, though the agony of it distorted his victim out of human shape. If arsenic would do his work as well, he would use arsenic, but he would make his work sure.

This insensibility to the pain—or at least the apparent pain—of the victim was shown also in the method of administering the poison. In almost every case a single fatal dose was given. In Dr. Pritchard's case alone a succession of small doses of a mineral poison was administered to his wife; though even he in the murder of his mother-in-law gave a single fatal dose. And Pritchard's poisoning of his wife differed from the acts of the woman poisoners. They did not, like him, weaken their victims, of deliberate purpose, that these might finally die not so much of poison as of exhaustion. Their doses were meant to be direct causes of death; they meant to give enough to kill, but to kill without unnecessary pangs. Their victims took a week to die in; he tortured his wife with all the malignity of his skill for four months. His object must have been not to avoid dramatic suffering, but to escape detection.

This haste to dispose of the victim was characteristic of the criminals, not of their crimes. In only a few of the cases—those of Harris and Hersey, for instance — haste seemed required by the emergency. Once or twice the defendant, not having constant access to his victim, was obliged to act once for all; but in most of them a slow course of poisoning was quite possible. It is obvious that the constant administration of poison in small doses does not increase the danger of detection; on the contrary, Dr. Pritchard was doubtless led to poison his wife gradually by the hope of thus escaping suspicion. These cases, then, suggest that there may be in men, at least, when acting from an intense desire to get rid of a loathed incumbrance, an almost irresistible desire to do it quickly and

have it over with. Women can wait in patience, buoyed up meanwhile by the confident hope of final success.

Another difference is in the lack of self-control shown by the prisoner. In a former paper the self-command of the women from the administration of the poison to the time of the trial was pointed out. The men showed no such power over themselves. They were unable to exhibit such natural-seeming grief as to allay suspicion; several of them could not contain their joy. They showed nervous apprehension when informed that foul play was suspected. Most of them confessed before execution. The one channel through which the women relieved the strain—the writing of letters or secret confessions—was not used; these men talked instead, to any one — to casual acquaintances, to mere strangers, if no more familiar confidant was at hand; and their talk was as aimless and as compromising as the women's letters. In the few instances when they wrote it was with the deliberate purpose of misdirecting suspicion.

An effort was made in every case to escape detection; but in each case the effort was so clumsily contrived as only to furnish additional evidence against the defendant. Are men then so entirely unable to plan and exe-

cute a crime without detection? Are they so inferior to women in concealing their acts? One would be tempted to say so, upon a comparison of cases. The defendants here were of all grades of education and intelligence; but each of them doubtless (and with reason) ascribed his conviction to his own stupidity.

In none of the cases stated was there, on the evidence, a reasonable doubt of the defendant's guilt; they therefore throw no light on the conjecture that juries are anxious to convict one charged with poisoning. Only one similar case has fallen under the writer's observation where the evidence leaves the question of guilt doubtful—Pettit's case, in Indiana, a few years ago. In that case the jury convicted, but the defendant was granted a new trial by the Supreme Court. In these cases the verdict of the jury was received with approval by the public, and the execution of the criminal was hailed with joy. Mary Blandy's body was followed to the grave by multitudes of mourners; Mrs. Maybrick's innocence is believed, and her pardon urged by thousands who never saw her face; but no one can be found to believe the innocence of Dr. Pritchard or Dr. Harris, or to lament their fate.



TWO LEGAL DOCUMENTS OF THE ELEVENTH CENTURY.

BY DAVID WERNER AMRAM.

I HAVE recently come into possession of a number of Hebrew and Arabic manuscripts which were formerly deposited in the Genizah of the synagogue of Ezra the Scribe, in the City of Cairo, Egypt. Among these manuscripts are legal documents of various kinds, fragments of books of devotion, of Mishnah, Talmud, works of ethics, philosophy and Kabbalah. The history of these documents is interesting. Some of the legal documents are dated, and are from six to nine hundred years old. The undated fragments are probably of equal antiquity.

The word "Genizah" means "a hiding place," or a treasure house, and as here used refers to a special apartment in or above a synagogue where old books and manuscripts of all sorts, which have lost their practical value, are deposited.

The synagogue of Ezra the Scribe stands in the city of Cairo, and has a recorded history extending back more than one thousand years. It was in the Genizah of this synagogue that the manuscripts, of which those in my possession are a part, were found.

The question naturally arises, how did such a mass of diversified literary material come to be gathered in such a place? It must be borne in mind that every piece of writing containing Hebrew letters was thereby invested, in the eyes of the orthodox Jews, with a certain character which saved it from profanation. A Hebrew business letter or legal contract, not to speak of a prayer book or a portion of the Bible or Talmud, instead of being destroyed or cast away as rubbish, was by virtue of the fact that it was written with Hebrew characters deposited in the Genizah. The Genizah thus became a storehouse for all sorts of literary material written in the Hebrew language. A scroll of the law that had become mutilated or otherwise made useless for ritualistic

purposes was laid away to rest in the darkness of the Genizah. Prayer books, law books, works of poetry and philosophy which had become torn or soiled were deposited in the same place; and in a similar manner letters, contracts and other documents which were no longer of any practical value at last found their way into this cemetery for old manuscripts.

In the course of generations the mass of material thus accumulated grew great and heavy, and constant struggles for existence took place. The weaker manuscripts, those written on poor parchment or papyrus, were literally pulverized in the course of centuries.

How did the contents of this treasure chamber become known to the world?

It appears that enterprising business men in Cairo and in Jerusalem, by means best known to themselves, probably by bribing the care-takers of the synagogue, obtained possession of old manuscripts which they afterwards sold to European libraries and amateurs.

Professor Solomon Schechter of Cambridge University, England, having discovered the source from which the aforesaid enterprising merchants obtained their curios, conceived the plan of purchasing the entire contents of the Genizah and transporting it from Cairo to Cambridge. He went down to Egypt, and there entered into negotiations with the rabbi and wardens of the synagogue, with the result that he carried away with him many great boxes full of manuscripts in a more or less perfect condition. During the past few years he has devoted himself chiefly to the examination, classification and publication of these literary treasures.

Upon information received from him, I entered into correspondence with dealers in

the city of Jerusalem, who were in possession of a portion of these Genizah manuscripts, and from them I acquired the collection which I now possess.

The document which I have selected from my collection for detailed description is a bill of divorce. It will be seen from the accompanying illustration that it has been mutilated, and this together with the wrinkles and stains, testifies to the fierceness of its battle with other manuscripts in the darkness of the Genizah. It is, however, in a fair state of preservation, and the writing is in parts clear and black, while in other parts the ink has faded to a pale brown.

This document is eight hundred and forty-eight years old. The following is a translation, the missing parts of the manuscript, in parentheses, being supplied at a guess from similar documents in use at a later time.

"On the second day of the week; to wit, the eighteenth day of the month of Adar, in the year one thousand three hundred and sixty-five of the Era according to which we are accustomed to reckon in Fostat, Mizraim, which is situated on the River Nile, do I, Joseph, the son of David and whatever other name I may have, determine, being of sound mind and under no constraint. And I do release and send away and put aside thee, my wife Chaba, the daughter of Joseph and whatever other name thou mayest have, who hast been my wife from time past hitherto, and hereby, I put thee aside (that thou mayest have permission) and control over thyself (to go to be married to any man) whom thou desirest (and no man shall hinder thee) in my name from this day (forever; and thou art) permitted to be married to any man. And these presents shall be unto thee from me a document of release and a bill of dismissal and a letter of freedom, according to the law of Moses and Israel."

The date in this bill of divorce is the year 1365, according to the era by which men reckoned in Fostat. This is the so-called Seleucidian era, which began in the year 312 before the Christian era.

In order, therefore, to translate this date into the corresponding year of the common era, subtract 312, which gives the date 1053 of the Christian era, or thirteen years before William the Conqueror landed on the shores of England. The Seleucidian era is no longer used in Jewish documents. It was at one time the custom to date the bill of divorce from the reign of Alexander of Macedonia; but as the scribes during the middle ages were not well versed in Greek chronology, it became the established custom to date the documents from the year of the creation of the world, according to the traditional calculation. Maimonides, who lived more than a hundred years after this bill of divorce was written, adopted the method of using exclusively the era of the creation.

Fostat is the ancient name of Cairo, and Mizraim is the Biblical name of Egypt; the city is particularly described in the bill of divorce as "Fostat of Mizraim situated on the River Nile."

After the name of the husband, follow the words "and whatever other name I may have," and after the name of the wife the words "and whatever other name thou mayest have." This formula was established by an ordinance of Gamaliel, president of the Sanhedrin in the first century, and was intended to provide against the danger of invalidating the bill of divorce by mistake in the name of the party, or where the party had more than one name. In later days, when the Jews always had a Hebrew name in addition to and differing from their name in the vernacular, this clause was especially important.

Inasmuch as a lunatic or a person under duress was not competent to enter into any legal obligation or execute any legal contract, it was necessary that the husband in giving the bill of divorce to his wife, should be of "sound mind and under no constraint." The effect of a bill of divorce was to release the wife forever from her husband's control, and to give her, as a divorced woman, abso-

lute right over herself. The essential words of a bill of divorce indicating the absolute separation of the husband and wife were "Thou art permitted to be married to any man," or according to the compiler of the Mishnah, "Thou hast herewith from me a bill of dismissal, a document of release and a letter of freedom, that thou mayest go and be married to any man."

It will be noticed that this bill of divorce has no subscribing witnesses. After the bill of divorce was written it was not customary for the husband to sign it, because his name appeared in the body of the document, but it was customary to attest it by the signatures of two witnesses.

As late as the middle of the second century of the Christian era, it was decided by a distinguished authority that a bill of divorce was valid even though it had no subscribing witnesses. It is possible, therefore, that our bill of divorce was a perfectly valid document, although no witnesses subscribed. On the other hand, it is more probable that after it was written, the parties were reconciled, and that therefore it was never attested or delivered to the wife, and, as a useless instrument, was thrown into the Genizah.

To the student of Jewish law, this document is of peculiar interest, because its form differs materially from that prescribed in the Shulhan Arukh ("The Prepared Table," a great code of the law, compiled in the year 1554 of the Christian era), or in the great code of Maimonides, which was completed in the year 1180 of the Christian era. The formula given in the latter is the earliest of which we have any record, and our document appears to be more than a hundred years older. It shows that the mere form of the instrument was considered less important at that time than at a later period, provided that all the essential words were contained in it.

The various rules and regulations which later rabbinical authorities established for the proper preparation of a bill of divorce, were of course unknown to the scribe who

wrote in Fostat in the year 1053. He prepared his bill of divorce in the same manner as he would have prepared any other legal document; and the numerous regulations concerning the number of lines, and the spelling of words and the shape of the letters, which later authorities deem of supreme importance in bills of divorce gave him no concern.

From another collection of Genizah manuscripts now owned by the Honorable Mayer Sulzberger, judge of the Court of Common Pleas of Philadelphia, I have selected for description a bill of release, which also appears in fac-simile. It is interesting because, like the bill of divorce, it contains the date of its writing; and it is important because it is a legal document of rare form. It was written in the year 1352 of the era of the Seleucidae, corresponding to the year 1040 of the Christian era—thirteen years before the bill of divorce. It was a contract made between a man and the parents of his divorced wife, and constitutes what we should call a general release of all claims and rights of action that he had against them. The history of the case, so far as it may be gleaned from the document itself, is as follows: Benjamin ben Joseph and his wife, Ganya bath Amram, lived in the city of Fostat (Cairo), and their daughter Raza was married to Sabaa ben Manasseh. For some reason unknown to us (perhaps for no reason at all) Sabaa gave a bill of divorce to his wife Raza, and she removed from his house and returned to the home of her parents. Naturally, this little episode did not tend to increase the good feeling that existed between Sabaa and his ex-parents-in-law. It seems that when Raza left her husband's house she took with her not only her own separate property and the amount of her Ketubah (marriage settlement) to which she was legally entitled, but also some of the property of Sabaa, and, deeming possession nine points of the law, she and her parents refused to give the property up to its rightful owner, Sabaa. The latter prob-

ably brought suit against them, and the case was eventually settled. To guard against further dispute, Sabaa was obliged to execute this bill of release, in which he mentions the marriage and the divorce, and states that he has no further claims at law, either in Jewish or Gentile courts, against his former parents-in-law. He acknowledges that they have no property in their possession belonging to him, either as loan or pledge or otherwise; that they have no articles of copper, or iron, etc. (articles enumerated in four lines of the manuscript), belonging to him, and that neither he nor his heirs have any claim upon them, and that any document produced by him or them or any other persons for the purpose of enforcing such claim shall be null and void.

Thus, by means of this fragment of writing, we are led into the house of a Cairo Jew who has been mouldering in the dust these eight hundred years, and are made witnesses of his family troubles. It is one of those

glimpses that we may enjoy when the veil is lifted for an instant, and the past flashes upon us out of the darkness of history. From such documents we may learn of the customs, the manners, the law, the procedure, the daily life, the language, the writing, in fact of every phase of the life of bygone ages.

As links in the chain of evolution of legal forms at Jewish law, these documents are of great interest. They go back to the time when the Jewish law had not yet become set and fixed, but was still flexible; they antedate the period of the codes which had a natural tendency to fix the law within the hard and fast lines. In those days and in that community the law was administered very much as the common law is administered in our time, by judges who based their decisions upon precedent, but who were not hampered by the restrictive effect of a huge code of law which summarizes the results of great periods of judicial activity.

OLD-TIME PICTURESQUE ELOQUENCE AT THE BAR.

BY JOHN DE MORGAN.

A GENERATION ago Jack Best, no one ever called him anything but Jack, held a high position at the English bar on account of his picturesque eloquence. When he was engaged on a case the court was sure to be crowded, for wearers of silk, as well as wearers of stuff liked to hear his forensic oratory, while the "pit" was sure to be filled with solicitors.

On one occasion he was defending a prisoner against Mr. Besley, Q. C., who was then a young junior. Jack Best considered that the prosecution had been pressed unduly, and proceeded to call attention to the fact in the following characteristic manner:

"May it please you, my lord, and gentlemen of the jury. I wish to heaven that I were the king of Dahomey. For if I were

I would appoint my friend, Mr. Besley, my attorney-general in recognition of the fairness and impartiality with which he always conducts a prosecution. I would present him, for the insignia of his office, with a yacht bearing the skull and cross-bones on its flag, and I would float it in a sea of human blood."

Once on circuit Baron Martin was asked by Jack Best to postpone a case till the next day. It was then about four o'clock in the afternoon. The learned Baron said with a sweet smile on his face: "Apply again later on, Mr. Best, and I will let you know. I am anxious to get through as much work as possible to-day, as we are due at Exeter on Thursday." "I am obliged to your lordship," Jack replied, and then in a stage

whisper added: "Why can't the damned old fool make up his mind?" "Mr. Best," the judge said with great dignity, "if you desire to curse the Court would it not be more decorous to retire into the corridor?" "If your lordship pleases," Jack answered quietly, suiting the action to the word, and at once walking out of the court. Baron Martin said at dinner that night, "Mr. Best's going out of court was the most eloquent speech he ever made."

Jack Best was once engaged in the defence of a prisoner before the Middlesex Court of Sessions. His well-known appearance and the knowledge of his eloquence made his defence a notable one. He closed his final speech with this exordium:

"Gentlemen of the jury, my learned friend has addressed you with the dexterity of the thimble-rigger and the eloquence of the three-card-trick man. He has beguiled you in tones so mellow as to remind one of the bulbul, or eastern nightingale. But, gentlemen, thank God these are the Middlesex Sessions, and not the Middlesex Shambles. Gentlemen, you all remember the three pious men of old, Shadrach, Meshach, and Abednego, who were put into the seven-times heated furnace by the wicked King Nebuchadnezzar." Here he bowed to the judge. "Gentlemen, what sustained them in their hour of need? The same thing as now sustains my client in the even more dreadful ordeal that he is passing through," another bow to the judge, "namely, the consciousness of his innocence."

Was it any wonder that the jury acquitted the prisoner without leaving their seats?

John Scott, afterwards Lord Eldon, was noted for his cutting eloquence, and for the *sang froid* with which he treated the judges. On one occasion a junior counsel, on their lordships giving judgment against his client, exclaimed that he was surprised at their decision. This was construed into a contempt of court, and the young barrister was ordered to attend at the bar the next morning. Fearful of the consequences, he con-

sulted his friend John Scott, who told him to be perfectly at ease, for he would apologize for him in a way that would avert any unpleasant result. Accordingly, when the name of the delinquent was called, Scott rose and coolly addressed the judges. "I am very sorry, my lords," he said, "that my young friend has so far forgotten himself as to treat your lordships with disrespect; he is extremely penitent, and you will kindly ascribe his unintentional insult to his ignorance. You must see at once that it did originate in that. He said he was surprised at the decision of your lordships. Now, if he had not been ignorant of what takes place in this court every day—had he known you but half so long as I have done—he would not be surprised at anything you did."

This is almost equal to the celebrated apology of Daniel O'Connell in the House of Commons. He had been lashing Benjamin Disraeli, and in the heat of his harangue he declared that the "honorable member was not fit to wheel dung from a dung-hill." There were loud cries of "Apologize!" The speaker called on the witty Irishman to offer an apology to the angry member. O'Connell stuck his right hand in his breast and in slow, measured time said: "I declared that the honorable member was *not* fit to wheel dung from a dung-hill. I was wrong. He *is* fit!"

Sergeant Kelly of the Irish bar in the early years of the nineteenth century, used to indulge in a picturesque eloquence racy of the soil, but unfortunately he would sometimes forget the line of argument and would always fall back on the word "therefore" which generally led his mind back to what he had intended saying. Sometimes, however, the effect was almost disastrous. One time he had been complimenting the jury, assuring them that they were men of extraordinary intelligence, and then branched off into a statement of his case. With a wave of his hand and a smile on his face he proceeded: "This is so clear a case, gentlemen, that I am convinced you felt it so the very moment I stated it. I should pay men of intelligence

a poor compliment to dwell on it for a minute, *therefore*, I shall proceed to explain it to you as minutely as possible."

Sometimes it happens that the most brilliant piece of "spread-eagle" oratory is answered in the most ridiculous manner. A very good instance is that of the time when the celebrated legal orator, Elisha Williams, of northern New York, was completely overshadowed.

Williams was a most graceful speaker; his voice, particularly in its pathetic tones, was melody itself. His power over a jury was equal to that of the great Choate. He swayed as with a wand of an enchanter, and it was very seldom that he failed to secure a verdict for his client. On one occasion he failed, and in such a manner that a crowded court and grave judges on the bench were convulsed with laughter at the burlesque of the result. The case was one of murder, the scene a small county town in the northern part of the State. Mr. Williams had been retained for the defence, for the accused had almost unlimited money at his command. Never had orator been more eloquent, never did jury look more convinced and a settled assurance of acquittal was visible on each face as the orator closed a brilliant speech with this exceedingly touching peroration: "Gentleman of the jury," said he, "if you can find this unhappy prisoner at the bar guilty of the crime with which he is charged after the adverse and irrefragable arguments

which I have laid before you, pronounce your fatal verdict; send him to lie in chains on the dungeon floor, waiting the death which he is to receive at your hands; then go to the bosom of your families, go lay your heads on your pillows—and sleep if you can." The effect was electrical, every one was sure of a verdict of acquittal, but by and by, the district attorney's assistant, rose to make the final speech. He drawled and spoke in the vernacular, he was chewing as he spoke, presenting a marked contrast to the great lawyer who had just sat down. "Gentlemen of the jury, I should despair, after the weeping speech which has been made to you by Mr. Williams, of saying anything to do away with its eloquence," he said. "I never heard Mr. Williams speak that piece of his'n better than when he spoke it now. Once I heard him speak it in a case of stealin'; then he spoke it agen in a case of rape; and then the last time I heard him speak it before jest now, was when them niggers was tried—and convicted, too, over beyond Kingston. But I never heard him speak it so elegant and affectin' as when he spoke it jest now." He paused, looked at the jury, saw the effect he had made and then closed with a single sentence: "If you can't see, gentlemen of the jury, that this speech don't answer all cases, then there's no use in saying anything more." And the jury thought so too, for the verdict was against the client of the great legal orator.



THE MEDICO-LEGAL CONFLICT OVER MENTAL RESPONSIBILITY.

BY GINO C. SPERANZA.

LAW and medicine are known to be "learned professions," and membership in either of them establishes a *prima facie* case of intelligence and culture. It is natural to expect among men of culture and intelligence that there should be, if not a consensus of opinion upon questions whose solution depends on scientific or philosophic examination and study, at least a certain agreement on substantial points. At all events, we would not expect a persistent antagonism and wide divergence between them.

The most casual observation, however, suffices to show that there is at least one of such questions which has been and is the cause of an apparently irreconcilable conflict between doctors and lawyers—the question of mental responsibility in regard to criminal acts.

This persistent and aggressive disagreement between two learned professions upon such a question cannot be ascribed to a puerile reason, as that of professional jealousy, but must have some rational cause.

The question is one of great importance and it will be one step towards its solution if we can ascertain the causes of disagreement, even though a basis for conciliation is not found. To this end it will be necessary to examine the respective scopes or objects of medicine and law, not purely as an academic question, but in the light of history and common usage.

The traditional aims and principles of the professions of law and medicine are very dissimilar. The doctor looks to the preservation of the individual patient and is bound and trained to use every effort towards this end. The lawyer's first duty, on the other hand, is to the public, for he "occupies a position of public trust" whose primary object

is "the furtherance of justice." He is not so much a defender of individual liberties as of the laws which guarantee them. Thus, for example, when a lawyer applies for a writ of *habeas corpus* he does so for the purpose of asserting and maintaining a fundamental law of the State, which he deems to have been violated, even though in effect he brings a benefit to his client.

Again, the sick man appeals to the medical practitioner as one who suffers and who must be helped and relieved, even though his disease is the result of immoral, illicit and illegal conduct. The criminal, instead, appeals to the legal practitioner (I omit those who prostitute law by conspiring with their clients for the miscarriage of justice) as one who inflicts suffering and menaces the order and stability of the State. The physician bends his energy to save his patient; the lawyer, as prosecutor, uses all his powers to destroy the malefactor.

Such being the respective aims of the two professions, it will be readily seen that if the question of mental responsibility for crimes were to pass from the juridic to the medical field, the tendency would be to change the point of view from that which sees in the criminal a law-breaker to that which recognizes him as a diseased unfortunate. Or, in other words, the power of abridging the right of liberty would in effect pass from the judicial tribunal to the bench of mental experts. I do not say that this would not be a distinct gain to the administration of justice, but I dwell upon it for the purpose of showing how strong arguments are possible on either side. The doctors say (and no thoughtful observer can deny it) "the courts are sending many men to prison and to death who ought to be confined in asylums." Or, in the words of Dr. Richardson before the

National Prison Congress of 1898, "There is in every institution a certain proportion of inmates who are epileptics, paranoiacs, imbeciles, or who are unquestionably suffering from various other forms of mental disease, such as acute and chronic mania, melancholia, paresis and the various forms of dementia." The lawyers reply (and there is much in their contention), "Will not your plan create too great a leniency for malefactors? Will you not in your solicitude for the individual evil-doer endanger the safety of society?"

There is a tendency among medical men to attribute the failure of lawyers to accept the medical test of responsibility to gross ignorance of mental conditions and phenomena. Such a charge is not wholly fair or deserved, for lawyers may admit the theoretical value of the medical test and yet reject it as a practical working theory. Our limitations in the methods of application of a perfect theoretic law through human instrumentalities may destroy its practical value. The medical experts in our courts (even allowing for the handicap of present restrictions in the law) have themselves furnished an argument against the theories they advance, for we have seen learned men "conscientiously testifying to diametrically opposite facts" and creating the impression that in the serene field of science theories may, at times, be conveniently modified to fit the demands of a fee. Moreover, we have authority for the statement that expert testimony (as at present in practice) is "in many cases wholly disregarded by the men in the box."

That the test of mental responsibility now on our statute books is clearly unscientific is beyond argument, but it does not follow that the formula suggested by mental experts is acceptable as a working test.

Another point to be considered as affecting this medico-legal conflict is that law and medicine represent distinct currents or forces of thought in the life of civilized States. Law represents conservatism and ad-

herence to rule and precedent; Medicine is essentially a positive science and inherently progressive. The decisions of the courts to a certain extent are based on logic and induction, rather than on observation of phenomena; as such they must necessarily be, to a great extent, immutable. This, in our day, may be only partially true (and fortunately so), but it is still an influence in judicial decisions. The antiquity of a medical formula, instead, is by no means a binding force on medical practitioners, but rather an objection to its use.

The difference in the point of view between the two professions undoubtedly strengthens the personal equation in the judgments of each which naturally exists as the result of their respective training, traditions and practice.

This mutually critical attitude is intensified by a cause which, though rather emotional than scientific, is by no means a negligible one. In a general way it may be said that the forces which are at variance in regard to the question of mental responsibility are separable not only professionally between the jurist and the pathologist, but also racially between the Latin and the Anglo-Saxon. The movement for the introduction of the medical test of responsibility in criminal law is the product of the teachings of the school of criminology which counts the greatest students among Latin scholars. Anglo-Saxons have a well-nigh instinctive and not always reasonable objection to what we call "foreign" theories, especially when they involve juridic questions and are advanced by people belonging to those nations which our masses imagine enjoy less liberty than we do. Hence any attempt to make the question of responsibility a pathological one will tend to be met by the emotional plea that if we take the power of life, liberty and property from the courts (which we justly consider the great preservers of our rights), and submit it to a medical tribunal, we weaken our defences in imitation of foreign systems.

Any curtailment of the power of the bench has always been opposed by public opinion, even when it was aimed to take from it the power to decide questions which necessitated the greatest specialized scholarship for a correct decision. Witness the long persistent fight that had to be waged before the bench allowed itself to be deprived of its power to "punish" insane criminals while, content in its erroneous assumptions, it branded idiots as malefactors and drowned old women as witches.

Another fruitful source of disagreement has been the failure to clearly define the elementary terms used respectively by the two professions. As I have elsewhere pointed out,¹ little can be accomplished until we fix the sense in which the technical terms of each profession are used. Thus the word "crime" has a distinct juridic meaning to the lawyer which is different from that given to that word by the criminologist and alienist. And so with "responsibility," "penalty," "disease," "degenerate," "moral," "premeditation," "consciousness" and many others.

All these causes of disagreement can and will be overcome. There is one barrier, however, that appears insurmountable, as to which, while it stands, law and medicine may declare a truce, but can agree to no terms of peace; I refer to that most ancient and greatest of questions—the freedom of the will.

The study of man from the physiologic standpoint has an undoubted tendency to make him, in the eyes of his investigator, a creature of forces beyond its control. Man in this aspect ceases to be a free agent in the eyes of the student; mind becomes solely the product of matter and subject to its limitations. To the alienist and psychiatrist who sees the mental power so intimately related to the physical organs and functions that injury or enfeeblement of these results in mental stagnation or death, the freedom of the will must appear as *pias fraus*.

Since Broca's time the localization of brain

¹ "Natural Law versus Statutory Law:" Address delivered before Society of Medical Jurisprudence, New York, 1899.

centres has become more than a mere guess, and this alone must be a powerful argument in the hands of the psychiatrist. Hence to the studious in this field the absorbing study of such phenomena must bring them to conclusions very much at variance with those of the metaphysician and the sociologist. It will hardly be denied that the tendency of psycho-physical study of man must be towards a denial of spirit.

Law, on the other hand, stands, pre-eminently for the freedom of the will. Without this as a foundation-stone juridic science has no existence, for the very test of juridic responsibility is man's power of choice. To this the juridic philosopher brings the sentiment of humanity, the teachings of metaphysics and the experience of history, which are repugnant to the physical measurement of the soul; he contends that after you have taken man's brain to pieces you have not yet found his mind; that molecular interaction may be demonstrated as the physical counterpart of thought, but it is not thought. He cannot see, in the words of Professor James, "how such a thing as our consciousness can possibly be *produced* by a nervous machinery," even though admitting that "if ideas do accompany the workings of the machinery, the *order* of the ideas might very well follow exactly the order of the machine operation."

I am not taking sides on this question; I am endeavoring to present the position of each party and its sources of strength. Unless we recognize this no fair judgment can be made. This is an age of specialization, and the curse of specialization is that it distorts proportions and narrows the horizon in mental life.

Medicine is essentially a positive science; it is based on the observation of physical phenomena. Law is one of the humanities; it is the "witness and external deposit of our moral life. Its history is the history of the moral development of the race." (Chief Justice Oliver Wendell Holmes, of Massachusetts.) The doctor and the jurist too

often forget the many-sidedness of man. The mental pathologist is dazzled by the discoveries regarding the physical basis of mind and his mental equation thereupon blinds his judgment. On the other hand, lawyers make too much use of logic, forgetting that the "life of the law has not been logic, but experience." (Chief Justice O. W. Holmes, "The Common Law.") "Fearful of rights which show no precedent, impervious to wrongs which time has hallowed, laden with responsibilities broad as life itself is broad, the law is most conservative in relinquishing error and in embracing truth." (Edward P. Payson.)

Can these opposing forces be turned into a common stream of usefulness? Can this medico-legal conflict be brought to a settlement which will be neither a mere working truce nor a concession to eclecticism, but an agreement based on reason and scientific data?

Mr. Edward P. Payson suggests a possible answer in his scholarly and interesting book on "Suggestions Towards an Applied Science of Sociology." It is to the effect that, without admitting or denying the spirituality of man, the question of mental responsibility in criminal law can best be solved by eliminating from it its animistic assumptions, and by making it a science of only sensible facts. A careful examination of Mr. Payson's book will show that his suggestions are not a concession to materialism, but an attempt to put criminal law on a scientific and practical basis.

But, independently of this, it will be one step towards an agreement, if law and medi-

cine will become mutually more tolerant, and will give to their opponents' views serious and impartial study.

The language of Dr. Carlos F. Macdonald is none too strong when he tells lawyers that "to set up a legal test or standard of insanity which is not in harmony with the teachings of medical science is a disgrace to jurisprudence and a travesty upon justice." (American Journal of Insanity, Vol. LVI., 1899.) On the other hand, doctors would do well to ponder over Mr. Payson's words when he says that law by its conservatism has "shunned many a quagmire, detected many a false light and stood fast against many an onslaught of ism and obliquity on the road of human progress."

Let neither the doctors nor the lawyers draw an impassable and inflexible line around their respective fields of investigation, but let them work in common for a common end. No mere doctor, and no mere lawyer, will be the one master that will solve the problem of mental responsibility in law; neither will it be a mere great specialist, nor a mere great scholar of one science. The Great Pacificator in this medico-legal conflict will be he who, truckling to neither party, respecting both, but fearing neither, will serenely and persistently strive for the study of man as he is in his many aspects, not as the manikin of a given school, nor as the idol of a close forum; it will be he, who, knowing the dangers and impracticability of endeavoring to solve human problems by adhering to theories and ideals, is nevertheless confident that without theories and ideals the hope and certainty of progress are idle and vain boasts.



THE NEW YORK FRIDAY CALENDAR.

BY ALBERT H. WALKER.

THE Friday calendar of the New York Supreme Court in the City of New York consists of a list of about seven hundred cases—out of the many thousands on the general calendar—from which number about one hundred and fifty are to be selected by the justice presiding at the call of the calendar and set down for trial on a day not later than one week after the call calendar. The calendar is designated the Friday calendar because it is called on Friday afternoons.

Calling the calendar is perhaps the most lively bit of legal and judicial procedure in this country. The work of the judge, of the clerk who assists him in "running the calendar," and of the lawyers who attend is most strenuous.

The calendar is called in one of the largest court rooms in the famous County Court House, which was built in Tweed's time. The room is about forty feet square with a seating capacity of perhaps two hundred. The call begins at two o'clock. Five or ten minutes prior thereto every seat is taken, and when the call begins all the aisles are full of lawyers and clerks standing. On good days there is hardly a foot of standing room vacant.

The assemblage is probably the most interesting and varied array of lawyers and clerks in this country. Neither Mr. Choate, nor Mr. Carter, nor Mr. Root, nor Mr. Coudert are there; but they and other big lawyers and law firms are represented by energetic young clerks whose chief instructions are to "get the Jones *v.* Smith case set for trial, sure," or to "keep the Jenkins *v.* A. T. & S. D. etc., Co. case off." The young lawyers are not always told how to accomplish the desired result. They are just to do it, and not to bother the partners or older clerks by asking what special reason exists

why a case should or should not be set for trial. To ask such fool questions argues, in the minds of some superiors, a lack of resource or nerve on the part of the clerk. The clerk might think out a reason for himself,—anyway, he is to do the act successfully. And, too, the call calendar is a sort of skirmish; it will do the young clerk good to think out a reason or special equity for his particular case, and when he finds that won't do, to get up on his feet before the judge and think out another one.

In addition to these clerks there are all sorts and conditions of lawyers, from the lowest shyster up through and including the woman lawyer and the young lawyer just starting for himself, to the middle-aged or white-haired lawyer who keeps no clerks, perhaps, and so attends in person. Many eminent younger members of the bar are present, and once in a while some greater legal light, fearful lest some important case may go wrong, is there in person to look out for the case. All told there are possibly three hundred, or more, lawyers present.

The scheme of calling the calendar is as follows: A certain number of cases, possibly about one hundred and fifty on an average, have to be selected and "set down for trial" in the various trial parts of the court. More than this number cannot be set down, because the trial parts can dispose of only about a certain number each week, and it does no good to get the trial parts congested with more cases than can be tried. This situation indicates the nature of the contest between the judge and the lawyers, and between the lawyers for the plaintiffs and the lawyers for the defendants. The judge is bound to get enough cases set for trial, but he cannot set down more than a certain number. Inasmuch as a case seldom gets in favorable position on the Friday calendar

until after it has been at issue many months, every lawyer for a plaintiff attends with the fixed purpose of getting his case set for trial. As the defendant seldom wants his case tried, every defendant's lawyer resolves that his particular case shall not be set down, if he can help it. In these many conflicting states of mind the judge and the lawyers and the clerks attend the call.

At two o'clock the judge and his clerk take their seats, and the clerk, who knows just about how many cases are required for the next week's work and knows, also, the calendar merits and equities of most of the cases, goes over the list a minute or two with the judge; and down in the very front row of seats three or four young lawyers may be seen "getting ready." They represent the law firms who handle the street railroad negligence cases. As each of these young men has anywhere from forty to ninety cases to take care of he must be alert. Most of the negligence cases are called at the very beginning of the calendar so as to dispose of them rapidly.

The call begins:

"Hogan *v.* Third Avenue R. R. Co.," calls the clerk.

"For trial the —th," (the earliest date possible), bawls the plaintiff's lawyer.

"Friday calendar the —d" (date three months later), pleads the defendant's lawyer.

"Trial the —th" (early date), says the judge.

"Murphy *v.* Metropolitan Street Railway Co.," sings the clerk.

"For trial the —th," howls Mr. Murphy's lawyer.

"That is satisfactory," answers the company's lawyer.

"For trial the —th," orders the judge.

"Itskatzkechowski *v.* Second Avenue R. R. Co.," rattles the clerk.

"Earliest day for trial," pleads the plaintiff.

"That case, if your Honor please—," puts in the defendant.

"All right, call calendar the —th" (date two months later), says the judge.

"Windgemundendorfer *v.* Metropolitan Street Railway Co.,"—the clerk.

"For trial,"—the plaintiff.

"Three months' call,"—the defendant.

"For trial,"—the judge.

All this is done as quickly as this can be read. The call proceeds with the crack and rattle of a Gatling gun. In a few minutes the negligence cases are disposed of, each defendant having possibly eight or twelve or fifteen per cent of his cases set for trial. In these cases it is give and take. There is little time for parley or arguments. The quickest man, provided he is polite, stands the best chance. This has been the skirmish.

Then comes the general engagement over the great array of contract cases. Here there is time for reasons, or for what the lawyers hope or think will appear to the judge to be reasons. The shorter and more concise the reason the better. Arguments as to the law of the case are suicidal. The judge wants a reason, not an argument. Here oratory is an impediment. Principles of law and eloquence are for the trial, not for the call. "State your reason," is the law of the call.

Lacking in reasons, many resort to devices, excuses, explanation or strategy. Sometimes it is strategy to let your opponent be too presuming, too insistent, too talkative. Then a little reason, concisely stated, wins. Often the talkative man demolishes his own case.

The devices and excuses are many and devious. Absence or sickness of the client, or of the attorney who is to try the case, pressure of important legal engagements of counsel, mysterious disappearance of the client or inability to communicate with him are all favorite excuses. Defendant actors and travelling men are "Out on the road," etc.

But the judge is a wise man, and the clerk is wiser.

"Your client is out of town; where is he?" asks the judge.

"He's—please your Honor, he's over on Long Island," replies the attorney.

"For trial the —th" (early date), replies the judge.

"This case, if your Honor please, is likely to be settled and we would like two months' adjournment," pleads a defendant.

"For trial," replies the judge, "that will expedite the settlement."

"My client has had an operation," pleads another.

"What was the operation?" asks the judge.

"I don't just know."

"One week's adjournment; find out," says the judge.

"My client has left the city, your Honor."

"When did he leave?"

"Yesterday."

"Humph, well, I will give you a week."

"Will your Honor please adjourn this case for two months?"

"Why?"

"I've been unable to locate my client. He's a travelling man."

"One week's adjournment. That will help locate him."

"I trust your Honor will not set this case down," says an important young lawyer.

"Why?"

"We have so many cases set we can't possibly try them all."

"Well, please your Honor," pipes up a boy's voice—for once in a while a boy answers the call—"won't you set that case for trial, 'cause our office hasn't any case on for trial."

"All right, my boy, for trial," says the judge, unwilling to close up an enterprising young law office.

"I'd like to have that case adjourned for six weeks, because my client is on the monitor ———, down the harbor," (this was in the Spanish war), says plaintiff's attorney.

"That's agreeable to us," says the defendant's lawyer, "for my client is doing duty on the same boat."

"All right," says the judge, "perhaps they will settle it."

Now the young man from Evarts, Choate & Beaman engages in conflict with the young man from Hoadly, Lauterbach & Johnson. The latter insists that it is exceedingly important that the case be set for trial. The young man from Evarts, Choate & Beaman attempts to convey the impression that Evarts, Choate & Beaman will go to the wall, if the case is set for trial.

The judge becomes anxious. "What is this case all about?" he inquires.

The young man from Hoadly, Lauterbach & Johnson is not fully informed. But he was to get the case set for trial and he is bound to do his best.

"What's it all about?" persists the judge, turning to the young man from Evarts, Choate & Beaman. "Well, your Honor, it is, I think, something about a contract," replies the latter.

"Humph, one week adjournment to give you all a chance to find out what it is about," says the judge.

Now the young woman lawyer, with the big curling feather in her hat, pleads for speedy justice for her client. The case is set for trial at an early date, and the defendant's lawyer looks disgusted and stunned. Oddly enough, all the other lawyers are smiling.

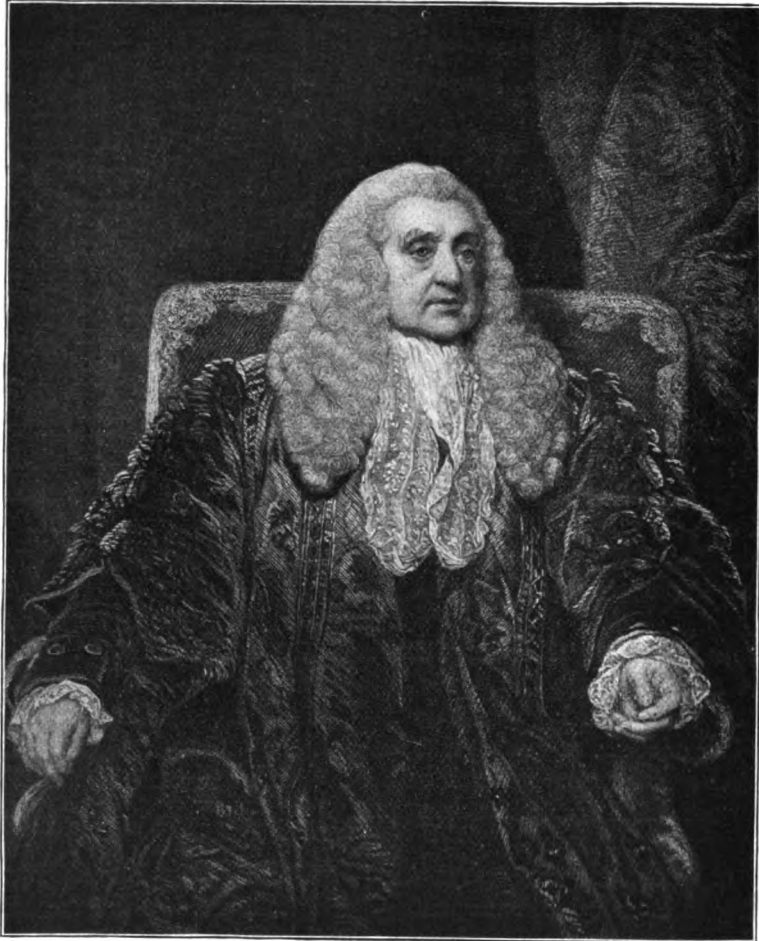
Then a mere boy, frightened into rapid speech, pleads frantically that his case be adjourned for many months.

"Why?" asks the judge—it is always "why" with him.

"Please, your Honor, I don't know, but they told me down at the office to get it set off as far as possible."

"That means the earliest day possible for trial," replies the judge; and everybody wonders what will happen to the little boy "down at the office."

So the call proceeds—full, once a week, of varied and amusing incidents, good nature, clever devices and able retorts. On the whole, probably, quite substantial justice is dealt out.



LORD STOWELL.

A CENTURY OF ENGLISH JUDICATURE.

III.

BY VAN VECHTEN VEEDER.

THE ECCLESIASTICAL AND ADMIRALTY COURTS.

PROBATE, matrimonial and admiralty affairs were administered for centuries by the civilians; but they left few records of their labors. As a system of judicial precedents this jurisdiction is the creation of the nineteenth century. The causes of this late development are mainly historical, and require a brief sketch of the administration of the civil law in England.

When the complete union of church and state was dissolved by William the Conqueror, the machinery of the ecclesiastical jurisdiction fell principally into the hands of the bishops, subject, of course, to the final appellate jurisdiction of the Pope. It may be said, in passing, that the Pope was an omnipotent court of first instance for all Christendom. A litigant appealed to the Pope for a writ or breve, just as in secular matters he went to the King's chancery; and although such appeals were regarded with disfavor, and were subjects of hostile legislation from the time of the Constitutions of Clarendon, they continued to a large extent until the Reformation. But with what we now understand to be the proper jurisdiction of the ecclesiastical courts — the maintenance of doctrine and the regulation of the clergy — I shall not deal.

I propose only to give a brief sketch of their jurisdiction in matters of probate and divorce. When the lay and spiritual courts became distinct, the church claimed jurisdiction in two classes of cases which had important consequences in after times: (*a*) where a clerk was accused of a felony, and (*b*) where the matter was of a spiritual nature. The claim of spiritual jurisdiction was for centuries a matter of great importance. It assumed jurisdiction of course with respect to

churches and the clergy, but the bishops also claimed the correction of the laity *pro salute animae*. So far as this claim dealt with such immorality as was untouched by the civil courts, it was not seriously contested prior to the Reformation: Persons were convened for intemperance, unchastity and all kinds of irregularity of life, and were compelled, under pain of spiritual censures, excommunication and minor penalties, to do penance and pay fines, and, if they refused obedience, they might be imprisoned under the writ *de excommunicatio capiendo*. But the pretensions of the church under this head included perjury, slander and breach of contract, where civil remedies co-existed. The examination into contracts where faith was alleged to have been pledged or broken, though regarded with jealousy by the civil courts, was continued till the Reformation; its cognizance of suits for defamation was not formally abolished until 1856.

By far the most important part of its jurisdiction, however, was with respect to matters of probate and matrimony. The matrimonial jurisdiction rested on the sacramental and religious character of the ordinance, and was undisputed. As a sacrament marriage was, under the canon law, indissoluble, and so continued until the Reformation, from which time Parliament undertook to grant divorce *a vinculo matrimonii*. But the ecclesiastical courts could grant divorce *a menso et thoro* so far as regarded anything subsequent to the marriage, and it would, during the lifetime of the parties, decree a nullity of marriage for any canonical disability.

The right of the King, as *parens patriae*, to the disposition of the goods of intestates, was, upon the severance of the civil

and ecclesiastical jurisdictions, granted to the church. The theory probably was that a spiritual person would be more likely than another to apply the dead man's goods for the benefit of his soul. It followed that the persons who had the administration of an intestate's goods acquired the right to investigate any circumstances which would deprive him of the benefit of administration, such as a testament made by the deceased person; and the competence of the church to compel the executor to carry out the testator's directions was firmly established before Glanville wrote. Just when the church acquired this jurisdiction over wills and intestacies is uncertain, but it is mentioned in Magna Charta and was spoken of in 52 Henry III as then being of great antiquity. To the fact that this jurisdiction never extended to real property, to which the King always succeeded in virtue of his feudal position as lord paramount, is due the anomaly, existing for centuries, that the probate of a will deals conclusively only with personal property.

The bulk of the testamentary and administrative business was then, as now, chiefly non-contentious. It was transacted by a number of spiritual courts or chambers scattered throughout England, the diocesan courts of the bishops, and the courts of the Archbishops of Canterbury and York. The Court of Delegates was for a long time the court of final appeal. This court was composed of doctors of the civil law and judges, and gave no reasons for its judgments. It was abolished by 2 and 3 William IV, from which time the judicial committee of the Privy Council was the court of final appeal in all matters governed by the procedure of the civilians. The judges of the spiritual courts were appointed by the prelates or other functionaries over whose tribunals they presided. They were occasionally lawyers, but more often clergymen. At the beginning of the nineteenth century the principal ecclesiastical business centered around the Doctors' Commons, where a close body of advocates

and proctors enjoyed a monopoly. As part of this system, governed by the procedure of the civilians, the admiralty court now requires notice.

The admiralty jurisdiction is of great antiquity. It seems to have been an ancient court in the time of Edward I, when we first find traces of it. (Inst. IV, 400.) It was then the Court of the Lord High Admiral of England and was held on shipboard in a summary way, *velo levanto*. The first admiralty ordinance of which we have any record was issued by Henry I, and dealt mainly with wrecks. Richard I, under whom were first published the sea laws of Oleron (so called from the island of that name where they were promulgated), speaks of the court of admiralty as being then a court of record. We have about this time records of the decisions of various naval commanders relating principally to the manning of the King's ships and the punishment of various offenders; but the judicial power of the admiral does not appear to have extended beyond his own command. The first considerable admiralty jurisdiction in ancient times seems to have been exercised by the Lord Warden and Bailiffs of the Cinque Ports, who for many generations dealt with questions arising on the high seas involving the rights of foreign nations and charges of piracy. Questions of charter-party, freight or other contracts were of course dealt with by the itinerant justices, when the ships of the parties were within the territorial limits of a county. The admiralty jurisdiction was reconstituted on a more definite basis by Edward III, in consequence of the difficulty in dealing with piracy and with spoil claims by or against foreign sovereigns. The matter was brought forcibly to Edward III's notice when he had to pay out of his own pocket damages for outrages committed on his allies, the Genoese, by his own subjects.

When, therefore, in 1340, the battle of Sluys gave him the supremacy of the sea, he established a High Court of Admiralty, under the Lord High Admiral of England, to

keep the peace of the seas, as his courts of common law kept his peace on the land,—so as “to maintain peace and justice amongst the people of every nation passing through the sea of England.” Conflict having arisen between this court and the local courts of certain seaports, like Ipswich and Padstow, which also administered the law maritime, the authority of the Admiral was, in the reign of Richard II, placed upon a distinct statutory basis, and from that time forward the court has exercised jurisdiction over all causes, matters and persons maritime. In order that the court thus constituted, with authority to decide on international as well as English rights, should have definite principles and a recognized practice to guide its deliberations, there was prepared during the reign of Edward III or Richard II the Black Book of the Admiralty. This book is a quarto volume of some 250 MS. pages, written partly in French and partly in Latin, containing chapters on the duties and privileges of the Lord High Admiral and how he should conduct his court; on the crimes and punishments of the admiralty, with a transcript of the laws of Oleron; forty-nine articles or sea laws adopted by maritime experts at Queensborough in 1375; on the practice of certain foreign courts, and the Duke of Norfolk’s treatise on the law and practice of the duello.

This book was continued under succeeding sovereigns down to Edward IV, by whom, in 1482, the first judge of the admiralty court was appointed by royal patent in the person of Dr. William Lacy. Until the accession of Henry VIII the admiralty exercised both civil and criminal jurisdiction, by virtue of the royal prerogative, and was independent of the common law courts. From the numerous documents relating to its judgments and jurisdiction to be found scattered through the records of other courts and offices, and from the regular records of the court, which begin in 1524, it is possible to gather some idea of its work. Some of the more common classes of business were spoil or piracy

cases, its original jurisdiction; wrecks, salvage and deodand, and torts committed on the seas. The most conspicuous part of its business, from an historical point of view, consisted of mercantile and shipping cases, in which it exercised jurisdiction as early as the latter part of the fourteenth century. This jurisdiction appears to have been very extensive. As the common law gave no remedy in cases of contracts made or torts committed outside the body of a county, the admiralty undertook to supply this deficiency. Under this head of foreign contracts it even took jurisdiction of marriages and wills. Indeed, the law merchant which it administered, particularly with reference to bills of exchange, bills of lading and charter parties, appears to have been far more fully developed than in the common law courts. This fact occasioned much friction with the superior courts of common law, and in the reign of Henry VIII the powers of the admiralty were much curtailed by various statutes enacted in the interest of the common law courts. From this time on its jurisdiction was rigidly confined to strictly maritime affairs.

The admiralty continued to assert its jurisdiction over claims for necessaries and materials supplied to ships and over charter parties; but unless the contract was actually made and the goods actually supplied on the high seas, the Court of King’s Bench issued prohibitions without mercy, for the admiralty was not a court of record, and did not become so until 1861. The common law courts, furthermore, encroached upon the admiralty jurisdiction by means of a fictitious allegation that the contract was made at the Royal Exchange. Thus the jurisdiction of the Admiralty over contracts and torts of a transitory character gradually fell into disuse. It was not until the enactment of various statutes from 1840 to 1868 that its earlier jurisdiction was to a large extent restored.

The sittings of the court were originally held within the ebb and flow of the tide; in

the time of Henry IV at a wharf in Southwark, and in the time of Henry VIII at Orton's Quay, near London Bridge. In 1597 part of the Church of St. Margaret-on-the-Hill was used, and here it was that Pepys attended the sittings of the court. The entry in his Diary gives us a characteristic portrait: "To St. Margaret's Hill in Southwark, where the Judge of the Admiralty come and the rest of the Doctors of the Civil law, and some other commissioners, whose commission of oyer and terminer was read and then the charge given by Dr. Exton, which we thought was somewhat dull, though he would seem to intend it to be very rhetorical, saying that justice had two wings, one of which spread itself over the land and the other over the water, which was this admiralty court. I perceive that this court is but yet in its infancy, and their design and consultation was—I could overhear them—how to proceed with the most solemnity and spend time, there being only two businesses to do, which of themselves could not spend much time." The court finally established its local habitation at Doctors' Commons under the shadow of St. Paul's, where all matters governed by the civil and canon law thereafter centered.

While the main stream of legal business flowed through the Inns of Court and Westminster Hall, here in the quiet backwaters of the Doctors' Commons the College of Advocates placidly pursued their scholastic vocation for more than two centuries. In 1672 the College itself was entirely rebuilt. It contained a dining hall, a garden, a fine library of civil and canon law, a quadrangle formed by the chambers and residences of the doctors, and a handsome court where the scarlet robed advocates sat in a raised semicircle, the judge in the midst of them, while the proctors occupied a table below. In their cloister-like seclusion the learned doctors caused scarcely a ripple on the surface of legal affairs; no report was issued of their proceedings, and to the world at large they were unknown. From this obscurity the

ecclesiastical and admiralty jurisdiction was rescued by the genius of Lord Stowell.

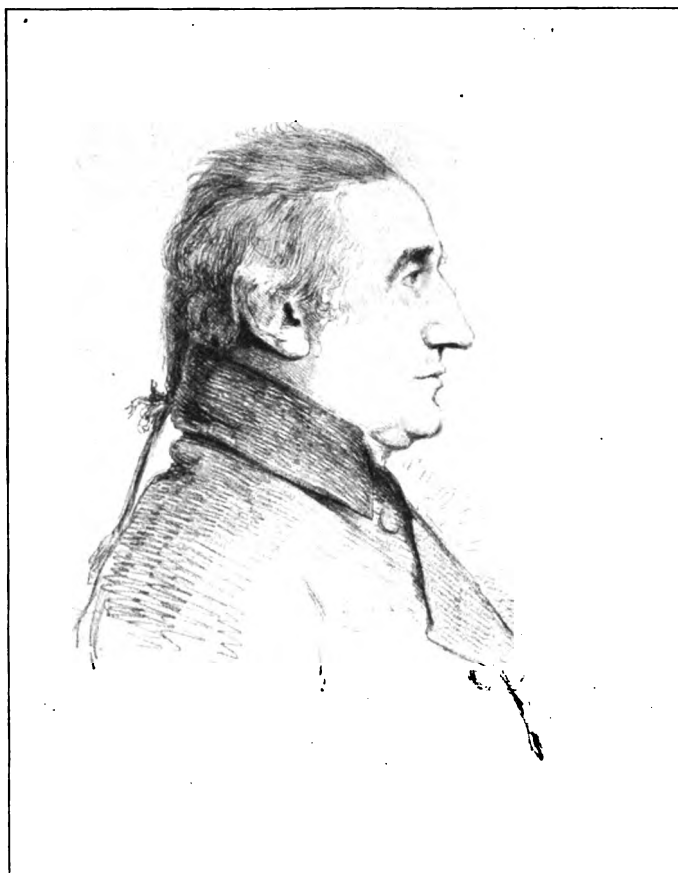
The brothers William and John Scott, who were destined in after life, as Lord Stowell and Lord Eldon, to make such lasting impression on their chosen branches of English jurisprudence, were strikingly dissimilar in mental temperament. The strength of intellect which in the case of Lord Eldon was applied with indefatigable industry to the confinement within rigid limits of the doctrines of a remedial system, was employed by Lord Stowell in laying the foundation of the law of the sea in accordance with the principles of universal justice.

Lord Stowell was a man of the most scholarly attainments, the friend of Johnson, Burke and Reynolds, and in touch with the intellectual movements of his time. The cosmopolitan sources of the civil law, which he originally studied as part of a liberal education—its philosophical, literary and historical associations—led him to adopt it as a vocation. The choice was most happy. He had the good fortune to live in an age peculiarly calculated to exercise and exhibit his great faculties. The greatest maritime questions that have ever presented themselves for adjudication arose in his time out of those great European wars in which England obtained the sovereignty of the seas. Most of these questions were of first impression, and could be determined only by a cautious process of deduction from fundamental principle. The genius of Stowell, at once profound and acute, vigorous and expansive, penetrated, mastered and marshalled all the difficulties of these complex inquiries, and framed that great comprehensive chart of maritime law which has become the rule of his successors and the admiration of the world.

His first judicial service was performed as judge of the Consistory Court of London, where for ten years he delivered discourses on the regulation of the domestic form which would have excited the admiration of Addison for their taste and of Johnson for their

morality. In this jurisdiction, involving the most sacred rights of individuals and the best interest of society, his benevolent wisdom is indelibly recorded. Such cases as *Dalrymple v. Dalrymple*, on the nature, origin and sanctity of marriage; *Evans v.*

of warmth and sensibility in each of their tempers; the husband is occasionally inattentive; the wife has a vivacity that sometimes offends and sometimes is offended; something like unkindness is produced, and is then easily inflamed; the lady broods over



SIR WILLIAM SCOTT, AFTERWARDS LORD STOWELL.

Evans, the first great case on cruelty; *Loveden v. Loveden*; *Sullivan v. Sullivan*, and many others to be found in the contemporary reports of Haggard and Phillimore, are rare specimens of legal philosophy and practical ethics. In the case of *Evans v. Evans*, for instance, he gives this picturesque analysis of matrimonial infelicity:

“Two persons marry together, both of good moral characters, but with something

petty resentments, which are anxiously fed by the busy whispers of humble confidants; her complaints, aggravated by their reports, are carried to her relations, and meet perhaps with a facility of reception from their honest, but well intentioned minds. A state of mutual irritation increases; something like incivility is continually practicing, and where it is not practiced it is continually suspected; every word, every act, every look has a

meaning attached to it; it becomes a contest of spirit, in form, between two persons eager to take and not absolutely backward to give mutual offence. At last the husband breaks up the family connection, and breaks it up with circumstances sufficiently expressive of disgust; treaties are attempted, and they miscarry, as they might be expected to do in the hands of persons strongly disaffected toward each other; and then for the very first time a suit of cruelty is thought of; a libel is given in, black with criminating matter; recrimination comes from the other side; accusations rain heavy and thick on all sides, till all is involved in gloom and the parties lose total sight of each other's real character, and of the truth of every fact which is involved in the cause."

He then benevolently proceeds to point out to the parties the limits of his powers:

"The humanity of the court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its means merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Everybody must feel a wish to separate those who wish to live separate from each other, who cannot live together with any degree of harmony and, consequently, with any degree of happiness; but my situation does not allow me to indulge in the feelings, much less the first feelings, of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether these reasons exist in the present case. To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom and that real humanity that regards the gen-

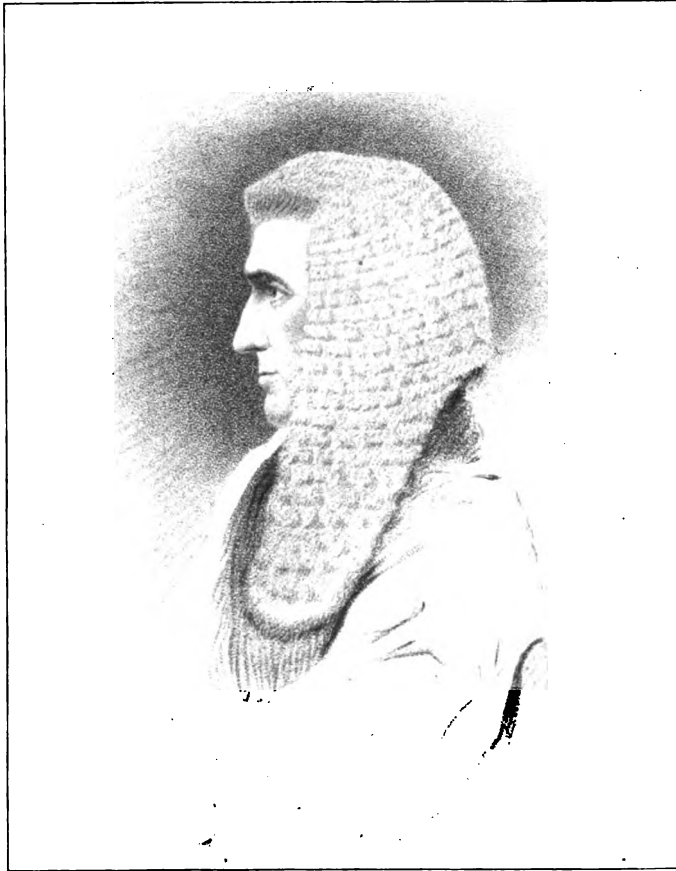
eral interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."

But the highest sphere in which he exercised his faculties was the court of admiralty, where for a period of thirty years he was rather a law-giver than a judge. Except a few manuscript notes of Sir E. Simpson, some scattered memoranda among the records of the Tower, and occasional references to tradition and personal memory, there were no precedents for his guidance in adjudicating upon the novel cases arising in the most important war of English history, involving millions of property and comprehending the rights of settlers in the most distant regions of the earth. He was free to be guided by the writers on Roman, canon and international law, and by the historical material with which his wide reading had made him familiar. At the same time the unequalled variety of cases which came before him gave him the

opportunity of giving unity and consistency to a whole department of law.

The legal interruption to navigation which both belligerent parties may create against neutrals, the rights of joint captors, cases of unlawful detention and seizure, the force and

points his judgments are still the only law; and little popular as they were at the moment among Americans, who often suffered by them, they have since been accepted by our courts as authoritative. Fortified by a store of knowledge at once profound and exten-



S. LUSHINGTON.

construction of different treaties, the existence of an actual blockade, the condemnation of merchant ships for resisting search, questions of domicile, the extent of the protection of cartel, the extent of territorial claims, the validity of orders in council—these are among the subjects adjudicated by him with such unerring accuracy that, though often appealed from, it is stated that not a single one was reversed. Upon many maritime

sive, combining all the materials that indefatigable research, close and minute observation and intense study could provide for the supply of an acute, vigorous and capacious mind, the judgments of Lord Stowell in international law have passed into precedents equal, if not superior, to those of the venerable authors of the science, Puffendorf, Grotius and Vattel. His work, like theirs, was animated by the spirit of universal jus-

tice. "I trust," he said in the celebrated case of the Swedish convoy, 1 C. Rob. 349, "that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me; namely, to consider myself stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nature holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally here in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting in Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question."

"If ever the phrase of being luminous could be bestowed upon human compositions," says Brougham, "it was upon his judgments." Aware of the value of his productions he bestowed extreme care on their preparation. In a few instances his language may seem somewhat stilted; the attention to diction may occasionally degenerate into purism; but the symmetry and elegance of the whole confirm Lord Lyndhurst's opinion that it is as vain to praise as to imitate him.

Probably his finest performance, from all points of view, is his luminous exposition in the case of the *Gratitudine*, 3 C. Rob. 240, of the power of the master of a vessel to hypothecate her cargo. But is little, if any superior to the following: The *Maria*, the case of the Swedish convoy, 1 C. Rob. 340; the case of the *Slave Grace*, 2 Hagg. Adm. 94; the

Jane and Matilda, 1 Hagg. Adm. 187; the *Neptune*, 1 Hagg. Adm. 227; *Le Louis*, 2 Dods. Adm. 210.¹

The regular reports of the Ecclesiastical and Admiralty Courts begin with Stowell. Haggard's Consistory Reports contain Stowell's decisions as judge of the Consistory Court. Dr. Lee's Reports, covering the second quarter of the eighteenth century, are mere notes of cases in the Arches and Prerogative Courts of Canterbury and in the Court of Delegates. Stowell's Admiralty decisions were reported, in turn, by Robinson, Edwards, Dodson and Haggard. Of these the reports of Sir Christopher Robinson, Stowell's successor in office, cover the most important period, and are of the highest authority. The earlier decisions of the Admiralty have since been collected from various sources by Marsden. Those from 1776 to 1779 are contained in Mariott's Reports.

Stowell was followed in succession by Sir Christopher Robinson (1828-33), and Sir John Nichol (1833-38), whose short service was respectable, but not particularly distinguished.

The next judge of this court maintained the high standard set by Stowell. Lushington (1838-67) was a man of high character, vast learning and sound judgment, who, during a service almost equal to that of Stowell in duration, administered the varied duties of his court with such accuracy and good sense that his judgment was seldom appealed from and rarely reversed. "All who ever

¹ The following is a fairly comprehensive list of his most important contributions to international law: The *Santa Cruze*, 1 C. Rob. 50; *Mercurius*, *ib.* 80; *Frederick Molke*, *ib.* 86; *Betsy*, *ib.* 93; *Flad Oyen*, *ib.* 135; *Hendrick and Maria*, *ib.* 146; *Columbia*, *ib.* 154; *Mentor*, *ib.* 179; *Jouge Margaretha*, *ib.* 189; *Hoop*, *ib.* 196; *Two Friends*, *ib.* 271; *Vrow Margaretha*, *ib.* 336; *Maria*, *ib.* 340; *Immanuel*, 2 C. Rob. 186; *Indian Chief*, 3 C. Rob. 12; *Portland*, *ib.* 41; *Twee Gebroeder*, *ib.* 162, 336; *Inuan*, *ib.* 167; *Atlas*, *ib.* 299; *Bremen Flugge*, 4 C. Rob. 90; *Anna Catharina*, *ib.* 107; *Fortuna*, *ib.* 278; *Venus*, *ib.* 355; *Phoenix*, 5 C. Rob. 20; *Carlotta*, *ib.* 54; *Boedes Lust*, *ib.* 233; *Anna*, *ib.* 373; *Orozambo*, 6 C. Rob. 430; *Atalanta*, 6 *ib.* 440; *Neptunus*, 6 *ib.* 403; *Madison*, Edwards, 224; *Coylon*, 1 Dods. 505; *Eliza Ann*, *ib.* 244; *Fanny*, 2 Dods. 210; *Le Louis*, *ib.* 210.

heard one of those luminous expositions of law," says a contemporary, "must remember the effect produced in court when, often without taking time to consider his judgment, Dr. Lushington would deliver one of those masterpieces of judicial wisdom and legal learning which rank him among the first of English jurists." With respect to maritime law in particular his name is permanently associated. The ancient jurisdiction of the admiralty was largely restored by various statutes during his tenure, and it was finally made a court in 1861. Then the Crimean war, bringing in its train many questions of the rights of neutrals, blockade and contraband of war, enabled him to build up a high reputation as an authority on in-

ternational law. The ecclesiastical controversies of his time, arising out of the ritualistic movement in the English Church, were also determined by him with broad minded liberality.¹

¹ Some of Lushington's conspicuous cases in Admiralty are: *The Milan*, Lush. 388; *Franciska*, 2 Spink's Adm. and Ecc. 1; *Banda and Kirwee Booty*, L. R., 1 A. and E. 109; *Batavia*, 9 Moo. P. C. 286; *Europe*, Br. and Lush. 89; *Pacific*, ib. 245; *Helen*, L. R., 1 A. and E. 1.

In matrimonial affairs see *Dysart v. Dysart*, 3 Notes of Cases, 324; *Williams v. Brown*, 1 Curt. 53; *Braithwalte v. Hook*, 8 Jur. (N. S.) 1186.

His principal ecclesiastical cases are: *Williams v. Bishop of Capetown*; *Westerton v. Liddell*; *Ditcher v. Denison*; *Burder v. Heath*; *Bishop of Salisbury v. Williams*; *Gorham v. Bishop of Exeter*; *Long v. Bishop of Capetown*; and the *Colenso case*.

A STRENUOUS AFFIANT.

BY HALE K DARLING.

A NAME frequently found on the Court records of Orange County, Vermont, in the closing years of the eighteenth century, is that of Seth Burbank, of Thetford. He appears to have been what might well be termed a "contagious critter." Not only did he frequently sue — he more frequently *was* sued. Outside of his profession as a litigant, he got out spars and masts and floated them down the Connecticut river, — that is, in the rare intervals when he was not in the county jail on mesne or final process.

But his great specialty was the making of affidavits. He wrote a fairly good hand for the times, and had been at law so much that he had acquired a good degree of fluency with respect to legal phrases, — particularly those commonly used in affidavits; and, though he had three attorneys of record, he always made his own affidavits.

During the August term, 1797, of the Supreme Court of Judicature, held at Chelsea, he boarded and lodged in the county jail. On the docket at that term he appears

as a party in five cases, and on almost every day of the session (which ran into September) he prepared and sent into Court at least one affidavit.

Isaac Bayley was then clerk, and it seems that he did not take these documents very seriously. The docket contains no entry showing that they were filed, and I found them tucked into a box in such shape as to indicate that they were put there to be got out of sight. It looks as if Brother Bayley got sick of receiving and filing them, for on the back of one of more than usual bulk are endorsed, in the clerk's handwriting, the words, "The Last Groans of Burbank."

From a large stock of these efforts of said Burbank, I have selected one affidavit, to serve as a sample of all. The reader will not fail to note certain peculiarities in spelling and in the use of capital letters, by no means uniform, which may indicate either that Burbank didn't know any better or that he was a genius — take your choice. I give him the benefit of both theories.

Hear him:—

"I Seth Burbank of Lawful age testifi and Say I have in my apinion a Good and metereal or Substantial defence in a action and Sute wherein Samuel Halkins and Samuel Raynols are pls and I am Dft and I set out as mutch as 4 or 5 weeks before the Siting of the County Court holden at Chelsey within and for the County of Orring in June last to Go to Connecticut and the Massachusetts Bay to obtaine evedance for this Cause and another cause to wit Joseph Dwight a gainst me pending in Sd Court and also a nother Cause pending before Israel Convis Esq Jus Pas and whitch was I Belleive sofitiant time to make all needful preparation in Sd action.

But I was tacon Sick at Hartland in this State and Lay there sick with the Collick 2 weeks and attended by a fesetion and then totally onable to make preparation in this part of the Contery and I prey to sd County Court to continu sd Cause until the then next term with a proper Depotion stateing these facts but could not prevaile and was a Bliged to appeale Sd Cause on a Demur and could not Give a proper plea on the mearits for want of the Coppys of a former tryal in the Superior or Supreme Court whitch the want of Health had Deprived me of obtaineing.

But I Rote down the hole Substance of the Plea that I ment to and now wish to Give in and presented to Mr. William Kibbe Esq who was then attending sd Court as atto for the plfs in Sd Cause So that the Pls mite have sofitiant Oppertunety to obtaine any Evidance they had in Sd Cause.

I Sot out from home the next Monday after Sd Court Rose to Go after witnes or Depotions for this Cause and the other two above mentioned, but went first to Newborough and got the Coppys to make Sd plea by and was advised by Counsel Larned in the Law to Git my witnes first and then have the plea made, and I proceeded after Sd witnesses whitch in the hole Causes a bove mentioned were Scattered from the upper Cowas at Lancaster and down in to Connecticut and premiscersly in every State on each

Side of Sd River, one in Wilmington in this State and in the State of Masechusets Bay as far east as twenty five miles to the Southard of Boston, and one was Removed to Albany Whitch I did not go after for want of time.

And I proceeded after those in Connecticut Maschusets and that at Wilmington and usd the utmost of my abiltes to obtaine Sd witnesses and to Return without delay as Loos of time and Returned as far as Hartland in this (state) the Last day allowed by Rules of this Court for Giveing or deleving a plea, and Mr. Pane was not at home who is one of my attos in Sd Couse and I feering Lest I Should not find Mr Marsh at home who is a nother of my atts I applyed to Oliver Gallop Esq to make Sd plea that I might deliver it to one of their Attos but he said by vewing my Defense said it was Good but he did not dare Risk his abilities to make a plea Lest it Sould be defective and advised me to Go to Charles Marsh Esq he said he was at home.

I went on to Mr. Marsh at Woodstock and found him Sick totally onable to make it or do any Business of importance and it was to Late then to Go to any other atto and Git it done to deliver that day to the plfs atto.

And on my way home I applyed to Mr. Jedediah P Buckingham to Receive Sd plea but he would not and I have not had time to Git Sd witnes from Albany nor the upper Cowos.

I therefore Humbly prey and move youre Honours that you will order and decre that the plfs to wit Samuel Halkins and Samuel Raynols or there attoos to wit Daniel Buck and Jedediah P Buckingham Esqs Shall Receive a plea the form and substance of whitch all But Stateing Sd Records I did Shew to the Sd Kibbe their sd atto and Gave him notis that I should plead a former judgment in the or this Supreme Court as a Bar to one of the Accounts set up in their Declaration whitch judgment above mentioned was Rendered at the Setion of the Supreme Court at

Newbary in the county of Orring in Sept Last and I also prey your Honours, that sd cause may Be Continued to next term that I may be able to make all the nesecery preparation for a defence whitch I Bellieve I can do soon after the Riseing of this Court if Sd plea is Received and sd Case Continued as I in duty bound shall ever prey.

Dated at Chelsey this 30 day of August, 1797.

Seth Burbank.

Chelsey County of Oring Solicet August the 30: 1797 then Personally appeared Seth Burbank Siner to the foregoing Deption and

made Solemn Oath that the facts there in Contained are true before me.

Tim Bartholomew, Justis of Peace."

From the entries on the docket it would seem that this display of eloquence had the effect of obtaining leave for Burbank to file his plea, but he "could not prevaile" on the Court to continue his case. It was tried by jury Sept. 2, 1797, with the following result:

"In this action the jury say that the Plffs from having and maintaining their action thereof agt the Defendt. ought not to be barred and therefore find for the Plffs \$81.33 Damages & their costs.

Abner Chamberlin, Foreman."

LEAVES FROM AN ENGLISH SOLICITOR'S NOTE BOOK.

XI.

PERJURY:—IS IT EXCUSABLE UNDER ANY CIRCUMSTANCES?

BY BAXTER BORRET.

(Registered at Ottawa in accordance with the Canadian Copyright Act.)

OUR English marriage laws are, I fancy, as good as those of any other country, perhaps better, yet I think I dare bet with perfect safety that I could (by way of a practical joke), present myself before the proper functionary in London, swear to an affidavit that I, Rawdon Crawley, of some fictitious address in some parish, desired to marry Rebecca Sharp, of another fictitious address in another parish; that we were both of us of full age (or, in the alternative, that the parent or guardian of the said Rebecca Sharp consented to the marriage), and that she and I had been living in the two parishes named for the preceding fifteen days, and that on payment of the fees I could obtain a license from the Bishop of London to marry the aforesaid lady; and, further, that if I could induce any lady of my acquaintance to adopt the name of Rebecca Sharp for the occasion and proceed with me to the church

mentioned in the license, she and I could be married in those names with all the ceremonies of the Church of England, and our names would thereupon be entered forever in the marriage register of that church, and a copy of the entry then made would, in due course, be transmitted to the General Registry in Somerset House, and remain there on record forever; and that no one would hinder us on the way, or molest us at any time afterwards. It is true I should have to swear to the fact of full age (or the consent of the parent or guardian), but I have never heard or read of a case in which a person falsely swearing to those facts has been subjected to a prosecution for perjury; and in no case would a marriage be set aside as invalid on the sole ground that one, or both of the parties, was stated falsely to be of full age. The worst that could happen would be in the case of the infant being a ward of the

Chancery Court, in which case the offending party would probably find himself committed to prison for contempt of court, until such time as he purged his contempt by executing a proper settlement of her fortune. To speak seriously, I do not think sufficient precautions are taken in the matter of issuing marriage licenses to make assurance of the facts sworn to on making the application.

But I am writing a story of my own professional experience, not a treatise on the deficiencies of the English marriage laws.

One morning about thirty years ago, there was considerable excitement in Coburg House, a well-known millinery store in Georgetown. Miss Constance Morgan, the prettiest girl employed in that large establishment, was missing, and no one knew where she had gone to. I had known her almost from her infancy; her mother was the widow of a clergyman who had died young, leaving his wife and little daughter, Connie, as she was called, almost entirely unprovided for. The mother had faced the world bravely, and, being clever with her needle, had succeeded in driving the wolf of starvation from the door, and later on had made money enough to give little Connie a fairly good education; then death knocked at the door and claimed the mother, and Connie was left on her own resources, without any near relative to take care of her, at the early age of sixteen. But she had all her mother's spirit, as well as her deftness for plying the needle, and, young as she was, she made application to the heads of Coburg House, and was taken in as an assistant in that house. Four years afterwards she mysteriously disappeared from Georgetown, first, however, leaving a letter for me to say that, though she was leaving without calling to see me, she could never forget all my kindness to her mother and to herself (poor girl, there was little I had done to thank me for), and that she would write to me before long to tell me where she was, and what she was doing. This was not very satisfactory; she had

grown up to be a very lovely young lady, and I feared that her very beauty might prove a snare to her; but so far as I knew, her conduct had always been excellent, and her demeanor was always modest and quiet. So all I could do was to call on the head of Coburg House, show him the letter so as to stop scandal, and wait for the next news of her, and hope for the best in the meantime.

One Sunday morning shortly after this I was seized with an unaccountable impulse to take a walk over the hills which overhang Georgetown, to the pretty village of Compton, of which a kind old friend and client, Archdeacon Harrison, was the rector. I timed my walk so as to reach the little church, one of the architectural gems of the county, in time for the morning service. I noticed at once that my old friend looked ill and feeble, his voice, usually crisp and firm, faltered, and at last he came to a dead stop; then rising in his place and speaking with difficulty, he told his little flock that he was ill and unable to continue the service, and asked them to go home and offer up their prayers for their afflicted minister. I hastened forward, and helped him to leave the church, and in the vestry, his daughter (the ministering angel of the parish ever since her mother's death a few years previously), helped him to disrobe, and between us we got him safely into his library at the rectory, and I mounted on one of his horses as fast as I could to summon his medical attendant from Georgetown. There was no time for asking questions, but I learned from his daughter that he had that morning received a letter which had caused him great trouble. The doctor called at my house on his return, and told me that the good old archdeacon had had some slight seizure, which had now passed off leaving no cause for immediate anxiety, though there might be danger of another and more serious attack if any sudden excitement of mind should occur, of which he had warned Miss Harrison, so nothing more remained to be done at present, and that there was no occa-

sion to summon his only son, George, from London. This son, George, had at one time been a pupil in my office, though only for a short time, as he had made up his mind to go up to London and keep his terms at the Temple and read for the bar. George was a fine fellow, a gentleman in every sense of the word; he had been a great favorite at his college, a good athlete, and a first-rate cross-country rider. His only fault that I had ever discovered was a disinclination to work, which had caused some little trouble between him and his father; but latterly, he had become more industrious, so I learned, and I was in hopes that he would be called soon and enter on his career, in which I had every reason to hope he would succeed.

It was only a few days after this that I received a letter from my London agent announcing that George was lying dangerously ill at his lodgings in Bernard Street, London, and that it was urgent that his father should go up at once if he wished to see him alive; and the letter ended with a postscript which added greatly to my anxiety, "Did you know that he is married? A young lady who calls herself his wife is nursing him with great care and attention, but we had never heard of his being married." Married! No, I certainly was not aware of it, and I felt sure his father knew nothing about it, or he would have told me. There was only one thing for me to do, to go out to Compton at once, and break the news of his illness as gently as I could to his father. I took his doctor out to Compton with me, as I feared the shock of the bad news would bring on another attack of illness, but I kept the question of the marriage to myself. We got over our task better than I had expected. I cannot put down all that passed, but I never realized before how far a good man of holy life is removed above the sphere of the trouble and worry of the smaller cares and anxieties of daily life, and lives in a region not so far off the other life in which his hopes and thoughts are centred. But when I took Miss Harrison aside, and asked her,

privately, whether she had any reason for supposing that her brother had married, I found that I had touched a secret grief, for she burst into a flood of tears, and told me that she feared that if he had married at all, he had married unwisely and unworthily, for he had said nothing to his father or to herself about it, but that an ugly rumor had reached the rectory, as to which, out of pity for her father, she had not spoken to him since his attack of illness on the Sunday when I had visited them. She implored me very earnestly to set my other business aside and travel to London with her father, so as to be with him in case of another attack of illness. I had not the heart to refuse her urgent entreaty, and a few hours later the archdeacon and I were speeding up to London as fast as the afternoon express could take us. My position was, as my reader will see, a very delicate one. Was I bound to tell the archdeacon of the postscript to my agent's letter? Suppose I said nothing about it, how could the presence of the mysterious nurse be accounted for? I was still young in the practice of my profession, but I had already begun to study the art of diplomacy, so needful to all lawyers, as, for example, how to cautiously approach a delicate subject in apparently careless conversation, with a view to discover how much the other party really knows. As soon as we were alone in the railway carriage, I managed to say a few apparently careless words as to my fear that this illness would stop George's being called to the bar for some little time, saying I had every reason for hoping he had a good career before him, and that if only he could find a good, sensible wife of the right sort, who would help him and not hinder him in his work, I hoped he would settle down and have a bright and happy home of his own. I watched the archdeacon's face closely as I spoke these careless platitudes, and I saw he was struggling with some thought; then, evidently nerving himself to his task with a strong effort, he asked me whether, in the course of my life, I had ever received an

anonymous letter. The question took me by surprise, and I answered that I had received several, but had always considered them not worthy of notice, and only fit to be burned; and then I asked him if he had ever received one in all his life which was worth a second thought. Then, with some little hesitation (remember I was but young as compared with my traveling companion), he produced from his pocket one which, so far as I can now recollect, was in these words: "Do you know that that precious scamp of a son of yours has seduced a young shop-girl and is now living with her in London." This, he told me, was the letter which he had received on the Sunday morning when I had gone out to Compton, and which had brought about his sudden attack of illness. The ice being now broken, I showed him the postscript to my agent's letter, but at that moment our conversation was interrupted by the stoppage of the train at a wayside station, and the unwelcome intrusion of a stranger, so that further private conversation was impossible; but just before our journey's end, we were again left alone. I had been meditating deeply what I should say next, but I was relieved from all doubt by the words which the archdeacon spoke in firm, clear tones: "Mr. Borret, if my son has wronged the girl he must marry her, and you and I must see to it before it be too late; he must not stand before the judgment seat of heaven with that sin staining his soul." How infinitely small the man whose life and being belong to the other world makes us feel who pride ourselves on our philosophy as men of the world. The miserable platitudes with which I had thought to palliate his son's conduct vanished like an unextinguished street lamp before the clear light of morning, which flashed from the steady eye of the good old archdeacon, and I shrank from it, abashed by its clear shining.

I had telegraphed to my agent that the archdeacon would travel up by the afternoon express, and asking him to get a comfortable lodging for him as near his son's

as possible, intending myself to go to my old favorite hotel, Wood's in Furnival's Inn. On our arrival at Paddington Station, we went at once to Bernard Street, where we learned that George was still alive, but that he was passing through the critical stage of the fever, and the next few hours would probably decide the momentous question of life or death. As the landlady of the house had prepared a comfortable room for the archdeacon in the same house, I felt that my further presence in the house of sickness would be an undue intrusion, so, after commending him to her care, and obtaining her promise that she would summon me from my hotel without delay, if anything made it desirable, I started off for Wood's, when, just as the door was closing on me, I caught sight of a face on the stairs, for one moment only and it was gone; and it was not until I was in the cab hastening on my way to Wood's that I recalled the face. It was the face of Connie Morgan, and no other.

Oh, Connie, pretty, Connie! so pure, so modest, as I thought you to be! How could you do it? Why did you not confide in me as your friend before it was too late? Well, well, it may be all right yet, and it shall be, if I have my own way, and if there be time. But will there be time? Yes, a special license will do it, and it can be had at any time from the Archbishop's Registry, the Faculty Office in Doctors Commons. But then Connie is not of full age, and has no natural guardian to give consent, and there is not time to get a special guardian appointed, still less to get his consent. Dare I suppress my knowledge of the fact that she is under age? Yes, I will run all risks in such a case, even if I go so far as to tell a white lie to the good archdeacon, I am sure Heaven will forgive me.

So the thoughts chased through my brain, and my firm resolve was made before I lay down to sleep; and my conscience when I awoke the next morning approved my resolve of over-night. My reader may sit in judgment upon me, I do not fear his verdict.

As early as possible, I called at Bernard Street to learn that the archdeacon and Connie had divided the night watches between them, that George was still tossing on his bed unconscious, and that the only hope for him was to fall into a long restful sleep. I returned to Wood's to get my breakfast and to read the few letters which I expected from my clerk; and now occurred something like the evolution of a "Comedy of Errors." First and foremost amongst my letters was one forwarded on to me from Georgetown by the last mail of the previous evening, and judging from the many postmarks which it bore, it had been delayed several days on its way through being insufficiently addressed; as there are several Georgetowns in England, and the letter had been sent to two of them before it reached my office. The letter was from Connie herself.

"Dear Mr. Borret:—I sit down to fulfil my promise of writing to you, but you must not let any one know what I am writing to you. I am married, and living in London, but I am under a solemn promise to my husband not to let any one know whom I have married, and he says you last of all. We have loved each other secretly for some time, and at the last he overcame all my scruples, and I came up to London and was married to him privately in St. Pancras Church near here some weeks since. I find that he made a mistake when he applied for the license, for he said I was of full age, but he really did not know that I was not, and there was no time to come back and ask the question. I hope it does not make any difference, because I shall be of full age in four months from now; but please let me know, for, of course, it makes me feel anxious. I am sorry to say he is unwell to-day, with a little attack of feverish cold, but I hope it will soon pass off.

"You can address your letter to me here as Mrs. G. H., and I shall be sure to get it.

Yours very respectfully,
 CONNIE H.,
 (formerly Connie Morgan".)

There was now no need to commit perjury, or tell white lies—the deed had been done, and no court of law in England would set the marriage aside. But how was I to enlighten the archdeacon, and get him to suspend the stern reproof which I felt sure he would feel himself bound to administer to poor Connie. I hurried back to Bernard Street, and arrived just at the time that George was regaining consciousness on waking up from his sleep of fever. I overheard the feeble voice of the patient calling from his sick bed, "What! my dear old dad! You here! Is it a dream; in mercy let me sleep on;" and then I heard a tender voice, "God bless you, my boy; I am here, go to sleep again;" then after a little while a faint sound of suppressed sobbing, and, looking into the room, I saw the old archdeacon on his knees beside the bed, and George wrapped unconscious in calm sleep.

My task was easy in getting the former to overlook George's only fault, his want of filial duty in not confiding more in his father. The doctor, too, spoke warmly in praise of Connie's devoted nursing, which he said had undoubtedly gone far to save George's life. In a few years' time it was Connie's privilege to share with Miss Harrison the loving task of nursing the old archdeacon in his last illness, and of smoothing his dying pillow.

But I hear my reader asking, What about that anonymous letter? who sent it after all? We none of us know the depths to which a disappointed woman will descend. The letter was sent by one whose love for George, if love it could be called, was not reciprocated by him, and this was her act of revenge. It is no part of my duty to moralize for the enlightenment of readers of THE GREEN BAG, but those who have followed my story will readily see that George's carelessness of the old precept, "Avoid all appearance of evil," very nearly brought a respectable lawyer to connive at willful perjury, and (a more serious matter) nearly brought honored gray hairs with sorrow to the grave.

THE LAST TRIAL FOR WITCHCRAFT IN IRELAND.

BY JOSEPH M. SULLIVAN.

ON March 31, 1711, Janet Mean, of Braid Island; Janet Latimer, Irish-quarter, Carrickfergus; Margaret Mitchel, Kilroot, Catherine McCalmond, Janet Liston, alias Seller, Elizabeth Seller and Janet Carson, the four last from Island Magee, were tried in the County of Antrim Court for witchcraft. Their alleged crime was tormenting a young woman called Mary Dunbar, about eighteen years of age, at the house of James Hathridge, Island Magee, and at other places to which she was removed. The circumstances sworn to on the trial were as follows:

The afflicted person being, in the month of February, 1711, in the house of James Hathridge, Island Magee (which had been for some time believed to be haunted by evil spirits) found an apron on the parlor floor, that had been missing some time, tied with "five strange knots," which she loosened. On the following day she was suddenly seized with a violent pain in her thigh, and afterwards fell into fits and ravings, and on recovering said she was tormented by several women, whose dress and personal appearance she minutely described. Shortly after that she was seized again with like fits, and, on recovering, she accused five other women of tormenting her, describing them also. The accused persons being brought from different parts of the country, she appeared to suffer extreme fear and additional torture, as they approached the house. It was also deposed that strange noises, as of whistling, scratching, etc., were heard in the house, and that a sulphurous smell was observed in the rooms; that stones, turf, and the like, were thrown about the house, and the coverlets frequently taken off the beds, and made up in the shape of a corpse; and that a bolster once walked out of a room into the kitchen, with a night-gown about it! It like-

wise appeared in evidence that in some of her fits three strong men were scarcely able to hold her in bed; that at times she vomited feathers, cotton yarn, buttons and pins; and that on one occasion she slipped off the bed and was laid on the floor, as if supported and drawn by an invisible power.

The afflicted person was unable to give any evidence on the trial, being during that time dumb, but had no violent fits during its continuance.

In defence it appeared that most of the accused were sober, industrious people, who attended public worship, could repeat the Lord's prayer, and had been known to pray both in public and private; and that some of them had lately received the communion.

Judge Upton, in charging the jury, noted the regular attendance of the accused on public worship, remarking that he thought it improbable that real witches could so far retain the form of religion as to frequent the religious worship of God, both publicly and privately, which had been proved in favor of the accused. He concluded by giving his opinion, "that the jury could not bring them in guilty, upon the sole testimony of the afflicted person's visionary images." He was followed by Justice McCartney, who differed from him in opinion, and thought the jury might, from the evidence, bring them in guilty, which they accordingly did.

This trial lasted from six o'clock in the morning till two in the afternoon, and the prisoners were sentenced to be imprisoned twelve months, and to stand four times in the pillory in Carrickfergus.

Tradition says that the people were much exasperated against these unfortunate persons, who were severely pelted in the pillory with boiled cabbage stalks, and the like, by which one of them had an eye beaten out.

The Green Bag.

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THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.

No one can read the principal addresses delivered on the fourth of February without experiencing a feeling of satisfaction that the leaders of our bench and bar of to-day rose to the great occasion, and expressed in fitting manner the well-deserved tribute to the memory of John Marshall, on the one hundredth anniversary of his accession to the bench. No other legal event in the history of this country has brought forth such eloquent utterances. In recognition of the high character of these orations, and to meet the widespread interest in them among the members of the legal profession, the April issue of THE GREEN BAG will be a Marshall number. The entire body of the magazine will be devoted to John Marshall day addresses, copies of which the distinguished orators on that occasion have courteously placed in our hands. It will be impossible, of course, to print in full all of these orations; but by a careful selection of the salient parts of the several addresses, it is hoped to present, as a connected whole, a comprehensive study of the life and work of the great Chief Justice. Such a review of his life and work by the men best fitted for the task—the distinguished and learned authors of these addresses, the foremost men on our bench, at our bar and in our law faculties—will have, we believe, permanent value.

THE unfortunate juror at last has found an outspoken champion in high quarters. The sharp comments on the present jury system by Mr. Justice Brewer in one of his recent lectures at the Yale law school have attracted wide attention. If the newspaper reports are correct, the learned lecturer said: "The present jury system is little more than a relic of a semi-civilized system. The juror is treated as a criminal, or as if it was feared he would become one. He is watched by day and locked up by night.

I hope the time will come when the juror will be treated as if he were an honest man and when he will be paid adequately." These words will strike a responsive chord in the hearts of all unfortunates who have served on a jury, and it is to be hoped that their utterance may lead to some practical result. It is not unreasonable to hope that this may be the case, in view of the weight which his large experience at the bar and on the bench will lend to Mr. Justice Brewer's words.

How would it do to give the members of the bar a dose of jury duty? If legal difficulties stand in the way of that, the bar, or those members of it in state legislatures and congress, might be locked up over night in a jury room. One such experience would be enough to bring about some, at least, of the reforms asked for.

THE following note from a valued contributor explains itself:

BOSTON, February 23, 1901.

My dear Sir: My attention has been called to an error on page sixty of the February number of the THE GREEN BAG, where through an inadvertance, unpardonable or otherwise, I wrote: "In *Cohens v. Virginia*, 6 Wheat. 264, the Chief Justice held an act of Virginia unconstitutional which was incompatible with a constitutional act of Congress." As a matter of fact, the constitutionality of the act of Virginia was supported, and it was held not to be repugnant to the act of Congress involved in that case and upon which the plaintiff in error relied.

I have the honor to be

Yours very truly,

FRANCIS R. JONES.

This is an instance of the curious slips made occasionally even by the most careful and scholarly writers.

ONE of the perquisites, so to speak, of an editorial chair, is the privilege of receiving priceless advice and cheerful damnation from anonymous correspondents. Such unsigned communications have, as a rule, the virtue of refreshing frankness—in all things but one. Why this reticence as to the identity of the writer? Why, for example, should our good friend, the author of

the following epistle, leave us guessing as to which one he is of our many "Old Subscribers"?

EDITOR OF THE GREEN BAG.

My dear Sir:— Will you allow me, as an old subscriber, to suggest that you give us less pictures and more "entertaining" matter. The last two numbers have not contained anything humorous, and hardly anything entertaining. Many of the illustrations have been repetitions of those heretofore published in the magazine, and consequently have not the charm of novelty. I hope you are not going to let THE GREEN BAG fall away from its standard of the past.

Very truly yours,

February, 7, 1901. "AN OLD SUBSCRIBER."

Can it be that our correspondent is such a slave to habit that, having been accustomed to find his humorous and entertaining matter labeled "Facetiæ," he fails to recognize what he is in search of, now that the familiar heading has been dropped? Let him pluck up courage to read the "Notes" in which his favorite column has been merged, in deference to the spirit of this age of combinations. We can assure him that "Facetiæ" by any other name will read as well. And if he wishes to be really strenuous in his search for the humorous, let him follow this tip,—hunt for an excellent joke concealed in one of this month's book-reviews. The illustrations to which our correspondent objects are, we take it, the collection of portraits of John Marshall, in our last number. We supposed, innocently, that it might be of interest, at a time when the accession of the great Chief Justice to the bench was being celebrated all over the country, to have brought together, for easy comparison, several of the best portraits, even though some of them had been published in our pages from four to nine years ago. Our critic is to be congratulated either on his excellent memory, which enables him to carry clearly in his mind portraits seen years before, or on having a file of THE GREEN BAG at his elbow and the leisure to hunt up the scattered illustrations. Some of our readers may not be so fortunate. But after all, helpful as is the letter quoted above, there is one further step which its writer should take; to wit, to contribute, from time to time, his fair share of "humorous and entertaining" matter. Fortunately he knows exactly what should be published in our pages; and we beg to assure him that his contributions will be welcomed.

NOTES.

IN an insurance case on trial in Vermont it was brought out that on the farm in question there had been two barns, and that it was the older one of the two that had been burned. Charles Bingham, who was fairly well along in years and very bald, was trying the case for the defendant company, and in his cross-examination sought to bring out the fact that the expression "old barn" and "new barn" were used merely as convenient designations, without necessarily implying that the burned barn was much older or in poorer condition than the other. The witness seemed drowsy and stupid, and kept reiterating the statement that it was the "old" barn that had burned.

"See here," said Mr. Bingham at last, with some warmth, "you keep saying that it was the *old* barn. What do you mean by that? Wasn't it in pretty good condition? Tell me what you mean by old."

"Well, squire," said the witness, rousing up, "the barn *was* old, and it needed shingling about as badly as you do."

RUFUS CHOATE, it will be remembered, died at Halifax, N. S. His body was conveyed by rail to St. John, N. B., thence by steamer to Boston. While it was being carried from the station to the pier in St. John it was followed by a large concourse of curious people. The gathering attracted the attention of persons in a building on a side street at the head of which it was passing.

"Hello!" said one of them. "What's the crowd about?"

"I'll go and see," volunteered a lanky, retired sea-faring man turning a quid of tobacco in his mouth.

Accordingly he went to the corner and inquired of a passer-by the cause of the commotion.

"Lawyer Choate," was the laconic reply.

Returning to his friends, he spat out his tobacco, sat on the edge of a work bench, and with a half exultant grunt exclaimed, "Only a darned lawyer choked."

At a recent criminal session a deputy inspector of police was on the stand, and in the most matter-of-fact way testified as follows:

"I was walking up the street when I saw the dip fanning a woman. He touched leather, took it, ducked round the corner, and weeded it; and then ran."

"Mr. Officer," said the judge, severely, "the court is about to take a recess of ten minutes. When the court returns, you will be good enough to give your testimony in English."

This the officer did, explaining that he had seen the thief feeling around for the woman's pocket; that he found it, took her pocket-book, and went around the corner, where he took out the money and threw away the pocket-book; after which he ran.

The deputy inspector's unconscious use of slang, in the above anecdote, recalls the following account of an English court proceeding, as told by an exchange. The defendant sued the plaintiff for driving over him. On the plaintiff stating that the defendant was driving at the rate of thirty miles an hour, the following colloquy ensued:

DEFENDANT. What are you bloomin' well talking about? I'm a costermonger, not a Great Eastern express.

JUDGE. Couldn't the horse go the pace?

DEFENDANT. Lord, shouldn't I like to see him! I buy my knackers thirty bob a time!

JUDGE. What are you?

DEFENDANT. A costermonger, bloomin' white-heart cauliflowers and fish. I was never near the place.

COUNSEL. But weren't you fined for this at the police court?

DEFENDANT. The blessed judge found me a pound and costs in a muddling case. I wasn't there!

JUDGE. You are the most innocent man in London. Judgment for the plaintiff for £10.

UNDER the act for the better prevention of cattle-stealing in Natal, the word "cattle" is defined as including, *inter alia*, ostriches.

A LAWYER of the Lynn, Mass., bar recently appeared before the court in Fall River in an accident case. Having been educated in medicine as well as in law, he was able to introduce into his argument an unusual amount of medical learning, which impressed the court, the bar, and

apparently the jury; for one of the jurors, dropping in a day or two afterwards at the office of a local lawyer, said to him, in sober earnestness, "What a powerful lot of medicine that Lynn lawyer knows. I should think he must have been studying up pretty near the whole of Lydia Pinkham's Works."

THERE hangs from the chandelier in the law library in the Penobscot county court house, a peculiar object, as viewed from the floor, says Holman Day, in the *Boston Advertiser*. Closer inspection shows that it is an old black pipe. A clay pipe. It has been there for months and it will probably stay there.

The oldest member of the Penobscot bar is Hon. Josiah Crosby or Dexter, now well along in the eighties.

Now, Squire Crosby smokes the strongest pipe in Maine. He has no use for a pipe that is a degree less black than ebony. When he goes to court he picks out his best pipe, and that is his blackest one. Such a one he took with him to Bangor on a trip some months ago. He sat down for a quiet smoke in the law library before his case came on—for he is still in active practice notwithstanding his age. When he was called to the court room, he laid his pipe down on a table and hastened away.

Some of the lawyers spied the curious black object. Its stem was stubby, it was absolutely as black as ink and its fragrance was so pronounced that it was almost a visible smell. The lawyers decided that Squire Crosby's pipe was in all ways as unique as its owner. They concluded that the relic ought to be suitably preserved. Therefore one of the young attorneys was sent out around the corner to buy a few yards of ribbon. Then the pipe was draped, and was suspended from the great chandelier in the room.

At recess, Squire Crosby came back with nervous, eager tread, his sharp little eyes peering and snapping as he looked for his pipe. He couldn't find it, though it swung above his head. It didn't occur to him that any such honor had been done his old T. D. He finally sadly concluded that some vandal had thrown it away. And he'd had it eleven years, and had just got it to tasting right!

THE death of the queen and the accession of Edward VII, have been the occasion of several interesting notes in the English law journals. For example, the *Law Times* points out that, in strict accuracy, there was a distinction between the right by which the queen ruled in England, and that by which she ruled in Ireland. She "ruled in England by parliamentary right by virtue of 6 Anne, c. 7. In Ireland, by a statute passed in 1542, the king of England was declared king of Ireland. This inseparable dependence of the crown of Ireland upon that of England, was generally expressed by the maxim that whoever was king *de facto* in England was king *de jure* in Ireland." At all events, whatever authority could rightfully dispose of the English crown disposed also of the Irish crown. When the English parliament, in 1702, by the act of settlement, excluded from the succession the elder branches of the line of Charles I, and settled the crown upon the descendants of the Princess Sophia, no corresponding statute was passed by the Irish parliament. The Irish parliament in this instance distinctly recognized the right of English authority to dispose of the Irish crown. An act was passed reciting the English act of succession, and visiting with the penalties of high treason any one who opposed the succession as directed by that act. It was admitted that the English parliament had the right to dispose of the crown of England, and, in exercising that right, disposed of necessity of the Irish crown."

The same journal, citing "Blackstone's Commentaries," fifteenth edition, p. 223, that "The heir apparent to the crown, is usually made Prince of Wales and Earl of Chester by special creation or investiture, but, being the king's eldest son, he is by inheritance Duke of Cornwall without any new creation," adds: "According to the notes to that edition by Mr. Christian, the principality of Wales has not been confined to the heir apparent, as Queen Mary and Queen Elizabeth, when in turn heiresses presumptive to the throne, had the title conferred on them. The same learned note informs us that it was solemnly determined in 1613, upon the death of James I's eldest son, Prince Henry, that Prince Charles (afterwards Charles I) was Duke of Cornwall by inheritance. On the other hand, if the eldest son died, leaving issue, the Duchy of Cornwall could not then go to the sec-

ond son, but would revert to the crown, as the Duke of Cornwall must be not only the king's eldest son, but also heir to the crown. So strange is this mode of descent that, according to the same authority, if it had not been created by an act of the legislature, it would have been void, as the king's charter could not alter the rules of descent."

On the re-settlement of the civil list, one of the first questions with which the new parliament will have to deal, the *Law Journal* says: "Down to the time of the Revolution, at the end of the seventeenth century, the sovereign conducted the financial business of the country on revenues derived from the crown lands and from taxes, which at the commencement of each reign were settled for life on every successive sovereign. If the amount was more than sufficient for the purpose, the sovereign appropriated the balance. If there was a deficiency, he looked to his faithful Commons to make it good. On the Revolution, however, a different system was introduced. Parliament took into its own hands the entire naval and military expenditure, for which annual provision was made, and settled on the sovereign an annual sum for his personal use and to defray the expenses of the civil service. The charges which were to be paid out of this fund were included in a list—called the civil list, so as to distinguish it from the naval and military estimates. George III, on his accession to the throne, surrendered to the public the hereditary revenues arising from the crown lands, the excise, and the post office, in exchange for an income of £800,000 a year, and a similar surrender has been made by each of his successors. It was held by the House of Lords in the case of *The Lord Advocate v. Douglas*, in 1842, that this surrender does not operate beyond the life of the sovereign making it. From the time of George III, the charges that had to be defrayed out of the civil list were steadily diminished. William IV was relieved of all strictly public charges, except a sum of about £23,000 for secret service money. The charges in the civil list at the end of the reign of Queen Victoria embraced the following items: Privy purse, £60,000; salaries of the household, about £131,000; household expenses, about £13,000; royal bounty, about £13,000; pensions, about £25,000; unappropriated, £8,000."

As to the constitutional position of a queen consort, the *Law Journal* has this to say: "The status of a queen consort always differed from that of married women in general. She was considered in law as a *femme sole*. By an act of Henry VIII, passed in 1540, she was enabled to take grants from the king, and to sue or be sued in her own name, with the addition of 'Queen of England.' The power of acquiring and disposing of property conferred on her by that statute was confirmed by 39 and 40 George III, c. 88, ss. 8 and 9. The queen consort is a public person, and the courts take judicial notice of acts of parliament relating to her. She has a separate court, and ceremonial offices and officers distinct from the king. She appears in the courts by her own attorney and solicitor general. Although she is only a subject, the compassing or imagining her death is high treason. Provision was formerly made for her by certain reservations and rents out of the demesne lands of the crown, and out of what was known as 'queen gold'—the portion of any sum paid by a subject to the king for a grant of office or franchise. But this matter is now regulated by statute."

There seems to be some difference of opinion on the question whether the "silks," who have had the letters Q. C. appended to their names, become at once, on the accession of the king, king's counsel. "With the death of Queen Victoria the suffix Q. C. disappears," says the *Law Times*. But "whether in technical accuracy such an immediate change"—from Q. C. to K. C.—is justifiable seems to the *Law Journal* to be somewhat doubtful. "The legal position seems to be strictly this. Certain members of the bar, in numbers not a few, were by letters patent under the great seal of the late sovereign appointed as her majesty's counsel learned in the law. The office of queen's counsel, being held at the pleasure of the Crown, would formerly have been vacated by the demise of the Crown. By virtue, however, of the statute of 6 Anne, c. 41, s. 8, every person in such office is continued in office for six months after the demise of the Crown, unless sooner removed by the new sovereign. The terms of his majesty's recent proclamation confirm this statutory renewal of office held under the Crown. But it is to be observed that the result of the statute and the

proclamation is merely to effect an extension of office for six months without in any way changing the title of functions of the holders of such offices. It would seem, therefore, that those who in the last reign attained the dignity of silk are still correctly described as Q. C.'s being in fact by virtue of their patents her late majesty's counsel. They will, it is submitted, only become king's counsel after patents have been issued to them under the great seal appointing them as such. That this is so seems clear when it is recollected that it is competent to the king to refuse to sign the warrant for the issue of the patent to any particular individual, as indeed was demonstrated on the demise of Queen Caroline, when George IV, for personal reasons, refused to appoint Brougham and Denman as king's counsel, they having held the appointments of attorney-general and solicitor-general respectively, to Queen Caroline. The appointment of a queen's counsel is from the terms of the patent creating it purely a personal one. No mention is made therein of the successors of the Crown, and a queen's counsel on the demise of the queen, can no more become a king's counsel than one of her late majesty's physicians can become one of his majesty's physicians otherwise than by express appointment."

It is interesting to recall that the first "counsel learned in the law" of a sovereign was a queen's counsel,—Sir Francis Bacon, on whom such an appointment was for the first time conferred in 1604, by Queen Elizabeth. Until 1831 the office carried with it a yearly fee of £40; and until that time "a member of parliament who was a barrister vacated his seat in parliament, on being appointed king's counsel or queen's counsel, thus showing that the appointment was regarded as an office under the crown."

Edward VII, is a bencher of an Inn of Court, but has never taken "silk." "The Middle Temple," to quote the *Law Journal* again, "now enjoys the distinction of having the king among its benchers. His majesty became a bencher in 1861, immediately upon joining the Inn." He is also senior honorary bencher of the King's Inn, Dublin.

On Victoria's accession it was contended that the Court of King's Bench should retain its name, on the ground that a queen regnant was *de facto* king as exercising the kingly office.

LITERARY NOTES.

In a recent small volume¹ well worth reading, M. Alfred Rambeau, a senator of France and a recognized authority on Russian history, has given a brief presentation of Russia's development, her aims, and the probabilities of her success. M. Rambeau outlines the origin and growth of the Russian State, pointing out that so far as territorial expansion in Europe is concerned, all the wars undertaken by Russia in Eastern Europe, from Peter the Great, in 1711, down to Alexander II, in 1877, have brought but meagre results, and venturing the opinion that the present Emperor is convinced that "in the direction of the Danube, of the Black Sea, and of the Aegean Sea the destiny of Russia is fixed for a long time to come."

But while, in Europe, Russia seems willing to act in harmony with the "European Concert," in Asia she has, on the contrary, followed a very decided and emphatic policy, acting in entire independence of that "Concert." It is the latter part of the book before us, dealing with the expansion of Russia in Asia, that has especial and immediate interest in view of current events in the Far East. While her progress in Europe, as is pointed out, has been the cause or the result of serious wars, Russian expansion in the East has been accomplished without a war with a power of the first rank, not excepting China. Her despotic form of government has made possible a consistent political policy, constantly pressing toward one goal, but urged with a prudence which M. Rambeau terms "wholly Oriental." One important element in Russia's success in Asia has been that Russian colonization does not exterminate the aboriginal races — it absorbs them, the Russian colonists adapting themselves to their environment and assimilating with the native peoples.

Mr. Rambeau, perhaps naturally, attaches undue importance, as it seems to us, to the Russian alliance with France, outlined in 1891, and proclaimed some half dozen years later. That alliance, he thinks, assured the safety of the European frontiers of Russia, and also furnished her with the money needed to push her designs in the East. Certain it is, however, that since then

¹ THE EXPANSION OF RUSSIA: Problems of the East and Problems of the Far East. By Alfred Rambeau. Burlington, Vt.: The International Monthly. 1900. Cloth.

Russia has made long strides toward the realization of the object for which she has been striving for centuries — access for her fleets to seas free from ice. To quote the book before us, "She is about to inaugurate a new era in her history; the oceanic, the world-wide era, is merely beginning for the Slav."

IN LAST SONGS FROM VAGABONDIA,¹ Mr. Carman has expressed so accurately what our feelings are each year "about this time," as the almanacs say, that we cannot forbear quoting two or three stanzas from the verses entitled "A Spring Feeling."

I am too winter-killed to live,
Cold-sour through and through.
O Heavenly Barber, come and give
My soul a dry shampoo.

.
I want to find a warm beech wood,
And lie down, and keep still;
And swear a little; and feel good;
Then loaf up on the hill,
And let the Spring house-clean my brain,
Where all this stuff is crammed;
And let my heart grow sweet again,
And let the age be damned.

We beg Mr. Carman to accept the apologies which we owe him for quoting these verses, rather than some of far more merit in this same volume; for instance, the admirable lines to the memory of Philip Savage. The pieces credited to Mr. Hovey are good, as was all that he wrote; but in the earlier volumes of "Songs from Vagabondia," rather than here, his best things are to be found.

RECEIVED AND TO BE REVIEWED LATER:

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES. By Francis Newton Thorpe. In three volumes, 1765-1895. Chicago: Callaghan & Company, 1901. Cloth \$7.50 net.

THE LAW AND POLICY OF ANNEXATION. With special reference to the Philippines, together with observations on the status of Cuba. By Carman F. Randolph, of the New York Bar. New York: Longmans, Green & Company, 1901.

¹ LAST SONGS FROM VAGABONDIA. By Bliss Carman, and Richard Hovey. Designs by Tom B. Meteyard. Boston: Small, Maynard and Company. 1901. Boards.

NEW LAW BOOKS.

A TRANSLATION OF GLANVILLE. By *John Beames, Esq.*, of Lincoln's Inn. With an Introduction by *Joseph Henry Beale, Jr.*, Professor of Law in Harvard University. John Byrne & Co., Washington, 1900. Law sheep, \$3.00. (xxxix. + 306 pp.)

The beginning of the reign of Richard the Lionhearted — 1189 — is the moment beyond which legal memory does not run. Yet from beyond that point — a few days, it may be, or possibly two years — comes the book entitled "Glanville de Legibus Angliæ," the earliest classic of the English law. To-day this old book comes for the first time from an American press, being, very appropriately, the earliest volume of a Legal Classic Series which has been planned by an enterprising publisher in reliance upon the scholarly tastes that now and then are found in even the most worldly lawyers, — for, after all, ours is a learned profession. Thus it is now easy for the lawyer to place upon his shelves, next to the latest volume of the Century Digest or of the statutes, if he likes, the work that must forever stand at the head of the long procession of English and American law books.

Glanville has profited, and must always profit, by the interest that attaches to the earliest example of any sort of achievement. Yet he has better claims than that he is an antique curiosity. He does not give the law of to-day, to be sure; but he does give, accurately and clearly, the law of an age as to which any intelligent man may well enjoy knowing something. One is tempted to say that Glanville comes from the very time when England first began to have law. Possibly such a statement would be extravagant; but certain it is — and this is enough for the present purpose — that in the reign of Henry II, for the first time in history, there was a well-defined system of protecting an Englishman's life and property by courts administering one rule throughout the whole kingdom, and following a definite procedure of a reasonable sort — though side by side with the primitive jury, then introduced, survived trial by ordeal and by battle, to the detriment of justice, but to the benefit of the picturesqueness of the scene, — and that from this famous reign comes the venerable book that has borne through all these years the name of Henry II's last Chief Justiciar, Ranulph de Glanville.

A learned investigator is said to have discovered that the Iliad was composed not by Homer, but by another person of the same name. A similar suggestion has been made as to Glanville, but Professor Beale sees no reason for accepting it, and, accordingly, the lawyers of this day may safely call this book Glanville, after the fashion of their predecessors for seven centuries. It is interesting to notice that Glanville's public life began in the very year — 1164 — when the Constitutions of Clarendon brought to a termination the king's contest with Thomas à Becket as to the jurisdiction of ecclesiastical courts, and made it certain that England would forever be ruled by the common law. It was a fateful year; for, although one cannot predict exactly what would have happened if à Becket had had his way, one can say with certainty that his triumph would have meant that to this day England and America would have in their legal systems, either through the canon law or directly from the civil law, a much greater infusion of the law of Rome, and that, by forcing the quarrel to an issue, à Becket, somewhat like King John, has become one of the unwilling benefactors of our profession. In the very year of à Becket's fall, as has been said, — although à Becket had still six years to live, — Glanville became one of the king's officials, charged with the duty of executing some of the new reforms. He first was sheriff of Yorkshire, and later he was transferred to other counties. The duties of a sheriff were both judicial and administrative, and in the case of Glanville by strange chance they happened to include the leading of a victorious *posse comitatus* against the invading King of Scots. In 1176, two years after his capture of this king, Glanville was made a judge of the *Curia Regis*; and in 1180 he was made Chief Justiciar. As the duties of the Chief Justiciar were not purely judicial, but in effect made this great official the viceroy of England, it is not strange that to the exploit against the Scottish king, Glanville added two expeditions against the Welsh. Besides, he was at least three times an ambassador. Of all his feats, the one most clearly entitled to be called extra-judicial was the preaching of a crusade. It is only just to add that Glanville practiced what he preached, on the accession of Richard the Lionhearted preceded the king to the Holy

Land, and in 1190 died of disease at the famous siege of Acre.

That was a vigorous and varied life, surely; but toward the end of it, this busy man, — apparently neither trained as an ecclesiastic to use the Latin language, nor trained as a lawyer in the practice of the old law learning, such as it was, but certainly experienced in judicial business and in the application of the writs of Henry II's time, — found leisure to compose this Latin treatise upon the English law.

This is a book of forms. The forms are the earliest writs that prescribed the procedure and measured the power of the national court — the *Curia Regis*, — as distinguished from various antique local tribunals; and hence they are of great historical value. Interspersed with the writs are comments, almost equally priceless as contemporaneous statements of the reasons underlying the forms and of the actual working of the system. It is probable that most of the writs are practically the work of Henry II's own hand; for although historians do not unanimously accept the tradition that Henry was in fact Stephen's Chief Justiciar, they do agree that he had a genius for law, that he often presided in his own court, and that he was the author of the reforms in procedure. The reforms were embodied in these very writs.

Like all forms, these old writs cast strong light upon the substantive law enforced through them. Thus we find here valuable matter as to crimes and property. The most important knowledge gained from the book, however, pertains to the introduction of the jury as the normal mode of trying questions of fact, and the development of the *Curia Regis* as the judicial power permeating the whole kingdom and largely displacing the manorial and other local courts. There could be no national law until there was a central judicial authority with sessions throughout the kingdom — in short the *Curia Regis* and justices in eyre; — and the English law, as we know it, could not exist without the jury. As Glanville's treatise is coeval with the rise of the jury, and with the great development of the *Curia Regis*, it is clearly a work of which something ought to be known by every lawyer who pretends to be a scholar. Nevertheless, the busy lawyer cannot read the whole of this book. The parts of it that he may

fairly be expected to read and enjoy are these: The Preface (the king, the judges, and the law); Book II, chap. 3 (trial by battle); Book II, chaps. 6, 7, 10, 12, 14, 16, 17, 19 (the jury); Book V, chap. 5 (villeinage); Book VI, chaps. 1-3 (dower); Book VII, chaps. 1-17 (inheritance and wills); Book IX, chaps. 1, 4, 8 (homage and reliefs); Book XII, chaps. 2, 6, 7, 9, 23 (writs of right); Book XIII, chaps. 1-3, 7, 11 (recognitions); Book XIV, chap. 1 (treason).

Yet the reading of even these selected passages is likely to prove unsatisfactory, unless one has the guidance of an editor. Here is where Professor Beale's introduction becomes useful, and, indeed, indispensable, with its methodical accounts of Glanville's life, and of the essential features of the treatise, and of the state of the law in the time of Henry II. When with the aid of Professor Beale's admirable introduction, the reader has mastered a few passages, he will find that early English law has become for him a living thing, and that he can appreciate many a learned allusion heretofore unintelligible. Indeed, there is no better way of preparing to enjoy the first two chapters of Thayer's "Preliminary Treatise on Evidence," or the first five chapters of Pollock and Maitland's "History of English Law." Even if the reader does not care to look into those larger and later works, he will find it well worth his while to give a few hours to Glanville, and to have at first hand the pleasure of seeing trial by jury in the very act of thrusting into the background the unscientific, superstitious, and brutal trials by ordeal and by battle.

JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION. Edited for the Society by *John MacDonnell, Esq., LL.D.*, and *Edward Manson, Esq.* New Series, No. VI. 1900, No. 3. London: John Murray, 1900. (278 pp.)

It is hard to over-estimate the value, to a student of jurisprudence and of sociology, of such a review of legislation as is presented here. The editors and their contributors are to be commended for the concise, yet full and clear, manner in which the subject matter has been set forth. As might be expected, the legislation of the more important Australasian colonies is of

especial interest, from the sociological standpoint; e. g., New Zealand legislation on the subject of the housing of the working classes in urban districts; of fixing a minimum weekly wage for boys and for girls employed in factories; of forbidding any employer, who takes out accident insurance policies to insure his workmen against accident, and against liability, from taking, directly or indirectly, any money from any workman in his employ, whether by deduction from wages or otherwise, howsoever, in respect of any such policy of insurance; of allowing the government to undertake accident insurance business — it already carries on the business of life insurance; and of restricting immigration.

Of more general interest than the review itself, are the fourteen admirable contributed articles, in the first half of the volume, covering a wide range of subjects. Sir Frederick Pollock's scholarly "History of the Law of Nature" has been seen on this side of the water in the initial number of the *Columbia Law Review*. Dr. Speyer's "Legal Aspects of the Sipido Case" deals with a matter in which there has been a "deplorable misunderstanding" in England,—and here, as well. The facts were these: three lads, between sixteen and twenty years of age, had incited Sipido, by procuring a revolver and by betting in his presence that he would not have the courage to carry out his criminal design of attempting to assassinate the Prince of Wales. On the trial, the jury, influenced by the penalty of ten to fifteen years of penal servitude in case of conviction, found that the state had not proved its case against the three accomplices. As to Sipido, the jury found that he was guilty of attempting a voluntary and premeditated homicide; but to the third question submitted to it by the court — "Did Sipido act with discernment?" — a question which the court was bound to submit in the case of a prisoner, like Sipido, under sixteen years of age — the jury answered in the negative; i. e., that he was not *doli capax*. When, as here, the jury finds "that the prisoner had acted without criminal discernment, the court *must* acquit him, but *may* direct that he shall be detained in a reformatory until he comes of age." Both of these things the court did.

Immediately the question arose: "Had the court authority to enjoin that its order shall be

executed immediately, or was it not bound to suspend execution and leave Sipido in liberty until that order had been made absolute, either by a decree of the Court of Cassation, or by expiration of the legally appointed time [three days] within which Sipido had the right to appeal to that court. . . . All authorities tend to show that detention in a reformatory is not a penal punishment, but simply an administrative measure taken in the interest of the child." Such being the case the court was "*bound* to order the immediate discharge of Sipido, and the Belgian government could no more have prevented this order being immediately obeyed by the police than the British government could disregard a writ of *habeas corpus* at the demand of a foreign potentate." Sipido immediately crossed the frontier and disappeared. Then diplomatic correspondence and violent denunciation of the Belgian jury, judiciary and government by the English press followed. It is to be noted, however, that the *bona fides* of the Belgian government was vindicated later. Sipido was found in Paris and arrested; his case not being covered by extradition treaties, "the Belgian government claimed him *in loco parentis*, the custody of a child ordered to the reformatory being temporarily withdrawn from the father, and vested for the time being in the state." He was surrendered, taken back to Belgium and sent to a reformatory.

An article sure to attract the attention of American readers is that on "The Immunity of Private Property from Capture at Sea," in which are brought together extracts from several valuable papers read at the recent conference of the International Law Association at Rouen. The United States was the first state to advocate such immunity; and the American members of the committee urged the calling of a conference of the various maritime governments to consider that question. Such diversity of opinion was manifested, and such strenuous opposition to such immunity was voiced, that the success of this movement seems more than doubtful. Mr. Justice Phillimore opposed it on the ground that the fear of loss and the fact of loss are both powerful to prevent war, and to bring about a speedy return of peace; that the present liability to capture made nations — especially England — more vulnerable, which he considered a

desirable thing as a deterrent to prevent plunging with a light heart into war. One of the French members advocated immunity; but two others opposed it, one taking the ground that it was a question of policy which each state must answer for itself, as occasion arises, and the other denying the assumed analogy between property on land and property at sea, and holding with Captain Mahan that "two contending armies might as well agree to respect each other's communications as two belligerent states to guarantee immunity to hostile commerce."

NOTES ON THE UNITED STATES REPORTS. By *William Malins Rose*. Book X. 103-115 United States Reports. San Francisco: Bancroft, Whitney Co. 1900. Law sheep. (1187 pp.)

This volume is, as the title page states, "a brief chronological digest of all points determined in the decisions of the Supreme Court, with notes showing the influence, following, and present authority of each case, as disclosed by the citations, comprising all citing cases in that court, the intermediate and inferior Federal courts, and the courts of last resort of all the States." This mere statement both shows the wide range and exhaustive character of the volume, and indicates its value, as a book of reference, to the working lawyer. The statement of the points decided in each of the cases in the thirteen volumes of United States Reports is short and clear, each point in a decision being stated by itself and followed directly by the citations bearing upon it. The amount of labor involved in the preparation of such an exhaustive work of reference as the volume before us is almost appalling; but the undertaking, if well and thoroughly done, as is here the case, is justified by the value of the result to the profession.

RECEIVED AND TO BE REVIEWED LATER.

THE ELEMENTS OF JURISPRUDENCE. By *T. E. Holland*, D.C.L. Ninth edition. New York. Oxford University Press, American Branch. 1900.

THE LAW OF COMBINATIONS. By *Austin J. Eddy*. Chicago: Callaghan & Co. 1901.

THE LAW AND PRACTICE OF BANKING IN Australia and New Zealand. By *Edward B. Hamilton*, B.A. Second edition. Melbourne: Charles F. Maxwell. 1900.

ENCYCLOPEDIA NOTES.

It is hardly probable that, when King Solomon cried out some three thousand years ago, "Of making many books there is no end," he foresaw the condition of the legal profession in the twentieth century of the Christian Era, else he would have concluded his sentence, "and much buying of them is a weariness to the bank account." With an ever-increasing torrent of reports and text-books, good, bad and unspeakable, falling from the press, and with endless "new editions" and other nefarious projects to vex his spirit, the lawyer of to-day finds himself in a truly embarrassing position. He must either give up a considerable part of his income to the purchase of text-books, or take the chance of "the other fellow" finding authorities which are not accessible to him. In view of this state of affairs he will doubtless welcome with delight the announcement of a publication designed to obviate the necessity for all other text-books and possessing the secret of eternal youth. These are the things promised by the publishers of the *Cyclopedia of Law and Procedure*, the first volume of which is soon to appear.

The plan of this work contains many features that are bound to prove attractive to the legal worker. To briefly indicate some of the salient points: it is to be a cyclopedia of *all* the law procedure as well as substantive law; it is to be completed in thirty-two volumes; it is to be written by competent law writers; it will cite not only the official reports but also the National Reporter System, the American Decisions, Reports and State Reports, and the reports of the Lawyer's Co-operative Publishing Company; it is to contain a complete lexicon of legal words, phrases and maxims; and last, but by no means least, it is to be kept always abreast of the current decisions by an inexpensive system of annotation. It is needless to say that a book carried to completion along these lines will prove of very great value to the busy lawyer. That the cyclopedic method of treating the law is superior to any other can hardly be disputed, for by it the law is rendered easier of access, which is the chief desideratum of the practitioner.

An inspection of the advance sheets sent out by the publishers shows that the work is being carefully and ably done. The subjects are minutely analyzed, the statements of the law are terse and accurate and the citation of authorities is apparently exhaustive. The advantage of treating the practice decisions along with the rest of the law on the subject becomes quickly manifest, and the innovation of indicating in the notes the cases containing adjudicated forms of pleading lends an additional value to the work. The publisher is the American Law Book Company, 120 Broadway, New York.



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JOHN MARSHALL.

I.

SOLDIER, LAWYER, STATESMAN, AND MAN.

THE John Marshall Day addresses were so many in number and so excellent in character that it has been found impossible to include in one number of THE GREEN BAG all that it seemed essential to reprint from these addresses. It has been necessary, therefore, to change the plan announced last month; and, instead, the Marshall article will be published in two parts. The present instalment is given to the consideration of John Marshall's career as soldier, lawyer and statesman, and of his character as a man. To the May issue is left the consideration of Marshall as judge and jurist. Naturally most of the orators dealt with their subject from the legal standpoint; some of them, indeed, confined themselves wholly to the consideration of that side; so that it happens that a number of the distinguished speakers on John Marshall Day are not represented in the present number.

— *The Editor.*

IN his eloquent address at Richmond, Virginia, Mr. Justice Gray, of the Supreme Court, quotes from a letter from Chief Justice Marshall, dated Richmond, March 22, 1818, and addressed to Joseph Delaplaine, Esq., Philadelphia, the following autobiography of the Chief Justice:

"I was born on the 24th of September, 1755, in the county of Fauquier, in Virginia. My father, Thomas Marshall, was the eldest son of John Marshall, who intermarried with a Miss Markham, and whose parents migrated from Wales, and settled in the county of Westmoreland, in Virginia, where my father was born. My mother was named Mary Keith; she was the daughter of a clergyman of the name of Keith who migrated from Scotland, and intermarried with a Miss Randolph on James River. I was educated at home, under the direction of my father, who was a planter, but was often called from home as a surveyor. From my infancy I was destined for the bar; but the

contest between the mother country and her colonies drew me from my studies and my father from the superintendence of them; and in September, 1775, I entered into the service as a subaltern. I continued in the army until the year 1781, when, being without a command, I resigned my commission, in the interval between the invasions of Virginia by Arnold and Phillips. In the year 1782 I was elected to the Legislature of Virginia, and in the fall session of the same year was chosen a member of the Executive Council of that State. In January, 1783, I intermarried with Mary Willis Ambler, the second daughter of Mr. Jacquelin Ambler, then Treasurer of Virginia, who was the third son of Mr. Richard Ambler, a gentleman who had migrated from England, and settled at Yorktown, in Virginia. In April, 1784, I resigned my seat in the Executive Council, and came to the bar, at which I continued, declining any other public office than a seat

in the Legislature, until the year 1797, when I was associated with General Pinckney and Mr. Gerry in a mission to France. In 1798 I returned to the United States; and in the spring of 1799 was elected a member of Congress, a candidate for which, much against my inclination, I was induced to become by the request of General Washington. At the close of the first session, I was nominated, first to the Department of War, and afterwards to that of State, which last office I accepted, and in which I continued until the beginning of the year 1801, when Mr. Ellsworth having resigned, and Mr. Jay having declined his appointment, I was nominated to the office of Chief Justice, which I still hold.

I am the oldest of fifteen children, all of whom lived to be married, and of whom nine are now living. My father died when about seventy-four years of age; and my mother, who survived him about seven years, died about the same age. I do not recollect all the societies to which I belong, though they are very numerous. I have written no book, except the "Life of Washington," which was executed with so much precipitation as to require much correction."

"My earliest knowledge of the existence of such an autobiography," Mr. Justice Gray adds, "was obtained from a thin pamphlet, published at Columbus, Ohio, in 1848; found in an old bookstore in Boston; and containing (besides Marshall's famous speech in Congress on the case of Jonathan Robbins) only this letter, entitling it 'Autobiography of John Marshall.' The internal evidence of its genuineness is very strong; and its authenticity is put almost beyond doubt by a facsimile (recently shown me in your State Library) of a folio sheet in Marshall's handwriting, which, although it contains neither the whole of the letter, nor its address, bears the same date, and does contain the principal paragraph of the letter, word for word, with the corrections of the original manuscript, and immediately followed by his signature."

This interesting autobiography is, perhaps,

the best possible introduction to the following sketch of the great Chief Justice.

ANCESTRY, BIRTH, YOUTH.

At an early period of Virginia's history at Turkey Island (a plantation some fifteen or twenty miles from the city of Richmond, near the scene of the terrific battle of Malvern Hill) lived the Virginia planter, William Randolph. He was the ancestor of all of that name in Virginia, and from him descended, in direct line, Thomas Jefferson, John Marshall and Robert E. Lee; a triumvirate of civic, judicial and military power. Sprung from a distinguished lineage; trained in a school where the amenities of life as well as "the humanities" were taught in their highest excellence, John Marshall practiced from his earliest childhood a scrupulous regard for the rights and feelings of others, and an indulgence to all faults, except his own.¹

Although the imperishable renown of Marshall rests largely upon the distinction attained by him in public office, it is nevertheless an interesting fact that he came from a distinguished ancestry. He belonged to that race of cavaliers whose influence upon the American character and our national history has been distinctively marked.

John Marshall was born September 24, 1755, at Germantown, a small village in what was then frontier county of Fauquier, in the Colony of Virginia. He was descended from Captain John Marshall, who came to Virginia about 1650. His great-grandfather was Thomas Marshall of Westmoreland County, Virginia, and his grandfather was John Marshall of the "Forest," in the same county. His father was Colonel Thomas Marshall, a friend of Washington, and who took an active part in the Revolutionary war. The grandfather of the Captain Marshall, who first settled in Virginia, was also a military man and fought as a captain

¹ Professor Henry St. George Tucker, of Washington and Lee University.

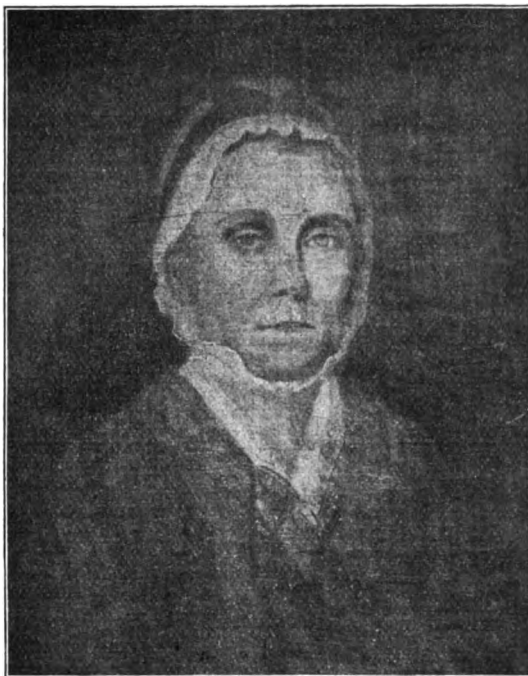
at the siege of Calais, where he was desperately wounded, and claimed descent from the father of William Marshall, Earl of Pembroke, the first of the barons to sign Magna Charta.

The mother of John Marshall was Mary Isham Keith; and it is said that her lineage reaches back to the remotest period of Anglo-Saxon history, and to Egbert, the first king of the Saxon Heph-tarchy. She was the daughter of Rev. Jas. Keith, an Episcopal minister.

Now, in consequence of the removal of Marshall's father, shortly after the birth of his oldest son, John, the boyhood home of the subject of this address was situated about thirty miles west of his birthplace in the mountainous region east of the Blue Ridge, at a place called the "Hollow," well calculated, so far as nature and surroundings can, to develop the purer and nobler qualities of a boy. The neighborhood was destitute of schools, but during the period preceding his fourteenth year Marshall received from his father a not inconsiderable training in literature, and thus he early acquired an intense love of that branch of learning. As a boy he was peculiarly attracted by the beauty of the scenery in the vicinity of his home, and we are informed that he dwelt with nature and delighted in the youthful

sports of the field. At that period of his life he was thoughtful and quiet in manner, rather sedate for a lad of his age, but full of a dreamy and poetic enthusiasm. It is said also that he enjoyed the solitude of the forest, and "was a dreamer of dreams." As we glance at his characteristics in later life, we are hardly disposed to class him, even in boyhood, as a mere dreamer of dreams.

One is more inclined, I think, to view the dreams of his youth as those longings natural to a vigorous and ambitious spirit looking out into the future and building castles of achievement and success. Nevertheless, it is doubtless true that Marshall's character, at that early period, was imbued with more or less poetic fervor. It would be strange, indeed, had it been otherwise, reared in the



MARY ISHAM MARSHALL (from an old painting).
Mother of Chief Justice Marshall.

love of the English classics and with so much in nature around him to charm the eye and incite the imagination. We know, in fact, that in his maturer years, and even late in life, he was occasionally given to express some deep emotion of the soul in metrical composition.¹

Marshall had literary leanings in his earlier years, not in the direction of the law. He cultivated the Muse of Poetry, with at least

¹ Honorable Charles N. Potter, Chief Justice of the Supreme Court of Wyoming.

some small result in verse. He had the example of the great lawyers who have occasionally dropped into poetry. But with him, as with them, it seems to have been a mere casual and accidental fault — an instance of Homeric nodding. . . . In his earlier years he wrote a small volume of verses, but, as his biographer felicitously puts it, "He exhibited in this matter the same rare good sense that characterized him in all things," he never published it. Certainly, the offence was grave, yet he nobly redeemed himself and afterwards lived it down.¹

MILITARY CAREER.

When the sound of the shot, which was heard round the world, reached a sparsely settled locality in the Blue Ridge region of northern Virginia, known as the "Hollow," where there were no schools or newspapers, a youth of nineteen, who was to become the colossal Judge, who was to expound and give vital force to the Magna Charta of American liberties, who was to become the great Chief Justice, who, to paraphrase Webster's famous figure of speech descriptive of the genius of Hamilton, was to touch the written Constitution that it should spring into life and become a living truth in the eyes of the world, left his home, where balm tea and mush were relished, and where the women used thorns for pins, primitive conditions to which he ever recurred with fondness, and armed with a gun, wearing a pale blue hunting shirt, with trousers of the same material, fringed with white, and a round black hat mounted with a buck's tail for a cockade, walked ten miles from his father's home to the muster-field, and, in the absence of the captain, informed the company of minute men assembled, that, instead of a better, he had been appointed a lieutenant, and that he had come to meet them as fellow-soldiers who were likely to be called on to defend their country and their own rights and liberties invaded by the British; that there had been a battle at Lexington, in Massachusetts,

¹Honorable Neal Brown, of Wassau, Wisconsin.

between the British and the Americans, in which the Americans were victorious; that more fighting was expected, that soldiers were called for, and that it was time to brighten their arms and learn to use them in the field, and that if they would fall into line he would show them the new manual exercise, for which purpose he had brought his gun. With this remark he brought his gun to his shoulder, went through the manual exercise by word and motion, deliberately pronounced and performed in the presence of the company. This he did before he required the men to imitate him, and then proceeded to exercise them with the most perfect temper. After a few lessons the company was dismissed, and addressed for an hour on the subject of the impending war, after which he challenged an acquaintance to a game of quoits, closed with a foot race and other athletic exercises, and walked another ten miles to his father's house, where he arrived a little after sunset.

At the time he joined the company upon the news of Lexington and Concord, to which I have referred, he was a little more than nineteen years of age, and has been described by a kinsman, as being about six feet in height, straight and rather slender, of dark complexion, showing little if any rosy red, the outline of the face nearly a circle, eyes dark to blackness, strong, penetrating, and beaming with intelligence and good nature, an upright forehead, rather low, and terminating in a horizontal line of massive raven-black hair of unusual thickness.

Common men may be brave in battle, so in dealing with the life of this most remarkable man as a soldier, and in the light of his future greatness in other lines, one does not care so much for personal deeds of valor in battle as for the motive for action, the sense and appreciation of duty, and the manner in which he performed the service to which he attached himself. We are looking for a sidelight upon the character of a future man of inexorable logic and stupendous intellectual and moral force, and thus it becomes import-

ant to inquire, whether, in the exuberance and the glorious fervor of youth, he thought only of martial display and the glory of military victory, or, whether he belongs to that class of soldiers who thoughtfully consecrate themselves to what they conceive to be a duty to themselves, and to their country; and we must in justice place him in the latter class, and accord to his memory all the glory that such a motive, such a consecration, and such a service entitle him. His thoughtfulness in preparation, his industry, and his intelligence, his patience in camp, his bravery in the discharge of duty in the face of the enemy, and his instant return to the peaceful walks of life, furnish abundant and unmistakable evidence, that he was a soldier of duty, rather than of thoughtlessness and vanity.

In his remarks to the company of which he was a lieutenant, and to which I have referred, he spoke of a battalion about to be raised, and said he was going into it, and expected to be joined by many of his hearers. Hostilities in the North, and the aggressive attitude of the British in Virginia, soon caused the volunteers of Culpepper, Orange and Fauquier Counties to form themselves into a regiment. Thomas Marshall, the father, became major, and John, the son, became a lieutenant in one of the companies. This regiment carried a flag displaying a coiled rattlesnake, and bearing the motto, "Don't Tread On Me," and the regiment was known by the British as "the shirt-men." They were dressed in green hunting-shirts, "homespun, homewoven, and homemade," with the words "Liberty or Death" in large white letters on their bosoms, and with buck-tails in their hats and tomahawks and scalping knives in their belts, they marched to Williamsburg. Under the excitement of the war spirit of the day, this organization of minute men, so equipped and uniformed, drew to itself a vast amount of glory, and must have carried terror to the hearts of the foe. John Randolph once extravagantly said in the Senate of the United States that

these men "were raised in a minute, armed in a minute, marched in a minute, fought in a minute, and vanquished in a minute." This regiment was in the engagement at the Great Bridge, and in the campaign which resulted in the capture of Norfolk. The British were in a fortified position at the bridge across the south branch of the Elizabeth River, and a detachment of minute men under Colonel Woodford, to which Lieutenant John Marshall's company was attached, led the advance, and secured a position at the causeway on the opposite side from the enemy, and held it until the battle of December 9, 1775, when the British being routed and subjected to severe loss, spiked their guns, and retreated to their ships. On the fourteenth of December the Virginians entered Norfolk, where Marshall remained with the troops until the town was bombarded and burned by the British fleet on the first of January, 1776.

The battle of the Great Bridge was the first engagement in Virginia, and with it came John Marshall's first actual experience in war, and he is said to have borne an active and honorable part. Marshall gives an account of this campaign in his "Life of Washington," but forbears giving any prominence to himself. In the summer following, the conditions were such as to require a greater force in Virginia, and as a result eleven regiments were raised, which were later taken into the Continental line. Thomas Marshall, the father, became the colonel of the third, in which James Monroe was a lieutenant, and which was with the army of Washington. John Marshall, the son, was made first lieutenant in the eleventh, and in the following winter went with his regiment into camp with the army of the Commander-in-Chief at Morristown. During the winter of 1776-77 he was promoted to the rank of captain, and was in command of his company during the spring and summer campaign of 1777. On the twenty-fourth of August, and the day before General Howe landed his forces at the Elk River Ferry, the

American army marched through Philadelphia and toward the Brandywine. The army at this time, according to Marshall's statement, after uniting with the Pennsylvania militia, did not number more than 11,000 effective men. Young Marshall's company was attached to a corps of light infantry under General Maxwell, which advanced and engaged in a skirmish at Iron Hill, but Maxwell soon retreated over White Creek, with a loss of forty men. The corps to which Marshall belonged held the advance of the army in crossing the Brandywine, and went into position on the hills south of the river on the road leading to Chad's Ford. The corps was immediately under arms and engaged in skirmishing with the enemy, but early in the day gave way, and recrossed the river below the ford, taking up a position which was only separated from the British by the river and a thin strip of wood. While the force was in this position, it is understood that Marshall took part in a sharp and hazardous skirmish which engaged a large body of the enemy; but in his own account of the affair he modestly refers to himself as an eye-witness.

Young Marshall was in command of his company in the hotly contested battle of the Brandywine, where his father, in command of the third regiment, notably distinguished himself by holding, under severe loss, his position in a wood against largely superior numbers long after his division had retreated from its position.

At Germantown young Marshall's company was attached to Woodford's brigade, which was in that part of the left wing opposite the British right. The infantry of the British right was sharply attacked and driven from the field, and while the brigade to which Marshall belonged was gallantly pursuing the retreating enemy, its onslaught was retarded and broken by the destructive fire of the British from the famous stone house.

There are few historical details of the service of subordinate revolutionary officers, so

we are without particular description of the conduct of young Marshall on the field. It is enough, however, to know that his career was honorable, and that he sought opportunity for service in the most active and hazardous parts of the various fields of action with which he was connected, and evidence is abundant that the skill and courage of the young Virginian were sufficient for the most serious work to which a soldier may be called.

Young Marshall is a part of the sad story of the terrible winter of 1777-8 at Valley Forge. He shared the sufferings and the privations of the army for the entire winter. The extreme cold and the hunger reached officers and men alike. We have the words of Washington, that "no history extant can furnish an instance of an army suffering such uncommon hardships, and bearing them with the same patience and fortitude." It is here that we have a sufficient test of the soldierly qualities of young Marshall. There was no pomp of parade, or of war, no gorgeous military display to stir the enthusiasm of youth. The cold, the nakedness and the hunger were such as to try the souls of strong and mature men. Here we find conditions which try the mettle, and the fibre of men; and let us see how the future illustrious Chief Justice acquitted himself. Let the words of a messmate tell. Lieutenant Slaughter says: "He was the best-tempered man I ever knew. During his sufferings at Valley Forge, nothing discouraged, nothing disturbed him. If he had no bread to eat, it was just as well; if only meat, it made no difference. If any of the officers murmured at their deprivations he would shame them by good-natured raillery, or encourage them by his own exuberance of spirits. He was an excellent companion, and idolized by the soldiers and his brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdote."

During the winter at Valley Forge, in addition to his field duties, young Marshall acted as arbitrator between officers and men

in the settlement of controversies, and acquired reputation and fame by acting officially as deputy judge advocate. In this capacity he was brought into contact with Colonel Alexander Hamilton, and relations of confidence and trust with Washington; and by his superior officers he has been spoken of as not only brave, but of signal and superior intelligence in respect to military affairs.

Marshall was at the head of his company which was with Washington's army in the campaign of 1778-9, and with the army in winter quarters. He was at the battle of Monmouth. He was under Wayne in the memorable assault at Stony Point. He was with the detachment to cover the retreat of Major Lee, after his brilliant surprise of the enemy at Powles' Hook.

Near the close of this year a portion of the Virginia troops was sent to the defense of that State, but those with whom Marshall was attached remained with Washington, and, upon the expiration of their term of enlistment, he was ordered to Virginia with other officers to take charge of such troops as the State should raise. He went to Williamsburg; and, during the delays incident to legislative action, he attended a course of law lectures by Chancellor Wythe, and a course on natural philosophy by Bishop Madison. In the early summer of 1780 he procured a license to practice law; but, recognizing in the emergency of the campaigns of that year a higher duty to his country, he sought further service in the army, and, tired by the delays and difficulties incident to bringing the Virginia troops into the field, he made that long and lonely walk from Virginia to army headquarters, and resumed service in the army. Arriving at Philadelphia, it is said, he was so worn and shabby that he was refused entertainment at the hotel. Soon, however, young Marshall again returned to Virginia, and joined the force under Baron Steuben to defend that State against the invasion of General Leslie; and he remained with that army until the inva-

sion was abandoned by reason of the failure of Leslie to form a junction with Cornwallis.

He again went into active service with the army organized to oppose the invasion of Arnold, and remained with that army until late in January, 1781, and until after Arnold, demoralized, had fallen back on Portsmouth.

After nearly six years' service, from May, 1775, to January, 1781, with occasional interruptions when hostilities were not active, and with the repulse and discomfiture of Arnold, John Marshall ended his military service, except later as general of militia.¹

AT WILLIAM AND MARY COLLEGE.

Toward the end of 1779, owing to the disbanding of Virginia troops at the end of their term of service, he was left without a command, and went to Virginia to await the action of the Legislature as to raising new troops. It was a fortunate visit; for at Yorktown he met the young girl who, two or three years later, was to become his wife; and he was also able to improve his leisure by attending, for a few months in the early part of 1780, two courses of lectures at the college, on law and natural philosophy. This was all of college or university that he ever saw; but later he received their highest honors from several universities. Harvard made him doctor of laws in 1806. Marshall's opportunity for studying law, under George Wythe, at William and Mary College, seems to have been owing to a change in the curriculum, made, just at that time, at the instance of Jefferson, Governor of the State, and, in that capacity, visitor of the college. The chair of divinity had just been abolished, and one of law and police, and another of medicine, were substituted. And on December 29 the faculty voted that, "for the encouragement of science, a student, on paying annually 1000 pounds of tobacco, shall be entitled to attend any school of the following professors, viz.: of Law and Police; of Natural Philosophy and Mathematics," etc.

¹ Honorable Edgar Aldrich, United States District Judge.

Marshall chose the two courses above named; he must have been one of the very first to avail himself of this new privilege. He remained only one term. In view of what was to happen by and by, it is interesting to observe that his opportunity for an education in law came, thus, through the agency of Thomas Jefferson.

The records of the Phi Beta Kappa Society at William and Mary College, where that now famous society had originated less than a year and a half before, show that on the 18th of May, 1780, "Captain John Marshall, being recommended as a gentleman who would make a worthy member of the society, was balloted for and received;" and three days later he was appointed, with others, "to declaim the question whether any form of government is more favorable to public virtue than a Commonwealth." Bushrod Washington and other well-known names are found among his associates in this chapter, which has been well called "an admirable nursery of patriots and statesmen."¹

The first American institution of learning to offer university courses in municipal law and the law of nations was the College of William and Mary. They were introduced there by Jefferson, when Governor of Virginia, in 1779, and Marshall was a member of the first class that took them up. (Papers of the Am. Hist. Ass., IV, 133.)

He was not a college graduate. At eighteen he began his law studies with the education of a Virginia schoolboy. He could read Latin; he knew something of French; he knew much of the best literature of England. There are American law schools today, and I am glad that Yale is not one of them, where, if such a youth were to seek admission, he would find the doors barred against him.

But Marshall had that in him which no

¹ Professor James Bradley Thayer, of the Law School of Harvard University.

A "Life of John Marshall," by Professor Thayer, is in press, to be published shortly by Messrs. Houghton, Mifflin and Company, Boston, in their Riverside Biographical Series.

liberal education can supply. It is the native faculty, God-given and self-helped, that makes the man. A college may polish it, quicken it, elevate it; but all of education is to bring out, to lead forth what is already in him.

"We receive but what we give."

Marshall entered upon university studies at twenty-four, with a mind undisciplined by college training, well disciplined by self-formed habits of patient reading and quiet thought. By the camp fires of the Revolution, in the watches of the night, he had thought on great themes and joined in high resolves. To such a man, as Wythe expounded the laws of nature and of nations, the great opportunities of American life, under free representative government, must have loomed up with a new dignity.

Jefferson was no friend of Marshall, and yet he was his best friend. He gave him what he lacked. His overthrow of the old curriculum of William and Mary, and introduction of a chair of laws opened for the young soldier the door to legal learning. It was Jefferson who made possible Marshall's great career.¹

AT THE BAR.

He was fortunate in beginning the practice of his profession at the close of the war. Long absences from home and the consequent neglect of property and business, the complications and confusion resulting from the political and social changes brought about by the Revolution, proved fertile sources of litigation. Marshall, from the first, had a large practice and rose so rapidly in his profession that before he reached the age of thirty he was the acknowledged head of the bar of his State, and Virginia at that time, in wealth and population and in the calibre of her great men, was surpassed by none of her sister States.

Many of the cases which arose in that critical period presented novel and difficult

¹ Honorable Simeon E. Baldwin, Justice of the Supreme Court of Connecticut.

questions, involving the relations of the States to each other and to the weak and inefficient central government, and to the common enemy, with whom peace had just been concluded; questions of quasi-political and international character, requiring for their solution not technical learning or precedents, but the right application of general principles and rules which had to be first thought out and formulated and then established by force of pure reasoning. For this high order of work Marshall's talents were peculiarly fitted.

His career as a soldier, bringing him in contact with men from different States, animated by the same spirit of resistance to a common enemy, threatened by the same perils and striving for the same goal, accustomed him, as he himself says, to the idea of a common country and a common government, co-extensive with the territory of the several States, and broadened his sympathies and interests beyond the confines of his State, thus emancipating his mind from the provincial spirit of the times and preparing him for broad and national views on questions of common concern.¹

In the Courts of his State Marshall was acknowledged to be the leader of the lawyers; intellectually, he was supreme among his legal associates. . . .

There were indeed great lawyers in those days; then was the time of law as both a science and a sentiment. The spirit of commercialism had not permeated or colored its fine air. Argument and advocacy, in behalf of justice, were its shining attributes. The compensating fee was not a principal object of the lawyer's endeavor; the selfish dollar was still subservient to the duty of his high calling. Those were the days when the appeals of Patrick Henry to courts and juries swept great causes to vindication and victory; when the logic of Jeremiah Mason and Luther Martin relentlessly broke down and pulverized all barriers of sophistry, and Dan-

¹ Honorable Joseph P. Blair, of New Orleans.

iel Webster stood colossal in reason, wisdom, argument, and walked before judicial tribunals with intellectual footfalls whose echoes are heard even unto this day. A glorious time indeed it was of lawyers; "there were giants in those days;" and among them was John Marshall,—youthful, strong, the equal of any, if not the superior of all.¹

Marshall had naturally a legal mind, and, at the time he came to the Bar, he was not confronted with a deluge of discordant decisions nor with the many questions of commercial law, which has advanced in the past century into a department of the law of itself. He had to lay the foundation of his legal learning deep in the common law, which came to us from the mother country, and with the text books of that day, and the decisions from Westminster Hall, he acquired a vast amount of technical learning, which it is difficult to acquire from case study of the present time. His arguments at the Bar evinced the depth of his technical knowledge, as well as the strength of his wisdom.²

His grasp of legal principles was intuitive. His aptitude for his chosen profession was apparent. Hosts of friends were attracted to him because of his splendid intellect, his lofty character and his genial nature. He at once took position in the foremost rank of the profession and fortified it at every trial of strength. He was entirely without those arts which are commonly designated by the phrase "the graces of oratory." The character and habits of his mind were already established. His talent was analytical and constructive. He would have been metaphysical if he had not been intensely practical. He never interrupted the flow of his own discourse. He restated no proposition. He made no room for catch phrases. His sentences were incisive, and every sentence was a step in the direct and resistless progress

¹ Honorable Luther Laffin Mills, of Chicago.

² Honorable William Pinkney Whyte, of Baltimore, former Governor of Maryland.

of his mind from premises to conclusion. A contemporary aptly likened one of his discourses to the easy but unremitting advance of the dawn. His speeches, like his opinions, abound in sententious questions, not only those general questions which comprehend cases and subjects, but those subordinate questions which occur in the process of analysis and argument, so stated as to suggest inevitable answers.¹

His professional reputation became national in the celebrated case of *Ware v. Hylton*, known as the English debt case, which raised the question whether, under the treaty of peace of 1783 British creditors could recover debts sequestered during the Revolutionary war by act of the Virginia Legislature. The honor of the State and the fortunes of many of its citizens were involved in the issue. The case was argued before the Supreme Court in Philadelphia in the winter of 1796. There were engaged in it the most learned and eloquent members of the Virginia Bar, which at that time was said to rank first in the country. Marshall appeared as leading counsel for the defendants; and, although on the losing side of the case, his great argument excited the admiration of the Court and the Bar.

Speaking of Marshall's effort, Wirt says: "Marshall spoke, as he always does, to the judgment merely, and for the simple purpose of convincing." Marshall was justly pronounced one of the greatest men of the country. He was followed by crowds, looked upon and courted with every evidence of admiration and respect for the great powers of his mind. Marshall's maxim seems always to have been, "Aim exclusively at strength."²

Marshall's professional career was repeatedly sacrificed to the public interest. In these days we smile when told that an office

¹ Honorable John A. Shauck, Chief Justice of the Supreme Court of Ohio.

² Honorable Le Baron Bradford Colt, United States Circuit Judge.

has sought the man who fills it, smile somewhat sadly, somewhat bitterly; why, we know too well; but in his life we see this done, not once, but often, not in semblance, but in grave and painful truth. A man of very moderate fortune, with many just and heavy calls upon his means, he frequently interrupted his lucrative practice, sometimes altogether, sometimes in great part, to serve his fellow-countrymen in exigencies which, to his mind, left no choice, always to strengthen his claims to their gratitude, but always to leave him, in worldly goods, a poorer man. He refused public service whenever his conscience tolerated the refusal; he declined to be Attorney General, Minister to France, Associate Justice of the Supreme Court; he announced more than once his permanent retirement from public life and his purpose to devote himself thereafter to the practice of his profession; in the words of Rinney:

"Office, power and public honors he never sought. They sought him, and never found him prepared to welcome them, except as a sense of duty commanded."

But the same "sense of duty" which had once bidden him draw his sword in his country's cause forbade him to stand aloof whenever he was called, too clearly for his modesty to question the call, to serve her in peace as he had served her in war; and this was too often for his personal interest and his professional prosperity. Marshall was a great lawyer, who had been greater had the people's just sense of his merits allowed him to be a lawyer only.¹

MARSHALL'S FEDERALISM.

He was a party man, but not a partisan. He distinguished clearly between principles and policies. A Federalist of the school of Washington, he was as moderate in the expression of his views as he was steadfast and inflexible in defending them. Popular clamor could neither move him from the line

¹ Honorable Charles J. Bonaparte, of Baltimore.

of duty, as he saw it, nor seduce him into a course that did not commend itself to his judgment or to his conscience.¹

In a well known letter to a friend, Marshall says that he entered the Revolution filled with "wild and enthusiastic notions." Most young men of that period, imbued with such ideas, remained under their control, and, in the course of events, became ardent sympathizers with the unbridled fanatics of the French Revolution, or, at least, ardent opponents of anything like a strong and well ordered central government, and equally zealous supporters of State Rights and separatist doctrines. Not so John Marshall. With characteristic modesty, he ascribes the fact that he did not continue under the dominion of his "wild and enthusiastic notions" to accident and to circumstances, when it really was due to his own clear and powerful intellect. In the struggle with England he came to see that the only hope of victory lay in the devotion of the army to a common cause, in their being soldiers of the Union, and not of separate colonies, and that the peril was in the weakness of the central government. It seems simple enough to say this now; but this central idea was, as a rule, grasped feebly and imperfectly, if at all, by the young men of that period. Like Hamilton, Marshall worked it out for himself; and, in the letter just referred to, he says that it was during the war that he came to regard America as his country and Congress as his government. From that time he was an American first, and a Virginian second; and from the convictions thus formed in camp and on the march he never swerved. Here was the principle of his public life; and to the establishment of that principle his whole career and all his great powers were devoted. These convictions made him a Federalist. It was this very devotion to a fundamental principle which was the source of that temperate wisdom which caused him to avoid the

¹ Honorable William Lindsay, United States Senator from Kentucky.

Alien and Sedition Acts, because, by their violence, they endangered the success of the party which had in charge something too precious to be risked by indulging even the just passion of the moment. But his moderation in what he regarded as non-essential, was accompanied by an absolutely unyielding attitude when the vital question was touched. Despite the criticisms of the extreme Federalists upon his liberality, there was no more rigid believer in the principles which had brought that party into existence than the man who became Chief Justice a century ago.¹

By political affiliation Marshall was a pronounced Federalist, but the present generation of lawyers will generally agree, and such will be the verdict of the future, that party prejudice never clouded his vision or distorted his judgment as a jurist. As we read his greatest opinions on questions of constitutional law our judgments yield readily to the vigor of his thought and the weight of his reasons. Indeed, we wonder at times how the conclusion that is reached could ever have been challenged by unprejudiced minds. Although he was a Federalist, yet he did not belong to that class of Federalists of whom there may have been a few, who distrusted the honesty and intelligence of the common people and for that reason were more anxious to establish an oligarchy than to found a Republic. His love of freedom and his desire to found a government whereby equal and adequate civil rights should be secured to all men by proper constitutional guarantees, were as strong and ardent as those men could have desired who were most at variance with his political views. He differed with Patrick Henry and Jefferson and other men of that school only as to the means whereby liberty could be preserved with the least danger of degenerating into anarchy.¹

¹ Honorable Henry Cabot Lodge, United States Senator from Massachusetts.

² Honorable Amos M. Thayer, United States Circuit Judge.

Marshall, it is true, was a Federalist, but not in the sense that Hamilton was. He was not a liberal constructionist, as was Hamilton, nor was he a strict constructionist, as was Jefferson. He believed that the Constitution must be carefully examined to ascertain if any particular power was therein given, that upon him who asserted the existence of the power rested the burden of proof, but that if such power was established the Constitution gave all those incidental powers which are necessary to its complete and efficient execution.¹

IN THE GENERAL ASSEMBLY OF
VIRGINIA.

While he never sought public office, he was often forced by a sense of duty to enter the public service. Repeatedly at this period of his life, when he had left by choice a public career to devote himself to the law, he was as often compelled by the call of duty to enter the political arena to battle for principles and policies, the disregard or rejection of which he thought would imperil the liberty and happiness of the country. The convictions he had already formed afterwards made him a stalwart Federalist.

As early as 1782 he was elected from Fauquier County to the General Assembly of the State, and again in 1784, and for the third time in 1787, when he was sent from Henrico County, where he then resided, near Richmond. The main questions which were at that time agitating the public mind concerned the proper relations between the State and the Federal Government and the duty of both to the soldiers of the Revolution. When Marshall saw his old comrades in arms unpaid, reduced in many cases to beggary, and threatening to become an element of danger to the country for whose independence they had fought so bravely; when he saw a large party in his State bent on bringing into still greater contempt the all but helpless central government, ignoring its requisitions, disregarding the obligations of

¹ Honorable Horace G. Platt, of San Francisco.

its treaties, and imperiling all that had been gained by the great war, he exerted all his powers, on the hustings and in the legislative councils, to strengthen the central government and to persuade his State to perform her obligations to her citizen soldiers and to the old confederation.

After her reluctant acceptance of the Constitution, the State of Virginia regarded the new central power with feelings of jealousy and hostility, which she evinced by unrelenting opposition to the administration even of Washington and by the advocacy of every measure or policy which would tend to embarrass the new government or endanger its success. Convinced as he was that the liberty and happiness of the country would not survive a second break down of the central government, Marshall again gave up the private life he coveted to serve two more terms in the State Legislature, where he contended strenuously, but in vain, against the anti-Federalist sentiment of his State.¹

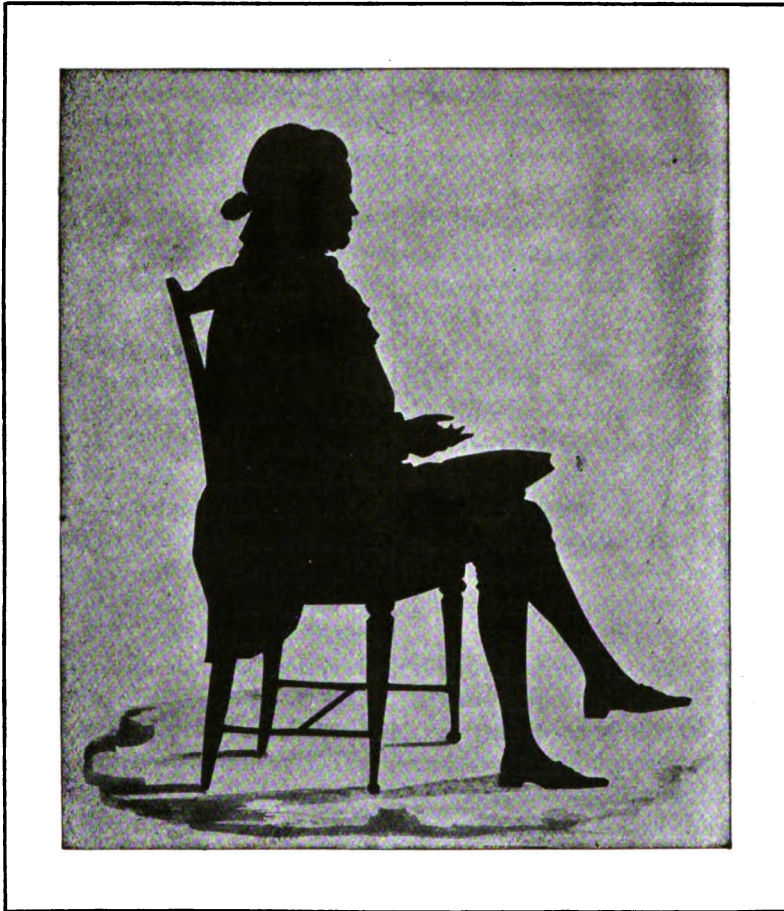
IN THE VIRGINIA CONSTITUTIONAL
CONVENTION: 1788.

Monday, June 2, 1788, found the little city of Richmond, on the James, all astir. The streets for that day were crowded with eager men hastening towards the Capitol; handsome equipages laden with Virginia's fairest daughters lined the main thoroughfares leading to the city. A stranger standing on one of the hills of the city, looking in any direction, would have noticed clouds of dust rising in the distance from the county roads. The roads, not railroads, leading into Richmond were lined with travellers approaching the city—some in gigs, some in phaetons, and many on horseback with saddlebags as their saratogas. Nor were they only those who expected to participate in the proceedings of the convention. Distinguished strangers from other States—planters from every portion of the Commonwealth—statesmen, though planters; while the ambitious youth from its remotest corners was eagerly

¹ Honorable Joseph P. Blair.

hastening to the scene to witness the most gigantic struggle in the history of the Old Dominion. Comely maidens and stately matrons whose grace had lent its charms to many official functions in the ancient cap-

unpopular in those days. While the delegates from beyond the Blue Ridge on horseback would scarcely dare to scale the mountains in the ample and comfortable carriage used for neighborhood purposes. Nor was



JOHN MARSHALL.

THIS WAS USED BY STORY WHEN MODELING HIS STATUE FOR THE
CAPITOL AT WASHINGTON.

By courtesy of the *The Outlook*

itol formed a bouquet of rarest fragrance, and diffused its brilliancy over the gathered assembly. Many members arrived late Sunday evening; and they continued to come until the hour of assembling on the next day at twelve. The steam engine brought none to the city; the trolley lines that now pierce the centres of commerce and population were

the bicycle or the automobile used as a mode of conveyance by members; and the picture of Chancellor Wythe or of the venerable Pendleton arriving at the Capitol in an automobile is one that the wildest imagination is unable to draw. Patrick Henry in his gig, Pendleton in his phaeton and others on horseback travelled the dusty

roads and across broad streams after many days of wearisome journey to take part in the deliberations of this great body.

In their elevated character and the loftiness of their patriotism, it is no disparagement to claim that the convention about to assemble was not inferior to that which adopted the instrument now presented for their consideration. . . .

Marshall, the future expounder of the Constitution, was not a member of the convention which framed it, and was thirty-three years of age when he took his seat as a member of the Virginia Convention called to ratify it. The impassioned eloquence of Patrick Henry, and the keen and incisive logic of Mason, day by day hurled with what seemed to be irresistible effect against the instrument, bore heavily upon its friends and caused them to feel the keenest doubt of the ultimate result. Madison and Wythe had met with signal ability the shafts of opposition. The public press, the great commanding influence of Washington and the solid phalanx of the soldiery were brought to bear by every ingenuity which skill and tact could devise in favor of its adoption.

Monroe, a young man of thirty, had just addressed the convention in opposition to the Constitution, which in subsequent years he was called upon to defend and execute. "He was succeeded on the floor by a tall young man, slovenly dressed, with piercing black eyes that would leave the observer to believe that their possessor was more destined to toy with the Muses than to worship at the sterner shrine of Themis. He was destined, like Monroe, to fill the mission of France, and to preside in the Department of War, and in the Department of State under the Federal Constitution. Marshall was in his thirty-third year, and from the close of the war to the meeting of the convention, with the exception of an occasional session of the House of Delegates, was engaged in the practice of law. His manners, like those of Monroe, were in strong contrast with those of Madison and Grayson. His habits

were convivial almost to excess; and he regarded as matters beneath his notice those appliances of dress and demeanor which are commonly considered important to advancement in a public profession. Nor should those personal qualities which cement friendship and gain the affections of men and which he possessed in an eminent degree, be passed over in a likeness of this young man—qualities as prominently marked in the decline of his honored life when his robe had for a third of a century been fringed with ermine, as when in the heyday of his youth, dressed in the light runabout, he won his way to every heart." . . .

By far the most interesting speech made by Judge Marshall in the convention was one in which he elaborated his views on the judicial system provided for in the Constitution. As we read this speech, made thirteen years before he assumed the position of Chief Justice, we see many traces of views which became his judicial judgments. I cannot stop to quote largely from it, but it is an able defence of the rights of the Federal Government to establish and maintain its own judicial system. Mason had made the objection that the Federal Courts would be used to oppress the people; that their judgments would not be impartial, and that Federal offenders would escape the penalties of the law because of the partialities of the courts for them. "Let us examine each of them (Grants of Federal Jurisdiction) with a supposition that the same impartiality will be observed there, as in other courts, and then see if any mischief will result from them. With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he (Mason) says, that the laws of the United States being paramount to the laws of the particular States, there is no case but what this will extend to. Has the government of the United States power to make laws on all subjects? Does he understand it so? Can they make laws affecting the modes of transferring property, or contracts, or claims between citizens of

the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction,—they would declare it void.”

Further on I quote, “with respect to disputes between a State and the citizens of another State—its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think a State will be called at the bar of a Federal Court. Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party and yet the State is not sued? It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words.” It may be doubted whether the Supreme Court at the time of the decision of *Chisholm v. Georgia* had these views of the great Chief Justice before them, though Mr. Hamilton’s views in the 81st number of the *Federalist* were in accord with them.

While it cannot be said in justice that Judge Marshall was the leader of the Constitutional forces in this convention, it can with truth be affirmed that on the subjects which he discussed he displayed the same abilities for which he was afterwards so justly distinguished, and won the respect and admiration of all of his colleagues. When by the narrow margin of ten votes, in a total of 180, the Constitution was ratified and a committee was appointed by the President to report a form of ratification, we find his name on that committee with Governor Randolph, Mr. Nicholas, Mr. Madison and Mr. Corbin as his associates; and, when, in order to meet the views of the large minority of the convention and quiet their fears, a committee was appointed to prepare and report such amendments as should be deemed necessary,

we find Judge Marshall’s name on that committee associated with George Wythe, Benjamin Harrison, Patrick Henry, Edmund Randolph, George Mason, James Madison, John Tyler, James Monroe, Richard Bland, John Blair and others. And so on the 27th of June, 1788, the Constitution was ratified by the convention.

As we look back upon the great record which he was permitted to make for a third of a century in expounding the instrument which he exhorted the people of Virginia to adopt, it may well be doubted whether that instrument would ever have been ratified by the people of Virginia in so close a contest had John Marshall been its foe instead of its friend; and as we view the history and development of our country in its mutation of parties, and the advancement of this remarkable people in every department of human endeavor, it may well be doubted if he ever did a greater service to the country than in throwing the weight of his great influence in favor of the adoption of the Constitution.¹

THE JAY TREATY.

A commercial treaty had been negotiated with Great Britain. The Republicans denounced it as an abject surrender of the interests of the country into the hands of an aggressive and arrogant foe. Besides the commercial objections to it, its constitutionality was questioned. It had been negotiated by our Minister to Great Britain under the direction of the Executive, and after a long and bitter debate had been ratified by the Senate. It was not referred to the House of Representatives for its concurrent action in any aspect. It was argued with great passion that this was a gross usurpation on the part of the President and Senate of the powers of the House, because the Constitution vested in Congress the power to regulate commerce with foreign nations, and further provided that all revenue bills should originate in the House; both of which provisions

¹ Professor Henry St. George Tucker.

were declared to be violated. On the other hand, Washington asserted as part of his prerogative, the exclusive power of the Executive and Senate to negotiate treaties with foreign nations. The question was new; there was nothing to go by but a general consideration of the nature of the executive function. It was most interesting, for nothing could be more important than the method of intercourse of the nation with foreign powers.

The Virginia Senators had voted against ratification. A resolution was introduced in the Legislature, approving their action and assailing the administration with great violence. The debate was protracted and acrimonious. Marshall opposed the resolution, but the tide was too strong, and he gave up hope of stemming it. With many misgivings he undertook an extreme measure. A public meeting was called in Richmond, of which in a letter to Hamilton, he says that it "was more numerous than I have ever seen at this place; and after a very ardent and zealous discussion which consumed a day, a decided majority declared in favor of a resolution that the welfare and honor of the nation required us to give full effect to the treaty negotiated with Great Britain." He addressed the meeting in one of the greatest speeches ever delivered in that beautiful capitol, where eloquence seemed to abide as once it had in Athens and in Rome. The question was then returned to the floor of the House, where he met the constitutional objections in a memorable oration of which those who heard it, said that "it was an admirable display of the finest powers of reasoning, accompanied by an exhibition of the fullest knowledge and comprehension of the history and scope of the Constitution and of the public interests affected by the treaty." The resolution arraigning the Administration gave way to another which did not "touch the constitutional or commercial objections to the treaty, but expressed the highest sense of the integrity, patriotism and wisdom of the President of the United States, and declared that in approving the votes of the Senators of that

State relative to the treaty, the assembly did in no wise mean to impugn the motives which influenced him to the ratification."¹

THE MISSION TO FRANCE.

When war between France and England was declared, the Directory demanded of our government a return of the good offices by aid of which we had gained our independence, and active sympathy in its behalf against England which it called a common enemy. Washington was deeply sensible of our debt, but was too self-poised to permit sentiment to overcome his judgment; and with calm and patriotic resolution he maintained that our true policy was strict neutrality and its safe part was to give into the hands of neither of the parties any influence in our domestic affairs. This touched our early friend to the quick. The Directory was betrayed into an act of great and inexplicable indiscretion. In November, 1796, by order of the Directory, its Minister announced to the Secretary of State the suspension of his functions, in a letter which concluded with an inflammatory appeal to the American people against their government; reminding them of its treaty of amity with the tyrant of the seas, and declaring that an administration capable of such treachery was no longer deserving of the loyalty of a people whose independence had been cemented by the blood of Frenchmen. The Directory itself, in the same undiplomatic spirit, dismissed General Pinckney, our Minister to France, and in its address of dismissal to Mr. Monroe, repeated the same offensive statements and the same appeal to the prejudices of the American people. This gross indignity deeply stirred the popular emotion and sense of respect of our countrymen, and turned the tide of popular feeling against our early friends. In May, 1797, another mission composed of General Pinckney, Mr. Marshall and Mr. Gerry, was dispatched to Paris. In his message nominating these gentlemen to

¹Honorable James M. Woolworth, of Omaha, Nebraska.

the Senate, President Adams stated that in the critical and singular circumstances then existing, it was of great importance to engage the confidence of the great portions of the Union in the character of the persons employed and the measures to be adopted; and he had therefore adopted the expedient to nominate persons of talent and integrity long known and interested in the three great divisions of the country. . . .

When the Ministers presented themselves at the Ministry of Foreign Affairs in Paris, the Secretary rudely refused to receive them, and they found themselves in the midst of the revolution, unprotected, exposed to violence, and subject to contumely and insult. Talleyrand demanded what he was pleased to call a "gratification" of \$250,000 for himself, and a loan to the Directory of 32,000,000 Dutch florins as the price of the privilege of entering upon negotiations. For months he kept the ambassadors in suspense, while he and his agents again and again repeated these demands. The answer of the Americans to every one was, "No, no; not a sixpence." Two letters were addressed to the rapacious Secretary, evidently from the pen of Marshall, in which the course of this country was powerfully defended and that of the Directory arraigned. The Commissioners at last abandoned their mission, received their passports, and Pinckney and Marshall returned home. In their dispatches to the government they set forth the obloquy to which our country had in their persons been subjected, and did so in a manner so clear, so moderate, and at the same time so impressive, that when the President, in a powerful message, communicated them to Congress, the halls of the two Houses and the whole country rang with one cry at the indignities which every citizen felt in his own person. Marshall landed in New York on the 17th of June, 1798, and reached Philadelphia, the seat of government, two days afterwards. His entrance into the city was a triumphal procession. He was escorted by the military and great crowds of his countrymen. Many of

the most eminent citizens paid him their respects, and public addresses were presented to him animated by sentiments of the highest respect and affection. A public dinner was given to him by members of both Houses of Congress as an evidence of affection for his person, and of their grateful approbation of the patriotic firmness with which he had sustained the dignity of his country during his important mission; and the country at large responded with one voice to the sentiment pronounced at this celebration, "Millions for defense, but not a cent for tribute."¹

IN CONGRESS.

Soon after [his return from France] Marshall, in company with Bushrod Washington, visited Mount Vernon at the invitation of General Washington, who sought that opportunity of urging them to become candidates for Congress in their respective districts. An amusing incident of the visit has been given, as follows:—"They came on horseback, and for convenience had bestowed their wardrobes in the same pair of saddle-bags, each party occupying his side. On their arrival at Mount Vernon, wet to the skin by a shower of rain, they were shown into a chamber to change their garments. One unlocked his side of the bag and the first thing he drew forth was a black bottle of whiskey. He insisted that this was his companion's repository; but, on unlocking the other there was found a huge twist of tobacco, a few pieces of cornbread and the complete equipment of a waggoner's pack-saddle. They had exchanged saddlebags with some traveler on the way, and finally made their appearance in borrowed clothes, that fitted them most ludicrously. The General was highly diverted and amused himself with anticipating the dismay of the waggoner, when he discovered this oversight of the men of law."—(Poulding.)

Both gentlemen yielded to the importunities of their venerable friend and became candidates. During the campaign, which

¹ Honorable James M. Woolworth.

was undertaken only because General Washington insisted that the perilous condition of the government demanded his services in Congress, Mr. Marshall declined the tender by President Adams of a seat on the Bench of the Supreme Court, rendered vacant by the death of Mr. Justice Iredell. The position was then offered to Bushrod Washington and by him accepted. After a vigorous and heated contest Mr. Marshall was elected.¹

Mr. Marshall's next public service was as a member of the last Congress which sat in Philadelphia, meeting in December, 1799, and which body, so competent a judge as Horace Binney has declared, "was perhaps never excelled in the number of its accomplished debaters or in the spirit for which they contended for the prize of the public approbation." In announcing the death of Washington, Mr. Marshall seems to have anticipated in some degree the doctrine afterwards associated with the name of President Monroe. He declared that "Washington was the hero, the patriot, and the sage of America, and that more than any other agency he had contributed to found this wide-spreading empire, and to give to the Western world independence and freedom."

However improbable such an occurrence may now appear, it is undoubtedly true that Mr. Marshall changed the current of opinion upon a grave constitutional question by a speech in Congress, although it is true that his argument in the Robbins case so far from being an ordinary speech in debate has all the merit and nearly all the weight of a judicial decision. It separates the executive from the judicial power by a line so distinct and a discrimination so wise that all men can understand and approve it. He demonstrated that, under the circumstances, the surrender of Robbins to the British authorities was an act of political power, which belonged to the executive department alone; and before the

¹ Honorable W. C. Caldwell, Justice of the Supreme Court of Tennessee.

session closed he was privileged to teach his associates as well as his successors in Congress, by a striking example, how, when the convictions of the individual conscience conflict with the behests of party, a true patriot will follow the former, in utter disregard of party discipline, and of possible calamitous consequences to his future political advancement. Although a strong supporter of President Adams' administration, Mr. Marshall voted without hesitation, contrary to the earnest desire of the President and in direct opposition to all those with whom he was in general political accord. Believing that the second section of "The Alien and Sedition Laws" ought to be repealed, he voted accordingly, and it has long since been universally acknowledged that he was right. Among other lessons he had learned from Washington was this: "The spirit of party, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human spirit, but in governments of the popular form it is seen in its greatest rankness and is truly their worst enemy."¹

He was a man who believed that public office was a public trust, and amid all the rancor of party politics, in those early days of strife, the breath of slander never cast a stain upon his spotless reputation. It has been said that in him virtue seemed to have its visible representative. . . .

It was well known that Marshall had little ambition for political preferment; on the contrary, he had a repugnance to a political career. He had entered politics largely against his will, and only from a sense of patriotic duty.²

Marshall's accurate knowledge of the wants of the people and the necessities of the times in which he lived, no less than his clear comprehension of the legitimate functions of government, fitted him to achieve distinction as a legislator no less than as a jurist.

¹ Honorable Wayne MacVeagh, Washington.

² Honorable William Pinkney Whyte.

By common report he was not a great orator, but he possessed ability in a marked degree to influence the judgments of men, as well as the capacity to formulate wise measures of national policy when the times were critical, and if his talents had been given opportunity for full development in this field of action he would have taken rank with our ablest statesmen and left an indelible impress on Federal legislation.¹ . . .

IN THE CABINET.

The short time he acted as Secretary of State gave him no opportunity to demonstrate his capacity for dealing with foreign affairs. Outraged by both France and Great Britain, the United States occupied a humiliating position. Too proud to submit to insults and too weak to resent them, they could only hope to contend with either of those nations by taking advantage of the war going on between them. Under these depressing surroundings Marshall still had the courage to declare that the United States did not hold themselves in any degree responsible to France or Great Britain for their negotiations with the other of those powers, and that they had repelled and would continue to repel injuries not doubtful in their nature, and hostilities not to be misunderstood.²

So far from Mr. Marshall's independence of party having estranged President Adams he very soon afterwards appointed him Secretary of State, and the duties of this important office he discharged with the same wisdom and firmness he had displayed in all other public stations. The right then asserted by both France and Great Britain, while at war with each other, to interfere in our affairs and to compel us to ally ourselves with the one or the other of the combatants, was denied in a dispatch which will always hold high rank among the important state papers

¹ Judge Amos M. Thayer.

² Senator William Lindsay.

of America. He said: "The United States do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with one or the other of those powers. The aggressions sometimes of the one and sometimes of the other have forced us to contemplate and prepare for war. We have repelled, and will continue to repel, injuries not doubtful in their nature and hostilities not to be misunderstood." With this clear and vigorous statement of the true position of his country he closed his career as a statesman.

He must have found that career singularly interesting and fruitful. In the Legislature of his native State; in its Constitutional Convention; in the special mission to the French Directory; as a member of Congress, and as Secretary of State, he had been brought into association with almost every member of that great galaxy of statesmen to whose wisdom, integrity and patriotism we are indebted for the priceless blessings of liberty and union which we now enjoy, and those associations had undoubtedly broadened and widened and deepened his opinion of the true character of the National Government, and assisted to give to his judgments that stately impress, alike of consistency and of conclusiveness, which they maintained to the end.¹

Marshall took no active part in the contest made in Congress that winter (1800-1) between Thomas Jefferson and Aaron Burr for the Presidency of the United States. His first inclination was to lend his influence to Mr. Burr, but he was dissuaded from that course by a private letter from Alexander Hamilton. He then refrained from supporting Mr. Jefferson, for fear the latter might construe his assistance as an indication of a desire to retain the position of Secretary of State in Mr. Jefferson's Cabinet in the event of his election.²

¹ Honorable Wayne MacVeagh.

² Mr. Justice Caldwell.

ACCESSION TO THE BENCH.

The August term of the year of our Lord 1800 of the Supreme Court of the United States had adjourned at Philadelphia on the fifteenth day of August and the ensuing term was fixed by law to commence on the first Monday of February, 1801, the seat of the government in the meantime having been transferred to Washington. For want of a quorum, however, it was not until Wednesday, February 4, when John Marshall, who had been nominated Chief Justice of the United States on January 20 by President Adams, and commissioned January 31, took his seat upon the Bench, that the first session of the court in this city began.¹

His characteristic letter of acceptance, addressed to the President, and dated February 4, 1801, was in these words:

"SIR: I pray you to accept my grateful acknowledgments for the honor conferred on me in appointing me Chief Justice of the United States.

"This additional and flattering mark of your good opinion has made an impression on my mind which time will not efface.

"I shall enter immediately on the duties of the office, and hope never to give you occasion to regret having made this appointment.

"With the most respectful attachment,

I am, Sir,

"Your obedient servant,

"J. MARSHALL."

On the same day, as is stated on the record of the Supreme Court, his commission as Chief Justice, "bearing date the 31st day of January, A. D. 1801, and of the Independence of the United States the twenty-fifth," was "read in open Court, and the said John Marshall, having taken the oaths prescribed by law, took his seat upon the Bench."²

The scene was the court room, now taken possession of for the first time. The apartment was semi-circular and spacious, the ceil-

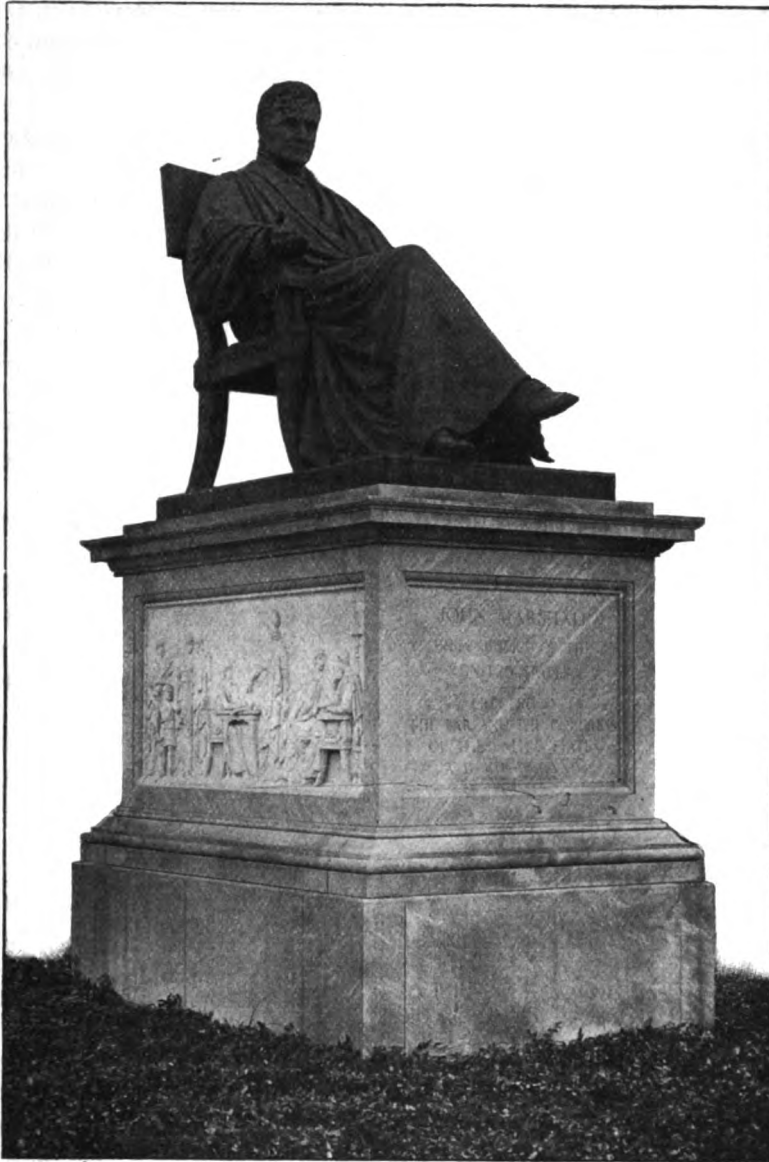
¹ Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

² Honorable Horace Gray, Justice of the Supreme Court of the United States.

ing was formed by groined arches, and columns near the circumference followed its line. The heavy arches and massive pillars depressed the ceiling, and gave a sombre appearance, although crimson hangings behind the bench and a shield above it, emblazoned with the arms of the United States lent some color to the room. On entering one could not have repressed a certain sense of solemnity and a consciousness that it was the place of great transactions. The Bar was well filled. Senators had come down from their chamber and Representatives had come down from their hall, many of them personages of distinguished presence and of fame for eloquence, erudition, character and patriotism. Counsel had come from Richmond, Baltimore, Philadelphia, New York, Boston and other cities as learned and eloquent as the barristers who thronged Westminster: Ingersoll and Dallas and Edmond Randolph and Charles Lee and Tilghman and Hamilton and Dexter and others whose names we do not know.

The announcement was made, "the Chief Justice and the Associate Justices of the Supreme Court of the United States," and in the presence of the members of the Bar standing in respectful attention, the procession of the Judges ascended to their places and graciously saluted the great attendance. We cannot help thinking that those who, in whatever office and capacity, had part in the event, appreciated its significance and had a glimpse of what should there be done, the contentions of giants for the destinies of the Republic, the stately judgment, tender of the rights of the meanest citizen and setting forth the rules of truth and righteousness for the advancement of the race, I say we cannot help thinking that such witnesses of the scene could not repress a thrill of intensely exhilarating emotion. . . .

And in the midst of his brethren, before that splendid Bar, stood the Chief Justice. Only forty-five years old, he bore a stamp and mien impressive in a singular way. He was tall and slender, his complexion was dark, his eyes twinkled with humor and dark-



CHIEF JUSTICE MARSHALL.

STATUE, BY STORY, AT THE CAPITOL, WASHINGTON.

ened to blackness when the nature behind them was aroused; the forehead rather low, was terminated by a horizontal line of thick raven hair, his temples fully developed, his cheeks rather thin, the mouth wide, full and soft rather than hard, and the chin and jaw large and strong, showing a capacity for standing by his convictions. But it was not the separate features of the man that conveyed the impression of his character. They say there is a graciousness of kings, but there is another. He has it who has suffered much for his country and has looked into the deep things of liberty. His graciousness is not of princes, but of leaders of the people. It is not courtly manners nor the seductions of persuasive speech which dwell in royal blood, but the unconscious dignity of exalted character. Such was Marshall. In the august presence of Senators and Representatives, counsel and venerable Judges, his whole person was the embodiment of the Chief Justice.

His commission was read, and the oath of office administered. The Court and Bar were seated. A few simple words were spoken, a few formal matters were transacted, and the Court adjourned for the term.¹

THE SUPREME COURT OF THE UNITED STATES BEFORE 1801.

On the 24th of September, 1789, the first Congress under the Constitution passed the Judiciary Act, which had been framed by Oliver Ellsworth, then a Senator from Connecticut. That act has always been regarded as a contemporaneous construction of the Constitution; and, with some modifications, remains to this day the foundation of the jurisdiction and practice of the courts of the United States. It provided that the Supreme Court should consist of a Chief Justice, and of five Associate Justices who should have precedence according to the date of their commissions; established the Circuit and District Courts; defined the jurisdiction, original and appellate, of all the

¹ Honorable James M. Woolworth.

Federal courts; and empowered the Supreme Court to reëxamine and reverse or affirm, on writ of error, any final judgment or decree, rendered by the highest court of a State in which a decision in the case could be had, against a right claimed under the Constitution, laws or treaties of the United States.

President Washington, on the very day of his approval of that act, nominated John Jay, of New York, as Chief Justice; and John Rutledge, of South Carolina, William Cushing, of Massachusetts, Robert H. Harrison, of Maryland, James Wilson, of Pennsylvania, and John Blair, of Virginia, as Associate Justices of the Supreme Court; and the nominations were all confirmed by the Senate on the 26th of September. The commissions of Chief Justice Jay and of Mr. Justice Rutledge were dated on that day, and those of the other Justices on successive days, in the order above named, thus determining their precedence. President Washington, in a letter to each of the Associate Justices, informing him of his appointment, remarked; "Considering the judicial system as the chief pillar upon which our National Government must rest," and in a letter to the Chief Justice, enclosing his commission, said that the judicial department "must be considered as the keystone of our political fabric."

During the first twelve years of the Supreme Court, there were frequent changes in its membership: three by the appointees preferring high offices in the governments of their several States; three others by resignation; one by rejection by the Senate; and two by death.

Rutledge never sat in the Supreme Court as Associate Justice, and in 1791 resigned the office to accept that of Chief Justice of South Carolina. Harrison declined his appointment, preferring to become Chancellor of Maryland. James Iredell, of North Carolina, was appointed in 1790, in the stead of Harrison; and Thomas Johnson, of Maryland, in 1791, in the place of Rut-

ledge. The other Associate Justices before 1801 were two appointed by President Washington: William Paterson, of New Jersey, in 1793, in the place of Thomas Johnson, resigned; and Samuel Chase, of Maryland, in 1796, upon the resignation of Blair; and two appointed by President John Adams: Bushrod Washington, of Virginia, in 1798, upon the death of Wilson; and Alfred Moore, of North Carolina, in 1799, upon the death of Iredell.

President Washington, in his eight years of office, appointed four Chief Justices of the United States; John Jay in 1789; John Rutledge in 1795; William Cushing and Oliver Ellsworth in 1796. Jay held the office for about five years and nine months; and for the first six months of that time, by the President's request, also acted as Secretary of State. Ellsworth held the office of Chief Justice a little more than four years and a half. But Jay, as well as Ellsworth, during the whole of his last year, ceased to perform his judicial duties, by reason of being employed on a diplomatic mission abroad. Rutledge, after sitting as Chief Justice for a single term, was rejected by the Senate; and Cushing, though confirmed by the Senate, declined the appointment, and remained an Associate Justice until his death in 1810. Ellsworth resigned in 1800, owing to ill health; and Jay resigned in 1795 to accept the office of Governor of the State of New York, and in 1800, towards the close of his second term of office as Governor, being in a depressed condition of health and spirits, and having finally determined to retire from public life, declined a reappointment as Chief Justice, offered him by President Adams on the resignation of Ellsworth.¹

Up to Marshall's time the importance of the Supreme Court in the scheme of the Federal Government had scarcely been appreciated. In the original proposals for the

¹Mr. Justice Gray.

erection of a capitol, prepared, I believe, under the direction of George Washington himself, no provision was made for the accommodation of the Court. The founders of the nation had inherited the traditions of the mother country, where, owing to the absolute power of Parliament, the function of the judiciary was limited to the settlement of private disputes, its only relation to the government being on the criminal side. The idea of enforcement of constitutional limitations by the judiciary upon the other departments of the government and upon the States themselves, axiomatic as such doctrines appear to us, was by no means understood, much less conceded.

Even the Justices themselves seemed to have failed to realize their importance. Appointments to the Bench were often declined, and resignations were frequent, some even to go upon the Bench of a State Court. Both of the Chief Justices who preceded Marshall (not counting John Rutledge, whose appointment was not confirmed, and who presided only over one term) resigned their offices to become Ministers to foreign courts; and John Jay, the first Chief Justice, when asked to resume his position, declined, saying, "I left the Bench perfectly convinced that, under a system so defective, it could not attain the energy, weight, and dignity which were essential to its affording due support to the national government."

The whole business of the Court during the first eleven years of its existence is recorded in less than a single volume of the size of current reports. Most of the questions before it concerned procedure and practice in the Federal Courts. The meagre decisions touching the scope of its own powers and duties, were for the most part confined to denial rather than assertion, like its refusal to advise the President, and its decision in *Hayburn's case* that Congress could not impose upon it the duty of acting as auditor to hear pension claims. It did assert the right to hear the case of a citizen against a State, and to enter judgment against the

State; but this right was promptly taken away by an amendment to the Constitution. Even Marshall continued to be a member of Adams' Cabinet after his appointment to the Bench, until the close of the Presidential term. So little was the true function of the Court understood that one of the earliest cases reported seems to have consisted of the trial of issues of fact by a jury, the charge being given by one of the Justices. It had been a Court of weak beginnings and of insignificant achievements. It had not found its place in the scheme of government. When the nineteenth century came in its great work was yet before it.¹

At its first session it had no cases. At the date of Marshall's appointment there were only ten cases on its docket. From 1790 to 1800 there were decided only six cases in which the Constitution was construed. The most important constitutional question decided during that period arose in the celebrated case of *Chisholm against the State of Georgia*, in which it was held that under the Constitution the States had lost that common attribute of sovereignty, exemption from suit by a private citizen. This interpretation of the Constitution was received with surprise by the country at large, and with consternation of the debtor States. It is one of perhaps two decisions of the Supreme Court on important constitutional questions which did not at once, or in time, command approval and general acquiescence — the other is known as the *Dred Scott* decision. The case of *Chisholm v. Georgia* was practically repealed by an amendment to the Constitution. From the *Dred Scott* decision the appeal was the wager of battle, and it was wiped out in the blood of civil war.

Prior to Marshall's becoming a member of the Supreme Court, the vast extent and importance of its duties and powers were dimly understood, and few suspected what a potent factor it was destined to become in the

¹ Honorable Hosea M. Knowlton, Attorney-General of Massachusetts.

development of the nation. The esteem in which it was held may be inferred from the fact that one of its members resigned to accept the office of Chancellor in his own State, a seat on its bench was declined about the same time in favor of a State Judgeship, Chief Justice Jay resigned his office to accept the governorship of New York, and both Jay and Ellsworth considered the duties of Chief Justice not to be incompatible with the holding of other offices at the same time. How far the Court was from the assured and exalted position it was soon to attain under its greatest Chief Justice is revealed by Jay, who, on the resignation of Ellsworth, was tendered, for the second time, the position of Chief Justice. In declining a second appointment, he said: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system."¹

It is not fair to say that the court had failed in securing public confidence up to the advent of John Marshall as its Chief Justice. It is not, however, unfair or unjust to say that public attention had not been specially directed to its field of labor, and that the litigation it had theretofore considered had not been of the character and importance to attract general public notice, in the face of the political interests excited by the law-making department, and the personal consideration enjoyed by the eminent men who had occupied the Chief Executive office of the Union.²

The Court in the eleven years after its organization, during which Jay and Rutledge and Ellsworth — giants in those days — pre-

¹ Honorable Joseph P. Blair. ² Senator Lindsay.

sided over its deliberations, had dealt with such of the governmental problems as arose, in a manner worthy of its high mission; but it was not until the questions that emerged from the exciting struggle of 1800 brought it into play, that the scope of the judicial power was developed and declared, and its significant effect upon the future of the country recognized.¹

MARSHALL'S ASSOCIATES ON THE BENCH.

Mark the persons of the Judges. The youngest was Alfred Moore, small in stature, neat in dress and graceful in manner, with a clear and sonorous voice, a keen sense of humor, a brilliant wit, and overpowering logic, and a style as an advocate lucid and direct, terse and compact.

Bushrod Washington, the nephew of the Father of his Country, was a man of solid rather than brilliant mind, sagacious and searching rather than quick and eager, of temperate yet firm disposition, simple and reserved in manner, clear in statement, learned in discussion, accurate in reasoning, and

¹ Mr. Chief Justice Fuller.

animated by a love of justice as a ruling passion.

Samuel Chase had labored zealously and successfully to change the sentiments of Maryland so as to authorize him to vote for

the Declaration of Independence, of which he was one of the signers. He was of imposing stature and wielded the power of an energetic eloquence, but he was irascible, vain, overbearing, and sometimes tyrannical, with an instinct for tumult and a faculty for promoting insurrection at the Bar.

William Patterson was a member of the convention which framed the Constitution. He contended that its proper object was a mere revision and extension of the Articles of Confederation, and proposed in that body what was known as the



JOHN MARSHALL.

FROM A SILHOUETTE HANGING ON THE WALLS OF THE VIRGINIA HISTORICAL SOCIETY.

By courtesy of *The World's Work*.

New Jersey plan, which preserved the sovereignties of States in their integrity and gave the general government power to provide for the common defense and general welfare.

Next the Chief Justice on his right, was William Cushing, appointed by Washington. A son of one of the Judges who presided at the trial of the British soldiers for the massa-

cre of citizens in the streets of Boston on the 5th of March, 1770, he succeeded his father as Judge of the Supreme Court of Massachusetts. He was a graceful and dignified man, of fair complexion, blue eyes and enormous nose. A gentleman of the old school, he adhered to the style of the Revolution — wearing a three-cornered hat, wig and small clothes with buckles in his shoes.¹

Among the five associates whom he found on the bench was Bushrod Washington, who served with him twenty-eight years. During Marshall's long service of thirty-four years on the Bench ten other associates were at different times appointed, who served with him for longer or shorter periods. Among these last was Joseph Story of Massachusetts, who for twenty-four years was an associate of Marshall. Aside from Washington and Story, of whom I will speak later, ten of his remaining associates had been members of the highest Court in their respective States before their appointment, besides holding many other important offices. Of the other three, one had been Secretary of the Treasury, another a United States Senator and a third a member of Congress. Many of them had been members of constitutional conventions. They were men of great learning and of the highest character, and added strength to the Bench. Their lives would be interesting had we time to consider them.

Bushrod Washington was a Virginian. He was the favorite nephew of George Washington, who bequeathed to his nephew his estate of Mount Vernon and all his valuable public and private papers. Judge Washington served in the Revolutionary War with distinction. He was a member with Madison and Marshall of the Virginia Convention which ratified the United States Constitution, and contributed to that end with them. December 20, 1798, at thirty-six years of age, he was appointed by President John Adams an Associate Justice of the United States Supreme Court. . . .

¹ Honorable James M. Woolworth.

He possessed many of the qualities of his renowned uncle. He had strong common sense and a clear judgment which he brought to bear upon all judicial questions which came before the Court. By his thorough familiarity with the principles of the Constitution, derived from the discussion in the Virginia Convention, and from his long and familiar intercourse with George Washington, his mind was trained to understand and determine the important constitutional questions which came before the Court at that time. His judgment and learning on these questions were of great assistance to the Court.

Joseph Story was born in Marblehead, Mass., September 18, 1779. He was educated at Harvard College. In 1801 he began the practice of his profession and soon attained unusual success. New Hampshire lawyers will readily believe this when they learn that within three or four years of his coming to the Bar he won two verdicts in two separate trials of a case in Rockingham county with Jeremiah Mason as the opposing counsel. At an early age he was a member of the State Legislature and of Congress, and subsequently was Speaker of the Massachusetts Legislature. November 11, 1811, at the age of thirty-two years, he was appointed by President Madison Associate Justice of the Supreme Court of the United States. He was the youngest member of this Bench and the youngest person who had ever been elevated to a similar position, with the single exception of Mr. Justice Buller of the King's Bench. His remarkable learning, his clearness of statement and the integrity of his intellect, coupled with his almost limitless capacity for labor and research, soon brought him to the highest rank as a Judge.

His literary labors were most extensive. He was a prolific writer of law books. His treatises on a wide range of legal subjects, including his work on equity, are among the standard legal text books, and have long been regarded as of the highest authority.

His "Commentaries on the Constitution" he dedicated to Chief Justice Marshall, who had the highest estimate of this work. . . .

He accepted the Dane professorship of law in the Harvard Law School and found time to perform its duties in addition to all his other labors. . . .

He had a charming personality, which, with his modesty, his amiability and his goodness, endeared him to his judicial associates and won the esteem and affection of a wide circle of friends. He carried on a large correspondence with authors, Judges and distinguished men in this country and Europe. He added strength to the Bench. He was its greatest scholar. His great learning and scholarship were reflected in his opinions and added lustre to the reputation of that distinguished Court. His fame as a Judge and author was by no means confined to this country, but was known throughout Europe. As has been said of him, "he was not merely a Judge; he was a jurist also, interested not only in the administration of the law, but in its science, in its improvement by legislation, and in its exposition by published works."

It may be of interest to note the social life of the members of the Supreme Court at this time. As a rule the Justices did not take their families to Washington, but lived at hotels during the sessions of the Court. It is said they did not mingle much in society in Washington. They lived rather apart from the rest of the world. Occasionally they paid a visit to Mount Vernon and enjoyed the generous hospitality of their Associate Justice, Washington. Once a year they dined with the President. "On other days," Judge Story said, "we dine together and discuss at table the questions that are argued before us. We are great ascetics and even deny ourselves wine, except in wet weather." Here the Justice paused, as if thinking his last statement placed too severe a tax upon human credulity, and then added slyly, "What I say about wine, sir, gives you our rule; but it does sometimes happen that

the Chief Justice will say to me when the cloth is removed: 'Brother Story, step to the window and see if it does not look like rain.' And if I tell him that the sun is shining, Justice Marshall will sometimes reply, 'All the better; for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere.'"¹

THE "LIFE OF WASHINGTON."

At the earnest insistence of Justice Bushrod Washington, the literary executor and favorite nephew of General Washington, Judge Marshall during his judicial term wrote a life of Washington which did not prove to be a literary success. It is out of print, though later in life he published an abridged edition which did not serve to redeem the book from dullness and verbosity.²

In the literary work of writing the life of Washington, he was not at his best, for he had neither the necessary training for such a work, nor had he the leisure for a most critical study of all the facts. He had been a part of what he portrayed, and his brush had upon it the colors of a sharing participant.³

It was impossible to write this life of Washington without discussing the causes that led, during Washington's administration, to the formation of political parties and divided the people into Federalists and Democrats. It was also impossible for a personal friend and political sympathizer to write an account of Washington's administration without reflecting on the conduct of those members of the Democratic party who practically constituted the opposition. And it was equally impossible that history could be written from such a standpoint without giving great

¹ Honorable Robert M. Wallace, Justice of the Supreme Court of New Hampshire

² Honorable Horace H. Lurton, United States Circuit Judge.

³ Honorable George B. French, Nashua, New Hampshire.

offence to leading Democrats. Jefferson spoke of the work as "the five-volumed libel;" "the party diatribe of Marshall."¹

IN THE VIRGINIA STATE CONVENTION:
1829.

At the time of becoming a member of that convention, Marshall wrote to Mr. Justice Story an amusingly apologetic letter, dated Richmond, June 11, 1829, in which he said: "I am almost ashamed of my weakness and irresolution, when I tell you that I am a member of our convention. I was in earnest when I told you that I would not come into that body, and really believed that I should adhere to that determination; but I have acted like a girl addressed by a gentleman she does not positively dislike, but is unwilling to marry. She is sure to yield to the advice and persuasion of her friends." "I assure you I regret being a member, and could I have obeyed the dictates of my own judgment I should not have been one. I am conscious that I cannot perform a part I should wish to take in a popular assembly; but I am like Molière's 'Médecin Malgré Lui.'"

Mr. Grigsby tells us that "he spoke but seldom in the convention, and always with deliberation," and that "an intense earnestness was the leading trait of his manner." Some remarks of his on the judicial tenure may fitly be quoted, without comment.

Strenuously upholding, as essential to the independence of the judiciary, the tenure of office during good behavior, he said: "I have grown old in the opinion that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, Sir, to the duties of a Judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular." "Is it not, to the last degree, im-

portant that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? You do not allow a man to perform the duties of a jurymen or a Judge, if he has one dollar of interest in the matter to be decided, and will you allow a Judge to give a decision when his office may depend upon it? When his decision may offend a powerful and influential man?" "And will you make me believe that if the manner of his decision may affect the tenure of that office, the man himself will not be affected by that consideration?" "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

The question of the weight, as a precedent, of the act of Congress of 1802, abolishing the Circuit Judgeships created by Congress in 1801, having been discussed by other members of the convention, and Chief Justice Marshall's opinion having been requested, he said, "that it was with great, very great repugnance, that he rose to utter a syllable upon the subject. His reluctance to do so was very great, indeed; and he had, throughout the previous debates on this subject, most carefully avoided expressing any opinion whatever upon what had been called a construction of the Constitution of the United States by the act of Congress of 1802. He should now, as far as possible, continue to avoid expressing any opinion on that act of Congress. There was something in his situation which ought to induce him to avoid doing so. He would go no farther than to say that he did not conceive the Constitution to have been at all definitely expounded by a single act of Congress. He should not meddle with the question, whether a course of successive legislation should or should not be held as a final exposition of it; but he would say this — that a single act of Congress, unconnected with any other act by the other departments of the Federal Gov-

¹ Professor Jeremiah Smith, of the Law School of Harvard University.

ernment, and especially of that department more especially entrusted with the construction of the Constitution in a great degree, when there was no union of departments, but the legislative department alone had acted, and acted but once, even admitting that act not to have passed in times of high political and party excitement, could never be admitted as final and conclusive."¹

LAST YEARS AND DEATH.

In the summer and autumn of 1831 the Chief Justice had a severe attack of stone, which was cured by lithotomy, performed by the eminent surgeon, Dr. Physick, of Philadelphia, in October, 1831. Another surgeon, who assisted at the operation, tells us that his recovery was in a great degree owing to his extraordinary self-possession, and to the calm and philosophical views

which he took of his case, and of the various circumstances attending it. Just before the operation, he wrote to Mr. Justice Story: "I am most earnestly attached to the character of the department, and to the wishes and convenience of those with whom it has been my pride and my happiness to be associated for so many years. I cannot be insensible to the gloom which lowers over us. I have a repugnance to abandoning you under such circumstances, which is almost in-

¹ Mr. Justice Gray.

invincible. But the solemn convictions of my judgment, sustained by some pride of character, admonish me not to hazard the disgrace of continuing in office a mere inefficient pageant." He concluded by saying that he had determined to postpone until the next term the question whether he should resign his office. After the operation he wrote: "Thank Heaven, I have reason to

hope that I am relieved. I am, however, under the very disagreeable necessity of taking medicine continually to prevent new formations. I must submit, too, to a severe and most unsocial regimen. Such are the privations of age." He continued to perform the duties of his office, with undiminished powers of mind, for nearly four years more, and ultimately died, in his eightieth year, of a disease of a wholly



GRAVE OF CHIEF-JUSTICE MARSHALL.

different character, an enlarged condition of the liver.¹

Mr. Justice Caldwell quotes the following paragraph from a letter written by the youngest son of the Chief Justice:

"It was an interesting exhibition of father's devotion to the memory of my mother, who was buried near Richmond, Va., that he habitually walked to her grave every Sunday afternoon, a distance of one and

¹ Mr. Justice Gray.

a half miles. Upon one Sunday afternoon, suffering with the malady which led to his death, he was taking his accustomed walk when he fell from exhaustion on the common outside the city and was unable to proceed. He was fortunately seen by two negro men (everybody knew him) and was carried in their arms to his home, whence he went to Philadelphia and placed himself under the care of the celebrated doctors, Physick and Chapman. Without avail, however, as in a few weeks his body was brought back and buried by the side of his dear wife."— (Green Bag.)

The great-granddaughter to whom that letter was addressed, says: "The Chief Justice died Monday, July 6, 1835. It was in the evening, and he quietly and peacefully closed his eyes in this world with the blessed certainty of opening them in Heaven."

On the morning of July 8, about five o'clock, the body of Chief Justice Marshall was removed to the steamboat lying at the foot of Chestnut street wharf. The Mayor and Council and many citizens went down with the boat as far as New Castle, and the Bar committee traveled to Richmond.

As the funeral cortege moved slowly down Chestnut street the old Liberty Bell began slowly tolling a majestic salute to the nation's dead. It was the first time the bell had sounded since February 22, 1832, the centennial anniversary of Washington's birth. Desiring to preserve intact the most venerable relic of the days of 1776, the authorities had made a rule forbidding the ringing of the bell except on very important occasions, such as the death of Marshall was deemed to be, and so the sonorous tones of the great bell which had proclaimed liberty and sounded the death knell of British domination, rang out impressively over the city, and groups gathered around listening spell-bound.

Suddenly there was an ominous sound, the beautifully crystalline tone became dis-

cordant and jangled, and on examination it was found that Liberty Bell was cracked. It was subsequently rung on several occasions, although the tone was doleful. Finally, on the celebration of Washington's Birthday, in 1843, the crack was so much increased in size that the bell was thenceforth kept mute forever.

As it stands in all its silent dignity, in honorable retirement within the sacred precincts of the shrine of American liberty, it is not only the symbol of all that is highest in patriotism, but with its pathetic crack is also a vivid reminder of the august sage and the mighty Judge whose expounding of the Constitution placed that instrument of law and order on an unassailable basis, and whose memory a grateful nation honors.¹

PRIVATE LIFE AND CHARACTER.

Marshall was, like Lord Camden and other eminent Judges, a great reader of novels. On November 26, 1826, he wrote to Mr. Justice Story that he had just finished reading Miss Austen's novels, and was much pleased with them, saying: "Her flights are not lofty, she does not soar on eagle's wings, but she is pleasing, interesting, equable, and yet amusing."

Mr. Binney, in his sketches of the Old Bar of Philadelphia, incidentally mentions: "After doing my best, one morning, to overtake Chief Justice Marshall in his quick march to the Capitol, when he was nearer to eighty than to seventy, I asked him to what cause in particular he attributed that strong and quick step; and he replied that he thought it was most due to his commission in the army of the Revolution, in which he had been a regular foot practitioner for nearly six years."

You would not forgive me were I to omit to mention the Quoit Club, or Barbecue Club, which for many years used to meet on Saturdays at Buchanan's Spring in a grove on the outskirts of Richmond. The city has

¹ Mr. Chief Justice Charles B. Lore, of the Supreme Court of Delaware.

spread over the place of meeting, the spring has been walled in and the grove cut down, and the memories of the club are passing into legend.

According to an account preserved in an article on Chief Justice Marshall in the number for February, 1836, of the "Southern Literary Messenger" (which, I believe, has always been considered as faithfully recording the sentiments and the traditions of Virginia), the Quoit Club was coëval with the Constitution of the United States, having been organized in 1788 by thirty gentlemen, of whom Marshall was one; and it grew out of informal fortnightly meetings of some Scotch merchants to play at quoits. Who can doubt that, if those Scotchmen had only introduced their national game of golf, the Chief Justice would have become a master of that game?

There are several picturesque descriptions of the part he took at the meetings of the Quoit Club. It is enough to quote one, perhaps less known than the others, in which the artist, Chester Harding, visiting Richmond during the session of the State Convention of 1829-30, when the Chief Justice was nearly seventy-five years old, and the last survivor of the founders of the club, tells us: "I again met Judge Marshall in Richmond, whither I went during the sitting of the convention for amending the Constitution. He was a leading member of a quoit club, which I was invited to attend. The battle-ground was about a mile from the city, in a beautiful grove. I went early, with a friend, just as the party were beginning to arrive. I watched for the coming of the old chief. He soon approached with his coat on his arm and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint-julep, which had been prepared, and drank off a tumbler full of the liquid, smacked his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher of the party, and could throw heavier quoits than any other member

of the club. The game began with great animation. There were several ties; and, before long, I saw the great Chief Justice of the Supreme Court of the United States down on his knees, measuring the contested distance with a straw with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout.¹

Like most truly great men, Marshall had a hearty laugh and a strong sense of humor. He was one of the most companionable of mortals. In a book published in Virginia not many years since, there is a delightful description of Marshall, when in the height of his reputation, participating in the recreations of the Barbecue Club. This was an association composed of the prominent men of Richmond, and one of its favorite amusements consisted in pitching quoits. On one occasion, after Marshall's quoit encircled the stake or "meg," another quoit, thrown by a clerical gentleman, alighted on top of the first one. Thereupon, the club, as a mock court, listened to jocose arguments on the solemn question: "Who is winner when two adversary quoits are on the meg at the same time?" Marshall cited, in his own behalf, the maxim, *Cujus est solum, ejus est usque ad coelum*. He argued that, as he was the first occupant, his right extended from the ground up to the vault of heaven, and that no one had a right to become a squatter on his back. The club finally decided that it was a drawn throw between the Chief Justice and Parson Blair. ("The Two Parsons," by George Wythe Munford, Richmond, 1884, 326-361.)²

Marshall dressed simply, but neatly. I am inclined to believe that many of the descriptions of his attire are exaggerations. One informant states that he would wear a coat until it was threadbare without once having it brushed; and it has

¹ Mr. Justice Gray.

² Professor Jeremiah Smith.

been quite customary with writers about Marshall to characterize him as careless in dress even to slovenliness. It is true that nothing could make him a fashionable man. The style of his garments were usually out of date as respects the decrees of fashion; but we have the word of a daughter-in-law that all who knew him best and saw him daily testified as to the neatness of his attire. His plain, simple and old-fashioned ideas in this regard, and his refusal to conform his apparel to that of other men about him, together with his modest bearing, has served to bring down to us some amusing anecdotes. One morning he called upon a lady who had recently married his brother, but whom he had never met. She was expecting a visit from the butcher to look at a calf she wished to sell. The servant casually observing his appearance, being also unacquainted with him, hastily deemed him unworthy to be ushered into the parlor, and his sister-in-law, being informed that a man was waiting at the door to see her, mistook him for the butcher, and ordered that he be conducted to the stable to see the calf. Mr. Marshall explained who he was, whereupon the lady, much mortified, at once invited him into the house. . . .

It was, however, no unusual occurrence for that distinguished man to walk the streets from the market to his home with a turkey or other supplies for his table. It was then the custom, indeed, for gentlemen to attend personally to their own marketing; and it is said that "the Old Market on lower Main Street, in Richmond, witnessed many friendly meetings each morning of solid men and echoed to much wise and witty talk. Behind each gentleman stood and walked a negro footman, bearing a big basket in which the morning purchases were deposited and taken home."

Judge Marshall on such occasions would chat with acquaintances in his usual happy manner; but in general carried his own basket, or, if that carry-all had been forgotten, he would bestow his newly-bought pro-

visions about his person as seemed at the time most convenient. . . .

He certainly paid some attention to the demands of his office in the way of dress, because, as he informs his wife, in 1825, he administered the oath of office to President John Quincy Adams, and was clad in a "new suit of domestic manufacture;" and he also informs his wife that the President was dressed in the same manner, though the cloth of the garments of the latter was, as he said, made at a different establishment. He adds, with some satisfaction, that "the cloth is very fine and smooth."¹

An English traveler gives a touching picture of the Chief Justice during his last days: "The Judge is a tall, venerable man, about eighty years of age, his hair tied in a cue according to the olden custom, and with a countenance indicating that simplicity of mind and benignity which so eminently distinguishes his carriage. His house is small and more humble in appearance than those of the average successful lawyers or merchants. I called three times upon him; there was no bell to the door. Once I turned the handle of it and walked in unannounced. On the other two occasions he had seen me coming and lifted the latch and received me at the door, although he was at the time suffering from some very severe contusions received in a stage while traveling on the road from Fredericksburg to Richmond. I verily believe there is not a particle of vanity in his composition." Such was the man, simple, kindly, great — the noble attributes of true manhood.²

Shortly after the close of the war Marshall met the lady to whom he was subsequently married. An air of romance surrounds the circumstance of that first meeting. Marshall had been invited to attend a ball held in the neighborhood of the residence of Jacquelin Ambler, in York, in the winter of

¹ Mr. Chief Justice Potter.

² Judge Le Baron B. Colt.

1781-82. He then held the title of captain and his reputation for genius and bravery having preceded his appearance at the ball, the younger ladies, much interested in the fact that he was expected, began it is related, "sportive projects for captivating him." Mary Willis Ambler, then only fourteen years of age, overhearing the remarks and

plans of the others, somewhat older than herself, assured them, jokingly, that they were giving themselves useless trouble as she intended to capture the young man and thus eclipse them all. At the first introduction to Miss Mary, Marshall became immediately devoted to her. Her sister subsequently narrating the event, states that Mary had "at a glance discerned his character and understood how to appreciate it, while I, ex-

pecting to see an Adonis, lost all desire of becoming agreeable in his eyes when I beheld his awkward figure, unpolished manners and negligent dress."

A son of the Chief Justice, having been requested to relate the circumstance of his father's courtship, gave the information that it was at first unsuccessful, for the lady, being young and diffident, had said "no" when she really intended to give an affirmative response to Marshall's proposal for her hand;

but the mistake was corrected through the kind offices of a cousin of the young lady. He had surreptitiously cut a lock of her hair which he sent to the disappointed lover, and Marshall, supposing that she had sent it, renewed his suit, which resulted in their marriage. They lived together forty-eight years.

The peculiar sweetness of Marshall's char-

acter was exalted in a loving devotion throughout the entire forty-eight years of their married life to the companion who, on account of his well known and unswerving loyalty, was spoken of by his acquaintances as unquestionably a model wife. With her he was at all times most tenderly considerate. For many years she had been an invalid, and there is not recorded in all history a more beautiful devotion of husband and wife than that felt and



MARY WILLIS MARSHALL (née Ambler).
Wife of Chief-Justice Marshall.

displayed by Marshall. He never ceased to be the lover of their earlier years. Mrs. Marshall was a beautiful and cultured woman, and had her health permitted, she would have been an ornament to society. Her complaint was such that the noise of celebrations, particularly, annoyed her, or, to speak with greater accuracy, they affected her nerves unpleasantly. On such occasions early in the morning it was the custom of Judge Marshall to accom-

pany his wife to the residence of some friend in the country and there quietly pass the day. Upon her death, in 1831, Marshall felt himself indeed sorely stricken, and he never ceased to revere her memory and mourn her loss with that fidelity which has always characterized his devotion during her life. On the first anniversary of her death he wrote a tribute to her character beautiful and touching. By that tribute Marshall not only perpetuated the character of a noble and charming woman, who had been estimable as a wife and mother, and deserved all commendation capable of expression, but unconsciously betrayed the beauty and sublimity of his own nature. It was Christmas day and he writes: "This day of joy and festivity to the whole Christian world is to my sad heart the anniversary of the keenest affliction which humanity can sustain. While all around is gladness, my mind dwells on the silent tomb and cherishes the remembrance of the beloved object it contains." Without further using his words, he refers to her who had gone as the companion that had sweetened the choicest part of his life, had rendered toil a pleasure, had partaken of all his feelings and was enthroned in the inmost recesses of his heart. He recalls having often relied upon her judgment in situations of some perplexity, and states that he did not recollect to have once regretted the adoption of her opinion.¹

A great-granddaughter of Marshall, writing a few years since to a distinguished member of the Bar at the South, said, in that part of the letter which was made public, that the family knew well she would learn from others that her great-grandfather was a great man; "they told me he was only a good man. My father spent many Christmas holidays with his grandparents. His grandmother was an invalid, and intolerant of the slightest noise, but his grandfather was ever ready to be his playfellow and companion. Every morning and evening he

¹ Mr. Chief Justice Potter.

would take him by the hand and bid him be very quiet; then, on tiptoe, with finger on his lips, he would take him to her room to say good morning and good night. He was a devoted lover every day of her life."

For nearly fifty years they two shared with each other the gladness and the grief of life. It is related that the day before her death she tied about her husband's neck a ribbon from which depended a charm containing a ringlet of her own hair. Never afterwards, by night or day, did it leave the resting place where it had been laid by those gentle hands, until after his death, when, by his directions, it was the last object removed from his person.¹

The official demands upon the duty of the Chief Justice being confined to the sessions of the Supreme Court, at Washington, and looking after the circuit in Virginia and North Carolina, he had the privilege during much of the year of remaining at home. He owned a farm near Richmond, and was extremely fond of agriculture and well informed upon all matters pertaining to the successful cultivation of the Virginia soil. A fair share of his leisure from official duties was devoted to the farm, and he took especial delight in superintending its operation.

The house in which Marshall lived at Richmond was built by himself, and is still standing on the corner of Marshall and Ninth Streets. It was a commodious structure, but modest in appearance and made no pretensions to architectural beauty. We are told that the exterior has never been remodeled, and but few changes have been made within. One writer has complained that this dwelling was constructed "hind-side before." "A handsome entrance hall and staircase, the balusters of which are of carved cherry, dark with age, are at the back opening toward the garden and domestic offices. Directly in front of this is the dining-room, looking upon Marshall Street.

¹ Honorable Sanford B. Ladd, Kansas City, Missouri

What was meant in the plan to be the back door opens upon a porch upon the same thoroughfare. The general entrance for visitors is by a smaller door in the side street." In this home the Chief Justice was a most delightful host. Courteous and hospitable and a prince of entertainers, his house was always an attractive place for his friends. He

In this home also he gave many large dinners to lawyers, which came to be quite celebrated among his friends and acquaintances. At those affairs there were usually not less than thirty members of the bar seated at the table with the Chief Justice at the head. The table groaned with ample quantities of good things to eat, making of each repast



CHIEF-JUSTICE MARSHALL'S HOUSE AT RICHMOND.

cherished the society of young people, and they were frequently guests in his home, his gentleness and generous conduct toward them inviting confidence and inspiring affectionate regard. Here, also, he and the wife he adored so profoundly, reared a family of six children, five sons and one daughter. They lost four others in childhood, which occasioned them much sorrow. Marshall was a kind and devoted father and deeply concerned in all that pertained to the welfare and happiness of his children.

an event long to be remembered; these, together with the "finest Madeira in the land," the witty remarks and roars of laughter, as well as an abundance of wise conversation, served to add zest to the occasion, and withal they were quite grand and enjoyable affairs. Chief Justice Marshall was a social man, as well as a great jurist, and delighted in the companionship of congenial spirits. He had a jovial laugh, one which his friends liked immensely to hear—such a laugh as is never found in the possession of an intriguer.

It was the very antithesis of insincerity. His whole spirit abounded with buoyant good nature, and the tranquillity of his temper, unflagging patience, generous disposition and never-failing courtesy rendered him equally agreeable in all the relations of his life and particularly was he companionable in the retirement of his home and in the presence of intimate friends. . . .

Although a slaveholder he was not an admirer of the system. He earnestly wished that it might be totally eradicated, but he did not favor immediate emancipation which might involve the retention of the negro population in the locality where they had served their term of bondage. He strenuously supported a scheme then attracting some attention for voluntary deportation, which was proposed by what was known as the Colonization Society. In his will he made provision for one of his slaves, his body servant, whom he designates as "my faithful servant, Robbin." He directed his emancipation if the latter should choose to "conform to the laws on that subject requiring that he should leave the State, or if permission can be obtained for his continuing to reside in it."¹

A word should be said as to his religious convictions. Indeed, in times past so much has been said that, if the half were true he had no religion at all. But would you not call a man religious who said the Lord's Prayer every day? And the prayer he learned at his mother's knee went down with him to the grave. He was a constant and liberal contributor to the support of the Episcopal Church. He never doubted the fact of the Christian revelation, but he was not convinced of the fact of the divinity of Christ till late in life. Then, after refusing privately to commune, he expressed a desire to do so publicly, and was ready and willing to do so when opportunity should be had. The circumstances of his death only forbade it. In all his life previously he was a constant at-

¹ Mr. Chief Justice Potter.

tendant upon the worship of the church. He kneeled down in the presence of all the people. He was an example of reverence to all his children. He encouraged their joining the church. Like many men, he waited until his mind was convinced, but, unlike many men, he was open to conviction — and God gave it to him with all the joy it afforded. But he was never professedly Unitarian, and he had no place in his heart for either an ancient or a modern agnosticism.¹

The Chief Justice was not a communicant of any church, but was a regular attendant upon the services of the Episcopal Church. Until near the close of his life he entertained views held by the Unitarian denomination, but they were finally changed, and he was about to join himself with the church in which he had so long worshipped when overtaken by his last sickness, and although he finally felt in full accord with the doctrines of that branch of the Christian church, he was prevented by sickness from formally entering into membership communion with it.²

Chief Justice Marshall was a steadfast believer in the truth of Christianity, as revealed in the Bible. He was brought up in the Episcopal Church; and Bishop Meade, who knew him well, tells us that he was a constant and reverent worshipper in that church, and contributed liberally to its support, although he never became a communicant. All else that we know of his personal religion is derived from the statements (as handed down by the good Bishop) of a daughter of the Chief Justice, who was much with him during the last months of his life. She said that her father told her he never went to bed without concluding his prayer by repeating the Lord's Prayer and the verse beginning, "Now I lay me down to sleep," which his mother had taught him when he

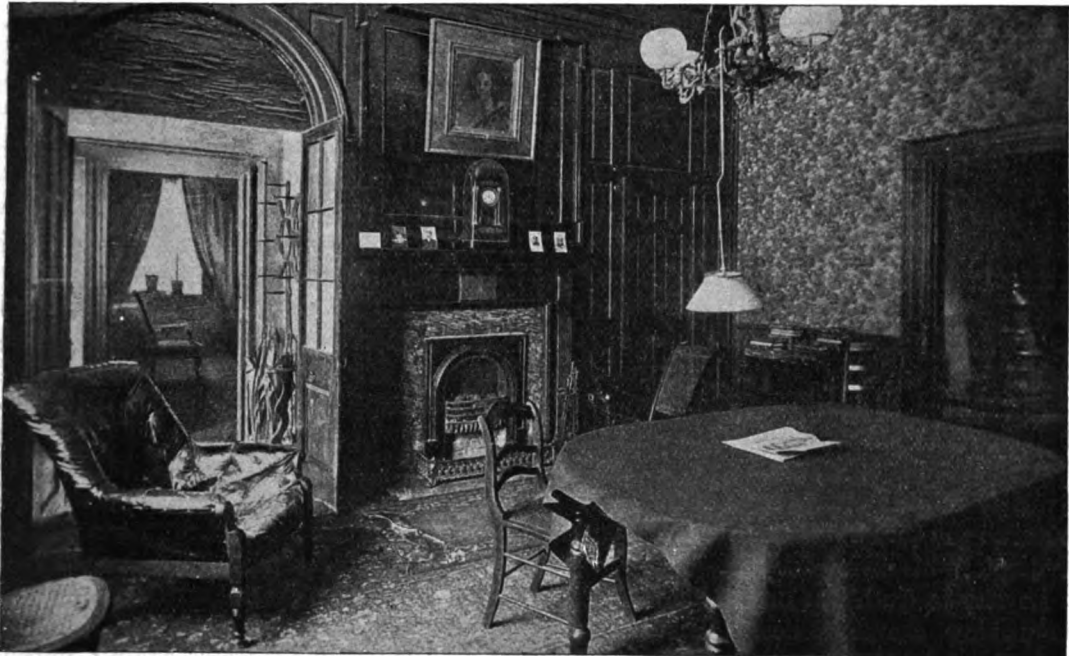
¹ Reverend W. Strother Jones, D.D., Trenton, New Jersey; a great-grandson of Chief Justice Marshall.

² Mr. Chief Justice Potter.

was a child; and that the reason why he had never been a communicant was that it was but recently that he had become fully convinced of the divinity of Christ, and he then "determined to apply for admission to the communion of our church—objected to commune in private, because he thought it his duty to make a public confession of the Saviour—and, while waiting for improved

showing therefrom what he became as a man. The different epochs of his life are so intertwined and mutually dependent that it is difficult to specify with accuracy any line of demarcation.

He was a soldier, scholar, statesman and legislator—all in splendid proportions—before he reached the meridian of life. He was as great as any of the many noble sons



ROOM IN HOUSE AT RICHMOND, USED BY CHIEF-JUSTICE MARSHALL AS A LIBRARY.

health to enable him to go to the church for that purpose, he grew worse and died, without ever communing."¹

John Marshall was a man of note long before he became either statesman or Chief Justice. The gift of genius had early been discovered, and it followed him all the days of his life.

It is difficult to speak of him as a man without going into his life as a whole and

¹ Mr. Justice Gray.

of Virginia in a day when Virginia led the Union. In private life abundant evidence is forthcoming that he was a model of what a husband and father ought to be. He was the idol of the household. His children held him in the most affectionate esteem. The servants vied with one another in their desire to serve him. In the long period of the ill-health of Mrs. Marshall the tenderest affection was most markedly manifested. He would permit no one to do for her anything that he could do, and when, on Christmas Day,

1831, she breathed her last, his was a grief only those can know who have been obliged to endure so inexpressible a loss. His letters show the greatest solicitude for his widowed sisters and sisters-in-law and their children.

His humility and freedom from arrogance were apparent to all. This was shown in his great consideration for others, howsoever humble their position in life; he was always willing to listen to their opinions, howsoever worthless. He did not settle matters of vast import at once, or after only a shallow survey of great principles and truths which have been benediction to the world and the church for centuries. He did not adopt the latest vagary of an ever-changing so-called scientific investigation just because it was the latest fad or the last utterance of some "higher critic," and this in a day when the great foundations of Christianity were assailed with a hostility unknown to-day. Looking before him and after him—possibly weighing opportunity on the one hand and considerations of health on the other—he said that his father was an abler man than he, and that his eldest son was possessed of a variety of gifts utterly beyond him. This is not to say that he underestimated himself or despised his own gifts. . . .

Loyalty to truth was one of his most distinguishing characteristics. We have no story like that of Washington and the hatchet to tell, but we have the even course of an irreproachable life to command our respect.

The success which attended John Marshall throughout his career may be largely traced to the fact that he was ever mindful he had a mission in life—a mission only he could fulfil. He seemed to realize, as few men do, that every gift is a trust, and that men are trustees of life, of opportunity, of possessions—each to be passed on to another till the great Court of Assize shall determine the result. There is no ownership in life other than trusteeship. Thus, as a man, John Marshall stands before us great and true in all the relations of life—a man ever ready to do his part in the common

service of his fellow-men. "He sought to hand on unquenched that torch of freedom" for which he had fought, and to which he had consecrated the best powers of his mind and heart. He grew all the time, and his influence on the life of the nation will be coterminous with the nation. He will stand out among the great men of the earth for the vastness of his intellect, for his insight into the truth, for his righteous judgment, for his interpretation and defence of the Constitution, for his high morality, and for his stainless honor.¹

His disposition was most amiable. He never had a personal enemy in his life. Story, in writing to a friend, said: "I think he is the most extraordinary man I ever saw, for the depth and tenderness of his feeling." His manner on the bench was dignified, but he was a most patient listener. One who knew him well says that no symptom of irritation was ever betrayed in his movements, no frown of impatience ever clouded his brow.²

It is certain that Marshall's faults, if he had any, are hard to discover. Suppose, however, that one were compelled to serve as the devil's advocate, whose official duty it is to urge objections to the proposed canonization of a deceased person. Is there any fact which would furnish an argument against putting John Marshall on the list of saints? I can think of but one plausible objection; a mental characteristic which he probably shared in common with almost every public man of his time. And that is, failure to do justice to the motives of political opponents. A friend, who has made careful investigation, tells me that he has found no evidence even of this fault. Still I cannot help supposing that it existed. After making, however, all deduction for this defect, it is safe to say that, among all the Federal leaders there are not to be found three whiter characters than

¹ Reverend W. Strother Jones.

² Honorable Sanford B. Ladd.

George Washington, John Jay and John Marshall.¹

There are many testimonies to his great modesty, self-effacement and true humility, in any company, whether of friends or of strangers. Let me quote but one, recently made known to me by the kindness of the President of [the Virginia] Supreme Court of Appeals (a kinsman of Chief Justice Marshall), and which, with his permission, is given in his own words: "I have an aunt in Fauquier County, Miss Lucy Chilton, now in her ninety-first year. I asked her on one occasion if she had known Judge Marshall. She replied that she had spent weeks at a time in the same house with him. I then asked her what trait or characteristic most impressed her. She replied without hesitation: 'His humility. He seemed to think himself the least considered person in whatever company he chanced to be.'" This quality in him may help us to understand the saying, that the great lawgiver and judge of the Hebrews—who, we are told, "was learned in all the wisdom of the Egyptians, and was

¹ Professor Jeremiah Smith.

mighty in words and in deeds"—was "very meek, above all men which were upon the face of the earth."

His private character cannot be more felicitously or more feelingly summed up than in the resolutions drawn up by Mr. Leigh, and unanimously adopted by the Bar of this circuit, soon after the death of the Chief Justice: "His private life was worthy of the exalted character he sustained in public station. The unaffected simplicity of his manners; the spotless purity of his morals; his social, gentle, cheerful disposition; his habitual self-denial, and boundless generosity towards others; the strength and constancy of his attachments; his kindness to his friends and neighbors; his exemplary conduct in the relations of son, brother, husband and father; his numerous charities; his benevolence towards all men, and his ever active beneficence; these amiable qualities shone so conspicuously in him, throughout his life, that, highly as he was respected, he had the rare happiness to be yet more beloved."¹

¹ M. Justice Gray.



JURY ROOM SENTIMENTS AND DIVERSIONS.

BY ALBERT H. WALKER.

THE query, "I wonder how the jury is getting along?" which is uppermost in everyone's mind after the jury has retired for its deliberations is answered in part by written records made by scores of Brooklyn jurors on the walls of one of the jury rooms in the Brooklyn, N. Y., County Court House.

These written, or rather scribbled records set forth in prose and poetry the doings, decisions, mental processes and sentiments of the average juror, and disclose not merely the juror's views as to the merits of the particular case he is trying to decide, but also his opinion of his fellow men temporarily serving as jurors. They reveal, as well, the workings of minds ranging through a wide realm of philosophy, from brightest optimism to soggiest pessimism.

This particular room is a cheerless chamber about twenty by thirty feet, with a high ceiling and void of all decoration. It is bare, desolate and lonesome. It gives one the impression of a place animate at times, but now deserted, haunted almost. Around the sides of the room are ranged eleven chairs, it being the proper thing, perhaps, for the foreman to stand. Some six inches above the tops of the chairs is a dingy yellow band, six inches or more wide, indicating, perhaps, the reflective positions assumed by the jurors. At irregular intervals the dull-colored tinting is rubbed off, and in some places the plaster is cracked. In the centre of the room stands a plain brown-colored wooden table with long irregular cracks and seams running its entire length. The table may have been struck by lightning, or perhaps the cracks were caused by the blows of the jurors' fists.

It is to such a council chamber as this that the jurors are conducted, and then locked in with the instructions to agree on a just verdict.

But the records show that it soon appears

that they cannot agree and that things are not going as they should; for here one of the jurors has gone off by himself and written on the wall in blue pencil: "Jury business be damned!" Nor is this the sentiment of a single, isolated, disconsolate juror, for underneath these words another juror has written: "I endorse the above." This general sentiment is popular, as evidenced by somewhat similar testimony inscribed by other jurors.

The difficulty the jurors have in agreeing is indicated by their written acknowledgment. "We cannot agree," one juror has written, which is corroborated by another juror, who has written at a slight distance the sentiment: "Hell! Oh, Hell!" Of course, that may seem an extravagant assertion, but it is perhaps a conservative opinion for a man doing jury duty for twenty-five days, as did a juror who wrote: "John Y. McKane. Twenty-five days jury and locked up here twenty hours." (The McKane jury had an unusually severe experience. For twenty-five days the jurors were under most careful surveillance, not only going to and from the court house, but also during the time spent at their hotel. One of the jurors said that the only bit of news of the outside world which came to him was the result of a famous prize fight which was being shouted by a newsboy outside the hotel windows.)

The obstinate juror receives considerable attention, and it has been observed at times that the obstinate juror is more vigorously disliked by his fellow-jurors than even by the attorneys whose case he has injured. Mere printable words are considered insufficient for him sometimes; and here, as we go around the room, is a corner into which a juror who had lost all hope retired and drew a lifelike picture of a man about to have his head crushed with a sledgehammer in the hands of another juror. Above this excel-

lent sketch the discouraged juror wrote: "All day! Hit the juror on the head who disagrees."

Another artist juror, whose words failed to express what he thought of the obstinate juror, whiled away some of his tedious minutes by drawing four rudimentary pigs as typifying "Jurors who disagree."

At times the weary juror turns to verse. When a jury could not agree one of them wrote:

"Three o'clock and no decision,
Notwithstanding, so hellup me gracious,
There is no disciple of circumcision
In this redoubtable twelve."

Another juror poet has written:

Many could swear like fury
At the obstinates on this jury
If 'twould help to settle the question,
And the doubts of all would——"

For some reason the poet could go no further.

In addition to seeking diversion in literary and artistic efforts, some jurors turn to philosophy. "Is this a free country?" asks one juror, writing on the wall, to which he replies with fine scorn: "Locked up all night!"

Another asserts that:

"The jury system is the guard
Of human liberty,
But when you lock one up all night,
This truth one fails to see."

Another juror has written: "God is love," to which another replies querulously, "Bosh! He does not love the jury."

"Jury duty," says another, along in the weary night hours, "is the privilege of a citizen's life," and then he adds: "Especially when locked up all night."

Among the tersest of the jurors' sayings are:

"One night in hock!"
"A crowd of chumps!"

"Damn poor feed!"

"That has nothing to do with the case!"

Much as the jurors may divert themselves with art, literature, philosophy, or personalities, these subjects are but diversions and of secondary importance, it seems, to the subject of food. The food question enters largely into the thoughts of the jurors, for scattered all over the walls are written bills of fare. Perhaps the most expressive sentiment in the whole room is the simple, "Oh! for that dinner." "We were thankful for that dinner," one thoughtful juror has written; while another, not satisfied, wrote: "A supper not fit for pigs."

Another juror united his contempt for the obstinate juror with his desire for dinner, in this couplet:

"Eleven good dinners for eleven good men,
One bale of hay for an ass."

In the matter of dinners the foreman and the other jurors stand on equal ground, as evidenced by the following memorandum:

"October 16, 8 to 4 for Def. 8.45. Just had grub, such as it was. Foreman had to go without potatoes, but filled up on bread. The rest had no bread. 8.50. Foreman eating pie and washing dishes."

The exact influence of a dinner facilitating an agreement is more or less of a moot question. Some evidence on this point is given by one juror, who wrote:

"We can't agree, but we have had supper, and, good as it is, we will agree at 12 A. M., as it is now 7.30 P. M."

Another memorandum from which various deductions may be drawn, reads:

"April 12, 7.15, no supper; 9-3 def't.; 7.30, no supper, 10-2 def't. 8.30, no supper yet, but it is on the way; 12 for def. Had supper."

What is perhaps the average juror's summary of what goes on in the jury room was that written by one juror in the following words: "I am a son of a gun, if you ever get me on a jury again."

CHAPTERS FROM THE BIBLICAL LAW.

THE CASE OF ADAM AND EVE.

BY DAVID WERNER AMRAM.

THE story of Adam and Eve as recorded in the beginning of the Book of Genesis is generally conceded to be not the record of an actual occurrence, but a primitive account of the origin of human life on earth. It is one of a number of legends well known to the student of folk-lore, in which men in the early stages of civilization, without the aid of science and under the influence of poetic imaginative faculties, told the story which attempted to account for the beginning of things.

No man, unless he be controlled by strong theological bias, or unless he be under the spell of ignorance, believes the story of Adam and Eve to be other than an imaginative account of an event that never took place. On the other hand, no man who lays the slightest claim to education or culture can fail to be impressed with the literary and poetic beauties of this tale.

I am not aware that the story of Adam and Eve has ever been considered from the lawyer's point of view, nor do I know of any attempt ever having been made to consider the legal aspects of it, although it is true, as I shall point out hereafter, that some of the Talmudists have deduced the existence of certain laws, from some verses in the Biblical account of the story of Adam and Eve. I shall consider the entire story, for the purpose of inquiring into the views of law and justice that are reflected in it. Lest I be misunderstood, in spite of the above prefatory remarks, I wish to say that I do not believe that it is a record of actual occurrences; nor do I desire to apply the scalpel of criticism to it, to destroy its poetic beauty. I take it to be a legend, told ages ago, centuries, perhaps milleniums, before it was written down in the form in which we

have it; and I look into it for the purpose of discovering what light it can throw upon the views of law and justice held by the people among whom it arose and by whom it was told as well as by him who finally reduced it to writing.

Every man unconsciously testifies, in every statement that he makes, to his life and surroundings, to the state of society, the degree of civilization, the nature of the laws, and to all other influences bearing upon him. It is testimony similar to that which the hand writing expert and graphologist finds in the lines and angles and variations of a signature, and in its general character and peculiarities, from which he reaches conclusions not only as to the genuineness of the signature, but also as to certain personal characteristics of the writer.

There are two accounts given of the creation of Adam and Eve. The first account is in the first chapter of Genesis, verses twenty-six to thirty-one. In this account, there is nothing said about the garden of Eden, and according to it Adam and Eve are created at the same time. The second account is given in the second chapter of Genesis, beginning with the fourth verse, and continued to the end of the third chapter. It is the story as given in the second and third chapters, to which we shall direct our attention.

In the first place, let us consider the facts of our case. "The Lord God formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul. And the Lord God planted a garden eastward in Eden; and there he put the man whom he had formed." And the man was put in charge of the garden, "to dress it and to keep it. And the

Lord God commanded the man, saying, Of every tree of the garden thou mayest freely eat: but of the tree of the knowledge of good and evil, thou shalt not eat of it; for in the day that thou eatest thereof thou shalt surely die." Thereafter, the Lord God determined to make a help-meet for the man, and for this purpose he took one of the man's ribs, and of it he made a woman. To this woman came a serpent and tempted her to eat of the fruit of the forbidden tree, and for this purpose the serpent said to the woman, misquoting the command, "Yea, hath God said, ye shall not eat of every tree of the garden?" The woman, likewise misquoting the command which she had never heard, because it had been given to the man before she was created, replied to the serpent, "*We* may eat of the fruit of the trees of the garden; but of the fruit of the tree which is in the midst of the garden, God hath said, ye shall not eat of it, *neither shall ye touch it*, lest ye die." Listening, however, to the tempting plea of the serpent, the woman ate of the fruit, "and gave also unto her husband with her." The record says nothing about any objections that he raised before breaking the command that had been laid upon him, but simply records the fact that "he did eat." Then the Lord God appears unto them and says to the man "Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?" The man admitted it, and added that the woman had given it to him; and she, being asked for her reason said "The serpent beguiled me, and I did eat." Thereupon the Lord God, without inquiring of the serpent and without hearing anything that it might say in its defence, punished it by decreeing "Because thou hast done this, thou art cursed above all cattle, and above every beast of the field; upon thy belly shalt thou go, and dust shalt thou eat all the days of thy life; and I will put enmity between thee and the woman, and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise his heel." Then, turning to the woman, the Lord God pronounces

judgment against her in these words: "I will greatly multiply thy sorrow and thy conception, in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee." Then turning to the man, the Lord God said "Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree of which I commanded thee, saying, Thou shalt not eat of it; cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life; thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field; in the sweat of thy face shalt thou eat bread till thou return unto the ground; for out of it wast thou taken; for dust thou art, and unto dust shalt thou return." In these words the case is recorded.

The lawyer, looking at the record from the twentieth century point of view, cannot fail to be impressed with many peculiarities and obvious differences between the method of procedure there followed and that which obtains in these days. These peculiarities are not merely to be accounted for by the fact that the story recorded is poetry of folk lore, and not a case at law; and that therefore the plea of poetic license will explain any faults in the statement of the law, applicable to the case, or in the manner in which the law is said to have been applied.

The essential differences between the procedure in this case and the procedure in our own days, lies in the fact that the former reflects the administration of justice by an oriental patriarch who is bound by no law other than that which he himself creates; and who may change even the law that he himself makes according to his own will and caprice.

In every age and among every people, peculiar conceptions of the Deity have arisen, each influenced by the actual conditions of life and society prevailing. In the story of Adam and Eve, the Lord God is pictured as doing justice in the free-handed manner of the oriental patriarch; in the story of Job, written at a much later time and

under the influence of an entirely different civilization, he is pictured as an oriental monarch surrounded by his court and the great officers of the Crown, listening to the charges of a public prosecutor. In the record of the case of Zelophehad's daughters (GREEN BAG, January, 1900), he is described as a supreme justice to whom the record of the case is submitted for an opinion, who renders a decree in the case, and then commands that this decree be enacted into a general law. In the Talmud, he is sometimes represented as sitting to do justice in the supreme court of heaven, modelled upon the plan of the great Sanhedrin of seventy-one judges, hearing the evidence, examining the witnesses, and proceeding in every way in accordance with the procedure that was followed by the Sanhedrin. Thus in each age, the Jewish mind conceived the Deity in a manner suited to the highest conception of the time; and as these views of divine justice differ from age to age among the same people, so they differ from the views of other nations. Mention need only be made of the different conceptions of the Deity held by Milton, by Sophocles, and by Goethe. Indeed, it may well be said that every living man has an idea of the Deity differing from that of every other man, and dependent entirely upon that bundle of qualities which go to make up what we call individuality. The oriental patriarch administered justice in the manner described in the case of Adam and Eve. He reached conclusions in a swift and ready manner, and meted out the punishment that he considered proper under the circumstances, often reversing his own decrees. This was the method that was familiar to the people at the time when the story of Adam and Eve circulated among them, and at the time when it was first written down; and hence this was the method that is reflected in the story.

In the first place, the command concerning the eating of the fruit of the tree was given to the man alone and not at all to the woman: she had not yet been created, and

therefore it seems to be unjust to have held her responsible for the breach of a command which was not directed to her. It is true, that both the serpent and the woman in discussing his command assume that it was directed to her as well as the man, but they were both mistaken. The probability is that Adam told Eve of the command that he had received concerning this tree, and she therefore assumed that she also was bound by it.

This is further indicated by the fact that in citing the law, she says "God hath said, Ye shall not eat of it, neither shall ye touch it." There is nothing in the law about touching the tree. This merely expresses the exaggerated fear of the woman lest any breach of the law occur, and shows that the practice of Adam and Eve was not to touch the tree lest they might by mistake be led to eat of its fruit; and this practice the woman concludes to have been part of the original command.

When the Lord God commenced his investigation of the case, he addressed Adam as the only law-breaker, saying to him, "Hast thou eaten of the tree, whereof I commanded thee that thou shouldst not eat?" and when the man then pleaded that the woman had given him of the fruit, he turned to the woman and merely asked, "What is this that thou hast done?" and did not charge her with having broken the law in having eaten of the tree, although she had in fact eaten of it. Her only offence was in causing Adam to break the law.

In sentencing the serpent, the woman and the man, the Lord God pronounced judgment against the serpent because it had beguiled the woman, and against the woman because she had beguiled the man. He does not allude to any breach of the law on her part. However, in sentencing the man he said, "Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded *thee*, saying *thou* shalt not eat of it."

The punishment for Adam's trespass was death. The command was as follows: "For

in the day that thou eatest thereof, thou shalt surely die," and yet in sentencing Adam, the law was not strictly applied; and instead of being condemned to death, he was condemned to work for a living.

It may be presumed that the judge in this case took into consideration the fact that there was a strong inducement for the breach of the law, inasmuch as Eve had already eaten of the fruit; and it was through her persuasion that Adam ate of it also; and in this view of the case the sentence of death would have been too severe a punishment for the crime. I call the attention of criminologists to this case. The abolition of capital punishment and the substitution of life imprisonment at hard labor finds its archetype in this decree.

The manner in which the Lord God conducted the investigation in this case is also characteristic of patriarchal administration of justice. The principal offender is brought before him, and is immediately subjected to a cross-examination whereby he is compelled to criminate himself. The very question, "Hast thou eaten of the tree, whereof I commanded thee that thou shouldst not eat?" was intended to elicit a confession; and the man who lived in a state of innocence and who was blissfully ignorant of modern rules of law, which have been invented for the purpose of saving criminals from endangering their lives by their own confessions, promptly admitted the deed.

If Adam had been a well-posted modern offender, he would have said, "I decline to answer on the ground that the answer to this question would incriminate me;" and then, as the only witness against him was his wife, and it would not have been difficult for Adam's counsel to have her testimony excluded on that account, it would have been impossible to prove a case against him. But procedure in patriarchal days was simplicity itself. The man admitted his offence and blamed it on the woman, thereupon the woman is summoned to appear, and she, although she has been guilty of no breach

of law, is similarly subjected to an examination, "What is this that thou hast done?" And then she tells her story and blames it on the serpent, and the serpent, not being a legal person at all, and having no higher status in this legend than a slave would have in the patriarchal society is condemned without being heard. Now, the serpent's only fault was that it induced Eve to eat of the tree, and if Eve had not induced Adam to do the same, no crime would have been committed. The serpent's action was the very remote cause of the breach of the law by Adam. The proximate, and indeed, the only cause of the breach of the law was the solicitation of Eve; but all these refinements and distinctions did not exist in the primitive patriarchal society. God felt that the serpent had done wrong in beguiling Eve and ought to be punished, even though there was no breach of the law involved. That is exactly the manner in which the patriarch would administer justice.

The punishment inflicted upon the serpent was by no means commensurate with the character of its offence. It had been guilty of a species of seduction; and although it had been more subtle than any beast of the field, and had been permitted to hold free intercourse with its human companions, it was now disgraced below every beast of the field, condemned to crawl on its belly and eat dust, and be in a state of perpetual warfare with the human species. Thus, for some trivial offence, the house slave of the patriarch might be disgraced below the most menial of the slaves of the field.

The punishment meted out to the woman was likewise excessive. She who had been the equal of man was now made his subordinate, "Thy desire shall be to thy husband, and he shall rule over thee." The real offender is by this decree elevated above the comparatively innocent cause of the crime. The solicitude of the woman that her husband should also eat of the tree was probably due to the fact that finding that she did not die when she had eaten of it, that it was good

for food and pleasant to the eyes, and a tree to be desired to make one wise, she was unselfish enough to want her husband to participate in all these joys; but the decree in her action reflects the patriarchal state of society, in which power, authority and rule were the heritage of the males. Kinship was reckoned through the father, property descended to the sons and to the collateral male heirs, a rule of inheritance that had to be essentially changed to provide for the daughters (see Zelophehad's case). Thus, the comparatively inferior status of the woman in patriarchal times is reflected in this legend, and is accounted for by this decree, in which her inferiority is made the punishment for the crime.

Upon this legendary account which bears all the marks of poetry, imagination and mythology, but none of the indicia whereby actual facts may be discovered, there has been erected an elaborate structure of dogma, built by the hands of theology. Sects, creeds, even entire religions have been founded upon this primitive myth. The social and legal inferiority of woman has been accepted by the world as unalterable, because, forsooth, the doctors of theology found this Biblical sanction for it, "And he shall rule over thee." The doctrine of original sin, the fall of man and other dogmas of the churches, all find their root in this ancient fable, told by primitive herdsmen far back in the dawn of history, and accepted by a credulous world as inspired truth given directly from God to man.

The noblest of human aspirations—religion—the seeking for the divine in nature and in man—has thus, by blind devotion to the written word, been made one of the great instruments that has perpetuated human misery;—but we did not set out to consider anything except the legal aspects of our legend.

A word, therefore, in conclusion, in illustration of the method by which Rabbinical

lawyers found Biblical sanction for civil and criminal law.

There was a tradition that the antediluvians had seven great laws which were the basis of all later legislations. These laws were one positive law; to wit, to do justice; and six negative laws; to wit, not to blaspheme, commit idolatry, murder, incest, or robbery, and not to eat of the flesh of a living animal. (Talmud Babl. Sanhedrin 56 a.b.)

Rabbi Yohanan, a distinguished Palestinian authority of the first century finds a hint for these laws in Genesis ii, 16, "And the Lord God commanded the man saying, Of every tree of the garden thou mayest freely eat." This verse he interprets as follows:

First. "And he commanded," to do justice, as it is written, Genesis xviii, 19, "For I know him, that he will command his children and his household after him, and they shall keep the way of the Lord to do justice and judgment."

Second. "The Lord" indicates the law against blasphemy, as it is written, Leviticus xxiv, 16, "He that blasphemeth the name of the Lord, he shall surely be put to death."

Third. "God" indicates the law against idolatry, as it is written, Exodus xx, 3, "Thou shalt have no other Gods before me."

Fourth. "Unto the man" indicates the law against murder, as it written, Genesis ix, 6. "Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made He man."

Fifth. "Saying" indicates the law against incest, as it is written, Jeremiah iii, 1, which verse begins with the word "saying."

Sixth. "Of every tree of the garden" indicates the law against robbery, this being permitted, and the one tree forbidden.

Seventh. "Thou mayest freely eat" is by every casualistic reader interpreted to indicate that the flesh of a living animal shall not be eaten.

BENEDICT ARNOLD ON THE MAINE BORDER.

BY GEORGE J. VARNEY.

AMONG the exhibits a few years ago at a town fair in the extreme southeast corner of Maine, was an old account book of a general store kept by Colonel John Allan, on a small island in Eastport harbor, in the period immediately following the Revolution. It was startling to find among the entries a charge against Benedict Arnold. The item was a gallon of rum; but there were charges, at other dates, of lumber and other articles.

Was Arnold haunting the border of the two countries in furtherance of any sentimental or public-spirited political project of the time? Those who thus imagine do not know the nature of the man. First and always he was looking out for himself, and seeking the means to swim on the sea of wealth and fashion. The success of his family marked the largest stretch of his sympathies.

Arnold's reputation previous to his appointment in the patriot army, according to the annals of the time, was not ethically admirable. His first temptation to disloyalty resulted from his extravagant living in Philadelphia, when in command in that city. So far as known, his first deviation from a patriotic course was when he formed a secret partnership for illicit trade within the enemy's lines, which amounted to about one hundred and forty thousand dollars. A letter of Sir Henry Clinton to a friend shows that Arnold's inclination to change his allegiance was known to him eighteen months before the overt act of treason.

When, on October 19, 1781, Cornwallis surrendered his entire army to General Washington, Lord North was heard to exclaim, "All is lost!" Arnold, too, saw that his game was up; and, in the December following, he sailed for England, with his family, who had been permitted to join him.

Though the traitor had received a small British command, with which he made his raids on New London, Connecticut, and Richmond, Virginia, he obtained neither military nor naval appointment after he left America, though he sought both with passionate earnestness. Consequently he had recourse to trade to support his failing estate. He made at least two voyages to the West Indies, his object in both being frustrated by the French successes there. Soon after the definitive treaty of peace between Great Britain and the new nation, he removed with his family from London to St. John, on the river of that name in New Brunswick.

In St. John he lived in the best style of the town, associating only with people of the highest social ranks, a large proportion of these being Tory refugees. Establishing a storehouse at the Lower Cove, he placed it in the immediate charge of the two younger of his three sons by his first marriage.

At this time he possessed considerable means, being known to have carried on one occasion £5000 in cash with him to the West Indies for the purchase of sugar. Besides his commission in the British army in America, he received as reward for his treason a sum in gold (£6,315) to cover his alleged losses in deserting the cause of his country. Five thousand pounds of this he invested in four per cent. consols, from which he realized £7,000 in stocks. Thus while he had really been bankrupt in a large amount, and escaped his creditors by joining the enemy, he was at once rehabilitated, and endowed with a capital which was ample for the opening of any mercantile business in that period. He appears subsequently to have received other favors, while after his death his wife and daughter were pensioned.

The first ship built in the province of New Brunswick was owned by Arnold before she

went to sea. This was the *Lord Sheffield*, which came over the falls of the *St. John* in June, 1786. The cost of her construction had proved too large for the purse of her builder, who found himself unable to purchase her rigging and outfit, and Arnold entered into a contract to supply them. All the local annalists and raconteurs, so far as I have been able to learn, favor the statement that the transaction by which the ship became the property of Arnold constituted a fraud. This person, however, maintained his business and social standing in the province. It is known that he subsequently owned or chartered one or more other vessels sailing from that port in the West India trade.

Previous to 1787, *St. John* had suffered severely from fires, and in that year the citizens undertook to raise a sufficient sum to procure two fire engines, and to sink a number of wells; the name of Arnold appears on the subscription paper for ten pounds.

Arnold's warehouse and its contents were insured in England for a large amount. In July, 1788, this warehouse was burned in the night. It was freely said about the streets that the insurance was larger than the value of the property, while some asserted that the fire was not accidental.

In consequence of such reports the London underwriters refused to pay over the insurance money. Arnold brought suit for its recovery, and showed that he was himself in England at the time of the fire, and that, while two of his sons slept in the building, one was not only in great danger, but was somewhat burned. The court ordered the company to pay the full amount.

At about the same time Arnold brought

suit in *St. John* for slander, singling out as his victim a man who had the means to pay large damages. The defendant was *Monson Hoyt*, a loyalist refugee, but not a traitor. This gentleman previously had been a partner with Arnold in some enterprise; he might, therefore, be supposed to know the business methods of that peculiar person. The jury brought in a verdict of guilty, and then jocosely fixed the damages at two shillings and sixpence.

While Arnold was in business at this place his vessel sometimes loaded with timber at *Campobello*, the large island in near view in the bay eastward of *Eastport*, the owner meanwhile making his headquarters at *Snug Harbor*. It was probably in connection with this business that Arnold had the dealings with *Colonel Allan*, that are recorded in the old account book.

It appears to be a fact that Arnold came very near an ignominious death in this region at the hands, too, of a staunch loyalist from *New York*, *Captain Alpheus Pine*. He once sold to Arnold a quantity of wood, but as it was not paid for and taken away as agreed, *Pine* sold it to another party. Just as the last purchaser began hauling the wood away, Arnold appeared, and a quarrel ensued. In the affray, *Captain Pine* caught a stick from the wood pile, and in a moment more would have brought it down upon the traitor's head, had not a bystander, by a quick movement, prevented the blow.

"But for this," *Pine* used to say, "I would not have left a whole bone in his skin."

Arnold returned to England with his family, in 1791, and lived in London until his death in 1801.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE article on Chief Justice Marshall, in the present issue and in the following number, is made up from about forty Marshall Day addresses, from copies furnished, with great courtesy, by the distinguished authors. To these gentlemen THE GREEN BAG and its readers are much indebted. It is a matter of keen regret to the editor that it was not possible to print each of these addresses in full; but as such publication would have filled, at a rough guess, a dozen numbers of the magazine, the only course open was to make such selections as, taken together, would present the career, the character, and the influence of the great man in whose honor these orations were delivered. The Marshall Day orators were chosen from among the most distinguished judges, lawyers and teachers in the country: and the article to which reference has been made was conceived in the belief that what these leaders of our bench, our bar and our law faculties would say about the great Chief Justice would be both of interest and of value. The reading of these addresses has confirmed this belief; for no commemorative occasion in this country has drawn forth so many strong and eloquent discourses.

THE many portraits of Chief Justice Marshall offer an interesting subject for an article. Possibly some art critic may profit by this suggestion; but in the absence of such an article, a word or two concerning some of these portraits may not be out of place. In the frontispiece of this number our readers will recognize the Saint-Mémin portrait of Marshall, here reproduced with the background colored as in the original, which was a life-size crayon, taken in March, 1808. Charles Balthazar Julien Févret

de Saint-Mémin was born in Dijon, in 1770. His father was a counsellor of France; his mother, a beautiful and wealthy creole of San Domingo. Between 1793 and 1810 he visited most of our Atlantic coast cities, from New York to Charleston; and such was his vogue that during that time he executed eight hundred and eighteen portraits, using a "physionotrace," an instrument invented by Chrétien, in 1786, by which the profile outline of a face could be taken with mathematical precision. The background of these portraits was usually, as in the present case, filled in with pink crayon. Mr. Justice Bradley in his article on the Saint-Mémin portrait of Marshall, (*Century*, vol. 16, p. 778; Sept., 1889.) relates that the charge for such a portrait was thirty-three dollars, in return for which the sitter received, first, a full-sized portrait bust; secondly, a copper plate of the same engraved in miniature, reduced from the portrait by an instrument called a "pantograph" and thirdly, twelve proofs from this plate. These miniatures were of medallion size, circular in form, and about two inches in diameter.

IN addition to the portrait noted above, Mr. Justice Bradley mentions the following which had come to his knowledge: an elaborate half-length by Rembrandt Peale, painted in 1825, presented to Chief Justice Chase by the New York Bar Association, by him bequeathed to the Supreme Court of the United States, and now hanging in the robing-room of the Court at the Capitol,—"a fine painting but not recognized as a good likeness by those who knew the Chief Justice"; a full length by Hubard, a French artist, taken at Richmond in 1830, and now in Washington and Lee University, Lexington, Va.,—"considered by the family a good likeness"; and a full length miniature in sitting posture by the same artist, and a replica of the same, both in possession of the Marshall family.

Mr. JUSTICE GRAY, in his recent address at Richmond, Va., says ;

"Of all the portraits by various artists, that which best accords with the above description, especially in the 'eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature,' is one by Jarvis (perhaps the best American portrait painter of his time, next to Stuart), which I have had the good fortune to own for thirty years, and of which, before I bought it, Mr. Middleton, then the clerk of the Supreme Court, who had been deputy clerk for eight years under Chief Justice Marshall, wrote me: 'It is an admirable likeness; better than the one I have, which has always been considered one of the best.' This portrait was taken while his hair was still black, or nearly so; and, as shown by the judicial robe, and by the curtain behind and above the head, was evidently intended to represent him as he sat in court.

"The most important of the later portraits are those painted by Harding in 1828-30, and by Inman in 1831, with a graver expression of countenance, with the hair quite gray, and with deep lines on his face.

"Harding's portraits were evidently thought well of, by the subject, as well as by the artist. One of them, afterwards bequeathed by Mr. Justice Story to Harvard College, was sent to him by the Chief Justice in March, 1828, with a letter, saying, 'I beg you to accept my portrait, for which I sat in Washington to Mr. Harding, to be preserved when I shall sleep with my fathers, as a testimonial of sincere and affectionate friendship:' and in the same letter he gave directions for paying Harding 'for the head and shoulders I have bespoke for myself.' Harding's principal portrait of Marshall was painted in 1830 for the Boston Athenæum, in whose possession it still is; it has the advantage of being a full length, showing that in his seventy-fifth year he retained the erect and slender figure of his youth; and the artist wrote of it in his autobiography: 'I consider it a good picture. I had great pleasure in painting *the whole* of such a man.'

"Inman's careful portrait, in the possession of the Philadelphia Law Association, has often been engraved, and is, perhaps, the best known of all.

"The crayon portrait in profile, drawn by

St. Mémin in 1808, which has always remained in the family of the Chief Justice, and been considered by them an excellent likeness, and is now owned by a descendant in Baltimore; the bust by Frazee . . . familiarly known by numerous casts; and that executed by Powers, by order of Congress, soon after the Chief Justice's death, for the Supreme Court Room — all show that, while his hair grew rather low on the forehead, his head was high and well-shaped, and that, as was then not unusual, he wore his hair in a queue.

"His dress, as shown in the full length portrait by Harding, and as described by his contemporaries, was a simple and appropriate, but by no means fashionable, suit of black, with knee breeches, long stockings, and low shoes with buckles."

AMONG the illustrations in our May number, which will contain the more strictly legal part of the Marshall article, will be the bust of the Chief Justice, by Frazee, in the Boston Athenæum, and the portrait by Rembrandt Peale, in the rooms of the Long Island Historical Society, Brooklyn, N.Y. We hope to reproduce, also, some of the less well-known portraits. The Jarvis, Harding, and Inman portraits, and one by an unknown artist, may be found in the February number of THE GREEN BAG.

CHIEF JUSTICE MARSHALL was the first president of the old, unchartered, Washington Monument Association. Among the records, which have been stored in the monument, has been found, his letter of acceptance of the office. This letter discloses that the Chief Justice had a crest, a fact which, when brought to the attention of Justice Gray, was pronounced as one which had escaped the notice of the historians of the great jurist. The letter is written on a double sheet, the outside one being used to form the envelope, and, where the paper is folded, the letter is sealed with wax. The seal is very imperfect, only the upper part of the impression being discernible. This shows two stags, one recumbent, the other, standing behind, is in the position of defense, seeming to be waiting for an attack upon its mate lying upon the ground.

NOTES.

CHIEF JUSTICE MARSHALL, it is said, used to narrate with great glee, a correspondence on a point of honor between Governor Giles of Virginia and Patrick Henry. It was as follows :

Sir; I understand that you have called me a bob-tail politician. I wish to know if it be true, and if true, your meaning.

W. R. GILES.

To which Mr. Henry replied as follows :

Sir: I do not recollect having called you a bob-tail politician at any time, but think it probable I have. I can't say what I did mean; but if you will tell me what you think I mean, I will say whether you are correct or not.

Very respectfully,
PATRICK HENRY.

THE late Harry Bingham was once defending, in a Vermont court, a case against a railroad for damages from a fire alleged to have been set by sparks from a locomotive. It had been shown that a "wild" engine had passed by, sometime during the morning of the fire, and Mr. Bingham was trying to make the witness commit himself to some exact time at which it had gone by.

"Was it five o'clock in the morning?" asked Mr. Bingham.

"Could n't tell exactly; might have been then; 't was along about the time of the fire," answered the witness.

"Well, was it six o'clock?"

"Was it seven o'clock?"

And each time came the same non-committal answer.

Then Mr. Bingham began at the other end. "Was it twelve o'clock? Eleven o'clock? Ten o'clock?" Each time the same unsatisfactory reply.

Finding this line of questioning was a failure, Mr. Bingham put his inquiries in a different form.

"You don't seem able to tell what time it was. But perhaps you can tell me this — how high was the sun?"

"Well," said the witness, "I guess it was about a rod high!"

"If it plaze the coort," said an Irish attorney, "if I am wrong in this, I have another point that is equally conclusive."

JUDGE LINDLEY, of the St. Louis Circuit Court, like many another good judge, is fond of a quiet joke. A raw German, who had been summoned for jury duty, desired to be relieved.

"Schudge," he said "I can nicht understand English goot."

Looking over the crowded bar, his eye filled with humor, the judge replied.

"Oh! you can serve! You won't have to understand good English. You won't hear any here."

BERRY G. THURMAN is one of the oldest and most prominent members of the bar in southern Missouri. In his home town of Lamar, he is naturally a legal light without a peer, which is mentioned as necessary to the full appreciation of the following story.

It was during the campaign of 1896, and politics were in a feverish state at Lamar. Thomas W. Ditty, a young lawyer-editor, had just appeared on the scene with a red-hot political sheet that was scourging partisans to wild and excited battle. Mr. Thurman, campaigning in opposition to Mr. Ditty, became the mark for editorial attack. The town presently transferred its interest in the election to the daring newcomer, speculating on his ability to best the veteran lawyer.

In the midst of the campaign, it happened that Mr. Thurman was called to conduct the prosecution in a certain case wherein Mr. Ditty appeared as a witness for the defense. The cross-examination of said witness offered Mr. Thurman an opportunity to even scores, and he embraced it. But the witness was looking to his laurels. He parried every thrust, frequently reciprocated, and wore a bland, tantalizing smile that captured the court-house idlers. Mr. Thurman finally became disgusted. In desperation he waved the witness aside, observing with all the contempt possible :

"You're a fine gentleman to appear before this court!"

With mock regret the witness retorted :

"And I'd say the same thing about you, if I wasn't under oath!"

Mr. Thurman declares that then and there he lost all prestige in the eyes of the village loungers.

AN English reader sends the following amusing clipping from a London newspaper :

A juryman whose verdict would be worth having, if it could be got, has made his debut before the County Court of Sleaford. He patiently listened all the forenoon to a case, and when Judge Shortt rose for luncheon he calmly strolled away and did not return, leaving the plaintiff and defendant to finish their dispute as best they could without him. He was a miller, and went home to see whether the water-wheel was running smoothly. Next day the judge had the truant brought before him summarily, and demanded the reason of his absence. The miller stared at him in wonder, and replied that, as everybody went out of the court, he thought the business was over. "But what about your verdict?" asked his Honour. "Never had such a thing in my possession," protested the miller, earnestly, as if anxious to clear himself of the imputation of dealing in unlawful articles. "I do assure you, sir, I never had one in my life—indeed, I was never in a court before." "But surely you know what a verdict is?" continued the judge, with a smile. The miller again asseverated, as strongly as he could, that he had never heard of the word before, and had never seen the article, if such it was. The Court could not help laughing at the man's mingled earnestness and naïveté, but quite believed him when he added, "I should be the last man to do wrong if I had known, but I thought the business was over." His Honour then explained to him the etymology and meaning of "verdict," and told him he would have the opportunity of impressing that lesson on his mind by acting as a juryman a second time, when it was to be hoped he would not again confound the word with luncheon. Happy rustic innocence!

THE retort of a little boy to an attorney in a justice's court not long ago, created some amusement. The lad, being on the stand as a witness, was questioned concerning a certain dime novel, alleged to have been stolen.

"What was pictured on the cover," asked the attorney.

"Two Indians," was the reply.

"What were the Indians doing?"

"I didn't ask 'em," answered the boy.

LITERARY NOTES.

TRUTH DEXTER¹ is a modern society novel, picturing rather laboriously, the up-to-date Boston social world, and, in much easier manner, the life on a southern plantation. The fascinating leader of the "smart set," beautiful, brilliant, but thoroughly unscrupulous, is pitted against an uninstructed little Southerner, strong chiefly in her honesty and simplicity, in a struggle for the love of a hero with a very long name and a strength of character shown more in his friends' opinions than his own actions. The young girl, guided by a charming grandmother, an old-fashioned lady of the South, the most attractive character of the book, wins the battle. The dialogue is never tiresome and much of it is brilliant. The style is clear, and the story moves rapidly.

THE HERITAGE OF UNREST² is a rather interesting story of life among the army officers on the Indian reservations. The heroine is an Apache half breed: the hero is an Australian of convict ancestry; and both are cursed by the hereditary lawlessness that poisons all civilized life for them. The story moves along at a fairly good rate in spite of some unnecessary incidents. The local color is good and some of the minor characters very well drawn, especially the Yankee preacher, who has an interest in the flora of the country, fine charity, and a remarkable stove-pipe hat, worn in spite of the rifles of his cowboy acquaintances. There is much bloodshed, but fortunately few gory details.

RECEIVED AND TO BE REVIEWED LATER :

THE WORKING CONSTITUTION OF THE UNITED KINGDOM. By *Leonard Courtney*. New York: Macmillan Company. 1901. Cloth, \$2.00.

WILLIAM SHAKESPEARE. Poet, Dramatist, and Man. By *Hamilton Wright Mabie*. With one hundred illustrations, including nine full pages in photogravure, New York: The Macmillan Company, 1901. Cloth, \$3.50.

¹ TRUTH DEXTER. By *Sidney McCall*. Boston: Little, Brown & Co. 1901. Cloth, \$1.50.

² THE HERITAGE OF UNREST. By *Gwendolen Overton*, New York: The Macmillan Co. 1901. Cloth. \$1.50.

NEW LAW BOOKS.

THE ELEMENTS OF JURISPRUDENCE. By *Thomas Erskine Holland*. Ninth edition. Oxford University Press, American Branch, New York. 1900. Cloth, \$2.50. (xxiii. + 430 pp.)

By jurisprudence, Professor Holland means the science that defines such words as law, right, duty, sovereign, ascertains the source of law, and divides law into its several branches, — in short, — Analytical Jurisprudence, the science that is identified with the name of John Austin as intimately as Geometry is identified with the name of Euclid.

It is a modern science, not quite a hundred years old; but it already has a history well worth telling. Long before its birth, it became indebted in a strange way to Sir William Blackstone. The first volume of the Commentaries contains much matter as to the nature, origin, classification, and reason of law. This matter has literary charm, doubtless; but it clearly enough is not the result of historical investigation or of acute analysis. In fact, what Blackstone was attempting to do was simply to present, accurately and clearly, propositions of law; and his digressions into analytical and historical disquisition were merely incidental and ornamental repetitions of the commonplace statements of ordinary lawyers. These platitudes passed muster with most people then, and they pass muster with most people still; but, to the detriment of Blackstone's fame and to the benefit of mankind, it happened that in the Oxford audience to which, in the form of lectures, the Commentaries were originally addressed, there sat a young man to whom fictitious reasonings were as transparent and offensive as cobwebs.

Yes, even in his youth Jeremy Bentham was an independent thinker and a vigorous writer; and in 1776, when he was only twenty-eight years of age, his "Fragment on Government," while conceding the merit of Blackstone's style, attacked Blackstone's theorizing with the acuteness that characterized Bentham's writing as long as he lived,

And Bentham lived a long while. For more than fifty years after that memorable attack upon Blackstone, he was the militant enemy of loose thinking and of obsolete law. He died in 1832; and long before that year he had convinced his contemporaries of the need for reform in the

law, and, still better, had made such an impression upon younger men of ability as rendered it certain that his modes of thought would long survive him. Trustworthy authorities — among them, none more interesting or important than John Stuart Mill's "Autobiography" and Mrs. Janet Ross' "Three Generations of Englishwomen" — make it clear that Bentham's influence, though exerted principally through his writings, was greatly enhanced by his position as the genial center of a small circle of influential friends. In tracing the history of Analytical Jurisprudence, it is not necessary to name all the members of the little group; but it is important to notice that as early as 1810 Bentham's fondness for James Mill had caused him to secure, as a next-door neighbor and almost constant associate, that famous father of a still more famous son. James Mill, though by twenty-five years Bentham's junior, was thirty-seven years of age, and already a man of note. John Stuart Mill was only four, but his intellectual feats had begun, or, according to the familiar story, even at that early age he had made substantial progress with the study of Greek. Both James Mill and John Stuart Mill continued in close social and intellectual companionship with Bentham until his death; and in their writings on law reform they frankly took the attitude of disciples.

To this little society of persons interested in close thought as to all subjects, and particularly as to the law, came in 1820, as another next-door neighbor, John Austin, of two years' standing at the bar, just married, thirty years of age, and already of high repute for acuteness. He was forty-two years younger than Bentham; but the venerable reformer was still active in mind and body, and had twelve years to live. The home of the Austins was a meeting place for Bentham, the Mills, Romilly, Erle, Bickersteth, and many other men whose names are not forgotten. In the winter of 1821-22, about two years after Bentham and the Mills and the Austins began to live side by side, John Stuart Mill then not quite sixteen years of age, studied Roman law with Austin. In 1827 John Stuart Mill edited Bentham's "Rationale of Judicial Evidence." In 1828, Austin, after a residence of less than a year in Germany, began to deliver in London his lectures on Jurisprudence. One of his hearers was

John Stuart Mill. The last lecture was delivered in 1832; and six lectures, entitled "The Province of Jurisprudence Determined," were published in that year, which happened to be the year of Bentham's death.

It is clear enough that there was close connection between Bentham and Austin. It does not follow that Austin was lacking in originality. His field was near Bentham's, but it was sufficiently distinct to be his own. Bentham's province was to point out defects in existing law and to suggest reforms. Austin's province was to analyze and classify law, whether existent or non-existent. Austin was indebted to Bentham for setting with wonderful clearness the example of independent thinking as to law; but, though that was a great debt, Austin was nevertheless as independent a thinker as Bentham. In fact, Austin was an enthusiast, an apostle, and almost a martyr. He dedicated his life to the development and teaching of a complete system of Analytical Jurisprudence, and when public interest flagged, — as was inevitable with such a subject, even though Austin had been, as he was not, a rhetorical lecturer, — he was much more fatally disappointed than he was willing to admit. In 1832 he voluntarily ceased lecturing; and although he lived until 1859, he could not be induced to publish the complete collection of his lectures, or even to revise the fragment that had appeared in 1832. Upon his death, his widow, Sarah Austin, with infinite labor and skill, made up from his manuscripts a fairly complete work, and prefixed to it a preface that is one of the masterpieces of literature. When she died in 1867, a new edition was in preparation, with the aid of strangely full and accurate lecture notes that had been taken by John Stuart Mill. This edition was published in 1869, and it furnishes the accepted text of Austin's "Jurisprudence," with which, either in abridged or in unabridged form, Englishmen and Americans are acquainted as a classic that ought to be read by every scholarly lawyer. The classics that ought to be read, however, are sometimes neglected; and that is what has happened to Austin. Although on the surface there is little charm in Austin's numerous repetitions, painfully accurate analyses, and somewhat unusual terminology, there is beneath the surface the

charm that attaches to the work of every enthusiast and creator. No one can read Austin for an hour without realizing that here is a master.

Yet after all is said in favor of Austin, the fact remains that his work is too large for the beginner, and, indeed, too long for any one but a specialist. Besides, the investigations of Sir Henry Maine and others have shown that Austin's discussions, based largely upon the Roman law, do not take into account legal phenomena even now existing in some regions of retarded civilization. In short, there is need of a smaller and later work. This need has been supplied by Professor Holland's treatise, which first appeared in 1880 and now has reached its ninth edition. The work is divided into five parts, entitled respectively Law and Rights, Private Law, Public Law, International Law, and The Application of Law. The first part is devoted almost exclusively to Analytical Jurisprudence, strictly so called; and the other parts are devoted largely to discussing, from the point of view of Analytical Jurisprudence, Torts, Contracts, Agency, and other familiar branches, with incidental statements of propositions of law found either in the Roman or in the English systems. An American lawyer cannot refrain from regretting the prominence given, especially in the first part, to Roman law and to quotations from unlawyerlike sources, such as the Vedas, St. Thomas Aquinas, Hooker, Kant, and Hegel. Professor Holland is at his best when he shakes himself loose from such learning, and expresses his own thoughts. His eighth chapter, for instance, is incomparably more enlightening than the first and the second. Yet viewed as a whole, there can be no question that the work performs well its purpose of opening to the student the modes of thought and expression essential to the science of Analytical Jurisprudence.

It is not fairly to be called a shortcoming that Professor Holland fails to give a history of the science, and so renders necessary the short sketch contained in this review. Yet it is deeply to be regretted that some one with space at his disposal does not present this history in full, giving in detail due credit to Bentham, James Mill, John Austin, Sarah Austin, John Stuart Mill, Sir Henry Maine, and the later workers whom happily we have with us still.

THE LAW OF SURETYSHIP AND GUARANTY. By *Darius H. Pingrey, LL.D.* Albany: Matthew Bender. 1901. (320 pp.)

An examination of the contents of the book shows that the author has succeeded in a large measure in accomplishing the task which he set himself of presenting "a systematic and concise treatise on the subject of Suretyship and Guaranty." The law relating to suretyship is first treated, and occupies three-fourths of the book, approximately. The arrangement is good, and the indexing is such that the student or practitioner readily finds the statement of the law for which he is looking. This is no small compliment to pay any law book.

In logical order are treated the nature and effect of a contract of suretyship, the execution of it, scope of the surety's liability, what will discharge him, the rights and remedies of the surety as to the creditor, the principal and his co-sureties. Then follows a discussion of the law relating to sureties upon bonds in legal proceedings and upon bonds of persons acting under judicial sanction. The chapters relating to bonds of private and public officers and agents are especially well and accurately stated, — from a Massachusetts standpoint, certainly. This statement, however, should not be taken to imply that the book is written or intended for Massachusetts practitioners alone. The author has not attempted, and indeed could not undertake, to deal with all of the statutory peculiarities of the law in the various States, within the limits which he has set for himself. But the principal changes from the common law in the leading States have been stated by him. Throughout, the references have been fairly distributed among the leading cases of the best known courts, and the author is to be commended for his restraint in the use of citations. The book has not been lumbered up with a mass of conflicting citations from various jurisdictions, but accompanying the statement of a principle is to be found at least one citation of a leading case from which as a starting point the student can extend his investigations, or the lawyer prepare his brief.

The distinction between a contract of suretyship and one of guaranty is generally a hazy and difficult one to the student, if not to the older men of the law. In the discussion of the differ-

ences between them the author has contented himself with a brief discussion in which is clearly pointed out the general line of demarcation between the two.

In the succeeding chapters upon the law of guaranty, he has indicated with care and brevity the finer distinctions, and illustrates the slight changes of fact which will throw the case upon either side of the line. In this volume of moderate size the busy lawyer will find a compendium of the law on Suretyship and Guaranty which will be of more practical benefit to him in the every-day work of his office than the larger editions of earlier writers.

THE LAW AND PRACTICE OF BANKING IN AUSTRALIA AND NEW ZEALAND. Second edition. By *Edward B. Hamilton, B.A.*; annotated by *J. G. Eagleson, B.A.*; *L.L.B.* Melbourne: Charles F. Maxwell. 1900. Cloth, 25s. (xxxiv + 399).

Naturally the scope of the book, and its style, is not quite the same as if the author had set himself the task of writing a legal text-book and nothing more. Its subject is not only the law of banking, but the practice also. So it is that there is found, for example, a chapter devoted to the Melbourne Clearing House, describing the *modus operandi* and also giving a short history of the growth of the clearing-house system in London and elsewhere. Then, too, in another place mention is made of the first allusion to a pass-book, which occurs in a letter written in 1715, by a customer to his banker. Things like this, and the local color here and there, as for instance, the reference to the general features of legislation affecting mortgages on sheep and other stock and liens on wool, together with the general style in which the book is written — a style a bit less technical and less heavy than is usually met with in a law book — make the manual rather entertaining reading, without in the least detracting from its solid value.

Judge Hamilton points out that "it is surprising how many points of law, not merely of local interest, but of general importance have been determined in cases which arose in these colonies, and which have been taken home to the Privy Council on appeal." But in some striking particulars the Australian system of banking differs

from the English system; it is in fact a modification of the Scotch.

The book is not only interestingly, but also well and carefully written; and the various legal propositions are clearly and accurately stated. It is of value to the Australian banker and man of business. It is also a text-book of distinct importance for the lawyer.

NOTES ON THE UNITED STATES REPORTS. Book XI. By *Walter Malins Rose*. San Francisco: Bancroft-Whitney Company. 1901. Law Sheep. (1242 pp.)

The cases digested and the citations of which are here brought together, are contained in the twenty-five volumes, 116-140, of the United States Reports. The statements of the several points decided in each case are models of clearness and conciseness. Printing directly after the several points in a case the citations bearing on that particular part of the decision, as is done here, brings all the references to each individual point before the eye at a glance. The inclusion of citations from the various "Reporters" makes it possible to bring the references quite closely down to date.

RECEIVED AND TO BE REVIEWED LATER.

CONFLICT OF LAWS. By *Raleigh C. Minor, M.A., B.L.* Boston: Little, Brown & Co. 1901.

THE LAW OF TORTS. By *Melville M. Bigelow, Ph.D.* Seventh edition. Boston: Little, Brown & Co. 1901.

THE LAW OF COMBINATIONS. By *Austin J. Eddy*. Chicago: Callaghan & Company. 1901.

COMMENTARIES ON THE LAW OF STATUTORY CRIMES. By *John Prentis Bishop*. Third Edition. Revised and enlarged by *Marion C. Early*. Chicago: T. H. Flood and Company. 1901.

A TREATISE ON THE CANADIAN COMPANY LAW. By *W. J. White, Q. C.*, assisted by *J. A. Ewing, B. C. L.* Montreal, Can.: C. Theoret. 1901.

RECEIVED.

THE YEARLY DIGEST OF REPORTED CASES. 1900. Edited by *Edward Beal, B.A.* London: Butterworth & Company, 1901. Cloth, 15s. (lxv. + 224).

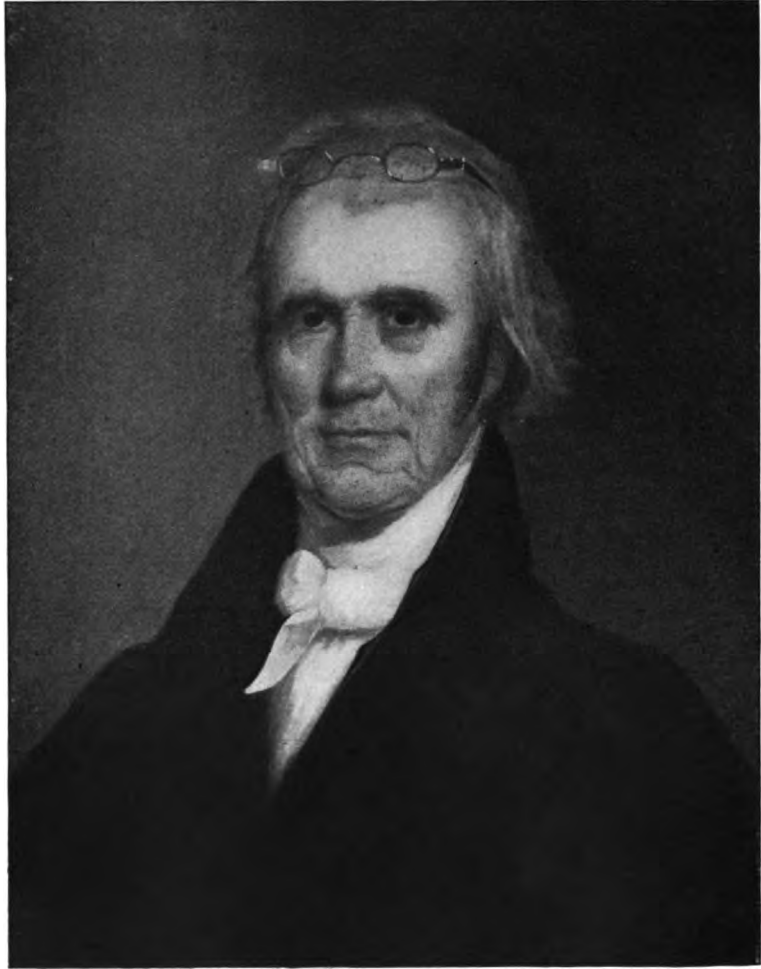
GENERAL DIGEST AMERICAN AND ENGLISH Bi-monthly Advance Sheets. No. 20. December, 1900. Rochester, N.Y.: The Lawyers' Co-operative Publishing Company. Paper, \$4 per year.

ENCYCLOPEDIIC NOTES.

MEMBERS of the legal profession throughout the country are looking forward with no little interest to the appearance of the first volume of the *Cyclopedia of Law and Procedure* to be issued shortly. While the cyclopedic method of rounding up the law is far from being a new one, having been to some extent developed as far back as Viner's and Bacon's Abridgments, yet so many new and original features are included in the plan of this work as to make it practically a novelty.

Lawyers are proverbially conservative, much given to clinging to the old things, and over-timid of parting from time-honored precedents. And nowhere has the evil effect of this ultra-conservatism been more apparent than in the making of law books. While the technical literature of the other learned professions has been keeping pace with the requirements of modern civilization the lawyer's books have been falling further and further behind, until the necessity for radical improvements in the methods of law writing has become decidedly apparent, even to those antiquated believers in general principles who deem a "case lawyer" beneath contempt. It is undoubtedly true that every lawyer who practices in the courts to-day is a "case lawyer" however unwilling he may be to admit it, and the text book that he wants is not one containing theoretical dissertations upon the law as it should be, and citing venerable cases, decided in the long ago. The ideal book to meet the demands of the modern lawyer must not only contain a concise and accurate statement of the law as it is, but must also cite all the authorities that have made the law what it is; it must not only treat all the law on a given subject, but must treat it all in one place, and must make that place easy of access to the busy searcher for knowledge; and, above all things, it must not only be up to date when published, but it must be capable of keeping step with the progress of the science.

All these things are promised, *inter alia*, by the publishers of the *Cyclopedia of Law and Procedure*, published by the American Book Company, New York, and therefore we feel that the appearance of their first volume will be a rather noteworthy even in legal circles. The most attractive feature of this work, from the bookbuyers' standpoint, is the plan of keeping it always abreast of the decisions by a simple and inexpensive system of annotation, whereby the continual appearance of "new editions" will be rendered unnecessary, or rather indefensible; it was always unnecessary. Without something of the sort the value of a legal text-book is ephemeral to a degree, and the large percentage of practically useless books that load the shelves of every lawyer will bear testimony to the truth of the assertion.



J. Mansell

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JOHN MARSHALL.

II.

JUDGE AND JURIST.

IF it be true, as was said by one of his friends, that a truly great Judge belongs to an age of political liberty and public morality, and is the representative of the abstract justice of the people, it is equally true that when John Marshall was made Chief Justice the age and the occasion and the great Judge came together.¹

If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives, just as I should hesitate over the battle of Brandywine if I thought of it apart from its place in the line of historic cause. But such thinking is empty in the same proportion that it is abstract. It is most idle to take a man apart from the circumstances which in fact were his. To be sure, it is easier in fancy to separate a person from his riches than from his character. But it is just as futile. Remove a square inch of mucous membrane and the tenor will sing no more. Remove a little cube from the brain and the orator will be speechless; or another, and the brave, generous and profound spirit becomes a timid and querulous trifler. A great man represents a great ganglion in the nerves of society, or to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being there. I no more can separate John Marshall from the fortunate circumstance that the appointment of Chief Justice fell to John

¹Honorable William Lindsay, United States Senator from Kentucky.

Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the working of the Constitution, than I can separate the black line through which he sent his electric fire at Fort Wagner from Colonel Shaw. When we celebrate Marshall, we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man, by the judgments and decrees of the most august of courts.

I do not mean, of course, that personal estimates are useless or teach us nothing. No doubt today there will be heard from able and competent persons such estimates of Marshall. . . . My own impressions are only those which I have gathered in the common course of legal education and practice. In them I am conscious perhaps of some little revolt from our purely local or national estimates, and of a wish to see things and people judged by more cosmopolitan standards. A man is bound to be parochial in his practice — to give his life and, if necessary, his death, for the place where he has his roots. But his thinking should be cosmopolitan and detached. He should be able to criticise what he reveres and loves.

"The Federalist," when I read it many years ago, seemed to me a truly original and wonderful production of the time. I do not trust even that judgment unrevised when I remember that "The Federalist" and its authors struck a distinguished English friend of

mine as finite; and I should feel a greater doubt whether, after Hamilton and the Constitution itself, Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice and the convictions of his party. My keenest interest is excited not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they do not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory and therefore of some profound interstitial change in the very tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure because what the world pays for is judgment, not the original mind.

But what I have said does not mean that I shall join in this celebration or in granting the motion before the Court in any half-hearted way. Not only do I recur to what I said in the beginning, and remembering that you cannot separate a man from his place, remember also that there fell to Marshall perhaps the greatest place that ever was filled by a Judge, but when I consider his might, his justice and his wisdom, I do fully believe that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one John Marshall.

A few words more and I have done. We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it. The setting aside of this day in honor of a great Judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought and Lincoln died, is now our corner stone. To the more abstract, but farther reaching contemplation of the lawyer, it stands for the rise of a new body of jurispru-

dence by which guiding principles are raised above the reach of statute and State, and Judges are entrusted with a solemn and hitherto unheard of authority and duty. To one who lives in what may seem to him a solitude of thought, this day—as it marks the triumph of a man whom some Presidents of his time bade carry out his judgments as he could—this day marks the fact that all thought is social—is on its way to action—that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code, and that according to its worth his unhelped meditation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power. It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and to the men of his generation—and for this above all we celebrate him and them—its red is our life-blood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.¹

THE BAR.

It is not too much to say that he (Marshall) found his country drifting rudderless without chart or compass, and he left it with its course as definite and certain as that of the fixed stars in their courses and invested with all the sovereign powers necessary to a great nation.

In these historic and enduring labors let us never forget that the Court consisting of himself and his able, learned and patriotic associates enjoyed the assistance of a Bar of unusual eloquence and ability. As we recall them our minds are filled with admiration of their great intellectual powers and of their absolute fidelity to the Court, which it was at once their privilege and their duty to advise and to instruct. In those arduous labors of evolving, year by year, the true

¹Honorable Oliver Wendell Holmes, Chief Justice of the Supreme Court of Massachusetts.

strength and grandeur of the Constitution we must never forget the part borne by the bar — among others by Wirt, and Dallas and Dexter, by Pinckney and Ogden and Mason, by Binney and Sargeant, by Livingston and Wheaton, by Martin and Rodney and Rawle, by Taney and by Webster; and the reciprocal confidence, regard and affection which existed between the Bench and the Bar in those memorable years of our judicial history should never be forgotten. It was only such an atmosphere which could have emboldened Mr. Wirt to indulge in flights of imagination when addressing the Judges, and it was not only with courteous attention but with an entire appreciation of their beauty that the Court listened to him when during the trial of Burr he described, in his vivid imagery, the startling change in the nature of Blennerhasset from his not permitting the winds of summer to visit his wife too roughly to allowing her "to shiver at midnight on the banks of the Ohio, and mingle her tears with the torrents that froze as they fell."

The Chief Justice has himself told us of the enjoyment of the Court of Mr. Pinckney's argument in the case of the *Nereide*: "With a pencil dipped in the most vivid colors and guided by the hand of a master, a splendid portrait has been drawn of a single figure, composed of the most discordant materials of peace and war. The skill of the artist was exquisite — the garb in which the figure was presented was dazzling."

During Mr. Webster's argument on behalf of Dartmouth College he faltered and said: "It is, as I have said, a small college — and yet there are those who love it;" and here the feelings which he had thus far succeeded in keeping down broke forth. Every one saw it was wholly unpremeditated—a pressure on his heart that sought relief in tears. "The court room during those two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure, bent over as if to catch the slightest whisper. Mr. Justice Washington also leaned forward with an eager, troubled

look, and the remainder of the Court pressed as it were towards a single point."

It is quite apparent, from these instances, that the conception of Chief Justice Marshall of the dignity of his great office in no manner interfered with his appreciation of the assistance to be derived from the arguments of counsel, or of his enjoyment of their eloquence. His own lofty standard of the judicial character was, however, never relaxed.¹

MARSHALL'S RELATIONS WITH HIS COLLEAGUES ON THE SUPREME BENCH.

A few words may . . . be said in regard to his relations with his colleagues on the Supreme Bench. It is not uncommon to speak of the Court as though it were composed of Marshall alone. In fact, he had divers able and efficient co-laborers, and he himself would have been the last man to disparage the value of their assistance. His prominence in the public mind is due, not merely to the general opinion that he was intrinsically the ablest of the Judges, but also to the fact that he acted as the mouth-piece of the Court in a very large proportion of cases. According to Mr. Hitchcock's figures, Marshall, during his thirty-four years of service, delivered the opinion of the Court in nearly half of all the cases decided, and delivered the opinion in more than half of the cases upon questions of constitutional law. Undoubtedly the Chief Justice was a great power in the consultation room and had immense influence over his associates. But that influence was due to force of intellect and character; not to obstinacy, nor to a disposition to treat a difference of legal opinion as a matter of personal offense. To the extent of his influence both friends and foes can be summoned to testify. In 1810, Jefferson, writing to President Madison, advocating the appointment of Tyler to the Supreme Court in case an expected vacancy should occur, said: "It will be difficult to find a character of firmness enough to pre-

¹ Honorable Wayne MacVeagh, of Washington, D. C., formerly Attorney-General of the United States.

serve his independence on the same bench with Marshall." (The Writings of Jefferson, Vol. IX, 275.) Jefferson believed, as the same letter shows, that Marshall's influence was due to cunning and sophistry. This theory seems to me effectually disproved by the relation which Judge Story for more than twenty years sustained to his chief. Story went upon the Bench an ardent young disciple of Democracy. He soon became an enthusiastic admirer of Marshall, concurred in most of his constitutional opinions, and loved him with devoted affection. Could a man of Story's intellect have been systematically deceived for twenty-three years by "cunning and sophistry"? The answer is not doubtful. It was the intrinsic merit of Marshall, both intellectually and morally, which accounts for his influence over his gifted associate.¹

MARSHALL'S PLACE AS JUDGE.

Among the great Judges who adorn the annals of English and American jurisprudence there stand forth conspicuously four names, to whom it was the fortune to inaugurate, as it were, a new era in the law, to broaden its principles and to establish precedents which have controlled and directed the principles upon which the law is administered. Each of them enjoyed long tenure of office and each in his day commanded the reverence and secured the applause of the profession. Hardwicke, building upon the improvements in the administration of equity, introduced by Nottingham, raised this branch of the law into a science and firmly established the wholesome and valuable jurisdiction of the Court of Chancery. Mansfield, bringing to the administration of the King's Bench his cultivated intellect and profound learning, and aided by knowledge and experience in the civil law, rescued the common law from the narrow technicalities so dear to the sergeants and laid broad and deep the principles of the law merchant. Sir

¹ Professor Jeremiah Smith, of the Law School of Harvard University.

William Scott, Lord Stowell, raised the Ecclesiastical and Admiralty Courts above the petty questions, crude methods and narrow principles which before his time characterized them and created a body of admiralty and ecclesiastical law in decisions, whose charm and beauty of diction are still the admiration and envy and despair of the profession. Marshall excelled each of these in his massive intellect and convincing logic, and created a body of constitutional law, in which he had no other guide than his own intellect and for which the precedents were to be created by himself.¹

Marshall had not the technical learning in the common law of Coke, or of several of Coke's successors. But, in the felicitous words of Mr. Justice Story, "he seized, as it were by intuition, the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities, as if the very minds of the Judges themselves stood disembodied before him."

He had not the learning of Nottingham or of Hardwicke in the jurisdiction and practice of the Court of Chancery, or of Mansfield in the general maritime law. But his judgments show that he was a master of the principles of equity, and of commercial law.

He had not the elegant scholarship of Stowell. But it is not too much to say that his judgments in prize causes exhibit a broader and more truly international view of the law of prize. Upon the question of the exemption of ships of war and some other ships, as it was observed by Lord Justice Brett in the English Court of Appeal in 1880, "the first case to be carefully considered is, and always will be, *The Exchange*," decided by Chief Justice Marshall in 1812.²

Marshall possessed intellectual powers of the highest order. The commanding features of his mind were calmness, penetration

¹ Honorable Charles H. Simonton, United States Circuit Judge.

² Honorable Horace Gray, Justice of the Supreme Court of the United States.

and profound wisdom. In judicial acquirements he was not the equal of some of his contemporaries. He was not what is termed a learned man, and he had none of the arts of an advocate. He relied upon the original powers of his mind, and not upon knowledge gained from others. He worked out the great problems of constitutional jurisprudence as Newton worked out the great problems of natural science. He mastered new subjects by his powers of analysis and intuitive perception of the truth. "He seized, as it were, by intuition," says Judge Story, "the very spirit of judicial doctrines, though cased up in the armor of centuries, and he discussed authorities as if the very minds of the Judges themselves stood disembodied before him."¹

He had other first rate judicial qualities. He courted, he demanded, argument. He had the aid of the ablest lawyers in what Mr. Phelps, himself a great lawyer, calls the Augustan age of the American Bar. He had, in a degree often remarked, a patience which, as Mr. Binney expressed it, was only exhausted when patience ceased to be a virtue. Marshall had, moreover, another quality without which no man can be a great Judge — courage. Marshall's placid courage, exhibited on many signal occasions, knew no fear except the fear of God and the fear that through some unconscious lapse he might fall into error. Consequences of his decisions to himself or to parties, if he ever considered, he never heeded. Back of all this was the simplicity, worth and dignity of his lofty character.²

Marshall had the first qualification of a good Judge — that of being a good listener. He heard the last word of the wordiest barrister, knowing that it might contain the whole matter. He interrupted counsel sometimes with pertinent suggestion and interrogation, but never for the purpose of

¹ Honorable LeBaron B. Colt, United States Circuit Judge.

² Honorable John F. Dillon, of New York.

airing his own learning, but only that he might better elucidate the subject in hand. He never delighted in small shows of authority over the members of his Bar, and it is certain that when he presided at *nisi prius*, he did not aim to impress the galleries, or use the occasion of an application for a continuance to harangue the rear benches. Nor did he play politics in court, intending that the benefit should return to him in the shape of political advancement or favor. His character was such as to assure us that no matter what judicial position he might occupy, he would never curry favor with the people by disloyalty to the Bar.

The striking feature of his Court was the absence of hurry. The Court seemed to have plenty of time, and calmly and leisurely took up the cases before it and heard them exhaustively presented before passing on them. The modern practice of writing opinions while you wait was happily not in vogue then. Marshall was not haunted by the fear of an overclogged calendar, and thought it more important that causes should be properly considered and determined than that he should keep his calendar clear.¹

Shortly before his death, in reply to an address from the Bar of Philadelphia, declaring that he had "illuminated the jurisprudence of his country and enforced with equal mildness and firmness its constitutional authority," the Chief Justice replied, with his unvarying modesty, that "if he might be permitted to claim for himself any part of their approval, it would be that he had never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required" — thus firmly maintaining to the end the two guiding principles with which he began his judicial career.

The bar of Richmond has left an enduring record of their appreciation of him, and of their veneration for him, which seems to me the best portrait of a perfect Judge

¹ Honorable Neal Brown, of Wassau, Wisconsin.

ever drawn. They declared that he was "never absent from the Bench in term time even for a day; that he displayed such indulgence to counsel and suitors that everybody's convenience was consulted but his own; that he possessed a dignity sustained without effort, and apparently without care to sustain it, to which all men were solicitous to pay due respect; that he showed such equanimity, such dignity of temper, such amenity of manners that no member of the Bar, no officer of the Court, no juror, no witness, no suitor, in any single instance, ever found or imagined, in anything said, or done, or omitted by him, the slightest cause of offense."¹

It would be too much to claim that even the broad foresight of Marshall had measured the force of the undercurrent of development leading to the splendid and unprecedented career that lay before his country. But he knew his countrymen, their history and their institutions. He knew that the spirit of the people was fast moulding a harmonious and homogeneous nation, which must be bound together by a national Constitution. And he labored in the spirit of a patriot, a statesman and, above all, a far-seeing Judge, to make the bond strong enough to endure inevitable strains, yet elastic enough not to break with expanding empire. To be thus man of practical affairs for his own day, yet prophet in his foresight for the years to come, what higher summit could there be in the achievements of human judgment, patriotism and wisdom?

In the four and thirty years that he sat in judgment, the Court made fifty-one decisions on constitutional questions, and the Chief Justice wrote thirty-four of them. In only one did the majority of the Court fail to agree with him.

Half a century or more ago Henry Brougham said that no judge could afford to be often wrong, and the time had gone by when any court could rest long on mere authority. It must justify itself by its reasons. No tri-

¹ Hon. Wayne MacVeagh.

bunal was ever more dependent on this principle than the Supreme Court of the United States, and no judge ever sustained the burden with more unflinching strength than Chief Justice Marshall.

Through all the intricacies of conflicting evidence or discordant principles his intuitive perceptions saw the connection between premises and conclusion, and, with an unrivaled grasp of every phase and bearing of the subject, his vigorous and unerring logic marked out the path with such cogent and convincing reasons as to meet the criticism of opposing views, and, still more, to stand the test of the future in the development of corollaries and consequences. His intellectual integrity and courage took him straight to his conclusion, turning his eye neither to right or left for irrelevant objects by the way.

It is related of the great literary autocrat of the eighteenth century that he said of a future Lord Chancellor, "I like Ned Thurlow; he lays his mind fairly against yours, and never flinches." If Dr. Johnson had known John Marshall he would have liked him for the same reason. He never flinched. He never underestimated or understated the strength of his opponent's position or the difficulties of his own. He laid his reason bare for all men to see and to challenge, and those who would not be convinced against their will were at least silenced by their inability to refute him. . . .

By the uniform concurrence, alike of contemporaries and posterity, we unhesitatingly claim for Marshall the foremost place in the list of eminent judges. Pinkney said "he was born to be the Chief Justice of any country into which Providence should have cast him." The Bar of Charleston, never converts to his view of the Constitution, yet paid this tribute to the man in a resolution passed on hearing of his death: "Though his authority as Chief Justice of the United States was protracted far beyond the ordinary term of public life, no man dared to covet his place, or express a wish to see it

filled by another. Even the spirit of party respected the unsullied purity of the Judge, and the fame of the Chief Justice has justified the wisdom of the Constitution, and reconciled the jealousy of freedom to the independence of the judiciary." This tribute, specially eloquent from its source, is believed to have been drawn by the pen of the learned and patriotic Petigru, the bold and eminent figure who, in his venerable age, attested his fidelity to the principles of Marshall through all the terrible years of civil war by standing out alone and unyielding against the heresy of secession. . . .

If we challenge the array of names in that country whose system has produced the historic exemplars of judicial greatness, where shall we find quite his equal? Not in Coke, prodigy of learning and relentless logic and courteous asserter of judicial independence as he was, for he was narrow and technical in his law, illiberal and even vindictive in his personality. Let me not be misunderstood. I speak as a devoted and reverent disciple of the common law and of Coke as a master of it. But it is given to few men to be larger minded than their age, and it is no disparagement to Coke to say that he was not one of the few.

Nor shall we find him in Ellesmere, or Nottingham, or Hardwicke, fathers of equity as they were, nor even in Mansfield, the first great master of technicalities, who yet saw through them all, that the true vitality of the common law was its adaptability to the changing affairs of men. Great as these were, and they are the honored of the legal profession wherever their language is known, yet, viewing the magnitude, breadth, variety and importance of his labors, or the ability with which he performed them, Marshall had no equal, hardly a second.

The world's great man, who helps to mould its history, is he who, with great abilities, has great opportunities, and by his use of them produces great results. Tried by this exacting standard, in the light of his work as time has proved it, Marshall is the

foremost in all the long line of judicial eminence.¹

JEFFERSON'S HOSTILITY.

But while the verdict of posterity is overwhelmingly in favor of Marshall, yet it must be frankly admitted that the opinion of his contemporaries was by no means unanimous in his favor. No sketch of his life can be complete which omits to mention the complaints of his critics.

Severe and unjust criticism is the common experience of Judges. And there is an especial reason why Judges of the United States Supreme Court should be liable to this fate. They frequently have to pass upon matters of public interest, concerning which the people have already taken sides, and upon which partisan passions have been excited. And dissatisfaction is especially likely to be manifested when the members of the Court belong to a political party which is opposed to the existing administration. How President Jefferson chafed under the yoke of such a Court is apparent from his letters. In December, 1801, he said of the Federalists: "They have retired into the judiciary as a stronghold. . . . There the remains of Federalism are to be preserved and fed from the Treasury; and from that battery all the works of republicanism are to be beaten down and destroyed." (1 Henry Adams' "History of the United States," 257.) Again, in 1807, he said: "And it is unfortunate that Federalism is still predominant in our judiciary department, which is consequently in opposition to the legislative and executive branches, and is able to baffle their measures often." . . . His hostility to Marshall antedated the latter's appointment to the Bench. So early as 1795, he speaks of Marshall's "profound hypocrisy." During Marshall's judicial career Jefferson used language which seems to question his honesty. In 1810 he speaks of "the ravenous hatred which Marshall bears to the government of

¹ Honorable James T. Mitchell, Justice of the Supreme Court of Pennsylvania.

his country," and "the cunning and sophistry within which he is able to enshroud himself." Jefferson also says: "His (Marshall's) twistifications in the case of Marbury, in that of Burr and the late Yazoo case show how dexterously he can reconcile law to his personal biases. . . ." (Ford's Edition of the Writings of Thomas Jefferson, Vol. IX., 41; X., 247; IX., 527; VII., 38; IX., 275, 276.) In a letter to Gallatin he speaks of the "gloomy malignity" of Marshall's mind. (Note. 1 Henry Adams' "History of the United States," 194.) A letter to William B. Giles, in reference to the Burr case, contains more specific complaints. In that letter Jefferson alludes to "the tricks of the Judges to force trials before it is possible to collect the evidence. . . ." He also says: "The presiding Judge meant only to throw dust in the eyes of his audience." And he sarcastically adds, that "all the principles of law are to be perverted which would bear on the favorite offenders who endeavor to overrun this odious Republic." (Forman's "Life and Writings of Jefferson," 110.)¹

MARSHALL AS CIRCUIT JUDGE.

Chief Justice Marshall, as appears by letters from him to his associates on April 18, 1802, was originally of opinion that the Justices of the Supreme Court could not hold Circuit Courts without distinct commissions as Circuit Judges. But in *Stuart against Laird*, in 1803, apparently deferring to the opinions of his associates, he acted as Circuit Judge; and the Supreme Court, in an opinion delivered by Mr. Justice Paterson, affirmed his judgment, upon the ground that practice and acquiescence for several years, commencing with the organization of the judicial system, had fixed the construction beyond dispute.²

Not only did the Chief Justice demonstrate his ability on the Appellate Court; he was equally eminent on the Circuit. It is a

¹ Professor Smith.

² Mr. Justice Gray.

mistake to suppose that higher qualifications are necessary for the Appeal Bench than for the Circuit Bench. A Judge on the circuit must be learned, quick of apprehension, equable of mind, with clear common sense. He is constantly called upon to meet issues and to decide questions of which he has had no intimation. In the opening of a cause, in the examination of witnesses, in the requests for instructions, in the arguments of counsel these questions are sprung, not only on him, but on the lawyers engaged in the case. They are presented with all the ingenious plausibility characteristic of the profession. They must be met and decided at once after argument, often necessarily imperfect, and must be solved by the Judge sitting alone, almost always unaided by authorities.

In an Appellate Court counsel appear with full opportunity of preparing their own case, fortified by authorities, provided by an endless number of digests, bearing more or less upon the case, and advised of the main points of their adversary. Both sides are usually exhaustively discussed. The court have full time for conference and consideration, and the conclusion having been reached by an interchange of views, the opinion is prepared in the solitude of a library.

When all the disadvantages are considered under which the Circuit Judges labor, it is a matter on which we at our Bar should congratulate ourselves, that their decisions at *nisi prius* are so often affirmed.

At *nisi prius* the Chief Justice left nothing to be desired. By an excellent provision of the Federal law, the Justices of the Supreme Court are required to go upon circuit and thus practically administer the law. He held these courts in North Carolina and Virginia. Often in turning over the dusty files of decided cases in these courts one comes upon a reported case heard by him, in which he displays his wonted power.¹

Sitting alone in the Circuit Courts, his finest qualities were perhaps more clearly

¹ Judge Simonton.

shown than at the head of the Supreme Court. His serene dignity, which imposed respect on all, his patience in listening, his comprehension of every point made, the accuracy of his rulings, and the clearness and correctness of his charges to the jury made him as nearly a perfect Judge as it is possible for a mere mortal man to be.¹

UNITED STATES *v.* BURR.

The most famous of [Chief Justice Marshall's] circuit cases is the great trial of the United States *v.* Burr. The distinguished prisoner was prosecuted with all the power of the administration, stimulated not only by the serious character of the offence charged, but also by personal and political hostility. His name was execrated by a large and influential portion of the people who were prepared to believe him guilty, not only of the treason charged, but of any or of all crimes in the deca-

logue. His politics and his principles differed *toto caelo* from those of the Judge before whom he was tried. The whole country looked on, anticipating, perhaps hoping, but one result of the trial. Surrounded by these circumstances, during a long and exciting trial, in which were used all the learning, eloquence, ability and ingenuity of a most able Bar prosecuting and defending, in which the accused himself took no unimportant part, the Chief Justice, with steady hand, kept the scales of justice evenly balanced, and in the concurrent opinion of the prosecution

¹ Honorable Charles E. Perkins, of Hartford, Connecticut.

and the defence swerved ne'er a hair breadth from the true line of justice. In the conclusion of his charge to the jury he showed his appreciation of his position and demonstrated the courage with which he met it. He ends with these words, which should be impressed on the mind of every Judge: "That this Court dares not usurp power, is most true. That this Court dares not shrink from its duty, is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass by him without self-reproach, would drain it

to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."¹



THE HALL WHERE WAS HELD THE TRIAL OF AARON BURR.

By courtesy of *The World's Work*.

The most important case in which he sat at the circuit was the celebrated prosecution of Aaron Burr for treason, and here he showed not only his ability, but his courage and independence in asserting and maintaining the power of the courts and withstanding public sentiment. This appears in his decision upon the memorable motion made by Burr's counsel for a subpoena *duces tecum*, addressed to Jefferson, then President, ordering him to produce upon the trial a letter written to him by Colonel Wilkinson. Jefferson, who had a high opinion both of himself and his office, indignant at being treated like

¹ Judge Simonton.

an ordinary witness, instructed the United States Attorney-General to resist the motion, and intimated very strongly that the Court had no power to call upon him to bring State papers before it, and moreover that if the Court should do so he would not obey. It was a difficult position, for, as the Court was a United States Court, only the authorities of the United States could be called upon to enforce its order, and they were completely in Jefferson's hands; but Marshall was equal to the occasion. He declared it to be his duty to issue the subpoena without regard to consequences, and so firm was he that Jefferson at last yielded, and sent the letter to the Attorney-General to be produced if necessary.

The same independence was shown in his rulings upon the trial. Whatever may be believed of Burr's real motives and objects, there was a strong feeling throughout the entire community that he was conspiring against the integrity of the Union. Jefferson firmly so believed, and all the power and influence which the government could command was exerted to obtain Burr's conviction. Curiously enough the whole case turned upon the question of the admissibility of evidence. The overt act of treason alleged in the indictment was the levying of war against the United States at Blennerhassett's Island in the Ohio River. The prosecution having offered evidence to prove acts of other persons at the island, which it was claimed constituted levying war, then proposed to connect Burr with the transaction by collateral testimony, while admitting that he was not in fact present. This evidence was objected to as not admissible under the indictment, and it was seen at once that the whole case turned on the admissibility of this evidence. Probably no question of evidence was ever argued so thoroughly and at such length. The discussion lasted a whole week; all of the eight able lawyers employed on the case were heard at full length, and the abstract of arguments, with the opinion of the Court, occupies sixty

printed pages of the report of the trial. In an elaborate opinion the Chief Justice declared the evidence inadmissible. That ended the prosecution, and the next day the jury under the charge of the Court acquitted Burr.¹

"Marshall," wrote Wirt to a correspondent, "has stepped in between Burr and death." "Why did you not," Wirt was asked, "tell Judge Marshall that the people of America demanded a conviction?" "Tell *him* that," was the reply: "I would as soon have gone to Herschel and told him that the people of America insisted that the moon had horns, as a reason why he should draw her with them."²

It was partly to the tendency on Marshall's part to give little thought to ordinary conventions, and partly to his kindness of heart, that we should attribute another singular occurrence, the fact that he attended dinner at the house of an old friend, one of Burr's counsel, after he knew that Burr was to be present; and when that individual, having previously been brought to Richmond under arrest, examined before Marshall and admitted to bail, was still awaiting the action of the Grand Jury with reference to further judicial proceedings before Marshall himself. He accepted the invitation before he knew that Burr was to be of the company. I have heard from one of his descendants that his wife advised him not to go; but he thought it best not to seem too fastidious or to appear to censure his friend by staying away. It is said that he sat at the opposite end of the table from Burr, had no communication with him and went away early. But we must still wonder at his action, which he himself afterwards much regretted.³

In the development of the system of common law and of equity which our ancestors brought with them from their English homes

¹ Honorable Charles E. Perkins.

² Honorable Sanford B. Ladd, of Kansas City, Missouri.

³ Professor James Bradley Thayer, of the Law School of Harvard University.

and to which they adhered with respect and sometimes with reverence, the Chief Justice was forcible, logical and forever instructive. Not to go into details, the trial of Aaron Burr is a classic, never equalled and not yet approached. The unerring self-control by which the presiding Judge mentally rose above the mists and miasma of popular excitement, and the clearness of judgment which fastened upon the central fact of the case, were never more perfectly exhibited than in the trial of Colonel Burr, and upon that trial alone Marshall's reputation as a great Judge could safely rest.¹

MARSHALL'S JUDICIAL STYLE.

Marshall's judicial opinions have qualities distinctively their own. They are among the most massive and original productions of the human intellect. Any one familiar with them instantly knows Marshall's style. It has been said that it was hard and dry and lacked finish. To this I cannot agree. Unornamented indeed his opinions are, and in all of his writings I recall only a single metaphor. But for strong, vigorous, masculine English, which expresses his meaning with the utmost clearness, precision and force, I do not know where his judicial style is excelled. His opinions are characterized still more distinctively by their matter than by their form. Though relating in many cases to questions on which parties warmly differed, how utterly free they are from political bias!

Story said: "When I examine a case I go from headland to headland; from case to case; Marshall has a compass, puts out to sea, and goes directly to his result." This is true. Marshall drew upon his own intellectual resources, and his drafts were always honored. In the light of his own intelligence, like another Columbus, he sailed, with dauntless courage, into new and unknown regions, guided only by the great principles of right, reason and justice, which he applied with equal caution, courage and wis-

¹ Honorable Nathaniel Shipman, United States Circuit Judge.

dom in the practical work of construing the Constitution. His opinions are masterful examples of pure reasoning and logic and legal intuition. It has often seemed to me that he was endued in a wonderful measure with what the old theologians called "illuminating grace," enabling him to see the end from the beginning, and the bearing and effect of any principle or proposition, however artful or insidious, with a far-reaching sagacity that was never surpassed. His power of exposition in his opinions irresistibly carried conviction and compelled assent.¹

Marshall's decisions are demonstrations founded upon pure reason. They are deductions, chains of compact reasoning, leading to inevitable conclusions. They are almost devoid of illustration of analogy. They show profound meditation and search after truth, and are remarkable for their deep penetration. They grapple with great underlying principles, and exclude extraneous circumstances. In the words of a contemporary: "When we regard their originality, their depth, their clearness and their adamant strength, we look upon them as the highest efforts of the human mind."²

He had an intuitive perception of the real issue of every case, however complicated, and of the way in which it should be decided.

His manner of reasoning was peculiarly judicial. It was simple, direct, clear, strong, earnest, logical, comprehensive, demonstrative, starting from admitted premises, frankly meeting every difficulty, presenting the case in every possible aspect, and leading to philosophical and profoundly wise conclusions, sound in theory and practical in effect. He recognized that, next to a right decision, it was important that reasons for the decision should be fully stated so as to satisfy the parties and the public. And it may be said of him, as Charles Butler, in his *Reminiscences*, says of Lord Camden,

¹ Honorable John F. Dillon.

² Judge Colt.

that he sometimes "rose to sublime strains of eloquence: but their sublimity was altogether in the sentiment; the diction retained its simplicity, and this increased the effect."

It was in the comparatively untrodden domain of constitutional law, in bringing acts of the Legislature and of the executive to the test of the fundamental law of the Constitution, that his judicial capacity was pre-eminently shown. Deciding upon legal grounds, and only so much as was necessary for the disposition of the particular case, he constantly kept in mind the whole scheme of the Constitution. And he answered all possible objections with such fulness and such power as to make his conclusions appear natural and inevitable.¹

The extraordinary influence of Marshall's judicial work is to be ascribed to his possession of reasoning powers of remarkable capacity, a character of unchallenged integrity, a moral courage which never quailed, and a devotion to the institutions of his country which animated every act of his official life. His impartiality was conceded by all. The processes of reasoning, through which, step by step, he reached a conclusion, were so accurate in their logical sequence, that the intellect could detect no flaw. He convinced the mind if he did not convert the heart. The arguments by which he supported a successful contention, were unanswerable. The opinions which prefaced his great judgments were, to be sure, entitled to that respect which due deference for the decisions of a judicial tribunal ought always to command. But his claims to the homage of a contemporary period and of posterity, rest upon other grounds than those of perfunctory reverence for those in authority. Not one of those judgments was the mere *ipse dixit* of power. He silenced the voice of opposing contention by his almost supernatural faculty of establishing the correctness of his views with the clearness and certainty of mathematical demonstration.

From premise to conclusion, the progress

¹ Mr. Justice Gray.

of his logic was like the movement of the mighty river, gathering strength and volume in its ever broadening, ever deepening flow, until, at the last, it glides through the placid estuary into its appointed harbor.

His immortal expositions of the Constitution are marked by a clearness of style which is unsurpassed. The mind follows easily the thread of his argument, even when dealing with the most complex or abstruse subject. A favorite expression was, "it is admitted." This provoked the remark: "Once admit his premises, and you are forced to his conclusion; therefore deny everything he says." And Daniel Webster said to Justice Story: "When Judge Marshall says, 'it is admitted,' sir, I am preparing for a bomb to burst over my head and demolish all my points."²

The opinions of Marshall are models of judicial style. No legal writings were ever freer from technicalities of language or thought. In plain words which reach even the unlearned understanding, without ornament, and absolutely devoid of flourish or by-play or looking to side effects of any kind, they present a calm and steady flow of pure and sustained reason from postulate to conclusion. And they read to the lawyers of to-day as they read to the lawyers in the cases they decided, for the argument has no trace of personal, or party, or temporary considerations.

Though his individual convictions were deep and strenuous and the contests of his time were fierce and unsparing, his personality no more appears than the personality of Shakespeare in "Hamlet" or "Macbeth." He wrote as Shakespeare wrote, not in the taste or fashion of his age, but on the foundations of human wisdom in the light of pure and enduring reason. And he wrote as Thucydides wrote, not for a day, but as a possession for all time.²

To describe his reasoning, lawyers, judges, commentators and biographers have em-

¹ Honorable Sanford B. Ladd.

² Mr. Justice Mitchell.

ployed all the adjectives indicative of strength or lucidity. A great lawyer who often appeared before him characterized his power of reasoning as "almost superhuman." Some of his associates excelled him in knowledge of the precedents, but that was of small moment in the department of international law which was so rapidly outgrowing its precedents, and of no moment at all in the department of constitutional law where there was no precedent. His illustrious achievements in the field of highest intellectual endeavor resulted from a concurrence of favoring conditions which was unusual if not unprecedented. He was strong in body, mind and purpose. He had the intellectual integrity to apply knowledge to every purpose for which it might be useful, and to accept without abatement the conclusions indicated by reason. He may have been aided by safe instincts, but he did not find the truth by chance. He knew the ways which lead to it. Extraordinary native endowments were strengthened by the study and reflection to which patriotism inclined him. More completely than any of his contemporaries he had assimilated the history of the colonies and the confederation. Hence the irresistible passages in his opinions in which he applies those trusted tests of interpretation—the evils which were to be cast out, the objects which were to be attained. His mind was stored with lessons drawn from the experience of every nation which had ever aspired to be free, and he comprehended their demonstration that most of the crimes against liberty are committed in the name of liberty.¹

Any staunch Federalist who was a good lawyer might perhaps have entered the same court orders upon the docket that were put there by Marshall, but who could have defended the conclusions of the Court as Marshall did? His literary style was simple, compact and clear. His taste and aptness in

¹ Honorable John A. Shauck, Chief Justice of the Supreme Court of Ohio.

illustration were faultless. He never sacrificed conclusiveness to brevity, nor sense to ornament; and yet, though he never strove for mere effects, his opinions, in their completeness, in their masterly anticipation of all cavils and objections, and in their overwhelming conclusiveness of argument, will appear to any one reading them with a due sense of the issues involved, as truly eloquent and as moving as the great speeches of Webster and Clay.¹

His opinions are not characterized by a display of great technical learning or legal scholarship, but rather by the higher qualities of an unrivalled grasp of general principles and the ability to apply them with unflinching wisdom and common sense to the question before him, and to reach the conclusion by reasoning so clearly expressed and so logical that the result always seems to be inevitable and unquestionably correct. He rarely cited authorities and never massed them. In this respect only his influence upon his successors does not seem to have been of enduring character. His decisions thus contrast strikingly with those of more recent date where the scales of justice are employed in weighing authorities *en masse*, and the reasoning of the Court is with difficulty traced through a bewildering maze of precedents.²

The distinguishing features of Marshall's power, as a Judge are seen in clear light when he is compared with Judge Story, who sat with him on the Bench from 1811 till Marshall's death. Story was a lawyer of remarkable ability and profound learning. As we all know, he attained great distinction, not only as a Judge, but as a lecturer on law, and as an author. In the Dartmouth College case both these Judges furnish opinions, and the methods of argument and effectiveness of each are perhaps as well seen in that case as in any of the cases in which both took

¹ Honorable Isaac N. Phillips, Reporter of the Supreme Court of Illinois.

² Honorable Joseph P. Blair, of New Orleans.

part. Marshall begins every important case by putting aside all confusing issues not vital to the decision. He clears the atmosphere by stating all the points that materially affect the question, getting right at the marrow. He carefully answers all the adverse arguments, and usually leaves practically nothing for a rehearsing. When he closes his opinion, counsel are convinced that the case is sealed. He does not attempt to convince or rivet his conclusions by an exhaustive array of authorities, or any complete analysis of them. While he shows some respect for authorities, he spends very little effort in reviewing them. . . .

His chief aim in argument is to be unanswerably strong, wasting no force in a display of learning, nor allowing anything not vital to his conclusions to distract or confuse. He often alludes in the beginning of his opinion to the serious if not solemn importance, of the questions involved, and how it would be more agreeable to be rid of deciding them, and then he states the fearless spirit with which the Bench must address itself to the matter. Thus inspired with the soul of a just, weighty and fearless purpose, the argument moves like a compact, irresistible body of soldiers.

He is not poor in effective illustrations, and he delights in putting one argument over against another, showing the relative strength of each. Judge Marshall was not learned in the authorities, nor did he believe that it was of much use to dig up English precedents to reach a proper construction of our Constitution. He expressed practically this in the case of *Osborn against the United States Bank*.

The profound reflections of his intellect, guided by what he was pleased to call in the *Dartmouth College* case, the "resplendent light" of the Revolution, were better to him than the reflections of the great English Judges in arriving at a right construction of this instrument. He was not inferior to the best minds that had gone before him, either in breadth and thoroughness of conception,

or in originality of argument. He never misconceived his own powers, so as to become the prey of errors from blinding pride and excess of self-confidence. He was safely remote from such faults, although he was not unconscious of his extraordinary talents.

In the field of correct reasoning his mind moved with transcendent freedom, never impeded by too great reading, nor restricted to the ruts of mere precedents or other men's methods.¹

Marshall's judicial style, as it appears in his constitutional opinions, we may well describe in the words recently used by Herbert Paul in reference to Dean Swift: "Absolute and utter simplicity" is its distinguishing mark. It leaves the reader "face to face with the precise idea which the writer wished to convey." During the long years since those opinions were first reported, there have been occasional discussions as to whether his views were correct, but there has seldom, if ever, been any doubt as to what his views actually were. In those opinions we find no needless display of learning, no collateral digressions, no talking for momentary effect, and no attempts at fine writing. Indeed, there is an entire absence of the defects which so often mar judicial opinions. In him, there is no "frequency of flat unnecessary epithets," nor the "folly of using old threadbare phrases;" nor are his opinions made up of poorly arranged quotations from other men, constituting what has aptly been termed "a manifest incoherent piece of patchwork." Above all, there is no "irrelevant eloquence." His motto was said to be: "Aim exclusively at strength." And in this connection it should be noticed that there is seldom any flaw in his logical processes. If his premises are once admitted his conclusion generally follows beyond all question. Of the effect of Marshall's moral qualities upon his style, I shall speak later.

The Chief Justice was not what would be

¹ Honorable George B. French, of Nashua, N. H. President of the Bar Association of New Hampshire.

called "a great *book* lawyer." While he had a fair knowledge of the books, yet his strongest intellectual points were his intuitive perception of justice, his wonderful power of analysis, and his faculty of close and logical reasoning. "Probably," says Professor Parsons, "the decisions of no (other) eminent Judge have so few citations of authorities." . . . "It used to be said of him, that, when he had formed his conclusions, he would say to one of his colleagues, 'There, Story, is the law; now you must find the authorities.'" Story himself said: "When I examine a question, I go from headland to headland, from case to case; Marshall has a compass, puts out to sea, and goes directly to his result." ("American Law Review," 436.) . . .

If we seek a wider field of comparison, taking in the whole country and looking at statesmen as well as jurists, we shall find strong points of resemblance between Marshall and Lincoln. Both have the same faculty of "embalming in one short happy phrase" an important principle; both go directly to the point; both are remarkable for their power of clearly stating the issue and working out a *reductio ad absurdum* of the opposing view. Cardinal Newman has said: "Half the controversies in the world are verbal ones, and could they be brought to a plain issue they would be brought to a prompt termination. . . . When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless." Marshall and Lincoln had each the happy power of stating their own views, so as to make their meaning unmistakable. And they also had the power to analyze their opponent's statement and reduce it to its lowest terms; showing exactly what it amounted to and what its practical effect would be. A reply to their statements was generally a hopeless task.

Years ago the Supreme Court of New Hampshire had announced the result arrived at in a case of great public interest, but their reasons had not yet been written out for publication in the reports. In this stage of the

matter one of the Judges was conversing with a legal friend as to the manner in which the views of the Court should be presented. His friend advised him to "write an opinion which the Selectmen could understand." Marshall never needed such advice. . . .

In what has been said of Marshall's judicial style, I wish to be understood as using the expression "style" in a larger sense than is sometimes attached to it. I mean something more than the selection of words, or the framing of sentences. I mean to include "the entire scheme" of the opinion, "the proportion of the several parts to the whole and to each other." No writing can approach perfection, unless the author has "the sense of proportion, which the Greeks called by an expressive term, 'the art of measuring.'" This is to be found in Marshall. The space given to each topic is in proper ratio to its importance, and the arrangement is such that each topic is discussed in its proper place and discussed only once.

But over and above all manifestations of intellectual ability, the opinions of Marshall evince a far higher characteristic, that of intellectual honesty; or, as Martineau puts it in reference to John Stuart Mill, "intellectual conscientiousness." There are no evasions of difficulties. Every point raised by counsel on the losing side is taken up and fully discussed. The workings of the mind of the great Chief Justice are laid bare. As was said of a great writer: "There is no veil, however thin, between the mind of the author and the mind of the public." There is not only great intellectual power, but also "absolute transparency of intellect."

And this brings us to what is, after all, the great distinguishing feature in Marshall's life; the real secret of his extraordinary success, fully as much as his great intellect. And that is high personal character. There was a man behind the magistrate. John Marshall was pre-eminently single-minded. His whole life was pervaded by an overpowering sense of duty and by strong religious principle. A firm believer in the Christian religion,

his life was in accord with his belief. The distinguishing trait of his life and character was one which has been attributed to two of the recent heads of the English judiciary. At the proceedings in Court, in memory of Lord Chief Justice Russell, the Attorney General, Sir Robert B. Finlay, said of the late Chief Justice: "He was simple with the simplicity of a great and kindly nature." A few years earlier Tennyson was reading aloud to some friends his "Ode on the Death of the Duke of Wellington." After pronouncing the lines —

"And, as the greatest only are,
In his simplicity sublime"—

the poet paused, and said there was one man only in the present time to whom those lines applied. The man thus singled out by Tennyson as sublime in his simplicity was the former Lord Chancellor of England, Roundell Palmer, Earl of Selborne. So we may truly say of our own great Chief Justice that his most marked characteristic was simplicity using that term in its highest and best sense.

It is, I believe, largely to this trait of simplicity of mind and heart, that we owe the charm and the effect of Marshall's judicial style.¹

MARSHALL'S CONTRIBUTIONS TO INTERNATIONAL LAW.

His services [in giving form and strength to American constitutional law] were so splendid that, for his countrymen, they have cast into the shade those which he rendered in other fields. But out of the United States Marshall's reputation as a great jurist rests rather on what he did towards the development and unification of the law of nations.

Marshall, while an officer in the Continental army, had attended the law lectures of Chancellor Wythe at William and Mary College, during a lull in the Revolution. It was his only systematic instruction in the learning of his profession, but it put his feet on solid

¹ Professor Smith.

ground. The law of nations then held a larger place in legal education in America than it did a half century or even a century later. Wythe taught it to men eager to hear. The Revolution gave its rules a practical importance. Fifteen years later Marshall had occasion to cross swords with his former instructor on the question of the policy of Jay's treaty. Chancellor Wythe pronounced it insulting to our dignity. Marshall defended it in a speech which won him general recognition as a master in international law.

A few months later he was offered by Washington the position of Minister to France, and although he declined it, President Adams prevailed upon him, the next year, to go there as one of three special envoys to demand reparation for her seizures of our ships. The rights of neutrals against belligerents were to be, from this time forward, one of the main subjects of his study, as our representative abroad, as our Secretary of State at home, and, finally, as Chief Justice of the Supreme Court.

His maiden opinion,¹ delivered in August, 1801, was a discussion of the rights flowing from a seizure by the frigate "Constitution," the old ship which the stirring verses of Oliver Wendell Holmes have kept afloat throughout the century. She had recaptured a German merchantman from a French prize crew, and, in this, his first case, Marshall had to pass upon at least three important and as yet ill-defined points of international law. Here, as always throughout his long service upon the bench, he gave precision and certainty to whatever he touched upon.

The highest court of England has said that in considering what are the rights of a sovereign as to property of his coming within the territory of another power, the first authority to consult must always be Marshall's decision, rendered a few years later, in the case of the *Exchange*.²

¹ Talbot v. Seeman, 1 Cranch, 1.

² 7 Cranch, 116.

The number of causes turning on points of constitutional law which were decided by the Supreme Court while he was at its head was about sixty. During the same period over a hundred were determined which passed upon questions of the law of nations.

In these, as in all other matters of judicial controversy, Marshall paid more regard to principle than precedent in coming to his conclusions. He did not hesitate to differ from so great a Judge as Sir William Scott in determining the effect of war upon a commercial domicil, even when he stood almost alone, and was driven to a position of dissent.¹

But what are principles? Those of international law are often founded rather on usage than on reason. Such is the claim of title by discovery to lands inhabited by savages. Marshall, while frankly admitting that it was opposed to natural right, held that it made Indian deeds of no avail against government grants.² The slave trade, he soon afterwards declared, was against the law of nature, but as all nations had at times practiced it, while any continued to do so it could not be pronounced contrary to international law.³

When Marshall stepped from the Department of State upon the bench the treaty which his predecessor, Chief Justice Ellsworth, and his associate envoys to France had negotiated with Napoleon was still pending for ratification. A long series of cases growing out of French seizures of neutral vessels was to follow. Other causes of international importance arose after the War of 1812 with Great Britain, and later, under our treaties of cession with Spain. The judiciary of a nation like ours, in which the courts are not under the control of the execu-

¹The *Venus*, 8 Cranch, 253. Recent decisions of British courts, not in affirmance of principles laid down before the Revolution, he regarded as entitled intrinsically to no greater weight than those of any other country. *Thirty Hogsheads v. Boyle*, 9 Cranch, 191.

²*Johnson v. M'Intosh*, 8 Wheat., 543.

³*The Antelope*, 10 Wheat., 66.

tive, may do much towards involving it in war, and much towards saving it from war. Under Marshall's lead the courts of the United States were a power for peace. They were such because their judgments were based on an intelligent understanding of international law and a serious purpose to apply it with an even hand to all.

In this, during nine years of Marshall's term of office, he was greatly aided by the accession of Henry Wheaton to the position of the official reporter of the decisions of the court. Wheaton was, no doubt, the American who had done most to make international law a science. To have in every case involving its application such a man at hand, on whom to call for counsel and criticism, was a source of strength. . . .

But Marshall's was a stronger mind than Wheaton's or than Story's. They had read more deeply. He had thought more deeply, and it is a man's own thought alone that can make him great.¹

MCCULLOCH *v.* MARYLAND.

Marshall's leading Constitutional opinions may be divided into three classes: *First*, such as discuss the general character and reach of the Federal Constitution, and the general relation of the Federal Government of the States. Of this class, *McCulloch v. Maryland*, probably his greatest opinion, is the chief illustration. *Second*, those cases which are concerned with the specific restraints and limitations upon the States, imposed by the Federal Constitution. To this class may be assigned *Fletcher v. Peck*, the bankruptcy cases of *Sturges v. Crowninshield*, and *Ogden v. Saunders*, and *Dartmouth College v. Woodward*. *Third*, such as deal with the general theory and principle of Constitutional law. There is little of this sort. Except as it is incidentally touched, perhaps the only case is *Marbury v. Madison*.

¹Honorable Simeon E. Baldwin, Justice of the Supreme Court of Connecticut, and President of the International Law Association.

I cannot now speak of these cases in detail; only on one or two of them is there time to comment at all. If we regard at once the greatness of the questions at issue in the particular case, the influence of the opinion, and the large method and clear and skillful manner in which it is worked out, there is nothing so fine as the opinion in *McCulloch v. Maryland*. The questions were, first, whether the United States could constitutionally incorporate a bank, and, second, if it could, whether a State might tax the operations of the bank; as, in this instance, by requiring it to use stamped paper for its notes. The bank was sustained and the tax condemned. In working this out, it was laid down that while the United States is merely a government of enumerated powers, and these do not in terms include the granting of an incorporation; yet it is a government whose powers, though limited in number, are, in general, supreme, and also adequate to the great national purposes for which they are given; that these great purposes carry with them the power of adopting such means, not prohibited by the Constitution, as are fairly conducive to the end; and that incorporating a bank is not forbidden, and is useful for several ends. Further, the paramount relation of the national government, whose valid laws the Constitution makes the supreme law of the land, forbids the States to tax, or to "retard, impede, burden or in any way control" the operations of the government in any of its instrumentalities.

This was the opinion of a unanimous court, in which five out of the seven Judges had been nominated by a Republican President.¹

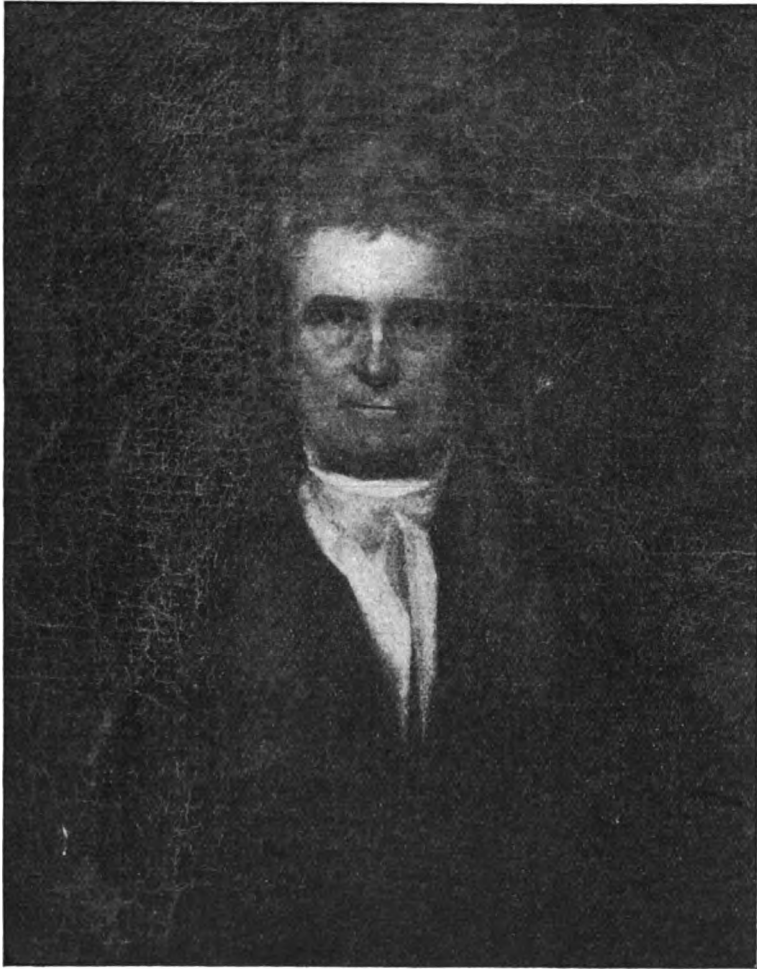
Nor must we forget that while Marshall was resolved to extend the power of the nation to its proper limits, he was as careful not to extend it beyond those limits. His desires on this point are very clearly shown in the celebrated case of *McCulloch v. Mary-*

¹ Professor Thayer.

land, the question in which was the right of the State of Maryland to tax a branch of the United States Bank, a corporation created by Congress as a part of the financial administration of the government. The case was especially interesting as the United States claimed that the tax law of the State was invalid as contrary to the Constitution, and the State claimed that the act of Congress creating the Bank was invalid, as beyond the powers given to Congress. In his opinion, Marshall first discusses the last point. He admitted that the Constitution gave no express power to create a bank, in terms, but held that it existed as part of the power "to make all laws that shall be necessary and proper to carry into execution the powers given to the government," saying "let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

This, I believe, is the furthest extent to which Marshall ever carried the doctrine of powers not directly given by the Constitution, but only to be implied from it. That doctrine, first enunciated by him, has been questioned by those who may be called strict constructionists, and Marshall has been criticised and accused of unduly and improperly extending the powers of government. Of course, such a principle, like most others, may be carried to too great an extent. It will appear, however, to any unprejudiced observer of Marshall's opinions, and of the reasoning by which he establishes the doctrine, that it is an absolutely necessary one, without which not only the operations of the government would be seriously embarrassed, but almost destroyed. In the final analysis it will be seen that the real objection has always been to the application of the principle to particular instances, rather than to the principle itself.¹

¹ Honorable Charles E. Perkins.



JOHN MARSHALL.

FROM A PAINTING BELONGING TO WASHINGTON AND LEE UNIVERSITY,
LEXINGTON, VIRGINIA.

MARBURY *v.* MADISON.

What was decided in *Marbury v. Madison*, and all that was decided, was that the Court had no jurisdiction, and that a statute purporting to confer on them jurisdiction to issue a writ of mandamus in the exercise of original jurisdiction was unconstitutional. It is the decision upon this point that makes the case famous, and undoubtedly it was reached in the legitimate exercise of the Court's power.

But, unfortunately, instead of proceeding as courts usually do, the opinion began by passing upon all the points which the denial of its own jurisdiction took from it the right to treat. It was thus elaborately laid down, in about twenty pages, out of the total twenty-seven which comprise the opinion, that Madison had no right to detain the commissions which Marshall had left in his office, and that mandamus would be the proper remedy in any court which had jurisdiction to grant it.

And so, as the Court, by its decision in this case, was reminding the Legislature of its limitations, by its *dicta* and in this irregular method, it intimated to the President also that his department was not exempt from judicial control. And thus two birds were reached with the same stone.

Marshall made a very noticeable remark in his opinion, seeming to point to the Chief Executive himself, and not merely to his secretary, when he said, "It is not the office of the person to whom the writ is directed, but the nature of the thing to be done, by which the propriety or impropriety of issuing the mandamus is to be determined"—a hint that on an appropriate occasion the judiciary might issue its orders personally to him. This remark gets illustration by what happened a few years later, in 1807, when the Chief Justice, at the trial of Aaron Burr in Richmond, ordered a subpoena to the same President, Thomas Jefferson, directing him to bring thither certain documents. It was a strange conception of the relations of the different departments of the government to each other, to imagine that

an order, with a penalty, was a legitimate judicial mode of addressing the Chief Executive. . . .

In outline, the argument [in *Marbury v. Madison*] is as follows: The question is whether a Court can give effect to an unconstitutional act of the Legislature. This is answered, as having little difficulty, by referring to a few "principles long and well established."

1. The people, in establishing a written Constitution and limiting the powers of the Legislature, intend to control it; else the Legislature could change the Constitution by an ordinary act. 2. If a superior law is not thus changeable, then an unconstitutional act is not law. This theory, it is added, is essentially attached to a written Constitution. 3. If the act is void, it cannot bind the Court. The Court has to say what the law is, and in saying this must judge between the Constitution and the act. Otherwise, a void act would be obligatory; and this would be saying that constitutional limits upon legislation may be transgressed by the Legislature at pleasure, and thus these limits would be reduced to nothing. 4. The language of the instrument gives judicial power in "cases arising under the Constitution." Judges are thus in terms referred to the Constitution; they are sworn to support it and cannot violate it. And so, it is said in conclusion, the peculiar phraseology of the instrument confirms what is supposed to be essential to all written constitutions, that a law repugnant to it is void, and that the courts, as well as other departments, are bound by it.

This reasoning is mainly that of Hamilton in his short essay of a few years before in the *Federalist*. It answered the purpose of the case in hand, but the short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of *McCulloch v. Maryland*, *Cohens v. Virginia*, and other great cases; and it is much to be regretted. Absolutely settled as the general doctrine is today, and

sound as it is, when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations — such, too, as affect today the proper administration of this extremely important power — not touched by Marshall, which must have commanded his attention, if the subject had been deeply considered and fully expounded. His reasoning does not answer the difficulties that troubled Swift, afterwards Chief Justice of Connecticut, and Gibson, afterwards Chief Justice of Pennsylvania, and many another strong man; not to mention Jefferson's familiar and often ill-digested objections. It assumes as an essential feature of a written constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of disregarding the act of a co-ordinate department and the action of a Federal Court in dealing thus with the legislation of the local States, a distinction important in itself and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of case, while denying it in the other.¹

The doctrine [that "the very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury"] he then asserted with such emphasis, which he treated later as "a political axiom," had been, at least in its practical application, vehemently denied in the earlier days of our government, and it is denied with no less passion today by aliens to the spirit of the American polity. That courts of law are the best instruments, nay, that they are the only good instruments, to determine all controversies and vindicate all rights affecting the persons and estates of freemen, he deemed an axiomatic truth, but when he took his seat as Chief Justice a great political party looked on the judiciary and, most of all, on the Federal judiciary, with dislike and suspicion

¹ Professor Thayer.

as a check upon popular omnipotence, and, in our own time, we see the same jealousy shown by socialistic innovators. Marshall thoroughly approved of, I will not say, "government by injunction," for the term is both inadequate and misleading, but of the very widest field for judicial action and judicial influence, whether invoked to protect individual rights or to enforce public obligation. Of this no better illustration can be found than his course in the case of *Marbury v. Madison*, above mentioned. That case is best known as the first wherein an Act of Congress was pronounced void, because unconstitutional, by the Supreme Court, but it is no less worthy of note in another aspect. When it became known at the seat of government that President Adams had been defeated as a candidate for re-election, the Federalists, who, for the moment, controlled all branches of the national government, were tempted to abuse the brief period of supremacy left them for purposes of selfish and short-sighted partisan advantage. In this spirit they created a number of new offices which the retiring President hurriedly filled with incumbents belonging to his own party, and among these were certain Justices of the Peace for the District of Columbia appointed for five years. The act providing for their appointment was approved on February 27, 1801; on March 2 President Adams nominated Mr. William Marbury and three others for the positions thus established, late in the evening of the third they were confirmed by the Senate, and but a few minutes before midnight their commissions were signed and sealed; these had not been delivered on the next day when Mr. Madison became Secretary of State, and passed into his possession. This action of the Federalist President and Congress was unfair, unbecoming, and, as events soon showed, gravely impolitic; in fact, the indecorous attempt thus made to preserve patronage for a defeated party went far to convert its defeat into irremediable ruin, but the whole proceeding has been

strictly legal, and the "Midnight Judges" were fully and clearly entitled to their offices; these might be abolished by the new Congress, but, while they existed, they had been legally filled. Unhappily, by a deplorable law of human nature, partisan excesses on one side breed the like or worse excesses on the other; President Jefferson refused to recognize the appointments and forbade Mr. Madison to deliver the commissions. Madison obeyed, and the Justices applied to the Supreme Court for a *mandamus* to enforce their delivery.

John Marshall had been nominated by the same President, confirmed by the same Senate, barely a month before their commissions were signed; he was known as a strong Federalist, although his moderation and sagacity had led him to oppose the extreme faction of his party; moreover, Thomas Jefferson was the only public man, and probably the only individual, in Virginia with whom his personal relations were notoriously cold to the verge of hostility. He fully recognized the duty of a Judge, not only to merit, but, so far as prudence might avail, to gain and retain public confidence, to seem impartial no less than to be impartial. Had he been an ordinary man he might well have been embarrassed when called to pass on the merits of this cause; had he been an ordinary Judge he must have gladly taken any becoming way to escape the responsibility of such decision. And a becoming way was open to him: the Court were unanimously of opinion that so much of the thirteenth section of the Judiciary Act as authorized the Supreme Court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any . . . persons holding office under the authority of the United States" was void in that it attempted to confer on the Court an original jurisdiction not authorized by the Constitution; he had but to announce this determination, in itself one of extreme moment, and any further discussion of the petitioners' rights or remedies became needless and might be deemed irrelevant.

Such might, such probably would, have been the course of the average man and of the average Judge; such emphatically was not the course of Marshall. He always sought to determine a controversy, never to avoid its determination; his aim was ever to decide a cause, not to be rid of it without decision. And with him, this was not a matter of temperament or policy, it was a matter of conscience and honor. He said in his charge to the jury, which reluctantly acquitted Burr of treason:

"That this Court dares not usurp power, is most true. That this Court dares not shrink from its duty, is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

Acting on this principle before he had thus announced it, he did not hesitate to point out in a masterly opinion that Mr. Marbury's appointment to office was in all respects complete, that his commission belonged to him as a muniment of title, that the various excuses alleged for withholding it were mere sophistry, that the Secretary of State was strictly bound by law to give it to him and that, if he failed to discharge this ministerial legal duty, an appropriate tribunal of first instance ought to compel its performance by *mandamus*.¹

In the centennial history of the Court, published with its approval, the opinion (*Marbury v. Madison*) is said to be "in some respects *obiter dictum*," and the same thing is apparently conceded by the Court itself as late as 1880 in the case of *United States v. Schurz* (102 U. S. 395), though it is added

¹ Honorable Charles J. Bonaparte, of Baltimore.

that the ruling, although said to be extra-judicial, has been steadily followed. I do not admit the soundness of the criticism. I have no apologies to make, but insist that none are needed. I maintain the judicial correctness and propriety of the whole opinion and deny that there is a single word in it which is extra-judicial or unnecessary to the ultimate decision. Be patient with me, I pray you, while I venture to remove even the faintest film of suspicion from one of the ablest and fairest opinions ever traced by a judicial pen.

I admit that ordinarily where the jurisdiction of the Court to grant the relief sought is challenged that becomes the first question to be determined, and if the Court is of the opinion that such jurisdiction does not exist the case is ended and comment upon the possible rights of the parties is immaterial, impertinent and binds nobody. But that rule on occasion comes in collision with another rule to which it is necessarily subordinate; a rule of great value and of extremest wisdom, never to be consciously violated. That rule is that an act of the Legislature should never be declared unconstitutional and therefore void except where such declaration is absolutely and inevitably necessary to a determination of the case before the Court; that is to say that if the controversy *can* be determined on other grounds, it *must* be determined on other grounds, and the constitutional question be left to some proper, because imperative, occasion.

The power to vindicate the Constitution against legislation which contravenes it is the highest and most delicate power of the judiciary. By the early Court it was spoken of with reverence as an "awful" power. It is no common thing, no cheap resource to be drawn on at will. It challenges the action of the people's representatives, of a co-ordinate department of the government; it throttles a law by them enacted; it measures the act by the fundamental law. Indeed, such a tremendous power should never be exerted without a necessity so imperative that from

it there is no escape. To that rule, which Marshall himself afterward formulated, he gave a just obedience as it was his duty to do. That duty demanded that before raising the constitutional question he should first determine whether, to solve the case before him, it was necessary to raise it; whether it might not be that the writ could be refused without touching the grave question of constitutional jurisdiction at all; in which event that question must be left, for the time at least, unsolved. To perform that duty the Judge was compelled first to ascertain whether on the facts the applicant was entitled to the issue of a mandamus. Only, if he was, did the further question arise whether the Court had power to issue it. For the inquiry was not whether there was general jurisdiction over the subject-matter of the applicant's right to his commission, nobody disputing that, but whether there existed the special jurisdiction to award a particular form of remedy, and so if the applicant was not entitled to that remedy, whether the Court could give it or not, that would be the sufficient and proper answer. To add another, obviously needless, and yet involving a grave constitutional question, would be extra-judicial and rob the decision on that point of all authority. "*Obiter dictum!*" Jefferson would have shouted — a Federal harangue tacked to an ended opinion!

I may possibly, at the expense of some enduring repetition, put the justification of the opinion as a whole in another form. There were three methods of framing it, and only three. First: the Judge might hold that the appointment was not complete until the commission was delivered and so the applicant had no right to a mandamus. That would end the case and the opinion, for since the writ was refused for *one* sufficient reason it was not permissible to give another involving the constitutionality of a statute. Second: he might pass over the question of the applicant's right in silence and go to the constitutional question. But in that event those who believed the applicant had no right

could dispute the necessity of the constitutional argument and therefore deny its authority; saying that the Judge silently assumed what was false to justify his resort to the constitutional question, and did not dare either to assert or argue the proposition assumed. Or, third: he could do as he did, first establish the applicant's right and then, the necessity of deciding the constitutional questions being shown, proceed finally to the argument of that.

And so I am confident that there is not and never has been any real foundation for the criticisms of enemies or the half-doubt of friends; that the opinion is not marred by the presence of a single needless or extrajudicial word; that from the beginning to the end it moves on its way with a logic as faultless as it is irresistible, and with a simplicity that is massive and grand; a carving cut from flawless marble by a master hand.¹

COHENS *v.* VIRGINIA.

In *Cohens v. Virginia*, 6 Wheat. 377, the question came directly before the Supreme Court as to its power to review the decisions of the highest tribunal of the State. Cohens had been convicted under a statute of Virginia for selling lottery tickets and plead permission under the laws of Congress. Virginia defended, first, upon the ground that the act of Congress was void; second, want of jurisdiction in the Supreme Court to review the judgment of the State Court. In the language of Judge Marshall, "They maintain that the nation does not possess a department capable of restraining peaceably and by authority of law any attempts which may be made by a part against the legitimate power of the whole, and the government is reduced to the alternative of submitting to such attempts or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws and treaties of the nation, but that this power

¹ Honorable Francis M. Finch, Dean of the College of Law at Cornell University.

may be exercised in the last resort in the courts of every State in the Union. That the Constitution, laws and treaties may receive as many constructions as there are States, and that this is not a mischief, or, if a mischief, is irremediable."

These questions so clearly stated by the Chief Justice had long been mooted in private discussion, and the Legislatures of some of the States, notably Virginia and Kentucky, had passed resolutions announcing a similar doctrine as to the supremacy of the States, but now the question for the first time had come before the Supreme Court itself for solemn adjudication. It was an important question for the government. Republican institutions were on trial before the Court. Many of the strongest and ablest statesmen denied its power and jurisdiction and the emphasis and bitterness of feeling existing against the courts for presuming to exercise such authority is best exhibited in the words of prominent statesmen of that day. Jefferson said: "It has long been my opinion that the germ of dissolution of our Federal government is in the Constitution of the Federal judiciary, an irresponsible body working like gravity day and night, gaining a little to-day and a little tomorrow, advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped."

Van Buren expressed the views of many of the most prominent men of his party when he complained of the encroachments of the Supreme Court and declared: "It would never have been created had the people foreseen the powers it would acquire."

Against such influences, opposed to the views of such men, leaders of a great successful political party, it required the courage and ability of a Marshall to construe the provisions of the Constitution in accordance with the views he has expressed. You know the result. Every student has read and studied this great decision. A monument, if there were no other, to the learning and ability of that great jurist; and as we read it now, its plain simple language, stating premise after

premise of the great syllogism, slowly reaching the final conclusion which demolishes forever the theory of a compact of States and declares the Constitution to be the fundamental law of the American nation, we are led to wonder how any other view could ever have obtained. A whole volume is contained in the brief sentences so often quoted: "The general government, though limited as to its objects, is supreme with reference to those objects. This principle is a part of the Constitution and if there be any who deny its necessity, none can deny its authority;" and, again, referring to the power of the States against that of the nation, how significant the language in the light of later events: "It is very true that whenever hostility to the existing system shall become universal, it will also be irresistible. The people made the Constitution and the people can unmake it. It is the creature of their will and lives only by their will. But this supreme and irresistible power to make or unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

The relations existing between the State and Nation could not be more clearly or briefly stated than in the following words of the Chief Justice: "The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. The States are constituent parts of the United States. They are members of one great empire — for some purposes sovereign, for some purposes subordinate."¹

The entire subject [of the appellate jurisdiction of the United States Supreme Court], though fully discussed, was not finally settled until the case of *Cohens v. Virginia*, when the decisive utterance was made by Marshall himself.

¹ Honorable Bartlett Tripp, of Yankton, South Dakota.

The case had originated in a State court; it had been carried to the highest State court; the State of Virginia was a party, and a writ of error had been issued to bring the matter before the Supreme Court of the United States for review. The appellate jurisdiction of the court was denied. It was argued that the Constitution never contemplated giving jurisdiction to the Federal Courts, in cases between a State and its own citizens. Moreover, it was further contended that there was nothing in the Constitution that indicated a design to make the State judiciaries subordinate to the judiciary of the United States; that the judiciary of every government must judge of its own jurisdiction; that the States were not to be denied the power of judging of their own laws; that as their legislatures were subject to no negative, so their judgments were subject to no appeal.

The Chief Justice recognized the magnitude of the questions, and said that they vitally affected the Union. . . .

"When we consider the situation of the government of the Union and of a State in relation to each other; the nature of our Constitution; the subordination of the State governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States is cognizable in the Courts of the Union, whoever may be the parties to that case. . . .

"If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of the government in its constitutional course, why should these cases be

excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the Constitution and laws? . . .

"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant and we cannot insert one."

What intellectual strength, what far-seeing statesmanship, what superb moral courage are here displayed! Every mind assented to his logic, every heart was thrilled by his intrepidity, and every eye was transfixed by the white light of judicial rectitude which shone in every sentence. The effect was decisive. The result has been acquiesced in by the country since that time without a murmur. The jurisdiction of the Court had at last been secured, vindicated and sustained. Upon these cases, as upon pillars of enduring strength, will forever rest the supremacy of the Supreme Court.¹

MARTIN *v.* HUNTER'S LESSEE.

The heated agitation of the time, the violent opposition, and even open rebellion,

¹ Professor Hampton L. Carson, of the Law School of the University of Pennsylvania.

which the work of the Court aroused, cannot be put in cold and formal propositions or stated in a syllabus. For instance, in the case before mentioned of *Martin v. Hunter's Lessee*, a mandate had issued from the United States Supreme Court requiring the Court of Appeals of Virginia to carry a judgment of the Federal Court into effect. Virginia was Marshall's native State, where he was personally much beloved, but its highest court took a rebellious tone at being thus ordered to carry out a mandate of the Federal Court. "The Court is unanimously of opinion," gravely wrote the Virginia Court, "that the appellate power of the Supreme Court of the United States does not extend to this Court under a sound construction of the Constitution of the United States; that so much of the twenty-fifth section of the act of Congress to establish judicial courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non jure* in relation to this Court, and that obedience to its mandate be declined by the Court." Martin then took a further writ of error to review this later defiant judgment, and the Supreme Court then reviewed the whole law of Federal jurisdiction in appeals from and writs of error to State courts in an opinion as clear and unanswerable as was perhaps ever rendered by any Court. The opinion was handed down by Story, but no one who reads it, and who knows the terse and simple style and cogent logic of John Marshall, will ever doubt that Marshall wrote every sentence of the opinion. Henry Adams says in his history that it was a great triumph of Marshall to thus induce Story, who had been appointed by Madison as a Republican, to render this conclusive and far-reaching opinion confirmatory of Federal jurisdiction.¹

¹ Honorable Isaac N. Phillips.

DARTMOUTH COLLEGE *v.* WOODWARD.

Of all Marshall's decisions the one most frequently doubted in this State (New Hampshire) is that in the Dartmouth College case. No lawyer likes to be compelled to choose between the conflicting views of two such jurists as Richardson and Marshall. It seems presumptuous to differ from either; still more so to differ from *both*. And yet I, for one, am inclined to say that both these great Judges were wrong; that while each was right on some points, yet each was wrong on other points; that Richardson erred when he held that the amendatory statutes were *not* in violation of the Constitution of New Hampshire, and that Marshall erred when he held that these statutes *were* in violation of the Constitution of the United States. In other words, I incline to indorse the views on this subject expressed by Judge Doe in his opinion in *Dow v. Northern R. R.*, 67 N. H. 1, pp. 27-53. (Also printed, in substance, in 6 *Harvard Law Review*, 161 and 213, under the title "A New View of the Dartmouth College Case.") Judge Doe thinks that the State had power to revoke the charter; but had not power to take control of the corporate property. He believes that the State's attempt to control the management of the trust funds is in conflict with the provisions of the State Constitution relative to deprivation of property, immunities or privileges. So far as the State Constitution is concerned, there appears to be no satisfactory answer to the powerful argument of Mr. Mason, which is fully reported in the reprint of the Dartmouth College case in 65 N. H., 473-497. To avoid misapprehension, it should be added that the only clause in the United States Constitution which was then under discussion is the prohibition against the passage of laws "impairing the obligation of contracts." The case was decided long before the adoption of the Fourteenth Amendment. The reasoning of both Mr. Mason and Judge Doe clearly demonstrates that the New Hampshire statutes of 1816, if enacted to-day, would be in viola-

tion of that amendment. And it should further be said that the reasoning in Marshall's opinion tends irresistibly to the same conclusion. His opinion is very strong to the point that the Trustees of the college have a *locus standi* in court to question the validity of the amendatory statutes, and also to the point that the amendments have the effect of totally changing the system of managing the corporate affairs, substituting the will of the State for the will of the donor. His error, if error there was, is in the assertion that the grant of a corporate charter involves a contract on the part of the State, within the meaning of the above quoted clause of the United States Constitution.

That Marshall made occasional mistakes may be safely admitted without seriously detracting from his judicial reputation. After making all reasonable allowance for errors, the fact remains that these errors are very few in proportion to the whole number of his decisions. We doubt whether, in any department of human effort, another modern instance can be found of one who had to travel over a new country, blazing his path through an hitherto unexplored forest, and yet lost his way so seldom or left behind him so few erroneous guideposts to mislead posterity.¹

GIBBONS *v.* OGDEN.

As a striking example of the extensive and beneficent influence and operation of Marshall's constitutional decisions, I select what is known as the New York steamboat case (reported under the name of *Gibbons v. Ogden*, 9 *Wheaton's Reports*, 1). This was decided in 1824. It is the first case that construed, in any important particular, the commerce clause of the Constitution. It is a well-known historical fact that the most efficient cause of the formation of the Union which resulted from the Constitution of the United States was the selfish and conflicting regulations of the different States in respect of commerce, each trying to secure an advan-

¹ Professor Smith.

tage over the others, there being no power under the Articles of Confederation to regulate or control this great and essential subject. This experience led to a provision in the Constitution (Article I., Sec. 8, Par. 3) in these words: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several States." This truly vital power, as respects foreign and domestic commerce, is contained in eleven words—"to regulate commerce with foreign nations and among the several States." There is no attempt to define what is "commerce," or what is meant by "regulation." The case involved the respective powers of Congress and the States over commerce.

The circumstances out of which that case arose and under which the decision of Marshall was made, are extremely interesting. There were enacted by the State of New York five different statutes between the years 1798 and 1811, granting or confirming to Livingston and Fulton, or one of them, the exclusive right of using steamboats upon all the navigable rivers, bays and waters within the limits and jurisdiction of the State of New York for a specified term of years. One provision was that for each additional boat which could be propelled by steam with or against the current of the Hudson River, at not less than four miles an hour, they should be entitled to five years' extension to their grant, not to exceed thirty years. If good for thirty years, the State could, of course, renew or extend it indefinitely. For the specified period the State granted a monopoly, under pain of forfeiture of boats and vessels owned by others which should violate the exclusive right granted to Livingston and Fulton. These acts recited that the inducement to the grant was to encourage the grantee to engage in the uncertainty and hazard of making expensive experiments in improving steam navigation. . .

Chancellor Kent enjoined the defendant Ogden from running his two steamboats between Elizabethtown, in New Jersey, and

the City of New York, holding that the question had, after an elaborate and profound discussion, been decided in the previous case of *Livingston v. Van Ingen*. (9 Johnson's Reports, 507, 1812.) At the January term, 1820, the highest court of the State unanimously affirmed Chancellor Kent's order, holding the exclusive monopoly in the grants made by the Legislature of New York to be valid, and that its Court of Chancery had the power to restrain citizens of another State from navigating the waters of New York with vessels propelled by steam, although such vessels may have been duly enrolled and licensed under the laws of the United States as coasting vessels.

It was this last case that came by due process of law before the Supreme Court of the United States. The cause was argued by counsel of the greatest eminence; Wirt and Webster against the constitutionality of the New York legislation; Emmett and Oakley in favor of it. That Court reversed the decree of the New York courts and held that the power of the general government to regulate commerce extends to navigation in the waters throughout the entire Union, and does not stop at the external boundary of a State, and that the grants to Livingston and Fulton of an exclusive right to navigate all waters within the jurisdiction of the State of New York, by steamboats, was inoperative as against the laws of the United States regulating the coasting trade, and could not restrain vessels licensed under these laws from navigating waters within the jurisdiction of a State in the prosecution of such trade.

The opinion of the Court was delivered by Chief Justice Marshall. He defined, for the first time, the meaning of the word "commerce" as used in the Constitution. He said it includes navigation. It includes trade and commerce. But he went further and said that it is intercourse itself. He defined also the word "regulate" in a definition which it has been justly said can never be excelled in its brevity, accuracy and comprehensiveness.

To "regulate" commerce, said Marshall, is to prescribe the rule by which commerce is to be governed; and he furthermore asserted the proposition, so extensive and beneficent in its future operation, that "wherever commerce among the States goes, the judicial power of the United States goes to protect it from invasion by State Legislatures."

The same sound and liberal principle was applied by the Chief Justice as against the right of the States to tax foreign commerce, in the case of *Brown against Maryland*.

Upon these decisions construing the Constitution rest the navigation and interstate commerce laws of the United States.¹

WORCESTER *v.* GEORGIA.

Marshall had devoted a third of a century to the duties of his high office when he came to *Worcester v. Georgia*, the last of his great opinions. The years had brought to his intellectual powers, not failure, but fruition. We are not now to look upon the flickering of a feeble light which is about to be extinguished, but upon the effulgence of a western sun, which, though it is soon to pass below the horizon, will continue the guidance of its light reflected. This is not entitled to be considered his greatest opinion, because others involved questions much more vitally affecting the nation. What was the nature of the case? He comprehended it in a sweeping sentence: "The legislative power of a State, the controlling power of the Constitution and laws of the United States, the rights, if they have any, and the political existence of a once-numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered." Juridical literature does not suggest another whose resources would have been adequate to the production of this opinion. It is the opinion of the philanthropist, the champion of treaty obligations, the historian of the colonies and of the Revolution, the master of the law among nations, and the father of constitutional interpretation.²

¹ Honorable John F. Dillon.

² Mr. Chief Justice Shauck.

BANK OF UNITED STATES *v.* DANDRIDGE. THE THOMAS JEFFERSON.

We, of the present generation, are not concerned to assert that Marshall was always right, or that he has spoken the last word on each and every subject which he discussed. Probably his worst mistake, according to our modern notions, is to be found in his dissenting opinion in *Bank of United States v. Dandridge*, 12 Wheaton, 64, pp. 91-94, 97, 108; where he contended that a corporation can act only by writing. He said, and said truly, that the impersonal entity (the "legal person") has no voice (i. e., no mouth or tongue) with which to speak. Hence he concluded that its will must be communicated solely in writing. He overlooked the fact that the impersonal entity has no hand with which to write any more than it has a tongue with which to speak. His view carried out to its logical conclusion, would debar corporations from transacting any business whatever. Indeed it would prevent the initial step of organizing the corporation.¹

Upon two important points in which decisions made in Chief Justice Marshall's time have been since overruled, the later decisions are in accord with the opinions which he finally entertained.

The Court, in 1809, in opinions delivered by him, decided that a corporation aggregate could not be a citizen; and could not litigate in the courts of the United States, unless in consequence of the character of its members, appearing by proper averments upon the record. In *Louisville Railroad Company against Letson*, in 1844, those decisions were overruled; and it appears by the opinion of the Court, as well as by a letter from Mr. Justice Story to Chancellor Kent of August 31, 1844, that Chief Justice Marshall had become satisfied that the early decisions were wrong.

In the case of *The Thomas Jefferson*, in 1825, it was decided by a unanimous opinion

¹ Professor Smith.

of the Court, delivered by Mr. Justice Story, that the jurisdiction of the courts of admiralty of the United States was limited by the ebb and flow of the tide. But an article published in the "New York Review" for October, 1838, by one who was evidently intimate with Chief Justice Marshall, tells us: "He said, (and he spoke of it as one of the most deliberate opinions of his life) at a comparatively late period, that he had always been of opinion that we in America had misapplied the principle upon which the admiralty jurisdiction depended—that in England the common expression was, that the admiralty jurisdiction extended only on tide waters, and as far as the tide ebbed and flowed; and this was a natural and reasonable exposition of the jurisdiction in England, where the rivers were very short and none of them navigable from the sea beyond the ebb and flow of the tide—that such a narrow interpretation was wholly inapplicable to the great rivers of America; that the true principle, upon which the admiralty jurisdiction in America depended, was to ascertain how far the river was navigable from the sea; and that consequently, in America, the admiralty jurisdiction extended upon our great rivers not only as far as the tide ebbed and flowed in them, but as far as they were navigable from the sea; as, for example, on the Mississippi and its branches, up to the falls of the Ohio. He also thought that our great lakes at the west were not to be considered as mere inland lakes, but were to be deemed inland navigable seas, and as such were subject, or ought to be subject, to the same jurisdiction." He thus foreshadowed the decision made in 1851 in the case of *The Genesee Chief*, by which the decision in *The Thomas Jefferson* was explicitly overruled.¹

MARSHALL AND THE CONSTITUTION.

While it is essential to the completeness of any picture of Marshall's career that every part of his life should be taken into view, it

¹ Mr. Justice Gray.

is to his labors in exposition of the Constitution that the mind irresistibly reverts in recognition of "the debt immense of endless gratitude" owed to him by his country. . . .

As the Constitution was a written instrument, complete in itself, and containing an enumeration of the powers granted by the people to their government—a government supreme to the full extent of those powers—it was inevitable that the issues in that contest (as indeed in so many others) should involve constitutional interpretation, and that finally the judicial department should be called on to exercise its jurisdiction in the enforcement of the requirements of the fundamental law.

The President who took the oath of office administered by the Chief Justice, March 4, 1801, in his inaugural included among the essential principles of our government "the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies;" and "the preservation of the General Government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad;" but it was reserved for the Chief Justice, as the organ of the court, to define the powers and rights of each, in the exercise of a jurisdiction, which he regarded as "indispensable to the preservation of the Union, and consequently of the independence and liberty of these States."

The people, in establishing their future government, had assigned to the different departments their respective powers, and prescribed certain limits not to be transcended, and that those limits might not be mistaken or disregarded, the fundamental law was written. And, as the Chief Justice observed, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

The Constitution declared: "This Constitution, and the laws of the United States

which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;" and "the judicial power shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

The judicial power was, then, in a general sense, co-extensive with the legislative power, the executive power, and the treaty making power, and to the department created for its exercise was exclusively committed the ultimate construction of the Constitution, although that power could not be invoked save in litigated cases and could not act directly beyond the rights of the parties.

And as a rule of construction was merely a question of law, it was to be, and it was, determined and applied according to law.

The principles applicable to the construction of written documents were thoroughly settled, and in themselves exceedingly simple. Applying them to the Constitution, the Chief Justice declared that "the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;" that while it was not open to dispute that an "enlarged construction which would extend words beyond their natural and obvious import," should not be indulged in, it was not proper, on the other hand, to adopt a narrow construction, "which would deny to the government those powers which the words of the grant, as usually understood, import, and which were consistent with the general views and objects of the instrument; that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent."

These were apparently plain legal rules of construction, yet in their application is to be found the basis of the national fabric; the seed of the national growth; the vindication of a written form of Government, and, simple as they now appear to be, their successful application, then, required the highest judicial qualities.

For we are to remember that there had been intense opposition to the adoption of the Constitution; that each of the Departments necessarily acted on its own judgment as to the extent of its powers; and that the operation of the sovereignty of the nation on the powers of the States was the subject of heated partisan controversy.

To hold the balance true between these jarring poles; to tread the straight and narrow path marked out by law, regardless of political expediency and party politics on the one hand, and of jealousies of the revising power on the other; to reason out the governing principles in such manner as to leave the mind free to pursue its own course without perplexity, and to commend the conclusions reached to the sober second thought; these demanded that breadth of view; that power of generalization; that clearness of expression; that unerring discretion; that simplicity and strength of character; that indomitable fortitude; which, combined in Marshall, enabled him to disclose the working lines of that great Republic, whose foundations the men of the Revolution laid in the principles of liberty and self-government, lifting up their hearts in the aspiration that they might never be disturbed, and looking to that future when its lofty towers would rise "into the midst of sailing birds and silent air."

During these first years of constitutional development in the due administration of the law, it was inevitable that bitter antagonisms should be engendered, but their shafts fell harmless before that calm courage of conviction, which, perceiving no choice between dereliction of duty and subjection to obloquy, could exclaim with the Roman orator:

"Tamen hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem."

And so the great Chief Justice, reconciling "the jealousy of freedom with the independence of the judiciary," for a third of a century, pursued his stately way, establishing, in the accomplishment of the work given him to do, those sure and solid principles of government on which our constitutional system rests.

The nation has entered into his labors, and may well bear witness, as it does to-day, to the immortality of the fame of this "sweet and virtuous soul," whose powers were so admirable, and the results of their exercise of such transcendent consequence.¹

The life of Marshall has been called the constitutional history of the country from 1801 to 1835. He set and fixed in its proper place the keystone of the beautiful and symmetrical arch of States which now spans a continent. He carried the Constitution through its experimental and formative stages, defined its enumerated powers, and clothed them with an authority and living force commensurate with their purpose. He "gradually unveiled" the Constitution, in the words of Bryce, until "it stood revealed in the harmonious perfection of the form its framers had designed." From a national standpoint we are to-day what the Constitution, as expounded by John Marshall, has made us. The supremacy and character of the national government we owe largely to him. Marshall was more than the interpreter of the Constitution. He was the creator of constitutional law as applied to a written Constitution. His luminous judgments determined whether the Constitution should stand or fall. They proved the Constitution created, in the words of Chief Justice Chase, "an indestructible union, composed of indestructible States." They demonstrated that a Federal Union, strong enough to perpetuate itself, and supreme within its delegated powers, was not a menace to the independence of the States or to individual liberty, but

¹Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

was the guardian and shield of both. They fixed the relative rights of the States and the Federal government under the Constitution, involving often the momentous question of sovereignty — the fatal rock on which the Federal unions are broken into fragments. They settled beyond challenge or debate the question of sovereignty as a judicial question arising under the Constitution. The only right to dissolve the Union which remained with the States after these adjudications was the right of revolution. They established the novel and striking feature of our political system that the construction and interpretation of the supreme law rests with the judiciary department. They vindicated the supremacy of the Constitution over all citizens and all States. They proved beyond question that the Constitution created a government, a composite republic, a nation; not a league, a compact, or a mere confederacy. They undoubtedly preserved the Union in 1861 when the attempt was made to settle constitutional questions by force of arms. Had not the judgments of the Supreme Court, during the thirty-four years Marshall was Chief Justice, judicially established the supremacy of the Constitution as opposed to the doctrine of State sovereignty, the Civil War would have been a war of conquest and the Federal tie forever severed. "The Southern Confederacy, as the embodiment of political ideas," says Judge Phillips, "surrendered not to Grant, not to Sherman, not to Thomas or to Sheridan, but to the statesman, the jurist and the sage — John Marshall."

The decisions of Marshall have taught us to worship the Constitution. They have built up the national spirit. They have not led to the consolidation of the States, but to the consolidation of national sentiment. They are the foundation of the patriotism, affection and pride which fills all our hearts as we look upon our country at the opening of a new century and contemplate with emotion the proud position she occupies among the nations of the earth. They have elevated our form of government in the eyes of the world,

and disproved the judgment of mankind that a Federal Commonwealth is weak and unstable. They have shown that, in the hands of an intelligent people, such a political system may exist in a perfect form for centuries; that it may extend over a vast area, peopled by different races, and may realize, under such conditions, its high ideal of combining the energy, patriotism and freedom of a small republic with the unity, security and power of a great empire. Speaking of Marshall's decisions in an address before the American Bar Association, Edward J. Phelps declared: "They passed by universal consent, and without any further criticism, into the fundamental law of the land, axioms of the law, no more to be disputed. They have remained unchanged, unquestioned, unchallenged. They will stand as long as the Constitution stands. And if that should perish they will remain, to display to the world the principles upon which it rose, and by the disregard of which it fell."

Our national government was moulded and shaped by the master hand of John Marshall. . . . For thirty-four years Marshall's decisions vindicated the necessity and value of the Constitution. They incorporated the national idea into the fundamental law; and they have been a most potent factor in the development and promotion of the intense national spirit which now pervades the country. . . .

When we speak of the Supreme Court decisions on constitutional questions as those of Marshall we are doing no injustice to the other members of the Court. His master mind directed and governed that tribunal on this subject. This was the verdict of his contemporaries. In dedicating his "Commentaries on the Constitution" to Marshall Judge Story wrote: "Other Judges have attained an elevated reputation by similar labors in a single department of jurisprudence, but in one department (it need scarcely be said that I allude to that of constitutional law) the common consent of your countrymen has admitted you stand without a rival.

Posterity will surely confirm by its deliberate award what the present age has approved as an act of undisputed justice."

Of the six decisions involving questions of constitutional law from the organization of the Court in 1790 to Marshall's appointment in 1801, only two were of grave importance. From 1801 to 1835, covering the period Marshall was Chief Justice, sixty-two decisions on constitutional questions were given, in thirty-six of which the opinion of the Court was written by him. Although this was his most important work, it comprises only a fraction of his judicial labors. In the thirty volumes of reports extending from the first of Cranch to and including the ninth of Peters, there are eleven hundred and six cases in which opinions were filed, and five hundred and nineteen of these were delivered by Marshall. These opinions cover questions on nearly every important branch of jurisprudence. The case of *Ogden v. Saunders* was the only case raising a constitutional question where the majority of the Court differed from the Chief Justice.

In the department of constitutional law the field was new. There were few precedents, because the construction and declaration of the supreme law by a Court, under a written Constitution, was unknown. Marshall's only light was the inward light of reason. He had "no guides but the primal principles of truth and justice." He does not cite a single decision on the great constitutional questions determined in *Marbury v. Madison*, *Cohens v. Virginia*, *Sturges v. Crowninshield*, *McCulloch v. Maryland* and *Dartmouth College v. Woodward*.¹

After the great Chief Justice took his seat on the Supreme Bench that tribunal ceased to speak in timid, doubtful or hesitating tones upon any of the great questions relating to the powers of the general government which were discussed at the bar in quick succession during the early years of the last century after the anti-Federalists had

¹ Judge Colt.

gained the ascendancy. The Chief Justice usually formulated the opinions of the court on such subjects, speaking always *ex cathedra*, as one who had "sounded the depths and shallows of every argument," and as one who, if not a member of the convention that had framed the Constitution, was nevertheless familiar with the thoughts and purposes of the great statesmen who had conceived it. For clearness of vision, breadth of view and power of logic the decisions of Chief Justice Marshall relating to the Federal Constitution have never been excelled and rarely, if ever, equaled. Under his masterful influence the Constitution of the United States grew for more than a generation, along well-defined lines, into those fair proportions of symmetry and strength which the American people have long since learned to reverence and admire.

No class of men understand so well as lawyers the extent to which legislative enactments, whether organic or otherwise, are affected by judicial interpretation. Statutes may be developed by a liberal construction or emasculated by a narrow, strict and unfriendly interpretation. Bad laws usually lose a part of their power to do harm when they have undergone judicial scrutiny, and wise measures of legislation are frequently amplified and improved by the well-directed efforts of the bar and bench. Of the Federal Constitution, as now understood, it may be said truthfully that it owes as much to the influence and genius of John Marshall as to the statesmanship of James Madison, who is supposed by some to have drafted it. Marshall was in thorough sympathy with those statesmen whose will had been most potent in framing the Constitution. He believed with them that "governments destitute of energy will ever produce anarchy;" that the new nation should be armed with power to levy and collect its own taxes and imposts, by its own officers; that it should be able to enforce its own laws by direct action on the individual; that it should have power to raise and maintain such military and naval forces

as might be necessary to maintain peace at home and to prevent invasion from abroad; and that it should have sole authority to deal with other countries and with all subjects of national and international concern. In short, Marshall was in full accord with that class of statesmen who aimed to secure for the new government a proper degree of respect, both at home and abroad, and who desired to place it on a plane of entire equality with the other civilized nations of the earth as respects its power to maintain its own existence and to discharge functions that are purely national. Actuated by these beliefs and by these sentiments, Chief Justice Marshall read and interpreted the organic law with no disposition to stunt its growth or curb its influence or to confine legislation by the National Assembly within narrow boundaries. From powers expressly conferred on the general government he deduced others which he deemed conducive to the public welfare, by liberal inferences. And yet I think it may be said, without departing from the truth, that in the whole course of his judicial career he never upheld the exercise of a power by the Federal Government unless a warrant for its exercise could be found in a rational and fair interpretation of the provisions of the Federal Constitution.¹

John Marshall grasped the helm with the hand of a master. There was no chart to guide his course excepting his conception of the spirit of the Constitution. But that conception was based upon a belief in the sovereignty of the nation, and was elevated by a conviction of the power and dignity of the judicial branch of the government. Within three years he had disposed of a contention, seriously made, that Congress was not bound by the Constitution, excepting as it might interpret for itself the terms of that instrument. He pronounced one of its statutes void; and thus asserted the supremacy of his Court over the legislative de-

¹ Honorable Amos M. Thayer, United States Circuit Judge.



JOHN MARSHALL.

FROM A PAINTING BY REMBRANDT PEALE.

partment; a supremacy which has never since been challenged; and which it is difficult for us now to conceive ever to have been challenged. Soon after he pronounced void an act of a State Legislature which was in violation of the Constitution of the United States. Then men began to appreciate the fact that the Federal power was supreme, and that under the interpretation of John Marshall the Constitution did not provide a mere rope of sand for the States, but was the strong title which bound them together into a nation.

From these sound beginnings he proceeded with unflinching steps literally building up a nation upon the foundation of the Constitution. His views did not at first, nor even during his life, meet with universal acquiescence. During the whole of the two generations of his judicial service he was the subject of bitter criticism, and more than once there was almost open revolt. He himself at times became disheartened, and in a letter to his associate, Joseph Story, in 1832, he said: "I yield slowly and reluctantly to the conviction that our Constitution cannot last." This was but three years before his death, and it may well be that his last hours were clouded with doubts of the future of his country. But he had builded more wisely and surely than he knew. His interpretation of the spirit of the Constitution, besides having the weight of authority, came eventually to be accepted as well for the truth of its resistless logic. He was not merely a great and learned Judge. There have been others. His title to the eternal gratitude of his countrymen is found in the fact that he was the creator of constitutional government, as we now understand that term. The result of his work is the grandeur of the imperial flag under which we live.¹

The great problem before the Supreme Court during Marshall's administration of the office of Chief Justice, was to declare

¹ Honorable Hosea M. Knowlton, Attorney-General of Massachusetts.

the meaning and the scope of the Constitution, and so to interpret that instrument as not to cripple the powers conferred upon the government of the Union, and yet to recognize the just powers of the States in respect of all matters not committed by the people to the general government. Heated partisans at the outset charged that the court, under the guidance and domination of Marshall, desired to destroy the powers of the States and to enlarge the powers of the Union beyond anything ever contemplated by the fathers. Marshall understood the motive of those attacks. He believed, and so wrote to Mr. Justice Story, that there was a deep design to convert the national government into a mere league of States, not emanating from the people. Said he: "The attack upon the judiciary is, in fact, an attack upon the Union. The judicial department is well understood to be that through which the government may be attacked most successfully, because it is without patronage, and, of course, without power. And it is equally well understood that every subtraction from its jurisdiction is a vital wound to the government itself. The attack upon it, therefore, is a masked battery aimed at the government itself."

But, unmoved by the clamor of political leaders, and having no purpose except to interpret the Constitution so as not to defeat the objects for which the Union was ordained, the Court held steadily to the line of duty, and in the great judgments of Marshall laid the foundations upon which our constitutional system rests. In one of those judgments he declared that "in America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." He rejected the theory of construction that would have prostrated the Union at the feet of the States, and equally the theory that would have taken no account of the rights which had been re-

served to the States when the Union was established. None of his judgments relating to the respective powers of the general and State governments have been overruled or materially modified. No one now doubts the wisdom displayed by him. . . .

Washington, more than any other man, saved our country from domination by a monarchical government which sought, by force, to take from our fathers the dearest rights of man. Lincoln, more than any other man, saved us from the perils of a divided country, and gave us a restored Union whose flag, wherever it may float, is loved by every true American, from whatever State he may come, and to whatever school of constitutional construction he may belong. But let us remember that Marshall, more than any other man, saved our Constitution from destruction by those who would have so minimized and fettered the powers of the National Government, while magnifying the powers of the States, as to have made the Union not worth preserving. In our respect for the law, and in our love for the Constitution and the Union which it ordained, let us take as our model the extraordinary man who this day one hundred years ago became the Chief Justice of the United States and began a judicial career unparalleled in the history of this or any other land. Let us remember that if we will have the same patience and gentleness that marked his life, the same love of right and justice that he displayed, and the same unfaltering purpose that he manifested to maintain in all their integrity the institutions ordained by the people of the United States, we will be the better public servants and better citizens.¹

When Marshall took his seat on the Supreme Bench he brought with him, not only his legal genius and training and his wide and various experience in politics and diplomacy, but also certain fixed convictions. He was a man who formed opinions slowly, and

¹ Honorable John M. Harlan, Justice of the Supreme Court of the United States.

who did not indulge himself in a large collection of cardinal principles. But the opinions which he formed and the principles which he adopted, after much hard and silent thought, were immovable; and by them he steered, for they were as constant as the stars. He had one of those rare minds which never confound the passing with the eternal, or mix the accidental and trivial with the things vital and necessary. Hence the compatibility between his absolute fixity of purpose in certain well ascertained directions, and his wise moderation and large tolerance as to all else. To these qualities was joined another even rarer, the power of knowing what the essential principle really was. In every controversy and in every argument, he went unerringly to the heart of the question, for he had that mental quality which Dr. Holmes once compared to the instinct of the tiger for the jugular vein. As he had plucked out the heart of a law case or of a debate in Congress, so he seized on the question which over-rode all others in the politics of the United States, and upon which all else turned.

That vital question was whether the United States should be a nation, or a confederacy of jarring and petty republics, destined to strife, disintegration and decay. . . .

These decisions are more than a monument of legal reasoning; they embody a masterly exposition of the Constitution; they embody also the well-considered policy of a great statesman. They are the work of a man who saw that the future of the United States hinged on the one question, whether the national should prevail over the separatist principle; whether the nation was to be predominant over the State; whether, indeed, there was to be a nation at all. Through all the issues which rose and fell during these thirty-five years, through all the excitement of the passing day, through Louisiana acquisitions and relations with France and England, through embargoes and war and Missouri compromises and all the bitter, absorbing passions which they

aroused, the Chief Justice in his court went steadily forward dealing with that one underlying question, beside which all others were insignificant. Slowly, but surely, he did his work. He made men understand that a tribunal existed before which States could be forced to plead, by which State laws could be annulled and which was created by the Constitution. He took the dry clauses of that Constitution and breathed into them the breath of life. Knowing well the instinct of human nature to magnify its own possessions, an instinct more potent than party feeling, he had pointed out and developed for Presidents and Congresses the powers given them by the Constitution, from which they derived their own existence. Whether these Presidents and Congresses were Federalist or Democratic, they would be certain, as they were human, to use sooner or later the powers thus disclosed to them.

That which Hamilton, in the bitterness of defeat, had called "a frail and worthless fabric," Marshall converted into a mighty instrument of government. The Constitution, which began as an agreement between conflicting States, Marshall, continuing the work of Washington and Hamilton, transformed into a charter of national life. When his life closed, his work was done—a nation had been made. Before he died, he heard this great fact declared with unrivalled eloquence by Webster. It was reserved to another generation to put Marshall's work to the last and awful test of war, and to behold it come forth from that dark ordeal triumphant and supreme. John Marshall stands in history as one of that small group of men who have founded States. He was a nation-maker, a State-builder. His monument is in the history of the United States and his name is written upon the Constitution of his country.¹

The thoughtful student of his speeches,

¹ Honorable Henry Cabot Lodge, United States Senator from Massachusetts.

addresses and judicial opinions can but perceive that he saw deeper into the heart of a question and with a clearer vision than any of his contemporaries.

With this power of insight and logical analysis he possessed the rarer faculty which belongs to the creator—the builder of institutions.

The post-revolutionary period abounds with men of high intellectual and moral attainments—men of learning, genius, eloquence and courage.

At no time in our history, and perhaps never in the history of the world, did any nation possess at one time so great a number of men illustrious for public virtues and conspicuous as leaders of public opinion.

"A glorious company
The flower of men to serve
As models for the mighty world
And be the fair beginning
Of a time."

But in this group of gifted and illustrious men there were a few who, in addition to the gifts of the others, possessed to an unusual degree the constructive faculty—that of creative wisdom at work. It is the rarest of rare gifts. When we find it in combination with character, eloquence, courage, learning and ardor, we have before us a file leader in human progress. It is the highest gift of the gods.

"To the souls of fire
I, Pallas Athena,
Give more fire, and to those
Who are manful
A might more than man's."

In Washington, Madison, Jefferson, Hamilton and Marshall we have a group of mighty men who, in constructive faculties, far outshone all of their contemporaries. Those were the real architects of this great and complex government, the real founders of a republic preserving liberty through law.¹

¹ Honorable Horace H. Lurton, United States Circuit Judge.

Having established his jurisdiction [by *Cohens v. Virginia* and the cases leading up to it] it remained for the Chief Justice to define judicially the powers and develop the resources and hidden treasures of the Constitution, demonstrate its capacities and adapt them to new relations of social life. He considered many of the most important powers of Congress; he established and sustained the supremacy of the United States; their right as a creditor to priority of payment; their right to institute and protect an incorporated bank; to lay a general and indefinite embargo; to levy taxes; to pre-empt Indian lands; to control the State militia; to promote internal improvements; to regulate commerce with foreign nations, and among the States; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy. He dealt with a mass of implied powers incidental to the express powers of Congress; gave life to the clause which authorized the employment of necessary and proper instruments; enforced the constitutional restrictions upon the powers of the States; struck down pretentious efforts to emit bills of credit, to pass *ex post facto* laws; to control or impede the exercise of Federal powers, to impair the obligations of contracts, to tax national agencies, to exercise power over ceded territory, to cripple commerce and to defy the lawful decrees of the Federal Courts. He upheld the paramount obligations of treaties, defined the law of treason, developed the admiralty and maritime jurisdiction, illustrated the law of prize, extended the application of the principles of commercial law, and placed the law of trusts and charities upon a stable basis. He protected the States in the exercise of their lawful powers, in their exclusive right to interpret their own Constitutions and local laws, in their freedom from molestation under the Fifth and Eleventh Amendments, in their right to levy taxes upon the creatures of their own sovereignty. In *United States v. Judge Peters*, in the Trial of Aaron Burr, in *Fletcher v. Peck*, in

the case of the *Nereide*, in *McCulloch v. Maryland*, in *Dartmouth College v. Woodward*, in *Sturges v. Crowninshield*, in *Osborn v. Bank of the United States*, in *Gibbons v. Ogden*, in *Wilson v. Blackbird Creek Marsh Co.*, in *Brown v. Maryland*, in *Craig v. Missouri*, in *Barron v. The Mayor of Baltimore*, in *Ogden v. Saunders*, and in *Worcester v. Georgia*, we recognize a magnificent range of adjudications which bear to our constitutional jurisprudence the relative strength and majesty of the Rocky Mountains to our physical geography.¹

Of all the persons, besides Washington, who were prominent anywhere in the years from 1789 to 1861, there are three who stand out pre-eminent as promoters of the strength and durability of the national government. They are Hamilton, Webster and Marshall. I would not detract one iota from the praise due to Hamilton's constructive and far-seeing statesmanship. Nor would I belittle the stately eloquence and powerful logic of Webster's anti-nullification speeches. But I believe that the unity of the nation, in other words, "American nationality," was advanced more by the decisions of Marshall than by the combined efforts of Hamilton and Webster. Had it not been for Marshall's work, the Union could hardly have withstood the strain of the civil war. . . .

His guiding principles of constitutional interpretation may be summed up in two familiar legal maxims. He proposed to construe the instrument, *ut res magis valeat quam pereat*. And he proposed, in construing the words, to take into account the subject-matter of the instrument. He believed that, in order to ascertain the meaning of a writing, we must look not only at the words, but also look at the object of such words relating to such a matter. The question is not what might these words signify, if used in some other connection, but rather — what is the intention which these words express when used in such an instrument for such a purpose.

¹ Professor Carson.

As to the nature of the instrument he was not misled by false analogies. He knew that the so-called "rules" of construction applicable to contracts between individuals, to wills, or even to ordinary legislative enactments, were not necessarily and always applicable to a Constitution, an instrument *sui generis*. "We must never forget," he once said, "that it is a Constitution that we are expounding." (4 Wheaton, 607.) "This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." (4 Wheaton, 415.) And on another occasion he said: "A Constitution is framed for ages to come and is designed to approach immortality as nearly as human institutions can approach it." (6 Wheaton, 387.)

He realized the distinction between a Constitution and a code of laws. He believed that the Constitution was not intended to contain "an accurate detail of all the subdivisions of which its great powers will admit," or of "all the means by which they may be carried into execution." In his view the very nature of the instrument required (and its framers so intended) "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." Hence he derived the doctrine that Congress has implied power to enact appropriate legislation to carry out the objects aimed at by the Constitution. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." (4 Wheaton, 421.)

Again, unlike some modern Judges, Marshall did not refuse to declare a statute unconstitutional merely because the Constitution did not contain, in express words, a specific prohibition of the particular legislation in question. In the great case of *McCulloch v. Maryland*, in sustaining the claim of the

United States Bank that it was exempt from the power of a State to tax its operations, he said: "There is no express provision for the case; but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, or blended with its texture, as to be incapable of being separated from it without rending it into shreds." (4 Wheaton, 426.)¹

It is no extravagance, it is but the iteration of a plain fact to say that of all then living men John Marshall was best fitted to be Chief Justice of the United States. It was not the profound and astute common lawyer that was then needed. Rather it was the combination of jurist and statesman who loved his country, and his whole country, and whose mind was limited by no State lines. Who would love his country more than he who fought for its independence, than he who early declared that America was his country, and who could love the Constitution more than he who had exerted his every effort to bring it into operation and who had since nursed it as a tender child, and who so well fitted to correctly interpret that Constitution as he who in its defense had been forced to scrutinize the meaning of its every word and line. All these conditions were happily blended in John Marshall. But Providence had not there stopped his equipment. Its greatest gift to the man was his unanswerable logic and the power that his pure, earnest, candid life gave him over men with whom he was called upon to daily associate. Most fortunate is it for us, most fortunate for this land that John Marshall was thus gifted. Judges are but men. They go upon the Bench carrying with them their existing political principles and political bias. Nearly all great constitutional questions have a direct political bearing. In their solution the Judges carry with them their political principles, and are always inclined to that construction that conforms to their po-

¹ Professor Smith.

litical views. This is no reflection upon their integrity. It simply shows the sincerity of their convictions. We have more than once in our day seen our honored Federal Supreme Court divide practically, and sometimes exactly, upon party lines. Now it so happened that during nearly all the thirty-five years that John Marshall was Chief Justice a majority of the Court were opposed to him politically. Yet we find very few cases where the Court divided, and no great constitutional questions when John Marshall spoke for the minority. So strong were his arguments, so keen his logic, so great his influence that we find Judges of opposite political faith joining with him in his broad, strong, comprehensive views of the Constitution. It is certain that had he possessed average powers only he would have spent most of his time in writing dissenting opinions, while the opinions of the Court would have established rules of construction for our great charter that no patriot dares now contemplate. It was the conviction of John Marshall that the Constitution made and was intended to make this country a nation complete and strong in all its parts, an indivisible nation capable of protecting itself from within and from without. To his mind no construction of the Constitution was permissible that would conflict with its great purpose. He carried his associates with him. His rules of construction brought out the force and beauty of the Constitution, the power and cohesiveness of the nation it created.

It has often been noted and commented upon by lawyers that in his leading opinions upon constitutional questions John Marshall quoted but few authorities. He might have accounted for this by saying that written constitutions had not thus far in the world's history been brought to the Bar of an independent, untrammelled judiciary for construction. But that, I conceive, was not the true explanation of the fact. His associates frequently cited authorities which they deemed cognate. But John Marshall conceived that

in a matter of such direct interest to every citizen of this Republic as the construction of their own new and untried charter, the people ought not to be required to accept the doctrines of some foreign court, but that the grounds and reasons for the Constitution ought to be stated in language so clear, and based upon logic so unanswerable that the construction could neither be rejected nor questioned. To that end he bent all his great powers, and the constitutional opinions written by him stand to-day for perspicuity and conclusiveness without peers in the law volumes of the world. Slowly, as case after case was brought before the high tribunal over which he presided, he unfolded his views and brought out the beauty, the flexibility and the capability of the Constitution. It was a fundamental principle with him that the United States was a government with certain expressly granted powers and with certain necessarily implied powers. That is to say, when he found express power given to do a certain thing he reasoned that it must have been the intention of the Constitution framers to grant power to do all those things incidental and necessary to the exercise of the power expressly granted. From that reasoning grew the doctrine of implied powers—a doctrine long combatted—but now universally conceded and a doctrine which really gave the Federal government greater strength by reason of its implied powers than by reason of powers granted in terms.¹

Marshall's rare talents found their greatest opportunity for exercise and triumph in the exposition and application of the Federal Constitution. That instrument, recently born of new conditions and for new relations, was in many vital particulars unlike any other that had ever been written. "The creation of a national government, by the terms of a written paper, was, as yet, a bold novelty, a brilliant but perilous experiment,

¹ Honorable J. M. Bartholemew, Chief Justice of the Supreme Court of North Dakota.

made alarmingly complex by the establishment of collateral semi-sovereignities in the shape of the thirteen States."—(Magruder.)

The construction of that paper was conceded the paramount responsibility of the Court. It presented some of the most momentous questions that ever came before a human tribunal; and, for their wise solution, it was the marvelous powers of Chief Justice Marshall on which his associates mainly relied. By their choice he prepared and delivered the vast majority of the Court's opinions on constitutional questions. His insight was so keen, his reasoning so cogent, his argument so persuasive, his illustration so clear, and his conclusion so irresistible that there were but few dissents from his matured views, and fewer instances in which he, from inability to convince the other Judges, himself had occasion to dissent. Though largely so, his deliverances, however, were, of course, not altogether the product of his own wonderful mind. He could but have been materially aided by conference with the other distinguished members of the Court, and by the arguments of one of the ablest Bars that ever practiced before any tribunal.¹

There are two things which I want to say about Justice Marshall's judicial career, and neither has the merit of novelty. After studying his opinions and before reading either his biographies or any essays upon his character, every student from 1801 to the present moment has been struck by the singular simplicity and clearness of statement and by the naturalness of the argument of the great Chief Justice. As the student advances from sentence to sentence, he says to himself, of course that proposition is true and is self-evident. I could have thought it and could have said it, until when he has finished and has taken in the massive force and power of the linked and completed argument, he says, this is, as an exhibition of mental strength, incomparable.

¹ Honorable W. C. Caldwell, Justice of the Supreme Court of Tennessee.

The second thing is Judge Marshall's insight into the nature of our dual system of government, and his foresight of the dangers from lax theories in regard to the supremacy of the Federal government in its own realm. One of his successors on the bench, Judge Daniel, also from Virginia, who, as Justice Brown has told us, wrote eighty-four opinions and dissented one hundred and eleven times during his nineteen years of judicial life, generally spoke of the communities now constituting the States of this Confederacy and described the Federal Government as a creature or agent of the States. In the mind of Judge Marshall, who, some one, I think, has said was a priceless legacy of the dying Federalist party to the country, and who understood, appreciated and abhorred the idea of a Confederacy, these theories of the Judge Daniel class condemned the country to perpetual weakness and impotence. The present working, efficient capacity of the Constitution, the strength of the power and dignity which the Federal government now possesses are due to Marshall's wisdom and foresight. If a man of narrow theories or of weak courage had been Chief Justice when *Cohens v. Virginia* was decided this country would have been a petty third rate power with not much more vigor and capability of expansion than it had under the articles of confederation. . . .

John Marshall, plain of speech and modest in manner, wrote, for all time, upon a half dozen quires of foolscap paper, the principles which made us a nation, with the right, either by the civil or military arm, to enforce the universal execution of its powers, and to exact non-interference with its property or its authority.¹

Determining the boundaries and establishing the vital and fundamental principles of our Constitution, was Marshall's distinctive work. On this his fame chiefly rests. Before Agamemnon there were many heroes. There are in English and American jurisprudence

¹ Judge Shipman.

many great Judges. Aside from Marshall's services as the main creator of the Federal constitutional law there are English and American Judges, not a few, who have as wide or a wider fame than Marshall. I may mention among his contemporaries in this country, Story, Shaw and Kent. . . .

Unlike Kent, Marshall does not owe the eminence and renown which inspire the public honors of this day, to services in the field of general jurisprudence, although these were great, but to his judicial work as the first and greatest expounder of the principles of the Federal Constitution. It has not been easy for me to find any single term which precisely and fully describes the labors of Marshall in this respect. He was, indeed, an expounder of the Constitution. But he was much more than a mere expounder. Mr. Webster in his day was called, and not unjustly, the great expounder of the Constitution.

In our jurisprudence as Marshall left it our Constitution means what the judicial department holds that it means. Marshall, in the course of his long service as Chief Justice, construed and expounded for the first time, nearly all the leading provisions of the Constitution, and in this he performed an original work of the most transcendent importance, and one which it is the universal conviction no one else could have performed as well. But the work after all was that of a Judge and not that of a statesman, since he was confined to the written text of the Constitution. It was this supreme work of Marshall that carried our Constitution successfully through its early and perilous stages and settled it on its present firm and immovable foundations.

Marshall had the good fortune, common to other Judges, "to connect his reputation with the honor and interests of a perpetual body of men." But in addition he had the golden opportunity, which he promptly took by the hand, the singular, the solitary felicity, of connecting his name and fame imperishably with the origin, development and estab-

lishment of constitutional law and liberty in the great American Republic. He is, therefore, entitled to be regarded as something more than a mere commentator. He is, more than any other man, entitled to be called the creator of our Federal constitutional law and jurisprudence.¹

These judgments and these opinions are now a part of the Constitution itself, and without them it would have been incomplete. They construed as many powers out of the Constitution as were unquestionably enumerated in it. They are pellucid as the mountain stream, yet have the force of the torrent. They contain the fountain and termination of juridical construction; at once its picture alphabet and completed language. Their topics being patriotic make their style lofty and pure. They contain more logic than images or illustrations. They abound in plain statements, rather than luxuriant amplifications. They put a gleam under every fact and cast a sunbeam upon every deduction, and thus made them so clear that time, criticism and comparison have not robbed them of a ray. The strain of legal dissertation is relieved by their Socratic method of reasoning. They took the inarticulate cry and the oppressed desire of the people for legal definitions of their rights and gave expression to one and action to the other, and sounded the weal and worth of civil liberty in strains as noble as can be found in poetry. They suggested, as I believe, to Webster his ideas of the "closeness," "compactness" and "inseparability" of the Union, and to Lincoln, "the people," "the whole of the people," and "all of the people." And all in all, considering their character, the time at and the circumstances under which they were formed and delivered; their plan, purpose and effect; they constitute the greatest and grandest judicature the world ever produced, and will endure as long as the elements of the stars.²

¹ Honorable John F. Dillon.

² Honorable John N. Baldwin, of Council Bluffs, Iowa.

During the thirty-five years that he filled the position of Chief Justice almost every important question which could arise upon the construction of the Constitution was not only decided, but the decisions were based upon such sound reasoning that they have never been attacked. Some of the most important of these questions may be referred to. Among them were the power to regulate commerce between the States, and the power of the States over foreign commerce; how far the prohibition to the States of emitting bills of credit extended; the nature and obligation of contracts, and how far the States might affect them; the power in the States to tax creations of the Federal government; the power of the States over Federal officers; the power of the Supreme Court to revise the laws of the States, or the judgments of the State Courts; and very many others. In all of these it must be remembered that then there were no precedents, no rules of decision to follow. They must all be reasoned out by the powers of the mind alone, and in the ability to do this Marshall was pre-eminent; in my opinion, above any other Judge who ever lived. He has sometimes been called the Mansfield of America, but I believe that even Lord Mansfield, the most distinguished of English Judges, if placed in Marshall's position, could not have filled it so well. There may have been other men who could have done what Marshall did; it is enough for us to say that no one else ever did. He fully and thoroughly believed that the whole people of the country, intended by the Constitution to form a government of the whole country which would be supreme in the powers given to it, and in the authority to enforce them; which would represent the people of a nation, be accountable to them alone, and represent their sovereignty; and it was no more to be unduly limited in the exercise of its proper powers than to be unduly extended beyond them. With this foundation principle in his mind he studied the instrument as a whole, not in isolated parts, interpreting each provision

by others so as to make a perfect and uniform system. His principles of construction are admirably and concisely stated by himself in a leading case: "To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in the sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary."¹

In fixing the credit due to Marshall's judicial career it is not necessary to belittle the wisdom and foresight of the men who wrote the Constitution. No structure can be stronger than its foundation. John Marshall could never have raised the Supreme Court from the weakness in which he found it to the power and majesty in which he left it if the Constitution had not afforded him an adequate field for the fullest exercise of his constructive genius. It would be superfluous, in this presence to discuss or even to mention the long series of decisions through which he labored with signal success to make the promises of freedom embraced in the Constitution actual possessions of the American people. It is enough to say that during his judicial service of thirty-four years in deciding many controversies arising in every part of the Union he succeeded in establishing four great principles which underlie our whole constitutional system and which constitute its main support:

First.—The supremacy of the national government over the States and all their inhabitants.

Second.—The supremacy of the Constitution over every department of government.

Third.—The absolute freedom of trade and intercourse between all the States.

Fourth.—The inviolability of private contracts.

¹ Honorable Charles E. Perkins.

It is true that these principles are now regarded as axioms of civilized society too obvious to be questioned in a nation capable of constitutional government, but the universal respect in which they are held is entirely due to the vigilance, resolution and ability with which Marshall asserted and vindicated them. If no attempt to violate them had ever been made by the States or by Congress no occasion would have arisen for the decisions which vindicate them so clearly that no respectable authority can now be found to challenge them. It is true that the distinguished Chairman of this banquet claims for another Judge priority in asserting the supremacy of the Constitution over Congress and the executive, and he supports the claim by reading from Judge Paterson's charge to a jury delivered long before Marshall assumed the ermine. It is equally true that at a still earlier period — in 1788 — Alexander Hamilton devoted a number of the *Federalist* — I think it was the seventy-eighth — to proving that it was the right and duty of the judiciary to set aside a law which contravened the Constitution. Indeed, I believe the principle had been asserted in some of the colonies before the Revolution. But there is nothing new under the sun. Marshall did not discover or establish any new principle of liberty, nor did this Constitution embrace one, but Marshall did devise means of making declarations of ancient principles effective for the protection of the citizen. Man can no more invent a new principle than he can invent a new force. The limit of human ingenuity is exhausted when new devices are found for utilizing forces which are external. The force which moves the steam engine existed since the beginning of the world, but it was not till Watts devised an effective machine that it became available for the use of man. Liberty was always an aspiration for man to cherish, but never till Marshall made this Constitution effective did liberty become a possession for man to enjoy. . . .

If I were to summarize Marshall's service I

should say that on the solid foundation of the Constitution he erected the four great pillars of our governmental system — national strength by establishing the sovereignty of the general government over the State, thus making it the most powerful nation in the world; justice by establishing the dominion of the Constitution over all the departments of government; peace by establishing freedom of intercourse between all the States; prosperity by establishing the inviolability of private contracts.

The decisions of Marshall's successors, without disturbing these pillars, have strengthened them, and the stately fabric of government which they support.¹

Marshall may not have been as deeply read in the literature of the law as some of his professional brethren, or as some of his judicial associates; in statecraft he may have had his superiors; in constructive ability he was not the equal of Hamilton, and as a political philosopher was inferior to Jefferson, but no man of his day, not even Madison, was more thoroughly imbued with the spirit of the Constitution or more familiarly acquainted with the causes that led to its formation, or with the ends and purposes it was intended to accomplish, or more capable of applying its provisions to the events that necessarily followed its adoption.

The key of John Marshall's character was that he was not "afraid of the face of man." His sublime courage, his discriminating judgment, his judicial temperament, his directness and simplicity of statement, his irresistible and irrefutable logic, combined to prepare him for the position he ultimately reached in public estimation — the first and the greatest interpreter and expounder of the Federal Constitution and of the checks and balances of the complex system of government resulting from its adoption. . . .

Under the leadership of Marshall, the court rejected the dogma of strict construc-

¹ Honorable W. Bourke Cockran, of New York.

tion, but did so without accepting or adopting its counterpart. Alexander Hamilton defined the rules of legal interpretation to be the rules of common sense, adopted by the courts in the construction of laws. The deliverances of the Chief Justice in *Gibbons v. Ogden*, *Cohens v. Virginia* and *Osborn v. the Bank*, afford striking examples of the application of common sense in the interpretation of the organic law. To say that "men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey," and that the makers of the Constitution "must be understood to have employed words in their natural sense, and have intended what they have said," joins conviction with simplicity and appeals directly to the common sense of the layman, as well as the lawyer, and of the uncultured man as well as the scholar. Such rules do not conflict in principle with Mr. Jefferson's rule that, on every question of Constitutional construction, we should carry ourselves back to the time when the Constitution was adopted, and recollect the spirit manifested in the debates, instead of trying what meaning may be squeezed out of the text or invented against it and conform to the probable one in which it was passed. Nor with his other rule, that "when an instrument admits of two constructions the one safe, the other dangerous; the one precise, the other indefinite, I prefer that which is safe and precise."

The Chief Justice was a steadfast defender of the theory that the authority of the United States was derived from the people, but he did not agree with those who argued from this postulate that the grants were made by the people, disassociated from their relations to their individual States.

When this claim was pressed on his attention he responded that: "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people in one common mass; of conse-

quence, when they act, they act in their States."

He did not agree with those who claim that the States were never separately sovereign or individual, but independent only as members of the American Union, before, as well as after, the acceptance and adoption of the Constitution. He considered the original confederation a league of sovereign and completely independent States, but held that the Union, under the Constitution, created a government which, though limited to its objects, is supreme with respect to those objects. He did not differ from Mr. Jefferson's theory that "our citizens have wisely formed themselves into one nation as to others and several States as among themselves. To the United States belong the external and mutual relations; to each State severally the care of our persons, our property, our reputation and religious freedom."

Without pretending to respect the voice of the people, emotionally or hysterically expressed, John Marshall let no opportunity pass to announce that the people are the source of all power, and that their will within the limitations that they have permanently established, when regularly and deliberately declared, is the law of the land. His theory of our government was: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may stop here or establish certain limits not to be transcended by those departments."

He did not reason after the manner of

philosophers, who deal alone with abstract principles. He did not express himself in the language of the poet. He did not attempt to show, nor did he believe that the maxim, *vox populi vox Dei*, is or ever was to be accepted as literally correct, but he always recognized that in free governments, sovereignty, in the most comprehensive sense, resides with and inheres in the people. Organized government embraces that portion of the original and illimitable power of the people they may choose to impart to the agencies they institute. Original sovereignty is one thing, delegated sovereignty another, and this distinction he never lost sight of. He realized to the fullest extent that "Power in the people is like light in the sun — native, original, inherent and unlimited by anything human. In government it may be compared with the reflected light of the moon, for it is only borrowed, delegated and limited by the intention of the people, whose it is, and to whom Governors are to consider themselves as responsible, while the people are responsible only to God; themselves being the losers, if they pursue a false scheme of politics."

Constitutions do not create individual rights or impart them to those by whom constitutions are ordained. The rights of persons are original, not delegated.

Magna Charta, Bills of Right, the Petition of Right and our State and Federal constitutions, are intended to guarantee, preserve and protect those attributes of men that are inherent and indefeasible. Government is a necessity with civilized man, but it emanates from the sovereignty of the people and remains at all times subject to such changes or modifications as that sovereignty may decree. The philosophy, I may say the framework, of our government, was thus epitomized by the great Chief Justice:

"When the American people created a National Legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceeded not from the people of America, but from the people of the sev-

eral States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument."

He was a "State's rights" man, in that he respected and on all occasions upheld the rights and powers reserved by the States and the people, but he undeviatingly advocated "the preservation of the general government, in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad."¹

The great constitutional questions of Marshall's day may be stated in general terms thus:

Is the Federal government the final judge of the extent of its own powers under the Constitution?

Is the Supreme Court bound to take the law of its decisions as Congress or the President, or some State authority may prescribe it, or is it an independent tribunal, endowed with full power finally and authoritatively to construe the Constitution and to judge of the limits and extent of its own jurisdiction?

Is the Federal government a sovereign nation, established by and acting upon the people, or is it a mere compact — a treaty among sovereign States — whereof no common and final judge is provided?

And subsidiary, in logic, to these, though yet greater in consequences, was that other momentous question: Is the Federal union perpetual, or may it be at any time dissolved by the action of one or more of its members?

To the solution of these great questions, sounding in political considerations of the highest import, fraught with the deepest significance to all future generations of Americans, John Marshall brought all the resources of a great, original mind; he brought a legal learning so far removed from pedantry that it has even been disputed that he was learned at all; he brought a logical

¹ Senator Lindsay.

faculty so keen and searching that cavaliers were silenced and answer was impossible; he brought a personal character as pure as the ermine he wore; and he brought the calm, clear vision of one of the first statesmen of the age. In solving these questions he lifted the Federal judiciary into a position of responsibility and independence, and made it what it was meant to be: the guardian of the Constitution and the shield and defense of personal liberty for the American people. . .

The ultimate propositions which his great decisions, as a whole, sustain, may be thus epitomized: That the United States is not a mere compact but a sovereign nation; that within the scope of the powers delegated to it its government is supreme; that it was instituted directly by the people and acts directly upon and for the people; that States and State agencies are powerless to obstruct its operations, mar its integrity or terminate its existence; that its Constitution, and the laws and treaties in pursuance thereof, are the supreme law of the land, and that in all cases of conflicting opinions as to the meaning of the Constitution the Supreme Court has the right and power to ultimately and authoritatively construe it.¹

Marshall was a public educator. It fell to him to demonstrate to the people of the United States, by its practical application, the true meaning of the instrument by which they had elected to be governed. In the face of sincere and determined efforts to render nugatory certain of its provisions, a weaker man would have wavered and perhaps given way. His prophetic instinct clearly discerned that the continued existence of the nation depended upon the assertion and unyielding defence of the doctrine of its own supremacy. And he resolved that never, with his aid or concurrence, should the powers conferred upon the government, be, by so much as one jot or one tittle, surrendered or disclaimed. He taught the American people certain important lessons, which were well learned, and have never been forgotten:

¹ Honorable Isaac N. Phillips.

That the Constitution created a nation in fact as well as in name.

That all means, appropriate and adapted for carrying into execution the powers expressly granted to the government, and which are not prohibited, but consist with the letter and the spirit of the Constitution, are Constitutional.

That the Constitution and the laws made in pursuance thereof, are supreme within the territory of every State.

That enactments, whether of Congress or the Legislature of a State, repugnant to that Constitution, do not enjoy the sanction of valid laws, and may be disregarded.

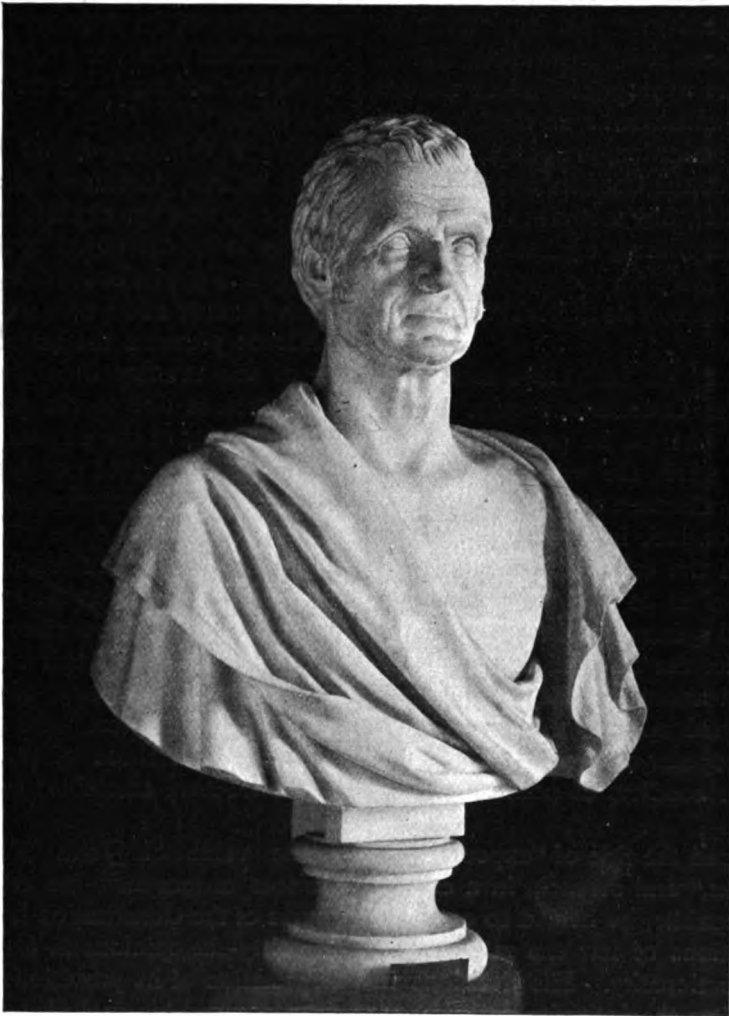
That the Constitution, to use his own language, contains what may be deemed a bill of rights for the people of each State, serving as a shield for themselves and their property, from the effects of those sudden and strong passions to which men are exposed, and which sometimes find vent in the exercise of legislative power.

That it is the duty and within the power of the Supreme Court of the United States (a proper case being before it) to crush, with its annulling edict, any statute, State or Federal, in conflict with the national organic law.

That the Supreme Court has been ordained by the fundamental law as the arbiter for the final determination of all questions arising under it, and that its judgments are entitled, not only to respect, but willing obedience; with the unvarying consequence, that in all the broad domain of the Republic, no authority, judicial or executive, Federal or State, recognizes or presumes to enforce any enactment, whether of Congress or of a State Legislature, which has been declared by that court to be repugnant to the Constitution of the United States; and, if unrepealed, it retain its place upon the statute book, its presence there serves only as a warning of the fate which threatens all acts of legislation in disregard of the prohibitions or limitations of the supreme law of the land.¹

With great wisdom, with great common

¹ Honorable Sanford B. Ladd.



JOHN MARSHALL.

FROM A MARBLE BUST BY FRAZEE.

sense, he found the constitutional provision that Congress may make all laws which shall be necessary or proper for carrying into execution the powers vested in the government of the United States, a cornucopia from which could be poured whatever was needed to effectuate a constitutional power. "Let the end be legitimate," said he; "let it be within the scope of the Constitution, and all means which are appropriate, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Thereby he made the Constitution an instrument that did not, like a strait-jacket, dwarf a growing, enterprising, expanding people, but that has grown with the people, and always along the lines of its original design.¹

In the years of his Judgeship most vital questions of the Constitution came before the high court wherein he presided. Then it was that the spirit, the true meaning, the purpose, the significance of the Constitution demanded exposition, interpretation, determination. And the call of the country for judicial decision as to the legal character of their political system was answered by the irresistible logic, the unequaled mental analysis and the clear expressions of John Marshall — always the man of self-poise, whom the noises of popular controversy could not disturb nor the conflicts of political parties affect.

Thus he earned the title of "expounder of the Constitution," and as such, in a critical time of the Republic, he helped to establish on the foundations of law the mighty fact of American nationality. His decisions in matters involving the integrity and the supremacy of the nation became and have remained and will continue the final adjudication as to the relative rights of the Federal government and those of the States existing under it.²

That this country has been blessed with

¹ Honorable Horace G. Platt, of San Francisco.

² Honorable Luther Laffin Mills, of Chicago.

the most perfect written instrument of government the mind of man has ever devised is due not solely to the members of the convention which framed it, but in a great measure to Marshall. As expounded and interpreted by him, it became a grander and more perfect instrument than it was even in the conception of its framers. "He found the Constitution paper, and he made it power; he found it a skeleton, and clothed it with flesh and blood."

That the United States have become a great nation, foremost among the world powers of to-day, capable of arousing and worthy to be the object of those feelings of loyalty and patriotism without which a nation cannot endure and which frequent change of residence prevents the majority of the people of this country from feeling for any of the States, is due to the possession by the United States of the powers which Marshall expounded, defended and justified when the national government was struggling for existence.

Among the great nation-makers who were his contemporaries, in the long line of illustrious men who have since left their mark upon the history of this country, we shall search in vain for any, save Washington, whose public services were greater or more enduring than those of the man in whose honor we have assembled to-day.¹

The value of [John Marshall's] public services cannot now be estimated, for the course of the Constitution is not yet finished. In thirty-six opinions in cases requiring interpretation of its provisions scarcely one of them escaped his analysis. So convincingly was their meaning unfolded, and with such felicity were the principles of interpretation defined, that it is to be doubted whether in sixty-five years a question of that character has arisen in Federal or State court to whose proper solution his learning has not contributed. Among our nation builders, he was the finisher. To those who had wrought

¹ Honorable Joseph P. Blair.

so well in the other departments of the work he had been attached by the strongest of bonds which can unite men — companionship in danger and glory. He survived them by a generation; and with pious devotion he guarded the Constitution as the ark of the nation's covenant, containing the treasures of the Revolution and of all our history. He was the last survivor of our great creative triumvirate.¹

The decisions of the great Chief Justice during his long service upon the Bench were clear, cogent and conclusive, whatever might be the question involved for determination. Although associated with him upon the bench were a number of men who, during their service there, immortalized themselves as Judges, it is nevertheless true that Marshall, especially in the determination of constitutional questions, was practically the Court. . . .

No higher encomium could be uttered of any man than that now universally bestowed upon him, especially by the Bench and Bar, that as pioneer jurist in the field of constitutional law, the paths marked out by him were always straight and in his decisions there was no semblance of error. . . .

What greater honor could any man desire than to be able to say, as Marshall could, "Compare the Supreme Court of the United States as it was when I took my seat and when I left it. Let the intelligent judgment of any man answer the question, why the difference?" Well might Adams say as he did to a son of the Chief Justice, that this gift of John Marshall to the people of the United States was the proudest act of his life.

Gladstone declared that the American Constitution is "the most wonderful work ever struck off at a given time by the brain and purpose of man." And we may well say that this is a great utterance of a great man, but when this declaration was made our Constitution had been vitalized and its immortality assured by the great Chief Justice provi-

¹ Mr. Chief Justice Shauck.

dentially furnished to us for that purpose. So long as this Constitution remains and our Supreme Court continues in its interpretation of that Constitution to follow in the footsteps of John Marshall, we need have no fears for the future, and our nation will continue to be, as in the past, the guide of those desiring and loving liberty, and the beaconlight of oppressed humanity.¹

The very greatness and completeness of the work of Chief Justice Marshall tends to prevent our appreciating how great it was.

He was a great statesman, as well as a great lawyer, and yet constantly observed the distinction between law, as judicially administered, and statesmanship.

The Constitution of the United States created a nation upon the foundation of a written constitution; and, as expounded by Marshall, transferred in large degree the determination of the constitutionality of the acts of the legislature or the executive from the political to the judicial department.

Marshall grew up with the Constitution. He served in the legislature of Virginia before and after its adoption, and in the convention of Virginia by which it was ratified. He took part in its administration, abroad and at home, in a foreign mission, in the House of Representatives, and in the Department of State, before he became the head of the judiciary, within a quarter of a century after the Declaration of Independence, and less than twelve years after the Constitution was established.

During the thirty-four years of his Chief Justiceship he expounded and applied the Constitution, in almost every aspect, with unexampled sagacity, courage and caution. . . .

The principles affirmed by his judgments have become axioms of constitutional law. And it is difficult to overestimate the effect which those judgments have had in quieting controversies on constitutional questions, and in creating or confirming a senti-

¹ Honorable John F. Follett, of Cincinnati, Ohio.

ment of allegiance to the Constitution, as loyal and devoted as ever was given to any sovereign.

You will, I hope, forgive me one personal anecdote. While I had the honor to be Chief Justice of Massachusetts I was a guest of a Boston merchant at a dinner party of gentlemen, which included Mr. Bartlett, then the foremost lawyer of Massachusetts, and one of the leaders at the bar of the Supreme Court of the United States. In the course of the dinner, the host, turning to me, asked, "How great a Judge was this Judge Marshall, of whom you lawyers are always talking?" I answered, "The greatest Judge in the language." Mr. Bartlett spoke up, "Is not that rather strong, Chief Justice?" I rejoined, "Mr. Bartlett, what do you say?" After a moment's pause, and speaking with characteristic deliberation and emphasis, he replied: "I do not know but you are right."

A service of nearly twenty years on the bench of the Supreme Court has confirmed me in this estimate. We must remember that, as has been well said by an eminent advocate of our own time, Mr. Edward J. Phelps, in speaking of Chief Justice Marshall: "The test of historical greatness — the sort of greatness that becomes important in future history — is not great ability merely. It is great ability, combined with great opportunity, greatly employed." None other of the great judges of England or of America ever had the great opportunity that fell to the lot of Marshall.¹

I wish to remark upon but three things connected with the career of John Marshall. It is not obvious what most of us are born for, nor why almost any one might as well not have been born at all. Occasionally, however, it is plain that a man is sent into the world with a particular work to perform. If the man is commonly, though not always, unconscious of his mission, his contemporaries are, as a rule, equally blind, and it remains for after generations to discover

¹ Mr. Justice Gray.

that a man has lived and died for whom was set an appointed task, who has attempted and achieved it, and who has made the whole course of history different from what it would have been without him. John Marshall had a mission of that sort, to the success of which intellect and learning of the highest order, as well as special legal ability and training might well have proved inadequate. But the wonderful thing is that, to all human appearances, Marshall was destined to be denied anything like a reasonable opportunity to prepare for this mission.

Contrast the poverty of his preparation with the greatness of the work before him. He probably did not appreciate it himself — it is certain, I think, that his fellow-citizens and contemporaries were far from appreciating it. To most of them the State was closer, dearer, and vastly more important than the nation; by all of them the significance of the place of the judiciary in the new government was but dimly, if at all, perceived; while to the world at large the judiciary of a new nation of thirteen small States strung along the North Atlantic seaboard, comprising a population of some four million souls, necessarily seemed a tribunal of the smallest possible account. To-day the "American Empire," as Marshall himself was the first to call it, with its immense territory and its seventy-five millions of people, is a negligible factor nowhere on earth, and its National Supreme Court ranks as the most exalted and potent judicial tribunal that human skill has yet organized. But the work Marshall was destined to undertake can be estimated only by considering its inherent character. All minor features being disregarded, there are two of capital importance. In the first place, here was a ship of state just launched which was to be run rigidly by chart — by sailing directions laid down in advance and not to be departed from whatever the winds or the waves or the surprises or perils of the voyage — in accordance with grants and limitations of power

set forth in writing and not to be violated or ignored except at the risk and cost of revolution and civil war. The experiment thus inaugurated was unique in the history of civilized peoples, and believed to be of immense consequence both to the American people and to the human race. But there were also wheels within wheels, and the experiment of government according to a written text entailed yet another, namely, that of a judicial branch designed to keep all other branches within their prescribed spheres. To that end it was not enough to make the judicial branch independent of the legislative and executive branches. It was necessary to make it the final judge, not only of the powers of those other departments, but of its own powers as well. Thus the national judiciary became the keystone of the arch supporting the new political edifice, and was invested with the most absolute and far-reaching authority. Since almost all legislative and executive action can in some way be put in issue in a suit, it is an authority often involving and controlling matters of high State policy, external as well as internal. At this very moment is it not believed, indeed proclaimed in high quarters, that the question of Asiatic dependencies for the United States, and incidentally of its foreign policy generally, practically hinges upon judgments of the National Supreme Court in cases requiring the exercise of its function as the final interpreter of the Constitution? What judicial tribunal in Christendom is, or has ever been, directly or indirectly, the arbiter of issues of that character?

It was a national judiciary of this sort of which John Marshall became the head one hundred years ago. That he dominated his court on all constitutional questions is indubitable. That he exercised his mastery with marvelous sagacity and tact, that he manifested a profound comprehension of the principles of our constitutional government and declared them in terms unrivaled for their combination of simplicity and exactness, that he justified his judgments by rea-

soning impregnable in point of logic and irresistible in point of persuasiveness — has not all this been universally conceded for the two generations since his death, and will it not be found to have been universally voiced today wherever throughout the land this centenary has been observed? "All wrong," said John Randolph of one of Marshall's opinions; "all wrong — but no man in the United States can tell why or wherein he is wrong." If we consider the work to which he was devoted, it must be admitted to have been of as high a nature as any to which human faculties can be addressed. If we consider the manner in which the work was done, it must be admitted that anything better in the way of execution it is difficult to conceive. And if we consider both the greatness of the work and the excellence of its performance relatively to any opportunities of Marshall to duly equip himself for it, he must be admitted to be one of the exceptional characters of history, seemingly foreordained to some grand achievement because fitted and adapted to it practically by natural genius alone.

If it be true — as it is beyond cavil — that to Washington more than to any other man is due the birth of the American nation, it is equally true beyond cavil that to Marshall more than to any other man is it due that the nation has come safely through the trying ordeals of infantile weakness and youthful effervescence, and has triumphantly emerged into well-developed and lusty manhood. Had the Constitution at the outset been committed to other hands, it could have been and probably would have been construed in the direction of minimizing its scope and efficiency — of dwarfing and frittering away the powers conferred by it, and of making the sovereignty of the nation but a petty thing as compared with the sovereignty of the State. Under Marshall's auspices, however, and his interpretation and exposition of the Constitution, the sentiment of nationality germinated and grew apace, a vigorous national life developed, and an

indestructible union of indestructible States became a tangible and inspiring entity, appealing alike to the affections and the reason of men, and in it, thus far at least, they have seen both the ark of their safety and an ideal for which willingly to lay down their lives.¹

In most of Marshall's opinions, one observes the style and the special touch of a thoughtful and original mind; in some of them the powers of a great mind, in full activity. His cases relating to international law, as I am assured by those competent to judge, rank with the best there are in the books. As regards most of the more familiar titles of the law, it would be too much to claim for him the very first rank. In that region he is, in many respects, equalled or surpassed by men of greater learning, and, men, if I may use the phrase, who were more deeply saturated in the technicalities of the law, that "artificial perfection of reason" of which Coke talks — such as Story, Kent, or Shaw; and even the reformer, Mansfield, whom he greatly admired, Eldon, or Blackburn. But in the field of constitutional law, and especially in one department of it, that relating to the National Constitution, he was pre-eminent, first, with no one second. It is hardly possible, as regards this part of the law, to say too much of the service he rendered to his country. Sitting in the highest judicial place for more than a generation; familiar, from the beginning, with the Federal Constitution, with the purposes of its framers, and with all the objections of its critics; accustomed to meet these objections from the time he had served in the Virginia Convention of 1788, convinced of the purpose and capacity of this instrument to create a strong nation, competent to make itself respected at home and abroad, and able to speak with the voice and to strike with the strength of all; assured that this was the paramount necessity of the country, and that the great source of danger was in the jeal-

¹ Honorable Richard Olney, of Boston; formerly Secretary of State.

ousies and adverse interests of the States, Marshall acted on his convictions. He determined to give full effect to all the affirmative contributions of power that went to make up a great and efficient national government; and fully, also, to enforce the national restraints and prohibitions upon the States. In both cases he included not only the powers expressed in the Constitution, but those also which should be found, as time unfolded, to be fairly and clearly implied in the objects for which the Federal Government was established. In that long judicial life, with which Providence blessed him, and blessed his country, he was able to lay down in a succession of cases the fundamental considerations which fix and govern the relative functions of the nation and the States, so plainly, with such fullness, with such simplicity and strength of argument, such a candid allowance for all that was to be said upon the other side, in a tone so removed from controversial bitterness, so natural and fit for a great man addressing the "serene reason" of mankind — as to commend these things to the minds of his countrymen, and firmly to fix them in the jurisprudence of the nation; so that when the rain descended and the floods came, and the winds blew and beat upon that house, it fell not, because it was founded upon a rock. It was Marshall's strong constitutional doctrine, explained in detail, elaborated, powerfully argued, over and over again, with unsurpassable earnestness and force, placed permanently in our judicial records, holding its own during the long emergence of a feebler political theory, and showing itself in all its majesty when war and civil dissension came—it was largely this that saved the country from succumbing in the great struggle of forty years ago, and kept our political fabric from going to pieces. I do not forget our own Webster, or others, in saying that to Marshall (if we may use his own phrase about Washington) "more than to any other individual, and as much as to one individual was possible," do we owe that prevalence of sound constitu-

tional opinion and doctrine at the North that held the Union together; to that combination in him, of a great statesman's sagacity, a great lawyer's lucid exposition and persuasive reasoning, a great man's candor and breadth of view, and that judicial authority on the bench, allowed naturally and as of right, to a large, sweet nature, which all men loved and trusted, capable of harmonizing differences and securing the largest possible amount of coöperation among discordant associates. In a very great degree, it was Marshall, and these things in him, that have wrought out for us a strong and great nation, one which men can love and die for; that "mother of a mighty race," that stirred the soul of Bryant half a century ago, as he dreamed how,

"The thronging years in glory rise,
And as they fleet,
Drop strength and riches at thy feet;"

the nation whose image flamed in the heart of Lowell, a generation since as he greeted her coming up out of the Valley of the Shadow of Death:

"O Beautiful! my Country! ours once more!

Among the nations bright beyond compare! . . .

What were our lives without thee?

What all our lives to save thee?

We reck not what we gave thee;

We will not dare to doubt thee,

But ask whatever else, and we will dare!"¹

¹ Professor Thayer.



NEW TIMES, NEW CRIMES.

BY GEORGE H. WESTLEY.

THE rapid strides of invention and discovery within recent years have kept our legislators busy making new laws and modifying old ones to meet new conditions. The development of electricity alone has called into being scores of enactments never before necessary, while other lines of advancement have been more or less prolific in the same way. It is stated, indeed, that the new laws of the forty-five States average in their aggregate no less than ten thousand pages a year.

One of the earliest laws concerning electricity was that forbidding the flying of kites in streets where electric wires were strung. This of course was to provide against interference with the current. Boys were the culprits, mostly, some of them quite against their intention, others doubtless in the Ben Franklin spirit of electrical experimentation. Presently, and perhaps of this parentage, a new crime was born, called "wire-tapping," and forthwith an ell had to be added to the code to accommodate the new-comer.

In different States the wire tapper is regarded differently. Thus Connecticut looks upon him quite leniently and lets him off with a \$50 fine, or ninety days' imprisonment. Montana, on the other hand, holds that he is no better than a gas or water thief, and consequently mulcts him anywhere from \$100 to \$500; while in Georgia he is indeed a bold, bad man, and must pay any sum up to \$1,000, spend six months in jail or twelve months at work with the chain-gang.

In Nebraska they prohibit not only the purloining of electricity, but also its presentation—to certain parties. Thus if any telephone or electric light company gives away its commodity, or lessens the price of it to any city or village official, said company lays itself open to a fine of from \$100 to \$500, and imprisonment of from thirty days to six

months. The recipient of such a favor comes under the law for a like amount, and loses his office besides. The wherefore of this statute is too plain to require explanation.

The bicycle is another prolific source of new legislation. Dozens, nay hundreds, of special laws have been enacted for it. There are laws relating to the larceny of wheels, to riding without gongs or lanterns, to scorching, and to wheeling in public squares, parks and gardens. There are bicycle laws for the protection of the propeller and for the peace and preservation of the pedestrian. There are statutes, too, protecting the bicycle rider from his own misguided enthusiasm. Illinois stands out prominently in this latter, that State having passed "An act to prevent long continued and brutal bicycle riding," which makes it a punishable offense for anyone to engage in "a bicycle race of more than twelve consecutive hours' duration, without a rest of six consecutive hours, following each twelve hours' racing."

Then the new inventions in this line had to be provided for. Thus the pneumatic tire called for a law prohibiting the throwing of glass, tacks or nails upon the highways—this in Connecticut, where any sort of wilful injury to a bicycle path is punishable by a fine of \$50, or three months' imprisonment. And as another example of the many special bicycle laws, we find in Ohio a statute which provides that when the streets are sprinkled a dry strip shall be left for the use of wheelmen.

The automobile being a new thing is not yet so thoroughly legislated upon. I remember recently reading in some newspaper that a youth while passing along the street saw an automobile standing unguarded by the curb, and being inclined to mischief he turned the lever of the machine so that it started off empty. He was seen doing this

and was arrested, but, as the story ran, his offense was covered by no statute, so he escaped scot free. Doubtless in a year or two the automobile will be figuring in our country's legislation as prominently as the bicycle.

Then we have the new laws of train and trolley car; statutes regarding track obstruction, ride stealing, and getting on and off the cars while they are in motion. Also numerous enactments against discrimination in the matter of passengers, extortion in rates and what not.

The development of anæsthetics and the temptation to the misuse of these blessings, have evoked many new statutes. In New York any person not a physician or surgeon, having in his possession any narcotic or anæsthetic with intent to administer the same to another without his consent, unless by the direction of a duly licensed physician, is liable to imprisonment in the States prison for any term up to ten years. In Colorado, Illinois, Louisiana and Massachusetts no one may sell cocaine except on prescription from a licensed surgeon or physician. The fines for such an offense are not uniform in all four States, however, but range from \$50 in Massachusetts to \$300 in Colorado.

The law against doctors and dentists practising without a license is well known. Chiropodists, embalmers and nurses are likewise so restricted in certain parts of the country. As an instance of the care nurses have to exercise nowadays to avoid penalty, in California should one neglect to report the fact of a baby's eyes becoming inflamed within two weeks after birth, she would be liable to six months in prison. In Minnesota no barber can legally engage in his art without first passing the test of an examining board.

Modern adulteration of food is another matter that has been dealt with. Certain nutrimental combinations have to be plainly labelled and tagged by the seller, and the purchaser undertakes certain obligations in buying such. Thus in Virginia, a boarding-house keeper must, if he uses the article, put

up a sign with "Imitation Butter Used Here" printed in large Roman letters not less than one inch square. If he neglects to warn his boarders thus, he lays himself liable to a six months' imprisonment.

Discoveries in connection with the public health and general welfare have made their demands upon the legislators. There are laws to protect shop-girls, miners, motor-men, and statutes prohibiting the sale of liquor and cigarettes. There are milk laws and meat laws. In Maine the bodies of animals that have died of disease must be thoroughly injected with kerosene oil. The object of this treatment is to protect the selling of the meat. Elsewhere there are impure ice laws—the adjective of course describing the ice, not the laws—and in Wisconsin a baker who sleeps in his bakery pays \$50 for his first night's lodging, \$100 for the second, and \$250 for the third. The same State again exhibits its care for the safety of its people by enacting that if anyone should lose his life from the explosion of a lamp or other vessel containing oil which has not passed the legal test, the seller of such oil shall be deemed guilty of manslaughter in the third degree.

The various slot machines which have been invented are responsible for certain new laws and penalties, especially those containing gambling devices and those exhibiting improper pictures. The automatic ballot machine is guarded by a special law. In New York to tamper with one of these machines renders one liable to five years' imprisonment.

The boom in advertising is another modern thing which has exercised the gray matter of our law-makers. For a few examples, in Pennsylvania trouble is prepared for the man who prints his advertisement on a picture of the American flag. In New York it is an offense punishable by imprisonment for one to drop unaddressed advertising circulars into one of those new-fangled letter chutes. In New Jersey it is provided that should an advertiser stick his ad. on the Palisades, he may be put away for three years or less for

disfiguring the landscape. While in Washington a lawyer may not solicit divorce business in the newspapers, upon pain of six months' duration.

But if the business man is restricted in some ways he is helped and protected in others. In Michigan it is a crime for anyone to buy an empty beer bottle stamped with a brewer's name; and in Florida the man who

smashes a similar bottle may be imprisoned for a year.

Even that modern invention the "trust" has been legislated against, though not so widely as some of us would wish. To organize a trust in North Dakota is to run the risk of a loss of liberty and restricted diet for perhaps ten years.

CHIEF JUSTICE ADAMS.

By H. K. D.

(WITH APOLOGIES TO MR. LEIGH HUNT, AND TO OTHERS, IF NECESSARY).

CHIEF JUSTICE ADAMS, of the court below,
Awoke from slumber several nights ago,
And, looking about, with much amazement saw
A figure, habited as of the law,
Writing down entries in a record book.

Darting his visitor a savage look,
The judge cried out, much vexed at the intrusion,
"What write you?" The scribe replied without confusion,
Giving this rudeness no apparent heed,
"The names of those who know enough to plead."

"In my name there?" the judge inquired. "Nay, nay"
His guest replied. The judge made haste to say,
"Then write down that I ne'er refuse, my friend,
At any stage, to grant leave to amend."

Our scribe complied; but back he came next night,
And showed the judge (who wilted at the sight),
A list of those to blame for slipshod pleaders,
And lo! His Honor's name ranked with the leaders.

THE SPANKING OF JACOB CLASEN.

BY LEE M. FRIEDMAN.

ON the 24th of June, 1656, old Jan Vinje, the innkeeper, spanked little Jacob Clasen. Do you ask me how I know this? The whole story has stood for almost two hundred and fifty years on the court records of New Amsterdam, where every reader of Old Dutch may see it all at a glance. This is how it came about.

June 24, 1656, was Saturday, and the little boys in New Amsterdam were excused from school so they might help at home in the preparations for the following Sabbath. It was such an extraordinarily beautiful June day that it made every boy long for a holiday. Little Jacob Clasen teased his mother to let him go fishing with the other boys, so Vrou Clasen gave him his lunch in a basket and off little Jacob ran to join his companions at the river at Schreyer's Hook, near the present Battery Park.

Our story, however, does not begin until Jacob returned home and would never have been written at all had it not been for two gray squirrels. Squirrels were too common in New Amsterdam to interest the boys especially. But these two particular squirrels sat in the road winking at the boys in such a tame and friendly manner that Peter Dircksen said he was going to walk right up and catch them, and as soon as he had them safely he would give Jacob one of them, so that then each would have a tame squirrel, just like the one Herr Van Leyden had given his son Oloff. Unfortunately, however, the squirrels did not agree to this arrangement. When the boys ran after them they scampered under a fence and up a neighboring tree from the branches of which they mocked at their pursuers. Now, where the many-storied business buildings stand to-day, between Wall Street and Maiden Lane, in 1656 Jan Vinje had a famous "pea patch." This "pea patch" was the pride of old Jan's life.

He and his wife tended it as they might have tended a favorite child, and in it they raised vegetables that were famous throughout New Amsterdam.

When the squirrels came down from the tree, where they had taken refuge, they started directly across Jan's sacred "pea patch" towards a neighboring grove. The boys, carried away with the excitement of the chase, made after them right through the peas, never once heeding Jan's warning shouts. But poor little Jacob could not run as fast as the other boys, and so fell into Jan's clutches, and was made to suffer not only for his own sins, but for those of all the other boys as well. Jan laid him over his knee and spanked him soundly. When he let him go little Jacob, forgetful of fish and squirrels, took the shortest cut for home. Little Jacob did not want his supper. He was lame and only wanted to go to bed. Such an extraordinary desire on Jacob's part aroused great curiosity in the minds of Herr and Vrou Clasen, who started an investigation which led to the discovery of the black and blue spots that little Jacob was hiding.

It might be expected that this would end our story. But Jan was so indignant that on the following Monday morning he went to the Court of Burgomasters and Schepens to ask that Herr Clasen might be ordered to pay for the damage that little Jacob and the other boys had done. So little Jacob had his spanking appear upon the court records of New Amsterdam. Jan complained that last Saturday he found in his peas and corn Herr Clasen's son with three or four other school boys, who did much damage, and he requested reparation from Herr Clasen.

This was too grave a matter to decide off-hand, so the Worshipful Court of Burgomasters and Schepens appointed arbitrators to

inquire into the evidence, and adjourned the case for a fortnight.

On the 10th of July, 1656, Jan brought into Court the arbitrators' report, but Herr Clasen still maintained he was not liable, "since the children have not taken or injured anything to the value of a pea's pod," and Jan had already beaten Jacob for the damage he had done, so that he came home black and

blue. Jan Vinje acknowledged that he had struck Jacob at the time, because he could catch no one else. Thereupon the Court decided that, since Jan punished Jacob, he had lost all his rights, and dismissed his case.

So justice was done in New Amsterdam two hundred and fifty years ago, and little Jacob disappeared from the pages of history.

LONDON LEGAL LETTER.

April 4, 1901.

TWO trials, one criminal and the other civil, have excited great interest during the past month and both are illustrative of certain features of English procedure which might possibly be studied with advantage by the practitioners at the American bar. In the criminal case one Bennett was tried at the Old Bailey for the murder of his wife. The body of the dead woman was found on the sands at Yarmouth early in the morning of a day in October last. She had been strangled by a bootlace, which was found entwined about her neck. Her identity was not discovered for some weeks, further than that she had come to Yarmouth from London accompanied by a young child, and had taken lodgings in a poor quarter of the seaside town. Ultimately, by means of a laundry mark on her linen, it was learned that she was a Mrs. Bennett, and in consequence of her husband having been some time engaged to be married to an eligible young woman, and by reason of other incriminatory matters, he was arrested and subsequently indicted for the murder. The evidence was entirely circumstantial, the only undisputed fact being that there was certainly a motive for the crime in the desire of the accused to marry again while his wife was still living. The defence rested mainly on an *alibi*, which was supported by the evidence of a witness of repute, a merchant of stand-

ing in the City of London, who was positive that he had met the accused, who joined him in a walk in the country, and who spent an hour or two in his company, at a place and at a time which absolutely negated the idea that Bennett could have been in Yarmouth at the time the murder was committed. Notwithstanding this remarkable evidence Bennett was found guilty, and within a fortnight afterwards was hung.

The remarkable features in this trial, at least from the standpoint of one observant of American practice in murder trials, are first that there was no *voir dire* examination of the jurors. The twelve men who entered the jury box were sworn and the trial was immediately entered upon. This was through no indifference of counsel, for the defence was conducted by an able King's counsel and two juniors, who were familiar with every device and artifice in criminal practice; nor was it because the English law does not admit of the challenging of a juror. On the contrary, in murder cases the accused by statute has the right of twenty peremptory challenges, while the Crown can order jurors to stand aside without reason assigned until the panel is exhausted, when the challenges must be for cause. In this respect the Bennett case is not unique, as it is only in the rarest instances that the privilege of challenge is ever exercised. This may be accounted for

by the fact that the qualifications of a juror are that he must be a householder, or the occupier of a shop, warehouse, counting-house, chambers or offices for the purpose of trade or commerce within the city, and have lands, tenements and personal estate the value of the equivalent of five hundred dollars. A book called the "Jurors' Book" is annually made up in each county, out of lists returned from each parish by the overseers, of persons qualified to serve as jurors. One of the Judges in anticipation of an ensuing term of court directs the sheriff to summon a sufficient number of jurors for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes or sittings. A printed panel containing the names of those thus summoned is made by the sheriff seven days before the term opens, and kept in the office for inspection, and a printed copy of such panel is delivered to any party applying for it on payment of a shilling. When a case is called for trial the jury is formed by drawing out, one after another, in open court, from a box into which all the names in the panel have been put, the names of twelve men, and these are then sworn. The fact that the right of challenge is exercised not oftener on an average than once a year, and then only as to a single juror out of each panel, may be taken as proof of the satisfactory character of the jurors and the system under which they are selected.

The second interesting feature of this trial lies in the fact that the accused's counsel did not avail themselves of the opportunity to put the prisoner into the witness-box, and thus afford him an opportunity to explain his whereabouts on the night of the murder and to clear away certain incriminating circumstances. The right of a prisoner to testify on his own behalf is of very recent origin in England, and this is the most important murder trial which has occurred since the act was passed. When the enabling bill was before Parliament, those who opposed it based their arguments on the ground that, if an accused person could be a witness for himself, it

would tempt a shrewd and clever criminal to commit unlimited perjury and to concoct such a story as would enable him to escape conviction. Bennett did not lack shrewdness, and had lived profitably on his wit for years. It was manifest, however, that, no matter how clever he might be, he could not face cross-examination, and he was therefore kept out of the witness box. Although, under the statute, this circumstance could not be commented upon by the prosecution, the inference was obvious to the jury, as well as to the judge, and is in itself a strong argument in favor of the new procedure.

The further feature of this trial which would excite comment in the United States is that from beginning to end—and it lasted nearly a week—there were practically no objections to evidence taken by counsel, no exceptions saved and no appeal lodged. The proceedings were conducted with the utmost care as well as decorum. The Lord Chief Justice gave the fullest latitude to the defence, and in his summing up devoted several hours to the law and to the evidence. It would be impossible to select a better example of the fairness and impartiality of English justice, and when the verdict was finally rendered, there was a universal feeling that it was the only verdict possible under the circumstances.

The other trial, which excited even more attention, was a libel action brought by Mr. Arthur Chamberlain against two newspapers for articles alleged to be defamatory of him. Mr. Chamberlain is the brother of the famous Mr. Joseph Chamberlain, the Colonial Secretary. The articles in question charged both brothers with having used or attempted to use the position of the Colonial Secretary to secure contracts from the Government for companies in which it was alleged both the Mr. Chamberlains and other members of their families were interested. The articles were couched in what, for an English newspaper, may be considered a most offensive style, and were obviously intended for the effect they might produce upon the recent

election. Mr. Joseph Chamberlain, while a tower of strength to his own party, is the most bitterly hated person in England by his opponents, who have no champion able to enter the lists against him. His private life has been blameless, and the only resource of those who thought to destroy his power was to attack him in his business relations, which are very extensive. Unfortunately, so far as the Colonial Secretary was concerned, the articles in question were so skillfully prepared that no direct attack was made upon him of such a nature as would bring the writers within the law of libel. It was different, however, with his brother, Mr. Arthur Chamberlain, and the latter accordingly brought his action. The trial lasted several days, during which the Lord Chief Justice's Court was so crowded that special arrangements had to be made with reference to the admission of the public. Although the nominal plaintiffs were Mr. Arthur Chamberlain and Mr. Neville Chamberlain, it was felt that the issue was whether or not Mr. Joseph Chamberlain had acted corruptly. The charge so often reiterated by his foes, and so insidiously expressed in the neat epigram, "The more the English Empire expands, the more the Chamberlain contracts," was the only one with which the jury was

supposed to be concerned. As the political parties in this country are fairly divided, so far as numbers go, the assumption is natural that of the twelve men in the jury box a considerable portion of them were bitter opponents of Mr. Chamberlain, while the others were his fierce partisans. And yet, as in the Bennett murder trial, the first twelve men called were sworn, and not a single challenge was made. So far as any scrutiny was concerned, or any interest in the personnel of the jurors was evinced, the litigants and their attorneys and counsel were absolutely indifferent to the sympathies, prejudices and connections of the entire panel. The situation may, perhaps, be better understood, if it is likened to the bringing of an action by Mr. Secretary Hay or Senator Hanna in New York City against the "New York Journal" for libel, and counsel accepting without question the first twelve jurors sent to the box by a Tammany sheriff.

In the Chamberlain action the jury awarded Mr. Arthur Chamberlain £200, and Mr. Neville Chamberlain, who had brought a similar action against the same defendant, £1,500 damages, and there the litigation ended. There had been no objections to evidence, no exceptions were taken, and there was no appeal.

STUFF GOWN.



The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE frontispiece this month is interesting in that it presents Chief Justice Marshall in an aspect distinctly different from that in which he appears in his other portraits. The picture has a decided individuality, and we find it easy to believe that the artist successfully caught and preserved the genial yet dignified expression of his sitter's face. The original of this portrait, as well as of the one reproduced on page 231, belongs to Washington and Lee University, at Lexington, Virginia, and both are by unknown artists. For their use we are indebted to the courtesy of Professor James B. Thayer, of the Harvard Law School. The portrait by Rembrandt Peale, reproduced on page 247, belongs to the Long Island Historical Society, of Brooklyn, N. Y. The Frazee bust, on page 261, is the property of the Boston Athenæum, to which it was given by Col. Thomas H. Perkins in 1835.

WE venture the inquiry whether it would be possible for the American Bar Association to publish, in a suitable volume, the Marshall Day addresses, in full.

Indeed it is by no means certain that such a publication, which would appeal to the legal profession in all parts of the country, would not find subscribers enough to meet the cost of printing. There could be no more fitting tribute to the memory of the Chief Justice than such a volume. If, however, the undertaking be not possible, it is at least a matter of congratulation that so many of these addresses have been printed in separate pamphlets, or, as in the case of the addresses at Boston and Cambridge, are to be brought out together in book-form. And as one of the happiest results of the recent Marshall celebration we may count the forthcoming volume, now in the press, by Professor Thayer, which may prove to be what has been looked for long in vain — an adequate Life of Marshall.

THE following portraits of Chief Justice Marshall have appeared in THE GREEN BAG: Saint-Mémin; in color; profile head; original owned by Thos. Marshall Smith, Esq. Vol. 13, p. 157, April, 1901.

Saint-Mémin; from a miniature of the original. Vol. 8, p. 481, Dec., 1896; vol. 13, p. 55, Feb., 1901.

Jarvis; head; original owned by Mr. Justice Horace Gray. Vol. 13, p. 53, Feb., 1901.

Inman; half-length, seated; original owned by Philadelphia Law Association. Vol. 8, p. 479, Dec., 1896; vol. 13, p. 61, Feb., 1901. Also from an engraving of the original, Vol. 7, p. 32, Jan., 1895; vol. 13, p. 63, Feb., 1901.

Harding; full length; original owned by Boston Athenæum; replica in Harvard Law School. Vol. 3, p. 541, Dec., 1891; vol. 13, p. 57, Feb., 1901.

Peale; head; original owned by Long Island Historical Society, Brooklyn, N. Y. Vol. 13, p. 247, May, 1901.

Unknown artist; half-length; original owned by Washington and Lee University, Lexington, Va. Vol. 13, p. 213, May, 1901.

Unknown artist; head; original owned by Washington and Lee University, Lexington, Va., Vol. 13, p. 231, May, 1901.

Unknown artist; head. Vol. 8, p. 482, Dec., 1896; vol. 13, p. 59, Feb., 1901.

Frazee; original marble bust owned by Boston Athenæum. Vol. 13, p. 261, May, 1901.

Story; statue, seated; in front of the Capitol, Washington, D. C. Vol. 13, p. 177, April, 1901.

Silhouette; full length, standing; original owned by Virginia Historical Society, Richmond, Va. Vol. 13, p. 181, April, 1901.

Silhouette; full length, seated. Vol. 13, p. 16, April, 1901.

THE present-day lawyer, struggling to maintain a bowing acquaintance with the decisions, at least of his own State and of the United

States Supreme Court, reads with envy of the good old times referred to in Fuller's *Worthies of England* (1662), when "all the writers of the common law, unless they be much multiplied very lately, with all the Year Books belonging thereunto, may [might] be bought for three-score pounds, or thereabouts; which with some, is an argument that the common law imbraceth the most compendious course to decide causes; and, by the fewness of the books, is not guilty of so much difficulty and tedious prolixity as the canon and civil laws." Alas, "fewness" is no longer a virtue of our law books, now multiplied to a degree which would have been inconceivable to our worthy historian and divine. Still, though not unmindful of the constant danger we all are in of being swamped by "Reporters," that roll in upon us constantly from all points of the compass, we venture to point out one field which has not been exploited as it deserves to be. When everything, from science to religion, has been popularized, why should an exception be made of the law? That the law would lend itself to popular treatment, there can be no doubt; as witness the readable column or two devoted to topics of the courts which some of the leading newspapers print weekly. These writings suggest what more can be accomplished in the same direction. Why not have a series of Popular Reports, which might be cited as "Pops," in which should be reported only those cases in which the facts are strange, dramatic or amusing? Every court in the land, from the lowest to the highest, might furnish material. The plaintiff's declaration and the defendant's answer, the testimony of the witness and the repartee of counsel, would all come as grist to the mill. With a suitable corps of reporters, in whom a live sense of humor, rather than legal acumen, would be the essential qualification, such a series of weekly reports would give to the story-reading public a collection of short stories and novels of absorbing interest,—such, in fact, as would carry envy and despair to the heart of the professional story-writer and novelist. Lawyers are notorious novel readers, so such a publication would appeal to them; while the reading public, by these reports, might be weaned from its love of Hall Caine and Marie Correlli.

NOTES.

THE following is an exact transcription of a "declaration" recently filed in the circuit court for Anne Arundel County, Maryland, by an Afro-American lawyer, who, when asked whence he had his precedent, somewhat proudly answered—"Out of mah head, sah." The defence is in doubt how to frame a plea in answer:

"For that the defendants falsely and maliciously spoke and published the words following, that is to say, 'he is a thief' in Anne Arundel County aforesaid, meaning that he is guilty of a crime against the State of Maryland, to wit—a felony, whereby the plaintiff hath the good respect of the citizens and his neighbors of honesty, to the great damage and injury and grief and expenses to him in prosecuting this suit. And the plaintiff claims \$1000."

JUDGE G— for a long time had been the dispenser of justice in one of the judicial district courts in the early days of Nebraska. His popularity with his constituents was mainly due to his populist orations from the bench, together with his well-known aversion to regular form and precedent in legal procedure, especially in criminal cases. His zealotry in behalf of the tax payers overshadowed his judicial judgment to such an extent that his cases were, almost without exception, reversed by the Supreme Court, for errors both large and small. For this undue interference with his prerogatives the Judge never lost an opportunity to pay his respects to that august body.

In one of the more remote counties of his district the inhabitants had been relieved of many horses by some maliciously minded persons who had been systematically engaged in their avocation against the peace and dignity of the State and contrary to a certain *lex non script* in such cases made and provided by the court of Judge Lynch, who exercised concurrent jurisdiction with Judge G—. The horse thieves were apprehended and, as a consequence thereof, on the morning of Judge G—'s arrival a throng of spectators was witnessing the last rites over the three ghastly forms dangling from the trestle work of a nearby bridge. Judge G— was conspicuously present, and his face bore one of those intense grins which it is difficult to ascribe to pleasure or to anger. He seemed to be restraining himself with great difficulty, from giving vent to his

feelings,— whether of approval or condemnation no one knew. It was soon discovered, however, when he was approached by the minister of the town, whose countenance bespoke his religious disapproval of the lynching. "What do you think of this, Judge? Isn't it awful?" inquired the minister with solemn indignation.

"What do I think of it?" quickly responded the Judge, as if glad for an opportunity to give vent to his pent-up feelings. It's all right, by — sir! What do I think of it?" he repeated with emphasis; "I think, by — sir, no damned Supreme Court will ever reverse that decision; that's what I think of it!"

AN interesting chapter might be written on this subject—the recreations of lawyers. Of them the saying is pre-eminently true, *Sua cuique voluptas*. Mr. Justice Buller's idea of happiness was to sit at *nisi prius* all day and play whist all night. Sir George Jessel's predilection for equity by day and whist by night was equally pronounced. Lord Lyndhurst's evening amusement was also whist and — oh! simplicity of true greatness—backgammon. How much nearer does this little glimpse of domesticity bring us to the Nestor of the House of Lords, especially when we are told that he played both games very badly, and did not at all like being beaten. Lord Camden, like Lord North, devoted himself to music as a relaxation from study; and, strange as it may appear, music had charms for the rugged Thurlow. When he came into the drawing-room after dinner he generally put his legs on a sofa and one of his daughters played on the piano-forte some of Handel's music, and, though he might sometimes appear to be dozing, if she played carelessly, or music he did not like, he immediately roused himself and called out, "What are you doing?" Another way which Thurlow had of relieving his *ennui*, when ex-Chancellor, was getting young lawyers to come to him in the evening to tell him what had been going on in the court of Chancery. On these occasions he was in the habit of censuring very freely the decisions of his successors. This was, at all events, better taste than that of Chief Justice Jeffreys, who used to keep a mimic to amuse his evenings by aping the judges and great lawyers of the age. How much more innocent than both was the device of good old Sir Matthew

Hale, who, "by way of ensuring entertainment at home, would keep a monkey or a parrot." Lord Campbell tells us that his chief amusement on circuit was in wandering about the town *incognito*, like Haroun al Raschid, and observing the manners of the people. Sir Alexander Cockburn's ruling passion was yachting. Sir Frederick Pollock is an expert swordsman; Mr. Justice Wills an accomplished Alpine climber. Cricket, of course, like Catholic truth, is received *semper, ubique, ab omnibus*. To play it scientifically, to play in county matches, requires more time than the practicing lawyer can afford; but to play it in an amateurish way is open to all. The present writer, then a very small boy, used to play at this invigorating pastime with the late Serjeant Parry, and he has a lively recollection of the portly serjeant tripping on one occasion in his fielding and measuring his length on the greensward — "Many a rood he lay." Not so long ago Mr. Justice Grantham broke his leg in the most honorable manner in assisting at a village cricket match. Shooting commands most votaries, perhaps, among the profession generally; it falls conveniently in the Long Vacation. Angling, the contemplative man's recreation, has special charms for the Chancery barrister, often a recluse. Kindersley was enamoured of both, and was always an ardent sportsman. He used to go salmon fishing in Norway long before that country had become tourist-ridden, and he looked forward with the keenest anticipation to his partridge shooting on the first of September. Yet even here, into these Arcadian pleasures, he was pursued at times by lawyers seeking the aid or protection of the court.

We read in Eastern lands of the Cadi administering justice under the palm tree, and sigh for the simplicity of such a scene, but what could be more charmingly primitive than the vice-chancellor on these occasions, seated under a hedge, with judicial gravity, his gun and bag laid aside, granting an injunction against some threatened act of oppression or injustice or appointing a receiver — While words of learned length and thundering sound Amazed the astonished rustics ranged around. There is surely, too, something more consonant here with the dignity of Justice than granting, like Sir Lancelot Shadwell, a similar remedy from the *déshabille* of a bathing machine.

The Law Times.

NEW LAW BOOKS.

THE LAW OF TORTS. By *Melville Madison Bigelow, Ph.D.* Seventh Edition. Boston. Little, Brown and Company. 1901. Buckram.

It is not at all surprising that a legal work by so thorough a scholar as Dr. Bigelow should have reached a seventh edition. His attainments in legal literature are solid and have long since given him place among those men of note who are referred to by the last name merely, — a genuine and respectful tribute to their fame.

Thoroughness of preparation is the dominant and constant impression one gets in reading the works of this learned author. This impression results not more from substance than from style. The terseness and exactness of Dr. Bigelow's style appeals commendably not merely to the lay reader, but to the experienced and well-read lawyer, whose professional reading brings him constantly in contact with language in which clearness is the one necessary element of style. Indeed, in the work under consideration, so unremitting, apparently, has been our author's search for the right word in the right place, that the very limits of common usage are now and then strained. For instance, "procedural" is not set down in Webster or Worcester, yet the adjective becomes eminently useful to the author in classifying rights as either of substantive or of "procedural law," and, while "voluntaryism" has been generally thought of as an ecclesiastical term, yet Dr. Bigelow properly enough finds it useful in distinguishing purely voluntary action from acts in which moral or official duty is an element.

The first edition of "The Law of Torts for the Use of Students" appeared in 1878, and successive editions have been published in 1882, 1886, 1891, 1894 and 1897, the present year marking the appearance of the seventh, now entitled "The Law of Torts" merely. The author has in this edition made some changes in classification. Part I is entitled "Lawful Acts done by Wrongful Means or of Malice," and Part II, "Unlawful Acts." Part III treats, as before, of Negligence, or, as now entitled, "Events caused by Negligence." This classification has been carefully explained in the valuable statement of the general theory and doctrine of torts, which well repays most careful

study. In two of the three classes the breach of duty is the result of that sort of act the legal result of which is the infringement of right coincident with the breach of duty, and whether the effect of the act,—the breach of duty and the coincident infringement of right,—may or may not have been intended, still such cases are commonly said to be cases of intention. Part I treats of such breaches of duty as are lawful acts done either by wrongful means, which is always presumptively unlawful, or of malice, which in certain cases is presumptively unlawful, Part II, treating of acts which are in themselves presumptively unlawful. In the third class of cases, the breach of duty is committed by an act or an omission, and while, according to our author's analysis, every act or omission as a thing of consciousness is intended, still, in this class of torts, the effect is not intended. Herein lies the domain of negligence. An event has taken place which has been caused by negligence and is therefore presumptively unlawful.

Part I, accordingly, embraces the titles of Deceit, Slander of Title, Malicious Prosecution, and Maliciously Procuring Refusal to Contract, as comprehending lawful acts done by wrongful means or of malice. In Part II, are found Seduction, Slander and Libel, Assault and Battery, False Imprisonment, Conversion, and the other well-known titles coming under the head of breaches of absolute duty.

As the result of recent decisions the "Malicious Interference with Contract" has been divided into two chapters, Maliciously Procuring Refusal to Contract, which as before stated has retained a place in Part I, and Procuring Breach of Contract, which is placed in the class of unlawful acts. In Part III, Negligence is treated.

To the student of law one of the most difficult subjects is that of malice, and we are glad that Dr. Bigelow in this last edition has treated this subject as a special topic of discussion in his excellent statement of the general theory and doctrine of torts. A careful study of his analysis and the cases cited to support the doctrine enunciated will carry the student to the root of the matter, if anything will.

The seventh edition is enough more comprehensive in scope and detail to make the possession of the work desirable, even to those who already have earlier editions in their libraries.

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES. By *Francis Newton Thorpe*. Callaghan & Co.; Chicago. 1901. Three volumes. Cloth: \$7.50. (XXI + 595; XIX + 685; XVI + 718 pp.)

The aim of this work is to cover the Constitutional History of the United States from 1765 to 1895. The first volume is devoted to the framing of the Declaration of Independence, the Articles of Confederation, and the Constitution. The second volume deals with the ratification of the Constitution, the adoption of the first twelve Amendments, slavery, and secession. The third volume discusses emancipation, the last three Amendments, and subsequent events,

It must be very difficult indeed for a writer upon constitutional history to determine upon his point of departure. Shall he begin with the Constitution itself? Or with the Articles of Confederation? Or with the colonial forms of government? Or with the rise and development of free institutions in England? Or with the earlier attempts to establish popular governments in Greece? And to what extent shall he discuss the influence of Dutch practices and of French theories?

The author of these volumes has confined himself, though not invariably, to American soil, and to the time in which there has been something resembling an American nation. Unquestionably these limitations are intelligible and sensible. Further, the apportionment of the subject among the three volumes is quite in accordance with perspective, for it seems, as the author says, that our constitutional history falls naturally into three nearly equal parts.

The less praiseworthy feature of the work is the author's apparent theory that the writing of constitutional history should be restricted almost exclusively to pointing out the steps by which the words of the Constitution and of the Amendments became what they are. This unfortunate misconception results in the very grave defect — from a lawyer's point of view, the fatal defect — that the work gives slight attention to the decisions of the Supreme Court. Of the forty-two chapters, only two purport to be devoted to constitutional cases; and, though these two chapters are not exclusively given up to this subject, and the subject is to some extent treated in other chapters, a computation based

upon the apparent apportionment of chapters is nearly accurate, and the work may fairly be said to represent that the decisions of the Supreme Court are in importance about one twentieth part of our constitutional history. This is very far from the lawyer's opinion; and it leads to the surprising result that the work apparently makes no mention of the Dartmouth College Case, the Slaughter-House Cases, and the Neagle Case. This conception, too, that constitutional history has to do with little save the very words of the Constitution and of the Amendments, leads to the equally unfortunate result that the work seems to omit the impeachment trial of President Johnson, the Tenure of Office Act, the Electoral Commission, and the present statute fixing the succession to the presidency.

The work makes liberal use of quotations and paraphrases from documents and speeches. This is probably its most original and useful feature, and for the layman, but not for the lawyer, this feature goes an appreciable distance toward atoning for the inexcusable underestimate of the part that the judicial department of the government has taken in creating or modifying the doctrines, whether written or unwritten, which are, or have been, part of the constitutional system of the United States.

REPORT OF THE TWENTY-THIRD ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. 1900. (682 pp.)

Outside of the working books of the profession there is no set of volumes which have a stronger claim to a place on the shelves of a lawyer's book-case than the twenty-three volumes of the "Reports of the American Bar Association." One has only to glance through the list of annual addresses, from the first one, in 1879, by the Honorable Edward J. Phelps, on John Marshall, which has become a classic, to "The March of the Constitution," delivered by George R. Peck, Esq., at the meeting last summer, and to note the subjects and the authors of the other addresses during the twenty-three years to see how wide a field these papers have covered and how distinguished are the gentlemen who have had the honor of speaking before the Association. These volumes may be opened at random with the certainty of finding some able and interesting contribution to legal literature.

In the volume before us the principal addresses besides that of the president, the Honorable Charles F. Manderson, and Mr. Peck's, already referred to, and aside from the papers read before the various sections, are by Charles Avery Harriman, Esq., Professor John Bassett Moore, and Richard M. Venable, Esq., on the subjects of "*Ultra Vires* Corporation Leases," "A Hundred Years of American Diplomacy," and "Growth or Evolution of Law," respectively.

We note with interest that the next meeting is to be held farther west than ever before, — at Denver, Colorado, on Wednesday, Thursday, and Friday, August 21, 22 and 23, 1901.

THE AMERICAN STATE REPORTS. Volume 76. Containing cases of general value and authority decided in the Courts of Last Resort in the several States. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1901. Lawsheep. (1036 pp.)

The cases here reported and annotated are from recent volumes of the Illinois, Nebraska, New Hampshire, New Jersey (Law), New York, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas (Criminal), Vermont, West Virginia, and Wisconsin Reports. As usual in the case of this series, the notes are excellent, and are rendered the more valuable by references to other monographic notes on the same general subject in previous volumes. The cases are chosen with good judgment, with a view, we take it, to covering a wide range of subjects; at all events, there is a good deal of variety in the nature of the cases and notes. For example, to speak of the more important notes only, "Insanity as an Excuse or Defence for Crime"; "Right of Corporations to Assess their Stockholders"; "Republication of Revoked Wills"; "Liability for Negligence and other Torts of Independent Contractors"; "Adverse Possession of Public Property"; "Exemption from Service of Civil Process"; "What is Seduction," are some of the questions discussed.

RECEIVED.

NEW YORK STATE LIBRARY BULLETIN 54. Summary and Index of Legislation by States in 1900. Albany: University of the State of New York. 1900. Paper: 25 cents (172 pp.)

ENCYCLOPEDIC NOTES.

The first volume of the *Cyclopedia of Law and Procedure* is to cover the titles from A. to Annuities including the following subjects: Abandonment, Abatement and Revival, Abduction, Abortion, Absentees, Abstracts of Title, Accession, Accident Insurance, Accord and Satisfaction, Accounts and Accounting, Acknowledgments, Actions, Action on the Case, Adjoining Landowners, Admiralty, Adoption, Adulteration, Adultery, Adverse Possession, Affidavits, Affray, Agriculture, Aliens, Alterations of Instruments, Ambassadors and Consuls, Amicus Curiae, Animals, Annuities.

If specimen pages are a fair sample of what the work will be, little is left to be desired in the matter of quality. The subjects are minutely and accurately analyzed, the statements of law are clear and concise, and the citations of authorities appear to be exhaustive. The practice of citing the American decisions, reports and state reports, and the unofficial reports of the West Publishing Company and the Lawyer's Co-operative Publishing Company, will lend an additional value to the work, as will also the innovation of indicating in the notes all cases containing adjudicated forms of pleading.

Another highly laudable feature of the forthcoming book lies in the fact that there will be no splitting up of the law along an arbitrary line alleged to divide pleading and practice from substantive law. The whole of each topic will be treated under a single head, and in this way not only will a great amount of duplication be avoided, but many valuable cases will be saved that would otherwise fall down in the splitting process. The publishers count on saving so much space in this way that they are guaranteeing to complete their set in thirty-two volumes.

The work is being carefully and ably done. The subjects are minutely analyzed, the statements of the law are terse and accurate and the citation of authorities is apparently exhaustive. The advantage of treating the practice decisions along with the rest of the law on the subject becomes quickly manifest, and the innovation of indicating in the notes the cases containing adjudicated forms of pleading lends an additional value to the work.

Especially striking among the articles already in print is one on "Accord and Satisfaction," edited by Hon. Seymour D. Thompson. If the other branches of the law are treated as fully and ably as this one, it is safe to predict that the *Cyclopedia of Law and Procedure* will quickly win a high place in the lawyer's library and affections. The publisher is the American Law Book Company, 120 Broadway, New York.



ATTORNEY-GENERAL KNOX.

The Green Bag.

VOL. XIII. No. 6.

BOSTON.

JUNE, 1901.

ATTORNEY GENERAL KNOX.

THE appointment of a new Attorney General calls to mind some of the noted men and some of the great lawyers who have held the office. One of the four original cabinet positions, its first incumbent was Edmund Randolph,—beloved of Washington, a leader of the Virginia bar, of fine talents, yet lacking somewhat in strength of character. Concerning him there have been, and will continue to be, all shades of opinion. Hamilton cordially disliked him. Jefferson said of him, unjustly, that he had “generally given his principles to the one party, and his practice to the other, the oyster to one, the shell to the other.” And yet on one point there is agreement,—that he performed well the duties of his office, and set a high standard for his successors.

Of his successors a few only may be mentioned. Theophilus Parsons, of Massachusetts, held the office for a brief period at the end of John Adams’s administration, and was succeeded by Levi Lincoln, of the same State, of whom the dramatic, though fanciful, tale so often has been told, how, shortly before midnight on the third of March, 1801, he walked into the office of the Secretary of State, John Marshall, and with Jefferson’s watch in hand put a stop to the signing of commissions at twelve o’clock exactly. William Pinkney, of Maryland, held the office under Madison; Richard Rush, of Pennsylvania, under both Madison and Monroe. William Wirt, of Virginia, who had made his reputation in the prosecution of Burr, and who ranked high both as a lawyer and writer, succeeded Rush, and held the office for twelve years, continuing, in office

through Monroe’s two administrations, and until the end of that of John Quincy Adams, during those twelve years discharging with ability his official duties, although not confining his professional labors to the service of the government. One of the great names on the roll is that of Roger B. Taney, Jackson’s adviser and supporter, and his Attorney General for two years.

In the list of the Attorneys General for the next fifty years stand the names of Benjamin F. Butler, of New York, John J. Crittenden, of Kentucky, John Y. Mason, of Virginia, Nathan Clifford, of Maine, Reverdy Johnson, of Maryland, Caleb Cushing, of Massachusetts, Jeremiah S. Black, of Pennsylvania, Edwin M. Stanton and William Maxwell Evarts, of New York, E. Rockwood Hoar and Charles Devens, of Massachusetts. The names of the distinguished lawyers who have held the office within the last twenty years are fresh in the minds of all.

It is well to recall the men distinguished in public life and at the bar who have served the government in the office of Attorney General. Their incumbency of the office, in the past, gives to it an added dignity and importance, and is a strong incentive to the leaders of our bar at the present day to aspire to the office, in spite of its meagre pecuniary reward as compared with returns of a successful practice. And it is a satisfaction to know that the standard of faithful service and of high professional ability set in the past will be fully met by the present Attorney General.

Philander Chase Knox was born forty-eight years ago in Brownsville, Fayette

County, Pennsylvania. His father was David S. Knox, a bank cashier, and a man prominent and respected in the community. The son, as a boy, was educated in the local schools, and tradition has it that he did not always refrain from the mischief which makes a schoolmaster's life more or less strenuous.

Mr. Knox is a college man,—indeed, he has a double claim to that title. Finishing his preparatory school education he went to the college at Morganstown, West Virginia, now the University of West Virginia. The tradition is that while there he argued his first case. A serious difference of opinion, on a question of discipline, arose between the faculty and the class of which Mr. Knox was a member. The faculty granted a hearing to the students on the question in dispute; Mr. Knox was chosen as spokesman for the class. He looked very small beside some of his classmates, and it is to be feared that he was chosen partly by way of joke, on account of his small stature; but he delivered an argument that astonished both his classmates and the faculty. He showed so thorough a comprehension of the principles by which a college should be governed, and expounded his objections to the regulation so clearly and forcibly that he succeeded in persuading the faculty to reconsider its action, and to repeal the obnoxious rule.

After two years at Morganstown, Mr. Knox went to Mount Union College, at Alliance, Ohio, where he was graduated in 1872. It was while at Mount Union that the friendship began between President McKinley and his present Attorney General,—a friendship which has remained unbroken for thirty years, and which may fairly be considered as one of the important factors in the recent appointment of Mr. Knox. It is said, indeed, that Mr. Knox was led to adopt the law as his profession by the advice of Mr. McKinley in undergraduate days.

After graduation Mr. Knox went to Pittsburg, entering as a student the law office of the Honorable H. Bucher Swope, United

States district attorney for the western district of Pennsylvania, and continued in the office of Mr. Swope's successor, the Honorable David Reed, until admitted to the Allegheny County bar in January, 1875. In the spring of the same year Mr. Knox became assistant United States district attorney, but held the position only a year, when he resigned to give his whole time to private practice. This was the only public office Mr. Knox ever held, except his Cabinet position. In 1877 he formed a partnership, which has existed up to the present time, with the Honorable James H. Reed, who has served for a time since then as United States Circuit Judge.

The branch of the law to which Mr. Knox has devoted himself especially is the law relating to corporations; in that he made himself an expert, with the natural result that the firm of which he is a member has long counted among its clients many large corporations, among them the Carnegie Steel Company. It is interesting to note in passing that in the litigation between Andrew Carnegie and Henry C. Frick, with whom as the executive head of the Carnegie interests Mr. Knox had been brought into close relations, the law firm of Knox and Reed, because of esteem for both litigants, refused to act for either side against the other.

But in making a special study of corporation law, Mr. Knox has not neglected other branches of the profession; for if we may accept the opinion of members of the bar at which he long has been a leader, his opinions on questions of constitutional law are of very great weight.

Mr. Knox is a hard worker in his profession. Clear minded and alert, yet painstaking and methodical, he studies a case intently, familiarizes himself with every detail of law and of fact involved, and having convinced himself what is the right line of action, fights out the matter to the end with untiring zeal. He is not an orator in the common acceptance of the term; he is not a jury lawyer; but he has the gift of placing before the

court the law and the facts in a case in the most convincing and effective manner. Indeed, his argument, only twenty-five minutes in delivery, in the Indianapolis traction railways cases has been cited as a model of what a legal argument should be. He has the legal instinct which enables him to grasp the essential point in a case, to weigh the relative importance of its various elements, and, with a true sense of proportion, to see clearly the bearing of one part of a case upon another.

In the case just referred to Mr. Knox was associated with the late President Harrison. The case grew out of an attempt to annul an ordinance by which valuable rights and franchises had been granted the street railway companies. It is said that, at first, Mr. Harrison favored a different line of defense from that supported by Mr. Knox, and, for a time, felt unwilling to adopt the suggestions of a younger man. Mr. Knox was so convincing, however, in support of his view of the case that Mr. Harrison yielded, and the suit was argued, and won, on the lines urged by Mr. Knox. The strong friendship between these two great lawyers dated from that case.

In personal appearance Mr. Knox impresses one as a strong man physically and mentally. He is of medium height, well-knit and muscular in build. His eyes are dark; his forehead is high, and his brown hair is turning gray. His smooth face shows a strong, resolute mouth, and the whole expression of the face stamps him as a man self-confident, self-controlled, with great reserve force, and of high intellectual powers.

It will strike a responsive chord in the hearts of many of his professional brethren to find that the new Attorney General is an enthusiastic fisherman, and to know that he brings to the pursuit of the gentle sport that same alertness, skill and perseverance that

he bestows upon the affairs of his clients. Indeed Mr. Knox brings angling and the law into very close relationship, for books and papers are often taken into the woods, and many important legal problems have been worked out beside a trout stream.

Fishing, however, is not the only sport at which Mr. Knox is adept. He is fond of several kinds of out-door exercise, and he is a good walker and an expert golfer. But driving is the sport which divides with fishing the first place in his affections. With the same spirit of thoroughness in his recreation as in the work of his profession he has become, by careful study, an excellent judge of a horse; and it may be an open question whether Mr. Knox takes more satisfaction in the successful outcome of some important case, than he derived some time ago from driving a pair of his horses a mile in time which broke, by two seconds, the world's pole record for gentlemen drivers.

The generally accepted belief seems to be that four years ago the President had serious thought of offering the Attorney Generalship to Mr. Knox, but that the latter's close relations with the Pittsburg corporations, especially in view of the bitter feeling roused by the then recent Homestead strike, made the appointment seem inadvisable at that moment. It is said also, that at that time Mr. Knox did not feel justified in putting aside his large practice. Fortunately both of these objections had lost, by this time, much of their weight, with the result that we have, as our new Attorney General, a thoroughly equipped and able lawyer, a tireless worker, a man of perseverance and courage, and, withal, a gentleman who, by nature and by training, is fitted to maintain the high standards and fulfill the arduous requirements of his high office.

ON THE CIRCUIT IN SOUTHERN WEST VIRGINIA.

BY EDWARD S. DOOLITTLE.

IN the year 1863 and in the midst of civil war, that part of Virginia lying between the Alleghany Mountains on the east and the Ohio and Big Sandy Rivers on the west, was admitted to the Union as the State of West Virginia, with the motto, *Montani semper liberi*.

Those were troublous times for the Union. Whether the new State should continue a member thereof with all the insignia and rights of independent Statehood, and thus demonstrate the truth of her motto, was one of the questions to be answered by the arbitrament of war. It was eminently proper that these fearless, liberty loving mountaineers should adopt this motto. The hills and mountains of their native land are well-nigh innumerable. In the southern part of the State, at the time of its admission, the natives, whether pursuing their usually peaceful avocations, whether resisting the encroachments of foreign land-grabbers or evading the officers of the law, were in their mountain retreats always free.

" 'Tis a rough land of earth and stone and tree,
Where breathes no castled lord or cabined slave,
Where thoughts and tongues and hands are bold
and free,
And friends will find a welcome, foes a grave ;
And where none kneel save when to heaven they pray,
Nor even then unless in their own way."

Well, the war ended,—or rather the war ended *well* for the Mountain State. And since the war West Virginia has rapidly increased in population and wealth. Immigration and capital, encouraged by the law-making powers, have poured steadily into the State.

The inland rivers have been improved, locked and dammed. The mountains have been reached and traversed by numerous railways. Upon these thoroughfares immense quantities of coal, coke and timber,

the chief products of the State, are annually exported, with the supply apparently inexhaustible.

The successful future of West Virginia is assured. In the language of the expiring Father Paul to his country, *Esto perpetua*.

Not unnaturally lawyers have been more instrumental than any other class of West Virginians in forming the State Constitutions and government, in adopting a rational system of laws, and, doubtless, by these their efforts, in promoting the general welfare and prosperity of the people. In support of this allegation,—not pretension as some of the ignorant laity may, Josh Billings like, "sarkastikally suggest",—it is only necessary for the latter class to look up the biographies of many pioneers of the West Virginia Bar—lawyers who have attained distinction in the legal profession and whose names are inseparably associated with the history and laws of the State.

Before and for some years after the war, there was no railroad in the southern part of West Virginia south of the Baltimore and Ohio, and in this part of the State the Circuit Judges with their respective retainers, the best lawyers, or rather advocates, rode on horseback the circuit, from county to county. In those days the Judge and the lawyers accompanying him would sometimes not "round up" to greet friends and relatives at home until after an absence of two or three months.

Occasionally they would ride three or four days before reaching the county-seat at which a term of court was to be held. During this long ride they beguiled the time by relating anecdotes, singing songs, cracking jokes at each other's expense, shooting at the game which came in their way, and occasionally racing their horses—after partaking too freely of the red-rosebud liquor with which

they were always supplied, to help them on their way and over the mountains.

The latchstring of every cabin door hung out, inviting them to enter, eat, drink and be merry. "Git off yer horse and look at yer saddle," was the mountaineer's usual salutation and welcome greeting. The lawyers after sharing his hospitality were careful not to insult their host by offering *him* any remuneration for their board and lodging. They were familiar with his eccentricity and yet not disposed to get something for nothing. And therefore in a politic way, when the host was supposed not to be looking, they slipped their coins into the hands of the house-wife who had made for them the sweet ash-cakes and good corn-dodger bread.

In those days the lawyers on the circuit carried their law libraries in their saddlebags. Tucker's Commentaries, Russell on Crimes, and Greenleaf on Evidence were the principal treatises from which they obtained their law learning, and with this artillery they bombarded Judge and jury.

Tucker's Commentaries were the lawyer's *vade mecum*. Seldom did any Judge have the temerity to rule contrary to any authority found within the lids of those books. There is a story current in this section that a certain attorney, stimulated for the great legal effort he was about to make, was once proceeding, contrary to the ruling of the presiding Judge, to argue to the jury a "point of law," and in support of his, the attorney's legal opinion, to read from his favorite author, when the Judge sternly interrupted him:—"Mr. S., the Court has ruled on that point and the Court's ruling is the law which governs this case. And you will quit arguing contrary to the ruling of this Court, or take your seat."

"I understand your Honor's ruling," replied the attorney, "and that it is the law of this case, so far as your Honor's Court is concerned; but I beg permission to read a short paragraph from this book, not to contradict your Honor's ruling, but to show you what a d—d fool Judge Tucker was."

The principal capital on which most attorneys then did business was their oratorical powers, rather than a thorough knowledge of the law acquired from the current textbooks.

The verdict was frequently the result of an eloquent speech and not according to the merits of the case; and judgment on this verdict ended the litigation.

Seldom did an attorney take his case to a higher court. It was easier and more congenial to argue the case orally in open court, than out of the court-room and presence of the listening and admiring throng to prepare the written bills of exceptions and record necessary to obtain an appeal or writ of error. The native West Virginia lawyer is a natural orator, and in this respect compares favorably with attorneys hailing from many other States.

It is not easy to give the reason why. The mountain air and scenery seem to inspire the fearless independent spirit that he has inherited from his Virginia ancestry, and to make him eloquent and plausible when arguing what is neither law nor logic. The advocate gifted with an eloquent tongue is prone to wander from the record, especially in the trial of criminal cases. An apt illustration of this tendency was recently observed by the writer in the trial of a Hatfield murder case in the County of M., on the border between West Virginia and Kentucky. Governor W. had been retained for the defence, and Colonel T. for the prosecution, both able and eloquent lawyers. The former during the two hours he argued before the jury seemed inspired. In glowing colors he portrayed the innocence of the prisoner, and then in the darkest hues the murderous intent and guilt of the deceased at the time of the tragedy. He reversed the tables on the prosecution, placed the deceased on trial and convicted him before the jury. His argument was to some extent based on matters not in evidence. Had the case gone to the jury at the conclusion of his argument, the prisoner would doubtless

have been acquitted of murder and convicted of manslaughter.

Colonel T. rose equal to the occasion, and at least once in his argument also wandered from the record. In one of his oratorical flights he referred to the numerous victims of the Hatfields, to the midnight burning of a McCoy dwelling house across the border in Kentucky and the shooting of the fleeing inmates by the Hatfields, during the Hatfield-McCoy feud.

He lined up the ghastly skeletons of their victims before the jury and then, to give the jury a better view of the horrible picture, he flashed upon the whole line the light of that burning dwelling-house. Here the presiding Judge rung down the curtain upon the scene by mechanically instructing the attorney to confine his argument to the evidence in the case.

The attorneys now practicing in the southern part of the State, while not less eloquent than their predecessors, are as a rule better lawyers. They do not trust alone to their gifts of oratory. They watch closely the record of the case and endeavor to keep the same clear of reversible error.

They are familiar with the reported decisions of the Court of Appeals, and the practice and procedure in the Circuit Courts; and their constant endeavor is to obtain judgments for their clients that will stand the scrutiny of the appellate court.

The office of an advocate continually practicing his profession and arguing cases in court, tends to sharpen his wits and powers at repartee. The late P. K. McC. was well known in this part of the State for his natural and acquired characteristics in this respect and also for an exuberance of diction.

If attorneys in the court-room grew facetious attempting to make him the butt of their jokes, they always found to their discomfort, that he was abundantly able to take care of himself. And quite frequently he was wont to assume the aggressive, at

times unexpected and somewhat inopportune. It is related that the late Senator John E. Kenna, when a young man, aspiring for his first congressional nomination, went to the County of L., there met and was introduced to McC. in a crowded court-room. The candidate, anxiously looking for political friends, expressed his pleasure in meeting a Democrat of whom and whose ability he had heard such favorable reports. "Mr. Kenna," replied the attorney, surveying the candidate from head to foot, "I was well acquainted with your father. He was a man of fine personal appearance, of an unusually intellectual countenance, attractive in his manners and prepossessing on the first acquaintance. There is nothing about you, Mr. Kenna, except your name, that reminds me of your father."

We imagine that the witty attorney's greeting would have been somewhat different, could he have foreseen the subsequent career of the young man; that he would be elected three times to Congress and twice to the United States Senate; that he would acquire a national reputation for wise statesmanship; and that his statue of imperishable marble would be placed in the rotunda of the Capitol at Washington to perpetuate the name and fame of John E. Kenna.

Times have changed. Lawyers to-day do not go regularly with the Judge on the circuit, but stay at home and spend more time in the seclusion of their office. There they do their most effective work and earn the largest fees; but occasionally when out on the circuit, they take quite naturally to the ways of the pioneer lawyers.

"They strive mightily,
But eat and drink as friends."

They become social creatures, drink to each other's health and success, and for the time being observe and obey the second great commandment in the law,—Thou shalt love thy neighbor as thyself.

SOME CURIOUS FACTS ABOUT THE CORONATION OF AN ENGLISH MONARCH.

BY JOHN DE MORGAN.

THE long reign of Victoria has caused many of the old customs, rites and formalities connected with the coronation of a monarch to be forgotten. Some of these ancient customs I propose to bring into the light of the twentieth century.

The incidents connected with the proclamation of King Edward VII. are so recent that reference to them would be entirely out of place, but the papers have not told of the proclamation of the king in the old town of Dartford, in Kent. It was in Dartford that Wat Tyler began his insurrection, and which in the time of Elizabeth could boast of a royal residence. In the thirteenth century the town of Dartford rendered good service to the then king and in granting a charter he gave the right to the town to hold a market, and also the privilege was granted to the lord of the manor and the market of officially making known the accession of a new monarch. This right has been exercised this year, and it has been held that the manor and its valuable privileges would have been forfeited to the crown had not the proclamation been duly made. On the day it was officially known that Victoria was dead the following proclamation was posted in the market place:



BY ROYAL COMMAND!

On the death of Queen Victoria, under the Charter and Statute Rights of

this Market of Dartford, Albert Edward, Prince of Wales, is now King of England.—Lord Tredegar.

Lord Tredegar, the lord of the ancient manor, did not care to risk his rights to the manor by neglecting the proclamation, though it bordered on the absurd, for the monarch of a mighty empire to be proclaimed king by a little town of nine thousand inhabitants.

The owner of Dartford market and manor can point to a very ancient document granted by the crown, should any one question his title to say who is or is not monarch of England.

When the unfortunate Lady Jane Grey, after reigning only ten days, was condemned to death, a doubt was raised whether she had been legally proclaimed queen, and among other evidence presented to Queen Mary was the fact that Jane Grey had been proclaimed at Dartford, thus making her Queen of England, and therefore justifying the death penalty for usurpation.

Addington Palace, long the residence of the Archbishops of Canterbury, was granted to its ancient owners, the Trecothicks, on consideration that at the coronation feast of a king they should serve up to him a mess of pottage. This curious custom dated from the days of William the Conqueror, who granted the manor to his cook, Tezelin. The custom was faithfully observed until the coronation of James II., when the owner of Addington was permitted to make a dish of "grouts" in the royal kitchen, and to carry it with his own hands to the king's table. The king was so pleased with the dish that he said no other monarch should be so favored and ordered that a small sum of money be paid to future kings in lieu of pottage.

Whenever Edward is crowned it will be the duty of Frank Seaman Dymoke, hereditary king's champion, to step forward, duly equipped, to challenge all who are bold enough to deny the king to be the lawful sovereign. The office of king's champion dates back to the coronation of William the Conqueror, who conferred upon Lord Marmion, of Fontenoy and Marmion, the title of king's champion, and with it the manor and barony of Scrivelsby, in Lincolnshire. The house and lands were held by "barony and grand serjeantry," the terms of the tenure requiring that at the coronation "the lord of the manor, or some person in his name, if he be not able, shall come well armed for war, upon a good war-horse, into the presence of our lord the king, and shall then and there cause it to be proclaimed that if any one shall say that our lord and king has no right to his crown or kingdom, he will be ready and prepared to defend with his body the right of the king and kingdom against him, and all others whatsoever." The title of king's champion descended in direct line from the lords of Fontenoy until the reign of Henry III., and then through the failure of heirs male the championship passed into the Ludlow family by the marriage of one of Marmion's daughters with Sir Thomas de Ludlow, whose granddaughter married Sir John Dymoke, in the reign of Edward III. The title and manor has remained in the Dymoke family to the present day.

Though the champion has not publicly entered Westminster Hall to make his challenge, since the coronation of George IV., he was ready within the precincts of the hall, at the coronation of William IV. and Victoria, in case he should be called on to fulfil the terms of his tenure. In both cases he had his white horse saddled and his armor ready to don at an instant's notice.

When the coronation of George IV. took place in Westminster Abbey, the ill-used Queen Caroline attempted to force an entrance into the Abbey to interrupt the cere-

mony; she reached the door leading to the cloisters, but found it locked. She knocked on it for some time but finally had to retire. More than one influential Englishman asked permission to challenge the King's right to be crowned without the Queen, but she declined to allow the sacrifice, for it would have meant imprisonment or death to the challenger.

Many changes have been made in the title of the sovereign of England as the centuries passed. In the days of the Heptarchy was first heard the title "*Rex gentis Anglorum*," but the style King of England was first used by Egbert in 828. King John, at the end of the twelfth century, was the first to use the pronoun "we" in his communications with his subjects. The monarch is still designated "Defender of the Faith," a title conferred by Pope Leo X. upon Henry VIII., in recognition of a theological polemic against Luther which the much-married king had written. When Henry renounced Romanism and declared that the Pope had no power or jurisdiction over him, Pope Paul III. revoked the permission to use the title, but the King, much annoyed, caused an act of Parliament to be passed (35 Henry VIII., cap. 3), which annexed to the Crown of England forever the style of "Supreme Head of the Church" and "Defender of the Faith."

The best authorities, such as the "Encyclopædia Britannica," state that it is under the above-mentioned act that the title of *Fidei Defensor* has ever since been used, but that statement cannot be correct, for the 1 and 2 Philip and Mary, cap. vijii., sec. 20, repealed the entire act of King Henry in the following emphatic words:

"Act for the ratification of the King's Majesty's style shall henceforth be repealed, frustrate, void, and of none effect."

The title of *Fidei Defensor* has never been revived in any English Act of Parliament, and must, therefore, still depend for its right to be used on the Pope's bestowal. When Mary came to the throne, Cardinal Pole was

sent as Papal Nuncio, and in pronouncing the absolution over the kneeling King, Queen and entire Parliament, he removed, in the Pope's name, all "censures, judgments and pains," and it was soon evident

and in the preface to the acts of the second session the full titles of the monarch are set forth in these words:

"Acts made at a Parliament begun and holden at Westminster the one and twentieth



CORONATION CHAIR.

that it was held the Pope's bar to the title was one of the censures removed. It was customary in those times to print the whole of the acts of a session in one continuous roll, and preface them with the full style and title of the King. In the preface to the acts of the very session in which the act of King Henry was repealed, the title cropped up,

day of October, in the 2 and 3 year of the reign of our most Gracious Sovereign Lord and Lady, Philip and Mary, by the Grace of God King and Queen of England, France, Naples, Jerusalem and Ireland; Defenders of the Faith; Princes of Spain and Sicily," etc.

It was Henry VIII. who first adopted the title King of Ireland instead of "Lord."

It was not until the union of England and Scotland in the reign of Queen Anne that "Great Britain" came into use. When the act of union was passed and Ireland lost its legislative independence, it was ordered that the royal title should be: "*Georgius Tertius, Dei Gratia, Britanniarum Rex, Fidei Defensor.*" This was the first time the long-prized title, "King of France," had been dropped, and this was only one hundred years ago (1801). On the 21st of January, 1837, Hanover was dropped from the Queen's style when she came to the throne, no woman, according to the Constitution of that country, being eligible to reign. Another change was made in 1876 when Queen Victoria was proclaimed Empress of India.

Certain isles and even towns still have the right to be mentioned in any proclamation which requires the king's signature, though this has not been insisted on except on very rare occasions. The proclamation of King Edward VII., "requiring all persons being in office or authority" to continue in the execution of their duties, specifies as the places to which this shall refer as: "Our United Kingdom of Great Britain and Ireland, Dominion of Wales, Town of Berwick-upon-Tweed, Isles of Jersey, Guernsey, Alderney, Sark or Man, or any of Our Foreign Possessions, or Colonies, or Our Empire of India."

The oath which the new king will have to take on his coronation is the one prescribed by statute (1 Will. and Mary, st. 1, c. 6.) with a slight modification on account of the disestablishment of the Irish Church. It had been found that prior kings had tampered with the oath, and there is in existence a copy of the oath sworn to by Henry VIII., interlined and altered with his own hand. To prevent any such changes in future the wording of the oath was established by statute.

He will take his place in a chair before and below the throne. Then the Archbishop of Canterbury, accompanied by the high officers of the State, presents him to the people to receive their homage, which is rendered by the boys of Westminster School. This is

called "the recognition." Then follows the oblation of gifts on the altar; then the Litany is chanted, and the Communion office commenced. After the Nicene Creed the coronation oaths are taken.

The Archbishop of Canterbury will demand:

"Sir, is your majesty willing to take the oath?" To which Edward will reply: "I am willing." Then the Archbishop will put these questions, a printed copy of which, together with the necessary responses, will have been given to the king:

"Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland, and the dominions thereto belonging, according to the statutes in Parliament agreed on, and the respective laws and customs of the same?"

The King: "I solemnly promise so to do."

"Will you, to your power, cause law and justice, in mercy, to be executed in all your judgments?"

"I will."

"Will you, to the utmost of your power, maintain the laws of God, the true profession of the gospel and the Protestant reformed religion, established by law? And will you maintain and preserve inviolably the settlement of the united church of England and Ireland, and the doctrine, worship, discipline and government thereof, as by law established within England and Ireland, and the territories thereunto belonging? And will you preserve to the bishops and clergy of England and Ireland, and to the churches there committed to their charge, all such rights and privileges as do, or shall appertain unto them, or any of them?"

"All this I promise to do."

The king then goes to the altar, and laying his hands upon the Gospels, takes the following oath:

"The things which I have heretofore promised, I will perform and keep, so help me God."

The king then kisses the book and signs the oath.

After the taking of the oaths comes the

anointing and the vesting of the sovereign with the Episcopal insignia, the alb, the stole and the pallium. The stole is the insignia of priesthood; only an Archbishop, or spiritual head of the church, can wear the pallium.

The spurs, sword of state, and the sceptre are next presented. The coronation follows and then the enthronement and homage. Lastly the Communion Office is completed. Should Alexandra be crowned queen consort she will be anointed, crowned and enthroned immediately after the king's enthronization is completed, and she will be conducted to her own throne on the king's left hand, the royal pair receiving the sacramental bread and wine together.

The coronation takes place in the Chapel of Edward the Confessor, Westminster Abbey, the king sitting on the original coronation chair, the queen consort on that made for the coronation of William and Mary.

The coronation chair has been in use for centuries. In the seat of the chair is the "stone of destiny" upon which the kings of Scotland were crowned since the beginning of the sixth century, and prior to which time it had been in use for the same purpose in Ireland for at least a thousand years, and as many claim, from the time it was taken into Ireland from Bethel, where it had been set up by Jacob for a pillar. (Genesis xxviii, 18.) The history of the "stone of destiny" can be traced back clearly for two thousand years.

After his coronation the King is entitled to many privileges and perquisites, one of which is the right to the head of every whale caught on the coast of his kingdom. The tail goes to Queen Alexandra, the object of the division being to guarantee that the Queen's wardrobe shall be furnished with whalebone. The King is entitled to every sturgeon brought to land in the United Kingdom; a law which is evaded by astute fishermen taking the sturgeons to some foreign port and re-shipping them to England. At the coronation and every anniversary thereafter the King is entitled to re-

ceive from divers persons a tablecloth, worth three shillings, two white doves, two white hares, a catapult, a pound of cummin seed, a horse and halter, a pair of scarlet hose, a curry-comb, a coat of gray fur, a nightcap, a falcon, two knives, a lance, worth two shillings, and from his tailor a silver needle.

When Henry VI. returned from the coronation in France, at the conduit in Cheap were formed "several welles — the Well of Mercie, the Well of Grace, and the Well of Pitie — and at each well a ladie, standing, administered the waters to all who asked, and these waters were found to be wine. About these wells were set various trees in full leaf and fruit, all heavilie laden with oranges, almonds, pomegranates, olives, lemons, dates, quinces, blanderells, peaches, costards, wardens and plums."

When Edward VI. was crowned he had to stop the procession for a considerable time to watch the antics of a foreign rope dancer whose rope was stretched from St. Paul's steeple downward to a great anchor near the gate of the Dean's house. The dancer came down the rope from the top of St. Paul's headforemost, kissed the king's foot and then ran up again and turned somersaults and danced and performed for the space of half an hour.

When Queen Mary passed through the city for her coronation the Lord Mayor had engaged a Dutchman to stand on the weathervane on the top of St. Paul's steeple, holding in his hand a streamer five yards long, which he waved about. Then he stood on one foot on the weather vane and afterwards knelt down on it. The city paid him for this performance the sum of £16 13s. 4d.

At the coronation of Edward VII. it is not likely that ropewalkers or acrobats will be engaged by the city, but there is no doubt that brilliant illuminations and plenty of bunting will testify to the fact that though the queen may be mourned, a live king is of more advantage to trade than a dead queen. The queen is dead! Long live the king!

A NEW DEPARTURE IN THE PROFESSION.

NEW YORK, June 1, 1901.

JOHN SMITH, Esqre.,

Dear Sir:—We are sending to our clients, many of whom are too busy to go to law, a very complete service in the way of a Daily Law Letter. The letter is purposely made of a size that will conveniently fit any wastebasket of the usual dimensions, while the paper is of a texture remarkably soft and pliable and therefore well adapted to the use of gentlemen who shave themselves. These letters will be sent free of all expense to those who drop us a line requesting them and at the same time enclose \$200 in stamps.

We enclose herewith our letter for June 1st, 1901. Do you need such service?

Very truly yours,
FLASHIE & LIGHT.

P. S.—We request that, if convenient to your good self, the stamps sent be uncanceled, as we have had some difficulty in persuading the postal authorities that cancellation does not appreciably affect the intrinsic value of the engraving.

NEW YORK, June 1, 1901.

JOHN SMITH, Esqre.,

Dear Sir:—We have to report that while business continues only moderate, many houses are showing new styles in Trusts and Combinations that are likely to attract out of town buyers. Last Wills and Testaments are beginning to move, although the late spring has kept things a little sluggish in this line. With the coming of milder weather and the buoyant discarding of overcoats, which usually occurs this month, we shall expect to see Probates increase to their customary proportions. Already the spring demand for divorces is beginning to be felt,

and there is reason to think that, when the discussions of family plans for the summer are once fully launched, this line will quickly assume its dominant position in the trade of this season.

Spot advice is dull. The market seems to be over-supplied with inferior grades, largely due to the fact that Reform Committees and the Clergy, have recently opened up several lines which were badly damaged by the recent election and were generally supposed to have been abandoned to the underwriters.

Negligence suits have fallen off somewhat, since people have grown accustomed to the loss of friends and relatives in this way, ranking the trolley with pneumonia or any other act of God. This line, it may be said, is likely in the future to be handled largely, if not entirely by Probate houses.

The large demand for Libel suits continues unabated, indeed, if anything, it is on the increase; our own theory of the cause of this being that there is less reputation than ever before and the less reputation a man has the more strenuous he is in his endeavor to protect what little the newspapers have left him.

In a general way, our advice to our clients is to lie low for the present and, while not abandoning lines of litigation already begun, not to open any new lines, until a quick recovery is almost assured. Public confidence in human testimony has been rudely shaken by Wall Street denials, and until it is re-established, disagreements of juries are more likely to be the rule than the exception.

Yours very truly,
FLASHIE & LIGHT.

N. B.—For terms upon which the above service can be regularly obtained, see our personal communication sent herewith.

GARDENING.

BY R. VASHON ROGERS.

"GOD ALMIGHTY first planted a garden; and, indeed, gardening is the purest of human pleasures." Many have been the lawyers who have loved to delve, to "wind the woodbine round the arbor, or direct the clasping ivy where to climb," or to redress "the spring of roses intermixed with myrtle." "The wisest, brightest, meanest of mankind," Lord High Chancellor Bacon, "the most distinguished man who ever held the Great Seal of England," says that a garden "ought not well to be under thirty acres of ground and to be divided into three parts; a green in the entrance; a heath or desert in the going forth; and the main garden in the midst, besides alleys on both sides." In it he would have grass, and fountains, hedges and thickets of sweetbrier and honeysuckle, the ground set with violets, strawberries and primroses, "for they are sweet," little heaps decked with brilliant flowers and blooming bushes; flowers blossoming fair to the eye and plants that do best perfume the air. We cannot quote but simply advise you to read the whole judgment of this great immortal on the subject.

Bacon's immediate predecessor on the woolsack once, when opening Parliament, called the royal prerogative of establishing monopolies "the chiefest flower in Elizabeth's garden." He cultivated rhetoric and flowers of speech, not the soil.

What can be done to the canine, feline, equine, bovine and gallinacean animals of your neighbors that trespass upon your garden, disporting themselves on the flower beds to the destruction thereof and of all the angelic qualities in your character?

This is the first great question; and the second is like unto it, what can you do to your neighbor if you don't forgive him these trespasses?

You can "shoo" these animals, both quad-

rupedal and bipedal, out; but you had better not shoot them. In shooing cows or horses you may resort to any of the ordinary means which a prudent man would naturally use: you may set a dog on them, but beware of using a dog that from its size and habits a man of care and prudence would not employ. If, however, you have no reason to believe that the dog is needlessly fierce, and you use your best endeavors to restrain his ardor, you will not be responsible to the owner of the trespassers for any excess of zeal on the part of your canine assistant. (*Tobin v. Deal*, 60 Wis. 87: 50 Am. Rep. 345.)

As to what a prudent man would do you will probably never know, until a jury is called upon by the judge to decide whether the means used by you for driving out the marauding cattle were reasonable and necessary for the protection of your property. (*McIntyre v. Plaisted*, 57 N. H. 606.) The knowledge may come too late to be of any practical utility to you. *En passant* we would query whether the intelligence of the average juryman has increased since the arrival of the "Mayflower."

Necessary force may be used in expelling the trespassers, but both the common law and humanity forbid you inflicting any unnecessary injury upon them: you must not shoot or wound them. The owner of the animals may be liable to you for the damage committed, yet the *lex talionis* of the Mosaic dispensation does not apply—you cannot inflict injury for injury, nor wreak vengeance on the animals that only obey the instincts of nature in seeking food where it is most inviting. (*Snap v. People*, 19 Ill. 80: 68 Am. Dec. 582.) You may, however, get a little of the sweets of vengeance by turning them loose on the highway, and so let them wander away, or go to perdition: unless, indeed,

their presence in your potato patch is owing to a defect in your fences for which you are responsible. Legal duties and obligations fall far short of the golden rule, "Whatever ye would that men should do to you, so do to them." But be careful not to drive the kine further along the highway than is necessary to keep them off your land. (Tobin v. Deal, *supra*: Shearman & Redfield on Negligence, sec. 200.)

The owner of an animal is liable for the injuries which, by his negligence, he suffers it to commit—for that and nothing more. If he has done all that he, or any other man in his circumstances, reasonably could to prevent injury he is not liable. Every unwarrantable entry by a man, or his cattle, or other animals, on another's land is a trespass, and the man is as much responsible for the trespass of his animal as for that of himself: and the law presumes negligence against him if his animal trespasses; (but see below). The general rule of the Common Law is that a man is bound to keep his cattle on his own land: the owner of a garden is not bound to fence them out. However the Common Law is not common everywhere: oftentimes statutes enact that people must fence in their gardens to protect them from wandering kine and equines. If such a statute exists where you dwell you must govern yourself accordingly: it abrogates the Common Law rule. (52 Ill. App. 200.)

The owner of a cow may be liable for her voracious appetite and her hoof prints even though a stranger turned her out of her own proper pasture on the highways. (Noyes v. Colby, 30 N. H. 143.) The owners of buffalo bulls, whether tame or wild, are responsible for their trespasses. (81 Ill. 403: 24 Mo. 199.)

If you are fortunate enough and active enough to catch the animal in the very act you can distraint it for *damage feasant*, and hold it (subject to the rules and regulations duly provided either by Common Law or statute) until the owner has given you satisfaction for all the damage done: should he

fail to do this you can in due time sell the animal and pay yourself. (Am. & Eng. Enc. Law s. v. Animals.)

As to trespassing cats, dogs and chickens, you must not kill them if they are only running about and doing no damage: that is quite clear. Even if they are doing damage it is, as a rule, not lawful or wise to kill them. Your safest plan is to sue their owners for the injuries you have sustained. They will probably be held liable to you for your losses: although it is not quite clear that the law will presume negligence in the owners from the simple trespassing of these small fry as it does in the cases of horses and cows. (Matthews v. Fiestal, 2 Ed. Smith, 90: Am. & Eng. Enc. of Law, s. v. Animals: Vanluven v. Syke, 4 Denio 127: Dunckle v. Kocker, 11 Barb. 387: Reed v. Edwards 17 C. B. [N. S.] 245.) If a dog is on your ground and you fear he will kill your hens you may take his life, if he is worth less than your chickens: or if you find your neighbor's cat in your poultry yard and you cannot otherwise save your birds you may kill the cat. But for a playful rush through your strawberry patch or amatory dances over your flower beds you must not take their lives. (Anderson v. Smith, 7 Bradw. 354: Hodges v. Cansey, 48 L. R. A. 95: Harris v. Eaton, 37 Atl. Rep. 30.) Once upon a time a shopkeeper spread some poison on bread and cheese and placed it under his counter for the purpose of destroying rats; a strange dog came wandering round behind the counter, and ate the bread and cheese, and ate no more, neither did he trespass any more. Nor had the merchant to pay anything to doggy's master. *Verbum sat*. There are vermin in the garden that you have a perfect right to poison. (Stansfield v. Boling, 22 L. T. Rep. [N. S.] 799.)

Apropos of cats, but not of gardening, do you remember Miss Moore's \$75 valuable cat of the seven-toed variety, with a domestic disposition, and the poetical defence of its murderers by the Roman (N. Y.) poet laureate, D. F. Searle, Esquire? Here is part

of the answer to the complaint for the unlawful and wilful and wicked taking away and killing the cat:—

This maiden plaintiff's Thomas cat
Was filled with bad propensity,
To prowl and fight, and scratch and fight,
And howl with great intensity.

The feline *ferae naturae*
Would go with great velocity
Not after rats, but neighbor's cats,
And claw them with ferocity.

He was a mangy flea-bit thing,
And mingled with bad company;
No high-born cat aristocrat,
But nasty, vile and vicious he.

His sire was mean and mean his dam,
And damned throughout eternity
By neighbors sad, and neighbors mad,
Whose damns meant not maternity.

A nuisance was this pesky beast,
Immoral, lewd and profligate;
'Twas his delight, both day and night,
His progeny to propagate.

After this revelation of the character of Seven-toed Tom, Miss Moore accepted fifty cents and costs. (55 Alb. L. J. 193.)

As to chickens it is a very common thing to kill, or try to kill, one's neighbor's poultry because of their scratchings, but it has not crystallized into a custom of the country so as to exempt you from liability for so doing. It is a great satisfaction to a gardener to toss dead chickens into the owner's yard or use two or three to enrich a hot-bed, but the amusement (if discovered) may cost the value of the hens, even though the owner has been frequently warned of the probable consequences of their continued depredations, and requested to keep them at home. (Clark v. Kilcher 107 Mass. 406.) If you can catch them *in flagrante delictu*, and your loss is likely to be greater than their value, you may slay with impunity, perhaps. (Anderson v. Smith, *supra*.)

That wise law-giver, Howel the Good, of

Wales, ordained that if one found geese in his corn, he might take a stick as long as from his elbow to the end of his little finger, and as thick as he chose, and he might whack them as hard as he liked, so long as they remained among the corn: but he had to pay for any he slew outside the corn patch. If a man caught a hen in his flax garden he might detain her until the owner redeemed her with an egg: if it was the "noble chanticleer" that was caught the person who suffered damage might either cut off one of his claws and let him go, maimed and halt, or else he could demand an egg for every wife the male bird had at home.

In Illinois a man found to his cost that he could not kill trespassing turkeys, while in New York another one discovered that the destruction of invading geese was equally disastrous; in Connecticut a man scattered poison over his ground and gave notice of the fact to his neighbors, yet he had to settle for the death of hens who intruded on his land, ate of the poison and died. (Reis v. Stratton, 23 Ill. App., 314; Matthews v. Fristel 2 E. D. Smith, 90; Johnson v. Patterson, 14 Conn. 1.)

Mr. Justice Bailey once decided that if pigeons came upon his land he might kill them, although he could not make the owner of the birds recompense him for the damage done. (Hannan v. Mockett, 5 B. & C.)

About a decade ago two ladies went to law about snails; the lady living on one side of a wall complained that the lady on the other side allowed her snails to crawl over the wall and damage her dahlias. The defendant contended that a snail is "an elusive beast" and cannot be controlled, and that the flowers were damaged by the complainant's own snails: and just as the lawyers were expecting to have a nice point decided the ladies kissed and made friends.

Probably after all this you feel that on some matters you have, perhaps, "some shallow spirit of judgment: but in these nice sharp quilllets of the law, good faith, you are no wiser than a daw."

A tree belongs to the owner of the land on which it grows; however, a tenant owns the bushes in his garden. You ask what is a tree, and what's a bush or shrub?

The courts have given an answer. A tree is a woody plant, whose branches spring from, and are supported upon a trunk, or body; while a shrub is a low, small plant whose branches grow directly from the earth without any supporting trunk or stem; undergrowth are plants growing under or below greater plants; because trees are young, of varying heights and thicknesses, they are not "shrubs, undergrowth nor bushes." A "tree," without words of qualification, means a standing tree. You do not commit larceny at Common Law, no matter how many trees you unlawfully carry off; nor can you bring an action for slander against any one who accuses you of stealing a tree. Because a tree is part of the realty. (*Clay v. Postal Tel. Co.* 70, Miss. 411; *Idol v. Jones*, 2 Dev. [N. Car.] 162.)

If a tree grows near the boundary line between you and your neighbor, and its roots extend into his soil and its branches reach over into his yard, the property in the tree belongs to you as the owner of the land on which it was first sown or planted. A man cannot limit the distance to which his tree will send its roots. (*Berriman v. Peacock*, 9 Bing. 384; *Holder v. Coatts*, 1 Moo. & M. 112; *Hoffman v. Armstrong*, 48 N. Y. 201; *Lyman v. Hale*, 11 Conn. 177.) If a tree grows directly on the line, partly on his land and partly on yours, then you and he own it and its fruit in common, and you must behave in a neighborly way about it; if one cuts it down or misuses it he will have to settle with the other in damages; or if the wrong-doer is seen in time he can be restrained by an injunction, and this though he is only doing as he has already been done by. (*Dubois v. Bear*, 25 N. Y. 123; 12 N. H. 45; 34 Barb. 543; *Quillen v. Betts*, 39 Atl. Rep. 595.)

If a tree, standing wholly in your garden, chooses to stretch its roots into your neigh-

bor's ground and draws thence nourishment, and if it temptingly stretches forth its branches laden with luscious fruit over the dividing fence, still the people next door have no right to pick the fruit. (*Lyman v. Hale*, 11 Conn. 177; *Skinner v. Wilder*, 38 Vt. 105; 25 N. Y. 126.) Even if the apples drop from your tree on to the road the passers-by have no right to appropriate them against your wishes. If you can pick the fruit of your tree hanging over your neighbor's fence without trespassing, you have a right to do so, and if neighbor Smith, Jones or Robinson interferes to stop you by force you can bring him up before the authorities for assault and battery. In one case a lady was standing on a fence picking cherries which hung over into her neighbor's land, the neighbor ordered her to stop, but knowing her rights she persisted, and a scuffle ensued, in which her arm received some bruises; and for this the ungallant man had to pay her \$1,000. If some fruit falls into the next yard while you are picking it, apparently you may go and pick it up (if you are mean enough to do so), of course, doing no avoidable damage. (*Hoffman v. Armstrong*, 48 N. Y. 376; 12 Vt. 273; 113 Mass. 376; *Anthony v. Haney*, 8 Bing. 192.)

The courts hold that the maxim *Cujus est solum, ejus est usque ad coelum*, has its full effect without extending it to anything disconnected with or detached from the soil, like fruit on overhanging boughs. Hale picked six bushels of pears off the branches that hung over his land some eight feet up in the air; the tree was four feet from the line. For twenty-five years Lyman had picked the fruit from those branches; the Court decided that Hale was not a joint owner because two roots had come into his land, and that he was liable in trespass for taking the fruit. In *Skinner's* case the trouble was over an apple tree and with the like result.

A most absurd case was where the Court of Chancery, in England, was appealed to to compel a man to give back a cherry stone,

and that high court actually ordered that the identical stone be handed back—true, the stone was carved and engraved in a marvelous manner; but that formidable and versatile tribunal was like a Nasmyth's steam-hammer, nothing was too big and nothing too small for it to tackle. (Pearue v. Lisle, Ambl. 77.)

If when pruning your fruit trees you let the clippings fall on the neighbor's land you cannot get over the fence and take them away, unless, indeed, you had unsuccessfully used your best endeavors to prevent them falling; in fact you may be liable in trespass for the effects of the law of gravitation attracting the loosened branches on to the next man's property. If Providence sends an unexpected wind and your tree falls onto the next lot you may enter and remove it. (Bacons Abr. Trespass, F.)

You cannot kill your neighbor's tree because its shade or its roots are hurtful to your plants. But if you have suffered actual damage by them you may dig down and cut off the roots, or you may cut off the overhanging branches, especially if the owner of the tree does not do so when requested. You must not cut them before they overhang, because you fear they will do so. If you cut them off you must be very careful not to use either the roots or branches, otherwise you may have to pay their value. If your neighbor has a deadly upas tree on his lot and its branches hang over your fence and cast baneful shadows, killing your flowers, you may probably have an action for damages against him; but the courts have said that it would be intolerable to allow an action in the case of a harmless tree overshadowing your garden, unless, indeed, the injury done you is real and substantial. If your neighbor's tree sends its roots into your well and poisons the water you can cut them off. (Am. & Eng. Enc. of Law, s. v. Tree; Lonsdale v. Nelson, 2 B. & C. 300; Countryman v. Lighthall, 24 Hun. [N. Y.] 405; Buckingham v. Elliott, 62 Miss. 296.)

If you have a tree growing near your

boundary line that is of poisonous or noxious nature, like the yew, that "unsocial plant that loves to dwell 'midst skulls and coffins, epitaphs and worms," you must be very careful not to let any clippings fall from it into your neighbor's field, otherwise, if his cattle or horses eat thereof, and are injured, you will be liable; in fact, you will be responsible even if his animals browse on the branches and leaves overhanging the fence and are hurt thereby. (Crowhurst v. Am. Bur. Board, 4 Ex. Div. 5; Wilson v. Newberry, L. R. 7 Q. B. 31.)

When fruit or ornamental trees are destroyed the owner may recover as damages, not merely the value of the tree when severed from the land but, the measure of his damage is the diminished value of the land, that is the difference in the value of the realty before and after such destruction. In many States specified penalties are imposed for the unlawful cutting down of trees. (Dwight v. Elmira & C. R. R., 132 N. Y. 199; Whitbeck v. N. Y. C. R. R. 36 Barb. 644; St. Louis, &c., v. Ayres, 67 Ark. 371; Wichita Gas, &c., v. Wright, 59 Pac. Rep. 1085.)

If you are working a rented garden and one injures your trees the landlord can sue for the damage done to the body of the tree, while you can bring an action in respect to its shade and fruit. If one comes upon your rented garden and cuts down and carries away a tree, you can sue for the trespass and the landlord for the carrying away. (Starr v. Jackson, 11 Mass. 519; Shadwell v. Hutchinson, 4 C. & P. 333.)

If your garden is only a rented one you must not sow it with pernicious seeds, and you must be careful not to dig up strawberry beds or asparagus beds that are actually yielding fruit after their kind. (Pratt v. Brett, 2 Madd. 62; Wetherell v. Howells, 1 Camp. 227.) And if you plant hedges and borders or trees you must leave them when you go, unless you have made a special bargain with your landlord; or unless you are a professional gardener and have planted these

things, or shrubs or trees, for the purposes of trade. (*Empson v. Soden*, 4 B. & Ad. 655; *Wyndham v. Way*, 4 Taunt. 316; *Wardell v. Asher*, 3 Scott. N. S. 508.)

What is fruit and what is a vegetable? A discussion once arose between an importer and a collector of customs over tomatoes, the former said the tomato was a fruit, and so came into the country free, the latter said it was a vegetable and should pay duty. The Supreme Court of the United States was called upon to settle the question. One judge said, "Vegetables are such things as are eaten after the soup and fish, along with the meats; while fruits are eaten after the meats as dessert. Therefore, because tomatoes are eaten after the soup and fish, along with the meats, they are vegetables." (Supreme Ct. Reporter, Vol. XIII, No. 25.) This conclusion may be right, but is the definition accurate? If currant jelly is eaten with mutton, is currant jelly therefore a vegetable? or are cranberries vegetables because gobbled with the Christmas gobbler? or is the golden pumpkin a fruit? It often appears in pie form at dessert.

The "bean" is a vegetable which all patriotic Massachusetts lawyers should cultivate, not only because, in Boston, they are sometimes eaten with pork, and according to Mr. John Fiske the early Bostonians owed much of their liberties to a stray pig; but also because in those innocent days of yore the freemen yearly chose the assistants by ballots of beans and Indian corn; the latter grain was to elect, the former, to reject. (*Book of Gen. Law & Lib.* 1649; the *Beginnings of New England*, p. 106.)

One of the most aggravating annoyances to the gardener—be he amateur or professional—results from the purchase of bad or impure seeds, or seeds not asked for. If a dealer sells an article marked and put up under a certain name, and so billed to the purchaser, this amounts to an absolute warranty or guaranty that the seeds are what they were bought and sold for; and if they turn out otherwise the gardener has his rem-

edy against the seller for the money he paid for the seed, if not for something more. And this is so even though the seedsman was perfectly honest and bought the seed for exactly the kind he sold them for. (*Allan v. Lake*, 18 Q. B. 560.)

But what a poor satisfaction for the loss of time, and work, and profit, and blighted hopes, is the mere recovery of the money paid. Fortunately it is now generally held that when a seedsman expressly warrants his wares to be of a particular kind or variety, or when he sells them without any reservation or limitation, and thus creates an implied warranty, he is liable for all the damages directly following from the gardener's use of the seed. A man once bought "early, strap-leafed, red-top turnip seed," and sowed it; he waited until the time of harvest and then found he had "Russia late," a variety unsaleable in the market and only fit for cattle. He recovered from the seedsman the difference between the value of the crop which he had had and that which he expected to have, even though the seller had honestly thought the seed was as represented. (7 *Vroom* 262; 9 *Vroom* 496; 34 *N. Y.* 634.) If the seed turns out absolutely worthless, and your crop of no value, you can make the dealer pay not only the cost of the seed, but for all the labor incurred and the fair profit you would have made had the seed been as represented. This was decided in a case where one had bought what was represented as "Van Wycklen's early flat Dutch cabbage;" and Van Wycklen had never grown it, and the plants would not head. (*Van Wyck v. Allen*, 69 *N. Y.* 72.) In an English case where seed was bought as "Chevalier seed Barley," and it was not so, the purchaser was allowed as damages the difference in value of the two crops. (*Randall v. Raper*, *El. Bl. & El.* 84.)

One can understand the contrariness of things inanimate and why so many good men are unsuccessful with their gardens, and grow profane instead of cabbages, plant raspberries and gather tears, if it is true as

old Burton, of melancholy fame, says, that "evil spirits and devils are everywhere: not so much as a hair breadth empty in heaven, earth, or waters above or under the earth." They come, too, these evil ones, in divers forms; sometimes as grassy pillars and caterhoppers (as the parson put it) innumerable, eating up the fruit of your vines and your cauliflowers. If you really want to know how to deal with such enemies in a legal and lawful way, consult the seventh, tenth and eleventh volumes of that "entertaining magazine for lawyers," *THE GREEN BAG*, and there you will find full accounts (pp. 323, 540 and 33, respectively) of how they were disposed of by legal process when the faith of the world was stronger than it is now-a-days; how they were summoned, tried, condemned, banished.

Sometimes Jupiter Pluvius sleeps like Baal of old and the clouds withhold their rain so long that plants and flowers fade and fall, then becomes evident the great advantage of the modern hose and waterworks; yet even

these latter have been known to prove but broken reeds. A gardener near Montreal got a judgment for \$2,500 against a town where he lived, and which had accorded to the Montreal Water & Power Company the exclusive right of supplying the inhabitants of the municipality with water. The company failed to carry out its contract, and the gardener had no water for his greenhouses and nurseries, and thousands of his rose-bushes died and numbers of other rose-trees and other plants nearly died, and it cost him a lot of money to prevent the entire loss of his plants. The Superior Court gave him judgment against the town; the town to be indemnified by the Water Company.

While talking about rain and gardens 'tis well to remember that St. Swithin, who is so much thought of in England and Scotland during July and August, was for many years Lord Chancellor of England, and probably taught King Alfred all the law that illustrious sovereign ever knew.

THE SUPPLANTING OF THE BREHON LAWS IN IRELAND.

By JOSEPH M. SULLIVAN.

THE Brehon Code had existed in Ireland for ages before the coming of St. Patrick. Professor O'Curry, a celebrated antiquarian, in his great work entitled "Senchus Mor" or the "Great Law Compilation," tells us in his introduction: "What did not clash with the Word of God in the written law and the New Testament, and with the consciences of the believers, was confirmed in the laws of the Brehons by Patrick, and by the ecclesiastics and chieftains of Erin; for the law of nature had been right, except as to the faith, and its obligations and the harmony of the Church and people." For more than a thousand years this Brehon Code set-

led the social relations and governed the conduct of the Irish people. It was like the common law in this respect, it had no statutes, but was composed wholly of the decisions of the Brehons. Anciently the Brehons or judges of the several provincial kings determined all controversies brought before them, and their general axioms were the "leges brehonicae." Whereof, says Bishop Nicholson, "There are several specimens to be seen in our public and private libraries." The most complete collection in his time was in the Duke of Chandos' library, but not perfect; it contained twenty-two sheets and a half, close written, in two columns, not

very legible and full of abbreviated words. In criminal cases the Brehons had an eleventh part of all the fines. This might sometimes amount to a considerable sum; for, among the Irish, murders, rapes and robberies, were only subject to a pecuniary commutation, which was called in Irish "eric." The Brehons were divided into several tribes, and their office was hereditary, yet their laws were wrapped up in an obscure language, intelligible only to those who had studied in their schools in order to succeed the family Brehon.

The first certain known instances of the supplanting of the Brehon Laws in Ireland occurred in 1541, when the bishop of Cork and Ross, the bishop of Waterford, together with the mayors of Cork and Youghal, were appointed by the Lord Deputy, Sir Anthony St. Leger, and the Privy Council, judges and arbitrators in Munster, who should hear and determine all controversies among the natives in the future instead of their Irish Brehons. Several of the Irish chiefs agreed to submit their disputes to the persons above mentioned. The suffrain of Kinsale, Philip Roche, Esq., and William Welch, Esq., together with the dean of Cloyne, are mentioned in the commission. Any three of them to hear and determine these disputes, the Earl of Desmond to be always one.

In the Red Book of the Privy Council (vol. 1, p. 273) says Sir Richard Cox: "There are several indentures of submission of the Irish chiefs registered about this time. Those in the County of Cork were—the Lord Barry alias Barrymore, MacCarty More, the Lord Roche, McCarty Reagh, Teig MacCormac, Lord Muskerry, Barry Oge alias the Young Barry, O'Sullivan Bear, chief of his nation, and Sir Gerald Fitz-John, knight, on the one part, and Sir Anthony St. Leger, James, Earl of Desmond, Sir William Brabazon, vice-treasurer and treasurer of war, in behalf of the king, on the other part. These kind of submissions were also made in all the other provinces.

In 1570 the office of Lord President,

clothed with despotic power, was established in Munster. Sir John Perrot was the first to hold the office. The power of the Lord President was very great. They had not only to hear and determine all complaints throughout the province, as well guildable as belonging to the franchises of corporations, and might send for and punish any such officers against whom such complaint was made. They had commission of oyer and terminer, as well as of gaol delivery of the whole province, and might hold their courts when and where they thought proper, with power to execute martial law upon all persons who had not £5 of freehold or goods to the value of £10, and could prosecute any rebel with fire and sword, and, for this purpose, might array any number of the queen's loyal subjects. They could hear and determine complaints against all magistrates, and officers, civil and military, throughout the province of Munster, and the crosses and liberties of Tipperary and Kerry, and might punish the offenders at discretion. They had authority to put persons accused of high treason to the torture, and might relieve condemned persons. They had power to issue proclamations tending to the better ordering and regulation of the queen's subjects. Their chaplain was to be maintained out of the fines arising in the provincial courts. The Lord President's salary was £133 6s. 8d., with a retinue of thirty horse and twenty foot. He had 2s. per day allowed him for an under captain, and for a guidon and trumpeter 2s. each. He had a sergeant-at-arms to attend him, who carried a mace before him in the same manner as the Lord President of Wales had his borne; such sergeant-at-arms to apprehend all disobedient persons.

Thus the presidency court was a civil jurisdiction, equal within the districts to the Lord Lieutenant of Ireland, he being a kind of viceroy in every circumstance but in name. He had the power of life and death; could make knights, and was royally attended with guards, and had power by patents to com-

mand all the forces raised, or to be raised, in the province. The Earl of Orrery, in answer to articles exhibited against him before the House of Commons in England, said that the presidency court of Munster had an absolute jurisdiction to hear and determine any cause whereof it had cognizance, without being subject to any other court, and constantly proceeded to the determination of causes, notwithstanding certioraris sent from other courts to remove causes commenced there; and added that his predecessors had

imprisoned persons who brought such certioraris. (Orrery's Letters, vol. I.)

Not until the reign of James I. had the English law supremacy in Ireland. The use of the Irish language in court records ceased about the year 1619. The study of the Brehon Laws, dating back into remote antiquity, is extremely interesting because it furnishes the connecting link between the jurisprudence of the pagan and the enlightened legal procedure of the Christian.

THE STUDENT'S MOURNFUL COMPLAINT.

("FOR EXAMPLE, GENTLEMEN, IF A OWES B AND B OWES C.")

BY ROBERT MUNGER.

O WELCOME peaceful seventh day,
When from these friends I can be free
And flee their most insistent sway!
Why all this wrangling, friends, I pray,
This vain continual mystery;
Why don't the beggars up and pay,
If A owes B and B owes C?

There is no end that I can see,
The debts are old; let each, I say,
Just plead the Statute legally
And make the whole affair R. J.,
Heavens! if C had gone astray,
Whatever had become of me?
It is a thing to make one gray,
If A owes B and B owes C.

L'ENVOI.

Prince, on the road to Mandalay
I've friends who wait impatiently;
But stop, how can I get away
If A owes B and B owes C?



LORD CAMPBELL.

A CENTURY OF ENGLISH JUDICATURE.

IV.

BY VAN VECHTEN VEEDER.

THE COURTS OF APPEAL DURING THE FIRST HALF OF THE CENTURY.

THE right of appeal is a modern conception. Down to very recent times it was rigidly withheld save in a strictly limited class of cases; and even in those cases in which an appeal was allowed the appellate jurisdiction was administered on principles which were anomalous and irrational in the extreme. In common law cases only matters of error apparent on the record were reviewable, and no appeal lay on a motion for a new trial or to enter a verdict on a non-suit. No error lay upon a special case framed by consent without a trial, but only from a special verdict where the parties had arranged or the judge had directed at the trial a special statement of the facts; in other words the expense and delay of a useless trial were required as a condition of appeal. And even where appeal was possible the appellant was held to the strictest observance of all the difficult formalities involved in challenging the direction of a judge by means of a bill of exceptions.

The Exchequer Chamber, the intermediate court of appeal in common law, practically dates from 1832. The Court of Appeal in Chancery was not established until 1851. The final courts of appeal, the House of Lords and the Privy Council, are of great antiquity; but prior to the nineteenth century their judicial functions were of secondary importance. The appellate jurisdiction is almost entirely a creation of the nineteenth century. This late development may be explained in part, so far at least as the common law jurisdiction is concerned, by the efficiency of the trial courts.

The three great common law courts in banc administered the system then in force as well as any court could administer it. It was not until the break down of the common

law courts in banc that more liberal rights of appeal became necessary. Moreover, the House could at all times avail itself of the advice of the common law judges. This advice, it is true, they were not bound to follow, but, in fact, it was seldom overridden.

In chancery, until the creation of the Court of Appeal in Chancery, the situation was not so satisfactory; in fact, it could not well have been worse. The Chancellor sat alone on appeal from the Vice-Chancellor and from the Master of the Rolls (often his superiors in technical learning); and there was usually small satisfaction in pursuing an appeal to the House of Lords, because, owing to the defective organization of that tribunal, there, too, the Chancellor usually dominated. The advice of the chancery judges was not available, because the House had no authority to summon them unless, as rarely happened, they were also peers.

COURT OF EXCHEQUER CHAMBER.

A Court of Exchequer Chamber existed from the earliest times both as a court of error and a court of debate. As a court for debate it consisted of the assembled judges, presided over by the Lord Chancellor, and here matters of importance and difficulty were discussed before judgment was rendered in the court below (e. g. Calvin's case).¹ By 31 Edw. III., c. 12, it was con-

¹ It was in the Exchequer Chamber that the judges assembled when they were consulted by the king. These consultations were frequent in early times. The judges were consulted by Richard II as to his kingly power; by Henry VII as to whether the devolution of the crown upon him purged him of his attainder by Richard III; by Henry VIII as to whether on a bill of attainder a person need be heard in his own defence. The practice became so common that in 1591 the assembled judges volunteered some good advice on the subject of illegal commitments.

stituted a court of error from the common law side of the Exchequer, and in it sat the Lord Chancellor, the Lord High Treasurer and the judges of the other courts. In 1585 another court was created to take error from the King's Bench. It was composed of the judges of the Common Pleas and the Exchequer.

Both these courts were finally merged by statute (11 George IV and 1 William IV) into a court of appeal from all three common law courts, appeals from one court being heard by the judges of the other two. This continued to be the intermediate court of appeal in common law until the Judicature Act.

As thus constituted it was at times a most powerful court. Its practical operation was, however, somewhat restricted. Occupied with the labors of their own courts the judges were irregular in attendance. And the general satisfaction given by the common law courts in banc was evidenced by a limited right of appeal.

During the first half of the life of the court its most active members were Tindal and Parke; but valuable assistance was rendered by Denman, Patteson, Coleridge and Alderson. During the second period the active participants were Willes, Erle, Blackburn, Bramwell, Pollock, Wightman, Cockburn, Williams and Martin.

During the forty-five years of the court's existence it heard only about eight hundred appeals, and nearly two-thirds of these were heard during the last half of its existence. The Queen's Bench supplied the largest quota of these appeals, although the Exchequer was not far behind. Appeals from the Common Pleas were comparatively few in number.

Of the eight hundred judgments reviewed by the court, a little more than one-fourth were reversed—somewhat less than the usual proportion. During the first period the Queen's Bench was reversed most often and the Exchequer least. In the second period the Queen's Bench fared better than the Exchequer.

There was a remarkable consensus of opinion among the judges in this court, the number of cases in which there was a division of opinion being less than fifty.

HOUSE OF LORDS.

The importance of the House of Lords as a court of final review in civil actions is a matter of recent development. Its evolution as a court is somewhat as follows: After the break up of the Curia Regis and the establishment of the three courts of common law there remained in the sovereign a residuary power covering cases where the courts were not strong enough to do justice, or were deficient in rules applicable to the case, or were alleged to have decided wrongly. In time the King in Council (at first the Star Chamber, and latterly the Privy Council) became the tribunal for the determination of cases where, from the greatness of the offender, or the magnitude of the issue, the ordinary courts were inadequate to do justice.

The King in Chancery (by the Lord Chancellor) acquired exclusive jurisdiction in all cases where the rigor of the common law had to be relaxed by supplemental rules, and the appellate jurisdiction in case of error passed into the hands of the House of Lords.

The actual extent of the jurisdiction of the House was long a matter of controversy. Its common law jurisdiction in error, which was settled in the first year of Henry VII, was decisively vindicated in the case of *Ashby v. White*, 14, St. Tr. 695. Its appellate jurisdiction in equity was clearly recognized by the statute of 27 Elizabeth, c. 28, and has been unquestioned since the case of *Shirley v. Fagg*, 6 St. Tr. 1121. In early times the House claimed and occasionally exercised an original jurisdiction between party and party; but this claim was finally abandoned after the conflict over the case of *Skinner v. East India Co.*, 6 St. Tr. 709, in 1688. Jurisdiction over Scotch appeals dates from the act of Union of 1707. Irish appeals have always been heard in the House. In 1696,

and again in 1719, the Irish House of Lords claimed jurisdiction; this claim was allowed in 1783, but in 1800 it was finally taken away by the act of union.

Yet even late in the eighteenth century the House was only beginning to be regarded as a regular court of justice. Its composition remained uncertain until it was finally settled by statute under the Judicature Act. The original conception doubtless implied the judgment of the whole House assisted by the advice of the assembled judges. Of course the Lord Chancellor presided, and there were generally eminent lawyers among the peers who would presumably lead in the discussion. The reports of the judicial proceedings of the House prior to the nineteenth century are so meagre that it is impossible to ascertain the character of their discussions. The earliest report of their judicial proceedings by Shower (1694-1733)—a brief report of about fifty cases confined mainly to a statement of the issues and the actual judgment of the House—was considered by the House an infringement of its privileges. The same meagreness characterizes other reporters of the eighteenth century: Colles (1697-1713) and Brown (continued by Tomlins) (1702-1800). Hall states that in his day judgment was regularly given by the majority of voices. In 1689 we find the judgment below in the case of *Titus Oates* affirmed by the vote of thirty-five to twenty-three in opposition to the unanimous opinion of the assembled judges. The judgment of the Queen's Bench in the celebrated case of *Ashby v. White*, 1 Bro. P. C. 62, in 1703, was reversed in the House by a general vote of fifty to sixteen. Some of the other cases in which the lay peers participated were *Douglas v. St. John* (Lord's Journal, XXXII, 264), in 1769; *Alexander v. Montgomery* (Lord's Journal, XXXIII, 519), in 1773; *Hill v. St. John* (Lord's Journal, XXXIV, 443), in 1775; *Bishop of London v. Fytche* (Lord's Journal, XXXVI, 687), in 1783; and as late as 1806 lay peers voted in the case of

Lord Hartford's guardianship of Lord Seymour's daughter.

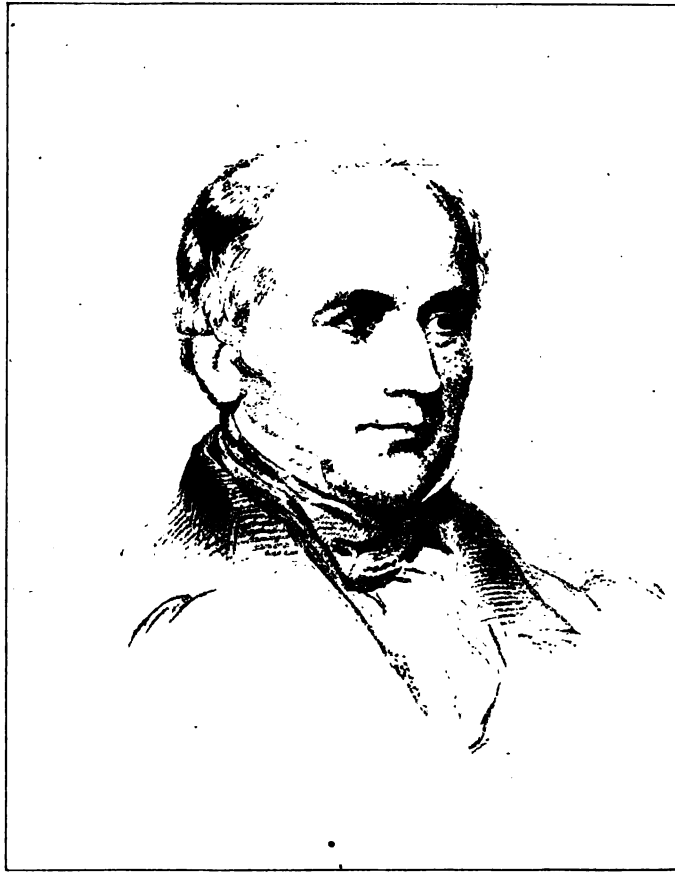
But the theory of final decision by a combination of lay and legal minds gradually broke down. Lay peers were, as a rule, little disposed to attend the hearing of purely private and technical cases; and they soon practically lost their right to sit even in cases of quasi-political and general public interest. The matter came to an issue in O'Connell's case, 11 Cl. F. 155, in 1844, when the lay peers, in deference to the Duke of Wellington, finally waived their right to vote. The last occasion on which a lay peer voted was the case of *Bradlaugh v. Clarke*, 8 App. Cas. 354, when Lord Denman, son of Lord Chief Justice Denman voted. Lord Denman had been educated for the bar, but he did not come within the recognized definition of a "law lord," i. e., one who had held high judicial office; yet the law officers of the government were of opinion that the vote was lawful.

The other component part of the composition of the ancient tribunal, the assembled judges, has also practically disappeared.

The right of the House of Lords to summon the judges at the beginning of each Parliament to be present for the purpose of assisting the House, when required, in the determination of legal questions, is of great antiquity. But, although the judges still receive this summons, they no longer attend unless specially summoned for a particular purpose. It seems to have been a common practice of the House during the eighteenth century to consult the judges; but the reports of that time give simply their judgment. During the first quarter of the nineteenth century Lord Chancellor Eldon and Lord Redesdale, who performed most of the judicial functions of the House, seldom called for the views of the judges. During the period from the retirement of Lord Eldon to the Judicature Act the judges were frequently consulted, and almost all the advisory opinions of the judges come within this period. Since the Judicature Act the judges have

been consulted in only four cases: *Mordaunt v. Moncrieff*, 1 Pr. & Div. App. 374, upon the question whether the statutory proceeding for dissolution of a marriage can be instituted or proceeded with either on behalf of or against a husband or a wife who prior

was subject to several objections. The judges were busy in their own courts and were irregular in responding. Moreover, the manner in which the House put questions of law, without regard to the form in which the questions arose, or to points



LORD LANGDALE.

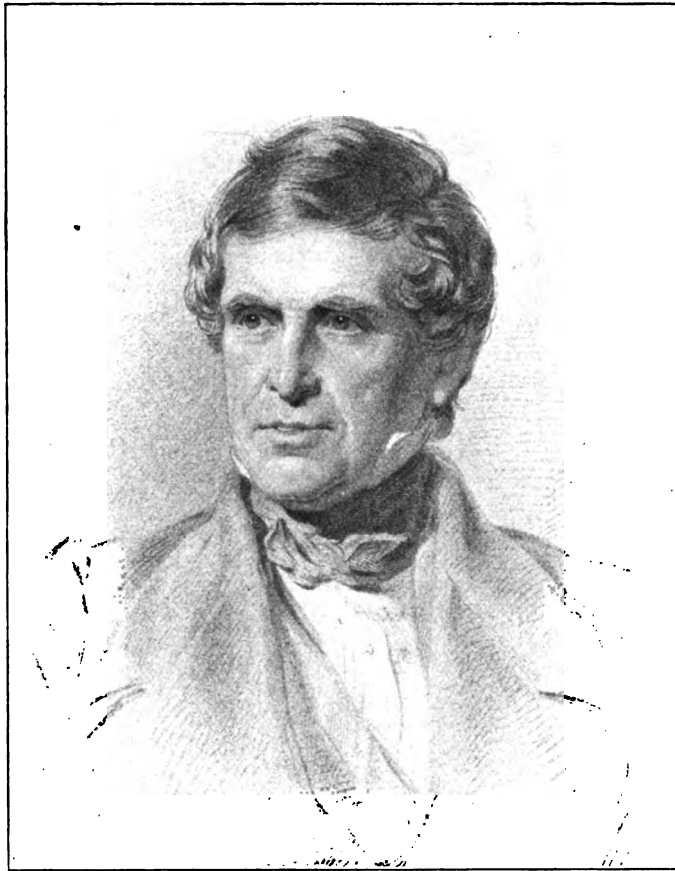
to the institution of such proceedings had become incurably insane; *Allison v. Bristol Marine Insurance Co.*, 1 App. Cas. 214; *Dalton v. Angus*, 6 App. Cas. 742, as to the right of lateral support for buildings; and the celebrated trade union case of *Allen v. Flood* (1898), A. C. 1. The establishment of permanent courts of appeal has obviated the necessity for such consultations.

In practice this method of consideration

actually raised often made it difficult for the judges to give a satisfactory answer. These difficulties were clearly defined by Justice Maule in *M'Naghten's case*, 10 Cl. & F. 199, where he hesitated to answer the questions propounded, "first, because they do not appear to rise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full an-

swers ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; secondly, because I have heard no argument at your lordships' bar or elsewhere on the subject of these questions, the want of which I feel

a constitutional question of great importance. Indeed, in the matter of the Westminster Bank, 2 Cl. & F. 192, the judges declined to answer on the ground that the question was "proposed in terms which render it doubtful whether it is a question con-



LORD LYNDHURST.

the more the greater are the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal cases." The practice of putting general questions might raise

fined to the strict legal construction of existing acts of Parliament." However, in the matter of the Islington Market Bill, 3 Cl. & F. 512, the judges gave their opinion on a bill pending in Parliament; and it will be remembered that the judges were called upon for their opinions on the law of libel when Fox's bill on that subject was pending in Parliament.

The judges are called upon simply to ad-

wise; the decision rests with the House alone. Lord Campbell expressed the accepted doctrine in *Burdett v. Spilsbury*, 10 Cl. & F. 413: "When your lordships consult the Queen's judges I do not at all consider that you are bound by the opinion of the majority, or even by their unanimous opinion, unless you are perfectly satisfied with the reasons which they assign for the opinion they give." Individual lords have taken a different view of their duty, noticeably Lord Wynford (*Atty. Gen. v. Winstanley*, 5 Bligh [N. S.] 144). Still there are only five instances in modern times in which the House has rendered judgment contrary to the opinion of a majority of the judges: *O'Connell v. The Queen*, 11 Cl. & F. 232, on the validity of a general judgment when some of the counts in an indictment are bad; *Jeffreys v. Boosey*, 4 H. L. 815, on copyright; *Unwin v. Heath*, 5 H. L. 513; *Hammersmith Ry. v. Brand*, 4 E. & I. App. 171, on the right to recover for damage necessarily resulting from the exercise of powers conferred by Parliament; and *Allen v. Flood* (1898), A. C. 1.

The House of Lords reports from 1827 to 1900 contain one hundred and twenty-five cases in which the judges have been called upon for advice. Of this number not more than a score are in any sense landmarks in legal history. Indeed, aside from the relative unimportance of most of these cases, it is difficult to understand upon what principle the House acted in determining when the judges should be assembled. For in twenty-four cases there was no difference of opinion from the beginning of the case in the trial court to its final conclusion in the House of Lords; and in fifty-eight cases the assembled judges were unanimous in opinion.

The form of judgment in the House is that of a motion, as in ordinary debates, recorded in the journal of the House. The House, unlike the Privy Council (*Cushing v. Dupuy*, 5 App. Cas. 409), holds itself bound by its own judgments. It also differs from the Privy Council in its privilege of summoning the judges.

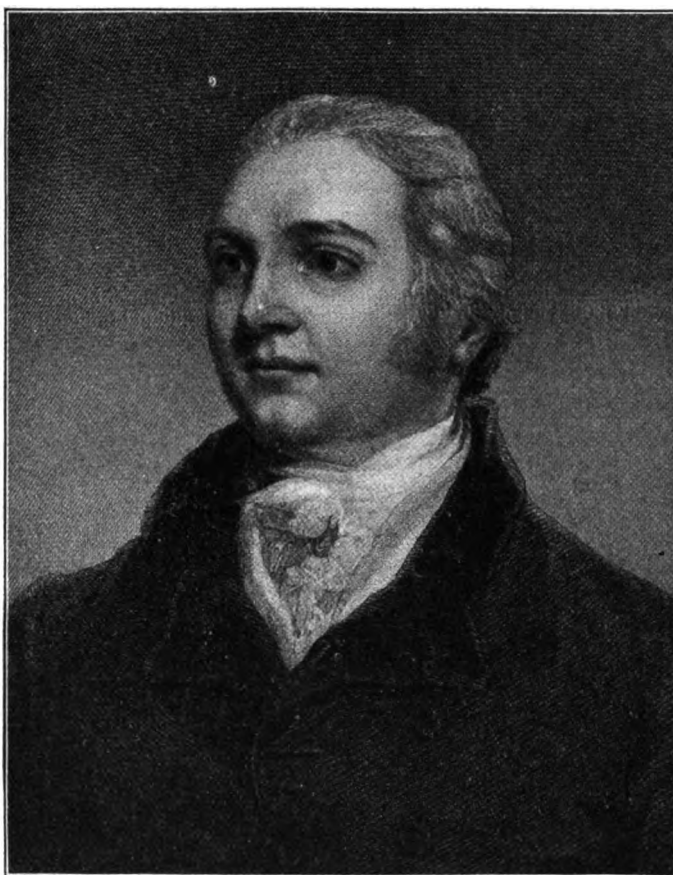
The reports of Dow (1812-18) and of Bligh (1819-21) covering the long chancellorship of Lord Eldon, indicate the defects of the House as an appellate tribunal. During this time the judicial functions of the House were performed by Lord Eldon, assisted from time to time by Lord Redesdale, the Irish Chancellor. So far as their attainments in equity were concerned these two eminent judges left little to be desired. But Eldon often sat alone. Inasmuch as three peers were required to constitute a House, it often became necessary to catch a bishop or two, or press one or more lay peers into service, to act as dummies, and then the Lord Chancellor, gravely assisted by these two mutes, finally disposed of appeals from his own decisions. As the Earl of Derby said to his colleagues in 1856, they were upon such occasions "like the lay figures which are introduced in a painter's studio for the purpose of adding to the completeness of the judicial tableau." In spite of its manifest absurdity this system was viewed with veneration. The satire of Swift did not prevent Lord Hardwicke from saying that if he went wrong in *Penn v. Baltimore* (1 Ves. Sr., 446) his errors would be corrected by a senate equal to that of Rome itself." Yet in every case that went to the House during his Chancellorship Lord Hardwicke himself constituted that senate, and affirmed in judicial solitude his own excellent opinions. And we read in Blackstone the wondrous tale of peers "bound upon their conscience and honor (equal to other men's oaths) to be skilled in the laws of their country"!

It may be imagined that such a tribunal would also be calculated to discourage common law appeals, particularly in view of Eldon's assertion of his undoubted right to override the judgment of the assembled judges of the common law courts.

Upon the retirement of Eldon the judicial functions of the House were largely dominated for more than twenty years by Lord Brougham. The reports covering this period are Bligh; new series (1827-37) (duplicated in part of Dow and Clark), Clark and Fin-

nelly (1831-46), and the first volumes of Clark's House of Lords cases (1846-65). During the period from the resignation of Eldon in 1827 to 1850 there were only three Chancellors,—Lyndhurst, Brougham, and Cottenham. Lord Lyndhurst's judicial ser-

aside from occasional assistance from Lord Langdale, the Master of the Rolls, he was the only competent equity judge in the court. The Irish Chancellors, Manners and Plunkett, sat occasionally, but their service was inconspicuous. But Cottenham, a pure law-



LORD WYNFORD.

vices in the House were comparatively unimportant. His experience had been in common law; moreover, an orator of great eminence, his great abilities were political rather than judicial, and when in office his attendance on judicial business was brief and irregular. Lord Cottenham, on the other hand, was an eminent lawyer. During the whole period of Brougham's supremacy, and until the chancellorship of St. Leonard's,

yer, profoundly versed within the narrow sphere of equity, but knowing little besides, was not constituted by mental temperament to take the same view of things as the versatile Brougham.

In common law authority, on the other hand, the court was somewhat better, owing to the elevation to the peerage of several common law judges. Justice Best, whose service as a legal peer under the title of Lord

Wynford was second only to Brougham's in duration, was a regular attendant on judicial business for a few years only; long before his death he ceased to sit. Chief Justice Tenterden sat quite regularly from his elevation to the peerage in 1827 to his death in

the court was a serious drawback. A litigant had no assurance that his appeal would be heard by a judge whose learning and experience in the particular subject was equal to that of the judge from whom he appealed. If Brougham's technical knowledge had been



LORD CHELMSFORD.

1832. His successor, Denman, was raised to the peerage a few years later expressly to assist Brougham in appellate work, but owing to the heavy work of his own court his attendance was irregular.

With the accession of Lord Campbell in 1841, by virtue of his appointment to the Irish Chancellorship, the House enjoyed the services of a thoroughly competent common law judge. The uncertain composition of

equal to his energy and assurance, things might have been better, but it must be said that his work, except in Scotch appeals, is not of a very high order.

Unsatisfactory as this tribunal had been, it grew steadily worse. During the ten years from 1850 to 1860 five chancellors succeeded one another in rapid succession: Truro, St. Leonards, Cranworth, Chelmsford and Campbell. Truro left the appellate work to

Brougham, and St. Leonards and Cranworth, who frequently sat without a third peer, were so notoriously at odds that judgments were constantly affirmed on appeal in consequence of a dead-lock. To such good causes of complaint may be added its inter-

future guidance, to formulate a single considered opinion clearly expressing the grounds upon which the judgment is based. Under the practice of the House, where each judge usually gives independent expression to the reasons upon which his vote is based,



LORD ST. LEONARDS.

mittent sittings and consequent delays, its extreme disregard of the proceedings and engagements of the other courts, its absolute irresponsibility, and the immense expense attendant upon its procedure. Its habit of transacting legal business through the legislative form of general debate has always been a serious drawback. It always conduces to the dignity of a court, and to the authority of the rules which it lays down for

it is often extremely difficult to extract the *ratio decidendi*.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The judicial functions of the Privy Council, first so called under Richard II, arise out of its ancient position as the *concilium ordinarium* of the King, which decided cases

which were too important for the ordinary courts but not of sufficient importance for the House of Lords. From this source sprang the Star Chamber and the Court of Requests as off-shoots. The first instance of the exercise of independent appellate jurisdiction by the Privy Council occurs in the reign of Elizabeth, when it took jurisdiction of an appeal from the Channel Islands. Coke calls the Council a board, not a court; and Hale, in treating systematically of all the existing jurisdictions, mentions it only in connection with its subservience to the House of Lords. By gradual encroachment, however, the Council built up a formidable jurisdiction. In the reign of Charles II it acquired jurisdiction of ecclesiastical and maritime appeals.

Its judicial functions were placed upon a modern basis by the establishment of the Judicial Committee of the Privy Council (3 and 4, Wm. IV, c. 41), with jurisdiction principally over appeals from the colonies and in ecclesiastical and admiralty cases.

Prior to this time the only Privy Council reports, aside from occasional decisions contained in the early House of Lords reports, were those of Acton and Knapp. The former (1809-11) is made up mostly of brief opinions in prize and colonial cases by Sir William Grant, who was during the early part of the century the dominant influence in the court. The reports of the court under its modern establishment begin with Knapp (1829-36), and the two series of his successor, Moore, overlap the official reports.

For nearly two decades the labors of the Judicial Committee were borne mainly by

Parke and Brougham. Some of Brougham's most useful services were rendered in this court, and his encyclopedic mind and liberal views are displayed to best advantage in these reports. These two judges were to a great extent relieved by the accession in 1844 of Kingsdown, who served in this court for more than twenty years with great distinction. Kingsdown was one of the great judges of his time. Although a lawyer of vast and varied learning, his grasp of principle led him to deal but little with precedents. In the formulation of the opinions of the court, in which he bore the principal part, his refined taste and fastidious use of language make his opinions models of judicial expression. From 1854 he practically took charge of the appeals in prize cases, interpreting the law of blockade, capture and prize with marked liberality towards freedom of trade. His opinions in the cases of *The Franciska*, *The Gerasimo*, and *Dyke v. Wolford*, in the eighth volume of the *State Trials*, are good specimens of his style and method. His opinions in ecclesiastical cases were likewise characterized by breadth of mind. Among his most prominent cases of this kind are *Gorham v. Bishop of Exeter*, *Liddell v. Weaterton*, *Long v. Bishop of Capetown*, and the *Essays and Reviews* case.¹

¹ The following are among his ablest opinions in various branches of the law: *Schacht v. Otter*, 9 Moo. P. C. 150; *Allen v. Maddock*, 11 do. 438; *Baltazzi v. Ryder*, 12 do. 168; *Kirchner v. Venus*, 12 do. 361; *Secretary of State of India v. Kamachee Boye Sahaba*, 13 do. 22; *Bland v. Ross*, 14 do. 210; *Ward v. McCorkill*, 15 do. 133; *Attorney General of Bengal v. Ranees Surnomoye Dossee*, 2 Moo. P. C. (N. S.) 22; *Cleary v. McAndrew*, 2 do. 216; *Brown v. Gogy*, 2 do. 341; *Austen v. Graham*, 1 Spink 357; *The Otsee*, 2 do. 170; *The Julia*, Lush. 224; *The Hamburgh*, Br. and Lush. 271.



CHAPTERS FROM THE BIBLICAL LAW.

BY DAVID WERNER AMRAM.

THE CASE OF BOAZ AND RUTH.

THE Book of Ruth contains only four chapters, but because of the unaffected picture of ancient manners that it presents, it is generally considered to be one of the most interesting of the books of the Bible. The principal legal questions presented in this book are the ones involving the right of inheritance to land under the law of intestate succession, and the questions arising out of the right of redemption of an estate of inheritance by the nearest kinsman so that it may not fall into the hands of strangers, and that the "name of the dead may be raised upon his inheritance." It is probable that the Book of Ruth was written long after the events which it narrates. There is slight evidence of this in the peculiar phraseology of the fourth chapter, seventh verse, "Now this was the manner in former times in Israel." The facts of the case, so far as they interest us in their legal aspect, are these:

Elimelech living in Bethlehem owned an estate in land. During a famine, he, together with his wife Naomi and his two sons Mahlon and Chilion left his home and went down into Moab and dwelt there. While living here Elimelech died, leaving his widow and two sons surviving him. The latter married Moabitish women; the name of the one was Orpah and the name of the other Ruth; and they continued to live in Moab for about ten years. Then both the sons, Mahlon and Chilion, died, leaving no children, and their mother, Naomi, was left with her two daughters-in-law. She then determined to return to Bethlehem, and attempted to persuade her daughters-in-law to return each to her mother's house. One of them, Orpah, did as she requested; the other, Ruth, insisted upon accompanying her saying, "Whither thou goest, I will go; where thou lodgest, I

will lodge; thy people shall be my people, and thy God, my God; where thou diest will I die, and there will I be buried." So Naomi and Ruth returned to Bethlehem.

What was the legal status of the parties with reference to Elimelech's estate of inheritance?

When Elimelech died leaving a widow and two sons, his estate descended absolutely to his two sons; the older of the sons obtained a double share. It is not known which of the two sons was the first to die, but this is a matter of no importance, because either would have inherited from the other. Both of them being dead, the estate descended to the nearest male kinsman of the sons of Elimelech, subject, however, to a certain inchoate right existing in the widow of the last owner, which will be considered later.

When Naomi and Ruth returned to Bethlehem they were so poor that the younger woman had to go out and glean in the fields behind the reapers for the purpose of gathering enough food to maintain them. The Poor Laws of the Jews provided that the gleanings of the harvest must not be gathered by the owner of the field, but must be left on the ground for the poor and stranger; and it was by virtue of this beneficent law that Naomi and Ruth were able to subsist without demanding alms. It chanced that Ruth gleaned in the field of Boaz, a kinsman of Elimelech. This being made known to Naomi reminded her of her husband's estate, and she then conceived a plan of bringing Boaz and Ruth together in the hope that he, as her kinsman, would marry Ruth and provide for them; and the plan succeeded. The beauty and modesty of Ruth attracted Boaz, and he promptly fell in love with her. Now came the real difficulty. Boaz was not

the nearest kinsman, and hence had no right to this estate. There was one nearer than he. Boaz determined to settle this matter immediately, and to ascertain legally whether or not the nearest kinsman was prepared to take the inheritance, or whether he would renounce his rights; and this leads us to the beginning of the fourth chapter of the Book, in which the full procedure in this case is given: "Now Boaz went up to the gate," this being the place of public meetings and the seat of the council of elders of the town, who were the administrators and judicial officers, "and sat down there, and beheld the near kinsman of whom Boaz spoke, passed by, unto whom he said, Ho, such an one! turn aside; sit down here; and he turned aside and sat down." The Hebrew word which we have translated "near kinsman" is "Goël," commonly translated "redeemer." It was the duty of the nearest kinsman to redeem the inheritance of one who had fallen into poverty, and was obliged to part with it. It was likewise the duty of the Goël to redeem his kinsman from captivity, to protect him from harm, to avenge his death by taking blood vengeance on his slayer, and to marry his childless widow, in order that his family might not become extinct.

Boaz then proceeded, "And took ten men of the elders of the city and said, Sit ye down here; and they sat down." The ten men thus selected from among the elders were to constitute the court in whose presence the formalities attending the redemption of the land were to be performed. Their duties in this case were very simple. They were merely required to attest the correctness of the procedure. It is interesting to note that unto this very day among the Jews ten men constitute a quorum in religious matters; thus, ten men are a congregation; ten men are required to attest certain juridico-religious acts, such as a marriage, or the granting of a bill of divorce, and the like.

The court having convened, Boaz arose, "And he said to the Goël: Naomi, who has returned from the land of Moab is selling a

parcel of land which belonged to our brother Elimelech, and I thought to inform thee saying, Buy it before those who sit here and before the elders of my people. If thou wilt redeem it, redeem it; but if thou wilt not redeem it, then tell me, that I may know; for there is none to redeem it beside thee; and I am after thee. And he said, I will redeem it." Then Boaz said, "On the day that thou buyest the field from the hands of Naomi, from Ruth also, the Moabitess the wife of the dead, must thou buy it, to raise up the name of the dead upon his inheritance; and the Goël said, I cannot redeem it for myself, lest I mar mine own inheritance; do thou take my right of redemption on thee, for I cannot redeem it."

Although the land is spoken of here as though it was going to be sold, the word sell does not truly express the nature of the transaction. It was a transfer of the possession of the land to the kinsman, and it was coupled with the duty of marrying the wife of the dead. By a legal fiction the son born of this marriage continued the family of the dead and thus "raised up the name of the dead upon his inheritance."

When Boaz first spoke to the Goël he made no mention of Ruth, saying, "Naomi is selling the parcel of land which was our brother Elimelech's." Now, it was known to the Goël that Naomi, the wife of Elimelech, had two children, Mahlon and Chilion, and therefore it would not have been necessary for the Goël to marry her, this being required only in the case of a childless widow; hence he expressed his willingness to redeem or acquire the land; but when Boaz added that "on the day that thou buyest the field from the hand of Naomi, from Ruth the Moabitess, the wife of the dead, thou must also buy it to raise up the name of the dead upon his inheritance," then the Goël refused to exercise his right of redemption; he evidently did not want to marry Ruth. It was Ruth, the widow of the last owner, who must be taken along with the land by the

nearest kinsman. Naomi was mentioned apparently because she was known as the wife of Elimelech, whereas, Ruth, who had been married to Mahlon in Moab, was not commonly known as his wife; and it may be, that the fact that Ruth was a foreigner had something to do with the precedence accorded to Naomi on this occasion. There is no doubt, however, that although Ruth was a Moabitess, she, by her action and by her words in following Naomi to Bethlehem, in adopting Naomi's country, her God and her domicile, became, according to the ideas of those times, thoroughly naturalized; whereas, Orpah, the widow of Chilion, who returned to her mother's house in Moab, remained an alien.

The question may be asked: if the land was Elimelech's, and the nearest kinsman had to marry Ruth the widow of Mahlon what is the meaning of the phrase "that the name of the dead may be raised upon his inheritance?" The answer to this is that the Jewish law considered the family, and not the individual, as the unit. As long as the family was kept up, the name of the individual was of no consequence, so that the child of Ruth as fully represented Elimelech as it did Mahlon; and in the same manner it represented all the ancestors of Elimelech, and was simply considered a link in the chain of descent which, by a legal fiction, thus became unbroken.

When Ruth had a son, they called him Obed. It will be seen, therefore, that the name was of no importance, but this Obed, although he was the son of Boaz and Ruth, was considered as the son of the dead Mahlon or of Elimelech; and it was thus by a legal fiction that this child continued the line of Elimelech, although it had none of his blood. This was the reason the neighbors said, "there is a son born to Naomi."

When the Goël refused to redeem the land after he discovered that he would have to marry Ruth, he excused himself, saying, "lest I mar mine own inheritance." This may be taken to mean that other property

which he owned would have to bear the burden of improvement and maintenance of the particular piece of land that came to him through this marriage, because it had to be preserved for his son who would, in the eye of the law, not be considered his son, but the son of the dead Mahlon; nor would this estate of inheritance descend to any other children that he might have, but it was in a measure entailed upon the heirs of the body of Ruth.

The record then goes on to say, "Now this was the custom in former time in Israel concerning redeeming and concerning changing, to confirm all things; a man drew off his shoe and gave it to his neighbor, and this was a testimony in Israel; so the Goël said to Boaz, Buy it for thyself; and he drew off his shoe." The shoe was the symbol of possession, and the foot planted upon the ground was the evidence of ownership; and figuratively, the word is used as indicating sovereignty probably from the fact that the king placed his foot upon the neck of captives and vassals; thus the shoe or sandal became the symbol of ownership and title; and the handing of the shoe from one to the other was evidence of a transfer of a right or title; thus in this case, the Goël who renounced his right to redeem in favor of Boaz, the next in succession, handed the latter his shoe as evidence of his transfer of the right of redemption. Boaz, having obtained the right of redemption through the renunciation of the nearest kinsman, made a public statement in the presence of the elders summarizing his rights, such a statement being necessary in the absence of written records of the transaction: "And Boaz said unto the elders and unto all the people, Ye are witnesses this day that I have bought all that was Elimelech's, and all that was Chilion's and Mahlon's from the hand of Naomi." There could be no doubt as to this title, and the fact that it was the family estate rather than the estate of the individual that was now being transferred is indicated by the mentioning of the names of the father and the sons. There

was something in the Jewish idea of the family estate as distinguished from the rights of its possessor, akin to the modern notion of the relation of a corporation to its members. The family estate was an entity separate and apart from the line of individuals who succeeded each other in its possession. Like the corporation, the family estate did not die, and to prevent the possibility of the extinction of the family, the legal fiction was called into requisition, as in this case, whereby the son of the widow of the last occupant of the estate was looked upon as though he were of the blood of the last occupant; thus the owner of the land, for the time being, was legally merely the representative of the estate which would continue after his death.

We might, to carry still further the analogy between the Jewish notion of the estate and the modern corporation, consider the owner of the estate like the president of the corporation—its representative clothed with certain powers over it, but unable practically to do anything whereby the estate would be minimized or lost to the family.

Boaz went on addressing the elders as follows: "Moreover, Ruth the Moabitess, the wife of Mahlon, I have purchased to be my wife, to raise up the name of the dead upon his inheritance, that the name of the dead be not cut off from among his brethren and from the gate of his place. Ye are witnesses this day; and all the people that were in the gate and the elders said, We are witnesses."

Now, this was a lawful marriage, and required no further ceremony. The wife went with the estate, and indeed, in a measure, transmitted the estate because her son would inherit it; her son would represent her former husband's family, and would take his place as one of the heads of the families of the town "in the gate of his place;" in other words, by virtue of his headship of the family he would be one of the elders of the town, and sit in the gate as an administrator and a judge.

The right and the duty of the nearest kinsman to marry the widow and raise up the

name of the dead upon his inheritance was, in later times, limited, and only the actual brother of the dead man was obliged to marry the widow. Contemporaneously with this change, there went on a change in the custom of drawing off the shoe as evidence of title and ownership. As stated in this record, "This was the custom in former times in Israel concerning redeeming and concerning changing, to confirm all things;" but in later times, the custom of drawing off the shoe was limited exclusively to the one case mentioned in the twenty-fifth chapter of Deuteronomy; namely, where the brother of the dead man refuses to marry the widow, she plucks off his shoe in the presence of the elders, spits out before him and says, "Thus shall be done to the man who will not build up his brother's house; and his name was known in Israel as the house of him whose shoe was plucked off." Thus what was originally a general symbol of title, in the course of time was modified, and eventually lost its significance as such altogether, and became a symbol of contempt; and that which was originally a general custom used in all cases, came in the course of time to be limited to a single case in which the actors changed places. It was no longer he who transferred the title that plucked off his shoe and gave it to his neighbor, but it was the rejected woman who in token of her contempt for the man who refused to marry her, plucked off his shoe. I do not know of any other cases in the Bible in which this custom of drawing off the shoe is mentioned. In the case of Boaz and Ruth we find it in its ancient primitive form, and in the other case in Deuteronomy, it has become modified and changed in the course of centuries, until it is hardly recognizable as the same custom. It is an interesting illustration of the manner in which customs are changed unconsciously in the course of long periods of time; it is only when we compare the two extremes side by side that the remarkable changes that have taken place are noticed.

LONDON LEGAL LETTER.

LONDON, May, 1901.

AN event to which the members of the bar, particularly the junior members, are looking forward with a great deal of interest is the forthcoming annual dinner of the Hardwicke Society which will be held on the 5th of June. The function has additional interest this year from the fact that the principal guest will be Maitre Labori the distinguished advocate and orator of the French Bar. Already a very large number of the judges and law-officers have intimated their intention to be present, among whom are the Lord High Chancellor, the Lord Chancellor of Ireland, Lord Morris, Lord Shand, Lord Davey, Sir Edward Fry, Sir Francis Jeune, Sir Henry Strong (late Chief Justice of Canada), Lord Justice Vaughan Williams, most of the judges of the King's Bench Division, and the Attorney General and the Solicitor General. The Hon. James M. Beck, Assistant Attorney General of the United States, who made such a favorable impression by his admirable response for the American Bar at the notable dinner of the Bench and Bar of England to the Bench and Bar of the United States, has also been invited to be present, and it is understood that he will accept, if his duties permit him to be in England at the time named.

Maitre Labori has several times been invited to England since his defence of Dreyfus gave him a world-wide reputation as an advocate and orator, but he has heretofore persistently refused all the attempts of his English friends to entertain him. He doubtless had in view the unreasonable resentment felt in France toward all those who protested against the travesty of justice which characterized the attempts to convict Dreyfus. It was doubtless due to the expression of feeling in England over this outrage that the unfortunate prisoner ultimately gained his liberty. Had Maitre Labori appeared in England immediately at the close of the trial

he could not have avoided such a demonstration of popular favor as would have deeply offended our French neighbors, and occurring concurrently with the ludicrous "Fashoda Incident," such a tension might have been produced as would have led to the gravest political results. Happily feeling has now quieted down, and there is no longer any apprehension of unpleasant consequences following the entertainment of Maitre Labori by his English admirers and fellow craftsmen. He speaks English fluently, but whether it is so good a vehicle for his oratory as French remains to be seen. He was intended originally for a commercial career and spent years in England. Ultimately he married an English lady, who was well known as a pianist, and in his domestic circle the English language is freely spoken.

The coming entertainment of Maitre Labori revives recollections of a grand banquet given by the English Bar to M. Berryer in the Middle Temple Hall in 1864. M. Berryer was then the leader of the French Bar, and the gathering which assembled to do him honor was one of the most brilliant collection of English lawyers which had ever been known. In fact its glory was only eclipsed by the dinner of the English Bar to the American Bar last summer to which allusion has already been made. It was on the occasion of the Berryer banquet that Sir Alexander Cockburn made his famous remark as to the duties of an advocate. Replying to Lord Brougham who insisted that it was incumbent on a barrister to subordinate every other consideration to the interests of his client, Sir Alexander Cockburn denied that an advocate ought to traduce the character of others in order to benefit his cause. "He is entitled," he said, "to use the weapon of a warrior, but not those of an assassin," a declaration which is said to have

called forth an outburst of applause louder than any ever heard in the Inns of Court.

A recent judgment of the Appeal Court has been received with the liveliest satisfaction by the community at large and will doubtless find sympathetic commendation on the other side of the Atlantic. During the thirty years that have elapsed since Mr. Forster's Education Act of 1870 came into existence, the London School Board has been constantly enlarging the scope of its operations and especially the curriculum of the schools. At first little more than the fundamentals, or the rudiments, of education were given to the scholars. Gradually further subjects were added to the course until children whose parents were of too limited means to spare even the time heretofore necessarily occupied in teaching them "the four Rs," have been compelled to take music and drawing and art; while the Board out of the ever-increasing taxes established evening continuation or post-graduate schools, to which not only children but adults were admitted. Notwithstanding the fact that the schools were sparsely attended provision was made for large numbers in the way of brilliantly-lighted class-rooms, free books and other supplies. This naturally provoked dissent on the part of many tax-payers, and at last the aid of the courts has been invoked to decide whether or not such expenditure was lawful. In the case alluded to in the Appeal Court the London School Board were the appellants, and the case raised was whether the Board was justified in paying out of the funds raised by taxes the expenses of the science and art classes in their day schools and evening continuation schools. The mat-

ter had originally found its way into court on proceedings for a writ of *certiorari* to bring up and quash certificates of a government auditor disallowing three sums which had been spent by the School Board upon the maintenance of classes registered under the Science and Art Department. A rule *nisi* for a writ of *certiorari* was obtained, but was discharged by a Divisional Court of the King's Bench Division, consisting of Mr. Justice Wills and Mr. Justice Kennedy, two of the ablest of our judges. They held it was not within the power of the School Board to provide, at the expense of the tax-payers, the instruction mentioned. The appeal was heard before the Master of the Rolls, Lord Justice Collins and Lord Justice Romer, probably as strong a bench as could be assembled in England. It was argued by the Attorney General and three other King's Counsel and a fine array of juniors. The decision of the judges was unanimous that the appeal should be dismissed, and that the auditors report, disallowing the sums expended by the Board for its science and art classes and evening continuation schools, should be approved. The opinion, written by the Master of the Rolls, is a voluminous and exhaustive one. Possibly there may be communities in America where tax-payers are growing restive under the profuse expenditure of Boards of Education, and for this reason I have referred to this case, which will be found in Part V, May 1st, 1901, of the Law Reports, Q. B. Division, page 726, and I have mentioned how the matter was brought before the Courts in order that a precedent may be established for any similar proceedings in America.

STUFF GOWN.



The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.

WE take pleasure in printing the following communication from a great-granddaughter of Chief Justice Marshall, Mrs. Sallie E. Marshall Hardy:

"Shortly after Monday, February 4, which was celebrated as John Marshall Day all over the United States, in memory of the great Chief Justice of that name, I went up into Fauquier County, Virginia, where the large tract of land lies which the Chief Justice purchased from the Fairfax heirs, and which was the cause of one of the most celebrated lawsuits ever brought in the United States.

"On this land still live a number of John Marshall's descendants, who hold it as a direct inheritance from him, and Leeds Manor, where I stayed, was his summer home, and in the dining room where I ate hang the portraits of his mother, his wife and himself which I had photographed several years ago for THE GREEN BAG.

"One day, as we sat at dinner, one of his grandsons told me of this experience he had on February 4. He had gone down from his mountain home, in response to the invitation he had received as one of John Marshall's descendants, to be present in the House of Representatives.

"Shortly after he took his seat a young man came in and took the seat next to him. General Wayne MacVeagh was just beginning his eulogy, which was the speech of the occasion, when the young man began to tell, with a chuckle, how he was in Washington sightseeing and hearing of this 'entertainment' had come to the Capitol and had outwitted the doorkeeper and found this 'good seat.'

"'I don't care a cent about that old duffer, John Marshall,' he continued; 'but I wanted to see the President and other big bugs.' His neighbor listened with patience until he called

his grandfather 'an old duffer' then he broke forth:

"'Now, young man, you keep quiet. I don't care how you got in here, but I wish to hear this speech, and I do care, now that you are in, how you behave yourself; and if you don't stop talking I will have you put out.' The young man saw he meant what he said and quickly subsided."

Readers of THE GREEN BAG will call to mind several interesting articles concerning the Chief Justice from Mrs. Hardy's pen. The portraits referred to may be found in Vol. VIII, No. 12, pages 489, 487 and 482, December, 1896, and were reprinted in February and April, 1901.

WE are indebted to the researches of J. L. Campbell, Esq., secretary of Washington and Lee University, for the following information concerning the two Marshall portraits belonging to the University. The portrait reproduced as the frontispiece of our May number was bequeathed to the University by Dr. William Newton Mercer, of New Orleans, who died in 1874. The painting was described in his will as "an original by Harding."

The other portrait (page 231 of the same number), purchased by the University from Mrs. Anne Jones, Marshall's granddaughter, in 1870, was painted from life, between 1832 and 1834, by William J. Hubard, who was an Englishman by birth, and who married in Virginia. His daughter, now living, is authority for the statement that he painted, for the State of Virginia, another portrait of Marshall, "almost life-size, sitting in a chair, with manuscript (I think) in hand." This portrait was formerly in the old Court of Appeals room in the Capitol Square at Richmond. Mr. Campbell suggests that this may be one of the two portraits by Hubard referred to by Mr. Justice Bradley (16 Century Magazine 778, note; Sept. 1889); Hubard is there spoken of as a French artist.

IN answer to inquiries asking which of the Marshall Day addresses have been issued in pamphlet or book form, we can give only the following imperfect list:

In book form: Addresses of Mr. Chief Justice Holmes, of Professor Henry St. George Tucker, and of Mr. Attorney-General Knowlton, at Boston, and of Professor James Bradley Thayer, at Cambridge. [In the press.]

Proceedings of the Bench and Bar of St. Louis; published by the Bar Association of St. Louis, containing addresses by Hon. H. S. Priest, former U. S. District Judge; Hon. A. M. Thayer, U. S. Circuit Judge, Hon. Jacob Klein; Hon. Warwick Hough, Hon. Henry Hitchcock, Hon. James Hagerman, Hon. Henry T. Kent, Hon. James L. Blair, and Hon. E. B. Adams. It is a matter of regret that only one of these admirable addresses came to us in time to be included, in part, in our Marshall numbers.

In pamphlet form; addresses by the following gentlemen at the places indicated:

Hon. LeBaron B. Colt, U. S. Circuit Judge, and Hon. Francis Colwell; Providence, R. I.

Hon. John F. Dillon, of New York; Albany, N. Y.

Hon. W. Bourke Cochran, of New York; Buffalo, N. Y.

Hon. Wayne MacVeagh; Washington, D. C.
Hon. William Pinkney Whyte; Baltimore, Md.
Mr. Justice Gray, of the U. S. Supreme Court; Richmond, Va.

Hon. Charles H. Simonton, U. S. Circuit Judge; Columbia, S. C.

Hon. Joseph P. Blair; New Orleans, La.
Mr. Chief Justice Shauck, of Ohio; Columbus, Ohio.

Hon. John N. Baldwin, of Council Bluffs; Iowa City, Iowa.

Hon. Sanford B. Ladd; Kansas City, Mo.
Hon. James M. Woolworth; Omaha, Neb.

Mr. Justice McFarland, of California; San Francisco, Cal.

Hon. Horace G. Platt, of San Francisco; Portland, Oregon.

The addresses of Mr. Chief Justice Fuller, at Washington, and of Hon. Charles E. Perkins, of Hartford, at New Haven, Conn., were put in type, and, we suppose, have been issued in pamphlet form. Part of Professor J. B. Thayer's address, at Cambridge, was printed in the March *Atlantic Monthly*, while Senator Lodge's address, at Chicago, appeared in the *North American Review* for February.

NOTES.

A QUESTION of citizenship has lately been raised on the following facts: A. was born of Norwegian parents, who were on their way to the United States in a vessel carrying the Danish flag, while the vessel was in American waters, the captain of the vessel being a citizen of Sweden and the pilot who boarded the vessel a Canadian.

THE average appellate judge not only meets with frequent opportunities to enlarge his views of the law, but the forensic efforts of the bar often afford him a chance to polish and dilate his vocabulary. Not often, however, is he regaled with such weird linguistic and mental gymnastics as are presented in a Missouri attorney's brief which we have lately, through the courtesy of a correspondent, had the privilege of inspecting. The following excerpt, culled at random from that brief, is suggested as a legal gem worthy of preservation.

"The declarations of law asked for by plaintiff *is* in strict harmony with the authorities above cited, yet the trial court refused to so declare the law, and *give* the declarations asked for by the defendant, which are in direct conflict to all the law governing this case. We frequently find in practice the law so unsettled that it becomes necessary to secure *judicial interposition*, but in this case, there seems to be a *unanimity of harmony* in the various States of the Union characterized by an approval by the United States Supreme Court by an unbroken chain of decisions on the point here involved, and this Court in the reports above referred to adhere to the same doctrine."

It is hoped that the attorney will be able to secure "judicial interposition" in this case, and that the "unanimity of harmony" referred to will not be disturbed.

The same attorney advises the Supreme Court of Missouri that "The promoters of this scheme, beside all others, however large or small, stood pre-eminent. They were intoxicated with the idea of great wealth, they wanted immediate wealth, wealth in one day. They were money mad. Crazy for greed, wild with inflated ideas of gain, their ideas of the magic growth of Springfield surpasses the story of Aladdin's *magic lantern*." Further along, alluding again

to the "magic lantern," he alleges that "These Aladdins of the nineteenth century could not work the combination." Possibly the Missouri court may discover, when it comes to look into the devious methods of these Mammon-smitten promoters, that Aladdin's lamp was, after all, only a cinematograph, concealed from our view by the terminology of oriental mysticism. Or, perhaps, this judicial investigation may reveal the fact that Aladdin was the real originator of the "living picture" device.

Strange to say the brief makes no allusion to the philosopher's stone, or to the purse of Fortunatus.

It is refreshing, after reading some of our complex and lengthened statutes, to turn to a Scotch act of Parliament of the reign of James the First, which briefly and pithily enacts that "nae man should enter any place where there is hay with a candle unless it be in a lantern." The whole of the Scotch acts of Parliament passed in the reign of James the First, extending over thirteen Parliaments, and amounting to 133 in number, were comprehended in forty-six pages of a small duodecimo volume, and that volume contained the whole Scotch acts of Parliament from 1426 to 1621, being nearly two hundred years.

A MAN was being tried recently in New South Wales for stealing a watch. The evidence was conflicting, and the jury made up their minds to retire, but before they left the hall the judge remarked that if there were any points on which they required information he would be pleased to assist them. Eleven of the jurymen had left the box, but the twelfth remained standing, with his eyes fixed downward, as if absorbed in thought. "Well sir," said the judge, "is there any question you would like to ask me before you retire?" "I would like to know, my lord," came the reply, "if you could tell us whether the prisoner stole the watch?" *N. Y. Tribune.*

THE late Maj. James Brown of Taunton, was not only a brilliant lawyer in his day, but considerable of a wit, with a memory well stocked with quaint and curious precedents and traditions in legal lore. He had carried a case, in

which his client had been convicted on the charge of being an habitual drunkard, up to the Supreme Court on a point of law involving the issue of what a state of intoxication was as a legal proposition. This he proceeded to argue to the court.

It was evident that the gallant major was conducting a forlorn hope. Of that nobody was more fully aware than himself. But his client—the dissolute heir of a prominent Bristol county family—was wealthy, as well as dissolute, full of fight and ready to pay whatever fee his lawyer would demand. Brown, on his part, was equally willing to do all he could to earn it. Finally, after permitting the lawyer to argue along for some time in a way that was delightfully entertaining, since he entered very minutely into a discourse on the various phases and degrees of intoxication, drawing on personal reminiscences, humorous anecdotes, old saws and some legal authorities to point his argument, the presiding justice courteously intimated that, while much of what the major was submitting was highly interesting, still it wasn't law. He suggested that Brown should state specifically, if he could, what actually constituted a condition of unquestionable intoxication, and cite some authority worthy the profound consideration of the court, whereupon the lawyer remarked that he was prepared to do that, although he would have to go back into the realm of English jurisprudence to a period long antedating the era of Blackstone.

In those ancient days, under the common law, he said, it is written that the determination of the question of whether a man was drunk or not was settled by the following test, which was accepted by the experts, legal and others, as infallible:

Not drunk is he who from the floor
Can rise again and drink once more.
But drunk is he who prostrate lies,
And cannot either drink or rise.

The gravity of the court was somewhat upset by the citation which Brown delivered with mock seriousness and elocutionary effect, but the judges were evidently not convinced that the precedent was sufficiently sound and reputable to deserve affirmation by the supreme judicial court of Massachusetts, inasmuch as a decision was forthwith handed down overruling the contentions of Maj. Brown. *Fall River Globe.*

NEW LAW BOOKS.

CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW. By *Raleigh C. Minor*, Professor of Law in the University of Virginia. Boston: Little, Brown & Company. 1901. 8vo. Law canvas, \$3.00; Sheep, \$3.50. (lii+575 pp.)

Perhaps in no department of the law was an adequate book for the practising lawyer of greater present importance than in the Conflict of Laws. With us in the United States are over fifty separate jurisdictions. So far as our business dealings and our social relations are concerned these are "law districts" simply, bounded by imaginary lines. We do not give these artificial lines any thought whenever or wherever we trade. Indeed every business of importance extends over many of our States; with us is no trace of territorial economy, and in all our social life we pass and re-pass these lines without noticing them. This is all very different from the situation between the various nations of Europe. With them the passing of the frontier is infrequent and solemn by comparison. So it is that the Conflict of Laws, an academic question in Europe, is become a most practical one in America. The European lawyer seldom has to do with cases involving the Conflict of Laws; the American lawyer must deal with such cases at all times.

The Conflict of Laws as a common law subject was discovered and named by an American jurist. But Story had no successors in America; and in the meantime the decisions had accumulated and the subject had developed. The profession needed a modern text-book, and this want is now supplied by Professor Minor. For unquestionably this treatise on the Conflict of Laws is an admirable work for the practitioner. The citation of the authorities is not made to exhaustion, but is made with discrimination. The statement of the cases is brief and accurate. The judgment displayed in indicating the better authority is of the soundest. The profession will have great present use for the book.

Whatever discussion is to be made of Professor Minor's treatise must be addressed to the general principles; for it is hardly too strong to say that no criticism can be made of the detail. In this subject where there is conflict of authority upon many of the points, controversy as to the

majority of rules, and disagreement as to most of the general principles, — one cannot but believe that it is too early for any final formulation. And yet Professor Minor reduces the subject to one single word — *Situs*. Find the *situs* of the particular act, circumstance, or subject under inquiry, and you will know the law which should properly regulate its validity and effect. The whole subject might, according to his view, more properly be called the Law of *Situs*. He follows this line out with entire logic in his main heads: I. Introductory; II. *Situs* of Person; III. *Situs* of Status; IV. *Situs* of Personal Property; V. *Situs* of Contracts; VI. *Situs* of Torts and Crimes; VII. *Situs* of Remedies; VIII. Pleading. The nomenclature is novel, — at times it is somewhat confusing to see old friends in their new garb. To find administrators under the head *Situs* of Status and the sub-head *Situs* of Fiduciaries is an example. Until one feels throughout that Professor Minor has attempted to impose a unification upon his subject which is not formal alone but substantial as well.

But is the Conflict of Laws capable of such simple statement? Undoubtedly the word *Situs* may stand for one great base of the Conflict of Laws — the Foreign Acquired Right. When a certain act is done within a certain jurisdiction where exists a certain law, the result is the creation of a certain right and of a certain obligation. This is all a question to be determined by the municipal law of the state where the act is done; in another state it is simply a question of fact, — a complicated question of fact made up of many elements. It is not a question in a domestic forum of the application of a foreign law, but of the recognition of a foreign fact. Doubtless the Conflict of Laws has much to say upon this question of the creation of the foreign right; and doubtless in last analysis it may be said to be all a question of *situs*. At this point the discussion seems to be lacking in something. For instance, it is not squarely said that the civil law and the common law proceed upon two opposite ideas; the civil law considering jurisdiction as personal, the common law regarding jurisdiction as territorial; that hence personal jurisdiction with us is anomalous and not to be reduced to a system by saying that the *situs* of the person may be at the domicile.

But the formula *Situs* to whatever extent it covers the first element of the Conflict of Laws seems hardly to extend over the second element. When this foreign acquired right is brought into another jurisdiction, the question is: how far will it be given effect. The principle—and it is the one fundamental principle of law in the Conflict of Laws—is this: the foreign acquired right is to be enforced in the domestic forum upon equal terms with rights acquired at home. That this is always a question of the obedience of the court to the mandate of a common law rule, Professor Minor does not say outright. There is mention made rather of international comity in the application of which the court has discretion. This, by the better theory, is not the position of the common law. At all events, to class this general principle as a question of *situs* adds nothing,—it confuses rather.

The sum of what has been said amounts to this: That the Conflict of Laws presents upon analysis two distinct divisions. If this is true, the attempt is hopeless to reduce the science to the consideration of a single principle—the Law of *Situs*.

COMMENTARIES ON THE LAW OF STATUTORY CRIMES. By *Joel Prentiss Bishop*. Third edition, by *Marion C. Early*. T. H. Flood & Co.: Chicago. 1901. Law sheep. (xv + 997 pp.)

As Mr. Bishop has reached the extraordinary age of eighty-seven, it is not strange that at last one of his works bears upon the title-page the name of an editor. Thus passes from literary activity a prolific and accurate writer, to whom the bench and the bar have long owed a growing obligation.

It is almost half a century since Mr. Bishop retired from practice and devoted himself exclusively to writing. His first plan was to begin with *Contracts*; but, on learning that Professor Parsons was preparing a treatise on that subject, he turned his attention to other fields. In 1852 appeared the first of the seven editions of "*Marriage and Divorce*," and in 1856 the first volume of "*Criminal Law*," now in its eighth edition. The first of the four editions of "*Criminal Procedure*" came in 1866, the "First

Book of the Law" in 1868, the first of the three editions of "*Statutory Crimes*" in 1873, the first of the two editions of "*Contracts*" in 1878, "*Directions and Forms*" in 1885, and "*Non-Contract Law*" in 1889.

Taking into account both quantity and quality of work, there is no American law writer, save Story, comparable with Mr. Bishop. Between the two writers there are obvious differences. Story's style is flowing and academic, whereas Mr. Bishop's, though probably framed quite as laboriously, is terse and homely; and similarly Story, in accordance with a professor's instinct, constantly uses the ancient Roman law, the modern systems of continental Europe, and the early, and almost obsolete, English treatises and decisions, whereas Mr. Bishop apparently does not go beyond the living decisions that would be cited as authority in an ordinary American court. Yet, notwithstanding these differences, each author has given us scholarly books that extract the law from the original sources, state it accurately, explain the technical and practical reasons underlying existing rules, and throw the whole subject into systematic order. Further, each of these authors has done work that is fairly entitled to be called creative. Thus, in "*Marriage and Divorce*," and to a less extent in "*Criminal Law*," Mr. Bishop was a pioneer, collecting and classifying doctrines for the first time, and often actually creating them, or at least suggesting new doctrines that after his initiative were ultimately adopted by the courts; just as Story long ago performed a similar service in "*Equity Jurisprudence*" and in "*Constitutional Law*."

The treatise on "*Statutory Crimes*" is not one of Mr. Bishop's books of a creative nature. The topic forbids creative work. The first half of the volume discusses the enactment and interpretation of statutes, whether dealing with criminal law or not; and the second half treats of statutory crimes exclusively. The new edition retains the whole of Mr. Bishop's text, and brings the references down to date and, like all of the author's works, it remains an example of that admirable sort of book in which the writer does his own investigating and his own thinking with the result that the statements are true, the citations in point, and the reasoning free from fictions and pitfalls.

A TREATISE UPON THE LAWS AND PRACTICE OF TAXATION IN MISSOURI. By *Frederick N. Judson*. Columbia, Mo.: E. W. Stephens. 1900. (xiv+358 pp.)

The title of this excellent book is modestly misleading. The volume is all that the title imports, and it is more. It treats in an exhaustive way the history and development of taxation in Missouri, and in so far is a book of especial value to the scholarly lawyer of that particular State; but using local tax laws as texts, Mr. Judson has discussed many of the most important questions of taxation which are pressing for solution elsewhere. It is this latter side of the book which makes it of interest to any student of the problem of taxation.

To the first two parts of the book, — Part I, Historical; Part II, Missouri Taxation in 1900, but a word can be given. It is enough to say that Mr. Judson has given in a clear and interesting way what appears to be an exhaustive presentation of these divisions of his subject.

To the question of local assessments for public improvements, one of the most important questions of taxation of late years, one chapter is devoted, and is treated as fully as the purposes of the present volume demand.

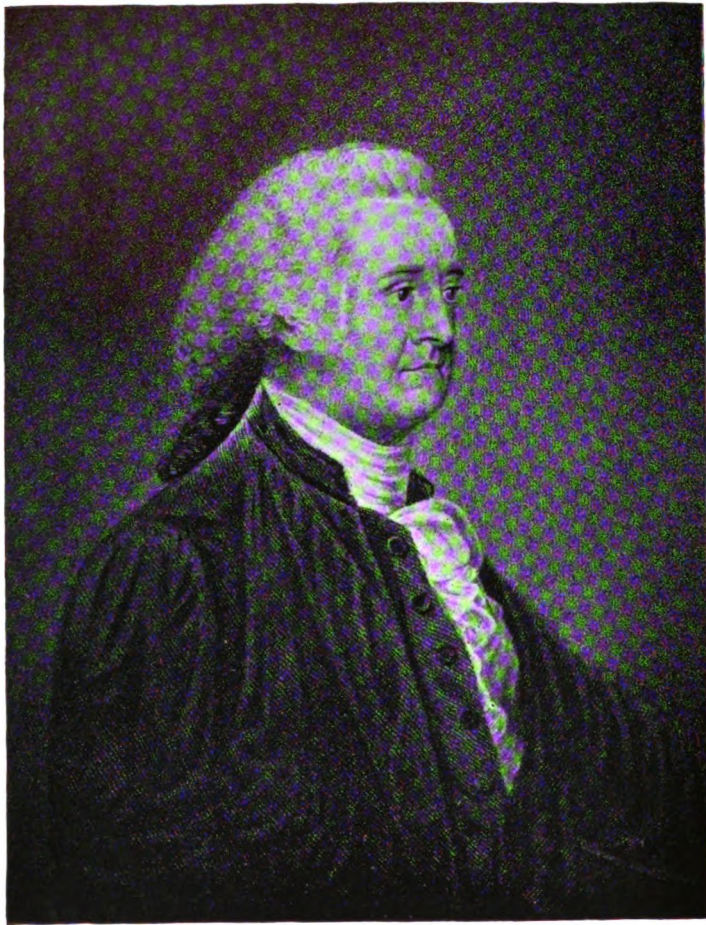
The subject of local assessments is, however, in a somewhat unsatisfactory state, and we should like to see it treated, at some time, at the length which it deserves, by so good a student and authority as Mr. Judson.

We are glad to find Mr. Judson calling attention to the uncertainty, confusion and inadequacy in remedial procedure in matters of illegal taxation. For example, take the question of determining the constitutionality of a tax statute. It may be brought up under a writ of *certiorari*; but the difficulty and oftentimes the impossibility of obtaining full and adequate answers, make this proceeding a far from ideal remedy. The question of constitutionality has been tested in other ways, of course; by prohibition, by *mandamus*, by injunction, by defending criminal prosecution. But the multiplicity and confusion of remedies, and the uncertainty which may arise in the mind of even a well-posted lawyer as to the proper or the most effective remedy in a given case, indicates, as Mr. Judson rightly believes, a defect in procedure. And he is right in thinking that sound public

policy demands a quick preventive remedy "in every case where the validity of an exercise of the taxing power" is questioned. The remedy suggested is, the regulation and enlargement of the jurisdiction of the courts in writs of *certiorari*.

Mr. Judson is an opponent of double taxation, and like many other students of taxation, he sees clearly the injustice and failure of the present system of taxing personal property. As to the question of taxation of corporations, he believes that the franchise of the corporation, as well as its tangible property, is rightly subject to taxation, "either on the basis of the market value of the securities representing such intangible and tangible property or on the earnings of such entire property"; that the taxation of the full value of the corporate property and franchise requires the exemption from taxation of the stock and bonds by which they are represented; that holders of corporate securities representing properties and franchises in other States, should be exempt from taxation on those securities.

In his concluding chapter Mr. Judson, clearly and with good judgment, enumerates the elements of weakness and inefficiency in the present system of taxation, and points out the remedies. He sums up his general scheme for a fair and just system of state and local taxation under the following heads: first, quicker and more adequate judicial remedies for inequality in taxation, to be found by enlarging the jurisdiction of the courts in writs of *certiorari*; second, the separation of the sources of State and local revenue, — local revenue to be raised from the tax on real estate, chiefly, and from that on personal property, assuming that last named tax to be retained, and State revenue to come from such taxes as those on railroad properties, on earnings of express companies, dramshop and other licenses, inheritance taxes, etc.; third, local control of the tax rate and bond issues, subject only to some constitutional limitation; fourth, the substitution of a corporation tax, laid either upon the value of the corporate property and taxable franchises, or upon the earnings of the corporation, in place of the present personal property tax; fifth, the avoidance of double taxation in any form; sixth, inheritance taxation; seventh, an income tax upon income from services and business profits.



J. Bullard

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JOHN RUTLEDGE.

BY FRANCIS R. JONES.

IT is always pleasant to contemplate the life of a prominent character in the Revolution. Through the haze of the receding years even an ordinary man stands forth of heroic size. Time lends a glamour. Patriotism too adds an enthusiasm, which is not only proper, but gratifying. It is particularly inspiring for a man of Massachusetts to dwell upon the achievements of an eminent son of South Carolina, who was one of the fathers of the Republic. It is refreshing to remember that she was the first of the colonies south of New England to respond to the call of Massachusetts in 1765, and to stand shoulder to shoulder with her in the succeeding twenty years of distress and carnage. It is with reverence that one remembers the fortitude with which that southern sister endured the awful scourge of the Revolution. Upon her devoted head were poured all the vials of a barbarous war of subjugation, unmitigated by mercy or chivalry. Tarleton and Lord Cornwallis have left names there with which to subdue unruly children. With fire and sword they laid waste that Southern land, then but a sparsely populated district. But her sons were filled with the love of liberty, and with dauntless courage. They accomplished the Revolution with great unanimity of opinion and order. Before the Declaration of Independence they had thrown off the shackles of the Crown, adopted a constitution and under it instituted a government. They gallantly repelled one attack of the royal troops only to be overwhelmed by a devastating invasion and a hostile occupation which lasted three years. The State rose triumphant from her

ruins to join in establishing that more perfect Union, which is today her pride. Of all these things John Rutledge was a large part. The story of his life from 1765 to 1795 is a history of South Carolina. However grateful the task, it would be worse than useless here to attempt to repaint the conditions of time and country in which that life was spent. They are a part of history indelibly written upon the mind of every educated American. Distinguished at the bar and in the Senate, a fearless Governor and an able judge, Rutledge deserved much of his countrymen. Little remains of his life except the bare outline of his career. He was a strenuous man, fearless and outspoken, the John Adams of South Carolina. The Irish blood in his veins was true to its popular repute. He was a disciple of freedom, ready to stake his all for the great principle, Liberty. Tradition tells of his haughty pride and vindictiveness, of his unruly temper, and hints at excesses which superinduced his melancholy end. Independent in thought and action he was earnest and sincere. The ardor of his temperament does not seem to have influenced his judgment often or blinded his common sense. He was no dreamer, no metaphysical politician. His impulsive energy executed the dictates of his reason. He must have been a man of large capacity and ability. He was tenacious of his opinions, but in great affairs was amenable to compromise. In the Congress of 1782 and in the Constitutional Convention of 1787 he readily and gracefully yielded his convictions in order to gain the great ends which were accomplished. With all his imperiousness

he does not seem to have had any overweening ambition or ever to have sought office. In temperament he was the antithesis of his predecessor in the Chief Justiceship of the United States. He enjoyed a great reputation for eloquence, but the fragmentary examples of his speeches which are still extant by no means sustain that reputation. The diction is below mediocrity rather than above it, the sentiments commonplace. Much must have depended upon the vigor and magnetism of his personality. Yet his portrait by Trumbull presents no very pleasing picture. There is something about it that forcibly reminds one of the portraits of His Majesty King George the Third.

John Rutledge was born at Charleston, South Carolina, in September, 1739. The exact date is not known. His father was a physician, and had emigrated from Ireland four years previously. His mother was but fifteen at the time of his birth. Doctor Rutledge died in 1749, leaving his wife with seven children, of whom John was the eldest. No pains were spared upon the education of the future Chief Justice. His father was his earliest instructor. After his death the boy was placed under the charge of a Reverend Mr. Andrews, with whom he remained for several years. Later a gentleman, David Rhind by name, who had an excellent reputation as a classical scholar, directed his studies. In the summer of 1755 he began the study of the law with James Parsons, a barrister of distinction, an Irishman by birth, and a devoted American patriot by principle, who held several important public offices during the revolutionary period, and was vice-president of South Carolina at the time of his death in 1779. Rutledge continued in the office of Mr. Parsons for two years. In 1758 he went to London, where he was entered as a student at the Temple, and three years afterwards was called to the English bar. This was the regular course at that time for young men of South Carolina who intended to adopt the law as a profession. He seems to have created great expectations

at the Temple by his ability. His reputation preceded him to Charleston. During these three years the great Pitt was Prime Minister, Lord Mansfield presided in the King's Bench, and Henley was Lord Keeper. Upon Rutledge's return to Charleston in 1761 he leaped at once into fame and a practice. Before the ship which brought him had reached the city an eager client had met it and retained the young lawyer. His first appearance at the bar made an extraordinary impression, and he was never in want of a lucrative practice, until the pressure of public events absorbed him in politics. The bar of Charleston at that time was not numerous. Mr. Flanders estimates that it could not have exceeded twenty. The fees appear to have been extraordinarily large. Rutledge is said to have received one hundred guineas for his first case. On the 17th of September, 1764, he was appointed Attorney General of the Province, and performed the duties of that position until the 5th of June, 1765. So great was his success at the bar that it became customary to believe that the result of the cases in which he was engaged was a foregone conclusion. Prior to 1769 all the courts were held at Charleston. In that year the judicial system was reorganized, and sessions of the courts held in the parishes. This necessitated riding the circuit by both bench and bar. During these years the politics of South Carolina were becoming unsettled. Rutledge was a member of the Provincial Assembly, and characteristically fought for the rights of the colonists against royal oppression. The royal governor waxed arbitrary until, in 1764, he refused to administer the oath to General Gadsden as a member of the Assembly. The Assembly itself protested against this high-handed act. The usurpation of power was vigorously denounced, and by none more boldly than by Rutledge. The succeeding year he took up with spirit and zeal the proposal of Massachusetts that the Provincial assemblies should send delegates to a common Con-

gress. The Assembly appointed him one of the delegates. In that Congress Rutledge, although only twenty-six, was one of the most influential members. He was chairman of the committee charged with the duty of preparing an address to the Lords in Parliament, and it is believed that he wrote that address. Upon his return to Charleston about the first of November he resumed the practice of his profession, with a reputation greatly enhanced. During the next ten years he accumulated an ample property, which was dissipated during the Revolution by liberal contributions to the public service, and by the enemy. Meanwhile the aspect of public affairs grew serious. The seeds of revolution, which had already been sown, were germinating. The news of the Boston Port Bill reached Charleston on May 31st, 1774. It created the greatest agitation, indignation and alarm. Events crowded thick and fast. The General Committee of Safety called a meeting of the inhabitants of the colony for the sixth of July. At that meeting five delegates, among whom was Rutledge, were chosen to represent the colony in the General Congress at Philadelphia. An attempt was made to limit the powers of the delegates. It was asked what could be done if they misused their unlimited authority to pledge the State. In reply John Rutledge blazed forth: "Hang them! Hang them!" Consider for a moment the courage that dictated that response! The delegates went to Philadelphia with powers uncurtailed.

The Continental Congress of 1774 assembled on the 5th of September. Rutledge saw that a crisis had come in which it was necessary to act and to act with vigor. In the end he supported all the measures advocated by that Congress. Meanwhile the first Provincial Congress of South Carolina had been elected by the people. It met on the 11th of January, 1775. Although an entirely illegal and unconstitutional assembly it represented the great mass of the people, and its acts were regarded with the highest

authority. Of this Assembly Rutledge had been elected a member and attended its sessions. In May he returned to Philadelphia to the Continental Congress. The war had already begun. Rutledge, however, still hoped for reconciliation with the mother country. Apparently he never advocated independence prior to its declaration, although, in November, 1775, he concurred in the recommendation of Congress to the people of New Hampshire and South Carolina to form new State governments. Immediately thereafter he returned to be in attendance upon the second Provincial Congress of South Carolina, which assembled on the first day of November. In the following February he was prominent in the formation of the new Constitution, which was mainly drafted by him and adopted on the twenty-sixth of March. On the same day he was elected the first President of South Carolina, and served in that capacity for two years. As President his energetic action and pluck in supporting Moultrie in defending Charleston against the British attack at Sullivan's Island on June 28 was inspiring and of the greatest efficacy. That splendid and successful defense warded off from South Carolina for nearly three years the disasters of war. In spite of General Lee's advice to abandon the fort, which afterwards took its name from its gallant commander, Rutledge insisted that the position must be held, and wrote to Moultrie not to evacuate the fort without an order from him. In conclusion he said: "I would sooner cut off my hand than write it." On the day that Rutledge visited Fort Moultrie to express thanks to its heroic defenders, the American Congress at Philadelphia declared the colonies free and independent States.

The first General Assembly elected under the new Constitution of South Carolina met on the fifth of December and re-elected Rutledge President. Meanwhile there had been in the autumn a formidable attack and invasion by the Cherokees, which had been successfully repelled. In March, 1778, a new

Constitution, made requisite by the Declaration of Independence, was ratified. Some of the provisions of this did not meet with Rutledge's approval. He therefore resigned the Presidency in a speech of excellent good temper, saying that he was unwilling to obstruct the wishes of the people, and so retired that the Legislature could choose another executive who would carry out their will. This action did not diminish his popularity or the confidence in which he was held by his fellow citizens. When the State was again threatened with invasion he was recalled to the Chief Magistracy on the fifth of February, 1779. He energetically entered upon the duties imposed upon him at that trying time, summoned the militia, and prepared for defence. But the force of the enemy overwhelmed all measures that could be taken. During that year the royal troops overran the State. The British General Prevost pushed his forces to the gates of the Capital, and there had some negotiation relating to a surrender by the Governor and Council. These latter shrewdly proposed the neutrality of South Carolina; the event of the war to determine whether the State should belong to Great Britain or remain one of the United States. This offer of Rutledge has been severely condemned. To me there is nothing in it to censure. It was a most crafty way out of a great difficulty. The State was practically in the hands of the enemy. There seemed no hope of redeeming it, until the American arms were successful elsewhere. Meanwhile it would be made a base of operations by the British. It was good politics and good patriotism to attempt to relieve the colonists from the hostile incubus, to deprive the enemy of a base. There was everything to gain and nothing to lose. South Carolina was then in no condition to aid in the war. Necessarily she must return to her allegiance to England, if the Revolution failed. Prevost replied that he had not come in a legislative capacity, that his business was not with the Governor but with the Commanding General, who must surrender. Upon this

Rutledge declared: "We will fight it out." The next day much to his surprise Prevost withdrew his army.

Sir Henry Clinton landed near Charleston on the eleventh of February, 1780, and immediately invested the city. In this crisis the Assembly, which was then in session, acted promptly. It clothed the Governor and Council with full power to do everything necessary for the public good "except the taking away the life of a citizen without a legal trial." All the efforts of Rutledge to get together an adequate force were fruitless. The approach of the British army seemed to paralyze the citizens. In April it was determined that the Governor should withdraw from the Capital in order that he might raise levies for its relief. On the twelfth of May General Lincoln surrendered. Meanwhile Tarleton's Brigade was ravaging the country. On the fifteenth of August General Gates suffered his crushing defeat at Camden, and Rutledge retired into North Carolina. Unbroken by defeat he attempted with great resolution and courage to rally the sinking fortunes. He was in the field and in the camp. He went to Philadelphia to solicit aid and clothing for the troops. His energy was untiring. It was largely due to his invaluable services in co-operating with military commanders that General Greene won the glorious victory of Cowpens on the seventeenth of January, 1781. By August Rutledge was back in his own State. The enemy were dispossessed of their posts and driven back into the vicinity of Charleston. The celebrated and decisive battle of Eutaw on the eighth of September practically ended the war in South Carolina.

Writs for an election of members to the State Legislature were issued by Rutledge, and the State government convened on the eighteenth of January, 1782. During these three years of strife and pressure he had used his dictatorial powers with discretion and moderation. Harsh and summary justice had to be administered. But he was never violent in the exercise of power, and was

arbitrary only when the necessity demanded. When the Assembly convened he addressed the two Houses with bitter impetuosity, denouncing in scathing terms the methods of warfare which the British had adopted. He saw about him ruin and devastation, a land wet with blood, and heard the cries of widows and orphans who had received no mercy from the foe. The Legislature returned congratulations and thanks to the Governor for his perseverance and prudence in the exercise of his authority. His term of office now expired. But he was immediately elected a member of the Confederate Congress, and took his seat again in that body on the second of May, 1782. Together with George Clymer he was delegated forthwith to visit the Southern States to urge upon them the necessity of continued vigilance and effort, although the surrender of Cornwallis on October nineteenth, preceding, practically put an end to the war. The great question then in Congress, as it was for long before and was to be for long afterward, was that of finance and the public credit. With Madison and Hamilton, Rutledge was very active and influential in the deliberations on that subject. He was one of the committee of five which was appointed to consider and report upon it. He advocated an importation tax of five per centum *ad valorem*. He also supported the treaty of peace and the commissioners who negotiated it, boldly replying to the objection that they had violated their instructions by not submitting to the dictates of France, that the instructions ought to have been disregarded, and that he would never have been bound by them as he thought them improper. He continued in this Congress until June, 1783, when he returned to Charleston.

In 1784 he was made Chancellor of South Carolina having drawn the bill under which the court was organized. The first term of that court was held at Charleston on the fourteenth of June. On December twenty-fourth he was elected by the Congress a judge of the court which was to determine

the controversies between New York and Massachusetts. Again, on July 5th, 1785, he was unanimously elected minister to the United Netherlands. Both of these appointments he declined, and remained upon the Chancery bench of his State. While he presided in that court there seem to have been no cases of any particular legal interest. Apparently he participated in all of its decisions until 1790, except those which were rendered while he was in attendance upon the Constitutional Convention of 1787. Among the distinguished gentlemen who were members of that Convention Mr. Rutledge was prominent and influential. His experience had been great. His fearlessness, frankness and ability inspired confidence. It is pleasant to recall that he seconded the nomination of Washington to the Presidency of the Convention, and with Robert Morris escorted him to the chair. The bluntness with which he expressed his opinions has no better example than in his declaration on the floor of the Convention in regard to slavery that: "Religion and humanity had nothing to do with this question. Interest alone is the governing principle." Surely there was no tergiversation in that statement.

It is more than gratifying to dwell upon the debates of that great Convention, where so many schemes for a national government were proposed, where almost every question was fought out to an *impasse*, and then compromised. I have no intention, however, to enter here upon any detailed narration of the part which Rutledge there played. But in order to give a just conception of the man it is necessary to make a brief summary of the principal propositions which he there maintained. He advocated a single executive elected by the National Legislature, eligibility to which should include a property qualification. But he opposed making the Supreme Court an executive council, saying that the judges ought never to give an opinion on a law until it comes before them judicially. He favored the proposition that representation in the lower House of Con-

gress from each State should be in proportion to its quota of contribution, and that in the Senate in proportion to its importance. He energetically opposed Madison's scheme of giving to the national government the right to negative acts of the States, and said: "If nothing else, this alone would damn, and ought to damn, the Constitution." Lastly he believed the right of *habeas corpus* should be inviolate. Thus he appears to have desired a strong central government, the preservation of the rights of the States, and the liberties of the citizens.

No difficulty was experienced in South Carolina over the adoption of the new constitution, and upon the organization of the new national government Chancellor Rutledge was complimented by the electoral vote of his State for Vice-President. On September 26, 1789, he was commissioned the first senior Associate Justice of the Supreme Court of the United States. The strange disregard for and the small importance attached to that tribunal at that time are shown by Mr. Justice Rutledge's course. He does not appear to have sat in the Supreme Court as Associate Justice, or to have resigned his Chancellorship of South Carolina. There is no record even of his having taken the oath of office. If he acted at this time as a Federal Judge it must have been upon the Circuit, although there are no records or reports which show that he ever exercised those functions. After his appointment to the United States Supreme Court, however, he probably did not sit as Chancellor. The last case in which he is reported to have sat on the equity bench of his State was decided at the December term, 1789. On March fifth, 1791, he resigned his Federal commission, having been elected Chief Justice of South Carolina. This office he held until July first, 1795, on which date he was appointed by Washington Chief Justice of the United States. He sat as Chief Justice at the August term of the Federal Supreme Court of that year, at which there are but two cases reported to have been decided in 3 Dallas.

We have no adequate means of determining his qualifications for a judge or the merits of his judicial administration, except the facts that Washington deemed him of sufficient ability and eminence twice to appoint him to the Supreme Court, and that twice he was elected to the highest judicial offices in his own State. It has been said that his knowledge of the principles of law was profound, and that his bearing upon the bench was courteous and dignified. His appointment, however, as Chief Justice of the United States was undoubtedly unfortunate. His health and his mind were impaired. In a speech in July, 1795, delivered at Charleston upon the occasion of the outburst of indignation at Jay's treaty with England, the vehemence, extravagance and incoherency of his language, the lack of logical argument, the bitter and undignified personal abuse, showed that his mental powers were weakening. His attitude towards that treaty manifested by that speech, aroused the wrath of the Federalists in the Senate and doomed his appointment as Chief Justice to rejection. He was the target of great political and personal vilification. Before December fifteenth, when the vote of rejection was passed, it was notorious that his mind had given way entirely. The last four years and a half of his life were filled with ever increasing mental aberration and physical weakness, until death released him from suffering on July eighteenth, 1800.

Thus sadly ended a life actively and picturesquely spent in the public service at the most important era of our history. Greatly acting in great events, I know of not one instance in his career that is justly subject to criticism, while his faculties were intact. In politics he was too independent to be bound by party ties. But until his unfortunate and fatal attitude on Jay's treaty he was a Federalist. His positive character compels respect. Although perhaps not in the first rank of intellect, yet he was a man of good sense, who proved himself adequate to all occasions. He acted always with decision and

boldness. He kept his public faith. He was influential in affairs of the greatest moment. He vigorously spent his fortune and his talents in the cause of Independence. He

strove to restore order, to create a nation. He enjoyed the confidence of his fellow citizens. He won the esteem of Washington.

THE PSYCHOLOGY OF POISONING.

III.

BY J. H. BEALE, JR.

IT is probably not difficult for any of us to feel a certain sympathy with those unfortunate creatures whose passions of love or loathing have led them to crime. We all have moments of longing for a complacent conscience which would permit the painless removal of a hated obstacle to our just desires; moments when we can understand how a respectable and ordinarily moral person could do the acts charged against Mrs. Maybrick or even Dr. Pritchard. But another class of poisoners have reached a depth of moral degradation to which one who lives an ordinary life can hardly follow, even in imagination. The man or woman who could murder a relative or a friend to gain money from his death is an unsexed and brutish creature with whom we must believe ourselves to have nothing in common. Yet such men and women, apparently ordinary persons, sane and respectable, have poisoned their relatives or their friends, for a legacy, for insurance money, to conceal and avoid paying a debt: some of them have formed a habit, like the Italian poisoners of the Middle Ages, and have numbered their victims by the half-score. Of the two great primary passions, love and covetousness, the meaner one is not the less powerful.

A few years before Mrs. Maybrick's trial at Liverpool, Mrs. Sarah Robinson was brought to the bar in the Supreme Judicial Court of Massachusetts, charged for the second time with murder; she had previously been tried upon another indictment, and the

jury had disagreed. Indictments were at the time pending against her for the murder of six persons by poisoning with arsenic, and evidence was presented at the trial tending to show that she had killed a seventh in the same way. All but one of these persons were near relatives and members of her family; her husband first, then her sister, her brother-in-law, their son, and her own son and daughter.

Mrs. Robinson's story, according to the theory of the government, seems almost incredible. Left early an orphan, she had cared for her younger sister until both were able to support themselves. She had worked industriously at her trade of dressmaking, gaining the good will of her employers. She married early and lived in apparent happiness with her husband for more than twenty years; she gave birth to five or six children, to all of whom she was devoted. She was a constant attendant at church and regularly devout in her family. Suddenly, in the summer of 1882, her husband died. His life had been insured, but owing to some informality she was unable to secure payment of the amount, and sued for it in vain. In February, 1885, she was called to the house of her sister, who was ill with pneumonia. Her sister's husband, Prince Arthur Freeman, had an insurance on his life, amounting to \$2,000, in the "Order of Pilgrim Fathers." Mrs. Freeman, who had seemed convalescent before Mrs. Robinson's arrival, grew rapidly worse afterward and in a few days

died. Mrs. Robinson then used great efforts to induce Mr. Freeman, with his children, to come to live with her; and they did so. The younger child, a baby, soon died. Mrs. Robinson then persuaded Freeman to make the insurance payable to her, she undertaking to bring up the surviving child, Arthur. This assignment of the insurance was made in May. Within a few weeks Freeman was seized with a sudden illness, showed symptoms consistent with arsenical poisoning, and died within a week. Five or six months later the boy Arthur died suddenly in a similar manner. At about this time Mrs. Robinson's eldest son and daughter joined the same "Order of Pilgrim Fathers," and both died suddenly within a few months. Mrs. Robinson collected the insurance on their lives, mourned them deeply, and performed all the offices of a bereaved mother. But so many sudden deaths aroused suspicion. It was discovered that Mrs. Robinson was in great need of money at the time of Mr. Freeman's death; she had leased furniture, and then mortgaged it several times under assumed names and was being pressed for payment. These claims she paid out of the insurance money. She had stated her belief in the approaching death of several of her family before their illness, giving as a reason that her husband or some other deceased member of the family had "sent for them." She was intimate with a quack doctor of shady reputation who (it was insinuated) supplied her with the means of accomplishing her purposes. The bodies of her victims were examined and all found to contain arsenic sufficient to cause death. She was then indicted, as has been said, for six murders.

This second trial was for the murder of Prince Arthur Freeman. All the facts just stated bearing upon his death were shown; and the prosecution was also allowed to prove the circumstances of Mrs. Freeman's illness and death. The defense attempted to raise doubt on three points. Freeman's work had involved his exposure to the fumes of

sulphuric acid and it was suggested that he was poisoned by them rather than by arsenic. He was shown to have been sometimes despondent after his wife's death, and suicide was urged as a possibility. Finally it was claimed that if a murder had been committed it had been done by the quack doctor, with the intention of marrying Mrs. Robinson and thus obtaining the insurance money. No evidence was presented of the possession of arsenic by Mrs. Robinson. The accused was convicted and sentenced to death, but her punishment was commuted to imprisonment for life.

The most striking contrast between this case and the cases previously studied is the clever concealment of the crimes by Mrs. Robinson. She wrote no letters, made no damaging statements to strangers, bought no poison, and suffered no suspicion by reason of circumstances connected with any one offence. If it had not been for the cumulation of sudden deaths in her family, and the frequency with which a single insurance society was called upon to pay, she might never have been accused. To secure a conviction it was necessary to set before the jury the facts connected with two deaths; and the jury even then reached a verdict only after long deliberation.

If the theory of the government was correct, the defendant poisoned three people to get two thousand dollars; her own sister whom she had cherished from childhood, in order to get an assignment of the policy to herself; her brother-in-law next, to get the money; and her nephew afterwards, merely to relieve herself of a useless incumbrance. She afterwards poisoned her daughter, who was most useful to her, and her son, her main support, at a time when she had no pressing need of ready money.

Could a woman do such things and yet be sane? Criminally accountable she clearly was. But there are moral wounds which leave a callous insensible scar, without visibly affecting the general conduct. If Mrs. Robinson's husband was almost dead and she just

barely assisted nature and made his fate secure, her conscience probably plagued her constantly for awhile, afterwards only now and then; finally it became adjusted to circumstances. A part of her life—the poisoning part—was ignored by her in her general estimate of herself; and with each successive crime it was further removed from consideration. It is this comfortable quality of conscience which enables us to do things we would shudder at when done by others; but on the other hand it keeps many a man who has done a bad act from becoming bad all through. Bluebeard doubtless possessed such a quality in high degree.

A very similar case was tried in England in 1850, which has become one of the famous poisoning cases of the century. William Palmer was charged with murdering his friend, John Parsons Cook, at Rugeley by the use of strychnia. Palmer was in serious financial straits for several years before Cook's death. He had obtained temporary relief by means of an insurance which he had placed upon his wife's life a few months before she died, and he had tried to place other insurance upon other lives. At the time of Cook's death he owed about twelve thousand pounds on bills, to which he had forged his mother's indorsement. The bills would shortly fall due, the creditor was pressing, and exposure was imminent. Cook died suddenly while in Palmer's company, under circumstances which, in connection with the post-mortem examination, led the jury to find that Palmer had poisoned him. The motive for this act apparently was to get hold of Cook's ready money and his betting-book, worth in all about eighteen hundred pounds. The difficulty in the prosecution was the inability of the chemists to find in Cook's body a single trace of strychnia; the later development of chemistry makes this fact more significant than it was then thought. But on the whole evidence there can be no reasonable doubt of the prisoner's guilt.

The interesting feature of this case, for purpose of comparing it with Mrs. Robin-

son's, lies in the similarity of character of the defendants. In a letter to Lord Campbell (who presided at the trial) Palmer's brother described Palmer's character with unquestioned fidelity to truth. "His frank sincerity, his courage, his faithful loyalty to his friends, his temperance, his performance of the duties of religion, his social relations in the character of father, husband and son, won for him the love and confidence of all who approached him." "His was in all respects the very opposite of that cool, calculating, cowardly, crafty temper which is essential to the poisoner, and we know cannot co-exist with those qualities which my brother possessed." He certainly loved his wife; but an examination of her body showed that she had been poisoned, and if Palmer had not been convicted of murdering Cook he would have been indicted for killing his wife. It was suspected also that he had poisoned a brother upon whose life he held a policy of insurance. These cases, as well as others previously studied, would seem to indicate with certainty that a "cool, calculating, cowardly, crafty temper" is not essential to a poisoner; and that the most amiable qualities and strong religious feelings cannot prevent a man from killing his neighbor for love or money.

The cool, crafty, cowardly temper appears, however, to have existed in full measure in our next criminal—Mudgett, called also Holmes and other names. His trial in Philadelphia in the fall of 1895 was one of the most sensational on record. It began by a motion for a continuance on the part of his counsel; upon its disallowance by the Court counsel threatened to withdraw from the case, but were restrained by the Court by a threat of disbarment. Holmes himself, however, dismissed them and began the trial as his own counsel; but in a short time he recalled them. Throughout the case he and his counsel fought not wisely but too well; and by their contentious course brought out many damaging facts which might well have remained unproved. At one dramatic moment in the trial the wife of the man for

whose death Holmes was being tried was shown the letters of her dead daughter, found among the effects of Holmes—after intercepting the letters he had made away with the child who wrote them. With cowardly craft, but hardly with tact, Holmes and his counsel chose just this moment to extort from the woman an admission that she had been cognizant of a fraudulent scheme in which Holmes and her husband had been engaged. At another time the last married of Holmes's simultaneous wives was called to the stand to testify against him, and his counsel insisted on the marriage as a bar to her evidence, and continued to ring the changes on the marriage until the jury must almost have fancied they were trying the defendant for bigamy.

The facts, as they were developed at the trial, were as follows: Holmes and the deceased, Pitezel, had been exercising the trade of defrauding insurance companies. The current scheme was based on a \$10,000 policy upon the life of Pitezel himself, who left his wife in Chicago and went with Holmes to Philadelphia, where he lived under the name of Perry. On September 4, 1894, Pitezel's dead body was found in his house. A claim was made on the company; identification was required, and was finally secured by means of Holmes, who took the dead man's daughter, Alice, with him; went to Philadelphia, pointed out distinguishing marks, and had the body recognized by Alice. He then returned West (leaving Alice somewhere on the way), got the money for the widow, and took from her the lion's share for himself, to pay, as he represented, a note of the husband's. He then began an extraordinary journey. He persuaded Mrs. Pitezel (who was not a strong-minded woman) to send on two of her children to join Alice. She herself was started off on the train for the East with her two remaining children, while Holmes himself, with his latest wife, went in the Pullman. The three parties appear to have gone on the same journey at about the same time; but

Holmes so arranged matters that they never met. They went from one city to another, staying sometimes at hotels, sometimes at houses hired by Holmes. The three children were, it is claimed, disposed of by Holmes, one by one; at least, their dead bodies were found distributed along the route. The survivors at length appeared in Boston, where they were at once arrested. Holmes there made a confession, in which he claimed that the body found was not that of Pitezel, but a corpse obtained by him from an unnamed medical student for the purpose of fraud. The body was, however, soon identified as that of Pitezel beyond a doubt. Holmes thereupon made a second confession, stating that Pitezel had committed suicide, and that Holmes had found the dead body and placed it where it was finally discovered. No evidence was offered for the defence; counsel relied in argument upon the insufficiency of motive shown, and upon the bungling way in which the poisoning was done if, as the prosecution claimed, Holmes had poisoned his friend by the use of chloroform. The jury brought in a verdict of guilty, and Holmes was executed.

No one upon reading the evidence can doubt that Holmes killed Pitezel and three of his children; no one can find a single redeeming trait in the character of the criminal, unless it is the generosity with which he shared his gains with his various wives; but the case remains in some ways a mystery. Why did Holmes kill his partner, when as their previous experience had shown the fraud might be easily accomplished without murder? Why did he kill to get money simply in order to give it to his wives, to whom he had already been lavishly generous within a short time? Why did he encumber himself with the whole Pitezel family, and above all why did he kill the children? The motive suggested is absolutely inadequate; we must seek evidence outside the report of the case to explain the facts.

Although Holmes, like Palmer, was a physician, his work was most bunglingly

done, and suspicion was soon aroused; and the statements of the accused himself turned suspicion into certainty. In short, though in atrocity Holmes's crimes resemble those of Mrs. Robinson and Palmer, in method, in care, in the disarming of suspicion at the first attempts, his crimes are as different from theirs as his character was apparently coarser, cooler and more calculating. At the trial all of them bore themselves with composure.

An account of trials for poisoning where the alleged motive was gain would not be complete without a reference to the Donellan case. This was a trial before Mr. Justice Buller, at Warwick, in 1781. Mr. Donellan, a gentleman of Warwickshire, was accused of poisoning his brother-in-law, Sir Theodosius Boughton, by the use of arsenic. It was proved that young Boughton had an apparently slight illness, that his mother gave him medicine from a phial, whereupon Boughton was suddenly attacked by convulsions and soon died; that an odor like that of bitter almonds was noticed; and that upon a post-mortem examination the same odor was discovered. Mr. Donellan possessed chemical skill, and had been at work at his still just before this; he had also expressed the belief that Boughton would not live long,

and had made other somewhat compromising statements; and at once upon Boughton's death he rinsed the phial which had contained the medicine. On the other hand, he was shown always to have been kind to Boughton; and though his wife would benefit by the young man's death, he would not gain personally. On this case, with no direct evidence of poisoning except the odor, and with no evidence to connect Donellan with the death except possible access, he was tried, and after a hanging charge by Buller was convicted. The judge directed the jury, among other things, that though the indictment alleged poisoning by arsenic, the defendant might be convicted if any kind of poison was used. Donellan was executed. It was stated, I know not on how good authority, that before execution he confessed himself guilty.

This case abundantly reinforces what has been said, that a jury is prone to convict on a charge of poisoning. Probably no one skilfully defended was ever convicted of murder by other means than poison upon such slender evidence. Judge Buller suffered great unpopularity by reason of the part he took in the case; but he was apparently fully convinced of Donellan's guilt.



CLAIMS ARISING FROM THE AMERICAN OCCUPATION OF THE PHILIPPINES.

BY W. F. NORRIS, SPECIAL COUNSEL FOR THE UNITED STATES.

THE Board of War Claims has been in session in the City of Manila for some sixteen months, during which period it has heard numerous claims against the United States arising from the American occupation of the Philippines. The greater number of claims are for comparatively small amounts, as the value of a carameta and horse, or a cariboo and the cart attached. The destruction of a house and its furniture by fire. Many claims of the latter class arose as a result of what is known as the Tondo and Binondo fires, on the 22d and 23d of February, 1899. The Districts of Tondo and Binondo were occupied in a large measure by the lower classes of the inhabitants of the city, especially the former, which was the stronghold of the insurgent element, by whom presumably the Barrio was set on fire, and almost completely destroyed as was partially the adjacent Barrio of Binondo. The buildings destroyed in this conflagration were mostly small nepa houses, the owners generally either through poverty, ignorance or from their insurrectionary sympathies making no claim against the government. As a rule compensation was denied to those asking compensation on the ground that the United States was not responsible for losses occasioned by the acts of insurgents in time of actual military operations for the purpose of subduing the insurgents.

The most pathetic case submitted to the Board was that of the widow of a Spanish officer who was living by herself in a small house at the time of the American occupation of the City of Manila. She was poor, her chief or only support being the rent derived from two carametas, or the little carriages constituting the chief passenger traffic of Manila. As the widow of a Spanish officer she may have been entitled to a small pen-

sion from the Spanish government—whether or so does not, however, appear in evidence.

Shortly after the American occupation of the city two soldiers entered the abode of the widow and presenting a revolver at her head demanded money, or as stated in her written claim—dinero pronto. The woman had saved 250 silver dollars of the currency of the country, after the manner of the people; in her fright she produced the bag containing the dollars, and the soldiers took it and vanished. In those unsettled times it was impossible to trace or prevent crimes of this character, and the men got safely away with their infamous booty. The claim was never judicially investigated, for when notice of a hearing was attempted to be served it was found that the woman was dead.

Perhaps the most important claim arising from the American occupation of the islands is that of the Manila and Dagaupan R. R. v. The United States. It is much the largest in amount, though not presenting as interesting legal questions as others. The railroad extends from Manila to Dagaupan, a distance of one hundred and twenty-two miles. The claimant is an English corporation, with its business center in London, the General Manager residing at Caloocan in the island of Luzon. The Company has submitted several claims against the Government, the largest which is now in course of hearing being for \$2,384,049.84, the amount alleged necessary to put the road and its property in the same condition it was at the time of the outbreak on the fourth of February, 1899. On the date in question, the road, with most of its rolling stock, was in possession of the insurgents. The Americans occupied Manila; the Manila station, with between one and two miles of the track, was within the United States military lines, the

balance of the track as well as nearly all the rolling stock being within the lines of the enemy. The United States never acquired possession of the road or its property till wrested by force from the enemy. When captured the cars were greatly injured, being in a large degree burned by the insurgents, the locomotives were disabled as far as the unskillful Tagallos were able to do so. Station houses were burned, portions of the track torn up, bridges partially destroyed. Some property was injured by the United States forces as a necessary military measure; but for all damages the Government is called upon to make compensation. After capturing it from the enemy and turning over to the owner the United States is expected to make good all losses sustained while in the enemy's possession, and while made use of by the enemy in its military operations against the United States army.

By the terms of the concession with the Spanish Government an annual sum equal to eight *per cent.* of the amount invested in the construction of the road was guaranteed the Company, the gross receipts in excess of such sum to be equally divided between the Company and Government. During several months immediately following the American occupation of Manila the receipts fell much below the *per cent.* guaranteed, for which deficiency the Company submitted a claim against the Government of \$451,217.59. The above mentioned, with other claims, including those claimed for a tramway about a mile and a half long leading from the Tondo to Manila station to the Pasig River, swell the entire amount to very nearly four million dollars, Mexican currency.

The claims arising from the capture of Iloilo amount to about \$1,500,000, Mexican currency, most of them submitted by foreigners, the business of the city being in the hands largely of the foreign and Spanish residents. At the attack by the Americans the city was set on fire in several places by the insurgents, who had made previous preparations to burn the city in case the war

vessels in the harbor opened fire. By this act of incendiarism the city was partially destroyed. Among the individual claims is one of \$50,000, presented by a Spanish resident for the loss of his daughter, who was killed by a shell from one of the American gun-boats. With the exception of the public market, which the evidence shows was destroyed by a shell, all the property seems to have been destroyed by the fire set by the insurgents, the legal aspect of the case being whether the United States can be legally held liable for the property of alien residents destroyed by insurgents under the circumstances of the case.

The Island of Negros is perhaps the most fertile of any of the Filipino Archipelago, especially the Western part. At the present time it is impossible, I suppose, to pronounce authoritatively of any particular section that it is the most fertile, as our acquaintance with the islands is not sufficient to authorize such statement. Western Negros is particularly rich in sugar plantations which have suffered devastation at the hands of parties who may have been insurgents, and were probably so in part, but the damage was I think chiefly, and perhaps altogether, caused by lawless bands of *ladrones* or thieves who have from time immemorial infested different sections of the Archipelago. Among the late despoilers of the land is a band composed of the followers of Papa Isio, who seem to be religious fanatics, a peculiar class under the leadership of one Papa, or Pope, Isio, whom they deem possessed of supernatural powers. This belief in the possession of superhuman qualities by conspicuous persons seems characteristic of the Filipinos, as in the popular apprehension, Aguinaldo wears a charm which renders him invulnerable to shot or shell. Whether his recent capture has shaken the popular faith in the power of his charm I am ignorant. From the owners of sugar plantations in Negros have been submitted some claims, large in amount, but up to date very few in number.

Among the claimants are the Friars who

have several claims for indemnification for damages to their convents, and for rent for the use of the same by the United States for the use of the troops. The Cathedral of Manila was used as a prison for Spanish prisoners of war, for the rental of which the Archbishop submitted a bill of \$2,000 month, and for \$3,000 for damages to the interior during the time the edifice was so used. The question constituting the real issue as to the real ownership of the property, it being denied that some of the buildings are owned by the Friars, the denial proceeding mainly from the natives, who entertain a deep-seated hostility to the religious brotherhoods. Whether such sentiment is well founded is a matter of doubt. Thus far when called upon to produce proofs to sustain their position as intervenors they have signally failed. The question, however, of the title to the real estate holdings of the Friars will probably receive future adjudication and may prove one of the most perplexing questions to be determined by the Filipino Commission.

During its sessions various cases of miscellaneous character have come before the Board. A distillery, burned at Malolos, for

which the chino owner wants indemnity to the amount of about \$100,000. A claim by an English mill owner for loss of time and services of two employees, one killed, the other wounded by American soldiers at the time of the Tondo fire. A claim by the wounded man for personal injuries. Of the widow of a third employee of the mill, killed at the same time and in the same manner, for loss of support of herself and children through the death of the husband and father. Various claims for loss of household effects. A very small percentage of the claims presented are recommended to pass by the Board, whose recommendation is almost invariably followed by the Military Governor. Those allowed are paid from the Insular treasury. Those disallowed may ultimately be brought before Congress or a special commission authorized by Congress, but probably the great mass of Filipino claims being comparatively small in amount will remain as determined by the military government of the Islands. As to the others it seems clear that no cause of action lies against the United States.



AN INJUNCTION OF A JEWISH-EGYPTIAN COURT OF
THE THIRTEENTH CENTURY.

BY DAVID WERNER AMRAM.

AMONG my Genizah manuscripts, some of which I described in the March number, is the document presented here in fac-simile. It is a decree made by the court to enjoin the officials of the congregation from pledging any of the belongings of the synagogue, and is written partly in Hebrew and partly in Arabic, with Hebrew characters.

I am indebted to the kindness of Professor Richard Gottheil of Columbia University for a translation, as follows:

"We, the Bet Din and the elders whose names are signed below, say that since difficulties have happened to the Congregation in that certain of the *Kele Kodesh* [sacred belongings], such as the dressings of the *Sefarim* [scrolls of the Law] and their pomegranates and the like, have been given in pledge, and their redemption in a short time has become difficult, thereby causing anguish of mind to some of the Congregation; and since we see that people will in future (on this account) hesitate to donate such objects for the holy *Sefarim*, out of fear that the like will happen; and since we wish to do away with the difficulty above mentioned, we have come to an agreement and have put under the ban the name of anyone who would again give as a pledge one of the things above mentioned or the like—of any of the belongings (*Kele*) of the Synagogues which are in Egypt, for the space of twenty years; believing that this action will be of advantage in the matter. We have set up this document on the last tenth of the month of Iyyar of the year one thousand, five hundred and forty and three (according to the Shtarot Era), in Fostat of Egypt, which is situate on the River Nile, the domain of our Lord, our Nagid, Abraham, the intelligent Rab, the banner of the Rabbis, the first of his time

and its wonder, the great Nagid—may his fame be great and his honor increase.

"That which precedes we have written and signed that it be for a witness and a proof; all is true and clear, stable and firm."

Nathanel son of Sa'adyah.

Eliyahu son of R. Zechariah (T. N. S. B. H.)

The decree purports to have been made by "the *Bet Din* and the elders whose names are signed below." The *Bet Din*, or court, consisted of three persons learned in the law, and the elders who are mentioned here as associated with the court in the making of this decree seem to have been the elders of the congregation, who have no definite judicial standing like the members of the *Bet Din*, but who, because of their dignity and standing in the congregation, are associated with the members of the court in this proceeding. The fact which led to the making of this decree can readily be ascertained from the decree itself. The officials of the congregation being short of funds, made loans and gave the sacred belongings (*Kele Kodesh*) of the synagogue in pledge. When the debts were due, they were unable to repay them, and the articles pledged were retained by the creditors. Now, as these articles were used during religious services, their absence while in the hands of the creditors caused "anguish of mind to some of the congregation." *Sefarim*, or scrolls of the law, were customarily robed in valuable silk dressings, emblazoned and embroidered with gold, and oftentimes adorned with jewels. The scrolls were hung with breastplates of precious metals containing suitable inscriptions, and having silver bells and pomegranates pendant from them.

The anguish of mind of the pious members of the congregation may have been caused by seeing some of the scrolls of the

law bare of all dressing and ornamentation; or, it may have been the anguish due to the wounded pride of the patrons of the synagogue who had donated these valuable articles, and now found that their pious gifts had been pledged to money lenders.

The pious members brought these facts to the attention of the court, due inquiry was made, witnesses were heard, and the court, after having satisfied itself that the synagogue belongings had in fact been pledged, came to the conclusion, "that the people will in future (on this account) hesitate to donate such objects for the holy *Sefarim* out of fear that the like will happen."

The court, apparently, had no jurisdiction in the premises to compel the officers of the congregation who had pledged the property to restore it. At any rate they made no decree to this effect. It may be inferred from this that the belongings of the synagogue had been pledged to pay congregational debts and not the private debts of the officers; and furthermore, that it was within the power of the officials of the congregation to pledge its property in this manner; hence the court and the elders did not attempt to interfere with what had already been done, and contented themselves with issuing the decree.

After setting forth the facts as above stated, that such conduct on the part of the officials would cause people to refrain from donating to the synagogue, and averring that it was their desire to do away with this difficulty, they make the following decree: "We have come to an agreement and have put under the ban the name of any one who would again give as a pledge one of the things above mentioned, or the like—of any of the belongings of the synagogue which are in Egypt for the space of twenty years." The threat to put the name of the offender under the ban was equivalent to an injunction, for no one would run the risk of so great a misfortune as being put under the ban of excommunication. The ban, in Rabbinical times, was pronounced according to

fixed and definite rules and in its extreme form resulted in absolutely ostracizing the unfortunate person against whom it was directed. He became an outlaw; all intercourse with him was absolutely forbidden; he was formally cursed; in some instances his entire property was confiscated; and he was subjected to severe corporal punishment.

The ban could only be enforced against the offender if it was published; hence it is probable that this document, after having been drawn up and signed, was publicly read in the synagogue, perhaps on several occasions, and that copies thereof, were sent to synagogues in other towns as far as the jurisdiction of the court extended. In Talmudic times, and in later times also, the ban was frequently used as a punishment in cases in which modern law would prescribe a fine and imprisonment, such as, for instance, the cases of libel and slander, contempt of court, maintaining a nuisance, and the like.

After pronouncing the ban, our document proceeds with these words, "believing that this action will be of advantage in the matter." From what we know of the force and effect of the ban, we have no doubt that this action was of advantage in the matter, and effectually prevented the officials of the congregation from offending in a like manner in the future.

The date of the document is given as the last tenth of the month of Iyyar of the year one thousand five hundred and forty-three, according to the Shtarot era. This corresponds to the fourth day of March, 1231, of the Christian era. Fostat of Egypt, "which is situate on the River Nile," is the name of a town immediately adjoining the city of Cairo, and was the old capital of Egypt. It was destroyed by fire in the year 1168 by the Vizier Shawir in order to prevent it from falling into the hands of the Crusaders. It is said that the city burned for fifty days, and it is probable that the Jews, who had been living there, together with the other inhabitants, moved to the city of Cairo near by.

Whether the city of Fostat was rebuilt after the fire, I have not been able to ascertain; but it seems that the fact that in our document the city of Fostat is mentioned as the place where the document was written, would indicate that the city had been repopulated; or it may be, that the ancient name of Fostat was carried over by the Jews who settled in the neighboring city of Cairo, and retained in their documents as the name of the latter city.

This decree of the court is issued in the name of Abraham who was the son of Moses Maimonides, who is described as "our Lord, our Nagid [prince], Abraham, the intelligent Rab [Rabbi], banner of the Rabbis, and the first of his time and its wonder, the great Nagid,—may his fame be great and his honor increase." After making due allowance for the exaggerated style of the author of this document, it is obvious that Abraham was a man of great importance. The fact is that the Jewish Nagid was recognized by the Caliphs. The Nagid was the religious and judicial head of the Egyptian Jews; he appointed rabbis and other officials of the congregation and was the supreme judge in criminal and civil matters. He was supported by the various congregations and received fees for all legal documents that were issued in his name. Abraham Maimonides succeeded his father, the great Moses Maimonides, as Nagid. Like his father, he was a great scholar and the great physician of the Caliph *El Kamil*, so that in addition to his power as the head of the Jewish communities, he had great influence and power as a statesman and as a member of the royal household. Although a great scholar, he was an insignificant figure in Jewish history compared with his father, Moses Maimonides, whose wonderful intellectual gifts and attainments, whose scholarship and statesmanship and business capacity and medical skill, all combined, strengthened and inspired by a most remarkable originality and intellectual boldness and independence, completely overshadowed those who preceded as well as those who followed him.

Our decree is signed by two men. It is probable that they were elders of the congregation, for otherwise, if the signatures were intended to be those of the *Bet Din* there should have been at least three names. It is possible, however, that this document is mutilated at the end, and that the other signatures have been destroyed, although I am inclined to think from an examination of the edges of the document that it is complete as we have it. It is possible, also, that the two signatures may be those of members of the *Bet Din*, it being sufficient to have two of them sign the document in the character of witnesses, the decree having been made by a full court. The letters T. N. S. B. H. after the last name are the initial letters of a Hebrew phrase which may be rendered "may his soul be gathered into life everlasting." A pious prayer for a deceased father.

Another feature of this document is that although written and published in troublous times, it shows no signs of the excitement that must have affected all the members of the Jewish community as well as their Mohammedan compatriots.

At this time the crusades were being conducted with unabated vigor. The sixth crusade had ended in the year 1229, and the seventh commenced in the year 1230. Only a few years before this document was written, the city of Damietta at the mouth of the Nile had been taken by the Christian invaders, and the entire community massacred. The invaders in turn were driven out by the Caliph *el Kamil*, assisted by a timely overflow of the river Nile. The land was filled with alarm, and war was being continuously carried on between Christian and Moslem. In these wars the Jews fought under the crescent against the cross. The relation between the Jew and Moslem was brotherly, both of them being separated from the Christian through the Trinitarian doctrine, and more especially, by reason of the fact that in the eye of the crusader, Jew and Moslem were alike children of the devil, whom it was a sacred duty to destroy. Indiscriminate application of this doctrine

threw the Jew and Moslem closer together, and it therefore does not seem to be remarkable that a distinguished professing Jew like Maimonides or his son should at the same time be one of the chief ministers at the court of a Mohammedan ruler. But of all these events our document says nothing. Beyond the limits of the fighting and out of earshot of the noise of combat, life went on quietly along its accustomed lines; men pursued their daily vocations haled each other

into court and lived their lives as though there was no such thing as the holy sepulchre about which millions of men were contending.

This document, having served its purpose, found its way into the Genizah where it lay neglected for nearly seven hundred years, until it was resurrected by an English university professor, and has now become an object of antiquarian interest.

WHAT'S IN A NAME?

By J. M. PATTERSON.

JOB TROTTER BROWN, the tipstaff, was a student of the Laws,
And all his time was occupied in learning legal saws.
He scorned to live a fameless life — mere lackey of the Court —
And nightly did he lucubrate on Contract, Crime and Tort.
For Job had sworn right solemnly, forensical renown
Should trumpet to the universe the worthy name of Brown;
And, though his own accomplishments ne'er reached the outer throne,
His genius hatched a brilliant scheme to help his oath along.
So all his little children, as they numerously came,
He christened after jurists in the Pantheon of Fame.
Hence Mansfield and then Webster Brown and Salmon Chase Brown appeared
And Brewster Brown and Blackstone Brown and Story Brown were reared.
P. Henry Brown and E. Coke Brown arrived at man's estate
And Bacon Brown and James Kent Brown filled up the family slate.
Old Job believed his great-named boys predestined to renown
And that, in time, they'd lift the sod from the buried name of Brown.
But still that great day has not come, and still that worthy name
Is missing from the pedestal within the Hall of Fame;
For Mansfield Brown, the farmer, is the man behind the hoe;
And Webster Brown's a tailor, content to sit and sew;
Salmon Chase Brown's a monger, of fish, both shell and scale;
And Brewster Brown's a maker of choicest brands of ale;
Young Blackstone Brown delivers coal — good anthracite's his line —
And Story Brown is pitching for the Tallahassee nine;
Pat Henry Brown, the lightweight, is a pugilist of note;
And E. Coke Brown's a stoker on a Jersey ferry-boat;
The butcher shop is Bacon Brown's and there he toils each day;
While James Kent Brown makes cock-tails in a Cripple Creek café.

CASES FROM THE OLD ENGLISH LAW REPORTS.

I.

FRAUD ON MARITAL RIGHTS.¹

BY A. WOOD RENTON.

MARY BOWES, the daughter of a wealthy English gentleman, with a mansion house and a valuable collection of plate, books, medals, jewels and pictures, besides other real and personal property of a great variety of forms, became entitled on her father's death to a life interest in it all. The hand of a lady so richly endowed was naturally an object of desire, and in a short time Miss Bowes became Countess of Strathmore. There were five children of the marriage, three sons and two daughters. In March, 1776, the Earl of Strathmore died, and in the beginning of the following year the Countess, who was then about to marry a Mr. Grey, executed with his knowledge and consent a settlement, securing her property to her own use, independent of the control of any future husband. Mr. Grey was not destined, however, to become the husband of the Countess of Strathmore. There was at that time in the army a half-pay Lieutenant—Andrew Robinson Stoney by name—who, being in "greatly distressed circumstances," was exceedingly anxious to fill the position. He adopted an ingenious method of compassing his end. He secured the insertion in a number of newspapers of attacks on the lady's character, and then pretended—and of course had the pretence brought to the Countess's knowledge—to engage in duels for the purpose of vindicating it. Having thus created in the Countess's mind feelings of gratitude towards himself, Stoney proceeded to turn them to the desired account. One evening a message was conveyed to the Countess that her gallant champion, who had been warring as usual in defence of her reputation, was lying mortally wounded at his lodgings in St. James

Street, and that if she wished to see him in life she must come at once. The Countess went.

The spectacle that awaited her had been arranged with a considerable appreciation of dramatic effect. Stoney was lying on a couch apparently in great torture. Addressing the Countess in a low and languid tone of voice he thanked her for her condescension in coming to see him, told her that he had only twenty-four hours to live and that, if she would but consent to marry him, he would gladly sing his *Nunc dimittis*. With the self-abnegating enthusiasm to which even widows with five children are sometimes subject, the Countess consented, and next morning the marriage was celebrated—the dying bridegroom being carried to church on a litter. Having gained his immediate object Stoney was not long in pursuing his advantage. A few days sufficed to heal his feigned wounds. He assumed the name of Bowes and brought to bear on his wife, for whom of course he had made no provision on his marriage, and of whose ante-nuptial settlements, placing every penny of her property beyond his power to touch, he only learned afterwards—every available sort of undue influence to induce her to revoke the instrument which stood in the way of his pecuniary ambitions. Angry words, threats, indignity and blows followed each other in quick succession. Soon the spirit of the lady was utterly broken. She signed parchment after parchment without knowing or caring what she was doing, and Bowes acquired that full control over her heritage which in the absence of settlements husbands had in the old

¹ *Bowes v. Bowes*, 1797, 6 Brown P. C. 427; Eng. Rep. 2 H. L. 1178.

days before the Married Women's Property legislation. He at once set about acting after his kind. He committed all sorts of waste on the estates, raised large sums of money by cutting down great quantities of timber and by granting annuities payable out of the rents and profits of the property, and compelled his unfortunate wife to execute whatever deeds he thought necessary by way of security. After some years his wife left him, and with the exception of a short period during which, having had her seized and forcibly carried away to a castle by armed men, he detained her there, maltreating her as before, she never lived with him again. At length the Countess appealed to the law. She instituted a suit for divorce—not, it need scarcely be said, *a vinculo* (in those days there was no tribunal that could grant *that*), but *a mensa et toro*, in the Consistory Court of London. She applied to the Court of King's Bench to compel him to "keep the peace" in regard to her, and she moved the Court of Chancery to establish the antenuptial settlement of 1777, and to set aside the revocation of it which Bowes had extracted from her by coercion. The hour of retribution had at last come. The Consistory Court granted a degree of judicial separation, and first the Court of Arches and afterwards the Court of Delegates affirmed the sentence. The King's Bench bound Bowes over to "keep the peace." In the

Court of Chancery he met the Countess's claim with a plea of extraordinary impudence. The man who owed his position as her husband to fraud of the grossest kind, actually maintained that the Countess's antenuptial settlement—not having been communicated to him before marriage, was invalid as being a "fraud on his marital rights." The Court of Chancery promptly rejected this contention, and the House of Lords met with an equally uncompromising negative. The head-note of the case is worth citing.

A settlement made by a woman while unmarried, is not in all cases void against any husband she may afterwards take. To avoid such a settlement the husband must show to the court that he has been deceived: mere concealment alone is not enough. And if he demands to have the deed set aside without offering to make any provision for the wife, this is a ground for refusing relief. In all cases where a husband comes into Chancery for his wife's fortune, he must make a settlement. A man who marries without a treaty must be content to take a wife as he finds her.

Thus, even in the days of Stoney, *alias* Bowes, was the law quick to deprive fraudulent and avaricious husbands of their prey wherever the opportunity offered itself. Now the Married Women's Property Act, 1882 (S. 2), prevents husbands who have married since that year from acquiring by marriage any title to their wives' property. So have the sorrows of the Countess of Strathmore yielded the peaceable fruits of justice to her sex in the years to come.



DOCTORS VERSUS LAW.

BY WM. ARCH. McCLEAN.

THE position of a physician in a community is peculiar. He is alternately blessed and damned, according to the ills he cures or does not cure. Sins are laid at his door, to be hurriedly cleared away when he is needed in haste. At one time he becomes an absolute and indispensable necessity, at another his very presence sends the pulse galloping, the tongue looks squeamish and the inwards revolt, remembering past experiences. He is a type of fate, holding one over an abyss again and again to remind mortal of the time when he cannot hold him longer and will have to drop him into the bottomless pit of to-morrow. In fact the physician pursues the unwelcome guest who is never bidden to the home and often shares with it the unwelcomeness.

The community is often an ungrateful thing toward the healer. It may not want to cultivate his acquaintance, or give room or support. It would rather enjoy such health that all healers would be starved and frozen out of its borders. It is not, however, master of the situation. Poor flesh, heir to frailties, goes blundering along, you are ill, your neighbor's uncle's aunt is down with the grippe, your wife's sister's child has the measles, your friend of the adipose tissue is nursing the gout. They are in need of a physician. The question of their wants is not debatable. They must have them if they are to live, they must have them if they must die. There is but one thing to do, send for an allopath, homoeopath, old school, new school, Christian science, or faith healer, according to the prejudices of those to be administered unto. If they are not in their offices, call in the quack, the hoodoo, the pow-wow, or any old kind of a medicine man or woman. Having so done swallow the prescribed doses, actually or mentally, in the attempt to get well. You are

afraid not to follow some such method else you would be a long time sick and you are afraid if you do as you must that something will happen to you anyhow.

After watching the physician generation after generation passing up and down the community, coming and going at all hours of the day and night, in times of plagues, and times that are plagueless, measuring doses by pillet, pill and spoonful, one is tantalized with the reflection of the miraculous escape of the physician from taking his own medicine. This is followed by another reflection, whether if you had been in the same boat with him you would not have been better off. This, however, in turn you dismiss with the admission that the healer was a jolly good fellow anyhow, and that his social and spiritual doses were well worth the price of the bitter stuff he sent down into the inwards. There may be times, it is true, that you wish you could prescribe for him. This feeling in time passes away, for you have an ache and you have to have him again, or think you have to, which is the same thing.

The physician seems to have his own peculiar way of looking at life, in a kind of a disinterested way. He sees so much of it that he is surfeited, it is to him a flame of a candle that burns a little while and then is snuffed out, sometimes almost before it has begun to burn, or when half burnt or when it has sunk deep down in the socket. To him it has simply gone out, that is all there is about it. He goes off unconcernedly to the next accouchement as though life was something of a joke. For all we may know he may be right in so considering it. The pity is that more of us cannot look at it in that way.

The physician may enjoy certain distinctions, provided he has the capacity. If

he can hold his tongue and does not try to tell all he knows or does not know, or is doing or is not doing, his silence, his nods, his grunts, his head shakings may pose as wisdom, and pass coin in the feeding of bread pills to hypochondriacs, of morphia to those with pain, of quinine to those with colds, and of whiskey to the weak and debilitated. When none of these remedies fit the subject and the patient does not survive of course it is the inevitable.

When Darwin announced to the world the law of nature of the survival of the fittest, he may or may not have conceived an exception to the rule, namely, a community presided over by such a healer as indicated, where in course of time necessarily the fittest would die, leaving a commune result of morphine wrecks, malaria suspects, toppers and hypochondriacs.

The physician's business may be said to be one largely of guessing. There is something fascinating about a game of chance to mortals. The passion rules many a life. While those outside the medical profession must play the games on black or red spaces, or on the throw of a die, or on the turn of a card, yet the great game is alone played by the healer. He has human pawns, rooks, knights, castles, kings and queens. There is much skill and science in the game. At all times there is the hazard of a human life by any movement made upon the board. The physician moves, some for the sake of the fee, and thereby loses out of his soul the spirit of the game, while the true healer moves for sake of game, for the chance of a human life, for a call of "check-mate" against his opponent Death.

The physician enjoys another unique distinction. He comes so close to the community actually and relatively that he knows the inhabitants better than they know themselves, knows their unsung virtues and their hidden sins, yea even the familiar outlines of the skeletons in the closets. Think for a moment what this knowledge must be, and then consider what is done with it. It is all

hidden in the breast of the healer, he must bear the burden alone. He can not communicate it to others, that is if he proposes to continue the practice in the same community. He can not even tell his wife. He simply bears the burden until it is buried where all other secrets are forever hidden.

Along with these apparent distinctions, socially, professionally and otherwise, there are certain responsibilities the physician must shoulder and be prepared to face at any time. He must be at the beck and call of humanity and he must perform the self-imposed duties of his profession in such a manner as not to become classified at some inopportune moment as a criminal. It is possible for a moment's recklessness or carelessness with human life to develop a charge of manslaughter and a punishment therefor.

England is more strict in holding the physician to account than is this land of freedom. Here greater latitude for guessing seems to be allowed. Or it may be in our youth we have not valued life as the older country has. However the drift of all the authorities seems to be towards greater strictness with the physician. In the mother country a physician or surgeon may by his negligence in causing the death of a patient render himself liable to be punished for manslaughter, or if the injury fall short of death he may be punished for a misdemeanor. It is not every kind of negligence, however, that is going to bring about this result. If there is an honest exercise of the best skill to cure, there is no criminal liability. The authorities are a unit on the proposition that the negligence or inattention must be of the grossest kind. It is this kind of negligence alone that may make of the healer a criminal.

This gross negligence may be of two kinds. It may be a sin of omission or one of commission. The first may be illustrated by a case where a physician went hunting and neglected his patient. Or he may have stayed in the game too long and, while waiting for the turn of a card, the patient may have died.

In either event he must answer criminally for his act. The other kind is where a physician was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, of the properties of which he was ignorant or how to administer a proper dose. A person who with ignorant rashness and without skill in his profession used such a dangerous medicine acted in gross negligence. A person who took a leap in the dark in the administration of medicine was guilty of gross negligence.

It is one thing, however, to catch your criminal healer and another thing to put him beyond range of making future experiments upon human life. The burden of proving the gross negligence, the leap in the dark, will be upon the people, upon those who make the accusation. The accused will be presumed to be innocent. Parenthetically it may be added that there is nothing so presumptuous as ignorance.

The attitude of the courts in England and this country on this subject are illustrated in two cases somewhat similar. The former held that if a person, not having a medical education, and in a place where persons of a medical education might be obtained, takes upon himself to administer medicine which may have a dangerous effect, and such person destroys the life of a person to whom it is administered, it is manslaughter. The party may not mean to cause death, on the contrary he may mean to produce beneficial effects, but he has no right to hazard medicine of a dangerous tendency when medical assistance can be obtained. If he does, he does it at his peril.

In this country it was said that if a person assume to act as a physician, however ignorant of medicine or science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter, but if

the party prescribing has so much knowledge of the fatal tendency of the prescription, that it may reasonably be presumed that he administered the medicine from an obstinate, willful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient.

It would seem that the law of this land is drifting nearer the Englishman's point of view than the above western idea. The American Court evidently had in mind more of the definition of murder than manslaughter. A person ignorant of medicine who should undertake to prescribe and thereby kill would surely be in the same boat with the one who picked up the same old revolver which was supposed to be minus a load, to have it go off and kill. There would be no intention of killing in either case. There would, however, be such a wanton and gross negligence both in the pointing of the revolver and prescription, that when the going off of the one would produce the same result as the other, it would be a singular distinction to have the performance in one case called by a different name than in the other.

These cases suggest a legal riddle. Suppose you or I should turn missionary and journey to some heathen land, if we could find any such in the Twentieth Century. Suppose we take along a case of medicine about which we know nothing, to catch and heal their bodies, while we are proselyting for their souls. Suppose we have the only medical chest in that heathen land and no other medical assistance can be obtained. Suppose we hazard the medicine in our laudable purposes and launch into the hereafter half of the tribe we went out to save. How would our act be construed, if we escaped the other half of the tribe with our life? Would we be guiltless because there was no other medically educated dispenser of medicine in the neighborhood, or would it be manslaughter?

We are not anxious for an immediate re-

ply. We have not engaged passage yet. It may not be amiss to remark, however, that there are distinctions known to the law, that bear in their technicalities a resemblance to the one suggested.

I am reminded here—yes, same old story. It may be old, yet it had a new setting. The subject was a farmer unacquainted with legal terms. He confided to his counsel who had in preparation a case for him.

“What’s this I hear about a cality?”

“A cality,” came the reply, “don’t know of any such thing.”

“It’s a cality I hear is going to make me trouble.”

“A cality, trouble, really you mustn’t listen to all the foolish talk people pour into your ears. I don’t know what you mean.”

“Well, I’m told that if I lose my case it will be on account of a cality and I want to know what kind of a thing it is.”

“Oh, yes, same old technicality.”

To go on with the other story, the disadvantage of the physician when it comes to a rash killing of a patient, consists not so much in having killed, or who is killed, or how it is done, but to what medical school the killer belongs. If he is a regular, the chances are it will not be manslaughter but only the inevitable. If he is an irregular, a Christian science, a faith healer, or what not, there will be trouble. It will not come from the deceased, nor from his relatives and friends. It will be from the regulars. When it comes to killing through gross negligence the physician can best protect himself from the charge by being a regular when it is done.

The civil liability of the physician to answer for his acts in damages is a far more serious question to him than the criminal one, for the latter seldom arises, while the former may be more frequently met. Physicians and surgeons who hold themselves out to the world to practice in their profession by so doing impliedly contract with those who employ them that they possess a reasonable amount of care, skill, diligence and learning. The skill is not so much stuff

as can be bought by the yard, open to inspection with its damaged spots. The buyer does not have to take the chances of what he is getting, but it becomes the duty of the seller to furnish what is impliedly contracted for, sight unseen as it were, according to the barter of boyhood days. He is bound not only to exercise such reasonable care, skill and diligence, but is liable for the want of the same.

The only object any one has in sending for a physician is that he will cure the patient. If, however, all physicians cured all patients there would be a long time between funerals for the undertakers, and the earth might become overcrowded. While a doctor is sent for to bring about a cure the law does not expect him to cure, either as a rule or as an exception. It only requires of him to use reasonable care, skill and diligence. If in using the same the cure is worse than the disease the physician is blameless in the eyes of the law.

Further if it happens that the patient does not recover or that a complete cure is not effected, there is to be no presumption against the healer on that account. He may have done all in his power, may have been up against the real thing and had his hand called. He is not to suffer thereby. Proof of no cure alone is not sufficient under any circumstances to make the physician answerable in damages. Some negligence or want of skill must be added to bring that about.

The implied contract of a physician is not that he will certainly effect a cure but that he will use all known and reasonable means to accomplish that object. That he will attend his patient carefully and diligently. That he will use such reasonable skill as is ordinarily exercised by others in his profession. He must be up with the times. It will not be sufficient for him to use such skill as was ordinarily exercised in his profession a generation ago, or often a decade ago, or when he attended a medical school. Since such a time the treatment of a particular disease

may have undergone a revolutionary change, lowering its mortality by a large percentage. As to the degree of skill which the physician contracts to bring to the service of his patients, regard must be had to the advanced state of the profession at the time.

It is to be noted that the contract between physician and patient is an implied one. It is one the parties thereto seldom discuss as to its terms. It is rarely expressed. Each takes the other on faith and the law. If expressed the contract might run somewhat as follows:

Agreement made and concluded between A. B., physician, and C. D., patient. Whereas C. D. has become ill of some disease unknown to him whereby his usefulness to himself and family is impaired, now know all men by these presents that in consideration of the premises and the further sums hereby contracted to be paid to the said A. B. by the said C. D., at such times and in such amounts as the said A. B. may demand the same, the said A. B. doth hereby contract to use all reasonable care, skill, diligence and learning to diagnose and cure the unknown disease of the said C. D., and give the said C. D. such continued attention as his case may demand; provided, nevertheless, if a cure is not effected payment is to be made the same as though there had been a cure, and provided further that C. D. is to conform to the prescriptions and treatment of the said A. B. as the same shall be directed and ordered.

Such it might be said would be the terms of the implied contract, if written out. Should the contract be so expressed as to declare that a cure would follow for the fee reserved, yet it is likely the law would say that such a contract does not imply any more than the law imposes, that is the exercise of reasonable skill and care, and does not mean an unqualified promise to cure. The doctor may tell you that he will soon have you out of bed. It will be no evidence of an absolute promise to cure. The term is equivocal at any rate, until you know the way you will go out of your bed.

It is to be further noted that the implied contract as expressed above and construed by the law is a mutual one. It will not do for the patient to be abed, and because the medicine tastes bitter, throw it out of the window, or feed it to the cat, or take half doses, or because he wants to hurry the cure swallow quadruple doses. If he does the physician is not responsible for the result. To make the physician entirely responsible for his methods of healing, the patient must submit to the ways and means, must conform to the necessary prescription and treatment of his physician. It has even been declared that if under pressure of pain the patient cannot obey the commands, the physician is not responsible. The contract impliedly is further that the relatives and nurse of the patient will regard the directions of the physician. The law will not permit the patient and his relatives to try along with the Doctor's treatment all the remedies prescribed by all the old men and women in the neighborhood, and when the cure fails to materialize to say that it was the fault or want of skill of the physician.

A physician is not bound, though requested so to do, to call in others of the profession with him. He may believe he is right, he may want to be free to act according to his own individual ideas, he may not want to have his work criticised by a rival. Accordingly it has been held that his refusal of assistance does not increase his liability to his patient. He has not contracted to call in the profession generally or particularly to sit in judgment upon him. If he is not negligent in any way, if he has used all reasonable skill and attention, he has done all that can be asked of him and is not responsible for what might have been the greater result to the patient if others had been called into consultation with him. His refusal to consult with others will only be construed to be an implied declaration of his ability to treat the case properly.

A refusal of a physician to consult with others may result in the shattering of faith that had been placed in him, which in turn

brings to pass the calling in of another doctor against his wishes. Perhaps he may be altogether retired from the case. It is then discovered that his treatment has been wrong, shows want of skill and that it is impossible to remedy the wrong he has done. Under such circumstances a court has said that a surgeon is responsible for his wrongful act, although the case is turned over to another, who either could not then help the patient or who might, by proper care and skill, be able to discover the error of the first doctor and relieve the patient. In the latter event the first surgeon does not escape liability. It is true the patient may eventually receive the proper treatment, but the first surgeon has prolonged the illness by his want of skill which can be measured in damages. In the former event where both surgeons blunder and exhibit their want of skill, the two wrongs do not make a right. If both erred wrongfully both are responsible to the patient, or if the first erred, and the second was unable to correct such error, the first is responsible for his act even though the case was taken from him.

If a surgeon has done everything reasonable skill dictates, the law will not permit him to be punished with damages. This was well illustrated in a reported case. A man had fallen from a building. A surgeon was called in, who attended to a broken arm and other injuries. The patient all the while complained of great pain in the hip. The hip and leg were again and again examined with the result that the surgeon was unable to discover any fracture at the point. Not content, however, with his own judgment, he called into consultation the highest surgical ability, with whom the most minute examination failed to show any fracture. Notwithstanding all this attention and skill, when the man was able to go around, one leg proved to be shorter than the other and he sued his surgeon for damages, by reason of such shortened leg. The judge and jury were of the opinion that the surgeon had done all that reasonable care and skill had

required and that he was not liable for results that proved to be beyond that.

In another case the question was whether in setting a broken leg, the surgeon was bound to bring to his aid the skill necessary to set the leg so as to make it strong and of equal length with the other when healed. The conclusion of the court was that that would be expecting too much. If the surgeon used all reasonable care and skill, and was not negligent in any way, he had done all that could be expected of him, no matter whether the broken leg proved to be a good or poor match for its neighbor. If the court had taken any other view than this then a surgeon might be expected to set a leg bow-legged provided its mate was crooked.

A physician is not bound to be omniscient. It is the patient's duty to tell him sufficient about himself so that he may act intelligently. It will not do to evade the questions asked, or give false answers, or keep mum, one must make a clean breast of the whole matter to the physician if he wants to hold him for his acts. In a case, a man had been kicked by a vicious horse and fell, striking his head, afterward he went to a dentist, who without being told anything of the accident chloroformed him for the purpose of extracting certain teeth. Partial paralysis followed the extracting. The question to be determined by the court was whether the teeth pulling produced the paralysis, or the kick of the horse, or the chloroforming or the three combined. The court washed its hands of the matter by deciding that a dentist is only bound to look to natural and probable effects and is not answerable for negligence or results arising from the peculiar condition or temperament of patients, of which he had no knowledge.

If a physician makes an honest mistake in the treatment of a case, or an error of judgment, is he answerable for the same? The determination of such a question often presents very nice distinctions. If the disease or wound showed reasonable grounds for uncertainty or doubt, and if the physician fails

in using his best judgment to clear up the doubt, according to the skill and diligence as is exercised by others in the profession generally, taking into account the advanced state of the profession at the time, he will escape liability. If the doubt or uncertainty grew out of his lack of skill, arising as it were from a want of learning such as is exercised by others generally, he would have to answer. It is dollars to doughnuts however that if the physician was of the right stripe in the matter of his medical doctrines, that he would be able to have all the expert testimony needed to demonstrate that his treatment was skillful, up to date, and such as conformed to the average judgment of the profession.

Locality will often make a difference in the degree of skill to be expected, under the implied contract between physician and patient. This is occasioned by the fact that certain places obviously afford better advantages than others. Physicians and surgeons practicing in small towns or rural or sparsely populated districts are bound to possess and exercise, not the same skill as the healer in a city filled with medical schools, hospitals, great doctors and teachers, but at least the average degree of skill possessed and exercised by the profession in such localities. This is the same as saying that when a mistake has been made in rural parts, it is not to be measured according to the skill of some smart Alec brought from the city to testify as an expert. Neither is it to be judged, it has been said, from those in the locality who may be quacks, ignorant pretenders of knowledge not possessed by them. It is to be judged by such skill and diligence as are ordinarily exercised in the profession in the locality, excluding smart Alocs from a distance and quacks at home.

It goes as a maxim that doctors disagree. Pondering thereupon one wonders how a physician can practice safely anywhere. Why will he not be made a victim continually on account of those he fails to cure. Given the emergency one would imagine

that all that need be done would be to call an allopathic physician to demonstrate that homoeopathy is all wrong and vice versa. The law will not however countenance such doctrinal disputes, for the purpose of becoming the judge of which is right and which is wrong. The law simply says, that a physician is not to be tried in the citadel of his enemy, but in the house of his friends. The treatment of a medical person of one school of practice is to be tested by the general doctrines of that particular school and not by those of other schools. If the physician can prove that his treatment, knowledge, care and skill is in accordance with the system he has studied, that is a sufficient defense. He is not expected and does not have to know all the remedies of all other pathies. This rule seems to have exceptions when it comes to Christian Science healers and Faith curers, but they will likely have no trouble when they can demonstrate their treatment to be a system or school. It is too frequently considered now a method of madness needing the care of an institution.

The lack of skill of a physician or his negligence, cannot be excused or affected by the fees he receives or does not receive. He can not escape liability by refusing to charge. A court has said that if a person holds himself out to the public as a physician he must be held to ordinary care and skill in every case of which he assumes charge, whether in the particular case he has received fees or not. You can have the physician serve you faithfully with his want of skill. When he presents his bill you can refuse payment, and later on you can sue him for damages his lack of skill brought about. This is all legal, because the courts have said so. The latter end of that unskillful, feeless healer is anathema.

The liability of a physician is well illustrated in the following case. The plaintiff had been lame for several years. His thigh bone was diseased. An amputation was necessary to arrest the progress of the disease. The defendant performed two operations

upon the plaintiff's thigh. The first was unobjectionable. The ground of complaint was to the second one, whether there was error in not cutting off the limb nearer the body, and want of skill and care in the mode of execution. It was not shown that the plaintiff sustained any material injury from the mere mode of execution, although it did not accord with the most correct and careful practice. As soon as the second amputation took place it was apparent that the bone was infected above the place of amputation. The plaintiff could not then bear another operation. The caries continued to increase in virulence, until the whole of the thigh bone was removed from its socket by another surgeon. The alleged fault of the defendant consisted in an error of judgment in not removing more of the diseased limb. The whole bone seemed to be diseased and hence it was of little importance in one sense, how much or how little was removed. It was the inevitable fate of the plaintiff to be a cripple for life without any agency of the defendant. Yet his want or error of judgment protracted the suffering of the plaintiff and caused an increase of expenses and loss of time for which the defendant was held liable.

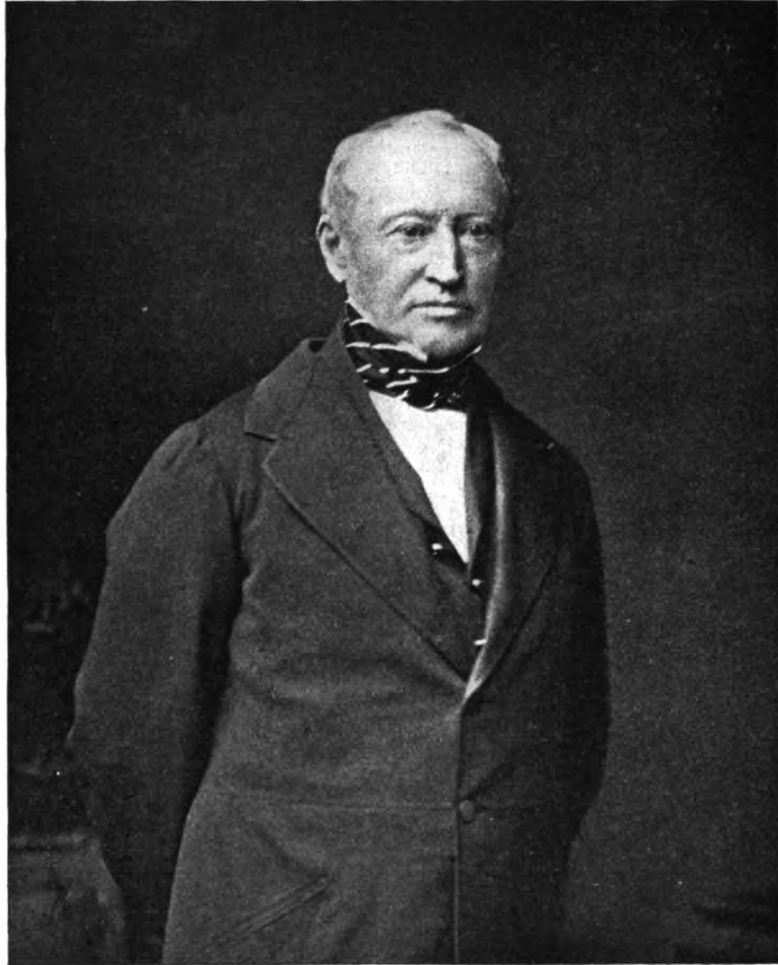
When the lack of skill and negligence of physicians and surgeons are to be measured in damages by courts and juries, light punishments are the rule. An unusual verdict may be said to be one running into the

thousands, while a verdict in the hundreds is more frequently what one may expect to find.

The courts have said that the practice of surgery and medicine is indispensable to the community, and while damages should be paid for negligence and carelessness, surgeons and physicians should not be deterred from the pursuit of their profession by intemperate and extravagant verdicts.

If such a condition should ever come to pass that they should be deterred, one might be a long time sick when illness overtakes him, or a short time sick minus recovery. Instead of the mortality of certain diseases and operations decreasing under the advanced methods of the last generation forty, fifty, and even one hundred per cent., there would be a return to the mortality of the dark ages, when the barber with his sign of a striped pole was the blood letter, chief healer or deliverer from the maladies flesh is heir to. Such, however, will never be the case, for the evolution is upward and forward, the world is becoming a healthier place to live in. Law will keep pace with the needs of those who are making it a better and more wholesome dwelling place. This ought to be some consolation, notwithstanding certain doctrines, which are neither medical nor legal, that to enjoy perfect health you have to lose your life.





LORD CHIEF JUSTICE COCKBURN.

A CENTURY OF ENGLISH JUDICATURE.

V.

BY VAN VECHTEN VEEDER.

FROM THE COMMON LAW PROCEDURE ACT TO THE JUDICATURE ACT.

A WELL defined change in the administration of English law occurred shortly after the middle of the century. Years of agitation against the anomalies and abuses of the prevailing legal system culminated about that time in a series of practical reforms which brought the administration of justice into something like accord with the world of affairs. From this time forward the law largely ceased to appear to be designed as a restraint upon human activity.

First and foremost was the Common Law Procedure Act of 1852. This great measure and its immediate successors largely transformed the ancient procedure. Adjective law, as its name implies, exists for something else. Under these reform acts this objective point ceased to be prolixity, delay and the profit of the lawyers, and became more like the realization of substantive rights. Causes of action by and against the same parties were permitted to be joined, and several equitable defences were allowed. Special demurrers were abolished, together with much of the ancient verbiage, and only such statements as must be proved were essential in pleading. In 1851 that final absurdity in the law of evidence which closed the mouths of the very persons who knew most about the matter in dispute was abolished, and the testimony of interested witnesses became at last a matter of credibility instead of competency. In equity a series of practical reforms removed many of the most obvious defects of procedure; additional vice-chancellors were appointed in 1851 to cope with the burden of arrears, and above all, in the same year, a permanent court of appeal in chancery was established. The confusion and absurdities of the ecclesiastical administration of probate and matrimonial affairs were

finally removed in 1858 by the creation of an independent court for probate and matrimonial causes; and about the same time the demand for the infusion of new blood into the court of final appeal was recognized. The Court of Crown Cases Reserved, where points of criminal law could be reviewed, dates from 1848.

But institutions are of little utility unless they are administered by men who are in sympathy with their purpose and spirit. From this point of view the middle of the century is of even greater significance as a turning point in legal history, for it marks the advent of Willes, Bromwell and Blackburn in common law, and of Knight-Bruce, Turner and Page-Wood in equity. Under the guidance of such minds, in which technical learning and common sense were combined in a rare degree, the law ceased to act as a sort of surprise upon mankind, and the realization of rights became practicable. And a few years later the larger interests of the law in the court of final appeal were for the first time adequately administered by the master minds of Westbury and Cairns. This period has been aptly termed by Sir Frederick Pollock the classical period of English law.

COMMON LAW COURTS.

The central figure in the Court of King's Bench throughout this period was Blackburn. But he was ably assisted and in some respects supplemented by the Chief Justice of the Court, Sir Alexander Cockburn (1859-80).

Cockburn came to the bench with a reputation as a jury advocate second only to Erskine's. Although it cannot be said that he

attained equal eminence as a judge, it may be asserted that no lawyer of the century combined in such an eminent degree the logical and imaginative qualities of mind. In Cockburn's mental equipment imaginative qualities certainly predominated. His mind was perhaps too quick and susceptible to admit of the tenacity of grasp essential to the highest excellence in the formal exposition of legal doctrines. But at *nisi prius*, in dealing with facts, he achieved enviable distinction. His most conspicuous effort in this sphere was his charge to the jury in the memorable Tichborne case, in the course of which he formulated with eloquence and force the true relations between courts and juries. "In my opinion," he said, "a judge does not discharge his duty who contents himself with being a mere recipient of evidence, which he is afterwards to reproduce to the jury without pointing out the facts and inferences to which they naturally and legitimately give rise. It is the business of the judge so to adjust the scales of the balance that they shall hang evenly. But it is his duty to see that the facts as they arise are placed in the one scale or the other according as they belong to one or the other. It is his business to take care that the inferences which properly arise from the facts are submitted to the consideration of the jury, with the happy consciousness that if we go wrong there is the judgment of twelve men having experience in the every day concerns of life to set right anything in respect of which he may have erred. . . . In the conviction of the innocent, and also in the escape of the guilty, lies, as the old saying is, the condemnation of the judge."

With respect to the question of reasonable doubt he said:

"You have been asked, gentlemen, to give the defendant the benefit of any doubts you may entertain. Most assuredly it is your duty to do so. It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the jury. But the doubt of which the accused is entitled to

the benefit must be the doubt that a rational, that a sensible man may fairly entertain, not the doubt of a vacillating mind that has not the moral courage to decide, but shelters itself in a vain and idle scepticism. . . . I should be the last man to suggest to any individual member of the jury that if he entertains conscientious, fixed convictions, although he may stand alone against his eleven fellow jurors, he should give up the profound and unalterable convictions of his own mind. . . . But then we must recollect that he has a duty to perform, and that it is this. He is bound to give the case every possible consideration before he finally determines upon the course he will pursue, and if a man finds himself differing from the rest of his fellows with whom he is associated in the great and solemn function of the administration of justice, he should start with the fair presumption that the one individual is more likely to be wrong than the eleven from whom he differs. He should bear in mind that the great purpose of trial by jury is to obtain unanimity and put an end to further litigation; he should address himself, and in all diffidence in his own judgment, to the task he has to perform, and carefully consider all the reasons and arguments which the rest of the body are able to put forward for the judgment they are ready to pronounce, and he should let no self-conceit, no notion of being superior to the rest in intelligence, no vain presumption of superiority on his part, stand in the way. . . . That is the duty which the jurymen owe to the administration of justice and the opinion of his fellows, and therefore I must protest against the attempt to encourage a single jurymen, or one or two among a body of twelve, to stand out resolutely, positively, and with fixed determination and purpose, against the judgment and opinion of the majority."

With respect to the argument that public opinion was with the accused, he said:

"There is but one course to follow in the discharge of great public duties. No man

should be insensible to public opinion who has to discharge a public trust. . . . But there is a consideration far higher than that. It is the satisfaction of your own internal sense of duty, the satisfaction of your own conscience, the knowledge that you are following the promptings of that still, small voice which never, if we listen honestly to its dictates, misleads or deceives—that still, small voice whose approval upholds us even though men should condemn us, and whose approval is far more precious than the honor or applause we may derive, no matter from what source. . . . Listen to that, gentlemen, listen to that; do right, and care not for anything that may be thought or said or done without these walls. In this, the sacred temple of justice, such considerations as those to which I have referred ought to have and can have no place. You and I have only one thing to consider; that is, the duty we have to discharge before God and man according to the only manner we should desire to discharge it,—honestly, truly, and fearlessly, without regard to any consequences except the desire that this duty should be properly and entirely fulfilled.”

Among other *causes célèbres* in which he presided were the Matlock will case; the Wainwright murder case, a leading case on circumstantial evidence; the convent case of *Saurin v. Starr*, an action by a sister of mercy against her mother superior for assault, and *Reg. v. Gurney*, a famous case of fraud and conspiracy.

By way of disparagement it was said that Cockburn acquired his knowledge of legal principles from sitting on the bench beside Justice Blackburn. Beyond doubt Blackburn's vigorous intellect was the ruling power in the Queen's Bench throughout Cockburn's service; but with his great natural acquisitive powers and assiduous application Cockburn certainly acquired a firm grasp of the fundamental principles of the law. If the scope and activity of his intelligence and the variety of his pursuits to

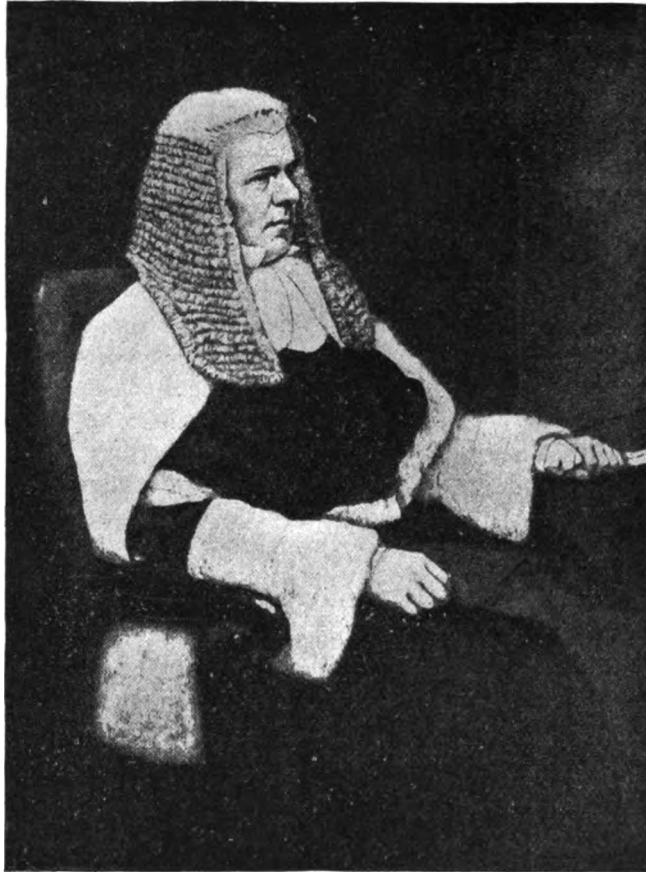
some extent impaired the fullness and accuracy of his knowledge of its details, his keen insight and knowledge of the world, acquired through cultivation, travel and extensive intercourse with all classes of men, frequently saved him from pitfalls into which the less worldly would have fallen. On the whole, his influence has perhaps been felt more in the impulse and direction which he gave to certain topics than in any direct contribution to its formal contents.

The doctrine of partial insanity may be directly traced to his efforts. This doctrine was formulated by him in defending *M'Naghten*, in 1843, and the advisory opinions rendered by the judges to the House of Lords in a subsequent investigation of the case lent support to his theory. In the subsequent case of *Banks v. Goodfellow*, 5 Q. B. 549, he applied the doctrine to testamentary cases in terms which have since been almost universally accepted. His reasoning is that whatever may be the psychological theory as to the indivisibility of the mind, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The pathology of mental disease shows that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties may be disordered, leaving the rest undisturbed—that while the mind may be overpowered by delusions which utterly demoralize it, there often are, on the other hand, delusions which, though the offspring of mental disease, and so far constituting insanity, yet leave the individual in all other respects rational and capable of transacting the ordinary affairs of life.

On the law of libel—particularly with respect to the public press—Cockburn made a durable impression. In the leading case of *Wason v. Walter*, 4 Q. B. 73, he established the reservation in favor of privileged publications on its true foundation; i. e. that the

advantage of publicity to the community at large outweighs any private injury that may be done. He also gave a strong impulse to the prevailing rule with respect to the limits of public criticism. His general principle was perfect freedom of discussion of public

belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country if



LORD BLACKBURN.

men, stopping short, however, of attacks on private character and reckless imputation of motives. When, therefore, a writer goes beyond the limits of fair criticism in making imputations on private character it is no defence that he believed his statements to be true. "It is said that it is for the interests of society that the public conduct of men should be criticised without any other limits than that the writer should have an honest

we were to sanction attacks upon them destructive of their honor and character, and made without any foundation. Where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations upon his motives which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism was not only honest but also well founded, an action is not maintain-

able. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest." *Campbell v. Spottiswood*, 3, B. & S. 769. See also *Hunter v. Sharp*, 4 F.

opinion on the jurisdiction over the sea within the three-mile zone.

Among his valuable contributions to the criminal law are *Reg. v. Hicklin*, 3 Q. B. 360, as to the bearing of motive in criminal acts; *Reg. v. Charlesworth*, 9 Cox Cr. Cas. 45,



MR. JUSTICE SHEE.

& F. 983, as to the protection afforded with respect to statements of motive.

One of his most valuable efforts is his exhaustive examination of the nature and limits of martial law in his charge to the grand jury charged with the investigation of the conduct of Colonel Nelson and Lieutenant Brand in the suppression of the Jamaica insurrection in 1865. In the "Franconia" case, 2 Ex. D. 63, he delivered a most elaborate

and *Reg. v. Winsor*, 10 Cox Cr. Cas. 308, as to whether in criminal cases a mistrial is a bar; *Reg. v. Rowton*, 10 Cox Cr. Cas. 28, on the testimony admissible to prove good character; *Reg. v. Carden*, 14 Cox Cr. Cas. 363, as to whether mandamus will lie to compel a magistrate to receive evidence.

The following commercial cases will repay examination: *Goodwin v. Robarts*, 10 Ex. 337, on the negotiability of foreign script;

Sacramanga *v.* Stamp, 5 C. P. D. 295, as to whether ship owners are liable for the loss of a cargo in a deviation for the purpose of saving life; Nugent *v.* Smith, 1 C. P. D. 423, on the liability of carriers by sea; Twycross *v.* Grant, 26 P. D. 469, a case of fraudulent prospectus; Rouquette *v.* Overman, 10 Q. B. 524, as to the bearing of the *lex loci* of performance on bills of exchange; Bates *v.* Hewitt, 2 Q. B. 595, upon the obligation to disclose material facts in contracts of insurance, and Frost *v.* Knight, 7 Ex. 111, where the doctrine of Hochster *v.* De la Tour, 2 E. & B. 678, was applied to a contract in which performance depended upon a contingency. It may be pointed out in this connection, that the significance of Cockburn's important opinion in Goodwin *v.* Robarts, mentioned above, lies in its repudiation of Blackburn's conservative view of trade customs as expressed in Crouch *v.* Credit Foncier, 8 Q. B. 376.

See, also, his learned opinion in Phillips *v.* Eyre, 42, B. 225, another case arising out of the Jamaica insurrection; his elaborate discussion of the nature and effect of foreign judgments in Castrique *v.* Imrie, 30 L. J. C. P. 177; and the celebrated ecclesiastical controversy, Martin *v.* Mackonochie, 3 Q. B. D. 730; 4 Q. B. 697; 6 App. Cas. 424, in which the writ of prohibition issued by Cockburn was set aside on appeal.

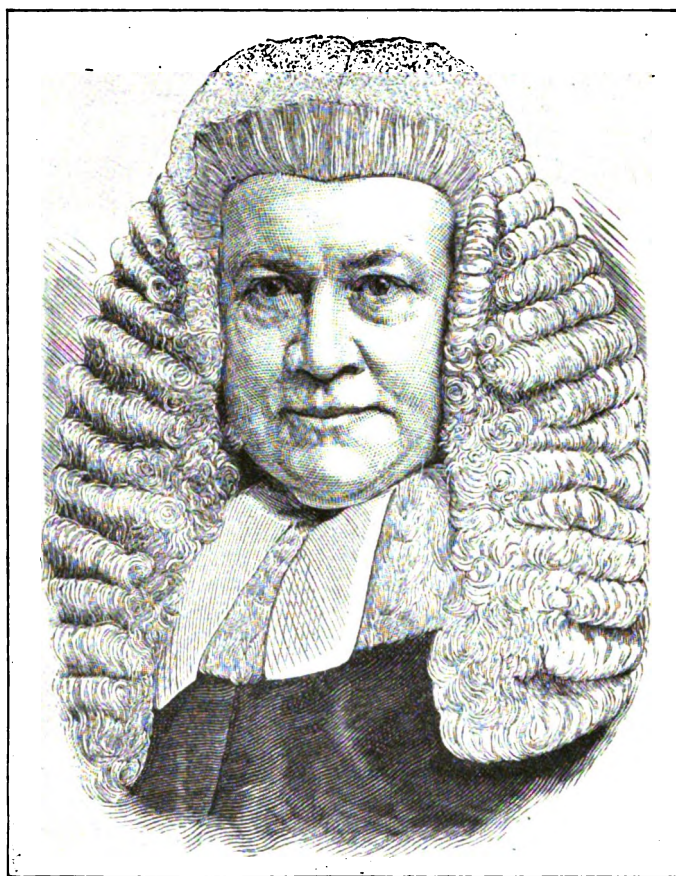
Lord Campbell records in his diary in June, 1856: "Having occasion for a new judge to succeed Erle, made Chief Justice of the Common Pleas, I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown, whereas several Whig Queen's Counsel, M. P's, were considering which of them would be the man, not dreaming that they could all be passed over. They got me well abused in the *Times* and other newspapers. . . . This was the sort of thing: 'Everybody has been going about town asking his neighbour, who is Mr. Colin Blackburn? The very ushers in the courts shake their heads and tell you they never heard of such a party.' 'His legal claims to this appointment stand at a mini-

num.' 'The only reason which can be assigned for this strange freak of the Chancellor is that the new *puisne* judge is a Scotchman.'" But Lord Lyndhurst came to the rescue in the House of Lords. "I have been asked," he said, "who is Mr. Blackburn, and a journal which takes us all to task by turns has asked somewhat indignantly, 'Who is Mr. Blackburn?' I take leave to answer that he is a very learned person, a very sound lawyer, an admirable arguer of a law case and eminently fitted for a seat on the bench." Never was a prediction more completely realized.

This unknown Scotch lawyer proved himself to be the greatest common law judge of the century, and was destined in his long career of nearly thirty years in the King's Bench, the Exchequer Chamber and the House of Lords to make a larger volume of substantial contributions to English law than any other judge in legal history except Coke and Mansfield. From the outset he easily held his own with such judges as Cockburn, Wightman, Lush, Archibald and Field, and it was not long before he was recognized as the corner stone of the Queen's Bench. In commercial law, of which he was completely master, he alone saved his court from being overshadowed by the authority of the Common Pleas under Willes. In real property law, also, he had no superior among his associates, and he was such a good all-round lawyer that even in those branches where a colleague was something of a specialist he stood without difficulty in second place. An acute observer has thus described the Court of Queen's Bench in action during Blackburn's supremacy: "So keen and alert was his mind, so full of the rapture of the strife, that in almost all cases it was he who in the point to point race made the running or picked up the scent. On such occasions all the papers and authorities in a case seemed to be drawn by a sort of magnetic attraction to his desk. And behind them he would sit with his wig on the back of his head, plunging his short-sighted eyes into one and another, firing off questions in quick succes-

sion at counsel on both sides, raising difficulties and objections, and at last, when the point was cleared, handing the conclusive document to the Lord Chief Justice, who meanwhile had often been leaning back in his chair in amused enjoyment of the scene,

on the other hand, he delivered the judgment of the court oftener than any of the *puisnes*. When he does undertake to formulate his views he gives fully the process by which he reaches his conclusion. While not so profuse in the use of authorities as Willes, his



MR. JUSTICE LUSH.

but always ready to intervene at the psychological moment and bear off the honors of a point, or to enforce the conclusion in a judgment of inimitable force and diction.”

It is obvious that the law reports furnish no adequate memorial of the services of such a character. But the volume of his work is immense. His name appears in almost every case, and although his opinions are often admirably terse he hardly ever simply concurred;

review of the cases is always thorough and interesting. He had no graces of style or flashes of imagination, but every conclusion is worked out with the hard headed and closely knit logic of his race. With a mind as vigorous as Jessel's, and a humor, when called for, as caustic, he was always conscientiously scrupulous in the discharge of his judicial functions. *Turner v. Walker*, 1 Q. B. 118, illustrate his candor.

It is impracticable to give within brief limits more than an illustration of Blackburn's vast contributions to the law. In mere volume his work was equalled during the century by Parke alone. There are more than six hundred cases in the reports in which he formulated in detail the reasons which influenced his judgment, and in more than one-quarter of these cases he delivered the unanimous opinion of the court. The following list¹ will give some indication of his work as a Justice of the Court of King's Bench, as a member of the Court of Exchequer Chamber, as an adviser to the House of Lords, and as a Lord of Appeal in Ordinary. It comprises most of his ablest efforts.

As a general illustration of his method of exhausting a subject, both from principle and from precedent, reference may be made to his examination in the case of *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, on the modern law of libel. The value of the details of his elaborate arguments may be observed in his admirable statement in *Cole v. North Western Bank*, 10 C. P. 362, of the difficulties which the common law put in the way of the customs of merchants.

Lord Blackburn contributed a leading case to the reports, not after his death, like Lord

St. Leonards, but while serving as a judge. A litigant named Rosanna Fray, who felt aggrieved at his disposition of her case, sued him for damages, and the case of *Fray v. Blackburn*, 3 B. & S. 576, formally established the principle that no action will lie against a judge of a superior court for anything done in his judicial capacity, although it be alleged to have been done maliciously and corruptly.

Besides Wightman and Crompton (1853-65) in the earlier part, the other principal *puisnes* in the King's Bench during the period were Mellor (1861-79), Shee (1863-68), and Lush (1865-80). Lush was the ablest of these; he closed his painstaking and useful service in the Court of Appeal.

During this period the Court of Common Pleas grew rapidly in importance and reached its highest standing. After Cockburn's short service in this court (1856-59) the succeeding chiefs were Erle (1859-66), and Bovill (1866-73). Erle added in this court to the substantial reputation which he had made on the King's Bench. The Court of Common Pleas under his presidency, as the Attorney-General said on his retirement, "obtained the highest confidence of the suitor, the public and the profession."

¹ In the Court of Queen's Bench: *Campbell v. Spottiswoode*, 32 L. J., Q. B. 185; *Lloyd v. Guibert*, 33-241, etc.; *Burges v. Wickham*, 33-17; *Coe v. Wise*, 33-281; *Moody v. Corbett*, 34-166; *Maurpoice v. Westley*, 34-229; *Wilson v. Bank of Victoria*, 36-89; *Fleet v. Perrins*, 37-223; *Allen v. Graves*, 39-157; *Godard v. Gray*, 40-62; *Ionides v. Pacific Ins. Co.*, 41-33; *Lloyd v. Spence*, 41-93; *Newby v. Van Oppen*, 41-188; *Armstrong v. Stokes*, 41-253; *Crouch v. Credit Foncier Co.*, 42-183; *Searle v. Laverick*, 43-43; *Queen v. Castro*, 43-105; *Taylor v. Greenhalg*, 43-168; *Iorides v. Pender*, 43-227; *Bettini v. Gye*, 45-209; *Mackenzie v. Whitworth*, 45-233; *Lindsay v. Cundy*, 45-381; *Queen v. Collins*, 45-413; *Shand v. Bowes*, 45-507.

In the Court of Exchequer Chamber: *Santos v. Illidge*, 29-348; *Clark v. Wright*, 30-7, etc.; *Fitzjohn v. Mackneder*, 30-257; *Jones v. Tapling*, 31-342; *Blades v. Higgs*, 32-182; *Scott v. Seymour*, 32-61; *Xenos v. Wickham*, 33-13; *Lee v. Jones*, 34-131; *Hidson v. Barclay*, 34-217; *Bullen v. Sharp*, 34-105; *Coles v. Turner*, 35-169; *Fletcher v. Rylands*, 35-154; *Appleby v. Meyers*, 36-331; *Duke of Buccleuch v. Met. Bd. of Wks.*, 39-130; *Holland v. Hodgson*, 41-146; *Brunsmead v. Harrison*, 41-190; *Duncan v. Hill*, 42-179; *Riche v. Ashbury Co.*, 43-177; *Liver Alkali Co. v. Johnson*, 43-216; *Thorn v. Mayor of London*, 44-62.

Advisory opinions in House of Lords: *Cox v. Hick-*

man, 8 H. L., 277; *Betts v. Menzies*, 10-131; *Peek v. No. Staffordshire Ry.*, 10-473; *Harwood v. Gt. Northern Ry.*, 11-666; *Mersey Docks v. Gibbs*, 11-686; 1 E. & I. App. 102; *Rankin v. Potter*, 6-97; *Hammersmith Ry. v. Brand*, 4-236; *Great Western Ry. v. Sutton*, 4-236; *Castrique v. Irvine*, 4-425; *Hollins v. Fowler*, 7-757.

In the House of Lords: *Direct U. S. Cable Co. v. Anglo-Am. Tel. Co.*, 2 A. C. 410; *Bowes v. Shand*, 2-455; *McKinnon v. Armstrong*, 2-531; *Brogden v. Met. Ry. Co.*, 2-666; *Rossiter v. Miller*, 3-115; *Orr Ewing v. Registrar*, 4-479; *Kendall v. Hamilton*, 4-541; *Fairlie v. Boosey*, 4-726; *Sturla v. Freccia*, 5-639; *Peorks v. Moseley*, 5-714; *Met. Asylum Dist. v. Hill*, 6-202; *Jennings v. Jordan*, 6-711; *Dalton v. Angus*, 6-808; *Capital & Counties Bk. v. Henty*, 7-769; *Countess of Rothes v. Kircaldy Waterworks*, 7-700; *Sarf v. Jardine*, 7-345; *Rhodes v. Rhodes*, 7-197; *Maddison v. Alderson*, 8-487; *Hughes v. Percival*, 8-445; *Bradlaugh v. Clarke*, 8-369; *Harvey v. Farnie*, 8-57; *Singer Mfg. Co. v. Loog*, 8-28; *Thomson v. Weems*, 9-677; *Fookes v. Beer*, 9-614; *Mersey Steel Co. v. Naylor*, 9-442; *Collins v. Collins*, 9-228; *Smith v. Chadwick*, 9-192; *Lyell v. Kennedy*, 9-84; *Ewing v. Orr Ewing*, 9-42; 10-499; *Speight v. Gaunt*, 9-15; *Svendsen v. Wallace*, 10-409; *Baroness Wenlock v. River Dee Co.* 10-358; *Met. Bank v. Pooley*, 10-220; *Sewell v. Burdick*, 10-90; *Seath v. Moore*, 11-369; *London Ry. v. Truman*, 11-58.

Bovill was unsurpassed in his practical mastery of commercial law, but his work as a judge suffered from want of more careful reflection in reaching conclusions.

The genius of this court, however, was Willes (1855-71), who was universally re-

gone, and with all the rules and forms of the ancient system of pleading. He knew by heart every old term and maxim. To this thorough knowledge of the principles and history of our own law in all its branches he added an extensive and accurate acquaint-



MR. JUSTICE WILLES.

garded by his contemporaries as the most learned lawyer of his time. He is said to have systematically read all the reports, from the first of the Year Books to the last volumes of Meeson and Welsby. He was consequently familiar with the history of the law, and understood the relation which the principles of his day bore to past times. He was intimately acquainted with all the changes which the common law had under-

gone with foreign systems of jurisprudence. To the great fountain head of civil law he habitually resorted for suggestion and comparison and analysis. Withal his vast learning was his servant, not his master. And he could be as forcible with brevity as he was often exhaustive in learning. Although his opinions are generally full and completely reasoned, his determination of the bankruptcy case of *Marks v. Feldman*, 5 Q. B.

284, is one of the shortest opinions on record. "Dolus circuiter non purgatur." He constantly drew upon his vast store of case law for illustration and argument, to the unfailing interest of the profession, if not with uniform success with reference to the

technical learning was inferior to his own, he had no respect for technicalities, which he never hesitated to brush aside when they interfered with an obvious principle. It was this combination of mastery of detail and clear sense which led to his employment in



MR. JUSTICE KEATING.

issue; but he never relied on mere authority where a principle could be discovered.

An occasional tendency toward academical refinements, apparently inseparable from most scholastic minds, may be observed in his work, but it is almost invariably confined to the details of his exposition.

His substantial conclusion is always marked by sound common sense. Unlike so many of his associates, whose

the preparation of the Common Law Procedure Acts. No one less familiar with the useless subtleties and effete technicalities of the legal system of that time, or less endowed with breadth of mind to free himself from their trammels, could have effected so completely and satisfactorily the revolution brought about by these acts.

Though somewhat reserved in disposition, among his intimates he seems to have been a

singularly attractive personality. The authority of judicial station never dimmed the finer sensibilities of his nature. He was a man of the broadest culture; he seems to have taken all knowledge for his province. The classics were his familiar companions,

L. J., C. P. 321, in answer to the suggestions of counsel that the dignity and privileges of the court were involved, may be taken as a true index to his judicial character: "I take leave to say that I am not conscious of the vulgar desire to elevate myself, or the court



BARON MARTIN.

and he found time to master all the spoken languages of Europe. The tone of his mind is largely reflected in the poetry of Wordsworth, of which he was a diligent student and admirer. In the unremitting performance of his judicial duties and the indefatigable pursuit of knowledge his over-worked mind finally gave way, and, in a moment of temporary insanity, he committed suicide. His remarks in the Fernandez contempt case, 30

of which I may be a member, by grasping after pre-eminence which does not belong to me, and that I will endeavor to be ever valiant in preserving and handing down those powers to do justice and to maintain truth which, for the common good, the law has entrusted to the judges."

Some of his most elaborate and exhaustive opinions are *Beamish v. Beamish*, 9 H. L. 274, an examination of the ecclesiastical

sanctions to the contract of marriage; *Ex parte Fernandez*, 30 L. J., C. P. 321, on the validity of a commitment for contempt by a court of assize; *Lloyd v. Guibert*, 1 Q. B. 115, as to what law governs as to sea damage in a contract of affreightment; *Exposito v Bowden*, 8 St. Tr. 817, as to the effect on a contract of affreightment of trading with an enemy; *Mayor of London v. Cox*, 3 E. and I. App. 252, on the history and principles of the practice of foreign attachment; *Notara v. Henderson*, 7 Q. B. 225, on the duties of the master of a vessel; *Seymour v. London and Insurance Co.*, 41 L. J., C. P. 193, on contraband of war; *Phillips v. Eyre*, 6 Q. B. 1, on the jurisdiction of English courts over acts committed abroad; *Mody v. Gregson*, 4 Ex. 49, as to the application of the doctrine of warranty in a sale by sample; *Dawkins v. Lord Rokeby*, 4 F. and F. 829, as to absolute privilege in libel; *Henwood v. Harrison*, 7 C. P. 606, on fair criticism of matters of public interest; *Shrewsbury v. Scott*, 6 C. B. 1, on the disabilities of Catholics with respect to real property. It may be said of all these opinions, as Lord Campbell said in the House of Lords of Willes's opinion in *Beamish v. Beamish*, that they "display extraordinary research and will hereafter be considered a repertory of all the learning to be found in any language upon the subject."¹

¹ For further study, see also: *Cook v. Lister*, 13 C. B. (n. s.) 543 (bills of exchange), etc.; *Dakin v. Oxley*, 15

Besides Williams, who continued his service in this period, valuable assistance was rendered by Byles (1858-73), Keating (1859-75), M. E. Smith (1865-71). Byles contributed largely to the popularity of the court in commercial cases, in which he was extremely accurate. Smith was an all-round influence for good; sagacious, sensible and practical, he added to the high standing of his tribunal.

During this period the Court of Exchequer declined in reputation, particularly during the latter half. Kelly, who succeeded Pollock in 1866 as Chief Baron, was old and soon became infirm; and an ill-assorted collection of barons, of whom Martin was the ablest,¹ detracted from the unity and authority of the court. Nevertheless, the court was distinguished throughout this period by the services of Bramwell (1856-76).

C. B. (n. s.) 646 (charter party); *Gt. Western Ry. v. Talley*, 6 C. P. 44 (negligence); *Hall v. Wright*, 29 L. J., Q. B. 43 (breach of promise); *Intermaur v. Dames*, 1 C. P. 274 (negligence); *Ionides v. Marine Ins. Co.*, 14 C. B. (n. s.) 259 (marine ins.); *Kidston v. Empire Marine Ins. Co.*, 1 C. P. 535 (marine ins.); *Malcomson v. O'Dea*, 10 H. L. 611 (evidence); *Mountstephen v. Lakeman*, 7 Q. B. 196 (statute of frauds); *Patter v. Rankin*, 3 C. P. 562 (marine insurance); *Ryder v. Wombell*, 4 Ex. 32 (infant's necessities); *Reg. v. Rowton*, 10 Cox Cr. Cas. 37 (evidence); *Renss v. Picksley*, 1 Ex. 342 (statute of frauds); *Santos v. Illidge*, 28 L. J., C. P. 317 (emancipation act); *Wilson v. Jones*, 2 Ex. 139 (insurance); *Bonillon v. Lupton*, 15 C. B. (n. s.) 113 (marine insurance).

¹ *Miller v. Salomons*, 7 Ex. 475, etc; *Embrey v. Owen*, 6 *ib.* 353; *Bellamy v. Majoribanks*, 7 *ib.* 389; *Crouch v. Great Northern Ry.*, 11 *ib.* 742; *Hubbertsty v. Ward*, 8 *ib.* 350; *Read v. Legard*, 6 *ib.* 636; *Dublin Ry. v. Black*, 8 *ib.* 181.



The Green Bag.

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THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetia, anecdotes, etc.

THE series of papers upon the Chief Justices of the United States, which was interrupted by the desirability of recognizing the Marshall centennial and the appointment of a new Attorney General, is resumed in this present number and will be continued in its chronological order.

NOTES.

THE jury ate up an important part of the evidence in a case they were trying in the superior court at Atlanta, Ga., in which one of the issues submitted was whether certain almonds, the price of which was sued for, were of the quality contracted for. The judge that presided at the trial has the humorous tendency that characterized the great judge whose names he bears and who was his grandfather,—Chief Justice Joseph Henry Lumpkin,—and in his judgment, refusing a new trial in this case he has, this to say:

"If a new trial should be granted in this case it can never be tried again exactly as it was before. Out of the almonds constituting the subject-matter of this litigation a small number were kept, and on the trial were submitted to the jury along with some almonds obtained from another shipment, for comparison. When the jury retired to their room for consultation the two small paper sacks containing these almonds were carried out with them. After some time they returned a verdict, but not the almonds. On inquiry the court was informed that as a part of their deliberation, and probably as a most conclusive mode of comparing the quality of the two samples, they had eaten both. In case of a new trial there are no more almonds for the next jury. It might be said that from an almond standpoint the case is exhausted. Perhaps it would be better for the jury not to eat up the evidence, at least not all the edible part of it. A due regard for the palates of a possible future jury, in case of a new trial, if nothing else, might suggest the advisability of only a moderate degustation. It is quite possible that juries sometimes find a difficulty in

swallowing all of the statements made before them, and that if on some occasion a toothsome or succulent bit of evidence is sent to the jury room with them, appealing at once to intellectual and gastronomic investigation, the desire for knowledge may be stimulated to a point beyond deliberative moderation."

SENATOR WILLIAM B. ALLISON of Iowa has a better memory for figures and faces than for overcoats. Two years ago when President McKinley passed through Iowa he was met at the eastern edge of the State by Senator Allison, Governor Shaw and other prominent people from the capital. The governor was accompanied by his body servant, William Coalson, a colored man with a remarkable memory for faces and for hats, overcoats and other articles of wearing apparel.

It was in the fall and the day was rather chilly. Consequently when the train reached Cedar Rapids and the program called for a short stop there was a general scramble for overcoats. Coalson was in charge of these as usual. He brought out a coat for Senator Allison but the senator refused to wear it.

"That's not mine" he declared and that ended the matter. A member of the party proffered a overcoat and the senator hurried up town and made a purchase at a clothing store.

In the meantime Coalson was searching high and low over the car for the lost coat. Finding no trace of it and spying the one which the leader of the senate had rejected a happy thought struck him.

He began to search through the pockets in hope of finding a clue. The first two or three pockets revealed nothing. But in an inside pocket he found some personal cards. He pulled them out and there in a plain script was the name.

"William B. Allison."

The president indulged in a hearty laugh when the joke was told him and Senator Allison had to confess that it was "on him."

ONE A. was the justice at a little village in Eastern Iowa, and, as there were but very few citizens, he was both justice and constable, and acted in nearly every other official capacity. He was on the whole a pretty good man, and had only one failing — that of getting drunk whenever he came within smelling distance of fire water. One time he went to the large city, where such things were dispensed, and became jagged to such an extent that he could not find his way home for a day or two. On getting home he was given a Mrs. Caudle lecture by the wife, who told him that he, being a justice, ought to be ashamed of himself to thus get full, and that if there had only been another official in the township she should have him arrested. A. took the reprimand with due Socratic stoicism, he thought the matter over and got down the musty law book to see what he really could do under the laws of his State. He found that he had committed a crime, which should be punished. So he issued a warrant of arrest as constable, got himself into court, and as justice began to try himself. He acted as attorney for the prosecution, and then for the defence, and all the time as chief witness for both sides. He made two speeches, and then as justice fined himself fifty dollars and costs. Before the twenty days were up for an appeal to the higher court he thought of perfecting an appeal, but found no one to go on his bond. It seemed probable that in the higher court he could not control the judge; and hence, as justice, he remitted the fine during good behavior, while the State should pay costs. This is actually the justice docket as it appears in one of the courthouse files of a county in Iowa. The good man has been dead for some days, and in all his dealings he was just the kind of a man he appeared to be — kind, generous, and liberal to a fault; so kind, indeed that he remitted his own fine, as he would any one else's for the same offence.

AN almanack for the year 1778 cites the following judgment in a case of murder: A Portuguese shoemaker prosecuted a bishop who had got his father assassinated, and the fact being proved, the bishop was prohibited from saying mass for one year. The shoemaker, not satisfied, applied to Don Pedro, king of Portugal, who, after inquiring into the case,

sent for the shoemaker, and asked him if he would venture to kill the bishop; which he undertook to do with the king's permission, and performed the day following, at a procession, just under a window where his Majesty was placed. He was immediately seized and brought before the king. Don Pedro asked him what could prompt him to murder a bishop. He pleaded the provocation he had received, and his Majesty's permission; to which the king replied: "Since the bishop was prohibited from saying mass for one year, I condemn you not to work at your trade for the same term, but that you shall not starve, a pension must be paid you out of the bishop's estate."

A YOUNG lawyer from the East was sent to a mining town in the West to straighten out the affairs of a client. In the course of the business the sheriff had gone out of his way to do several favors, and the attorney, while unwilling to offer money in return, wished to express his appreciation in some more delicate way. So he invited the sheriff into a saloon to take a drink. In reply to the really superfluous question of what he would take, the officer of the law answered "Whiskey." His host ordered beer; whereupon the sheriff, leaning over confidentially, said in a tone rather of instruction than reproof: "Mister, you're making a mistake. In this saloon whiskey and beer cost just the same, and you can get a sight drunker on the whiskey."

LITERARY NOTES.

IN *The Crisis*, Mr. Winston Churchill has chosen the stirring times in St. Louis before and during the Civil War for the setting of his latest historical novel, in which the descendants of *Richard Carvel* and his friends take the leading parts, while Lincoln, Grant and Sherman relieve the Revolutionary heroes of his former novel. The heroine is a beautiful rebel who sings "Dixie," urges all her friends to die for the cause of the South, and herself promptly falls in love with a staunch supporter of the Union. The friendship of her father, an ideal Southern gentleman, for an abolitionist lawyer, ungracious in manner, but, underneath his gruffness, tender and loving, arouses our greatest interest.

The broken friendships and divided families of those days, when neighbors, and even brothers, felt so deeply on opposite sides of the great question are vividly described; and the character of Abraham Lincoln is portrayed with a loving reverence and deep admiration which must touch the hearts both of his friends and of his enemies. One feels sure the book is historically faithful and trustworthy.

ARROWS OF THE ALMIGHTY, by Owen Johnson, is the history of a man inheriting an intense pessimism, which is aggravated by every sort of misfortune, but who eventually works out his own salvation, or, to quote the author, "acclaims his own soul, recognizing that within him something greater than his understanding had existed and would exist forever and ever." The psychological aspect of the story is not intruded, though it serves to explain the introduction of so many incidents, and possibly relieves the strain on the reader's sympathy which such great misfortunes as overwhelm the hero might arouse, if one were not interested in their effect on his point of view. The style is good, but the various scenes seem to lack continuity, giving the effect of many good short stories, not of necessity part of the same novel.

In a pocket volume of less than two hundred pages, one of the series of Temple Primers, Mr. Jose has in press a very readable history of Australasia from its discovery to the present day. The political system, also, and the social development of the colonies, are outlined in an interesting way.

RECEIVED AND TO BE REVIEWED LATER.

JOHN MARSHALL. By *James Bradley Thayer*. Number 7 in the Riverside Biographical Series. Boston: Houghton, Mifflin & Co. 1901. Cloth. 75 cents. (157 pp.)

FALSTAFF AND EQUITY. By *Charles E. Phelps*. Boston: Houghton, Mifflin & Co. 1901. Cloth. \$1.50. (xvi+201.)

POLITICS AND THE MORAL LAW. By *Gustav Ruemelin*. Edited by *Frederick W. Holls*. D. C. L. New York: The Macmillan Company, 1901. Cloth. 75 cents. (125 pp.)

¹ AUSTRALASIA THE COMMONWEALTH AND NEW ZEALAND. By *Arthur W. Jose*. London: J. M. Dent and Company. 1901. Cloth, 40 cents.

NEW LAW BOOKS.

A DIGEST OF THE LAW OF INSURANCE. Vols. 3 and 4. By *John R. Berryman*. Callaghan & Co., Chicago, 1901. (iv. + 1831 pp.)

"I was just going to say, when I was interrupted, that one of the many ways of classifying minds is under the heads of arithmetical and algebraical intellects. All economical and practical wisdom is an extension or variation of the following arithmetical formula: $2+2=4$. Every philosophical proposition has the more general character of the expression $a+b=c$. We are mere operatives, empirics, and egotists, until we learn to think in letters instead of figures."

Thus Dr. Holmes begins "The Autocrat of the Breakfast-Table"; and as in his youth he spent some months at a law school, it is probable that he was not unmindful of the bearing that this passage has upon the law.

It is hardly necessary to expound the quotation; for it is obvious to the lawyer that the judgment pronounced in any one case is one of the arithmetical formulas contemplated by Dr. Holmes, and that the general propositions found in treatises are formulas of an algebraical nature. What is equally true, but perhaps not quite so obvious, is that the function of digests is to aid in the transmuting of lawyer's arithmetic into lawyer's algebra.

And how laborious the performing of this useful function is! Take for example these two new volumes of the series entitled "A Digest of Insurance." They embody, in more than fifteen thousand paragraphs, the legal propositions—and often the facts—of more than seven thousand cases; and the paragraphs represent a vast amount of work, for the digester has not been content to reprint head-notes.

These new volumes closely resemble their predecessors, of which the first volume was by Sansum, and contained the cases down to 1876, and the second was by the present digester and brought the cases down to 1887. The present volumes, coming down to substantially the close of the nineteenth century, follow, as has already been said, the plan of the earlier volumes, using the same titles for the topics and digesting most of the cases in the same rather elaborate form.

The series has been before the public so long and has been so favorably received, that it is

rather late in the day to call attention to defects; but by and by the publishers may find it practicable to bring out a revision combining in one alphabet the matter of all these volumes, and accordingly it may be worth while to point out that in some respects the plan and the execution might be advantageously amended.

It would be a great convenience to have the titles subdivided into sections dealing separately with marine, fire, life, and other sorts of insurance. At present most of the titles disregard any such division. Further, the titles are not very happily chosen; for though most of them are unobjectionable, some are neither necessary nor natural. Finally, there are many, very many, paragraphs that are not placed under the existing titles to which they belong.

The title "Valid and Void Policies" affords examples of these defects. The first paragraph is to the effect that a fire policy is not invalidated by the fact that part of its subject matter is fitted, and perhaps intended, for unlawful purposes. The second paragraph is to the effect that a life policy taken out by the person whose life is insured is not invalidated by the fact that the beneficiary or assignee has no interest in the life. The third paragraph is to the effect that, in the absence of fraud, a fire policy is not invalidated by the fact that part of the goods described did not belong to the assured. The fourth paragraph deals with beneficiary certificates. Thus the title goes on, jumping from one kind of insurance to another, and from one class of problems to another, in a way that wastes the time of the investigator and that makes it quite impossible for him to foresee whether the matter for which he is seeking is to be expected in this title or elsewhere; for of course it is obvious enough that each one of the paragraphs described above belongs in one or more of the familiar titles — some of which are found in this series and some not — "Illegality of Business," "Insurable Interest," "Beneficiaries," "Assignees," "Non-disclosure," "Title," "Benefit Societies." In fact, the title "Valid and Void Policies" should not exist at all save as a basis for cross-reference to other titles.

Yet although it is necessary to call attention to the fact that neither plan nor execution is perfect, justice requires a recognition that even

in its present form this series is one of the most useful sets of tools in the insurance lawyer's workshop.

What has been said thus far is chiefly from the point of view of the maker of briefs. From the point of view of the writer of treatises it must be added that by gathering all the authorities this series relieves the author from the necessity of crowding his text and notes with citations, and gives him ample opportunity to devote his pages wholly to their special function of stating and explaining the law. Thus the series is fairly entitled to commendation of the sort that Falstaff bestowed upon himself: "I am not only witty in myself, but the cause that wit is in other men."

A TREATISE ON CANADIAN COMPANY LAW.
By *W. J. White, Q.C.* assisted by *J. A. Ewing, B.C.L.* Montreal, Canada; C. Theoret, 1901. (xxiii + 708 pp.)

Naturally this treatise is intended, in the first instance to meet the needs of the Canadian practitioner. It deals in the main with the Canadian Companies' Act (chapter 119 of the Revised Statutes) and is an interpretation of and commentary upon that Act. Consideration, however, is given to similar acts of the other provinces; the appendix contains the text not only of the Companies Act of the Dominion, but of like acts of the Provinces of Ontario, Quebec, and British Columbia. Of practical value and convenience are the forms relating to Dominion Letter Patents, given in fifty pages of the appendix.

Canadian jurisprudence on the subject of corporation is not very extensive; but many questions of importance have arisen and have been passed upon by the courts in decisions entitled to respect and weight. In this volume all of the leading Canadian cases bearing on the subject in hand have been referred to and carefully considered.

The authors have given their subject able and exhaustive treatment, with the result that this treatise both explains the Companies Act so far as it has been interpreted already by the Canadian courts, and considers in a suggestive way, points not as yet passed upon directly. The arrangement of the book is good, following that of the act itself, and the style is clear.



THOS. H. BENTON.

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BOSTON.

AUGUST, 1901.

THOMAS H. BENTON.

BY CHARLES W. SLOAN.

WHEN in the closing hours of the United States Senate, in May, 1900, the statues of Thomas H. Benton and General Francis P. Blair were accepted from the State of Missouri, the distinguished Senator from Massachusetts, Mr. Hoar, spoke in part as follows: "The whole country approves the choice of Missouri. When the figure of Benton is unveiled the genius of Missouri—rather the genius of the West—has come. He is to stand among his peers the representative, the embodiment of a great history. Missouri did well that she waited nearly half a century after his death before electing him to the greater and perpetual Senate which is to sit forever in yonder chamber. It would be well if this example were always followed. Thomas H. Benton was a sturdy and courageous champion. He understood, as no other man ever understood, the interest of the great West. He is beyond all question without competitor or rival, down to this moment, the foremost statesman of the states beyond the Mississippi. He loved Missouri, he loved the West; he loved the South. From his first coming to manhood there was scarcely a pulsation of the Western heart which he did not share. Yet when the time came for him to choose between office, party, his state, popularity, the love of old friends and companions, influence, power, the master passions of his soul, as it seemed on the one hand, and freedom and country upon the other, he did not hesitate in the choice. This is the character which the great State of Missouri, speaking through her Governor and honored Senators, gives to the American people today.

Certainly Massachusetts feels herself, and her great children of the days of the Puritan, and the days of the Revolution, honored by the companionship. Sam Adams, if need be, will draw a thought more nigh to John Winthrop to make room for him. Webster will greet his old antagonist. The marble lips of Charles Sumner, welcomed in the Senate in 1851, will return the greeting, now from yonder ante-chamber. The old strifes are forgotten. The old differences have vanished. But the love of liberty, the love of justice, the love of national honor, the spirit that prizes liberty and justice and honor above gain in trade or empire—the spirit of this great statesman of the West abides, and shall abide forever." Eloquent words—fitly spoken.

Thomas H. Benton was born in North Carolina, March 14, 1782. His father was of English lineage, and a lawyer of fair ability and good practice, who died in middle life. His mother was from Virginia, and was descended indirectly from one of the best families of that state. He early attended a grammar school, and afterwards completed his education at Chapel Hill College, though for some reason he never graduated. He, obtained, however, a liberal education. His father on his death left a large tract of land near Nashville, Tenn., to which the widow and family removed. There, it is said, Mr. Benton studied law while teaching school on Duck River, near Franklin. After his admission to the bar, in 1808, he opened an office in Franklin, but shortly after this removed to Nashville. He early showed a taste for politics, and in 1811 was elected to the Tennessee Legislature. On the break-

ing out of the War of 1812 he joined the army, becoming the aide-de-camp to General Jackson, and continued in this position until an unfortunate difficulty occurred between himself and his brother Jesse on one side and General Jackson and General Coffee on the other. This occurred at a Nashville inn, and resulted in Jackson receiving a pistol shot wound in the arm and in Benton being thrown downstairs. However, Jackson and Benton afterward became close friends, as we shall see later. After this occurrence Benton was made a Colonel of a Tennessee regiment, and later Lieutenant-Colonel of the Thirty-ninth Infantry, although he was never engaged in any actual fighting. It is an historical fact, however, that thirty-five years later he was appointed by President Pierce commanding General in the time of the Mexican War; but the Senate refused to confirm the appointment.

While a member of the Tennessee Legislature, Mr. Benton secured the enactment of a law giving to slaves charged with criminal offenses the right of trial by jury. Thus early do we get a glimpse of his leaning towards freedom; thus do we see a disposition on his part—though a slave owner—to remove some of the harsher features incident to slavery as then existing.

He removed to Missouri in 1813, first settling in Ste. Genevieve, an old French village about thirty-five miles from St. Louis, and opened an office to practice law. That office, built of cypress logs, still stands as one of the ancient landmarks. This place soon proved too small for one of Benton's nature, so he shortly afterward located in St. Louis. At this time he wrote a great deal for the press, a part of the time conducting a Democratic journal, called the *St. Louis Inquirer*. He took a lively interest in politics, wrote and delivered many addresses in favor of the admission of Missouri into the Union. In 1820 a convention was held to form a new constitution, and under it a Legislature convened in November of that year which elected Mr. Benton Senator, although the

State was not admitted until August, 1821. His first election was hotly contested, he receiving barely one majority. The deciding vote was cast by a man named Ralls, who was quite ill, and had to be carried by four stout negroes into the room where the election was held.

After locating in St. Louis Mr. Benton was retained in many important land suits, and his conduct was such with reference to this class of litigation as to render him very popular with the people. The condition of land titles was generally bad, based as they were in many cases on "concessions" of land by the old French and Spanish Governments, which had to be ratified by Congress, subject to certain conditions. These conditions, through ignorance of the occupants, were in many cases omitted, and many lawyers favored a technical construction calculated to defeat these titles, while Benton favored a liberal policy, and opposed defeating titles on purely technical grounds. He favored the confirmation of every honest claim, and when elected to the Senate had hundreds of cases under his charge. He recognized, however, that further legislation by Congress would be necessary to protect claimants of land; so he called all his clients together and informed them that his duties as Senator would conflict with the relation of attorney, and he refused either to continue in charge of the cases, or to name his successor. Here was an opportunity to have amassed wealth had he remained in charge of these cases.

It may be stated in this connection that during all his official life, especially when in such close and confidential relations with President Jackson as to be able, had he been so disposed, to dictate almost any appointment in the President's gift, he never permitted any person connected with him by blood or marriage to accept any moneyed appointment under the Government, nor would he favor any applicant for a Government contract, though a political friend.

After Mr. Benton's election to the Sen-

ate, outside of his legal arguments on questions of constitutional law, we see or hear little of the lawyer. For nearly thirty years he represented Missouri in the Senate continuously, and during that time made a record unexcelled by any other man. Although devoted to his state and ever faithful to her interests, he represented more the nation at large. This is manifest in his attitude on the great questions agitated during his public service. His public acts are a part of the history of the country; and it would not be permissible within the limits of this article to attempt to recount in detail such acts, or even to mention all the measures he advocated and assisted in shaping. He was at no time sectional in his feelings. When once he made up his mind about a measure, he did not stop to ask the question, is it politic for me to do this thing? Had he been a mere trimmer or politician, he could easily have remained in the Senate to his dying day. On the contrary, he took a broad, a national view of all measures proposed, and espoused or opposed them conscientiously, in view of the paramount interest of the whole country.

Believing, as he did, that President Jackson was right in removing the public deposits from the United States Bank, when the Senate by resolution denounced Jackson for usurpation of power, it was Benton who immediately gave notice that he would introduce a resolution to expunge the hateful record against his chief. It took years to accomplish this result; but neither cast down, nor discouraged, by repeated failures, at length victory crowned his efforts, and he had the proud satisfaction of seeing black lines drawn around the objectionable resolution, and across the record, in the presence of the Senate, the words, "expunged by order of the Senate." This victory was the more gratifying because Benton had to fight Clay, Webster, Calhoun and other powerful influences. Jackson greatly appreciated the effort of his friend, and gave a banquet at the White House at which all the "expungers" and their wives were present. On the happy

occasion Jackson met the company, but being too weak by reason of illness to preside, placed the "Chief Expunger" at the head of the table and retired to his sick chamber. It was a proud day for Benton.

Mr. Benton was a man of wonderful industry and memory, and in the investigation of subjects seemed to exhaust all available sources of knowledge, and to bring to the discussion of questions under consideration a wealth of information. Although he had traveled comparatively little, he had, aside from books—by contact with others, by conversations with explorers, Indian chiefs visiting Washington and others—become well acquainted with all sections of our country; by this means he knew more than any other man about the resources of the great West. No man was better posted on the political history of the country. This was conceded by Mr. Webster, who said that Benton knew more political facts than any man he ever knew. Indeed, Benton's "Thirty Years' View," from 1820 to 1850, giving "a history of the workings of the American Government," prepared by him in the latter years of his life, is the most complete and exhaustive work of the kind ever written by any one.

He was often engaged in spirited and acrimonious debates with others, and especially with Clay, Webster and Calhoun. At times these controversies were of such character, and so bitter, as to interfere with their personal relations. Mr. Webster said that for a long while he and Benton were not on even bowing terms; that they passed each other in silence day after day, only speaking when absolutely necessary officially; that they had no social relations. However, during President Tyler's administration an event occurred which seemed to change the current of their lives. At a gun explosion on board the "Princeton," a war vessel, Mr. Benton was present as a guest. Just before the gun was fired some one plucked Mr. Benton on the shoulder, and called him aside to speak to him. He was somewhat irritated

at the interruption, and Governor Gilmer, then Secretary of the Navy, took the position vacated by him. Immediately afterwards the explosion took place, killing Gilmer and Mr. Upshar, then Secretary of State. The incident made a deep impression on Benton's mind, and in speaking afterwards of it to Webster he said: "It seemed to me, Mr. Webster, as if in that touch on my shoulder the hand of the Almighty stretched down there drawing me away from what otherwise would have been instantaneous death. I was merely prostrated on the deck, and recovered in a short time. That one circumstance has changed the whole current of my thoughts and life. I feel that I am a different man, and I want, in the first place, to be at peace with all those with whom I have been so sharply at variance; and so I have come to you. Let us bury the hatchet, Mr. Webster." And so they did, shaking hands and ever thereafter remaining friends.

Mr. Benton religiously believed the doctrines advocated by Calhoun would ultimately lead to disunion; he loved the Union with his whole soul, hence he stood with Jackson, and bitterly fought nullification. It seems from that date the fight with Calhoun was on for life; that they were never friends again. We may at least infer so from an incident which I shall now mention. In 1849, when Benton was making his great appeal to the people of Missouri, on one occasion he began his speech as follows: "Citizens, no man since the days of Cicero has been abused as has been Benton. What Cicero was to Cataline, the Roman conspirator, Benton has been to John Cataline Calhoun, the South Carolina Nullifier; Cicero fulminating his philippic against Cataline in the Roman forum; Benton denouncing Calhoun upon the floor of the American Senate; Cicero against Cataline—Benton against Calhoun." On one occasion Benton was to reply in the United States Senate to a speech delivered the day previous by Calhoun. Before beginning his speech it was announced that during the night before

Mr. Calhoun had been prostrated by sudden illness. Benton promptly said, "Benton will not speak today; for when God Almighty lays his hand on a man Benton takes his off."

The Legislature of Missouri, in January, 1849, adopted what were known as the Jackson resolutions. In substance the resolutions denied the constitutional power of Congress to inhibit slavery in the territories, and announced that, if Congress passed such acts, Missouri would be found with her sister states of the South, battling against "Northern fanaticism"; the Senators were instructed to act in conformity with the resolutions. Benton recognized this as a thrust at him, and intended for his undoing. He promptly met the issue, denounced the resolutions, refused to obey them and announced his purpose to appeal to the people of Missouri. As soon as Congress adjourned he entered upon the most remarkable campaign of his life. He addressed the people throughout the state, many of whom really met him for the first time. This campaign was the most remarkable, in many ways, that ever occurred in the state. The Democratic party was divided as "Benton" and "Anti-Benton" Democrats. Benton believed joint discussions on the stump accomplished no good, hence he refused to take part in such discussions. His style of campaigning was unique—unlike that of other men. He was always promptly on hand to fill his appointment. He usually rode in a carriage from his hotel to the place of speaking, walked to the rostrum without stopping to speak even to the most intimate acquaintance, and without introduction by any one commenced his speech—always addressing his audience as "Citizens"—never "Fellow-Citizens." His speeches in the above mentioned campaign were described by those who heard them as remarkable for their great force, their logic, their sarcasm and their withering denunciation of his enemies. At times he was almost brutal in his fierce denunciation of those whom he accused of becoming traitors to his party, and to the Union. He considered the lead-

ers of the opposition to him as "fire eaters," led on by Calhoun, whom he regarded as the arch-traitor of the country. He had no sense of fear, and with a boldness and fearlessness that was characteristic of the man, figuratively speaking, took the hide off the leaders of the opposition. He usually picked out a local leader—and he knew the history of each man—and in scathing terms held him up to public scorn. It was verily the fight of his life, and he seemed to feel it. Not one effort did he make at conciliation. The result of this canvass was, that he stirred up the people as they had never been stirred before; but he was defeated by the next Legislature for re-election. Once after Benton had spoken, a friend suggested to him that evidently he had made an impression on the audience, to which he quickly replied: "Always the case; always the case, sir; nobody opposes Benton but a few blackjack prairie lawyers; they are the only opponents of Benton; Benton and the people, Benton and the Democracy are one and the same; synonymous terms—synonymous terms, sir."

It was usually a dangerous experiment for one to interrupt Benton with a question while speaking. One day a former political friend, Colonel A. W. Lamb (who had been a member of Congress), interrupted him by asking a question. Benton stopped and looked at him, and then, as if he did not know him, asked, "Who are you sir?" The reply came, "My name is Lamb, sir." "Oh," replied Benton, "you are the lamb that slipped into Congress by hanging on to my coat-tail."

Criticising on another occasion one who had deserted him, he said: "His ingratitude is more base than traitors' arms; mean did I say; yes, most damnably mean; yes, the meanest man God ever made." Speaking again of his enemies, he described them as "flatterers, who do not season with any salt the praises they give; whose flatteries have a nauseous sweetness which sickens the heart that listens to them; those sordid courtiers of favor, those perfidious adorers of fortune, who burn incense before you in pros-

perity and crush you in misfortune. They may do it, but, if Benton goes down, he will go down with his flag at topmast, and with his pathway strewn with the bones of his enemies." One day after Benton had delivered his celebrated speech against the "Omnibus Bill," which, by way of derision, he compared to Dr. Townsend's sarsaparilla, and in which he kept the Senate in a roar of laughter at the expense of Mr. Clay, who had opposed the bills separately, but supported them when consolidated, he met Judge Bay on the street, as he was going home, and asked him if he heard his speech. Bay, having answered in the affirmative, Benton said: "Didn't I give Clay hell; didn't I give Clay hell?"

Judge Henry, formerly of the Supreme Court of Missouri, who often heard Benton speak, in a recent paper says of him: "I have met many men whose personality impressed me, but never one who so commanded my admiration. I knew that he was an egotist, a dogmatist, bitter and intolerant, but his transcendent genius obscured these faults as the sun's brilliant light hides from our view the stars which are so bright, when the sun has set in the west. Benton was not a lovable man. He had nothing to attract men to him except his gigantic intellect. He did not adopt the means to which 'small fry' politicians resort to win popular favor. He was honest, and the people knew it; he was able, and the people recognized it." Judge Henry was politically opposed to Mr. Benton in his lifetime. In 1852 Mr. Benton was elected to Congress from St. Louis. While serving in the House he made his last great speech in opposition to the Kansas and Nebraska bill, which had been so strongly urged by Douglass. So intense were his sentiments against the bill advocated by Douglass, that in speaking once before a Missouri audience, to emphasize his feeling against Douglass, he spoke of him as "Stephen A. Douglass—not Fred." The matter of the aspirations of Douglass for the Presidency being once mentioned in his pres-

ence, Benton said, "He can't be elected; he can't be elected; his coat tail is too near the ground!"

Having been defeated for re-election to Congress in 1854, he resumed his literary work in Washington, and finished the second volume of his "Thirty Years' View." He also wrote an elaborate criticism of the famous Dred Scott decision, in pamphlet form, which was regarded as a very able legal argument on the questions involved in that case. He came back to Missouri in 1856, and announced himself a candidate for Governor, but was defeated. This was the last appearance of Benton on the stump in Missouri. It may be here said that so strong was his hold on the people of the state that in this campaign many of his old friends were known to ride on horseback as much as a hundred miles to hear him speak. In this year he supported Buchanan for President, and opposed his son-in-law, John C. Fremont, because, as he said, the latter was too sectional to be President.

Returning again to Washington, he entered with his accustomed vigor and energy on the last great work of his life, "The Abridgement of the Debates of Congress From 1787 to 1856," in sixteen volumes. The work only reached the year 1850. His health gave way under the great mental strain; but he continued dictating to the last in a whisper on his dying bed. He died April 10, 1858.

In speaking of Mr. Benton, Judge Bay in his "Bench and Bar of Missouri" says: "That he was inferior to Mr. Webster as a close reasoner; that he was not the equal of Clay as an orator, and that Calhoun surpassed him in the power and condensation of language, all must admit. But in depth of mind, originality of thought and the power to conceive and execute any great measure of public welfare, he was the equal of either and in some respects the superior of all; for the dominant characteristics of all were combined in him. He had Webster's depth of brain, Clay's nerve and power of will, and Calhoun's great moral integrity."

WAR ON FRENCH LEGAL JARGON.

BY ERNEST R. HOLMES.

FRENCH judicial and legal circles are just now considerably agitated by proposals of various reforms, not the least of which is a new civil procedure code soon to be discussed by the Chamber of Deputies. M. Henry Breal, known to many Americans as the Secretary of the Franco-American committee to aid and inform students coming to Paris, has deemed this the "psychological moment," as they said during the siege, to spring another proposition. He attacks the time-honored custom of disguising the meaning of legal documents in verbiage so old-fashioned and technical that ordinary mortals can make nothing of it. Such a reform will doubtless be hailed with more de-

light by the common people than by the legal fraternity. The initiated, by several years' special training, are enabled to know what it is all about when they see summons and writs and such things. If the public at large, as well as that in custody, is forced to call in legal advice to get at the inwardness of the formulæ, the knights of the code do not object. M. Breal, however, is an attorney still young in years and practice, with his heart not wholly hardened to the woes and perplexities of common folk. He has written an article, recently printed in the *Revue des Revues*, and of which extracts appeared in the newspapers, showing up the absurdities of the ancient forms still employed and de-

manding a reform. Although perhaps in less degree, English law is still beclouded by special construction and vocabulary, so that the strictures of the would-be French reformer apply in a measure at least to our own country.

M. Breal says in part:

"I should like to call the attention of the public to an abuse from which it has suffered for more than two hundred years, which has survived many revolutions, and which it is none too soon to remedy.

"If you have ever received a judicial document, you have certainly been surprised to see in what style it is drawn up. I have reference to papers coming from 'laboratories of procedure,' solicitors' notices, constables' writs, etc. Whoever reads for the first time a paper drawn up in this special style is overwhelmed with astonishment. Is such language really French? How is one to find one's way through the involved construction of a sentence which seems not to belong to present-day language? No one escapes this impression. It may become deadened by usage, but the barrister who to-day without difficulty unravels the most repellant-looking stamped papers, and the attorney who draws up with master hand and not a little satisfaction the '*qualités*' (qualifications) of a judgment by '*défaut profit-joint*' (default of one defendant and joining of his cause to that of defendant present) or the *conclusions de débouté d'opposition* (non-suiting), can remember perfectly the day when they first read a bill of procedure and were at least bewildered by the style of that scrawl. Yet they were prepared by several years' study of Latin and of law.

"The educated reader recognizes in this complicated French the Latin construction, and the meaning of words fallen into disuse. With a little work and attention he gets the general sense. But if the reader be a man of medium culture, or still more, a man of the people, it is a regular problem for him to discover the sense of the summons or order that he has received. The collabora-

tion of his neighbors, the aid of the school teacher, are necessary. He is only too happy if he be not forced to have recourse to the costly knowledge of some business agent.

"This obscure language frightens and disconcerts the common people. An insignificant paper brings trouble into a simple and little educated family. 'It's stamped paper'; they understand nothing of it, but a few words stand out only too clearly: 'I, the undersigned constable.' All those who have been called upon to enlighten the humble people by their counsel (in sitting, for example, in the office of free consultation of the order of the advocates) have been able to convince themselves that sometimes the difficulties that trouble and possess the minds of these clients arise solely from the impossibility of understanding a text really very simple. The intimidating mystery of a few archaic formulas often suffice to cause anxiety in uncultured minds. Personally, we have had several examples, such as a witness who believed himself accused of acts about which he was to testify. A woman threatened with attachment by her landlord for delay in rent-paying, did not dare go home, but remained with a son."

M. Breal cites several examples of current legal phraseology to prove that it is no wonder such misunderstandings occur. Here is one:

"A suit is prosecuted by Mr. Martin against Messrs. Dupont and Durand. If the latter does not have himself represented by a barrister he will receive the '*signification d'un jugement de défaut profit-joint avec ré-assignation au défaillant, ou celui-ci pourra lire que le tribunal a joint à la cause pendante entre le requérant et le sieur Dupont le profit du défaut qu'il a prononcé contre le sieur Durand. A ce que le sieur Durand n'en ignore.*' And all this to say to Mr. Durand, 'If you do not have yourself personally represented by a barrister, the judgment pronounced against Dupont will be valid also against you and it will be too late to act.'"

M. Breal quotes an entire summons, oc-

cupping a printed page, and points out how the real significance is obscured by a mass of useless words. The really important part is thus expressed:

"A comparaitre d'hui à trois jours francs à l'audience et par devant MM. les presidents et juges composant la première Chambre du tribunal civil de première instance de la Seine, séant au Palais de Justice à Paris, à dix heures du matin, pour, par les motifs énoncés en la requête dont copie est donnée en tête des présentes, en voir adjuger au requérant les fins moyens et conclusions."

M. Breal comments: "In reading this summons an inexperienced person would think he had to betake himself in three days, at 10 o'clock in the morning, before the magistrates of the First Chamber. In acting thus one would be sure to lose one's time and would risk, in spite of his trouble, being condemned by default. In fact, all these indications are false, for 'à trois jours francs' (in three full days) means in five days; 'dix heures du matin' (10 A.M.) really means noon; 'the First Chamber' will in all probability not be the one to judge your case; and finally it would avail nothing to 'appear' personally for an attorney alone is qualified to represent you. So "*comparaitre à trois jours francs à dix heures du matin*" means simply: Go right away and find an attorney, pay him a fee, and don't bother yourself any more about it. That is what a summons signifies, but one must understand it and not try to follow directions that it contains, for this document that should warn and inform is so out of date that it can only lead to error."

In conclusion M. Breal demands:

"That the legal documents be legible and comprehensible. We would thus gain a better understanding of the different phases of the operations of justice.

"What would we lose? A vestige of the past. Certainly we are not revolutionary in the matter of justice. We feel how much more power an organization has which pos-

sesses such far-reaching attachments with all the traditions of our country. Exterior pomp, even, which recalls to us the past, is not displeasing to us, and a President of the Assize Court, draped in the purple of a toga, the pattern of which goes back five hundred years, is more imposing and inspires more respect than the judge of New York City, who, clothed in a check suit and yellow shoes, goes to court in the garb of a habitue of fashionable beaches. But the imposing costume of French magistracy does not hinder it from speaking clearly. We should be shocked if it expressed itself in language contemporary with its costume. But that is precisely what the pettifoggers do who use in their relations with us the language of our ancestors.

"It is regrettable to note that in France, the country of pure, clear and elegant style, the judicial acts are incomprehensible. Justice, addressing the people, does not speak the language that this people speaks and understands."

How it comes about that 16th century French is still written by 20th century law clerks, is told in few words. Procedure was not uniform in France till 1667, when Colbert unified the code and forms for all the country. A volume was published containing formulas for every circumstance, and the style used was based on the "Stile du Châtelet," which already had a century of usage to give it the antique flavor which it preserves to the present day. A hundred years ago there was a decree of the Constituent Assembly that "the code of civil procedure be immediately reformed so that it be made more simple, more expeditious and less costly." M. Breal would add to these desirable qualities "more comprehensible" and he hopes that the committee on the new code may require only to have its attention called to the need for a change of language to accomplish what the last century did not succeed in doing.

RIOT LAW.

BY JONATHAN TAYLOR, JR.

THE punishment of a criminal is taken as a matter of course in our modern system of law and there follow from such punishments no outbursts of prejudice or passion. In even the best regulated communities, one expects there will always be some degenerates, who ever need the strong hand of the law to force them to their proper place. The calm resignation with which the public mind greets the punishment of the wrong-doer is one of the modern marvels. We expect larceny, burglary and murder to meet their adequate and just punishment. Our scheme of criminal justice is so well ordered that the punishment of criminals occurs with the greatest of regularity and precision, save in one or two notorious offenses, for which the public mind entertains a lively increasing horror and dislike. The punishment for criminal assault and rape has met with startlingly little regular enforcement save in older and more settled communities. To insure the punishment of these crimes, men have called into operation "Lynch Law." By the use of this power they propose to right the wrongs of society and to relieve the constituted authorities from their sworn and solemn duties. To discuss the means by which "Lynch Law" is met and overcome, to investigate the exact legal status of such means, to define the application of these laws in a concrete instance, is the object of this paper.

In the idea of self protection and preservation, one finds the aim of "Lynch Law." Personal wrongs and grievances form a potent and ever present reminder of some injury inflicted and hence the eternal desire to right any fancied wrong. For example, a man may be fairly tolerant of any breach of contract and may not be particularly enraged over the loss of some chattel. But let one person strike another, and the instan-

aneous tendency is to strike back; the injury and the hurt are too recent and too present. Thus we see the germ of "Lynch Law." Then there is that ever present tendency to enforce laws, because the proper authorities fail to do so. This is the tendency against which all lawyers and right-minded citizens strive so earnestly. Recently, in Kansas, the efforts of Mrs. Nation have shown some startling evidences of this tendency. Talk as one will, the desire for squaring up all matters by one powerful stroke is eternal in the human heart.

The consideration of certain recent legislation in Ohio, and of the proceedings under it, may throw some light on the questions before us.

Ohio, like most other States, has always had on her statute books a statute against ordinary riot, the usual disturbance caused by a tumult on public thoroughfares. But new conditions arose, and the need of more stringent legislation was felt. Two serious outbreaks occurred, one at Fairfax County, Washington C. H., and the other at Urbana, Ohio. In both places an attempt was made to seize and capture a negro ravisher. To meet these conditions, in the year 1898, the following act was passed (O. L., Vol. 92, p. 411):

"That whoever shall break into, or attempt to break into, a jail or any prison, or attack an officer with the intent to seize a prisoner with the purpose of lynching, shall be deemed guilty of a felony, and shall be confined in the penitentiary not more than ten years nor less than one year."

As will be seen from the language of the Statute, this act was aimed directly at any attempt to further mob violence. Being a recent act, no enforcement of it was possible until the riot at Akron, Ohio, occurred. Here the authorities had removed the prisoner from the jail early in the day. The

crowd was dissatisfied and made an attack upon the officers who guarded the City Prison and City Hall, until at last dynamite was used and the entire structure was completely destroyed. Several other buildings of private persons were destroyed at the same time, and a hardware store was broken into, from which \$2,500.00 worth of guns and ammunition was taken. Two persons were killed, several seriously wounded and the entire city was torn from end to end. Very shortly, upward of 40 men were indicted for rioting, under the provisions of the Statute already quoted and the interpretation of those laws began. The indictments for offenses covered three, Rioting; Attacking an Officer; Dynamiting.

To discuss the law as developed during these trials is the second object of this article.

The first question that presented itself was whom shall we indict? This was all the more perplexing because of the Ohio Statute on the subject of Aiders and Abettors. It reads as follows:

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

At the time of the riot, several thousand people were on the streets and if not actually assisting in the work of destroying property, they were encouraging the mob by shouts and gestures, or at least by their presence. On the trial of one of the accused, in discussing the Statute, the presiding Judge, the Hon. J. A. Kohler, used the following language in his instructions to the jury:

"Where several persons conspire to do an unlawful act, all are liable for the acts of each, if done in the prosecution of their common purpose; but if the act committed has no connection with the common object, the party committing it alone is responsible for its consequences."

And again the Judge said:

"Every person who incites, counsels, advises or encourages another to commit any crime is a principal in the crime so committed.

"One who merely stands by when an attempt is made by others to commit a crime does not thereby, and for that reason, become an aider and abettor, unless he takes part in the criminal act or acts, or

promotes, incites or encourages another to commit a criminal act. The mere looker-on, while a crime is being committed, who does nothing, who neither then nor before, by any word or act, encourages it, is not punishable, though mentally he approves of the crime."

In the discussion of the aider and abettor by counsel, many appeals were made to the jury to remember the great number of people against whom no indictment lay and who were yet fully as guilty as their client. It is difficult to lay down any hard and fast rule, whereby one may be declared an abettor and another not. But for purposes of public justice it ought to be said that the interpretation laid down by the presiding Judge gained all reasonable ends and purposes.

Another interesting question arose in the admission of certain evidence. During the trial it developed that some of the rioters left the City Building with the avowed intent of breaking open a hardware store, for the purpose of taking therefrom certain weapons. Being indicted for larceny, this question arose. On the way to the hardware store, several of them cut several pieces of fire-hose, which were then playing on the then blazing City Building. *Quære*—Shall there be admitted in a trial of larceny, the proof of what was done in such a way, prior to the actual larceny of the goods, as charged? On this question much might be said, but the Trial Judge (Kohler) admitted the evidence as part of the *res gestae*.

Another question rose as to compensation to persons injured in the riot and for property destroyed thereby. On this point recent legislation (1898) in Ohio speaks as follows (O. L. 92, p. 161, Sec. 5):

"Any person assaulted by a mob and suffering lynching at their hands, shall be entitled to recover from the County in which assault is made, any sum not to exceed five hundred dollars; or, if the injury received is serious, any sum not exceeding one thousand dollars; or, if it result in permanent disability to earn a livelihood by manual labor, any sum not exceeding \$5000."

In this riot two children were killed during the riot, and now their personal repre-

sentatives have brought actions in the local Courts to obtain their rights under the law. For injuries to property, apparently there is no redress in Ohio. Insurance companies refuse uniformly to insure against riot, and when buildings were burned in Akron, the owners thereof could recover no insurance. In the hardware store, above mentioned, \$2,500 worth of property was stolen from the store, plate glass was broken and various other injuries suffered. Yet this loss fell wholly on the proprietors of the store. A steam laundry and a small store were completely destroyed, and for this there was no recompense. By this, these men lost all their property and the law gives no redress. An interesting question arises in this connection under the following circumstances. Suppose a foreign corporation should lend money on property which is destroyed as a result of a riot. Under the Ohio decisions, the loss is fixed in the real owner of the property. Now since the subject matter of the loan is destroyed, what becomes of the security? Obviously the trend of all these decisions works an injustice and many disastrous results follow from such an interpretation. Of course, such liability may be guarded against by special contract and some of the larger loan companies insist upon the insertion of such a cautionary clause. Manifestly insurance companies protest against such insertions, but rather than lose the insurance accept the clause guarding against loss by riot.

Our readers are to remember that this new statute providing penalties against rioters, who attack officers or break into prison, has never yet met with a judicial interpretation. Aside from several grammatical errors, the very construction of the Statute is open to considerable question. Assuming the truth of the general proposition, that the purpose of all judicial interpretation is to get at the real meaning of the Statute, its legal intendment, the purpose of its enactment, what shall we say as to this Statute? Hastily enacted, the direct outcome of recent riots at Urbana and

Washington C. H., its provisions were made to cover only such conditions as arose there. Generally speaking, there is no doubt that it looked toward the prevention of mob violence. Any interpretation leading otherwise must necessarily be unwise and absurd. On the interpretation of this Statute, it is difficult to decide, whether it shall be liberally or strictly construed. At first glance it would seem that the Court must apply the rule ordinarily applied to the burglary statute. The circumstances render interpretation a matter of peculiar import.

At the time the mob gathered before the City Prison, in which the negro was supposed to be confined, the officers had taken him away to the neighboring city of Cleveland. When the mob reached the prison, their intended victim had escaped. Our readers will note that the Statute makes intent an essential of the crime. Before trial there was a demurrer to the indictment on this ground. Attorneys for the defense asked, "How can you seize a prisoner who is not there? How can the mind operate against an object which has no existence? One cannot seize a man who does not exist." Our Ohio decision, which declared that there could be burglary if the object were not in the dwelling upon which the breaking was made, was cited. Counsel for the State urged that intent is necessary in burglary. In support of their position the Prosecuting Attorney cited *State v. Beal*, 18 O. S., 108. The Court in this case overruled this charge of the lower court:

"That if the accused broke and entered the building with intent to break into the safe and steal money supposed to be therein, and the safe was not used as a place for the deposit of money, and there was none therein at the time, he was not guilty."

This seemed an analogous case and following it the Court overruled the demurrer. This contention of the defense opens up the whole subject of lynching as a legal act. Are we to construe statutes punishing lynchings, just as we construe ordinary criminal statutes? In other words, is this statute to

be construed liberally or strictly? In favor of a strict construction is a long line of facts gleaned from the field of criminal jurisprudence. A strict construction of this particular statute, means that the breaking into a prison for the purpose of seizing a prisoner is not to be regarded in the same light as breaking into a house for the purpose of seizing property. Ought we to entertain such an interpretation? Should we treat a man who breaks into a prison under the circumstances, just as we treat a burglar, who breaks into one's house at midnight for the purpose of stealing personal property? At times it has been held that the killing of a burglar, if found in one's dwelling house under these circumstances, was excusable homicide. Naturally, the distinction will arise that officers of the law are at hand to protect a prisoner, while in cases of burglary the householder himself usually protects his property, for the protection of which precedents of many centuries justify measures of the most vigorous kind.

Suppose one were to look back over that history which speaks of the centuries of toil, during which our criminal law finally developed into a splendid and humane code. We find that certain crimes were punishable by death at the hands of the injured party. We hardly need the melodious pages of Gibbon to assure us that under the Empire a wife's paramour might be killed by the wronged husband. Modern statutes make no distinction between this sort of murder and murder of the usual type, and yet we have yet to learn that any wronged husband has been executed for any such crime.

The circumstances of these particular cases aid further in such interpretation. On trial it developed that one of the defendants while on the streets during the day of the riot, was told that the prisoner had been removed from the City Prison. Thus when he went into the City Prison, on the night of the riot, how could he intend to lynch a prisoner, who he knew to be absent from that

prison? Wherein is the intent to seize such a prisoner?

As bearing further on the interpretation of this Statute, the facts leading up to the actual breaking are important. We find the mob assembled before the jail. While there the frequent cries of the crowd annoyed and alarmed the few officers who were on duty. Acting on this, the officers, knowing the prisoner to be safe in Cleveland, asked the crowd to appoint a committee to enter the prison and satisfy the crowd that no prisoner was there. Accepting the invitation, a number of men entered and searched the building, of course, finding no one. Now are members of this committee liable to prosecution just as any ordinary member of a mob, who attacks a prison for the purpose of lynching an inmate? Is this entry and breaking, the same as the breaking and entry of a burglar, as a liberal construction of the Statute would imply?

With these facts in view, what shall we say is to be the construing of this Statute liberally, are we to put in the same category the man who has recourse to lynch law and the ordinary burglar? Does the public regard lynching with horror, does it become astounded and awed, as if on the commission of some horrible crime? We think not. Far from condemning such an outburst, we find members of the Congress using such language as this:

"He might have told you that the same spirit that thrills the white man in North Carolina thrills the white man in Indiana, where recently white mobs murdered two negroes for murdering a white barber. He might have gone to Illinois, and found that wherever the white man looks to the blue sky the spirit of superiority and progress stirs within him. The gentleman wants to know if that is fair. Was the election conducted fairly? I tell you in the light of a sound philosophy, in the eyes of civilization and justice, it was fairer and juster than the disgraceful régime (that of the negro) that made that revolution necessary (applause)." — *H. R. Record, Jan. 12, 1901.*

Again, in the House on the same day:

"The truth should be known. Apologists sometimes make the statement that lynching is caused by

the law's delay and the uncertainty of punishment by the courts. In my judgment, for the crime of rape, any one, white or black, of high station or low station, would be lynched in the South, if there were absolute certainty that the prisoner would be tried, convicted and executed on the next day. In my judgment, the main reason for this, which, strange to say, so far as I know, has never been mentioned in the public prints, is the fact that every one revolts at the idea of placing on the witness stand a refined woman and compelling her to go through the harrowing and disgusting details of so horrible a crime. Such a punishment of a good woman would be more cruel and inhuman than lynching one who has placed himself beyond the pale of law and forfeited his right to protection under the law, human or divine. Another thing should be well understood, that our people will never be influenced by those who are continually bawling against the crimes of the lyncher and have no abhorrence for the hellish crime of the lynched, and no sympathy for his victim."

With the plain declaration of the attitude of modern statesmen toward lynching, as a further aid to interpreting this Statute, we may compare the attitude of the Roman Law toward irregular punishments. Gibbon, in his great chapter on the Roman Law, speaks as follows:

"In some pressing emergencies, the citizen was authorized to avenge his private or public wrongs. The consent of the Jewish, the Athenian and the Roman Law approved the slaughter of the nocturnal thief. Whoever surprised an adulterer in his nuptial bed might freely exercise his revenge; the most bloody and wanton outrage was excused by the provocation; nor was it before the reign of Augustus that he was reduced to weigh the rank of the offender, or that the parent was compelled to sacrifice his daughter with her guilty paramour."

Such was the bearing of Roman Law on the subject. We in America are proud to boast of a jurisprudence which has its foundations of the great English Common Law. The thought may occur that the Roman Law was well adapted to inhabitants of a warm climate, and to Roman conditions of life, but quite unsuited to American conditions of civilization. On this subject, we are fortunate to have so eminent an authority as Sir James Stephen. Speaking of such punishment in his "History of the

Criminal Law of England," Vol. I, p. 59, he says:

"The early criminal procedure was of two kinds: the law of *infangthief*, a procedure so summary as hardly to deserve the name, and the law of *purgation* and *ordeal* (*evertheil*), a system which formed the first step toward our modern law. . . . It should be remembered that in early times the really efficient check upon crimes of violence was the fear of private vengeance, which rapidly degenerated into private war, bloody feuds and anarchy."

Still more specifically, Stephen, in the same work, says on "The Law of Summary Execution or *Infangthief*":

"A single step, but still a step however short, from private war and bloody feuds, is made when people are invested by law with the right of inflicting summary punishment on wrong-doers, whose offenses injure them personally. To recognize the right of the injured husband, or owner of property, to put the adulterer or thief to death, then and there, is a nearer approach to law than to leave them to fight out their quarrel subject to a compulsory arbitration, ending in the payment of a prescribed sum.

"On this right of summary execution the Saxon laws are full, as the following extracts show: 'If a thief is seized, let him perish by death, or let his life be redeemed according to his *wer*,' say the laws of Ina, meaning apparently that the thief's fate was to be at the discretion of his captor. Another of Ina's laws says: 'He who slays a thief must declare on oath that he slew him, offending not his gild brethren.' A very obscure law of Ethelstaris begins thus: 'That no thief who may be taken handhaebender above eleven years and above eight pence.' The rest of the law implies that in some cases the thief may be imprisoned. Another law of the same king implies that the natural and proper course as to thieves was to kill them."

These quotations show that summary execution of an offender at the hands of the injured party was a part of the regular law of England, and from it follows that the lynching of to-day, far from being a mad outburst of passion, may be considered simply as an expression of early English justice.

Now then even in these modern days, men are upholding the rights of the lyncher. In the light of the ancient law of Rome, and of the great Common Law of England, what interpretation shall we make, liberal or strict.

Looking again to the doctrine of aider and abettor, shall we say that every member of such a mob is a rioter? Viewing together the construction of the Statute and this abettor doctrine, if we insist upon the broad and extensive application of the Statute, do we not, *ipso facto*, deny the right of revolution? The facts of this particular riot, the doctrine thereby touched upon, provoke the consideration of some grave questions, and their final determination involves the ultimate safety of a part of our judicial life.

After all, the great question before us is the real value of legislation against lynch law, either as general legislation or as specially manifested in Ohio Statutes. This question of lynch law may be considered separate and apart by itself, or as a type of a considerable part of our legislation. If we look upon it as a type of the great mass of unenforced laws of the country, laws so much in advance of public sentiment, that they quite fail of their purpose, the field is wide for open discussion. We may accept the general proposition that unless a law is the expression and embodiment of public sentiment it fails in its purpose. No one questions the wisdom of laws punishing larceny,

burglary, arson, etc., such laws are backed by the great common sense of the world and the public sentiment of civilization. How many are the laws that exist only on the printed page, that find expression only in cold type, which are endorsed neither by the warm blood of peoples, nor the reverence of a just populace. The smuggling laws evaded prior to the American Revolution by such men as Hancock and Adams, the Fugitive Slave Law, openly jeered at and scorned from Boston to Oberlin, the liquor laws relaxed in prohibition Maine, and scoffed at in Kansas until a Carrie Nation wields an axe of destruction. We must conclude even from a most cursory survey of dead-letter legislation, that such laws are nugatory, absurd and futile. We must admit that law, far from being a divine product, is a very human and imperfect instrument. Be it far from this paper ever to defend or uphold lynch law. The bald fact remains, here is law which does not commend itself to a part of the nation. Yet the Ohio law is a bold step to the future and all must concede that acting from its best lights, this State has taken a long step toward exact justice.

ANCIENT LAW IN MODERN LIFE.

BY F. P. WALTON.

IN turning over the Reports of cases decided by the Privy Council, we are now and then startled by the strangely unfamiliar paths into which that illustrious tribunal is liable to be led. A case as to the powers of an electric light company may stand cheek by jowl with a case as to the reason and extent of a primitive Hindu custom the origin of which is buried in the fathomless depths of an unrecorded antiquity. It is only the other day that this committee of English judges had to consider in all seriousness

arguments which would have sounded vastly more familiar to the lawyer-priests of India three thousand years ago. The question raised was, "Is it lawful by the Hindu law for a father to give his only son to another in adoption?"¹ The argument against this was that it would sanction the voluntary extinction of a family. This happens every day with us, and no one is a penny the worse. In fact, I suppose, that if families were immortal our charitable foundations

¹ Radhamohon v. Hardai Bibi, L. R. 26, Ind. App.

would hardly manage to exist. But among the Hindus of to-day, as among the ancient Greeks and Romans, the extinction of a family is a much more serious affair. It affects the dead as well as the living. Take the case already referred to. It was argued that if a man were allowed to give away his only son, his own death would leave no representative of the family to perform the private family rites. The consequence would be that he would be left to languish in *put* or hell. This might seem a personal matter, as to which the father ought to be allowed to choose for himself. If he chose *put* with his eyes open, why should anyone interfere? But unfortunately, he would not be the only one to suffer. The cessation of the family rites would prevent the flow of promotion among previous generations of the dead. If a man duly performs the rites his dead father is freed from *put*, his grandfather becomes immortal, and his great-grandfather is carried up to the solar system. If the rites are not performed the foundations of this posthumous happiness are dashed away, and the legitimate expectations of deserving ancestors are rudely disappointed. All this, except perhaps the rise to the solar system, would have sounded quite reasonable and natural to a Roman in the early days of the city. All the Aryan peoples, and many non-Aryan peoples, too, start with attaching profound importance to perpetuating the family. Ancestor-worship is the most universal of early religions. It appeals to human nature, for the benefits are not all on one side. The man who treats his ancestors well will not be overlooked by them, and many a stroke of apparent luck may be due to their pious care. We find this form of faith among peoples extremely remote from each other in space and time; among modern Hindus, ancient Greeks and Romans, Chinese, Japanese and Arabs, without attempting to enumerate them all. So deeply rooted are these old beliefs that in some out of the way corners of the world fifteen hundred years of Christianity has not destroyed them. Among the mountains of the Caucasus, in

what is now a Russian province, the Ossetes still place food and drink upon the tombs, that their dead may not suffer from hunger (Dareste, *Etudes d'Histoire du Droit*, p. 137); yet the Ossetes have been Christians since the fourth century. But the Anglo-Saxon race has travelled so far from the faith of its forefathers that we have most of us forgotten all about it.

And we are apt to forget that in this, as in so many other things, the Hindus are to-day where we were thousands of years ago. In their present we have a picture of our own remote past. In India we see all round us institutions and customs which in Europe were extinct before history began. A case about ancestor worship in the law reports startles us in much the same way as if we were to put up a pterodactyl in the Park.

One of the most fruitful ideas of modern science is that our complex, civilized society has grown out of a simple and uncivilized society, and that when we observe and study the customs of savage peoples we are as it were beholding our own far away ancestors. Mons. Paul Bourget, writing of his travels in America, said what struck him as most instructive was to pass in a few hours from the simple and elementary conditions of a new settlement to the complex civilization of the Eastern cities. In looking through the windows of the cars, as we travel from West to East, we see the history of America unrolled before us. And one who did not know anything about the primitive bush might think the simple log village of the West was the starting point. We are liable to make the same mistake in our study of mankind. The religious ideas and the social customs of the Hindus strike us as bearing the marks of a hoary age. They may represent, so to speak, the views of our grandfathers. But if we want to find out the views of our great-great-grandfathers, it is not to the polite and subtle-witted Hindu that we must look, but rather to races at the stage of progress reached by the tribes of Central Africa or by the Pacific Islanders.

It is in India that we find still surviving

that form of family organization which was once characteristic of all the Ayrans. This is the joint undivided family, composed of the "male descendants of a common ancestor, any males who have been adopted by members of the family, and the wives, widows, and unmarried daughters of the male members; all of whom are living as a joint Hindu family, and none of whom have separated from others." (Sir W. C. Petheram; second article on "English Judges and Hindu Law," *L. Q. R.*, 1899, p. 175.) All of these are joint owners in the family property, and offer sacrifices to the same common ancestor. Students of Roman Law know that this description of an existing Hindu family applies with absolute accuracy to the early Roman family.

Those of us who were brought up on the works of Sir Henry Maine, are not likely to forget how that interesting and plausible writer finds in the patriarchal family the germ of our modern social organization. The *paterfamilias* or patriarch governs his household, which includes his sons and their wives and families. As he has the power of life and death over all the members of the family, he can easily repress any tendency on the part of an unruly son to take too seriously his position as a joint-owner of the family property. Where one of the joint-owners can play ducks and drakes with the common property, while the other owners have to grin and bear it, community of property seems rather a misnomer. This was the happy position of the Roman *paterfamilias*, and the same liberal powers are enjoyed by the Canadian husband over the property which, in theory, belongs to his wife as much as to himself. (*C. C.*, 1292). The patriarch is the king and priest of the family. The families of Abraham and other patriarchs as described in Genesis are looked upon by Maine as illustrating this theory. Each family is an independent unit, forming no part of any larger organization such as a state, or even as a tribe. And, in Maine's view, these larger organisms were formed by

the gradual extension of such patriarchal families. If the descendants of the same patriarch continued to live near each other, they became in time a clan, and sometimes out of the confederation of several clans, perhaps united for war under some powerful chief, there would grow up a rude kind of nation. The theory of evolution has, however, led many modern writers to look much further back into the mists of antiquity. Even the pterodactyl is a creature of yesterday, compared with the simple organisms which flourished when all the world was young. And it is now earnestly contended that the patriarchal family was the outcome of a long process of social development. In the Roman family, as we know it from the earliest records, relationship is only recognized on the father's side. The daughter when she marries becomes a stranger to her father's house. She passes into the family of her husband. His people are her people, and his gods her gods. She and her descendants have henceforth no part nor lot in her original family. They are not agnates, and the law looks only at agnatic kinship. To us nothing seems more obvious than the fact that a man is as much related to his mother's brother as to his father's brother. But at a certain stage in the history of many of the Aryan peoples, a mother's brother is no relation at all. Sir Henry Maine fixes on this stage as being the starting point. His modern opponents, on the other hand, maintain that long before this stage was reached there had been a time when the only relationship known was that on the side of the mother. This system is still followed by many uncivilized peoples. Among many tribes of savages society is organized on the clan system. The clan consists of a number of persons—sometimes as many as five hundred, but generally fewer—who live together in a village. They all claim to be the descendants of a common ancestor, and bear the same family-name. The name is taken from some animal or natural object. They are all called rattle-snakes, corn-stalks,

or by some analogous appellation. Marriage is strictly forbidden within the clan. Only a man from a neighboring or foreign clan is allowed to marry a lady rattle-snake or lady corn-stalk. And she will not go to him. If he wants to marry her he must come to live with her in her village, and throw in his lot with the rattle-snakes. This is the well-known custom to which Mr. J. F. McLennan gave the name exogamy, which is now generally adopted. Descent among the rattle-snakes is reckoned only in the female line. The children are rattle-snakes irrespective of the clan of their fathers. The imported husbands play their humble part in perpetuating the race of rattle-snakes, and have to drop into the ways of their wives' people. It is hardly possible for them to oppose the traditional policy of the rattle-snakes, for they are so-many isolated units. One husband may be a fox by birth, and another a squirrel. And the foxes from time immemorial have had no dealings with the squirrels. If now and then a cantankerous husband tries to be aggressive, he is promptly brought to see that he is in a minority of one. The rattle-snakes stand by each other through thick and thin, and every member of the clan is bound by all that is holy to take vengeance for a wrong done to a brother or sister rattle-snake.

So among the North American Indians every nation was divided into a number of clans, and among most of the nations the rule is, or was, first, that no man could marry in his own clan, and, secondly, that every child belonged to the clan of its mother. (McLennan, *Primitive Marriage*, 96, Post, *Grundriss*, Vol. I, p. 71). It would be easy to multiply instances of the same rule. What is the explanation of reckoning kindred by the mother only, and not considering that a child was related to its father or its father's kin? The answer generally given is that it dates back to a time when even the wisest child did not know its own father. It is assumed that there was a time in the infancy of the race, when marriage

had not been thought of. The wild men and women who wandered about the woods, picking up a precarious livelihood by killing game with the rudest weapons, formed according to this theory no permanent alliances with each other. Sir John Lubbock, with commendable gallantry, speaks of the women as "communal wives." But some degree of specific appropriation seems to be implied in the word "wife," and the term marriage is inappropriate to describe the casual and fleeting relations between the sexes which are assumed to have been universal in primitive society. As Mr. Herbert Spencer puts it, "among low savages the relations of the sexes are substantially like those common among inferior creatures." (*Principles of Sociology*, 3d Ed., Vol. I, p. 600). Exclusive relationship by the mother is ascribed upon the theory to the uncertainty of paternity. The well-known saying "maternity is a matter of fact; paternity is a matter of inference," appealed with irresistible force to primitive mankind. Many modern writers have followed McLennan's view that all races began by counting kindred by the mother's side only; that many races at a later date adopted the agnatic principle and reckoned kindred only by the father; and that still later some races came to admit relationship on the side of both parents equally. Dr. Post, one of the most recent and most learned of the German writers on this subject, goes even further. He says kinship by the female line only is everywhere the most ancient system; kinship by both parents everywhere the most modern. Kinship by the male line only is everywhere more modern than kinship by the female line only, and more ancient than kinship by both parents. And probably kinship by females only, and then by males only, are stages through which all races have passed. (*Grundriss*, I, p. 661; McLennan, *Primitive Marriage*, 133).

The passage from promiscuity, or more euphemistically, "communal marriage" to monogamy is bridged over by the curious

system of polyandry. In Thibet, among the Nairs of Malabar, and elsewhere, we still find this system in force. Several men have one wife in common. A refinement of this arrangement is to insist, as in Thibet, that the co-husbands must be brothers. A traveller in Thibet of the last century, says: "They club together in matrimony as merchants do in trade. Nor is this joint concern often productive of jealousy among the partners. They are little addicted to jealousy. Disputes, indeed, sometimes arise about the children of the marriage, but they are settled either by a comparison of the features of the child with those of its several fathers, or left to the determination of its mother." (Cited by H. Spencer, Principles of Sociology, third edition, p. 648).

The course of development is then said to be (1) promiscuity, in which paternity is altogether uncertain; (2) polyandry, in which paternity lies between the members of a small partnership; and (3) monogamy, in which *pater est quem nuptiæ demonstrant*.

As paternity becomes more and more demonstrable, the unreasonableness of reckoning kin by the mother only is more apparent, until a time is reached when the men assert their independence and claim that the children should bear their name, and not that of their mother. The rise of private property facilitated the change. It made men anxious to see their sons provided for as their heirs.

That many races took to polygamy instead of monogamy does not affect the argument, because there, too, paternity was indisputable.

The theory of the progress of the race which I have sketched, has met in the last few years with much criticism. Westermarck, Starcke and other able writers have advanced many cogent arguments against it.

The general line of attack may be indicated in a few words.

(1) It is denied that primitive mankind lived in a state of promiscuity. Even many animals which men look down upon, live in

pairs; e. g. the man-like apes, whales, seals, the hippopotamus, and squirrels. As for birds, one naturalist affirms that "real genuine marriage can only be found among birds." (Westermarck, Hist. of Human Marriage, p. 11). It is true that modern observers would not go so far as Ulpian. He said natural law was shared by man with all animals, and gave as instances of its operation the union of the sexes which we call marriage, and the care which all animals show in the rearing of their young. But the most kindly critic must admit that, as to sexual relations, some of the lower animals set but a low standard of decorum, and that, as to the education of the offspring, they leave their young to fight their own battles at a dangerously early age.

Notwithstanding, if it can be shown that some of the so-called inferior animals form more or less durable alliances, it seems too harsh a view to think that our ancestors were less virtuous than the gorilla or the hippopotamus. Moreover, this is confirmed by the fact that some of the rudest races of existing men are found living in separate families. To give one example out of many: "The wild or forest Veddahs (in Ceylon), Mr. Pridham states, built their huts in trees, live in pairs, only occasionally assembling in greater numbers, and exhibit no traces of the remotest civilization, nor any knowledge of social rites."

And a very strong argument against promiscuity is the prevalence of jealousy. In spite of many curious and interesting customs, most savages are extremely jealous; e. g. "Among the nomadic Koriaks many wives are killed by passionate husbands. Hence the women endeavor to be very ugly: they refrain from dressing their hair or washing, and walk about ragged, as the husbands take for granted that if they dress themselves, they do so in order to attract admirers." (Westermarck, p. 120).

(2) There is no evidence to show that polyandry was ever a wide-spread, far less a universal institution. Rather it seems to

have sprung up in a few out-of-the-way places, owing to peculiar local conditions. It is, therefore, unscientific to assume the general existence of polyandry in order to account for the change from kinship by females to kinship by males.

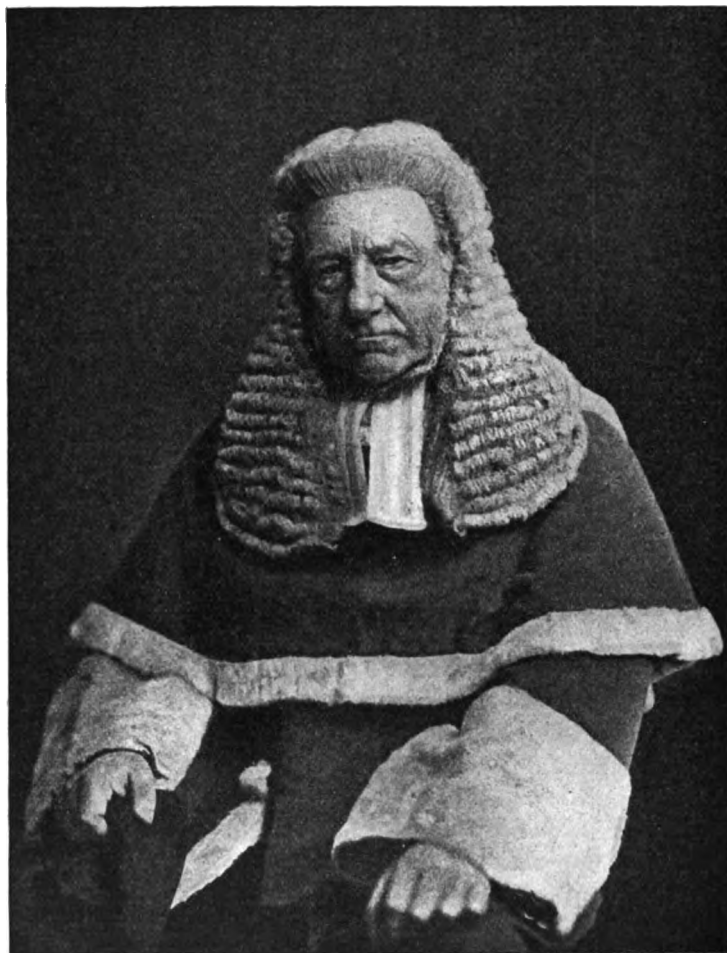
(3) The assertion so frequently made that all races start with kinship by females cannot be supported. It is true that we find such a system very widely spread; but it is equally true that among some of the rudest races we find no trace of it, and as regards the Aryan peoples the evidence of its existence before the historic period is very unconvincing (Westermarck, p. 104). So far as we know, there are many races which from the earliest times have followed the system of kinship by males.

On the whole it seems unsafe to assume that kinship by females everywhere preceded kinship by males. It is more probable that different circumstances led to one race adopting the one custom, and another race the other custom. The co-existence of these two systems is, no doubt, difficult to explain. The clue to the solution lies, perhaps, in the different position enjoyed by the husband in different tribes. Among many tribes, as among the Indians to whom I referred some time ago, a man on marrying has to leave his own home, and go to live in the home of his wife's father, of whose family he becomes a member. In Sumatra, in the mode of marriage called *ambel anak*, the father of a virgin makes choice of some young man for her husband, and he lives in the father-in-law's house "in a state between that of a son and that of a debtor" (Westermarck, p. 109). Among other tribes, on the contrary, the men are less meek. They steal, or buy, or coax wives to come to live with them in their homes. Curiously enough, in one case at least, both customs are found side by side among the same people. (See e. g. McLennan, *Patriarchal Theory*, p. 42).

Among the Singhalese there are two recognized forms of marriage: the *beenah* marriage, in which the husband goes to the wife's hut; and the *deega* marriage, in which he carries her away to his village. Many circumstances may have led to a difference of custom. Where wives are scarce it may be necessary to propitiate their parents in many ways. Even where purchase in its coarser form is not met with, the intended mother-in-law may expect little attentions to be shown her. We may find it wise to take her now and then to a theatre. Among the Padams of India the lover presents the young lady's parents from time to time with small delicacies, such as field mice and squirrels. The *beenah* marriage is not unknown among ourselves. When we say that the husband "hangs his hat up" in the house of his wife, or of her father, this is essentially the same thing. Now where such a practice is customary, one is not surprised that the children bear the name of the mother, and belong to her family. But when the husband has carried off his wife, like young *Lochinvar*, or even in a more peaceful mode has persuaded her to leave her home, and go to his, and to follow his fortunes; it would seem a very odd thing if the children were to be accounted as related only to their mother's family.

Whatever explanation we may adopt of these curious customs, there seems to me to be great force in the modern criticism of McLennan's theory.

That the patriarchal family, as we find it in India, is really primitive can hardly be considered likely. But it is very possible that among our Aryan forefathers there never was a time when no family system existed, and perhaps there never was a time when the husband did not successfully assert his claim to be the head of the house.—*La Revue Légale*.



LORD BRAMWELL.

A CENTURY OF ENGLISH JUDICATURE.

VI.

BY VAN VECHTEN VEEDER.

FROM THE COMMON LAW PROCEDURE ACT TO THE JUDICATURE ACT.

IN any consideration of modern English judges Baron Bramwell must hold a conspicuous place. In mere length of service (thirty-six years) he is surpassed in modern times only by Baron Parke, whom he succeeded. He is an interesting link between the past and the present. Coming to the bar soon after Lord Tenterden apologetically made a few changes in the supposed perfections of the common law, he lived to frame the Common Law Procedure Act and to assist in the final overthrow of the old system by the Judicature Act. He was doubtless a great lawyer and a learned judge, but his marked personality exerted an influence not limited by learning—the breezy, invigorating influence of sturdy common sense caustically applied to particular problems.

In almost every respect he was a complete contrast to his prosaic predecessor, Baron Parke. He chose to mask a genial and generous nature under the garb of humorous cynicism, but in reality he was no cynic. Throughout his career he was one of the most popular as well as interesting of the judges. With a personality as vigorous as Maule's or Westbury's, he was one of the sturdiest, manliest and kindest of men.¹ He did not always respect conventional traditions, and his plain directness of speech sometimes shocked sensitive people. He never hesitated to speak out what he thought. In the fearless discharge of his judicial functions he had great contempt for public opinion. Some observations in a charge

¹ Upon his retirement he could recall only one unpleasantness. "Once a very old and dear friend of mine provoked me so much and made me so angry that I actually threatened to commit him and I remember that on my asking him what he would have done if I had committed him, he answered promptly, 'Move for my own discharge.'"

having met with applause, he paused and then said quietly, "I recall those words—I must have been saying something foolish."

He received his legal training in the strictest school of special pleading, and was familiar with all its mysteries. But he was not, like Parke, blind to the defects of the system. "I think," he said, "that some twenty or thirty years hence, when the present generation of lawyers has ceased to exist, it will scarcely be believed that such a state of things did exist in a civilized country." Consequently, when public opinion was ripe for the overthrow in a large measure of the system, Bramwell was chosen to make the change. The work required a mind well trained in the old system, yet broad enough to see its defects. It was conceded that Bramwell and Willes did most of the work. The final overthrow of the old system by the Judicature Acts received his cordial support. He occasionally showed the effect of his overtraining in this species of dialectic in his fondness for framing dilemmas (see his opinion in the *Bernina* case, 13 App. Cas. 11) and, more rarely, in the maintenance of metaphysical positions somewhat removed from common sense.

One of the most conspicuous instances of this susceptibility to scholastic logic was his position that an action for malicious prosecution will not lie against a corporation. (*Abrath v. North Eastern Ry.*, 11 App. Cas. 247.) A corporation, he maintained, is incapable of malice or motive. If the stockholders direct a malicious prosecution they are personally liable; while such action by the directors would be *ultra vires*. Obviously if malicious prosecution could not be

maintained against a corporation neither could negligence.¹ Another characteristic perversion was his application of the maxim *volenti non fit injuria*. "It is a rule of good sense," he said in *Smith v. Baker*, 9 App. Cas. 187, "that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate. He can, if he chooses, say, 'I will undertake the risk for so much, and if hurt you must give me so much more, or an adequate equivalent for the hurt.' But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk and did not bargain for a compensation if hurt; in effect he undertook the work with its risks for his wages and no more. He says so. Suppose he had said, 'If I am to run this risk you must give me six shillings a day, and not five shillings,' and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, 'No, I will only give the five shillings.' None. I am ashamed to argue it."

He reargued the same matter in *Membery v. Great Western Ry.*, 14 App. Cas. 179: "I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is *volens*? Willing; and a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwillingly, with no good will; but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it. I suppose *nolens* is the opposite of *volens*, its negative. There are two men; one refuses to do work, wills not to do it, and does not do it. The other grumbles, but wills to do it and does it. Are both men *nolens*, unwilling? Suppose an

¹ Observe, also, his position on the liability for rent of an original lessee whose assignee has become bankrupt and disclaimed the case. *Smyth v. North*, 7 Ex. D. 250.

extra shilling induced the man who did the work. Is he *nolens* or has the shilling made him *volens*? There seems to be a strange notion either that a man who does a thing and grumbles is *nolens*, is unwilling, has not the will to do it, or that there is something intermediate *nolens* and *volens*, something like a man being without a will and yet who wills. If the shilling made him *volens*, why does not the desire to continue employed do so? If he would have a right to refuse the work and his discharge would be wrongful, with a remedy to him, why does not his preference of a certain to an uncertain law not make him *volens* as much as any other motive? There have been any infinity of profoundly learned and useless discussions as to freedom of the will; but this notion is new."

The truth is, the good Baron's political views were so pronounced that in a certain line of cases they influenced his judicial opinions. He was the stoutest of liberals, and looked with alarm upon modern socialistic tendencies—"grandmotherly protection," he termed it. "Please govern me as little as possible," he said. This was the basis alike of his opposition to the prohibition logic (see his articles on "Drink" in *Nineteenth Century*, May and June, 1885), to employer's liability legislation (see his pamphlet "On the Liabilities of Masters to Workmen for Injuries from Fellow-Servants," London, 1880), and his point of view on many legal doctrines. Sometimes this tendency moved in directions where his fearless independence and plain speech were most needed. In the trades union case of *R. v. Druitt*, 10 Cox Cr. Cas. 592, he asserted in broad terms that by the common law of England the liberty of a man's mind and will, how he should bestow himself and his means, his talents and his industry, was as much the subject of the law's protection as was that of his body. Certain details of his exposition of the law in that case have since been regarded as *obiter dicta*, but his views deserve

careful consideration. Nothing could be saner than his views in the great Mogul Steamship case (1892), A. C. 25, on the vital subject of freedom of trade. "It is admitted," he said, "that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of fair competition? What is unfair that is neither forcible nor fraudulent? It seems strange that to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection." The inquiry, "What is unfair that is neither forcible nor fraudulent?" is the sum and substance of his legal and political philosophy. Throughout his judicial and political career he stood firmly on the ground of strict adherence to contract. "A bargain is a bargain," he used to say; and he strongly deprecated making contracts for people, whether by legislation or through equity. It may be inferred, therefore, that he had little sympathy with certain equitable doctrines. In the case of *Salt v. Northampton* (1892), A. C. 18, on the validity of fetters on redemption in mortgage transactions, he took occasion to say: "Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise, and probably to undo this would be more costly and troublesome than to continue it." And he adverts, in *Derry v. Peek*, 14 App. Cas. 337, to what he regards as the mistake made by courts of equity in "disregarding a valuable general principle in their desire to effect what is, or is thought to be, justice in a particular instance." But if he was inclined to lean too

much toward the legal as distinguished from the equitable view of rights, he seldom failed to temper his common law views with the good sense which gives to technical rules their just limitations.

Baron Bramwell was quick to see the weak side of a case against a railway corporation. This tendency was not, however, an original prejudice, but rather an effort to rectify the injustice done by misdirected sympathy for the weaker side. "Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets." (9 App. Cas. 187.) The authorities, he said on another occasion, "show a generous struggle on the one hand to make powerful companies liable to individuals, and on the other hand an effort for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly" (13 App. Cas. 51). "It does not follow that if a man dies in a fit in a railway carriage there is a *prima facie* case for his widow and children, nor that if he has a glass in his pocket and sits on it and hurts himself, there is something which calls for an answer or explanation from the company." And in the course of his statement of his view that an action for malicious prosecution would not lie against a corporation, in *Abrath v. North Eastern Railway Company*, he said: "Every one, or every counsel and solicitor listening to me, knows that the only reason why a railway company is selected for an action of this sort is that a jury would be more likely to give a verdict against a company than against an individual. Everybody knows it; and perhaps there is a sort of hope of confusion. It is said, 'the man was innocent; somebody ought to be punished for it; here is a railway company; there was an improper motive'; and so there is a jumble; the case gets before a jury, and a railway company is exactly the party to have damages awarded against it."

But aside from the well-recognized class of cases in which he was known to entertain

favorite prepossessions he was a sound judge. As a whole, clearness of perception, strength of judgment and wide acquaintance with the world of affairs are indelibly stamped upon his work. On many occasions his quick perception, good sense and dry humor were admirable solvents to the doubts and difficulties of his more subtle-minded brethren. A good instance is his characterization of the distinction sought to be made in *Derry v. Peek*, 14 App. Cas. 337, between legal and actual fraud: "I do not think we need trouble ourselves about 'legal fraud,' nor whether it is a good or bad expression, because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase 'legal fraud' except when actual fraud cannot be established. 'Legal fraud' is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks that a claim is somehow made out." In commercial law, in particular, he was a recognized authority. His powerful dissenting opinion in the *Vagliano* case (1891), A. C. 107, shows his familiarity with the subject. It was he who suggested the theory of limited liability. In the domain of torts, the application of the doctrine *sic utere tuo ut alienum non laedas* in *Rylands v. Fletcher* was due, in the first instance, to Bramwell, who differed from the other judges in the *Exchequer*.

It is probable that he was at his best sitting with a special jury. There what has been aptly called the high initial velocity of his mind in mastering facts, assaying evidence and applying general principles to particular facts came into full play. His insight into human nature was keen; he knew its weaknesses and its faults, and humbug had no chance before him. The force of common sense and caustic humor could

go no further than his admirable charges to juries. In a case where a farmer was charged with shooting at a boy who was stealing apples, after a lengthy argument by the counsel for the defendant, Bramwell charged the jury as follows: "Considering the materials he had, I am surprised, gentlemen, that the learned counsel did not make his speech longer. I, however, shall leave the case to you in eight words: The prisoner aimed at nothing and missed it." He had, moreover, rare skill in putting his view of a case before a jury without seeming to take a side.

His highly original and independent mind contributed much to enliven the reports of his time. His clear and analytical intellect expressed itself in a vigorous and epigrammatic style which is as rare in the reports as it is refreshing. No man appeared to think less of words and more of substance, yet few Englishmen have used their mother tongue with greater effect. His discussion in the case of the *Commissioners of the Income Tax v. Pemsel* (1891), A. C. 531, as to what constitutes a charity, is a good example of his happy colloquialism.

"I hold that the conversion of heathens and heathen nations to Christianity or any other religion is not a charitable purpose. That it is benevolent, I admit. The provider of funds for such a purpose doubtless thinks that the conversion will make the converts better and happier during this life, with a better hope hereafter. I dare say this donor did so. So did those who provided the faggots and racks which were used as instruments of conversion in times gone by. I am far from suggesting that the donor would have given funds for such a purpose as torture; but if the mere good intent make the purpose charitable, then I say the intent is the same in the one case as in the other. And I believe in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours. But what is a char-

itable purpose? Whatever definition is given, if it is right as far as it goes, in my opinion this trust is not within it. I will attempt one. I think a charitable purpose is where assistance is given to the bringing up, feeding, clothing, lodging and education of those who from poverty, or comparative poverty, stand in need of such assistance, that a temporal benefit is meant, being money or having a money value. This definition is probably inefficient. It very likely would not include some charitable purposes, though I cannot think what, and include some not charitable, though also I cannot think what; but I think it substantially correct, and that no well-founded amendment of it would include the purposes to which this fund is dedicated. * * * I think there is some fund for providing oysters at one of the Inns of Court for the Benchers; this, however benevolent, would hardly be called charitable; so of a trust to provide a band of music on the village green."

For authorities however venerable, if irrational or founded on doubtful principles, he had scant respect. "I am prone," he once said, "to decide cases on principles, and when I think I have got the right one I am apt (I hope I am not presumptuous), like Caliph Omar, to think authorities wrong or needless." He was well equipped with self-confidence. "Lord Cairns was a great lawyer and a consummate judge," he said in one case, "but I differ with him unhesitatingly." He was too tenacious of his personal opinions, some thought. The view that posting acceptance of an offer which never reaches the offerer constitutes a contract, is one of the doctrines to which he never would assent. (*British and American Tel. Co. v. Colson*, 6 Ex. 118; *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216). It is often amusing to observe his efforts to enforce his favorite views. In the *Members* case his discussion of the doctrine *volenti non fit injuria* was really unnecessary to the determination of the issue. This is

the way he introduces it: "Of course it is in a sense not necessary that I should express an opinion on this, as the ground I have just mentioned, in my opinion, disposes of the case. But if, instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not *obiter*, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff, and I decide against him on both, one as much as the other."

On the occasion of his retirement from the bench Baron Bramwell said: "I can honestly say that if I had my choice of being a great judge or a good judge, I should unhesitatingly choose the latter." He was both.¹

¹ Baron Bramwell's principal efforts are: *Derry v. Peek*, 14 A. C. 337 (deceit); *Jackson v. Insurance Co.*, 10 C. P. 25 (marine insurance); *Hall v. Wright* (breach of promise); *Bullen v. Sharp*, 1 C. P. 86 (partnership); *Debenham v. Mellon*, 5 Q. B. D. 394 (wife's necessities); *Rankin v. Patter*, 6 E. and L. App. 131 (marine insurance); *Reg. v. Druitt*, 10 Cox Cr. Cas. 592; *Commrs. of Income Tax v. Pemsel* (1891), A. C. 531 (charity); *Mogul Steamship Co. v. McGregor* (1892), A. C. 25 (conspiracy); *Mills v. Armstrong*, 13 A. C. (negligence); *Capital and Counties Bank v. Henty*, 7 A. C. 741 (libel); *Degg v. Midland Ry.* 1 H. and W. 781 (master and servant); *Jones v. Tapling*, 31 L. J., C. P. 342 (easements); *Gray v. Carr*, 6 Q. B. 522 (shipping); *Hammersmith Ry. v. Brand* (damage for vibration); *Bryant v. Foot*, 3 Q. B. 497 (prescription); *Rodocanachi v. Elliott*, 9 C. P. 578 (marine insurance); *Mullinger v. Florence*, 3 Q. B. D. 484 (liens); *Clark v. Molyneux*, 3 Q. B. D. 237 (libel); *Massam v. Cattle Food Co.*, 14 Ch. D. 763 (trade name); *Honck v. Muller*, 7 Q. B. D. 92 (sales); *Sewell v. Burdick*, 10 A. C. 74 (bill of lading); *Britton v. Gt. Western Cotton Co.*, 7 Ex. 130 (master and servant); *Duke of Buccleuch v. Board of Works*, 3 Ex. 306; *Reg. v. Castro*, 5 Q. B. D. 507 (criminal procedure); *Drew v. Nunn*, 4 Q. B. D. 668 (agency); *Ryder v. Wombell*, 3 Ex. 218 (infants' necessities).

Some of his more characteristic opinions as to method and tendencies are: *Abrath v. Northeastern Ry.*, 11 A. C. 247 (malicious prosecution); *Great Western Ry. v. Bunch*, 13 A. C. 31 (negligence); *Members v. Gt. Western Ry.*, 14 A. C. 179; *Sullivan v. Mitcalfe*, 5 C. P. D. 469 (company); *Salt v. Marquis of Northampton* (1892), A. C. 18 (mortgage); *Bamford v. Turnley*, 3 B. and S. 62 (nuisance); *Bridges v. No. London Ry.* (negligence); *Twycross v. Grant*, 2 C. P. D. 469 (company).

His dissents are always vigorous and original. See the following: *Bank of England v. Vagliani* (1891), A. C. 107; *Smith v. Baker*, 9 A. C. 187; *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216 (contract); *Riche v. Ashbury Co.*, 9 Ex. 224 (company); *Jackson v. Met. Ry.*, 2 C. P. D. 125 (negligence); *Johnson v. Roylton*, 7 Q. B. D. 438 (sales); *Gray v. Fowler*, 8 Ex. 249 (vendor and purchaser).

THE PETITION OF JACQUES DE LA MOTTHE.¹

BY LEE M. FRIEDMAN.

IN 1654 Brazil was surrendered to the Portuguese and the Dutch settlers withdrew leisurely to the growing colonies in New Netherlands. The Jews settled at Bahia, who had fought valiantly at the side of their Dutch neighbors, found themselves outcasts, forced to flee from the homes they had occupied for almost twenty-five years. A few of these Jews escaped to Cape St. Anthony, where they fell in with some of their old neighbors, who were embarking for New Netherlands. The Jews pleaded to be taken along. The little barque St. Catrina was very small and already overcrowded, and Captain de la Motthe did not regard Jews with favor. However, the Jewish gold and extravagant promises to still larger payments overcame the captain's prejudices, and finally the Jews were taken aboard, but the larger part of their possessions were left behind to be sent after them to New Amsterdam whenever opportunity might offer.

At last, one autumn day the St. Catrina cast anchor in the waters of New Amsterdam. When, however, the Jews prepared to go ashore Captain de la Motthe would not allow any of their goods to be carried from the ship until every stiver of the passage money of each one of them had been paid. They reasoned with him. They told of the goods they expected to be sent after them. They spoke of the promises of assistance from friends in Holland. They offered drafts on their kinsmen. To all explanations and promises the captain was deaf. The Jews were obliged to go ashore and leave their goods behind them. They had no friends in New Amsterdam to whom they could appeal for aid. Without food or shelter they were obliged to camp on the shore outside the town. They ate the bread of charity and

¹ All the Court proceedings are to be found in "Records of New Amsterdam," vol. 1.

grew disheartened at the constant demands for payment of Captain de la Motthe. The days dragged on and Captain de la Motthe grew impatient. In vain the Jews begged more time until the arrival of the ships which surely would bring their goods. In vain they pointed to the nine hundred guilders they had paid in advance, and begged for only a part of their goods and tools, that they might start work to earn the balance. In vain they promised the captain to pay when he should return again to New Amsterdam. He pointed to his contracts and insisted on every guilder of his dues. He swore at them and he threatened them, yet the poor Jews had never a stiver left to give him, and the captain would show them no mercy.

Matters soon reached a climax. The court records of New Amsterdam tell the story. On Monday the seventh of September, sixteen hundred and fifty-four, the Jews were summoned before the Worshipful Court of Burgomasters and Schepens of the City of New Amsterdam.

"Jacques de la Motthe, master of the bark St. Catrina, by a petition written in French, requests payment of the freight and board of the Jews whom he brought here from Cape St. Anthony; according to agreement and contract, in which each is bound *in solidum*, and that therefore, whatever furniture and other property they may have on board his bark may be publicly sold by order of the Court, in payment of their debt. He verbally declares that the Netherlanders, who came over with them, are not included in the contract and have satisfied him. Solomon Pietersen, a Jew, appears in Court and says that nine hundred and odd guilders of the 2,500 are paid, and that there are twenty-three souls, big and little, who must pay equally."

Solomon Pietersen spoke much more to the point, telling of struggles, hopes, disap-

pointments, sufferings and strivings. He was earnest and eloquent and persuaded the learned Court to grant time; for the judgment was:

"That the Jews shall, within twice twenty-four hours after date, pay according to contract what they lawfully owe, and in the meantime the furniture and whatever the petitioner has in his possession shall remain as security, without alienating the same."

To whom did the Jews look for aid? On what promises did they rely? Surely there was some hope when Solomon Pietersen, the eloquent, brought joy to his fellows by "twice twenty-four hours" delay wherein they might strive to save their household goods they had carried so far. But whatever hopes and promises the Jews may have had failed them. "Twice twenty-four hours" passed away.

When the Court assembled early on the following Thursday morning, Captain de la Motthe had his case called first. He read the Jews' contracts and counted out their debts to him before the learned Court. They came to just 1,567 florins. He showed a list of their property, and in answer to all this the Jews said not a word.

The Court hesitated about what to do. Able bodied men were wanted in New Netherlands and the Burgomasters and Schepens felt they should do all they could to encourage immigrants. It seemed rather hard to them for Captain de la Motthe to press so fiercely for the very letter of his bond. Still the law was plain, and so they were forced to give judgment that the Jews "shall first be called upon, and their goods sold for payment, and if these shall not be sufficient to make up the full sum, then, according to contract each one for all, *in solidum*, shall be called upon, until the full amount shall be paid." They did, however, soften this judgment by a further delay of four days, and if the debt should not then be paid, they authorized the captain "to cause to be sold, by public vendue, in the presence of the officer, the goods of Abram Israel and

Judica de Mereda, being the greatest debtors, and these not sufficing, he shall proceed in like manner with the others to the full acquittance of the debt and no further."

The four days passed and still no ship came for the Jews. The passage money was not paid. So early on the morning of the fifth day Captain de la Motthe unloaded the goods of the Jews and offered them for sale publicly in the market place. The good-natured New Netherlanders bid in the property of the Jews at nominal prices, and gave it back to them. Therefore, the worthy captain found the sale progressing unsatisfactorily and stopped it. He pondered long and hard. It was a difficult problem. It was time to call a lawyer into the case. Straightway he went to Jan Martya, and together they schemed for the undoing of the Jews.

Early in July of that year it was decreed by the Worshipful Court of Burgomasters and Schepens that upon the payments "for each member of the Council, five guilders; for the Secretary a like five guilders, and for the Court messenger two guilders" a litigant might have a Court held out of the ordinary court days. So Jan, crafty and learned in law, drew his pleadings, paid his guilders and demanded a special hearing.

On Wednesday the sixteenth of September an "Extraordinary meeting" was held at the "Stadt Huys." The council chamber over Jan Pietersen's tap room, where "beer was sold by the whole can, but not in smaller quantities," was crowded by the townspeople. There sat the Heeren Arent Van Hattem and Martin Crigier, mighty Burgomasters and the Schepens, Pieter Wolfertsen, Van der Grift, Oloff Stevenson, citizens of "Good naem and faem staen,"¹ and Herr Cornelis van Tienhoven, Councillor and Fiscal of New Netherlands, and Schout of the Stadt of New Amsterdam, to harken unto the complaint of "Jacques de la Motthe, Master of the Bark called St. Catrina, Plaintiff contra David Israel and the other Jews, according to their signatures, Defts; touching

¹ "Good name and standing."

the balance of the payment of the passage of the said Jews, for which each is bound *in solidum*."

"Whereas, their goods sold thus far by vendue, do not amount to the payment of their obligations, it is, therefore, requested that one or two of the said Jews be taken as principal which, according to the aforesaid contract or obligation, cannot be refused. Therefore he hath taken David Israel and Moses Ambrosius as principal debtors for the remaining balance, with request that the same be placed in confinement until the account be paid."

Jan exhibited the bonds of the Jews sealed with their big red seals and argued at length in an admirably technical manner of contract and covenants and judgments, quite confounding with learning the crowd of fellow citizens, and forcing even the Schout himself to admit that there was reason in his argument. The poor Jews sat silent and disheartened all through his long speech, and when he had finished had never a technicality to answer back. They could only implore the mercy and the charity of the Court.

And now hearken unto the judgment of the Most Worshipful Court:

"The Court having weighed the petition of the plaintiff and seen the obligation wherein each is bound *in solidum* for the full payment, have consented to the plaintiff's request to place the aforesaid persons under civil arrest (namely with the Provost Marshal) until they shall have made satisfaction."

A condition was added at the suggestion of Herr Cornelis van Tienhoven, subtle and wise Schout; and note, too, the craft of this wily Dutchman who was keeper of the public moneys:

"Provided, that he, la Motthe, shall previously answer for the board, which is fixed at 16 stivers per diem for each prisoner and is ordered, that for this purposes 40-50 guilders, proceeding from the goods sold, shall remain in the hands of the Secretary, together with the expenses of this special

court. Done in New Amsterdam in New Netherlands."

The sale was progressing slowly. In spite of the sale of their goods, of the cleverness of Jan, and of the decree of Court and of imprisonment, the Jews still could not pay their debts. Captain de la Motthe was anxious to be off, the wind was holding fair, and the St. Catrina was ready to sail. Some of the Jews were still in prison. Autumn was almost over, and the October frosts brought dismal suffering to them all. Many lacked food. Some even had not proper shelter against the cold. It was bad enough for the men, but even worse for the women and children. Starved, weary and sick the situation was desperate, but there still survived an indomitable determination to struggle and strive again where they had failed so often before. Solomon Pietersen once more went to the sailors of the St. Catrina and moved their pity with tales of the woe and the suffering of the Jews, and persuaded them to wait until their return for payment of the balance of the passage money. No doubt Captain de la Motthe had had his share in full, so he was content to let his crew do what they pleased about the rest. At any rate, on the twenty-sixth day of October, 1654, "Solomon Pietersen appeared in Court and exhibited a declaration from the attorney of the sailors, relative to the balance of the freight of the Jews, promising to wait until the arrival of the ships from Patria. Wherefore he requests to receive the monies still in the Secretary's hands for Rycke Nunes, whose goods were sold, over and above her own freight debt, in order to obtain with that money support for her. Whereupon was endorsed: Petitioner Solomon Pietersen as attorney was permitted to take, under security, the monies in the Secretary's hands."

So begins the history of the Jews in New York, and thus ends in an act of kindness and charity this ancient tale of struggle and law.

THE INDIAN REMNANT IN NEW ENGLAND.

I.

BY GEORGE J. VARNEY.

THE fact that efforts have been made during the years since 1882 to the present date to obtain payment from Rhode Island, and, more recently, from Connecticut and New York also, for "Shorelands" within those States, by Indians whose ancestors were once the sole possessors of large portions of the territory embraced by those commonwealths, demonstrates that the "Indian Question" is not yet settled in the earliest permanently colonized parts of the United States, excepting Virginia. The Indians concerned in this movement are the Narragansetts in Rhode Island, the Mohegans in Connecticut, and the Montauks (of eastern Long Island) in New York,—three tribes only. At the time of the founding of the Puritan commonwealth there were resident in New England territory not less than thirteen tribes, with numerous sub-divisions because of location.

A question that must sometimes have arisen in recent years in the minds of persons of ethnic predilection is, What has become of the descendants of the people whose numerous villages were, a few generations ago, scattered along all the rivers from seaboard to source? The answer is not readily to be found, but will be attempted in this paper.

The Massachusetts tribe (which occupied the middle portion of the eastern section of the Bay State), after its early and severe discipline by Miles Standish and his men, soon put themselves in a friendly attitude toward the English. Before the Pilgrims had been in Plymouth one year, Chickataubut, the principal sachem of this tribe, with eight other sachems, by written instrument, acknowledged themselves the subjects of King James. Ten years later, on the twenty-second of March, 1631, the chief sachem

visited Governor Winthrop at Boston, presenting to him a hogshead of corn. At this time the sachem wore English garments, and sat at the governor's table, where he conducted himself creditably.

On June 14, of the same year, Chickataubut was ordered by the court to pay a small skin of beaver, in satisfaction for the killing of a settler's pig by a member of his tribe; which mandate he promptly obeyed. Later in the same year a citizen and his servants stole some of the sachem's corn. Being detected, the court, on September 27, ordered that the citizen should restore two-fold, and lose his title of gentleman, and pay five pounds sterling. His accomplices were "whipped to the same amount." In the following year two of his men were convicted of assault upon some persons of Dorchester in their homes. The culprits were put in the "bilboes," and the sachem was required to beat them,—which he did. This was in accord with the Indian custom of the time in the region.

The Massachusetts, having been greatly reduced before the English came, by disease, and soon after by a war with the Tarratines, and, subsequently, with the Pequots, continued to dwindle; and the remnant, no doubt, was absorbed by the Narragansetts and other tribes about them; for before King Philip's war, they had ceased to be heard of.

The extinction of several other tribes has resulted from the destructions they suffered in consequence of their attacks upon the English settlers, and their subsequent emigration from their old haunts, and the resulting union with kindred tribes. Of these were the Canibas, of the Kennebec river region; the Anasagunticooks, of the Androscoggin valley; and the Norridgewocks, on Sandy River, in Maine; all of whom, after

great losses, retired more or less directly to the St. Francis river, in Canada, north of the present State of New Hampshire. Farther and farther northward, toward the same region, followed the main portion of the Sokokis and Pequakets, from the Saco and Piscataqua rivers, and the eastern slopes of the White Mountains. The Pennacooks, also, from the Merrimack river, mostly went northward; though some, probably, went westward with the northern Nipmucks,—being territorially intermingled with that tribe.

The latter occupied the central portion of Massachusetts. Some joined the Wampanoags, their neighbors and allies at the southeast. The Mohegans occupied most of the region west of the Connecticut river toward the Hudson, and northward to the sources of the Housatonic. The Indians dwelling on the latter river embraced Christianity, and more and more flocked by themselves. Between the years of 1735 and 1737 their missionaries (of the Puritan church) induced them to remove from their former villages, on the lower part of the river, to the fertile meadows in the present town of Stockbridge, in Berkshire county. Both Dutch and English had already taken up lands in the locality; but the Bay colony purchased their rights, so as to have a clear field for the Christianized red men.

What cause of dissatisfaction subsequently arose is not now apparent; but shortly before our Revolutionary War the Oneidas, who possessed the territory about Oneida lake, in New York, offered the Stockbridge Indians a large tract of their land free, if they would remove there. The Oneidas were prompted to this offer by their gratitude for assistance given by the Mohegans, in a war with some western Indians. Because of the war between England and the colonies, the removal was only partial until 1785.

In 1792 these emigrants, together with the Oneidas and others of the "Six Nations," who had adhered to the American cause, were invited by General Washington to visit

Congress. In due time the delegates appeared in Philadelphia, when Congress voted the tribes represented an annuity of fifteen hundred dollars.

Several years after the few early skirmishes of the Plymouth colonists with the neighboring Indians, there occurred the greater and more sanguinary conflict with the Pequots, whose principal seat was on the Thames river, in eastern Connecticut. The offence of these Indians against the English was chiefly the robbery and murder of traders. The tribe was almost annihilated by the united forces of the English and Mohegans. The remnant, by agreement of the latter tribe and the Narragansetts with the Colony government at Hartford, in 1638, were distributed between these two tribes; and by these parties in convention it was pronounced that this condemned tribe should "nevermore inhabit their native country," nor "be called Pequots."

While the Narragansetts occupied the territory of Rhode Island west of Narragansett bay and Providence river, the Wampanoags possessed all the country eastward of the bay to the sea on the east and south, and as far northwestward as the Massachusetts and Nipmucks. This was the powerful nation over which ruled the wise and able Massasoit, always friendly to the English, and between whom and Governor John Winthrop existed a strong friendship.

When this chieftain died, and his son, Alexander—who first succeeded him—resigned his authority to his brother Philip, the tribe fell under evil influences. The result was the destructive conflict that extended not only about the Plymouth and Bay colonies, but endangered the New Haven colony; and, involving the tribes in Maine, brought destruction upon most of the English plantations there. The Narragansetts became so entangled with their tribal neighbor that they, too, were drawn into the war; the result being the breaking of the power of both. From this time, these tribes with all others in the three southern States

of New England, became somewhat scattered and much reduced. At this period the ravages of rum were becoming almost equal to that of the "plague"; consequently, the Christianizing of the Indians was a work of physical as well as spiritual salvation.

Little trouble was experienced thereafter from the Indians who continued to dwell south of the White Mountains; but in the five French and Indian wars which ensued, beginning with that of 1688, and ending with the fall of Quebec in 1759, the Indians of northern New England joined the French and Indians from Canada; and the settlers in Maine, New Hampshire and northern Massachusetts endured great suffering and destructions. Treaties were made after each war, only to be easily broken on slight pretexts, whenever the interests of the French led them to incite the Indians to action against the English.

As previously mentioned, the Indians of Maine west of the Penobscot region were finally forced to take refuge in Canada; but the Tarratines, more secure in their numbers and their remote fastnesses up their great river, still retained much strength. Less accessible to the French, they held to their treaties better; while the Indians about Passamaquoddy bay had never given the English settlers much trouble.

By great care on the part of the national and State governments, the Penobscots and, generally, the Quoddy Indians, had been influenced to remain loyal to the American cause during the Revolution; and the succeeding generation gained increased regard for Massachusetts during the war of 1812.

The Tarratines, at this period, practically possessed all of Maine north of Bangor; and had an exaggerated idea of their importance in comparison with the scattered white communities in the District of Maine, which was also subordinate to the government of the Bay State. Wherefore when the movement started for the separation of the district from the parent State, the Indians began to exalt their tribe in ways suggested by their admi-

ration of Massachusetts. Her government had very much pleased them by liberality in connection with the treaty or agreement of 1818, in regard to the kinds and increased amounts of annual supplies to the tribe, together with some specially gratifying gifts of small cannon, ammunition, and extra quantities of tobacco and of gorgeous cloths, flags having already been supplied.

Adopting by degrees the dress of the English, and their customs, they, probably, with some jealousy of the new state that was being formed, planned to supersede in civil authority their hereditary leaders, the sachems, with officials chosen in the manner of the English; naming these new rulers after those of Massachusetts, viz., governor and lieutenant-governor; whereby they excelled the new State of Maine, which did not rise to the dignity of having a lieutenant-governor, like the parent State and the Tarratines.

However, the tribe submitted without demur to the change of administrators of its external affairs, and was gratified and assured by the guaranties required of the new State for the fulfillment of the provisions of the last treaty.

The provisions for the Quoddies were similar to those for the Penobscots. There was assigned to them a satisfactory dwelling-place and farming lands on Pleasant point, in the town of Perry on Passamaquoddy bay; also a township for purposes of hunting and fresh-water fishing on the Schoodic lakes.

In Vermont, the Iroquois tribe of Indians occupied the region of lakes Champlain and George, and appear to have been the only aboriginal residents in the territory of that State. Hunting parties of Algonquins from Canada sometimes ranged through the northeastern parts, and through northern New Hampshire, but the middle portion of both States was mostly left to the Mohawks, who occupied a wide territory about Albany.

All through the early period of the English and French settlements in America, war

parties of these Indians swept across the territory of these States both north and south of the White Mountains, killing many of the Pennacooks, and sometimes causing great fright, at least, to the Massachusetts tribes as far south as the present Norfolk County, and much more to the tribes of Maine. They forced the Penobscots, and probably the Androscoggins and Kennebecs, and possibly, the Sokokis, for many years, to pay them annual tribute, consisting of blueberries and dried clams. The Mohawk hordes, indeed, on one occasion, penetrated as far eastward as the Schoodic lakes; where, according to Indian tradition, a great battle was fought; but whether this completed the conquest of the country by them, or checked their further advance, is a matter of doubt.

The Mohawks and the Iroquois gradually disappeared with the western movement of the tribes soon after the Revolutionary War; and the only hostile Indians encountered since in New England were the composite and vengeful tribe of the St. Francis; though this also had been greatly reduced by the very effective attack of Colonel Rogers upon their chief village in 1759.

Some twelve or fifteen hardy pioneers, about the year 1790, followed up the fertile valley of the upper Connecticut, and began a settlement near the northern border of New Hampshire; but during the war of 1812, the Indians drove them off. However, they returned with more settlers after the war.

When—in 1660, or soon after—a sort of civil community was established at Natick, an Indian named Waban was made a ruler of fifty; subsequently he was appointed justice of the peace, proving a most efficient officer. The following—said to be a verbatim copy of a warrant he once issued—is probably familiar to many local readers:

“You, you big constable, quick you catch um Jeremiah Offscow. Strong you hold um, safe you bring um afore me.

Waban, justice peace.”

One story relates that a young justice,

presumably of his own race, once asked Waban what he should do when Indians got drunk and quarreled. To which the sapient old Indian replied: “Tie um all up, and whip um plaintiff, and whip um ’fendant and whip um witness.”

The Christian Indians by the year 1675 had become quite numerous. Drake mentions communities of them at Provincetown and Truro, in Eastham, Chatham, Harwich, Barnstable, Yarmouth, Mashpee, Sandwich, Wareham and Falmouth; their number aggregating four hundred and sixty-two. One hundred and forty of them could read, and seventy-two, write Indian; while nine only could read English. In 1685 there were in Plymouth Colony one thousand, four hundred and thirty-nine Indians who were considered Christians. At the same period there were fifteen families, about seventy-five persons, at Wamesit—now Lowell.

For a long time there was little gain from the efforts to Christianize the Mohegans and Narragansetts; the chief sachems being fixed in their determination against it. Historian Neal relates that Cutahamoquin, one of the Mohegan sachems, went to Rev. John Eliot’s Indian lecture in an English settlement on Connecticut river, and openly protested against the Christianizing of his people, and the building of a town there by the white people. “He said to Mr. Eliot: ‘Indians that pray to God do not pay me tribute, as formerly they did.’ The statement was admitted to be partly true; for now they gave him no more than they thought reasonable.

“To remove the reproach which their sachem had laid upon them, the few Christian Indians present at the lecture told Mr. Eliot what they had done for the sachem in the last two years. Their gifts to him, they said, had been twenty-six bushels of corn at one time and six at another; that, in hunting for him two days, they had killed him fifteen deer. They had broken up for him two acres of land; made him a great wigwam; built for him twenty rods of fence, with a ditch and two rails about it; and paid a debt for him of

three pounds, ten shillings. One of them had given him a skin of beaver of two pounds' weight, besides many days' work in planting corn. Moreover, they said they would be willing to do more, if he would govern them justly, by the Word of God."

"But the sachem," says the reporter, "swelling with indignation at this unmannerly discourse of his vassals, turned his back upon the company, and went away in the greatest rage imaginable; though upon better consideration, himself turned Christian not long after."

The most noted member of this tribe, after the chief sachem, Uncas, was Samson Occum, born in 1723. He was educated by Rev. Eleazer Wheelock, who was settled in 1735 over the Second church in Lebanon, Connecticut. Occum became an enthusiastic Christian, and the establishment of the Indian school in the town was largely because of the encouragement he gave and the aid he afforded. The funds for its endowment were obtained by Rev. Mr. Wheelock in England, where he was accompanied by his brilliant pupil. This school was removed to New Hampshire in 1771, and was there incorporated as Dartmouth College. Occum accompanied the Mohegans of the Housatonic from Stockbridge to the Oneida's territory, as their pastor; in which capacity he remained until his death in 1792.

In 1659 Major John Mason, said to have acted as the agent of the Connecticut Colony, obtained a new conveyance to himself, from Uncas and his subordinate sachems, of all

the tribal lands not actually planted and improved by the tribe; and the next year, when he had been chosen deputy governor, he made an informal surrender to the colony of certain of the rights he had acquired. It appears in the record of the General Court at Hartford, in 1660, that it was the "Jurisdiction Power" that was surrendered; and the record further shows that Major Mason reserved the right of laying out these lands in plantations and farms.

But this division of involved rights and powers entailed upon the colony, the Indians, and upon many white families and whole communities, disturbance, bitterness, litigation, and large property losses; and these affairs remained unsettled until 1790; when also the lands which had been reserved to the Mohegans in common were sold by authority down to less than three thousand acres, and these divided among the families by an act of the Legislature; the State continuing its guardianship by looking after the rents of the unoccupied land, the moneys from which were distributed to those Indians who were entitled to them. The numbers of the tribe had become greatly reduced, and even in 1735 they scarcely exceeded one hundred heads of families. A large proportion of the males had served with the English in the French and Indian war, and there were many widows in consequence. The numbers of Mohegans at the period of the Revolution were too small to form a town in any of their several locations.



CASES FROM THE OLD ENGLISH LAW REPORTS.

II.

DISPUTES ABOUT CHURCH PROPERTY.¹

BY A. WOOD RENTON.

AT the time of the Reformation, the Established Church of Scotland cut itself adrift from the Catholic Church. The Episcopate was sacrificed, and, in accordance with the maxim *ubi episcopus ecclesia*, a purely Protestant body took the place of the ancient Catholic Church of Scotland, which still survives north of the Tweed in the so-called "Scotch Episcopal Church." A fissiparous tendency soon displayed itself in the Scotch establishment. In 1737 four ministers, one of whom was a Mr. Wilson of Perth, seceded and were consequently (in 1740) deprived of their livings. Mr. Wilson's congregation adhered to him, and purchased a piece of ground on which they built a chapel where he might exercise his ministry. The money was raised by voluntary contributions, recommended at a general meeting of the whole congregation. Most of these were in very small sums, the highest not exceeding £21; many were raised by personal labor or sacrifice on the part of members of the church, e. g. by the use of their carts and horses for so many days, weeks and months; and the minister's "stipend" was paid, repairs made, and debts paid off by contributions at the church door. The point on which the secession arose was not a serious one, and the seceders retained the plan of ecclesiastical government that prevailed in the establishment, and regulated their internal economy accordingly. The ground acquired for Mr. Wilson's chapel was conveyed to trustees for and in behalf of the subscribers to the building of the meeting-house. Ere long a dispute arose in the sect about the lawfulness of a clause in an oath imposed on persons

elected into the magistracy in some of the royal boroughs. There was a farther secession. A minority of the ministers, holding the oath to be unlawful, separated themselves from their co-religionists and formed a distinct sect—"the Anti-Burghers." Mr. Brown, who had by this time succeeded Mr. Wilson as minister of the Perth congregation, and a majority in point of numbers (as was alleged) joined the new sect, and gave up the chapel to the rest, containing a majority of the original money contributors, who adhered to the old Burgher sect and principles. These events occurred in 1745. In 1795 a further dispute arose. At this time Mr. Jarvie was minister of the Perth congregation, Mr. Aikman being his colleague and successor. The main point at issue was the power of the magistrate to suppress heresy.

Mr. Jarvie and a majority of the money contributors took one view, which happened to be the traditional one. Mr. Aikman and a majority of the congregation took the other. Under these circumstances the question was sharply raised to which of the parties the chapel belonged. Mr. Aikman and his friends claimed it on the ground that they represented the majority of the congregation, and that their view was accepted in deference to their ecclesiastical judicatory—the Associate Synod. Mr. Jarvie and his adherents, on the other hand, rested their claims to the property on the grounds that they adhered to the original faith of their sect and represented a majority of the original contributors in money toward the erection of Mr. Wilson's chapel. There was naturally an appeal to Cæsar. The Lord Ordinary of the Court of Sessions decided

¹Craigdallie v. Aikinon, 1813, 1 Dow P. C. I.: Eng. Rep. 3 H. L. 601; 2 Bligh 529; Eng. Rep. 4 H. L. 435.

that the property in question was held in trust for "a society of persons who contributed their money either by specific contributions or by contributions at the church door, for purchasing the ground and buildings, repairing, and upholding the house or houses thereon, under the name of the Associate Congregation of Perth." Against this decision there was an appeal to the Inner House of the Court of Session, and the judges were equally divided on the point (the Lord President being disqualified from voting), the result being that the interlocutor of the Lord Ordinary was affirmed with the following amplifying clause descriptive of the Society on whose behalf the property was held in trust:

"Such persons always by themselves, or along with others joining with them, forming a congregation of Christians in a communion with, and subject to the ecclesiastical judicatory of, a body of dissenting Protestants, calling themselves the Associate Presbytery and Synod of Burgher Seceders." In this form the case once more went back to the Lord Ordinary (or judge of first instance), who found that Mr. Aikman and his adherents had the preferable and exclusive right to the ground in question and the chapel and other buildings erected on it. Ultimately all these tangled decisions—"interlocutors" they are styled in Scots law—came before the House of Lords. It is not perhaps surprising that the result of the appeal was that the Scotch judges were invited to review their own judgment. But Lord Eldon took occasion to lay down the rule applicable to cases of the kind:

"With respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C, etc., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts* for adhering to the opinions and principles in which

the congregation had originally united. He found no case which authorized him to say that the court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights."

The Court of Session found that the separating members of the congregation had failed to prove any real deviation by Mr. Aikman and his friends from the principles of the original secession and accordingly gave judgment in his favor, and this decision the House of Lords affirmed—Lord Eldon cryptically observing, "All I can say is, that after racking my mind again and again upon the subject, I really do not know what more to make of it."

The contemporaneous case of *A. G. v. Pearson* (1817, 3 Merivale 353) however settled the rule substantially in accordance with Lord Eldon's language. It is expressed by Mr. Campbell, with his usual accuracy, in 5, Ruling Cases, 689:

"Where property is held in trust for the purposes of religious worship and teaching, the nature of the original institution must alone, in the case of a split, be looked to as the guide for the decision of the court between rival sections, claiming to have the trusts carried out. The deed (if any) creating the trust is the primary source for ascertaining what was the form of worship and what was the doctrine intended by the foundation; but if it cannot be discovered from the deed what form of worship or what doctrine was intended, the usage of the congregation must be inquired into, and will be presumed to be in conformity with the original purpose."

After the reiteration of this rule in "*Lady Hewley's Charity*" (*Shore v. Wilson*, 1842, 9, Clark & Fin., 355) an act was passed—the Non-Conformists Chapels' Act, 1844—which provides that in cases where there is no express statement in the deed of formation as to the particular doctrines for which a chapel was to be employed, twenty-five years' usage is to be conclusive. Curiously enough the

question involved in *Craigdallie v. Aikman*, may soon again engage the attention of the Scotch Courts. The Free Kirk of Scotland and the United Presbyterians (or "U. P's"), both dissentient bodies from the Establishment, and until recently separate, last year buried the hatchet of difference and were

formally amalgamated. A small section of the Free Kirk maintains that this is a departure from the principles of the original secession, and claims the property of the body, and an appeal has once more, it seems, been lodged with Cæsar to adjudicate on the claim.

CHAPTERS FROM THE BIBLICAL LAW.

BY DAVID WERNER AMRAM.

THE COVENANT OF JACOB AND LABAN.

THE Biblical story of the sojourn of Jacob with his father-in-law, Laban, contains much interesting information illustrative of life in patriarchal society. Although we hear of no positive law, frequent mention is made of customs which in that state of society had all the force of law. Toward the end of Jacob's stay with Laban, after he had married and had acquired a great deal of property in cattle and slaves, the sons of Laban showed jealousy of Jacob's increasing wealth, and charged him with having gotten his property out of that which was their father's. Jacob concluded that, inasmuch as he had been with Laban for twenty years and had suffered a great deal at his hands, and more especially because he was no longer *persona grata* on account of his great accumulation of property, the time had come for him to return to his father's house. He secretly told this to Leah and Rachel, his wives, who answered him saying, "Is there yet any portion or inheritance for us in the house of our father? Are we not counted of him strangers; for he hath sold us, and hath quite devoured our money; for all the riches which God hath taken from our father is ours and our children's." The position of the daughter in the patriarchal family was one of legal subjection. Laban had sold his daughters to Jacob for the price

of seven years' labor for each of them. By this act, they, apparently, were no longer legally considered members of their father's family, but entered the *manus* of their husband; hence their complaint that there was no longer any portion or inheritance for them in the house of their father, that they were now strangers to him because he had sold them, and they looked upon all the wealth which Jacob had acquired while in their father's employ as so much riches taken by God from their father in order to be preserved for them and their children; hence they were quite willing to go with Jacob.

Jacob, taking advantage of Laban's absence from home, while shearing his sheep, gathered his family and his cattle and his property and left for Palestine. Rachel stole her father's household gods and carried them off with her under the saddle of her camel. As soon as Laban heard of the flight, he, accompanied by his household, pursued Jacob and overtook him after a seven days' journey. There was a great deal of bluster about Laban at their meeting, and he assigned as a reason for his pursuit of Jacob the fact that some one of Jacob's family had stolen his household gods. Jacob bluntly told Laban that the reason for his flight was that he was afraid that Laban would take his daughters

from him by force. It must be remembered that Laban was the chief of his clan, and as such, could exercise right, because he had the might. Although his daughters had passed out of his household, it was quite within his power to take them away from their husband; and illustrations are not wanting in other portions of the Bible to show that this exercise of power by the father was not uncommon. King Saul took his daughter away from her husband David and gave her to another; and in the same manner Samson's father-in-law took away his wife from him.

As to the theft of the household gods Jacob was quite innocent, not knowing that his wife Rachel had carried them off. Laban searched for his household gods but did not find them, and then Jacob became angry. He drew up a catalogue of Laban's trespasses against him during the twenty years that he was in Laban's service; and he challenged Laban to point out anything that he had taken from him, and to "set it here before my brethren and thy brethren that they may judge betwixt us both." This was the family court which afterwards grew into the tribal council.

Laban answered Jacob's angry outburst with surprising calmness, making no allusion to Jacob's charges of illtreatment, and merely pointing out the fact that he, Laban, as chief of the clan, was the master not only of his daughters (Jacob's wives) but of their children, and of the cattle and of everything that belonged to Jacob. Thus he said, "These daughters are my daughters; and these children are my children; and these cattle are my cattle; and all that thou seest is mine;" but he concluded, "What can I do this day unto these my daughters or unto their children which they have borne?" In other words, he asserted his right to do as he pleased with them, adding, however, that he felt it impossible to do anything to their harm. This assumption of the right of property and control over all the family of Jacob and over his cattle is rather confusing in the

light of the statement of Leah and Rachel, that they had no further share or inheritance in the house of their father, and that they were counted of him as strangers, because he had sold them. It may be explained upon the ground that Laban, having the power to take anything from Jacob that he chose, was simply bullying the latter. On the other hand, it may indicate that Jacob's marriage with Laban's daughters made him a member of Laban's family; and in this case, we have evidence of the survival of a matriarchal state of society which preceded the patriarchal society that everywhere seems dominant in the Biblical traditions.

Laban finally concluded to part in peace with Jacob, and invited him to make a covenant, saying, "Let it be for a witness between me and thee." This covenant was a renewal of their brotherhood, and irrevocably bound them to remain at peace with each other, and ended all matters of dispute that had arisen theretofore.

The record proceeds to give us the details of the formalities constituting the covenant between Laban and Jacob: "And Jacob took a stone and set it up for a pillar, and Jacob said unto his brethren, 'Gather stones', and they took stones and made a heap, and they did eat there on the heap; and Laban called it *Jegar Sahadutha* [Chaldaic: "the heap of witness"]; but Jacob called it *Galeed* [Hebrew: "the heap of witness"]; and Laban said, 'This heap is a witness between me and thee this day;' therefore, was the name of it called *Galeed* and *Mizpah* [Hebrew: "watch-tower"]; for he said, 'The Lord watch between me and thee when we are absent one from another; if thou shalt afflict my daughters, or if thou shalt take other wives besides my daughters, no man is with us; behold God is witness betwixt me and thee.' And Laban said to Jacob, 'Behold this heap, and behold this pillar which I have cast betwixt me and thee; this heap be witness and this pillar be witness that I will not pass over this heap to thee and that thou shalt not pass over this heap and this pillar unto me for

harm; the God of Abraham and the God of Nahor (the gods of their fathers) judge betwixt us;’ and Jacob swore by the fear of his father Isaac. Then Jacob offered sacrifice upon the mount and called his brethren to eat bread; and they did eat bread, and tarried all night in the mount; and early in the morning Laban rose up and kissed his sons and his daughters and blessed them, and Laban departed and returned unto his place.”

In ancient law, covenants were like modern treaties of peace. In the patriarchal state of society there was no public law, and each family was an independent autonomous sovereign; hence the heads of the families dealt with each other as sovereigns, and instead of settling their disputes by appeal to common law, they made treaties of peace and amity which took the form of the so-called covenants. The covenant was in fact a ceremony whereby kinsmen and even strangers in blood who had been at feud with each other ended their differences by becoming brothers. The effect of entering into a covenant with another was equivalent to an adoption of the other as one’s own brother.

By a legal fiction, the parties entering into the covenant became bound to each other by the sacred ties of blood, and thus not only were bound to remain at peace with each other forever, but even assumed all the responsibilities that blood relationship entailed. They had to avenge wrongs committed by third persons against either of them; they had to protect the person, property and the family of each other. Inasmuch as the covenant was fraught with such important consequences to the parties, it is not surprising that it was entered into with all the solemnity of a religious act.

The sanction of the Deity was required to give it perfect validity, and the ceremony usually ended by a formal sacrifice or by the eating of a sacred meal at the very place where the covenant was made, and where, through the ceremony attending the sacrifice, the Deity was presumed to be present. Nothing of the nature of the modern con-

tract between two parties dealing at arm’s length appears in this covenant. The contract is a legal concept unknown in those primitive times.

Returning to our record we note in the first place that some visible symbol was erected as a memorial and a testimony of the act of covenanting; a large stone was erected as a pillar, and a heap of stones was gathered together as “a heap of testimony.”

There is a further significance in the fact that a little hillock of stones was made the memorial of the covenant. According to primitive Hebrew notions the Deity was sought for and found on high places; and the map of Palestine is even to this day dotted with names which indicate that at some primitive time these localities were sacred high places. Nearly every mountain top and every hill had its shrine and sanctuary. When, therefore, Laban and Jacob desired to enter into a covenant they built up a miniature high place upon which to make their sacrifices and seal their covenant. This hillock served a double purpose; first, “as a witness between me and thee,” namely, as a witness of the agreement between the parties, and of the settlement of their dispute; and, secondly, that “the Lord watch between me and thee when we are absent one from another,” as an indication of their brotherhood and of their defensive alliance.

It will be seen that in addition to these general purposes of the covenant certain specific agreements could be entered into by the covenanting parties. In this instance Laban bound Jacob by covenant not to “afflict” his daughters by taking any other wives, a provision intended obviously for the benefit of his daughters. After the terms of the covenant were agreed upon, the parties called upon their tribal Deities and the *manes* of their fathers to witness. They sacrificed to them and sat down together to partake of the sacred meal, and thus sealed their covenant by the blood of the sacrifice and by breaking bread together in the very presence of their God and of the spirits of their fathers.

Such a covenant was absolutely inviolable; and, with this knowledge of the meaning of the ceremony of the covenant, we can un-

derstand the horror of the phrase so often used by the prophets in Israel, "Ye have broken the covenant of your fathers."

LONDON LEGAL LETTER.

JULY, 1901.

THE case of the divorce in Nevada and the subsequent marriage in that State of Earl Russell, to which reference has been made in these columns before, has attracted a great deal of attention in this country within the last few days, owing to the arrest of Earl Russell on the charge of bigamy. At the hearing at the Bond street police station he was remanded to await the action of the grand jury which, day before yesterday, found a true bill against him. Instead of sending the case for trial at the Old Bailey, as would have been done had the indicted person been a commoner, the Recorder was obliged to remand the accused for trial by his peers in the House of Lords. As such trials are very infrequent every stage of the proceedings will be watched with curiosity. When the Lord Chancellor took his seat on the Wool-Sack yesterday afternoon, he announced that he had received the following communication from the Recorder of London:

"Central Criminal Court, City of London,
June 25, 1901.

"My Lord—I have the honour to inform you that a true bill for bigamy has this day been returned into Court against John Francis Stanley, Earl Russell, a Peer of Parliament—bigamy being a felony. I have, in accordance with the practice hitherto pursued in such cases, enlarged the recognisances of the witnesses until the pleasure of the House of Lords is signified.—I have the honour to be your lordship's faithful servant,

"Forrest Fulton, Recorder of London.
"To the Right Honourable the Lord Chancellor."

A committee of the Lords was forthwith appointed, consisting of the Lord Chancellor, the Earl of Morley, the Marquis of Salisbury, the Lord Chamberlain, Earls

Woldegrave and Spencer, and Lords Ribblesdale, MacNaughten, Morris, Davey, James, Brampton, Robertson, Lindley and Alverstone, to consider the proper methods of proceeding in order to bring the accused to a speedy trial. Of these eminent peers, one, the last named, is the Lord Chief Justice, and seven are law lords who are accustomed to sit to hear appeals in the House. As every peer will have a right to sit as a judge in the case, and as each has the further right of making a speech before casting his vote, the proceedings may, if all the peers, of whom there are several hundred, avail themselves of their privileges, be protracted to an interminable extent. It is not probable, however, that any others than those who are accustomed to take part in the appeal cases will deliver judgments, although all will be given an opportunity to vote.

The prosecution of Earl Russell for bigamy has been taken up by the public prosecutor, who, to procure the necessary evidence, sent an agent to Nevada, in which State Earl Russell obtained his divorce and subsequently married. In order to prove the marriage the judge of the second judicial district of Nevada, who married the parties, has been brought to London. He is the authority for the statement that the decree of divorce is invalid, although, presumably, he pronounced it himself. The statutes of Nevada provide that forty days shall elapse after the date of the last day of publication (where divorce is by publication) before a decree can be entered. In this case there was service by publication, and the last

advertisement was inserted on April 13, 1900. The decree was entered on April 14, 1900. It is such cases as this which tend to bring the law as it is administered in the Western States of the United States into deserved contempt in England. The law is salutary, and is not criticised. It is the loose way in which it is administered that excites comment. In this country it is almost a proverb that it is more difficult to get a decree in an undefended divorce case than in a defended one, for the simple reason that the judge scrutinizes the papers and sifts the evidence with the greatest care, acting in this respect for the absent defendant. In the Russell case if the judge had looked at the papers with even ordinary care, he must have discovered this defect in them, and the wrong which his negligence or indifference has thus permitted, would never have been perpetrated. It may also be added that if a lawyer in England should be detected in applying for a divorce, or a judicial decree of any kind, knowing that a fraud of this kind had been committed, he would at once be struck from the rolls.

Lord Russell in order to comply with the requirements of the Nevada practice as to notice to the absent defendant, gave an address in England as that of his wife. She had never lived at the place named. He is now himself qualifying to become a member of the English bar and was eating one of the requisite dinners in Gray's Inn the night after his first appearance at Bow street. It will be interesting to know how the benchers of his inn consider his conduct when, if ever, he applies to be called.

The reception of Maitre Labori by the lawyers and the people of England was even more enthusiastic than his warmest friends and admirers could have anticipated. Almost his first public appearance was at the American embassy when Mr. Choate gave a reception to the American delegates from

the New York Chamber of Commerce to the London Chamber of Commerce. As Mr. Choate truly expressed it Maitre Labori's presence shed lustre on the gathering. Subsequently the distinguished French advocate was the principal guest at the banquet of the Hardwicke Society when over five hundred guests, including the Lord Chancellor and a score of judges and law officers, assembled to do him honor. He was also entertained at the Grand Night of Lincoln's Inn, and at the Lord Mayor's annual dinner to the English judges. His presence is winning and attractive, and notwithstanding the compliments and adulation that were liberally heaped upon him, the modesty of his demeanor was most marked. At the Hardwicke Society banquet he spoke in English first and afterward in French. His English, both in public and in conversation, is fluent and easy, being marked by an abundant vocabulary and accuracy in pronunciation. He desires to visit America in company with Madame Labori, and is looking forward to that pleasure at an early date. If his plans would admit of it he would go this summer, but that, he thinks, is hardly possible. Those Americans whom he met while in London very much hope that arrangements may be made for his presence at the meeting of the American Bar Association in 1902, and that he may be entertained in some of the leading cities of the United States in the early autumn of that year. He has been pressed to accept flattering terms for a lecture tour throughout the States, but these he has resolutely declined. He is averse to making an exhibition of himself or of being used by politicians to advance their interests. Here in London he declined all engagements save those where he could appear simply as an advocate among his brethren of the bar, and it is in this frame of mind he will go to the United States.

STUFF GOWN.

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.

A SHORT article in the current number of *The Journal of the Society of Comparative Legislation* throws considerable light on the prosecutions for *lèse-majesté* in Germany — information welcome to those of us who are not versed in the principles of German criminal law. In Germany, "personal insult," which embraces more than slander, libel and assault, taken together, in English law, is punishable as a criminal offence in all cases. To quote from the article in question: "Any act or omission, or any words spoken or written, or any other manifestation, expressing or implying contempt of another person or a low estimate of his character or reputation, or withholding the proper respect due him, is punishable as an insult, on the complaint of such other person. It is not necessary for that purpose that the act or utterance should take place in the presence of, or come to the knowledge of, any third party; it is sufficient that it should take place in the presence of, or come to the knowledge of the party to whom it refers. . . The criterion is always whether, according to the reasonable interpretation of an unprejudiced person, the act in question is deficient in proper respect or liable to expose the party concerned to contempt or ridicule."

Prosecutions for insults directed against German sovereigns, — *lèse-majesté* — rest on the same principle which underlies prosecutions in the case of insults to private persons, namely, the principle that the law should protect every one, whatever his station, against personal insults.

But in the *quantum* of punishment, and in the mode of procedure, there is a marked difference between prosecutions for private insults and those for insults directed against the German

Emperor or against the sovereign of any of the German States. While in the case of a private insult the minimum punishment is a small fine, usually without imprisonment, in cases of *lèse-majesté* the lowest possible punishment is imprisonment for two months, or for five years, if the insult is in the nature of an assault. The maximum penalty in ordinary cases of *lèse-majesté* is five years' imprisonment. As to the mode of procedure, prosecutions for private insults are instituted only on complaint of the aggrieved person; but in cases of *lèse-majesté* "it is the duty of any prosecutor to whose notice some contemptuous act committed in his district is brought to institute proceedings forthwith, whether in his personal opinion the prosecution be judicious or not."

CURIOSLY enough it seems impossible to find any trace of the bust of Chief Justice Marshall, by Frazee, bequeathed by Mr. Justice Story to Harvard College (2 W. W. Story's "Life and Letters of Joseph Story," 553). The records of the College show that the bust was received. This bust and the Frazee bust in the Boston Athenaeum (GREEN BAG, vol. 13, p. 261.), cannot be the same, because the latter was presented to the Athenaeum in March, 1835, a few months before Story's death, which occurred in 1845. Possibly the bust bequeathed to the college, was of plaster, and was broken at some time; but it seems improbable that the material of the bust was plaster rather than marble.

THE true spirit of Western hospitality is seen in the plans of entertainment at the twenty-fourth annual meeting of the American Bar Association at Denver, on August 21, 22 and 23. After the usual meetings the visiting members have been invited by the Colorado members and by the Colorado and Denver Bar Associations to make a four days' trip to Cripple Creek and other places of interest. Such cordial hospitality should be met by a large attendance from the East.

NOTES.

ODDITIES in legal papers are of frequent occurrence, but the following verbatim copy of a return has features of its own that are rarely found:—

“Executed the within subpoena in Reynolds, Mo., on the — day of — by going to river. The river was up and couldn’t get across. The canoe was on the other side.

— — Sheriff.”

This return was actually made by the sheriff of Reynolds County on a subpoena returnable to the Iron County Circuit Court.

THE collector is a personage who knows little about law but much about human nature, and has a good stock of common sense. One of the sharpest collectors in northern Iowa in his prime was one M., who became noted far and wide for his collections. If it was a claim which had been given up by all others he was at his best. He preferred some outlawed account which had been carried on the books as worthless for years and years. He never made any agreement for fees. If he did collect no one complained that they were large, for what little came back to the creditor was looked upon as found-money, indeed. M. had for a long time tried to collect a debt from an Irishman who seemed to know as much about the laws of exemptions as any lawyer, and to have the knack of keeping just as much property as the law allowed and no more. M. held a judgment and had tried on several occasions to levy and sell, but to no avail. One day he dropped in on the Irishman and asked to stop for dinner, having in his buggy a hog, which, he said, he had taken on an execution out in the country. When after dinner, M. was ready to go, he said that he had to drive several miles out into the country, and would leave the hog until his return. He offered to pay for the care of the team and himself, but this the Irishman refused. M. insisted that he was in debt to him and would give him the hog as a present, if he cared for it. Of course the Irishman accepted this offer gladly; and then the lawyer drove away. Before night, however, the sheriff was on the place with an execution; the Irishman was caught napping, and the lawyer took the best hog in the pen, and satisfied the judgment.

A FORMER Chief Justice of the Supreme Court of Missouri had been confined for some weeks to his room, suffering from a severe indisposition. Having somewhat recovered he ventured out of his room and walked down to the State library, where he was accosted by the librarian, at that time Colonel J. W. Zevely, who inquired after his health and received this reply: “William, I am not well; but I am better than I was when I was worse than I now am!”

AN anecdote is told of another judge of that court, which is thought worthy of repetition.

One McGregor had been newly elected prosecuting attorney of — county. Among his subordinates was a negro deputy constable, black as the proverbial ace of spades, who, but recently appointed, was full of official zeal. A few days after his appointment he came to McGregor with his eyes bulging out and told of his having the night before arrested a man and woman in a room in a certain house, who were found together in very compromising circumstances. Thereupon McGregor informed the zealous official that one act of that nature, standing alone, did not make a crime under the laws of Missouri.

Then the deputy asked:

“Boss, who writ dat law?” And on being told Judge S., and that it was to be found in *State v. Chandler*, 132 Mo. 155, replied:

“Boss, I ain’t surprised Jedge S. writ dat law; he ain’t home much!”

ONE of the local justices of the peace is also an oddity. Among his set of rules governing practice before him is the following:

9. “Please don’t ask me to take a drink during business hours. I can’t go and I do not want to get into the habit of refusing.”

THE same justice is carrying the following in the local papers:

Get Married and Stop Your Foolishness!

From this date until and including July 4th, 1901, any persons or persons of any class, quality or color, who will clip this ad out, and bring to me at my office accompanied with a marriage license, I will marry them free of charge. I do this to keep even with those “two-by-four officers,” and to relieve suffering humanity.

H. E. JOHNSON,
Justice of the Peace.

BARTIMEUS WILLARD, one of the early settlers of Egremont, Mass., was a ready wit, a keen satirist and a natural poet. He was one day at Lenox during session of County Court, and the lawyers there were much diverted with his political effusions and sallies of wit. One of the lawyers said to him, "Come, Barty, and take dinner with us; it shan't cost you anything." He consented, and accompanied the lawyers. One said to him, "Barty, we want you to ask a blessing." Barty, who made no pretension to religion, said, "Well, if I do, I hope you will behave as men should on such an occasion, and not make a mock of it; and I want some one to return thanks." One was accordingly appointed. All stood up around the table, and Barty began thus:

Lord of the climes,
Haste on the times
When death makes lawyers civil;
Lord, stop their clack,
And send them back
Unto their father devil.
Don't let this band
Infest our land,
Nor let these liars conquer;
Oh, let this club,
Of Beelzebub
Insult our land no longer!
They are bad indeed,
As the thistle weed,
Which chokes our fertile mowing;
Compare them nigh
To the Hessian fly,
Which kills our wheat when growing.
Come, sudden death,
And cramp their breath,
Refine them well with brimstone;
And let them there
To hell repair,
And turn the devil's grin'stone.

They ate but little dinner that day, and the one appointed to return thanks arose, turned on his heel and left.

A LAWYER, about to furnish a bill for costs, was requested by his client, a baker, to make it as light as possible.

"Ah," said the lawyer, "you might properly say that to the foreman of your establishment, but that is not the way I make my bread."

THE American negro of our southland makes an ideal witness in many respects. He talks to the jury, and not to the examiner, and, unless he is instructed, he is perfectly willing to argue the case from the witness chair. He is positive and hard to confuse on cross-examination.

On one occasion the examiner was endeavoring to learn if he had ever seen a certain person. "No, sah! not since Jesus Christ made me," was extremely convincing as a reply.

On another occasion an attorney with a great deal of self-importance, was cross-examining an aged negress. His dignity suffered from the following:—

"But you are not a young woman?"

"Lawd, no, honey! I'se ole enough to be yah mommy, but, thank God, I isn't."

LITERARY NOTES.

JUDGE PHELPS deserves high rank as a discoverer in the field of literature, by virtue of his finding, at this late day, a significant Shakespearean phrase which had been passed over without notice or explanation by commentators. And not only has he discovered such a neglected expression, but, taking that as a text, he has written a series of most interesting papers, which have now been brought together in book form.¹

The phrase upon which Judge Phelps comments so delightfully is an expression of Falstaff—"There's no equity stirring" (I Henry IV., Act II, scene 2.) Pointing out that the word "equity" is to be found in Shakespeare but three times outside of the present instance, and that in each of these three cases it is used in a different sense—as synonymous, in a general way, with justice; with reference to juridical or technical equity; and in the special sense of concrete equitable right—he finds that, in Falstaff's mouth, it is used in all these three senses at once. It was, indeed, as Dr. Furness remarked to the commentator, a "gag."

Bearing directly on the subject in hand is the account, to which, roughly speaking, half of the book is devoted, of the controversy between the courts of equity and of common law, which in the form of the struggle for jurisdiction between the ecclesiastical and temporal courts can

¹ FALSTAFF AND EQUITY: an Interpretation. By Charles E. Phelps. Boston and New York: Houghton, Mifflin and Company. 1901. Cloth: \$1.50. (xvi. + 201 pp.)

be traced back to the time of Henry II, the latter half of the twelfth century. This is a field in the history of the law in which Judge Phelps is thoroughly at home — as witness his book on "Juridical Equity."

It is an ingenious and interesting picture which, in the later chapters, is drawn of the boyhood of "little Will Shaxbere," and of the atmosphere of litigation in which he was brought up: for in the forty years ending in 1601 his father was actively engaged in forty-odd lawsuits the records of which are still extant. Interesting, too, are the chapters tracing the various cases of Shakespeare *v.* Lambert, in the later stages of which long-drawn controversy the dramatist himself was joined.

"Falstaff and Equity" is a treat to both the lawyer and the lover of Shakespeare; to the lucky mortal who is a student both of the law and of great dramatist, it is nothing short of a feast.

The graceful introduction to the volume is written by the well-known Shakespearean scholar, Henry Austin Clapp.

FOR one who enjoys a historical novel, a story of adventure in Florida during the Huguenot and Spanish struggle for that colony, proves a pleasant change after so many stories of Virginian colonists. IN SEARCH OF MADEMOISELLE,¹ the scene of which is in Florida, abounds in shipwrecks, duels, and other trials of strength and skill. The old-time setting of the picture is well done, and the style is clear, though often abrupt.

THE author of VOYSEY² essays to answer in considerable detail, the question whether a brilliant, cultivated man of wealth and position should try to love and to be loved by a woman neither very young nor attractive, by no means his intellectual or social equal, and already the wife of another man. The style is realistic, the analysis keen, and the characters well drawn and true to life, excepting in the abnormal lack of truth and honor shown by the hero and heroine to everyone except each other.

¹ IN SEARCH OF MADEMOISELLE. By *George Gibbs*. Philadelphia: Henry T. Coates & Co., 1901. Cloth, \$1.50. (373 pp.)

² VOYSEY. By *R. O. Prouse*. New York: The Macmillan Company, 1901. Cloth. (404 pp.)

NEW LAW BOOKS.

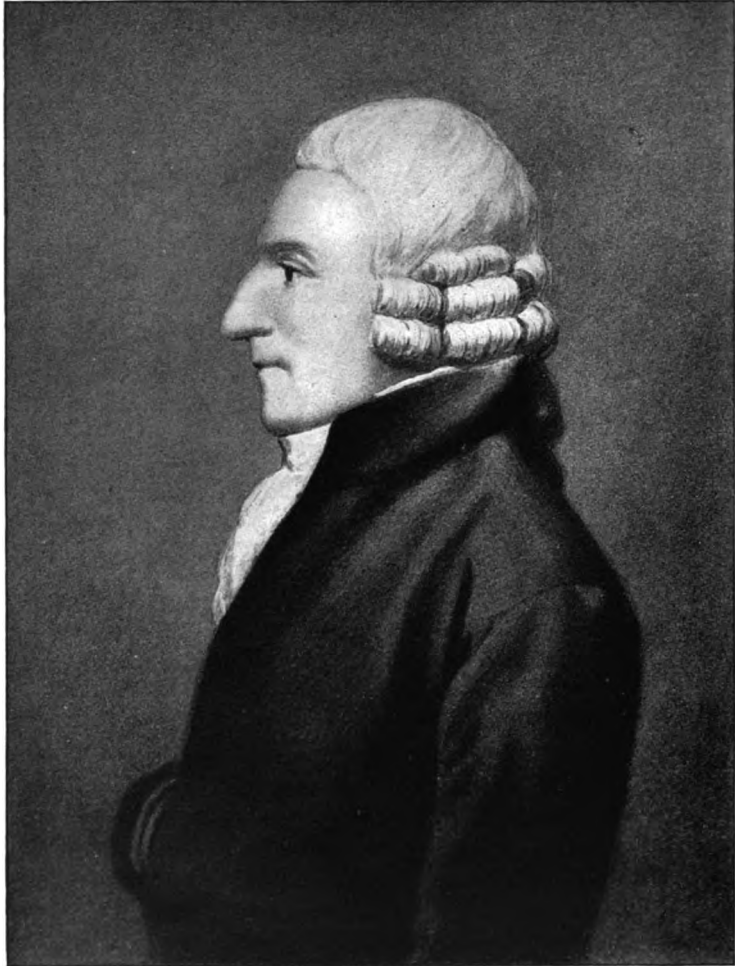
THE AMERICAN STATE REPORTS. Vol. 78. Containing cases of general value and authority decided in the courts of last resort. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1901. Law sheep. (1047 pp.)

The value of this series of reports lies in part in bringing together in one volume of the more important recent decisions in a large number of the different States, and in part in the admirable notes following the several cases. Some of these notes are of an exhaustive character and bring together in a convenient form the law bearing upon the subject dealt with in the principal case. In the present volume the more important monographic notes deal with the following subjects: Acts which the Legislature may or may not declare criminal; Effect of assignments of judgment; Common-law powers of executors; Computation of time; When and how the Statute of Frauds may be pleaded; The withdrawal of a juror.

The cases here reported and annotated are from recent volumes of the California, Georgia, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Jersey (Equity), North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island and Tennessee reports.

AMERICAN BANKRUPTCY REPORTS. Vol. V. Annotated. Edited by *James W. Eaton* and *William Miller Collier*. Albany, N. Y.: Matthew Bender. 1901. Law sheep: \$5.

How impossible it is to frame a law to cover adequately such a wide field as that of bankruptcy is shown by the large amount of litigation which has arisen under the present Bankruptcy Act; even when, as in this case, there was a previous Federal Bankruptcy Act, and the decisions thereunder, as a guide in the framing of the present law. It is fortunate for the active practitioner that bankruptcy decisions of the Federal and State Courts and the opinions of the referees in bankruptcy are brought together promptly in a carefully edited series of reports like that to which the volume before us belongs. The digesting and the references by the editors, who have made a special study of the subject of bankruptcy, add much to the value of these reports.



WILLIAM CUSHING.

The Green Bag.

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BOSTON

SEPTEMBER, 1901.

WILLIAM CUSHING.

BY FRANCIS R. JONES.

NO greater contrast to Mr. Chief Justice Rutledge could well have been found than his successor, William Cushing. The one a Southerner, impulsive, rash, outspoken. The other, timid, reticent, a trimmer. A son of Massachusetts, a graduate of Harvard, a Colonial judge, little remains to be told of his life. He was first and always a lawyer. His life was passed in the seclusion of judicial office. The records of it are meager. He kept studiously aloof from public affairs. Even the exciting times of the Revolution broke not through his cautious and timid reserve. When compelled to decide between the cause of his King, whose commission he held, and that of his country, with hesitation he chose the latter. There is not much in his character over which to enthuse. If he was to be a traitor, it had been better to have been a whole souled one, like his friend John Adams or his predecessor John Rutledge. Interest alone seems to have guided his choice. His father and grandfather were Provincial judges before him. John Adams has not hesitated to charge the father with being jesuitical and false. Think of the episodes of the time, the unselfish devotion to liberty manifested by so many, the uplifting influence of the great principles which then agitated the community. Beside those principles and examples any weakness and trimming seem paltry and sordid. The comparison is too odious to dwell upon. As very little is known of the life of William Cushing, as he never presided in the Supreme Court of the United States as Chief Justice, and as the events of the

era of his youth and service upon the Massachusetts Court, and the men who acted in those events are so well known, only the briefest notice of his career will be attempted here.

William Cushing was born at Scituate, Massachusetts, on March 1, 1732. He was prepared for Harvard by a Mr. Richard Fitzgerald, "a veteran Latin schoolmaster," and graduated in 1751. Shortly after his graduation for a year he taught in the public grammar school of Roxbury, and then entered the law office of Jeremiah Gridley, that Nestor of the Massachusetts bar who advised John Adams to study the law for itself rather than for its emoluments, to avoid an early marriage and much company. Cushing remained in Gridley's office until 1755, when he was admitted to the bar. He then began to practice in Scituate, but soon removed to Pownalborough, now Dresden, Maine, where his father owned land. In 1760 he was appointed Judge of Probate there, a position which he held for twelve years. Nothing is known of those years of his life. In 1771 John Cushing, after having been offered the Chief Justiceship of Massachusetts upon the appointment of Chief Justice Hutchinson to the Governorship, resigned. William Cushing in 1772 went to live in Scituate, having been appointed an associate justice in his father's place, to whose property also he succeeded some six years later.

In 1772 popular excitement in Massachusetts was acute and daily growing worse. The power of the Crown was watched with a jealousy that already amounted to hatred.

Judge Cushing attempted to steer a middle course. He abstained from any expression of political opinion. He tried to retain his friendship with both sides, with the royal party and the friends of his father on the one hand, with John Adams and Thomas Cushing on the other. He was finally compelled in 1774 to choose between accepting his salary from the Province instead of the Crown, and impeachment. Reluctantly, without comment, he elected the former alternative. This was the beginning of the end of judicial administration in Massachusetts under His Majesty's government. Alone of the royal judges Cushing now took the side of his country. When the Provincial Congress reorganized the judiciary in the autumn of 1775, he was appointed one of the justices. If the Revolution had not succeeded, this position of course would have exposed him to the severest punishment. Nevertheless having been compelled to elect, he acted with firmness. He saw that independence or subjugation alone could result from the struggle, and on June 4, 1776, drafted the instructions to the representatives of Scituate in the Provincial Congress, which urged them to have the delegates in the Continental Congress declare independence. In February, 1777, John Adams resigned his office of Chief Justice of Massachusetts, never having served in that capacity, as he had been engaged in the Continental Congress. Cushing was appointed in his place. He presided over this court for over twelve years to the satisfaction of both bench and bar. There can be no doubt that he was an able lawyer and an upright judge. His most noted decision, however, is sufficiently surprising. In April, 1783, he held that the first article of the Bill of Rights, which declared that all men are born free and equal, abolished slavery in Massachusetts.

At the close of the Revolution Massachusetts was overwhelmed by debt. Taxation was oppressive. It gave rise to great discontent. Shay's Rebellion in 1786 was not its only unfortunate expression. On other oc-

casions frequently the court-houses were surrounded by armed and angry mobs, through which the Chief Justice walked pale, but resolute. His love for the administration of the law, his high conception of its dignity overcame his personal timidity. Great ought to be his honor for his calm persistence in the performance of his judicial duties. In 1785 and 1794 he was asked by all parties to stand for election to the Governorship. On both occasions he declined. In 1785 he was given the degree of Doctor of Laws by Harvard College, and in January, 1788, in the absence of John Hancock, the President of the Convention which ratified the Federal Constitution, Mr. Chief Justice Cushing presided over its deliberations as Vice-President. On September twenty-fourth, 1789, he was nominated by Washington and confirmed by the Senate an Associate Justice of the Supreme Court of the United States. His commission was dated September twenty-seventh.

He attended the first term of the Supreme Court in February, 1790, at New York. It was probably the first time that he had ever been out of New England. But while a Federal judge he conscientiously went the circuit, and as the Justices then annually changed their circuits Mr. Justice Cushing visited all parts of the country. As the senior Associate Justice he presided over the court after Mr. Chief Justice Jay's departure for England in May, 1794. And upon the rejection of the nomination of Mr. Chief Justice Rutledge by the Senate, he was nominated by Washington to that vacant place on January twenty-seventh, 1796, and was immediately confirmed. After keeping the commission for a week he returned it upon the ground of ill-health. Washington tried in vain to dissuade him from his declination. Sickness somewhat interfered with the performance of his judicial duties during the last years of his life, and he had already written a letter of resignation when he died on September thirteenth, 1810.

Mr. Justice Cushing appears to have been

a man of equable temperament, rather negative and timid. His manners were mild and his ability decent. His devotion to the law and the judicial function command respect.

His character arouses no enthusiasm or admiration. His mind was not so great as to leave any impress upon the jurisprudence of his country or his State.

SOME DELIGHTS OF THE LEGAL PROFESSION.

BY WILLIS B. DOWD.

IT is not intended here to enter into a legal dissertation on any subject. The object of this article is merely to indicate a few of the delightful sources of entertainment which are open to the student and practitioner of the law, it being manifest that the subject is too comprehensive for full consideration in a magazine article. There are very many humorous matters which come under the consideration of the student of the law and some of these will now be noticed.

Here is an interesting cat case. It is well known that there is held in the City of New York annually a show of poultry, pigeons, pet cats and the like. Why it is that cats and ferrets should be mixed up with ducks and pigeons nobody can tell, but such is the case. When show time came, about the year 1898, a lady sent her pet cat to the Madison Square Garden where the show was held, and paid the entry fee, expecting of course to win a prize. Under the rules of the New York Poultry, Pigeon and Pet Stock Association, Limited, the good lady had to make this exhibition of her pet cat at her own risk, but still there was a duty on the part of the Association to give ordinary care to the comfort and preservation of the cat. Now, horrible to relate, shortly after this entry was made there was a disappearance of the creature from the Madison Square Garden, and as it was never recovered the good lady brought an action to obtain the value thereof. She succeeded in proving her case in the Municipal Court, and there was awarded to

her the amount of fifty dollars, which represented, of course, the value of her quadruped. An appeal was taken from this judgment to the Appellate Term of the Supreme Court, where the majority of the judges in a very brief opinion, which gives no token that they understood the real inwardness of this action, that is to say, the fun of it, affirmed the judgment with costs. One of the judges, however, who had a keen eye for the treasures of the profession, saw in this case an opportunity to hand down to future generations a dissertation in legal phraseology upon cats as exhibits at poultry shows, *et cetera*. Mr. Justice McLean thereupon delivered himself in part of the following opinion: "Herein is an instance of bailment, or, to borrow learned language from Massachusetts (10 Gray, 366), *locatum* of a Manx feline, described as a male specimen, longer as to its hind legs than as to its fore, prize-winning from agricultural societies, of great value and without a tail. Zenda, for so the Manx was dight, was brought to the show of pigeons, of poultry and of pets of the defendant, and placed in a coop thereof by mistress and maid, assisted by an offering man, of fair complexion and dressed in blue checked overalls, with a colored blouse, in which livery many were about, who opened the coop door and showed both how to open and to close it. A little later the powerful and peculiar exhibit had moved the iron cage, unforesightedly not fastened at the bottom, along and partly beyond the plat-

form whereon it stood, making an aperture sufficient for his escape. Then he was off. There was quick but bootless pursuit by the attendants, in pack with many others, with hue and cry. Though often spied in the secrecies between the roof rafters and subcellar of the vast garden, Zenda was never recovered. Whether his manucapture was impracticable because he was strenuously moved to solitude by jealousy or any other of the impulses delicately suggested by Allen, J., in his lettered and sympathetic opinion (22 Barb., 506) anent the contentions of and over the dogs of Oneida County, or because *ferae naturae* as was held (47 Hun., 366) to be the bivalve, though destitute of locomotivity, in an oyster-bed litigation in the adjoining judicial department, is not stated." This learned justice concurred in the opinion of his more solemn brethren, saying, "The learned justice of the Municipal Court before whom the parties appeared and introduced their evidence found for the plaintiff and cast the defendant in damages of fifty dollars. He was right."

So much for the cat case, illustrating as it does, the leavening power of humor, which makes delightful reading of even the most prosaic matters in law books.

Next, let us consider a sea lion case. It is well known that Mr. James A. Bradley was the founder of Asbury Park, and that he has been zealous to provide entertainment there for summer visitors. All the world does not know, however, that Mr. Bradley got himself into a lawsuit a few years ago on account of a sea lion which he bought from a fisherman who alleged that he caught it in a fish pound about seventy miles from the City of New York. A certain man, who had been in the habit of buying sea lions at the Islands of Santa Barbara and transporting them across the Continent for sale in the East, had been the owner of this particular animal, which he had not been able to sell on account of certain blemishes caused by wounds which it had received while being captured. "Hav-

ing the animal thus thrown back upon his hands," says the opinion in the case, "the plaintiff placed it temporarily at Glen Island, on Long Island Sound, from which place, within a few days after its arrival there, it disappeared, and the plaintiff, quite reasonably assuming that he had no prospect of ever finding it, made no effort for its recapture. This took place during the first week of July, 1896. It was not until about a year afterwards that he discovered it in the possession of the defendant, and having satisfied himself of its identity, which, it may be said is not in dispute here, demanded its surrender, which was refused." Mr. Bradley's refusal was based upon the ground, of course, that he had a good title to the animal, having bought it from the fisherman, as above stated.

Now, there is a very nice and a humorous point of law in this case. Sea lions are wild by nature, *ferae naturae*, and it has been the law from time immemorial that if an animal of this kind escapes from its owner and returns to its station in life, there is no longer any right to it which the owner can assert as against any other person. Observe in this case that the sea lion was originally found at the Islands of Santa Barbara, that it was an entire stranger on the eastern shore of the United States, and that Mr. Bradley's fisherman captured it seventy miles from the City of New York, in waters entirely unfamiliar to it. The man who had brought the sea lion East contended that the animal had not had time to get back to its place of nativity and habitation, and that while it was in transit he had a right to it as against the founder of Asbury Park or any other person in the world. It is well to observe that no such point had been raised in the course of human events, and no wonder it was a poser for the judges who had to decide it. They wisely resolved that as there was no precedent for the contention, and that as the rule was that the owner of a wild animal lost his property in it when it regained its liberty,

this sea lion was its own master until the fisherman caught it, and thereupon it became his and subsequently Mr. Bradley's.

Everybody knows that a common sow with a litter of pigs is a dangerous animal. The bristles and savage tusks of the black razorback are enough to drive terror into the bravest soul. Now, what should a farmer, who insists upon having hogs, do to protect his neighbors and their property from them? Well, in brief he should shut them up. The disposition of hogs to roam, and to root up the earth in search of luscious roots and kernels, is well known, and if one, owning such beasts, permits them to wander abroad and commit depredations upon his neighbor's land he must be prepared to bear the consequences. Who would suppose, however, that a sow and her litter of pigs would go into a neighboring pasture and there attack a cow, mutilating and mangling her with their teeth so as to kill her? A case of that kind occurred about the year 1844 in Ulster County of the State of New York. A man of the name Van Leuven, was the owner of a cow, which was peacefully enjoying the comforts of life in the pasture where she belonged. Doubtless it was very far from her dreams as she lay chewing her cud upon the dewy grass that the end of her existence was nigh; but lo! through the umbrageous distance appeared Mrs. Sow and a numerous brood of her offspring. What it was about Mrs. Cow that provoked the ire of Mrs. Sow, whether innate feminine envy of her race, color or condition, the case sayeth not, but certain it is that there was soon a great commotion in the vicinity of the cow, and presently the sward was dyed in the crimson of that gentle creature. Of course Mr. Van Leuven proceeded at the law to attempt to get damages from Messrs. Lyke and Dumond, the alleged owners of the sow and pigs, and he would infallibly have done so but for the fact that it was not shown in the case that the aforesaid sow and pigs were by nature calculated to do such

damage or that they had theretofore done the like and that their owners had knowledge thereof, and hence this did not come within the rule that the owners of domestic animals are liable for such damage as they are calculated ordinarily to do when permitted to go at large. Had the sow and pigs rooted open a dozen sacks of corn and consumed a large part of their contents, destroying the balance, this would have been such a case as would have made the defendants liable beyond doubt, and indeed a recovery may be had for mischief done by tame animals, *mansuetae naturae*, such as horses, oxen, cows, sheep, swine and the like to the person or property of another, provided only it can be shown that their viciousness was known to their owner.

Finally, in this aspect of the subject, let us briefly consider a horse case. The trickiness of horse dealers is proverbial, and the law books are full of cases concerning spavined, ring-boned, splinted, wind-broken, blind and glandered horses. Since David Harum, the hero of Mr. Westcott's novel, has impressed so many people pleasantly with the slick manner in which he put off a balky horse on his old enemy, the deacon, it may be well to consider from a legal standpoint just what would have happened to David had he made such a deal as this in cold reality. A case came up in England long ago (*Wood v. Smith*, 4 C. & P., 45), in which it appeared that a man when about to sell a mare was asked the question: "Is she sound?" To this he replied, "She is, to the best of my knowledge."

"Will you warrant her?" said the buyer.

"No," said the seller, "I will not; I will not even warrant myself." Thereupon the mare was sold, and afterwards it turned out that she was unsound when sold and that the seller must have known it. Lord Tenterden, in delivering the opinion in this case, said: "If a man says when he sells a mare, 'She is sound to the best of my knowledge, but I will not warrant her,' and it turns out

that the mare was unsound and that he knew it, I have no doubt that he is answerable." From that time, at least, to the present day the law has always looked at the intent with which a man sells a horse. He cannot escape responsibility for putting off a worthless animal on a credulous purchaser by any mere form of words, unless he says, indeed, that the horse is unsound. The question is, does the seller intend that the buyer shall believe that the horse is sound, and free from vice, and is the horse sound, kind and true as represented? If so, well and good; if not, the law says that the seller has played false with the buyer and that he must answer the consequences. Now let us look at the case of David Harum, which has been permitted to pass as innocent and inoffensive literature and as a proper subject for merriment on our stage. Observe the words which David uses in selling the horse to the deacon. He is recounting the warranty which followed the horse when he bought him. "He says to me, 'that hoss hain't got a scratch or a pimple on 'im. He's sound an' kind an'll stand without hitchin', and a lady 'ed drive him as well's a man.'" "That," said David, "was all true." Now it is perfectly apparent from a perusal of the book or from the stage performance that David had tried the horse, that he knew he was balky, that he had contrived a means of curing the horse for his own use and yet, when bargaining with the deacon, he purposely concealed each and every one of these facts. A man may perpetrate a fraud by concealment as well as by express word of mouth. The plain intent of David was to put off on the deacon, for a fancy price, a horse which he knew to be unfit for use, and no amount of juggling with words could have excused his conduct in the matter. The deacon wanted to buy a good, sound, serviceable horse. David Harum was perfectly aware of that fact and it was his duty to reveal the defects of his horse in order that the deacon might have a fair chance to accept or reject him. There

is no doubt that should such a case as this come before any ordinary court of law, the seller would have to pay back the money which he obtained on the sale with the costs of the suit. Here let it be noted, it is the man or woman who understands the law, who occupies the place of vantage from which to pass proper judgment on all matters of a moral nature which appear in our literature or on our stage. The legal mind better than any other mind knows, or ought to know, the difference between right and wrong. This has been the concern of the profession for ages past, and the forum of conscience is one into which all matters of doubtful propriety are finally taken for solution. Thus, in this case, which is likely to have produced so pernicious an effect upon the minds of innumerable people, we see how wiser the law is than a simple man, and how better than many who attempt to teach by letters. Is a thing right? Does it work justice? Is it founded on good principle? These are the questions which always and forever come up, in consideration of such human affairs as pass under the eyes of men of the legal profession.

In contrast with the humorous phase of the law there is its serious side, by which one traces the evolution of society. Lawyers read in the acts and decisions of times past what evolution has been going on in human affairs since the dawn of civilization. Men of the legal profession know the value of reason and of public opinion because it is these which affect legislation as well as judicial interpretation of laws. "Reason is the life of the law; nay, the common law is nothing else but reason," said Sir Edward Coke. "Public opinion," said Mr. James Brice in his book on the American Commonwealth, "this vague fluctuating complex thing is the omnipotent yet indeterminate sovereign to whose voice every man listens, yet whose words, because he speaks with as many tongues as the waves of a boisterous sea, it is hard to catch." Nevertheless, the

voice of public opinion is often heard and heeded in legislatures and in judicial tribunals; and reason also, which is sometimes obstructed and delayed, still shows progress and prevails wherever men make laws or interpret them. Nothing could better illustrate the progress of reason and of public opinion in matters legal than the evolution of the rights of women, as now recognized by the law of the State of New York.

It used to be, and not so long ago, that when a woman married all her personal property went to her husband. If she had cash, he was privileged to take it and spend it. If she had promissory notes or open accounts, he alone could sue upon them and the proceeds belonged to him. She could not bring an action to redress an injury to her person without her husband's concurrence. It was lawful and proper for the husband to whip his wife, if she did not obey him. He was not permitted to knock her down with a stick, but he could administer moderate correction with a switch and could abuse her within the limits of reason by word of mouth. Moreover, they used to have what was known as the cucking stool, into which common scolds were put; and it must have been a spectacle worthy of a kodak to see a fussy woman fastened in one of these instruments of torture and ducked a few times in the water. It was held, however, that merely scolding once or twice did not make a common scold, and there is no trace of any effort anywhere in legal history to prevent a woman from freeing her mind mildly concerning any of the matters offensive which were done for or concerning her by her lord and master, man.

Great changes have come over the spirits of men with regard to the rights of women. These fascinating creatures have so used their wiles on the sterner sex that, since the time of Elizabeth, when their emancipation seems to have begun, they have so completely captured the minds and souls of men that they have yielded to them vastly more

than they have retained for themselves. Thus at the present time in the State of New York a woman may hold her real estate or her personal property in her own name. She may sell or give away the same without any regard whatever for her husband. It is true that she may not sell her real estate without recognizing the right of her husband to some share therein, provided she has children by him, and she may not dispose of her personal property by will so as to cut off her husband from his share thereof. She may make a contract with her husband, however, just as though he were some other man, and if she gets the better of him the law makes no objection. If she brings an action for divorce against her husband, she may compel him to pay for her counsel and her legal expenses, but the husband has no such right as against the wife, even though he be penniless and she have a million. The husband is compelled to pay all the necessary living expenses of his wife, but she is under no obligation to contribute a penny toward his support. Whilst it used to be so that her earnings belonged to her husband she is now entitled to keep all she can make or to spend it, according to her own sweet will, regardless of the needs of her spouse or her offspring.

It may be added that this is the law in other States besides New York; and so, that dreadful day seems not so far distant when women will not only practice law and medicine, but vote and make political speeches, sit in legislatures and Congress and on the bench of the Supreme Court of the United States, and in short completely vanquish man from the realm of his aforetime lordship and leave him nothing to do but to drive delivery wagons, to cook the dinners and to look after the babies! Seriously, this evolution of the rights of women, as disclosed in the law, shows how amenable the minds of people are to reason and to public opinion. This, again, is but another instance of the many cheerful aspects of the legal profession.

The delights of the profession which have heretofore been considered are purely subjective, lying entirely within the realm of study and contemplation. There are other pleasures which are derived solely from the practice of the law. There is no theatre in the world in which such a variety of comedies and tragedies is enacted as in a court of law. Here day by day suitors come with their contentions about all manner of things, and the State brings the objects of its wrath, those unfortunates whom we denominate criminals, and proceeds to battle with them for their lives or their liberty. No gladiatorial contest was ever more interesting than a murder trial. In this the grim beast which is designated by the title "The People" essays to devour poor man. Whether the event be such as to excite the approval or the condemnation of the spectators, still, this is the ghastly spectacle which is forever enacted where a man comes up for trial for a capital offence in a court of law. There are also very many cases both in the criminal and civil branches of the profession which excite humor and merriment both for the court and practitioners and for the spectators. It may well be said in passing that no set of men in the world have a keener sense of the ludicrous than judges and lawyers.

In illustration of the fine points of the play of the game of law, by which is meant the conduct of a given suit by the contending attorneys, which is essentially a game like a game of chess or a game of whist, these facts which occurred in a case tried in the city of New York not long ago may be considered. The action was one brought on behalf of a little girl, one of whose eyes had been put out by a boy who threw a stone at her while she was passing in the street, inflicting the injury of which complaint was made. The little girl had told her story as a witness in the case, and was under cross-examination by the attorney for the defendant. She had testified that the boy threw the stone at her,

and the plain intimation was that he had done it intentionally. The attorney for the defendant asked her whether she could give any reason why the boy should have thrown the stone at her. She hesitated a long time in giving her reply and seemed utterly unable to assign any reason. At last she said so. Then the attorney for the defendant turned her over again to the attorney for the plaintiff. "Now, Mary," said that gentleman, "counsel for the defendant has asked you whether you could give him any reason why this boy should have thrown a stone at you. Did you ever hear of his throwing stones at other little girls in the neighborhood?"

"I object, I object," exclaimed the attorney for the defendant. "Counsel is putting words in the mouth of the witness."

"Objection sustained," gravely ruled the Judge.

"Mary," suavely said the attorney for the plaintiff, smiling, "can you now give me any reason why this boy should have thrown a stone at you?"

"I object, I object," shouted the attorney for the defendant. "The witness has no right to express an opinion in her own behalf on the stand."

"Unfortunately for you, counsellor," said the Judge, addressing the attorney for the defendant, "you opened the door to this sort of examination, and although the attorney on the other side has no right to ask a question which practically suggests the answer to it, yet he has a right to put one which does not, and I overrule your objection."

"Yes," said Mary, brightening up, "I can give you a reason. He has been in the habit of throwing stones at other little girls in the neighborhood."

Thereupon the attorney for the boy felt badly, and the attorney for the little girl felt elated, and the Judge, the jury and everybody else in the court room grinned at the humorous turn the examination had taken.

A very amusing story is told of the late Zebulon B. Vance, the great war Governor

of North Carolina. After the war he practiced law until he was called again into political life. He had on one occasion a client who was indicted for maiming, the specific charge being that the defendant had bitten off the ear of the prosecutor. The case came on for trial and the outcome of it was not very promising for the defendant. While the defence was still being adduced the defendant leaned over and whispered in the ear of his attorney, saying, "Call Jack Deans." "Who is Jack Deans?" asked the ex-Governor, not being acquainted with that person. "There he is," said the defendant, indicating the man, who had come into the court house, as a spectator. "He was there; he saw the whole thing." Thereupon in a short while Jack Deans was duly called and put upon the witness stand in behalf of the defendant. "Now, Mr. Deans," said the ex-Governor, after some preliminary questions, "you say that you know the defendant and that you were present at the time of the alleged assault by him on the prosecutor. Tell us what you saw of that occurrence."

"Well, I was coming 'long the road," said the witness, "and I seen 'em gitting up out of the dirt, but I didn't see the defendant hit the prosecutor and I didn't see him kick him, and I didn't see him bite his ear off."

"You were in plain view of the parties and you say you did not see any of these things?" asked the ex-Governor, with an expanding chest. "Yes," said the witness.

Then the Solicitor took a hand in the business. "Now, Mr. Deans," said he, "you have told the Governor all that you *did not* see of this assault; please tell *me* what you *did* see of it."

"Well," said the witness, squirming in his chair and hesitating a long time before proceeding, "it's so I didn't see the defendant bite off the prosecutor's ear, but jest as I got abreast of him I seen him spit the ear out of his mouth."

That was enough for the prosecution and a great deal more than enough for ex-

Governor Vance, who always enjoyed a joke on himself and told this afterwards with great glee, saying that it had taught him never to put a witness on the stand without first having subjected him to a close examination.

If there are humorous things in the practice there are those which are tragic also. It often happens that the practitioner finds himself face to face with a terrible tragedy in life resulting from infirmities in the law. For illustration, take the case of a boy about twelve years of age who was indicted for murder in the State of New Jersey about the year 1828. That was a case of a little negro named James Guild, who was charged with the murder of an old lady about sixty years of age. The circumstances of the case were substantially as follows: The old lady, who had been left alone in her house, was found in a dying condition in one of its rooms late one afternoon, and her head was so battered as to make it certain that she had been assaulted by somebody who had wielded a heavy instrument. This instrument, as it turned out afterwards, was a horse yoke, which of course was of considerable size and weight. There was at first great mystery as to the perpetrator of the deed, but it developed that in the course of the afternoon the boy Guild had been seen in the vicinity of the house, which was a detached one about two hundred yards distant from any other, and suspicion fastened on him. He was a precocious boy, well developed, illiterate, profane, shrewd in worldly matters, but had never attended Sunday school, and was absolutely lacking in education of his moral or religious qualities. So an inquisitor went to work on this boy and tried to pump out of him some information about the murder. Some threats were made to him, as to the consequences of his refusing to admit the act, which might have produced terror in the mind of any child of that age. For instance, a remark was made to him that "it would be a pity to hang so fine a boy." He

thereupon confessed that he had done the deed and thereafter on numerous occasions repeated his story, which was to the effect that he had gone to the house of the old lady in the afternoon to borrow a gun, which she refused to lend him, using abusive language to him for his impudence in approaching her on such a matter. He thereupon became incensed and struck her with the horse yoke, which caused her to fall, and he then became afraid that she would report the assault to his mistress and that he would be punished severely for what he had done. He therefore resolved to complete the job and returned to the prostrate form of the woman, striking her on the head repeatedly with the yoke until he thought she was dead. These confessions were the only evidence upon which the State could rely for a conviction. Although the first confession was excluded as having been induced by threats the subsequent ones were admitted in evidence. The boy was convicted, his case was appealed to the Supreme Court of New Jersey, where the judgment was affirmed, and he was subsequently put to death for this crime. Now let us see what the tragic features of this case were to the lawyers and the judges who were interested in it. In the first place, from time immemorial the law had presumed that all children of tender years were incapable of committing crime. There is a general presumption, of course, that all persons, whether adults or children, are innocent of the crimes with which they are charged, but in the case of a boy under fourteen years of age the presumption extends further and clothes the infant with the protection of his supposed incapacity to know the difference between right and wrong and consequently his incapacity to commit murder or any other crime. These presumptions may be overcome by evidence showing the precocity in the child, and there are many instances where children have been executed for murder. But how was the presumption of innocence and incapacity overcome in this case? A man's con-

fession of his innocence may not be used in his behalf, but his admission of his guilt may be used against him in a criminal case. Nevertheless, if an admission of guilt is superinduced by threats or the equivalent thereof it cannot be used against the accused. In the case under consideration it was shown beyond doubt that such language had been used toward the boy in the first instance as to have probably produced terror in his mind and it was on this ground, as above stated, that his first confession was excluded. It was not shown that the boy ever saw a jail, that he knew anything about an execution, that he had the remotest practical concept of the workings of the criminal court, or that he had any comprehension of the appalling consequences of his talking against himself. Moreover, at that time under the criminal law it was not possible for a person accused of murder to give evidence in his own behalf. While the State could offer the admissions of the accused, made out of court, against him, yet the accused could not take the witness stand and testify in his own behalf. It therefore happened in the case of Guild that while his confessions were being used against him, he had to sit mute beside his attorney and in a certain sense permit his life to be taken away by default. His attorneys were powerless to help him. No wonder the judges of the Supreme Court in affirming the judgment of conviction, "under a deep sense of responsibility," felt the awful gravity of the burden put upon them and expressed their lament in their decision. Here was a possible judicial murder which must have touched the minds and hearts of all the people who knew of it. Here was one of those awful tragedies in law illustrating the need of enlightened legislation and showing the responsibility that rests upon every man for the kind of laws which are enacted in the place where he lives for the protection and control of himself and every other man. Here was doubtless one of those frightful instances of justice so-called which shook

the conscience of the civilized world and caused much remedial legislation, instanced by Lord Denman's act in England (1843) and many similar ones in this country, removing from persons accused of crime all disabilities to testify in their own behalf.

Since the delights of the legal profession are many and it is impracticable to touch upon more than a few of them in an article of this kind, one more only will be considered. Beyond the pleasure which the student derives from the humorous and serious aspects of the law and the practitioner from the comedy and tragedy of its forum, and perhaps above them both, lies the delight of the *entente cordiale* between members of the bar. It is a remarkable fact that there is little or no jealousy between men of the highest order in the legal profession. Of course there are exceptions, but the rule is that any reputable member of the bar is ever ready and willing to give a full meed of praise to one of his brethren who performs noteworthy service in the profession. It must not be forgotten that the rules of the profession are as well known as those of any game of chance, and since legal matters are

vastly more consequential than mere play, those rules are inviolable by all men of honor of the legal cult. No man can survive an intentional infraction of any of the well known rules obtaining in the practice of the law. Ability does not efface from a countenance the brand which is placed upon it by willful disregard of the ethics of the profession. Hence it is a source of very great and unceasing pleasure to gentlemen of the profession to have to do with each other and with their brethren who sit upon the bench. A lawyer of great sagacity once said that no man of even ordinary ability and good character who applies himself diligently to the practice of the law ever fails of success; and certainly no man of pre-eminent character and ability ever failed of high honors as well as continual pleasure in contact with his brethren in this noble profession. Truly the law, as has been said, is "the royal road to fame," and though its ascent may be steep and difficult yet there are many pleasant prospects by the wayside and many cozy inns thereon wherein the travelers do oft assemble and make merry.

AN UNSCRUPULOUS LAWYER AND AN INGENIOUS DEFENCE.

BY JOHN DE MORGAN.

ONE of the wittiest, shrewdest, most successful, learned but unscrupulous men at the Irish bar, a century ago, was James Costelloe. He had the reputation of never losing a case, though many of his fellow members of the profession shrank from endorsing the means he used to win such a character. To his intimate friends he declared that while capital punishment was the penalty for trivial crimes he was justified in adopting even unscrupulous methods to save the life of an accused.

Costelloe was a descendant of an ancient and respected family of the County Mayo.

His father was a landed proprietor and lavished a small fortune on the education of his hopeful son.

Having received the best primary education at private and public schools, James Costelloe became a student of the Middle Temple in the year 1744. He was in his glory in the British metropolis, for besides being possessed of plenty of money he was a "fellow of infinite jest," a good comrade, full of life, fond of social pleasures, witty and the inspiring genius of any circle in which he might be.

Having served his terms, he was called to

the bar in Dublin, and at once proved that he was possessed of unquestionable talent. His friends predicted a great career for him and pictured a roseate future. But he eschewed equity and common law and devoted himself to what was then termed "Old Bailey" practice, in short he became a criminal lawyer, thus marring his chances of promotion but increasing his immediate emoluments.

He was shrewd and, though apparently leading a superficial life, did not disdain to use every means to advertise himself. He had every magistrate's assistant clerk in his pay and no sooner was a man committed for trial than the particulars were sent to Costelloe. If the case promised a good fee or a large share of glory he at once worked incessantly to be retained for the defence. At that time a counsellor could also be a practicing attorney, the rules separating the branches not having been passed, the bar recognizing that "it was well to leave it to a man to find out from the opportunities that might arise of calling forth the particular qualities and talents that are in him, and so leave it to such occasions to develop whether or not he has a better opportunity of carrying on the business of a solicitor than the profession of an advocate." (Mr. Justice Hannen.)

Costelloe would hurry to the prison, seek an interview with the accused and often before the other members of the bar had heard of the arrest.

One morning the city of Dublin was startled by the announcement that one of the largest and most influential banks had been plundered of a large sum in gold, by the chief cashier. The alleged culprit was instantly arrested, taken before a sitting magistrate, and a *prima facie* case having been made out, committed to Newgate before noon. Before the accused had reached the prison, Costelloe was made aware of the facts in the case and arrived at the gloomy jail within a few minutes of the prisoner.

The accused cashier, a man of about fifty years of age, had intended retaining Costelloe and was therefore pleased to see him, welcoming the counsellor in a serious and sanctimonious manner. It was evident the cashier was going to assume an innocent demeanor.

The door being carefully closed, the cashier commenced by saying that he had been the cashier of Gleadowe's bank and that a large deficit had been discovered in his accounts.

The shrewd counsellor saw the kind of man with whom he had to deal and replied:

"I have heard that Gleadowe's cashier has appropriated to himself one of the money bags, in fact that the bank had been robbed by the rascal of a whole heap of gold."

"Rascal! That is a harsh word to apply to an honest, conscientious man. I am the cashier, or at least was."

"Then you are the thief!"

"Sir!"

"I repeat, it was you then who robbed the bank?"

The cashier pretended to be very indignant. He assured the counsellor that he was innocent, that Mr. Gleadowe was his best friend and that some enemy had trumped up a false charge against him on purpose to ruin him.

"Then you have no money?"

"Not a shilling, I assure you, Mr. Costelloe."

"Then you will be hanged. I'll make it clear to you. The law is very plain. If you have robbed the bank, you must have some of the money left, enough to retain me and so save your life. If you are innocent, and consequently penniless, you have no means of counteracting the efforts of your enemies and so must hang as surely as did *Cahir na grappul*." ("Charles the horse.")

At the mention of *Cahir na grappul* the cashier trembled. The man referred to was a notorious horse thief who had just been hanged. After a moment's dejection the cashier asked:

"What is your fee, sir?"

"Ten per cent!"

"Ten per cent, of what?"

"The amount you stole."

"It is too much, why that would be a thousand pounds!"

"So much the better for both of us, you will have nine thousand and I shall have one. Now will I tell you what I will do. If I get you acquitted give me the thousand pounds; if you are hanged I'll let your widow off with fifty pounds."

This was agreed upon and the counsellor left the prison. He at once went to the Crown Office and saw the chief clerk, who said Dublin was in a state bordering on panic for Gleadowe's bank was considered as safe as the government, and if that bank could be robbed, all sense of security would be lost. Costelloe agreed with the chief clerk and expressed a hope that the guilty man might be captured. The clerk said he was captured, had been committed, and was already in Newgate. Costelloe professed surprise and then began to question the clerk about the evidence.

"You say the money was all in gold?"

"Yes, and the rascal left, in the safe, some rolls of farthings marked up to the value of the gold stolen."

"But if it were all in gold how could the money be identified? One guinea is exactly like another."

"Ah, Counsellor, there is the mark of Providence! Along with the guineas the rascal carried off ten foreign gold ducats, which he had on his person when he was arrested, these have been identified by his deputy and will hang him."

"Then the crown has the ducats?"

"Yes, here they are." The clerk took the gold coins from his desk, and Costelloe examined them one by one, turning them over and over again and again; then he handed them back and said:

"The fellow has undone himself; he will hang."

"Yes, he has not a loophole by which to

escape, not even your skill could save him, Counsellor."

Several weeks later the prisoner was brought to trial in the Commission Court, Green Street. The court room was crowded and members of the bar gathered to witness the discomfiture of Costelloe, for he had allowed it to go abroad that he had no chance of success.

On one side of Costelloe sat his clerk, with whom he frequently conversed, and whose hat was on the table before him.

The prisoner, with deep emotion, pleaded "Not guilty," and with solemn asservation, added that the rouleaux of farthings found in the safe were just as he had received them from his predecessor and that he had receipted for them at the value indicated by the ticket attached to each package; he had never opened them.

The witnesses who testified to the preliminary facts were only lightly cross-examined by the prisoner's counsel. At length the deputy cashier was called and his testimony was very damaging to the prisoner. He testified that he had frequently seen the Dutch ducats in the safe and he was able to positively identify the pieces now produced by the Crown.

Costelloe looked very serious, and seemed deeply overwhelmed by the testimony of the witness. He made no sign of rising and the deputy cashier was stepping from the witness stand when Costelloe in a half-dazed voice and abstracted manner said:

"Stop a moment, young man, I have a question or two to ask you on behalf of my unhappy client." The prisoner was weeping bitterly as the witness again took his seat on the stand.

"And so, sir, you accuse your friend of robbery?"

"I am sorry that my duty compels me to give criminatory evidence against him."

"I understand that. His conviction will gain you a step, eh?"

The witness was indignant. In a loud voice he exclaimed:

"Do you think that it was under such an impression, and with such an object that I gave my testimony?"

"Certainly I do."

The Crown asked protection for the witness; members of the bar declared that Costelloe was going too far in thus insulting a respectable witness, but the Court did not interfere. The Counsel stood quite indifferent during the objections and protests and then continued:

"You swear, sir, that those identical pieces of gold in your hand this moment—where are they?" he asked the solicitor for the Crown. The ducats were again handed to the witness, and Costelloe resumed: "You swear, sir, that those identical pieces were in the prisoner's keeping? Now mind you, you are on your oath."

"I do swear it."

"Hand me those coins, sir," said Costelloe, angrily. The Counsellor took them and looked at them as though he acknowledged defeat. Not a sound was heard in that court room, save a sigh from Costelloe as he asked in a low, dejected voice:

"You have sworn positively, sir, and it will be well for you, if truly. Here, sir, take your blood money."

Costelloe stretched out his hand, his face was turned away as though he would hide his emotion from the witness and as he let the coins fall, they went, by the merest accident apparently, into his clerk's hat.

"I very humbly beg your pardon, sir," he said to the witness, "I am very sorry." Then putting his hand in the hat he took up a single piece, looked at it, and asked: "You persist in swearing, sir, that this identical piece of money, the property of Mr. Gleadowe, was in the keeping of the prisoner and was found on him when arrested?"

"I swear it."

"Take the coin, man, how dare you swear away a man's life in that manner? How can

you swear to a coin unless you can see it?"

The witness took the ducat and, his face red with anger, his voice tremulous, looked at the coin and said: "I swear it."

"And this also?" presenting another.

"Yes."

"And this?"

"Yes."

"Take care, sir. And this, and this, and this?" continued Costelloe, handing the coins quickly to the witness up to the number of ten.

"Yes."

"And this, and this, and this?" continued Costelloe, producing from the hat twenty other ducats bearing the same date as the first ten. The witness was dazed, his hair stood on end. He had sworn that only ten ducats had been in the strong chest of the bank and now thirty were produced.

"Look at them," shouted the Counsellor, "are they not all of the same date, of the same quality and you only can swear to the first ten?"

The Crown prosecutor looked amazed, the case had fallen through, the prisoner was saved.

When Costelloe had examined the foreign coins at the Crown office on the day the prisoner was arrested, he had mentally noted the date and appearance of the coins. On the evening of that day his confidential clerk sailed for Liverpool, and from thence by mail coach to London, from which port he took a passage on a packet to Rotterdam, where he bought twenty ducats of the dates identical with those of the stolen pieces. He returned to Dublin and enabled Costelloe to make the ingenious defence which saved a guilty cashier from the gallows.

Costelloe amassed considerable wealth and a peculiar notoriety. It was said of him, by a judge, that he "knew more criminals than all the judges had ever tried, and had shared in enough plunder to build a city."

EARLY CRIMINAL TRIALS.

I.

AS a mine of historical information the State trials have been commended from Burke to Froude. Long before the great political trials become of any value as legal precedents they throw all sorts of side lights upon contemporary life. While the trials of political offenders have received due attention, the occasional trials for common offenses scattered throughout the early State trials have been overlooked. Yet as pictures of the social life and customs of the nation some of them surpass in interest and value the most celebrated of the State trials, properly so-called.

The earliest case of a common offense reported in the State trials is the trial of Lord Sandquire for the murder of a master of fence named Turner, 2 St. Tr. 743 (1612). In a fencing bout Turner had accidentally put out one of Lord Sandquire's eyes. Some time thereafter, at the court of Henry of France, the king inquired of Sandquire how he had lost his eye. The latter answered that "it was done with a sword." "Doth the man live?" asked the king. This suggestive inquiry, says the report, was the "beginning of a strange confusion" in his lordship's mind. He brooded over it for years and finally resolved to have revenge for what he had come to conceive as a wrong. Thereupon he employed two ruffians to murder Turner, and for this murder he was tried and convicted. Sir Francis Bacon prosecuted in an admirable speech, in which he developed with characteristic power his view of the moral infirmity of revenge.

In 1621 Archbishop Abbott had the misfortune to be the subject of an investigation, 2 St. Tr. 1160 (1621). While hunting with Lord Zouch in the latter's park in Hampshire, the Archbishop shot at a deer with a cross-bow, and one of the keepers unluckily

came within range and was killed. It was deemed necessary to assemble a commission to inquire whether the fact that the Archbishop had shed human blood should not deprive him of his ecclesiastical office. But Abbott was not disturbed. "As for the wife of him that was killed," says Howell in a contemporary letter, "it was no misfortune to her, for he hath endowed herself and her children with such an estate that they say her husband could never have got."

Passing over the revolting and unnatural crimes of Lord Audley, 3 St. Tr. 401 (1631), the next case in order of time is the trial of the Norkotts for murder, 14 St. Tr. 1342 (1628). One Jane Norkott had been found dead in her bed beside her infant child. There was no evidence of violence; she was found lying in a natural position and the bed clothes were not disturbed. Yet her throat had been cut and her neck broken. There was no blood on the bed, but a bloody knife was stuck in the floor, and there were two pools of blood at some distance from the bed. The mother and sister of the deceased woman testified at the inquest that they slept in an outer room, through which the room in which the deceased was found was entered, and that no stranger had entered during the night. After a second inquest these persons were suspected of the crime, tried and acquitted. Thereupon the judge, being dissatisfied with the result, instigated an appeal of murder by the infant child against its father, grandmother, aunt and uncle. The principal evidence against them was that at the second inquest, when the defendants were required to touch the dead body, "the brow of the dead, which before was of a lurid and carrion color, began to have a dew or gentle sweat arise on it, which increased by degrees until the sweat ran down in drops

on the face, the brow turned to a lively and fresh color, and the deceased opened one of her eyes and shut it again; and this opening the eye was done three several times; she likewise thrust out the ring or marriage finger three times and pulled it in again, and the finger dropped blood on the grass." What meaning these portents were supposed to have does not appear. The report breaks off abruptly without giving the result of the trial.

In 1653 we have the trial of Faulconer for perjury, 4 St. Tr. 323. Many witnesses were sworn to prove that the defendant committed perjury in his testimony before the commissioners for sequestration of royalist estates. Other witnesses were then called to show the defendant's bad character; they testified to his having drunk the devil's health in the street at Petersfield; having used bad language; having been guilty of gross immorality; having been committed on suspicion of felony, and to his having "a common name for a robber on the highway."

The trial and conviction of Rose Cullender and Amy Duny for witchcraft, 6 St. Tr. 647 (1665), is a permanent stigma upon the name of Sir Mathew Hale. The charge against these poor creatures was that they had bewitched several children. These children were considered too young to be called as witnesses, and the testimony against the defendants was given by the parents and relatives of the children. The substance of their testimony was that the women on trial had quarreled with the parents of the children said to be bewitched; that thereafter the children had fits, during which they threw up crooked pins; they also declared that the defendants were torturing the children. Many other puerile incidents were related. Then the celebrated Dr. Brown, the author of "Religio Medici," testified as an expert that the defendants were in his opinion witches. The prosecuting counsel, who seems to have been somewhat skeptical, suggested some experiments in court. The

children were brought into court blindfolded and asked to touch several people besides the defendants, and it was observed that the children went through the same convulsions in every case. Nevertheless Chief Justice Hale allowed the case to go to the jury, and the women were convicted and hanged.

The trial of Lord Morley on a charge of murder, 6 St. Tr. 770 (1666), is the earliest judicial proceeding to be found in these volumes. It seems that Lord Morley, in an affair of honor with a Mr. Hastings, had come out second best. This result rankled in Lord Morley's breast and he took frequent occasion thereafter to insult Hastings and press him to fight; but the noble lord took care that on such occasions he should be in the company of one or more of his friends. At length he and a friend deliberately attacked Hastings and killed him. The evidence proves that it was deliberate assassination. Lord Morley was prosecuted before his peers by Heneage Finch (afterwards Lord Chancellor Nottingham) in a manner which does credit to his great reputation. The trial was orderly and fair. When the depositions taken before the coroner of some witnesses who were then dead were offered in evidence proof was first made that the witnesses were dead and the coroner was put on the stand to testify that the depositions had not been altered. Amid the harsh and often brutal conduct of crown counsel in early times, Finch's closing argument stands out in bold relief as a model of forcible but temperate method. "My lords," he said in conclusion, "the quality of an offender may serve to enhance the crime, but since the world stood it never was counted any abatement. The same duty to the king, the same obedience to his laws, the same reverence to human nature, the same care to avoid the effusion of Christian blood, is expected from a lord which is required from the meanest commoner of England. It is the case of all the people of England who are highly con-

cerned in the present example. If they put their trust in the law as the great avenger of blood in the world and once find themselves deceived, who knows the consequences that may follow? What feuds in private families? What massacres it may produce at last? And therefore, no doubt, all the kingdom will observe and mark the issue of this day, and will be curious to know what will become of a lord in whose eyes the blood of a gentleman hath been so vile and inconsiderable. If it were possible—I say if it were possible—that so great a tribunal as this should either mistake the fact or misunderstand the law, what judicature is there left on this side of heaven for mankind to rely on? I pretend not to aggravate the matter. This is the place where no detestation of the crime, no passion of the prosecutor and no compassion of your lordships towards a peer of the realm is to have any ingredient in the verdict. And, therefore, having observed to your lordships that there is malice implied by the law, and in a manner confessed by the party, besides the direct and formal malice which hath been proved, I shall now submit all to the judgment which the law hath wisely placed in your lordships' most noble breasts, with this only consideration: it is the voice of blood that crieth. I know your lordships will give it such an audience as it ought to have; such an audience as may quiet it and keep it from crying any more; such an audience as may cleanse the land from blood, and be a means to continue to your lordships that due veneration which all men have for your lordships' most righteous and impartial proceedings." This speech is the first specimen of genuine eloquence to be found in the State trials. The result shows that Finch's exhortation to the court was not irrelevant. A majority of the peers adjudged Lord Morley guilty of manslaughter, whereupon he claimed the benefit of clergy and went scot free.

The trial of Hawkins for theft before Hale,

6 St. Tr. 922 (1669), is curious in many ways, if the defendant's report be true. Hawkins, in the course of the trial, raised the novel point that a proposed witness had not been baptized. The prosecutor introduced evidence to show that the defendant had committed two other unconnected thefts, which, said Hale, "if true would render the prisoner now at the bar obnoxious to any jury." If the defendant's report is correct the case disclosed a conspiracy between Mr. Justice John Croke and the prosecuting witness to railroad Hawkins to prison. Croke sat on the bench with Hale, and when directly implicated by the evidence for the defendant, Hawkins says, he sneaked from the bench. No action seems to have been taken against Croke; but Hale warmly espoused Hawkins' cause and he was acquitted.

The trial of the Earl of Pembroke by his peers on a charge of murder, 6 St. Tr. 1310 (1679), was orderly and judicial. Lord Nottingham, who was then Chancellor, presided as Lord High Steward, and controlled the proceedings with his customary dignity. When the defendant was arraigned Nottingham addressed him in an admirable speech, in the course of which he said: "Doubtless the shame of being made a spectacle to such an assembly as this, and the having of a man's faults and weaknesses exposed to the notice and observation of such a presence as this, to a generous mind must needs be a penance worse than death itself; for he that outlives his own honor can have very little joy in whatsoever else he lives to possess. In such a state and condition as this is, it will be very fit for your lordship to recollect yourself with all the care and caution you can; it will be necessary for you to make use of the best temper and the best thoughts you have when you come to make your defense; let not the disgrace of standing as a felon at the bar too much deject you; no man's credit can fall so low but that if he bear his shame as he should do, and profit by it as he ought to do, it is in his own power to redeem his

reputation. Therefore let no man despair that desires and endeavors to recover himself again, much less let the terrors of justice affright you; for though your lordship have great cause to fear, yet whatever may be lawfully hoped for your lordship may expect from the peers."

The evidence showed that the Earl and some friends were drinking at a public house in the Haymarket on a Sunday afternoon, when Nathaniel Cony and a friend named Goring dropped in to drink a bottle of wine. The Earl, being acquainted with Cony, persuaded him and his friend to join the larger company. Near midnight, when the whole party were more or less under the influence of liquor, a dispute arose between the Earl and Goring. The Earl threw a glass of wine in Goring's face. Goring thereupon attempted to draw his sword, but was restrained and put out of the room by some of the Earl's friends to avoid further mischief. Thereupon Cony, who had not been at all concerned in the original dispute, desired to go out of the room that he might look after his friend. This incensed the Earl, who violently attacked Cony, struck him to the ground and kicked him so brutally that he died shortly afterwards.

The peers found the Earl guilty of manslaughter; whereupon he asked to have the benefit of clergy. Benefit of clergy was allowed to a common person by reading and burning in the hand with a hot iron; but according to statute a peer escaped without either. Lord Nottingham discharged the Earl with the caution that no man could have the benefit of the statute a second time.

The case of Lord Cornwallis, 7 St. Tr. 143 (1678), was a similar trial. In a drunken brawl at Whitehall a youth had been brutally murdered by Lord Cornwallis' companion, a person named Gerrard, and Cornwallis was charged with being an accomplice. The evidence against him was not conclusive and he was acquitted. The case furnished an occasion for another admirable speech by

Lord High Steward Nottingham, in the course of which he said:

"It is your lordship's great unhappiness at this time to stand prisoner at the bar under the weight of no less a charge than a murder; and it is not to be wondered at if so great a misfortune as this be attended with some kind of confusion of face, when a man sees himself become a spectacle of misery in so great a presence and before so noble and illustrious an assembly. But be not yet dismayed, my lord, for all this; let not the fears and terrors of justice so amaze and surprise you as to betray those succours that your reason would afford you, or to disarm you of those helps which good discretion may administer, and which are now extremely necessary. . . . Hearken, therefore, to your indictment with quietness and attention; observe what the witnesses say against you without interruption, and reserve what you have to say for yourself till it shall come your turn to make your defense, of which I shall be sure to give you notice; and when the time comes assure yourself you shall be heard not only with patience but with candor, too."

The case of Count Coningsmark, 9 St. Tr. 1 (1682), was a celebrated case in its day. The Count was charged with having instigated the murder of Thomas Thynn. Count Coningsmark was a German who had distinguished himself as a soldier in leading a forlorn hope at the siege of Mons, where he and one companion were the sole survivors of a whole command. In recognition of his gallantry the Prince of Orange had made him a lieutenant in the Guards, and the King of Sweden gave him a troop of horse. Thomas Thynn is the Issachar of Dryden's *Absalom and Achitophel*; he was a rich country gentleman who had been much engaged in the Duke of Monmouth's cause, and a strong effort was made to give political significance to his murder. Mr. Thynn had been shot in his coach in Pall Mall by Boroski, a Pole, acting under the orders of

and in company with Lieutenant Stein and Captain Vratz, two German officers; all three men being in some sort retainers of the Count.

The trial was before Chief Justice Pemberton. The jury was *per medietatem linguæ*, according to the privilege of strangers. The substance of the evidence was that Captain Vratz, knowing that an affront had been given to the Count and having received an affront himself, resolved to punish Thynn. There could be no doubt of the guilt of the three actual participants; the question was whether the Count was an accomplice before the fact. The evidence, which is fully reported, leads to the conviction that the Count was cognizant of, if, indeed, he did not instigate the purpose on the part of his friends to call Thynn to account; but the indications are that their zeal carried them beyond their original purpose or instructions. Chief Justice Pemberton's charge was conspicuously fair. For instance, he said in conclusion:

"It has been said by the counsel, it will be all one whether it were with the knowledge of Count C. or not. Now I must tell you, gentlemen, the law is not so; for if a gentleman has an affront given him which he does seem to resent, if any of his servants officiously, without acquainting him with it, out of too much zeal and too forward a respect to their master's honor, will go and pistol and kill him that they apprehend has affronted their master, he not knowing of it, it will not charge their master with any guilt at all. The law, gentlemen, is not so as was urged; for if it were without the Count's knowledge and direction, if a zealous captain has gone and overshot himself out of respect to his master's honor, when really it was a dishonor to himself and all that were acquainted with it, this cannot lie upon him to make Count C. guilty. But it lies upon me to direct you, for otherwise you might swallow it as a maxim, to be all one in law when it is not." The Count was acquitted.





LORD CAIRNS.

A CENTURY OF ENGLISH JUDICATURE.

VII.

BY VAN VECHTEN VEEDER.

CHANCERY COURTS.

The Chancery Courts were somewhat behind the common law courts in improvement. A new and better period in chancery may be said to have begun with the accession of Lord Westbury to the woolsack in 1861. During the succeeding fifteen years the Chancery was presided over by Westbury, Cairns, Hatherley and Selborne. Westbury, Cairns and Selborne rank among the most distinguished names known to English law, and Hatherley suffers only in comparison with men of their genius.

Lord Westbury (1861-'65) was one of the marked personalities of his time. His intellectual gifts were of the highest order. Baron Parke considered him the ablest advocate at the bar; Sir George Jessel described him as, a man of genius who had taken to the law, and Gladstone compared him to Cardinal Newman for "subtlety of thought, accompanied with the power of expressing the most subtle shades of thought in clear, forcible and luminous language." It was this rare combination of thought and expression which particularly distinguished him. His power of lucid statement arose from readiness of perception. "Clearness of expression," he asserted, "measures the strength or vigor of conception. If you have really grasped a thought, it is easy enough to give it utterance." The elevation which he gave to the simplest discussion arose from his habit of bringing the driest details to the test of fundamental principles. With such a powerful equipment he seems to have set out to conquer the world rather than conciliate it. Heedless alike of misconception and antagonism, he impressed his

intellectual superiority upon his contemporaries with caustic wit and blistering sarcasm. His judgments in the ecclesiastical controversies of the time—particularly the case against the authors of the "Essays and Reviews" and the Colenso case—by which, it was suggested, "he dismissed hell with costs and took away from the orthodox members of the Church of England their last hope of everlasting damnation"—brought him into conflict with the High Church party; and his standing controversy with the bishops in the House of Lords gave rise to some of the most characteristic specimens of his rather spinous humor. His description of a synodical judgment as "a well-lubricated set of words, a sentence so oily and saponaceous that no one could grasp it," has never been forgotten. The consequence of this unfortunate lack of restraint was that his enemies blocked the great scheme of law reform which seems to have been the one continuous purpose of his life. In his great speech of 1863 in the House of Lords he proposed the most systematic scheme of law reform that had been conceived since the time of Bacon. Since Lord Westbury's day other men, better suited by temperament for the patient diplomacy by which alone radical legislative action is attained, have carried on the work which he began; and as the outline of his splendid conception is gradually filled in by accomplished fact it becomes us to remember him for his aspirations as well as for his actual achievements.

The law reports contain about two hundred and fifty cases in which Lord Westbury

formulated an opinion. His domineering intellect made him perhaps too impatient of authorities which conflicted with his individual opinion, and his uniform effort to ground his judgment on elementary principles sometimes led him beyond the estab-

would be unnecessary to range up and down a variety of decisions, because those rules would afford the best answer and secure the removal of every difficulty" (5 E. & I. App. 529.) Still he was not given in the exercise of judicial functions to the extreme views



LORD WESTBURY.

lished landmarks of the law. It is common to find in his work such opening statements as these: "My Lords, we are all exceedingly glad when, in a collection of miserable technicalities such as these which are before us here, we can find our way to something like a solid and reasonable ground of decision" (5 E. & I. App. 25). "There is no difficulty at all in the matter, and if the general rules of law were more steadily kept in view it

which marred his political career. His subtle mind was restrained by good sense.'

¹ For example, in *Overend v. Gibbs*, 5 E. and I. App. 495, he offers the following sensible reflection:

"I think it would be a very fatal error in the verdict of any court of justice to attempt to measure the amount of prudence that ought to be exercised by the amount of prudence which the judge himself might think under similar circumstances he should have exercised. I think it extremely likely that many a judge, or many a person versed by long experience in the affairs of mankind as conducted in the mercantile world, will know that there

Westbury was at his best in the discussion of topics in which the authorities were conflicting and in questions that lay outside the ambit of well-settled authority. His great opinion in the case of *Taylor v. Meads*, 4 DeG., J. & S. 597, on the testamentary capacity of married women, is a good illustration of his remarkable skill in settling discussion of a complex subject. The domain of what has been called private international law afforded scope for his peculiar powers. *Udny v. Udny*, 1 Sc. & Div. App. 457; *Cookney v. Anderson*, 32 L. J. Ch. 427; *Ex parte Chavasse*, 34 L. J., Bank. 17; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Bell v. Kennedy*, 1 Sc. & Div. App. 320, and *Shaw v. Gould*, 3 E. & I. App. 80, on various aspects of the conflict of laws are among the best specimens of his rare skill in exposition.¹ The law relating to trade-marks and patents was another congenial subject. See, on such topics, his opinions in *Leather*

is a great deal more trust, a great deal more speculation, and a great deal more readiness to confide in the probabilities of things with regard to success in mercantile transactions, than there is on the part of those whose habits of life are entirely of a different character. It would be extremely wrong to import into the consideration of the case of a person acting as a mercantile agent, in the purchase of a business concern, those principles of extreme caution which might dictate the course of one who is not at all inclined to invest his property in any ventures of such a hazardous character."

¹He was accustomed to present at the outset of his opinion a summary statement of the general principles of law by which the issue was to be determined. His lucid statement of the doctrine of domicile in *Udny v. Udny* is worth quoting as an illustration:

"The law, of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions, — one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on

Cloth Co. v. same, 33 L. J. Ch. 199; *McAndrew v. Bassett*, 33 L. J. Ch. 561; *Witherspoon v. Currie*, 5 E. & I. App. 521; *Hills v. Evans*, 31 L. J. Ch. 458; *Betts v. Menzies*, 10 H. L. Cas. 151. His contributions to the law of easements are of permanent value. *Tapling v. Jones*, 11 H. L. Cas. 303; *Suffield v. Brown*, 33 L. J. Ch. 249; *Backhouse v. Bonomi*, 9 H. L. Cas. 503. Many of his judgments have become landmarks in the law. It will suffice to mention *Holroyd v. Marshall*, 10 H. L. Cas. 208; *Cooper v. Phibbs*, 2 H. L. Cas. 149; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 649; *Blades v. Higgs*, 11 H. L. Cas. 630; *Isenberg v. East Indian Estates Co.*, 33 L. J., Ch. 392; *Lister v. Perryman*, 5 E. & I. App. 538; *Sackville West v. Holmesdale*, 5 E. & I. App. 565.

It is difficult to characterize the mind and career of Lord Cairns (1868; 1874-'80) without seeming to exaggerate. I prefer, there-

this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother, if illegitimate. This has been called the domicile of origin, and is involuntary. Other domicils, including domicile by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being, by the act of the party, entirely obliterated and extinguished. It revives and exists when there is no other domicile, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicile of choice. Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time."

fore, to quote at the outset the deliberate opinion of his life-long professional and political antagonist, Lord Selborne. Referring to Lord Salisbury's eulogy that Cairns "had an eminence not often granted to a single man, in that he was equally great as

more profoundly learned lawyer; but the degree in which they severally excelled him in these respects was less than that in which he excelled them in other qualities, more necessary than statecraft or eloquence and not less necessary than learning for a great



LORD HATHERLEY.

lawyer, statesman and legislator," Selborne said: "Even that enumeration of his titles to greatness fell short of the truth; for he was also a great orator, and a man exemplary in private life. It would be difficult to name any chancellor, except Lord Hardwicke, who was certainly his superior, or indeed in all respects his equal. Lord Somers was a greater statesman, Lord Lyndhurst a greater orator, Lord Eldon a

judge; and the gifts which in them shone separately were in him combined. Lord Thurlow, Lord Rosslyn and Lord Westbury had not less ability; but he was more of a statesman, a more persuasive orator and on the whole a better judge than any of them. There have been chancellors, such as Lord Talbot, Lord Cranworth and Lord Hatherley, whose private virtues were not less conspicuous and whose public reputation was

not less honorable, yet who were not, like him, as fit to play a great part in political as in judicial affairs." (Personal and Political Memoirs, pt. 2, vol. 1, pp. 157, 158.) By Jessel, Benjamin and his most distinguished contemporaries he was regarded as the ablest lawyer of his day; and as time goes on it is not too much to expect that he will be held the greatest lawyer of the century.

It may be said at the outset that his high reputation derived no adventitious support from personal affection. He was never popular. His manner was austere, cold and sternly self-repressive. This was undoubtedly due in a large measure to continual ill health. It was probably influenced, also, to some extent, by the gloomy religion of which he was a devout professor. Religion indeed seems to have enlisted the deepest feelings of his nature. It was with him the paramount consideration, in comparison with which, he once said, all else—honor, reputation, wealth, recreation—were "nothing, absolutely nothing." A stern Protestant in his views of ecclesiastical polity he disliked with all the strength of his austere nature the tolerance of modern thought. Like Hatherley and Selborne, he was a Sunday school teacher all his life.

The most obvious characteristic of his career is his astonishing versatility. At the outset of his professional career his constitutional diffidence was so great that he deemed himself unfitted for everything but chamber practice. He soon gained confidence in his powers, however, and forthwith became the acknowledged leader of the chancery bar. Although his professional labors were confined almost entirely to equity cases, he argued many Scotch and ecclesiastical appeals with brilliant ability; and on the rare occasions when he appeared before a jury—such as the Windham lunacy case, and the Alexandra case, arising out of our Civil War—he displayed, as if by intuition, the most consummate powers of popular advocacy. In public life, too, he dis-

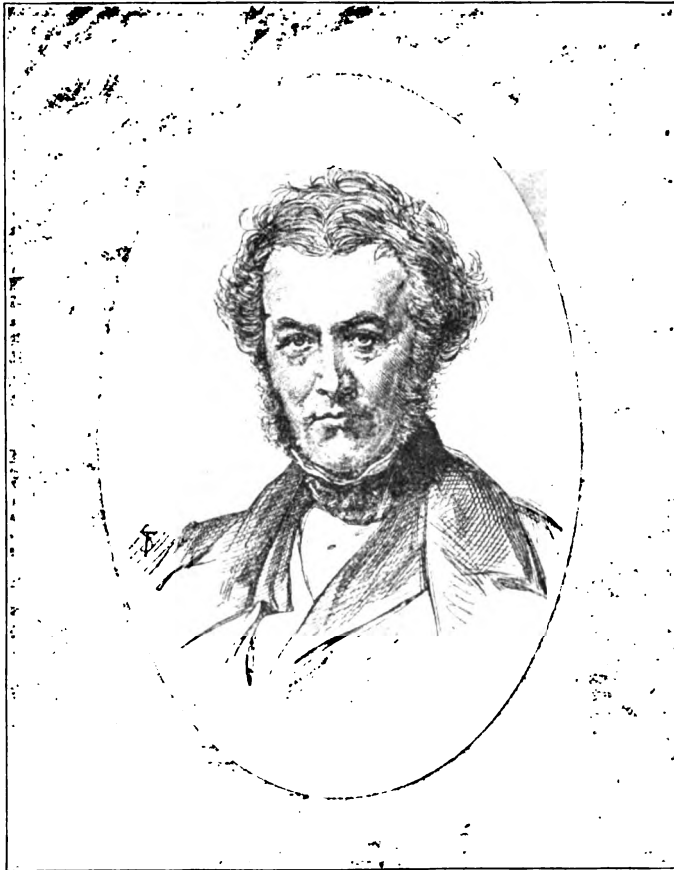
played a capacity for statesmanship which few great lawyers have possessed. He was not only "great in council," as Disraeli said, but next to the Prime Minister himself he was the ablest orator of the conservative party. Almost alone among great lawyers, he seems to have had a strong apprehension of the class of considerations which determine party policy and influence public opinion.

Legal distinctions, it has often been pointed out, are so specific in kind that they seem to incapacitate ordinary minds for the apprehension of moral and political distinctions when once the guiding clue of legal principle is lost sight of. Distinguished lawyers in public life are apt to become either so merged in mere party advocacy that they cease, like Westbury, to exhibit individual character and conviction, or, like Selborne, when once they leave the firm ground of legal principle, they lean toward extreme views on either side from sheer want of apprehension of the intermediate resting places of political thought, and lose weight from the far-fetched moral and speculative arguments by which they seek to support their position. But Cairns' public speeches are replete with independent political thought and strong personal conviction, and his sagacity is as keen and his logic as close on subjects of purely political interest as on legal topics. He never rendered himself vulnerable to flank attacks, like Gladstone, by going out of his way into rather remote intellectual regions for arguments in support of his main proposition.

In manner, both at the bar and in public life, he was Scotch rather than Irish, logical rather than emotional. He was not a passionate orator. His great speech on the Reform Bill of 1867 was described by one of his opponents as "frozen oratory": "It flows like the water from a glacier; or rather it does not flow at all, for though Cairns never hesitates or recalls a phrase, he can scarcely be called a fluent speaker. His words rather

drop with monotonous and inexorable precision than run on in a continuous stream. The several stages of his speech are like steps cut out of ice, as sharply defined, as smooth and as cold." There was a studied absence of passion, and an entire concentra-

infirmities could overcome, stood at the side of the woolsack pouring forth for hours an unbroken stream of clear and logical eloquence against the measure before the House. Everyone in the crowded chamber listened spellbound."



SIR JOHN ROMILLY.

tion on thought, clear exposition and remorseless logic. Beneath his cold exterior, however, there was the deepest feeling. Occasionally when he was deeply moved this suppressed fire came to the surface. One of these occasions was the disestablishment of the Irish Church, which enlisted the deepest feelings of his nature. An eye witness to the final debate relates how "the Lord Chancellor, pale, emaciated, evidently very ill, but possessed by a spirit which no physical

The peroration of his speech on the English humiliation in the Transvaal has often been admired as a specimen of parliamentary eloquence:

"I wish that while the Transvaal remains, as you say it does, under our control, the British flag had not been first reversed and then trailed in insult through the mud. I wish that the moment when you are weakening our empire in the East had not been selected for dismembering our empire in South Africa. These are the aggravations of the transaction. You have used no pains to conceal

what was humbling, and a shame which was real you have made burning. But the transaction without the aggravation is bad enough. It has already touched, and will every day touch more deeply, the heart of the nation. Other reverses we have had, other disasters; but a reverse is not dishonor, and a disaster does not necessarily imply disgrace. To

which most of the leaders of the bar were engaged on one side or the other. In concluding his argument on behalf of Mr. Windham, Cairns said:

“ In opening his case, Mr. Chambers referring to my client, frequently used the words, ‘ This unfortu-



VICE-CHANCELLOR BACON.

Her Majesty's government we owe a sensation which to this country of ours is new and is certainly not agreeable.

‘ In all the ills we ever bore
We grieved, we sighed,
We toiled, we wept;
We never blushed before.’ ”

For a specimen of his stately eloquence at the bar, reference may be had to his argument in the Windham lunacy case, one of the most celebrated contests of the day in

nate young man.’ I attribute to my learned friend perfect sincerity and kindness of feeling, and I accept the expression from him in all frankness. My client is, indeed, an unfortunate man. Other men have passed their youth in excess, in riot, in debauchery. They have purchased, by an expenditure of health and property, a conviction of their folly, and they have settled down into active, useful, if not brilliant members of society. Other men have had youthful vices and immoralities over which the kind hands of friends and relatives have gently and tenderly drawn the veil of concealment and oblivion.

Mr. Windham has been received on his entrance into public life by a panoramic view unfolded by his relatives to the public eye, in which have been portrayed, not the events of his life, but all such isolated acts as ingenuity or perversion could twist into the appearance of that which is hideous and obscene. And what is the object for which this has been done? That a young man, the heir to a considerable property and to an illustrious name, who from his boyhood upwards has gone out and come in, who has acted and been treated by all about him as capable and sane, with whom his relatives have dealt and bargained and negotiated upon a footing of perfect equality, who has been deliberately allowed by them to go out into the world and to enter into contracts, including among them the most momentous contract of life, should now be adjudged incapable of taking care of himself, in order that his persecutors should be authorized to administer his estate. In one of the books which Mr. Windham used to read at Eton there is a story told of a tyrant in ancient days who invented for his prisoners the terrible torture of chaining a living man to a lifeless body, leaving the living to die, and both to decompose together. That, in truth, was a melancholy and terrible fate; but I own that seems to me a severer punishment, and a more cruel, because a more exquisite and more enduring torture, which would consign a warm and living soul, with all its sensibilities and affections, with all its hopes and aspirations, with all its powers of enjoying life and everything that makes life valuable, to the icy and corpse-like embrace of legal incapacity and lunatic restraint. Such, gentlemen, is the torture which his relatives have prepared for Mr. Windham, and of that torture they ask you to be the ministrants and agents. But, gentlemen, I appeal from them to you; from them, from whom I can anticipate no mercy, to you, from whom I can confidently expect justice. I implore you, gentlemen, to sweep away the cobwebs which theory and prejudice, which partizanship and ignorance, which interest and falsehood have woven around this case, and to show by your verdict, as often has been shown before, that whatever gloss and whatever covering may be thrown around a proceeding such as I have endeavored to expose, it is at once the highest and most grateful duty of an English jury to detect deceit and to defeat oppression."

Coming, now, to an examination of Cairns' work as a judge, the reader is forewarned that on first view it will be somewhat disappointing. In the first place ill health constantly interfered with his work. I do not believe he participated in the hear-

ing of more than four hundred cases during his whole judicial career. In more than half of these cases he did not formulate an independent opinion. Moreover, Cairns was rarely in the habit of explaining the process by which his mind reached a result. Yet his mind was severely logical; he had attained the perfect mental discipline which enabled him to follow without reflecting on the rule. With his swift, strong, subtle instinct for the truth he was able to disregard the slow, syllogistic processes along which ordinary minds move. He made no display of learning, like Willes and Blackburn, though his learning was unquestioned. He would exhaust the argument from principle and only in conclusion illustrate it by reference to a few leading cases.

His solution of the great case of *Rylands v. Fletcher*, 3 E. & I. App. 330, on the "duty of insuring safety," is a typical illustration of his method:

"My Lords, the principles on which this case must be determined, appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural uses of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not complain that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature. . . . On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close

of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred, namely, of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable."

Indeed, I am acquainted with only one instance in his judicial career where he expressed in full detail the logical process by which he reached his conclusion. That case is *Ward v. Hobbs*, 4 App. Cas. 19. For a fine specimen of his skill in exposition, reference is again made to his speech in the *Windham* case:

"It may be convenient," he said to the jury, "to remind you what the precise issue is. You are to decide whether Mr. Windham is incapable of managing his affairs—not whether he is of unsound mind, but whether he is incapable of managing his affairs by reason of unsoundness of mind. The object of making that distinction is plain and simple. There are many cases in which a man may be said to be incapable of managing his affairs. He may be incapable by reason of ignorance, or on account of inexperience and want of peculiar skill, or because of a preference for literary or other pursuits of a kind utterly unconnected with the management of property, or in consequence of a ruinous and inveterate habit of gambling. Such a person may justly be said, in a certain sense, to be incapable of managing his affairs, and, indeed, the Roman law made no distinction between unthrifths and idiots. But in England a man cannot be deprived of his personal liberty or his property on the ground of incapacity, until a jury of his countrymen are satisfied, first, that he is incapable of managing his affairs, and, secondly, that his incapacity arises from unsoundness of mind. Moreover, you are to bear in mind that the presumption is in favor of sanity, and that it lies upon those who allege unsoundness to make out and prove their case. I call your attention to the peculiar nature of the insanity alleged in the petition against Mr. Windham. It is not an ordinary case of insanity accompanied by delusions—a case in which the great and critical test of sanity is the absence or presence of hallucinations—but a case of imbecility approaching to idiocy, or amounting to unsoundness of mind. In a case of insanity accompanied by delusions, the mode of investigating it, so as to arrive at the truth, is a matter of great difficulty and doubt; but in a case of imbecility, where there is either no mind at all or next to none, the task of coming to a right or just decision is com-

paratively easy. It is impossible for a man who is said to have only a limited amount of mind, or none at all, to assume at any moment or for any purpose a greater amount of mind than he really possesses. If the mind is not there, or only there in a certain small and limited quantity, no desire on the part of the individual to show a greater amount of mind, or to assume the appearance of a greater amount of mind, can supply him with that which nature has denied him. Hence when a man is charged with imbecility, if it can be shown that for a considerable time and in various situations he has acted like a natural being, any acts of folly which might be alleged against him should be carefully, deliberately and keenly investigated, because at first sight it is next to impossible that a man can at certain times assume a mind and intelligence which are wholly absent."

Cairns was never given, like Jessel, to bringing his own individuality into a decision. A man of fine classical and literary attainments, his opinions are never stilted or academic. The frugality of the style by which he conveys his unbounded fertility of thought is truly remarkable. Of words or illustrations or expository digressions, he is sparing almost to the point of barrenness—he is so terse as to be almost cold; he never relaxes for a moment the tension of the argument.

All the characteristics just mentioned point toward the most conspicuous quality of his opinions—lucidity. The most complex legal problem presented no difficulties to him. Such was his intuitive insight into legal principles that by his simple statement he would place it in so simple and clear a light that one wonders why there should ever have been any doubt about it. He disembarrassed himself of details and grasped principles, and by strict logical deduction from general principles about which there could be no dispute he not only settled the law, but also terminated discussion.¹ He had, moreover—and this was his crowning gift—that cultured imagination which is essential to the highest juridical art. Imag-

¹A comparison between his solution of the case of *Goodwin v. Roberts*, 1 App. Cas. 488, with Chief Justice Cockburn's judgment in the lower court (10 Ex. 337) will illustrate his habit of seeking ultimate principles.

ination, after all, is, for the most part, simply depth and breadth of insight; and, far from being detrimental to judicial thought, surely no quality could be more desirable in the administration of the law than the intellectual and imaginative insight which goes to

was involved. Cairns' solution of the problem by reference to the going concern as a "fruit-bearing tree" is highly imaginative, and was so convincing that further discussion ceased. In the vibration case of *Hammer-smith Ry. v. Brand*, 4 E. & I. App. 215,



LORD JUSTICE JAMES.

the heart of things and expresses in perfect form a rule for future guidance. The luminous effect of Cairns' imagination may be observed to splendid advantage in the case of *Gardner v. London, etc., Ry.*, 2 Ch. App. 201, on the vexed question of the relative rights and obligations of railway companies and their debenture holders. The briefs of counsel on either side will indicate the doubt and conflict of opinion in which the subject

involving the right to recover for damage incident to authorized acts, he failed for once to convince his colleagues.

Probably his most important contributions to the law lie within the domain of company affairs. But these are scarcely superior to his judgments in cases of contract. One of his most original contributions to jurisprudence is his series of decisions as arbitrator in the complicated affairs

of the Albert Insurance Company. This company was the final result of various financial transformations, and many of the claims against it turned upon the doctrine of novation. Cairns took an advanced position with respect to the assent of the debtor

As a law reformer he was a worthy succession of Westbury. Although the Judicature Act of 1873 was passed under Lord Selborne's chancellorship, public opinion had been aroused and the main outlines of the reform suggested by Cairns, who was



LORD JUSTICE KNIGHT BRUCE.

to novation, justifying his position by considerations drawn from the rapidly changing nature of commercial transactions in the present day. (See Cairns' Decisions in the Albert Insurance Company Arbitration, 1870-'72, particularly Kennedy's case, p. 5.)¹

¹Following is a full list of Cairns' most important opinions: Company law — *Erlanger v. Phosphate Co.*, 3 A. C. 1234; *Ashbury Ry. Co. v. Ritchie*, 7 E. & I. App. Cas. 663; *Peek v. Gurney*, 6-402; *Reese Mining Co. v. Smith*, 4-77; *Houldsworth v. Evans*, 3-263; *In re Reese*

chairman of the first Judicature Commission of 1866. It was he who influenced the modification of the act so as to retain the final appellate jurisdiction of the House of Lords. Among his other legislative achievements are the Conveyancing Act, the Vendors' and Silver Mining Co., 2-604; *Gardner v. London, C. & D. Ry.* 2 Ch. App. 201; *Hoole v. Gt. Western Ry.* 3-262; *Princess of Reusse v. Bos.* 5 E. & I. App. 199; *Evans v. Smallcombe*, 3-249; *Gillespie v. Glasgow Bank*, 4 A. C. 636.

Purchasers' Act and the Registry Act. The only statute which bore his name, however, was the act enabling the Chancery Courts to give damages in lieu of specific performance or injunction.

Hatherley (1868-'72) sustained on the woolsack the reputation which he made as Vice Chancellor. He was an accurate and sound judge, although somewhat overshadowed by his distinguished contemporaries. He thought so quickly and expressed his opinion so readily (he always delivered oral judgments) that his opinions lacked form. Lord Campbell, on appeal, once commented strongly on the "prodigious length" and slipshod style of his judg-

Contracts — *Cundy v. Lindsay*, 3 A. C. 463; *Rossiter v. Miller*, 3-1129; *Hussey v. Horne-Payne*, 4-316; *Brogden v. Metropolitan Ry. Co.*, 2-672; *Rhodes v. Forwood*, 1-261; *Thorn v. Mayor of London*, 1-126; *Lakeman v. Mountstephen*, 7 E. & I. App. 20.

Torts — *Metropolitan Ry. Co. v. Jackson*, 3 A. C. 196; *Dawkins v. Rokeby*, 7 E. & I. App. 753; *Bridges v. No. Condon Ry.*, 7-537; *Hammersmith Ry. v. Brand*, 4-215; *Rylands v. Fletcher*, 3-330; *Prudential Ins. Co. v. Knott* 10 Ch. App. 144.

Wills — *Fulton v. Andrew*, 7 E. & I. App. 456; *Omahoney v. Burdett*, 7-392; *Hill v. Crook*, 6-283; *Harrington v. Harrington*, 5-103; *Sackville West v. Holmesdale*, 4-571; *Bowen v. Lewis*, 9 A. C. 904; *Singleton v. Tomlinson*, 3-413; *Thomson v. Eastwood*, 2-227.

Mercantile law — *Bowes v. Shand*, 2 A. C. 455; *Goodwin v. Roberts*, 1-488; *Ward v. Hobbs*, 4-19; *Steel v. State Steamship Co.*, 3-75; *Vyse v. Foster*, 7 E. & I. App. 728; *Morgan v. Laixviere*, 7-429; *Shotsman v. Ry. Co.* 2 Ch. App. 332; *In re Agra & Masterman's Bank*, 2-391.

Miscellaneous — *Lyon v. Fishmonger's Co.*, 1 A. C. 670 (riparian rights); *Swindon Waterworks Co. v. Nav. Co.*, 7 E. & I. App. 701 (do); *Kendall v. Hamilton*, 4 A. C. 512 (joint and several liability); *Doherty v. Allman*, 3-716 (injunction); *Singer Mfg. Co. v. Wilson*, 3-381 (trade mark); *De Thoren v. Atty. Gen.*, 1-688 (Scotch marriage); *Clark v. Adie*, 2-317 (patent); *Harrison v. Anderson Foundry Co.*, 1-575 (do); *Corser v. Cartwright*, 7 E. & I. App. 734 (estate); *Nickalls v. Merry*, 7-538 (broker); *Shropshire etc. Co. v. Queen*, 7-504 (equitable mortgage); *Beattie v. Lord Ebury*, 7-108; *Lamaire v. Dixon*, 6-474 (specific performance) *Ferguson v. Wilson*, 2 Ch. App. 77 (do); *Maxwell v. Hogg*, 2-307 (copyright); *United States v. Wagner*, 2-582 (foreign state as plaintiff); *Patch v. Ward*, 3-203 (fraud); *Lloyd v. Banks*, 3-488 (notice); *Parker v. McKenna*, 10-114 (trustees); *Wilson v. Merry*, 1 Sc. & Div. App. 328 (fellow servant); *Redsdale v. Clifton*, 2 P.D. 276; *Attwood v. Maude*, 3 Ch. App. 369; *Gisborne v. Gisborne*, 2 A. C. 300.

ments. He was amiable and exceedingly religious. "The monotony of his character," said Westbury, "was unrelieved by a single fault."¹

Sir John Romilly (1851-'73) presided over the Rolls Court during this period, when the work of the court was rapidly increasing. His numerous decisions display industry rather than breadth and grasp. His haste in disposing of cases led him sometimes to decide without sufficiently considering the principles involved and the precedents by which they were governed, and he was often reversed on appeal.

Vice Chancellors of various degrees of ability served during this period.

Upon the promotion of Knight Bruce in 1851, of Turner in 1853, after a short service as Vice Chancellor (1851-'53) to the Court of Appeals in Chancery, and of Rolfe (1850-'51) to the woolsack, the office was held during the next fifteen years by Kindersley (1851-'66), Stuart (1852-'71) and Page-Wood (1853-'68).

Kindersley was a sound equity lawyer, whose decisions were seldom reversed. His opinions are, as a rule, based upon broad principles, and bear the impress of a superior mind and sound judgment. Stuart was the weakest of the later Vice Chancellors, and was generally reversed on appeal. A witty counsel once placed an appeal from his decision on the calendar of motions of course. Page-Wood was one of the most competent and satisfactory judges who held this office. It was as Vice Chancellor that he laid the basis of the reputation in equity which led to his appointment as Chancellor.

¹ *Castrique v. Imrie*, 4 E. & I. App. 414; *Barber v. Meyerstein*, 4 do. 317; *Aister v. Perryman*, 4 do. 521; *Knox v. Gye*, 5 do. 656; *Daniel v. Metropolitan Ry.*, 5 do. 49; *Overend v. Gurney*, 5 do. 480; *Rankin v. Potter*, 6 do. 83; *Bain v. Fothergill*, 7 do. 170; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Thorn v. Mayor of London*, 1 do. 120; *Rhodes v. Forwood*, 1 do. 256; *Bowes v. Shand*, 2 do. 455; *Brogden v. Metropolitan Ry.*, 2 do. 666; *Rossiter v. Miller*, 3 do. 1124; *Kendall v. Hamilton*, 4 do. 504; *Sturla v. Freccia*, 5 do. 623; *Harrod v. Harrod*, 1 K. & J. 4; *Reade v. Lacy*, 1 J. & H. 524.

The principal Vice Chancellors during the latter period of the Court were Malins (1866-'81), and Bacon (1870-'86). Giffard (1868-'69) and James (1869-'70) spent a brief period in this court on their way to the Court of Appeal, and Hall (1873-'82) was not particularly distinguished. Malins, in spite of judicial peculiarities, was a compe-

tent equity lawyer, and the reports contain some excellent expositions by him of various branches of real property law. Bacon, the last of the Vice Chancellors, was a man of varied accomplishments, not the least of which was the literary skill which makes his opinions such entertaining reading.

BELDEN'S CLIENT.

BY JOHN B. MORGAN.

JAMES BELDEN was an old lawyer who had practiced for nearly half a century in a county seat town in the Western Reserve. He had never risen to the dignity of a judge but, in his day, had enjoyed a large and fairly lucrative practice. It had brought him a competence and the respect of his neighbors, and now, relieved of active duties, he had reached that age and place in life where he loved to talk of incidents in his career.

Exclusive devotion to his profession had made him narrow. His stories were all of the law, and most of them were of his own triumphs. And ordinarily he found more pleasure in the relating of them than did his auditors in the hearing thereof. But he had one good story and he had told it so often that he could tell it fairly well. This story was his pet. But he never could be induced to tell it till he had almost distracted his hearers with a recital of his dullest and many more than "twice-told" tales. However, if they had listened attentively and with apparent interest, he would tell them of his client, John Fleming.

"One morning, about ten years after I had located here, in casually glancing over the half dozen letters of my morning mail, I observed one directed to me in red ink. I opened it first, and found a short, well written business letter, enclosing me for collec-

tion a claim against a party then residing here—all written in carmine ink. I acknowledged receipt of the letter, inquired about some matters necessary to know before proceeding, and the reply came promptly in the same fiery color. The correspondence thus far had informed me that the writer, John Fleming, was a storekeeper in a small town in the northern part of the county. After some further correspondence each way, this matter was closed, and nothing of the transaction remained to impress me but this one unusual departure from the approved style of ordinary business correspondence.

"Several years after this, when I had almost forgotten the incident, a deed was handed me by a client for examination. One of the subscribing witnesses had signed in red ink, and the signature read John Fleming. And on several subsequent occasions, various papers, bearing this signature and always in the same careful handwriting and the brightest of red ink, passed through my hands. I could not help wondering what strange whim prompted him to it. I had noted this peculiarity of the man till I was more likely to be impressed with its absence than its presence.

"One day I received a note requesting me to come to the county jail at once. It was

signed John Fleming, but the body and signature of the note were in black ink. I at once recognized the handwriting, and, though the note was a little off color, so to speak, I went in answer to the summons. I found a man past middle life, detained on the charge of intoxication and not yet fully recovered from that condition. To this time I had never seen the John Fleming of whom I am talking, but in a short conversation with the prisoner, I learned that he was my Fleming—"Reddy Fleming," as I had once called him to my clerk. The matter was arranged, as such things usually are, by a plea of guilty and the payment of a light fine. In the course of the proceeding, it became necessary for my client to sign his name, and I, meaning to show that I remembered his methods, dipped the pen in red ink before handing it to him. But with a show of anger, he flung it aside. This transaction closed, I never saw him again.

"About three years afterward, a lady called at my office to secure my services in the probating of a will, which, she informed me, her husband had drafted himself. I took the document to examine it and every word, save the signatures of the witnesses, was written in bright red ink. It was the will of the erratic Irishman, Fleming, whom I was informed, had died recently.

"The will was filed, the subscribing witnesses, one of whom was the family physician of the deceased, answered the formal questions as to execution and capacity satisfactorily, and the last will and testament of

John Fleming was, after a few facetious remarks by the court about the grotesque appearance of so sombre a document, duly admitted to probate.

"I asked the doctor to accompany me to my office, which was near at hand. As soon as we were there, I told him of my experiences with the deceased; at which he smiled dryly. Then I asked him rather bluntly, 'But was he sane?' He thought a moment and then said, 'Let me explain. Fleming was a man whose whole life was dominated by one great vice. It was his absolute master when he yielded to it; and, when for a time he had subdued it, he seemed strangely impressed with a fear that he might be suspected of being under its spell. He was a periodical drunkard; the drunkest of the debauched, when on his sprees, and the soberest of sober men in the intervals between. When not drunk, he was more careful of his reputation for temperance and sobriety than the strictest of prohibitionists, and always fearful that some one might suspect that he had been drinking. This state of mind led him to many absurdities. He sought to impress his acts, when not under the control of his evil appetite, with some distinguishing features. He had unusual ways of doing certain things when sober, apparently to draw attention to the fact that he was sober. His unvarying habit of writing with red ink when not under the influence of drink, which no doubt led to your question, was one of these. Yes, he was sane, unquestionably sane.'"

STUDIES IN GOLD BRICKS.

My Client Who Bought One.

IT was the old story. The noble Red Indian had found a mine. He wanted money for a medicine dance on the grave of his dead brother. He escaped from the res-

ervation and came East with the gold brick wrapped in a fine figured oil-cloth. A kind go-between introduced the farmer to the Indian lurking in the woods, fearing recapture and return to his reservation. But

much as I had heard of gold bricks I never came in touch with the subject until I prosecuted and convicted the kind go-between.

The Witness Who Had Bought One.

To prove that the kind go-between knew brass filings from gold and was not himself deceived we imported a witness from Indiana. On direct-examination he identified the man, the Indian, the oil-cloth and the style of brick which he had himself bought. On cross-examination he testified:

Q. Where did you get the money to buy this brick you say you bought?

A. Wal, I guess I borrowed enough.

Q. From whom did you borrow it?

A. Wal, from the bank in our town.

Q. (Scornfully) Did you tell them what you were going to buy.

A. (Placidly). Cert. I told them jest that.

Q. And you mean to say they lent you money for that?

A. Wal, I guess I was President of that bank.

Just then there was a commotion in the dock, and those near the prisoner heard him whisper excitedly to his counsel, a good fellow; who afterwards told me that the remark was:

“For heaven’s sake bail me out for half an hour and I’ll sell him another.”

The Man Who Bought Two Gold Bricks.

But the sale of a second gold brick is no fantasy. That is an Alabama story. At the end of a year the gold brick men returned to the farmer, who ought to have been sadder and wiser, and said they owed him both apologies and compensation, that they had treated him badly and were sorry. “But one basic proposition you must admit,” said the spokesman. “There must be some good gold

bricks sold or else there would never be so many bought in the United States of America.”

Yes. After argument he admitted that. It was but a short step to the purchase of the second brick by a man who was convinced that the real regret of these kind men had led them to choose him as the purchaser of the genuine one, which was to be their text thereafter.

The Man Who Did Not Buy the Gold Brick.

A year after my trial I started to tell the story to a visitor from Detroit. He was a man of a few words, and after my second sentence he fired up with questions. “Indian from Reservation? Medicine man dance on grave? Oil-cloth wrapper?” “Yes,” said I, when he drew breath. “Well,” said he, “I’ve met that brick. Would you believe it a client came in to me to borrow money on mortgage to buy it. He wouldn’t be reasoned out by me, so I took him to the local editor, the local banker, the local jeweller, and got their opinions on gold in bricks. At the end he said he respected my advice and wouldn’t buy any gold against it and didn’t. But to this day he believes I did him out of four thousand at least.”

Another Kind of Gold Brick.

What is the difference between a farmer and a gentleman farmer? You can’t guess? “Why a farmer makes money in the country.” Well? “And buys gold bricks in the city.” “Oh!” said my friend. “Yes, I do some farming besides my law business, and one day I heard that among lawyers I was considered a farmer, and among farmers I was considered a lawyer. I guess you mean the same thing.”

A PHILIPPINE PETITION.

By W. F. NORRIS.

AT the taking of the city of Iloilo by the Americans about one-half of the place was destroyed by fire set by the insurgents as they withdrew from the city. Numerous claims for indemnification have been filed with the Board of Officers convened to pass upon claims arising from the insurrection in the Philippines, and among them is the following petition, submitted by a Spanish lawyer, who labored under the impression that he had mastered the English language:

To Secretary of the Government from United States in Philippines Islands:

Sir:

Mr. Jose Joaquin Fernandez, a lawyer residing in Iloilo, Concordia Street, with sufficient power of D. Miguel Gomez, authorized in Manila at 18th October last year, before the Notary of the same D. Luis M. Blanco.

To Secretary of the Government from United States in Philippine Islands, respectfully I say:

1—That D. Miguel Gomez of 49 years old, native of Spain, merchand, citizen and domiciliated in Iloilo until month October of the last year that her was going away to Spain where he resides at present in Alicante without actually acquaintance occupation he was in the former date to 11 February of last year, the owner of one fabric of bricks named "La Castellana" situated to access of village La Paz, contiguous to Iloilo to which industry and commerce he was consecrated libing of the products of his own work until his march to Spain.

2—In the morning of eleven of said February my represented had to abandon said fabric as all inhabitants of Iloilo abandoned their own houses when they were surprised by frequent explosions of battering pieces that the American ships, made anchor in bay,

which fabric left in perfect state working when it was abandoned by his owner as it designs in anixed inventory, in which day when the army of the United States occupied military the town of Iloilo they occupied also the contiguous village of Paz and the fabric of bricks which warehouses had been transformed in places of bulls by the same soldiers.

In first dais of November of last year, absent already from this city, D. Miguel Gomez, and occupying yet the American army the said village of the Paz burned the fabric, warehouses and the house in what libed his owner the said Miguel Gomez, having not been able to inquire publicly the motive of the fire.

The losings can it computes according the anixed inventory formed by the damaged owner own in the sum of twelve thousand, seven hundred and eighty-seven pesos (12787 pesos) to which sum it concretes this reclamation.

These are the facts and circumstances in what took place the lsong or damage origen of the reclamation that I direct to the Government of the United States as singular liable by the reasons that I am going to expose.

Without to go in legal appreciations relating to if it proceed or not legally the bombardment to place of Iloilo, by to be opened and by to have not finished the period of the ultimatum that are not of this opportunity, by to be another the cause of the reclamation what there is to determine into of the rules of the international right, if the damages caused in a population occupied military by forces of the army they are imputable to the same by to have caused them directly or for to have permitted them, being able to avoid them that to the cause is it the same and if by consequence of such imputation the Gov-

ernment from which said forces depend it does liable of the same damages.

The rights correspondences between the United States of America and Philippines Islands were initiated to it signes Peaces Treaty in Paris, they consolidated when said treaty ratified by Spain and America and they done capable when the American forces occupied this territory since which act to ondulate in each one populations of the same the standart from that birth, have been transformed in Americans country which inhabitants are or natives or foreigners in order to diferents rights correspondences.

Every births have accepted to the regulation of the rights that about the national territory the foreigners may have, the rules of Estatuto real and these rules maintained by the english Authors of threatises Story and Wharton is to, which has inspired the international right; in force in the United States of America incarnated in the Common Law.

If the Estatuto personal rules to the natives of the territory into of the same and the rights that about him the foreigners may have it rules by the Estatuto real establish-between both there is to agree with Savigny that "to each rights correspondence it is necessary to give it the legal dominion that this correspondence belongs by his nature" and being of ownership in the foreigner citizen, this right correspondence with territory" the unique legal dominion that can give it by its nature, it is not other that respect to that right, and if it had failed to him the immediate reparation of the caused damage, which reparation corresponds in this case to America, then she as all birth assumes herself the collective liability of this subjects.

Such considerations that are in synthesis the doctrinal reason of our right and first foundation of the legality of our petition, they have still most value and effacasy to doing application of them to the facts that motive this reclamation. The first village of this Islands that was occupied with American forces, it was the Paz, precisly in the

same day eleventh of February in which said forces, gone in Iloilo, in which village there is the fabric and warehouses of ownership of Mr. Miguel Gomez and since that date the revolutionaries evacuated completely this zone teking been place the fire of these ownships in full occupation of the American forces, those which to the same time occupied also the fabric and warehouse to their uses own it deducing logical and rationaly of such assertion or that the same american forces were the causers of the fire with the wars motive, or if they were not they not avoided it, dispossessing as they disposed of all material midles in one and another case the reparation od caused damage corresponds to, Government of the United States because under guardship and protection of the American laws there are the persons and ownships of foreigners since that in compliment of Treaty of Paris the Spanish authorities evacuated this territory, as belonging to te United States of America. Of the exposed it deduces the following considerations in which it condences the doctrina of the International Right applicable to the related facts.

1rst. That the caused rights pertubations are not debted the case of *fuorza ma yor* that may have not been able to avoid, unique that exempts of all liability since that the fire it produces to presence of the American forces that occupied to the same time the village La Paz and burned ownships also.

2cond. That american forces into american territory have not assisted to created interests.

3third. That tis fault of protection originaire cause of liability that contracted the state to which those forces represented.

Of these three conclusions it deriviates the perceptive basis of the polite liability that in this writing we treat doing efective Is it general doctrine of International Right maintained for Heffter Sourdat and Dalloz that the liability of a state when into it Territory may meet contrary facts to the security of its inhabitants or it may caused damages

to citizens of a foreigner state can it derives of if it have done immediate application of the existent laws into territory to disturber case or of whether it has proceed in case of that such laws may have not respected with the characterise force of coercion complementary of right. Which conceits the eminent Bluntschl condensed them in doctinary international precepts telling that are liability and states of others, not only of the realized acts in his name or by his order but for to have not constrained to the particular men to violate into the territory the rights of anothers States or those of the natives of the same with legal precept have been accepted as valid by different births desideing analoge questions as decitions of the Court from Sena of 20th July of 1883. 22th February 1836. 23t April 1844. and sentences from Lieja and Gante of 8th March 1849 and 30th May 1851.

By the exposed is it undubtelly that the United States of America from which depend the forces that occupied the village La Paz meeting the fire are directly liability of the damages caused in the ownerships of Mr. Miguel Gomez, which liability we confide it will do effective by the Government of the same, restoring of this manner the damaged right guarantted for the Peace'a Treate from Paris and by international jurisprudence.

3ird. This reclamation does it the Lawyer Mr. Jose Joaquin Fernandez to favor of Mr. Miguel Gomez which personally circumstances are evident above.

4th. The reclamation Mr. Miguel Gomez

to the time causing this reclamation as at present have been and he is the unique and absolute owner of the totally sum reclaimed without participation in it of no other person.

5th. Mr. Miguel Gomez made reclamation to the American Government of six thousand and eight hundred (6800) bricks that hidid from the fabric during the permanency of the american soldiers in the house of his ownership, which reclamation was resolved faforably by the Military Government of this province, habing received the Lawyer that subscribed as powered of the said Mr. Gomez in last mont Juny the sum of one hundred and seventy pesos (170) amount of the six thousand ang eighth hundred bricks for twenty-five pesos (25) the thousand.

6th. The fabric, warehouse and house were not asured by which motive do not accompany the poliza of assurance.

7th. As it has told already this reclamation, makes the Lawyer, Mr. Frederick Soler, residing in Iloilo.

8th. It accompanies to this writing the coppies in inglish of the same and of the inventory unique documents that it presents in this reclamation, which translation is made for the same lawyer who affirms to be true said translation.

I request therefore to the Secretary of the Government from the United States in these Islands has pleassure giving direction to the present reclamation in order to obtain in it day the solicited reclamation.

Iloilo 27th. August. 1900.

(Signed)

JOSE JOAQUIN FERNANDEZ.



The Green Bag.

PUBLISHED MONTHLY AT \$4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,
THOS. TILESTON BALDWIN, 1038 Exchange Building, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetia, anecdotes, etc.

It is a matter of congratulation that the recent meeting of the American Bar Association, at Denver, was, if we may trust the newspaper despatches, the most largely attended meeting in the history of the Association. This was a fitting response to the hospitable efforts of the western members of the Association to make the occasion a success. The next annual meeting will be held at Saratoga; and favorable action was taken on resolutions proposing a congress of lawyers from all over the world to be held at the coming St. Louis exposition.

CURIOUS bits of correspondence come to us. A not uncommon request, from a new subscriber, is that his name be added to the subscription list of THE GREEN BACK — a slip which is easily explained, if four "long greens" are enclosed. The only blunder of this kind to which we object seriously is that of the printer, when he sends page-proofs headed THE GREEN RAG. But what excuse can be offered our readers for such a slip as the omission of a line in an editorial in our last number? What was intended to be said there was that the Frazee bust of Marshall was presented to the Boston Athenæum "in March, 1835, a few months before Marshall's death, and some years before the death of Story, which occurred in 1845."

NOTES.

LORD LUDLOW, who was exceedingly mild when on the bench, saved a witness who was being badgered about a denial of intoxication. The Judge asked him kindly from the bench:

"Did you say 'I was not drunk, sir?'"

"I never said anything about you at all," was the unexpected reply.

It is related of Daniel Webster and Jeremiah Mason that they were once riding the circuit together in the winter season. The snow was deep, and the weather cold, and both were well muffled in buffaloes. Mr. Mason was an uncommonly tall man, and Mr. Webster, it is well known, had a very deep voice, amounting at times almost to a growl. On the road, where it was not very easy turning out, they met a bluff countryman, with his ox team, who shook his goad at them and sang out "Turn out there — turn out!" They gave him half the track, but he insisted upon the whole, and began to threaten, when Mr. Mason began to rise, and rise, until he had got up six feet and more, and, to the astonished view of the teamster, seemed to be going higher, when Mr. Webster growled out in his most bearish manner, "Turn out yourself, sir!" "Gee, gee," cried the teamster, "why don't you gee?" putting the brad into his oxen as he cleared the track for what, to his astonished vision, appeared a brace of giants.

This anecdote reminds one of the case of the gentleman who was riding with a span new turn-out, when he was saluted by a teamster he was about meeting with an imperative order — "Turn out, there! turn out? or I will serve you as I did the man the other day." The owner of the gay equipage, not caring to risk his carriage in an encounter with an ox-cart, took up a position on the extreme right, and waited patiently for the horrid despoiler of vehicles to pass. He could not, however, resist his curiosity to know what dreadful thing the cartman did do; and so, leaning his head out of the carriage, he accosted him with the inquiry, "How did you serve the man the other day?" "How did I serve him?" replied the teamster; "why, he wouldn't turn out, so I turned out myself."

A TRIAL took place at a county assizes in which an alderman of a well-known corporation was plaintiff, and a tradesman of the same town was defendant. The action was brought against

the tradesman for an assault on the alderman by taking him by the nose, and the plaintiff obtained a verdict with forty shillings damages. In the course of the trial, the counsel for the defendant strongly urged the jury that the taking of an alderman of — by the nose could not be deemed an assault, it being a customary salutation among the aldermen of that corporation, and that those aldermen had been led by the nose for years.

THERE is one Iowa lawyer who disregards the ethics of the profession and uses advertising of a unique nature. The following is a copy of his latest letter head:

Office Over First National Bank	TOM H. MILNER <i>Lawyer</i>	"He that loveth pleasure shall be a poor man." —Chancellor Solomon.
Practices in every court on this earthly ball. Expert title perfecter and buys and sells mortgages and makes loans. Am the red-headed, smooth-faced, freckle-punctured Legal Napoleon of the Slope, and always in the saddle. Active as the Nocturnal Feline. Leonine in Battle, but Gentle as a Dove.		
"FEES ARE THE SINEWS OF WAR."		

Mr. Milner's residence is Belle Plaine, Iowa. He is a lawyer of ability, and has acquired a reputation as a criminal attorney. His practice extends all over the State.

The letter-head of which the above is an exact copy is the latest edition in his series of unique letter-heads. The edition before contained the epigram, "Red-Headed but not Comely," which, by the way, Mr. Milner has painted on a sign and hung over the doorway leading up to his office. In the upper right hand corner of the sheet was the following: "Better stalled ox and contentment than great riches. Give me stalled ox." Under the name appeared the following challenge: "I am a Legal Napoleon. Have Been in Many Battles and Thirst for More."

The letter-heads are preserved as curios in every office in which they may chance, but whether Mr. Milner has found the notoriety thus gained to be advantageous in his profession is a matter upon which the records are silent.

IN Curran's last illness, his physician observing in the morning that he seemed to cough with more difficulty, he answered: "That is rather surprising, as I have been practicing all night."

LITERARY NOTES.

THOSE of us who were fortunate enough to enjoy the privilege of listening to the eloquent and scholarly address of Professor Thayer, of the Harvard Law School, in Sanders Theatre on the fourth of February, and the readers of his article on Chief Justice Marshall in the March number of the *Atlantic Monthly*, have looked forward with pleasure to the publication of his life of John Marshall¹ in the Riverside Biographical Series. This book now lies before us. We find in it one defect—its brevity—a defect attributable to the modest size set by the publishers for volumes in this series. This limitation is exasperating in the present instance, because, we make the guess, Professor Thayer had considerable interesting material which the size of the volume made it impossible to use.

The incidents in the life of Marshall are, through the recent celebration, so fresh in our minds that it is unnecessary to mention them here. Nor need we quote from the chapters in which Marshall's opinions and his work and influence on the bench are considered, because in the recent Marshall numbers of THE GREEN BAG we were privileged to quote freely on these points from Professor Thayer's Marshall Day address, much, if not all, of which is embodied in the present volume.

It was a task of uncommon difficulty which Professor Thayer essayed in writing for the general reader a biography of our greatest jurist. To be sure the earlier years of Marshall's life were filled with public activities; but important as were his public services before his accession to the bench, they are relatively unimportant when compared with his great work as Chief Justice. Among the leaders of our bar no one would be better fitted than Professor Thayer to discuss for strictly professional readers the legal work of Marshall and his influence on our system of law and government; but in the third, fourth and fifth chapters, comprising, roughly, a third of the present volume, he has written what may, perhaps, be termed an essay on American constitutional law, on Marshall's constitutional opinions, and on the working of our system of constitutional law, which will be

¹ JOHN MARSHALL. BY *James Bradley Thayer*. Number 7 in the Riverside Biographical Series. Boston and New York: Houghton, Mifflin and Company. 1901. Cloth: 75 cents. (157 pp.)

found to be delightful and instructive reading by both layman and lawyer. There is here the excellent and cultured style, the charming modesty, the deep learning and vigorous thinking which marks all that Professor Thayer writes, — qualities which make us wish that he were a more prolific writer in the fields both of law and of literature.

The frontispiece is an excellent photogravure from the well-known miniature by St. Mémin; but it would have added to the interest of an already enjoyable volume if the traditions of this Biographical Series had sanctioned the use of several interesting and little-known portraits of Marshall, photographs of which are in Professor Thayer's possession.

NEW LAW BOOKS.

A TREATISE ON INTERNATIONAL LAW, including American Diplomacy. By *Hon. Cushman K. Davis*, Late Chairman Committee on Foreign Relations, U. S. Senate. Introduction by *Hon. Henry Cabot Lodge, LL.D.* Annotated and Revised by *Peter F. Healy, D. C. L.* St. Paul, Minn: Keefe-Davidson Law Book Company, 1901. Law lamb, \$3.50; Cloth, \$3.00. (368 pp.)

This little book comes into the world with unusual stir, for it is not only the offspring of a senator, late Chairman of the Committee on Foreign Affairs; but is introduced by a fellow senator and man of letters, and annotated and revised by a doctor of the civil law! It almost reminds one of royalty. "Gentlemen," said Louis XIV, on introducing his little grandson, "this is the King of Spain." The result in both cases was unfortunate.

The title leads one to expect something much more profound from the book, which states itself to be a "Treatise on International Law including American Diplomacy" — all contained in 368 pages, text, notes, appendix and index. International law and American diplomacy must indeed be short and simple subjects to be treated within this compass.

The fact is, the pretence is all in the title, for the book itself does not attempt to cover the ground indicated. The late Senator Davis, whose mind — witness the book — was admirably stored with International law, delivered a

course of lectures, informal talks would be the better term, on International law and one on American diplomacy. The fundamental principles of International law are clearly stated, but in a positive way, without suggesting that the doctrines of the text are disputed or that they are not universally accepted. A single indication of this will suffice to show what is meant. "The general principle of International law is this: That every vessel on the high seas is a part of the territory of the country whose flag it bears," page 188. This may be true: it has the authority of Secretaries of State; but it would not be going too far to oppose the great authority of Lord Stowell, who maintains the contrary. This positive method of statement is apt to mislead, for one might accept it as law rather than as the personal opinion of the writer.

A student would undoubtedly carry away much from the book, but would have to modify his doctrines considerably and broaden them without adequate suggestion from author or editor. Still compression and positiveness have at times an advantage as on page 69, where the privileges and immunities of ambassadors and ministers are admirably summarized; page 95, where the right of *de facto* States to recognition are tersely and correctly stated; pages 97-102 where the question of intervention on behalf of insurgent States is examined; and pages 140-141, dealing with the effect of war on treaties and relations would easily bear quotation. There are other passages scarcely less good, but the scope of the book is so limited, the thread of comment so slender, that it requires considerable courage to call it a treatise.

The style is generally agreeable, always interesting, but is open at times to the charge of informality. In the lectures as delivered, these passages were probably enjoyed but the editor might have revised them with profit to the book. For instance, in speaking of mob violence at Rock Springs, Wyoming, Senator Davis says that the Chinese "were asked by a turbulent mob, composed largely of aliens, to join in a strike for higher wages. John Chinaman did not see it that way, and refused to join," page 63. In another passage he compares Secretary Seward, during the troubles with France about Mexico, to "a blown pugilist, sparring for wind," page 282.

But if the book can hardly be called a treatise either on International law or American diplomacy, much less on both, it is not without a certain value. The influence of Senator Davis was very marked in the last three or four years of his life, and his attitude toward the Spanish troubles as well as on the matter of expansion is here clearly stated. But while these expressions of personal opinion are short, yet they are out of all proportion to the size of the volume, and do not properly belong there.

Dr. Healy has been very painstaking in his annotation and at times the notes are longer than the text. For instance, note 3, page 14, is thirteen pages and note 1, page 141 is longer than the chapter to which it is appended. If the book were a classic, as, for example, Wheaton's, such annotation might be necessary to bring it up to date, or to show the progress of the science since its publication. As it is, one loses the thread of the text. The little craft carries too much ballast.

But if Dr. Healy is not to be blamed for making an earnest attempt to enhance the value of the book, he is to be taxed with many serious misprints or inaccuracies, with which the book is disfigured. Some of these are as follows: page 17, is a direct quotation from, not a paraphrase of, D'Aguesseau; page 26 "Lord" Story is unknown, although Mr. Justice Story is one of our greatest jurists; "Lord Chancellor Jas." Cockburn is fictitious, although Chief Justice Sir Alexander Cockburn is well known to us through the Geneva Award; page 72, "executor" should be executive; page 130, "Humbolt" should be Humboldt; Pitt was Prime Minister and Chancellor of the Exchequer, not "foreign minister"; page 172, Sir Charles Hedges was Judge of the Admiralty in 1689 not in 1869.

The American cases that Dr. Healy cites are well chosen and he deserves great credit for thus treating International law as law proper. But here again misprints occur. For example: page 107, *U. S. v. Pohner* should be *U. S. v. Palmer*; page 165, *The Dos Hermanus* should be *Dos Hermanos*; page 120, *Jackson v. Dunn* should be *Jackson v. Lunn*; page 166, the San Jose Indians should be the San Jose Indiano.

The Appendix contains at least three bad ones: "Marboin" is made Bonaparte's minister of the Treasury instead of Marbois; "Decies"

is made minister of Marine instead of Decrès, page 260, and Bernadotte, the future king of Sweden loses his identity in Revendotte, page 258.

The Appendix, in addition to the lecture on American Diplomacy contains an abstract of the Treaty of Westphalia and Professor Lieber's famous "Instruction for the Government of the Armies of the United States in the Field," for which no credit is given to the codifier.

To the many friends and admirers of Senator Davis the book will be pleasant reading, but it is too short, too summarized and the style hardly such as to make it a text-book for schools or colleges.

A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. BY *Henry Brannon* (Judge of the Supreme Court of West Virginia). Cincinnati: W. H. Anderson & Company. 1901. Cloth. (ix + 562 pp.)

Judge Brannon has taken as the subject for his treatise Section 1 and Section 5 of the Fourteenth Amendment. The discussion falls, in a general way, under four heads; first, citizenship, under the first clause of Section 1; secondly, privileges and immunities of citizens of the United States, and thirdly, life, liberty and property, and equal protection of the laws,—all under the second clause of Section 1; and fourthly, Federal processes to enforce the Amendment. The clause relating to privileges and immunities arising from national citizenship Judge Brannon agrees with Judge Cooley in thinking not essential, since, even in its absence, a privilege or immunity based on national right could not be abridged by State action; for, to quote the present author "a power to protect Federal privilege or immunity, would, without the amendment, reside in the Federal judiciary, and likely in Congress." (p. 62.)

The questions of citizenship, of privileges and immunities, and of the enforcement of the amendment are considered at sufficient length: but the larger part of the present volume is, rightly, devoted to the consideration of the clause which is the core of the amendment—"nor shall any State deprive any person of life, liberty

or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In view of the vast number of cases to which this most important amendment to the Constitution has already given rise, it is somewhat surprising that the present volume should be the only treatise devoted exclusively to this amendment and to the cases bearing upon it. The tendency to invoke its aid is seemingly increasing. Undoubtedly the Fourteenth Amendment changed radically the relations between the Federal government and the States; but it is well to bear in mind that the clause quoted a few lines above created no new rights of life, liberty, or property; as Judge Brannon puts it, this clause "is only Magna Charta over again." What it did do was to give to the Federal government power to enforce, as against the States, rights already recognized by previous amendments to the Constitution.

Under the general heads of Life, Liberty, Property, Due Process of Law, Police Power of States, Judgment without Service of Process, Business Licenses, Taxation, and Equal Protection of the Law, Judge Brannon has discussed with fine legal acumen this most important clause, citing, quoting at considerable length, and commenting upon the important cases bearing upon and construing it. His treatment shows a good grasp of his subject. We should have been glad to find a more extended study of certain of the important lines of cases, as for example, those having to do with the assessment of betterments for local improvements, of which *Norwood v. Baker*, 172 U. S. 269, is the leading case; but an exhaustive examination of every subject arising under the amendment was, of course, impossible. We note, here and there, a somewhat careless arrangement, as, for instance, in Chapter 15, entitled Taxation, the latter half of which includes such subjects as police power over vagrants and drunkards, heating cars by stoves, petroleum illumination, killing of unlicensed dogs, and restriction by a State to its own citizens of the right to take fish from State waters,—all subjects coming under the Fourteenth Amendment, but hardly to be looked for under the title Taxation. But this is a minor defect, outweighed by the general excellence of the book.

CYCLOPEDIA OF LAW AND PROCEDURE. Vol. I. Edited by *William Mack* and *Howard P. Nash*. New York: American Law Book Company: 1901. Law sheep. (v + 1160 pp.)

The appearance of the first volume of the *Cyclopedia of Law and Procedure*, which is to be completed in thirty-five volumes, deserves more than passing notice. When one thinks of the amount of painstaking labor involved in preparing even a short treatise on some one subject of the law, the work involved in a scheme to cover, in an adequate way, the whole legal field, seems stupendous. It is, indeed, a task beyond the powers of any one man; but many marvelous things are accomplished by co-operation,—and not the least marvelous among them is a Cyclopedia like that the first volume of which is before us.

There was a time in the past when we felt a prejudice against such a publication as this. That was before we had made use of it. The scheme seemed too ambitious. Experience has shown, however, that a general plan like that embodied in this Cyclopedia can be successfully carried out. Such a work, carefully edited and planned, and its articles written by competent hands,—such is the case in the present instance, if we may judge by the initial volume—is of great value to the active lawyer,—especially to one whose practice covers a wide range of subjects. Particularly valuable must such a Cyclopedia be to the lawyer outside of the few large cities, whose office is not next door to the well-stocked library of some bar association.

The subjects treated in the present volume run from "A" to "Affidatus." Among the longer and more exhaustive articles are those on Abatement and Revival, Accounts and Accounting, Acknowledgments, Actions, Admiralty and Adverse Possession. Each of these, covering respectively between one hundred and two hundred pages, is a moderately full treatise on its particular subject.

The practice, as in this publication, of printing the names of the authors of the principal articles is to be commended. Among the more prominent contributors to this volume are Mr. Justice Wilkes of the Supreme Court of Tennessee, who writes on "Abstracts of Title"; Mr. Justice Lewis, of the Supreme Court of Minnesota,

whose article deals with "Adulteration"; Mr. Justice Cole, of the Supreme Court of the District of Columbia, whose subject is "Adjoining Land Owners"; George Hoadly, of the New York bar, who treats of "Acknowledgments"; and Seymour D. Thompson, the well-known legal writer, who contributes a valuable article on "Accord and Satisfaction."

Among the minor good points of the *Cyclopaedia* is, in the principal notes, the grouping in separate paragraphs of the citations from the various States. The excellent binding, which allows the pages to lie flat when the book is open, deserves mention.

THE JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION. New Series, No. VII. Edited by John Macdonell, C.B., L.L.D., and Edward Manson. London: John Murray, 1901. (145 pp.)

It is interesting to note that five out of the sixteen articles in the current number of this *Journal* have to do with South African affairs, if in this list is included the article on "Military Service and Immunity from Arrest," which cites the decision of the Supreme Court of Ceylon holding, on the ground that "in times of war the claims of individuals must give way to the paramount right of the Queen to the services of her subjects," that a warrant of arrest (asked for, apparently, under a statute allowing arrest of a defendant about to leave the island) could not issue against a resident who had enlisted as a volunteer and was about to sail for South Africa on active service.

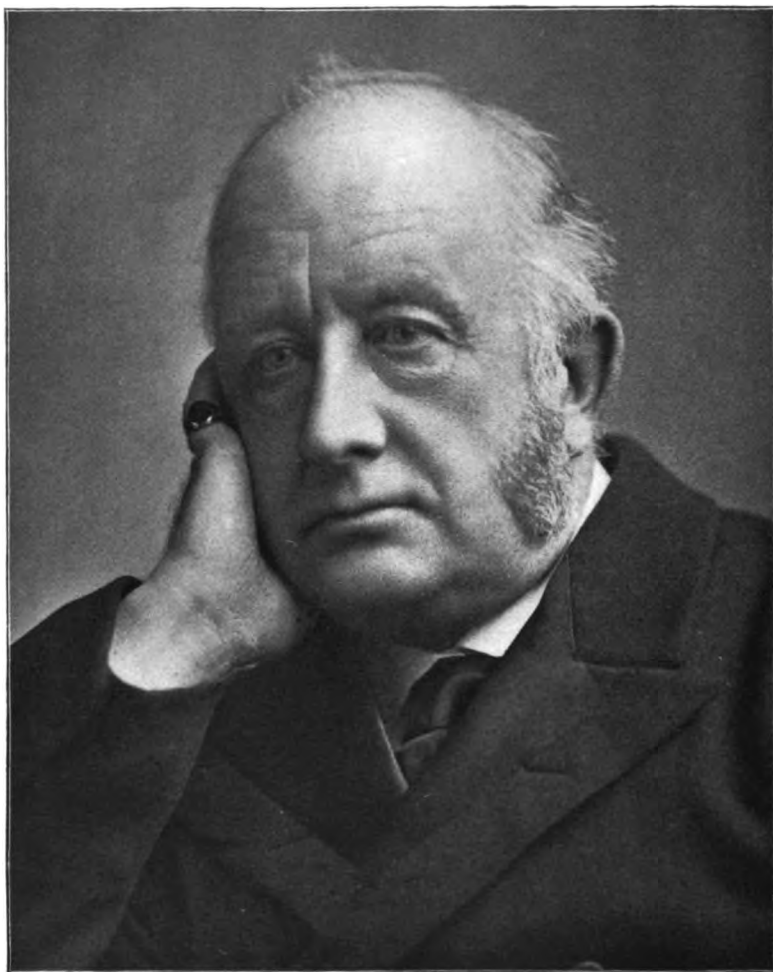
The leading article, "The Law of South Africa," contributed by the Chief Justice of Cape Colony, maintains that the law for the newly acquired provinces should continue to be the Roman-Dutch law, modified by local legislation. It is pointed out that "a difference of opinion among judges in the South African Courts upon disputed questions of law is of rare occurrence";

that Dutch jurisprudence was progressive; that the excessive punishments allowed under the Dutch law have, in fact, been mitigated by tacit arrangement among the judges; and that it has been judicially decided that any Dutch law "which is inconsistent with well-established and reasonable custom, and has not, although relating to a matter of frequent occurrence, been distinctly recognized and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse." This same view — against forcing upon the South African provinces a code of laws based on English law — is advocated in a later article on the "Vitality of Roman-Dutch Law;" to which last-mentioned article are added some interesting notes on the "Developments of Modern Dutch Law." The fifth South African article treats of "High Treason in Natal."

Two interesting articles relate to the jurisprudence of India. In the first, "The Influence of English Law and Legislation upon the Native Laws of India," the conclusion is reached that while both direct legislation and silent and indirect methods have left a "permanent impress of British administration upon the native laws," yet "the native races of India still enjoy the great privilege of being governed by their own laws, intelligently and honestly administered, in respect to those matters which more directly appeal to their religious sentiments or social usages. No conquered races, in fact, have ever felt the rule of the victor less oppressive." The second of these articles, by the Vice-Chancellor of the Punjab University, deals with "English Jurisprudence and Indian Studies in Law."

Among the other articles may be mentioned that on "Lèse-Majesté in Germany," from which we quoted last month; the synopsis, by A. Wood Renton, of the tests of criminal responsibility in mental disease which have been adopted in seven different countries, including the United States; and the summaries of French, and of German legislation in 1900.





LORD ALVERSTONE,
Lord Chief Justice of England.

The Green Bag.

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OCTOBER, 1901.

LORD ALVERSTONE, LORD CHIEF JUSTICE OF ENGLAND.

THE promotion of Lord Alverstone from the Mastership of the Rolls to be Lord Chief Justice has been hailed with pleasure alike by lawyers and laymen in England, for by common consent he was the fittest man at the bar or upon the bench to succeed the late Lord Russell of Killowen in that exalted position. To most people, and particularly to most Americans, he is better known as Sir Richard Webster. It is too often the case that when elevated to the peerage the new peer takes a title which hides his identity to such an extent that the name under which his success has been achieved is no longer known to the public. It would seem to be a needless penalty of greatness, and one that might easily be avoided. If after length of years, to which it is devoutly to be hoped the new Lord Chief Justice may attain, the people become accustomed to the new name and learn to associate it with the old, comparatively little confusion will result. At present, however, while every fairly well-informed man in England knows Sir Richard Webster, it is only the very few, outside the legal profession, who could recognize him in "Lord Alverstone." Sir Charles Russell assumed the name of Lord Russell of Killowen (his old home in Ireland) when elevated to the bench, after which occasion he was given a life peerage. Lord Coleridge, his predecessor, was Sir John Coleridge at the bar and on the bench before becoming a peer. His predecessor, in turn, declined a peerage and was always known as Sir Alexander Cockburn. Thus it happens that while for many years the office of Lord Chief Justice has been filled, as at present, by an

eminent advocate, this is the first occasion in this long period when the occupant has assumed another name than that under which the distinction has been won.

On the other hand the late Lord Esher, so long Master of the Rolls, was Sir William Balfour Brett at the bar and Lord Justice Brett during a part of his long and distinguished term on the bench. Comparatively few American lawyers hunting through the English law reports would identify Lord Justice Brett with Lord Esher, and yet they are the same person. Lord Justice Lopes became Lord Ludlow, and Sir Henry Hawkins, who was for a long time the most conspicuous figure on the Queen's Bench, is now a Law Lord in the House of Lords, where he sits as Lord Bramwell.

Lord Alverstone, like his predecessor, looks every inch the Lord Chief Justice. He is of commanding stature, with a massive intellectual head and an expressive countenance. He may lack the piercing eye and the severity of demeanor of Lord Russell, but he will have equal dignity and added graciousness of manner and a never-failing courtesy. He will rule with firmness but with less of the dominating spirit and open scorn of technicalities so frequently displayed from the bench where he now sits. He may not so quickly and so unerringly arrive at the kernel of truth in the mass of husks as his predecessor did, but he will administer justice just as evenly and truly and will quite as conspicuously maintain the best traditions of the high office to which he has been called.

Lord Alverstone has gained his place by

great natural ability and still greater capacity for hard and unceasing work. While at Cambridge he took excellent rank among the scholars of his time, and upon being called to the bar in 1868 soon began to get work, not from favor but through merit. One of his earliest cases was an action against the London and North Western Railway Company, one of the largest and most progressive railway lines in England. The skill he displayed and the manner in which he had worked up his law and his facts so impressed the law department of the Company that he was soon afterward given a retainer for the Company, and thenceforward until, through accepting the post of Attorney General, he was obliged to abandon his private practice, he represented that railway in all its legal affairs. The honor of "silk" was conferred upon him in 1878, when he had been only ten years at the bar, and seven years later, in 1885, he was appointed Attorney General, which post he filled, except for a brief interval, until 1890, when he was raised to the bench as Master of the Rolls. During most of the time he occupied that office the present rule which prevents its holder from engaging in private practice did not prevail, and he was therefore free to continue to serve his personal clients. It is doubtful if any advocate at the English bar, or at any bar, ever had the variety or even volume of business which was thrust upon Sir Richard Webster. He was equally at home in the common law and chancery courts, while there was hardly a case of prominence in admiralty, the ecclesiastical courts or divorce in which he did not appear. In the lucrative work of condemnation and compensation cases he was an acknowledged authority, while in patent law and in everything requiring a special knowledge of science he was supreme. In fact he was in every thing which human ingenuity can find an excuse to fight about. The following clever lines were written upon him as an impromptu by Mr. La Vie, one of the Regis-

trars of the Chancery Division, while he was making an argument in a patent case which turned upon the various methods of the carbonization of thread:

" 'Twas no mean workman that devised
A speech of such electric force ;
Successfully he carbonized
The thread of his discourse.
Logic and fact so close were packed
That Webster to his purpose bent
Even a cotton filament ! "

The volume of work which he got through with was enormous, and as he was wanted by everybody and everywhere his fees were correspondingly high. Even the arbitrarily adding of a special fee to those ordinarily given made no diminution in his business, but rather increased it. To get through his work required an application which few men are capable of or have the physical stamina to endure. The story is told of a junior who was asked by Webster, who was leading him, to come to a consultation at Sir Richard's residence at half-past five o'clock in the morning. The junior to make sure of keeping the appointment remained up all night. He found his leader, however, fresh from a good night's rest and having already got through with several sets of papers in anticipation of the day's cause list.

The physical strength and continued "fitness" of Lord Alverstone have always been a great factor in his success. At the University he gained his blue by winning the two-mile inter-university race, and through all his career, and no matter how hard pressed with work or social engagements he has kept up his athletic exercise. His country residence in Surrey has among the other attractions of its park a well kept cricket ground, and for years every summer he has taken great pleasure in getting up a match with the Old Carthusians, the team of "old boys" of Charter House, his public school. He is one of the most formidable of his own side, both at the bat and in the field. He is still an excellent player of the ancient

game of tennis, and at fifty-eight years of age can hold his own with the great majority of amateur players irrespective of age.

Like Lord Russell, Lord Alverstone is a great friend of America and Americans, and many members of the American bar have enjoyed his hospitality. He twice represented Great Britain in international arbitrations, in which he met leading American counsel and judges, first at the Behring Sea Arbitration and afterwards at the Venezuela Arbitration. He has been an intimate friend of the representatives of the United States at the Court of St. James, and while holding them all in the highest esteem was particularly a close friend of Mr. Bayard. Nearly his first public appearance as Master of the Rolls was at the banquet of the Bench and Bar of England to the Bench and Bar of the United States. In proposing on that

occasion "Other Guests," that is the guests other than those from the United States, he said: "It has been my privilege to be closely associated with many distinguished members of the American Bar, probably except the Lord Chief Justice, whose absence we so much deplore to-night, there is no one who has had more intimate connection with distinguished barristers from the United States. And I desire to bear my testimony to the fact how thoroughly they appreciate not only the principles of law we respect, but the traditions of the great profession in which we have been brought up."

It is with gratification that it may be added that among the very first gatherings which Lord Alverstone attended in his official capacity as Lord Chief Justice was the Thanksgiving dinner of the American Society in London.

THE NATION AND THE ANARCHISTS.

BY EUGENE WAMBAUGH.

IT IS fortunate that Congress is not in session. To decide what legislation should be adopted for the punishment of successful or unsuccessful attempts upon the lives of public officials is a task of extreme delicacy, calling for calmness and wisdom; and to decide what should be done towards punishing or preventing the mere propagation of opinions naturally leading to such attacks is a task of still greater importance and difficulty. For such decisions as these the days closely following the assassination of a President are obviously unsafe. Nor has there ever been a more inauspicious time for decision than this very autumn of 1901. There have been other equally exciting assassinations, it is true; but, although this is the second time that the people of the whole United States have waited far into the night for the tolling of bells, and the third time that a funeral train has impressively borne

from Washington to the West a murdered President, this is only the first time that the murder has been done in the midst of the peculiarly democratic ceremonial wherein the Chief Magistrate by taking the hand of any comer illustrates the equality of all men before the American law, and the first time that the assassin has been a mere enemy of government.

Yet although in the midst of anger, however just, it is impossible to come to a safe decision, it is inevitable that there should be discussion—particularly among members of the bar. Fortunately, at this very time of excitement the essential feature of the whole matter is brought clearly into view, and this is that the killing of a President differs in kind from the killing of a private citizen, in that the killing of a President disturbs the pursuits of the entire community, takes the government from the hands of the person

chosen by the people, and unsettles the nation's policy, both foreign and domestic.

In short, the killing of a President is a breach of the peace of the whole United States. Hence this crime should not be punished, as now, exclusively in state courts and under the varying statutes of the states—statutes that classify homicide in divers ways, and that provide as the maximum punishment in California death by hanging, and in New York death by electricity, and in Maine perpetual imprisonment; but the crime should be punished under federal statutes and in federal courts and with consequent uniformity of penalty.

What should the crime be called? Not treason. The Constitution says: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The Constitution further provides, as will be well to bear in mind further along in this discussion, that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." This careful definition of treason and of the proof necessary for conviction indicates clearly that the framers of the Constitution kept in mind the history of England, and realized that, as Madison says in *The Federalist*, "New-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other." Even if it were desirable, it would be practically impossible to-day to amend the Constitution by creating new kinds of treason.

Without amending the Constitution there is a possible and desirable remedy, namely, a statutory provision similar to the one now punishing conspiracies to prevent any person from accepting any office under the United States or from discharging the duties thereof. Let there be a new statute punishing any person who prevents, or attempts to prevent, the President, Vice-President, any member

of the Cabinet, any Justice of the Supreme Court or of the Circuit Court or of the District Court, or any member of either House of Congress, or any person elected or appointed to any one of these offices, from accepting or holding such office, or from discharging the duties thereof. Let the punishment for causing death in such cases be identical with the punishment for murder. Let the punishment for smaller injuries and for attempts be imprisonment for a term of years or for life, in the discretion of the judge. Let the punishment of accessories be identical with that of principals. The filling out of this sketch will furnish a series of provisions coming within the constitutional powers of Congress and placing the protection of high federal officials in the hands of the federal courts.

There remains the most dangerous question of all. What shall be done with the person who has committed no overt act? May the anarchist without restriction spread doctrines directly or indirectly counseling assassination? The nation certainly is under no obligation to admit an immigrant holding anarchistic opinions; and, although it is difficult to define such opinions with accuracy, it seems advisable to exact from immigrants an oath to the effect that so long as they remain in the United States they will obey the laws of the nation and of the State and of the municipality, and will recognize the authority of all legally constituted officials. The nation is also under no obligation to transmit by public machinery publications subversive of its own existence, or even publications of an immoral nature; and hence it is proper enough to exclude anarchistic literature from the mails. These remedies, however, are obviously inadequate to prevent the dissemination of anarchistic opinions. Can anything else be done? Yes; it is practicable to punish with fine or imprisonment anyone who makes threats or who counsels violence; but, as it is not expedient to encourage martyrdom, it would be preferable to adopt some less spectacular

remedy. If anarchists make distinct threats of molesting a public official let us take the homely and ancient course of binding them over to keep the peace; and if, without making threats, they give such incendiary counsel that a person following their advice would necessarily interfere with one of the high federal officials heretofore enumerated, let us extend the unexciting remedy and require those who thus counsel violence to give bonds that will be forfeited upon the happening, within a given time, of any unlawful act as the direct consequence of their teaching. The recognizances would not be forfeited unless some act of violence took place, and hence the anarchists might continue to speak freely as long as they chose, or rather as long as they were able to furnish new bonds; but the remedy would probably be far reaching, for the man who has been put under bond to keep the peace seldom causes trouble, and bonds do not grow on every tree.

So much for such threats and exhortations as cannot fairly be deemed peaceable. Yet suppose, as must be supposed, that anarchists are so adroit as not to make threats and not to counsel violence directly—what then? Then it must be frankly admitted that according to the essential theory of our government nothing can be done. The first amendment to the Constitution says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." As Jefferson said in his first inaugural: "If there be any among us who would wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it." Freedom of discussion as to political matters unquestionably has dangers; but so has repression. The present freedom of our institutions is the carefully reasoned result of generations of our predecessors, both here and abroad. The existence and the protection of public officials are not ends, but means; and they are means toward the end that the private citizen may enjoy what the Declaration of Independence calls "certain inalienable rights"—"life, liberty, and the pursuit of happiness." We cannot silence the anarchist without endangering the freedom of patriotic citizens, departing from our high theory, forgetting of what country we are inheritors, and disregarding our mission to our successors. That thought and word and printing-press shall be free is so clearly of the essence of our system, that, if anarchists shall ever provoke us in sudden heat to exchange freedom for repression, then they will indeed have wrought a revolution, and will have destroyed—as in no other way can they destroy—the present government of the United States.



**AN INTERESTING CASE OF DISPUTED IDENTITY, WITH A
PRACTICAL SUGGESTION FOR ITS SOLUTION.**

BY BAXTER BORRET.

IN the ninth century of the Christian era there lived in England a pious king named Edmund, afterwards canonized and known as St. Edmund, King of East Anglia. In the year 870 he was taken prisoner by the Danes, and on his refusal to abjure the Christian faith he was pierced through with many arrows, and gained the Martyrs' Crown. He was buried at the place which memorializes his name to all ages, Bury St. Edmunds, in the County of Suffolk; and, a little later on, King Canute caused a most magnificent abbey church to be erected at the spot, and the remains of the martyred king were translated to this abbey with every circumstance of pomp and ceremonial. So far we are on the safe-ground of undoubted English history, but from this point everything is disputed. The next undoubted fact has occurred in the last three months, when a case containing the alleged body of the martyred king has found its way from the French city of Toulouse to the private chapel of Arundel Castle in the English County of Sussex, en route for the Roman Catholic Cathedral, which is fast approaching completion, almost within the shadow of Westminster Abbey, with the pious intention of the alleged sacred relic finding a last resting-place under the high altar of the new cathedral. These are the facts, and the question at issue is the identity of the relics.

The case set up by the promoters, if we may so call the parties who allege that they are the veritable remains of the martyred king, may be cast in the language of pleadings as follows: Averment. That during the first quarter of the thirteenth century a marauding raid was made by certain Frenchmen, headed by Prince Louis, who afterwards became King Louis VIII. of France, who ransacked the Abbey Church of Bury

St. Edmunds and carried off the body of the martyred king to France, where it has ever remained in the custody of the Holy Church, within the walls of the Cathedral of Toulouse, till the present year.

Plea of the respondent. 1. Denial of the truth of the Averment of the promoter.

2. Responsive allegation: That there were two St. Edmunds buried in the said Abbey Church, one being the King of East Anglia, the other being Archbishop Edmund of saintly rank, and that the body which was feloniously stolen from the said Abbey Church was that of the Archbishop.

3. And for a point of law by way of demurrer upon the pleadings, that the Holy Roman Church, upon their own admission, are in the position of receivers of goods knowing them to have been feloniously stolen, and that the true owner thereof is the British nation and not the Holy Roman Church.

These are the issues of fact and of law. We are only concerned with the issues of fact.

It is not known what evidence it is intended by the promoters to adduce in proof of the identity of the relic with the body of the martyred King of East Anglia.

On the other side it is believed that the evidence of records, of sufficient age and worthy of all credit, will be forthcoming to prove that several decades after the death of King Louis VIII. of France the coffin of King Edmund was opened in the said Abbey Church of Bury by the orders of Samson, the Abbot thereof, in the presence of (amongst other persons) one Jocelyn de Brakeland, a monk of the said Abbey, and chaplain to the said Abbot, who on the spot at the time aforesaid caused a record to be made, which record will be produced from

its rightful custody, and that at the date aforesaid the body of St. Edmund the King, or so much thereof as then remained, was seen and fully identified by the parties aforesaid. It is further believed that other records of the said Abbey will be produced to prove that after the alleged robbery of the sacred relic many notable miracles of healing continued to be wrought at the shrine of the said martyred king, notwithstanding the alleged abstraction of the saint's body, which miracles are vouched for by the records of the said Abbey, and are incompatible with the abstraction of the saint's body. And rumor, which is always busy, says that the answer of the Holy Church will be to the effect following: It would be impious to deny the truth of the pious records of these holy monks; nevertheless, the fact is, that while the greater part of the body of the martyred saint was carried away to France, one portion thereof, to wit: one arm, was left behind in the said Abbey Church, which part was of itself fully competent to work miracles of healing, notwithstanding the abstraction of the rest of the body of the said saint and martyr.

We hope we have herein laid before our readers the points of a most interesting issue of identity, gathered from the columns of English newspapers, now greatly disturbing the minds of many English people, Catholic as well as Protestant.

Might it not be well in so important an issue to invoke the assistance of experts who are well skilled in the sifting of evidence, through daily practice in the law courts of the temporal powers that be?

Now it so happens that among the

many contributors of large sums toward the erection of the new cathedral at Westminster is one whose name is a household word in every city and home in England, as a past-master of the science of sifting evidence, and of exposing fraud and imposition of every kind; we allude to Lord Brampton, better known to our readers as Mr. Justice Hawkins. Could his lordship be induced by the Holy Church (of which he is a member, and a pious member, too, if piety is to be measured by the largeness of his contribution to the fund for the building of the new cathedral) to undertake, on this occasion only, the part of Devil's Advocate and dissect the evidence of the promoters and marshal the evidence of the respondents, and once more gladden the hearts of Englishmen by one of his masterly addresses, sifting the wheat from the chaff, the true from the false. If Mr. Justice Hawkins says he is convinced that the evidence of identity is unimpeachable, *cadit quæstio in æternum*. But if, on the other hand, Mr. Justice Hawkins should pronounce that the evidence adduced by the promoters is wholly insufficient, and that there remains on his mind a strong impression that the remains in question are not truly the relics of the martyred king, the Roman Church will be spared the mortification of making an official pronouncement of their identity on insufficient evidence, and future generations will rise up to bless the pious memory of one who has hitherto been regarded by his countrymen as unequalled in his character of an honest judge and a fearless exposé of everything in the way of falsehood and deception. *Magna est veritas.*

WOMEN AMONG MOHAMMEDANS.

BY R. VASHON ROGERS.

ACCORDING to all Mohammedan schools a son is at liberty to contract a marriage without his father's consent after he has completed his fifteenth year; the Hanafis and Shiabs grant the same privilege to the daughter, but according to other schools a woman is emancipated from paternal control only through marriage. A Mohammedan father certainly has a right to impose the status of marriage upon his children, sons and daughters alike, during their minority, but the law takes particular care that this right shall not be exercised to the prejudice of the infant. Any act of a father which is likely to injure his infant children is illegal and entitles the judge to interfere to prevent or annul it. (Amir Ali, *Personal Law of Mohammedans*, 179-184.)

Whatever is in the Koran was and is law. It is the most widely read book in existence: more than one hundred millions of men believe it to be the very word of God, it is held by them to be eternal and uncreated: the original text is in heaven, they affirm: piece by piece it was brought down by an angel to Mahomet, who communicated it to the world.

In the fourth Sura, or chapter, of the Koran, Mahomet says to his followers, "Respect women who have borne you, for God is watching over you"; "Men's souls are naturally inclined to covetousness, but if ye be kind toward women and fear to wrong them, God well knows what ye do"; and as to female orphans whom they did not desire to marry, he says, "Observe justice toward them, whatsoever good ye do God knoweth it." The Pagan Arabs used to marry beautiful and rich orphans against their will, or else not suffer them to wed at all, in order that they might retain their possessions.

Alamgri tells us that daughters as well as sons are liable for the support and maintenance of their poverty stricken parents.

Among Mohammedan peoples marriage is considered a duty incumbent upon both men and women. A woman will rather marry a poor man, or become a second wife to a man already married, than remain in a state of celibacy. In these countries marriage differs little from a real purchase. Although marriage is merely a civil contract, it is usually concluded with a prayer to Allah. (Westermarch, *History of Human Marriage*, 140.)

Notwithstanding the Koran's permission the Mohammedans in Asia, Europe and Africa are, as a rule, monogamous. Syed Amir' Ali says that more than ninety-five per cent. of the Mohammedans in India are, either from conviction or necessity, monogamous. Mrs. W. M. Ramsay tells us that in Turkey polygamy is far from being the rule among the ordinary people, and that among the poorer classes it does not and cannot exist. (*Every Day Life in Turkey*.)

According to the Koran a man could not marry his mother-in-law, step-mother, daughter-in-law or step-daughter (if she were under his guardianship), nor two sisters at the same time. It is considered an uncleanness, and an abomination and an evil way for a man to marry his father's wife, and the faithful were forbidden to marry their mothers, or their daughters, or their sisters, or their aunts on either father's or mother's side, or nieces, or foster sisters, or foster mothers. Nor was it lawful to marry a free woman that was already married, be she a Mohammedan or not, unless she be legally parted from her husband; but it was lawful to marry those who were slaves, or had been taken captive in war, though their

husbands be still living, after the women had gone through the proper purifications: according to Abu Hanifah, it was illegal to marry any whose husbands were taken captive with them, or were in slavery with them. Those of the faithful who had not sufficient means to marry free women, who were believers, might marry maid-servants if of the true faith. All are alike descended from Adam, said the Prophet, and being of the same belief it was lawful to marry slaves with the consent of their masters, if they were modest, not guilty of licentiousness, nor entertaining lovers; such had also to be given proper dowers. As slaves did not require so large a dowry, nor so good and plentiful a maintenance as a free woman, a man might keep several of the former as easily as one of the latter. (Sura, IV.)

In a previous chapter of his Book, Mahomet had said, "Marry not women who are idolaters, until they believe; verily a maid-servant that believeth is better than an idolatress, although the latter please you more. And give not women who believe in marriage to idolaters, until they believe; for verily a servant, who is a true believer, is better than an idolater, though he please you more." (Sura, II.)

When the message limiting the number of wives to four was sent down from heaven the most of the Arabs had eight or ten wives each, and these they often treated very badly, so Mahomet restrained polygamy within much narrower limits, and did much to ameliorate the condition of women.

Among the Mussulmans all conjugal matters are absolutely private. The civil power does not appear any more than the religious in the celebration of marriage. As a general rule the future husband goes to declare his union to the sheik or *cadi*, who then sends a minute of it to the interested party without keeping a copy of it. This formality, however, is in no way obligatory; the marriage is considered as a private act, and if afterwards any disputes should arise in

relation to it the parties concerned arrange them as well as they can, by appealing to the writing.

It all amounts to this, that for Mussulmans the wife is a thing, and the marriage a simple bargain. The wife is always sold to the husband, and the price is discussed either by her legal representatives or by her agent. The nuptial gift is an essential to marriage, and if it has not been paid the wife has a right to refuse her husband's embraces. "The wife sells herself," says Sidi Khelil, "and every vendor has the right to retain the merchandise sold until after receiving the payment." Before buying, the suitor is allowed to see the face and the hands of the bride: for the hands of a woman are supposed to give an idea of her personal beauty. *Ex pede Herulem!*

A man ought, whenever possible, to marry a virgin, and the bargain may be made years before the delivery of the merchandise. If a girl is unmarried after a certain age, her father has a right to impose matrimony upon her. An orphan girl can be married by the authority of the *cadi*, if she has passed her tenth year, and if there is reason to fear she may lead an irregular life. (See authorities quoted, Letourneau, "Evolution of Marriage," 143.)

Speaking of Turkey a recent magazine writer says: "The couple do not meet until the conclusion of the *dughuh ziafcti*, or week of wedding festivities and ceremonies, which may not be held for some months after the appearance before the *cadi*. These entertainments, to which all friends and acquaintances are invited, and at which the poor of the neighborhood are feasted, constitute the social sanction of the family alliance entered into in private. For should the girl's assent be suspected of having been obtained by force or fraud, and the match be considered unsuitable, public disapproval would be very properly shown by refusing to take part in the wedding rejoicings. And even when all these formalities are at an end, and the

bride has been conducted with much pomp to her new house, if the spouse chosen for her by her parents or guardians is not altogether a *persona grata* to herself, she may still refuse to accept him for her husband: for according to an Oriental custom of immemorial antiquity, a newly wedded husband can assume no rights over his wife until she has spoken to him. Eastern brides are, indeed, often advised by experienced matrons not to respond too readily to the advances of their bridegrooms, even if they regard them with affection; and when a girl is exceptionally shy, or obstinate, stratagem has sometimes to be had recourse to in order to break the spell of silence." (Women in Turkey, The Cosmopolitan, July, 1900.)

Mahomet, in his celebrated Arafat discourse, said: "Ye men, ye have rights over your wives, and they have rights over you." He made marriage a civil contract, and as a contract of partnership it requires two witnesses. The husband is bound to maintain his wife and her domestic servants; as the Hidaya says, "The word of God appoints a wife subsistence and a maintenance." Amir' Ali says: "The contract of marriage gives a man no power over the woman's person beyond what the law defines, and none whatever over her goods and property. She retains in his household all the rights which the law vests in her as a responsible member of society. She can be sued as a *feme sole*; she can receive property without the intervention of trustees; she has a distinct lien upon her husband's estate for her ante-nuptial settlement. Her rights as a mother do not depend for their recognition upon the idiosyncrasies of individual judges. She can enter into binding contracts with her husband, and proceed against him in law; her earnings cannot be squandered by a prodigal spouse; she can sue for debt or damages without any intermediary; and she can sue her husband if he assaults her." (51 Albany L. J., 315, 316.)

Among Mohammedans the maintenance

of the children devolves so exclusively upon the father that the mother is even entitled to claim wages for nursing them. (Westermarch, 17.)

The Koran declares: "Men are superior to women by reason of the qualities God has given them to place them above women, and because men employ their wealth in giving dowries to women. Virtuous women are obedient and submissive; they carefully guard during their husband's absence that which God has ordered them to preserve intact. Thou shalt correct those whom thou fearest may be disobedient, thou shalt put them in beds apart; thou shalt beat them; but as soon as they obey thee again, do not seek cause of quarrel with them; God is merciful and great."

"It is permitted unto you to procure wives with money, and thou shalt keep them in virtuous ways, avoiding debauchery. Give unto her with whom thou dost cohabit the dower thou hast promised." A little shamming was possible about these dowries, for the Prophet says: "Assign dowries freely to your wives, and if it pleases them to give you back a part, enjoy it conveniently at your ease." (Sura, IV, 36, 18, 3.)

Mahomet revealed to himself that he might perform his marital duties to the members of his richly furnished harem as he thought fit, but to ordinary believers he said: "Ye can by no means carry yourselves equally between wives in all respects, though you study to do it: therefore turn not from a wife with all manner of aversion, nor leave her like one in suspense: if ye agree and fear to abuse your wives, God is gracious and merciful." (Koran, IV, v. 129.)

The husband must supply food to his wife, even if she is afflicted with a voracious appetite. This affliction is considered as a calamity, but the husband must put up with it or repudiate the glutton. He must also provide his wife, or wives, water to drink and for ablutions and purifications, oil to eat and to burn, and with cosmetics, unguents,

wood for cooking, salt, vinegar and meat, every day, or according to the custom of the country. He must supply her with a mat or a bed, that is, a mattress and a covering. Of course these duties have correlative rights.

The young Kabyle girl is sold in marriage by her father, her brother, her uncle, or some relative who is considered her legal owner. In some tribes she can twice refuse the man proposed to her; then her right is exhausted, and she is forced to submit. The legal owner of the girl generally gives to her at the wedding garments and jewels, or rather he lends them to her, for she must not dispose of them, and at her death these precious articles must be returned to her relatives. An essential condition of a Kabyle marriage, as of the Arab, is the payment of a certain price; this sum is generally a matter for discussion, but with some tribes there is one price for all girls. The sum is called the "turban" (*thamanth*), as with us "pin-money" is spoken of. A penalty guarantees the payment of this money and the handing over of the girl. In principle the woman has no right over this *thamanth*. The father receives also the provisions that will be consumed at the wedding feast, and he also stipulates that his daughter shall receive a gift of garments and jewels; if the husband gives this present, he is not bound to maintain the bride during the first year. Once handed over, the poor Kabyle wife is entirely at the mercy of the husband-proprietor. She must follow wherever he goes to live; she can only own the garments which cover her; he can correct her with his fist, with a stick, with a stone or even with a poignard: he is, however, forbidden to kill her without a reasonably serious reason. If she is not able to nurse her own babies, the law decides that the husband must supply a wet nurse. (Hanoteau and Letourneau, *La Kabylie*, II, 148-169.)

The Koran is by no means silent as to the conduct of married women. In one place it

says: "The women ought to behave toward their husbands in like manner as their husbands should behave toward them, according to that which is just; but the men ought to have the superiority over them. God is mighty and wise." In another chapter we have these words: "Speak unto the believing women, that they restrain their eyes and preserve their modesty, and show not their ornaments (that is, their clothes, jewels and the furniture of their toilet, much less the beautiful parts of their bodies), except what necessarily appeareth thereof (their outer garments, or hands and faces). And let them throw their veils over their bosoms, and not show their ornaments unless to their husbands, or their fathers, or their husband's father, or their sons, or their brothers' sons, or their sisters' sons, or their women, or their slaves, or unto such men as attend them and have no need of women, or unto children who distinguish not the nakedness of women: and let them not make a noise with their feet, that their ornaments which they hide may thereby be discovered." Only the nearest male relatives were allowed to see Mohammedan women, and they only such parts of them as cannot be well concealed in the familiar intercourse of the family. Doctors of the law vary considerably in their interpretation of this passage. It will be remembered that the Hebrew prophet Isaiah was very severe on the Jewish matrons who were fond of "tinkling the ornaments of their feet." "As to such women as are past child-bearing, who hope not to marry again, because of their advanced age, it shall be no crime in them if they lay aside their outer garments, not showing their ornaments: but if they abstain from this it will be better for them. God both heareth and knoweth." (Sura, XXIV.)

"Woman's rights, of a kind, are not unknown in Turkey, it would seem. The wife is mistress of her own domain. She manages the household and the children; and

when she desires to exclude her lord and master from the harem, a pair of shoes placed at the door, implying that there are visitors within, is usually a sufficient bar to his entrance. The mother is treated by her children with the greatest respect and deference, even when they are grown up, or it might be more correct to say, especially when they are grown up and are able to understand their duty. Grown up sons, even when they are married, do not sit in the presence of their mother without permission. . . . It is usual to find among well-to-do people married sons living with their parents, or with their widowed mother. In such cases the mother is boss of the whole concern. The young wife, or each wife, if there is more than one, has her own private apartments in the establishment, where she is mistress, and in some cases her own servants and slaves, but over all the mother-in-law presides, often with an iron rule; and if she is a widow she is supreme indeed; her husband being dead, there is no one to gainsay her." (Mrs. W. M. Ramsay, *Every Day Life in Turkey*.)

As a recent writer says: "As to personal and proprietary rights a Turkish woman occupies a not unenviable position. As a daughter she is entitled, on the death of her father, to inherit his property in common with her brothers in a proportion determined by law according to the number of his children. As a wife she has the uncontrolled possession both of the fortune of which she may be possessed before marriage, and of any wealth that may subsequently accrue to her. She can inherit landed property without the intervention of trustees, and bequeath it at her death to whom she will. No doctrine of coverture exists for her; she can sue in the courts, or be sued, independently of her husband, and can also sue him, or be sued by him. She is also entitled to plead her own cause before the public tribunals, which she often does most ably and eloquently. A husband is, on

the other hand, bound to support his wife and her slaves or servants according to their rank and his means, and to furnish her with a suitable residence to be solely and exclusively appropriated to her." (L. M. J. Garnett, *Women in Turkey*, *The Cosmopolitan*, July, 1900.)

The Koran says the husband may divorce his wife without assigning any reason or giving any notice; he may rebuke, imprison and scourge her. He may twice divorce and twice take back the same woman, but if he a third time divorce her, she cannot again become his wife until she has married and been divorced from some other man. (Sura, II, 230.) Yet Ibrahim Halebi says: "In the absence of serious reasons no Mussulman can justify divorce in the eyes either of religion or the law. If he abandon his wife, or put her away from simple caprice, he draws down upon himself the divine anger, for 'the curse of God,' said the Prophet, 'rests upon him who repudiates his wife capriciously.'" Practically, however, a Mohammedan may, whenever he pleases, without assigning any reason, say to his wife, "Thou art divorced," and she must then return to her parents. (Amir' Ali, *Personal Law of Mohammedans*, 332; Lane, *Modern Egyptians*, I, 150, 247.)

Among most of the Mohammedan peoples divorces are very frequent. According to Dr. Van der Berg, an even more fatal influence is exercised on family life in the East by this laxity of the marriage tie than by polygamy. In Cairo, according to Lane, there are not many men who have not divorced one wife, if they have been married for a long time; and many men in Egypt have in the course of two years married as many as twenty, thirty or more wives; whilst there are women advanced in age who have been wives to a dozen or more men successively. In Morocco, a man repudiates his wife on the slightest provocation and marries again. Among the Moors of the Sahara it is considered "low" for a couple to

live very long together. (Westermarch, 519, 520.)

On the other hand, in India, among the Mohammedans divorce is seldom heard of.

The Koran specifies that the divorced wife shall have a sufficient maintenance provided for her, that her dower must be restored, that the husband shall have four months within which to change his mind; that if the wife has a babe at the breast, the husband, or in default, the next of kin, shall supply her needs during the two years of nursing. The law of Mahomet encourages amicable arrangements, and these by money payments between the ill-assorted couples. (Sura, II, 229, 233, 226, 242, IV, 127, LXV.)

The Koran lays it down that a woman after she is divorced must wait three months before she can marry, and she must declare whether she be with child or not. After a divorce it was lawful for the parties to return to one another, if they thought that they could obey the ordinances of God. A divorced wife after she had waited the prescribed time, was either to be retained with humanity or sent away with kindness; a man who kept his divorced wife by violence, or by making her leave him part of her dowry, transgressed and injured his own soul. After the proper time the wife was to be allowed to marry again.

Savary says: "The Mahometan who has thrice sworn to divorce his wife, religion punishes by not allowing him to take her again till she has shared the bed of another man. The faulty person, who is thus unpleasantly situated, endeavors to evade the law. He chooses a friend on whose discretion he can rely; shuts him up with his wife in the presence of witnesses, and tremblingly awaits the result. The trial is a dangerous one. If, when he quits the room, the obliging friend declares that he divorces the woman, the first husband has a right to resume her; but if, having forgotten friendship in the arms of love, he should say that he acknowledges her as his wife, he takes

her away with him, and the marriage is legal; the too impetuous husband has lost his partner."

The want of ready cash wherewith to pay to the wife her promised dowry often prevents a man divorcing his wife, as well as the odium that attaches to such a proceeding; a man who without just and serious cause repudiates his wife does not easily obtain another; the severe censure of the Prophet also rests upon him.

The wife, now-a-days, is entitled to a decree for a divorce for her husband's adultery, or his desertion, and for his cruelty to her, for any degrading act committed by him toward her, or if he threatens her with personal injury. Pending the proceedings, the husband must support the wife; and after getting a divorce the wife cannot marry for three months. The mother is given the custody of the daughters until they arrive at puberty, and of her sons until they are able to earn their own living. (51 Albany Law Journal, 317.)

If a child is born to the couple after separation and the mother nurses it, the father must pay her for doing so, and if he is wealthy he is required to expend proportionately for the maintenance of the mother and child out of his plenty. Should the mother die before the children have passed out of her care, the right of custody reverts to her female relatives, the child's maternal grandmother having the first right, and on her death, failing a sister of suitable age, the child's aunts. Should the mother be without near female kin, the paternal grandmother and aunts have charge of the children.

If a wife without adequate cause and contrary to the desire of her husband, solicits a divorce, she obtains it only by foregoing her dower. (The Cosmopolitan, July, 1900.)

Professor Robertson Smith is inclined to believe that in Arabia before the time of Mahomet a custom had established itself by which the husband ordinarily made a gift—

under the name of *sadac*—to the wife upon marriage, or by which part of the *mahr* (the money paid for her) was customarily set aside for her use. But under Islam the difference between *mahr* and *sadac* disappeared, the price paid to the father becoming the property of the woman. (Westermarch, 408.)

It is a religious duty for a man to give a dowry to his daughter. The Mohammedans, as a rule, settle very large dowries on their wives; and it is generally stipulated that two-thirds of the dowry shall be paid immediately before the marriage contract is made, while the remainder is held in reserve to be paid to the wife in case of her being divorced without her consent, or in case of her husband's death. And whatever property the wife receives from her parents or any other person on the occasion of her marriage, or otherwise, is entirely at her own disposal, and not subject to any claim of her husband or his creditors. (Sura, IV, 3; Macnaghten, Principles of Mohammedan Law, P. XXXV; Lane, Modern Egyptians, I, 218, 138.) No coverture is recognized, and a wife's property remains hers in her individual right. She can alienate or devise without her husband's consent.

Amir Ali says that there must be an antenuptial consideration moving from the husband to the wife, for her exclusive use and benefit, to make a legal marriage. Another writer says: "Dower is so necessary to marriage that if it is not mentioned at the time, or in the contract, the law will presume it by virtue of the contract itself." (51 Albany Law Journal, 316.)

The Fourth Sura says, "Men ought to have a part of what their parents and kindred leave behind them when they die; and women also ought to have a part of what their parents and kindred leave, whether it be little, or whether it be much; a determinate part is due to them." Before this among the Arabs neither women nor children took any part of their husband's or father's property,

on the ground that they only should inherit who could go to war.

The same chapter of the Koran also provided that if a man die without issue, and have a sister, she shall have the half of what he shall leave; and a brother shall be heir to a sister in case she die without children. But if there be two sisters they shall have between them two-thirds of what a brother so dying shall leave; and if there be several, both brothers and sisters, a male shall have as much as the portion of two females. "God declareth unto to you these precepts, lest ye err; and God knoweth all things," are the impressive words with which this Sura ends.

The Koran says that one year's maintenance must be provided for every widow out of her husband's estate. If a mother is poor and the son is able to work, he is bound to support her, even though he is in straightened circumstances. If a son is able to support but one parent or grand parent, the mother or the grandmother has the preference over the father or grandfather. (51 Alb. L. J., 317.)

The Koran forbids a widow marrying for four months and ten days after her husband's death; if she is then found to be pregnant she must not marry until after her delivery. (Sura, II, 234.) Among the Arabs, if at the time of her husband's death the wife thinks herself with child, she lays her girdle on his body; note is taken of it and the time awaited. If the waiting is vain, at the end of eleven months the widow is examined by a jury of matrons, and if nevertheless the expected child does not come, it is called "asleep." The widow is free, may marry again, and if she becomes a mother the child awaited so long is reputed the child of the dead husband, and inherits from him. However, this pretended sleep is generally limited to four years. (Hanoteau & Letourneau, Kabylie, II, 174, 175.)

Although a widow had to wait four months and ten days before she could marry again,

yet it was no crime if, previous to that date, she should leave off her mourning weeds and look out for a new husband; and so with a man courting a newly made widow, the desire of marrying her, whether shown openly or concealed in his own breast, did not render him guilty in the sight of God. The Almighty knows men cannot prevent themselves from thinking about women; so argued the Prophet, but he added, "make no promise to them in secret unless you veil your love in decorous language; and resolve not on the knot of marriage until the prescribed time is accomplished; and know that God knoweth that which is in your minds, therefore beware of him, and know that God is gracious and merciful."

It was customary among the Pagan Arabs when a man died for one of his relations to claim a right to his widow, which he asserted by throwing his garment over her; and then he either married her himself if he thought fit, on assigning her the same dower that her former husband had done, or kept her dower and married her to another, or else he refused to let her marry unless she gave up all she was entitled to claim out of her husband's goods. The fourth chapter of the Koran abolished this unjust custom. A trace of this making a claim by "throwing a garment" over a young widow is seen in the lovely pastoral story of Ruth and Boaz, as given in the Jewish Scriptures.

Mahomet was not an ascetic, nor had he the courage to be too severe on others. He calls adultery by a woman "the infamous action" *par excellence*, but he directs that the crime should be proved by four witnesses. Moreover, the woman could exculpate herself by swearing four times before God that she was innocent, and that her husband had lied. If she is convicted she and her accomplice both receive a hundred lashes in public, and she is then shut up until death visits her, or God finds her a means of salvation. If a husband accuses his wife of infidelity and has no witnesses to prove it,

he can substantiate the assertion by swearing five times to the truth of the charge, invoking upon himself the malediction of God, if he gives false witness. (Sura, XXIV, 6-9.)

The Kabyles of Algeria are Moslems, but they do not abide by the humane prescriptions of the Koran. With them a kiss on the mouth is equivalent to adultery and costs more than an assassination. If a child is born out of wedlock, both it and the mother are put to death. The husband is entitled to sacrifice his guilty wife, but is often hindered by the dread of losing the capital she represents; he is entitled to compensation from the guilty lover and to take a bloody vengeance upon him. The indemnity is always insisted upon, the vengeance taken is sometimes sham. With these people marriage is a very mercenary affair, and money is the great solace for the infidelity of the wife; besides the payment by the lover the husband can demand the *thamanth* that he paid for his wife. The guilty parties are not allowed to intermarry. (Hanoteau & Letourneau, *Kabylie*, quoted in Letourneau, *Evolution of Marriage*, p. 219.)

The ancient Arabs were not more lenient towards adultery than were their cousins of Palestine, the Jews; and the Bedouins who have preserved most of the old customs, still consider adultery the greatest of crimes. Burckhardt tells us that among them the adulterous woman is beheaded either by her father or her brother.

The husband has the right to forbid his wife to eat garlic, or to eat or drink any other thing which may have a disagreeable odor. He may forbid any occupation likely to weaken her, or to impair her beauty. If she refuses to perform her conjugal duties, without reasonable cause, he may at will deprive her of salt, pepper, vinegar, meat, etc. (Meynier, *Etudes sur l'Islamisme*, 166, 167.)

The Koran says, "If any of your women commit adultery or fornication, produce four witnesses from among you against them, and

if they bear witness against them, imprison them in separate apartments until death release them, or God affordeth them a way to escape." After a time this cruel punishment was mitigated, and the offending woman might elect to suffer in its place the punishment ordained in its stead by the *Sonna*, according to which the maidens were to be scourged with a hundred stripes, and to be banished for a full year, and the married women to be stoned. A slave guilty of adultery was condemned to only half of the punishment of a free woman, on account of her supposed ignorance; that is, she was to receive fifty stripes and be banished for six months; she was not to be stoned for that could not be inflicted by halves.

To check the spread of licentiousness Mahomet enacted that the wicked woman should be joined to the wicked man, and the wicked man to the wicked woman; but the good woman should be married to the good man, and the good man to the good woman. (*Sura*, XXIV.)

False witnesses were not allowed to go unpunished; "they who falsely accuse modest women who behave in a negligent manner and are true believers, shall be cursed in this world and in the world to come; and they shall suffer a severe punish-

ment. Those who accused women of reputation of adultery or fornication, and produced not four witnesses of the fact, were to be scourged with fourscore stripes, and their testimony was never to be received, unless indeed they should repent and amend." (*Sura*, XXIV.)

The Moslems say there are three classes of persons who have no religion, Bedawin Arabs, muleteers and women. Mahomet declared that when he looked down into hell he found the greater part of the wretches confined there to be women.

Yet women were to be in heaven according to the Prophet's ideas, for the paradise of true believers is only an ideal heaven; he writes, "Say, O believer, what shall I declare of greater benefit for those that fear God, than gardens through which flow rivers of water, where they shall dwell for ever, and there shall be women who are pure virgins. Damsels having large black eyes will there. Therein will be agreeable damsels, whom no man or spirit has hurt. There shall be young and beautiful virgins. . . . And near the elect will be houris with large black eyes, having complexions like rubies and pearls. Verily we have created the damsels of Paradise by a peculiar creation." (*Koran*, III, 13; LII, 20; LV, 56; LVI, 22, 35.)



LOMBROSO IN SCIENCE AND FICTION.

BY GINO CARLO SPERANZA.

IF the American magazine reader of average education were asked to give the name of some contemporary Italian scientist the answer in the majority of cases would probably be Lombroso. I have often asked this question of lawyers and physicians, with the same result. In books, monographs and articles published in this country dealing with the problems of crime which I have examined, Lombroso is the Italian criminologist most often cited. Next to him come Ferri and perhaps Mantegazza. Very few others are cited, and it would seem that only a very small number of students of crime in our country have any knowledge of the works of Sergi, Garofalo, Ferriani, Collajanni, Sighele, Ferrero or Morselli. Possibly this is due to the fact that, with the exception of one or two of Ferrero's and Morselli's books, there are no English translations of the scholarly contributions of these Italians to criminologic science.

It would, therefore, appear that to a large number of educated Americans, if indeed not to a majority of them, what I might call Lombrosoism and criminology are one and the same thing; or, in other words, that to a good many of our countrymen Cesare Lombroso is the greatest Italian exponent of criminologic science.

The question naturally presents itself whether such a view is correct, and the question gains importance from the fact that criminology being to-day a very young science (if a science at all) its high priests should be closely examined lest perchance they utter false oracles to the detriment of the truth for which they stand.

This being so, it cannot be expected that criminology in its embryonic or experimental stage, will escape the pitfalls and dangers which beset youth, whether it be in

man, in science, or in government. It is natural enough that the enthusiasm of its disciples may at times so strengthen their personal equation as to blind their judgment or sense of proportion between cause and effect. And it is to avoid such dangers that the critical student must insist that the upholders of the new doctrines produce indisputable facts as a basis of their deductions or theories, and sufficiently numerous as to quantity as to make their average something more than a mere numerical majority. They cannot expect the public to accept eagerly any theory which tends in practice to subvert well-established or dearly cherished principles, nor that it will readily follow them into regions which, although by stress of logic they may appear to be the natural sequence of certain premises, are not yet lighted up by facts.

How far are these criticisms or questionings applicable in the case of Lombroso's work? It is not denied that we owe to him the initial interest in the study of crime; that he is the founder of the Italian school of criminal science; that to him more than to any other man we owe the collection of an amazing number of facts bearing upon the subject of the criminal. An indefatigable worker, he has drawn information from numberless sources with perhaps more enthusiasm than discrimination.

But it is by no means an unsupported opinion that many of these specimens which he has gathered appear to the scientific student more as the interesting jumble of a curiosity shop than the convincing array of the scientific museum. He has collected, but not sifted; heaped together, but not classified. With the persistency and zeal characteristic of the Jewish race to which he belongs, he has unhesitatingly and unswerv-

ingly followed the scientific ideals he had set before him. Carried away by such zeal, he has oftentimes made facts fit his theories with an ingeniousness as remarkable as it is deceptive.

Men like him have their great usefulness in scientific progress; they bring out the popular side of otherwise recondite and abstruse questions; they arouse public interest in otherwise dry and uninteresting topics, and thereby win the sympathy and support of the reading public not only in their work but in the work of more serious investigators.

Allowing for differences in time and popular knowledge, Lombroso may in certain respects be compared with Mesmer or Cagliostro. Both the latter stood for a certain amount of scientific truth; it is true they prostituted it for unworthy purposes. Lombroso cannot be charged with this, but there is reason to believe that in his efforts to popularize the scientific truths for which he stands he has weakened his prestige among men of science. The danger of popularizing scientific data and problems is that by the use of striking similes, catch-eye comparisons and a loose and inexact vocabulary, the door is opened to error, misunderstanding and misconceptions.

Lombroso has a facile style and an imaginative pen; he can "draw a crowd" and hold it spell-bound. This, however, is not necessarily a test of scientific truth. In the end this popular thirst for the striking and marvelous reacts on the exhibitor himself. He feels that he must keep up this interest at any cost; he may honestly convince himself that a little sensationalism is honorable and justifiable as a means to a good end; they do not want that dry precision which is the basis of scientific exposition, and a little stretch of the imagination will not break the principle itself.

I venture to say Lombroso has reached this stage. I pass over his numberless con-

tributions to second-rate papers and yellow journals wherein he builds up fanciful inductions upon the data furnished by rough and indistinct press cuts or second-hand information. I pass over his sweeping generalizations which from time to time appear in American periodicals, based upon facts of which he has read, but with which he has never been in touch. I pass over his recent contribution going to show that bicycling tends to the increase of the crimes of robbery and murder, which called forth this well-deserved English criticism, "Lombroso is an amusing person, viewed as an unconscious humorist, but it is a waste of time to read him as a scientific person."

I pass over all these to consider one of his more recent articles which seems typical of that mixture of fact and fancy, faults and virtues so noticeable in his latest contributions. It appeared in the "Rivista d'Italia," one of the most serious and ably edited monthlies of Italy. It is entitled "An Epidemic of Kisses," and is given as a serious, scientific investigation into the causes which led to Lieutenant Hobson's popularity with the ladies.

He starts out by gravely telling us that the Hobson epidemic had its origin at Vassar College, which he describes as "an institution for women conducted on what might be called, from a continental standpoint, conventual lines." Despite such restrictions, Hobson's lecture (Lombroso makes him lecture at Vassar) results in an enthusiastic osculatory applause participated in by old and young women, students and hearers. He estimates that in the course of his lecture tour Hobson received some 10,000 kisses.

What appears to us as absurd appeals to him as a subject for scientific investigation. How can you account for such conduct, he asks, considering the reserve, modesty and undemonstrativeness of Anglo-Saxons? The question right away assumes large proportions.

The author draws from his store of curiosities striking cases of Anglo-Saxon undemonstrativeness, such as the meeting of Stanley and Livingstone in Central Africa, and of Kitchener and Neufeld in the Soudan.

Then he enters into an historical study of the kiss; he ransacks the literatures of Greece, Persia and India to show its origin and development. He examines the influence of what is known as the "suggestion of the crowd" as one of the causes of the Hobson epidemic, adding that the newly developed imperialistic tendencies may have had some influence also, and ends by finding in Hobson's exceptional heroism a potent excuse for the breach of Anglo-Saxon decorum.

We have here a type of his more recent contributions. It is a characteristic mixture of facts and nonsense, intermingled with stray bits of science; it is a jumble of imaginary premises and over-bold and over-general deductions. It is scientific fiction like Wells' "War of the Worlds," or Verne's "Twenty Thousand Leagues Under the Sea."

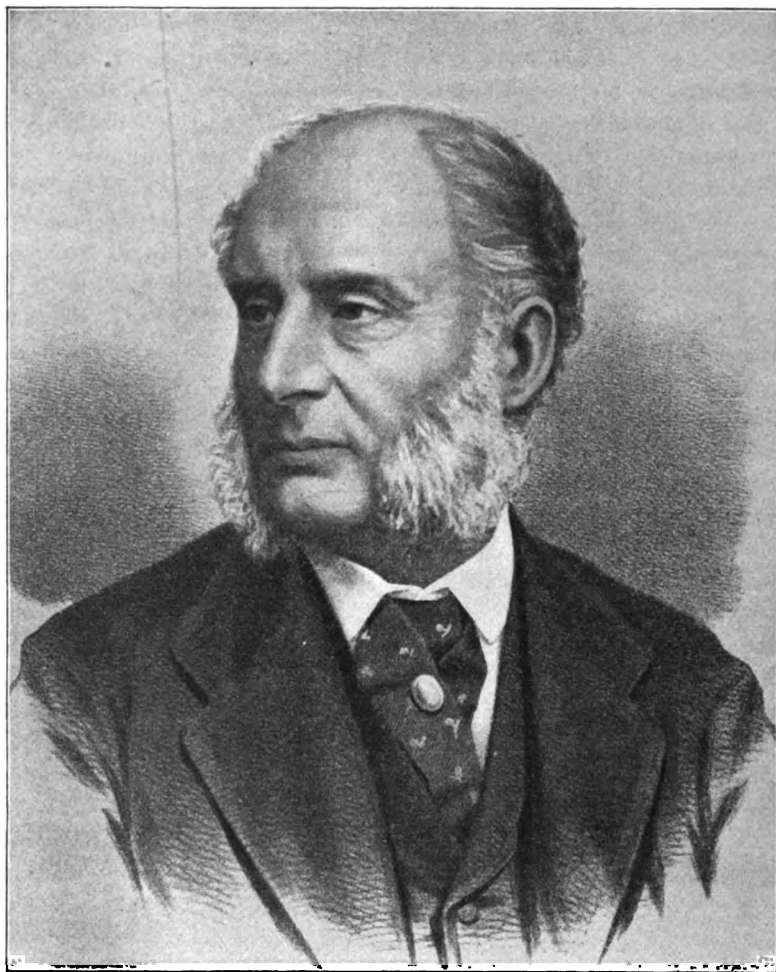
But Wells and Verne are self-confessed romancers; they make no claim to scientific exactness. Lombroso, on the other hand, demands a hearing as a scientist and, in America at least, he is looked upon as the head of the new school of criminology. It is obvious, therefore, that his scientific fictions and pleasing vagaries may do a great

deal of harm to the new science of which he is admittedly the founder.

The study of the criminal is too important and vital a problem to let it fall into disrepute; it has been hard enough work for students of criminal sociology to get even a half-hearted hearing in our country. It is the duty of all who wish our criminal and penal systems improved and brought into harmony with scientific progress to raise their voices against the confounding of scientific data with figments of the imagination. They must do so even at the painful cost of showing how some of the high priests of science have turned into false prophets.

There are many excellent works dealing with the problems of crime and punishment not only by continental writers but by English-speaking students. Let us read less of the more recent sensational writings of Lombroso and Mantegazza and more of the less alluring but more scholarly works of Sergi, Morselli, Ferri, Garofalo, Ferrero, Ferriani, Colajanni and Beltrani-Scalia among the Italians; Tarde, Corre, Prins and Michaux among the French; Benedikt Krohne, Aschrott and Von Hamel among the Germans, and Pike, Du Cane, Ellis, Wines, Macdonald, Barrows and Morrison among those who write in our tongue. We shall then find that criminology is a far different and a far less fanciful science than the majority of us have been led to believe by some current magazine articles.





LORD PENZANCE.

A CENTURY OF ENGLISH JUDICATURE.

VIII.

BY VAN VECHTEN VEEDER.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

THE outcry against the ecclesiastical administration of probate and matrimonial affairs at length became too strong to be resisted. The inefficiency of most of the judges, the variations of practice and procedure, the expense, the delay, the frequently inconsistent and mistaken views of law and of fact adopted by the different authorities, the anachronism of a system which permitted civil rights to be decided by judges not appointed by nor responsible to the crown, rendered its fall inevitable. The humorous absurdity of many of their abuses have been preserved in lasting caricature by the pen of Dickens. In "David Copperfield" the characteristics and advantages of "The Commons" are fully described. The practical objection to the jurisdiction was that, in the absence of its power to bind the heir in relation to land, there might be a decision one way in the ecclesiastical courts as to personal property, and another at common law as to real estate, with respect to the same document. It seems incredible that such a state of affairs could have lasted for centuries.

With respect to matrimonial affairs the conditions were quite as unsatisfactory. The abuses of the procedure of the ecclesiastical courts had affected the trial of these causes to such an extent that redress was practically denied to persons of moderate means. To obtain an absolute divorce resort must be had to Parliament, and the cost of carrying a bill through both Houses made such relief unattainable except by very wealthy persons. Justice Maule brought out the incongruities of the law with characteristic irony in passing sentence in a bigamy case. "I will tell you," he said, addressing

the prisoner, "what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively presumes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages. That would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the ecclesiastical courts for a divorce *a mensa et thoro*. That would have cost you £200 or £300 more. When you had obtained a divorce *a mensa et thoro* you had only to obtain a private act of Parliament for a divorce *a vinculo matrimonii*. This bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would have cost you £1,000. You will probably tell me that you never had a tenth of that sum, but that makes no difference. Sitting here as an English judge it is my duty to tell you that this is not a country where there is one law for the rich and another for the poor. You will be imprisoned for one day."

Finally, in 1857, this anomalous condition of affairs came to an end. The ecclesiastical courts were by statute divested of all power to entertain suits relating to probate of wills and grants of administration, to declare the validity of marriages and pronounce divorces *a mensa et thoro*, and such jurisdiction was conferred upon a new court of common law, which was to sit in Westminster Hall and to be held in two divisions, called respectively the Court of Probate and the Court for Divorce and Matrimonial Causes.

The success of the change depended largely

on the judge who was first to exercise the new jurisdiction. Fortunately the choice fell on Justice Cresswell, who was transferred from the Common Pleas. Cresswell was a strong, able and experienced judge, and a man of the world, and at once justified every expectation.

Under his guidance the procedure of the court was adapted to modern ideas, witnesses were examined *viva voce* in open court, a concise form of pleading was introduced, and parties could, upon application, have any disputed matter of fact tried by a jury. The reports of Swabey and Tristram, which contain his clear and concise opinions and charges to juries, are monuments of learning and common sense; and so skilfully and with such foresight were the modern foundations of this jurisdiction laid that, although he decided nearly a thousand cases, his judgment is said to have been only once reversed.¹

Wilde, an industrious and painstaking judge, who is best remembered by his subsequent title as a legal peer, Lord Penzance, succeeded Cresswell in 1863, and in turn gave way to Lord Hannen in 1872, on the eve of the Judicature Act.

COURT OF ADMIRALTY.

Lushington continued his distinguished labors in admiralty and ecclesiastical affairs until 1867, when he was succeeded by Phillimore (1867-83). Through his voluminous writings and his work on the bench Phillimore stands high in scholarship and professional learning. In both admiralty and matrimonial affairs he left his mark on the law at a time when a new practice and an increasing volume of litigation gave rise to novel and intricate problems. His elaborate opinions are replete with historical knowledge, and are always luminously expressed.

¹ Hope *v.* Hope, 1 Sw. & Tr. 94; Keats *v.* Keats, 1-346; Mette *v.* Mette, 1-416; Tallemache *v.* Tallemache, 1-561; Tompkins *v.* Tompkins, 1-168; Ward *v.* Ward, 1-185; Egerton *v.* Brownlow, 4 H. L. 1; Sutton *v.* Sadler; Coxhead *v.* Richards, 2 C. B. 569.

In 1875, under the Judicature Act, he became a member of the Probate, Divorce and Admiralty Division of the High Court.¹

COURT OF APPEAL IN CHANCERY.

The Court of Appeal in Chancery, which was established in 1851, was throughout its brief career one of the most satisfactory courts in the history of the English judicature. The original Lords Justices were Knight-Bruce (1851-66), and Rolfe (1851-52). Rolfe was soon made chancellor, and Turner (1853-67) succeeded him. The court for fifteen years consisted of Knight-Bruce and Turner—an ideal court, animated by profound knowledge of law and marked aptitude in its successful application to modern conditions. Turner was on all occasions courageous in expanding the remedial powers of the court to meet modern developments; and so anxious was Knight-Bruce to shake off the trammels of technical procedure when they interfered with what he conceived to be the justice of the case, that in some of his decisions as Vice-Chancellor (generally overruled by Cottenham) he anticipated reforms which were subsequently made. One of Knight-Bruce's most prominent characteristics was his fastidious English; and a certain irrepressible humor pervaded his gravest judgments. So vigorous and original was his mind, so animated and epigrammatic his style, so constant his flow of humor, that his opinions are veritable oases in the chancery reports. These sentences are taken at random: "Men may be honest without being lawyers, and there are doings from which instinct

¹ Some of his notable admiralty cases are: The Charkeh, 4 Adm. & Ecc. 59; The Tentonia, 3 do. 394; The Halley, 2 do. 3; The Circassian; The Constitution; The Parlement Belge, 5 P. D. 197; The City of Mecca, 5 do. 28; The Macleod, 5 do. 254; R. *v.* Keyn, 2 Ex. D. 63.

In probate and matrimonial affairs see Cheese *v.* Lovejoy, 2 P. D. 25; Sottomayer *v.* De Barros, 49 L. J. P. 1; Baker *v.* Baker, 5 P. D. 142.

His most remarkable ecclesiastical judgment is Martin *v.* Mackonochie, 2 Adm. & Ecc. Others of importance are the well-known cases of Elphinstone *v.* Purchas, Sheppard *v.* Bennett, Boyd *v.* Phillipotts, Jenkins *v.* Cook, and the Colenso case.

without learning may make them recoil." "Some breaches of good manners are breaches of law also." "The decree in this case is a matter of course unless the court and the laws of this country are to be reconstructed with a view to this particular case."

great powers of thought and expression.¹ The contrast between Knight-Bruce and Turner in their habits of thought and mode of expression—the vivacity and dry humor of the one and the steadiness and gravity of the other—blended admirably in result.²



SIR ROBERT PHILLIMORE.

See his highly characteristic opinion in *Thomas v. Roberts*, where the father of a child had joined a new sect and had gone to live in "a sort of spiritual boarding-house," to which, as a home for the child, Knight-Bruce said he would prefer a "camp of gypsies." His earlier opinions are models of composition, but the habit of deciding a case in a few words increased on him, so that the books give little evidence of his

From 1866-70 several distinguished chancery lawyers sat in this court for brief

¹ *Thomas v. Roberts*, 3 De G. & Sm. 758; *Walter v. Selfe*, 4 do. 315; *Prince Albert v. Strange*, 2 do. 652; *Re Cumming*, 1 De G., M. & G. 559; *Kekewich v. Manning*, 1 do. 176; *Burgess v. Burgess*, 3 do. 896; *Briggs v. Penny*, 3 De G., M. & S. 525.

² A fine illustration of their benevolent wisdom is their disposition of the case of *Stourton v. Stourton*, 8 D. M. & G. 760, where it was sought to interfere with the education of a child who was being reared by his guardians in a different faith from that professed by the boy's father. The judges had an interview with the child, and Lord Justice Knight-Bruce expressed the opinion that "the

periods. Cairns (1866-68) and Page-Wood (1868) were elevated to the woolsack, and Rolt (1868-69), Selwyn (1868-69) and Gifford (1869-70) died in office. During his brief service as Lord Justice, Cairns justified the expectations raised by his distinguished career at the bar, and began in this court the splendid service which, continued in a higher tribunal, placed him in the front rank of English judges.

In 1870 the unity of the court was again restored under James (1870-81) and Mellish (1870-77). James was a most eminent judge, exceptionally learned, and gifted with a rare power of terse and clear enunciation of principles. Cairns said of him that he had a no less admirable share of common sense than of law. He had a highly trained mind, and always sought to get at the merits of a case. In quoting his own decisions he would humorously add, "which is an authority though I joined in it." His comprehension of a case was rapid and masterly, and his memory marvelous. Bramwell said on his death: "He possessed every quality and accomplishment that a judge needed. He had a very great intellect, at once keen and profound. He was a consummate lawyer, thoroughly imbued with legal principles. He was a man of vast experience, not merely in the law, but in those things which make a man what is commonly called a man of the world, fitted to deal with the affairs of the world. He had but one desire when he took his seat upon the bench, and that is, that justice should be done according to right.

Protestant seed sown in his mind has taken such hold that if we are to suppose it to contain tares they cannot be gathered up without great danger of rooting up also the wheat with them. Upon much consideration, I am of the opinion that the child's tranquility and health, his temporal happiness and, if that can exist apart from his spiritual welfare, his spiritual welfare also, are too likely now to suffer importantly from an endeavor at effacing his Protestant impressions not to render any such attempt unsafe and improper." And Lord Justice Turner sagely adds, in answer to the argument that the child was too young to have formed fixed opinions: "May it not be that the impressions which have been formed might lead to the instruction which would be given being received with carelessness or indifference, or, which would certainly not be less dangerous or less destructive to the character of the boy, with affected acquiescence?"

It was said of him, and truly, that he was rapid in the formation of his opinions and confident in the expression of them, and so he was, and so a man of his ability had a right to be; but I can say this of him, that a more candid man never lived, nor one more ready to renounce an opinion, though he had given expression to it in the most confident way, if he thought it was wrong." His largest contributions to the law were in company law, in which the Joint Stock Companies Acts gave him an opportunity, and in bankruptcy and patent law.¹

Mellish was considered by many eminent judges the ablest advocate of his time before a court in banc. Lord Selborne said of him that "as an advocate he was distinguished above all other men whom I remember at the bar by the candor of his arguments and by the decision with which he threw aside everything which did not seem to him relevant to the case and deserving of serious consideration by the court which he was addressing." Mellish belonged to the common law bar, but his mastery of the principles of jurisprudence and the judicial quality of his intellect qualified him to sit in any court. He came to the bench with an impaired constitution, which limited his work both in quality and extent; but his subtle mind, stored with the learning of the common law, in combination with James' profound knowledge of equity, made a most satisfactory court of appeal, and justified the subsequent establishment of a single court of appeal in law and equity. His special characteristics were his clear judgment and his power of luminous exposition. He had the rare faculty of extracting the pith of a

¹ *Harvey v. Farnie*, 6 P. D. 35; *Niboyet v. Niboyet*, 4 do. 1; *Massam v. Cattle Food Co.*, 14 Ch. D. 748; *In re Campden's Charities*, 18 do. 310; *New Sombrero Co. v. Erlanger*, 5 do. 73; *Smith v. Anderson*, 15 do. 247; *Re Goodman's Trusts*, 44 L. T. 527; *Wimbleton Conservators v. Dixon*, 1 Ch. D. 362; *Pike v. Fitzgibbon*, 14 do. 837; *In re Agar Ellis*, 10 do. 49; *Re Canadian Oil Works*, 10 Ch. App. 599; *Barnes v. Addy*, 9 Ch. 244; *Day v. Brownrigg*, 10 Ch. D. 294; *Johns v. James*, 8 do. 744; *Macdonald v. Irvine*, 8 do. 101; *Rogers v. Ingham*, 3 do. 351; *Nitro Phosphate Co. v. London, etc., Docks*, 9 do. 503.

case and putting it in the fewest possible words. His judgments are marked, too, by much independent thought.¹

HOUSE OF LORDS.

In view of the widespread dissatisfaction

would extend to the court of final appeal. The ultimate renovation of the tribunal owes much to Lord Westbury. As the leader of the chancery bar and a law officer of the government it was his caustic wit that concentrated attention upon the defects of the



LORD JUSTICE MELLISH.

with the administration of legal affairs in the House, it was to be expected that the spirit of reform which had done so much toward transforming the procedure and usefulness of the courts of original jurisdiction

¹ *Nugent v. Smith*, 1 C. P. D. 423; *Nichols v. Marsland*, 2 Ex. D. 1; *Aynsley v. Glover*, 10 Ch. 283; *Hext v. Gill*, 7 do. 712; *Crook v. Hill*, 6 do. 311; *Lindsay v. Cundy*, 2 Q. B. D. 96; *Dickinson v. Dodds*, 2 Ch. D. 463; *Wimbleton Conservators v. Dixon*, 1 Ch. D. 362; *Rogers v. Ingham*, 3 do. 351; *Re South Wales, etc., Co.*, 2 do. 763; *Hopkins v. Great Northern Ry. Co.*, 2 Q. B. D. 228.

existing system and overcame the inertia of public sentiment; and subsequently as Lord Chancellor it was he who brought to the discharge of his judicial functions the commanding ability which led the way to better things.¹ It was finally determined to rein-

¹ His various arguments in answer to the supporters of the old order of things afford fine specimens of his powers. For instance, in reply to the contention that judgments of the highest authority had been rendered in the House by the Chancellor alone, he said: "If there be a single judge who, by the common consent of mankind,

force and infuse adequate ability in the House by the creation of life peers. The plan itself was admirable, but the elevation of Baron Parke as Lord Wensleydale, in pursuance of the plan, was not calculated to further liberal views.

Lord Wensleydale came to the House of Lords after his long domination in the common law courts; and, it may be added, just as his domination ceased. The Common Law Procedure Act seemed to him a desecration of the sacred system of special pleading, and led to his retirement from his old court. The atmosphere of embodies the highest qualities of a judge, then the decisions of that individual, being uniform, certain, definite and clear, would be of the highest possible value; precisely as if you had an arbitrary government, with absolute authority vested in a man of the highest possible moral and intellectual perfections, one would desire to live under that government rather than any other. But it is so difficult to obtain such a man, and still more a succession of such men, that it is impossible, particularly in the case of a tribunal which has causes brought before it from all quarters of the globe, involving all possible questions, to suppose that one individual will at all times be equal to the satisfactory determination of such a vast and multitudinous assembly of subjects; therefore it is that we desire a greater number of minds than one, in order that some may supply what is wanting in others."

the House during his twelve years service was not congenial to his peculiar powers. Lord Campbell, whose unquestioned learning

was his servant and not his master, combated here, as he had in the courts below, the narrow technicalities with which Wensleydale sought to confine the common law. Then the preponderance of equity lawyers, due to the rapid succession of chancellors, was little calculated to lend support to his general views. A far more accomplished lawyer was added to the court in 1858 in the person of Lord Kingsdown, after his brilliant services in the Privy Council. From the chancellorship of Lord Westbury (1861-65) a new period may be said to begin. Himself one of the ablest lawyers who ever held the seals, Westbury had the assistance of four ex-chancellors and two legal peers. The chancery element now predominated, and



LORD COLONSAY.

the eminent ability of the succeeding chancellors, Cairns, Hatherley and Selborne, maintained this ascendancy for the remainder of the period. In 1867 the court was further

strengthened by the addition of a distinguished Scotch lawyer, Lord Colonsay. In 1869 Sir James Wilde was also raised to the peerage as Lord Penzance.¹ The court now, for the first time, gave satisfaction, particularly in equity, and the reports of its decisions, as contained in the last volumes of Clark's House of Lords cases, the English and Irish appeal cases (1865-75), and the Scotch and divorce appeal cases (1865-75) are of great value and importance. They deal less with public and more with private cases, and the discussion of general principles is much more satisfactory than any of the prior debates of the House.

In the Privy Council during this period

¹ *Kelly v. Kelly*, 39 L. J., P. 9; *Parfit v. Lawless*, 41 do. 58; *Coombe v. Edwards*, 39 L. T. 294; *Pearks v. Moseley*, d App. Cas. 714; *Capital v. Counties Bank v. Henty*, 7 do. 741; *Dalton v. Angus*, 6 do. 740; *Rhodes v. Forwood*, 6 do. 256; *Erlanger v. Phosphate Co.*, 3 do. 1124.

Kingsdown received valuable assistance from Knight-Bruce, who was learned in foreign systems of jurisprudence, and from Turner, Penzance and Westbury. Peel and Colville had great weight in Indian appeals. By a statute of 34 and 35 Victoria, provision was made for the addition of four paid judges, in consequence of which the court was strengthened by the appointment of Peacock, Collier, Montague E. Smith and Byles. Byles' service was unimportant, and Peacock confined his attention mainly to Indian appeals; but Collier and Smith were able and industrious judges. Collier took an important part in formulating the opinions of the court, and the work performed by Smith was both considerable in amount and of permanent value. These judges were assisted principally by Cairns and Penzance.

SIC TRANSIT GLORIA PLACITORUM.

BY ROBERT WYNESS MILLAR.

I SAW a grisly army march by in weird review,
 No flaring bugles did I hear nor e'en a drum's tattoo.
 'T was not a mortal army; — it passed with solemn tread,
 In the catacombs of Limbo, to the mansions of the dead.
 The army was of shadows,— of shadows gaunt and gray;
 A rustling as of parchment went with that sere array.
 I stopped and gazed and wondered; — what could that army be?
 But as I looked, a sudden thought revealed the truth to me:
 The shadows in those legions were shapes of olden time,
 The entities of pleading in the days of pleading's prime;
 For now a new assignment would greet my wildered eyes,
 And now the shade of oyer in dark and gloomy guise,
 Again the shade of color, the shade of profert too,
 Would sweep along in grewsomeness and pass beyond my view.
 Anon there came the band of writs in close and serried file;
 They stretched as far as eye could see, — I ween for full a mile;
 The writ of latitat was there, the writ of ouster keen;
 The habere facias seizinam and entry, too, were seen;
 The writ of coram nobis hoar, the trenchant writ of right,
 And all the brethren of that ilk, deep scarred from moil and fight,
 And close behind the writs there marched the bristling ranks of pleas
 Of divers kinds in stern array—one could not number these.
 I saw the plea of tender, the plea of son assault,
 And eke the absque hoc itself, sans blemish and sans fault;
 E'en too the non-assumpsit and others known to fame,
 Of many kinds and sundry in aspect and in name.
 But as I watched these cohorts, the lines all thinner grew,
 Till presently in murky gloom they vanished quite from view.

THE CITED.

BY GEORGE H. WESTLEY.

AMONG the traditionary stories of our new possessions are not a few concerning law and lawyers. One of the most interesting of these is the following:—

Some seventy years ago there lived in Havana an humble artisan by the name of Felipe Guayos. He was a man of peaceful, industrious habits, and a lover of quiet and home, yet in some way or other he contrived to incur the enmity of Don Alonzo Morelos, who was a prominent lawyer in the same city. This enmity became so marked that there was much speculation upon it, and tongues clacked up and down the byways as to the cause of the rich man going out of his way to persecute the poor one. It was told by some that it was because Guayos, who was a mulatto, had dared to address the haughty Spaniard familiarly upon the street, in the presence of ladies and officers. Another rumor said that Guayos had a pretty wife upon whom the lawyer had cast desiring eyes. Howbeit, one day officers came to the artisan with a warrant for his arrest on the instigation of Señor Morelos. The crime laid to his charge was that of treason.

Revolution was in the air at that time, and many secret meetings were being held to overthrow the Spanish dominion in Cuba; but those who knew Guayos intimately could think of no man less likely to be concerned in any such movement. They knew him for one who attended strictly to his own affairs, and as for his staying away from his home to drill in hot barns or chigger-infested clearings, they could not believe any such thing of him. Yet for this was he arrested, and in those days a charge of disaffection toward the crown meant death.

Cuban law was usually tardy and involved, but on the day of Guayos's trial it was singularly brisk. The court-room was crowded to

the doors. The prisoner's pretty young wife was there and many of his friends and relatives; but of all the company Guayos himself seemed the least concerned in the proceedings. He appeared like one in a dream; his eyes were fixed placidly upon the nodding palms, which could be seen through the open window. Occasionally as the trial went on, he would start a little and withdraw his gaze for a moment upon hearing his name spoken, but again it would stray to the open window and palms. The waving trees outside seemed to soothe, to fascinate him.

The evidence against him was not strong, but his enemy was a man of influence. After the witnesses had all been heard, the summing up showed that the prisoner had once owned a gun, had spoken equivocal phrases, had been seen to lift his nose in passing certain men, and had admitted a suspect into his house at night. On this he was declared guilty.

During the last few minutes of the trial, Guayos had roused to some interest in what was going on. He withdrew his gaze from the window and fixed it steadily upon Morelos. The lawyer returned the gaze calmly for a time; then he frowned and turned the pages of a law-book. After a little he moistened his lips with his tongue, and strove to appear listless and bored. He did not look at the prisoner again until the verdict had been given.

When the judge asked the convicted man if he had anything to say why the death-sentence should not be passed upon him, Guayos rose, his face pale, but his eyes fixed in an expression of stony calm. Looking at neither judge nor audience, but straight at his accuser, he said in a clear, tense voice: "I go to my death. It is useless to speak, for you have condemned me. But I cite you,

Don Alonzo Morelos, to appear beside me at the bar of God, one year from my death-day, and testify how I came to my end."

There was a moment or two of deep silence among his awe-stricken hearers, and then they broke forth with excited murmurs. The judge signalled the officers to clear the court, and then left the bench.

Morelos sat in his chair white to the lips. He seemed dazed, as from a blow. His fingers plied abstractedly among his papers, and his eyes were fixed upon the vacant bench. The court-room was quite empty before he came to himself, and with a scowl and a shrug he took up his hat and went home, taking a roundabout way to avoid the people.

Guayos made no appeal, asked for no delay. A week later he was hanged. At the execution an odd thing happened: the rope slipped a little and the knot working towards the front, left an impress there as of two crossed fingers. The friends of the executed man took this to be a sign of grace.

As for Morelos, a month had not passed after the trial ere a great change was noticed in him. His fine jet black locks began to turn white. He grew gray and dry in his complexion, his shoulders bent as beneath a heavy burden, his eyes lost their clearness and boldness, often a harried, hunted look came into them; he became in short a mere wreck of his former self. Everybody around him knew the cause and noted the signs of his decay. He was a marked man. Even the boys in the street knew him, and as he passed with bent head and hands clasped behind his back, they would whisper: "There goes *El Citado*."

Gradually he appeared less and less in

public. He neglected his practice, he resigned from his club, he shunned the society of his fellows, he walked abroad only at night. His old housekeeper told one of her friends that the man frequently paced the floor of his room till dawn, and that now and again he would mutter to himself and gesture as if striking something.

Presently it was rumored that the grave of Guayos was haunted, a black figure having been seen kneeling before his tomb. One old woman declared that this watching, waiting figure had horns and green eyes like a cat's; while another said it was merely the form of a man, taller, thinner, more bent than Guayos, therefore not his ghost.

The months rolled by and at length came the anniversary of the hanging. There was now left in the lawyer hardly a vestige of his former manhood and power. All the previous day Morelos had shut himself up in his room, and all that evening and far into the night, the housekeeper had heard him pacing to and fro overhead. At midnight the woman retired. A little before dawn she found herself sitting bolt upright in bed. What had roused her she knew not. Nobody had called to her. Next moment she heard a faint sound of crumpling paper. Then a chair was roughly pushed back, and there sounded out a blood-curdling cry: "No, no! My God!" Then the house shook. Frightened half out of her senses the woman bolted her door and fell to praying.

In the morning Don Alonzo Morelos was found lying dead on the floor of his chamber, and on his throat was a livid mark as of two crossed fingers. The citation had been obeyed.

EARLY CRIMINAL TRIALS.

II.

THE GREAT OYER OF POISONING.

THE case of Sir Thomas Overbury was one of the great sensations of its day. And this fact is calculated to stimulate interest, for the reign of James I. was not exactly prosaic. Beside the absorbing interest of the affair itself, it touched in so many ways the life of the time that it may justly be called the most celebrated murder case to be found in the early State trials. It is still known as "The Great Oyer of Poisoning."

Sir Thomas Overbury, the unfortunate subject of the story, was an English gentleman of good birth and, for his time, a man of considerable scholarship. He was a poet of some pretensions, and enjoyed the friendship of Ben Jonson and other literary celebrities of the later Elizabethan period. On a journey to Edinburgh in 1601 he made the acquaintance of Robert Carr, the future Duke of Somerset, then only a page to the Earl of Dunbar. This friendship, which was destined to bear such bitter fruit in after life, was continued when young Carr came to London in 1603 to seek his fortune. The rapid progress made by this young Scotchman in the favor of James I is a matter of history. He soon became the King's favorite, and was advanced with dazzling rapidity in the line of political preferment. Overbury partook in a measure of the success of his friend, and acquired a certain position in court circles. He seems to have acted as a sort of tutor and general adviser to Carr, whose mental equipment was not calculated to sustain, much less to win, the position thrust upon him by his infatuated sovereign. Everything went along smoothly until the youthful favorite succumbed to the charms of Lady Frances Howard, Countess of Essex.

This lady, whose scorn was to cost Overbury his life, was then experienced beyond

her years. For reasons of family policy she had been married while still a child to the Earl of Essex, the son of Queen Elizabeth's unhappy favorite. The Earl, who was then only fourteen, was forthwith sent to the continent to travel and acquire the education and experience requisite to his rank. Meanwhile the girl wife grew up in the fetid atmosphere of court gaiety and intrigue and became an accomplished flirt. Carr was attracted by her beauty and a liaison soon followed. Overbury assisted his friend in this love affair to such good purpose that it is asserted that Carr owed his success in no small measure to the fervid poems and letters which Overbury wrote for him. Overbury himself was not without experience in such matters, having written his best-known poem, "A Wife," with a view to securing favor in the eyes of the Countess of Rutland, Sir Philip Sidney's daughter. At all events the young favorite's advances met with success. In the midst of their liaison the young Earl of Essex returned to claim his bride. She received him with disgust. He pressed his authority and took her for a time away from the court. But he could make no headway against her repugnance and finally gave up in despair. Lady Frances pursued her advantage and determined to secure a divorce. With a view to marrying Carr, who was then Viscount Rochester, she resolved to obtain a divorce from Essex. A divorce was in those days no easy matter. But the Earl of Essex was now thoroughly indifferent, and seems to have agreed to admit any charge that his wife saw fit to make against him. The King, in the interest of his favorite, openly exercised his influence, and in the end, in an undoubtedly collusive proceeding, a divorce was eventually granted on revolting grounds with the consent of

the highest ecclesiastics of the time. (2 State Trials, 785.)

Now came the break between Overbury and his friend. When Rochester informed Overbury of his intention of marrying Lady Frances, Overbury opposed it with great warmth. He warned his friend against formally allying himself with a woman of abandoned character, and used every influence to avert what he very properly characterized as a useless entanglement. This opposition stirred Lady Frances' passionate nature to its depths, and she seems to have resolved to be revenged on Overbury, even before consummating the desired marriage. Rochester evidently desired to save his late friend from the lady's wrath as much as possible, and endeavored to persuade him to undertake a foreign mission. But Overbury, in spite of the frowns of the court circle, would not go. Lady Frances' taunts at last drove Rochester to consent to consign the culprit to the Tower as a temporary expedient. There is no proof that Rochester was cognizant of Lady Frances' subsequent operations against Overbury; she seems to have persuaded him that with Overbury in the Tower they would effectively stop his mouth, and incidentally they could oversee his correspondence. But my lady's fury knew no such bounds. Nothing but Overbury's life would satisfy her. She first suggested assassination to Sir David Wood; but, although offered a tempting reward, Sir David could not see his way clear to undertake the risk unless she would secure a pardon in advance through Rochester. Obviously such a course was not available. She then started upon another course. Through the influence of her unscrupulous great uncle, the Earl of Northampton, she secured the dismissal of Sir William Waad, the lieutenant of the Tower. Sir William, it seems, had an unconscionably high reputation for integrity. A more pliable officer, Sir Gervase Helwys, was promptly put in the place. Another of Lady Frances' creatures, Weston by name, was appointed goaler

and put in immediate charge over the prisoner. Other agents of the infuriated lady were a Mrs. Turner, an abandoned character, and James Franklin, an apothecary. Weston, the goaler, had instructions to mix with the prisoner's food the poisonous contents of certain phials with which he was supplied. Lady Frances herself provided the confectionery for Overbury's table, which Helwys was suggestively instructed to allow none but the prisoner to taste. According to the confession subsequently made by Franklin, the apothecary, white arsenic was the poison chiefly employed, although *aqua fortis*, mercury, powder of diamonds, *lapis costivus*, great spiders and cantharides" were at various times mixed with Overbury's food.

Overbury was in poor health at the time of his imprisonment and had no suspicion that foul play was the cause of his failing health. Although he was not allowed to see anyone, he was permitted to write, and his letters, which have been preserved, are filled with pathetic descriptions of his physical tortures and with appeals for release. After three months of this inhuman torture his condition became critical, and with a view to finishing him he was removed to a damp and unwholesome cell. So cleverly had the plot been carried on that two of the most eminent physicians of the day, who had been allowed to examine him, were deceived. For some reason Sir Gervase Helwys now summoned a new medical attendant, one Lobel, who diagnosed Overbury's ailment as consumption. Lady Frances, meanwhile, had become impatient with slow and cautious methods and employed a man in Lobel's pay to end the matter at once. Thereupon the latter administered a clyster of corrosive sublimate, from the effects of which Overbury died on the following day, after three months and a half imprisonment. On the same day, September 14, 1613, he was buried within the Tower.

Meanwhile, having obtained her divorce,

Lady Frances, on December 26, married Carr, who had been created Earl of Somerset on November 3. For nearly two years the crime lay secret. But the Earl of Somerset himself invited comment by his moody and morose demeanor, which was so entirely foreign to his nature. It may be that, if not actually cognizant of Lady Frances' operations, he readily divined them, and a guilty conscience may have been a heavy weight for his volatile nature. However, the secret leaked out in July, 1615, through a boy in the employ of one of the apothecaries in attendance on Overbury. An investigation and the arrest of the conspirators quickly followed.

The minor personages were first brought to trial (2 State Trials, 911 *et seq.*). There was little doubt about their guilt, and they were speedily convicted and executed. Lord Chief Justice Coke displayed unpardonable zeal in accomplishing this result. A confession had been wrung from Weston, but when arraigned he seemed disposed to make a contest. He at first stood mute, apparently with an idea that this would block the proceedings against him. But an account of the cruel punishment inflicted upon a refusal to plead eventually overcame his resolution. Coke's conduct towards Mrs. Turner was simply brutal. After the evidence was all in and before the jury had retired, he told the prisoner that she had committed the seven deadly sins, as she was a whore, a bawd, a sorcerer, a witch, a papist, a felon and a murderer, and he advised her to pray God to cast out of her those seven devils.

Sir Gervase Helwys, the keeper of the Tower, was the only prisoner who put up any sort of defence. He pleaded that although he had conveyed various preparations to Overbury he did not know that they contained poison. There is a bare chance that he might have escaped, if Coke had not taken him in hand and exposed his pretensions. After the evidence had been concluded, Coke produced against him a confession by Franklin, the apothecary,

which had been made privately before him on the morning of the trial. This confession was not even under oath. Helwys seems to have been a hardened villain. In view of his sinful life the long speech that he made on the scaffold was the height of blasphemy. The following passage illustrates his curious complacency:

"I had almost forgotten to show you a strange thing, which God brought to my memory the last night, which was this: I confess I have been a great gamester, and especially on the other side have wasted and played many sums of money, which exhausted a great part of my means; which I perceiving vowed seriously (not slightly or unadvisedly) to the Lord by my vows and prayers, 'Lord, let me hanged if ever I play any more;' which not long after is most justly come upon me, whereof you are all eye witnesses, because a thousand times since I broke this my vow."

Finally, in the trial of Sir Thomas Monson, who seems to have been implicated in some way in the crime, Chief Justice Coke overstepped the bounds of discretion, with disastrous results to himself. Throughout the excitement caused by the discovery of the cause of Overbury's death there appears to have been an undercurrent of suspicion that there had been some sort of connection between this plot and the sudden death of Prince Henry, the King's promising son. It is impossible to unravel the mystery. The report of Monson's case simply records the fact that Coke having let drop some insinuations that Overbury's death was in retaliation, as if he had been guilty of some crime against Prince Henry, Monson's trial was suspended and he was soon afterwards liberated. Bacon is authority for the statement that the King rebuked Coke, and before the end of the following year removed him from office in consequence of this indiscretion.

The trial of the Earl and Countess of Somerset would ordinarily have followed at once. But it was postponed for several

months, apparently to enable an investigation to be made with respect to Somerset's relations with the Spanish ambassador, and also in consequence of Lady Somerset having given birth at this time to a daughter, who afterward became the mother of Lord Russell.

At length, on May 24, in the following year, the countess was arraigned, and at once pleaded guilty. She simply said, when asked why sentence should not be pronounced, "I can much aggravate, but nothing extenuate my fault; I desire mercy, and that the lords will intercede for me with the King." The Countess' plea was evidently unexpected, for in Bacon's works is preserved a speech which he had prepared for her prosecution.

Most important of all was the trial of the Earl of Somerset, which now followed. Somerset's head had unquestionably been turned by his rapid advancement. His arrogance and his open espousal, as a high officer of state, of the Spanish connection, had aroused a powerful intrigue against him. This influence was now actively arrayed in pressing its advantage. On the other hand, he had so long enjoyed the King's favor and had participated so deeply in the secret affairs of state, that the king may well have been apprehensive of the outcome of the death struggle of his quondam favorite. When the day for the trial had been fixed, Somerset declared that he would not appear. He warned the King, furthermore, that if he were forced to attend he would make some disclosures that would be likely to lead to serious consequences. The royal apprehension is plainly disclosed in the correspondence which passed between the King and Sir Francis Bacon, who, as attorney-general, conducted the prosecution. The elaborate brief which Bacon prepared for this case (preserved in his published works) indicates the thoroughness of his preparation. In this brief, among what he terms "questions legal for the judges," he notes an inquiry whether, in case Somerset should attempt to make any

disclosures involving the King, he should not be interrupted and silenced by the court; and if he should persist, whether he should not be withdrawn and the evidence concluded in his absence. It is said that among other precautions in this direction, Somerset, at his trial, was placed between two servants, who had instructions to throw a cloak over his head, at a given signal, and forcibly carry him from the court room.

Somerset was finally arraigned before his peers in the Court of the Lord High Steward. Lord Ellesmere presided with dignity, and, on the whole, treated the prisoner fairly, although his repeated solicitation to the defendant to confess was very reprehensible. In accordance with the usual custom Ellesmere opened the trial with an address to the prisoner, the substance of which is disclosed by the following passage:

"Now, I must tell you, whatever you have to say in your own defence say it boldly, without fear; and though it be not ordinary custom, you shall have pen and ink to help your memory; but remember that God is the God of truth; a fault defended is a double crime; hide not the verity nor affirm an untruth, for to deny what is true increases the offence; take heed lest your wilfulness cause the gates of mercy to be shut upon you."

The prosecution was conducted by Attorney-General Bacon and Sergeants Montague and Crewe, and it is one of the ablest specimens of such work to be found in the early judicial records. As a precedent in judicial procedure its value is insignificant by reason of the non-observance of rules of evidence which are now considered fundamental, but as an example of the methodical accumulation of testimony it is still worthy of study. Bacon had no difficulty in proving that Somerset had taken part in a highly suspicious plot, and he argued that Somerset could have no motive to imprison Overbury unless he had meant to murder him; for, he said, if Overbury had been sent abroad he would have been effectually disabled by distance from hindering the obnoxious mar-

riage. Somerset might have made two answers to this course of reasoning: Overbury positively declined to go abroad; and, moreover, had he gone, he could easily have communicated by letter in hindrance of the divorce and proposed alliance. In the Tower no communication with the outside world would be possible, and Somerset may well have accepted this course as the most practicable temporary expedient to obviate his friend's opposition until his desires had been realized.

According to the custom of the time the different counsel divided the case among themselves. In this division of labor Sergeant Montague was given the most difficult task. He proved that Somerset had sent certain powders to Overbury, and tried, without much success, to show that Somerset had poisoned the tarts which had been sent to the Tower. His theory that Somerset was constantly administering poison to Overbury during a period of three months would seem to prove too much, for the fact remained that Overbury did not die until the apothecary's servant administered corrosive sublimate—and there was not the slightest evidence to connect Somerset with that act.

Bacon summed up the evidence in an excellent speech. It was, however, divided and subdivided in the old-fashioned anatomical style and was replete with classical allusions. "For the matter of proof," he said, "you may consider that impoisonment of all offences is most secret, even so secret that if in all cases of impoisonment you should require testimony you should as good proclaim impunity. Who could have impeached Levia by testimony for the poisoning of her figs upon the tree, which her husband was about to gather with his own hands? Who could have impeached Parasetis for the poisoning of the one side of the knife she carried with her, and keeping the other side clean so that herself did eat of the same piece of meat that they did whom she did impoison?"

Contrary to the King's expectations the

defence was devoid of sensational features. In fact, it was so weak as to amount to a virtual surrender. Somerset was not a strong man, in any sense of the term, and it is an open question whether his failure to make a more vigorous defence may not have been due to a feeling of the hopelessness of trying to fight successfully against trained lawyers. Certainly this case is a good illustration of the absurdity of the reasoning upon which the exclusion of counsel for the defence in cases of felony was based. It was said that the case against the prisoner should be so clear that the ablest lawyer could find no fault with it, and the judges, who were, of course, supposed to be the equals of the ablest lawyers, were counsel for the defendant to the extent of seeing to it that the weak points in a prosecution were exposed. As a matter of fact Somerset received no assistance from the Lord High Steward; on the contrary, Lord Ellesmere would seem to have assumed the prisoner's guilt from his repeated efforts to secure a confession. It is questionable whether in any event Somerset would have been acquitted; but if he had been defended with half the skill which characterized the prosecution, he could have made a strong defence.

He seems to have been oppressed by a consciousness of the bad appearance of his participation in Overbury's imprisonment. Moreover, he had taken the ill-advised course of burning letters which could have done him little harm. It is impossible to get at the truth of the defence which he feebly suggested rather than presented. It would seem that Weston had not actually administered all the poison, as instructed. Somerset had in fact sent some tarts and jellies to Overbury as a means of conveying letters assuring him, in answer to his appeals, that efforts were being made to hasten his delivery. Lady Somerset is supposed to have mixed the poison with these tarts—whether with or without Somerset's knowledge can never be known. Somerset was also known to have sent certain powders to Overbury,

for the purpose, he claimed, of giving Overbury the appearance of ill health, and thus assisting in working on the compassion of the King. Although the contents of these powders were not proved, the theory used to explain them seems to be the most damaging evidence in the case. In short, his explanation of his conduct was that he wished to keep Overbury out of the way until his marriage with the countess had been consummated, and, meanwhile, he desired to impress Overbury with his friendliness.

Not until the lords were about to retire to consider their verdict did Somerset seem to gain self-possession enough to make a rational statement. "My lords," he concluded, "before you go together I beseech you give me leave to recommend myself and cause unto you; as the King hath raised me to your degree so he hath now disposed me to your censures. This may be any of your own cases, and therefore I assure myself you will not take circumstances for evidence, for if you should the condition of a man's life were nothing."

After his conviction he wrote a long letter to the King, in the course of which he said with much force: "I fell rather for want of well defending than by the violence or force of any proofs; for I so far forsook myself and my cause as that it may be a question whether I was more condemned for that or for the matter itself."

The King granted a pardon to the Earl and Countess, and in 1621 they were released from the Tower, under certain restrictions as to their future movements. The Countess died in 1632; the Earl lived until 1645.

This affair led to another celebrated case. Sir John Hollis and Sir John Wentworth had attended Weston's execution, and had asked Weston whether he was really guilty, expressing a wish to pray with him. Hollis also stated that had he been on Weston's jury he would have doubted what to do. For this mild scepticism they were summoned before the Star Chamber for "trading public justice" (2 State Trials, 1022), and were fined one thousand marks and imprisoned one year.

CHAPTERS FROM THE BIBLICAL LAW.

BY DAVID WERNER AMRAM.

THE CASE OF THE BLASPHEMER.

AMONG very primitive peoples, blasphemy as a crime is unknown. The gods are considered to be simply superhuman powers with superhuman attributes, but conducting their affairs very much like human beings. Any one, therefore, in such a state of society who offends the gods either by blasphemy or by robbing them of their sacrifices, or by desecrating their sanctuaries, is left to deal with them exclusively, and public law, so far as it exists, takes no cognizance of the crime. But when a people has reached national estate and has a national

god, any offense against the deity becomes a national crime, equivalent in some respects to high treason. It is the national pride that is wounded when the national god is insulted, and it is the national property that is stolen when the sanctuaries are robbed or desecrated.

In the earlier stages of society the gods were, so to speak, allowed to attend to their own affairs without interference from their human worshippers. If their sanctuaries were insulted, they were expected to smite the offender with their lightnings or with dis-

ease, or in some other way to manifest their displeasure and resentment.

The transition from this condition to the later stage in which the people take up the cause of their god is found in an interesting story in the sixth chapter of Judges, where Gideon threw down the altar of Baal that his father had, and cut down the grove that stood by it. "And when the people of the city beheld what he had done and discovered who was the offender, they went to his father and said: Bring out thy son that he may die, because he hath cast down the altar of Baal and because he hath cut down the grove that was by it." And Joash, who was Gideon's father, said to them, "Will ye plead for Baal? If he be a god let him plead for himself because some one has cast down his altar."

Here Baal was a deity worshiped by all the men of the city, but the particular altar that was destroyed belonged to Joash, and inasmuch as Joash did not choose to take vengeance for the destruction of the altar, the men of the city allowed themselves easily to be persuaded not to do so, by the plea that if the offended deity did not avenge the wrong done to him, they need not be zealous for him.

A fully developed law of blasphemy cannot arise until a nation as such recognizes the same god, and the beginning of such national self-consciousness among the Hebrews is shown in the case of the blasphemer, which is recorded in the twenty-fourth chapter of Leviticus. While the Israelites were in the wilderness after the exodus from Egypt, there went forth one of that "mixed multitude," the son of an Israelitish woman whose father was an Egyptian, and he and a man of Israel strove together in the camp, and the son of the Israelitish woman blasphemed the Name and cursed, and they brought him unto Moses. And his mother's name was Shelomith, the daughter of Dibri, of the tribe of Dan. And they put him in ward to ascertain the law according to the mouth of Jehovah; and Jehovah said unto

Moses: "Bring forth him that cursed without the camp, and let all who heard him lay their hands upon his head, and let all the congregation stone him." And Moses spake to the children of Israel that they should bring forth him that had cursed out of the camp and stone him with stones; and the children of Israel did as Jehovah commanded Moses."

That this was a case of first impression is shown by the fact that Moses, before whom the case was brought, did not venture on an opinion off-hand, but had the prisoner put in ward until he had consulted the Lord.

In the article on "The Case of Zelophehad's Daughter" published in THE GREEN BAG, January, 1900, a similar phrase was explained to mean that the court retired to consult, and inasmuch as the court pronouncing judgment spoke in the name of God, and its judgment was considered the judgment of God, the phrase here used, "to ascertain the law according to the mouth of Jehovah" is simply another way of saying that the court consulted for the purpose of reaching a decision, which, *ipso facto*, was inspired of God. The difficulties that the case presented to the court were these: Was there a crime committed? Was the offender punishable? What punishment should be meted out to him?

The fact that this man was arrested indicated that public opinion had at this time been sufficiently crystalized to warrant public officials in taking cognizance of the act as a crime. This man had blasphemed the name of God and cursed. We are not told what he said, and from the use of the Hebrew word which is translated "blasphemed," and which also may be translated "pronounced," it has been supposed that his crime consisted in pronouncing the ineffable name of God accompanied by a curse.

The second question was a more difficult one. Assuming that the offense was a crime if committed by one of the house of Israel against Israel's God, what was to be done to

a man whose father is an Egyptian and whose status as a son of Israel is therefore doubtful? Is it a crime to blaspheme the name of a god in whom one does not believe? Could, therefore, the son of the Egyptian be held amenable for this crime? It appears that Moses' decision is based on the general principle of the law which provided that the child follows the status of the mother, and as she was an Israelitish woman, her son was considered an Israelite, irrespective of his paternity. This is furthermore emphasized by the fact that the record is careful to give his, *i. e.*, his mother's pedigree. But what would have been the decision had he been the son of an Egyptian woman? The question is not decided in this case, but it evidently must have arisen, for as we shall shortly see, in the general law that was promulgated on this subject this case is provided for.

The court consulted and decided that a crime had been committed, that the offender was amenable to the law, and that he should be stoned to death. In the sentence of the court, the witnesses, that is, those who heard the blasphemy, are directed to place their hands upon his head. This was analogous to the custom of sacrificing, where the persons bringing the sacrifice placed their hands upon the head of the sacrificial animal. The idea implied here was that the animal was offered by the hands of the persons who sacrificed to the deity, and that the sins or offenses of the person sacrificing were to be atoned for by the sacrificial offering. Thus the persons who are, as it were, parties to the crime, merely from having heard the blasphemy, offer the offenders as a sacrifice to the insulted deity, and thereby avert the divine wrath from themselves.

The blasphemer was stoned to death by "all the congregation." The Hebrew word which we have translated "congregation" is *Edah*, meaning assembly. It was the select men of the people who are meant by *Edah*, who acted as executioners, and

perhaps were also the associate justices with whom Moses deliberated before rendering judgment.

After the sentence of the court was carried out, a general law to cover this and similar cases was formulated. Judging from the proximity of the text of this special case and the general law, it might be supposed that the latter was passed immediately after or even before the execution of the sentence, but, as was pointed out in the case of Zelophead's Daughters, the mere proximity of laws or texts in the Bible proves nothing regarding their chronology. The general law was no doubt much later than the special case which is here cited, and sums up the law on the subject in a brief sententious manner, thus: "And thou shall speak unto the children of Israel saying, Whoever curseth his god shall bear his sin, and he that blasphemeth the name of Jehovah shall surely be put to death, and all the congregation shall certainly stone him; as well the stranger as the native when he blasphemeth the Name shall be put to death."

This general law seems to have been especially made to cover the point that was raised, but not decided in the case of the son of the Egyptian. If he had been the son of an Egyptian woman he would not have been an Israelite; and the question as to whether he could have been punished would have been a more difficult one. This question is now settled. The stranger as well as the native is punishable with death if he blasphemes the name of Jehovah. If the stranger blasphemes his own gods, the Jewish law takes no cognizance of it. If a man blasphemes his god let him bear his sin—let him suffer such punishment as his god may mete out to him; but if he blasphemes the name of Jehovah, and is, for the time being under the jurisdiction of the Jewish law, let him be punished with death.

That the crime of blasphemy was akin to the crime of treason is shown in several other passages of the Bible. In Exodus

XXII, 28, the code says, "Thou shalt not revile the gods nor curse the ruler of thy people," and, similarly, Isaiah speaks of the people cursing their king and their god (Isaiah VIII, 21); and in Naboth's case (I Kings XXI, 10) (GREEN BAG, October, 1900), the crime with which he was charged was "Thou didst blaspheme God and the King." It indicates what was before stated, that when the people attained a national dignity the national god was guarded like the king, and offenses against him were similarly punished. As long as the people were living in a patriarchal state an offense against the gods was an offense against the head of the family, for the gods were household gods; and this we see in the case of Gideon whose offense really was against his father in breaking down his father's altar and sacred grove.

In the later Jewish law the idea of blasphemy was very much more refined. Merely uttering the sacred name of God constituted the crime. So careful were the Jews not to offend in this way that the original pronunciation of the name of Jehovah has been lost, and it is only as a result of modern painstaking scholarship that its probable sound "Yahweh" has been recovered. The early translators of the Bible carefully avoided it; the Greek translated it "Ho kuriós;" the Latin translated it "Dominus," both meaning "Master" or "Lord;" and

from these translations all the modern languages use similar term, such as "Lord," "Herr," "Sieur," and the like.

Josephus, in his desire to curry favor with the Romans, went so far as to say that according to Jewish law it was a crime to blaspheme other gods; but the text of the law in the case of the blasphemer is clearly to the contrary.

The reader of the Bible will find appended to the law of the blasphemer, and apparently forming a part of it, certain laws concerning other capital crimes (Leviticus XXIV, 17-22). These have nothing to do with the law of the blasphemer, and have been interpolated here through the law of association because they also refer to capital crimes, and lay down the general law that the stranger and the native are equally liable.

In order, therefore, to read properly the case of the blasphemer as it is recorded in the twenty-fourth chapter of Leviticus, read first from verse 10 to verse 14 inclusive, and then read verse 23, which will be found to connect directly with verse 14. Verses 15 to 22 are obviously interpolated. Verses 15 and 16 should be read after verse 23, and with these verses the law concerning blasphemy is concluded. As above stated, verses 17 to 22 have been appended to the law concerning blasphemy, although they have no direct connection with it.



LONDON LEGAL LETTER.

SEPTEMBER, 1901.

A RECENT decision of the House of Lords, which has not yet been reported, is pertinent to the present condition of labor matters in the United States. Last year there was an almost paralyzing strike on the Taff Valley Railway in Wales. It arose through the dissatisfaction of some of the railway employees with their conditions of service, but the moment it had been entered upon, one Bell, the general secretary of the Amalgamated Society of Railway Workers, wrote to the manager of the railway that all negotiations with the railway employees should be conducted through him. The company made arrangements for the engagement of new men, and large numbers of them arrived in Cardiff to enter upon their service. They were watched and beset by pickets from the strikers and prevented from working. The secretary, Bell, who had assumed sole command of the strikers, issued a circular, which was traced into the hands of the new employees, which contained this sentence:

"Are you willing to be known as a black-leg? If you accept employment on the Taff Vale that is what you will be known by."

The company brought an action against Bell and one Holmes, the organizing secretary of the Society of Amalgamated Railway Workers, and joined the society as a defendant, and they applied to Mr. Justice Farwell, the vacation judge last summer, for an injunction to restrain these officials and the society itself and its officers from watching or besetting the company's railway stations for the purpose of persuading or otherwise preventing the workers from performing their duties. Mr. Justice Farwell granted the injunction, but the society successfully appealed to the Court of Appeals from his judgment, on the ground that although it was an incorporated body it was not incorporated as a business concern, but

only as a benevolent institution, and that if it was obliged to respond in pecuniary damages for any wrongs its officers might commit, its funds would no longer be available for the widows and orphans of its members. The railway company appealed to the House of Lords, which, after patiently hearing the argument of counsel at great length, reversed the Court of Appeal and affirmed the judgment of Mr. Justice Farwell. The judgment of the Lord Chancellor is a model of brevity, as well as clearness, and is worthy to be inserted in full in *THE GREEN BAG* as a model to judges in courts of last resort in America. It consists of only two sentences, which appears all the more remarkable when it is considered what weighty effect the decision must have upon the labor organizations, and hence upon politics, not only in England but throughout the British Empire. It is as follows:

"In this case I am content to adopt the judgment of Mr. Justice Farwell, with which I entirely concur, and I cannot find any satisfactory answer to that judgment in the judgment of the Court of Appeal which overruled it. If the legislature has created a thing which can own property, which can employ servants, which can inflict injury, it must be taken, I think, to have impliedly given the power to make it sueable in a court of law for injuries purposely done by its authority and procurement."

The House of Lords have also decided another trade union case within the past few weeks. This is the case of *Quinn v. Leatham*, and it came on appeal from Ireland. Leatham, who was the plaintiff in the court of first instance, was a butcher, who for upwards of twenty years had carried on his business in Belfast in a large way, having several assistants, and, among others, one customer named Munce, to whom he supplied between £20 and £30 of meat weekly. In February,

1893, a trade union society of journeymen butchers was registered. Leathem did not join it nor did his workmen, although he offered to do so and to pay the dues or subscriptions of all of his employees to the society. This offer was not accepted, and a strike was declared against him. His customer, Munce, was threatened with severe penalties if he did not cease trading with Leathem, and the defendant society and certain of its members decoyed Leathem's servants away from his service and paid them their wages while idle. They also published a "black list," in which they held up Leathem and his customers to ridicule. Leathem finally brought an action against the individual whom he could connect with these practices. The jury, upon questions being left to them, found that the defendants wrongfully and maliciously induced the customers and servants of the plaintiff not to deal with him and that they blacklisted him, and they assessed the damages at £250, for which sum judgment was given against the defendants. This judgment was affirmed by the Irish Court of Appeals, and although with one dissenting opinion, now has been affirmed by the House of Lords. The case has especial interest because of the defence set up, and it was upon this ground that the appeal was made, that there was no privity between the defendants and Leathem, and that the acts of the defendants in refusing themselves to trade with Leathem and in persuading others not to trade with him, were legitimate, and they relied upon *Allen v. Flood*, which seemed to support their contention. The Lord Chancellor distinguished *Allen v. Flood* from the case at bar by saying that in the former case the defendants neither uttered nor carried into effect any threat at all. The other judges, although with apparent difficulty, got rid of *Allen v. Flood* in the same way, and from their expressions it is very fair to infer that they would be only glad if it was not hereafter to

be considered a precedent for anything. It is notable that Lord Lindley, who since his translation from the Mastership of the Rolls to the House of Lords, is looked upon as the strongest judge in that body, in his opinion used this language: "I am aware of the difficulties which surround the law of conspiracy, both in its criminal and civil aspects, and older views have been greatly, and if I may say so, most beneficially modified by the discussions and decisions in America," and he quoted with approval *Vegeahn v. Gunter* (167 Mass., 92).

The courts were closed earlier this year than usual, as the 12th of August came on a Monday, and but one court was at work on that day. Judges and counsel left town for the continent or the cool retreats of the seaside or the Scotch mountains early the week before. This year, as year after year for some time past, there has been the usual grumble at the arrangement of the legal term which keeps the courts open till nearly the middle of August, when judges and counsel and even jurors are stale, and then close them not to open again until nearly the first week in November. The popular change would be a vacation from the 25th of July till the 25th of September; but those who have the deciding of the arrangement do not sympathize with the desire for any change.

Although the vacation is very young yet, one very sad accident has happened in the death by drowning of Lady Smith, the wife of the Master of the Rolls. The latter will have the sympathy of every member of the bar. His courtesy and common sense are as proverbial as his knowledge of the law and his facility in applying it. He has been ill and overworked recently, and a rumor of last term said that he was likely to resign. How far the shock of his great bereavement will affect his future cannot now be surmised.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.

THE members of the bar have shared in the horror and sorrow felt by all good citizens at the assassination of the President; and because of their influence, direct and indirect, upon legislation, on them, more than on any other class of citizens, rests the grave responsibility of solving, or of attempting to solve, two serious questions which are pressing to be answered: what punishment should be meted out—and by whom—to the assailant or the assassin of the President or other high official of our Federal government, and what, if any, restrictive legislation should be enacted in respect of public utterances of an anarchistic nature. It behooves all good citizens to consider these questions calmly and seriously; and we commend to their consideration, and especially to the attention of members of the legal profession and to our legislators, the wise and conservative words of Professor Wambaugh in the earlier pages of this issue of the GREEN BAG.

NOTES.

UNDER date of February 12, 1787, a correspondent in Hartford, Conn., wrote as follows to a newspaper of the day:

The great increase of lawyers among us since the Revolution begins to give serious concern to all good men, and I am told a pamphlet of more than one hundred pages is now in the press, or soon will be, proposing an easy method to reduce their numbers in less than six months.

Peter the Great, in his time, had but four lawyers in his whole dominion, and two of these he hanged. For my own part, I will read no tedious essays on this subject. Let individuals check the present prevalent spirit of wrangling and litigation, and the number of attorneys will soon become inconsiderable. No man will follow any trade or profession longer than he can live by it.

REPRESENTATIVE WEILEP, a Kansas legislator, is probably the only man in the world who has been allowed by a court of inquiry to testify regarding what he said to himself.

In 1895 a committee was appointed by the Kansas legislature to investigate the alleged bribery of certain members in connection with a defeated railroad bill. Mr. Weilep was the first witness called by the prosecution. In the course of his testimony he told of seeing Representative M—— late one night coming down a hotel stairs. "I said to myself," continued Weilep, but a member of the defense had jumped to his feet.

"Hold on!" he shouted, "you can't testify about what you said to yourself!"

The prosecutor retorted hotly that there was no law to prohibit Mr. Weilep from so testifying.

Both serious and ludicrous was the argument that ensued. A majority of the committee finally concurred in the chairman's decision, that the witness had a right to tell what he said to himself.

"I said to myself," seriously proceeded Weilep, "that M—— had been up to Billy Carter's room to get his pay."

The testimony was recorded and made a part of the official record of the Kansas house.

SOON after Daniel Webster came to the bar, he was retained in a suit between two neighbors. It seemed that they had got to loggerheads about a disputed line, out of which had grown trespass suits and all sorts of controversies, and that the more malicious and artful of the two had so plied the other with law in one shape or another, that he had nearly ruined him. The latter at last became aroused, and brought an action against the other for malicious prosecution and retained Mr. Webster to manage it. On the trial, proof of malice was clear and convincing, and it was evident that the day of reckoning had at last come. In summing up for the

plaintiff, Mr. Webster after making a strong argument against the defendant, showing that he had again and again instituted suits against his client, merely to perplex and annoy him, closed as follows: "In a word, gentlemen, I do not see how I can better conclude than in the words of the good old psalm." Then looking at the jury but pointing to the defendant, he repeated from his favorite authors, Sternhold and Hopkins:

He digged a pit, he digged it deep,
He digged it for his brother,
By his great sin, he did fall in
The pit he digged for t'other.

And so it proved. The verdict was heavy against the "digger."

THE following anecdotes of Lord Coleridge are taken from an interesting sketch of the Lord Chief Justice in *The Law Times*:

Perhaps he was at his best on such ceremonial occasions as receiving the Lord Mayor of London on his election, summing up a society *cause célèbre*, addressing law students, or as treasurer of his Inn entertaining royalty. On one of these last occasions, when the then Prince of Wales was a guest, the arrangement was "no speeches," yet no sooner had the Benchers withdrawn to the Parliament chamber to finish their festivities than the Prince gave the health of the Lord Chief Justice. Lord Coleridge was equal to the occasion. "Put not your trust in princes," he said, "was a lesson they had all learnt from the psalmist, and the truth of it had been verified that evening," and he went on to make a graceful and felicitous speech, in which he quoted an epigram of Pope on a quondam Prince of Wales:

"Mr. Pope, you do not like kings?"

"Sir, I prefer the lion before his claws are grown."

In 1883 the Lord Chief Justice went on a trip to the United States in company with Lord Bowen, Sir James Hannen, and Sir Charles Russell, on the invitation of the Bar Association of the State of New York. They received a noble welcome from the bench and bar of America, were splendidly entertained and *fêted* everywhere. *Apropos* of this trip, Lord Coleridge had an amusing story to tell of a dinner given him in Chicago by a once famous lawyer of that city. At the outset there was an ominous pause, and soon it transpired that the pause was due to the viands having been seized by a sheriff's officer put in by a creditor of the host. What if under the law of Illinois—the thought

flashed through the Chief Justice's mind during that anxious pause—what if the guests as well as the viands were liable to be taken in execution! Of course the Chief Justice had to submit to the infliction of the interviewer, but, as an old hand at the game of cross-examination, he was well able to bear his share with a grace.

Here is a useful hint for solicitors which he extracted from an American attorney:—

LORD COLERIDGE: "Pray, Mr. Evarts, how do clients pay their lawyers with you?"

MR. EVARTS: "Well, my Lord, they pay a retaining fee; it may be fifty dollars or fifty thousand."

LORD C.: "Yes! and what does that cover?"

MR. E.: "Oh! that is simply a retainer. The rest is paid for as the work is done, and according to the work done."

LORD C.: "Yes, Mr. Evarts; and do clients like that?"

MR. E.: "Not a bit, my Lord; not a bit. They generally say: 'I guess, Mr. Evarts, I should like to know how deep down I shall have to go into my breeches pocket to see this business through.'"

LORD C.: "Yes; what do you say then?"

MR. E.: "Well, my Lord, I have invented a formula which I have found answers very well. I say 'sir' or 'madam,' as the case may be, I cannot undertake to say how many judicial errors I shall be called upon to correct before I obtain for you final justice."

Here is another American reminiscence. The Chicago fire was then recent.

"I am told, my Lord, you think a great deal of what you call your Fire of London. Well, I guess that the conflagration we had in our little village of Chicago made your fire look very small."

Lord Coleridge blandly replied:

"Sir, I have every reason to believe that the Great Fire of London was quite as great as the people at that time desired."

Lord Coleridge was driving towards his court one morning in his brougham, when an accident happened to it at Grosvenor-square. Fearing he would be belated, he called a cab from the street rank and bade the Jehu drive him as rapidly as possible to the Courts of Justice.

"And where be they?"

"What! A London cabby, and don't know where the Law Courts are at old Temple Bar?"

"Oh! the Law Courts, is it? But you said *Courts of Justice*."

LORD NORBURY once said. "When I read the interminable sentences of some authors, I begin to feel that their readers are in danger of being 'sentenced to death.'"

A correspondent sends the following instrument, which, he affirms, is recorded with Doggerel Deeds, Lib. 25, Fol. 100 :

Know all men by these presents, that we, William Adams, of Brookline in the County of Norfolk and Commonwealth of Massachusetts, merchant prince, and Eleanor Adams, wife of said William, in her own right, in consideration of the love and affection we bear to Francis W. Dorr, of said Brookline, mariner, and of divers other good and valuable considerations us thereunto moving, the receipt whereof can never be adequately acknowledged, do hereby give, grant, bargain, sell, convey, remise, release, and forever quitclaim, transfer, set over, and set on to the said Francis W. Dorr two undivided halves of a certain dog, hound, mastiff, bull-dog, collie, setter, pointer, harrier, retriever, beagle, pug, spaniel, terrier, cur, or canine creature, now known as Tu Tu Adams, but hereafter to be called Tu Tu W. Dorr, situated, when last seen, in the position of one about to "eat the crumbs which fall from his master's table," and bounded and described as follows viz.: Beginning in the dining room at breakfast, thence running north-easterly through the kitchen to a bone and biscuit; thence turning and running southerly and westerly, on an irregular curve, in the direction of a certain black cat, to the point where said cat intersects with a cherry tree standing on land now or late of Jonathan Pratt; thence turning sharply, and running in a straight line, under a fence, to a swill tub standing on land of one Thompson, there measuring three feet at every step; thence turning south-easterly and walking slowly to the point of beginning. Containing all that he can hold, more or less, and being the same dog described in a certain license dated May 1, 1899, and recorded with the records of the Town Clerk of said Town of Brookline.

To have and to hold the said Tu Tu, by a string attached to his collar, with all the privileges and responsibilities thereunto belonging, to the said Francis W. Dorr and his heirs and assigns forever, or until said string breaks. And we hereby for ourselves and our heirs, executors, and administrators, covenant with the grantee and his heirs and assigns that we are seized with simple terror of said Tu Tu;

that we have good reason to sell and convey him as aforesaid; that he is free from all incumbrances except stomach-ache, monkey-mange, rabies, hydrophobia, sunstroke, and gross and confirmed habits of raiding swill-tubs, running to fires, sheep killing, and terrorizing the neighborhood; that we will, and our heirs, executors, and administrators shall warrant him to wear Plymouth Rock pants; to run away whenever called; to consume blacking in any form, liquid or dry, from boots, bottles or stoves; to be well read in the dogmas of the Unitarian faith, to religiously observe all dog-days; and when at sea to be thoroughly competent to act as the watchdog of the dogwatch; and that we will defend him against the lawful claims of Henry Adams, but against none other.

Reserving to us and our heirs and assigns an estate in fee-tail in said Tu Tu, with the right of docking the tail just behind the ears on the breach of any of the conditions of this deed.

Provided, however, and this conveyance is made upon the express condition that the said Francis W. Dorr shall feed and water said Tu Tu once in each and every day, shall require him to "pay his board" once a month without recourse to us in any event, and shall procure for him on or before the first of May in each year a license — as a first-class victualler.

In Witness Whereof we, the said William Adams and Eleanor Adams, hereunto set our hands and seals this first day of May in the year one thousand nine hundred.

WILLIAM ADAMS. [SEAL]
ELEANOR ADAMS. [SEAL]

IN the thirty-second year of Henry VIII, an order was made in the Inner Temple that the gentleman of that company should reform themselves in their cut or disguised apparel, and not wear long beards; and that the treasurer of that court should confer with the other treasurers of court for an uniform reformation, and to know the justice's opinion therein. In Lincoln's Inn, by an order made the twenty-third of Henry VIII, none were to wear cut or pansied hosen or breeches, or pansied doublet, on pain of expulsion; and all persons were to be put out of Commons during the time they wore beards.—*Brayley's Londiniana*.

LITERARY NOTES.

MR. HAMILTON W. MABIE'S *William Shakespeare* will appeal more to the intelligent part of the general reading public than to the select body of Shakespearean scholars. Doubtless it was written for that first class of readers; and having that fact in mind, it may be said that Mr. Mabie—or should we say Dr. Mabie?—has given us a book which admirably fills its author's purpose.

Starting with a brief summary of the rise of dramatic literature and of the state of such literature in England immediately before Shakespeare's time, Mr. Mabie gives a chapter to Stratford and the surrounding country; speaks of the poet's birth and breeding, his marriage and his removal to London; and then devotes the last three-quarters of the volume to the more strictly literary side of his subject. An account of the London Stage brings us to Shakespeare's earlier work; and after a consideration of the Sonnets and the other poems, Mr. Mabie takes up for discussion, in more or less detail, the plays, under the separate heads of the Historical Plays, the Comedies, the Romances, and the Tragedies, sub-dividing his consideration of these latter plays into the Approach of Tragedy, The Earlier and the Later Tragedies, and the Ethical Significance of the Tragedies.

This book, like all that Mr. Mabie writes, is pleasant reading. Besides the Chandos portrait of Shakespeare, which is the frontispiece, there are several full-page photogravures, and about a hundred other illustrations, many of these latter from old prints and very interesting.

NEW LAW BOOKS.

THE CIVIL SERVICE LAW OF THE STATE OF NEW YORK. By *William Miller Collier*. Albany, N. Y.: Matthew Bender. 1901. Buckram; \$4.50. (xliv + 440 pp.)

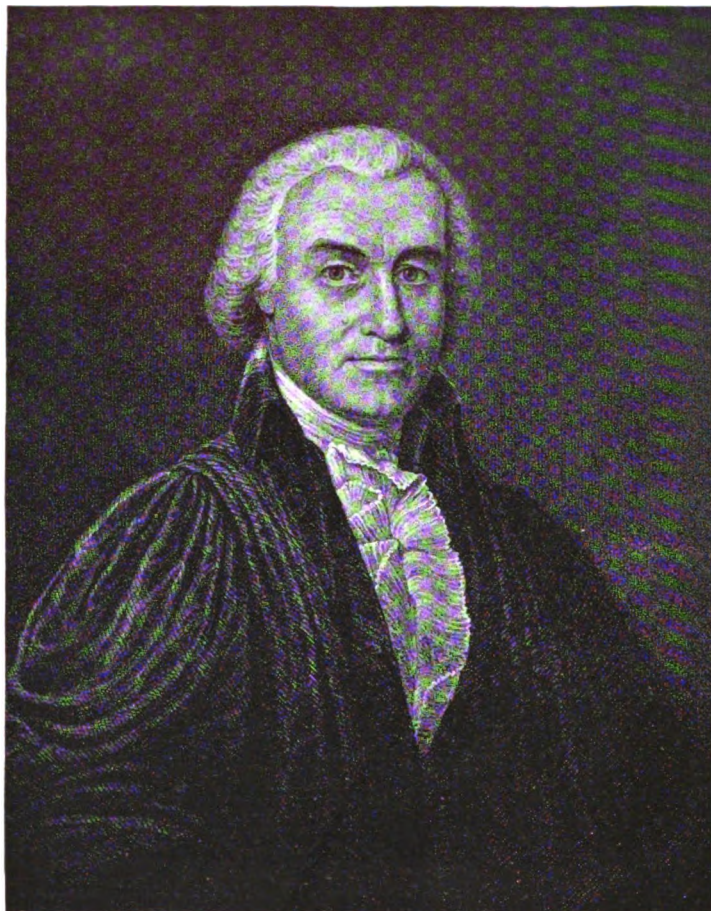
The sub-title gives an accurate idea of the scope of this book, which is "A Treatise upon

¹ WILLIAM SHAKESPEARE: Poet, Dramatist, and Man. By *Hamilton Wright Mabie*. New York: The Macmillan Company, 1901. Cloth. (xviii + 421 pp.)

the law as to appointments to office, removals from office, and tenure in office, as embodied in the New York Civil Service Law and the 'Veteran' Laws"; but although thus dealing primarily with New York statutes and thus of practical and professional value to practising lawyers of that State, it is, also, a treatise which may be read with interest and profit by supporters both there and elsewhere, of an honest and efficient civil service. It is a matter of congratulation that the important subject of the Civil Service Law is treated by one so competent as Mr. Collier to deal with it; for to his experience as a legal editor and text-book writer, he adds the strong grasp of, and deep interest in, the subject, which one both looks for and is glad to find in the president of the New York State Civil Service Commission.

The arrangement of the book is good. The present civil service law is quoted and discussed, section by section; all the New York cases bearing thereon are cited and freely quoted, and reference is made also to cases decided under the Civil Service Laws of the United States, Massachusetts, and Illinois, and to those reported or cited in the reports of Civil Service Commissions in various parts of the country. Of value, both on the practical and theoretical sides is the inclusion in the notes of the original form of each section and its successive amendments—in a word the history of the section.

In the long note following Section 1 is an excellent summary of the present condition all over the United States of statutory law—Federal and State—relating to civil service; and the very full note, of some fifty closely printed pages, on the section regulating the power of removal, adds much to the value of the book and is an example of the thorough way in which the subject in hand is treated. The texts of the original New York Civil Service Law, of supplementary statutes, of the former "Black Law," of former "Veteran Laws," of State Civil Service rules and regulations, and of forms, complete the volume.



Oliver Ellsworth

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OLIVER ELLSWORTH.

BY FRANCIS R. JONES.

AFTER his failure in the appointment of John Rutledge to the Chief Justiceship, Washington seems to have turned to an entirely different type of man for that position. After William Cushing declined it he nominated Oliver Ellsworth. Ellsworth seems to have been a typical Connecticut Yankee. He had a pretty wit. He was shrewd. He was honest. He was kindly. He was parsimonious. He amassed a large property. He appears to have been singularly shortsighted in his public views. His ideas of the powers of the National Government, as evidenced in the convention of 1787, were contracted. Judged in the light of history for the most part they were erroneous. It now seems strange that he should have cut such a large figure in the public eye. It is remarkable that he was placed upon almost every important committee of that Convention with Hamilton, Madison and Rutledge. His mission to France most unfortunately showed his limitations. He had no grace of oratory, no distinction of person, no depth of learning, no fertility of mind. Apparently he was a much over-rated man. Perhaps the explanation is that he was the best whom Connecticut at that time produced. No doubt he shone beside Roger Sherman, the Wolcotts, and Eliphalet Dyer.

I have in this series of papers on the Chief Justices of the United States hitherto studiously refrained from entering upon the history of the Revolution and the formation of the State and National Governments, except in so far as the life under consideration came

into direct contact with those events. To go beyond this limit would involve a treatise upon a subject which, however glorious, is trite. By keeping within this limit the story of the career of Mr. Ellsworth can be briefly told. It was in reality not an exceptional career. *Mutatis mutandis*, it has been duplicated again and again by both English and American lawyers. To-day there are a score of men in this country whose lives afford almost complete parallels.

Oliver Ellsworth was born at Windsor, Connecticut, on April 29, 1745. His boyhood and youth were spent upon his father's farm. His mind developed slowly and its processes were always laboriously sluggish. He owed his education to his father's desire to make him a clergyman. The Reverend Dr. Bellamy prepared him for Yale, which highly respectable institution he entered at the age of seventeen. After remaining there two years in disgust he changed his college to Princeton, where he graduated in 1766. He then began the study of theology with the Reverend Dr. Smalley. In a year, however, his own desire for the profession of the law prevailed over that of his father's for the ministry. After reading law with Governor Griswold and subsequently with Judge Root he was admitted to the bar in 1771. At that time he was in debt. Determined to liquidate his obligations, before he entered upon the practice of his profession, he cut timber off land which he had tried to sell. The timber was marketable. About this time he married, and his father gave him the lease of a farm near Windsor, where for three years

the young lawyer was occupied more with potatoes than pleading. He used to walk to Court at Hartford and back. His industry at last won him a practice. He was capable of dogged application. Wanting in imagination he was not led astray to lighter pursuits. In 1775 he removed to Hartford, and the next year was appointed State's attorney, which at that time was a lucrative office. His legal business soon became larger than any other lawyer's at the Connecticut bar. It is said that his docket often contained fifteen hundred cases. It is well to remember that the inhabitants of Connecticut have always enjoyed a singularly grand reputation for litigiousness. It is not claimed for Ellsworth that he was a learned lawyer or an eloquent advocate. His success seems to have depended upon his integrity and the mediocrity of his talent. He concentrated his attention solely on the main points of his cases and let the minor issues go. He had no play of fancy, but he was always in earnest and could state his points with lucidity and conviction.

Thus passed his life until 1778, little disturbed by the Revolution, the principles of which he had early espoused. In 1775 he was elected to represent Windsor in the General Assembly of Connecticut, and was appointed one of the committee called the "Pay Table," which seems to have been a sort of treasury board. In the summer of 1776 he went to Albany on business connected with that committee. In October, 1777, he was elected by the Assembly a delegate to the Continental Congress; but he did not take his seat there until October 8, 1778. Connecticut had seven delegates to the Congress, one or more of whom could represent the State. They therefore accommodated one another's convenience and each attended alternately. The prestige of Congress had then departed. The enthusiasm had vanished. Jay has said that its members were "a set of damned rascals." Public credit was exhausted. Political cabals intrigued and misgoverned. At this juncture

of public affairs Ellsworth came to the council of the nation unknown. He had no acquaintance with politics, no knowledge of political science. He was not adaptable. His only qualifications for the place were his talent for business, his zeal for the public cause, his power of steady application. The day after he took his seat he was appointed upon the committee of Marine Affairs, which had general control over naval matters. Soon also he was put upon the committee of Appeals, the functions of which were judicial. This was the lineal ancestor of the Supreme Court of the United States. It was vested by Congress with power to determine appeals brought from the admiralty courts of the States in cases of prize and capture. One interesting case decided by this committee was afterwards affirmed by the Supreme Court in *United States v. Peters*, 5 Cranch, 115, wherein all the facts are set forth and Mr. Chief Justice Marshall delivered the opinion. In February, 1779, Ellsworth went home, but returned to Philadelphia in December, where his chief service was his support of Robert Morris's scheme for a bank. From August, 1780, to June 4, 1781, he was in Connecticut. On the latter date he returned to Congress, but in August left it again. During those three months, however, he manifested his narrow views of the dignity of the States as against the central authority of the nation. At that time of ruined credit, total lack of resources and no power by which to enforce the collection of a revenue, the only hope of salvation was in strengthening the National Government. Not to have seen that a strong Federal policy was necessary bespeaks a myopy, indeed a blindness, that almost amounted to stupidity. He resumed his seat on December 20, 1782, and retained it until after the flight of Congress to Princeton on June 30, 1783. This period was of immense importance. The war had ended. Constructive statesmanship was demanded. Hamilton and Madison had made their appearance in the national Legislature. Order was to be

brought out of chaos. For this work Ellsworth's caliber was sadly lacking. He opposed the proposition of Hamilton for a revenue to be collected under the authority of Congress. But he gave his cordial consent to the final compromise. With Madison and Hamilton he was placed upon the important committee to report a plan for organizing the civil department of the government. This was his last service in the Confederate Congress. Although re-elected a delegate, he declined to serve. He also refused to act as Commissioner of the Treasury to which office he was elected by the Congress in 1784.

The first crisis was over. Perhaps he felt that his talents were not suited to the work which now pressed upon the National Legislature. At any rate he returned home. In 1780 he had been elected a member of the Governor's Council. This was the upper house of the Connecticut Assembly. It also constituted the Supreme Court of Errors. He continued to be re-elected to this until 1785. In 1784 he was appointed a Judge of the Superior Court. The following year an act was passed which prohibited the same man from being a member of the Council and a Judge of the Superior Court at the same time. Judge Ellsworth therefore resigned from the Council. The jurisprudence of Connecticut was at that time in a curious state. It was not known how much of the Common Law was the law of the Commonwealth. An attempt had been made to modify its application and its rules. There had been no reports of decisions. The whole system was in an amorphous condition. It does not appear that Judge Ellsworth was instrumental in ameliorating that unfortunate predicament. So much of his labors on the Superior Court as have been preserved are reported in Kirby and the first volume of Root. They are not of sufficient importance or eminence to detain us here. He left his judicial duties in May, 1787, to attend the Constitutional Convention at Philadelphia.

Years afterward, upon the floor of the Senate of the United States, John C. Calhoun eulogized Mr. Ellsworth's work in that Convention in the following words: "It is owing,—I speak it here in honor of New England and the Northern States,—it is owing mainly to the States of Connecticut and New Jersey that we have a Federal instead of a National government; that we have the best government instead of the most despotic and intolerable on the earth. Who were the men of these States to whom we are indebted for this admirable government. I will name them. Their names ought to be engraven on brass, and live forever. They were Chief Justice Ellsworth, Roger Sherman and Judge Patterson." Perhaps no further comment is necessary. It may be well, however, in order to show how absolutely wrong the future Chief Justice was upon almost every question, to give here a summary of the measures which he there advocated. He had two fixed ideas: the limitation of the national power, and the preservation of democratic simplicity. He objected to the term "National Government." He wanted no central authority to interfere with the supreme sovereignty of the States. In spite of the fact that the Articles of Confederation had been found utterly inadequate, he urged that no new frame of government should be attempted, that only Amendments to them should be made. Consider the crisis. Think of the peculiar mental gestation that could produce such an attitude! He opposed at first the payment of representatives in Congress out of the National Treasury. Of course he advocated the equality of representation of each State in both branches of the Legislature. He supported the proposition to make the Justices of the Supreme Court an Executive Council with revisionary powers. He was hostile to giving the Executive authority to appoint judges. He wanted to leave the question of the qualifications for suffrage entirely to the States. He favored annual elections, saying that the people liked them

and that they could do no harm. It is evident that not to him is due any of those provisions which have made the fundamental law of our country so workable that under it we have grown to a mighty and powerful nation. He was absent from the Convention during the last month of its sitting, and so did not sign the Constitution. But he gave it his hearty support. Indeed, after its adoption his views seem to have changed. He was wise enough to perceive that the States having agreed to the plan for a National Government it was folly to curtail its powers. He determined therefore to strengthen the government in which those powers were vested. During his seven years in the Senate he was a consistent, though mild Federalist, cordially supporting Washington. In January, 1788, he was a member of the Connecticut Convention which ratified the Constitution, and upon the organization of the National Government he was elected to the short term in the Senate. Two years later he was re-elected for the full term. For the position of Senator he was well fitted. That was his true sphere as a public man. There his business ability came into play. The work of invention was superseded by that of application. Theory was to be reduced to practice.

As I have detailed his conduct in the Constitutional Convention, it seems requisite, by way of contrast, to summarize his more valuable services in the Senate. When Rhode Island hung back, he proposed the bill which prevented importation of goods into the United States from that recalcitrant community and also authorized a demand to be made upon her for her proportion of the public debt. This was effective for the purpose intended. The State promptly adopted the Constitution. As chairman of the committee appointed for that object, Senator Ellsworth was the father of the first Federal judiciary bill under which the Courts of the United States were organized. It is even to-day the basis of that judicial system, although the provision which

required the Justices of the Supreme Court to sit on the Circuit was undoubtedly unconstitutional. It was only acquiesced in by Mr. Chief Justice Jay, his associates and their successors in order to avoid friction. By custom it has reached the established dignity of a binding obligation. Mr. Ellsworth vigorously supported Hamilton's scheme for funding the debt of the United States, although he differed from it in one or two important particulars. He also aided materially in Hamilton's plan for the incorporation of a bank of the United States. He was opposed to the Embargo Act. He not only approved of the mission of Mr. Chief Justice Jay to England, but it was he who proposed that mission to Washington and recommended Jay as the special envoy. He believed that our greatest safety lay in friendship with England, dreading the influence of French ascendancy and the excesses of the French Revolution. Supporting Jay's treaty with England he disapproved the nomination of Rutledge to the Chief Justiceship and voted against his confirmation. After the declination of Mr. Justice Cushing, on March 4, 1796, Washington sent to the Senate the nomination of Mr. Ellsworth to the Chief Justiceship. He was immediately confirmed, and took his seat upon the Bench March 8. On that day John Marshall argued the case of *Ware v. Hylton*, 3 Dall. 199.

For nearly four years Mr. Chief Justice Ellsworth performed the duties of his high office. He had hesitated to accept this position, because he doubted his fitness for it. His practice had been entirely among an agricultural community, and he knew little of commercial law. While Chief Justice he studied hard to make himself competent. His opinions were uniformly short and showed neither depth nor breadth of erudition. During the time that he presided over the Supreme Court there were few cases argued which are of interest to-day. He added nothing to the learning of the law. He contributed nothing to the science of jurisprudence. I shall not therefore refer to any of

the cases in which he delivered opinions. With Mr. Justice Wilson, Mr. Justice Iredell, Mr. Justice Washington and Mr. Justice Chase for associates, it would not have been possible for him to have gone far wrong in his final conclusions. His courtesy secured for him the esteem of the bar.

On June 21, 1798, President Adams announced to the Congress that he would "never send another minister to France without assurances that he would be received, respected, and honored as the representative of a great, free, powerful and independent nation." This avowal was made in the heat of the indignation over the X Y Z letters, and the treatment received from France by our envoys Marshall, Pinckney and Gerry. Preparation for hostilities was begun and continued. Washington was placed in command of the army. Party politics ran high. Hamilton was bent upon ousting Adams from the leadership of the Federalists. In this posture of affairs the President received from the French Government assurances that envoys from the United States would be well received in France. On February 18, 1799, he nominated Murray envoy extraordinary. There was grave doubt whether the Senate would confirm that nomination. The President therefore withdrew it, and on February 25 nominated a commission of three. These were Mr. Chief Justice Ellsworth, Patrick Henry and William Vans Murray. Patrick Henry declined, and Governor Davie of North Carolina was substituted in his place. These nominations were confirmed on February 27, but the envoys did not start for France until November 3. The Chief Justice was in no way fitted for successful diplomacy. His mind worked too slowly. His information was too meagre. There was nothing in his training or temperament to make him a diplomat. Moreover his health was broken by the painful disease of stones in the kidneys. When he reached Paris on the second of the ensuing March, Napoleon was First Consul, and received the envoys with all honor. It

soon became evident however that the treaty which they had hoped to negotiate was impossible. They therefore arranged a commercial convention which was concluded on September 20, 1800. The provisions of this, although in many particulars advantageous, so amazed the Chief Justice's friends that even Oliver Wolcott wrote to Pickering: "You will read the treaty which was signed with France with astonishment. I can account for it only on the supposition that the vigor of Mr. Ellsworth's mind has been enfeebled by sickness." The Chief Justice heard of these imputations on his sanity and in a letter to Rufus King showed his philosophy and good nature. Referring to George III's mental aberration he said: "I am very sorry to hear that his majesty has been deranged and still more so to learn that I am supposed to be in the same predicament. I devoutly hope that a similar imputation will not extend to our government; but that it will continue to have respect, though mine is lost in its service."

Before leaving France he resigned the Chief Justiceship, on October 16, 1800. His constitution was shattered and he was much enfeebled. He went to England to try the waters of Bath. While there he met many judges and lawyers by whom he was well received. In the spring of 1801 he returned to Windsor. His fellow citizens forthwith elected him to the position on the Governor's Council, which he had resigned seventeen years before. For five years he performed the duties of that position with as much regularity as his health permitted. In May, 1807, the Courts of Connecticut were re-organized. He was selected for the Chief Justiceship. But his health giving way he was forced to decline the appointment. He died on November 26.

In society his kindliness and conversational powers made him popular. He was fond of children and found with them his greatest recreation. His indisputable integrity gained him respect. The business of the Supreme Court during his administration

was not large. That tribunal did not command the unexampled reputation and influence which it afterwards attained under Mr. Chief Justice Marshall. Mr. Ellsworth's service was too short to enable him to make any impression upon judicial policy. He did what he had to do with his might. His puritanical austerity was lightened by a playful

humor, which brightened a life and character that were otherwise singularly sombre. There must have been something more in his personality, however, than has survived the years. If there had not been, he could not have held his high place among the men of his time. Yet in no sense of the word was he great.

WEBSTER AS AN ORATOR.

By SAMUEL W. McCALL.

From an address delivered at the Webster Centennial Celebration at Dartmouth College, September 25, 1901.

WHAT is the relative position of Webster among the great orators of the world? All judges would not agree upon his exact place, although all would doubtless place him very high among them. The two great orators of ancient times must, I think, be left out of the account. There is little more common ground for a comparison between Webster and Demosthenes than there would be for a comparison between one of the speeches of the former and a book of Homer. What common standard can be set up between the Greek who spoke to a fickle and marvelously ingenious people, whose verdict when he obtained it would often only be written on water, and Webster speaking in a different tongue to an altogether different people, and shaping in their minds the principles of practical government to endure for generations? How many English-speaking people know enough Greek to understand a speech of Demosthenes as they would one spoken in their own language? Those who do not cannot form an exact judgment, and the few, if any, who do are prone to find virtues in particles and, like Shakespeare's critics, to bring to view in the text things of which the author was abjectly ignorant. Too much has been swept away in the twenty centuries since Cicero and Demosthenes spoke, and it is easy to praise those orators too little or too much. Separated from us by the barriers of distance, of language and of race, the most that can safely

be ventured is that in literary form they probably surpassed any of the moderns.

The orators with whom Webster can most profitably be compared are those who employed the same language and spoke to the same race. Surely it is not a narrow field. It is a race that has employed the art of government by speaking for centuries, and has far outstripped any other race of ancient or modern times in the development of the parliamentary system. The result of that system has been to produce oratory which is not simply literature or merely spectacular, but which at its best is especially adapted to the practical purpose of influencing the judgment of those who listen, upon some momentous public question. Where, as is the case among the English-speaking peoples, the fate of a government or an administration often turns upon the result of a single debate, where again the verdict of the parliamentary body is liable to be overturned by the people who are the sources of political power and before whom the discussion must ultimately be carried, there is a field for the development of oratory which has only imperfectly existed in any other race. Among the orators of his own country there may be individuals who in some particulars surpass him. Everett carried the elaborate oratory at that time in vogue to a greater perfection of finish and form. Webster does not show the surprises and felicities to be found in the style of Choate, who is as rapid, pure and winding as

a mountain stream, and who in brilliancy of imagination easily outranks all other American orators. The only Englishmen who

not a nurse of political eloquence. It imposes rigid artificial limits and, to the extent that it requires orators to be the expounders



DANIEL WEBSTER.

stand in a class with Webster are Fox and Burke. In comparing him with them it must be borne in mind that his most important speeches were made in construing the terms of a written constitution which, however beneficial it may be to individual liberty, is

of written political scriptures rather than of broad national principles, it hampers the freedom of the mind.

Rogers said that he never heard anything equal to Fox's speeches in reply, and Burke, with generous enthusiasm, called him the

most brilliant debater the world ever saw. That was Webster's great quality. He was pre-eminently a debater. He did not have Fox's celerity, but he possessed far greater weight. Fox would lay down a proposition and repeat it again and again. He was often stormy in manner, and would sometimes also magnify trifles. His vehemence was so great that one occasionally suspects that he was diverting attention from the weakness of his argument. But he had no affectations. He was animated by noble ideas of political freedom, which comprehended not merely his own race or neighborhood, but embraced the peoples of distant lands, and regardless of literary form he would press those ideas home and strike by the most direct lines at the judgment of the listener. There was little quickness or mere dexterity about Webster, but it seemed impossible to impose upon his understanding, and his great guns would open upon the weak points of his adversary however artfully covered up. No man could excel him in the power to utterly destroy the sham structures of sophistry. He would never set up a man of straw, but would resolutely grapple with his opponent's argument in its full force. His vigilance was extraordinary, and when surprised, as he sometimes was in running debate, it is not difficult to detect in his tone the martial note as he would rush upon and capture the threatened position by a display of force simply portentous. It is not easy to compare Webster and Fox in the immediate effect produced by them, but there can be no doubt that the personality of Webster was more impressive, and, if we are to trust at all contemporary accounts, it is entirely safe to say that Fox never surpassed, if indeed he ever equaled, the tremendous effect produced by Webster in his greatest efforts. Between the speeches of the two men there can be no comparison in point of substance and literary form. Fox's speeches certainly contained one characteristic that he claimed was essential to good speeches, they do not read well. It is not difficult to see in the best of them

the evidence of his brilliant talents, but they do not strongly impress one with weight of matter or with the literary quality. In the half-dozen large volumes of Webster's speeches which have been collected together there is doubtless a great deal that is prosy. A man who always makes an eloquent speech is usually one who will never make a great one. Webster was not that sort of an orator, and only on exceptional occasions was he thoroughly aroused. But those volumes contain a mine of information and reason for political students; they are good literature, and I doubt if in all of them a sentence can be found that is flippant or petty or mean.

I have already spoken of Burke. He is, I think, superior to Webster as a political philosopher and also in breadth of information and in imaginative power, but in the excellence of the great mass of oratorical work which he left behind him he does not much surpass Webster, if at all. He presents more gorgeous passages, but even his most glittering fabrics do not imply the intellectual strength shown in the simple solidity of Webster. But if it be admitted that Burke precedes Webster in the permanent value of his speeches, in their temporary effect I do not think he can be classed with him. He often shot over the heads of his audience, and some of his greatest speeches emptied the House of Commons. It was said of him that he always seemed to be in a passion. Webster never permitted himself to be in a frenzy, fine or otherwise. On the whole, I think it clear that Webster is not surpassed by Burke, and if he is equaled by any other English-speaking orator, he is equaled by Burke alone.

But whether or not Webster was the greatest of all men in power of speech, he deserves a place among the half-dozen greatest orators of the world. To take rank in that chosen circle is indeed glory. For the transcendently great orator, who has kindled his own time and nation to action, and who also speaks to foreign nations and distant ages, must divide with great poets the

affectionate homage of mankind. While the stirring history of the Greek people and its noble literature shall continue to have charm and interest for men, the wonderfully chiseled periods of Demosthenes and the simple yet lofty speech of Pericles will be no less immortal than the odes of Pindar or the tragedies of Sophocles or Æschylos. The light that glows upon the pages of Vergil shines with no brighter radiance than is seen in those glorious speeches with which Cicero moved that imperial race that dominated the

world. The glowing oratory of Edmund Burke will live until sensibility to beauty and the generous love of liberty shall die. And I believe the words of Webster, nobly voicing the possibilities of a mighty nation, as yet only dimly conscious of its destiny, will continue to roll upon the ears of men, while the nation he helped to fashion shall endure, or indeed while government, founded upon popular freedom, shall remain an instrument of civilization.

WITCHCRAFT IN OLD SCOTS CRIMINAL LAW.

THE old Scots criminal law is, in the examples we have given, more or less quaint, but it rises to its greatest height both of tragedy and of absurdity in its treatment of witchcraft. On this point lawyers and ministers were equally in error, and Sir George Mackenzie was quite as bad as the rest. A little consideration, however, will show that there were reasons for the contradiction which seems to exist between great learning and the great ignorance which had faith in witches. We have already noted the cast of mind which ranked Blasphemy and Heresy, because they were crimes against the Divine majesty, in a class above Treason towards an earthly sovereign, which is usually regarded as a crime of especial atrocity. There can be no doubt that this fashion of thought was generally prevalent, and induced feelings of peculiar animosity against those miserable creatures who were said to pay homage to the devil. It was not unnatural that men, who were so jealous for the honor and reverence due to God, should hate with a bitter hatred the professed servants of His enemy. Hence arose the vindictive persecution of witches, not so much because they were a source of danger to the public as because they were traitors towards God of the worst sort. The persecution was horrible, and merits our severe censure, but

the motives which inspired it were not mere malice and cruelty. The persecutors sought to maintain the Divine authority, although they were really doing their utmost to discredit the religion they professed. It must not be forgotten that their belief in witchcraft was sincere. Sir George Mackenzie was a highly educated man, yet he had no doubt on the subject. "That there are witches," he says, "divines cannot doubt, since the Word of God hath ordained that no witch shall live, nor lawyers in Scotland, seeing our law ordains it to be punished with death." Witches being named in the Bible, the Scots Acts and the *Corpus Juris Civilis*—the three greatest sources of law known to him—who could doubt? And yet there were even then doubters, who supported their doubts with arguments. They adduced the significant fact that the alleged witches were mostly silly old women, whose age and sex disposed them to melancholy, and whose melancholy disposed them to madness. Further, they said, the miracles ascribed to those poor creatures were impossible to be done by them, seeing that they were but human, and God alone, the Author of Nature, was able to alter or divert its course. It was, moreover, unjust to punish witches for doing evil by means of charms, unless it could be proved that these charms produced the evil

effects which were punishable, a fact incapable of proof. Lastly, granted that witches were able to do certain acts, whatever they did was decreed by God, and those who executed His will were not punishable. Sir George replied to these arguments by again quoting Exodus xxii. 18: "Thou shalt not suffer a witch to live." After observing that Jews, Persians and Romans agreed in condemning witchcraft, he asserted that "by the same reason we should deny witches, we must deny the truth of all history, ecclesiastical and secular;" and that "it is true that the devil, having the power and will to prejudice men, cannot but be ready to execute all that is in witchcraft." The acts of witches were not necessarily impossible, since "it is undeniable that the devil, knowing all the secrets of Nature, may, by applying actives to passives that are unknown to us, produce real effects which seem impossible." True, there were secrets in Nature now known to men, which would have formerly been regarded as the effects of magic, and a philosopher in the darker ages drawing iron with a magnet might have run a great risk of being burned; nevertheless he was of opinion that learning had sufficiently illuminated the world to enable men to distinguish between physicians and magicians. It cannot have afforded much comfort to the student in those days to reflect that he ran the risk of being burnt at the stake if his opinions were too advanced to be deemed orthodox by a jury of prejudiced blockheads.

Witchcraft was held to be one of the greatest of crimes, in so far as it included in itself "the grossest of heresies, blasphemies and treasons against God, in preferring to the Almighty His rebel and enemy, and in thinking the devil worthy of being served and revered." In addition, it was often accompanied by murder, poisoning and other wickedness, which added to and doubled the blackness of its inherent guilt. When reviewing the attitude of the older divines and lawyers towards witchcraft, we must not overlook this last point. It is an undeniable

fact that the possession of occult powers was often used as a cloak for abominable crimes, and that if the miserable wretches did not merit death as witches, they well merited it by the atrocities they had otherwise wrought. This circumstance helps to explain the stern conclusion of our author that witches should be punished, not merely with scourging and banishment, but "by the most ignominious of deaths."

At the same time he deprecated rash and hasty judgments. "I condemn," he says, "next to the witches themselves, those cruel and too forward judges, who burn persons by thousands as guilty of this crime." Conviction ought not to follow accusation except upon the most convincing proofs, and convincing proofs were, from the nature of the charge, adduced with difficulty. Confession, even where it had not been extorted by torture, had to be regarded with suspicion. The persons charged were usually poor ignorant creatures, who did not understand of what they were accused. Deserted by their friends, shut up in squalid cells, starved, deprived of sleep, often tortured by their keepers, what reliance could be put upon their statements? In testimony of the utterly unreliable nature of the confessions of self-accused witches, Sir George relates the following experience: "I went when I was a Justice Depute to examine some women who had confessed judicially, and one of them, who was a silly creature, told me under secrecy that she had not confessed because she was guilty; but being a poor creature who wrought for her meat, and being defamed for a witch, she would starve, because no person thereafter would either give her meat or lodging, and that all men would beat her and hound dogs at her, and that therefore she desired to be set out of the world; whereupon she wept most bitterly and upon her knees called God to witness to what she said." The narrative closes at this point and does not satisfy our curiosity as to the fate of this poor woman; but the connection in which it is introduced, and our knowledge of

the rectitude and firmness of Sir George Mackenzie, leave no room for doubt that he redressed the iniquity to which she had so nearly fallen a victim. The position of a friendless woman, or even of one with influential friends, was in such a case desperate indeed. The accusation was like the taint of leprosy, or like a charge of horse stealing in the Wild West. Every man's hand was against the accused. Her accusers were neighbors who, having lost children or property by a sudden visitation, were spurred by grief and anger to destroy the vile wretch whose abominable arts they regarded as the cause of their loss. The witnesses and jurors were also in the ordinary case neighbors, some of whom feared death or injury if the witch should escape, and were impelled by their fears to ensure her conviction; while others had private spite to gratify, and sought her destruction by a terrible death for the satisfaction of their own revengeful passions. How these combined influences operated is apparent from one sentence in our author: "I have observed that scarce ever any who were accused before a country assize of neighbours did escape that trial."

It is rather curious to note the several points which were regarded as important in establishing a charge of witchcraft. The first of these was a paction or agreement to serve the devil. For this the formula has been preserved: "I deny God, creator of heaven and earth, and I adhere to thee and believe in thee." Absolute proof of the use of these words was not demanded. Evidence of any promise to serve sufficed to condemn the prisoner. Upon this promise the natural sequel was the renunciation of baptism. That rite was performed with appropriate solemnity. The aspirant to occult powers placed one hand on the crown of her head and another on the sole of her foot, and in that posture pronounced the words of renunciation. Satan then baptized the witch in his own name, and wiped from her brow the moisture of the old baptism. At the same time he called her by a new and, if the

specimens given us are fair examples, usually ridiculous name, and impressed his mark by a pinch in any part of the body. Seeing that these unhallowed ceremonies took place far from human observation, there was but one portion of the proceedings which could be expected to leave traces available as real evidence. That was the devil's mark. It was blue, devoid of sensation, and incapable of bleeding. A set of scoundrels called "prickers" made a trade of professing to detect those marks. As the poor prisoner was entirely at their mercy, without redress, we can easily picture the horrors of an examination of her person by such brutes. Even Sir George has no good word for these men, whom he stigmatizes as "villains" and "horrid cheats."

As regards the subject-matter of the charge, it had to be varied according to the kind of occult power said to have been exercised in each case. Some witches professed the faculty of divination. There were three species of that art, Demonomancy, the invocation of pagan gods; Necromancy, the prophesying by departed spirits, and Hydromancy, the divination by water and natural objects. In a charge of divination, two victims were claimed—the diviner and the man who sought to rend the veil that overhangs futurity. Both were punished with death. Other witches professed the power of blasting or injuring those who had given them cause of offence. Agnes Finnie was, in spite of the efforts of an able advocate, condemned and burned for this form of the crime. She had angrily told a man that he would come halting home, and the same day he was struck down with palsy; she had declared that a woman who had declined to pay her money would repent her refusal, and within an hour the refuser was a helpless paralytic; she had informed another woman who had objected to carry away two herrings, that she had eaten her last meal, and shortly afterwards she died. If these threats and their apparent fulfilment were facts, we must admit that the coincidence was remarkable. Evil

deeds, although the most common feature of such charges, were not essential. A man named Drummond was burned for performing what were deemed miraculous cures, even where no malicious purpose was conceivable. Here we perceive the influence of the factor which imparted the peculiar gravity to the charge of witchcraft, the contempt of the Divine government of the world implied by the invocation of the enemy of mankind to interfere with the decrees of providence.

At the root of the matter lay the question whether the devil was capable of conferring upon his servants occult powers of the character we have indicated. In discussing this question, Sir George found himself sorely hindered by absurdities to which his belief in witches could not blind him. His common sense here got the better of his credulity. When, for instance, he maintained that Satan might give form to himself and appear with a body of condensed air, in the shape of man or woman, and could in that body transport witches from one place to another, he had to face a palpable difficulty. The devil was alleged to be a spirit, and the witches were human beings. The immaterial could not touch or carry the material. His mode of overcoming this obstacle was ingenious if not convincing. "If we consider how the adamant raises and transports the iron, and how the soul of man which is a spirit can raise or transport the body, and that a man's voice or a musical sound is able to occasion great and extraordinary motions in other men, we can easily conclude that devils, who are spirits of far more energy, may produce effects far surpassing our understanding." At the same time he entertained a doubt whether witches could cause a person to be possessed by evil spirits, remarking that, "if the devil could possess at pleasure we should see many more possessed than truly there are." He also displayed some clearness of perception in disputing the then popular belief that the devil could transform one

species into another,—as, a woman into a cat. Numerous tales are still told around the winter fireside in country places of witches who assumed at pleasure the forms of wolves, cats or hares, particularly the last. Sir George will not credit these. "He (the devil) behoved to annihilate some of the substance of the woman, or create some more substance to the cat, the one being much more than the other; and the devil can neither annihilate nor create, nor could he make the shapes return *nam non datur regressus a privatione ad habitum*" (for there is no return granted from deprivation to possession). Thus he answers the proposition neatly, conclusively and philosophically. He was willing to concede to Satan the power to effect cures, for the very odd reason that "he knows the natural causes and the origin of natural diseases better than physicians can, who are not present when diseases are contracted, and who being younger than he must have less experience." There is here a really fine piece of unintended sarcasm, mixed with a foreshadowing of some modern theories respecting the origin of diseases. Certainly the statements of medical men about germs, bacteria and bacilli, would almost justify a belief that Sir George was not far wrong when he attributed to the Evil One a share in the production of disease.

The charge having been made, and the prejudiced accusers, the perjured witnesses and the terrorized jurors having finished their work, there was no doubt as to the sentence of the judge. "The doom bears to be worried at the stake and burnt." Such was the end of that ghastly travesty of justice, a trial for witchcraft. Only one atom of mercy is visible in the proceedings, and that was the law which decreed the "worrying" or strangling of the victim before she was involved in the agony of the fire. It is hard to say which one condemns the more, the brutal ignorance of the people or the pseudo-philosophy of the lawyers.—Henry H. Brown, in *The Juridical Review*.

A STUDY IN THE FINE ART OF MURDER.*

BY H. GERALD CHAPIN.

"That was a strange story, gentlemen. If you and I had read it in fiction, we would say, perhaps, that the novelist had overdrawn or overstated the facts; that he had overdrawn the story and made it stronger than our imagination or fancy could tolerate."—*Address of Hon. George S. Graham, District Attorney.*

DE QUINCEY, in an endeavor to classify murder among the fine arts only succeeded in establishing a contrary proposition. There is no art, fine or otherwise, in brutally rending soul from body when it is accomplished under such circumstances that the exercise of a reasonable amount of ingenuity on the part of the detective force will result in the discovery of the criminal. Edgar Allan Poe in his "Imp of the Perverse," far more successfully described a well-executed murder than has the eulogist of Williams. *Nascitur, non fit*—one is almost tempted to apply the phrase to the homicide. While science, art, literature have advanced with giant strides, the gentle art of disencumbering oneself of those inconvenient individuals whose sole mission in life appears to be the obstructing of our road to happiness, has decidedly retrograded since the days of the Borgias, or at the best, remained stationary. Just why it should take an exceptionally brilliant man to perpetrate an undetected murder, a thing which at first blush must be looked upon as comparatively easy of accomplishment, is somewhat of a mystery until we study more closely the psychology of the criminal. True it is that the individual of intelligence far above the average, in committing this crime,

*In presenting this analysis of the notorious Holmes case, the author desires to express his deep appreciation of the courtesy of Thomas W. Barlow, Esq., of the Philadelphia Bar, who appeared as Special Assistant District Attorney at the trial. To the careful preparations of Mr. Barlow, was due in large measure the securing of a verdict of conviction and it is certain that without his valuable assistance, cheerfully given, this article could only have been written under great difficulty.

is almost certain to perpetrate the most puerile errors of judgment.

While these propositions are applicable to the subject of murder in general, they are peculiarly true of what is probably the greatest insurance fraud ever perpetrated, a crime with the details of which the press teemed but a comparatively short time ago. The affair was considerably more than a nine-days wonder, though, like most matters of its kind, it has now somewhat faded from public recollection. The case of the Commonwealth of Pennsylvania *v.* Herman W. Mudgett, *alias* H. H. Holmes, is, however, of far too interesting a character to permit of its being consigned to oblivion.

At the time of his trial, Mudgett, or Holmes, as we prefer to call him (for by the latter name he has been generally known), was in the neighborhood of thirty-five years. There was nothing particularly distinctive in his appearance¹, though a follower of the Italian school would no doubt be able to point out many traits of physiognomy peculiar to the instinctive criminal; but then while the world owes much to Lombroso, as the true father of the science of criminal anthropology, his most fervent admirers are compelled to admit the existence of a temperament far too ready to draw conclusions of a nature somewhat *a priori*. Undoubtedly a composite photograph of a number of criminals will reveal a certain similarity of type. A glance, however, at the picture of one whose face is absolutely normal or very nearly so (as is that of "Ian Maclaren") will

¹"Holmes was a man of moderate education," wrote Mr. Barlow in a letter to the author. "He was not a college graduate, neither would either you or I call him very refined in his deportment. He was not a gentleman as the word is generally understood, though he was particularly anxious to be considered one. He was free from outward evidences of vulgarity. In all my interviews with him, I never heard him use a vulgar or a profane word and his voice was singularly mild."

demonstrate how completely the abnormal is the rule among mankind in general. But we digress from the thread of the story, though in an analysis of the acts of such a criminal as Holmes, this may not be considered out of place.

For Holmes was no vulgar murderer, possessed of the one thought of accomplishing his crime, and taking but slight heed to the adoption of measures to secure himself from detection. His educational advantages—his medical and scientific attainments were by no means to be despised. Hence there is the greater reason for wonder at the comparatively clumsy manner in which the crime was perpetrated.

The key-note of the instinctive criminal's character has been stated to be a moral insensibility so complete as to render him utterly incapable of appreciating all ethical differences—an obliquity of mental vision so great as to constitute almost, if not quite, an inability to distinguish between right and wrong—a colossal and ferocious egotism which regards the dictates of self as the decrees of a Deity and hesitates at nothing to satisfy desire. It is this characteristic that chiefly points out Holmes as a member of the class rather than one of the so-called habitual or professional criminals.

Of his life prior to the commission of the quadruple crime, but little can be said, for it is practically unknown. In the "confession" made to a representative of the sensational press, Holmes furnished a number of details relative to the commission of some twenty-seven murders (for which "confession," it is believed, he received \$7,500)—but then Holmes was such an atrocious liar that his word was utterly unreliable and the aforesaid elaborate press statement was, to use his own expressive phrase, "written because they wanted sensation—and they got it."

In brief, then, a scheme was concocted between Holmes and one Benjamin F. Pitezel, who for many years had been less confederate than tool, by which insurance was to

be taken out upon the latter's life, a substituted body used, and the amount collected. Pursuant to this plan, a policy was procured in 1893 from the Fidelity Mutual Life Association for ten thousand dollars, and Pitezel, under the name of B. F. Perry, leased the premises 1316 Callowhill street, Philadelphia, and engaged in the ostensible business of a dealer in patents.

The premises consisted of a two-story and a half building, with single window storefront.

In the latter part of August, 1894, Eugene Smith, a carpenter, called upon Pitezel, or Perry, in regard to an invention for a saw-sett which he had recently perfected. This interview led to several others, for Pitezel employed Smith to put up a rough counter. One day while working at this task, the latter saw a man enter the store, give a sign to Pitezel and walk to the stairway immediately in the rear. Him he afterward identified as Holmes. Pitezel followed and the two remained for some time in conversation.

On Monday, September 3, in the afternoon, Smith again called, this time in regard to his invention. He found the outer door unlocked and the store vacant. In the belief that Pitezel would soon return, Smith waited for a short time, but without result. The next morning he again called, found the door still unlocked and the store in the same condition as he had left it the day before. A hat and pair of cuffs were hanging on a nail, and the place presented the appearance of having been left for a few moments only by a careless proprietor. Smith, after waiting a short time, called for "Perry" several times, and receiving no answer concluded to make an investigation. He ascended to the second story and found the front room vacant except for a cot. The turn of the stairs was such that on arriving at the landing, his back was toward the rear room. Looking into it, from where he stood in the hall, he beheld a body stretched upon the floor. Although the face was almost unrecognizable by rea-

son of decomposition and what seemed to have been an explosion, Smith recognized it as that of the supposed Perry, and summoned two police officers and a physician. The corpse was immediately removed to the City Morgue, which, by a coincidence too peculiar not to have been arranged for, was in the immediate rear of the premises.

Now a word as to the position of the body and its surroundings. It lay flat upon its back, feet toward the window, head toward the door, in an attitude strongly indicative of the most peaceful repose. The heels were together, left arm close to the side, right resting across the breast. Right side of face and trunk was burnt and charred. At the side lay a filled but unsmoked pipe, to which a match had been applied, and several of the latter, burnt, were scattered over the floor. A broken bottle with the pieces *inside*, lying near at hand, and a few bottles, filled and unfilled, occupying the mantel, completed the furnishing (if such it may be termed) of the room.

In the July preceding, Holmes had been arrested in St. Louis at the instance of the Merrill Drug Company on a charge of fraud. While incarcerated in the City Jail, he met one Marion L. Hedgepeth, who was awaiting sentence for train robbery. Holmes made a confidant of him and to a certain extent revealed his plans relative to the perpetration of the insurance swindle. Hedgepeth recommended to him one Jephtha D. Howe, a member of the St. Louis bar, as a shrewd lawyer, likely to prove of considerable assistance in the scheme. For this service Holmes promised to pay Hedgepeth five hundred dollars.

After remaining in jail for over a month, the former was released on bail furnished by a Miss Georgiana Yoke, a most estimable woman, who he had married under the name of Henry Mansfield Howard, although having two wives already. He then left for Philadelphia, and had several interviews with Pitezel, or Perry, at one of which, as has

been seen, he was observed by Smith. On Sunday, September 2, the crime was perpetrated. In all probability Holmes either found Pitezel under the influence of liquor or else made him intoxicated, and then caused his death by administering the fumes of chloroform. Afterwards he poured some of the drug into the mouth of the deceased and caused it to pass into the stomach by working the arms up and down, broke the bottle and arranged the pipe so as to present evidence of an explosion, poured some inflammable mixture upon the right side of the corpse, ignited it so that an appearance of burning might be presented, and that evening left Philadelphia for Indianapolis with his supposed wife, Miss Yoke.

It was then time for Jephtha D. Howe to enter on the scene of action. Before the burial of the body, an event which took place eleven days after its discovery, he sent a letter to the insurance company stating that he was the attorney for Mrs. Carrie A. Pitezel, wife of the deceased and beneficiary named in the policy, and requested payment of the ten thousand dollars.

The officers of the company considering that the case presented grounds for suspicion, immediately communicated with the manager of their Chicago branch (the contract of insurance having been entered into in that city) and instructed him to make as thorough an investigation as was possible under the circumstances. Mr. Cass, the cashier, after some inquiry, discovered the fact that one H. H. Holmes, of Wilmette, Illinois, had been well acquainted with the deceased. He was unable, however, to see Holmes, for his wife in that city (No. 2) said that he was traveling, but promised to communicate with him. In the early part of September, Holmes wrote Cass stating that he was well acquainted with Pitezel, and that he believed from the description furnished him that the body found and identified as that of one Perry was of his former friend and employé. Holmes said that he

would be glad to go to Philadelphia for purposes of identification, provided his expenses were paid.

On September 21 a most interesting interview took place in the office of Mr. Fouse, president of the company. Howe had arrived and was talking with Fouse when the latter was informed that Holmes, the friend of the deceased, was in the building. He was immediately summoned and introduced to Howe, whom he met apparently as a stranger, although they had traveled together from Ohio to the city of Washington. Little Alice Pitezel, a child of some fourteen years, shy, reticent, and somewhat stupid, accompanied Howe for the purpose of identifying her father's remains, as Mrs. Pitezel was ill at the time.

The next day the body was exhumed at the Potter's Field, and although badly decomposed, was recognized both by Holmes and Alice. On September 24 the company paid to Howe the amount of the policy, less the expense to which it had been put, and the conspirators no doubt regarded the incident as closed, except in so far as a division of the spoil was concerned.

And now observe a somewhat interesting turn of events. Like the convenient phrase, "murder as a fine art," that of "honor among thieves" may generally be taken as without foundation of fact. Mrs. Pitezel, while scarcely innocent of complicity in the fraud, must be looked upon somewhat leniently. Both she and her husband had for a long time been completely under the domination of Holmes, whose crafty brain had conceived the entire plot. The latter's intention was, of course, to possess himself of as large a portion of the insurance money as might be possible, and in order to carry out his purpose, he determined upon the cold-blooded murder of the remaining members of the family. Besides Mrs. Pitezel and Alice, it consisted of four children, Dessa, the eldest, Howard, Nellie and the baby. Howe handed over Alice Pitezel to Holmes, who

took her to Indianapolis. Leaving her there, he went on to St. Louis, and met Mrs. Pitezel and Howe. The interview which took place at the office of McDonald & Howe, as revealed by Holmes in one of his numerous "confessions" must have been highly edifying, even if we make due allowance for his habit of telling the most extraordinary lies. The attorneys' original demand was for three thousand dollars, to which Holmes refused to accede. Then, in the language of the confession:

"McDonald immediately asked, 'Well, what are you going to do about that?' Deponent¹ said he would not consent to a \$3,000 fee, 'I will go to State's Prison before I will be browbeaten out of that amount of money.' 'Well,' said McDonald, 'you'll go there. I am going to send the money back and tell them we have just found out it is a crooked case.' Deponent¹ thereupon said, 'All right, you can send the money back. I think the company is well enough satisfied with the death and they will not change. I shall go on there and run my chances, and if I get into State's Prison all right. The difference is enough for me to take chances on.' That the said McDonald then said, 'Jeptha, you go out and get a New York draft for that money.' That the said Howe thereupon left the office, and Deponent¹ followed him into the hallway and there said to Howe 'Wait, I have something to say to you.' That Deponent¹ and Howe stood by the elevator, and Deponent¹ said 'You remember those two nights you were in my room, you know you had a lunch there and remember where you sat.' Said Howe 'Yes, what about it?' Deponent¹ then asked Howe if he knew what an Edison phonograph was and stated that there was a phonograph in the bureau drawer and that he had a record of every word which the said Howe had spoken. 'Well,' said Howe, 'you have taken a damned mean advantage of me.' That the said Howe and Deponent¹ thereupon returned to the office and nothing more was said about purchasing a draft . . . that a settlement was finally agreed upon, and that the said Jeptha D. Howe retained the sum of \$2,500 as his share of the profits (*sic*) of the transaction."

Now, some time before, Pitezel and Holmes had been interested in certain real estate at Fort Worth, Texas, and for the purpose of obtaining a loan, the former had

¹ Holmes.

executed his note to one B. B. Samuels. The original instrument which Samuels had given to Holmes for the purpose of having signed by Pitezel, was never returned, but in its place Holmes prepared a new note, telling Pitezel, as we may infer, and Samuels, as we know, that the first had been lost. The second note, like the first, was signed by Pitezel under the name of Benton T. Lyman, and, unlike the first, was delivered to Samuels. Having the original in his possession, the arch-criminal succeeded in obtaining all but a few hundred dollars of the remaining insurance money, telling the widow that it was necessary for her to take up her husband's note. For it must be remembered that all this time Mrs. Pitezel labored under the impression that her husband was still alive, believing that a substituted body had been used. Under the plea that the danger of detection would be lessened, Holmes persuaded Mrs. Pitezel to entrust to him two more children, Nellie and Howard, whom he brought with him to Indianapolis, where they met their sister Alice. Holmes then took them to Cincinnati, and back again to Indianapolis, and on his second stay there rented a house at Irvington, one of the suburbs. To this house Howard was taken, the others being left at the hotel, and the child disappeared on October 10.

A series of remarkable wanderings now commences. Summoning Mrs. Pitezel from Galva, Illinois, where she had been staying with her family, Holmes begins a tour which it would take too long to follow in detail. The actors in the drama travel in three separate parties (for it must be kept in mind that Miss Yoke accompanied him during the entire time, in the honest belief that she was his wife), from Indianapolis to Detroit, to Toronto (where a house was rented at 16 St. Vincent street, and Alice and Nellie Pitezel were murdered and their bodies buried in the cellar), to Ogdensburg, Prescott, Burlington, and finally to Boston. At some of the cities

they were within a few blocks of each other. The fact that Holmes could have managed such a tour successfully, demonstrates his genius for intrigue. In the early part of November he even visited his parents at the old home in Gilmanton, New Hampshire, where resided his real wife, the first Mrs. Mudgett. Her suspicions he quieted by a remarkable fabrication of having lost his memory in a railroad wreck.

In the meantime events were fast drawing to a close. It is scarcely necessary to say that Holmes never paid Hedgepeth the promised five hundred dollars for procuring an introduction to Jephtha D. Howe. What more natural, therefore, than that the train robber should write to Major Lawrence Harrigan, Chief of Police of St. Louis, divulging what he knew relative to the conspiracy to defraud the Fidelity Mutual? The company took immediate action and through the aid of the Pinkertons succeeded in tracing Holmes to Boston. Realizing that as yet the evidence was scarcely sufficient to warrant conviction, the authorities caused his arrest not for fraud, but having telegraphed to Fort Worth and discovered that he was "wanted" there on a charge of horse-stealing, he was incarcerated to await extradition papers from Texas.

O. LaForrest Perry, assistant to the President of the Fidelity Mutual, who had met Holmes at the time that Pitezel's body was exhumed, went to Boston to identify the prisoner. On seeing him Holmes immediately broke down, and said that he "guessed he was wanted in Philadelphia by the Fidelity and not in Fort Worth for the horse business." Aware of the fact that the methods employed by the citizens of Texas in dealing with horse-thieves cannot be said to err on the side of excessive leniency, he expressed an entire willingness to go to Philadelphia without extradition papers.

At the time, it was generally believed that the body found in the house in Callowhill street was not that of Pitezel, and hence

Holmes counted on meeting with a charge no more serious than that of conspiracy to defraud.

Right here are involved two most curious traits in the character of the criminal. For so astute an individual to have made a confidant of Hedgepeth to the extent to which he did, was surprising to say the least, when, through the instrumentality of the train-robber an introduction to Howe could have been easily obtained without the disclosure of a single item of the plot. After all, silence is not a necessary concomitant of crime. A far more serious blunder, as Holmes himself acknowledged later on, was his failure to pay to Hedgepeth the latter's share of the booty. This omission eventually cost Holmes his life, for it was the letter to Major Harrigan which first started the officers of the law on the trail of the criminal.

We have previously commented on the incorrigible propensity of Holmes to pervert the truth. Scarcely had he been arrested than he began a series of the most remarkable fabrications, designed to mislead the police in their search for the missing Pitezel. The peculiar part of the matter was that many of his inventions were not even plausible. He said that a cadaver had been obtained from a medical friend in New York whose name he refused to disclose. This had been brought to Philadelphia and "made up" so as to resemble Pitezel. The prisoner stated that he had himself doubled up the body in the trunk, and that he had learned the "trick" while studying medicine at Ann Arbor. He remained silent, however, when Mr. Perry called his attention to the fact that the corpse found in Callowhill street was in a condition of *rigor mortis*, and asked him, "Can you tell me where I can find a medical man or a medical authority which will instruct me how to re-stiffen a body after *rigor mortis* has once been broken?"

Pitezel, he said, was in South America with the children. Afterwards, Pitezel was

wandering around the country and the children (one of the girls disguised as a boy) were in Europe with a Miss Williams. Then again, Pitezel was in South America with some of the children and the remainder were in Europe. In fact, so many misstatements did he make, that it became absolutely impossible to believe anything he said. On Nov. 20, 1894, Holmes and Mrs. Pitezel, both under arrest, arrived in Philadelphia, and a few days later Jephtha D. Howe was brought from St. Louis on a charge of conspiracy and held in \$2,500 bail. The jury found a true bill of indictment against all three as well as against the supposedly living Benjamin F. Pitezel, charging them with conspiracy to cheat and defraud the insurance company.

Upon being brought to trial, Holmes, on the advice of counsel, pleaded guilty. By this time, however, the detective force of Philadelphia were beginning to question whether the found body was not that of Pitezel after all, and if it were not possible that both he and the children had been murdered. To permit of further investigation, sentence was suspended.

The credit of having unravelled the vast system of Holmes' duplicity is to a large extent due to Frank P. Geyer, a detective of the Philadelphia police. Following step by step and with unwearied patience the devious journeyings of Holmes from city to city, often losing the trail, but never despairing, unearthing a clue here, a clue there, he finally discovered the bodies of Alice and Nellie Pitezel in the cellar of the Toronto house and a few teeth and bones which were all that remained of Howard in the Irvington residence. It was shown that on one occasion Holmes requested Mrs. Pitezel to take a box containing nitro-glycerine from cellar to attic and was much annoyed upon his return, when he found that this had not been done. It can scarcely be doubted that had he been given but a short time longer he would have removed the entire family.

And now, discarding the theory of fraud, the Commonwealth boldly proceeded to the trial of Holmes on a new indictment, charging the wilful, deliberate murder of Benjamin F. Pitezel. Mrs. Pitezel, who, after all, was more a victim than an accessory, was released. She was at length convinced of the fact of her husband's death and testified against his slayer.

The trial of Herman W. Mudgett, *alias* H. H. Holmes, began on Oct. 28, 1895, but

announced an intention of withdrawing from the case.

"You have no right to withdraw," said Judge Arnold. "Your duty is to remain. Of course I cannot force you to stay and do your duty. The remedy of the court is, if counsel withdraw upon the eve of a murder trial without consent, to enter a rule on them to show cause why they should not be disbarred."

The impaneling of a jury was then pro-



H. W. MUDGETT, *alias* H. H. HOLMES.

a little more than a year after the commission of the crime. It occupied six days, and was held before Hon. Michael Arnold in the "Court of Oyer and Terminer and General Jail Delivery and Quarter Sessions of the Peace, in and for the City of Philadelphia" (to give the official title). There were present George S. Graham, District Attorney, and Thomas W. Barlow, Special Assistant, for the Commonwealth, and W. A. Shoemaker and Samuel P. Rotan for the prisoner. Counsel for defendant upon the opening of court made desperate efforts for an adjournment, and when their application was refused

ceeded with, but after the first salesman had been examined by the Commonwealth, the prisoner arose and stated to the court that he had discharged his counsel and would proceed to conduct the case alone. For nearly two days this remarkable man fought the prosecution stubbornly, displaying the forensic ability of a trained advocate. His handling of the expert witnesses revealed no inconsiderable amount of medical knowledge, and it is much to be regretted that lack of space forbids an extended discussion here. Suffice it to say, that at the evening session of the third day, Messrs. Rotan and Shoe-

maker reappeared and the prisoner was represented by them during the remainder of the trial. No evidence was offered for the defense, Holmes not even appearing on the stand in his own behalf, fearing probably to be met with the dozen or more conflicting stories which he had told at various times. The theory of the defense (in accordance with the last "confession" made by the prisoner) was that Holmes had gone to the Callowhill street store on the fatal Sunday of September 2 and found a cipher letter addressed to him lying on the counter. In accordance with its directions, he searched in the closet, where another note was found, contained in a bottle. In the second, Pitezel stated that he was tired of life, that the insurance scheme was impracticable, that Holmes would find his (Pitezel's) body lying upstairs, and it could be used far better than could a substituted corpse, in obtaining the ten thousand dollars. Holmes accordingly proceeded to the third-story front room, where he found his late friend and ally stretched upon the floor in the same position in which he was eventually discovered. Beside him upon a chair and supported by blocks, so that the neck reclined downward, there was a large bottle of chloroform. Through the cork a quill was inserted, which led into a rubber hose, constricted in the centre so as to regulate the flow. This tube led to a towel over the mouth of the deceased, whose death was due, as defendant contended, to the inhalation of chloroform fumes. Fearing that the suicide clause in the policy would prevent a recovery, Holmes dragged the body down to the second-story rear room, where he placed it in the same position, lit pipe and matches, broke the bottle and burnt the corpse on its right side so as to present the appearance of an explosion. This story the jury evidently regarded as somewhat improbable, for a verdict of guilty was promptly returned, which, on appeal, was affirmed. Finally, on May 7, 1896, a year and a half from the time that

Pitezel's body was found, Holmes was duly executed in the Philadelphia County Prison.

Jeptha D. Howe, it may be remarked, though indicted for conspiracy, was never brought to trial, and subsequently obtained his release, going unwhipped of justice.

The records of the proceedings before Judge Arnold are well worth careful study, for they reveal so excellent a method in which a case may be conducted by prosecution and presided over by judge. For conciseness and fairness of examination in bringing out the salient points from the witnesses it takes high rank. Morning, afternoon and evening sessions were held, the last beginning at seven o'clock. Compare this six-day trial of an exceedingly complicated case with the long-drawn proceedings which characterize many other States, of which New York stands as the type. What a contrast does it present to the recent trial of Roland B. Molineaux! Incredible as it may seem to citizens of the Empire State, here was a criminal tried with the utmost impartiality and fairly convicted in half or one-third the time usually occupied by their courts. The jurors were actually treated as intelligent gentlemen and not as convicted felons. Not a single "knock-out" question was put by counsel, the inquiry as to their fitness being usually limited to half a dozen queries, and yet through some wondrous and mysterious dispensation of an overruling Providence, the twelve good men and true proved to be an able, intelligent body, well qualified to decide the issues of fact.

For so shrewd a man as Holmes to have concocted such altogether improbable lies, must verge on the marvelous unless we take into consideration the inability of the vast majority of criminals—a fact previously alluded to—to frame a sufficient defense. It would have been thought that with his knowledge of chemistry and physiology, he would never have told a story which was open to so many objections.

To begin with, had there been an explo-

sion, the pieces of glass would certainly not have been found *within* the bottle, but scattered over the floor and sticking into the deceased. Nor would the latter have occupied the position of peace and repose in which he was found. Secondly, the theory of suicide—evidently an afterthought on the part of the prisoner, was altogether improbable. What object could Holmes have had in removing the body from the third-story front room, where he claimed to have found it, to the second-story back? Whatever became of rubber tubing and towel? How could the prisoner, comparatively slight built as he was, have carried the heavy body of Pitezel downstairs, grasping it under the armpits and letting the feet drag, as claimed by him, without in any way disarranging clothing and general appearance? These are questions which, it would seem, might naturally suggest themselves to any one.

There were other improbabilities which an expert like the prisoner should have guarded against.

At the moment of death, as is well known, a discharge occurs through relaxation of the involuntary muscles. If the theory of the defense was true, how did it happen that such discharge was found in the room in which the body was discovered? How could the two ounces of chloroform, found in the stomach, have come there when his death was supposed to have occurred from the inhalation of the fumes? The prisoner contended that there was an overflow from the mouth. But all students of anatomy are aware that for a liquid to flow from the œsophagus into the stomach of a person lying flat on his back, without first passing into the lungs (which in the present instance were found to be empty) it must have flowed up-hill. While this is possible when the subject is living and has consequent control over the muscles of the throat, the contrary is manifestly the case in a person deceased. The proposition is elementary that to permit a fluid to flow from its receptacle means

must have been provided for the admission of an equivalent quantity of air. Hence, if the rubber tube had been constricted in the middle, only an amount of chloroform equal to the amount of air at the point of constriction could have passed from the bottle—a quantity wholly insufficient to fill the stomach. Furthermore, taking into consideration the extreme volatility of chloroform, and the consequent diminution that the drug would suffer while exposed to air during transit through the tube, it would appear extremely unlikely that any appreciable amount would ever have arrived at the mouth of Pitezel. As is well known among medical men, chloroform on being administered, primarily causes a feeling of exaltation amounting almost to a spasm. Conceding to Pitezel the possession of a will power almost abnormal, sufficient to enable him to remain quiet under the drug's influence up to the point of unconsciousness, it is inconceivable that when the latter had supervened, violent contraction of the muscles would not have ensued. When taken internally, chloroform being an irritant poison, will produce considerable inflammation of the lining of the stomach, the absence of which in the corpse of Pitezel clearly demonstrated a post-mortem administration. Such were some of the indications that pointed indubitably to the defendant's guilt. Moreover, could it be imagined for an instant that Pitezel, the uncultured and ignorant, as Holmes himself designated him more than once, could have designed so elaborate a scheme of self-destruction?

But why did Holmes murder Pitezel? one is tempted to ask. For a man of his calibre, the deception of the insurance company would have been a comparatively easy task had he chosen to resort to the original plan of a substituted corpse. In the event of non-success, the penalty would have been only a few years' imprisonment. The stakes were the same, the hazard less.

It may be doubted much whether the

crime was premeditated. Probably Holmes called on September 2 merely for the purpose of arranging further details of the scheme, found Pitezal intoxicated, and remembering what dangerous secrets his drinking associate might some time disclose, and in the sudden hope of securing the entire booty, the arch-criminal had resort to the ever-present chloroform. If the crime had been long premeditated, it is probable that the details would have been better arranged.

The present short account of a crime as involved as was that of the quadruple murder, necessarily compels the omission of many incidents which would throw strong light on what cannot fail to be an interesting personality. The peculiar bent of mind of the instinctive criminal—that warping of the brain, characterized by a lack of ethical faculties—in fine, the entire absence of all ability to distinguish right from wrong, was present in the highest degree. Such an individual will pervert the truth, not so much to escape detection as because he cannot help himself, for he will oftentimes lie when the truth would in reality have served his purpose better.

We have seen the bungling manner in which the first murder was managed. Do not the circumstances warrant the conclusion that Holmes was in a state of abject panic at the time? Surely he should have better hidden the true cause of death and

presented more credible evidences of an explosion with practically an entire afternoon at his disposal. The murder of the children, while performed in a far abler manner, was open to the objection that the criminal did not *entirely* destroy the bodies, thus preventing any proof by the Commonwealth of the *corpus delicti*.

When will the murderer ever realize that the only safe course to pursue upon being arrested is to wholly refrain from any allusion whatever to the crime until he has seen counsel? Instead of so doing he will usually converse with detective, jailer, magistrate or reporter, only to have his statements spread upon the records of the trial.

In this brief analysis of a famous crime, the endeavor has been to point out a few of the defects inherent in the average homicide, which defects, as previously observed, render the art of undetected murder a somewhat difficult one to practice. It was certainly not with any desire to indicate a method in which crime *should* be performed in order to secure immunity that this sketch has been written. "Everything in this world," as De Quincey has aptly put it, "has two handles. Murder, for instance, may be laid hold of by its moral handle (as it generally is in the pulpit and at the Old Bailey), and that, I confess, is its weak side; or it may also be treated æsthetically, as the Germans call it, that is in relation to good taste."

TENURE IN IRELAND UNDER THE BREHON LAWS.

BY JOSEPH M. SULLIVAN.

IN ancient times justice in Ireland was regulated and administered by the Brehon law, which is said to have been formed into a code at a very early period. The Brehon laws, as we learn from the best authorities, were a written code three or four centuries before those of more modern Europe were

transcribed. They were undoubtedly of Phœnician or Milesian origin, and owed their existence to the traders of Phœnicia and Tyre, who, in very ancient times, visited the coast of Ireland, and brought with them the civilization and customs of the Orient. They were written in a character called the

"Phenian dialect," and the family of Mac-Egan alone possessed the secret of deciphering their records, and were in possession of this secret down to the reign of Charles I. The office of brehon, or judge, was a hereditary one in certain families. The distinguishing feature of the Brehon laws was their mild and conciliatory spirit: a fine or eric was the only punishment inflicted even for the worst of crimes. Their mild form of punishment for serious crimes often led to contempt for their decrees, and the chieftains of the various tribes frequently took the law in their own hands, and inflicted severe punishment on malefactors. Feuds were common, and the lack of vigorous punishments for crimes kept the country in a state of civil war and wild disorder.

The tenure was gavelkind, but of a different sort than that which prevailed in England. The gavelkind of Ireland and Wales differed in several important particulars from that which still prevails in some parts of England. By the Irish custom, females were absolutely excluded from all rights of inheritance; and no distinction was made between legitimate and illegitimate children. The lower orders were divided into freemen and tillagers, or, as they were called by the Normans, villains. The former had the privilege of choosing their tribe; the latter were bound to the soil, and transferred with it in any grant or deed of sale.

To understand tenure in Ireland under the ancient laws, a knowledge of the habits and customs of the ancient native clans is necessary.

"The chieftainship of the tribe was not hereditary. The tanist, or heir, was elected from among the elder branches of the family during the chieftain's life. This arrangement, which secured the most efficient leader, had likewise its serious disadvantages in the disputes it so frequently originated. The lands were the common property of the tribes, and they were divided into a common pasture land, common tillage land, private

demesne land, and demesne land of the tribe. The demesne land of the tribe was devoted to the maintenance of the public functionaries, viz.: The chief, the tanist, the bard, and the brehon, or judge. Each individual of the clan pastured as many cattle as he possessed on the common pasture land; and every year to prevent unfairness, all cast lots anew for their portions of the common tillage ground, so that he who had a sterile portion one year had his chance for a fertile tract for the next.

"Each clan was composed of two classes: the kindred, or original members of it, and serfs, settlers and refugees from other clans. If these latter were able to pay an entrance fine, provision was made for them on one of the tribe lands; if unable to do so, they became serfs on the private demesne land of the chief. The serfs, who consisted chiefly of the conquered aboriginal population, tilled the soil, and were forbidden the use of arms. The clansmen, properly so called, were thus spared the drudgery of the fields, of the less respected branches of handicraft, and of the mines."

Before the reign of Edward I there were no regular courts of justice or inns of court in Ireland; the number of palatinates and chiefries existing throughout Ireland, which were governed by the old Brehon laws, rendered a court of chancery unnecessary; but an exchequer was still required. This system led to infinite abuses and oppressive practices, and after an existence of nearly four centuries under the crown of England the application and practice of the Brehon laws was at length declared to be treasonable in the 40th of Edward III by the Statute of Kilkenny.

The average student takes it for granted that the law of tenure was introduced into Ireland by the Normans. This is not strictly true. The law of tenure, with all of its feudal characteristics, had existed in Ireland for centuries before the first Norman invader set foot on her shores.



SIR GEORGE JESSEL.

A CENTURY OF ENGLISH JUDICATURE.

IX.

BY VAN VECHTEN VEEDER.

UNDER THE JUDICATURE ACT.

IN his great speech introducing the Judicature Bill in Parliament Lord Selborne enumerated the principal defects of the existing system under four heads: (1) The artificial separation of legal and equitable jurisdictions; (2) divided courts and divided jurisdictions; (3) lack of cheapness, simplicity and uniformity of procedure; (4) necessity of improving the constitution of the court of appeals. "We must bring together," he said, "our many divided courts and divided jurisdictions by erecting or rather re-erecting—for after all there was in the beginning of our constitutional system one supreme Court of Judicature—a supreme court which, operating under convenient arrangements and with sufficient number of judges, shall exercise one single undivided jurisdiction, and shall unite within itself all the jurisdictions of all the separate superior courts of law and equity now in existence." (Hansard's Parl. Debates, vol. 214, pp. 331, 337.) Accordingly the Curia Regis of the Norman kings was taken as a model, and all the existing courts were consolidated into one Supreme Court of Judicature. (The first Judicature Act was passed in 1873, and was designed to take effect in 1874; but this not being practicable its operation was postponed until 1875, when a second act was passed, and the judges took their seats as members of the Supreme Court.) This Supreme Court was divided into two sections, the High Court of Justice and the Court of Appeal. The High Court is a court of first instance, exercising general jurisdiction in civil and criminal matters. It consisted originally of five divisions, corresponding to the old courts, of which it was made up. But in 1881 the Common Pleas and Exchequer were finally abolished; and

by subsequent legislation the Court of the Master of the Rolls was likewise abolished, and that judge was placed at the head of a division of the Court of Appeal. Thus all the business was consolidated into the High Court, of which the Lord Chief Justice of England is permanent president. This court sits in three divisions, King's Bench, Chancery, and Probate, Divorce and Admiralty. The business assigned to each division corresponds to its ancient jurisdiction; but the changes effected by the Judicature Act are these: any judge may sit in any court belonging to any division or may take the place of any other judge; and any relief which might be given by any of the courts whose jurisdiction is now vested in the Supreme Court may be given by any judge or division of the Supreme Court, and any ground of claim or defence which would have been recognized in any of the old courts may be recognized by any division of the new court. Where the rules of equity, common law and admiralty conflict, equity prevails in the absence of specific provisions. Beside this uniform administration of the principles of law and equity, the act also provided a common and simple code of procedure. The main characteristics of this procedure are similar to those which have long been familiar in this country: a single form of action for the protection of all primary rights, whether legal or equitable; a limited pleading characterized by a plain and concise statement of the substantive facts; provision for joinder of different causes of action and the bringing in of new parties, with a view to the adjustment of the substantial rights of all the parties and the complete determination of the whole controversy in a single action.

In some respects this great measure of reform has failed to meet with the expectation of its supporters. In accordance with the original design the chancery judges ceased to be vice-chancellors, and as justices of the High Court took turns with the judges of the Queen's Bench in going on circuit to try common law cases. But the practice was soon abandoned, and the chancery judges now confine themselves to the administrative and other business for which they have special aptitude. Hence the dividing line between the two ancient jurisdictions is as clear as ever. In other respects the original scheme of assimilation has broken down. Probate, divorce and admiralty matters still form a class by themselves; bankruptcy affairs have a court of their own, and separate courts sit for the trial of commercial and of railway and canal cases.

THE HIGH COURT OF JUSTICE.

The establishment of a permanent Court of Appeal under the Judicature Act has served to detract from the relative importance of the judges of the High Court. The presidents of the three great divisions are of course most conspicuous.

The presiding judge of the Queen's Bench Division is now the Lord Chief Justice of England. Lord Coleridge, the first chief to assume this title, succeeded Cockburn in 1880. Like Cockburn he was a man of ripe scholarship and polished eloquence, and as a presiding magistrate left nothing to be desired in the way of dignity and urbanity. With an intellect quite as strong and with even broader views, he was nevertheless inferior to Cockburn in industry and application. He did not seem to enjoy wrestling with principles and authorities in the solution of difficult problems, and was content to contribute less to the law than colleagues who were not so gifted. Occasionally a case of general public interest would rouse him from his seeming indifference, and on such occasions his work was so

admirable as to prompt a feeling of regret that he was not more strenuous in the exercise of his undoubted powers. The reports contain several such expositions of the law, animated by learning, exquisite diction, elevation of sentiment and liberality of thought. In the interesting case of *Reg. v. Dudley*, 15 Cox Cr. Cas. 624, where the issue was whether shipwrecked persons were justified in taking the life of one of their number in order to save the rest from death by starvation, Coleridge said:

"Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is, generally speaking, a duty; but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the 'Birkenhead'—these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country—least of all, it is to be hoped, in England—will men ever shrink, as indeed they have not shrunk. It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life. '*Necesse est ut eam, non ut vivam*' is a saying of a Roman officer, quoted by Lord Bacon himself with high eulogy in the very chapter on the necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors—from Horace, from Juvenal, from Cicero, from Euripides—passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of

heathen ethics. It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow."

And in another case, in discussing the limits of fair dealing in the world of business, he offers these sensible reflections: "It must

them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are the coun-



MR. JUSTICE HAWKINS.

be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering (I give examples only), men fight without much thought of others, except a desire to excel or to defeat

sels of perfection, which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business." (21 Q. B. D. 544.)

With his ready wit and fluent tongue Coleridge was perhaps at his best when sitting with a jury. In summing up a case he was always admirable.¹

¹ Other evidences of his ability may be found in *Reg. v. Bradlaugh*, 15 Cox Cr. Cas. 225; *Usill v. Hales*,

His statement of the modern law relating to blasphemy, on the trial of Ramsey and Foote, 48 L. T. 733, is in every way a notable effort.

Lord Russell, who succeeded Coleridge as chief justice in 1894, had been for many years the leader of the common law bar; his name is associated with most of the great cases of the day. Although not a profound lawyer, he was a man of great force and displayed commendable energy in employing his authority in the furtherance of practical reforms in the procedure of his division. The institution of the new court for commercial causes was largely due to him. Like many of his predecessors he displayed great ability as a criminal judge. *R. v. Munslow*, 64 L. J., M. C. 138, is a good specimen of his judicial powers. He enjoyed the distinction of being the first Roman Catholic to hold the office of chief justice since the Reformation.

The lord chancellor, the president of the Chancery Division, now practically confines his judicial labors to the House of Lords.

The first president of the Probate, Divorce and Admiralty Division was Sir James (afterwards Lord) Hannen. With his knowledge of the law relating to the various sections of his court, his painstaking industry, absolute impartiality and keen sense of the value of evidence, he won universal esteem. The spirit which animated his labors was displayed in his address at the conclusion of the hearing before the Parnell Commission, over which he presided. In speaking of the responsibility of the court he said that one hope supported them: "Conscious that throughout this great inquest we have sought only the truth, we trust that we shall be guided to find it, and set it forth plainly in the sight of all men." His opinions, which are more fully reasoned than those of Cress-
3 C. P. D. 319; *Reg. v. Labouchere*, 15 Cox Cr. Cas. 423; *Mogue Steamship Co. v. McGregor*, 21 L. B. D. 544; *Reg. v. Keyn*, 2 Ex. D. 63; *Twycross v. Grant*, 2 C. P. D. 469; *Bowen v. Hall*, 6 L. B. D. 333 (dissenting); *Ford v. Wiley*, 16 Cox Cr. Cas. 688; *Bradlaugh v. Newdigate*, 11 L. B. D.; *Currie v. Misa*, 10 Ex. 153 (dissenting); *Mackonochie v. Penzance*, 4 L. B. D. 697; *ex parte Daisy Hopkins*, 17 Cox Cr. Cas. 448.

well, are notable for their graceful diction and apt illustrations.¹ He was promoted to the House of Lords in 1891.

Among the more prominent justices of the Queen's Bench Division during this period may be mentioned Hawkins² and Stephen,³ whose specialty was criminal law, Mathew and Wright in commercial law, and Chitty⁴ and Kay in equity.

COURT OF APPEAL.

The second section of the Supreme Court, the Court of Appeal, is composed of the Master of the Rolls and five Lords Justices, with the heads of the three great divisions of the High Court, the Lord Chancellor, the Lord Chief Justice and the president of the Probate, Divorce and Admiralty Divisions, as members *ex officio*. It exercises a general appellate jurisdiction in civil cases from the determination of the High Court. It was originally planned to make this the final court of appeal, but the pressure from the House of Lords was too strong, and in the end the judicial functions of the House were left undisturbed; so that the Supreme Court is supreme only in name. The original conception of this court, as a single court in law and equity, was that the contact of minds trained in the different systems would subject the current ideas and tendencies of the two rival systems to scrutiny, and thereby

¹ *Boughton v. Knight* L. R. 3 P. 64; *Durham v. Durham*; *Sugden v. St. Leonards*, 1 P. D. 154; *Gladstone v. Gladstone*; *Crawford v. Dilke*; *Frederick Legitimacy Case*; *Niboyet v. Niboyet*, 4 P. D. 1; *Smee v. Smee*, 5 P. D. 84; *Sottomoyer v. De Barros*, 5 P. D. 94; *Bloxam v. Favre*, 9 P. D. 130; *Harvey v. Farine*, 52 L. J., P. 53; *Peek v. Derry*, 37 Ch. D. 591; *Haster v. Haster*, 42 L. J. P. 1; *The Rhosina*; *Duke of Buccleuch v. Met. Bd.* Wks. 5 E. and I. App. 418; *Bailey v. De Crespigny*, 4 L. B. 184.

² *Re Castioni*, 17 Cox Cr. Cas. 237; *R. v. Curtis*, 15 do. 749; *R. v. Clarence*, 58 L. J., Mag. Cas. 10; *R. v. Lillyman*, 65 do. 195; *Ford v. Wiley*, 16 Cox Cr. Cas. 688.

³ *R. v. Tolson*, 23 Q. B. 169; *R. v. Serné*, 16 Cox Cr. Cas. 311; *R. v. Clarence*, 16 do. 523; *R. v. Cox*, 15 do. 612; *R. v. Price*, 15 do. 393; *R. v. Doherty*, 16 do. 307.

⁴ *Elwes v. Briggs Gas Co.*, 33 Ch. D. 562; *Re Earl of Adnor's Will Trusts*, 45 do. 402; *Edmonds v. Blaina Furnace Co.*, 36 do. 315; *Wallis v. Hands* (1893), 2 Ch. 75; *Starr-Bowkett Bldng. Society Contract*, 42 Ch. D. 375; *De Francesco v. Barnum*, 43 do. 165; *Re Nevin* (1891), 2 Ch. 306; *Dashwood v. Magniac* (1891), 3 Ch. 306.

dispel confusion, explode inveterate fallacies and give increased clearness and force to principles of permanent value. But here, as in the court of first instance, this plan has not been carried out in practice. The Court of Appeal now sits in two divisions, chancery

of the court, during the service of Sir George Jessel as Master of the Rolls (1873-83), were James (to 1881), Baggallay (1875-85), Bramwell (1876-81), Brett (1876-97), and Cotton (1877-90).

Jessel's short service of less than ten



MR. JUSTICE MATHEW.

appeals being allotted to one division, common law appeals to the other; and it usually happens that chancery appeals are heard by chancery lawyers and common law appeals by lawyers trained in the common law. Nevertheless this court has given general satisfaction. It is, indeed, as one of its most distinguished members called it, the backbone of the judicial system.

The principal judges during the first decade

years has given him a place in the narrow circle of great judges. Other judges have been more subtle in intellect, but in swiftness and sureness of apprehension, in grasp of facts, tenacity of memory and healthy superiority to mere precedent, he presented a combination of qualities hardly to be found in the same degree in any other judge. As a judge he was at once so swift and sure that the surprise which each quality called forth

became nothing less than astonishing at the union of the two. His quickness of perception amounted almost to intuition. His learning was profound; yet he was no mere follower of precedent, no mere directory of cases. He was able to take up the confused mass of the law and mould it to the ends of justice. No matter what the subject under discussion was—and no branch of the law seemed unfamiliar to him—he was alike clear, practical and profound.

Such achievements are possible only to a man gifted with the swiftest apprehension and the most ample and tenacious memory. It was these faculties which enabled him to deal with such extraordinary sagacity with facts, however numerous and complicated, and to deliver occasionally those judgments in which the statement of facts gives at once the reasoning and the conclusion. His mind was of that high order which, while never overlooking the details, takes a broad and common sense view of the whole.

The excellence of his judicial opinions becomes truly marvelous when we are assured that he never reserved judgment except in deference to the wishes of a colleague, and that he never read a written opinion. A remarkable feat of this kind was his decision in the great Epping Forest case, concerning the ancient rights of twenty manors. The hearing lasted twenty-two days, one hundred and fifty witnesses having been examined. Jessel delivered judgment orally immediately upon conclusion of the evidence, and no appeal was taken from his decision, although the largest forest in the vicinity of London was thereby thrown open to the public. "I may be wrong," he once said, "and doubtless I sometimes am; but I never have any doubts."

Apart from the soundness of his conclusions his opinions are always expressed with vigorous and pungent emphasis. His work is conspicuous for the spirit in which he approached his cases. "There is a mass of real property law," he frankly told a friend, "which is nonsense. Look at things as they

are and think for yourself." This he certainly did, and moreover he expressed himself in language characterized by racy vigor and almost colloquial directness. No judge has ever been plainer in denunciation of ancient technicalities. In *Couldery v. Bartrum*, 19 Ch. D. 394, he said: "According to the English law a creditor might accept anything in satisfaction of a debt except a less amount of money. He might take a horse or a canary or a tomtit if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of the English law he could not take 19s. 6d. in the pound. That was one of the mysteries of the English common law, and as every debtor had not on hand a stock of canary birds or tomtits or rubbish of that kind it was felt desirable to bind the creditors," etc. Of authorities which conflicted with his views of equity he was not always as tolerant as he was in the case of *Jackson's Will*, 13 Ch. 189, where, in speaking of the question whether a reversionary interest in personality should be excluded from a gift of "any estate or interest whatever," he said: "I see no reason whatever why it should; but not wishing to speak disrespectfully of some of the decisions I shall say nothing further about it." In *Re National Funds Assurance Co.*, 11 Ch. D. 118, he began his opinion thus: "This question is one of great difficulty by reason of the authorities, and my decision may possibly not be reconcilable with one or more of them. In the view which I take of them I think they do not, when fairly considered, prevent my arriving at the conclusion at which I should have arrived had there been no authorities at all." He was equally unceremonious in dealing with the decisions of his contemporaries. In referring, in *Re Hallett's Estate*, 13 Ch. D. 676, to a decision by Justice Fry, where that learned judge had felt himself "bound by a long line of authorities," Jessel said: "That being so, I feel bound to examine his supposed long line of authorities, which are not very numerous, and show that not one of them lends any

support whatever to the doctrine or principle which he thinks is established by them." At all events he was no respecter of persons. In *Johnson v. Crook*, 12 Ch. D. 439, the question was whether a gift over when the first legatee dies before he shall have

opinion he adds: "I am no *Œdipus*; I do not understand the passage." Further on he remarks: "Lord Selborne says, 'Lord Thurlow said' so and so. There is a very good answer to that—he did not say so." "What is the proper use of authorities?" he



MR. JUSTICE WRIGHT.

"actually received" the legacy is operative, though the legacy had vested in the first taker, if not yet paid to him. He took a view contrary to most of the other equity judges, and he proceeds to despatch them in order. After quoting from Vice-Chancellor Wood he says: "All I can say about it is that it was simply a mistake of the Vice-Chancellor, and that is how I shall treat it." Then quoting from Lord Chelmsford's

inquires in *Re Hallett's Estate*, 13 Ch. D. 676. He declares it to be "the establishment of some principle which the judge can follow out in deciding the case before him." Jessel had a convenient application of this rule by means of which even the decision of a higher court was not binding unless it decided a principle which he recognized as such. In *Re International Pulp Co.*, 6 Ch. D. 556, where he was pressed by the authority of two

cases previously decided by a higher court, he said: "I will not attempt to distinguish this case from the cases before the Court of Appeal, but I will say that I do not consider them as absolutely binding upon me in the present instance, and for this reason, that as I do not know the principle upon which the Court of Appeal founded their decision I cannot tell whether I ought to follow them or not. If these decisions do lay down any principle I am bound by it; but I have not the remotest notion what that principle is. Not being at liberty to guess what the principle of those decisions is, I am only bound to follow them in a precisely similar case; consequently as the legal decisions do not stand in my way, I dismiss the summons with costs."

It is remarkable that so strong and positive a mind should have gone wrong so seldom. In the few cases in which he was held to have gone wrong his errors came from his keen sense of justice or impatience with the law's delays. (See *Coventry and Dixon's case*, 14 Ch. D. 660.) His complacency was never disturbed by reversals. "That is strange," he said when his attention was called to the fact that the Court of Appeal had reversed one of his decisions; "when I sit with them they always agree with me."

Jessel's mental fibre was so strong that it was coarse grained. He lacked the cultivated imagination of such men as Cairns, whom, alone of his contemporaries, he conceded to be his superior, and second only to Hardwicke. In the rank of supremacy in the long line of chancery judges he modestly placed himself third.¹

¹ Jessel's work may be studied in the following list of representative opinions: *Re Hallett's Estate*, 13 Ch. D. 693; *Smith v. Chadwick*, 46 L. T. 702, 20 Ch. D. 67; *Wallis v. Smith*, 21 Ch. D. 243; *Re Campdens Charities*, 18 Ch. D. 310; *Baker v. Sebright*, 13 Ch. D. 179; *Rositer v. Miller*, 36 L. T. 304; *Adams v. Angell*, 5 Ch. D. 634; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Carter v. Wake*, 4 Ch. D. 605; *Dymond v. Croft*, 3 Ch. D. 512; *Re Eager*, 32 Ch. D. 86; *Flower v. Lloyd*, 6 Ch. D. 297; *Freeman v. Cox*, 8 Ch. D. 148; *Re Hargreave's Contract*, 32 Ch. D. 454; *Henty v. Wrey*, 21 Ch. D. 332; *Patman v. Harland*, 17 Ch. D. 353; *Redgrave v. Hurd*, 20 Ch. D. 1; *Richards v. Delbridge*, L. R., 18 Eq. 11; *Steed v. Preece*, L. R. 18 Eq. 192; *Sutton v. Sutton*, 22 Ch. D. 511; *Tussaud v. Tussaud*, 9 Ch. D. 363; *Walsh v. Lonsdale*, 21 Ch. D. 9; *Couldery v. Bartrum*, 19 Ch. D. 394;

Bramwell had few of those subtle and impressive attributes which go toward the make-up of a great judge of appeal. It would be idle to compare him as such with such contemporaries as Cairns, Selborne or Bowen. But his sturdy common sense was an invaluable influence for good among associates differently constituted. With his strong character, not wanting in sharp edges, he cut his name deeply in the law, while finer and less robust natures have left few traces. In the Court of Appeal, sitting with Brett and Mellish, he supplemented the impetuosity of the former and the somewhat academic narrowness of the latter. Sitting in equity with Jessel and James he was not so much in his element. On one occasion in following the chancery judges in giving opinion in an equity case, he said: "Having listened all day to things which I don't think I ever heard of before, I can safely say I am of the same opinion and for the same reasons." His pronounced views upon the desirability of holding people to their bargains prompted little sympathy with certain equitable doctrines.

Cotton, through a longer term of service, made a very respectable reputation. He brought to the discharge of his judicial duties the clearness of thought and thorough preparation which characterized his vast labors as an equity lawyer, and, notwithstanding a certain want of facility in expression, his numerous opinions (for he was rarely satisfied with mere acquiescence) will repay careful study.¹ Upon the death of Jessel in 1883 he became more prominent as the presiding judge of the chancery division of the court.

Sugden v. St. Leonards, 1 P. D. 154; *Ex parte Reynolds*, 20 Ch. D. 294; *Suffell v. Bk. of England*, 9 Q. B. D. 555; *Mersey Steel Co. v. Naylor*, 9 Q. B. D. 648; *Aynsley v. Glover*, 18 Eq. 544; *Speight v. Gaunt*, 22 Ch. D. 727; *Ewing v. Orr Ewing*, 22 Ch. D.; *Re W. Canada Oil Co.* 17 Eq. 1 (first case); *Ex parte Willey*, 74 L. T. 366 (last case).

¹ *Johnstone v. Milling*, 16 Q. B. D. 460; *Henty v. Capital & Counties Bank*, 7 do. 174; *Davies v. Davies*, 36 Ch. D., 359; *Allcard v. Skinner*, 36 do. 145; *Tod Heatley v. Benham*, 40 do. 97; *Angus v. Dalton*, 6 App. Cas. 779; *Harney v. Farnie*, 6 P. D. 35; *Niboyet v. Niboyet*, 4 do. 1; *Re Goodman's Trusts*, 44 L. T. 527; *Turton v. Turton*, 61 do. 571; *Kensit v. Great Eastern Ry.*, 51 do. 863; *Hunt v. Clarke*, 61 do. 343.

A GOSSIP ABOUT FEES.

BY GEORGE H. WESTLEY.

SOMEWHERE or other an amusing story is related concerning the outwitting of Daniel Webster by an unsophisticated looking old Quaker. The latter was mixed up in a suit down in Rhode Island, and he asked the famous lawyer what he would charge to go there and defend him. Webster thought a moment, and then placed his fee at a thousand dollars. The Quaker all but fainted; but in a moment he recovered himself and said calmly: "Lawyer, that's a great deal of money; but I'll tell you what I'll do. I have other cases there, and if you will attend to them also, I will give you the thousand dollars."

Totally unsuspecting of anything like sharp practice on the part of his quiet companion Webster agreed, off-hand, to do his best, and the deal was closed.

When the case came up in Rhode Island the lawyer was on hand, and by his skill and eloquence carried it for his client. The Quaker then went around to several who had cases in court and said: "What will you give me if I get the great Daniel to plead for you? It cost me a thousand dollars for a fee, but now he and I are pretty thick, and as he is on the spot, I'll get him to plead cheap for you."

In this way he got three hundred dollars from one, and two hundred from another, and so on, until he had realized eleven hundred dollars, one hundred dollars more than he had paid. When Webster heard this he went into a towering rage. "What!" he cried, "do you think I would agree to your letting me out like a horse to hire?" "Friend Daniel," said the Quaker, "didst thou not undertake to plead all such cases as I should have to give thee? If thou wilt not stand to thy agreement neither will I to mine."

The humorous side of the matter suddenly struck the lawyer, and he broke out into

heartly laughter. "Well," said he, "I guess I might as well stand still for you to put the bridle on this time, for you have fairly pinned me up in a corner of the fence, anyhow." So he went to work and pleaded them all.

Among the great Sir Walter's writings we find the following couplet:

"Yelping terrier, rusty key,
Was Walter Scott's first Jeddart fee."

Scott's first client was a burglar. He got the fellow off, but the man declared that he hadn't a penny to give him for his services. Two bits of useful information he offered, however, and with these the young lawyer must needs be content. The first was that a yelping terrier inside the house was a better protection against thieves than a big dog outside; and the second, that no sort of a lock bothered one of his craft so much as an old rusty one. Hence the couplet.

Small compensation as this was, the first brief of the noted French lawyer, M. Rouher, yielded still less. The peasant for whom M. Rouher won the case, asked how much he owed him. "Oh! say two francs," said the modest young advocate. "Two francs!" exclaimed the peasant. "That's very high. Won't you let me off with a franc and a half?" "No," said the counsel, "two francs or nothing." "Well, then," said his client, "I would rather pay nothing," and with a bow he left M. Rouher to reflect upon rustic simplicity.

According to Uriah Heep, "lawyers, sharks and leeches are not easily satisfied." Certainly the French lawyer of the following story bears out the saying. He was pleading in a separation case, and he told with pathetic eloquence how his client was literally dying of hunger and had two little children. He demanded the immediate aid of two thousand francs in the name of humanity and justice,

and this sum was awarded. A few days later his client received the following letter: "Madame, I am happy to say we have succeeded in obtaining the provision of 2,000 francs. I have handed 1,000 francs to your attorney, who has given me a receipt, and I am much obliged to you for the surplus in settlement of fees."

In the early colonial days not much encouragement was offered to lawyers to come across and practise their profession here. The first Boston lawyer, Thomas Lechford, who hung out his shingle here in 1638, was not allowed to take fees as advocate. Three years later things were no better, for the Body of Liberties declared that "every man that findeth himself unfit to plead his own cause in any court, can employ any man against whom the Court doth not except to help him, provided he give him no fee or reward for his pains."

Virginia had also strict laws on this matter. In 1658 any lawyer who took compensation for pleading there was liable to a fine of five thousand pounds of tobacco.

But in this regard a few hundred years has wrought a mighty change. A recent article in one of the popular magazines shows us to what vast proportions lawyers' fees have developed, and enlightens us also on the modern method of figuring them out. In one of the big law firms in New York "every employee is required to keep a record of the time spent on each client's affairs, and the exact amount of work done by each member of the firm is also registered. There is even a record of the time each client spends in the office. These things go to the fee clerk, who determines how much the case costs the office, including the office expenses. To this is added a regular percentage of profit, and the client's bill then goes to the auditor, who decides whether the result to the client justifies the charge."

Quite frequently nowadays we hear of single fees which are enormous—fees in fact

which exceed the entire earnings of some of the most distinguished lawyers of twenty years ago. Take, for example, the astounding fee received by William G. Moore, of Chicago—no less than five million dollars. This was for bringing together all the American tin plate manufacturing concerns and uniting them in one immense corporation. The task involved an almost incredible amount of thought, labor, patience, courage, and even audacity; but it fell into the right man's hands and he carried it through most successfully. It should be said that a considerable portion of his reward was in the form of stock in the new company.

Lawyer James B. Dill seems to come second, with a tidy little fee of one million in cold cash. Mr. Dill was called upon to settle a dispute between Andrew Carnegie and his chief associate, Mr. Henry C. Frick. After a quarter of a million had been swallowed up in litigation, and millions threatened to go in the same way, Mr. Dill succeeded in convincing the litigants that by patching up their difficulties and reorganizing an enormous profit would result for all concerned. They took his advice, and he their very handsome check.

Half a million dollars is an encouraging compensation, and this was received by Mr. Levy Mayer for his services in safely steering the Ogden Gas Company into the Chicago Gas Trust.

Several two hundred thousand dollar fees might be mentioned, among them the one paid to Edward Lauterbach for reorganizing the Third Avenue Railroad Company, and that paid to Messrs. Cromwell and Sullivan by the Northern Pacific Railroad.

Perhaps the most easily earned fee on record was the quarter of a million dollar one paid to the late William M. Evarts a few years ago. He was asked a single question, viz.: Whether or not a certain great corporation had the legal right to exist. He answered it with a single word, "Yes."

THE AMERICAN SYSTEM OF SUPREME COURTS.

IN the course of an interesting article in the *International Review* Mr. Justice S. E. Baldwin, of Connecticut, writes as follows:

The American system of Supreme Courts investing one tribunal with the right to reverse the judgments of all others has also given to every man a reasonable and increasing certainty in respect to his rights and obligations, under any and all circumstances.

This is due to our Law Reports. For more than a hundred years, the judicial opinions of our highest appellate tribunals have been reduced to writing by the judges themselves, and published for common information. During most of this period the publication has been made officially, and at public expense. No other people has ever done this. It has given us a mass of legal precedent, and it belongs to our system of jurisprudence that—

“Freedom broadens slowly down
From precedent to precedent.”

It is not merely political freedom that thus grows. It is freedom also from unjust interference with personal rights, in the ordinary relations of private life, between man and man.

These Law Reports are interwoven with American history. They constitute no small part of it. Such opinions as those of Chief Justice Marshall as to the right of Congress to charter banks, or to make commerce between two States free from the control of either of them; of Chief Justice Taney, before the Civil War, in the “Dred Scott Case”; of Chief Justice Chase, after the Civil War, that the United States is an indestructible Union composed of indestructible States; and of the various Justices in the recent “Insular Cases,” are great historical events. They are true State papers.

But the reported decisions of our State courts are still more important as a record

of the history of American society. The political relations of men are far less complex and far less important than their private relations. The object of creating or suffering political relations is to secure proper private relations. The mutual rights and obligations which, from time to time, govern the daily life of men in civilized society must depend largely on the application of sound reason to changing circumstances. This is the work of the courts, and the Law Reports explain it for the public benefit.

A complete code of civil rights would be better, if it were a possibility. But the fullest code calls for interpretation, and demands it more and more as the years roll on and conditions change. What code of fifty years ago, for instance, could provide for the use of the telephone in the negotiation of contracts, or as an instrument of evidence in court?

When the Roman law was codified under Justinian, every attempt was made to keep it as the only source of authority. Lawyers were forbidden to cite the original works from which it was compiled. Commentaries were absolutely prohibited. All was, of course, in vain. It was a collection of signs, that is, of words used to express thoughts and precepts. What thoughts and what precepts? This inevitably, in many cases, would be a matter of controversy. The magistrate must settle the dispute, and to do this justly he must have all the light to be got from argument and treatise.

Precisely because of this impossibility of making word signs convey exactly the same meaning to all men under all circumstances, the power of our Supreme Courts to declare the law, when used in the interpretation of statutory and constitutional provisions, has been not infrequently pushed beyond due bounds.

The executive and the legislative officers

are sworn to support the Constitution as fully as are the judges. It is to be presumed that in their official acts they mean to support it. Only in a clear case should it be held by the courts that they have failed in this purpose.

It is always a misfortune when a statute is judicially pronounced unconstitutional and void by anything less than a unanimous court. A dissenting opinion, under ordinary circumstances, is almost a demonstration that the statute may fairly be held to be consistent with the Constitution.

At the National Democratic Convention, held in 1896 for the nomination of a President, one of the Kansas delegates advocated the insertion in the party platform of the following declaration:

"Our theory of government is, in the main, averse to the decision of one, but relies with confidence upon the voice of the whole. From very necessity, the judicial branch of the government must, in matters of constitutional right, become the final arbiter, and to the end that its determination shall have that highest confidence and respect, as being the determination practically of the whole, rather than of one, we would commend to the thoughtful and patriotic consideration of our country, the advisability of the following amendment to our national Constitution:

"That before any act of Congress which shall have been regularly enacted according to the general forms provided for the enactment of laws by Congress, and duly approved by the President as the representative of the executive branch of the nation, shall be held void by the judicial department of the government as being in conflict with the Constitution, such decision shall be the concurrent opinion of seven (7) judges of the Supreme Court."

This was rejected, and probably wisely. Any numerical rule of decision tends to substitute quantity for quality. The proposition, however, voices a general feeling that this great power vested in the judiciary should

be exercised with caution, and is open to abuse.

Nor is it to be denied that it often reflects the popular and even the political feeling of the day, or of the former day in which the judges giving the decision were appointed. This, however, is not an unmixed evil. Theory may be perfect; practice is imperfect. The best government, as Solon said, is the best which the people subject to it will endure. Authority may be too rigid; it may be strained till it snaps.

This atmospheric influence of the judicial surroundings increases with the public interest in the questions to be determined. No bad illustration of it was furnished by the "Dred Scott Case" in 1856. Almost every great public measure in those days was considered in Congress and out of it largely in view of its relations to slavery. Did it tend to strengthen the hold of that institution upon the nation? Then the South was for it, and the North was divided. Of those who were then upon the Supreme Court of the United States, the Chief Justice and four of his associates were from Southern States. All five, with one of the Justices from the North, stood for the doctrine that the Missouri Compromise was unconstitutional and void. It purported, they said, to dictate to the people of the United States what should be the character of their local institutions, and this was outside the powers with which Congress had been invested, and never within the view of those who framed the Constitution. "I look in vain," said one of the strongest of the Associate Justices, Campbell, of Louisiana, "among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive provisions of

Samuel Adams, George Clinton, Luther Martin and Patrick Henry; and in respect to dangers from power vested in a central government over distant settlements, colonies or provinces, their instincts were always alive. Not a word escaped them to warn their countrymen that here was a power to threaten the landmarks of this federative Union, and with them the safeguards of popular and constitutional liberty; or that under this article there might be introduced, on our soil, a single government over a vast extent of country,—a government foreign to the persons over whom it might be exercised, and capable of binding those not represented, by statutes, in all cases whatever.”¹

Of the three others one waived this question and two upheld the validity of the act.

The discussion probably spoke the almost unanimous opinion of the South, and what also had been that of half the North up to the date of the troubles in Kansas, which

¹ Dred Scott v. Sandford, 19 Howard's Reports, 505.

brought the cry of “squatter sovereignty” so prominently into politics.

Fifty years pass, and in the “Insular Cases” a similar question divides the court again. There is now no great all-controlling party force like that furnished by the institution of slavery. The country is nearly equally divided in opinion as to the extent of Congressional authority over our new possessions. The Court was nearly equally divided. The Chief Justice and three of his associates held that it must be exercised in subordination to certain express provisions of the Constitution. The majority of the Justices took a different view, though they were not agreed as to the reasons for the judgment. Neither is the country agreed. The opportunism of the court was the opportunism of the people; disposed on the whole not to disapprove what has been done by a government struggling with a new and difficult situation, and more interested in the “condition” than in the “theory.”

LEAVES FROM AN ENGLISH SOLICITOR'S NOTE-BOOK.

XII.

THE WRONG MRS. SIMPSON: A COMEDY OF PROFESSIONAL ERRORS.

BY BAXTER BORRET.

(Registered at Ottawa in accordance with the Canadian Copyright Act.)

WHAT a grave responsibility is cast upon a solicitor who is called upon, at a few moments' notice, to make the will of a testator who is in extremis, and whom he has never known before! But, as I take it, his duty is clear; he must do his utmost to give effect to the instructions put before him, and leave the rest to Providence. It is a solemn responsibility cast upon him as a member of a learned profession, which he has no more right to shirk than has a surgeon who is called in to a case of sudden ac-

cident, involving the issue of life or death (as for instance a severed artery).

I was once sent for, in a great hurry, by a medical man in Georgetown, who was an occasional client of mine, to draw the will of a lady who was a complete stranger to me, who had had an apoplectic seizure, and was then lying *in articulo mortis*, but conscious and perfectly *compos mentis* (so the doctor assured me), and whose peace of mind could not be assured until her testamentary wishes had been put into legal form. I learned from

the doctor that at the time of the seizure she was seated at her writing table, and that on it was found a half-written letter as follows: "Sir, I wish you at once to draw a will for me, giving all I have to dispose of to my niece, Emma Simpson." There the writing ended. There was no name on the letter to show to whom it was intended to be addressed, but I learned from the doctor that her usual solicitor was a fellow-townsmen named Maule, who was then away in London, not expected back for some days. I also learned that the old lady, whose name was Mary Elliott, had a niece residing in Georgetown, whose husband's name was Simpson, and who managed a dry-goods store in the High Street of Georgetown, over which was the name of Mary Elliott. My duty seemed plain; I at once wrote out a short will, revoking all previous wills, and giving, devising and bequeathing all her property of what nature and kind soever to her niece, Emma Simpson, for her own sole use and benefit, and appointing her the sole executrix. I read this over very slowly to her in the presence of the doctor, and of my clerk, who had come with me, and I asked her whether she thoroughly understood it, and whether it carried out her wishes. She was unable to speak, but she bowed her head, which the doctor said I might accept as her assurance that it was right; signature was impossible, but with some little difficulty I got her to make a mark, and so the will was executed and attested. The doctor told me that he had sent for Mrs. Simpson, but he found she was away for the day, but was expected back late at night. There being nothing more for me to do I left the house, taking the will with me, but the doctor stayed behind as he thought the end was not far off. Late at night I met the doctor, who told me that Mrs. Elliott had passed away painlessly, her niece, Mrs. Simpson, being with her at the last. I felt satisfied in my own mind that I had done a good work; I had relieved the dying lady's mind of an anxiety which, apparently, had been oppressing her; I had

saved the catastrophe of an intestary, which she had seemed anxious to avoid, and I had given effect to her desire to leave everything to a trusted niece.

On my arrival at my office next morning my clerk told me that Mr. Simpson was waiting to see me. After expressing to him my regret that Mr. Maule had not been at hand to see to the drawing of the will, and that the circumstances had compelled me, a perfect stranger to Mrs. Elliott, to be called in to do the work so hurriedly, I said I felt sure that the will which had been signed carried out the testatrix's intentions, telling him of the unfinished letter which had been found on the old lady's writing table, and I produced the will and read it to him. I certainly was not prepared for what followed; uttering a moan he sank back into his chair in a swoon, and it was some little time before he recovered.

As soon as he could speak I asked him to tell me what was wrong; he told me that his wife's name was Mary, not Emma; that Emma was the name of another niece of the testatrix, who also had married a man of the name of Simpson, a distant connection of his; and that he lived in a suburb of London. I was now able to realize the extent of the catastrophe which had befallen my visitor, whom I had imagined to be, in right of his wife, placed in a position of affluence and independence; whereas in fact his real position was that he was left penniless and that his wife's cousin could claim the premises, the business, the stock, and everything else, and turn him into the street at short notice, to begin the world afresh. This was all the more hard upon him, because, as he told me, Mrs. Elliott had often told his wife that she would find at her death that she and her husband had been well cared for.

Here was an awkward position for all concerned, but I felt sure that the testatrix fully understood and approved of the will which I had drawn. My present duty, therefore, was clear. I must at once telegraph to Mrs. Emma Simpson, inform her of her aunt's

death, and of the effect of the will, and ask for her instructions as to the arrangements to be made for the funeral. I did so, and in a few hours received a reply telling me to act on the instructions of her Cousin Mary in everything, and that she (Emma) would come down to the funeral and confirm all that her cousin ordered to be done; and asking me to meet her at the house of the testatrix after the funeral.

The day before the one fixed for the funeral Maule returned to Georgetown. I made a point of calling on him as soon as I heard of his arrival. Had I been dealing with any ordinary member of the profession I should at once have handed the will over to him, and retired from the business in his favor. But he was one of those keen, aggressive, self-seeking practitioners, whose hand was against all his brethren in the profession, consequently he was distrusted by all who knew him. Sleek and fawning in outward demeanor, with an insinuating mode of approach which was attractive, at first impulse, to those who were not fully acquainted with him, he took in many a stranger meeting him for the first time; he always seemed at first to agree with the view which you advanced to him as your opinion, and approved of the course which you suggested should be adopted, but you found before you left his presence that he gradually so qualified his opinion as not only to stand uncommitted to anything, but to leave an uncomfortable impression in your own mind that on the first available opportunity he would adopt the precisely opposite view, and act upon it; and that later on he would tell you that he had differed with you from the first. I suppose some people would consider this very clever, and strictly professional. I, for one, do not. I hold that when one member of our profession meets another, and the meeting is not essentially a hostile one, perfect candor should rule on both sides; it is always open to either party to say "our clients' interests are antagonistic, and you must not expect me to concede anything;" and then the busi-

ness can be discussed on its dry legal merits, in the same way that a case would be argued in court, keeping your opponent at arm's length. But, in the greater number of interviews taking place between solicitors, it is essential that the men meeting should be able to trust each other once and for all. On some such footing as this the rules of professional courtesy and etiquette which, in my younger days at least, governed the conduct of the best members of the profession, sprang up and became a code of honor in our dealings with one another; and any one offending against this code became discredited and lost caste, to his own detriment, and to the detriment of his client also. Such a man was Mr. Maule, shrewd, in a certain sense, clever, but disliked and distrusted by all the respectable members of the profession.

In my interview with Mr. Maule I briefly explained the circumstances under which I had been called in, and the effect of the will which I had drawn, and my fear that it would place Mr. Simpson, of High Street, in an awkward position; but I expressed the hope which I felt that Mrs. Emma Simpson would meet her cousin's husband reasonably and give him time to turn round, or possibly continue his employment as manager of the business for some definite period, a course which seemed to me prudent under the circumstances. His answer was characteristic of the man.

"Well, Mr. Borret, I acknowledge your courtesy in calling on me. You could hardly have acted otherwise than you did; you were called in, no doubt, in my stead and in consequence of my absence, and you had a delicate position to face, and, no doubt, acted for the best, according to your knowledge in drawing the will as you did and saving an intestary. Of course you will at once see the propriety of handing the will over to me, and letting me carry through the business of my late client."

"I can hardly do that, Mr. Maule, in the face of Mrs. Emma Simpson's telegram asking me to meet her at the house immediately

after the funeral, which is to be to-morrow afternoon. But I will urge her to place the matter in your hands, just as if you yourself had drawn the will; and unless she expressly directs me to the contrary I will send the will to you. In the meantime I am glad to hear that you think I acted rightly in drawing the will as I did."

"Oh, you must not take it that I think so; it is a very awkward thing to take up the business of another solicitor, and to draw the will of one who is a complete stranger to you, and unable to speak her own mind. I hope it may not turn out that you have made a mess of it altogether; it seems to me like it at present; and as to what Mrs. Emma Simpson may be disposed to do, I beg you to remember that I look upon her as my own client, and you will, I am sure, recognize the impropriety of your advising her one way or the other. You refuse to hand the will over to me then, do you?"

"For the present I certainly do, especially in face of your suggestion that I have made a mess of it, which may mean anything or nothing. Unless you have anything further to say I will bid you good morning," I said, feeling angry.

I had not been back in my office an hour before my clerk came into my room and announced that Mrs. Simpson wished to see me. "Mrs. Simpson, of High Street, I suppose; show her in, Harry."

A lady dressed in deep mourning and wearing a veil over her face came in.

"Mrs. Simpson, of High Street, I believe, madam?" said I.

The lady bowed, and sat down. "You are the solicitor who drew my aunt's will a few hours before her death, I think, Mr. Borret; I want you to tell me plainly all about it and what its effect is. May I read it over for myself?"

"Certainly, madam, I have it here, and it is so short and simple that you will readily see the effect of it. You will see that everything is left absolutely to your cousin, Mrs. Emma Simpson."

"Everything without exception? Shop,

stocks, book debts, even the furniture in the living rooms over the shop?"

"Everything that was the property of your aunt at the time of her death has now passed absolutely to your cousin, for her own use, and she has complete power over everything."

"But suppose my aunt had made a settlement, or deed of gift, some time before she died, would the will over-ride that?"

"No, not if the settlement or deed of gift was complete in itself and irrevocable."

"I think I understand you. In the absence of any settlement everything passes to Emma Simpson, who can at once take over the shop and the business and everything."

"Yes, madam, that is the legal position of Mrs. Emma Simpson, if there is no previous deed of gift or settlement to the contrary. But your cousin has asked me to meet her immediately after the funeral, and I have every hope that when I explain the effect of the will to her, and that there was no time to discuss details with your aunt, that she will act reasonably towards your husband and yourself, and give you ample time to make your own arrangements; I may go so far as to promise beforehand that I will take upon myself to advise her, outside her legal rights, that it will be to her own best interests to do so, for reasons which I need not mention now."

"Have you seen Mr. Maule, Mr. Borret? I hear that he is at his office to-day."

"Yes, I saw him this morning, Mrs. Simpson. I thought it my duty to call on him, and explain what I had done in his absence, and he seemed very angry because your cousin wished to see me after the funeral."

"But did Mr. Maule make no mention of any deed of gift or settlement, Mr. Borret?"

"No; not a word, except that for some reason of his own he seemed strongly opposed to my seeing your cousin or saying anything to influence her in your favor."

"Then you think if there was any such settlement or deed of gift he would have told you of it?"

"Yes, I think so; I gave him my full con-

fidence; told him how awkwardly I had been placed in having to draw the will so hastily, and how unfortunately the will affected your husband and yourself. If he knew of any settlement in your favor he was bound in candor and courtesy to tell me of it."

"And he told you nothing, Mr. Borret? Nothing to give you any idea that there was any settlement or deed of gift which would put another aspect on the matter?"

"Not a word. Have you any reason for believing that there is any such document in existence?"

"Yes, of course there is a settlement," said my visitor, now raising her veil. "But now I must ask your forgiveness for a piece of deception on my part. I see you have mistaken me for my Cousin Mary. I am Emma Simpson. I arrived here early this morning and saw my cousin. I found her of course in great grief at the idea of everything having been left away from her and her husband; but for reasons of my own I did not tell of the existence of any settlement until I felt sure about it. I called to see Mr. Maule before calling on you, but his answers to me were so vague and unsatisfactory, and he seemed so very anxious to put you in a wrong position and to throw blame on you, which I felt was not deserved, that I resolved to come to see you myself. I saw that you mistook me for my Cousin Mary, and I thought I would not undeceive you until I had learned from you exactly how she and her husband were placed. Settlement, of course there is a settlement, and a very proper one under the circumstances. What was Mr. Maule thinking of not to tell you all about it! But tell me, Mr. Borret, how came you to make such a will, leaving everything to me, when you knew I had a cousin living in the town who is as much entitled to my aunt's bounty as I am?"

"There is nothing like perfect candor, Mrs. Simpson. I confess at once that when I saw that unfinished letter of your aunt's I thought that Mrs. Simpson, of High Street, was the intended legatee; I did not know of your

existence, and as your cousin lived here, and her husband controlled the business it seemed to me only natural that your aunt should wish to leave everything to her. Remember, I never saw your aunt until that day, and knew nothing of her circumstances, and there was no time to ask questions, even if the poor lady could have answered them, which she could not have done."

"So, then, if your advice had been asked you would have advised my aunt to leave everything to my cousin?"

"No; I do not say that. But I should have advised your aunt that your cousin and her husband ought not to be left entirely without provision, and at the mercy of any one to whom your aunt might feel disposed to leave her property generally. But it is useless thinking now what I should have done if I had known all the circumstances. I feel sure that the will carries out your aunt's last wishes, and I can only hope from the words which fell from you that your cousin is already provided for by some settlement. If not I shall certainly feel bound to urge a plea on her behalf that you will give her and her husband every reasonable indulgence and ample time to turn round and find some other home for themselves."

"Mr. Borret, I fully appreciate the good feeling which prompts you to plead my cousin's cause with me, but I assure you there is no necessity."

At this moment I heard a loud voice outside, which I recognized as that of Mr. Maule, in a personal wrangle with my clerk. "I insist upon going into Mr. Borret's room at once, he has no right to see any client of mine behind my back, his conduct is most unprofessional." And in another moment the door was flung open and in walked Mr. Maule.

I rose at once, and offered him a chair, saying as I did so, "I overheard your last remark, sir, but I hope we shall neither of us forget the courtesy which is due to the presence of a lady."

"Courtesy be hanged, Mr. Borret. What

the d—I do you mean by interviewing a client of mine behind my back?”

Here the well-bred lady rose to the occasion and came to rescue me from as awkward a position as I ever remember myself to have placed in. Rising from her seat she faced the angry lawyer, saying in clear, ringing tones: “Mr. Maule, I am not in the habit of sitting in a room where men use bad language, I require you at once to apologize to me, and afterwards to Mr. Borret, for your language and for your rudeness.”

A gruff apology was muttered, and Mrs. Simpson resumed her seat.

“As Mr. Maule is present I will now ask you, Mrs. Simpson, to tell me about the settlement which you spoke to me about a few minutes since.”

“Do not tell Mr. Borret anything about any settlement,” said Mr. Maule; “it is no business of his, and if he wants to know anything about it he can apply to me.”

“As you please, Mr. Maule,” said I. “Then I will ask you in Mrs. Simpson’s presence whether you are aware of any settlement made by Mrs. Elliott in favor of Mrs. Simpson, of High Street, or of her husband?”

“I decline to answer your question,” said Mr. Maule, fiercely.

“But why do you decline, Mr. Maule?” asked the lady; “surely Mr. Borret ought to be told about it, now that my aunt is dead.”

“I will give you my reasons when you and I are alone, not till then.”

“Mr. Maule is strictly within his right, Mrs. Simpson,” I said. “I will leave the room, and when you and Mr. Maule have had full time for advising together, you can call me in again. I am only anxious to be relieved of the charge of having made a mess of the whole business.”

I went into another room, but before long I heard Mr. Maule’s voice raised in angry discussion, and presently I heard the door open, and overheard Mrs. Simpson saying, “You will be good enough to send that settlement and any other papers of my aunt’s over to Mr. Borret’s office as soon as pos-

sible; I shall not require you to act for me any further, Mr. Maule.”

I waited until he had gone out and then rejoined Mrs. Simpson, whom I found very much agitated by the interview. Of course I felt it my duty to make light of Mr. Maule’s rudeness, but what struck my visitor as inexplicable was Mr. Maule’s keeping secret the existence of the settlement; to me it was not so extraordinary, knowing him, as I did, as a man to whom candor and straightforwardness were unknown virtues. I have no doubt that he bitterly resented my having been called in to draw the will, in his absence, and he wanted in every possible way to humiliate me in Mrs. Simpson’s eyes, and prevent her entrusting me with the proving of the will and the business of distributing the estate. This last scheme of his was quite unnecessary, for I had already made up my own mind that strict professional etiquette required me to refuse to take up the business, even if Mrs. Simpson desired to withdraw it from Mr. Maule; and so the business went into the hands of Mrs. Simpson’s husband’s London solicitor.

I learned, however, from her that she and her cousin were both left orphans in their early infancy, through an awful epidemic of small-pox, that Mrs. Elliott had taken them to her own home, bravely facing all risk of infection, though they carried the terrible disease with them to Mrs. Elliott’s only child, who died from it; that Mrs. Elliott nursed them bravely and devotedly, notwithstanding her own terrible bereavement, and for some years they knew nothing of their true relationship, but were brought up to look upon her as their mother. And when the elder of them married the man who had fought his way alone in the world, and had risen to be the manager of Mrs. Elliott’s business, she had by a deed of settlement (drawn up by Mr. Maule, but kept secret from every one by Mrs. Elliott’s desire), settled the shop and the good-will and stock of the business on Mr. Simpson, in trust for Mary, his wife,

subject only to a life interest in it which Mrs. Elliott reserved to herself; and, in the same way, when the younger niece married, she had made a secret deed of gift of stock in the funds and other securities, reserving a life interest to herself. But, a few weeks before her death, something prompted her to distrust Mr. Maule, and she took the precaution of writing to her younger niece to tell her of the existence of the settlement and deed of gift, which were still to be kept secret as long as the aunt lived. The object of the will which I had drawn was to leave the residue of her property, which was only of trifling value, to Mrs. Emma Simpson, in order to equalize her fortune with that of the elder niece.

And here my story ends. Will my readers forgive the somewhat garrulous old fogey who has written this and the preceding mementoes of his professional life, if he concludes with the following advice, tendered for the guidance of the younger members of

the profession. He who expects candor, courtesy and straightforward dealing from his brethren in the profession, must practice the same virtues with them. Courtesy is always exercisable under any circumstances; candor and complete openness, not always; but where these are impossible, or at least unadvisable, they should not be affected; it is always possible to say "this is a matter of business in which I must reserve my own opinion, and act as I may be advised in the best interest of my client; I cannot meet you an inch of the way, and we must meet as antagonists at every point." This is honest and straightforward, and will earn the respect of your opponent, if he be a man of right mind. But the solicitor who at first fawns on a professional brother, and invites candor and confidence from him, and then turns round and betrays confidence, is properly ranked as an "outsider," unworthy of being recognized as a member of an honorable profession.



THE SIFTON MURDER CASE.

AN interesting murder case was tried last month at the assizes held at London, Ontario, Canada. The jury disagreed on their verdict, nine being for a conviction against three. The facts were these:

One morning at the end of June last year, the deceased, Joseph Sifton, left his home in good health, to go to a barn on his farm; half an hour afterwards he was lying outside the barn, dying, from the effects of wounds on the head, a blood-stained axe lying near him. The deceased man never regained consciousness, and died a few hours afterwards. The only persons with him at the time of the accident, or crime, as the case may be, were his son Gerald Sifton, and a young man named Herbert. The story of both of them then was that the deceased had fallen from a beam in front of the barn, and in so doing had injured his head by falling on an axe which he had been using just before the fall. The medical man, who was at once called in, certified that the cause of death was accident, and no inquest was then held, and the old man was buried. A few days afterwards rumors spread that there had been foul play; a man named Martin stated that Gerald Sifton had tried to bribe him to help to murder the deceased, and to aid him, the son, in passing off the death as an accident. The old man was to have been married that morning to a young woman who had previously been engaged to be married to Martin. An inquest was held, the body was exhumed, and Gerald and Herbert charged with murder, and committed for trial. Meanwhile, Herbert made a confession that he had joined with the son Gerald in murdering the deceased, by striking him on the head with the axe in the barn, and throwing him down, and that after the fall, further blows on the head were inflicted with the axe; and that he had been

bribed by Gerald to assist in the crime, and to swear that the death was accidental.

Both Gerald and Herbert were indicted for murder at the last spring assizes, and tried separately, when Herbert pleaded guilty, and his sentence was postponed. The trial of Gerald was then postponed on the ground of the absence of a witness whose evidence was thought to be material.

In the meantime civil proceedings were taken to test the validity of a will put forward by another man, a relative of Martin, which will was found to be a forgery.

At the trial the principal witness for the Crown was Herbert, who repeated the story of his confession; and he was the only witness, indeed, the only possible witness of the fact. The doctor who attended the deceased up to his death could not swear that the death might not have been caused by accident. Other medical men called by the Crown were positive, from the appearances sworn to by those who performed the post-mortem examination, that the death could not have been the result of accident. Other circumstantial evidence was put in by the Crown tending to corroborate Herbert's confession. The motive assigned by the Crown for the murder was that the old man's marriage would have materially altered Gerald's position as expectant heir, and presumptive sole legatee, he being the only child.

The evidence on behalf of the prisoner consisted mainly of medical witnesses, who testified that the appearance presented by the skull of the deceased, as deposed to by the medical men who made the autopsy, were inconsistent with Herbert's story of repeated violent blows, but were not inconsistent with an accidental fall from the barn.

When a final verdict comes to be given we shall hope to give our readers a full account of this most remarkable case.

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.

WITH deep regret we record the death, on October 26, of Horace W. Fuller, the editor of THE GREEN BAG for twelve years, from its start until the beginning of the present volume. Mr. Fuller was born in Augusta, Maine, in 1844, but came to Boston at an early age. Studious and scholarly in his tastes, he was especially fitted for the literary and editorial work which he assumed in addition to his practice. Brought by his editorial duties into pleasant relations with many of the brightest and most prominent lawyers here, in Canada and in England, Mr. Fuller was widely known and highly esteemed by his professional brethren, to whom the news of his death comes as a sad shock.

NOTES.

JUDGE ROBERT C. GRIER, one of the associate justices of the Supreme Court of the United States from 1846 to 1870, was possessed of a very caustic wit, which he did not hesitate to use on the bench upon frequent occasions. At one time he was holding a session of the United States District Court at Williamsport, Pa. The officers of the Court, with their records and papers, had come from Pittsburg two hundred miles distant and jurors and witnesses had been summoned from all over the western part of the state, at a very large expense to the government.

When court convened, it was found that there was but one case for trial, that of a man charged with robbing the United States mails. He had no counsel and so the judge appointed to defend him a young member of the bar, Andrew G. Curtin, afterwards the great war governor of Pennsylvania and United States Minister to Russia. There was no doubt of the man's guilt, but Curtin made an impassioned speech in his defense and when the jury came in, to the surprise of everybody in the court room, the verdict was not guilty.

Judge Grier glared at the jury with a look of disgust and then drawled out in his squeaky voice, "Humph, gentlemen, this is like ordering out a regiment of United States soldiers to shoot at a pigeon and then miss the pigeon."

AN assistant judge had dropped asleep on the bench. The presiding judge, who was collecting the votes, asked him for his.

Rubbing his eyes, the latter said, "Hang him!"

"But it is a meadow we are dealing with."

"Ah? Well, mow it, then."

AT the recent Webster celebration at Dartmouth College, Rev. Dr. Edward Everett Hale told the following anecdotes:

Mr. Webster was very fond of children, and got along excellently well with them. I am always proud to tell this story of a child's game of speculation or commerce at which at some birthday party we were all playing in his own library. The great library table was cleared for us, and, as it happened, I sat by Mr. Webster's side. In the exigencies of the game, perhaps from my own imprudent playing, I had lost all my counters, and I cried out: "I have nothing left. Have I no friend who will lend to me?" With perfectly characteristic generosity, Mr. Webster pushed half his stock in front of me and said: "Edward, as long as I live you shall never say you have not a friend." I was a child, but I treasured those words, and they always proved true.

Senator Lodge may well express his surprise that anyone who knew Mr. Webster at all thought he had no sense of humor. His humor cropped out always when he was at ease. I have a child's poem which he and other lawyers wrote to my father and mother for me, to entertain me in sickness. It was the trial of the Sparrow for the murder of Cock Robin. I have always guessed that Mr. Webster furnished these lines, because they were the best in the

little poem, and because they were such good law :

The judge charged the jury
For an hour and a quarter ;
He spoke of murder,
And then of manslaughter.

He stated that malice
Was the essence of crime,
And that this was too clear
To take up their time.

That if the defendant,
When his arrow he hurled,
Had acted from malice
Against the whole world,
And cared not who suffered
So he had his sport,
That then he deserved
The worst sentence in court.

THESE anecdotes recall two other stories of Webster printed some years ago in the *Evening Post*, whose correspondent wrote :

Master Pierce, the father of Mr. Henry L. Pierce, of Boston, kept the school on Milton Hill. To this it was a walk of a mile for me, and of a mile and a half for Fletcher, the eldest son of Mr. Webster. One day, thinking to pleasantly vary the mode of locomotion, Fletcher, during the absence of his father, took his favorite black mare from the stable, and, calling for me on the way, we two rode bareback to the school, taking the precaution to tie the mare in a lane a little short of the schoolhouse, intending to ride home at noon, as it was Saturday. But Mr. Webster unexpectedly returned to his house, and, missing the mare, suspected the escapade. The first notice we had of our detection was the appearance of his stately form at the door fronting our seat. He fixed his eyes upon us, and they spoke even louder than the deep voice which followed, "Where is the mare?" Master Pierce dropped his ferule, the class reciting became breathlessly silent, and the culprits shrank into absolute nothingness. I could never liken my sensation on that occasion to anything else than the fear of Cain when the missing Abel was required at his hands.

Fletcher at last managed to gather himself together, and walked with his father down to the place where the beast was tied. Mr. Webster fastened her by the bridle to the back of his

chaise, and not a word did he say about the misdemeanor to his son or to me, either then or afterward, but it was the last time we went to school on that black mare, and nothing would have induced us to repeat the experiment. There are old men and men of middle age who can remember the magical influence of Mr. Webster's eye, and they can readily imagine the scene I have described. His voice was majestic, but his eye was almost superhuman.

One Sunday a student from Andover occupied the pulpit, my father not intending to take any part in the exercises. The young minister got along very well with the opening prayer and the scripture lesson, but when he had read only a verse or two of the hymn he became confused, stammered, and at last his voice failed him entirely. As he seemed to be taken suddenly ill, my father finished the services, preaching an extemporaneous discourse. On the way home in the carriage, the young man, who by that time had quite revived, being pressed for an explanation of his conduct, finally confessed. "Well, sir, it was merely an unaccountable nervousness. Just as I was reading the second stanza of the hymn, a gentleman came into the church and sat down in a broad-aisle pew directly before me, fixing such great, staring black eyes upon me that I was frightened out of my wits!"

Until he was then told, he did not know that Daniel Webster was a member of the congregation or an inhabitant of the town.

THE defendant in a case concerning the right of way to a well, was asked in the cross examination: "How long have you had this right of way?"

Witness — "Forty years, sir."

Lawyer — "And, madam, how old are you?"

Witness — "Twenty-five years, sir," and she wondered why the court laughed.

IN Cape Breton, a short time ago one Benjamin Bowline assigned for the benefit of his creditors, and the usual notices announcing the fact and that a meeting would be held on a certain day were sent out. Among the notices was one to a country storekeeper in the county of Inverness who had sent some butter to Bowline the account amounting to about one hundred dollars. With the notice went an affidavit to

verify the claim. In reply to the notice No. 1 letter came and as usual the affidavit was a sight. Davidson had signed where the justice should have signed and the justice where Davidson should have signed. The affidavit was sent back to Davidson, who returned it with letter No. 2. There had been considerable delay in winding up the estate, and a short time ago letter No. 3 was received.

NO. 1.

Dear Sir: Your mandate *re* the gallant hero who has assigned duly to hand. Presume that he can go preaching now as his knowledge of commercial failure will make him an adept as gentleman of the long cloth.

I appoint yourself as a fit person to personate me. Seriously speaking, will there be anything left after the piper is paid — I mean the lawyer — Any dividend? Kindly don't smother if this question is entirely unreasonable — but truly I would like to get enough to buy me a jack knife or a cork screw. Kindly report.

Yours truly,

C. DAVIDSON.

NO. 2.

Gentlemen: I now return to you the paper — adjusted, remodelled and complete. I hope that at meeting of creditors Mr. Bowline will get a favorable send off.

Am quite willing to give him a chance. I offered him three months longer before assigning, but some miserable starving creditor must have pressed the life out of Mr. Bowline, and who ever it is I hope you will squeeze him at your Congress on fourteenth and knock him out. I knew quite well that Mr. Bowline was doing what best he could and time was all the perquisites needed by him. Hope you will have a peaceable meeting and not cold water for toasting, and please drink towards the prosperity of Ben Bowline, the King next; and fill up your Bowls towards the health of the disciples of Blackstone (Messrs. Ross & Ross) not forgetting our absent brethren, of whom I am one.

Yours sincerely,

C. DAVIDSON.

NO. 3.

Greeting: I desire to learn what is the result of meeting of creditors *re* B. Bowline. This day is the date you met for the last time, I hope, and trust the proverbial expression shall not be verified: — “the mountains have labored” etc. Have you sold him out or sent him into exile? Please reply.

Yours truly,

C. DAVIDSON.

LITERARY NOTES.

THE John Marshall Day addresses which have been printed in book or pamphlet form make an interesting collection of Marshalliana. On our table are several of these publications in addition to those to which we have called attention earlier in the year. The Boston and Cambridge addresses have appeared in a limited edition, edited by Marquis F. Dickinson. The addresses in this volume are those by Chief Justice Holmes, Attorney-General Knowlton, Professors James Bradley Thayer and Henry St. George Tucker, and the Honorable Richard Olney. In addition to reproductions of the Inman and St. Mémín portraits of Marshall — the latter in color — the volume contains excellent portraits of the orators above named and of Professor John C. Gray, president of the Bar Association of the City of Boston.

Especially attractive in get-up is the volume containing the Proceedings of the Chicago Bar on February 4. These include the proceedings in the United States, State and County Courts at the Centennial exercises and at the banquet. The principal addresses are those by Senators Lodge of Massachusetts and Lindsay of Kentucky, Judge Grosscup, of the United States Circuit Court, and the Honorable James M. Beck, Assistant Solicitor General of the United States. The frontispiece is the head of Marshall, after the Inman portrait.

Senator Lindsay's address referred to above is printed also in the recently issued report of the *Proceedings* of the Illinois State Bar Association at its twenty-fifth annual meeting.

The printed report of the Marshall celebration in Philadelphia contains the proceedings before the United States Circuit Court of Appeals, and the address before the bench, bar and law-students by Mr. Justice James T. Mitchell, of the Supreme Court of Pennsylvania. The Inman portrait is the frontispiece to this volume.

The address delivered by Professor John Bassett Moore, of Columbia, at Wilmington, Delaware, which appeared originally in the *Political Science Monthly*, has been reprinted in pamphlet form.

From the West we have a pamphlet containing the address delivered at Boise, Idaho, before the Bar Association of the State, by the Honorable James E. Babb.

NEW LAW BOOKS.

THE LAW OF SALES OF PERSONAL PROPERTY.

By *Francis M. Burdick*. Second edition. Boston: Little, Brown & Company. 1901. Buckram: \$3.00. (299 pp.)

This work has been written especially for law students and seems admirably suited for their needs. To say that a law-book is "handy" would seem, in these days, when educators are more and more impressing upon the student the necessity of being his own investigator, to be sufficient commendation of a law text-book, which best justifies its existence if, like the guidepost, it carefully and correctly points the way to the student journeying through his subject. The great part of knowledge being to know where to look for it, the student of law will most gratefully use that text-book which, leaving out lengthy treatises by the author, most systematically and directly takes him to those cases which are the law upon the principle stated.

This book well satisfies these requirements and cannot fail to be welcome in the student's hand. It has seemed to the reviewer that some text-books there are which cite too many cases and sacrifice "handiness" to voluminousness. The citation of one leading case is in most instances a key to the storehouse of legal knowledge on that principle. The eminent jurist handing down the decision which has settled the law, has taken pains to fortify himself behind bulwarks of cited cases in order to render his position impregnable.

The author has wisely left out of this volume the discussion of such subjects as consideration, mutual assent, the capacity of parties, illegality and fraud, which belong more properly to the study of pure contracts and torts.

In every work on sales the Statute of Frauds must be constantly on the stage, and the author's treatment of the provisions of the Statute in connection with the common-law topics to which they relate is good arrangement.

The conditional sale, so-called, has recently taken such prominence in commercial transactions, that a more comprehensive treatment than our author has given of the law appertaining to this kind of sale would have been welcome.

In the appendix are found the English, New

York, and Massachusetts "Factors' Acts" together with brief historical sketches of the "Factors' Acts" in England and in the United States.

THE LAW OF CONTRACTS. By *Edward Avery Harriman*. Second edition. Boston: Little, Brown & Co. 1901. Buckram, \$3.00; law sheep, \$3.50. (xiv+410 pp.)

Although this book is primarily intended for students, it is so accurate and thorough, and at the same time so original in arrangement and in expression, that it is full of interest for the practitioner. A rather careful examination of the work has failed to disclose any substantial defect, although probably in a new edition it might be advisable to amend Chapters II and XXX in such manner as to point out more minutely the distinction between Contracts and Quasi-Contracts.

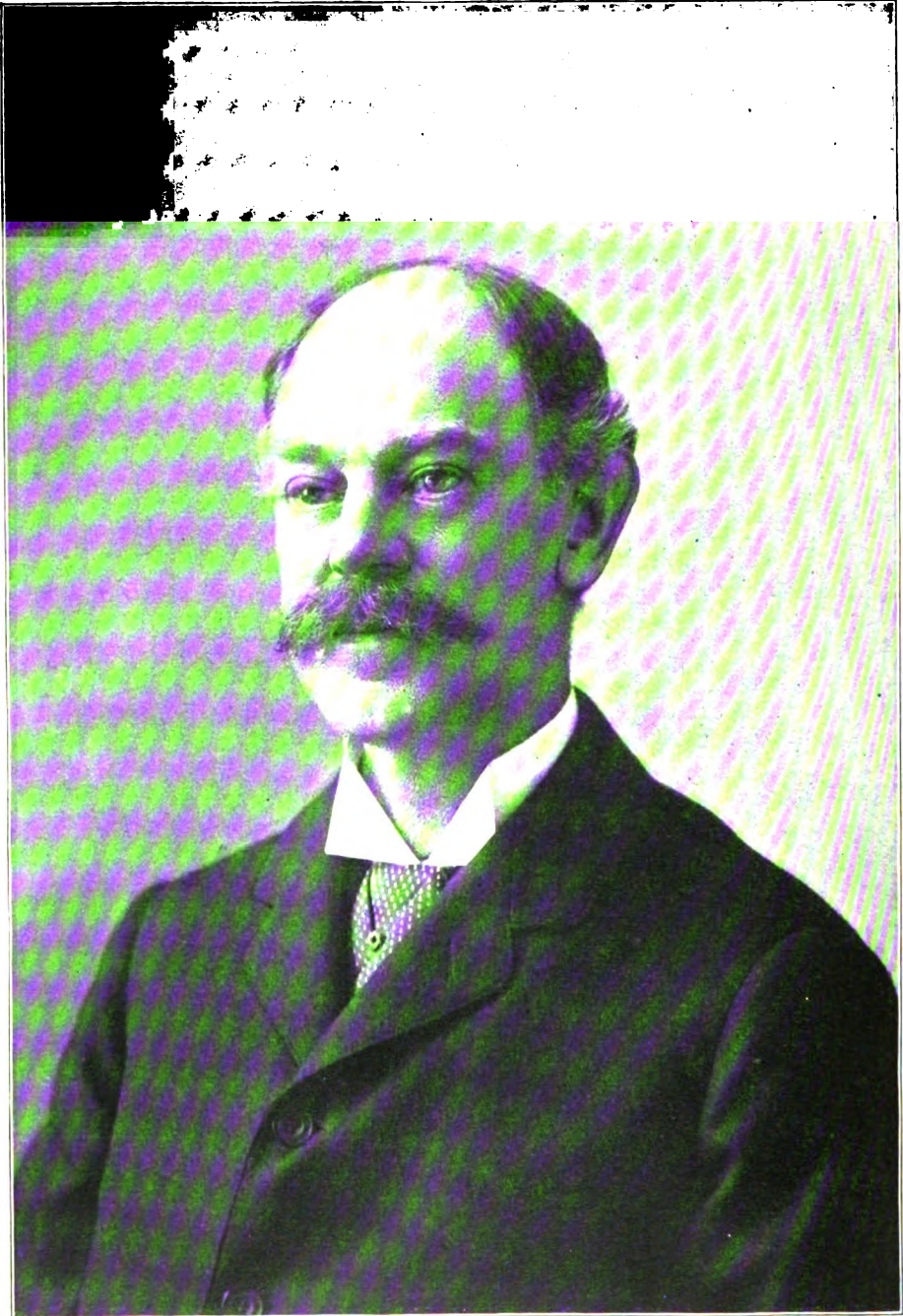
THE TAX LAW OF THE STATE OF NEW YORK.

By *H. Noyes Greene*. With a chapter on the Powers and Duties of Assessors, by *J. Newton Fiero*. Second edition. Albany, N. Y.: Matthew Bender. 1901. Law sheep: \$3.00 net. (xv+349 pp.)

THE LAW OF TAXABLE TRANSFERS, STATE OF NEW YORK. By *H. Noyes Greene*. Second edition. Revised and enlarged by *Andrew J. Nellis*. Albany, N. Y.: Matthew Bender. 1901. Buckram: \$2.00 net. (204 pp.)

These two volumes cover in a full and satisfactory way the matter of taxation under the laws of New York. The many important amendments to the general tax law which have been passed within the last three years, especially the Special Franchise Tax Law enacted in 1899, make apparent the need of new editions of both of these treatises, which in the volumes before us are brought "up to date."

A valuable part of the first of these volumes is the chapter on the Powers and Duties of Assessors, by Mr. Fiero, counsel for the State Board of Tax Commissioners. The volume on Taxable Transfers, while dealing primarily with the taxation of inheritancies under the state laws, contains also so much of the text of the Federal War Revenue Law as is applicable.



HORACE WILLIAMS FULLER
Editor of "The Green Bag," 1889-1900.

The Green Bag.

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THE FIRST EDITOR OF "THE GREEN BAG."

BY CHARLES C. SOULE.

WHEN Mr. Fuller gave up the editorial charge of this magazine, a year ago, he appeared to be in such excellent health—he had settled into such a serene routine of domestic life, unruffled by business cares or financial anxieties, with a circle of congenial comrades to keep him bright, and a fondness for outdoor exercise to keep him invigorated—that his friends expected him to outlive them all. It was with a painful shock, therefore, that the news reached them of his sudden death. While the grief of his passing away belongs especially to his intimate friends, it will be felt also by the readers of *THE GREEN BAG*, who shared for twelve years the literary feast which he set forth every month for their entertainment.

Horace Williams Fuller was born in 1844, at Augusta, Maine. His father was Benjamin Apthorp Gould Fuller, by profession a lawyer, who was for several years on the bench, and his grandfather was also a lawyer. His mother's maiden name was Harriet Selden Williams. After getting an education at the Augusta High School and Phillips Academy, Exeter, he came to Boston in 1861, and for several years devoted himself to business, beginning as a clerk in the office of Page, Richardson & Company. Later the legal instincts of the family prevailed (the present Chief Justice of the United States was his cousin), and after reading law in the office of Henry W. Paine, and taking a course of instruction at the Boston University Law School, he was admitted to the Suffolk bar in 1876. He never

appeared much in the courts, his business (so long as he continued to follow it) being mainly office practice and trusts. In 1877 he married Emily Gorham Carter, of Roxbury, and shortly afterwards made his home in Brookline—a suburb of Boston—where he has since resided.

Although Mr. Fuller never took a university course, he was such a constant student throughout his life that he attained a culture so broad and thorough that many readers of this article will be surprised to learn that he did not hold a college degree. He had an especial fondness for French literature, writing in his leisure hours, and contributing anonymously to magazines and the press, spirited translations from that language. His only acknowledged work in this line was a small volume entitled "Noted French Trials, Impostors and Adventurers," published in 1882.

When *THE GREEN BAG* was projected, its publishers, knowing Mr. Fuller's literary aptitudes, offered him the position of editor. This offer, fortunately for the undertaking, was accepted. He threw himself into his new duties with characteristic vigor, and for many years was not only editor, but also, to a great extent, business manager. Although he relinquished the latter part of his duties after the first few years he kept up the literary portion with unflagging devotion. To the excellence of his work the twelve bound volumes of *THE GREEN BAG*, from 1889 to 1901 inclusive, will stand as a permanent monument. To sustain the tone of

such a periodical, to open new veins of light legal literature when old ones were worked out; to enlist the aid of worthy contributors; to hold the interest of readers, month after month and year after year, was a task to weary most men; but he kept at it with so much zeal and ability that the later volumes seem as fresh and interesting as their predecessors.

His editorial work not only made him known to the legal profession, but its incidental correspondence brought him into direct touch with many leading lawyers throughout the United States. For several years he was an active member of the American Bar Association. At its annual gatherings he had the opportunity of meeting the men who already knew him by reputation, or through exchange of letters, and who welcomed him cordially as a friend at first sight.

As a citizen Mr. Fuller never held office nor took active share in party politics. He felt, however, a keen interest in public affairs, and was always ready to give encouragement and effective personal work to what may be called "conscience issues" like Civil Service Reform.

Among Mr. Fuller's accomplishments was a talent for amateur theatricals. His specialty was character parts, in which he excelled—both in humorous characters and in those requiring pathos and delicate shades of acting. For many years he devoted much time and energy to the duties of manager of

the Brookline Comedy Club, a position requiring peculiar tact and patience.

Although a member of several clubs, Mr. Fuller was essentially a home-lover. He was fond of the St. Botolph Club's Sunday afternoon musicales, he enjoyed golf at the Brookline Country Club, he played whist with neighbors, but his favorite evening resort was his own fireside, in the society of his wife, his sons and his friends. Here he was at his very best—a cordial host and a genial companion. The traits in his character, however, which many friends will remember most fondly, were his courtesy to women, his deference to age, and his thoughtful attentions to the sick and afflicted.

On the morning of October 25 Mr. Fuller was stricken with apoplexy, and after lingering unconscious for a day, he died October 26, 1901, and was laid at rest two days later at Walnut Hills, the beautiful cemetery of the town in which he had lived for twenty-three years. Though such a sudden death is always a shock to friends, it is merciful in its freedom from lingering pain, and it has one blessed feature,—through future years we can recall him to mind not as a suffering invalid, but as full of health, vigor and enjoyment of life.

The old subscribers to THE GREEN BAG, as they read this sketch, will pay tribute of loving remembrance to the ready pen, the busy brain, and the kindly heart of the editor who served them so long and so well.



WHIPPING AS A PUNISHMENT FOR CRIME: A REPLY.

BY DUANE MOWRY.

A WRITER in *THE GREEN BAG* for February, 1901, advocates the return, in this country, to the antiquated and barbarous method of whipping as a punishment for crime. He submits no statistics or data to show the restoration of the institution of whipping would lessen the commission of crime; that it makes a better citizen of the criminal who has been subjected to its use; that it begets or promotes a better public opinion; that it is an actual saving to the State in dollars and cents.

He believes "that human government exists by the permission of God and in some sort represents divine justice on earth; that for grown men the main object of criminal punishment should be to punish, and that reformation is a secondary matter, and generally a hopeless task." He thinks the criminal should be caught and made to smart for his offense; that to punish all cases of serious crime by a number of months or years in jail is to use but a rough yardstick; that "no sentence in a county jail, be it long or short, is greatly dreaded by the hardened criminal"; that whipping is dreaded by everyone, mainly because it hurts; that the degradation which accompanies the infliction of a whipping of a grown man is no more than is deserved.

The foregoing is a brief summary of the position taken in this somewhat remarkable article. Of course it is not difficult to entertain a "belief" upon any subject. To believe, for instance, that the governments of men are allowed to exist by God and represent divine justice, is no more difficult than is the reverse, and it is no more convincing. And there are not a few very reputable, worthy citizens who believe that if some of the justice which is meted out under the forms of human government can be construed to mean "divine justice," the sooner there is

less of it the better will it be for the social order.

While there is no argument in what the writer says about criminal punishment being designed, primarily, to punish, let us see if the writer is right in his conclusion as to the purpose of punishment. There is certainly some very respectable authority which takes a position diametrically opposed to this view.

A writer in "*The Popular Science Monthly*" for April, 1886, says that "punishment, in its proper acceptation, means the protection of society, as represented by the State, against the inroads of the individual upon its welfare, or, as it is called in criminal law phrase, 'the peace of the State.' It is only when the encroachments of the individual upon the rights of others amount to a public wrong that they are punishable criminally, and then it is only the wrong to society, and not the sin, that is cognizable by the tribunals."

William Douglas Morrison, who was for many years in charge of the prison at Wandsworth, England, and is an authority upon crimes and their punishment, says that "punishment ought to be regarded as at once an expiation and a discipline, or, in other words, an expiatory discipline."

"The criminal," he asserts, "is an offender against the fundamental order of society in somewhat the same way as a disobedient child is an offender against the center of authority in the home or the school. The punishment inflicted on the child may take the form of revenge, or it may take the form of retribution, or it may take the form of deterrence, but it undoubtedly takes its highest form when it combines expiation with discipline. Punishment of this nature still remains punitive, as it ought to do, but it is at the same time a kind of punishment from which something may be learned. It

does not merely consist in inflicting pain, although the presence of this element is essential to its efficacy; it consists rather in inflicting pain in such a way as will tend to discipline and reform the character. Such a conception of punishment excludes the barbarous element of vengeance; it is based upon the civilized ideas of justice and humanity, or rather upon the sentiment of justice alone, for justice is never truly just except when its tendency is also to humanize."

These views of punishment under the criminal code are widely different in scope and effect, from those entertained by the writer in *THE GREEN BAG*. *He* would have the criminal flogged because it accords with his idea of criminal punishment, and gives the culprit actual physical pain. And whether or not the ordeal made of the criminal a better citizen would, in his estimation, be a merely secondary and unimportant matter, and more than likely a hopeless task. The writer's position is not endorsed by penologists and those who have made a study of social science, the broader and more humane view taken being that which looks somewhat to the future of the criminal, as well as to the offense committed and its punishment and the effect of the punishment inflicted as an example and a warning.

One of the amendments to the Constitution of the United States provides that "cruel and unusual punishments shall not be inflicted." The writer in "*The Popular Science Monthly*," above quoted, defines "cruel punishments as including such penalties for crimes as are designed to inflict direct physical suffering, accompanied by circumstances of ignominy." He cites the whipping-post as an example of such punishment. For it will not be denied that the infliction of the lash does cause physical pain, and the writer in *THE GREEN BAG* admits that when a whipping is imposed on a man, "it is and always was a mark of degradation in the eyes of the community." Can any civilized and

progressive country afford to stand sponsor for such manifest iniquitous statutes?

The writer in *THE GREEN BAG* says the criminal is degraded by his brutal act and heart, and "is further degraded by the whipping to which he may be sentenced. So far as concerns his relations to his particular friends and associates, he ought to be, and this, however we may deplore his fall in the eyes of the world at large, is a strong argument for the infliction of this particular penalty. The social sting often goes deeper. A man hates to lose caste among those with whom he associates familiarly. The term 'jail-bird' shows how the community regards the man who has been once sentenced to imprisonment. But his mates often look upon him as none the worse for it. He has simply been unlucky. Let him be stripped and put under the lash, however, and he sinks in their estimation. It may, indeed, have another tendency from that fact. It may drive him from out of their company into that of honest men again."

Here is an admission of the infliction of a cruel punishment, the effect of which is far-reaching in the future career of the criminal. To argue, however, that it may induce the man who has been hopelessly degraded in the eyes of respectability and of his criminal associates, to seek associates in the future who will forgive and forget his crime and his disgrace, among the non-criminal class, is about as reasonable as to expect water to flow up-hill. Nothing could be farther from the domain of probability. The better nature of the individual is rarely reached in that unexpected way. The tendency of such unusual punishments is to make the criminal class worse and to augment its numbers, and to have, generally, a demoralizing and brutalizing effect on all classes. It does not deter crime. Even in Delaware this is not claimed. And who, by the way, was ever known to refer to Delaware's local government as pre-eminently clean and orderly? It is reported that there is a public sentiment

in that state in favor of the whipping-post, but there is no evidence extant that its use lessens crime or makes the administration of the criminal law more economical.

It is our contention that by using the whipping-post as a punishment for crime you have effectually banished the criminal from the community in which he lived. This is contrary to the policy of all penal statutes, except those inflicting capital punishment. It makes of him a wanderer and an outcast on a cold and cheerless world. If there ever was any goodness in the culprit's nature it is completely stamped out. The spirit of revenge is made uppermost in his nature. It visits disgrace on the family of the man. They are the innocent victims of irreparable injury. This fact alone is sufficient to condemn the law as unwise and cruel.

It has impressed the writer that the article in *THE GREEN BAG* proceeds on the theory that the criminal has forfeited all claim for consideration at the hands of the constituted authorities; that the strong arm of the law cannot be too severely visited upon his defenseless body. This is not the true position to take. James Anson Farrar, in his work on "Crimes and Punishments," insists that "a punishment to be just must contain only such degrees of intensity as suffice to deter men from crimes; that the final test of all punishment is its efficiency, not its humanity." Thus it will be seen that all students of social science agree that the punishment to be inflicted on the criminal is not of the first importance; that the criminal himself is to be dealt with as if he still had some rights; that the behests of the law are fulfilled when such discipline is inflicted as will serve as a warning, alike to the culprit and to the public. Someone has well said that "the end of all punishment is not by way of atonement or expiation of the crime committed, for that must be left to the just determination of a Supreme Being, but as a precaution against future offenses." If the penalty to be inflicted cannot be made to conserve the peace of the State we are not warranted in

imposing it. The State is not justified, therefore, in inflicting a greater punishment than is necessary to the adequate protection of society. Any punishment beyond that is "cruel," "unusual" and barbarous. Instead of attaining the end desired, it works directly to the opposite point. Above all other considerations penal statutes must be just. It was Horace Mann who said that punishment should always be regarded as an evil. And the evil of punishment should always be compared with the evil proposed to be removed by it. It is only in those cases where the evil removed preponderates over the evil caused, is punishment to be tolerated. The opposite course would purchase exemption from a less evil, by voluntarily incurring a greater one.

"Crime is inherent in our defective civilization, and you cannot hurry up the march of civilization in any such way as lashing men. Criminal law is not a panacea to soften the human heart. Civilization has reached a certain height or state of development, and sin and crime are concomitants of that state. While crime must be punished it cannot be wiped out. Human nature is so constituted that men revolt at the deliberate infliction of pain upon a fellow being, more so, indeed, than at any violence or brutality committed by the offender in the heat of passion. Any punishment that shocks the moral sense of a community, as all cruel punishments are calculated to do, falls short of its mark and fails signally to produce the general satisfaction always arising from the administration of wise punishments."

The foregoing statement puts the case so clearly and cogently that it would seem futile to add more. Whipping as a punishment for crime is, as we contend, cruel punishment within any fair interpretation of the constitutional prohibition. If this is so, that fact alone is ample to condemn its use. But there are other reasons. The demands of society, the best civilization, an enlightened and humane public opinion, the innocent members of the culprit's family, including,

particularly, his wife and children, these and many other reasons cry out in unmistakable language against the unwise, inhuman and barbarous practice.

We give slight weight to the question of economy. There is no data tending to show that it lessens the expense of the administration of the criminal statutes. Even if it did, which we question, it should have slight consideration as against a condition which guarantees the best and most orderly social state, let the cost be ever so great. That is what human governments are for, and the question of cost is a minor matter and of slight consequence.

We are assured that the restoration of whipping as a punishment for crime is an exceedingly remote possibility in this country. As Dr. Henderson truly says, "the danger of abuse has been thought to be so great that this method of punishment has not often been incorporated in penal law." It is confidently submitted that whipping would be the revival of the antiquated doctrine of "an eye for an eye, and a tooth for a tooth." It does not deter men from committing crime. It does not lessen the number of offenses committed. It does not make men respect the law.

A FLIRTATION UNDER THE BLUE LAWS.

BY SAMUEL SCOVILLE, JR.

IT is profitable in these flippant days of unconsidered kisses and general attention without intention, to hark back to the times of our Puritan forbears and note their views on flirtation and its accessories. The legal status of a kiss, unfortunately, is not yet clearly determined, but the trend of the modern decisions seems to be toward the view that osculation in moderation is certainly not *malum in se*. This would be indicated by the verdict in a recently reported case wherein the plaintiff brought suit for an alleged breach of promise, and showed by her testimony that the defendant had escorted her to a church sociable and on the homeward journey had not only once, but repeatedly, kissed said plaintiff with the utmost enthusiasm. This perilous course of action was not denied at the trial, yet the jury, after protracted deliberation, brought in as a special verdict that the defendant had treated the plaintiff with great courtesy and once with ice cream—by implication evidently including the acts complained of in the category of courtesies.

No such flippant verdict would have obtained in colonial days, with a jury composed of the men who, eschewing may-poles, mincepies and other devices of the devil, came to these shores to achieve the liberty of controlling their own and their neighbors' consciences. Their very names well indexed their characters, and it is impossible to imagine light-mindedness among such worthies as "Stand-fast-on-high Stringer," "Kill-sin Pimple" or "If-Christ-had-not-died-for-you-you-had-been-damned Barebones," pleasingly shortened, as shown by contemporaneous records, to "Damned" Barebones.

Contrary to popular opinion there is no reference to unauthorized osculation in Roger Ludlow's Code of 1650, commonly known as the "Connecticut Blue Laws." The case of *People v. Murline et al.*, decided on May Day, 1660, as appears from the New Haven judicial records, affords, however, an indication of the treatment accorded to unlicensed kissers and kissees in those uncompromising times.

On the above-mentioned date, Jacob M.

Murline and Sarah Tuttle were summoned before the Court by no less a personage than the Governor of the Colony of New Haven, who, to quote the language of the report, declared that the business for which they were warned to this court he had heard in private at his house, which he related to stand thus:

"It chanced that on the day on which John Potter was married, Sarah Tuttle went to Mistress Murline's house for some thredd and Mistress Murline bid her go to her daughter's in the other room. Whereupon her son, Jacob Tuttle, came in and tooke up or tooke away Sarah's gloves. She desired him to give her the said gloves, which he answered he would do so if she would give him a kysse, upon which they sat down together, his arm being about her waiste and her arme upon his shoulder or about his necke, and he kyssed her and she kyssed him or they kyssed one another for about the space of half an hour, which Marian Murline now in court affirmed to be so.

"Jacob was asked what he had to say to these things, to which he answered that he thought that Sarah had with intent let fall her gloves when he came into the room, and that he tooke them up and told her he would give her them, if so be that she would kysse him.

"But Sarah hereupon testified that she did not let her gloves fall with intent.

"Further, said Jacob, that he tooke her by the hand and they both set down upon a chest but whether he kyssed her or she kyssed him, he knows not for he never thought of it since until Mr. Raymond spoke to him at Man-

atos and told that he had not layde it to heart as he ought.

"But hereupon testified Sarah that she did not kysse him but upon being questioned would say not as to whether he had kyssed her or no.

"Mr. Tuttle testified that Jacob had endeavored to steal away his daughter's affections.

"But thereupon Sarah testified that he had not so stolen her said affections.

"The Governor told Sarah that her miscarriage is the greatest, that a virgin should be so bold in the presence of others to carry it as she had done, for though that part of the kyssing is denied yet much is proven.

"Sarah professed that she was sorry that she had carried it so sinfully and foolishly which she saw to be hateful. She hoped that God would help her to carry it better for time to come.

"The Governor allso told Jacob that his carriage hath been very evil and sinful and to make such a light matter of it as not to think of it doth greatly aggravate.

"Whereupon the Court declared that we have heard in the Publique Ministry that it is a thing to be lamented that young people should so misconduct themselves. As for Sarah, her miscarriages are very great that she should carry it in such an uncivil, immodest manner as hath been proven. And for Jacob, his carriage hath been very corrupt and sinful such as brings reproach upon his family and place.

"The sentence therefore concerning them is that they shall pay either of them as a fine 20 s. to the Colony."



THE INDIAN REMNANT IN NEW ENGLAND.

II.

BY GEORGE J. VARNEY.

THE two exclusively Indian towns in New England, Gay Head and Mashpee, took their embryotic form at an early date, growing up to civilization and incorporated communities by various gradations.

It was in 1641 that Thomas Mayhew, who had previously been a merchant in Southampton, England, obtained a grant of Marthas Vineyard from the King. In the following year he sent there his only son, Thomas, then twenty-one years old, who had been educated for the ministry. A few settlers accompanied him; and the senior Mayhew, proprietor and governor, soon followed. He represented to the Indians that he was governor of the English, but would not assume jurisdiction over them. He, however, advised the chiefs to establish a jury system for the trial of important cases. When he wanted land he always bought and paid for it, if the Indians would sell; for some refused this for several years after the coming of the white people.

Tawawquatuck was the chief sachem of the eastern end of the island, where the English arrived; and he was the first sachem to become a Christian. The first Indian convert was Hiacoomes, who embraced Christianity in 1643. He had been an obscure person, but proved an excellent missionary. Miohgsoo, the chief man of Nunpaug, in the limits of the present Edgartown, one night in 1646, sent a message to Hiacoomes, who lived five or six miles away, requesting a visit. The convert received the message at the break of day, and complied with it at once. On his arrival he found many Indians gathered at the dwelling of Miohgsoo, who received him cordially, explaining that he desired him to show his heart to them, and let them know how it stood towards his God, and what they ought to do.

Hiacoomes then made his talk to the company. When he had ended, his host asked, "How many gods do the English worship?" Hiacoomes answered: "One, and no more." Whereupon Miohgsoo reckoned up about thirty-seven principal gods which he had. "Now," he said, "shall I throw away all these thirty-seven principal gods for the sake of one only?"

"What do you yourself think?" replied the missionary. "For my part I have thrown away all these, and many more, some years ago; and yet I am preserved, as you see this day."

"You speak true," said Miohgsoo; "and therefore I will throw away all my gods, too, and serve that one God with you." In the sequel, he committed a son and a daughter to the care and instruction of the Rev. Thomas Mayhew, son of the governor.

Twenty-five years ago there were Indian hamlets in several of the Marthas Vineyard towns; but persons of aboriginal blood have now mostly removed to Gay Head, the Indian township which embraces the western end of the island.

In the side of this headland is a deep bowl-like hollow about twelve hundred feet in circumference and a hundred feet deep, being open to the sea on one side. In the soil at the bottom are found rocks, fragments of trees and huge bones. "Here," says the Indian legend, "resided the giant Manshope. Here he broiled whales on great fires made of dead cedars which he tore up by the roots. After separating Noman's Land from Gay Head, changing his wife into an ugly rock, which may now be seen on Saconet point, and performing other supernatural feats, he left the island."

There are a few persons of pure white blood living in the town; but of purely In-

dian blood there remains only one person, an aged woman. Negro blood is the principal intermixture. The town has produced persons of good abilities, and sometimes furnishes the representative to legislature for the group of towns in which Gay Head is classed.

After existing many years as a "District," the place was incorporated as a town on April 30, 1870; and a month later, the legislature granted an act of incorporation for the only other exclusively Indian town in New England, Mashpee. This lies near the western extremity of Cape Cod, extending from the middle latitude southward to the sea.

In the year 1660, Mr. Richard Bourne, then recently from England, purchased from the Wampanoag sachem, Quachatisset, and other Indians, the tract of land which constitutes the township of Mashpee, for the occupation and use of the so-called "South Sea Indians." He had become acquainted with the needs of the Indians dwelling on the south side of the Cape, and established them on his purchase as a permanent home. The deed was so drawn that no part nor parcel of the lands could be bought by or sold to any white person without the consent of all the Indians having right in the territory, not even by consent of the General Court. The place was incorporated as the Plantation of Mashpee, on June 14, 1763. Between this time and the date of its establishment as a

town (1870), inclusive of both, there were not less than twelve changes of its political condition either from the expiration of legislative acts or from new ones.

Mr. Bourne was both investor and evangelist; and in 1670 he was ordained pastor of a religious society of Indians in this town, which had been formed from his own converts. He died about the year 1685, leaving a good property to his family in various excellent land investments. An Indian named Simon Popmonet succeeded him in his pastoral office.

After about forty years of service the latter was succeeded by Rev. Joseph Bourne, a grandson of the pioneer. Shearjashab, son of the latter, secured the ratification by the Plymouth Colony court of the original deed of Mashpee,—having inherited his father's property in that place, where he pursued the business

of a trader. At his death, about 1719, he was succeeded by his son Ezra, who became president of the sessions and first justice of the Court of Common Pleas for the county. Several of the family in the next generation attained to eminent positions in several States.

The remnant of the Wampanoags, outside of these two Indian towns, has probably been absorbed by the Narragansetts. The affairs of the latter tribe have been mostly under the control of the government of Rhode Island, since it ceased to be a colony



MASHPEE INDIANS.

of Great Britain. The views of the parties of different interests have been much at variance for many years, causing a disturbed state of feeling in the tribe.

In January, 1879, the president of the Indian council, with certain other members of the Narragansett tribe, living on their reservation in the town of Charlestown, in the southwest part of the State, petitioned the House of Representatives for the appointment of a commission to investigate their affairs in respect to the encroachments of the whites upon the tribal lands; and whether it were better to continue their existence as a tribe, or to discontinue this and become citizens; and to consider the most equitable manner of disposing of the land belonging to said tribe, etc.; and that the commission report to the next January session of the general assembly of the State of Rhode Island and Providence Plantations.

The commission was appointed accordingly. Its first session was held in Charlestown on July 30, 1879, and was well attended by the Indians. The commission learned that there was not an Indian of pure blood in the tribe, those present showing every shade from white to black. As was well known, the Narragansetts had adopted single individuals and families of Pequots and other neighboring tribes, and even whole communities, as the Aquidnecks of the Wampanoag tribe, and the Niantics, and had even admitted white persons and negroes.

The Narragansett reservation, as bounded in 1709, was eight miles square (sixty-four square miles) less than one-half of which was, at the time of the first hearing by the commission, in possession of the tribe. Nearly every head of a family within the reservation lives upon individual property, inherited or held by deed, the latter paying three-quarters tax. This land and Fort Neck—the common land of the tribe—comprise the best of the specially reserved Indian lands. The common tribal land was said to consist of about fifteen hundred acres.

At the first hearing, in reply to a question

of the commission, the president of the council of the Narragansetts, an Indian, said:

“ . . . Now we have a reservation five rods wide, from Pawcatuck to the Indian ford on Pawcatuck river; and in order for you to get at the truth and to learn the truth, I will begin at 1827. That will give the citizens of Rhode Island fifty years from their independence for you to find if they have any land that goes any nearer [to the salt water] than five rods from high-water mark; and high-water mark was placed in Governor Fenner's time where the September gale was [i. e., where the tide reached at that time]; and I can carry you to walls that were built [to that line]; and every fisherman of South Kingston [which embraced “Fort Neck”] knows where that is on George Congdon's farm,—a cove that used to be called Congdon's cove, and everywhere where there was a wall built on the seaside, it left this five rods, which was for the privilege of pitching our tents, and fishing to procure a living. . .

“Well, it is generally questioned sometimes, by some people, to know how we came into possession of this land [the unenclosed shore land], whether or no the State gave it to us, or whether or no Congress gave it to us. That paper will show you how we got possession of this land.”

At this point the speaker passed to the chairman of the commission a document by which Nenegrate, chief sachem of the Narragansett country in 1708, resigned to the governor and company of Her Majesty's colony of Rhode Island, and their successors all his right and title in the vacant lands within the jurisdiction of said colony, with the privileges therein contained or appertaining, but making a reservation whose bounds the document describes.

The president of the council declared that the “vacant lands” referred to by Nenegrate were traced upon a map made by the English, “which map was accepted by the honored assembly sitting at Newport, the first Wednesday of May, 1708.” The document presented was signed by the said sachem on

March 28, 1709, and it also bore the other necessary signatures.

The tribe claims that this instrument furnishes the entire basis of the State's property in all lands which it holds now or ever held within the original limits of the Narragansett territory; that the reservations of this instrument included all the shore rights on sea waters, which was distinctly shown on the map, according to the president. He stated that this map could not now be found; and that, probably, it never came into the possession of the Indians.

The president of the council called the attention of the commission to the fact that the owners of land purchased of the Indians "used to build walls around the shore and into the surf, or onto the rocks, so that cattle couldn't go by;" but, he said that doing thus, they claimed something that wasn't theirs. . . . "High-water mark is government waters, and we lay right on government waters."

The general assembly also, he said, had asserted that the conventional distance between the fences and high-water mark was five rods. If the original bound was changed at Fort Neck, where the old walls were torn down, it was Governor Fenner who laid out the new lines, taking for his high-tide mark that of the extraordinary September gale. "And," continued the Indian president, "they have gone and put

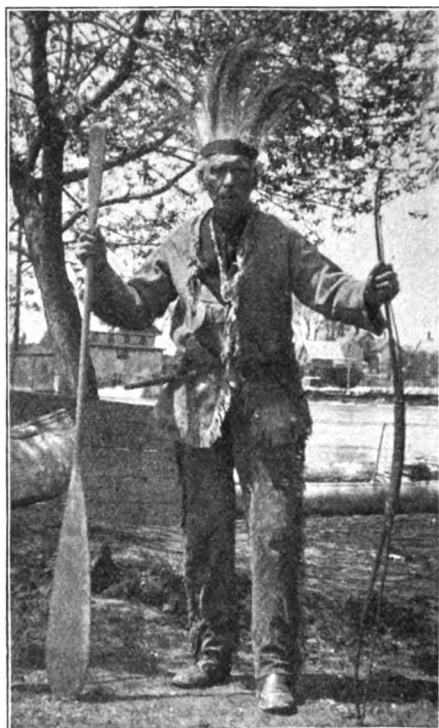
up a watering-place. We had just as lief have them there, but we want pay for our land."

The "watering-place" enterprises along the shore near Fort Neck, then just begun, were probably the main incentive of the movement, originating with the dominant race, for "conferring" citizenship on the Indians, which carried with it the surrender of the tribal lands. Several subordinate establishments have sprung up about the main one, now known for nearly twenty years as Narragansett Pier; so that old "Fort Neck" and many other sections of the west shore of the bay have become valuable property.

The extent of this claim of shore land is thus stated by the commission in its report: "The Indians claimed before your Board of Commissioners that the tribe owned not only the reservation in the town of Charlestown, but a strip of land five rods in width along the shores extending from Wes-

terly around Point Judith and up the bay to the mouth of the Blackstone river."

In regard to this claim, a report of the commission made a year after the statement on the matter by the president of the Indian council, says: "That the first English settlers upon the lands of the Narragansetts believed that the Indians were the absolute owners of the soil, there can be no question. Roger Williams, even before he left Massachusetts,



INDIAN CEREMONIAL DRESS.

is reported to have expressed himself to the authorities of that colony thus: 'Why lay such stress upon your patent from King James of England? Your patent is but a bit of parchment. James has no more right to give away or sell Massasoit's lands and cut and carve the country than Massasoit has to sell James's, or to send his Indians to colonize Warwickshire.'

"But the granting and accepting of the charter of Charles II settled this question; and Rhode Island acquired then the same rights to the Indian lands within its jurisdiction as the other colonies had to the lands within their jurisdiction.

"The Supreme Court of the United States says, by Chief Justice Marshall, in *Johnston vs. Macintosh* (8 Wheat. 603), 'the very grant of a charter is an assertion of the title of the crown, and its words convey the same idea, —the country granted is said to be Rhode Island, etc., and the charter contains an actual grant of the soil, as well as the powers of government.'

"From these and other authorities the commission has been led to consider it as authoritatively settled, that the ultimate title to the lands of the tribe was vested in the State subject to the possessory right of the Indians, and that the State could not convey these lands without the assent of the Indians, any more than the Indians could convey without the assent of the State."

To some persons it will no doubt seem that the position of the commission was a

tacit acceptance of the political doctrine of the "Divine right of kings"; while others will take note that Chief Justice Marshall was a full-fledged imperialist, in the early period of perfect wisdom in our republic.

The commission reported to the legislature that at the meeting with the Indian council, December 26, 1879, "an agreement on the part of said council was made that, in behalf of the tribe, they would quit claim to the State the interest of said tribe in their common or vacant lands, and all other tribal rights and claims for the sum of five thousand dollars."

Accordingly, the common lands of the specified tribal reservation were sold at public auction in the summer of 1882, realizing "schedule prices." The stipulated sum of five thousand dollars was duly paid to the tribe, being distributed to one hundred and eighty persons. "Indian Fort," one hundred and eight feet square, and the three Indian ponds were reserved from sale.

The matter of the "shore rights" of the Narragansett tribe has commanded the attention of the legislature; for by request of the State Senate, the Rhode Island Supreme Court, appellate division, rendered an opinion on the subject, February 24, 1898 [R. I. Reports, Vol. XX, p. 715].

The Mohegans in Connecticut and the Montauks on Long Island, in the State of New York, are reported to be taking similar action.

EARLY CRIMINAL TRIALS.

III.

THE ADVENTURES OF LORD MOHUN.

Lord Mohun attracted a large measure of public attention during his lifetime, but the story of his turbulent life would have been buried in the events of more than two centuries had not his name and career supplied a theme for the imagination of Thackeray.

Charles Mohun, fifth Baron Mohun, was born about 1675. When only a year old his father was mortally wounded while acting as second in a duel, and as a boy he seems to have been subject to no control whatever. In 1692 he quarreled over dice with Lord

Kennedy and was confined to his lodgings in consequence. With the assistance of his constant companion, the Earl of Warwick, he broke out and fought his first duel, in which both parties were disarmed. Two days later he participated in an affair which led to his trial for murder.

This affair was the murder of William Mountford, the actor, in Norfolk street, Strand, by Captain Hill. Mountford was the most admired actor of young lover's parts which the stage then possessed; and he was murdered mainly, it would seem, because of the fire which he threw into his scenes with the beautiful Mrs. Bracegirdle, of whom the turbulent captain had the impertinence to be enamored. This celebrated actress was then at the height of her powers, "the darling of the theatre," as Colley Cibber describes her; "for it will be no extravagant thing to say, scarce an audience saw her that were less than half of them lovers, without a suspected favorite among them; and though she might be said to have been the universal passion, and under the strongest temptation, her constancy in resisting them seemed but to increase the number of her admirers." According to the universal tradition of the age this discreet actress deviated from the path of discretion, if ever, only in favor of Richard Congreve, for whom at all events, to the day of his death, she preserved a close and affectionate friendship.

Captain Hill, it seems, had for some time paid his addresses to Mrs. Bracegirdle, but his proposals had been totally rejected. This enraged the captain, who declared that Mountford was the only man who stood in his way, and, with many execrations, he repeatedly expressed a resolution to be revenged upon the young actor. On the morning of the murder Lord Mohun and Captain Hill together hired a coach and directed the coachman to be in waiting for them in Drury Lane, near the playhouse, about nine o'clock that night. Mohun and Hill dined together that day at a tavern in Covent Garden, and discoursed much about

Mrs. Bracegirdle, both declaring their belief that Mountford was unduly intimate with her. The conversation was principally concerned, however, with a design which they had formed to seize Mrs. Bracegirdle, force her into a coach and carry her into the country. This design was to be executed that night, and they secured arms and soldiers for the purpose. Hill was heard to say, "If the villain resist I will stab him;" whereupon Mohun asserted that he would stand by his friend. In accordance with their plans they met that night at the playhouse. When they went behind the scenes they were informed that Mrs. Bracegirdle would not be there that night, as she was to sup at a Mr. Page's house in Drury Lane. They proceeded therefore to post themselves with their soldiers at the latter place. After waiting a considerable time without results, and suspecting that they had been misinformed, they drove to Mrs. Bracegirdle's lodgings. They soon returned, however, to their former station in Drury Lane, and were rewarded about ten o'clock by seeing Mrs. Bracegirdle come out, accompanied by her mother and Mr. Page. Mohun sat in the coach, with the door open and several cases of pistols by him. When Mrs. Bracegirdle and her companions reached the place where the coach stood, Hill and the soldiers seized Mrs. Bracegirdle and attempted to force her into the coach. A scuffle ensued in which the lady's mother and Mr. Page clung to her so effectively that the conspirators were unable to accomplish their purpose; a crowd began to collect in response to cries for help and they were compelled to desist. The soldiers were dismissed. Mohun and Hill would not be denied the liberty of escorting Mrs. Bracegirdle to her lodgings, and all five accordingly started hence followed by the crowd. After Mrs. Bracegirdle and her companions had entered the house Mohun and Hill remained in the street near by for nearly two hours, drinking wine and standing about with drawn swords. Mountford lived just below Mrs. Bracegirdle, and, it

seems, necessarily passed this point to reach his own house. Mrs. Mountford was informed that men were lying in wait for her husband and made an ineffectual effort to find him and put him on his guard. Meanwhile the watch appeared and demanded of Mohun why he had his sword drawn. My lord was pleased to answer that he was a peer of the realm, and bade them touch him if they durst. About midnight Mountford appeared, on his way home. When Mohun saluted him, he said, "My Lord Mohun, what does your lordship do here at this time of night?" Mohun remarked, without answering the question, that he supposed Mountford had been sent for, and added, "I suppose you have heard about the lady." Mountford answered, "I hope my wife has given your lordship no offense." "No," said Mohun, "it is Mrs. Bracegirdle I mean." To this Mountford replied, "Mrs. Bracegirdle is no concern of mine; but I hope your lordship does not countenance any ill action of Mr. Hill." Upon this Hill came up to them and remarked to Mohun that it was not a time to discourse of such matters; and forthwith he attacked Mountford and ran him clear through the body before Mountford could draw his sword. Immediately there was a cry of murder, and the watch appeared in time to arrest Mohun; but Hill escaped. When Mohun was taken his sword was not drawn. Upon being taken the first question Mohun asked was whether Hill had been apprehended; when answered in the negative he said he was glad of it, and that he did not care if he were hanged for his friend.

Lord Mohun was indicted for murder, and, in accordance with his privilege, was tried by his peers in the Court of the Lord High Steward. The prosecution was conducted by the attorney-general, John Somers. The trial of this youthful peer was evidently a great event. The King was present throughout the trial. Mrs. Bracegirdle was a witness. From the repeated proclamations for silence during the trial it

is plain that there was a large attendance of spectators. One interruption of a quarter of an hour was occasioned by a lady in the gallery falling into fits. The lords appeared to be much in doubt as to the law applicable to the case. They propounded numerous questions to the judges, which were answered by Lord Chief Justice Holt. In the end Lord Mohun was acquitted by a vote of 69 to 14.

This experience does not appear to have sobered the young lord. He was engaged in several duels within the next few years. For a time he served as a soldier in Flanders. In 1699 he was again tried for murder—this time with less apparent cause than before.

The facts of this second case, so far as they can be gathered from the conflicting testimony, were as follows: On Sunday night, October 25, 1698, Lord Mohun, Earl of Warwick, Captains Coote and French and Messrs. Docwra and Johnson were drinking together at the Greyhound Tavern in the Strand. Some dispute having arisen, they came down stairs to the bar, where the drawer of the tavern saw them with swords drawn and apparently divided into opposing groups of three each. There was some evidence going to show that Lord Mohun had grasped one of the swords with his hand and been wounded in an effort to separate the men. The gentlemen soon called for chairs, with the evident purpose of going out to settle their differences. The evidence clearly shows that Lord Mohun remonstrated with Captain Coote, who seems to have been the most belligerent of the party; he said there should be no further trouble, and insisted that Captain Coote should go home with him. But the others were insistent, and the chairman (who, with the drawer, were the two principal witnesses) set the men down in Leicester Square and departed. They had gone but a short distance when they heard the Earl of Warwick calling for a chair. When they returned they found two of the men supporting Captain Coote. The captain was mortally wounded and died almost immediately.

The whole party were indicted for murder. French, Docwra and Johnson were first tried and convicted of manslaughter. The evidence in their cases tended to show, it is said [no report is available], that Captain French had dealt the fatal blow.

The Earl of Warwick was next put on trial (13 State Trials, 939). His version of the affair was that the original quarrel was between Coote and French, and when the remainder of the party finally took sides he and Mohun were arrayed with Coote against the others; and the Earl protested that having fought on the side of the man who was killed and his three opponents having been convicted of killing him, he could not in justice be held. The difficulty was that these alleged facts rested upon the Earl's simple statement. Of course, as the law then stood, none of the participants—the only persons who knew the facts—were competent witnesses. The Earl did, however, offer Captain French as a witness, on the theory that having been tried and allowed his clergy he was thereafter competent. It seems, however, that the burning in the hand, the usual accompaniment of the allowance of clergy in the case of a common subject, had, in French's case, been waived. On the situation thus presented Chief Justice Treby, on behalf of the judges, held that French was not a competent witness. The evidence for the prosecution, however, showed many circumstances of suspicion against the Earl. Although he tried to make out that Coote had been his intimate friend the evidence showed that after the affair had terminated he went away, not with the dying Coote, but with French, whom he thereafter tried, moreover, to conceal. And after the encounter the Earl's sword was bloody up to the hilt. Ninety-three peers found Warwick guilty of manslaughter, whereupon he claimed his clergy and was discharged.

On the following day Lord Mohun was placed on trial before Lord High Steward Somers, who, as attorney-general, had prosecuted him on his former trial. The only

difference between his case and the others was that the evidence proved beyond question that he had opposed the engagement from the outset. That fact secured his acquittal. In thanking the court he spoke the only words of penitence that he was ever heard to utter:

"My lords, I do not know which way to express my thankfulness and acknowledgment of your lordships' great honor and justice to me; but I crave leave to assure your lordships that I will endeavor to make it the business of the future part of my life so to behave myself in my conversation in the world as to avoid all things that may bring me under any such circumstances as may expose me to the giving your lordships any trouble of this nature in the future."

It is this latter affair that Thackeray describes in the fourteenth chapter of "Henry Esmond." Thackeray had previously introduced Lord Mohun in his story under the name "Harry" Mohun. The name is changed to correspond with Esmond's, so that Lady Castlewood's unguarded exclamation of regard for "Harry" supplies a motive for Lord Castlewood's resolve to follow Mohun to London and there call him to account for a fancied wrong. Readers of this delightful story will remember how Lord Castlewood, Henry Esmond and Jack Westbury went together to the playhouse in Duke street in expectation of finding Mohun. They witnessed a performance of Wycherley's "Love in a Wood," with Mrs. Bracegirdle in the girl's part. Lord Mohun was present, in company with the Earl of Warwick and Captain Macartney. "My lord had a paper of oranges, which he ate and offered to the actresses, joking with them, and Mrs. Bracegirdle, when my Lord Mohun said something rude, turned on him and asked him what he did there, and whether he and his friends had come to stab anybody else, as they did poor Will Mountford." When the play ended the two parties joined company, and the six gentlemen proceeded to the Greyhound Tavern in Charing

Cross. There they had wine and cards, and presently Castlewood and Mohun became involved in an altercation over the snuffing of a candle. They resolved to fight. "A half dozen of chairs were now called, and the six gentlemen stepping into them the word was privately given to the chairmen to go to Leicester Field, where the gentlemen were set down opposite the 'Standard Tavern.' It was midnight, and the town was abed by this time, and only a few lights in the windows of the houses; but the light was bright enough for the unhappy purpose which the disputants came about; and so all six entered into that fated square, the chairmen standing without the railing and keeping the gate, lest any persons should disturb the meeting. All that happened there hath been matter of public notoriety, and is recorded, for warning to lawless men, in the annals of our country. After being engaged for not more than a couple of minutes . . . a cry from the chairmen without . . . announced that some catastrophe had happened, which caused Esmond to drop his sword and look round, at which moment his enemy wounded him in the right hand. But the young man did not heed this hurt much, and ran up to the place where he saw his dear master was down."

The duel and its fatal termination, continues Thackeray's account, caused the greatest excitement in the town. "The three gentlemen in Newgate were almost as crowded as the bishops in the Tower, or a highwayman before execution. . . . Nor was the real cause of the fatal quarrel known, so closely had my lord and the two other persons who knew it kept the secret, but every one imagined that the origin of the

meeting was a gambling dispute. Except fresh air, the prisoners had, upon payment, most things they could desire. Interest was made that they should not mix with the vulgar convicts, whose ribald choruses and loud laughter and curses could be heard from their own part of the prison, where they and the miserable debtors were confined pell-mell." Then follows an account of the trials. "Of the two lords engaged in that sad matter, the second, my lord the Earl of Warwick and Holland, who had been engaged with Colonel Westbury and wounded by him, was found not guilty by his peers, before whom he was tried (under the presidency of the lord steward, Lord Somers), and the principal, the Lord Mohun, being found guilty of the manslaughter (which, indeed, was forced upon him, and of which he repented most sincerely), pleaded his clergy, and so was discharged. . . . The lords being tried then before their peers at Westminster, according to their privilege, being brought from the Tower with state processions and barges, and accompanied by lieutenants and axe men, the commoners engaged in that melancholy affray took their trial at Newgate, as became them; and, being all found guilty, pleaded likewise their benefit of clergy."

Lord Mohun finally came to an untimely end, like his father, in a duel. The challenge in this instance came from his opponent, the Duke of Hamilton. It was actually a fight to the death. Lord Mohun, whose body was literally hacked to pieces, is said to have dealt the Duke a mortal wound with a shortened sword as the Duke bent over his prostrate form.



WILLS—QUAINT, CURIOUS AND OTHERWISE.

BY JOHN DE MORGAN.

THE true index to a man's character is contained in his last will and testament," wrote an able jurist of the last century, and there is a great deal of truth in the statement. The strange and erratic testaments presumably sane people leave behind them when compelled to part with the wealth they have been able to acquire during life, prove beyond all doubt that very few men are really known until they are dead.

Millionaire Rogers, of Paterson, N. J., who cared less for art than he did for anything on earth, left several millions of dollars to the Metropolitan Museum of Art in New York, though he may have tried to invalidate the bequest by an absurd repetition of a word, leaving a nephew seventy-five thousand *thousand* dollars, which was several times the amount of his wealth.

Some of the crudest and quaintest wills have stood the legal test, while others carefully drawn by men whose authority is unquestioned, break down, as in the case of the will of Samuel J. Tilden, one of the greatest lawyers of the nineteenth century.

It has frequently been held that the will must be in writing, and the question once arose in an English court whether an engraving on a sheet of copper could be called "writing." Some years ago there was produced in the English probate court a plank of wood on which were scratched the testamentary dispositions of a shipwrecked naval officer. The piece of board, with its crude carving, was held to be a will duly executed.

In the Surrogate's office, New York hangs a frame containing the fragments of a will which had been torn to pieces by the testator on his death-bed during a fit of delirium. The bits were secured, pieced together and were admitted to probate.

Heinrich Roth, a well-to-do tradesman,

committed suicide in Central Park, New York, and in his pocket was found a German story book, on the back of the frontispiece was a carefully written will, which, though not witnessed, was admitted to probate, and the book is preserved as carefully as any of the parchment testaments drawn by the shrewdest lawyers.

Sometimes wills are exceedingly short, that of Mrs. Potter, wife of the Rt. Rev. Henry Codman Potter, Bishop of New York, contained only fifty-one words. It is said to be the shortest will recorded in the New York Surrogate's office. In Rhode Island a shorter will was probated, for it only contained the words: "Mrs. —, I leave her all."

In one court it was held, after long legal argument, and much litigation, that the sentence, "Mrs. Sophie Loper is my heiress," constituted a legal will.

This brevity is very different to the prolixity of old-time introductions to wills. Shakespeare, for example, commences his will as follows:

"In the name of God, Amen. I, William Shakespere, of Stratford-upon-Avon, in the county of Warwick, gent., in perfect health and memory (God be praised!), do make and ordain this my last will and testament in manner and form following; that is to say:

"First, I commend my soul into the hands of God, my creator, hoping, and assuredly believing, through the only merits of Jesus Christ my Saviour, to be made partaker of life everlasting; and my body to the earth whereof it is made." Then follows a large number of bequests.

While Shakespeare treated the making of his will with becoming solemnity, William Hickington, who died in the year 1770,

looked upon the matter in a different way, for he wrote his will in rhyme, as follows:

This is my last will,
I insist on it still;
To sneer on and welcome,
And e'en laugh your fill.

I, William Hickington,
Poet of Pocklington,
Do give and bequeath,
As free as I breathe,
To thee, Mary Jarum,
The Queen of my Harum,
My cash and my cattle,
With every chattel,
To have and to hold,
Come heat or come cold,
Sans hindrance or strife,
Though thou art not my wife.
As witness my hand,
Just here as I stand,
The twelfth of July,
In the year Seventy.

Wm. Hickington.

This will was admitted to probate at the Deanery Court in the City of York, 1770.

Another poetic will was proved in an English court in the year 1737, and is worthy a place among quaint and eccentric wills. It reads as follows:

This fifth day of May,
Being airy and gay,
To trip not inclined,
But of vigorous mind,
And my body in health,
I'll dispose of my wealth;
And of all I'm to leave
On this side the grave,
To some one or other,
I think to my brother.

But because I presaw
That my brothers-in-law
I did not take care,
Would come in for a share,
Which I noways intended,
Till their manners were mended—
And of that there's no sign.

I do therefore enjoin,
And strictly command,
As witness my hand,
That nought I have got
Be brought to hotch-pot.

And I give and devise,
Much as in me lies,
To the son of my mother,
My own dear brother,
To have and to hold
All my silver and gold,
As th' affectionate pledges
Of his brother,

John Hedges.

An American, named Sanborn, living at Medford, Mass., in his will dated 1871, bequeathed his body to Harvard University, and "especially to the manipulation of Oliver Wendell Holmes and Louis Agassiz." He requested that his skin be made into two drumheads, to become the property of his life-long friend, Warren Simpson, leader of a drum corps, of Cohasset, on condition that on Bunker Hill at sunrise, June 17th, each year, he should beat on the said drum the tune of "Yankee Doodle." On one drumhead was to be inscribed Pope's "Universal Prayer," and on the other the "Declaration of Independence."

"The remainder of my body," he continues, "unless for anatomical purposes, to be composted for a fertilizer to contribute to the growth of an American elm, to be planted in some rural thoroughfare, that the weary wayfarer may rest, and innocent children play beneath its umbrageous branches rendered luxuriant by my remains."

The distinguished author and founder of the school of Utilitarianism, Jeremy Bentham, bequeathed his body to Dr. Southwood Smith for dissection, desiring that a lecture might be delivered over it to medical students and the public generally.

He had experimented with many embalming preparations, and on the day of his death declared himself satisfied with a

preparation submitted to him. His last words were, as he examined the mixture, "That will do," and in a few minutes he was dead. He had desired that his body, after dissection, should be embalmed, and dressed in his ordinary clothes, to appear as natural as possible, and seated in his old arm-chair, he wished to be placed at the banquet table of his friends and disciples when they met on any great occasions of philosophy and philanthropy.

When he died his wishes were carefully carried out by his favorite disciple, to whom he had bequeathed his body. Dressed in his usual clothes, wearing a gray broadbrimmed hat, and with his hazel walking cane, called Dapple, after a favorite old horse, the farmer-like figure of the benevolent philosopher sat in a large arm chair, with a smiling, fresh colored countenance, locked up in a mahogany case with a plate-glass front. This was his actual body preserved by some scientific process. An Italian artist made a wax mask, the real face being really underneath it. Some years ago the case containing Bentham's body was taken to University College, where it still remains.

Dr. Ellery, a distinguished member of the Society of Friends in London, who died in 1827, inserted these two clauses in his will:

"Item: I desire that immediately after my death my body shall be carried to the Anatomical Museum in Aldersgate street, and shall there be dissected by Drs. Lawrence, Tyrrell and Wardrop, in order that the cause of my malady may be understood.

"Item: I bequeath my heart to Mr. W——, anatomist; my lungs to Mr. ——, and my brain to Mr. F——, in order that they may preserve them from decomposition; and I declare that if these gentlemen shall fail faithfully to execute these my last wishes, I will come—if it be by any means possible—and torment them until they comply."

John Rudge, of Trysull, Staffordshire, England, by his will, dated April 17, 1725, bequeathed the sum of twenty shillings a

year, payable at five shillings quarterly, to a poor man, "to go about the parish church, during the sermon, to keep people awake, and to keep dogs out of the church." There was a quiet sarcasm in that bequest which must have caused the rector to wonder how it came about that it was necessary to keep people awake while he was preaching.

A peculiar will was recently filed in Montreal for probate. The late Mrs. T. P. Roe bequeathed to her husband during his lifetime the interest on twelve shares of Montreal Bank stock, the same on his death to be given to the Church of St. John the Evangelist. To her little dog Frolic she bequeathed the interest on four shares of Montreal Bank stock for use during its lifetime, and at its death to be sold or given in stock to the Church of St. John the Evangelist.

Mrs. Roe is not singular in her testamentary thoughtfulness of her domestic pets, for a few years ago a Massachusetts woman left a fund to endow a home for friendless cats, and an Ohio man left plans for a cat infirmary, where the homeless cats were to be well cared for, and even sporting grounds were to be provided, the said grounds to be well stocked with rats.

A Scotchman left to each of his daughters her weight in one-pound bank notes; by this provision one daughter being stouter, was entitled to \$30,000 more than her sister.

Personal prejudices, pique and passion sometimes find their way into wills, the testator often telling the "plain, unvarnished truth" in an offensive manner. In the will of a Mr. Parker probated in London, 1785, there was this clause: "I will and bequeath the sum of £50 to Elizabeth, whom, through my foolish fondness, I made my wife, without regard to family, fame or fortune; and who, in return, has not spared, most unjustly, to accuse me of every crime regarding human nature, save highway robbery."

A Mrs. Darley, also hailing from London, searched her husband's pockets and abstracted some money; when her husband

died it was found that he had not forgotten the incident, for there was added to his will a codicil revoking a clause in his wife's favor and bequeathing her only "one shilling for picking my pockets of sixty guineas."

Evan Lewis Morgan, of Gwyllgryth, in Wales, in the ninety-eighth year of his age, made a new will which was probated; it was brief and to the point. It read as follows: "I give to my old, faithful servant, Esther Jones, the whole that I am possessed of, either in personal property, land or otherwise. She is a tolerable good woman, but would be much better if she had not so clamorous a tongue. She has, however, one great virtue, which is a veil to all her foibles—strict honesty."

David Hume and John Home used to have frequent discussions as to the correct manner of spelling their respective names, each insisted that his was the original, and the matter was not settled during life. Home detested port wine, while Hume preferred it to any other, and when the debate on patronymics waxed warm, the one would switch off to the merits or demerits of port wine. When David Hume died, the following clause was found in his will: "To Mr. John Home of Kilduff, ten bottles of my old claret, at his choice, and one bottle of that other liquor called port. Also six dozen of port, provided he attests under his own hand, signed John *Hume*, that he has himself alone finished that bottle at two sittings. By this concession he will at once terminate the only two differences that ever arose between us concerning temporal affairs."

Sectional prejudice was very marked in the will of New York's famous citizen, Lewis Morris. In part it reads:

"In the name of God, Amen. I, Lewis Morris, of Morrisania, considering the many evil consequences of dying intestate, and that the disposition of an estate by will is one of the most important acts of a man's life, I have, therefore, thought proper to take advantage of that season of health and se-

renity of mind which by God's favor I now enjoy to make this, my last will and testament, which, to obviate all disputes and contention, I have endeavored to express myself in the plainest language. My body I desire to be laid in the family vault at Morrisania with as little pomp and show as my executors shall think proper to direct. The stock of negroes, cattle, horses, sheep, hogs and farming utensils I bequeath to my wife. It is my desire that my son, Gouverneur Morris, may have the best education that is to be had in England or America, but my express will and directions are that he be never sent for that purpose to the colony of Connecticut, lest he should imbibe in his youth that low craft and cunning so incident to the people of that country, which is so interwoven in their constitutions that all their art cannot disguise it from the world, tho' many of them under the sanctified garb of religion have endeavored to impose upon the world for honest men."

This will, so bitter against Yale University, and the colony of Connecticut especially, was dated Nov. 19, 1760, "in the thirty-fourth year of His Majesty's reign." Lewis Morris had, himself, been educated at Yale, and perhaps imbibed his prejudice from some personal trouble. His son Gouverneur was educated at King's College, now called Columbia, and had a brilliant career.

Just after the close of the Franco-German war, a Capuchin monk, well known in the Faubourg Saint-Jacques, Paris, where he fed nearly a hundred poor persons by alms collected by him in the Faubourg Saint-Germain, bequeathed his entire property, consisting of his breviary, frock, cord, a volume by M. Thiers, and a wallet, as follows: "I bequeath: First, to the Abbe Michaud, my breviary, because he does not know his own; secondly, to M. Jules Favre, my frock, to hide his shame; thirdly, to M. Gambetta, my cord, which will prove useful one day round his neck; fourthly, to M. Thiers, his own work, that he may read it over again; and

fifthly, to France, my wallet, because she may shortly have occasion for one to collect alms."

John Swain, who died in Southwark, in the year 1851, gave "to John Abbot, and Mary, his wife, 6d. each, to buy for each of them a halter, for fear the sheriffs should not be provided."

Edward Wortly Montague, son of the English Ambassador to Turkey, by Lady Mary Wortly Montague, the supposed "Sappho" of Pope, signed and executed a will which is more than singular. After some bequest "to my noble and worthy relation, the Earl of —," he adds, "I do not give his lordship any further part of my property because the best part of that he has contrived to take already. Item, to Sir Francis — I give one word of mine, because he has never had the good fortune to keep his own. Item, to Lord — I give nothing, because I know he'll bestow it on the poor. Item, to —, the author, for putting me in his travels, I give five shillings for his wit, undeterred by the charge of extravagance, since friends who have read his book consider five shillings too much. Item, to Sir Robert Walpole I leave my political opinions, never doubting he can well *turn* them into cash, who has always found such an excellent market in which to *change* his own. Item, my cast-off habit of swearing oaths I give to Sir Leopold D—, in consideration that no oaths have ever been able to find him yet."

The maker of this peculiar will was one of the most brilliant men of the day, though utterly worthless and depraved. His mother, the witty, talented Lady Mary Wortly Montague, disinherited him, cutting him off "with a shilling."

Henry Budd, whose will was probated in London, 1862, had a very great objection to mustaches. In his will were the following provisions: "In case my son Edward shall wear mustaches, then the devise hereinbefore

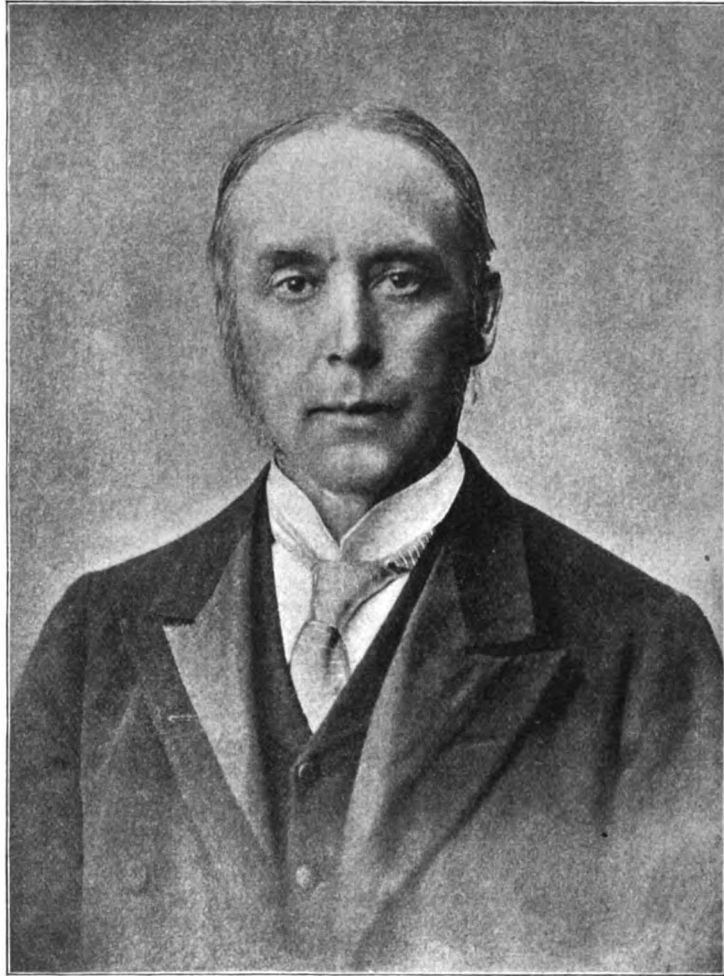
contained in favour of him, his appointees, heirs and assigns of my said estate, called Pepper Park, shall be void; and I devise the same estate to my son William, his appointees, heirs and assigns. And in case my said son William shall wear mustaches, then the devise hereinbefore contained in favour of him, his appointees, heirs, assigns of my said estate called Twickenham Park, shall be void; and I devise the said estate to my son Edward, his appointees, heirs and assigns."

Division of property by means of wills is of very ancient origin, perhaps the first of which we have any written account is that contained in Genesis *xlvi*, 22, where it is stated that Jacob gave Joseph a portion above his brethren. Solon is said to have introduced wills into Greece B. C. 594, and testamentary bequests were first regulated at Rome by the laws of the Twelve Tables, B. C. 450.

In ancient Rome wills were sealed by seals applied after the deeds had been pierced and the linen envelope passed three times through the holes—a method, says an early writer, established in the time of Nero against forgers, and adopted in Germany and Gaul, where it remained in vogue till the Middle Ages. Outside the will were written the names of those who had affixed their seals. Upon the first page, or left-hand tablet, were written the names of the principal heirs; and upon the second, or right-hand tablet, the names of the legatees.

To guard against accidents, Anglo-Saxon wills were written on three copies, carefully compared and afterwards read over in the presence of various witnesses, and were then consigned to three separate persons for safe custody, one being placed in the great oaken chest in the parish church.

From the Norman conquest to the time of Edward III, wills were written in Latin, but after that time the "common language" became the language of the testament.



LORD BOWEN.

A CENTURY OF ENGLISH JUDICATURE.

X.

BY VAN VECHTEN VEEDER.

WHEN Brett (better known by his subsequent title, Lord Esher) was made one of the first judges of the Court of Appeal he had already served an apprenticeship of eight years as a judge of the Court of Common Pleas. Being further promoted to the post of Master of the Rolls in 1883, he served until 1897, thus completing a continuous service of thirty years. Unfortunately for his reputation he clung to office so long after age had impaired his usefulness that he was often spoken of by his contemporaries with reproach. But no one who has examined with any care the total result of his long service will be apt to overlook its great value. That he was a learned lawyer, particularly in the domain of commercial law, cannot be gainsaid; shortly after his accession to the bench we find the learned Willes adopting and complimenting the opinion of his young associate. *Gray v. Carr*, 6 Q. B. 554. Still it was rather, like Bramwell, as an invigorating general influence for good that his services were of most value. He resembled Bramwell, too, in an ingrained aptitude for logic; but he seldom became a slave to his logic. He was, however, apt to reach beyond established authorities and the particular facts of individual cases for broad, general principles and logical symmetry. For instance, in the case of *Heaven v. Pender*, 11 Q. B. D. 503, where the majority of the court held a ship owner liable for damages sustained by the employee of a ship painter, who was injured on a defective scaffold furnished by the ship owner, in accordance with the well known doctrine of invitation, the Master of the Rolls set for himself the task of solving the large problem, "What is the proper definition of the relation between two persons other than the relation established by contract or fraud, which imposes on one of

them a duty toward the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property?" His highly interesting argument is in substance as follows:

"When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of a collision between them. This relation is established between them whether they know and think of the danger or not, because anyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be danger. According to the universally recognized rules of right and wrong everyone ought to think so much with regard to the safety of others who may be jeopardized by his conduct; and if, under such circumstances, he does not think, and in consequence neglects, or fails to use ordinary care and skill, and injury ensue, the law holds him liable. In the case of a common carrier the law implies the duty; with regard to the condition in which the owner or occupier of premises leaves his shop or warehouse, other phraseology has been used; it is said that his constructive invitation to customers raises the relation between them which imposes on the inviter the duty of using reasonable care to so keep the premises that the person invited may not be endangered. This is in a sense an accurate phrase. Yet you do not really invite; you merely intimate that if it pleases a customer to come in you are ready to sell. It is also said that you impose on yourself a duty not to lay a trap for the customer. This, again, is not a strictly accurate statement of

the duty, for to lay a trap involves in ordinary language an intention, yet it is clear that the duty extends to a danger resulting from negligence irrespective of intention. Though each of these circumstances covers the circumstances to which it is

propositions. That, in the present consideration, is the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognized cases suggest, and which is therefore to be deduced from them,



LORD ESHER.

particularly applied, it does not cover the other set of circumstances from which an exactly similar liability is inferred. It follows that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premises there must be a more remote and larger premise which embraces both the major

is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger."

It must be confessed that he sometimes went to the other extreme in his desire to do full justice in particular cases. "The law of England," he once said, "is not a science. It is the practical application of the rule of right and wrong to the particular case before the court, and the canon of law is that that rule should be adopted and applied to the case which people of honor, candor and fairness in the position of the two parties would apply in respect of the matter in hand." In the pursuit of this laudable end he was apt to overlook the necessity for fixed principles. He was independent to a fault, and frequently differed from his colleagues. When a precedent stood in his way he did not hesitate to pass it by. "There is no such thing in law," he said, "as a rule which says that the court shall determine that to be true which the court believes and knows to be untrue."¹ All his learning and experience had been in common law, and like most of his colleagues in Westminster Hall he was not above an occasional sneer at equity. But in the practical administration of justice as a judge of appeal he was, perhaps, next to Bowen, the common law judge who displayed least bigotry in favor of common law technicalities as opposed to equity.

Esher was destitute of any graces of literary style. His opinions are sometimes loose and discursive in the extreme. Yet he often presents a point with admirable brevity and force; as, for instance, in *Munster v Lamb*, where a lawyer has been sued for words used in the conduct of a case in court:

"It has been contended that as a person defamed has, *prima facie*, a cause of action, the person defaming must produce either some statute or some previous decision directly in point which will justify his conduct. I cannot agree with that argument. The common law does not consist of particular cases decided upon particular facts: it consists of a number of principles, which are recognized as having existed

¹ He sometimes had the gratification of having his minority views adopted on appeal, as in the *Vagliano* case, *Turner v. Mersey Docks Company*, and *Niboyet v. Niboyet*.

during the whole time and course of the common law. The judges cannot make new law by new decisions; they do not assume power of that kind; they only endeavor to declare what the common law is and has been from the time when it first existed. But inasmuch as new circumstances and new complications of fact, and even new facts are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be laying down a new law, whereas they are merely applying old principles to a new state of facts."

But, however little his style may be admired, his opinions in substance are invariably interesting, suggestive and strong.¹

Under the service of Lord Esher as Master of the Rolls his principal associates were Lindley (1881-99) and Fry (1883-92) in equity, and Bowen (1882-94) and A. L. Smith (1892-1900) in common law.

After a laborious career at the chancery

¹ The following cases will give an accurate idea of his great labors: *Le Lievre v. Gould* (1893), 1 Q. B. 491; *Johnstone v. Milling*, 16 Q. B. D. 460; *The Bernina*, 12 P. D., 58; *Mitchell v. Darley Main Colliery*, 14 Q. B. D. 125; *Bowen v. Hall*, 6 do. 333; *Randall v. Newson*, 2 do. 102; *Mogul Steamship Co. v. McGregor*, 23 do. 598; *Johnson v. Royleton*, 7 do. 438; *Harrison v. Duke of Rutland* (1893), 1 Q. B. 142; *Niboyet v. Niboyet*, 4 P. D. 1; *Currie v. Misa*, 10 Ex. 153; *R. v. Judge of the City of London Court*, 66 L. T. 135; *The Gas Float Whitton*, 65 L. J., P. 17; *Dawkins v. Autrobus*, 17 Ch. D. 615; *Angus v. Dalton*, 6 App. Cas. 779; *Drew v. Nunn*, 4 Q. B. D. 661; *R. v. Keyn*, 2 Ex. D. 63; *R. v. Bunn*, 12 Cox Cr. Cas. 338; *Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Thomas v. Quartermaine*, 18 do. 685; *Finlay v. Chirney*, 20 do. 494; *Merivale v. Carson*, 20 do. 275; *Henty v. Capital & Counties Bank*, 7 Q. B. D. 174; *Mackonochie v. Penzance*, 4 do. 697; *Abrath v. North Eastern Ry.*, 11 do. 440; *Sewell v. Burdick*, 13 do. 159; *Rankin v. Potter*, 6 E. & I. App. 83; *Hollins v. Fowler*, 7 do. 762; *The Parlement Belge*, 5 P. D. 197; *Bridges v. No. London Ry.*, 7 H. L. Cas. 213; *Bank of England v. Vagliano*, 61 L. T. 420; *Medawar v. Grand Hotel Co.*, 64 do. 851; *R. v. Barnado*, 64 do. 73; *Castillian v. Preston*, 49 do. 29; *Ballard v. Tomlinson*, 52 do. 952; *The Pondita*, 51 do. 849; *Macdougall v. Knight*, 55 do. 274; *The Moorcock*, 60 do. 654; *Searles v. Scarlett*, 66 do. 837; *Campania de Mocabique v. British So. Africa Co.*, 66 do. 773; *South Hettor Coal Co. v. News Asso.*, 63 do. 293; *Meux v. Great Eastern Ry.*, 64 do. 657; *Wakelin v. London & South Western Ry.*, 65 do. 224; *Bridges v. North London Ry.*, 7 H. L. Cas. 213; *Seton v. Lafone*, 57 do. 547; *Walter v. Everard*, 65 do. 443; *Salmon v. Warner*, 65 do. 132; *Cleaver v. Mutual Life Asso.*, 66 do. 220; *Royal Aquarium v. Parkinson*, 66 do. 513; *Turton v. Turton*, 61 do. 571.

bar Lindley spent six years as a judge in the Court of Common Pleas, and thus came to the Court of Appeal thoroughly equipped. Had other judges been equally well trained Lord Selborne's original scheme for the consolidation of law and equity might have been realized. As it happened Lord Lindley found his sphere of usefulness in the chancery division of the Court of Appeal, where for twenty years his very accurate and methodical mind set a high standard of efficiency for his associates. His great eminence is the result of conscientious labor and an apparent belief that a lawyer's education is never finished. As a specialist he completely mastered the law relating to companies and the law of partnership. Lord Lindley is a self-made man; but he must have been born with legal instincts, for he takes rank with associates whose academical distinctions lend a glitter to their legal eminence. His opinions are logical, comprehensive and convincing, and the only criticism that the most captious can make is that when any of his brethren dissent he is apt to wander off in all the by-paths of the subject in his evident desire to fortify his own conclusion.¹

Fry was one of the greatest technical masters of equity in recent times and contributed materially to the high standard of the court.²

Few laymen have found the law reports

¹ *R. v. Keyn*, 2 Ex. D. 63; *The Bernina*, 12 P. D. 58; *Angus v. Clifford*, 6 App. Cas. 779; *Scaramanga v. Stamp*, 4 C. P. D. 316; *Hollins v. Merney*, 13 Q. B. D. 305; *Tod Heatley v. Benham*, 40 Ch. D. 97; *Dashwood v. Magniac* (1891), 3 Ch. 306; *Allcard v. Skinner*, 36 Ch. D., 145; *Maxim-Nordenfelt case* (1893), 1 Ch. 631; *Carroll v. Carbolic Smoke Ball Co.* (1893), 1 Q. B. 265; *Dalton v. Angus*, 6 App. Cas. 740; *Smith v. Chadwick*, 20 Ch. D. 67; *Stuart v. Bell*, 64 L. T. 633; *Reddaway v. Hemp Spinning Co.*, 67 do. 301; *Whitwood Chemical Co. v. Hardman*, 64 do. 716; *Re Piercy*, 78 do. 277; *Re Perry Almshouses*, 79 do. 366; *Lyons v. Wilkins*, 79 do. 709; *Pemberton v. Hughes*, 80 do. 592; *Low v. Bonvière*, 65 do. 533; *McClatchie v. Hasham*, 65 do. 691; *Ballard v. Tomlinson*, 52 do. 942; *White v. White*, 62 L. J., Ch. 342; *Lemmon v. Webb*, 63 do. 570; *Hudson v. Ashby*, 65 do. 515; *Powell v. Birne Vinegar Co.*, 65 do. 563; *Macduff v. Macduff*, 65 do. 700; *Hardacker v. District Council*, 65 L. J., Q. B. 363; *Speight v. Gaunt*, 22 Ch. D. 727.

² *Cochrane v. Moore* 25 Q. B. D. 57; *Davies v. Davies*, 36 Ch. D., 359; *Northern Counties Fire Ins. v. Whipp*,

entertaining reading. Lord Bowen is probably the only judge in the present generation whose work has commanded such an audience. The reason is not far to seek. Besides grasp of principle, breadth of view and cogent reasoning, the style is so lucid, the illustrative matter so aptly chosen, the analogies so dextrously handled, the whole fabric of the exposition so admirably articulated, that he may be said to have combined, to an extent unsurpassed in English law, legal learning and literary form. He had a refreshing conception of intellectual reserve, a fine sense of proportion and wholesome mental habits of discrimination; and he expounded the historical evolution of legal principles in a style so pure, accurate and distinguished that it appeals to all persons of cultivated taste.

The law, to Lord Bowen, was not a mere collection of rules. "There is no magic at all in formalities," he said. He recognized, to use his own language, the duty of endeavoring to apply legal doctrines so as to meet "the broadening wants or requirements of a growing country, and the gradual illumination of the public conscience." In the course of a bold application of an established principle he said: "It is not a valid objection to a legal doctrine that it will not be always easy to know whether the doctrine is to be applied in a particular case. The law has to face such embarrassments. . . . The instance to which the legal principle is now for the first time adopted by this court may be new, but the principle is old and sound; and the English law is expansive, and will apply old principles, if need requires it, to new contingencies. Just as, in America, the law of watercourses and of waste has modified itself to suit the circumstances of enormous rivers and wide tracts of uncultivated forests, so the English law accommodates itself to 26 do. 482; *Miles v. New Zealand Co.* 32 do. 266; *Nitro-Phosphate Co. v. London Decks Co.*, 9 do. 503; *Fritz v. Hobson*, 14 do. 42; *Smith v. Chadwick*, 20 Ch. D. 67; *Dalton v. Angus*, 6 App. Cas. 740; *Roussillon v. Roussillon*, 14 Ch. D. 358; *Salmon v. Warner*, 65 L. T. 132; *Walter v. Everard*, 65 do. 445; *Wallis v. Smith*, 47 do. 389; *Campania de Mocambique v. British So. Africa Co.*, 66 do. 773; *R. v. Jackson*, 64 do. 679.

new forms of labor and new necessities of [arbor] culture." *Dashwood v. Magniac* (1891), 3 Ch. 306. Therefore, in applying, in a leading modern case, the ancient rule as to contracts in restraint of trade, he said with great force:

takings which supply war material to the executives of the world, we appear to pass to a different atmosphere from that of *Mitchell v. Reynolds*. To apply to such transactions at the present time the rule that was invented centuries ago in order to discourage the



LORD JUSTICE LINDLEY.

“A covenant in restraint, made by such a person as the defendant with a company he really assists in creating to take over his trade, differs widely from the covenant made in the days of Queen Elizabeth by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of *Mitchell v. Reynolds*, 1 P. Wms. 181, sprang, to the central trade of the few great under-

oppression of English traders and to prevent monopolies in this country, seems to be the bringing into play of an old-fashioned instrument. In regard, indeed, of all industry, a great change has taken place in England. Railways and steamships, postal communication, telegraphs and advertisements have centralized business and altered the entire aspect of local restraints on trade. The rules, however, still exist, and it is desirable that

they should be understood to remain in force. Great care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions." *Maxim-Nordenfelt Co. v. Nordenfelt* (1893), 1 Ch. 631.

Lord Bowen vitalized and enforced his exposition of legal principles by reference to history. "The only reasonable and the only satisfactory way of dealing with English law," he once said, "is to bring to bear upon it the historical method. Mere legal terminology may seem a dead thing. Mix history with it and it clothes itself with life." In his brilliant application of this method he avoided many of the errors which have resulted from the attempt to give a rational or scientific basis to doctrines which owe their origin to historical accidents. A brief quotation from his opinion in a *nisi prius* action for illegal distraint, in which it was claimed that the landlord had broken an outer door, will illustrate his use of the historical method:

"The doctrine of the inviolability of the outer doors of a house and its precinct has long been established by English law. The principle is one which carries us back in imagination to wilder times, when the outer door of a house, or the outer gates and enclosures of land, were an essential protection, not merely against fraud, but violence. The proposition that a man's house is his castle, which was crystallized into a maxim by the judgment in *Semayne's case*, and by Lord Coke, dates back to days far earlier still, when it was recognized as a limitation imposed by law on all process except that which was pursued at the King's suit and in his name. A landlord's right to distraint for arrears of rent is itself only a survival of one among a multitude of distraints which, both in England and other countries, belonged to a primitive period when legal procedure still retained some of the germs of a semi-barbarous custom of reprisals, of which instances abound in the early English books, and in the Irish *Senchus Mor*. Later, all creditors and all aggrieved persons who respected the

King's peace, the sheriff in a civil suit and the landlord in pursuit of his private remedy for rent and services, were both of them held at bay by a bolted door or barred gate. To break open either was to deprive the owner of protection against the outer world for his family, his goods and furniture and his cattle." *American Must Corp. v. Hendry*, 62 L. J., Q. B. 389.

Lord Bowen's subtle intellect could not have made him the great judge that he was had it not been balanced by good sense. He was continually using the terms common law and common sense as equivalents; he likened the common law to an "arsenal of sound common sense principles." A multitude of illustrations might be given. One will suffice. In speaking of the standard to be used in weighing the evidence as to whether a certain hospital was an "annoyance" to neighboring inhabitants, he said:

"'Annoyance' is a wider term than nuisance, and if you find a thing which really troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house,—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment or discomfort. You must take sensible people; you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case. Doctors may be able to say, and, for anything I know, to say with certainty, that there is no sort of danger from this hospital to the surrounding neighborhood. But the fact that some doctors think there is, makes it evident at all events that it is not a very unreasonable thing for persons of ordinary apprehension to be troubled in their minds about it. And if it is not an unreasonable thing for any ordinary person who lives in the neighborhood to be troubled in his mind by the apprehension of such risk, it seems to me that there is danger of annoyance, though there may not

be a nuisance." *Tod-Heatly v. Benham*, 40 Ch. D. 611.

For Lord Bowen's substantial contributions to English law the following cases may be cited:

Maxim-Nordenfelt Gun & Ammunition Co. v. Nordenfelt (1893), 1 Ch. 631, which settled the law as to contracts in restraint of trade; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, on the limits of trade selfishness by way of combination to exclude rivals; *Thomas v. Quartermaine*, 18 Q. B. D. 685, on the duty of owners of premises, and the doctrine *volenti non fit injuria*; *Le Lievre v. Gould* (1893), 1 Q. B. 491, on the limits of the law of negligence; *Ratcliffe v. Evans* (1892), 2 Q. B. 524, on the evidence admissible to sustain an action for defamation; *Finlay v. Chirney*, 20 Q. B. D. 494, and *Phillips v. Homfray*, 24 Ch. D. 453, on the maxim *actio personalis moritur cum persona*; *Dalton v. Angus*, 6 App. Cas. 779, on the right to subjacent support; *Carlill v. Carbolic Smoke Ball Co.* (1893), 1 Q. B. 256, on the essential requisites to the formation of a contract; *Cochrane v. Moore*, 25 Q. B. D. 57, on the vexed question of the passing of property by voluntary gift; *Smith v. Land & House Property Corporation*, 28 Ch. D. 7, on actionable misrepresentation; *Re Hodgson*, 31 Ch. D. 177, on the rights in equity of creditors of joint debtors; *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674, on malicious prosecution as a cause of action; *Brunsdon v. Humphrey*, 14 Q. B. D. 141, and *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. D. 125, on the doctrine of *res judicata*; *Jacobs v. Crédit Lyonnaise*, 12 Q. B. D. 598, on the *lex loci contractus* and *vis major*; *Johnstone v. Milling*, 16 Q. B. D. 460, on the limits of repudiation as a breach of contract; *Merivale v. Carson*, 20 Q. B. D. 275, on the distinction between fair public comment and privileged communications in the law for libel; *Newbigging v. Adam*, 34 Ch. D. 582, on relief in equity in cases of fraud and misrepresentation; *Angus v. Clifford* (1891), 2 Ch. 449, on actionable misrepre-

sentation; *Allcard v. Skinner*, 36 Ch. D. 145, on undue influence; *Speight v. Gaunt*, 22 Ch. D. 727, on the duties of trustees; *Hammond v. Bussey*, 20 Q. B. D. 93, applying the doctrine of *Hadley v. Baxendale*, 9 Ex. 341; *Castellian v. Preston*, 11 Q. B. D. 397, on the recovery under fire insurance policies; *Steinman v. Angier Line* (1891), 1 Q. B. 619, on recovery under a bill of lading for loss by theft; *Svensden v. Wallace*, 13 Q. B. D. 69, on the scope of general average contribution; *Abrath v. Northeastern Ry. Co.*, 11 Q. B. D. 440, on the nature of the burden of proof; *Hutton v. West Cork Ry. Co.*, 23 Ch. D. 654, on the corporate power to remunerate directors for past services; *Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 684, on the limits of the corporate capacity to contract; *Re Portuguese Consolidated Copper Mines*, 45 Ch. D. 16, on the doctrine of ratification; *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714, on the liability for fraudulent acts of an agent.

The *Maxim-Nordenfelt* case and the *Mogul Steamship* case are probably his greatest efforts, illustrating as they do all his peculiar powers. But whatever the form of the argument may be—whether pure development of principle without the citation of a single authority (*Allcard v. Skinner*), or elaborate analysis and review of a mass of conflicting cases (*Phillips v. Homfray*, *Mitchell v. Darley Main Colliery Co.*); a perfect example of systematic logic (*Ratcliffe v. Evans*, *Quartz Hill Gold Mining Co. v. Eyre*), or a series of detailed answers to specific points urged in argument (*Carlill v. Carbolic Smoke Ball Co.*); statutory construction (*Hewlett v. Allen*, *Thomas v. Quartermaine*), or argument on the facts (*Medawar v. Grand Hotel Co.*, *Abrath v. Northeastern Ry. Co.*)—we invariably find the same characteristic precision, sense of proportion, force and completeness of logic. Whatever the form may be, the result was well described by him in the course of his opinion in *Re Portuguese*, etc., *Mines*, 45 Ch. D. 60: "As soon as one applies one's mind to dissect

the ingenious argument, the light breaks through and makes the case perfectly plain."

His subtlety in legal analysis may be seen to good advantage in *Le Lievre v. Gould*, *Angus v. Clifford* and the *Carbolic Smoke Ball* case. What could be clearer, to give a single quotation, than his statement in *Badeley v. Consolidated Bank*, 38 Ch. D. 262, of the manner in which the lower court had gone wrong on an issue of partnership: "The question is whether there is a joint business or whether the parties are carrying on business as principals and agents for each other. Now where has Mr. Justice Stirling gone wrong? He has gone wrong because he has not followed that test. What he has done is this. He has taken one of the circumstances which in many cases affords an ample guide to truth; he has taken that circumstance as if, taken alone, it shifted the *onus* of proof—as if it raised a presumption of partnership—and then he has looked about over the rest of the contract to see if he could find anything which rebutted that presumption. Now that cannot be a right way of dealing with the case. You have a group of facts—A, B, C, D, E and F—and you want to know the right conclusion to draw from them. The right way is to weigh the facts separately and together, and to draw your conclusion. It is not to take A, and say that if A stood alone it would shift the *onus* of proof, and then to look over B, C, D, E and F and see if the remainder of the proof is sufficient to rebut the presumption supposed to be raised."

Besides the *Maxim-Nordenfelt* case see *Finlay v. Chirney*, *Dashwood v. Magniac*, *Steinman v. Angier Line* and *Brunsdon v. Humphrey*, for applications of the historical method. *Allcard v. Skinner* is one of the finest specimens of his style at its best. *Borthwick v. Evening Post*, *Hutton v. West Cork Ry. Co.*, and the *Carbolic Smoke Ball* case are characteristic specimens of his colloquial style. It is difficult to stop when one begins to quote from Lord Bowen's work. I shall conclude with an example of simple exposition. In the case of *Smith v.*

Land & House Property Corporation, 28 Ch. D. 14, the vendee under a contract for the sale of certain property was resisting an action for specific performance on the ground of misrepresentation, the vendor having stated that the property was let to "a most desirable tenant," when in fact the tenant had been in arrears on his last quarter's rent, and soon afterward went into liquidation:

"It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to another is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the property is let to a most desirable tenant; other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant; what does that mean? I agree that it is not a guaranty that the tenant will go on paying his rent, but it is to my mind a guaranty of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlord and the tenant which can be considered to make the tenant

an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think it was

not. . . . In my opinion a tenant who had paid the last quarter's rent by driblets under pressure must be regarded as an undesirable tenant."

THE DEVIL IN LAW.

BY R. VASHON ROGERS.

WE wish to speak of the position assumed by the law towards a crime which was regarded for centuries not only as possible but as specially noxious. As the writer of the article on "Witchcraft," in the "Encyclopædia Britannica," says: "It is a long interval from 'The Twelve Tables' to the 'Petition of Right,' but the lawyers of the latter age accepted the existence of witchcraft with a faith almost as unquestioning as those of the former, and comparatively few were they, whether lawyers or laymen, who dared to raise their voices against the prevailing superstition."

Witchcraft may be taken to include any claim of a power to produce effects by other than natural causes. In Christian times "a witch" has meant any person who is confederate with the devil, and works with him, or by him, or through him.

The Twelve Tables forbade the conjuring away of a neighbor's crops. According to other Roman laws those who worked by magical or diabolical arts were liable to be burned alive, those that consulted them to crucifixion. To possess magical books was a crime; to give a love potion was punishable by labor in the mines or by fine. Under Constantine sorcery was punished by death, by burning or by banishment; an accusation of witchcraft rendered anyone liable to torture.

Under the early Christians witchcraft was deemed heresy. In the fourteenth century a bull was published against witchcraft, and in the fifteenth a vigorous crusade against

it was begun by Innocent VIII. The "Malleus Maleficarum" is the great text book of procedure on this subject; it was published in 1489. The author, Sprenger, divides witches into three classes: (1) Those who can injure and not cure; (2) those who can cure and not injure; (3) those who can do both, and these are the worst. According to this authority they kill and eat children, and devote the unbaptized to the devil. They cause abortion, and make man and woman barren; by twirling a moistened broom or casting flints behind them, or boiling hogs' bristles, they raise tempests and hail-storms, bring plagues of locusts and caterpillars, and make animals mad. They predict the future, bring about love or hate, slay men with lightning, or even with a glance; turn men into beasts, or transform themselves into cats and wild animals; cause or cure sickness, and regulate the weather. They banquet upon children and cattle and then restore them to life. Taking the ashes of a toad fed on a consecrated wafer, the powdered bones of a man who had been hung, certain herbs, and mixing them together with the blood of an unbaptized infant, they make an ointment, and spreading it on hands and on a stick or stool placed between the knees, quickly they are transported to their place of meeting, the Brocken, Benvenuto, Berwick on Tweed, or the other side of Jordan. Sometimes they rode thereto on horse, or goat, or dog. At their Sabbat there was high feasting and wild revelry; homage was paid to the devil, visibly present in the form of a pig or goat

or dog. They presented their bodies and souls to him, kissed him under the tail, spat upon a cross and tramped on it. The devil preached to them of evil, and sometimes parodied the holy mass. Lascivious dances followed, and the rites ended with indiscriminate intercourse, obliging demons serving as *incubi* or *succubæ*, as required.

At first the Church tried to prove that these nocturnal meetings were fiction, and denounced as heretical belief in them. But the evidence of reality soon became too strong; numbers of accused confessed that they had taken part in these orgies; besides, in 1450, three most reliable men, an inquisitor, a mayor and a notary, actually beheld such an assemblage. These peeping Toms paid dearly for their curiosity. The presiding demon spied them and set his followers upon them, who so beat them that they all three died in a fortnight.

Witchcraft was considered more natural to women than to men, on account of the inherent wickedness of the female heart.

That well-known American divine, Cotton Mather, seems to have known exactly how the devil spread diseases and plagues throughout the world. He says: "'Tis no uneasy thing for the Devil to impregnate the air about us, with such malignant salts, as meeting with the salt of our Microcosm, shall immediately cast us into that fermentation and putrefaction, which will utterly dissolve all the vital ties within us; ev'n as an Aquafortis, made with a conjunction of nitre and vitriol, corrodes what it seizes upon. And when the Devil has raised these arsenical fumes, which become venomous quivers full of terrible arrows, how easily can he shoot the deleterious miasms into those juices or bowels of men's bodies, which will soon enflame them with a mortal fire. Hence comes such plagues."

As old Burton says, "You have now heard what the devil can do of himself, and you have heard what he can perform by his instruments, who are many times worse (if it be possible) than he himself, and to satisfy

their revenge and lust cause more mischief; as Erastus thinks much harm would never have been done had he not been provoked by witches to it. He had not appeared in Samuel's shape, if the witch of Endor had left him alone, or represented those serpents in Pharaoh's presence had not the magicians urged him into it."

What rendered the power of a witch particularly dreadful was the deplorable fact that the Church had no remedy for the ills she so recklessly wrought. 'Tis true, the sign of the cross, holy water, blessed oil, palms, candles, wax and salt, and the strict performance of religious rites were in some sense safeguards and preventives. But when once the spell was cast the victim could find no relief on earth or in heaven, only from under the earth—from the devil—through other-witches. The Church condemned this curative sorcery; still a profitable trade in it sprang up, and many witches confined themselves to this branch of the profession, although they were as liable as their adversaries to punishment for having dealings with the devil, for it was a fact that they could only relieve a sufferer by transferring his disease to someone else, or by doing some act equally evil. However, many in the latter part of the sixteenth century believed that a fragment of earth from a grave, if blessed at mass, and placed on the threshold of the church door would prevent the egress of any witch that might be within; a splinter of oak from a gallows, when sprinkled with holy water and hung up in a church porch had the same effect.

Fortunately the illimitable powers of the witch were limited in one direction. So soon as the hand of justice was laid upon her her hellish power vanished; some thought that it was necessary so soon as she was arrested to put her in a basket and thus carry her to prison, for if her foot touched the earth she would slay her captors with lightning and escape. Experience proved that public functionaries who had to suppress witchcraft were not subject to the influence of

witches or demons. Although the devil deserted the witch so soon as an official took her, he still, often, gave her the gift of taciturnity, which kept her from confessing even when under the most terrible torture. One way of getting over this taciturnity was by giving the prisoner (on an empty stomach after invoking the Trinity) three drinks of holy water, in which blessed wax had been melted.

If we believe many of those who, in the olden times, studied the question we must hold that the devils were the children of Adam by his first wife, Lilis. Spirits and devils are everywhere, not so much as a hair-breadth is empty of them in heaven above, in the earth beneath or in the waters above or under the earth. They have the most excellent skill in all the arts and sciences; and as Cicogna maintains, the most illiterate devil is more knowing than any man. Mather came upon one who understood English, Latin, Greek and Hebrew, but he was deficient in his knowledge of the Indian languages.

Both the secular and the spiritual courts had jurisdiction over witchcraft. It would seem that in Europe in the fourteenth and fifteenth centuries the secular tribunals sometimes tried to do justice; but when the Inquisition took up the matter all the resources of fraud and force, of guile and torment, were exhausted to secure conviction; the inquisitor was instructed never to declare the accused innocent, the most favorable verdict possible was "not proven."

From a very early period torture was recognized as indispensable in all trials for sorcery and magic. Witchcraft was considered so peculiarly difficult of proof that torture became an unailing resource to the puzzled tribunal, although every legal safeguard was refused to the wretched criminal, and the widest latitude of evidence was allowed against him. Generally endurance of torture might be regarded as a proof of innocence, but in these cases it was only an additional sign of guilt; it showed that Satan

was endeavoring to save his servant, and the duty to defeat him was plain; the power of Satan was checked to a certain extent if the whole body had been shaven before the rack was applied. Torture could not be repeated, but it could be continued indefinitely. Confession was not requisite, still it was greatly desired, and to obtain it torture was used, or else it was obtained by fraud or promises.

An infallible sign was the inability of a witch to weep under torture or before her judges. She was to be adjured by the living tears shed by Christ to weep, and if she did weep it was held to be a device of Satan and was not to be reckoned in her favor.

The cold-water ordeal was, in the thirteenth century, abandoned as a judicial practice in ordinary cases, but it was still maintained as a special mode of trying those accused of witchcraft and sorcery. For a time it fell into desuetude, but it was revived in the second half of the sixteenth century. The accused were stripped naked, hands and feet were bound together, right to left and left to right, and they were then thrown into the water. If guilty they would float, because witches from their intercourse with Satan partake of his nature; he resides within them—he is an imponderable spirit of air, and therefore they become lighter than water, as he is lighter. Some supposed that the body was actually borne up by demons. There was any amount of evidence of learned and respectable men to show that witches were very light—very large and fat women were found to weigh only thirteen or fifteen pounds. In 1728, in Hungary, six men and seven women were burnt alive for witchcraft, their guilt had been proved beyond a doubt, first by the cold-water ordeal and then by the balance. One of these wretches—a large, fat woman—weighed only one and a half drachms, her husband five drachms, and the rest varied from a pennyweight to three drachms and under.

James VI, of Scotland, eulogized this ordeal as an infallible guide in such cases; his argument was the old one that the pure

element would not receive those who had renounced the privileges of baptism; and his authority no doubt gave encouragement to innumerable judicial murders. However, fortunately for the morals of the people of Scotland, they decently wrapped the naked woman in a sheet before tying her thumbs and toes together.

The red-hot iron ordeal (*judicium ferri*) was also at an early date used where accusations of witchcraft were made. However, in 1487, the Inquisitor Sprenger doubted the wisdom of using this test, and thought that the willingness of the accused to undergo this ordeal was a sign of guilt as showing that she knew that Satan would carry her through it unscathed.

Practically the sole defence of the unfortunate accused lay in her showing that the witnesses were disabled by enmity; but then the enmity had to be of the most violent character, for some hostility must always be involved, as witches are odious to everyone. The names of the witnesses, however, were generally suppressed, or given so as to mislead; or the accused was first induced to say she did not know them, or that they were her friends, so as to discount her subsequent objections to their evidence.

If counsel was asked the Court appointed him, but all he could do was to advise as to confession or disabling the witnesses; if he attempted any of his ordinary tricks of trade he was in danger of excommunication as a fautor of heresy, and his risk was greater than his client's. Seldom was an appeal allowed to be made, never except for unjust proceedings, such as refusing counsel and improper torture. When convicted by a secular court the witch was invariably burned, and the Inquisition after the middle of the fifteenth century came to adopt the same practice. There was no hope, even though she repented, confessed and sought for pardon. Poor Joan of Arc had found this years before.

The earliest detailed account of a witchcraft epidemic was written in 1337. Witches, of

course, had existed from the days of Moses; but the dread of them was not great, nor did they increase rapidly until the fifteenth century. Then the wretchedness of the peasantry, reckless as to the present and hopeless as to the future, led thousands to wish that they could, by transferring their allegiance to Satan, find some momentary relief from the sordid miseries of life. The tales of the sensual delights of the Sabbath, where exquisite meats and drinks were furnished in abundance, had an irresistible allurements for men on the verge of starvation. Sprenger says the attraction of intercourse with *incubi* and *succubae* was a principal cause of luring souls to ruin. The devastating wars and bands of cruel pillagers reduced whole populations to despair, and fancying themselves abandoned by God they turned to Satan for help. The seduction of young girls recruited the army of witches; scorned by society they sought to avenge themselves on it. Many excitable minds fancied they had really obtained admission to these foul mysteries. The weak and the poor found protection in the reputation of being in league with the Evil One, and many won gain by opposing and curing the ill deeds of others. The Church, in its alarm, stimulated this new heresy in its endeavor to repress it. Every inquisitor whom it commissioned to suppress witchcraft was an active missionary, who scattered the baneful seeds ever more widely. "Hideous are the details of the persecution of witches in the fifteenth century, but they were but the prelude to the blind and senseless orgies of destruction which disgraced the next century and a half. Christendom seemed to have grown delirious, and Satan might well smile at the tribute to his power seen in the endless smoke of the holocausts which bore witness to his triumph over the Almighty. Protestant and Catholic rivalled each other in the madness of the hour. Witches were burned, no longer in ones and twos, but in scores and hundreds. Paramo boasts that in a century and a half from 1404, the Holy Office had burned at least 30,000

of them, 'who if they had been left unpunished would easily have brought the whole world to destruction.'" (Lea's "History of the Inquisition," vol. III, p. 549.)

The horrors enacted in France, and still more in Germany, during the seventeenth century surpass description. England and Scotland did not lag behind in this fearful slaughter of innocents. Nor was the persecution confined to the Old World. The Puritans who fled from oppression persecuted in their turn, and witches were as badly treated in New England as heretics. The number of victims is an unknown quantity. A writer in *Popular Science Monthly* for 1893, says: "Not to mention torture, torture beyond the wildest flights of modern fancy, the number of persons who perished, chiefly by fire, in Christian Europe and America has been calculated at from one to nine millions. Probably four millions is a correct estimate."

The last trial in England was in 1712. The woman was convicted but not executed; this according to "Encyclopædia Britannica." But Campbell, in his "Puritan in Holland, England and America," says two victims were executed in 1711, two others in 1716, and five in 1722; in Scotland the last execution was in 1722; in 1780 a witch was burned in Spain; in 1793 in Germany; in 1807 one was tortured and burnt in France; in 1850 a man and his wife tortured and killed a woman suspected of witchcraft in France, and it was with some difficulty that they were punished at all, on account of the lingering beliefs of the people. In 1874 several were burnt in Mexico; in 1879 and 1880 some witches were burnt in Russia, and even since that date some judicial trials for this crime were held in Austria and Prussia. In 1875 one Hayward was charged at the Warwick Assizes with the murder of a woman of eighty. He said he had been overlooked by her, and he quoted Lev. xx, 27, as his justification. (See also the cases mentioned in THE GREEN BAG, vol. III, p. 94.)

Belief in witchcraft still lived in the last decade of the nineteenth century. In 1893, in the village of Lupert, in Austria, lived an old woman thought to be a witch. When she died the town authorities ordered a public merriment; while this was in progress the burgomaster's cow died. Evidently the witch, though dead, yet wrought. Matters had to be sifted; a black stallion was procured, and they tried to drive it over the old woman's grave, but the horse kicked and plunged and would not cross the spot where the body of the sorceress lay. Then the villagers pulled the corpse from the grave and burnt it, singing, praying and sprinkling themselves and the ground with holy water. At night they celebrated their triumph over the powers of darkness by drinking and dancing.

In England, the same year, at the Yeovil Petty Sessions, a man was bound over to keep the peace for calling a woman a witch, saying she had cast a spell over his sister, and threatening to knock her brains out; and the next year a Lancashire youth was bound over for having pricked his sweetheart with a pin; a wise woman had told him that his sickness was caused by a charm the girl had and that shedding her blood would break the spell.

In 1893, in Ohio, a witch doctor told a farmer, who was digging for water, that the poisonous breath and evil eye of a neighbor kept water out of the well, and that nothing but the death of the witch would remedy the matter. As all these persons belonged to the same Methodist church a church trial was the result. In Pennsylvania, about the same time, a poor epileptic child was barbarously tortured in order that the devils which afflicted her might be cast out.

In 1895, Michael Cleary, living near Clonmel, Ireland, was convicted of manslaughter, for having, with the advice of the family doctor and in the presence of her father and a number of other relatives, stript his wife, poured paraffin over her and burnt her to death in the kitchen fire. None of the

others attempted to stop the proceedings; in fact they assisted with a red-hot poker in making her take medicine before she was carried to the fire. The poor husband believed that she had been keeping company with fairies and was not really his wife, but a fairy. The judge showed his views by giving the husband twenty years and his accomplices from five to six months each.

In England, before the conquest, witchcraft, conjuration, sorcery and enchantment were severely punished, sometimes by exile, sometimes by death. These offences were first made felonies by a statute of 33, Henry VIII. This act was soon repealed and changed; but another was passed in the first year of James I, which continued in force until 1736. Let me quote my Lord Coke: In the third part of his "Institutes" he thus describes these sinners:

"A conjurer is he that by the holy & powerful names of Almighty God invokes & conjures the devil to consult with him or to do some act.

"A witch is a person that has conference with the devil, to consult with him or to do some act.

"An inchanter, *incantator*, is he or she *qui carminibus, aut cantiuunculis daemonem adjuvat*. They were of ancient times called *carmina*, because in those days their charms were in verse.

"*Carminibus Circe socios mutavit Ulvssis.*

"By charms in rhyme (O cruel fates,)

Circe transform'd Ulvsses mates.

"A sorcerer, *sortilegus, quia utitur sortibus in cantationibus demonis*. Thou shalt not suffer a witch to live. *Non est augurium in Jacob, aut divinatio in Israel.* . . .

It appeareth by our ancient books that these horrible and devilish offenders, which left the everlasting God & sacrificed to the devil, & thereby committed idolatry, in seeking advice & aid of him, were punished by death." And Coke then quotes the *Mirror*, and Britton and Fleta to prove this.

James I was an expert and specialist in

the matter of witchcraft. His act was to this effect: If any person or persons shall use, practice or exercise any invocation or conjuration of any evil or wicked spirit, or shall consult, covenant with, entertain, employ, feed or reward any evil or wicked spirit, to or for any intent or purpose; or take up any dead man, woman or child out of his or her or their grave, or any other place where the dead body resteth, or the skin, bone or any part of a dead person, to be employed or used in any manner of witchcraft, sorcery, charm or enchantment; or shall use, exercise or practice any witchcraft, enchantment, charm or sorcery whereby any person shall be killed, destroyed, wasted, consumed, pined or lamed in his or her body or any part thereof; that then every such offender or offenders, their aiders, abettors and counselors, being of any of said offences duly and lawfully convicted and attained, shall suffer pains of death as a felon or felons, and shall lose the privilege of clergy and sanctuary. If any person or persons take upon him or them by witchcraft, charm or sorcery, to tell or declare in what place any treasure of gold or silver should or might be found, or had in the earth or other secret places; or where goods or other things, lost or stolen, should be found or become; or to the intent to provoke any person to unlawful love, or whereby any cattle or goods of any person shall be destroyed; or to hurt or destroy any person in his or her body, although the same be not effected or done; being therefor lawfully convicted shall for the said offence suffer imprisonment for a whole year without bail or mainprize, and once in every quarter of said year he shall stand in the pillory upon some market day or fair day, and there confess his or her error and offence. For the second offence it was death.

The act in force in Scotland at this time was one passed in 1563 under Mary Stuart, and it enacted that any person using any manner of witchcrafts, sorcery or necromancy or abusing anyone by pretending to have such

craft or knowledge, or any persons seeking any help, response or consultation with any such users or abusers of witchcrafts, sorcery or necromancy should suffer death.

These statutes of James and Mary were both repealed in 1736 by an act which put a stop to all prosecutions and proceedings against anyone for witchcraft, sorcery, enchantment or conjuration, but enacted that anyone pretending to use witchcraft, tell fortunes or discover stolen goods by skill in any occult or crafty science is to be imprisoned for a year, to stand in the pillory and to find sureties for good behavior. This law still lives as well in Ontario as in England, although the pillory part of the punishment is abolished.

In March, 1664-65, before Sir Matthew Hale, at the Assizes at Bury St. Edmunds, took place the trial of two poor widows, Rose Callander and Annie Duny, for bewitching several young children. The evidence showed that the parents had quarreled with the accused, and that these latter had uttered threats. The children fell into strange and violent fits; one was taken with such a lameness in both her legs that she was forced to go on crutches; they cried out the names of the accused in their fits. The fits were various, and sometimes the lameness was on one side, sometimes on the other; at times they were deaf, blind and dumb; they would vomit up crooked pins, and one a two-penny nail with a very large head; they could not pronounce the sacred words, "Lord," "Jesus," but if they attempted to do so would fall into fits and cry out: "Annie Duny says I must not use that name." When they came to the words "Satan or "Devil" they would cry, "This bites, but it makes me speak right well."

The children (according to one witness) saw invisible mice running about the house; one was caught by a child and thrown into the fire, where it screeched out like a rat; another one was thrown into the fire and it flashed like gunpowder. None but the child saw the mouse, but all saw the flash. Some-

thing like a bee flew into the face of one of the children, and the child threw up a nail and said that the bee had brought it and forced it into her mouth.

Annie Duny nursed one of the children one day, the child had fits for weeks; then by Dr. Jacob's advice the mother hung up the child's blanket all day in the chimney corner, and at night a great toad fell out of it. A boy caught the quadruped and held it over the fire with tongs. It exploded with a noise like a pistol and a flash like gunpowder, and was no more seen; but the next day Annie Duny was found to be grievously scorched by fire and blamed the mother of the child for it. After this the sufferer got well. The witch's marks were found upon Rose Callander. The children were taken with fits, blindness and lameness in court, and were at times speechless. The court made the experiment of bringing them in contact with the witches, but this was unsatisfactory. Sometimes the same result happening whether they were touched by an innocent person or by the accused. The evidence was almost entirely the evidence of the parents and friends of the children, for the latter were either too young or unable to give testimony. Testimony was then given as to reputation—that these women were accounted witches by others, and that some of their kindred had been condemned as such. A farmer told how he was bringing hay home in three carts, one touched the prisoner's house and angered her; the cart was overturned thrice and stuck fast in the gate; the noses of those who were unloading it bled; but there was no trouble with the other carts. Another man's cart broke down near Callander's house; she was angered thereat and said his horses would suffer, and in a short time all his four horses died, many of his cattle died suddenly, he himself became lame and "was so vexed with lice of an extraordinary number and bigness that no art could hinder the swarming of them, till he burnt up two suits of apparel." Annie Duny had said that the devil would not let her rest

until she was revenged on the wife of Sandswel. Straightway Sandswel's poultry died, his chimney fell down and a firkin of fish tumbled into the water.

Sir Thomas Browne, author of "Religio Medici," "Urn Burial," etc., was called as a medical expert, and his opinion was that these children were bewitched, and that the devil in witchcraft did work upon the bodies of men and women upon a natural foundation, and that he did extraordinarily afflict them with such distempers as their bodies were most subject to; in other words, that the swooning was natural, heightened to great excess by the subtlety of the devil co-operating with the witches.

The judge told the jury that they were to inquire first, whether these children were bewitched, and, secondly, whether the prisoners at the bar were guilty of it. He had no doubt there were such creatures as witches, for the Scriptures have affirmed it, and the wisdom of all nations had provided laws against such persons. He prayed the God of heaven to direct their hearts in the weighty matter they had in hand, for to condemn the innocent and let the guilty go free were both an abomination to the Lord. The jury in half an hour brought in a verdict of guilty. The children were restored to health in thirty minutes after the conviction. The witches were executed and confessed nothing.

James VI, of Scotland, thought he had performed a wonderfully heroic deed when he crossed the seas to wed Anne of Denmark. He considered that the devil and all his powers were overwhelmed with fear because of the union of a Protestant princess with the high and mighty Protestant King of Scotland and heir to England's throne. His fleet had been tempest-tossed, so naturally he felt that the prince of the powers of the air had been personally active in the matter. Suspicion fell upon one Agnes Sampson, a grave, respectable matron, who affected to cure diseases by words and charms. She was accused of being a party

to a conspiracy to destroy the fleet by tempest, and to kill the King by anointing his linen with poisonous materials, and by constructing figures of clay. Many others—some thirty in all—were accused, from respectable dames to the lowly old ploughman who acted as doorkeeper to the secret conclave and had been cuffed by the devil for saying "God save the King." After one hour's torture by the twisting of a cord round her head, poor Agnes Sampson confessed to consulting someone as to the probable length of the King's life and the means of shortening it; that she and others of her weird sisters had tried to raise a tempest by charming a cat with certain spells and throwing it into the sea; and that once they had embarked in sieves and gone out to sea, the foul fiend himself rolling before them over the waves. That with him they had boarded a foreign vessel, and after carousing thereon to their heart's content, had sunk the ship and all her crew. Cunninghame, one of the accused, had the nails torn from his fingers, pins driven in where the nails had been, his knees crushed in the boots, and his finger bones splintered in the pilniewinks, then the devil withdrew his help, and he confessed that he had been at a watch-meeting at Berwick, that after marching round the church withershins, he blew into the lock, the bolts gave way, and the unhallowed crew entered, and the devil harangued them from the pulpit, which was appropriately hung with black candles. An unpleasantness arose because the devil had not brought the picture of the King, which he had repeatedly promised to do, and some of the women were particularly abusive to him in consequence. In his excitement Satan forgot himself and called some of those present by their own names. To cover his breach of etiquette he proposed a dance, and well nigh two hundred persons were soon swinging in an antique round, chanting and singing. The orchestral accompaniment must have been weak, for there was only one performer, and she played a jewsharp. After the dance they

adjourned to the graveyard, and resurrected a newly-buried corpse or two, cutting off the fingers joints. Agnes Sampson got two of these and a winding sheet. That "Defender of the Faith," James, attended the examinations of the accused, and was particularly interested in the account of the nocturnal dance, and he insisted that the solitary musician should perform for his benefit on her jewsharp the tune to which Satan and his followers had danced. She did so. It is to be regretted that the music has not come down to us. Some of the unfortunates told his majesty that his Satanic Majesty had said that he, James, was the greatest enemy he had in all the world. Nearly all these poor wretches were executed, strangled to death and burnt to ashes.

We must not blame James too much, for he was "The Defender of the Faith," and a century and a half afterwards John Wesley wrote: "The giving up of witchcraft is in effect the giving up of the Bible. . . . I cannot give up to all the Deists in Great Britain the existence of witchcraft until I give up the credit of all history, sacred and profane."

Let us look particularly at one of the celebrated Salem cases. On June 2, 1692, Bridget Bishop, *alias* Oliver, was indicted for bewitching several persons in the neighborhood. She pleaded "not guilty," and many witnesses were brought in who had long undergone many kinds of miseries, which were preternaturally inflicted and generally ascribed to a horrible witchcraft. There was little occasion to prove the witchcraft, it being evident and notorious to all beholders. To fix the charge on the prisoner they first took the evidence of the bewitched. These testified that the shape of the prisoner did oftentimes very grievously punch, choke, bite and afflict them, urging them to write their names in a book—the devil's book. One said the shape had carried her to the river and threatened to drown her if she would not sign, and had bragged of having killed sundry persons; another testified that

the ghosts of these murdered ones appeared before the shape and accused her of killing them. During the examination of the prisoner the bewitched were greatly tortured. If she looked at them they were struck dumb; if she touched them when in their swoons they would revive immediately (no other's touch had that effect). If she shook her head or lowered her eyes the others did the like. One man had struck out where he was told the shape of Bishop was, the bewitched said, "You have torn her coat," and lo! Bishop's coat was found to be torn in that part. Deliverance Hobbs had been a witch and confessed; now for her confession she was tormented and whipped with iron rods by the shape. She swore that Bishop had been at a witches' meeting, and there partaken of the devil's sacrament. This was apparently all the evidence produced to prove that Bridget Bishop had been truly charged with the witchcraft complained of. To make her guilt still clearer evidence of other witchcrafts by her perpetrated was produced. One swore that six years before, one morning about sunrise the shape of the prisoner had assaulted him in his chamber, looked at him, grinned at him, and hit him on the side of his head; the same day at noon he had an apple in his hand, the shape came into the room, and the apple strangely flew out of his hand into the lap of his mother, two or three yards off. Another swore that fourteen years before he awoke one night and found the room full of light and a woman between him and the cradle. On his speaking she vanished, but came back. The baby screeched, and she disappeared. It had been a likely babe, but now it sickened, and after divers months died. Afterwards he recognized Bishop as being that night visitor. Another had bought a pig from Bishop's husband. Bishop did not want it sold; the pig was forthwith taken with strange fits. Witness believed the woman had bewitched it. Another said the apparition of Bishop and two others had appeared to him one night, and oppressed

him so that he could not stir; then she took him by the throat and pulled him out of bed. Another said that twelve years before Bishop had come to his house upon such frivolous and foolish errands that he suspected mischief. His eldest child began to droop; the oftener Bridget came the worse was the child. She would be thrown down and knocked about by invisible hands. Bishop brought him things to dye whereof he could not imagine any use; she would pay him; he would put money into his purse and lock both in a box, but the money would never be seen again. The child's health and mind gave way; years afterwards stranger came and told witness that the child was bewitched, and that there was a neighbor who was a witch, and that the neighbor had quarreled with witness' wife and threatened her. Then witness remembered that Bishop had so quarreled. Several men proved that they had awakened in the night and found the likeness of this women sitting upon them and grievously oppressing them, and that when they accused Bishop of this she was very angry. One worthy man was at home on the Lord's day (he had had some trouble with her about fowls); the doors were shut, and he saw a black pig come towards him; he went to kick it but it vanished. So soon as he sat down again a black thing, with a body like a monkey, feet like a cock and a face like a man, jumped in at his window and spoke to him, offering him wealth and prosperity. He went to lay hands on the spectre but it vanished; coming back he hit at it with a stick, but only broke the stick on the ground, and his arm was disabled. It disappeared, and going to his window the witness saw Bridget in her orchard going towards her house. The monster returned, and was about to assault him when he quoted Scripture, whereupon the goblin sprang back and flew over an apple tree, shaking many apples off the tree. At its leap it flung dirt with its feet against the stomach of the man, whereon he was then struck dumb, and

so continued for three days. When he swore to all this Bridget denied that she knew him, although (as the reporter says) their orchards adjoined, and they had often had their little quarrels for some years together.

Another witness deposed that Bishop had paid him money, which unaccountably disappeared. Once, after speaking to her on the road, the wheel of his cart, although he had a small load, got into a hole, and he had to get help to get out; but when he returned to look for the hole it was not there. Another time on meeting her his horse's gear all fell to pieces, and he himself could not even budge a two-bushel bag of corn. One dark night, after Bridget had threatened him, he was suddenly lifted from the ground and thrown against a wall.

The witch's house was searched, and in holes of an old wall were found several puppets made of rags and hogs' bristles, with headless pins in them, the points sticking out. Of these things she could give no account to the court that was reasonable or tolerable. Her body was searched and a witch mark was found on her, which had mysteriously vanished when a second search was made some three hours after. One thing that made against her was her being evidently convicted of gross lying in the court several times during her defence.

What need was there of any further witnesses? and yet there was further evidence of her witchcraft, for as, under guard, she passed the great and spacious meeting-house she looked towards it; immediately a demon entered the building and tore down a part of it. No person could be seen there, yet, when the people hearing the noise ran in, they found a board that had been firmly nailed up transferred to another quarter of the house.

Poor Bridget was hung, the first of nineteen who were executed, one of them being a minister. One hundred others were imprisoned on the same charge, and two hundred more were accused at one time. To

such a pitch did the excitement rise that two dogs were accused of witchcraft, tried and put to death.

Increase Mather had at last to admit that it was possible for the devil to impose on the imaginations of persons bewitched and to cause them to believe that an innocent, yea, that a pious person does torment them, when the devil himself does it, and that Satan may appear in the shape of an innocent and pious as well as of a nocent and wicked person to afflict such as suffer from diabolical molestations.

We must not be too surprised at the New Englanders solemnly trying and executing dogs in 1692, for from the twelfth to the end of the seventeenth century many were the dogs, hogs, sows, horses, cows, bulls, rats and ponies that were accused, tried and condemned and publicly executed in France, Italy and Spain for crimes and misdemeanors. Many of these animals were accused of murder. In England, as late as 1771, near Chichester, a dog was tried by four justices of the peace—what for and with what result, I wish I knew.

THE DUCHY OF CORNWALL.

IN our legal annals Princes of Wales have often figured as litigants, by reason of their possession of the Duchy of Cornwall, with its valuable mineral and other rights; and the Prince of Wales may sue or be sued in the name of his Attorney-General for matters relating to the duchy. It is not, however, every Prince of Wales who is Duke of Cornwall. The devolution of the dukedom is both curious and unique. It was created in 1337 by a charter of Edward III, in favor of the Black Prince and his heirs, being eldest sons (*filiis primogenitis*) of the Kings of England. This charter was soon after the accession of James I, declared in the *Prince's Case* (8 Co. 1) to have the force of an Act of Parliament. There is also a statement in the report of that case that only a first-born son of the Sovereign can become Duke of Cornwall, but that, said Lord Hardwicke (1 Ves. sen. 294), was only an observation of Coke's; and a few years afterwards, on the death of James' eldest son, Henry, it was solemnly determined that the dukedom passed to his

brother Charles. Thus, whenever there is an heir-apparent who is a son of the Sovereign, the dukedom vests in him. At other times the dukedom is merged in the Crown, even though there be an heir-apparent, grandson of the Sovereign. For instance, George III, though heir-apparent after his father's death, was not Duke of Cornwall. Richard II was, indeed, Duke of Cornwall after the death of the Black Prince, but, as Hale points out ("Pleas of the Crown," vols. i, p. 126), only under a special grant. There is, according to Christian, one of the most learned editors of "Blackstone," authority in the records of Parliament for the curious proposition that the Duke of Cornwall is born of full age, or is subject to no minority in respect of the possessions of the dukedom. Care was taken after the birth of the present King that the question should not arise, for an Act of 1842 (5 & 6 Vict. c. 2) provided, amongst other things, that during his minority his rights in respect of the duchy should be exercised by the late Queen. — *The Law Journal*.

CHAPTERS FROM THE BIBLICAL LAW.

THE MURDER OF ABEL.

BY DAVID WERNER AMRAM.

ALTHOUGH, according to the traditions of the Book of Genesis, the death penalty for murder—"He who sheddeth the blood of man, by man shall his blood be shed" (Gen. IX, 6)—was not formally enunciated until the postdiluvian period, yet it seems that this was the penalty inflicted in the antediluvian period; for Cain, after having slain his brother, Abel, feared that someone would put him to death (Gen. IV, 14).

In considering the ancient Biblical traditions no great stress is to be placed upon their historical accuracy. The terms antediluvian and postdiluvian literally refer to Noah's flood, which is supposed to have covered the earth, but which was, in all probability, only a local inundation. The reference to persons who might kill Cain for the murder of his brother Abel implies the existence of others beside the family of Adam and Eve; and yet the latter are supposed to be the parents of all the human race. As has been stated in these articles the primitive traditions of the Hebrews are of value, not as historical records, but because they reflect ancient thought and life.

In the fourth chapter of Genesis we have recorded the first murder case. In the characteristic terse manner of the Hebrew narrators the facts of the crime, the motive, the trial, and the sentence are all given in a few phrases, but given with such clearness as to enable us, with little effort, to reconstruct the entire incident.

Cain and Abel were brothers, children of the first man and woman. Abel was a shepherd and Cain was an agriculturist. It is well known that sheep herding and agriculture were the first occupations of civilized men. In the early and ruder state hunting

was the only source of livelihood. The fact that Cain and Abel are known as herdsman and farmer in this story reflects ancient views concerning the antiquity of these occupations. There is something suggestive, also, in the fact that Cain killed Abel. This veils a great sociological truth, and translated into modern language, may be taken to mean that the farmer supplanted the shepherd.

"And in the process of time it came to pass that Cain brought of the fruit of the ground an offering unto the Lord; and Abel he also brought of the firstlings of his flock and of the fat thereof; and the Lord had respect unto Abel and to his offering, but unto Cain and his offering he had not respect. And Cain was very wroth, and his countenance fell." Here appears the motive for the crime that followed. Cain's offering, although apparently brought in good faith, was not received with favor; the offering of his brother Abel was so received, and the anger that was thereupon kindled in the breast of Cain eventually led to the crime.

The gradual perfection of the plan of revenge in the mind of Cain is indicated in the two phrases wherein the Lord says to Cain, "Why art thou wroth; why is thy countenance fallen? If thou doest well, shalt thou not be accepted, and if thou doest not well, sin lieth at the door, and unto thee shall be its desire; but thou shalt rule over it." The feeling of anger is dramatically compared to a wild beast lying at the door, and, as the wild beast at the door, having once gained a partial entrance, can hardly be restrained, so anger turns into hatred, and hatred suggests revenge, which gradually overpowers the man's better nature and prompts him to crime. It is only when the door is kept shut that "thou shalt rule over

it." Cain was deaf to the voice of conscience, and when he and his brother were in the field, Cain rose up against his brother Abel and killed him.

There were no witnesses to the crime—only the telltale stains of blood on the ground. God appears in the legend as conducting a court of investigation, summoning Cain before Him, and, as in Adam's case, subjecting him immediately to cross-examination. As was stated in "The Case of Adam and Eve" (*THE GREEN BAG*, April, 1901) the system of procedure in patriarchal days was entirely different from that of our own times, and the various rules which have been evolved to guard the rights of defendants were unknown.

If we leave the name of God out of this legend, and substitute the word "judge," we shall have a perfectly clear representation of the procedure, unaffected by theological or religious views. The case then presents itself in the following manner:

Cain and Abel were last seen going out to the field together; Cain returned without his brother Abel. Search was made for Abel, and no trace of him was found, excepting the blood stains in the field in which Cain and Abel were last seen. Suspicion rested upon Cain, and he was summoned before the judge and subjected to an examination. "Where is Abel, thy brother?" and Cain answered, "I do not know; am I my brother's keeper?" The answer would naturally strengthen the suspicion that Cain was the murderer. An innocent man accused of fratricide would hardly have given an answer like this, which breathed defiance and showed a heartlessness unexpected, and, therefore, highly significant.

Cain makes no further attempt to defend himself, apparently relying on the fact that no witnesses can be produced against him, and deeming silence his best defense. From these circumstances the inference of guilt is very strong, and his guilt is assumed by the judge, who says, "What hast thou done? The

voice of thy brother's blood crieth unto me from the ground." To this question there is no reply, and the punishment, that is, the sentence of the court, follows swift upon the condemnation. Not death, but exile—a punishment greater than death—is decreed. "And now thou art cursed from the earth which hath opened her mouth to receive thy brother's blood from thy hand. When thou tillest the ground it shall not henceforth yield unto thee her strength; a fugitive and a vagabond shalt thou be on the earth." This was a sentence of outlawry, and was so understood by Cain, for he feared that anyone that found him might kill him. It excommunicated him from all intercourse with his fellows—he was to be a fugitive and a vagabond.

At a later period in the historical development of ancient Hebrew law such decrees of outlawry were modified, and the criminal who was found guilty by the Court instead of being subjected by a general decree of outlawry to punishment at the hands of any man, was made an outlaw only so far as the kinsmen of the person injured or killed by him were concerned. He was turned over to them, and they meted out punishment for the crime of which he had been convicted. The Court had no sheriff or executioner or keeper of the jail to inflict punishment on a criminal, and in the evolution of the law this duty devolved on the kinsmen. To society at large the criminal, so far as meting out punishment was concerned, was like any other man, and any injury done to him was punishable like an injury done to any innocent man. It was only the kinsmen who had the right to inflict the punishment.

The figure of speech which is used, wherein the ground is cursed which drank in his brother's blood, and being cursed would refuse to yield its crop to him working it, was equivalent to a decree of excommunication, driving him from the soil which he had been cultivating, and which, without the help and propinquity of his neighbors, would yield him

no return. The greatest punishment, however, lay in the fact that banishment from the soil meant not only outlawry, separation from friends and neighbors, but also removal from the protection of the Deity. God was God of the land, and his protecting influence did not extend beyond its boundaries, so that, according to primitive notions, exile was worse than death, because in it a man was without law, family, friends or God.

It is almost impossible for us to appreciate these primitive notions. To-day we travel fearlessly to the ends of the earth. In those days every stranger was *ipso facto* an enemy, and a stranger in a strange land lived in constant fear, not only of his mortal foes around him, but of unfriendly demons and spirits with whose worship he was unfamiliar, and whom he did not know how to placate.

Thereupon Cain said unto the Lord, "My punishment is greater than I can bear. Behold, thou hast driven me out this day from the face of the earth, and from Thy face shall I be hid, and I shall be a fugitive and a vagabond upon the earth; and it shall come to pass that every one that findeth me shall slay me." Having been driven out from his land he would be hidden from his God, and the protection of his God being removed, any man might kill him with impunity.

Now, it obviously was not the intention of God that Cain should be put to death for this crime. He was to be punished more severely; and, therefore, when Cain pointed out the fact that by being made an outlaw every man was free to kill him, God said to him, "Whoso slayeth Cain, vengeance shall be taken on him sevenfold," and in order to insure Cain against harm God set a mark

upon him lest anyone finding him should kill him.

The mark of Cain is commonly spoken and thought of as a "brand" marking him as the murderer and as condemned of God. Thousands of sermons have been preached on this text, and the phrase has gone into common speech as "the brand of Cain"; and yet it is entirely false. It was apparently a mark fixed upon Cain in order to show to all the world that he was under God's protection, and that his life should be spared. Furthermore, it seems quite obvious that the mark was put on him at his own request, in order to obviate the danger of being killed by anyone who found him. It was equivalent to the mark of the taboo of the Australian. The man who was thus marked was not amenable to human jurisdiction, and his person and property were inviolate. He belonged to the Deity. It was a species of *Herem*.

The *Herem* was an institution known at Jewish law, whereby persons and property were devoted to God. This act of devotion usually meant that they were utterly destroyed, the notion at the bottom of the word *Herem* being not so much that the objects were given to God as that they were forever removed from man, and could never more be used or enjoyed. This seems to have been the state of the case with Cain. He was banished from all association with his fellow-men, made a wanderer and a vagabond, and because of that, made personally inviolate, so that he was permitted not even the intercourse with his fellow-men that would have been necessary in order to kill him.



LONDON LEGAL LETTER.

NOVEMBER 1, 1901.

THE beginning of the legal year, which dates from the opening of the Court in the last week in October, and which is always ushered in with stately and impressive ceremonies, has this year been marked by an unusual number of changes in the judiciary. The personnel of the retiring judges and of the ones who have been elevated to the bench in their stead, can hardly be of concern to American lawyers; but the system which governs the appointment of judges in England cannot fail to interest members of the legal profession all over the world. It illustrates most strikingly how it comes about that "English judges have for centuries been among the best educated and trained of their generation"—a *dictum* which appears to be thoroughly appreciated in the United States.

The first change to occur was in the Mastership of the Rolls. It is probably known that the appellate court in England, to which appeal lies from the *nisi prius* courts, is the Appeal Court. It consists of six judges, with the Master of the Rolls at their head, and sits in two divisions, one for hearing appeals from the common law courts, the other for hearing appeals from the chancery side of the courts. If by reason of illness or otherwise the six judges are not able to make up the two courts there are special judges, qualified by statute, to assist. These are the Lord Chancellor, or an ex-Lord Chancellor, the Lord Chief Justice and the President of the Probate, Divorce and Admiralty division. Hardly more than two years ago the then Master of the Rolls, Sir Richard Webster, was appointed Lord Chief Justice. To fill the vacancy thus created Lord Justice Lindley, better known perhaps to Americans as the author of "Lindley on Partnership," was made Master of the Rolls. In a short time he was promoted to the House of Lords, and Lord Justice A. L. Smith was made

Master of the Rolls. He was not a profound lawyer, but he was a strong judge. He had a remarkable aptitude for getting at the facts of a case and a wonderful, shrewd common sense. He never failed to do justice, and hardly ever failed to judge righteously. He was elevated to the *nisi prius* bench years ago, after having served as an "Attorney-General's devil," that is, an unofficial assistant to that important law officer. He had had very little practice as an advocate, and was a diffident and hesitating speaker, never using words unless when necessary. It is remembered of the famous Parnell trial, in which three judges sat day after day for weeks, that of the two associate judges Sir John Day opened his mouth once, and Sir A. L. Smith not at all. When he came to the Appeal Court his common sense and his quick appreciation of facts supplied what deficiency he might have experienced in the technicalities of the law. But he had great industry and soon his judgment exhibited the work of unusual legal learning. Toward the close of his career there was no one on the bench who was more highly regarded by the profession, and no one who could more quickly despatch the business. He never tolerated speechmaking in his court. If counsel had a point which it was necessary to elaborate at length, he was the embodiment of patience and courtesy throughout the argument. But if he saw there was no case he had no hesitation in saying so, and in insisting upon stopping the flow of useless talk. During the long vacation he went to Scotland for rest, accompanied by Lady Smith, who for years had been in ill-health. While watching in her sick-room at night the Master of the Rolls fell into a doze, during which his wife escaped from the room, and the next morning her body was found in a neighboring stream. The shock was so

great that illness followed, during which he resigned his position, and before his successor was appointed his lamented death was announced.

The vacancy thus created was filled by the appointment of Lord Justice Henn-Collins to be Master of the Rolls. He had been a judge of the Appeal Court for five or six years, and by common consent was the fittest among his associates for the position. To keep the number of appeal judges up to the complement Mr. Justice Mathew was promoted from the *nisi prius* bench. He was not only one of the oldest circuit judges, but one of the ablest. It was at his instance that a division of the Court was constituted to hear commercial cases, in order, if possible, to inspire merchants with confidence, that if they brought their disputes into court they might have them as speedily settled as if they took them to boards of arbitration. In this he was highly successful, and to-day business is despatched in the Commercial Court with remarkable celerity. This is due in no small degree to the way in which he insisted that pleadings should be abandoned, and that interlocutory motions should be reduced to the smallest compass. To supply his place on the circuit bench the Lord Chancellor appointed Mr. Joseph Walton, K.C., a judge. Mr. Walton had for some years been the

leader of the Commercial Court, and in order to take this position he must give up a practice second, perhaps, to none at the bar. While these changes were going on Mr. Justice Day resigned on account of ill health, and to fill this vacancy on the *nisi prius* bench the Lord Chancellor has appointed Mr. A. R. Jelf, K.C., who for years has been a leader in all kinds of common law cases. It is now announced that Lord Justice Rigby has resigned from the Court of Appeal, also on account of his impaired health, and in this instance, also, his successor has been chosen from the list of judges who have distinguished themselves upon the *nisi prius* bench, Mr. Justice Cozens-Hardy having been signalled out for promotion.

This then is the secret of the system which makes the "English judges the best of their generation." As vacancies occur in the House of Lords, judges are sent into that august tribunal of last resort for the whole Empire, from the Appeal Court; and to fill up the gaps in the latter body *nisi prius* judges are promoted, while to take their places leading lawyers from the bar are selected. It is a system worth imitating, even if it may perhaps infringe upon the right of the people to elect their magistrates by popular suffrage.

STUFF GOWN.



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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiae, anecdotes, etc.

AMONG the tributes received from friends of the late editor of THE GREEN BAG, we are allowed to quote these words of the Honorable F. W. Hackett, Assistant Secretary of the Navy:—

“I knew Fuller in Cambridge, when I came to the bar in 1866, and for the period of my law practice in Boston saw him frequently. He had natural gifts of a high order. He had an active mind, a readiness to see what was humorous and amusing in affairs, and a certain quickness of sympathy that made him socially very attractive. I chiefly remember him as a very excellent amateur actor in private theatricals. His success in this line was marked.

“I lost sight of him when I came away from Boston, and found later that he was in charge of THE GREEN BAG. He was admirably fitted to give tone and character to such a periodical. What I mean to say is that he was singularly capable of seizing on all those little light amusing incidents that brighten up the dull routine of law practice, and making them of literary value by his way of setting them out.”

JOEL PRENTISS BISHOP, the author of many well-known text-books, died at Cambridge, Massachusetts, on November 4, at the age of eighty-seven years. His career was so unusual, and his legal work is of such real worth, that it is fitting that there should be spoken, at this time, a word of recognition both of the value of his labors and of the sacrifice at which they were performed. “Taking into account both quantity and quality of work,” said the reviewer of the last edition of Mr. Bishop’s “Statutory Crimes,” in the June GREEN BAG, “there is no American

law writer, save Story, comparable to Mr. Bishop.” And it was there pointed out that, like Story, Mr. Bishop had “done work that is fairly entitled to be called creative,”—rare praise for a text-book writer!—and that in some of his work he was a pioneer, often “suggesting new doctrines that after his initiative were ultimately adopted by the courts.” Appreciation of his labors as a writer on jurisprudence was shown by the University of Berne, Switzerland, which conferred upon him the degree of *Doctor Juris Utriusque* in express recognition of the “great services” rendered by his legal works to his country “and to the science of law.”

After a seemingly hopeless struggle with ill-health, lasting many years, Mr. Bishop entered a law office in Boston, as a student, at the age of twenty-eight, with no expectation, however, that he would be able to practice. His health improved, however, and he was admitted to the Suffolk bar in 1844. “Some years of practice,” says a recent writer in the *Boston Transcript*, “found him with his business divided between large and small cases, much of it being of the latter description. Preferring the former, he determined to get rid of the latter and to write a law book as a side exercise during the change. The first edition of his “Marriage and Divorce” was the result. It was published in one volume just ten years after he entered a law office as a student. The book was received with unusual favor by the profession, and it brought him a constant succession of requests and advice to write other books. So he finally decided upon making what he afterwards considered to be the great sacrifice of his life, by relinquishing lucrative practice and thenceforth devoting himself to the drudgery of legal authorship. He believed that by pursuing this course he could be of genuine service to the profession, and that he could supply a crying need in legal literature by expounding some of those important branches

of the law which had not hitherto been adequately treated by any author.

"After Dr. Bishop decided to devote his time exclusively to authorship he applied himself so assiduously to his self-imposed task that he became very much of a recluse, and was personally little seen by the general public. He thenceforth positively refused, however strongly urged, to accept any proffered cases from clients requesting his services. It was only on rare occasions, even, that he could be induced to give an expert opinion in an important case; and only when he could be convinced that the question involved was one of unusual importance to legal science, aside from the interests of the parties concerned. Among the few instances occurring to the writer, in which Dr. Bishop consented to give an expert opinion, may be mentioned the Lauderdale Peerage cases, reported in 10 Ap. Cases, 692. The cases involved the descent of an earldom and large estates in Scotland, and turned upon the validity of a marriage celebrated in New York in 1772. The opinion was in regard to what the marriage laws in New York were at that period, that being the point that perplexed both the counsel and the courts in which the cases were first tried. His most recent opinion was given in the Louisiana *nolle prosequi* cases, 48 La. An. 109, *et seq.* The question was, 'as to the right and power of the district attorney to enter a *nolle prosequi* after verdict and before sentence.' . . .

"Although not insensible of his own attainments, Dr. Bishop always seemed to take a deep pride and pleasure in showing a stoical indifference to the glitterings of notoriety, and he always shunned politics and office. Not long before he launched himself upon the sea of legal authorship, he was tendered the appointment of chief justice of the Hawaiian Islands by King Kamehameha III, but declined to accept the position."

To the Editor of The Green Bag,

DEAR SIR:—Under the heading "Some Delights of the Legal Profession," Mr. Willis B. Dowd gave us some very entertaining reading in the September number of THE GREEN BAG, and among other things, the worthily famous cat decision of Mr. Justice McLean, of the New York Supreme Court, which is surcharged

with sparkling wit and crammed with quaint legal lore. Mr. Dowd wrote too soon, or else he overlooked one of the richest and raciest opinions handed down by a court of last resort in the last decade—the opinion written by Mr. Justice Sullivan, of the Nebraska Supreme Court, in a decision handed down by that court June 5, 1901 (*Chapman v. State*, 88 N. W. Rep. 907), which, for quaint humor and keen wit, deserves to live in the memory of the profession with that of Mr. Justice McLean. The case was a prosecution for statutory rape. In the trial below the jury found the defendant guilty and the Court sentenced him to imprisonment in the penitentiary for a period of three years, and he "went up." In the course of the opinion Sullivan, J., says:—

"The petition in error contains many assignments, but the principal grounds relied upon for a reversal of the sentence is that the State's evidence, while tending to prove seduction, disproves completely the crime charged in the information. Briefly stated, the main facts of the case are these: Bruce Chapman resides in Sherman County, and is now between thirty-two and thirty-five years of age. One evening in August, 1899, he attended a camp meeting at Round Grove, where he satisfied his religious yearnings,—slaked his thirst for spirituality,—and then permitted his attention to become engrossed with secular things. At the meeting he fell in with the prosecutrix, Ora Nell Johnson, and the two went home together. On the way home, it would seem, Chapman felt the rise and surge of a tender passion, and took occasion to mention the fact to Miss Johnson. Finding her in a responsive mood, he indulged freely in erotic vagaries, and, finally, after promising marriage and eternal fidelity, had sexual intercourse with her. The promise of marriage, it is now insisted, adds to the crime charged an extenuating element which reduced it from rape to seduction,—from a felony to a misdemeanor. We listened with great interest to the ingenious reasoning by which the learned counsel for the defendant undertook at the bar to sustain his position. We were charmed with the cleverness of the argument, but its logic was not irresistible. It failed to convince us that a person prosecuted for the commission of a criminal act must go free if it be made to appear at the trial

that he transgressed two sections of the law against crime, instead of one. . . . If the defendant were held to be innocent of rape because guilty of seduction, he might, according to the argument of his counsel, when prosecuted for the latter offense, secure an acquittal by showing that he was a married man, and therefore guilty of adultery. And, by the same logic, a person charged with a murderous assault would be entitled to an acquittal, if it should appear that the person assaulted were an officer engaged in the execution of his office, or a minister of the gospel preaching to his congregation. It would also entitle a licensed vender of intoxicating liquors, charged with making sales on Sunday or election day, to an acquittal if he could show that the person to whom the sales were made were minors, Indians, lunatics, or habitual drunkards. The true rule undoubtedly is that a statute which denounces an act as criminal does not cease to be effective because another statute declares the same act to be a crime when done at a particular place or under special circumstances. . . . The wage of sin is certainly due to Mr. Chapman, and the hour of liquidation is at hand. The judgment is affirmed."

Yours very truly,

JAMES M. KERR.

OMAHA, NEB., Nov. 2, 1901.

NOTES.

THE advertisement of the Missouri lawyer, a copy of which was printed in the August number, and the letter-head of the Iowa legal light, set forth in the September issue, are rivalled by the following self-addressed envelope used by a colored member of the West Virginia bar. The esteemed correspondent to whom we are indebted for this gem expresses the belief that as a piece of professional advertising it has no equal.

MR. J. K. SMITH,
LAWYER AND JAIL ROBBER,
KEYSTONE, W. VA.

ONE of the earliest judges in what is now Illinois was Judge Dumoulin, appointed in 1790, or shortly after, to the bench in St. Clair County. The judge, says Mr. J. N. Perrin, in an address on "Primitive Justice in Illinois," recently de-

livered before the Illinois Bar Association, "had occasion to deal with a case of contempt in his courtroom. He dealt with the matter so vigorously that he left the bench to enforce the decree by pummeling the obstreperous individual whom he had adjudged guilty of the contempt. The result was that the judge soon found himself before the court to answer a charge of assault and battery. The case, however, was dismissed, and the informant had to pay the costs, thus coming out of the legal contest with two defeats, a bruised anatomy and a less plethoric pocket-book."

WHILE feeling was running high in England over the "Home Rule" question, John Morley, chancing to meet the late Lord Morris, the Lord Chief Justice of Ireland, expressed surprise at the cordiality with which the latter, who was above all, an Irishman, greeted him.

"Ah, come now," said the Chief Justice, "sure I've known many worse — in the dock."

In his earlier years, Lord Morris was Recorder of Galway. On one occasion the last case on the list — a dispute over a few shillings — was argued before him at great length and with much warmth. Lord Morris was anxious to get back to Dublin, where the courts were in full swing and he held important briefs. Within a few minutes the Dublin train was timed to start. The Recorder looked at his watch, but the wrangle did not seem to be approaching an end.

At last he said to the opposing solicitors: "See here, gentlemen, I must catch the train. Here is the sum in dispute"; and throwing down the silver, he vanished from the court.

JUDGE WILDE, formerly on the Supreme Bench in Massachusetts, while at the bar was quite famous for his apt repartee. He was once trying a case, and labored very hard to obtain a certain answer from a reluctant witness. The opposing counsel interrupted him with the side remark: "Ah, it is no use, Brother Wilde, to pump the witness further — you are only on a wild goose chase." "Just so," said Mr. W., "Wild(e) on one side, and a goose on the other."

A GOOD story is being told concerning Judge S. F. Prouty, of the Polk County (Iowa) district

bench, whose face, when he smiles, beams with pleasantness, but when in repose is as stern and forbidding as that of old Chief Sitting Bull. It appears that in the courtroom presided over by Judge Prouty is a bailiff named Thomas, who is considerable of a politician in his precinct, and who is no handsomer than the judge. Bailiff Thomas wears his hair combed pompadour, and his hair being long, the effect is something startling. His face is covered with whiskers, which he combs straight back at the side, so that his head looks as if the hair had been caught by a fifty-knot breeze and frozen into position.

Not long ago a lawyer from another city stepped into the clerk's office at Des Moines, Iowa, and inquired for Judge Prouty, wishing to see him on political business. The clerk directed the stranger to the courtroom presided over by the judge. A deputy volunteered the suggestion that court was then in recess, and that the judge was not on the bench, but was seated in the room, talking.

"What does the judge look like?" inquired the stranger. "How shall I know him?"

The clerk laughed and replied:

"Go in through that door and the homeliest man in the room is Judge Prouty. You can't mistake him."

The stranger obeyed. He pushed open the door of the courtroom and entered. Several groups of men were standing and sitting about, talking. The stranger cast his eye over the gathering once, and without a moment's hesitation walked up to a man in the far corner and tapped him on the shoulder, saying:

"Excuse me, but this is Judge Prouty, is it not?"

It was Bailiff Thomas.

A CASE was being tried before Chief Justice Draper at an assize in a county town. Among those living in that neighborhood was a well-known character, who had once been a school-master, but who was at this time given to the too free indulgence in strong drink, devoting most of his time to loafing. On this occasion he found himself in court much the worse for liquor. Being somewhat obstreperous, the chief justice inflicted upon him a small fine. As this, however, had not the desired effect of

quieting him, he was brought up a second time, whereupon the chief, in his well-known quiet but severe tone, reprimanded him, telling him that he had previously inflicted a small fine, but as the offense had been repeated, he would now have to inflict a heavy one. The pedagogue, however, was equal to the occasion, and promptly rejoined: "Stop, judge, you ca-an't do it; it's agin the law. It's unconshushinal—*Nemo bis vexare pro eadem causa*. You see, judge, it's the same old drunk." Even the quick wit of the sarcastic chief justice had no answer ready, and, turning away, he ignored the presence of the delinquent.

The same learned judge was on another occasion trying a case in the old Prince Edward district. Many of the settlers there were Tunkers, and in giving evidence theoretically preferred to affirm rather than swear. The Court having put to a witness the question usual in that locality, "Do you swear or affirm?" received the prompt and entirely unexpected reply, "I don't care a d—n which"; whereupon the chief justice leaned over his desk, and, in his usual suave manner, instructed the clerk of assize as follows: "Mr. Campbell, the witness swears."—*Canadian Law Journal*.

LITERARY NOTES.

At the present moment the reading public is suffering from—or shall we say enjoying?—an epidemic of novels dealing with the "Negro Question" and the relations between the North and the South which grew out of the Civil War. Two such books lie before us.

The first of these, *The Marrow of Tradition*,¹ by Charles W. Chestnutt, is a strong story of modern life in the South, emphasizing the great race problems and their attendant tragedies. With much dramatic force and very little bitterness, the facts are set forth, with no suggestions for the solution of the future, excepting that the negro may overcome the prejudice to his race when, like the hero of this novel, he shall make himself absolutely essential to the life and happiness of even his bitterest enemies.

¹THE MARROW OF TRADITION. By Charles W. Chestnutt. Boston: Houghton, Mifflin & Company. 1901. (vi + 329 pp.) Cloth: \$1.50.

THE other story, *Henry Bourland*,¹ is one of Virginia life, in the time of the "Crisis," and in it is related once again the oft-told tale of the struggle between North and South, and of the dark days of reconstruction. If one had left the preface unread, one would say that the author's treatment of the war and of the negro question, and his seeming insistence on the essential trickery and vulgarity of all Yankee settlers in the South, showed the extreme bias of an unreconstructed Southern mind — if any such mind exists; but from the preface it appears that the author is Northern bred, and that he has attempted to write wholly from the Southern point of view. The result is not altogether satisfactory. His desire to do justice to "the other side" has been carried to an undue length; his standpoint is so extreme as to be unfair to both sides. Perhaps to this forced point of view of the writer should be attributed also his cock-sure way of treating vital social questions and settling them off-hand; still it is a bit irritating to the reader. It is only right to say that the men in the story are well drawn — along conventional lines; the women, however, are neither attractive nor interesting.

AMONG the attractive holiday publications is a new illustrated edition of Drake's *New England Legends*.² The first edition was published nearly twenty years ago, and it is high time for a new one — especially for the sake of the present generation of boys and girls; for this is one of the books with which every New England bred youth should be familiar, for New England is a most fertile and interesting field of legendary lore, and Mr. Drake is well fitted to till it. The illustrations are many and, for the most part, good; though one can but wish that the sea-serpent on page 157 might have been a bit more terrible, and can but wonder that Harry Frankland fell in love with Agnes Surriage at first sight, if her face were that with which, on page 222, the artist has inflicted her.

¹HENRY BOURLAND: *The Passing of the Cavalier*. By Albert Elmer Hancock. New York; Macmillan Company. 1901. (xi + 409 pp.) Cloth: \$1.50.

²NEW ENGLAND LEGENDS AND FOLK LORE, in Prose and Poetry. By Samuel Adams Drake. New and revised edition. With numerous illustrations. Boston: Little, Brown & Co. 1901. (xvi + 477 pp.)

NEW LAW BOOKS.

THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT. By *Waterman L. Williams, A.B., LL.B.* Boston: Little, Brown and Company. 1901. Sheep: \$3.50 net. (345 pp.)

As a general survey of the common law liability of municipal corporations for tort, this work is a welcome addition to the library of law textbooks. So clearly and interestingly is the subject treated, that the academic value of the work to the mere student of municipal government is not less than its direct usefulness to the working lawyer referring to it for business reasons. Members of city councils and boards of selectmen with a spark of municipal science in them would read such a work with no little pleasure and profit, as from its pages can be gathered a clear idea of the legal status of the municipality in its various activities as a legislative, executive, or even socialistic, entity.

The work sets forth the distinction between the *quasi* corporations, or those "territorial and political sections of the state, created by the sovereign power without reference to the wish of the inhabitants and solely for public and governmental purposes," and municipal corporations proper, created by special charter or voluntarily organized under general laws.

The former embrace such political divisions as counties, townships, school districts and the like, and, as they are mere auxiliaries in the work of carrying on the governmental duties of the state, the rule of liability is not applied to them as to private corporations. Municipal corporations proper, on the other hand, such as cities, incorporated at the request of, or with the assent of, their inhabitants and for the purpose of securing peculiar local advantages, occupy a dual position in relation to the law of liability. So far as municipal corporations proper represent the state in the discharge of governmental functions, that is, "duties relating to the public peace, health, safety, and education, and as well duties growing out of the exercise of legislative and judicial or discretionary powers," immunity from common law liability is enjoyed. When, however, municipal corporations perform "duties that pertain to the exercise of those private franchises, powers and privileges which belong to them for their own corporate benefit, or are dealing with property held by them for their own

corporate gain in emolument, then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances."

It is this analysis of the various municipal functions whereby they may be classed under one head or the other, that constitutes the theme of the work. The difficulties that have confronted the courts in their efforts to classify those duties which occupy a middle ground, and have in so many states resulted in statutory enactments to settle the vexed questions, are ably set forth and citations from the law courts of the various states are given with sufficient completeness. Particularly helpful is the full discussion of the liability of municipal corporations relative to streets and highways.

THE LAW OF AGENCY, INCLUDING THE LAW OF PRINCIPAL AND AGENT AND THE LAW OF MASTER AND SERVANT. By *Ernest W. Huffcut*. Second edition. Boston: Little, Brown & Company. 1901. Buckram, \$3.00; law sheep, \$3.50. (li+406 pp.)

This book does not aspire to a place among standard works for the practitioner; but it is useful to students wishing a rapid review just before examination for the bar. The present edition is an improvement upon its predecessor both in scope and in execution.

THE LAW OF REAL PROPERTY. Vol. 7. Edited by *Emerson E. Ballard*. Logansport, Indiana: Ballard Publishing Co. 1901. (xxxi+884 pp.)
A COMPLETE INDEX TO BALLARD'S LAW OF REAL PROPERTY, VOLUMES I-VII. By *Emerson E. Ballard*. Logansport, Indiana: The Ballard Publishing Company. 1901. (144 pp.)

This seventh volume brings down to date a series which aims to be a complete compendium of real estate law, embracing all current case law on this subject. The present volume is devoted especially to new cases, thus making it a supplement, as it were, to the preceding volumes. The plan of the book is to treat the subject of real property under some one hundred general heads, alphabetically arranged; under some heads printing in full an important

recent decision, but in all cases giving an epitome of cases, arranged under sub-headings.

LAW OF REAL PROPERTY. By *Charles T. Boone*. New Practitioners' Series. 3 volumes. Second edition. San Francisco: Bancroft-Whitney Company. 1901. Law sheep: \$9.00.

These volumes are a cross between a digest and a treatise on the law of real property; in other words, they give a very concise statement of the law on this general subject, starting with the Nature of Real Property and working on down the important heads into which the subject divides itself naturally. It is, what it purports to be, a handy manual of the principles of law relating to real property; and is of value to either the student or the practitioner who wishes to see at a glance what has been decided on a particular point and where that decision is to be found.

THE AMERICAN STATE REPORTS. Vol. 79. Containing cases of general value and authority decided in the courts of last resort. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1901. Law sheep. (1050 pp.)

This last volume of an excellent series covers cases as late, for example, as 176 Massachusetts, and draws from the recent California, Florida, Illinois, Indiana, Minnesota, Missouri, New York, Pennsylvania State, Rhode Island, South Carolina, South Dakota, and Washington reports, besides the Massachusetts report above named.

The wide range of law covered by this series of reports is seen by glancing at the titles of the principal notes in the present volume, which are as follows: The Causes for which the Legislature will authorize the Sale of Real Property of Decedents; Constitutionality of Statutes allowing an Attorney's Fee; Who are Related by Affinity; What Marriages are Void; When does the Title of a Statute embrace but one Subject, and What may be included thereunder; Constitutionality of Civil Service Laws; Partnership after Death; What Words create Conditions Subsequent; and Title acquired by Purchaser at his own Execution Sale. As usual these monographic notes are well done.

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