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The Western Jurist.

JANUARY, 1877.

RUFUS CHOATE.*

THE double relation which distinguished men have held to others, often excites regret and curiosity. The public life and service may be well known; the private life and character, however worthy, may remain unknown. The information is generally sought for in biographies. But the veil which separates those conditions, or states of being, may intervene, even between friends, and limit or qualify the most faithful revelations. We may well be grateful, however, for delineations by writers of taste and judgment, who knew, as well as could have been known, the men whose genius and character they have earnestly and lovingly sought to commemorate. Thus could Prof. Brown write of Rufus Choate, and Mr. Trevelyan of Lord Macaulay.

The work by Trevelyan was necessary. It was well that something more definite and personal than had been learned from Carlyle, Arnold and Cockburn, should be known of Macaulay. Beyond casual references, some sketches, and a few anecdotes, grown so familiar that no prudent diner-out would venture to repeat them, we knew him from his speeches and course in Parliament, his Essays and Reviews, his services in India, and from the History. But the inferences to be drawn were general; the veil behind

* This article is from the pen of Judge NEILSON, of Brooklyn, the learned and impartial judge who presided at the Beecher-Tilton trial, and who is specially fitted for the preparation of an interesting biography of RUFUS CHOATE, who was peculiarly great in literature, law and statesmanship. We obtain the article from the columns of the *Albany Law Journal*, one of our most valued exchanges.

which lay his private life remained undisturbed. As an author, he came to us after elaborate preparation, as if in state-dress, and took the reading public by storm. His writings had a fascination strong enough to divert students from their lessons, the readers of romantic tales from their dissipations. At the time when he was expressing to Mr. Everett his surprise, that any but "a few highly educated men" in this country were interested in his History, our wives and daughters were reading it. It seems incredible that he could have thought his work too profound, or "insular in spirit" for general readers; a history which, though dealing with principles in large relations, appealed strongly to the imagination, gave the romantic side of events, and, in highly wrought and felicitous descriptions, called from the depths of the past, forms regal in their adornment and beauty. But in calmer hours, Mr. Macaulay may have had a just estimate of his labors. He must have known that his services in Parliament had been of less value and importance than those of Brougham; that he had lacked the almost prophetic apprehension, the logical precision, the harmony of thought and expression of Edmund Burke, and that his Essays, rich in poetic sentiment and illustration, his criticisms, more acrid to the taste than the invectives of Junius, could not take deep root in a firm soil. But in the retrospect he was, no doubt, satisfied with the policy which had led him to seek relation to the names of Bacon, Milton, Pitt, and of some other men who had helped to shape history, as well as to an interesting period of the national life of England. In that he was wise, as the conservative element, respected by time, lies in the nature of the subject rather than in the author's mode of treatment. Macaulay's verses will be read, as they are the "Lays of Ancient Rome;" his History will be known when most of his other writings may be forgotten. In the coming generations, none will care whether Croker was a bad fellow, and ignorant of Greek; whether Barere, when he ceased to write trifles, began to write lies; whether Robert Montgomery was a poet or not.

But Macaulay's strongest claim to remembrance rests on his services in India in the preparation of a Code of Laws. He thus won a place in legal history. But for that service, we should have no pride in the fact that he was a lawyer, be less ready, perhaps, to recognize the relation which existed between some of his charac-

teristics, and Rufus Choate. Not that they had anything in common, as lawyers, save in their mastery of legal principles applied by the one in his labors in India, illustrated by the other in the labors of his life. Mr. Choate never had occasion to frame a Code for a peculiar people. Mr. Macaulay, having been called to the English bar, held a short and silent flirtation with his mistress, the law, and finding her coy and cold, gave her up. He had, indeed, one case in court, and but one. There was, therefore, nothing like professional brotherhood between him and Mr. Choate. The likeness and the unlikeness, material to our purpose, are to be found elsewhere.

They were fortunate in their lineage, each came of good stock. They had admirable training at home, cherished great love for those related to them by family ties, and were blessed in the return of that love. With a poetic temperament, exquisite sensibility, a fondness for the romantic, were united loyalty to the truth, and aversion to everything like duplicity, or artifice in life and conduct. They also had great industry, devotion to study, and desire to excel. But nature, as if to perfect her work, and set these, her favorite children, quite apart from others, gave to each of them great, indeed, marvelous powers of memory. In their boyhood they became so familiar with "Bunyan's Pilgrim," that they could recite most of it. Later in life, they apprehended and retained the sense of what they had rapidly or casually read, and could recall the dates and the relations of events. Instances illustrative of such powers, when suddenly called into exercise, have been given by their biographers. In speaking of his knowledge of certain books, Mr. Macaulay said that if, by some miracle of Vandalism, they were destroyed off the face of the earth, he could, from memory, reproduce them. It is quite possible that Mr. Choate could have made a like boast, if he had allowed himself to speak of the extent of his own acquisitions. It appears that what he had read, and considered worthy of attention, he remembered to a remarkable extent, and could use with precision, ease and celerity. That is clearly shown in some of his speeches delivered in the heat and pressure of debate. The powers of memory possessed by Choate and Macaulay challenge our admiration, not simply because they were marvelous in sudden and signal display, but because of healthy origin and growth, they were held to the last in perfect co-ordination with their other powers.

They were ardently devoted to classical studies, had an intimate acquaintance with the Latin and the Greek, and knew something of some other languages. They did not take up the German early in life; Mr. Choate studied it with his daughter; Mr. Macaulay, on his return voyage from India, and after his method or beginning with the Bible, which he could read without a dictionary. In some respects he was more fortunate than Mr. Choate. He had more leisure, a larger acquaintance with learned men, and with society, and should have attained a higher and broader culture. He had access to many books which could not have been found in this country, but was a mere reader of some works of importance, which Mr. Choate studied, and in part translated. He wrote out his speeches, and revised them for the press, and with care treasured up his thoughts and words. Mr. Choate let his thoughts and words—many speeches and arguments which had excited unbounded enthusiasm in learned men and severe judges—go to the winds as uttered. That economy, and the want of it, bore their appropriate fruits. Mr. Macaulay's name became familiar in every household. Mr. Choate's merits, if not his name, would have passsed out of mind, but for the zeal of his friend and biographer, who illustrated his virtues, and collected mere fragments of his works.

But, now that Mr. Trevelyan gives us the letters, diary and journal of Macaulay, as Prof. Brown had given us those of Choate —the same forms of literary labor, representing more truly than any other forms, the habits of thought, and modes of expression peculiar to each of them—the reader may consider their relative merits. After lingering over, and seeking to compare their work, our conviction is that in the simplicity and unstudied grace of his letters, in the earnest purpose and profound study disclosed in his diary, in the descriptions, criticisms, suggestions recorded in his journal, in tone and spirit, in the use of clear, compact, nervous, beautiful, yet simple English, Mr. Choate appears to greater advantage than Mr. Macaulay.

Mr. Choate's suggestion that one who would write well, should write slowly, had respect to the example of some great authors—Sallust, Virgil, Tacitus—as well as to the instructions of Cicero and Quintilian. The virtue of such deliberation was recognized by Mr. Macaulay. When the materials for his History had been collected and arranged, his task was to write two pages daily, and, in one

instance, after having been engaged nineteen days over thirty pages, he was not satisfied with the character of his work. The habits of Burke, Bossuet, Gibbon and others, in correcting their compositions, are well known. Macaulay bettered the instruction. He was constantly revising his work. Having stated in his diary the time by which the third volume of his history might be written—"rough-hewn"—he adds: "Of course the polishing and retouching will be an immense labor." Of that care and industry, great, certainly, and worthy of commendation, Mr. Thackeray, with characteristic extravagance, said: "He reads twenty books to write a sentence; he travels a hundred miles to make a line of description."

By his example, Mr. Macaulay has happily put in a protest against the free use of words and phrases from other languages by English writers. With reasonable success, he resisted the temptation to indulge in such quotations. That was no slight victory, as, with his well-stored and active memory, such words and phrases, often laden with a delicacy and fragrance not to be retained in any translation, must have frequently occurred to him. Mr. Choate had not, in equal degree, that power of resistance. In pages of his journal, and some of his arguments, we do not find him using foreign words, nor need he ever have used them. But when he did so, it was the well-accepted aphorism, the ripe fruit of ancient experience, to which he stood related as an heir, that he wished to appropriate. The maxim or precept pressing upon his mind had been so familiar, that he was led to take it in its old attire, as an imperial hand might accept tribute in a foreign coin. But he applied freely, and in simple English, the teachings of the old masters. The foreign word or phrase, when used, was a mere adjunct—as an additional rap of the hammer after the nail had been driven—the argument complete without it, the terms luminous, the sense transparent. He was, therefore, always understood, even by those who knew nothing of the Latin or the Greek. It may be inferred from the directness and ease with which he continually expressed in English the most subtile thoughts and distinctions, that he never could have been conscious of anything like poverty in our language. It served him in a spirit of entire obedience. He illustrated its strength, contributed to its wealth and dignity. His pride in it would seem to have been intense, his faith

in its mission unfaltering, his ideal of it akin to that perfection which Cicero may have had in view, when he extolled the discourse of an old philosopher, as *a river of flowing gold.* Mr. Choate has left us some of the best specimens of modern English. But he had not the leisure to give a day to the writing of two pages like Macaulay, or of two verses, like Virgil, or even to revise and polish much that he had written. Some of his best lectures and arguments were prepared in the short intervals of professional toil. The wise counsel, the profound deduction, the brilliant thought and illustration, the exceeding grace and beauty of expression—"skiey sentences—aerolites—which seem to have fallen out of Heaven," —were conceived while the pen was doing its rapid work, or in the excitement of the moment when he was speaking. A friend found him in the night sitting up in bed, writing. He could only thus make up for the delay which other duties had imposed. He was preparing the eulogy of Daniel Webster to be delivered at Dartmouth College. When a few days later, before an audience representing the highest culture known among us, he had set forth the life and character of Mr. Webster, according to his conception of them—the profound study and discernment, the long, patient, patriotic service, the great example, the loss "incapable of repair," the love and reverence due to his memory then and evermore—the audience drawn into profound sympathy with the subject, strong men in tears, Mr. Choate, as if the fervent thoughts that possessed him demanded more free utterance from the heart, cast aside his notes, and gave his peroration without them.

Some significant words as to the relation of our language to the Bible deserve attention. After a conversation with Lady Holland, in which she had condemned the use of such words as "constituency," "talented," "gentlemanly," Mr. Macaulay says: "I did not tell her, though I might have done so, that a person who professes to be a critic in the delicacies of the English language ought to have the Bible at his fingers' ends." Speaking of the Bible in Schools,* Mr. Choate says: "I would have it read, not only for its authoritative revelations and its commands and exactions, obligatory yesterday, to-day and forever, but for its English, for its literature, for its pathos, for its dim imagery, its sayings of consolation and wisdom and universal truth." He read it daily.

* See Dr. Spear's "Religion and the State" as to the Bible in our public schools.

Something of the spirit of it pervades his speeches suggestively, as an undercurrent, giving tone and an air of authority to the argument. That is especially so in those speeches in which he illustrated the character of our Pilgrim Fathers, their faith, endurance and mission, the beauty of heroic and patriotic endeavor, the blessings of peace, of education, and of the law. In his references to favorite authors, his admiration great, if not amounting to hero-worship, he assigns them their subordinate place. Thus, in noting in his journal his morning's study, he refers to Milton. "I read, besides my *lessons*, the temptation in Matthew, Mark and Luke, in the Greek, and then that grand and grave poem which Milton has built upon those few and awful verses—Paradise Regained. I recognize and profoundly venerate the vast poetical luminary 'in this more pleasing light, shadowy.' Epic sublimity the subject excludes; the anxious and changeful interests of the drama are not there. It suggests an occasional recollection of the book of Job, but how far short of its pathos, its agencies, its voices of human sorrow and doubt and curiosity, and its occasional unapproachable grandeur! Yet it is of the most sustained elegance of expression. It is strewn and burning with the pearl and gold of the richest and loftiest and best instructed of human imaginations."

Mr. Choate had faith in the inspiration of the Scriptures and in the scheme of redemption. He had a profound reverence for "the foolishness of preaching." He attended faithfully, for years, the church of the Rev. Dr. Adams in Boston. On the hearing of the last case in which he appeared as counsel in the city of New York, Mr. Choate was ill, and the court adjourned over from Friday to Monday, when he proceeded with his argument. But on the intervening Sunday I met him at the old Brick Church, where, though nervous and suffering, he listened devoutly to a plain sermon by the Rev. Gardiner Spring. If Mr. Macaulay had like faith, he had not like reverence. He regarded ecclesiastical matters "exclusively from the stand-point of the State," a sermon as an intellectual performance. If the discourse was learned and fine, it was well to be in church. He leaves a record of two occasions when he was there—the one on a day appointed for national humiliation and prayer, and he says: "Nothing could be more solemn and earnest than the aspect of the congregation, which was numerous. The sermon was detestable—ignorance, stupidity, bigotry. If the max-

ims of this fool," etc. On the other occasion the preacher was dull, and Macaulay says: "I withdrew my attention and read the Epistle to the Romans. I was much struck by the eloquence and force of some passages. * * * I know of few things finer than the end of the first chapter and the 'who shall separate us from the love of Christ!'" We do not pause to inquire when and where he knew the finer things, however few, having been in turn much struck by the deference he so loftily pays to "the eloquence and force of some passages." We recall nothing so exquisitely complaisant in Hume or Gibbon, and confess that no such generous criticism could have been conceived or perpetrated by Rufus Choate.

A sensible man always respects the delicacy of the situation in which he may be placed, quiets a difficulty, and smooths over an impertinence. Mr. Choate was so fortunate in observing the "due temperance" that his life never rose to the dignity of a single quarrel; yet his patience was often severely tried in the courts, in the Senate and in popular assemblies. But it may be well to observe how easily Macaulay could get up trouble by evading or answering a single question. At a public meeting an elector in the crowd asked what his religious creed was. Macaulay cried out: "Let that man stand up where I can see him." It was a Methodist preacher. They hoisted him up on a form, and Macaulay, inveighing against bigotry, poured out a torrent of reproaches, and finally declared: "Gentlemen, I am a Christian." The poor preacher, about to be roughly handled by the fellows near him, slid down and crept away. The crowd cheered, perhaps because of Macaulay's virtuous indignation, perhaps because of the vital discovery that had been made. We think Mr. Choate would have answered such a question without heat or irritation.

At an early day Macaulay was admonished to improve his temper. Later, Disraeli said, "He must get rid of his rabidity." Sydney Smith told him that his "great danger was that of taking a tone of too much asperity and contempt in controversy." As we are contrasting him with one who never needed such advice, who never had a revenge to gratify, or an enemy to pursue, the flower and fruit of that rabidity, asperity and contempt, as shown in Macaulay's treatment of others, deserve notice. We do not pause to ask whether the studied denunciation of Mr. Croker or of Robert

Montgomery, in a dozen pages or so, had or had not some justice to qualify the apparent malignity. All that could be allowed to pass as belonging to, even if not dignifying, criticism: but not until Mr. Trevelyan had unrolled the record for inspection did we know that Macaulay could go so far beyond the office of the critic as to treasure up bitter personal animosities, and that, writing in quiet hours, he could illustrate that evil temper by unbecoming words. He calls Croker, then in Parliament, a "varlet;" says, "I detest him more than cold boiled veal." We also learn that Montgomery, finding the article denouncing him republished and hawked about, the bitter cup ever held to his lip, was in great distress, wrote again and again to Macaulay and his publisher, asking "to be let out of the pillory," and that Macauley put on the record, "Never with my consent." But while we turn with repugnance from much that he wrote of Lord Brougham, we quote a few words. Macaulay says of him: "He has outlived his power to injure." Again: "Strange fellow! His powers gone; his spirit immortal; a dead nettle." The grounds of his hatred of that great man were trivial, such as most persons would have passed over in silence. We are told by Macaulay that Lord Brougham thought that the seat given to him in Parliament should have been given to another; that Brougham professed not to have read the Essays; had not complimented him on his speeches when others had done so, and that he aspired to too much control over the *Edinburgh Review*. Thus Macaulay states his grievances—distempered dreams, and rejoices over Brougham's supposed mental as well as political decline, although Brougham had been the friend of Macaulay's father, and had favored his projects. How much more graceful and becoming if Macaulay had been silent, or had treated Brougham with something of the respect Choate always manifested for Daniel Webster!

In speaking of Choate, Mr. Charles G. Loring said: "He rarely permitted himself to indulge in personalities, and never in those of an offensive and degrading nature." Mr. Richard H. Dana, Jr., said: "Who ever heard from him an unkind word?" And Professor Brown says: "He never spoke ill of the absent, nor would suffer others to do so in his presence." We contract with such concurrent testimony what Macaulay deliberately wrote of other members of Parliament. In a letter to Ellis, as to the close vote on a

reform bill, he says: "And the jaw of Peel fell; and the face of Twiss was as the face of a damned soul; and Herries looked like Judas taking his necktie off for the last operation."

Since Lord Coke announced that two leaks would drown any ship, we have learned that the same principle admits of extended application; that a single flaw will spoil a mirror, too much alloy the largest coin in the realm, and that a spirit of rabidity and asperity, having been cherished in the heart, other evil spirits will enter in and take possession. We must confess, however, that we always regarded Macaulay hopefully until we began to read his letters, diary and journal, and from thenceforth felt great concern as to his taste, style and manners.

In a letter to his sister, Macaulay mentions his introduction to Lady Holland, and her gracious invitation to Holland House. In other letters he often refers to his visits there after this fashion: "I dined yesterday at Holland House; all lords except myself." He met there many distinguished persons; for the first time heard Talleyrand, then famous, talk and tell stories. The reader of the "Life of Sydney Smith," by his danghter, will recall his estimate of the honor conferred upon him when, young and poor, he was received into that society, and of the kindness shown to him by Lord and Lady Holland—a grateful and beautiful picture. As the doors of Holland House were thrown open widely to Macaulay, and as he was treated by Lord and Lady Holland as a son might have been, that sovereign courtesy would have been sufficient to inspire in one fit to be introduced a grateful respect, a decent degree of reticence. But what record does Macaulay leave? The little household flurries are depicted; the unguarded chat and prattle of the most gracious hostess that ever smiled a welcome to her guests are given; her freaks, fears, superstitions, lamentations and "her tantrums" are described, even to the extent of saying that she was hysterical about Macaulay's going to India, and had to be soothed by Lord Holland. No zealous attorney was ever more faithful in getting up a bill of particulars.

Macaulay's sorrow for the dead and dying dignifies a pathetic letter to his sister. Thus he writes: "Poor Scott is gone, and I cannot be sorry for it. A powerful mind in ruins is the most heart-breaking thing which it is possible to conceive. Ferdinand of Spain is gone, too; and I fear old Mr. Stephen is going fast. I am safe for Leeds. Poor Hyde Villiers is very ill."

How considerate the transition from the want of hope for others to his own flushing hope in the coming election! Through the dark shadows the light breaks in so naturally—don't fret, sister—"I am safe for Leeds."

Mr. Choate read with discrimination the authors of his day. Mr. Trevelyan says: "Macaulay had a very slight acquaintance with the words of some among the best writers of his own generation." But his reading seems to have been incessant, fragmentary and capricious. He says: "I walked the heath in glorious weather and read the Mysteries of Paris. Sue has quite put poor Plato's nose out of joint." Again he says: "Read 'Northanger Abbey;' worth all Dickens and Pliny together. Yet it was the work of a girl. She was certainly not more than twenty-six. Wonderful creature! Finished Pliny. Capital fellow, Trajan, and deserving of a better panegyric." Most scholars have been satisfied with the picture drawn of the Emperor. Choate commended Pliny as "one who seldom colored too highly."

Mr. Choate was never severe as a critic: his dissatisfaction was always expressed in becoming terms. Mr. Macaulay's criticisms, as we now have them, were often crude, mere freaks of fancy, rashly and rudely stated. Thus he says: "Looked in the 'Life of Hugh Blair'—a stupid book, by a stupid man, about a stupid man." Blair was not a great man, but he was always, and especially in his style, respectable. His first volume of Sermons was published on the advice of Doctor Johnson. Macaulay refers to two of Gibbon's critics thus. "That stupid beast, Joseph Milner." "But Whitaker was as dirty a cur as I remember." That may excite surprise, as Macaulay remembered so many curs. He puts down some men as beasts, several as asses, others as curs. The association brings to mind what Coleridge said of Burke in his public character, to-wit: "that he found himself as it were in Noah's ark with a very few men and a great many beasts." But neither of those critics was stupid. Mr. Choate thought somewhat well of Milner, and we turn poor Whitaker over to Mr. Charles Butler, a lawyer, a great controversialist, one who always wrote as became a gentleman. He says: "Dr Whitaker's criticism of his (Gibbon's) history is rough, but powerful."

We do not pause to illustrate Macaulay's egotism and vanity? the proofs cropping out in many pages of his letters and diary would be

burdensome. As compared with Macaulay's self laudations—from the "My speech has sent me in the front rank," on down to the "How white poor Peel looked while I was speaking," and to the two damsels who, having paid their shilling to see the Hippopotamus, abandoned the show to get a look at Macaulay. Mr. Choate's record would seem to be poor indeed. Not a shade of egotism, or vanity, was ever imputed to him. Nor need we, after our quotations from Macaulay, enforce our conviction that his style, unlike the style of Mr. Choate, had caught no grace from Grecian studies, no strength from Biblical reading.

The spirit of grace and courtesy which indicates social and literary refinement, in a man not morbidly selfish, shines forth in his words, spoken or written, and in his enforced intercourse with decent strangers. Mr. Macaulay has given us some evidence of the amenity of his manners, when he was approached respectfully by persons wishing to do him honor. He says: "What odd things happen! Two gentlemen or at least two men in good coats and hats, overtook me as I was strolling through one of the meadows close by the river. One of them stared at me, touched his hat and said: 'Mr. Macaulay, I believe.' I admitted the truth of the imputation. So the fellow went on: 'I suppose, sir,' " etc. But he soon got rid of the fellow. Macaulay was at Rome, and says: "Yesterday, as I was looking at some superb portraits by Raphael and Titian, a Yankee clergyman introduced himself to me; told me that he had heard who I was; 'that he begged to thank me for my writings in the name of his countrymen.' * * I bowed, thanked him, and stole away, leaving the Grand Duke's pictures a great deal sooner than I had intended." In contrast with these exhibitions, the statement of the Rev. Dr. Adams may be cited. He said that Mr. Choate "treated every man as though he were a gentleman, and he treated every gentlemen almost as he would a lady."

The poverty which often attaches to biographies qualifies in some aspects these works of Professor Brown and Mr. Trevelyan. That was unavoidable. It is quite apparent that no one could fathom the mystery of Mr. Choate's genius, or state its precise character. His friends could only wonder and admire—seek to measure its power in the intellectual performance. Mr. Macaulay had, from first to last, been so silent in respect to a matter of the most vital concern, that his nearest friends could make no discovery, his biographer no revelation.

But no one who had considered Macaulay in his works previously published, and who now considers him in his other writings, will doubt the uses of biography. If one who is supposed to give tone to society has an artificial voice full of melody when abroad, a natural voice full of discord when at home, that should be known. If an author who has beguiled us into a high estimate of his merits appeared as a poet in prose as well as in verse, his words and sentences polished and full of measured sweetness—"a burnished fly in the pride of May," was in reality weak in tone and sentiment, bitter and unforgiving, ungrateful for social service and distinction, often rude in manners, and, as a writer, in his natural, every-day style, was diffuse and ungraceful, if not rough, all that should also be known. If such a character appears in its true light, taken in connection with one whose life, open as the day, was a perpetual benediction, full of beneficent influences, inciting to every thing that was just, loyal, noble in sentiment, beautiful in speech, uniform and exemplary in conduct, we may well be thankful that biographies could be written. J. N.

(TO BE CONTINUED.)

NOTE.—Several distinguished members of the learned professions have, at my request, kindly sent me valuable statements of their intercourse with and knowledge of Mr. Choate; and others have promised to send me their views. What I have received and may yet receive will be given as notes to subsequent articles.

J. N.

AGENCY—DUTIES OF AGENT—DIGEST OF RULES.

The principles that should regulate the conduct of each and every agent in the performance of his duty, whatever may be the nature of his agency, are capable of being grouped under a few heads. In other words, there exists a number of general principles common to the whole law of agency so far as it relates to the duties of agents in executing their authority, principles to which may be traced back all those apparently independent rules peculiar to the vast variety of forms in which the contract of agency may exist. The rules,

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RUFUS CHOATE.—II.*

THE first few years of Mr. Choate's professional life were spent at Danvers. While residing there, he married; an alliance which gave grace and dignity to his social life. He was chosen as a member of the legislature, also of the State senate, and was thus brought into near relations with leading men of the Commonwealth, some of whom became his life long friends. In 1828 he removed to Salem. There further political honors came to him. He was elected to Congress, and, having served a term, was re-elected, but at the close of the first session he resigned and soon thereafter settled in Boston. He had then acquired great repute as an advocate. But, although his profound knowledge of the law, and his command of all that gave power and beauty to illustrations of it, had been tested at Salem, where there was a strong bar, yet he may have felt some misgivings as to the competition that awaited him in his future labors. The field chosen was occupied by lawyers who, in learning and eloquence, in experience, judgment, and dignity of character, would have compared favorably with the members of the profession in any city in the world. Among such men Mr. Choate became the architect of his own fortune; by the studies and contentions of a few years, won his

*This article which we copy from the *Albany Law Journal*, is from the pen of Judge NEILSON, of Brooklyn.

way to the highest and best assured professional renown. The gifts and acquisitions, the zeal, energy and perseverance necessary to secure that distinction must have been extraordinary. The highest proofs of merit are found in the nature of the achievement, and in the fact that the members of the bar loved him, proved that love by brotherly attentions while he lived, by the eloquence of sorrow when he died.

Mr. Choate was a man of decided convictions, and upon questions of public interest had expressed those convictions without disguise or reservation. He thus subjected himself to occasional criticisms. But while those criticisms may have given his friends little concern, three, and as we believe, only three, uncharitable suggestions made to his prejudice have attained such factitious importance as to be still referred to without dissent by sensible men.

From their first appearance as opposing counsel, comparisons were made between Daniel Webster and Rufus Choate, as if their relative merits as lawyers and advocates could be thus determined. But those men were so unlike in genius and style, as to render any such estimate delusive. Moreover, the comparison was unjust. When Mr. Choate came to Boston, Mr. Webster stood on vantage ground. It was not merely that he had had great experience, and was even enjoying the fame of his triumph in the Dartmouth College case, before Mr. Choate took up the study of the law, but that by a series of signal and impressive services, ministering in turn to the interests, the pride, and the honor of the people, he had won their love and confidence, became invested with a degree of weight and authority which no member of the bar, as such, could have secured. The glamor of his greatness would impress the average juryman; in the forensic tournament he was doubly armed, whether his quarrel was just or not. Mr. Choate had no such adventitious claims to attention; was clad in no armor but such as industry, learning and eloquence could supply. He led no one to regard him as the rival of Mr. Webster; his taste would have been offended by the mere suggestion of such rivalry. His estimate of Mr. Webster's powers was too generous for qualification. In the like

spirit Mr. Webster often spoke of Mr. Choate's learning and eloquence. Indeed, it may be doubted whether he ever went into a trial or an argument in opposition to Choate without being conscious that he was meeting an athlete whose dexterity and strength were quite equal to his own. Enough is known of their causes to justify the belief that none of them were lost or won because Mr. Webster or Mr. Choate had failed to make an adequate presentation of his case to the jury, or to bring to the attention of the court the law applicable, in whatever form or domain of jurisprudence that law might have been discoverable. The critic who assumes to doubt the capacity or learning of either of them would do well to find some instance of such failure.

Most young lawyers of shining parts have had occasion to undertake the defense of criminal cases. Such service may have been accepted as a source of income or as the most direct approach to popular notice and favor. While at Danvers and at Salem Mr. Choate had often acted as counsel for the accused. It is said that no one defended by him was convicted. The like fortune, to a great extent, attended his subsequent labors. In important cases, notwithstanding strong indications of guilt, his clients were acquitted. Such instances gave rise to the popular impression that his powers of persuasion could lead jurymen to sympathize with and shield the guilty. Some laymen were shocked on learning that new shades of mental delusion had been suggested; others,—as if one who, while walking in his sleep, kills another, should be punished,—objected to the defense of somnambulism interposed for the benefit of Tirrell. There were two indictments against Tirrell, one for murder, the other for arson, and both depending on circumstantial evidence. The verdicts were not obtained against any specific rulings or instructions of the court. Indeed, Chief Justice Shaw, in his charge to the jury in one of the cases, strongly discredited some of the witnesses for the prosecution. Those cases excited as much effeminate criticism as any other in which Mr. Choate was supposed to have had undue influence with the jury—his supremacy proved by the sneers of the critic—but it is believed that the general sense of the profession was satisfied with the acquittal of Tirrell.

Mr. Choate was not less sought for or successful in civil causes. But his brilliant defenses in the other department of the law had excited more attention, and finally led to the imposition of a title which represented the least important part of his labors—that of "The Great Criminal Lawyer." With those not ignorant of legal and forensic history that title implied no disparagement, certainly, none that would not have been equally due to advocates of historic renown, ever to be held in reverence, who, after counsel could be heard for the accused in state trials in England, devoted their skill to the protection of life and liberty.

During the later years of his practice, the burden of defending criminal cases was distasteful to Mr. Choate, became, indeed, intolerable, as injurious to his health. He came from crowded court rooms, after hours of intense excitement, utterly exhausted. He may have been conscious that his sympathies were not always under his control, and that in the fervor of discussion, he was liable to be carried beyond the line of logical argument which his deliberate judgment approved. It is believed that he had no other or further cause for regret. No one has suggested that he had practiced any artifice or evasion to enable the guilty to escape. It would seem, therefore, that the eulogist of Daniel O'Connell, another great criminal lawyer, could have had the sympathy only of political allies when he referred to Rufus Choate as the man "who made it safe to murder; and of whose health thieves asked before they began to steal."

If Mr. Phillips knew anything of the matter implied in that aspersion, he may have known little of the merits of the cases in which Mr. Choate had been engaged. He knew even less of the spirit which had led Mr. Choate to assert the rights of persons charged with crimes of which they might have been innocent. To no one was the law, in its pure, inflexible, benign administration, more dear than to Rufus Choate. His letters and speeches prove that devotion. To no one could the feeble presentation of a case, half giving it away, have been more offensive. That is shown by his own method—from first to last, he did his work with all his might—and sufficiently proved by an entry in his journal as to a

trial he had witnessed at the Old Bailey; that of Pate, charged with striking the Queen. Mr. Choate says: "The prisoner's counsel, in my judgment, gave up his case by conceding; 'he feared he should fail.' I thought and believed he might have saved him." It is apparent that he should have saved him, as "all seemed to admit that the prisoner was so far insane as to make whipping improper, yet that he was not so insane as not to be guilty." No counsel could thus impair the rights of the accused without being guilty of a moral offense deserving the severest reprobation. In such a case it would be wiser, more just and humane, to err, if at all, by an excess of zeal, than from the want of it.

The fact that, as occasions required, Mr. Choate did defend criminal cases, is to be accepted with grateful pride. It illustrates not merely a spirit of self-sacrifice, the sympathy which led him to consider those in sore, perhaps undeserved, distress, but the keen sense he had of his duty as an advocate. He did not, it would seem, accept the notion of Cicero, that where life was at stake, it was more honorable to defend than to prosecute. He had regard for the wants of the State, as well as for those of the citizen. In one of the few prosecutions in which Mr. Webster acted for the people, that against Knapp, charged with aiding and abetting in the murder of White, Choate was associated as counsel with him. It was twenty-three years later that Mr. Choate, then in the height of his fame, accepted the office of the Attorney-General of Massachusetts. The relation of the advocate, whether to the State or to the citizen, had long ere that become so important that a man of the finest sensibilities and of the loftiest ambition might have been proud to accept it. His duties defined, his aid recognized as needful in the administration of justice, he rose to the full and proper measure of his usefulness when he could be heard as one speaking with authority, for the accused, whatever the degree of crime imputed. In this new relation, the character of the public prosecutor underwent a transformation. A humane temper took the place of the old violence. Perfidy and cruelty gradually went out of fashion. Neither in England nor with us, could one like Mr. Solicitor

General Rich gain a triumph by plotting and perjury, as in the case of Sir Thomas Moore; nor, after the manner of Mr. Attorney-General Coke, secure a conviction by false and bitter denunciation as in the case of Sir Walter Raleigh. Concurrently with such and other improvements, helpful to the administration of justice, the severity of the criminal laws in England was relaxed. The work was retarded during many fretful years. While men like Lord Eldon and Lord Ellenborough were resisting and defeating the efforts of Sir Samuel Romilly to abolish the death penalty for shop-lifting to the value of five shillings, juries, moved by the monstrous severity of the punishment, were defeating the law by falsely undervaluing the stolen property. The demoralization was very great. Many statesmen were slow in discovering that humane as well as just laws have a healthy influence on the public mind. The tenacity and bitterness with which they resisted reforms would justify a reproach like that cast on Lord Chancellor Hardwick by Henry Fox: "Touch but a cobweb in Westminster Hall, and the old spider of the law is out upon you with all his vermin at his heels." It may be said, generally, that not until after those reforms, after the judges had ceased to hold office during the mere pleasure of the crown, after jurors were relieved from the coercion of apprehended fine and imprisonment, did the administration of justice assume its present character. Before those beneficent reforms, an occasional acquittal of one whom the minister of State or the judge at his bidding, wished to destroy, excited popular surprise and official indignation. Between the reign of James II and that of William III, between the administration of Chief Justice Jeffreys and that of Sir John Holt, there lies a great gulf; beyond that, judicial murders; this side of it, a reasonable certainty of unperverted justice.

That the services of counsel were necessary on important trials, was confessed at an early day in England. The crown always called in the ablest lawyers to represent it in the courts, even when the accused were denied such aid. If, in those days, the English bar had been equal to that of later times, the lawyers as devoted, intrepid, independent, the same love of justice and the same power

to demand it, many innocent lives would have been saved. Would not cruel judges have been held in restraint; timid jurors have been inspired with courage? Mr. Scarlett, afterwards Lord Abinger, declared in parliament that he had often seen persons he thought innocent, convicted for want of some acute and intelligent counsel to show the bearings of the different circumstances on the conduct and situation of the prisoner. Expressions of a like import abound in the debates and in legal biography. But the crowning proofs appear in the facts that the right to speak by counsel came in as a national reform; and that our courts now appoint such counsel where the prisoner has none.

The popular fallacy which imputes to lawyers, as if derogatory, a willingness to defend the guilty, had been sufficiently exposed by Dr. Johnson and other moralists. Erskine, in terms and by his example, denied the right of counsel to withhold his services. But there are many cases of apparent guilt which may be justly defended, as, for instance, where the crime, murder or arson, has different degrees of enormity and of punishment; or where the indictment is for libel or assault and battery, the offense more or less modified in character. It is to be confessed, however, that, even with our improved methods of discovering the truth, and humane administration of the law, mistakes are committed. Instances have occurred in which counsel of skill could not unravel the complicated circumstances, and the innocent have been condemned to die. Now and then, in the light of newly-discovered evidence, we find that men have been unjustly consigned to the States-prison. After they may have suffered the bitterness of death for years, we open the doors, with a humiliation scarcely less than that which had been imposed upon them. We are thus admonished to improve our methods and to be more patient in determining the rights of our fellow men.

The third of the uncharitable suggestions from which Mr. Choate suffered some prejudice may be dismissed with a few words. He was, from his studies and convictions, conservative. He had a profound recognition of the sacred character of organic laws. He saw that slavery was a State institution, under the control of and to

be abolished only by the States where it existed; and that Congress had no power to touch the question. He deprecated our feverish and fruitless discussions as to the duties of the Southern States, our attempts to regulate, as a matter of sentiment, an evil we could not cure. This drew upon him the reproaches of a party which claimed to represent the spirit of higher and more humane laws than those which had been, or by our instrumentality could have been, enacted. Yet it could not well be suggested, that the man who is now loyal to the Constitution and to our laws, is entitled to more respect than was then due to Mr. Choate who had cherished a like spirit.

Mr. Choate exulted over the abolition of slavery in the District of Columbia, and was opposed to the annexation of Texas. Were he living, no voice would take up the song of gratitude and praise more fervently than his, now that slavery is no more. But he would perceive that his old adversaries in debate had been as powerless, finally, as in their first contention; that slavery had not been abolished by or through them; that the convulsions which had so shaken the land that its granite foundations seem to be quivering still, had been divinely ordered.

For a specimen of eccentricity, a testator residing in Bellingham, Mass., takes the lead. The will gives her the use of a certain portion of the house he owned in Bellingham, with the use of front garden in common with others; also the use and improvement of one stall in the barn together with storage for hay during her widowhood; four cords of wood to be consumed during her widowhood; said wood to be cut off a lot near the house; the use of the kitchen furniture and cooking stove, and one seat in a pew on the lower floor of the Second Congregational Church of Medway, on condition of her paying one-fourth of the tax assessed on said pew from year to year, also to pay all the taxes that may be assessed on the real estate. Each bequest contans the proviso, "as long as she remains a widow."

The Western Jurist.

APRIL, 1877.

JUDICIAL SALE: BONA FIDE PURCHASER.

IN IOWA, *can a plaintiff in a judgment from which an appeal has been taken without supercedeas, become a "bona fide purchaser" of the property of the judgment defendant, pending the appeal, so as to hold the title thereto, in case the judgment shall be subsequently reversed?*

Upon this question in Iowa, there was an early statute, as follows (being Code of 1851, section 1993):

"Property acquired by a *bona fide* purchaser, under a judgment subsequently reversed, shall not be affected by such reversal."

The same statute was re-enacted by section 3541 of the Revision.

I think it may be accepted without question, that this statute is but declarative of the well settled common law principle and rule. The particular question of interest arising is, whether the plaintiff is such "*bona fide* purchaser."

It was formerly doubted whether a plaintiff in a judgment, who should purchase land thereunder at execution sale, would take it discharged of every claim of title, whether arising on an unregistered deed, or other mere equity. The authorities on this question, on both sides of it, were collated and stated in *Parker v. Pierce*, XVI Iowa, 227. The question also occurred again shortly thereafter, in *Vannice v. Bergen*, XVI Iowa, 556, and the authorities were collated and stated very fully by Mr. Justice Dillon,

he maintaining that the purchaser at a sheriff's sale, under such circumstances, would take the land discharged of every claim or title, whether arising under an unregistered deed, or a mere equity of which he had no notice at the time of its purchase, and which would be invalid against an ordinary purchaser. And he also held that the rule applies equally when the judgment creditor is the purchaser, as when the purchase is made by a stranger.

And in *Vance v. McGlasson*, XVIII Iowa, 152, the court united in holding the view as above expressed by Mr. Justice Dillon, but held that the rule might be modified in cases where there were equities of so strong and persuasive a nature as justly to prevent its application.

The same doctrine was also followed and affirmed in *Holloway v. Platner*, XX Iowa, 121, and in *Gower v. Doheney et al.*, XXXIII Iowa, 36, the same doctrine was affirmed, after a review of all the previous authorities.

These cases, therefore, abundantly settle the proposition that in respect to *bona fides*, the plaintiff in the execution stands in no other or different position than a stranger to the record.

It might be deduced by reason and fair logic, that if the plaintiff could, under such circumstances, be a *bona fide* purchaser, and stand as any other third person, a stranger to the record, that thereby was established the legal proposition, that in every case he was a *bona fide* purchaser, chargeable only with matters of which he should have express notice, and then only as any other third person would be charged.

But the precise question above stated was practically decided more or less in conflict with the principles of the cases above cited, in *Twogood v. Franklin et al.*, XVII Iowa, 239; for there it was held "that a purchase of land at a sheriff's sale by the plaintiff in execution, or his attorney, with actual knowledge of a pending appeal, is at the peril of the purchaser, and the party or his attorney thus buying, is not, within the meaning of the statute "a *bona fide* purchaser."

But that was a case of peculiar hardship, and the case might have been rested upon its special facts, just as well as upon

the announcement of that principle. And it is submitted, that in the late case of *Frazier v. Crafts*, XL Iowa, 110, the doctrine of *Twogood v. Franklin*, is very seriously shaken, if not entirely overruled; for there Crafts, who was judgment plaintiff, became the purchaser of a farm under an execution upon his own judgment, which judgment was afterward reversed, and in a controversy thereafter arising, and after Crafts had obtained another judgment for the same amount as his first judgment, it was held that his title acquired under the sale by execution upon his first judgment, was a good and valid title, and that he was in fact a *bona fide* purchaser at such sale. The case of *Twogood v. Franklin*, is reviewed, and while it is not expressly overruled, yet the two cases are inconsistent, although the judgment in *Frazier v. Crafts*, purports to be rested largely upon the fact that the appeal from the first judgment was not taken until *after* the sale. But it occurs to us upon principle, that whether the appeal was taken before or after the sale can make no difference, since the right of appeal exists in either case, and the purchaser must have knowledge of that right, and that it may be exercised within a limited time.

And it is further submitted that since the right of appeal without supercedeas is a right correlative with the plaintiff's right to enforce the judgment by execution sale, that each party must be charged with the known legal rights of the other; and that whether the appeal is taken or not, the purchaser must be charged with knowledge of the *right* to an appeal, and if, in the exercise of that right the judgment is subsequently reversed, his title under the purchase could not be any better, whether it was acquired before or after the exercise of the right.

Very plainly, it seems, therefore, it is the duty of the appellant to execute his supercedeas and prevent the sale of his property, or he will be subject to all the consequences that may follow from a sale thereof pending his appeal, and whether the sale is made to a third person, or to the plaintiff in execution, can make no difference to such judgment debtor, nor can the fact of the pendency of the appeal destroy the *bona fides* of *any* purchaser.

The statute, as well as the common law, of which it is declara-

tive, clearly recognizes the fact that there may be a *bona fide* purchaser pending an appeal. The decisions of our Iowa Supreme Court have established the fact that a plaintiff in a judgment is just as much a *bona fide* purchaser as any other third person. This doctrine has been re-affirmed in the late case of *Cooley v. Wilson*, XLII Iowa, 425. See, also, *Butterfield v. Walsh*, XXXVI Iowa, 534.

RUFUS CHOATE.—III.*

A DISCRIMINATING critic, as happy in delineating character as he is modest in his claim to describe it, says: "To give a strict analysis of a mind so complex, various and richly gifted as that of Mr. Choate, we feel to be a difficult and delicate task."† That has been the view of writers generally. If the lessons taught by each incident, resolve, expression, service and sacrifice could be combined in their proper relations, weighed as in a balance, interpreted, an approximation to such an analysis might possibly be made. But, even then, the problem as to the powers of mind which made specific achievements possible, might remain unsolved.

The seemingly alien qualities of Mr. Choate's nature were strongly marked. We find him gentle, yet exigent; simple, yet subtle; natural, yet artistic; poetic in conception and tone, but logicial in arrangment and inference, and are often startled by unexpected revelations. The range of his studies and services had a corresponding scope and variety. With those who knew him intimately, his influence was healthy and inspiring. To those who carefully study the incidents described by his friends, his writings, his lectures, speeches, arguments, the influence of his precepts and of his cheerful spirit may be equally salutary. With such aids he may be regarded as his own interpreter.

The outside public, having no such advantage of personal inter-

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*This article which we copy from the *Albany Law Journal*, is from the pen of Judge NEILSON, of Brooklyn.

†Whipple's Essays and Reviews," vol. 2, p. 139.

course or study, adopted an erroneous view of Mr. Choate's characteristics. To that Mr. Choate had casually and unconsciously contributed. He was so happy in his retorts that an adversary seldom gained any thing by an interruption. But the reports of these retorts (and they were sure to be reported) were bereft of the grace and courtesy which had charmed even his opponents. His witticisms in court had their conception and birth at the same moment, had strict relation to the exciting cause, and, unlike Sheridan's best things, were free from the tincture of malicious preparation. Mr. Choate occasionally used an expression so whimsical as to convulse the court. It was caught up and passed from one to another as current coin. The more grotesque the utterance, the better for the gossips, the more certain to give the public exaggerated notions of his method and style. Yet it was well to expose a fallacy by some incisive word, an epithet or epigram, when that could be done effectively. It saved time and made the error significant. So too, when a State line was proposed, with landmarks of an unstable character—a couple of stones by a pond, and a buttonwood sapling in a village — it may have been pertinment to say that "the commissioners might as well have defined it as starting from a blue-jay, thence to a swarm of bees in hiving time, and thence to five hundred foxes with firebrands tied to their tails." But the people remembered that, repeat it in various forms still; while of the argument made by Mr. Choate on that occasion, however valuable, they remember nothing. The suggestions of some critics have had a like influence. Thus it has been said by one entitled to great respect, that "Choate's first appearance at the bar was a signal for much laughter and ridicule," and by another that "he had to create a taste for his peculiar style." His first appearance before Chief-Justice Shaw would seem to have been exceptional. We learn from Professor Brown that the Chief-Justice said: "I had an opportunity to see Mr. Choate, and witness his powers as an advocate, very early, when he first opened an office in Danvers, and when I had scarcely heard his name mentioned. * * * * As he was previously unknown to us by reputation, and regarding him as we did, as a young lawyer just commencing practice in a

country town, we were much, and very agreeably surprised at the display of his powers. It appeared to me that he then manifested much of that keen legal discrimination, of the acuteness, skill, and comprehensive view of the requirements of his case, in the examination of witnesses, and that clearness and force in presenting questions both of fact and law, by which he was so much distinguished in his subsequent brilliant professional career." But, to help the people to a clearer notion of Mr. Choate's mode of argument, a member of the Boston bar tells them in book form, cheap reading for the million, that Mr. Choate "advanced with a diversified, but long array which covered the heavens, thunderbolts volleying, auroras playing, and sunlight, starlight and gaslight shooting across the scene in meteoric radiance." As this was understood, and had its influence, it may be assumed that the Boston court-house was kept insured against loss and damage by fire. But we recall, with equal satisfaction an elaborate article in a New England paper, the writer, in an analysis of Mr. Choate's mind, comparing it to a landscape where nature, playing odd freaks, presented things, simple, complex, rough, beautiful, sublime, in weird relations—a fit place, as he thought, for witches to hold their revels in. That writer impressed us, at the time, as a substantial sort of person, with an imagination a little touched by a sense of real property, and of Swedenborg's laws of symbolism, but, having a liking for him still, we would help him to a different interpretation. We prolong the study of the landscape, and seek to enter into communion with the spirit of the place. May it not be that the distant hills, the less distant forests, reposing in their majesty, the nearer table land broken into elevations, shooting up to meet a purer air and diviner light, are fit emblem of great thoughts and aspirations, of principles which shall never die? May it not also be that the lesser objects—the noisy cascade, the entangled vines encroaching upon the barren heath, the flowers tropical in bloom, the great bowlders which may have reposed in the bosom of mountain glaciers beyond the seas, were intended to modify the rugged sublimity of the scene, if not to inspire gentle thoughts? We may, indeed, be troubled and perplexed, but shall not a sense of the mystic beauty and in-

congruity which beguiles us, remain as a pleasant memory? The taste which it is said Mr. Choate had to create for his peculiar style, must have been of sudden growth. His first juries understood him—his early trials, triumphs—and the people when he appeared before great assemblies, a stranger, hung upon his words with breathless interest. He was master of the pathetic in oral discourse, and by that the world has been moved. He always adapted himself to the occasion, and went to the marrow of the business in hand. Professor Brown mentions the favorable manner in which his first speeches in Congress and in the Senate were received. Thus, Benjamin Hardin, member of Congress from Kentucky, indisposed to hear others upon the same side of a question he intended to discuss, was about to leave as Mr. Choate rose to speak, but having lingered a moment, and noticed the tone of his voice, he was constrained to stay, and said: "I was captivated by the power of his eloquence, and found myself wholly unable to move until the last words of his beautiful speech had been uttered." So a western member said: "He was the most persuasive speaker I ever heard." After hearing Mr. Choate in the Senate, James Buchanan, in his reply, said: "It is the first appearance of the Senator in debate here, and, judging of others by myself, I must say that those who have listened to him once will be anxious to hear him again." He was first heard before the Supreme Court at Washington in a case as to the boundary between Masachusetts and Rhode Island. Mr. Webster was with him; Randolph and Whipple opposed. Mr. Choate's argument is said to have "made a strong impression upon all the judges." Judge Catron said: "I have heard the most eminent advocates, but he surpasses them all."

Mr. Choate was a genius, so they all declare, and that fact was sufficient to quicken the distrust of the more sedate critic. Each one, with "a little hatchet," claimed the inalienable right to hew his little hewing, and have his little hack on Choate's supposed peculiarities. They discover that he was a man of words, whereas he was a man of ideas fitly represented by his words; that his style is florid — his style is clear and unconstrained, effective in its simplicity. Those who think that prose should have no alliance with

poetry, forget that a poetic spirit enters into the incipient growth of languages, the prattle of children, the eloquence of savage tribes; forget that the beauty which sparkles and flushes over the natural world, was intended to give tone and color to the world of thought, the outer glory to become an inner experience; forget that, as the diver brings up pearls from the ocean, so he who, uniting the wisdom of the past with the sagacity of the present, absorbs the power and grace of other languages to enrich his own, gives to old doctrines a modern aspect, and to later discoveries their best application, making the truth appear more truthful, is a benefactor of his age and people. Those who doubt this, who do not perceive that a spirit of poetry, of wit, of humor, may be helpful to culture in thought, language and style, and may be held in such subjection and mellow use, that we may recongnize the poet as such, though he construct no rhyme, the wit, though he excite tears rather than laughter, will consign Milton, Burke, Choate to the upper shelf.

We had intended to give more immediate attention to a distinctive class known as of the Gradgrind school. In inquiry and argument they always profess to go down to what they call the hard-pan. For aught we know the mole does that, and without being the wiser for it. But they insist upon the facts; will be content with nothing less. We commend Mr. Choate to them as having been a high priest of their order, the most relentless inquisitor after the facts. He would know what, in fact, had been the rulings in the Year Books, and by judges of later times; the facts as to the dates and modifications of statutes; the facts stated in the pleadings of a cause; and on a trial he was so pertinacious to get at the facts that witnesses who began to testify with certain mental reservations, were led, as by gentle compulsion, to make full and circumstantial disclosures. It must be confessed, however, that the facts, as discovered by Mr. Gradgrind, may have been dry, inert and wanting in relation; as used by Mr. Chote, may have seemed essential to the exposition, as of vital force, instinct with demonstration.

It has often been regretted that many of the important cases in which Mr. Choate had been concerned as counsel were not reported. Of some of them we have fragments; of others a few

words of description. Professor Brown was not able to find even a fragment of Mr. Choate's argument as to which we have cited Judge Catron's commendation, It is some alleviation of this poverty that what is commonly known as the "Methodist Church Property case," was fully reported, including the arguments of counsel. We are indebted to the Hon. Enoch L. Fancher for a copy of the book. We turn the pages with conflicting emotions —pleasure in recalling what interested and impressed us so many years ago; sadness in calling what the country and the profession have since lost. On that trial Judges Nelson and Betts presided, and Rufus Choate, Daniel Lord, George Wood and Reverdy Johnson were of counsel, not one of whom is now living. Mr. Fancher was also of counsel for the Northern party, so-called. Mr. Choate and Mr. Wood associated with him.

The complainants by their bill sought to have the property of the Methodist Episcopal Church, known as the "Book Concern", and amounting to about $750,000, divided between the Southern and Northern parties, according to an alleged plan of separation. The property had been obtained by the publication and sale of religious books, supplying the wants of the Methodist in the States and Territories, the traveling preachers acting as agents in the sales. The profits were applicable to the support of the preachers, their families, widows and orphans. The publishing business had been commenced in Philadelphia, but in 1836 it was removed to the city of New York.

The existence of slavery in the Southern States, an important field of labor, had disturbed the councils of the church. The grievances, so far as they took outward form, were referable to the disabilities imposed upon Mr. Harding and Bishop Andrew, as the owners of slaves, but the spirit of estrangement, working in deeper currents, and with increasing force, gathered such strength as to rend the church itself in twain. The complications tending to that result, and the result itself, had been deplored by many members of the church in the South as well as in the North. The defendants in the cause claimed to hold the property in contention, in trust for the extended charities for which they had originally received it, and,

denying the legality, necessity, wisdom and economy of the severance, looked hopefully to a restoration.

We do not propose to notice the historical events, or to consider the difficult and delicate questions involved in that litigation, but simply to call attention to Mr. Choate's argument regarding it as illustrative of his style. Those who read it closely and critically, having in mind the requisites of such a performance, and the approved forensic speeches that have been preserved for us, will be satisfied with the argument. Not only are the words fitly chosen, so combined as to give them special power and beauty, the sentences clear and compact, but the elements of the case take rank and order, fall into place as if answering some potent invocation. There is nothing constrained or artificial, nothing discordant to disturb the melody. Once, and only once, wrought up by his keen sense of the fallacy he is exposing, does he use a figure of speech which seems preposterous, but the fallacy, yelding to the treatment, assumes a like guise, and we cease to think of the incongruity. Then, too, the spirit of the cause takes entire possession of him; it seems that if the church is to suffer, he must suffer with it. He pleads for the grand old church as if planted to live, its comprehensive charities, pious, lowly service as destined to grow and scatter blessings indefinitely. He regards its separation "as the taking down of a structure built for immortality on earth." He refers to those who, notwithstanding the alleged demolition, had "come back to be taken again into the old fold of their fathers and mothers' baptism," and adds: "I say such Methodists as these might have been kept; and heavy, heavy is the responsibility which will allow such delicious and priceless affections as these to run to waste and water but a desert. Still heavier is the responsibility of him who puts out that Promethean fire which no hand may kindle."

But the real merit, the charm of the speech, lies in the quiet and less striking parts, so adapted, so perfect in their union, simplicity and service. That merit would not be made apparent by quoting isolated gems of expression, any more than would the grace, harmony, and repose of a beautifal countenance receive expression by the delineation of detached features.

RUFUS CHOATE.—IV.*

ALTHOUGH endowed with great intellectual powers, Mr. Choate was as careful, methodical, and solicitous in regard to mental helps as any student who might have been less conscious of innate strength. He would seem to have been mindful that the summit of excellence was to be approached by a road open to all; that those who could pass on easily and swiftly, and those less favored by nature, but of superior diligence, might finally reach the same destination. Thus, regarding genius as a mere capacity to acquire knowledge and to use it, he gave himself up to continuous toil.

Some perils attend students who possess great intellectual powers. From the hour when such a one first realizes how receptive he is to suggestions of truth and beauty, how readily the barriers which impede others yield to his touch, he is liable to become the victim of a delusive self confidence, and to accept the notion that the harmony and fruitfulness of his life will be of spontaneous growth. As he seems to apprehend the less occult relations of things by intuition, he regards close and prolonged study as unnecessary. So, content with some appearance of culture, he falls into easy ways, goes through life as the lounger saunters through the streets. He bears to true learning the relation which the slothful miner has to the mine as he gathers up the bits of precious metal exposed to view, without acting upon the hints nature has given of the wealth hidden below the surface. Another student, of like gifts, moves on earnestly, acquires knowledge, does some good work. Having found that what he should learn is easily attained, he assumes that there need be no end to his acquisitions. Like the student in Faust, he confers with the evil spirit, and is encouraged to inquire into mystieries too deep and profound for his apprehension. He takes to such studies, and thenceforth, swims not with the current, but against it. He is vain, superficial, weak in proprotion as he shakes off the influence of natural laws, the checks and hindrances designed to hold him in restraint, and which are as necessary for his safety as the wall built at the edge of the precipice, or of the road

*This article which we copy from the *Albany Law Journal*, is from the pen of Judge NEILSON, of Brooklyn.

by the river is for the protection of travelers. He undertakes to inform the schoolmen in their specialties, and his speculation upon religion, science, the nature and relation of man, partake of the artificial texture of his life, but they are printed and in the hands of inquiring readers. As he has performed some good work in other departments, his speculations secure respect and confidence. So his best efforts have an evil influence.

As Mr. Choate escaped the perils which beset students in their early growth, it would be interesting could we know to what that good fortune may be ascribed. Some may refer it to the incentives of ambition, of self-respect, of pride, taste or temperament, and such incentives may enter largely into the question. But in this instance beneficent influences acting upon a delicate, docile, susceptible, emotional nature, had been at work in advance of the schools. The boy went into those schools with his mind stored with good examples. The family training had given a proper bias to the affections; lessons from the Bible, from Watts' hymns and psalms, from the church service, from the poets and from history, had inspired a love of the true and beautiful, and he had read enough of biography, of travels, to impress him with the dignity of earnest efforts, self-sacrifice and heroism. The case is not thus stated too strongly. What should be said of the strength and maturity of one who, as Professor Brown tells us, had devoured the "Pilgrim's Progress" before he was six years old, had nearly exhausted the village library before he had reached his tenth year; whose tastes and delicate sense of the use of words were such that when nine years of age he could point out an inappropriate word in a discourse? The preacher, after citing Paul, had added, "Even James says, etc." The young critic thought that the word *even*, as thus used, implied some disparagement of the Apostle James. But, without extending these statements, it is apparent that young Choate went out into the world with large moral and intellectual preparation. He carried the devotion, the genial spirit of his home life into the schools. The light of the early love never faded from his brow. He was thus prepared to exercise the manly patience given on his riper studies. The methods observed, as he sought to store his mind with lessons of the ancient and modern prudence, with such examples, maxims,

imagies, analogies, such conceptions of principles as should enlarge his range of thought, enrich and vivify his language, chasten his style and make his public ministrations more efficient and acceptable, deserve the attention of students.

Mr. Choate knew the need and the use of study; he also knew the limitations which were to be respected. A conservative spirit held him in restraint, repressed longings to slake his thirst at fountains placed beyond his reach. With firmness and prudence he refused to follow a friend into the labyrinths of German mysticism, or to explore the extended domains which Swedenborg had made his own. This economy was becoming in him, not simply because he did not wish to be "shocked, waked, or stunned" out of settled convictions, but because the duties before him, with the related studies, would consume his time and strength. Whatever his estimate of his own powers might have been, he knew that the Universal Genius, so called, was as fabulous as the Scandinavian Troll or as the Schamir, the worm that ate stone, and which, according to a Jewish superstition, had been used in preparing the stones for Solmon's Temple. So he put by studies that seemed too remote from his purpose, as ostentatious or improvident. He never lost his balance by reaching out too far, or, like one of old, walked into the water while gazing at the stars.

Mr. Choate's study of the cases in which he was to appear as counsel was exhaustive. Each case was tested and tortured until every conceivable shade of strength, and of weakness, was revealed. His son-in-law, Mr. Bell, has described the method, and Judge Fancher's statement of the preliminary examinations of the case in which Mr. Choate was associated with him, is of a like character. He studied the cases, pen in hand. The facts and qualifying circumstances, with the decisions and principles applicable, were noted in a little book. A like book was kept by Erskine. Mr. Espinasse says that Erskine brought his arguments into court in a little book, and, even after long experience as a barrister, used to read and cite cases from it. On one occasion his opponent affected to ridicule that method, and, with a sneer, said he wished Erskine would lend him his little book. Lord Mansfield said "it would do you no harm, Mr. Baldwin, to take a leaf out of that book as you seem to want

it." Mr. Erskine may have been in the habit of citing cases from his memorandum books to a greater extent than Mr. Choate. He thus used his book in debate when he claimed that the trial of Warren Hastings had ended with the dissolution of Parliament. Edmund Burke, not able to control his temper when excited by opposition of any kind in reference to that trial, had a fling at "ideas which never traveled beyond a *nisi prius* case," and a sneer for the note book. But in this relation it is pleasant to recall the spirit in which, a short time before his death, Burke called on Erskine, and, holding out his hand, said "Come, Erskine, forget all, I shall soon quit this stage; and wish to die in peace with everybody, and especially with you." But we confess that we have always had great respect for Mr. Choate's little books as evidencing the care given to the preparation of his cases, the security against possible confusion or forgetfulness. How else could counsel who goes into the argument of case after case on the same day, do full and exact justice to each of them? It is said that Sugden once got hold of the wrong brief, and argued in support of his adversary. A like mistake is reported of Dunning. Neither of them had kept the little books. Neither did our former attorney-general, Samuel A. Talcott, who made a like blunder. As he was about to close, the attorney of the party came into court and in a troubled whisper told him of his mistake. Not at all disconcerted, and artfully concealing his error, Mr. Talcott re-arranged his papers and said: "May it please the court, I have thus presented fully and fairly, the case as understood by my learned friends opposed. I shall now proceed to show that that view of the case is utterly erroneous." The late B. Davis Noxon, who was present, told me that the promise was made good; that the argument that followed was one of the most able and brilliant he ever heard from that distinguished counsel.

Mr. Choate's study of the law, apart from his preparation in particular causes, and from those in which he had been concerned, was extraordinary. In the range of legal biography to which we have had access, we do not recall an instance of equal devotion. His methods of noting the facts of cases reported in the books, and writing out opinions, as if for judicial use, of preparing arguments in support of the decisions or against them, of criticising the author-

ities cited, and finding others to confirm or qualify them, of seeking to discover how far a doctrine underlying a series of adjudications might have been fortified or made to appear more just in the light of history, reason, and of scientific tests, have been from time to time so fully stated in this Journal that present illustration is unnecessary. Such a course of study, so close, symmetrical, critical, deserves great respect. But an entry here and there, in his diary and journal, as he notes how he applied his morning hour, seems articulate with admonitions. He has a few moments with the poets, with historians, with the critics, and then the genius of the law beckons him away. Thus, he says, "I have read and digested a half-dozen pages of Greenleaf on Evidence, and as many of Story on the Dissolution of Partnership"; and, later, "I read Phillips' Evidence, beginning at title 'Incompetency,' and common-placed a reference or two"; and yet again, later, and while in London, after saying "Mr. Bates called and made some provision for our amusement," he adds, "I read Bible, prayer-book, a page of Bishop Andrew's prayers, a half dozen lines of Virgil and Homer, and a page of Williams' Law of Real Property." All this and more, to keep the law, even in its simplest elements, fresh in mind, a purpose from which not even the delights of travel, of new scenes, of courteous fellowship, could wholly divert him.

The fruit of such devotion was wholsome and nutritious. Thus trained and strengthened, his vision could take in, as from a tower of observation, the domain of the law. It lay before him as a familiar and inviting landscape. The practical benefit was obvious. On a trial or an argument, when unexpected difficulties might arise and an appeal be made to principles not noted in his "little book," the countervailing doctrine was in his mind ready for use.

The law thus faithfully pursued, leads to logic, to ethics, to metaphysics, and, in a word, to the whole scope of special sciences. Even such views of it may not indicate adequately, certainly not with precision, Mr. Choate's estimate of the law as pervading all space, and subordinating to its use all knowledge. If so, that estimate may reveal to us the reasons which led him to more enlarged and liberal studies than are commonly regarded as necessary to the profession.

The Western Jurist.

JUNE, 1877.

ADDRESS DELIVERED BEFORE THE IOWA STATE BAR ASSOCIATION, AT DES MOINES, MAY 17, 1877.

BY G. F. MAGOUN, ESQ., PRESIDENT OF IOWA COLLEGE.

MR. PRESIDENT, AND GENTLEMEN OF THE STATE BAR ASSOCIATION:

It was not possible for me to accept the invitation, which came through the accomplished President of last year, to be here to-day for the present purpose, without openly discerning in it how graceful a courtesy passed from one of "the learned professions" to another. Let me fall back upon the handsome terms in which it was couched in your name:

"The invitation expresses the sentiments of esteem and good will that the BAR ASSOCIATION feel alike for yourself, for your profession, and in that cause of thorough education with which you are connected."

That if I should take immediate advantage of this grateful language, Mr. President and gentlemen, to maintain here in the name of "thorough education," and under the sanction of Blackstone, that every one who studies law should be first a graduate of a college! I confess myself strongly restrained by the fact that only about a half a dozen years ago less than half the law students at Harvard were college graduates, and the degree of LL. B. was bestowed for residence merely, without examination! This very year President Elliot has published the admission that it will take

time yet to return to the standard proposed so far back as 1829, by Story.

And I am effectually prevented by the thought that the best I might say for the thorough education of lawyers, would only give you the more reason to lament that the stroke of death—so untimely and so recent—silences to-day the noble and winning voice to which you were to have listened.

If he were here to speak, who gave his best twenty years to the elevation and success of Harvard Law School; if he were here with his life of seventy-seven years, in all respects so rounded and complete, as scholar, teacher, jurist, and man—reaching at the Worcester Bar the largest practice of any lawyer in Massachusetts, before the professional life of any of you, gentlemen, began, save the Nestor of the Iowa Bar, before the birth of the majority of Iowa attorneys—historical scholar, author, lecturer, professor of law, legislator, judge, governor of the State, he would have spoken, whether upon the preparatory or the professional education of lawyers, with authority.

All that is personal kindness in this invitation I can return with that description of interest, Mr. President, and gentlemen, which is paid out of the heart; to some of you I speak now, and always, as the sincere personal friend of years. The other reference—to my profession—suggests to me in a general way, as one coming from spheres of service to his fellow-men, different from those you move in, the topic on which I am to speak.

Very fitly in former years from within the Bar have come the pertinent addresses upon *the Sources of Inspiration in your Pursuits*, upon *the Progress of the Law during a hundred years*, and upon *its relations to Literature*. It may be no less fitting if you hear to-day, from without the Bar, some considerations touching

THE CLAIMS OF THE LEGAL PROFESSION TO GENERAL RESPECT IN CIVILIZED SOCIETY.

That any of you might with propriety present such considerations, especially any of those who have been called to adorn the Bench, is very evident. *Noblesse oblige*. "I magnify mine office," said once a great thinker and actor in another calling; and every

man is a debtor first to his own vocation in life. But possibly a clergyman may say some things in honor of your vocation you might not be so free, gentlemen, to say yourselves. It is not quite an argument for lawyers that will here be made. They can commonly argue for themselves and other people too! It is not an argument for law that is proposed, by any means. We are all born under it, whether we will or not, and have but this to do, in the main to show ourselves law abiding. The subject is that which comes between law and lawyers—*the Law*, as your phrase is, gentlemen, the profession as such, and the practice of it in distinction from those who practice it, one of the instances our language recognizes in which profession and practice are not so far asunder as vulgar axioms imply.

The most obvious of these considerations, gentlemen, is that your calling is an absolute necessity to organized society. Not a necessary evil, as I heard it said the other day of the medical profession. The question might be raised, sometimes, whether some occupations born in civilization, which protect us from certain evils, are not carelessly compounded with the evils themselves—that of the physician or surgeon, for example, being distributed in the same class with the diseases, wounds, and ailments they cure. Are doctors and counselors evil because their directions must be followed with some care, and fairly paid for? So it is with all who serve their fellow-men. Is it an evil to save time and expense to the public in the adjustment of affairs between man and man? Is there no clear gain in professional skill? Nor is your profession an unnecesary utility, an artificial and superfluous convenience, a luxury of high civilization we might do without. "Every man his own lawyer" may answer as a title to a catch-penny book; as a description of even possible fact, no one need dwell upon its worthlessness. The various callings in life are necessary because human powers are limited. As law is vital to society, its correct exposition and application are vital to itself. When all of us can command time and means of research for all "the ills that flesh is heir to" and all their remedies; and keep pace, while bound to other all absorbing engagements in life, with every improvement that chemistry,

physiology, and biology make posible in the art of healing ; and vie with the practitioner in growing special skill—so that every man shall be "his own physician" indeed—then may we undertake to know the state of the law up to the last statute, and the head-notes of the last decision, *not before;* then may we claim to comprehend adequately the interlaced relations of all persons and things, the rights and liabilities growing out of the constitution and facts of society, the procedures proper to all cases, the remedies for all wrongs. The progress of our age renders this less and less possible. It is immensely more difficult to-day than when, two hundred and thirty-five years ago, the colonial law of Massachusetts (1642) required the select men of every town to see that all children and apprentices were taught "the English tongue *and knowledge of the Capital Laws,*" on penalty of twenty shillings for each neglect therein! All conveyances, contracts, and wills, illustrate the necessity of your profession as well as their own, and the great commercial and manufacturing establishments which support private legal advisers, together with branches of government that must have solicitors of their own, do but show a need that any of us may encounter at any time in ever so limited a sphere.

Our complex civilization, gentlemen, is seen to require every decade a greater number and variety of all experts. It multiplies with industries, interests and equities. When some country representative in the legislature, whose life is far from towns and their multiplex and complicated affairs, frets over the time and attention given to laws, the very title to which he cannot comprehend—when some one of us plain laymen, in distinction from you, finds that his legal obligations have grown while he slept—"he knoweth not how"—he is apt to sigh for a less elaborate and an easier social existence. But no simplification of legal processes and practice would relieve him. "Law upholds the State, and the State upholds its members," says Prof. Amos, and there must be at least judges and sheriffs and constables to conduct the course of law, for a law that executed itself, human or divine, was never yet seen by man or God, and it is impossible to drop attorneys out of the

scheme without vast injury and loss. The likenesses in Roman law to our own patent divisions of common law, equity and statute, show a ground of both sets of divisions in human nature; but law can never stop with such great distinctions; it multiplies minor distinctions perforce; it is as naturally a growth *in* society as *from* society—a growing thing, as in a family or a school. As communities advance in age they naturally—so to speak—take on what is more artificial, at least in progressive western lands. If they leave systems like the Anglo-Saxon and the Hindoo Code of Menu behind, they go forward to those more elaborate and refined. For where civilization is, law keeps step with it. Statutes grow on occasion. Inventions and arts create new relations and rights, and the need of their legal ascertainment. No experts oftener exclaim than do veterans of the bar, "our business has flowed away into new channels." Why is it possible for parts of Blackstone to become as obsolete as Coke upon Lyttleton? And parts of Kent, in turn, as obsolete as either? Why would it be impossible for a thousand rulers like Justinian, a thousand codifiers like Tribonian, to keep the principles and practice of law stationary? Why have legal fictions ever held the place they have? Law follows life. It runs with the current of industry and science and thought. The ever extending work of mind on matter, the rapidly altered conditions of persons and things predestinate its development. Its changes are but signs of human progress or decline. The citizen is very blind who does not sometimes see that he needs a lawyer; but, even with respectable discernment, he may not discover *what kind* of a lawyer he needs.

For your profession, gentlemen, like all other secular ones, at least, runs to specialties. Each involves large knowledge of fact as well as of law; of that copious body of special facts on which its own branch of law rests. To be a skillful bank or insurance counselor, a great railroad or admiralty advocate, has much of its dificulty in an immense mastery of details outside the statute book. It is safely predicted that the practice of the future will be largely in matters of recent origin or of recently acquired importance; and the great lights of law and equity in coming days will shine,

doubtless, in causes and trials whose peculiar natures we are not prophets enough to divine.

But imagine one so recently passed away as Choate, conducting a great case arising out of the transportation of beef to England, begun within some ten months past; or Webster and Soule serving as opposing counsel before an electoral commission; or Jeremiah Mason with a kerosene oil company for clients; or Sheridan appearing for an express company; or Burke arguing for a copyright; or Erskine in a patent case; or Patrick Henry pressing for damages before the Southern Claims Commission; or Charles Cotesworth Pinckney arguing some anomalous question arising from alleged intimidation by one party or another in an election. I have tried to conceive of Mr. Justice Wilde, whom I saw on the bench of his great Divorce Court at Westminster, in wig and gown, presiding at a trial for divorce and alimony wherein the plaintiff is the nineteenth wife (the eighteenth in polygamy), and the defendant ex-magistrate of the dignity of Governor; but some of you would be as perplexed to conceive of Judge Story sitting on a telegraph issue; or Chief Justice Shaw giving an opinion on a railroad injunction; or Lord Eldon directing judgment to be entered about a tax title; or Lord Mansfield deciding whether there was fraud in mining stock; or Sir John Holt laying down the law on the disposal of property under the influence of spiritualists; or Sir Matthew Hale turning from the trial of a witch, to charge the jury in a murder case where the defense was *modern* insanity. The constant widening of the diversity of legal business is but an illustration of that permanent and extending need of the profession for which it deserves large respect.

Another of the considerations of which I would speak, is the contributions of "THE LAW" to language and literature. The showing here last year how lawyers themselves lean on knowledge and culture and on the accomplishments they bring, might be offset by showing what they have done in return for good letters. I mean something that lies behind that. For, turning again to the impersonal profession, it may be fairly claimed that, if it had contributed nothing thereto, in its own right, its members and masters would hardly have made contributions so solid and brilliant.

Such traces of legal lore as enrich the pages of Shakspeare would never have been picked up by him, as a student of life and language at times in the courts, but for meanings in them which common language and the phraseology of his few books could not supply him. The professional terminology of his day must have often been rare entertainment to his ear. What he might see of law and chancery practice would furnish plentiful matter of human relations and experience for solution in the wondrous alembic of his mind. One could easily accept the Lord High Chancellor's argument that the dramatist was, on a time, a student in the Inns of Court, had he but time for it in his roystering young life. Long since I discovered that of all the professions there is none makes so large use of figurative terms, and terms of action, as the law. Authors like Sandars, notice how it delights in symbolical forms. Hardly a page of opinion or argument from its great chiefs, but is fairly studded with crystallized metaphors. Something in this to aid their correct use in general literature and common speech. It is true that like every other branch of learning which has a history, law brings down to us a mass of expressive words now obsolete. And it holds many instinct yet with its own life which cannot be transferred to other tongues or pens than those to which they are professionally familiar; for it makes a thousand distinctions of importance where common thought makes none. It has its own classifications. It must have. They extend the realm of science. They illustrate the fact that classification and science cannot be confined to material things. But they do not become common property even among the intelligent. Neither in word nor in thought can you make the doctrine of *uses* popular. The general conceptions on theories of physical science pass over far more readily into ordinary phraseology, because more of us have to do with material objects and facts, than with that great structure of requirement and prohibition and the great science founded on it, which we call *legal.* Nor would terms taken from any science or art without their precise meaning, benefit literature at all. Every American mechanic is likely to know what a lien is, and every English land-owner what entail is; and among the writs incessantly issued

by courts, it is not impossible for any man to discover the meaning of *habeas corpus* and injunction; but bailment, easement, estoppel, eviction, laches, merger, are as likely to remain professional as flotsam, jetsam, or ligam. On the other hand, every art borrows largely from the lips of the people, but it charges the words lent to it with new technical meanings, and these return to the people, at least in part, freighted with them. "Every new term," says Mr. Coleridge, "is a new organ of thought." So is an old one filled with a more exact or complete signification. That is a poor thinker, to be sure, who cannot treat any subject without overlaying it with the pedantry of his profession. But every man helps us who gives us an accurate and adequate expression for the first time. So does every profession.

It is hard to say concerning many words whether they were originally law terms, whose technicality has faded out in common use, or whether they were borrowed from it; but among the latter are attorney, libel, recovery, consideration, action, duplicity, forbearance, challenge, condition, acknowledgment, traverse, and a host of others. The little word sue, we borrow from you, but the little word fix, which you borrow from us, it would seem a child could understand, though hardly on the lips of the court. The old use of affection in contracts would certainly puzzle a lawyer's wife; while dogmas for which we are indebted to you, not you to us! Gentlemen, if the clergy had not kept it alive, would now be utterly unintelligible. The direct gifts of your profession outright to the common vocabulary may not be very numerous. I fear we should have had tortuous, if there had been no such title as tort in the law books, for human nature is as crooked as—some whisky. I wish we had the old French law word subreption, for what is, alas! too common a sin in every day representations of fact. I know that we could not name such ordinary things as defalcation, embezzlement, contumacy, abatement; we could not legitimate, attest, commute, or alienate anything, if you had not taught us how. Light literature could not characterize a look as pleading, a voice as appealing, a gesture or spectacle as arresting, without your help; if we abet a criminal or commit a breach of the peace it is all—in a sense—owing to you! Your term escheat

has been reduced to cheat, and the escheatour on royal estates (who took notice of fines and forfeitures which had fallen in to the crown) became in fact the cheater by official malfeasance before the one word passed into the other. A village debating society will talk of its archives entirely unaware of the legal muniments of privilege which in the Middle Ages bore that name. Thus common parlance gives modern senses often as remote from the original ones as that of novels in our fictitious literature and in Latin law. Who imagines that danger is feudal—the prerogative of suzerain in regard to the fief of the vassal! Civilization has grown into a grand sense, but Johnson's Dictionary recognized it merely as a legal technicality, expressive of the turning of a criminal process into a civil one. Language is called "fossil poetry," but a good deal of our old mother tongue is fossil law.

The debt of literature to your profession, gentlemen, however, is quite distinct from the debt of language, and greater. The one can never be the measure of the other. Principles, distinctions, grounds in reason and the nature of things and the history of mankind, such as you have to do with, spread in every direction *proprio motu*, and enlarge the web and enrich the texture of human thought. Law is itself a literature. It makes many a man a thinker and writer who otherwise could never have become one. Text and process yield not merely a body of facts and actions, but a body of truth and learning. What is permanently valuable in this cannot be detached from the common mental treasures of its age. Only in rare instances, like that English Chief Justice whose name Lord Campbell pronounces "the first for a mere lawyer to be found in our annals," does the legal habit of mind exhaust its usefulness and force within mere professional lives. Even if it does, its products are there, part of the whole body of literature. Ordinarily you note its mark elsewhere. The historians who were trained for the Bar can be as quickly recognized as those who have had a military, a clerical, or a purely literary education. In books and periodical literature, both sides the sea, the handling of many subjects has been far more logical than it would have been had the legal profession been struck from existence. For the science of law is a branch of logic; and though there are

now simpler processes than once for joining the issue, the old methods were logical exercises, and even a faulty logic is better than none at all. The third kind of interpretation which the civilians recognized, the doctrinal or scientific, with its three subdivisions, extensive, restrictive, declaratory, and all the applications of rules of interpretation to contracts, for example, furnished, it cannot be denied, a rigorous and vigorous intellectual discipline. Other things being equal, he who has been through it, will think through any subject better. One thing that all solid literature sadly needs, law, like mathematics, successfully teaches the real student, *viz:* to stick to the subject. Our common law is "more tortuous and more interrupted by fictions" in reaching conclusions, according to Sir H. J. Maine, than any other; and your learned President in his elegant introduction to Sandars' Justinian has pointed out most interesting analogies between it and the civil law and their common lack of a scientific structure. Yet Maine knows "nothing more wonderful than the variety of sciences to which Roman Contract Law, more particularly, has contributed modes of thought, courses of reasoning, and a technical language. Of the subjects which have whetted the intellectual appetite of the moderns, there is scarcely one, except Physics, which has not been filtered through Roman jurisprudence." They have not been so largely affected by the English jurisprudence, yet it would be easy to show how largely, especially as the latter has been enriched from importations from the Roman.

In one branch of English literature the legal contributions are more notable, and most noble that of eloquence. It would be trite to name even the masterpieces, and it would be no more than candid to confess that at the Bar, as elsewhere, eloquence is "in the man, the subject and the occasion." To Choate are well applied the lines:

> "So on the tip of his subduing tongue
> All kinds of arguments and questions deep,
> All replication prompt, and reason strong,
> For his advantage still did wake and sleep:
> To make the weeper laugh, the laugher weep,
> He had the dialect and different skill,
> Catching all passions in his craft of will."

The orator is born, not made by his profession, yet this furnishes "subject and occasion" to which the orator born in the man responds, and your annals are full of cogent, and event great, speakers, who would have been such nowhere but at the Bar.

There is another fair claim of your profession, gentlemen, to general respect, in what it has done for human progress. Its own progress and that of jurisprudence form part of that society. Law not only founds itself on relations; it creates new and better ones. If progress is ever towards refinement, it must needs be so here. If the ancient historic order in the genesis of law was (1) isolated judgments on individual facts (Themistes); (2) customs; (3) case-law; (4) codes—still accretion, rather than evolution, explains periods of rapid growth, like that which followed the introduction of the Greek idea of the Law of Nature. Development by accretion, instead of theoretical or metaphysical differentiation, indeed, in all periods; and perhaps this is only the ambitious philosophy of evolution has not meddled with the question of legal progress as with so many questions; perhaps because Spencer's definition of law—"uniformity of phenomena"—is exactly that which does not exist in respect to rights and duties in society, and law in its original meaning with you is the requirement of acts because they are *not* uniform. Without a class of men to help it, however, *i. e.* to make the accretions of foreign legal material, growth would be slow, capricious, and uncertain. We are sometimes peculiarly grateful for short sessions of our American General Assemblies—though they leave not a few titles on the statute book untouched that sadly need mending—but our thankfulness is not so much for absolute lack of legislation as for this—that the legislature did not attempt what they lacked wisdom to do.

When, on coming from New England in 1844, I first inquired into the school law of Illinois, I was informed by an open published letter from the chairman of the General Assembly's committee, that it was in part so self-contradictory it could not be executed. It was easy to infer that there should always be some well-read practical attorneys in *that* legislature! Yet such men have no greater interest in self-consistent, beneficial legislation, keeping

pace with the wants of the people, than others. As a class they favor and push sound law reform. They bring simplicity and order out of the often fearful confusion of the statutes. The Iowa Code and the English Act of 1873—Lord Selborne's Supreme Court of Judicature Act—are examples. An English reviewer of this last says that it is not selfish greed keeps the men of the Bar from reform, that professional bias works with them instead through slavery to custom and neglect of first principles; and that to reach a system of law based upon a sound philosophy, "the impulse must be given by a strong and sustained blast of lay common sense." Yet I note that the philosophical jurists come from the profession, and reformers like Sir Roundell Palmer have won their first distinctions there. Conceding that the lawyer-like habit and statesmanship are still more distinct from each other than the mental workings of the attorney and the judge, still a nature capable of it rises easily in both cases, from the one into the other. Happy is that commonwealth which in its maturity of resources and wants can send to the State House, to die in legislative service, a jurist like Emory Washburn! Such men love improvement. They legislate in the simplicity of wisdom for the good of men. But they are not moved by hasty love of change. You would all agree to what Prof. Amos says of "the fallaciousness of the notion of making experiments in legislation."

Thirty years ago I rode a few miles on the Old Colony Railroad, in Massachusetts, with one who filled with a larger presence the three-fold sphere of lawyer, statesman, and orator, than any man of American history, and ventured to ask his judgment of an innovation then just woven into a Western State Constitution: "I deem it a piece of great presumption," he answered, "for the first settlers upon new soil to go counter to the best principles of jurisprudence and the experience of ages." What Mr. Webster thought of selecting supreme judges by popular vote, the late Senator Grimes, our first Iowa example of the lawyer-statesman, expressed publicly as his independent judgment, while Governor, and against it you had the able argument of Judge Love, last year. Let me add, with deference, that with these three opinions of

weight there are multitudes of us laymen who coincide. Such experiments cannot be laid at the door of that conservative radical guile which has often by the assertion and establishment of sounder principles than prevailed among the multitude, advanced legislation and justice a long stride at a time, which has moved with the people—when it has not led—for larger liberty and opportunity for all, and thus powerfully helped the advance of the whole community while giving good proof of its own. And any calling which does the best it can in its own way for general progress, helping it in other ways beside, does all it can for this end.

The helpfulness of such a profession in the ascertainment of truth at large should here be recognized as a further claim to respect—if only by a moment's notice. The better this inquest is conducted judicially anywhere, the better will it be everywhere. For the belief of men, in facts beyond their personal knowledge, is firmest when it has been reached by processes approaching in precision the best that are known. We all owe a large debt to "case lawyers." One thing thoroughly investigated and settled is worth a thousand not *settled*, because not examined and decided right. Even legal fictions, in their original purpose of giving jurisdiction, opened the way to truth. That is a striking series of axioms for judicial investigations which an English reviewer of Lord Selborne draws out—it makes a quick thinker ask if law has yet to learn the method of proof?—but it is as striking that the reviewer shows how the axioms are implied in the jurisprudence he would amend. The last English author on Evidence, Stephen, mentions one author who refers to 9,000 decisions, and another who cites 11,704. He exalts the sagacity of English Evidence law and its capacity for systematic form. One profession in every generation influences everything into which evidence enters, because to itself the art of presenting it is integral. It came about, therefore, naturally, that an American authority in that branch of law, Prof. Greenleaf, furnished my own profession an acute and sound treatise on the Testimony of the Four Evangelists to the Christian Religion. And it had come about as naturally that special theological truths should be established by methods not altogether alien to those pur-

sued on secular themes. If there be, besides, any sound analogies between human relations and those disclosed by religion, if governmental relations run upward as well as laterally—if law as "that rule of action which is prescribed by some superior, and which the inferior is bound to obey," exists in the universal realm of Him who could not be Creator without being Law-Giver and Executive, there could have been no mystery in its becoming "difficult to say whether the religious system of Calvin or the religious system of the Armenians, has the more marked by legal character."

But it is not necessary to go to the Continent for examples of this great debt to the law. The English, and curiously enough, still more the American theology (for it is more scientific), disclose it —sometimes in servile fashion, often in that grand mastery of old and broad principles as applied to new topics which betrays at once learning and original thought.

In confessing judgment thus of a professional debt for the theologians, gentlemen, let me add that the early New England masters in each science, in the day of private schools for each, paid honorable and generous homage at the shrine of the other. The great divines recommended law-study as a preparation for theological, while the renowned advocates advised a course of reading in theology as introductory to law. If this were not possible, they suggested an intelligent hearing of the closely-reasoned Sunday sermons! When Massachusetts Colony needed a "BODY OF LIBERTIES," it chose, to frame them, the Rev. Nathaniel Ward of Ipswich, who had practiced in the Common Law courts before he became a minister of the Church of England.

Gentlemen, let me modestly hope that the holding of your thoughts with these observations has not been entirely idle. Impersonal as the theme is, to which the recentness of my invitation to address you has confined me, it cannot here be laid down without a passing thought of the admirable characters that adorn, not merely the chronicles of the order of men to which you belong, but the Bench and the Bar of to-day. Great and pure legal names belong to the world as well as to you. No one of you can do aught professionally noble and high, however retired, and remain unhonored

and unknown. You may well cherish a vocation that lends opportunity to so much personal worth; in which so many get the best of it by making the best of themselves; which cultivates the respect for law, self-restraint, and healthful government over men; whose most exalted names have ever been the names of those who looked up reverently from the jurisprudence of earth to the supreme and perfect jurisprudence of heaven; whose best principles must be rejected in order to reject the purest source of human law—the Bible; whose brightest triumphs were never won on the wrong side of contested questions, or by bad men. No dispute as to the abstract ends of law can be extended to bring into just question the true aims of the lawyer himself. No chasm between statute and perfect right can permit us to respect separation between his personal character and honor and rectitude. Nor can any good lawyer despise the testimony Richard Baxter wrote down after the death of his great legal friend—in the Bible he received from him by legacy—beginning:

"Sir Matthew Hale, that unwearied student, that prudent man, that solid philosopher, that famous lawyer, that pillar and basis of justice—who would not have done any unjust act for any worldly price or motive." Any man of thought and principle may well, at the very threshold of his entrance into the legal fraternity, take into his heart the rich, weighty, and felicitious description of law given to English literature long ago by "the judicious," the almost judicial, Hooker:

"*Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power; both angels and men, and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy.*"