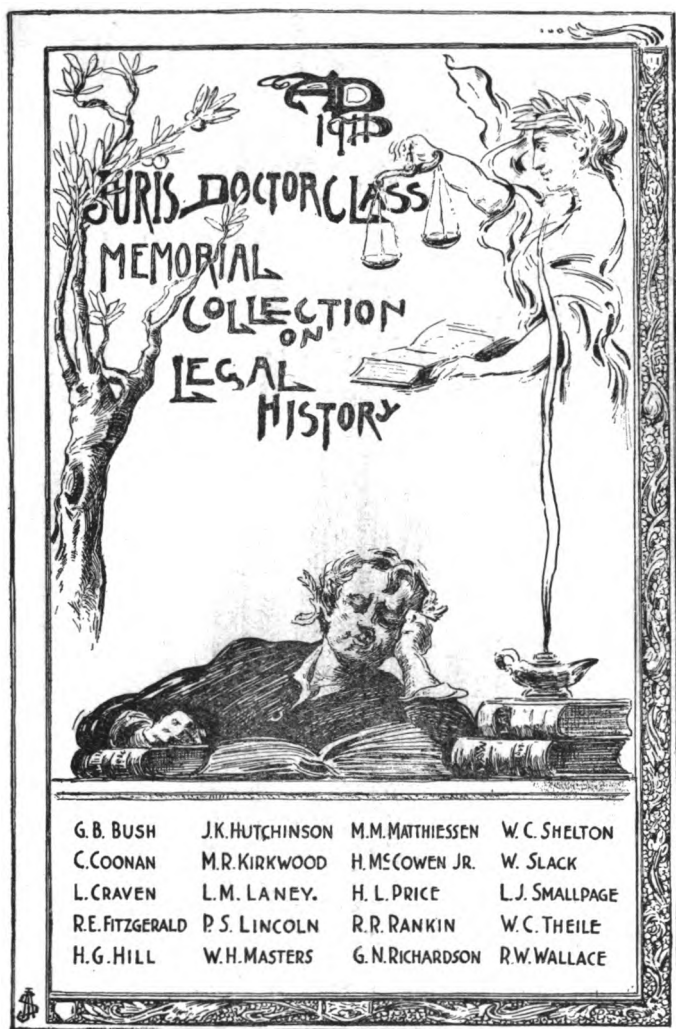

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LEMUEL SHAW
CHIEF JUSTICE



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LEMUEL SHAW



Samuel Shaw.

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CHIEF JUSTICE
OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

1830-1860

BY
FREDERIC HATHAWAY CHASE



BOSTON AND NEW YORK
HOUGHTON MIFFLIN COMPANY

The Riverside Press Cambridge
1918



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PREFACE

It is doubtful if the country has ever seen a more brilliant group of lawyers than was found in Boston during the first half of the last century. None but a man of grand proportions could have emerged into prominence to stand with them. Webster, Choate, Story, Benjamin R. Curtis, Jeremiah Mason, the Hoars, Dana, Otis, and Caleb Cushing were among them. Of the lives and careers of all of these, full and adequate records have been written. But of him who was first their associate, and later their judge, the greatest legal figure of them all, only meagre accounts survive. It is in the hope of supplying this deficiency, to some extent, that the following pages are presented.

It may be thought that too great space has been given to a description of Shaw's forbears and early surroundings; but it is suggested that much in his character and later life is thus explained. His speeches are somewhat fully referred to for the reason that they are nowhere collected.

Due acknowledgment is made to the Social Law Library in Boston and the Massachusetts Historical Society for the privilege of examining the many papers and manuscripts in their possession. To Miss

Josephine MacC. Shaw, the granddaughter of the Chief Justice, are rendered sincere thanks for valuable and highly treasured letters and documents. From her also comes the admirable likeness taken in 1853, which for the first time is reproduced in the frontispiece.

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LEMUEL SHAW

CHAPTER I

ANCESTRY AND YOUTH

THE early settlers of New England came in search of freedom in religious thought, and in that respect was the promise of the new land first fulfilled. Few of them left England with hopes of worldly advantage, and naturally the newcomers followed the occupations to which their hands had been trained at home. The farmer there was the farmer here, and the miller of the Dee became the miller of the streams of the new Essex and Middlesex. Rejoicing in their liberty, the forefathers found contentment in their hardships, and for a time were satisfied.

But as years passed, when the permanency of the community they had established became secure and the support of their families less doubtful, their thoughts began to range forward. Then came new hopes that the future might hold for their children something more than mere enjoyment of the liberty which the parents had attained. In the old country the father was content that his son should follow in his footsteps, and the son did not expect to move beyond the limits of the sphere into which he had been born. There, fate seemed to have drawn the line of life, and birth to have determined station and calling. But New England was fertile soil in which

the seeds of ambition could sprout and flourish. Thenceforth frugality and thrift had for their end the education of the sons beyond what had been the fathers', and a place in the caste of the intellectually superior.

Lawyers in the early days were few or none. Physicians were more skilled in practice and experience than learned in science. But the minister of the church of God was the man of the community who dwelt on an intellectual plane as high above his fellow-men as his pulpit was over their heads on Sunday. He not only preached to them once a week doctrinal sermons so deep in theology that only a glint of humanity here and there lightened the gloom, but he was everywhere regarded as the intellectual leader, the learned man, to whom all turned for direction and advice. In the clergy of that time, more completely, perhaps, than has ever been approached since in this country, was a distinct class recognized as superior and privileged. Josiah Quincy, in his "Figures of the Past," says: "On the topmost round of the social ladder stood the clergy; for although the lines of theological separation among themselves were deeply cut, the void between them and the laity was even more impassable."

The ministry, then, was the goal set by the ambitious father for his son. Seldom was it achieved with more conspicuous success than by Joseph Shaw, farmer and miller, of East Bridgewater, Massachusetts, a grandson of Abraham Shaw who emigrated to this country from Halifax, England, in 1636.

The life of Joseph Shaw was obscure and as little remarkable in most respects as that of any farmer or miller of his day. But he wanted distinction for his children, and so managed that every one of his four sons was educated at Harvard College, and all of them became Congregational ministers.

John Shaw, one of the four sons of the miller, was graduated from Harvard in 1729 and was ordained to the ministry in South Bridgewater two years later. He married Sarah Angier, the daughter of a minister, by whom he had five sons, three of whom in turn became clergymen, and a daughter, who also had a reverend son. One of the two sons of John who did not take orders made up for this shortcoming by rearing his two sons to the cloth. Thus in three generations did the family tree of Joseph the miller bear the fruit of ten ministers on one branch.

One of the five sons of John Shaw was Oakes, the father of the great chief justice, born in 1736. In due season he was sent to Harvard from which he was graduated in 1758, and in 1760 he too became pastor of a church, in the West Parish of the Town of Barnstable. This parish is worthy of passing mention aside from the interest it has because of the man who later was born within it.

In 1616, at Southwark, one Henry Jacob organized the first independent Congregational church in England. Jacob was persecuted and fled the country, dying in America soon after. John Lothrop succeeded him as pastor. In 1632 the secret worship of the society was discovered and thirty-two of the

church members, including Lothrop, were cast into prison. There they were confined for two years, when they were released on bail, with the exception of Lothrop who was still held in custody. Archbishop Laud denied his petitions for release, but freedom was finally granted by the king upon condition that he leave the country, which he did in 1634, with thirty-four members of his congregation. They came to Scituate in the Plymouth Colony, where they were joined by thirteen more from the parish who had preceded them to America. Five years later the band sought, and were given, lands on Cape Cod in the locality called Mattacheese, which they renamed Barnstable. Subsequently came a division of the church into an East and West Parish. The West Parish retained the title of the First Church as against the East Precinct and has good claim to be the successor of the original society in England. Upon these facts it is alleged to be the oldest Congregational society in New England and even the world. In 1718 a new meeting-house was built in this parish, which, with some additions and alterations, is the one standing and in use to-day, rearing its spire in white, simple dignity in a district which is hardly changed in aspect since colonial days. The long line of sand dunes raises a yellow barrier crowned with stunted pines beyond the bay and against the sea. The great marshes, surrounding the church, stretch away to the rolling knolls of the East Parish, and the sandy, porous soil scantily tilled, but not heavily wooded, produces little of note but men.

To this parish and to this church, in the steeple of which hung the bell given by Colonel James Otis, came Oakes Shaw in his twenty-fifth year, there to remain for the rest of his many days. His father, the Reverend John Shaw, of South Bridgewater, preached the sermon at the ordination of his son at West Barnstable on October 1, 1760. His text was: "Holding forth the word of life; that I may rejoice in the day of Christ; that I have not run in vain, neither labored in vain." If the preacher meant to express in this text, covertly, a pardonable pride in adding another to the family's list of ministers, it is almost the only human sentiment pronounced in the long discourse which followed. Judged as a professional performance the sermon may have had interest for the assembled clergymen. But the almost mathematical demonstration of doctrinal truth had little in it, even in those days when such sermons were more common than now, to attract or hold the attention of the general congregation which packed the meeting-house. The fear must have entered the mind of more than one member of the parish who sat through its dry length, that even as the father preached so also might the son. Whether that fear was fulfilled or not we have no adequate means of knowing, for only one of the sermons delivered during the forty-seven years of Oakes Shaw's pastorate survives in print, and that only fragmentarily in a portion of a charge delivered to the young pastor of a neighboring parish.

In those times clergymen were settled for life. The responsibility upon the parish in calling a min-

ister was great, and correspondingly so upon the incumbent. Each was taking the other for better and for worse, and the relation was seldom divorced. The minister did more than preach to his congregation and visit amongst them for a while. He lived his life with his people, and often the pastorate of a father descended to his son. Oakes Shaw's predecessor, Jonathan Russell, Junior, who was pastor of the church for more than forty years, had succeeded to the pulpit of his father.

The lands of Barnstable were not fertile. The industries besides farming were the primitive occupations of a simple community, chief amongst which was fishing, and did not bring wealth. Probably the pastor fared as well as the rest of the community, but in a sense his needs were greater, and his spirit often rebelled and his voice complained at the grudging delay with which his payments were made. The Reverend Mr. Shaw's salary was fixed at eighty pounds a year, with an allowance of firewood. This sum was considered fairly liberal for those days, although it could have been hardly sufficient to sustain his family. But it seems to have been raised by the parish with great difficulty, and payments were constantly in arrears. From 1792 to 1796 complaints of the pastor over the deficiencies were frequent, and his protests became more vehement as the balance of unpaid subscriptions became larger. In 1794 a precinct meeting, coldly answering the pastor's demand, declared that "it was their mind that on the whole there was not anything due him, as he always said he was willing to suffer his proportion with the

people." In 1796 matters had not improved and the minister wrote: "God only knows the apprehension of my mind, the agitation, the great perplexity and trouble I have often had in attempting to obtain nearly what I was encouraged to hope for when I first became the Pastor of this flock, and how shockingly my feelings have been hurt."

This appeal seemingly roused the conscience of the parish, for almost immediately the salary was raised to one hundred pounds a year, but upon the understanding that arrearages were wiped out. Within a month or two, however, the parish repented its generosity and a proposition was advanced that the increase should not be considered binding but that the minister's salary should be conditioned upon the ability of his parishioners to meet the payments. This called forth a supreme protest from the harassed pastor in the form of a lengthy communication which was read at the precinct meeting. "For the clergy to be kept low," he declared, "dependent on charity, and the *humours* of every one, without a fixed regular plan for their decent support, would be to render them mean, creeping, and contemptible. This would hurt their influence and usefulness; this would perplex them and hinder them from serving the cause of religion as otherwise they might do. At the same time those who are forward to keep them so would most probably be the first to despise them. . . . Were it a time of general distress with the people at large or persecution of the church of Christ, it would become me as much as possible to minister to this people and

parish altho' I were clothed in sheep skins and goat skins, but the case is exceedingly different now. . . ."

This letter seems to have exhausted the powers of remonstrance of the pastor, for with it ended the controversy which had been going on for more than four years. So exasperated had the pastor become that he is said to have declared that he would never ask his flock for another cent. Christen them, marry them, preach to them, and bury them, he would, but continue to beg for money he would not. Thereupon his capable and business-like wife came forward insisting that in the future she would receive his dues, and by her they were collected ever after. But the parish could not be shamed out of its parsimony. The difficulty, although alleviated, was not cured, and payments continued to be made tardily throughout his life.

The situation was not so acute as it doubtless would have been had not the clergyman's second wife had means of her own from which to help out the family expenses. After his second marriage Mrs. Shaw bought a house at a convenient distance from the church in which the family lived for the rest of Mr. Shaw's lifetime. The house is still standing, an object of interest as the birthplace of the illustrious judge who passed his boyhood within its walls, and a tablet has recently been placed upon the premises to denote the fact. The Reverend Oakes in his last will perpetuated this evidence of the injustice which he deemed had been done him in explaining his reasons for leaving all his property to his wife: —

Secondly, as it respects my present beloved wife, Susanna Shaw, I give as above, for she has been obliged to spend on her own patrimony to assist in paying the charges of our sons' education. She has likewise defrayed many other family expenses from what was her own separate from mine, whereby (unless I put it in her power by this instrument) she will not be able to leave her children what her parents left her, but as it is my will and desire she should I bequeath to her as above.

When he died in his seventy-first year, after a short illness, the "Panoplist," a religious journal, published an obituary notice which is the only contemporary account of him to be found. It is here quoted in part: —

In the character of the late Mr. Shaw, as a minister of Christ, there were some distinguishing excellencies which ought to be in everlasting remembrance by those who come after him. Among these may be mentioned his devotedness to the peculiar duties of his profession; his intimate acquaintance with the holy scriptures; his affectionate concern for the eternal welfare of the people of his charge; his honest zeal in what he called, to use a favorite phrase of his own, "the cause of evangelical truth": and the peculiar fervour and solemnity of his manner, both in praying and preaching. This was such as to be particularly remarked and will not easily be forgotten by those who have heard him. His remarkable readiness to officiate in the duties of his office on all public occasions when a number of his Brethren in the ministry were present, was a feature of his character which ought also to be remembered to his honour. Though naturally modest and unassuming, it is believed he was never known to decline public duty on such an occasion without the most obvious and satisfactory reasons. In regard to his devotedness to the duties of his profession it was almost literally true

that he gave himself wholly to these things. He was remarkable for visiting his people both in sickness and in health, and besides his public preaching on the Sabbath, he not infrequently preached in private houses in remote parts of his parish on other days. Of sermons he had probably written a greater number than any other minister now living in New England, if not in the world. So intimate was his acquaintance with the sacred scriptures that it was scarcely possible for any one to misquote a passage in his presence without being immediately corrected by him. His affectionate concern for the eternal welfare of the people of his charge was evidenced by his fondness for seasoning his common conversations with them with religious anecdotes and reflections as well as by the remarkable solemnity and fervour of his manner, both in his devotional and didactic exercises in the pulpit. Here "he spoke as a dying man to dying men." In his religious sentiments he was strictly and zealously evangelical, but at the same time remarkably catholic towards those who seemed to differ from him. The evangelical sentiments of which he was so fond, and for which he so honestly and earnestly contended he believed to exist at least as much in the heart as in the head. He had no confidence in the efficacy of any religious sentiments, however good and true, separate from a good life of evangelical holiness. By evangelical sentiments he meant the plain, simple, unadorned and undisguised doctrines of revealed truth as expressed in the language of the Holy Ghost.

During his last illness, upon being asked by a visiting clergyman upon what point he thought preaching should lay particular emphasis, he replied: —

To impenitent sinners, we must preach their totally lost and ruined condition by nature and the utter impossibility of their ever being saved except by the free grace of God in Christ.

In spite of his reproaches to his people he seems to have been held in high regard, and upon his tombstone in the graveyard at West Barnstable is this evidence of affection: —

Benevolence, affection, and sincerity characterized and endeared him in all the relations of social life, with unaffected piety and zeal, with unshaken constancy, and fidelity he discharged the various duties of the pastoral office. To perpetuate the remembrance of his virtues and talents, to prolong the influence of his character, and to testify their respect for his memory, this monument is gratefully erected by a bereaved and affectionate people.

More than thirty years after his death, at the celebration of the two hundredth anniversary of the founding of the Town of Barnstable, his son Lemuel, who could never speak of his father without emotion, and always with the greatest respect, referred to him in the following terms: —

Almost within sight of the place where we are, still stands a modest spire, marking the spot where a beloved father stood to minister the holy word of truth and hope and salvation to a numerous, beloved, and attached people, for almost half a century. Pious, pure, simple-hearted, devoted to and beloved by his people, never shall I cease to venerate his memory or to love those who knew and loved him. I speak in the presence of some who knew him, and of many more who, I doubt not, were taught to love and honor his memory as one of the earliest lessons of their childhood.

And later in a history of Cape Cod, his ministry is referred to as "happy and prosperous, and his memory is still cherished with respect by the aged." ¹

¹ Freeman's *History of Cape Cod* (1862).

Oakes Shaw was twice married, his first wife being Elizabeth Weld, daughter of the Reverend Habijah Weld, of Attleboro'. She died in 1772 at the age of forty, leaving him with three daughters. Two years later he took for his second wife Susanna, the daughter of John Hayward, of Braintree. They had two sons, John Hayward, and Lemuel, who was born on January 9, 1781. The younger son was named for his mother's brother, Lemuel Hayward, who was a prominent physician in Boston. His house stood on Newbury Street, as it was then called, now Washington Street, in an extensive garden. The present Hayward Place, taking its name from him, crosses what were once his grounds. Years later, after the Doctor's death, when his land was divided into house lots and sold at auction, Lemuel Shaw in writing the advertisement of the sale described the new lots as "being the gracious garden of Doct. Hayward deceased." To this uncle the boy later on seems to have owed much in the way of encouragement and advice. He took a great interest in Lemuel and in his education and advancement at the time when a youth is most susceptible to friendly influence coming from outside his immediate family circle.

Lemuel Shaw's mother was a most estimable and worthy woman. She watched over him with the eternal vigilance of every good mother, and he in turn seems to have performed his full duty toward her. She was deeply religious and lost no opportunity to perform what she deemed to be her duty toward her children in teaching them devoutness.

Many of the letters of this good mother to her son are little sermons in themselves. Thus, for example, one written to him on the last day of the year 1802, closes with this earnest exhortation: —

! This night concludes another year — in what quick succession the years roll on! It ought to impress our minds with a sense of the shortness of life and importance of improving our time to prepare for death. I hope you will be on your guard not to be carried away with the licentious examples of the present age. Let me entreat of you to pay a sacred regard to the Sabbath, and by no means to spend any part of that day in reading, writing, or any other exercise that has not a direct tendency to promote piety and devotion. If you should follow your professional studys so close as to spare no time to inquire into the evidences of Christianity you must be convinced by one moment's reflection that in so doing you will suffer (I may say) infinite loss.

The faith in Divine Providence which the son so often expressed in his later years came to him, softened but not lessened by his breadth of experience and view, as a heritage from both his godly parents. But more particularly, we may suppose, did it come from his mother, who throughout her life seems to have kept very close hold upon the affections of her favorite son. She was also capable in a business way and her husband seems to have left material matters largely to her. She ran the farm, purchased the family supplies, and kept all accounts. At one time a load of lumber was being delivered at the parsonage, and the pastor, not having ordered it, insisted that there must be some mistake. His wife soon set him right, however, and informed him for the first time

not only that she had bought the lumber, but that she was going to build a barn with it. After her husband's death in 1807 she made her home with Lemuel for the rest of her life, and lived to see him achieve success and distinction, dying at his house in Boston in 1839 at the extreme age of ninety-four. Her portrait, which now is in the possession of her great-granddaughter, painted when she was well beyond middle age, shows a beautiful strong face, the lines of which suggest the well-known features of her son.

The accounts of the early life of Lemuel Shaw are very meagre. Doubtless the history of his days to the time he left the parental roof bears marked resemblance to that of the average boy of his time. That his life was wholesome there can be no doubt. Born with a goodly heritage of health, his body, in the pure air and simple surroundings of Cape Cod, grew to the strength and vigor conducive to a sound mind and long life. Attached to the parsonage was the farm on which the sons of the minister exerted their growing strength. Lemuel certainly had work to do at the age of twelve, for in an early letter to his brother, who had expressed a care lest he be studying too hard, he gave assurance that such was not the fact, as his eyes were weak, and his work on the farm took more than half his time.

There were no public schools at that time in Barnstable, and such instruction as was obtained had to come from within the household or from other private sources. Lemuel's father, with two sons, may have felt the burden somewhat, for he started

a movement for the opening of a subscription school for the elementary branches. But the community was too small, or too poor, to make this project a success, and the mental training of the boys continued to devolve wholly upon their father, and up to the time when he was nearly ready for college Lemuel had no other teacher. Besides his own boys Mr. Shaw had another pupil in the son of a neighbor named Parker, who entered college a year or two in advance of Lemuel, and afterwards became a Congregational minister. This young man some time later put into rhyme his reminiscences of the days when he used to hie himself to "good Father Shaw's" to recite: —

Well I remember his grave, solemn look
His three-cornered hat, his pipe, and his book.

I do not forget the high-backed arm-chair
And the old pipe-box and desk which were there
In the study where our lessons we said,
And the east window with hop vines o'erspread,
Where three of us sat learning Latin and Greek,
Day following day and week after week.¹

When Lemuel approached the time when his entrance to college was in near prospect, paternal solicitude gave rise to fears that home instruction might not be adequate. The father had now been out of college for nearly forty years. In that time requirements for matriculation had doubtless changed, and it was wise to send the young man for final preparation to one who was more closely in touch with the college. Accordingly, in 1795 Lemuel was sent to

¹ Samuel S. Shaw, *Lemuel Shaw, Early and Domestic Life*.

his mother's home town of Braintree, there to be tutored by Mr. William Salisbury, who was graduated at the university the same year. Here for a few months he received instruction, living meanwhile with his uncle. Owing to encouragement from Mr. Salisbury it was decided that Lemuel should try for admission to the college in the summer of 1796, and accordingly he presented himself for examination at that time. Perhaps the misgivings of the father would better have been felt sooner, or possibly the young Mr. Salisbury had not been sufficiently proficient in the art of cramming his pupil for the ordeal, but at any rate Shaw's first application for admission was unsuccessful.

As soon as she heard of his failure from her brother, Dr. Hayward, his mother wrote a consoling letter full of balm for the wounded spirit. She assured her son that it was really for his best interests that he had not been admitted, and quoted his brother to the effect that one of his friends who proved to be the best scholar in his class "was turned by for the vacation." There was doubtless assurance from the college authorities, however, that with further study during the summer the candidate would be admitted in the fall, for his mother goes on to give "Lemmy" directions about getting a new coat made from cloth she had sent to Weymouth to be dressed. If the cloth were not done he was to apply to the government for permission to wear his old coat, representing to them that when he left home in May his father had not thought he would enter college that year and so had not

provided him with proper clothing. The mother's anxiety on the score of her son's clothes will be understood when it is recalled that in those days the college government took a paternal interest in the habiliments of the students. Ten years before, regulations had been adopted prescribing a uniform to be worn by undergraduates. This rule met with little favor, but for a while was enforced by penalties, which grew more severe as the law became more unpopular. In 1796, however, the regulation had fallen into neglect, and in 1797 it was abrogated. When Shaw entered, the rules were limited to provision that a dark blue or blue-gray coat must be worn, and permission might be obtained to wear a black gown, but gold or silver cord or edging was forbidden. The wearing of silk was also prohibited, and home manufactures were recommended. In this state of enforced simplicity, therefore, there could be little doubt that Shaw's explanation of the shabbiness of his dress would be acceptable.

Later in the summer Dr. Hayward had the satisfaction of announcing to his sister that her son had been admitted to the college. This brought from her a letter of pleased congratulation, full of anxious care that her son establish a good character, and warning him to beware the first deviation from the path of rectitude.

Shaw's course in college was at a time when the university was emerging from a period of great poverty. It had with difficulty survived the depression of the Revolution, when in addition to other vicissitudes it had suffered through the irregularities

of its treasurer John Hancock. After the special messenger of the college had followed Hancock to Baltimore and obtained from him the funds which he had caused to be carried to Philadelphia with his private belongings, and he had been supplanted in office by another treasurer, the college was still unable to secure from him payment of the income for which he was in arrears and which the institution so badly needed. He had acknowledged his indebtedness in a very substantial sum as early as 1785, and had given bond to secure payment, but the college because of his political eminence had not cared, or dared, to put the bond in suit, although it had gone so far as to threaten to do so. It was not until two years after Hancock's death in 1793 that even the interest was paid, and not for six or seven years did his heirs pay the principal sum. Matters had come to such a pass that professors had been lent money by the college upon notes to be paid from donations which the Legislature was expected to make in accordance with its previous custom. But the Legislature persistently ignored all appeals for funds, and after many efforts to secure a resumption of these gifts, the attempt was abandoned and the evidences of indebtedness from professors to the college were cancelled. When Shaw was admitted, however, the efforts of the new treasurer to place the institution on a sound financial basis had been so successful that its affairs were self-sustaining and reasonably prosperous.

Many of the old customs and regulations survived. The system of fagging, under which the

freshman was at the beck and call of the upper classmen to perform services of drudgery, was in the decline, although it had not wholly disappeared. Joseph Story, who was Shaw's senior in college by two years, was active in opposition to this practice and refused to exercise his rights in this respect and invited his own fag to his room as a friend. Shaw's duties could not have been very burdensome, as he fell into the partial hands of Freeman Parker whom his father had instructed at Barnstable.

There was very little communication between students and instructors except in the classroom, where classes attended in a body. By the old rules tutors were required to visit students in their rooms to assist them in their studies, but this practice was much objected to on the part of the tutors, as it "tended to diminish their respectability in the minds of the students," and whatever observance of this law existed was of a perfunctory character.

Many of "the ancient customs of Harvard College, established by the Government of it," were still in force, and the list of "pecuniary mulcts" for their breach included penalties for all the petty offences of college life, from "going upon the top of the college," making "tumultuous noises," and "neglecting to repeat the sermon," to "opening doors by pick-locks," and "tarrying out of Town one month without leave." Shaw never transgressed the rule that "No Freshman shall wear his hat in the College Yard, unless it rains, hails, or snows, provided he be on foot, and have not both hands full," which at about this period, "considering the spirit of the

times, and the extreme difficulty the executive must encounter in attempting to enforce the law," was repealed.¹ But he fell under the ban in some respects, and was fined for absences and tardiness at prayers and recitations. Although it has been stated that he was punished "for throwing snowballs in the College Yard," "walking on the Sabbath," and "for entering the hall with his hat on while the Government were there," yet a careful examination of the Faculty Records fails to disclose that he was guilty of such heinous sins.

Of the fifty-four members of the class of 1800 at least three besides Shaw became illustrious: Washington Allston, the poet-artist from South Carolina; Joseph S. Buckminster, the brilliant young epileptic preacher; and Joshua Bates, afterward president of Middlebury College. Loammi Baldwin, an engineer of ability whose monuments are found in the naval dry docks at Charlestown, Massachusetts, and Norfolk, Virginia, but whose name is more generally perpetuated by the variety of apple which he accidentally discovered while surveying, was also of this class. In college also, but of the class of 1798, were Joseph Story, afterwards Justice of the Supreme Court of the United States for many years, and William Ellery Channing, the celebrated divine. Allston was then, as always, absorbed in his art, and painted upon the windows of his room specimens of his talent which caused the passer-by to stare in wonder. He once assisted Channing, who was as slow at mathematics as Allston was quick,

¹ Quincy, *History of Harvard University*, vol. II, p. 278.

with the solution of a problem, and so developed his figures into amusing caricatures of the professors and tutors that Channing could not resist the temptation to display it at the recitation.

With none of those whom we have mentioned did Shaw seem to form a close friendship. Allston after a time settled down and worked at Cambridgeport, but a fair walk from Beacon Hill, and there ended his somewhat disappointed life, but Shaw is nowhere mentioned as among the friends who frequented the artist's house on regular evenings, attracted by his charming personality and brilliant conversation. With Story, of course, he came into frequent contact afterwards in his professional life. Buckminster, while yet under twenty-one years of age, was settled over the Brattle Street Church, one of the largest congregations in Boston.

All of these men, except Allston, with Shaw, were members of the Phi Beta Kappa Society, which, founded in 1781, was then on an established footing. From the position which that organization has for generations occupied, it is now hard to believe that there was a time when it was in great disfavor and when its continued existence was opposed. It was organized at Harvard in 1781 for "the promotion of literature and friendly intercourse among scholars." For some time, however, it was regarded with suspicion by the officers, and in 1789 a committee of the Overseers, of which John Hancock was chairman, recommended that inasmuch as there was "an institution in the University with the nature of which the Government is not acquainted which tends to make

discrimination among the students," its nature and design should be inquired into. No action was ever taken, however, and the society continued to flourish.¹ Shaw later became the president of the society, serving from 1832 to 1837, being preceded in that office by Edward Everett, and succeeded by Judge Story.

Then, as now, although probably not to such a complete extent, membership in Phi Beta Kappa was made up of those having highest rank in scholarship. Thus we have proof that Shaw's standing in his class was good, which is confirmed by the fact that he received a *detur* in his senior year. Further evidence, though from a biased source, comes in a letter from his brother John who visited Harvard in 1800 and wrote home to his parents as follows: —

I have the pleasure to inform you I arrived in this town safe Saturday eve. I went immediately to Cambridge, where I had the pleasure to find my brother in very good health and by the strictest inquiry found him much admired for scholarship and stability.

Strange to say, he never delivered one of the annual orations before the society. It is hardly possible that he was not urged to do so, and we are led to infer, from the almost utter absence of all public addresses of a general character after he went on the bench, either that he did not have the time to give to their preparation, or, as is more likely, that he deemed it improper for the Chief Justice of the Commonwealth to make public utterances touching the questions of the day.

¹ Quincy, *History of Harvard University*, vol. II, p. 398.

Of his social life in college there is little report. We know that the graces of dancing were sought and can imagine the difficulties experienced in subduing his bulky and ungainly frame to the rhythmic poetry of motion. There was probably but little occasion to put his instruction in this respect to the test, however. He visited his uncle, Dr. Hayward, through the winter vacation of his first year and may have had something of society there, but at the college there was little. Story says:—

The intercourse between the students and Boston when my class entered college was infrequent and casual. West Boston Bridge had been completed but a short period before. The road was then new and not well settled, the means of communication with Cambridge almost altogether by walking; and the inducements to visit in private circles far less attractive than at present. Social intercourse with the young, and especially with students, was not much cultivated; and invitations to parties in Boston rarely extended to college circles.¹

Doubtless the young men were sufficient unto themselves in the way of amusements. Shaw himself says, "There I could always find some person with whom I could pass my time agreeably away." Allston tells of a remarkable masquerade held in their junior year in which he appeared as Don Quixote with a wonderfully realistic suit of pasteboard armor of his own devising and manufacture. There was the Speaking Club as well, which, as its name implies, had for its purpose the practice of elocution and oratory. There was also the Hasty Pudding Club,

¹ Story, *Life and Letters*, vol. 1, p. 51.

organized the year before Shaw entered college, a literary club, admission to which was based to some extent on scholarship. The meetings were held once a week, hasty pudding and molasses constituted the spread, and the exercises were closed by singing a hymn.

Not many of the vacations did Shaw spend at home. The journey to Barnstable was then a formidable undertaking, often requiring more time than is now necessary to cross the continent. In his freshman year, after his first visit home, his father had occasion to write as follows to the president: —

I would inform you that my son had so long and so difficult a passage from Boston to this place by means of contrary winds and tempestuous weather (he was a week on his passage) that he tarried at home but a few days. We hurried him to return to Cambridge, he was desirous to be there in season, but Monday was such storm the vessel could not depart, Tuesday and Wednesday the winds were contrary, but yesterday he went in the vessel under a fair wind. Suspecting that he will be tardy two or three days I have sent this after him to present you, and hope this will serve to exculpate him.

His father continued to have the old trouble with his parishioners about his salary. They evidently had not improved much in this respect, and the effect was felt at Cambridge. In 1799 Mrs. Shaw writes thus to her son: —

“You mention seeing Mr. Miller since he returned to Cam. but nothing of the conversation that I had with him. He told me that he understood that you were so deficient in discharging your bills that your connections had ceased; and you must pay $\frac{1}{6}$ per day punishment

till your bills were paid. This information surprised me. The consideration of your want of prudence gave me more uneasiness than the needless expense; tho' you *must* know we had no money to throw away. I have always told you that if your father's remittances failed of getting to you in season to discharge your bills, you must apply to your Uncle Doctor and he would let you have money for the purpose. . . . Your father has received of the treasurer between 13 & 14\$ only since you left home, a sum so small I knew would be inadequate to your wants, therefore supposed you would apply to your uncle. The \$33.39 cents you wish me to send with this by the post you must go to your uncle for, as your father has no money, and knows not when he will have any.

And again in the same year she says: —

We have received three letters from you since you left us, in neither of which have you complied with my proposal in giving an exact statement of your affairs respecting money matters. There is great complaint about the scarcity of money. I hope you will make the best use of the little you have.

After his first year Shaw was able to add to the scanty allowance he received from home by teaching school during the winter vacations lengthened by leaves of absence, and his mother took occasion, in answer to a letter from him on this subject, to give him this good advice: —

In order to recommend yourself as a schoolmaster let me advise you to pay all the attention in your power to your handwriting thro' this term. If you have no other motive to do it let a mother's advice have so much influence on your conduct as to induce you to comply with her request. Furnish yourself with finer paper (and better ink) than your letters are written upon. I don't expect

you will ever attain that elegance in handwriting which is the distinguishing characteristic of some persons, but I should be happy to see your ambition aspire to that degree that in future you may never feel the least mortification or disadvantage arising from your deficiency in this particular.

His compensation as a schoolmaster was not large, but he had his board, transportation, and sixteen dollars a month for the term of ten weeks. This was of some assistance to his father, but of more benefit probably to the son in the self-reliance and confidence which the authority reposed in him must have instilled. His last engagement of this kind — during the winter before his graduation — was in Lexington, and concerning it he writes that the winter was spent very agreeably there, and the acquaintances formed were highly valued.

At this time he had not chosen a profession, although his leaning was toward the law. Quite naturally, it was the wish and hope of his parents that he should enter the ministry. But very wisely as it proved, with a confidence inspired by the steadiness and thoroughness he had thus far displayed, they left him much to himself upon the question, believing that he would exercise his own choice prudently and carefully. In a letter dated in February, 1800, he wrote as follows: —

In your letter you inquire of me what profession I expect to pursue. It is indeed a secret which I have not yet discovered myself. It in a great measure depends upon circumstances. Perhaps you have been informed that I have some prospect of employment as assistant in one of the public schools in Boston. If I do go there to assist in

a school I shall be advantageously situated for studying law. It is a profession I must confess to which I have a partiality; but you know I was always designed for the desk. From my own observation I am fully convinced that it is not the profession that adorns the man, but the man the profession.

And thus the four years drew to a close without a decision upon the momentous question. It was said of Shaw in later life that his habit of thought was slow, but this was not true in the sense in which it was meant. His mind was not slow, but his decisions were slowly formed. He had, perhaps, one of the most perfect types of judicial mind which the country has ever seen, quick of comprehension, but slow of decision. One of his characteristics as a judge was that he never discouraged further argument. He had never heard so much upon a question that he would not gladly hear more. He never in his life jumped at a conclusion, or made a hasty judgment.

Here, then, we see him exhibiting the first manifestation of that quality which afterwards helped to make him such a great judge. It is inconceivable that he had not thought deeply and long on the question of his life-work. He knew that his parents intended him for the ministry, and that no other profession had ever been thought of for one of the Shaw family. He knew what the ministry was, and the kind of life that the minister led, and doubtless had his opinions concerning them. What those opinions were we have no absolute means of telling. So far as known he never expressed his views upon the subject. But he honored and revered his parents,

and from the manner and surroundings in which he had been reared, with his own deeply religious nature, must have held the calling of his father in the highest regard.

These considerations had great weight with him, and had he been less thoughtful and careful, or inclined to make inconsiderate judgments, he doubtless would have followed along the family groove. But however highly he may have thought of the ministry, his own adaptability for it was a further question, involving careful consideration of his own tastes and abilities. On this question the argument to this time had been *ex parte*. He had heard only one side. He wanted to look into the matter more fully. A mistake once made could with difficulty be retrieved. He wanted more information before he made up his mind, and an opportunity for observation beyond the college walls. In the decision of this question in his own life he followed the same deliberate course that in after years upon the bench he pursued with reference to matters of the same importance in the lives of others. He took his time, and waited until his judgment was mature.

So it was that at commencement, after participating in a Greek dialogue on "The Excellency of the Greek Language," which formed his share in the exercises, Shaw took his degree without a definite plan for the future.

CHAPTER II

EARLY LIFE AND STUDY OF LAW

At the dawn of the nineteenth century school teaching had not developed into the profession it has since become. Horace Mann had not at that time aroused the conscience of the people to a recognition of public duty in the development of the minds of children. Even twenty years later the city authorities of Boston were to close a school for the advanced instruction of girls, "which had been opened as an experiment," because too many applied for admission. It was deemed to be as impracticable to give an education to all girls whose parents would wish them to be educated at public cost "as to give such an one to all the boys of it at the city's expense." "No funds of any city could endure the expense," declared the Mayor.¹

But then, as ever since, the occupation of teaching afforded a convenient and moderately profitable intermediary to the youth, rich in college lore but poor in purse, who did not yet feel his feet firm in the path to the future, or who sought a means of self-support while pursuing further studies toward a profession. How many lawyers, and doctors, and clergymen have found means to an end in the temporary occupation of teaching! And how many children have thus been privileged for a while to come under the influence and example of a brilliant

¹ Mayor Josiah Quincy's Farewell Address.

and pure-minded youth whose sincerity and high purpose more than made up for his lack of experience in pedagogy.

In his unsettled state of mind young Shaw turned to teaching. This afforded him a means of earning his own living and thus to "disencumber his beloved father of the expenses of his education,"¹ while to many others in after life it doubtless gave the proud satisfaction of having had for a school-master the Chief Justice of the Commonwealth.

At that day schools were few and instruction was simple. There was then no hint of the elaborate and amazingly diversified courses of instruction which now are offered in the public schools of all large communities. In Boston there were only six schools besides the Latin. The city was divided into the North, South, and Centre districts, each having its separate Reading and Writing School. To the "South Reading" Shaw went as an usher or sub-master. This school was afterwards named the Franklin, and subsequently became the Brimmer School. His salary was probably less than six hundred dollars, which was the amount paid at a somewhat later period. But it was sufficient for his maintenance, and served his purpose.

For a year in this capacity he taught the young idea, and doubtless frequently wielded the rod, for to the usher in great part fell the duty of discipline. As he subsequently expressed it, he "worried through" the year. His son tells us that he regarded it as a period of "vexation, drudgery, and failure to

¹ Palmer, *Harvard Necrology* (1864).

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maintain discipline," but Dr. Asa Bullard, the master under whom he served, declared that he was the best usher who was ever in the school.

Of the pupils who came under his charge we hear of but one who ever approached fame, Charles Sprague, who had local renown as a poet, and who has been called a "Bostonian of the Bostonians." Although his poems, chief among which is an ode to "Experience" delivered before the Phi Beta Kappa Society at Cambridge in 1829, furnish his claim to distinction, yet his peculiar life provides an item of greater interest. He died in his eighty-fourth year and was a man of means, yet he never went beyond the limits of Massachusetts but twice, once to Connecticut in pursuit of an evading debtor, and again to the same State to bring home the body of a dead relative. After reading his poem at Cambridge when he was thirty-eight years old, he never again crossed the river to that city, and although his pen had hitherto been active he never wrote a line after he was forty.

But the young schoolmaster, during his first year out of college, did not confine his energies to the classroom. His duties there were irksome, and his spirit soared above the heads of his youthful charges and beyond the confines of school walls. We have seen that his preference was for the law, but thoughts of literature gave him pause, and for a while he wavered. Thus he wrote to a classmate soon after leaving Cambridge: —

Literature in my opinion is almost the only resort of a man who wishes to render his enjoyments independent of

others. You will think this a singular declaration from one who seemed to care so little for the attainment of literature while in college; but I assure you my situation is now extremely altered.

An opportunity to indulge his tastes in this direction, and to try his wings in flight, was afforded when he became attached to the "Boston Gazette," a newly founded journal with commercial, political, and literary proclivities. The politics of the paper were to his taste, for it was staunchly Federalist. Although it held its columns open to contributors, after the custom of the time, for the airing of their views upon public questions, yet, in a notice to its readers published upon the occasion of the rejection of a letter of criticism upon the course of President Adams, it announced that it could not print abusive attacks upon his political principles. The paper contained a column headed "Political Miscellany," and another called "The Parterre," under which title literary articles and reviews were printed. At about the time Shaw must have become connected with the paper it published a long review, with lengthy extracts, of Joseph Story's poem, "The Power of Solitude," a youthful effusion, hard to find at this time because of the fact that later on, when he had ceased to have pride in the work, the author bought up all the copies he could lay his hands upon and burned them.

Shaw officially became an assistant editor of the "Gazette," which means that he corrected proof. The life of the paper was provided by letters from regular and casual contributors. Fisher Ames and

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Robert Treat Paine, Junior, were regular correspondents. But whatever his title, and irrespective of the question of remuneration, there is little doubt that Shaw contributed liberally to the columns of the "Gazette" during this first year. There is now no way of identifying his articles. Had his contributions been written in after years, when his style had become fixed and so characteristic that it is readily distinguished from that of his colleagues on the bench, there would be no difficulty in determining his work. But the articles in the "Gazette" were his first efforts, put forth before his mind and his style had settled, and in the absence of avowed authorship cannot be separated from the mass. Story lived to envy the prudence or timidity of the young author who did not append his name to the trailings of his pen, for Shaw never had occasion to feed the flames with the efforts of his salad days. He may have been "Caius," "Cato," "Truth," "Marcus Brutus," or "Marcus Aurelius," any one or all, but the obscurity which covers the identity of the author of the lines written for the "Gazette" over those names forever remains unilluminated.

In the meantime he continued to be undecided upon the question of his profession. In February, 1801, his mother writes:—

You seem to be undetermined as to the choice of a profession. I hope you will not be apt to mistake your talent. I could name several that took upon them the sacred profession of divinity, their profession so far from regulating their conduct that their conduct would have disgraced a Hottentot. Others we have seen in various professions

who have been an ornament to the Christian religion. I was not aware till I had finished the last sentence that you might construe it into a discouragement of entering upon the study of divinity. This was not my intention, for I do most sincerely hope that you will make it your study through life, whether you ever preach or not. I hope you will remember that you are not to look to yourself alone, but to others also. I conceive it to be your duty to provide for yourself in that way in which you are capable of doing the most good and being the most extensively useful. In order to promote so desirable an end it may be best for you to take some more time to consider the subject, at the same time to be as diligent as health and circumstances will permit to lay up a stock of general knowledge that may be useful to you in future, let your particular calling be what it may. I hope you will not suffer yourself to give way to discouragement. Our country is very extensive; there is ample space for all good men of every profession. Seek first and principally the kingdom of heaven and the righteousness thereof, and you need not fear but that all others things that Infinite Wisdom shall see to be best for you shall be added to you.

The devout mother still had hopes that her son would follow the profession of his fathers, but her love for her son and her wise faith in him made her content to abide his choice.

To his uncle, Dr. Hayward, must be ascribed much of the influence which determined Lemuel's course and caused him finally to decide to enter the law. Dr. Hayward's house was the young man's second home while he was in Boston, and in him was found a ready counsellor and sincere and paternal friend. The Doctor was a man of substantial position who had seen the world from a different

viewpoint from that of a Barnstable minister. To his discernment, as he watched the literary ventures of his nephew, it was doubtless apparent that although his talents in that direction may have been considerable, yet they were too ponderous and lacked the brilliancy necessary to rise above mediocrity. We can see very plainly at this time, and by so much more must it have been clear to the uncle, that of the professions which were of interest to Shaw, he was far best adapted for the law. The ministry he himself seems to have eliminated from consideration at an earlier date. Whether the uncle used direct means of influencing his nephew toward the law we cannot tell, but we do know that indirectly at least he was the means of turning the balance.

One of Dr. Hayward's good friends was a young lawyer named David Everett, who was likewise a contributor to the "Gazette," as was also Thomas O. Selfridge, an older lawyer, in whose office Everett practised. It was through Everett that the columns of the "Gazette" were opened to Shaw, and during the following winter he must have seen much of the company of both lawyers. Selfridge was a man of ability, in good practice, and of strong Federalist politics, who was soon to come into unfortunate notoriety. Everett's allegiance at this time was torn between the law and literature. He was one who had not made haste slowly in the matter of choosing a profession. At this time, when he should have been bending all his energies to succeed in practice, he was much given to writing. While he was a student in Dartmouth he had composed those lines which

are still familiar to every one, although the name of the author is not: —

“You’d scarce expect one of my age
To speak in public on the stage,
And if I chance to fall below
Demosthenes or Cicero,
Don’t view me with a critic’s eye,
But pass my imperfections by.”

The year when Shaw first knew Everett on the “Gazette,” a play written by the latter was produced at the Federal Theatre, and the following year he was the Phi Beta Kappa poet at Cambridge. Soon after this he was to remove to Amherst, New Hampshire, where we shall follow him, later returning to Boston to forsake the law and establish a newspaper called the “Boston Patriot.” After conducting this and other papers for a few years, he removed to Marietta, Ohio, where he died in 1813. He was evidently an attractive, versatile man, though lacking singleness of purpose. But he was well read and of high intelligence. At this time, when he had not yet learned that he could not ride two horses, particularly if one of them be the law, he was probably enthusiastic over the profession. Frequent contact with Everett, aided by the influence of association with the maturer Selfridge, was plainly enough to dip the scales in favor of the legal calling, and accordingly in 1801 we find young Shaw, with school life behind him, enrolled as a law student in Everett’s office.

There were no law schools in those days. Not until 1815 was a professorship of law founded in Harvard

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University by Isaac Royall, which resulted in the establishment of a separate law department. This solitary chair was augmented in 1827 by Nathan Dane's endowment of a second professorship which Judge Story was called to fill. Theron Metcalf conducted a law school at Dedham which met with considerable success, but this was not started until after the period which we are considering. When Shaw made up his mind to study for the bar, legal education was only to be gained by entering one's self as a law student in the office of a practitioner. A period of three years' office study was required, after which the student could be admitted to practice in the Court of Common Pleas. After that, two years' practice was necessary before the student could be admitted to the bar of the Supreme Judicial Court as an attorney. Before receiving the gown, or becoming a counsellor, with authority to try all cases before the highest court, a further experience of two years' practice as an attorney was required. Thus seven years must elapse before one could be admitted to full practice.

The matter of admission to the bar was almost wholly in the hands of the bar associations for the different counties. These were voluntary organizations intended to promote fraternal feeling amongst members of the bar, and regulate questions of practice, fees, and like matters. Similar organizations exist to-day, and in them is found almost the sole survival of the ancient system of guilds. When a student had fulfilled the requirements of study the association moved his admission before the court,

which, relying on the investigation made by the members, allowed the motion as of course. If a youth who applied to be taken into an office as a law student happened to have no college degree, the matter of his general fitness for the bar was inquired into by a committee appointed for that purpose. If found to be sufficiently proficient in the liberal arts, he was allowed to become enrolled in the office of his preceptor. By agreement amongst themselves no lawyer could receive a student into his office without first obtaining the consent of the bar association, and no office could have more than three students at one time. This rule was supposed to have been prompted by the jealousy of the bar caused by the large numbers of students who sought instruction under Theophilus Parsons, later the Chief Justice of the Supreme Court. As another of the prescribed rules of the bar provided that each student should pay at least one hundred pounds for his instruction, the reason for the jealousy is apparent. In 1806 rules governing the admission of attorneys and counselors to practice at the bar, substantially in accordance with the custom which had theretofore been followed, were announced by the Supreme Court in the "*Regulæ Generales*" which are published at the end of the first volume of Massachusetts Reports.

Accordingly we find this minute upon the record book of the Suffolk Bar Association in the fall of 1801: —

On motion of Mr. Everett it was voted; that Lemuel Shaw be considered a student in his office from August last.

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From this time on Shaw pursued his studies for the bar without remission. It is not to be concluded that he gave up writing altogether, or that his industry did not prompt him to pursue other subjects of interest. But all other pursuits from this time on were to be classed as either avocations or pastimes. He had chosen to follow the law, and had made the choice deliberately and advisedly. Henceforth his profession was to absorb him more and more completely.

In addition to his contributions to the "Gazette" the only other extraneous subject to which the student devoted much attention seems to have been the study of the French language. The state of politics in France and the wonderful career of Napoleon, as well as our own relations with that country, were matters in which the keenest interest was felt. There had been a great revulsion of feeling here during and after the bloody course of the French Revolution. Then came the disagreement between that country and America which increased within a short time to a breach which seemed sure to result in war. The papers of the period contain many translations of French letters and documents, tending to show the state of French arms and politics and to throw light upon the attitude of that country toward the United States. During this exciting time, when badges of loyalty to our own Government and disapproval of France were commonly worn by citizens in the street, Shaw's interest in French affairs led to the acquirement of further proficiency in that

language, the study of which he began while an undergraduate. During the first year of his preparation for the bar, in addition to his literary occupations in writing for the "Gazette," he pursued a course in French under the instruction of Antoine Jay, a Parisian, who was a political refugee to this country under the assumed name of Renaud. He was soon to return to his native land, there to resume his true name, and as a founder of the "Constitutionnel" newspaper, subsequently to acquire wealth, and for his literary performances be honored by being made a member of the French Academy. Shaw was one of his most apt pupils and was not forgotten by his instructor after his departure from this country. Nearly forty years afterwards Jay wrote to him, in a hand so minute as to be almost illegible, expressing vivid and agreeable recollections of his stay in Boston and the friendly relations he had enjoyed with eminent men and most respected families. Even at the advanced age which he had then reached he seems to have entertained misgivings lest he might again be forced to seek the hospitality of the United States, in which event, his correspondent was assured, Boston would surely be the place of his last asylum. It is interesting to note that Shaw, in 1842, gave his friend Andrew Ritchie, who was about to visit Paris, a letter of introduction to Jay, by whom Ritchie was received with much cordiality. Ritchie wrote Shaw a long account of his visit to the Frenchman, in which he described enthusiastically the viands and wines served at a luxurious dinner at Jay's house, during which the host said "he never

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should forget our *squash pies*, which he could not get in Paris." On taking leave of him Jay sent by Ritchie a bas-relief of his own head as a present to Shaw.

The proficiency which the young law student acquired under his brilliant teacher was such that in his zeal he was led to undertake the translation of a contemporary French work entitled "A Political and Historical View of the Civil and Military Transactions of Bonaparte, First Consul of France," by J. Chas. This work had appeared in France in the year 1801, before the establishment of Bonaparte as Emperor, and was thought to have had considerable influence in producing that event. Its general tone was that of adulation toward the First Consul, but the book contained a full description of the principles of the Government of the country, and the situation of the nation with respect to its commerce, internal resources, navigation, morality, and religion.

The translation of the work, which made a volume of about three hundred pages, was completed and it was proposed to publish it. In the "Gazette" of December 13, 1802, the announcement is found that Russell & Cutler would print the book "on fine paper, with a handsome type," if subscriptions to the number of five hundred were received. "In the translation," it was declared, "it has been attempted to give a faithful and accurate delineation of the ideas, opinions, and principles of the author." However, in spite of the "full confidence of . . . liberal patronage and support" with which the offer was made, the proposal does not seem to have met with

much response, and the book was never published. The manuscript was returned to Shaw with the following note from the publishers: —

BOSTON, *Jan. 29, 1803.*

DEAR SIR: — Accompanying this, directed to D. Everett, Esq., you will receive the 1st vol. of your m.s. We must apologize for not forwarding it sooner. What are you about at Amherst? Do the muses fly your haunts? or has the frost chilled the mental as well as the corporeal fluids? "Keep silence but speak out."

With esteem, Yours,

RUSSELL & CUTLER.

Shaw did not lose his interest in these matters, nevertheless, and continued to follow the ascendant career of Napoleon with unabated attention. Later on, upon more than one occasion he gave public expression to his views on French affairs, in the formation of which doubtless his knowledge of the book by Chas had an important influence.

In 1802, Everett, evidently not meeting with the hoped-for success in Boston, removed his office to Amherst, a small town in Hillsborough County, New Hampshire. With him went his student, and there for the next two years, in the quiet of the country village, his preparation for the bar was continued, in surroundings perhaps on the whole as conducive to good work as in Boston. Shaw did not give up his writing even there. A small but excellent newspaper had recently been started in the town, the "Farmers' Cabinet," which compared favorably with sheets published in larger places. Contributions from writers of sense and education were doubtless welcomed

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both by the editor and his readers. But, as in the case of the "Gazette," Shaw's communications bear no distinguishing mark, and with a single exception cannot be identified. During the period of his residence in Amherst, however, many translations of French articles appear in the paper which were doubtless the result of Shaw's familiarity with that language.

The one contribution to the "Cabinet" which can definitely be laid at Shaw's door is a piece of verse entitled "Dancing," which appears in the issue of November 29, 1803. The authorship of these lines is revealed in the following letter which Luther Cushing, the proprietor of the paper, with whom Shaw was on intimate terms, wrote to him on December 18, 1803, while Shaw evidently was absent on a visit to Boston: —

I have been very hard beset lately, particularly by the two beautiful and loquacious Nancys, for the authorship of the poem on "dancing," and great promises have been made if I would only inform them whether he were *now* in town. Notwithstanding the vague manner in which my replies were made they have pretty much determined to fix it on my friend Shaw, and if he finally has to father it I think he need not be ashamed of so likely an offering.

Some of the lines which excited the curiosity of the young ladies follow: —

The long-expected evening came, the ball
Summons its votaries to their much lov'd hall;
Joy fills each breast, and gladness points the way
Where health and pleasure hold united sway.
Each gaily entering, leaves dull care behind,
Gives spleen and melancholy to the wind;

·Mirth waves her magic wand unseen in air,
And bids defiance to th' approach of care,
With mystic circle shields her favorite place,
From all th' intrusions of his dæmon race;
Now fond inquiries, cordial greetings, prove
Pledges of friendship, harbingers of love;
And true politeness, unconstrained by art,
Bespeaks benevolence in every heart.
Beauty and wit and fashion here display
Their charms to fascinate, their power to sway;
And sprightly conversation, pure, refined,
Pours forth the richest treasures of the mind.

Amherst was the shire town of those days, and therefore was of more importance, at least to the lawyers, than it is to-day. But it is safe to say that the time which the candidate for the bar needed for study was rarely if ever encroached upon by the demands of his instructor's practice. During term time the attention of all the fraternity centred at the Court-House, and there the student was in constant attendance listening and observing. This court-house, a year or so later, was to be the scene of the opening of one of the greatest careers which the country has held, for here the youthful Daniel Webster came to try his first case. The sitting of the court was accompanied by fraternal social gatherings, many of them we fear of a highly convivial character. A contemporary account of one of these occasions, written by a lawyer to his friend who was regrettably absent, although not elevating, may perhaps be of interest as throwing light upon the playful habits of the learned brethren when off duty:—

Judge — wore a wig, alias a scratch, which was upon the whole tolerably ridiculous, especially as it was fre-

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quently made to change its position, to our no small amusement. As to the rest I will say nothing.

Gordon had the bar to dine with him on Thursday, and it happened that I had previously asked the judges to dine with me, and therefore missed of much pleasure, as well as wine, I should have enjoyed at his house. He endeavoured to get all his brethren drunk, and it not being a very difficult undertaking he succeeded very well, with respect to them and himself too. About half past three in came the whole fraternity with Judge D. at their head, who was the soberest man among them (what think you of the others?) ready to give the fraternal hug even to old K. himself. D. *goggled* the court. A. and S. were silent for the best of reasons — they could not speak. C. and W. quarreled and threatened to fight. Gordon laughed at everything and everybody. B. and S.D., Jr., argued a case to the great satisfaction of themselves. Claggett fell asleep, and Ben Champney made poetry. N.G. stole a few writs and Thompson made up his *large* bills of costs. Old K. (the sheriff) broke all his deputy sheriffs, and took care of the jury himself to save the fees.¹

Probably the apprentices upon such occasions were not admitted to the society of their masters. More likely than not, at the time of the revels described, Shaw was cosily ensconced beside the fire of his friend Cushing at the "Cabinet" office, much less strenuously amusing himself, for Cushing writes thus to Shaw absent: —

Had I the powers of a Goldsmith I might now almost sing the Deserted Village. Since your departure my fire and candle I find burn more dimly, and the column of smoke which used so frequently and pleasantly to ascend in my little counting-room has almost ceased.

¹ Daniel F. Secomb, *History of Amherst*.

There was society of a very different kind as well in the town, as we are led to infer from Shaw's poem, and here the law student experienced his first love affair. His friendship with Miss Melville, one of the "Nancys" referred to in Cushing's letter, and the daughter of Major Thomas Melville, of Boston, was formed during the student period at Amherst.

Major Melville was a leader of the Boston Tea Party in 1774, afterwards an officer in the Continental Army, and later Surveyor of the Port of Boston. He persisted until his death in 1832 in wearing the old-fashioned cocked hat and knee breeches, and was called "the last of the cocked hats." He inspired Oliver Wendell Holmes's poem "The Last Leaf," and the author said of him: —

His aspect among the crowds of a later generation reminded me of a withered leaf which has held to its stem through the storms of autumn and winter, and finds itself still clinging to its bough while the new growths of spring are bursting their buds and spreading their foliage all around it.

And so the Autocrat wrote: —

"I know it is a sin
For me to sit and grin
At him here;
But the old three-cornered hat
And the breeches, and all that,
Are so queer!"

A close friendship developed between the young couple, which resulted in an engagement of marriage. To his death Shaw carefully preserved two tender notes written in the delicate hand of his

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first betrothed, timidly referring to their immature plans for the future and her admiration and love for him. The untimely death of the young lady, unhappily, cut short their youthful dreams, and not until he was thirty-seven years of age were Shaw's affections again engaged.

The intimacy between Shaw and the Melville family, however, continued after the young lady's death, and subsequently the families were united in 1847 by the marriage of Shaw's daughter Elizabeth to Herman Melville, the grandson of the Major. Herman Melville, Shaw's son-in-law, had been a wanderer on the seas, and had written a most interesting and delightful account of his life amongst the savages of the South Sea Islands. This volume, "Typee," which is still read with interest, was dedicated, in 1846, "to Lemuel Shaw, Chief Justice of the Commonwealth of Massachusetts."¹

After two years in the country village Shaw's apprenticeship was over, and in the summer of 1804 he is discovered debating the question of where to begin practice. He has thought of about fifty different places, he says, and is still at a loss where to locate. Very wisely he determined to go to Boston

¹ Herman Melville was an author of considerable ability and note. After his marriage to Miss Shaw they lived in Pittsfield, on a farm, now the Country Club. Here he was friendly with Hawthorne, who alludes to him in his "Wonder-Book" as "shaping out the gigantic conception of his 'White Whale' while the gigantic shadow of Greylock looms upon him from his study window." Later the Melvilles removed to New York where he was employed in the Custom House until 1836. He died in New York in 1891. Besides "Typee" his best-known works are "Omoo," "White Jacket," and "Moby Dick, or, The Whale."

to consult his uncle, for whose judgment upon all questions of perplexity he had the greatest respect. The uncle's advice was evidently for Boston, and there the young advocate determined to cast for his fortunes.

In the "Farmers' Cabinet" of September 11, 1804, appeared the following item:—

At the late term of the Court of Common Pleas in this County, Lemuel Shaw, Moody Kent, and Henry B. Chase were admitted practitioners at said court.

Two months later in Massachusetts, at the Court of Common Pleas held at Plymouth on November 20, as appears by the record:—

Justices present, viz:—

Willm. Watson

Ephraim Spooner and

Daniel Howard, Esquires.

Lemuel Shaw of Barnstable was admitted an Attorney of this Court and took and subscribed the Oaths required by law, &c.

CHAPTER III

PRACTICE OF THE LAW — SPEECHES — PUBLIC SERVICE

SHAW's career had nothing in its whole course of the sparkle and flash. The fire of his genius kindled surely but slowly, with little flicker and less smoke, into the clear and steady flame which was to illumine the pages of the law for generations to come.

His first office was opened on Congress Street in Boston, near to the home of the "Gazette" with which he was so familiar. "The tenements in this street are not numbered," he wrote, "but you may easily distinguish my office by this description, 'adjoining Russell and Cutler's Printing Office.'" Clients came slowly. The first years of practice for most lawyers afford little more than opportunity for further study and for broadening the base and increasing the depth of the foundation upon which to build. The young man of industrious habits improves the opportunity during this period of little business to equip himself for the activities of later years. If he is lazy, however, he falls into easy-going ways hard to shake off at will, and if easily discouraged he may abandon altogether the calling which seems to need him so little. Shaw was both industrious and persistent. Few men have gained a practice more slowly than he, yet at no time did he utter a complaint or word of discouragement, but made the best of his opportunities in turning his hand to

whatever it found to do. He had, nevertheless, that failing common to many lawyers, procrastination. This he confessed to his mother in a letter of apology for not writing earlier: —

It is not to be dissembled, I cannot deceive myself in this particular, that I am under the influence of an unconquerable, or rather I hope not unconquerable, but a strong and inveterate habit of procrastinating and postponing till to-morrow what ought to be done to-day. . . . I hope and resolve to improve in this particular and establish for myself a more regular distribution of time and employment, and adhere to it with more firmness. I even have the satisfaction to think I have done something towards amendment.

There is evidence in his later life, however, that his efforts to overcome this tendency did not meet with complete success. But of this more hereafter.

During his first winter in Boston Shaw continued the enjoyment of the rural pleasures indulged in at Amherst, and took advantage of the fine sleighing which the season afforded. He also attended the Boston Assembly, a series of dancing parties, which he found highly enjoyable.

In the fall of 1805, he learned that there was likely to be a change in the clerkship of the Supreme Court of New Hampshire for Hillsborough County, and wrote to his friend Cushing to see what his chances might be to secure the appointment. The place paid in fees about one thousand dollars a year, a sum which looked very attractive to the new lawyer who saw so dimly into the future. Fortunately for Shaw, however, and for Massachusetts, Cush-

ing's letter was so discouraging that all ambition in this direction was quenched. Cushing wrote that the judges were disposed to reappoint the then clerk, and advised Shaw strongly not to take the position even could he obtain it without difficulty. "The spirit of innovation which has gone abroad," he wrote, "will certainly affect the fees of this office. . . . There will I think be a general revolution in the judicial department and an entire revisal and great alteration in the fee bill, and as the judges of the Supreme Court and others have frequently referred to this office as an instance of extravagant fees, legislative denunciation will be particularly levelled at it."

In December, 1806, he left his office on Congress Street to enter that of Selfridge in the old State House at the head of State Street. Everett was still in Amherst, but the acquaintance of his two friends, formed during association on the "Gazette," now led to a closer connection. We do not know whether the two became partners, or merely office mates, with the opportunity for the younger to do such work as might be turned over to him by the older practitioner. But whatever arrangement existed between them was soon to be terminated by a tragic event which caused great public excitement and ended in one of the most celebrated trials of the time. Selfridge, although a lawyer of good ability and practice, must have had either an exaggerated sense of personal honor or a vindictive and relentless spirit, as subsequent events went to prove.

On July 4, 1806, a public dinner was given on

Copp's Hill in Boston, by the Democratic, or Republican Party, as those holding anti-Federalist views were then bi-nominally called. The committee in charge of the arrangements, of which Benjamin Austin was chairman, had wished to have a spread of some pretensions, since they expected persons of importance as guests. They had instructed the caterer to provide plentifully, assuring him that he would be well paid. Roast pigs and green peas were added to the bill of fare by express direction, and meat pies, "plumb puddings," and "good cyder" contributed to the excellent food which was set before the faithful.

After the festival, a dispute arose as to the payment of the bill, and when efforts of compromise proved unavailing suit was brought against the committee of arrangements by Selfridge, acting as attorney for the caterer. A speedy settlement was effected, and the suit was never entered in court. But the accusation covertly included in the process was bitterly distasteful to those whose personal and political, not to say gastronomic, honesty had thus been impugned. Austin, in an attempt to show that he and his fellow-committeemen had been made the victims of a political conspiracy for party ends, averred that the caterer had been solicited to bring the suit by a "damned Federal lawyer." This charge was resented by Selfridge, who immediately and insisently demanded a retraction. Austin, while acknowledging that he had been misinformed, refused to recant to the extent demanded by Selfridge, and finally was "posted" by the latter in a

newspaper advertisement which branded him as a "coward, a liar, and a scoundrel." This led Austin to declare that, although he would not take Selfridge in hand himself, some person on a footing with him would do so. This remark, when repeated to the lawyer, led him to arm himself, as he claimed, in self-defence.

On August 4, 1806, shortly after he left his office upon a matter of business, Selfridge encountered Charles Austin, the eighteen-year-old son of the committeeman, then a student in college, who approached him with a heavy cane in hand with which he struck Selfridge over the head. Selfridge fired, whether before or after the first blow was uncertain, and Austin fell, mortally wounded. Feeling against Austin's slayer, particularly on the part of the Democrats, was so turbulent that Selfridge voluntarily submitted to arrest in order to seek safety in jail. The grand jury subsequently indicted him for the crime of manslaughter, and the trial was held in November of the same year. Judge Parker, who afterwards became Chief Justice, and was Shaw's predecessor in that office, presided.

Shaw was called as a witness for the defence, and testified that Selfridge had mentioned to him the subject of his controversy with Austin on the morning of the homicide, and that he had known of the quarrel before then. He stated that Selfridge had kept for many months a pair of pistols in an open desk in the office, and identified as one of them the weapon with which Austin was shot. This was the substance of Shaw's testimony, which was briefly

given. His son states that he firmly believed in his associate's innocence from the first, and was confident that he would be acquitted.

Samuel Dexter, counsel for the prisoner, argued in supplementing his claim that the killing was in self-defence, that a man's honor was as sacred as a woman's virtue, and that in an extreme case such as this, a man of gentle and sensitive nature was justified in killing his assailant to escape the disgrace and humiliation of public chastisement. This was poor law, as the jury were subsequently told by the court, but it may have been this thought, operating in the minds of the jury more strongly than the legitimate theory of self-defence, which served to bring about the verdict of not guilty in which the trial resulted. The law of the case as laid down by the court has been adopted in Massachusetts and other jurisdictions, and although not contained in the printed reports, it has since been known and followed as a leading case.

The verdict was assailed in the partisan press. Some public disturbances occurred and effigies were burned. Probably the greater part of this conduct was prompted by the strong political feeling of the time, which claimed to see in the result of the trial the effect of party influence and prejudice.¹

¹ "I happened to be at the first court at Worcester which was holden after the acquittal of Mr. Selfridge. There I was told by Mr. Speaker Begden and others that I was accused of having apostatized from Federalism. I informed them that if the expression of my firm conviction that Selfridge was guilty of murder, and ought to have been hanged, was the sole ground of the accusation, and if that was enough to constitute a secession from Federalism, I wished to be considered as seceding. But I was not ejected. The great

Selfridge left Boston soon after his acquittal, removing to New York, but returned at a later date and resumed his practice. We must assume that the departure of Selfridge increased for the time the business of his office associate, upon whom thus devolved the duty of settling and completing many of the matters which the former left behind him.

Shaw's early practice differed little from that of the ordinary young lawyer who takes every honest case which comes his way. What work he got at first seems to have consisted mostly in collecting bills. His execution book shows that many of the accounts put in his hands were hopeless, for while he recovered numerous judgments, few of them, particularly the larger ones, seem to have been satisfied. His total receipts for the first year were slightly over two hundred dollars, and of this a substantial proportion undoubtedly was reimbursement for expenses paid. It is true that his expenses were small. His office boy received but \$1.25 per week, and his office rent, even at a much later date, when, in partnership with Sidney Bartlett, his practice was large and remunerative, was only \$19.69 per quarter.

The first entry in Shaw's cashbook, March 9, 1805, was a charge against Mr. Warren, "to writing a will for Robert Fulton \$2.00." This entry, taken in connection with the fact that shortly afterward Shaw made a trip to Albany and there inspected the political parties in the State, arranged under their respective standards on the simple question of the guilt or innocence of an individual under a criminal accusation, was a curious spectacle!" (Letter to Adams, Cunningham's *Correspondence*, p. 70. See as to partisan character of court, *Memoirs of J. Q. Adams*, vol. iv, p. 422.)

Clermont, which he described as "a wonderful machine one hundred and sixty feet long, calculated to accommodate eighty passengers with beds, and many of the accommodations in the most splendid style," might seem to furnish some evidence that the Robert Fulton mentioned was the inventor of the steamboat. Fulton, however, in 1805 was in France and England, vainly endeavoring to secure the adoption of his ideas by those countries, and did not sail for America until October, 1806. In addition to this alibi, difficult to overcome, it appears that the will of Fulton which was probated was not drawn until December 13, 1814. It is fairly conclusive, therefore, that Shaw's first client was not the famous inventor, but another of the same name.

His accounts show that he drew many writs and entered numerous actions in court. His bills for officers' fees and court entries were considerable in the earliest years even. At one term of court, in November, 1806, he had twelve cases entered in the Supreme Court. In 1807, his brother writes from Barnstable, "We are very happy to hear you are constantly employed and have plenty of business." He searched records of titles, and abstracts carefully written in his hand, and as carefully preserved, are still to be found in his papers. He appeared before Justices' Courts and defended clients charged with criminal offences, for which services his compensation was characteristically small. "For going before Justice Gardner in defence of your wife on a charge of theft" his fee was three dollars, and a like sum was collected from Benjamin Russell for defending

him on a similar complaint. Shaw also appears to have had the experience, common to younger practitioners, perhaps, of raising a charge already fixed, although not communicated to his client, when reflection had overcome timidity to the extent of making the first charge seem too small. One of his entries, covering services in journeying to Attleboro' to secure a debt, "attaching property, trouble, counsel, and expenses," had originally stood at sixty dollars, but the figure "6" was subsequently over-written with an "8."

During his earlier years at the bar it was his practice to devote much time to the consideration of moot questions. For over a hundred years in his papers have survived a series of "law questions for my own consideration, amusement, and use." He was a member, and afterwards president, of a small law club composed of a group of young men who met at stated intervals. A question was selected for discussion and assigned to two of the members as principal disputants. At the next meeting the case was argued, and a vote was taken of the members present upon the merits of the controversy. In the records of this club is found an invitation from the Solicitor-General to the gentlemen "to eat a Beef steak with him on Monday evening next, after they shall have closed the business of the evening," a polite request which was laconically stamped "Accepted."

Of the way in which he spent much of his time while the courts were in session, Shaw had this to say in a letter written to his mother in March, 1808:—

I will just inform you that the Supreme Court is now sitting here, having begun yesterday for a long term, and since November there has not been ten days' intermission of the sitting of some court. It is true I have not business in them constantly, but it is necessary, in a place like this where competition is great, to be always in the way of business. Besides, in the Supreme Court there is always much useful information to be obtained. If therefore I am not constantly in court I am generally attending part of almost every day, and must be at or about my office during the remainder.

The Court of Common Pleas and the Justices' Courts were occupied in hearing cases of minor importance, larger cases coming before the Supreme Court, the *nisi prius* jurisdiction of which was more inclusive in those days than now.

Not until six years after he was admitted to practice in the Court of Common Pleas, and had been in full practice for two years, did Shaw argue a case before the full bench of the Supreme Court. This suit¹ came up from the Court of Common Pleas on a question of law, and would not merit notice were it not for the fact that it was the future Chief Justice's first reported case. The amount involved was only five dollars, the point at issue being whether a person who had received a counterfeit bank-bill in part payment of a promissory note must stand the loss himself or could recover the amount of the bill from the man who gave it to him. Shaw contended that there was no fraud, and, both parties being equally innocent, the loss must lie where it had fallen, and argued earnestly to that effect.

¹ *Young v. Adams*, 6 Mass. 182.

Judge Sewall, however, although stating that the question had been "fully and ingeniously argued," decided to the contrary and against Shaw's client. From this time on his name appears more and more frequently in the Reports during the twenty-six years of his practice. He was now coming to be regarded as a young man of promise and his part in community life became more prominent as the circle of his horizon grew wider.

The Humane Society of Massachusetts is a venerable institution with a highly laudable purpose and an honorable history. As its name implies the object of its formation and existence has been the furtherance of the cause of humanity in the preservation of life. It was the custom of the society at that time, upon the occasion of its annual meeting, to listen to an address upon an appropriate subject delivered upon invitation by some citizen of prominence. One evidence of Shaw's growing consequence is that in 1811 he was requested to deliver this address. His remarks, which were subsequently printed, give us the first report of any public speech made by him.

Shaw delivered his discourse on June 11, 1811. It was directed to topics appropriate to the meeting and naturally turned to the achievements of the organization whose guest he was upon this occasion. Upon such topics, the speaker warned his audience, not "much originality of design or novelty of illustration" could be expected, and the address upon the whole followed rather conventional lines. A few quotations will suffice to show the characteristics of

style of the speech, which in general contains little to interest the reader at this day: —

However we may lament, we must, I think, admit the tendency of advanced civilization and refinement, of the union of men into large communities, of the increase of wealth and its attendant luxuries, to impair our sympathy and to add energy and activity to the selfish passions. Man's attention is solicited by a greater multitude of objects. The avocations of business, the eagerness of political competition, the artificial gaiety of fashionable life, render him insensible to the purer but less obtrusive joys that flow from the exercise of the mild and tender affections. His desires are awakened by the more seductive forms of pleasure. His anger and revenge are enkindled by keener feelings of indignation, more refined, perhaps more fastidious, notions of honor, and more frequent occasions of collision. His avarice is excited by more magnificent displays of wealth, and his ambition is stimulated to madness by the lustre of renown and the blaze of power.

In considering the means by which any extensive plan for the relief of human wretchedness is to be effected a little observation will convince us that success is not the result of idle speculation, of feeble hopes, and indolent good wishes, but the fair fruit of ardent and unconquerable zeal, of patient and persevering industry. Such designs, to be successful, must obtain the concurrence, if not the cordial coöperation, of public opinion. But there is in masses of mind, as of matter, a sort of *vis inertia*, an aversion to change, a disposition to rest immovable, on the basis of settled habits, a disposition yielding only to the vigorous and repeated impulses of superior minds. What is the natural and ordinary course of all beneficial changes of public opinion and feeling? Upon a particular subject the public mind is enveloped in a cloud of error, of ignorance, or of apathy. The prospect is cold and cheerless. The sparks of intelligence occasionally struck out by

scattered individuals are scarcely perceived amidst the general gloom. But the friends of humanity unite and persevere. The fuel is slowly but diligently gathered, each adds another and another brand to the rising pile, until at length, lighted by a coal from the altar of benevolence, it bursts forth into a vigorous flame, warming, enlightening, and cheering, as it blazes.

The speaker then mentions amongst the causes for satisfaction in the advance of enlightenment the diminution of the extent of the slave trade, and the recent establishment of a hospital for the insane in Massachusetts. More concretely, the society itself is commended for the dissemination of information of the means of resuscitating drowning or suffocating persons, by which many lives had been preserved, and praise is bestowed for the construction of life-boats, and shelters for shipwrecked mariners upon exposed coasts. An allusion is made to the career of Napoleon, as the "ferocious despotism that has desolated the fairest portions of Europe," which, "not content with enslaving the persons, seeks to fetter and manacle the minds of men."

In the formation of character with what anxious solicitude should we guard our imaginations and our hearts against the imposing splendor and destructive influence of such an example? With what firmness ought we to resist the approaches of that ignorance and error, that corruption and perversion, in which alone such a system could have found support? With what assiduity should we cherish that freedom of thought and of communication that sustains fortitude of character, and that sobriety and tenderness of feeling which form the best security against the encroachments of ambition?

The oration concludes with a good, old-fashioned orthodox tribute to woman: —

To her it belongs to unfold the powers of the infant mind, to instil the earliest precepts of virtue, to impress feelings of humanity, to form at once the understanding, the imagination, and the heart. Hers is the delightful task, and, let me add, the imperious duty, to temper heroic fortitude with the gentleness of compassion, and manly vigor of understanding with the tenderest affections of the heart.

In 1813, his growing clientage and the increasing importance of his practice led to his being made a director of the newly organized New England Bank, an office which he retained, acting as counsel for the institution as well, as long as he remained in practice.

The first public service he was called upon to perform was as Representative to the General Court, to which office he was first elected from Boston in 1811. He served in that capacity continuously for four years. The sessions at that time were short, and his attendance there did not conflict with the demands of his practice. He may have acquired some experience as a lawmaker which was of service to him in later years when called upon to interpret statutes. The days of experimental legislation had not then arrived and the enactments of the lawmaking body were very conservative. No change was made in the law until the necessity for the change was apparent. The people preferred the law as they had it and knew it, and sought no panacea at the State House for every ill. Conditions of life were simpler then, however, and the complexities of business and society,

now so confounding, had not created the needs which have led to much of the modern legislation.

His service in the Legislature was renewed in 1820, when he was returned as a Representative. In 1821 and 1822 he sat in the Senate, and in 1829 again consented to be elected a member of the lower branch. In those years, he was concerned in many important matters, as we shall see.

On July 4, 1815, Shaw delivered the annual oration in Faneuil Hall in commemoration of American Independence. This yearly address is an ancient Boston institution with an interesting history which deserves at least a passing reference.

One of the important events in pre-Revolutionary history is the "Boston Massacre." On the 5th of March, 1770, the citizens of Boston, provoked to open violence by the presence of the king's troops in their city, and the jeers and taunts of the soldiery, were fired upon by the troops, and several of the people were killed. This act the citizens never forgot nor forgave, and to this day the spot where "the blood of the citizens stained the snow" is marked by a circle of stones set in the pavement of State Street. Ever after, until the colonists had successfully established their independence, upon the anniversary of the "massacre" a meeting was held in the nature of a memorial to the citizens who were killed, and a protest against the cruel and bloody act of the troops. Upon this occasion an oration was always pronounced by some prominent citizen. At the first of these anniversaries, held on the evening of March 5, 1771, Dr. Thomas Young, who was a member of

the Boston Tea Party in 1773, delivered the address, in which he gave an account of the stirring events of a year before, and rehearsed the imputations of treason cast upon the people and the threats to take away the Massachusetts charter.

In 1783 the event gave place to an oration on the national independence, delivered in Faneuil Hall, which ever since has formed a feature of the city's annual celebration on July Fourth. Before Boston became a city, the Selectmen by vote invited one of the citizens to deliver the address. After the city was chartered, the honor was conferred by the Aldermen and Council. Many eminent names are in the roll of Fourth-of-July orators. Amongst them are found Harrison Gray Otis, John Quincy Adams, Josiah Quincy, Fisher Ames, Webster, Everett, and Sumner.

After this custom had been followed for a period of nearly half a century, John Adams wrote:—

These orations were read, I had almost said by everybody that could read, and scarcely ever with dry eyes. They have been continued for forty-five years. . . . They have been made the engine of bringing forward to public notice young gentlemen of promising genius whose connections and sentiments were tolerable to the prevailing opinions of the moment. There is juvenile ingenuity in all that I have read. There are few men of consequence among us who did not commence their careers by an oration on the 5th of March. They are infinitely more indicative of the feelings of the moment than of the feelings that produced the Revolution. . . . If I could be fifty years younger and had nothing better to do I would have these orations collected and printed in volumes, and then write

the history of the last forty-five years in commentaries upon them.

According to that venerable statesman, therefore, Shaw's career may be said to have begun when he was called upon to exercise his "juvenile ingenuity," in the very year when Adams wrote his somewhat sarcastic comment, and true to the words of the latter we have an indication of the "feelings of the moment" in Shaw's reference to the state of affairs in France and the closing events in the stupendous course of Napoleon Bonaparte.

After a brief congratulatory introduction, the speaker reviewed the events leading to the Revolution, the character and condition of the colonies before the war, and the principles of liberty which underlay the adoption of the Constitution, as the expression of assurance of popular rights to all: —

These principles of civic liberty, and this system of popular government, America has attempted to maintain and perpetuate, principally by the more complete extension, development, and practical adoption of the principle of representation. This principle is the great and capital improvement of modern times. Nothing at all similar or equivalent to it was known to the governments of antiquity. It consists in a judicious selection of a few, to exercise the powers of government in trust for the whole. It is in fact, the only mode by which a numerous people can exercise any direct control over the administration of its government. This principle has long been recognized and valued, and seems interwoven into the very form and texture of our society. Its use is as familiar in private as in public affairs. Whenever any number of individuals have occasion to act in concert, whatever

may be the nature of their organization, or the object of their association, a select number is delegated to deliberate and act for the whole. It is worthy of remark that this great leading principle in our government does not derive its sanction from the constitution, but on the contrary gives to that constitution all the sanction it possesses. The adoption of the constitution itself, the highest act which a people can exercise, was entrusted to representatives delegated for that purpose. As the practical operation of this principle may be extensively beneficial, it is also capable of great and dangerous abuses. But when properly modified and regulated by a due adjustment of the right of suffrage, its only effect should be to elevate to office men of capacity and integrity, having a common interest in the trust they are to exercise, and who will exercise it under a deep sense of duty and responsibility. The representative will then be a precise miniature of the constituent body, concentrating and preserving all its lineaments and features in exact proportion.

The view of the audience is then directed, in painful contrast to the scenes of tranquillity and repose at home, —

“O’er the vine-covered hills and gay regions of France,” —

to the efforts of Napoleon, then returned from Elba, to recover his lost empires: —

Whatever may be the eventual issue of this tremendous conflict, we rejoice in the belief that the danger which we once feared from the ascendancy of French power and the more contaminating influence of French principles, is forever removed. The secret spell which seemed to bind us in willing chains to the conqueror’s car is forever broken. No sophistry can again deceive us into a belief that the cause of Bonaparte is the cause of social rights, or create

a momentary sympathy between the champion of despotism and the friends of civic liberty.

One of the most alarming points of view in which the sincere opponents of the late war with England regarded that measure was that it tended to cement and perpetuate that dangerous and disgraceful connection. The commercial restrictions of America corresponded in principle and in object with the continental system of France. We declared war at the moment when Napoleon had prepared the whole force of his empire to strike the last fatal blow against the liberties of Europe by the conquest of Russia.

Of the character of that war we have often expressed our strong and decided opinion; and it is not my design to anticipate the sentence of censure and condemnation which history will pronounce on its authors.

Had Shaw but known it, when these words were uttered the power of Bonaparte was already finally broken. No longer could it be said that

The palace and the cottage, the sanctuary of the church, the halls of science, the universities and schools, the counting-house of the merchant, the workshop of the artisan, the hallowed abode of domestic retirement, incessantly felt and lamented his oppressive influence.

The news had not yet found its way to these shores, but sixteen days before Shaw's words voiced the concern of America lest the man who had dominated Europe should reinstate himself in the power which so lately had been his, Waterloo had been fought and Napoleon was a fugitive.

In 1819, four years after Shaw delivered his Fourth-of-July oration, Franklin Dexter was chosen to give the annual address. Shortly afterwards, an

incident occurred which illustrates the seriousness with which these yearly speeches were received by the people of Boston. James Scallon, a lieutenant in the United States Army, wrote to Dexter expressing his strong disapproval of Dexter's reference to the character of General Jackson, saying in part: —

In accusing General Jackson of inhumanity you uttered an *untruth*, and in perverting the situation in which you were pleased to portray the manners and principles of those who achieved the independence of the country, to the vilification of one of its most distinguished defenders, you pursued a course the opposite of what I consider honorable or manly.

This comment was brought to the attention of the Selectmen of Boston, and a letter, drafted by Shaw who was then a Selectman, and signed by the Chairman of the Board, was sent to John C. Calhoun, Secretary of War, enclosing a copy of the army officer's letter, and protesting against this attempt on his part to interfere with the right of free speech. Calhoun replied stating that, although in view of the previous good conduct of the officer, the matter was not considered a sufficient cause for his discharge from the service, yet the President had written a letter strongly censuring him. Following this Daniel Webster wrote to Shaw as follows: —

I am very much gratified with these two letters. I think the Selectmen took a very proper and judicious course, and am exceedingly rejoiced that the case was so justly viewed at Washington.

In 1816, an occasion was offered for Shaw's indulgence of his taste for travel, and a trip to the

White Mountains was undertaken in the company of a party of friends. This trip was in the nature of a botanical excursion. Dr. Bigelow, Nathaniel Tucker, and Dr. Francis Boott were, as Shaw expressed it, "the professed botanists. Francis C. Gray might be considered as the geographer or historian of the expedition. I myself as an amateur, a looker-on and earnest admirer." The journey was by the way of Concord, New Hampshire, to Hanover, and thence to the mountains. Progress was necessarily slow, and the ascent of Mount Washington occupied the better part of three days. This excursion left a lasting impression on Shaw's mind, and in 1851, in a letter to Dr. Boott, he refers to it with remembrances of keenest enjoyment. He recalls—

The wild and patriarchal establishment at Rosebrook's, the wild wonders of the Notch with the echoes wakened by the report of our musket, the solitary log house at Willey's, since overwhelmed by an avalanche of stones and gravel, the dinner of salted trout at Crawford's, the cool reception at Judge Hall's, and our subsequent hospitable welcome by the talkative judge in person, our kind welcome at Mrs. McMillen's at Conway, our fitting out, our departure on horseback, our encampment under a primitive hunter's lodge near the bank of New River, not forgetting the eager appetites of the mosquitoes of that region, our thirteen miles' walk, our dinner at the summit of Mount Washington on fresh meats put up in London, the untiring attention of the Nutes, Jem and John, and their associates, our guides and partners.

The excursionist revisited the White Hills again in 1844 when he was out of health. This time, how-

ever, he did no mountain climbing and stayed at Fabyan's, which had been built in the meantime near the site of Rosebrook's. "The principal change which I perceived in that region," he wrote of his second visit, "did not arise from the convulsions of nature, but rather through party politics; it was the change of the name of the little town of Adams, lying in one of the gorges of the mountains, from Adams to Jackson."

In 1818, when he was thirty-seven years of age, Shaw married Miss Elizabeth Knapp, daughter of Josiah Knapp, of Boston. On his marriage he took the house numbered seven on Kneeland Street where he continued to live until he removed to 49 Mount Vernon Street, in 1831. By this marriage he had two children: John Oakes, who died in 1902, and Elizabeth, who married Herman Melville, the grandson of Major Melville to whose daughter Shaw had become engaged while he was in Amherst. His first married life was short, and his wife died after it had continued but four years. He remained a widower for five years, when, in 1827, he took for his second wife Miss Hope Savage, the daughter of Dr. Samuel Savage, of Barnstable. By this marriage he had two sons: Lemuel, born in 1828, who died in 1884, and Samuel Savage, who was born in 1833 in the house on Mount Vernon Street, where he continued to live until his death in 1915. His second wife survived her husband and died in 1879.

The first public office with which Shaw was honored under the town was that of Fire Warden, which he held from 1818 to 1821. Lest this bare statement

should fail to convey the full idea of what this interesting service meant, a word of amplification may not be out of place. Fire companies in Boston were not then organized as now. They consisted in the aggregate of some three or four hundred men enrolled in different companies under the direction of the fire wardens, of whom there were thirty-six, three being chosen from each ward. Hose was little used at fires and the efficiency of the companies depended upon the voluntary aid given by the citizens at the time. Lines were formed along which buckets were passed from the nearest well to the engines, from which streams played on the blaze. The fire companies operated the engines, and formed the nucleus of the organization collected on the spur of the occasion, the wardens being in command. Much pride in these fire companies was displayed by the members, and great rivalry existed amongst them. To be first at the fire, and nearest the burning building during action, was the honor coveted by all. Public opinion regarded assistance at such times as a matter of neighborly duty. There seems to have been a sort of distinction to membership in the different organizations, and a premium was often paid for admission into the companies. The small compensation awarded by the town for their services was spent by the members for social suppers, and the only perquisite attached to the service seems to have been exemption from militia duty. Quincy says: —

From the earliest period of the settlement the members of these companies had been accustomed to regard themselves as the guardians of the city against this element,

and took a pride in the consciousness of their power. They were a body of men energetic and fearless. . . .

Formerly one could not open the front door of the highest or the richest citizen without having his eye greeted with at least two buckets containing fire bags, and a bed key, all duly labelled, indicating to what fire society he belonged.

There is good reason therefore, to regard the office as an honor bestowed upon Shaw by his friendly neighbors.

It is curious to note, so influential were the members of these fire companies, and so strong a hold did the time-honored system have upon the community, that great difficulty was experienced in introducing improved methods. It was not until after the new city government had been in existence for three years that a paid fire department was organized in 1825, and then only upon an urgent appeal for the change from the Mayor after a heated controversy on the question. Even after the improvement had been effected, the City Council could with difficulty be persuaded to provide reservoirs for a sufficient supply of water for the new engines.

Pumps, buckets and lanes of citizens continued to be considered by many as more efficient for the supply of the engines than hose. They regarded the new fire department as an experiment, and of very dubious result.¹

When the War of 1812 was over and people again began to look about them and give some attention to local matters, one of the things which seemed to re-

¹ Quincy, *Municipal History of the Town and City of Boston*.

quire much attention was the schools. A committee having this subject in charged lamented "that so many children should be found in the streets playing and gaming in school hours, owing either to the too fond indulgence of parents, or the too lax government of the schools." The School Committee, therefore, set about the task of remedying this condition, and from this time on the schools came to have their share in the general development of the period. The Latin School, which could fit boys for college, was founded, while the writing and reading schools, in which Shaw served his year as usher, still taught the rudimentary branches. Here much idleness was found to exist at a time of life when the youth should be acquiring not only knowledge, but habits of industry and application. The subjects taught were also not considered sufficiently extensive for the boy who was not for college, "nor otherwise calculated to bring the powers of the mind into operation nor to qualify a youth to fill usefully and respectably many of those stations, both public and private, in which he may be placed." Plainly an enlargement of the system was needed, and Shaw took a prominent part in effecting it.

Under the Town Government, he served on the School Committee, and in 1820 was a member of a sub-committee to which was referred the question of broadening the field of instruction. This committee recommended the founding of an English Classical School, with a course of three years. The age of admission was to be not less than twelve years and the school was to be for boys exclusively. The subjects

to be offered included some branches of the higher mathematics, history, logic, and natural and moral philosophy. On October 26, 1820, the report of the committee was ordered printed and recommended to the people for acceptance. The report found favor, and the school was established in the same year, under the name of the "English Classical." In 1824 the name was changed to "English High," by which designation it has since been known.

Later Shaw was chairman of a sub-committee to inquire into possible improvements in the grammar schools, and drew up a lengthy report on that subject. The slow progress made by the students, the meagre knowledge acquired during the whole course of instruction, and the attendance of children of both sexes in the same room, were pointed out as defects which called for a remedy. Changes were recommended which would tend to eliminate these faults, chief among which was urged the separation of the sexes. The strong and ever-to-be-reckoned-with spirit of conservatism in the people was conciliated in these terms: —

Some persons perhaps may repose with some confidence upon the antiquity of the present system, and distrust the value of an innovation upon existing and long cherished institutions, which may seem to call in question the wisdom of our fathers. But it is obvious that the best and most valued institutions may from the alterations and changes occasioned by time and circumstances, require changes adapted to these circumstances . . . the substitution of a plan apparently better adapted to such a condition implies no impeachment of the wisdom or patriotism of the former guardians of the schools.

After the incorporation of the city, Shaw continued to serve on the School Committee for several terms. In 1821, he held the office, and from 1827 to 1831. During these years the development already substantially begun went steadily forward, receiving but one rather curious set-back in 1828.

The success of the Boys' High School had led to opening one for girls, and what were supposed to be adequate accommodations were provided for the estimated number of those who would apply for admission. When the examinations were held, however, to the consternation of the committee, over three times as many as were expected presented themselves. In a quandary as to what should be done the expedient was adopted of holding an examination, and then admitting to the school only the girls receiving the highest marks, to the number of those for whom accommodations had been provided. This was done and led to much discontent and complaints of favoritism. It was found that a majority of those whose standing in the examination had entitled them to admission had come from private schools, and hence it was considered to be demonstrated that the school was "chiefly for the advantage of the few, and not of the many, and those also of the prosperous few." Instead, therefore, of enlarging the school, to accommodate all who applied, to the number, according to estimate, of fourteen hundred, the committee, after receiving an exhaustive report on the subject from a sub-committee, voted that the High School for Girls ought not to be continued. It was accordingly summarily closed and

the experiment was abandoned. Thus did the higher education of women receive a check after its first promising trial, solely because the opportunity was seized upon with too great avidity by those to whom it was offered.

CHAPTER IV

THE CONSTITUTIONAL CONVENTION OF 1820 — THE IMPEACHMENT OF JUDGE PRESCOTT — THE CITY CHARTER OF BOSTON — FURTHER PUBLIC SERVICE

THE Constitution of Massachusetts, adopted in 1780, contained a provision for ascertaining the will of the people in 1795 on the question of revision and amendments. When that time came, however, no desire for a change was manifest, and the instrument remained without alteration for over forty years. During the latter part of that period the question of amendment began to be discussed with growing frequency. The provision for public support of religious worship still stood in the Constitution, although by this time there were many who believed that compulsory contribution toward religious instruction ought to be done away with. The feeling that the welfare of the State demanded adherence to the system which had been followed in the past, however, was strong. The happiness of the people depends "upon piety, religion, and morality; and these cannot be generally diffused throughout a community but by the institution of the public worship of God, and of public instruction in piety, religion, and morality," declared the Constitution, and such still was strongly the view of the greater part of the people. The Constitution, however, went a step further and declared that the Legislature, in addition to providing for the support of worship and

religious teaching by taxation, could make religious instruction compulsory. Although no Legislature had ever exercised this power, the provision still stood, in the minds of many, a menace to untrammelled freedom of thought. Then, too, it was established that the principles of Protestant religion only should be taught, and against this restriction there was a growing feeling of antagonism.

✓ These were the reasons largely which led to the calling of the Constitutional Convention of 1820-21. Some changes in the composition of the two branches of the Legislature were also advocated.

The convention assembled November 15, 1820, and its sessions continued until January 9, 1821, almost without interruption. Shaw was elected a delegate from Boston.

Amongst the members were many who were then, or later became, prominent in the affairs of the State and Nation. The venerable John Adams was a member for the Town of Quincy, and was honored by being elected President of the convention. At the same time a resolution was adopted expressing the respect and gratitude of the delegates to this eminent patriot and statesman for the great services rendered by him to his country, and their high gratification that at this late period of life he was permitted by Divine Providence to help them with his counsel in revising the Constitution, which forty years ago his wisdom and prudence assisted to form. The aged former President, however, in a letter to the convention, in which he expressed his cordial thanks for what he termed the "purest and fairest

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honor of my life," begged permission to decline the appointment, and prayed that some other gentleman be elected "whose vigorous age and superior talents may conduct their deliberation with more convenience to themselves and with greater satisfaction to the people of the Commonwealth at large." Thereupon Isaac Parker, Chief Justice of the Supreme Judicial Court, was chosen in his stead, and served throughout the session. Justices Wilde and Jackson, of the same court, were also members, and Judge Story, of the United States Supreme Court, was a delegate from Salem. Daniel Webster, Lemuel Shaw, Josiah Quincy, and William Sullivan were among the Boston delegation, while Levi Lincoln, afterward Governor, Robert Rantoul, Leverett Saltonstall, and Samuel Hoar were members for their respective towns.

Shaw was named chairman of the committee to make rules and orders for the regulation of the convention, and read the report of that committee. He also served on the committee to which was referred the question of changes in the judiciary, of which committee Story was chairman and Lincoln was also a member.

The Committee on the Judiciary, through Story, made three important recommendations. In the first place, it was urged that a change be made in the provision that a judge could be removed by the Governor, with the advice of the Council, upon address of a majority of the members of the Legislature. The committee expressed the opinion that the Constitution as it stood had a tendency "materially to

impair the independence of the judges, and to destroy the efficacy of the clause which declared that they shall hold their offices during good behavior." The tenure during good behavior seemed to the committee indispensable to guard judges, on the one hand, from the effects of sudden resentments and temporary prejudices entertained by the people, and on the other, from the influence which ambitious and powerful men naturally exert over those who are dependent upon their good-will. A provision which should at once secure to the people a power of removal in case of palpable misconduct or incapacity, and at the same time secure to the judges a reasonable permanency in their offices, seemed of the greatest utility. Such a provision would, in the opinion of the committee, be obtained by requiring that the removal, instead of being upon the address of a majority, should be upon the address of *two thirds* of the members present of each house of the Legislature. This provision had the additional recommendation that it was engrafted into the Constitution of some of the other States, and existed in analogous cases in the Constitution of the United States.

Thus we are given to see that Shaw's thoughts on this important question, upon which he was to speak in after years solemnly and warningly in his last public utterance, were in no sense the result of his long subsequent service upon the bench, which might well have been said, in the absence of any former expression of his views, to have had an effect upon his opinions; but were formed and expressed ten years in advance of the time of his appointment

as judge, when he could have had no idea of ever becoming Chief Justice.

The committee also recommended that the Legislature be given the power to create a supreme court of equity distinct from, but of equal dignity with, the supreme court of law, with power to establish a court of appeals where the judgments of the supreme courts of law and equity might be subject to revision. The suggestion was made that, by creating certain high officers of the Government *ex officio* members of this court of appeals, or by the appointment of some of the Commonwealth's most distinguished citizens to that bench, as *offices of honor only*, the court might be made one of great utility and security at a very inconsiderable expense.

The third change recommended by the committee was the repeal of the clause which gave each branch of the Legislature, as well as the Governor and Council, the authority to "require the opinions of the Supreme Judicial Court upon important questions of law and upon solemn occasions." In the minds of the committee this article was of questionable utility and might lead to serious embarrassments. These questions must always be answered by the court without argument, and it was contrary to the general theory of a republican government that the right or property of any citizen should be taken away without an opportunity to be heard upon the questions of law involved. It was also desirable that the courts be not called upon to advise in questions of general interest, political power, or even of party principles.

✓ Shaw spoke in the convention in favor of the first change reported by the committee. He claimed that by the Constitution as it stood the judges held office at the will of a majority of the Legislature. This power was not consistent with the general principle announced in the declaration of rights that the legislative, executive, and judiciary departments respectively shall not exercise the powers of either of the others, and that it is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. If judges were not faithful in the discharge of their duties, they could be impeached. A provision in the Constitution for their removal by other means should be intended to cover such cases only as incapacity, or other cause not implying misbehavior, where the reason was so manifest as to command general assent. Webster also spoke at length in favor of the resolution, but ✓ the convention voted against the proposed change two to one. The proposition to establish a separate court of equity failed as well. The convention subsequently, upon motion of Judge Story, recommended an amendment providing that judges should not be removed by address without stating the causes of removal and giving the right of a hearing in defence.

The report of the committee, depriving the Governor and Legislature of authority to propose questions to the Court, was also confirmed and an amendment to that effect reported. Both these amendments, however, failed of adoption by the ✓ people, and the Constitution remained unchanged in its provisions as to the judiciary.

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The growing spirit of tolerance in matters of religious thought and worship, which was in great degree responsible for the calling of the convention, manifested itself in the adoption of an amendment directing that the power and duty of the Legislature to require provision for the worship of God and for the support of public teachers should not be confined to Protestants, but should be applied equally to all Christian teachers of religion, and should also extend to unincorporated as well as incorporated religious societies. It was also recommended that the part of the article which gave the Legislature power to compel attendance upon religious instruction be annulled. A more radical measure had been proposed, abolishing public control over the whole subject, and providing that no one should be compelled to be a member of any religious society or be taxed for religious purposes. This step, for the day, was decidedly too wide a departure from the existing order of things, and was defeated by a large majority, Shaw, Webster, and Story voting against it.

The convention, in the expression of its ideas on religious freedom, proved to be in advance of the times, however, and the amendment when submitted to the people was voted down by a substantial majority. Over a decade later the Legislatures of 1832 and 1833 adopted an amendment greatly modifying this article, abolishing compulsory religious taxation and instruction, which was approved and ratified by the people in 1833.

The subject of the relation of the State to religious worship occupied the greater part of the discussions

of the body. Shaw apparently did not speak upon it, but confined his attention more closely to questions which were of strictly legal aspect. He was then in his fortieth year and was engrossed in his practice, which had by that time reached substantial proportions. Although he was deeply religious, it was no more than natural that his activities in the convention, with the limited amount of time at his disposal, should be confined in matters of debate to those questions as to which, from his professional experience, he felt he could be of most assistance to the assembly.

The Constitution as it stood contained no provision for the government of municipalities except in the form of towns. Boston had reached a size which made the administration of its affairs cumbersome and inconvenient and had often discussed the advisability of changing its government so that business could be conducted more effectively than was possible under a system which required the assembling of all citizens to pass upon every question. The town meeting obviously was a bungling method of handling the common interests of a large community.

A resolution was accordingly presented to the convention by Webster, as chairman of the committee to which the question had been referred, recommending that the Constitution be amended so that the Legislature might have power to constitute city governments within the State. To this resolution Shaw spoke, strongly urging its adoption, and pointing out the obvious difficulties of administering the

concerns of forty thousand inhabitants in a town meeting which from eight to ten thousand qualified voters had the right to attend. He recommended that in fixing the limit in size of towns which should be permitted to incorporate as cities, consideration should be given to the number of voters who could conveniently meet and act together without danger of disorder. Probably about two thousand might be the highest number he thought, and computing that voters constituted about one fourth or one fifth of the population, he recommended that the limit be fixed at ten thousand. The resolution was adopted, with almost no opposition, but the amendment, as it went to the people and was ratified, provided for the incorporation of towns of not less than twelve thousand inhabitants.

Another matter upon which Shaw spoke was that of giving to one accused of crime the right to address the jury himself as well as by counsel, instead of being obliged to elect between the two as the provision then stood. Shaw's speech on this question is not reported, and it is stated merely that when the resolution came before the convention for a second reading he opposed it, saying that when it was before the house on the first reading it was not well understood and when it was discussed in committee of the whole it was in a thin house. He then proceeded to recapitulate the arguments against the resolution. Those arguments were, that as the law stood, the right to address the jury was already possessed by prisoners who were without counsel, and the privilege was always granted to them when represented

by counsel upon proper occasions. To extend the right would be to grant license of speech in court, and, as Webster argued, might lead to the spectacle, common in English courts, of insults and offensive remarks being directed to the judge, with the object of provoking the court to some act of severity by which the accused might excite sympathy. The change was advocated by the convention, nevertheless, but failed of ratification by the people, and the provision stands to this day in the form in which it was first enacted.

Shaw also opposed, with Story and Quincy, a resolution providing that no bank should thereafter be incorporated, nor the charter of any existing bank be renewed, unless the stockholders were made liable in their private capacity.

The importance of Shaw's work in the convention lay not in its effect upon the action of that body, for his efforts seem to have had no controlling influence. It is found rather in the views we are given of his attitude toward the Constitution and the judiciary with both of which he was to be so greatly concerned at a later time.

The part taken by him in the deliberations, except with reference to the amendment permitting city charters, was not one of great prominence. He spoke neither frequently nor at any great length. Webster, Story, Wilde, Quincy, Lincoln, and others assumed the lead in debate. Shaw as a rule contented himself with expressing his views upon the subjects upon which he felt most strongly, or in which he saw the greatest need for a revision. This course seems

to indicate his belief that the Constitution should not be amended lightly or in the fulfilment of any vague desire for a change. Only when the growth of the State and changed conditions demand it, as in the matter of the incorporation of cities, or where the interests of the people can be rendered more secure, as in making the tenure of the judiciary more independent, should the fundamental law be revised.

His respect for the judiciary amounted to veneration. Next to his religion, like most thorough lawyers, he bowed to the law. He realized the importance of having its principles fixed and definite as well as securely protected and insistently observed. This result, he was convinced, could be permanently obtained only by maintaining the judicial department separate and apart from the coördinate branches of the Government, and by affording it every protection against the varying and inconstant demands of the hour. He often had occasion in later life to announce, and to insist upon, these principles, and did more than any other one man in the history of his State to establish and secure them.

The work of the convention as a whole was not of great importance. The main change effected, in the net result after submission to the people, was in the amendment which made possible the incorporation of the City of Boston, and this, and the other changes finally adopted, could well have been brought about without calling for a general revision. Historically, the convention is of interest, taken in connection with the second convention of 1853, as showing how little is accomplished through such

assemblages. The people in the main stand by the Constitution, and, as judged by results, seem to have had greater confidence in the body which originally drafted that instrument than in any contemporaneous recommendation for radical or extensive change. All of the amendments, except the first nine, have been adopted from time to time without the assistance or deliberations of a convention, and the structure of the document remains substantially without change. The main service performed by these two conventions, therefore, seems to consist in the fact that they demonstrated how unnecessary they were. The original base and foundation of the Government was found to be still strong enough to bear the structure built upon it.¹

The Constitutional Convention had hardly adjourned on January 9 when the attention of the Legislature was occupied with the novel and impressive spectacle of the impeachment of a judge. As early as 1788 the sheriff of Worcester had been tried before the Senate for financial irregularities, and later, at different times, three justices of the peace had been impeached for malfeasance in office. But up to this time in the history of the Commonwealth no member of the higher judiciary had ever been called to account for his conduct before the bar of the General Court, although several had been removed by address.

¹ Since the above was written another constitutional convention has been called and its sessions at this writing are uncompleted. Three amendments have already been submitted to the people, and were adopted in November, 1917.

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James Prescott was Judge of Probate for the County of Middlesex. Dissatisfaction with the administration of his court, which had existed for some time throughout the county, finally became so strong that a petition for his impeachment was presented to the House of Representatives. After an investigation of the charges preferred against the judge, and hearing evidence, the House unanimously voted that he be impeached, and formal articles of impeachment were drawn up.

He was charged with fifteen acts of misconduct extending over as many years. It was alleged in several instances that he held court in his law office; that he had demanded and received fees greater than those allowed by statute. In other instances he was charged with having acted as counsel in matters which were likely to come before him in his judicial capacity, and with having given advice to litigants in cases pending in his court, receiving pay for his services, and afterwards allowing his fees in the account of the executor to whom the advice was given.

A very lengthy answer was filed by Judge Prescott in which he admitted practically all the facts set forth in the articles, claiming in defence that he had a right to hold court in his private office, and that the other acts charged did not constitute misconduct or malfeasance. Receiving fees greater than those allowed in the statutory fee bill he justified under the claim that extra services were performed or papers made out for which the statutes prescribed no fees, and that the fees actually charged were permissible and reasonable in amount. The answer

asserted the propriety of giving advice in matters pertaining to the administration of estates by claiming that some of the matters in which this was done were not litigated or contested, and that in other cases the service rendered, although perhaps indiscreet, was given in good faith and in innocence of any corrupt motive.

✓ The House appointed Shaw one of the managers to conduct the case before the Senate. Webster and Hoar appeared as senior counsel for Judge Prescott. The trial, which began on April 17, 1821, was held in the Senate Chamber, the members of the House attending the sessions throughout as spectators, or, perhaps more correctly speaking, as the accusers. The Senate Chamber was arranged as a court-room, and the sheriff of Suffolk and a court crier sat on respective sides of the room. The proceedings are said to have followed in form the impeachment of Warren Hastings.

Little contest was made over the facts. The witnesses, called by the managers to prove each instance of misconduct, testified briefly and were as briefly cross-examined. The respondent's main defence, as to the allegations that he had charged excessive fees, was his claim that the fees were for services of the court for which no amount was established by law, for which, therefore, it was proper to receive reasonable compensation. In support of this claim he sought to show that such a custom prevailed in the other counties of the State, was in existence when Judge Prescott took office, and had been followed by him in good faith.

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Shaw objected to this testimony, asserting that other similar wrongs could not make Judge Prescott's acts right, and that the only question was whether the fees taken were illegal. Webster replied that, although this might be so in an action to recover the fees, yet the articles of impeachment charged more than legal wrong in that they alleged moral turpitude and corrupt motive. It was, therefore, clearly competent, he urged, to rebut that charge by showing what the practice had been. Webster cited cases from the Massachusetts Supreme Court, and the impeachment cases of Judge Chase, Warren Hastings, Lord Melville, and Lord Chancellor Macclesfield to support his contention. His position would seem to have been clearly right, the more so inasmuch as the accusation specifically charged wilful and corrupt misconduct and the managers had themselves called a witness to testify to the ordinary fees for certain services. The Senators, however, barred the inquiry, deciding the question by a silent vote. This brought upon them the thunder of Webster's wrath.

I cannot silently acquiesce, sir, in the silent decision of this Honourable Court [he exclaimed]. It is the misfortune of the respondent that he is before a court which does not assign the reasons of its judgments. You do not tell us the grounds of your decisions. We cannot discern them. We must therefore be guided by the feeble lights of our own minds, the professional habits we have formed, our books, and our practice before inferior tribunals. . . .

We are bound to propose it. It is a duty to our client to propose it. And we shall continue to propose it in some shape or other until the decisions of the Court shall have

covered the whole field of inquiry; until our ingenuity in devising forms and modes of interrogation shall have been exhausted; or until we have been convinced by the honourable managers that all evidence of usage is to be shut out of the case. . . . You must hear him. You cannot say this is no justification. I maintain we are fair. We are honest. We are firm. We are not to be shaken in this position. We stand right in court; in this court; in any court; but more especially in the highly criminal court which I am now addressing. We can defend this man, — we do defend him, — from the charge of wilful corruption, if we can show anything that will account for his conduct consistently with an honest motive, with anything but a corrupt motive. It is a case too plain for argument. We have cited a decision of the Supreme Judicial Court. You are not bound by its decisions. But you are not above the law. You are not better judges of the law. You allow its decisions to be made. Why? Not because you are not a Superior Court. I admit it. You may be coördinate. You may be supreme. But the Constitution has appointed that court to pronounce the law. Its decisions are the law of this Commonwealth. And if that law prevails anywhere, it must prevail here.

The Senate remained obdurate, although Webster, true to his word, persisted in offering the testimony. Its rejection was of no ultimate prejudice to his client, however, inasmuch as he was finally acquitted on every charge to which the evidence was relevant.

Webster made the chief argument for the defence in a speech which is one of his masterpieces. His words have been preserved in their entirety and have often been printed, and therefore need no further description or mention here.

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Shaw made the leading speech for the prosecution, unexpectedly, as he stated. It may be that Levi Lincoln, who had been appointed one of the managers for the House, but for some reason did not serve, had been intended to take the lead, or that one of Shaw's colleagues had planned to do so, or, perhaps, the managers thought that Shaw was best fitted to reply to the weighty and eloquent words of Webster, and to counteract and balance the effect produced by the power of his speech. Whatever the reason for putting the task unexpectedly upon Shaw, the burden as it proved was wisely placed upon the shoulders best able to bear it.

To follow Webster on any occasion was a trying experience. In this case it was doubly so. Aroused and angered by the adverse, and, as it seemed to him, unjust, rulings of the Senate, deeply moved by interest in his client, he rallied all the forces of his majestic oratory to the defence. He seems to have believed sincerely that Prescott was innocent of any conduct deserving impeachment. His plans for defence had been seriously disarranged by the exclusion of all evidence as to customary charges in other courts. Surprised at the moment when this unexpected ruling was made, he had attacked the Senate openly and fearlessly, but indiscreetly, and now was evidently sensible of the hostile feelings, which they, little trained to judicial work, perhaps not unnaturally entertained. Tact, therefore, and conciliation, were thrown to the winds, and by main strength was his assault conducted.

When Webster had taken his seat, Shaw arose,

with no intermission, and began his address. His remarks may be described as weighty, rather than eloquent, in the common acceptance of the word. He spoke for nearly four hours, with solemn directness, and not an irrelevant word or thought in that time did he utter. He was sensible that he was addressing no ordinary jury in the usual functions of an advocate. His words show a full realization of the unusual and extraordinary capacity in which he, as well as the judges, was called upon to act. His lofty conception of the judiciary had, within a few weeks, been voiced under the same roof beneath which he was now called upon to accuse a member of that body of being false to his ideal. His position was that of a prosecuting officer, who, in a capacity quasi-judicial, is called upon, in the performance of his official duty, not to sway by prejudice or sympathy, but to elicit the facts as he believes them to be, and to point out their full significance under the law. This was Shaw's attitude in the case, during the introduction of evidence and throughout his argument. No doubt the work was distasteful to him. It is never a joyous task to prosecute one's fellow-man. The less so when he is a member of one's own profession. Undeniably a brotherly feeling does exist amongst those who are members of the same guild. Besides this, Prescott was a judge of fifteen years' standing, with whom Shaw presumably was acquainted, and before whom he undoubtedly had practised. Clearly nothing but a strong sense of duty could have urged him thus to take an important part in proceedings set in motion for the ulti-

mate end of removing from the bench in disgrace a judge who, as such, he strongly felt should be protected and guarded from every move and attack which had been prompted by jealousy, hostility, or a spirit of revenge. Counsel for the prosecution has not the wide range for the display of oratorical powers which is offered the advocate for defence. The chords of human interest, passion, prejudice, and common feeling cannot be touched. He must appeal to reason and duty alone. So understood, Shaw's address in this case does not suffer in comparison with Webster's.

Probably this is the only one of Shaw's arguments which is fully reported. Its intrinsic merit is such, and its place in a comprehensive study of his life as an example of his work at the bar is so important, that nothing but its length prevents its full reproduction here. Extracts, however, must suffice to convey an idea of its merit. He began thus:—

Mr. President, in common with the Honorable Managers with whom I am associated, I trust that I am sufficiently impressed with the magnitude and importance of the transaction in which we are now engaged. I am well aware of the dignity of the high tribunal before which I stand, of the duty of the constitutional accusers by whom this prosecution is instituted, of the elevated person and official character of the accused, of the nature of the offences imputed to him, and the deep and intense interest, which is felt by the community in the result of this trial. It is perhaps true that these transactions may be recorded and remembered, that the principles advanced, and the decisions made in the course of this trial, will continue to exert an influence on society, either salutary or

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pernicious, long after all those of us who, either as judges or as actors, have a share in these proceedings, shall be slumbering with our fathers. And yet I do not know that these considerations, serious and affecting as they certainly are, can afford any precise or useful practical rule, either for the conduct or decision of this cause. In questions of policy and expediency there is a latitude of choice, and the same end may be pursued by different means. But in the administration of justice, in questions of judicial controversy, there can be but one right rule. Whether therefore the parties are high or low, whether the subject in controversy be of great or of little importance, the same principles of law, the same rules of evidence, the same regard to rigid and exact justice, must guide and govern the decision. "Thou shalt do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty, but in righteousness shalt thou judge thy neighbor,"—is an injunction delivered upon the highest authority and enforced by the most solemn of all sanctions.

Nor am I aware that powerful and animated appeals to your compassion or resentment can have any considerable or lasting influence; they may indeed afford opportunity for the display of genius and eloquence, excite a momentary feeling of sympathy and admiration, and awake and command attention. Beyond this, their influence would be pernicious and deplorable. If the charges brought against the respondent are satisfactorily proved, justice, that justice due to the violated rights of an injured community, that justice deserved by the breach of the most sacred obligations, demands a conviction, from which no considerations of compassion can or ought to shield him. On the contrary, if these charges are not substantiated, or do not import criminality, no feelings of resentment, no prepossessions of guilt, however thoroughly impressed, can prevent his acquittal. The question therefore comes to precisely the same point as in

every other case of criminal accusation, that of guilt or innocence. In discharging that part of the duty of this occasion, which has unexpectedly devolved on me, I am oppressed with a feeling of anxiety, which it is impossible to express, and quite in vain to disguise. The extent and variety of the legal and constitutional principles, which have been brought under discussion, the number of the charges contained in those articles, with the mass of evidence introduced in relation to them, the rare combination of talent, eloquence and legal information, which the respondent has called to his aid in conducting his defence, all admonish me of the great weight of responsibility which rests upon the managers of this prosecution.

He then went on to sketch the history of the proceedings by which the accused had been brought to trial, and expressed the hope that the expedition which had been shown would serve to "redeem the process of impeachment from the imputation of unwarrantable and almost interminable delay which has sometimes been attached to it."

Then follows a discussion of the principle upon which the impeachment was based, and an expression of his conception of what conduct was sufficient to require the removal of a judge:—

By the Constitution, which is a law of the highest nature, every officer is bound to take an oath, faithfully and impartially to perform and discharge all the duties incumbent on him as such officer, according to the best of his abilities and understanding, agreeably to the rules and regulations of the Constitution, and the laws of this Commonwealth.

To perform these duties faithfully and impartially, he must understand them, and he must use due diligence to acquaint himself with them. I should therefore hold that

any gross and continued neglect of the ordinary means of information, as if an officer were to disregard those public statutes which are made from time to time, and the knowledge of which would be necessary to the intelligent and proper discharge of the duties of his office, or if the judge of an inferior court should wilfully neglect to inform himself of those adjudications of superior courts, which as precedents ought to bind and govern him; or in any way should wilfully neglect the means of qualifying himself for the faithful and intelligent performance of his duties, such neglect would be misconduct punishable by impeachment.

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But, sir, it has been urged upon you in the course of this trial, and reiterated again and again, with as much confidence as if it were a conceded point, that the managers here claim to come before you, with loose, general and undefined charges against the respondent, relying rather upon a general temper of dissatisfaction abroad, than upon any proof of criminality in his conduct, and that after all, this prosecution is little more than an appeal to your discretion or your resentment, to remove the respondent from office, because he has happened to become unpopular and obnoxious. Upon this assumption much of the argument and eloquence of the learned gentlemen on the other side have been exhausted; and they have contended with a laudable, but in our view rather a misplaced and unnecessary, zeal, against the introduction of arbitrary and oppressive principles. Sir, I am at a loss to discover in what part of these proceedings the learned gentlemen have perceived any ground for imputing any such views to the managers of this impeachment. It would surely be a paltry and inglorious triumph, one which the House of Representatives and the managers would earnestly and sincerely deprecate, should they succeed in attaining the object of the present prosecution, at

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the hazard of sanctioning principles, and establishing a precedent, which would impair the rights and jeopardize the liberties of themselves, their constituents and their posterity.

Dealing with the charge of receiving excessive fees, Shaw begged leave to differ from Webster's view that if they were paid voluntarily or without remonstrance there was no extortion: —

This notion is not warranted by the authorities, all of which concur in this, that when money is demanded and received by color of office, where none is due, or more than is due, it is extortion. It is not requisite that the party paying should resist, or even object to the payment. He may or may not know that the demand is extorsive. He may yield through ignorance, or he may prefer acquiescing in an illegal and unjust demand to the trouble and risk of an altercation with an officer, whose good will it is his interest to conciliate. But the officer is bound at his peril to take notice what his fees are, and to ask and receive no more than the law will warrant. It is however urged that when money is paid voluntarily to an officer, to stimulate him to the more prompt discharge of his duty, the receiving it is not extortion. This proposition, however well founded, can never apply to the case of a judicial officer. Justice when due, can neither be sold nor delayed.

In these words he deprecated the argument that the smallness of the excess charges disproved wilfulness and corrupt purpose: —

It is by small and almost imperceptible encroachments, by demands too insignificant, in the first instance, to be an object of remark or opposition, that great abuses creep into public office.

Webster's excuse that it was more troublesome and laborious for Prescott to perform probate duties at his office than in ordinary court, and thus an extra fee for that service was warranted, Shaw met as follows:—

Where is this doctrine to stop, and to what corruption and abuses would it not lead! A judge possesses large discretionary powers, in other cases, to which, if correct, the same reasoning would apply. He may adjourn at such time as he thinks expedient. Supposing on the first day after opening his regular court, in a remote part of the county, where there is a press of business, he should think fit to adjourn, on the ground that his private business required his attention. Might he lawfully receive a large sum of money of the suitors, to induce him to exercise his discretionary power and continue his court? In short, if business at the special courts, is to be paid for liberally, and upon a scale of what the judge might think reasonable for extra time and attention, and business at regular courts of probate is paid for according to the humbler standard of the fee-bill, would it not soon be in the power of the judge to render the transacted business in the latter courts so irksome and vexatious as to induce all suitors to resort to the special court, without regard to the enhanced expense? If a Judge of Probate may sell his discretion, and turn his judicial power to profit, why may not the same thing be done by the judges of common law courts? It is no answer to say that they are paid by salaries, and not by fees. They are bound to do their duty, and they have an equal right to say that they will do no more without compensation. They too have large discretionary powers, and by adjournment may hold sessions at such times and places as the public good requires. Suppose an individual suitor, having an important cause, depending upon the decision of a question of law before

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the Judges of the Supreme Court, should pay them a fee to induce them to hold an extraordinary session for his accommodation. It would be no apology to say that such individual could well afford to pay the extra sum, that in fact it would be for his advantage to pay it, rather than wait the delay of the ordinary course of business. Such a transaction, it is quite manifest, would fix a stigma upon the reputation of the court, which years of the purest administration of justice, and the most assiduous discharge of official duty, could not obliterate.

Shaw proceeded through twelve of the articles of impeachment, the remaining three being left to his colleague. He discussed the evidence mainly, dealing with the law in only a broad and general way. Throughout, he was forceful but always dispassionate. The strength of his argument lay in sound sense, and his dignified phrasing and impressive delivery gave it added weight. In closing, he made a stately plea for justice which compares favorably with anything to be found in Webster's speech. How better could the duty of the judges be phrased than thus? —

We have no earnest invocation to make to the Judges of this honorable court except that they will examine the case now submitted to them, without fear, favor, affection, prejudice or partiality, and pronounce their decision, not according to the momentary impulses of sympathy and compassion, but upon the invariable dictates of judgment and reason.

If sensibility should usurp the seat of justice, and take the place of the understanding and judgment, laws would be unavailing, and all civil and social rights become fluctuating and uncertain. Justice might throw

away her balance, for it would be useless, and her sword, for it would be mischievous. If punishment and disgrace are to overtake the respondent, it is because punishment and disgrace are the natural, the necessary and the inevitable consequences of turpitude and crime. The Representatives of the people of this Commonwealth, demand at your hands no sacrifice of innocence; they ask for no victim to their resentment, for they have none to gratify. If applying the evidence to the law in this case, this court can consistently with the conclusions of enlightened and inflexible judgment, pronounce the respondent innocent, these Representatives will rejoice to find that the reputation of this Commonwealth still remains pure and unspotted. But if these conclusions should be otherwise, if this court is satisfied, that the respondent has abused the powers entrusted to him, disregarded the rights of others, and violated his high official duties, the Representatives of the people do earnestly hope, and confidently trust, that this high court, disregarding all consequences personal to the respondent, will pronounce such judgment on his conduct as will prove a salutary example to all others in authority, vindicate the honor and secure the rights of this Commonwealth, and enable them to transmit to posterity that unblemished reputation for purity, honesty and integrity in the administration of justice which has hitherto been the ornament and glory of Massachusetts.

Judge Prescott was convicted upon two of the articles of impeachment. Upon all other counts in the articles he was acquitted. After the verdict the President made the somewhat extraordinary announcement that the Senate had agreed on the sentence to be pronounced unless some suggestion for a stay of judgment should be made. This again aroused Webster's ire, and when inquired of as to

whether he wished to make a motion in arrest of judgment, he replied: —

The course which has been adopted has been so extremely novel, and so different from the practice of courts to which I have been accustomed, that I cannot consider it my duty to my client, to speak against a judgment already formed. It might have been material to address some considerations to the court before that judgment was formed. We do not think it our duty to our honorable client to trouble Your Honors with any observations.

He indignantly refused to be put to the disadvantage of moving uselessly for a reconsideration of the court's opinion on the question, and judgment was thereupon pronounced to the effect that Prescott be removed from office.

While a member of the Senate, Shaw took an important and influential part in the movement of the States to secure an appropriation from Congress of the valuable public lands held by the Government.

The early grants of land by England to the colonists were without doubt made in great ignorance of the geography of the interior of the country, and were large and liberal. Upon the adoption of peace after the Revolution, the new Nation secured by the treaty large areas which had never before been included within the most widely extended claims of State boundaries. All title to these tracts, estimated at many millions of acres, was ceded by the several States to the United States Government, for the use and benefit of the new country, and by this large

accession of territory the credit and resources of the Nation were substantially increased. The disposition of these lands, with the territory acquired by the Louisiana Purchase, later became the subject of much envious dispute between the States and the Federal Government. Large portions were offered for sale, the land having been first divided into townships six miles square, each township in turn being subdivided into thirty-six sections. One of these sections in each township was reserved from sale, to be given for the support of schools within the district.

Several of the States, Maryland in the lead, followed by Virginia and Connecticut, brought forward the contention that this reservation of land for public purposes was virtually a gift to the new township, and therefore, in the aggregate, a donation to the new State within which the township might lie. This constituted, so the claim went, a distribution of the public lands, and was in effect an unjust discrimination in behalf of the new, or *favoured*, States, against the original, or *excluded*, States. Maryland, therefore, memorialized Congress upon the matter, and made a claim for herself and the other original thirteen States, including Maine, Vermont, and Kentucky, which had been carved out of territory originally belonging to the thirteen. The same favors which were being accorded the new States were demanded, through similar grants of lands for educational purposes. A computation was made by which it would appear, upon a proportionate basis, that 9,370,760 acres of land would be "necessary to

do justice to the States which have not yet had any."

Other States were following Maryland's lead in this respect, and a message from the Governor referred to the Legislature the question whether Massachusetts should join in the claim. The inquiry was referred to a joint committee of which Shaw was chairman. While the matter was pending, an article written by Jared Sparks, afterwards President of Harvard College, appeared in the "North American Review," strongly advocating the adoption of the Maryland resolution, concluding as follows: —

Before we wholly close this article we beg leave earnestly to recommend the principal subject of it to the attention of the American public at large and individually of the State Governments in our own neighborhood, who cannot, we think, acquit themselves of unfaithfulness to the interests of their constituents if they do not imitate the laudable example of the Legislature of Maryland in pursuing so important and just a claim.

The subject was examined with great care by the committee and a report submitted of much higher standard than is usually found in such documents. It is notable for its judicial tone and carefully reasoned justice. The same characteristics which later distinguished Shaw's opinions are manifest in this forgotten document. The subject is dealt with in the most impartial manner, as if the question between the Central Government and the States as claimants had been referred to the committee as judges. This breadth of view is all the more commendable when it is recalled that, had the appro-

priation been granted, the value of the share of Massachusetts in the distribution would have approximated a million dollars. The importance of the question at that day, therefore, when the subject of the schools was beginning to take on some semblance of the proportions it has since assumed, and when larger drafts to that end were coming to be made upon the public treasuries, can readily be seen.

Shaw pointed out that under the Government's plan of selling the lands, every purchaser, knowing that a section was to be reserved for the benefit of the schools, bought his land with the privilege annexed, and thus paid full consideration for it. The land was offered for sale upon terms which included, for the price asked, the provision that a section was to be held in trust for the benefit of the purchasers of the remainder of the square miles. When land was taken upon this offer a contract between the Government and the purchaser became complete. This contract the United States, upon its part, was bound to execute. Therefore no gift was made of the land in question to the new towns, and no basis existed for Maryland's claim of favoritism. It was pointed out that this was one of the means adopted to give value to the lands and to encourage and promote their sale. It should be regarded in the same light as if the Government had agreed, before the sale, to build roads through the lands.

Every privilege, benefit, and advantage, which an owner of property annexes to it prior to the sale and which thus passes with the property as one of its inci-

dents and appurtenances, must be considered as a sale for valuable consideration and not as a gift or gratuity. . . .

This arrangement by which a portion of the Public Lands sold is reserved for schools, your committee consider to be in a high degree wise and judicious. Whilst it serves to encourage the sale of the lands in the first instance, it remains as a growing fund, becoming valuable in proportion as the occasion for its application arises by the increase of families within the township. Still it is a fund paid for by the owners of such township, which the government cannot resume without injustice and breach of faith and for which it would be equally unjust to claim an equivalent from other funds. . . .

It was shown that obviously it would be compelling such purchaser to pay again for this benefit if, in consequence of such reservation, other lands or other funds should be appropriated to the use of all other citizens of the United States, from the benefit of which such purchaser should be excluded. In addition to this, it was stated, the grants were not to any State, or to the people of any State. The State Governments had no control over them and could make no disposition of them. Those who bought the lands were not necessarily settlers, as residence was not a requisite feature of the terms of sale, and citizens of other States could purchase as well as those who intended to dwell upon the land themselves.

The report concludes with the following words: —

As a question between parties thus situated it becomes an imperious duty to waive all considerations of interest, policy and expediency, and to decide only on those unerring principles of justice which alone can ensure harmony and safety.

The committee's report was made in January, 1822. It was followed by a Resolve of the Legislature that it be printed and that copies be sent to the Legislatures of the several States and to the members of Congress. Thus published, the forceful logic of the document doubtless had a wide influence in rebutting the interesting and thrifty, but fallacious, argument which Maryland was so industriously urging.

The General Laws of the State greatly needed revision. No new edition had been published for many years, and successive Legislatures had convened and adjourned, each leaving its increment to the Statutes of the Commonwealth. Many acts as they stood in the volume current as the enacted law had been repealed. Others had been modified and added to. While the number of legislative acts passed at a session was not in any degree as great then as has since come to be expected, yet in the aggregate, their mass had become considerable, and the desirability of having changes and additional legislation noted in the volume distributed for general use and reference was plain.

In 1822, the Governor was authorized to appoint two "able and discreet persons, learned in the law, to be commissioners for revising and superintending the publication of the laws." In pursuance of this authority Professor Asahel Stearns, of the Harvard Law School, and Lemuel Shaw were appointed. They chose as editor of the work Theron Metcalf, who in later years was to become an able associate of Shaw's upon the bench.

The duties of such commissions are of a meticulous character, involving painstaking research and comparison rather than anything in the nature of constructive work or interpretation. It is probable that the committee left a large share of this work to the editor, who was so admirably fitted for the task. Metcalf was a lawyer of ability whose professional inclinations seemed to follow the studious lines of research and authorship rather than the more strenuous and active branch of advocacy. He was the editor of English reports and numerous textbooks, a frequent contributor to legal periodicals, and later published an important work on Contracts. Subsequently he acted as one of the commissioners to revise the Statutes when they were consolidated in 1835, and became the Reporter of Decisions for Massachusetts, receiving his appointment while Shaw was Chief Justice. Later he was appointed as an Associate Justice on the bench with Shaw in 1848, where he served for seventeen years. With such an editor in its employ the commissioners doubtless were obliged to devote but little time to the more laborious and less interesting part of the work, and acquitted themselves of the responsibility placed upon them by the exercise of the more general task of direction and supervision.

The laws in the revision were printed in chronological order, in chapters divided according to the years from 1782 to 1821. Repealed acts and those which had become inoperative, were printed in small type, the repealing acts being indicated by marginal references. Full references were also made to other

acts enlarging or modifying the text, as well as to the Colony and Province Laws on the same subject, in order that "a view of the whole history of our Legislature might be readily obtained by those who desire it." An admirable index was included at the end. The Resolve provided for the form the compilation should take, and therefore the Legislature, and not the commissioners, was responsible for the confusing and cumbrous method of arranging the laws by the years when they were enacted rather than by subjects. It must be remembered that this was a new edition of the laws and not a general revision. The latter did not come until 1836, when for the first time the laws were classified and arranged by subjects and reënacted. The Resolve also was so specific as to prescribe the type to be used, the paper, and size of the volumes, and, "to ensure perfect accuracy, that the title of every act, and the text of every act printed in this edition, should be compared with the original manuscripts in the Secretary's office."

The people of Boston clung tenaciously to the form of town government long after it had become inadequate and an awkward means of administering the affairs of the municipality. A number of reasons seem to account for this. For one thing it was their own system, worked out and followed through colonial days, and maintained through the trials of the War of Independence. It had not been imposed upon them in the beginning, nor had it ever been the means of oppression. On the con-

trary, the town meeting had been the place where wrongs inflicted upon the colonists had been debated, and had been the field for public expression of resentment at those acts. Then, too, there was something personal in the town government which the community was loath to give up. The town meeting, where the people, not through delegates, but each man for himself, discuss and decide questions of social welfare, is as near the ideal governing body as we seem likely to get. There is a sense of security in the open meeting, and in the opportunity afforded for free expression of opinion and a direct vote. But of course there are limits to the adaptability of this means of control. The representative form of government becomes a necessity when communities are large or widely scattered.

Boston had long outgrown the town meeting, but had been very fortunate, nevertheless. Loosely as its money affairs had been administered, and divided as all responsibility had been, the people had not suffered, and had secured the advantages of government at a reasonable cost. Small wonder that they were tolerably well satisfied with what they had, and delayed to discard for something new that which had served them well.

But it had been apparent for some time that a change was necessary. The town had increased in size slowly and solidly, until in 1821 it numbered over forty thousand people, of whom some eight or nine thousand were voters. It is obvious that when any considerable fraction of this number attended a town meeting, the mass became unwieldy and

unmanageable. Josiah Quincy¹ thus described the situation: —

When a town meeting was held on any exciting subject in Faneuil Hall, those only who obtained places, near the moderator, could even hear the discussion. A few busy or interested individuals easily obtained the management of the most important affairs, in an assembly in which the greater number could have neither voice nor hearing. When the subject was not generally exciting town meetings were usually composed of the selectmen, the town officers, and thirty or forty inhabitants. Those who came were for the most part drawn to it from some official duty or private interest, which, when performed or attained, they generally troubled themselves but little, or not at all, about the other business of the meeting. In assemblies thus composed by-laws were passed; taxes to the amount of one hundred or one hundred and fifty thousand dollars voted, on statements often general in their nature, and on reports, as it respects the majority of voters present, taken upon trust, and which no one had carefully considered except perhaps the chairman.

Then, too, as Quincy points out, there was no direct check or control upon the agents of the town. The executive power was divided amongst different boards which did not always work in harmony. Taxes were raised upon the estimates of the same boards by which the money when provided was expended, according to needs of which they were their own judges.

Recognizing these deficiencies, and with a desire to remedy them, as early as 1784, on the petition of citizens, a committee had been appointed "to con-

¹ *Municipal History of Boston.*

sider the expediency of applying to the General Court for an act to form the Town of Boston into an incorporated city, and report a plan of alterations in the present government of the police, if such be deemed eligible." This committee reported two proposed plans for a new government, which, after being printed and distributed amongst the voters, were summarily rejected in town meeting. The people were not ready for any change. The record states: —

But the impatience of the inhabitants for the question being immediately put prevented any debate thereon and it passed in the negative by a great majority, and the meeting was immediately dissolved.

In 1785, another attempt was made, and another committee investigated and reported, recommending no change. In 1791, the subject was again brought up, and the proposition a third time was rejected, which happened again in 1804 and in 1815, the last attempt being, however, lost by a majority of but thirty-one votes.

So matters stood in 1821, with this difference, however. It had always been claimed whenever the subject came up for discussion that no incorporation of cities was possible under the State Constitution. As we have seen, the Constitutional Convention of 1820 had resulted in a change in this respect, and city charters were now expressly provided for. At this time also much discontent had arisen concerning county expenditures, as well as over the action of the town boards in disregarding a vote of

the town, and the question of the change from town to city was broached for the sixth time.

A committee of thirteen inhabitants was appointed to report "a complete system relating to the administration of the town and county, which shall remedy the present evils." Shaw was a member of this committee. In 1820 he had served a term as Selectman, and therefore, in addition to being an able lawyer whose advice was of value upon the question, he was familiar with the condition of the town's affairs. His associates upon this committee included John Phillips, the father of Wendell Phillips, William Sullivan, Josiah Quincy, and Daniel Webster.¹

After the discouragements with which former boards had met in recommending a city government, this time the committee endeavored to devise a scheme involving changes less fundamental. It recommended the establishment of a police court and a Town Council composed of the Selectmen and a number of "assistants" chosen annually in the wards, one for each nine hundred inhabitants, this Council to have the right to confer such executive powers upon the Selectmen as they deemed fit.

The committee, however, evidently had not gauged accurately the state of changed public opinion on the question, for after debate in town meeting upon the report, it was voted, —

¹ The full committee was as follows: John Phillips, William Sullivan, Charles Jackson, Josiah Quincy, William Prescott, William Tudor, George Blake, Henry Orne, Daniel Webster, Isaac Winslow, Lemuel Shaw, Stephen Codman, and Joseph Tilden.

That the report should be recommitted to the same committee with the addition of one person from each ward of the town, with instructions to report a system for the government of the town, with such powers, privileges, and immunities as are contemplated by the amendment of the constitution of the Commonwealth authorizing the General Court to constitute a city government.

Thus augmented, on the 31st day of December, 1821, this committee made its report. Even then, with a caution born of expressions of prejudice against the names of "Mayor" and "Aldermen," heard in former debates upon the question, the report avoided the use of those offensive titles. The executive was designated "Intendant," and seven "Selectmen" and a "Board of Assistants" of forty-eight members comprised the "Town Council." The Intendant was to be elected by the Selectmen, the Selectmen by general election, and four Assistants from each ward.

This report was debated in town meeting for three days. The general scheme of the new government, so far as division and distribution of power was concerned, was favored, although an attempt was made to modify the plan so that the members of both boards should be elected by wards. This was opposed by Shaw and others, and the system first advocated was approved. Evidently, however, the people, having made up their minds that city government was an inevitable necessity, were determined not to balk at nomenclature, and were willing to call things by their right names. Accordingly, in the resolves adopted approving the report of the

committee, Mayor, Aldermen, and Common Council were substituted for Intendant, Selectmen, and Board of Assistants.

On January 7, 1822, the vote of the citizens was taken on the question. The change was adopted by a substantial majority, and the matter was immediately carried to the Legislature. On January 15 the petition of the town was presented praying for the establishment of a city government, and after being referred to the Committee on Towns, and later to a conference committee, of which Shaw was a member, the act was passed on February 23.

On the 4th of March next the citizens accepted the act and the first city election was held on the 8th of April following. Harrison Gray Otis and Josiah Quincy had been the chief candidates for Mayor, but neither had a majority, the votes being nearly equally divided. Thereupon both withdrew their names, and John Phillips was elected Mayor with practically no opposition.

The charter as it was adopted defined a system of municipal government, since followed widely, which has been found satisfactory in its practical simplicity. The control of the city affairs was vested in the Mayor, a board of eight Aldermen, and a Common Council of forty-eight. The city was divided into wards. The Mayor and Aldermen were chosen by the inhabitants at large. Four members of the Common Council were elected from each of the twelve wards. The Mayor and Aldermen were charged with the administration of the police department and with general executive duties; and

all other powers of the municipality were in the Mayor, Aldermen, and Common Council, concurrently. No material change in the charter was effected until 1856 when substantial additions were made, chief amongst which was the bestowal of the veto power upon the Mayor. But even this was not done without consulting Shaw, who was then Chief Justice, and the framework and general structure of the city government remained as originally fashioned, and served its purpose until 1913, when a new system was adopted.

It was no ordinary task thus to devise a new form of community government. The work required far more than mere adaptation of a tested plan to local needs. Boston was not the first American city, although its predecessors were few in number. New York and Philadelphia had been cities for some time, and there were also cities in Connecticut, but the outlines of these charters were not used for Boston, and because of their English cast very likely would never have been acceptable to the people. The result reached was a combination of the representative idea found in State and National Governments, with the principle of local and personal participation and intimate control peculiar to Town Government. The difference in the manner of electing the Aldermen and members of the Common Council served to provide a system of check, and the general and local representation diminished the danger of having both bodies divided by factional differences.

Shaw's part in this piece of constructive legisla-

tion was very important. As we have seen, he made the chief speech in the Constitutional Convention of 1820 advocating an express provision for the incorporation of cities. When the committee was appointed by the town to consider the matter, it was Shaw who drew up the plan which was accepted, and he again who drew the act of incorporation accompanying the petition to the Legislature which was enacted. With the exception of the section providing for the licensing of theatrical and other exhibitions, which was drafted by Sullivan, he was the author of the whole of the charter, and in his handwriting is the original draft which now rests in the State archives.

Very properly did Judge Thomas, his colleague upon the bench, say of him, in suggesting that his portrait should hang in Faneuil Hall:—

He was in a sense *conditor urbis*. His large services to the city and to the Commonwealth, of which the city is the head, fairly claims some memorial of her respect and gratitude.

CHAPTER V

LATER PRACTICE — APPOINTMENT TO THE BENCH

WHILE he had been engaged in important matters at the State House Shaw's practice had not been permitted to suffer, and at the close of the second decade of the century his business was becoming so large and profitable that he could no longer take the time from his office for further political service. His name did not yet appear in the Reports with the frequency of many other counsellors, which is accounted for probably by the fact that his practice was largely commercial, and he was successful in keeping his clients out of litigation. Even at that day appearances in court furnished no criterion upon which to estimate the success of the practitioner, and he who seldom appeared in the forum might have a clientage by many times larger and more lucrative than his brother lawyer whose attendance there was constant. The judicial quality of his mind seems to have been commonly recognized, and many cases were left to him as referee. A classmate said that probably no member of the bar of his time decided so many cases of difficulty and importance.

As he became more prominent in practice students came to his office for instruction in increasing numbers, and the following rules were drafted by him to govern their conduct: —

Rules to be observed by students at law

1. Students on their entrance who have previously been at a Law School, or in any other office as students, will be expected to state particularly what books they have read, the progress they have made in each branch of the law.

2. Students are requested to report to me each Monday in the forenoon the course of their reading the preceding week, and receive such advice and direction as to the pursuits of the current week as the case may require. In case of the absence or engagement of either party on Monday forenoon, such conference to be had as soon thereafter as circumstances will permit.

3. At any and all other times students are invited to call me and enter into free conversation upon subjects connected with their studies, and especially in reference to those changes and alterations of the general law which may have been effected by the Statutes of the Commonwealth and by local usage, and in respect to which therefore little can be found in books.

4. As one of the main objects of the attendance of students in the office of an attorney and counsellor in practice, they will be employed in conveyancing, pleading, copying, and other writing as the business of the office may require.

5. As order, diligence, and industry are essential to success in so laborious a profession, students will accordingly be expected to attend in the office, unless some other arrangement is made in particular cases, during those hours which are usually appropriated to business, and to apply themselves to the appropriate studies and business of the office.

6. If a student proposes to take a journey or to be absent for any cause for any considerable [time] he will be expected to give notice of the fact and the probable length of his absence; and if he is confined by sickness or

other necessary cause he will be expected to give notice of the fact.

One of his students was young Sidney Bartlett, who came to Shaw's office fresh from college in 1820. After he was admitted to practice, Shaw took him into partnership, and for the next ten years the two continued to work together. Bartlett was an exceptionally able man, and to him, it has been claimed, Shaw owed much of the financial success which followed in this period of his life. It has been stated that Shaw was careless and impatient of authority,¹ and that he was much indebted to Bartlett for the painstaking care with which the latter investigated the law of subjects in hand. But this view of Shaw is hardly warranted, at least in the absence of more substantial proof. None of his contemporaries have given us that idea of him, and no evidence of such traits is found in the enduring work which he has left behind. It may be that Shaw shrank from the laborious hunt for authorities which without doubt is necessary in nearly every important case. But this was work in the nature of legal drudgery, which quite naturally would fall to the junior partner. What lawyer who has a reliable and highly intelligent junior insists upon delving for precedents himself? Very likely Shaw was not a "case lawyer," who seeks first not the principle of the question, but some decision upon the point involved, and, failing to find it, knows not which way to turn. The great and dominant feature of his mind was its

¹ Joseph H. Beale, *Great American Lawyers*, vol. III, p. 469.

simplicity. Reduction to first principles and basic questions was ever his method of approach. The doctrine of *stare decisis* is very proper and very necessary, but into what a complexity of detail and confusion of thought is he led whose sole endeavor it is to discover and follow a case on all fours with his own.

It was certainly no reflection upon Shaw when the court remarked, in a case where he had been exerting his efforts to the utmost to free a client who had been caught between the upper and nether millstones of the technicalities of insurance law, that his contention had "been urged by the counsel for the plaintiff with as much force as zeal and eloquence without authority can give."¹ He was then dealing with one of those hard cases which, besides tending to make bad law, are very distressing to all concerned except the party who invokes the protection of the rule which seems to give him what he ought not to have. The zeal of the advocate in such cases may well lead him to make claims which the court is constrained to deny, as it did in Shaw's case, with the statement that "If they ask for law, it must be dealt to them." But Shaw did not go to the extent of arguing against an express authority which he had either overlooked or ignored. He was merely urging in support of his arguments on the law the claims of natural justice.

Shaw has not come down to us with the fame of a great advocate. We are given to doubt if in that direction he was a match for Choate, Webster,

¹ *Wiggin v. Amory*, 14 Mass. 1, 11.

Mason, or Dexter. Pure advocacy is more an art of itself than an integral part of the profession of law. The successful advocate must be a good lawyer in order to cope with the questions which inevitably arise in the course of every trial to be dealt with on the moment. But the best of lawyers may be no advocate. No degree of profound learning can supply the natural aptitude, supplemented by training and experience, which are the prerequisites of great success with juries. It may be that Shaw lacked a certain degree of agility of mind which serves good stead in the trial of jury cases, or perhaps his natural inclinations led him to the law side of a case rather than to the realm of disputed fact. However this may be, those talents seem wisely to have been most exercised which were most pronounced, and the strength of his grasp upon the law increased each year. Although, in comparison with Shaw, we are led to believe that Bartlett possessed the qualities of a jury lawyer to the greater degree, yet he never seems to have practised extensively as such. At the memorial exercises held after Bartlett's death, it was said by the Presiding Justice, Oliver Wendell Holmes, Jr., that he had never known Bartlett to try a jury case.

Bartlett continued his successful career long after Shaw left him to go upon the bench, and occupied a commanding position at the bar for nearly forty years from that time. After he began to practise, children were to be born, nurtured, educated, admitted to the bar, and die in practice, to be succeeded in the court-room by their sons, who were to

meet there an antagonist in this remarkable man, who argued cases in court with almost unabated vigor when he was ninety years old. Justice Holmes has said of him that "between seventy and ninety Mr. Bartlett did work enough for the glory of an advocate's lifetime." To most of the older generation of present-day lawyers his tall, straight figure was a familiar sight in the corridors of the Court-House.

The combination of Shaw and Bartlett was a formidable one, well able to hold a prominent place in the group of extraordinary men who practised in that day.

In 1819, Shaw's thoughts were turned toward the bench, either because he desired a judicial position, or because he was urged to consider the office by his friends. In his papers was found the following endorsement: —

It being said that the Honorable Judge Prescott is about to resign the office of Judge of the Boston Court of Common Pleas, the undersigned members of the Bar of Suffolk are of the opinion that the appointment of Lemuel Shaw, Esq., would be acceptable to the practitioners in this county and to the public.

This was signed by fifty-eight lawyers, a number which must have comprised the greater part of the bar. Amongst the signatures are those of Daniel Webster, William Sullivan, Octavius Pickering, H. G. Otis, Jr., Charles P. Curtis, and W. D. Sohier. This recommendation bore the date of April 22, 1819. It either failed of its intended effect, however,

or was never presented to the Governor, for on May 11, 1819, the Governor gave the appointment to Artemas Ward, who a year later was made Chief Justice of the newly organized Court of Common Pleas for the Commonwealth.

Shaw was also urged to run for Congress at a time when, could he have been prevailed upon to stand for the office, his election is said to have been assured. He was essentially a lawyer, however, and had no taste for politics as a career. Transit between Boston and Washington was not at that day sufficiently rapid to make it feasible for a Congressman to retain his practice. Webster, to be sure, held a large practice while he was in the Senate, but this was due to his preëminence as a national figure and to his being specially retained in causes of great magnitude. It is doubtful if even he had much practice of an organized nature while he was at Washington. Shaw's practice had been one of gradual growth, carefully attended to, and was not to be relinquished or neglected at the call to political honors. He declined the opportunity to go to Congress and always steadfastly refused to be tempted from the professional path.

In 1827, Shaw was invited to deliver the address at the annual meeting of the Suffolk Bar Association. The following quotation is from the account of the meeting published in the "Boston Advertiser" of May 25, 1827: —

The subject of his [Shaw's] address was the importance of the profession of law under a free representative gov-

ernment, and the duties and privileges of the American lawyer. In discussing these topics the orator took a wide range, in which we shall not attempt to follow him, as it would be impossible to do him justice within any reasonable limits. It is sufficient to say that the address was distinguished by classical purity and elegance of language, deep and vigorous thought, manly sentiments, wide and liberal views, and by an intimate acquaintance with the civil and political institutions of our own and foreign countries. Every subject was treated in the most free and masterly manner. After the address was concluded a committee of the bar was appointed to request a copy for the press. We trust that the wishes of the bar in this respect will be complied with.

So far as can be discovered, the address was never printed. It is quite certain that a copy of the speech was delivered to the committee according to request, although no trace of it can now be found in the records of the Bar Association. If it had remained in Shaw's hands it would undoubtedly have been found in his papers, so carefully did he preserve all manuscripts and letters. The committee referred to was composed of William Sullivan, Daniel Webster, John Pickering, Samuel Hubbard, and Peter O. Thacher. After hearing the address, which was delivered in one of the court-rooms at the Court-House, the members of the bar adjourned to the Exchange Coffee-House, where, after dinner was served, there were speeches and songs, a stanza from one of which runs as follows: —

“True it is we're a poor set of dogs,
Half our clients begrudge us their money,
While for them we get hoarse as bull frogs,
Making speeches of pure oil and honey;

Tho' of assets we stand in great need,
T' other half, men of honesty dubious,
Give us nought but the will for the deed,
And we find our estates *in nubibus*.

Sing *fee*, fal de ral,
And *fee*, fol de rol,
Oh, *fee*, fal de ral,
Oh, *fee*, fol de rol," etc.

Sometime after he delivered his address before the Bar Association in 1827, Shaw was elected president of that organization. There is no record of his election now to be found in the papers of the Association, but the fact that he held the office at the time of his appointment to the bench is attested by the following letter, —

BOSTON, 10 Sept., 1830.

To the Standing Committee of the Suffolk Bar, —

GENTLEMEN, — Having most unexpectedly to myself been appointed to a judicial office, which at present removes me from the Bar, I beg leave through you to resign the trust with which I have been honored as President of that body. I cannot reconcile it to my feelings to take leave of professional brethren with whom I have been so long and so pleasantly associated, without a strong expression of gratitude for the uniform kindness and courtesy which I have experienced from them. Whatever may be the course of my future life, I shall never cease to regard with the liveliest interest whatever concerns the honor, prosperity and happiness of the Suffolk Bar, collectively and individually.

I am furthermore, most truly, your friend and obedient servant,

LEMUEL SHAW.

During his last years of practice, Shaw was engaged in many of the large cases of the time. His opinion was sought by the city in numerous instances. He often appeared before legislative committees, and acted as counsel for corporations with toll franchises in opposing the establishment of new bridges and roads. With Webster he was counsel in the famous case of *Charles River Bridge v. Warren Bridge*, in which the plaintiff sought to prevent the erection of a new bridge across the Charles River so near the old one that traffic on the latter would be materially lessened. Shaw drew the bill of complaint and appeared throughout as junior counsel. Preparation of this case led to many conferences with Webster, which seem to have been arranged sometimes with much difficulty by Shaw. Before the argument upon the demurrer Webster wrote this note to him: —

DR. SIR, — If I were to argue the Bridge case on the wrong side, it appears to me I should put my argument in the shape of the three enclosed propositions.

Yrs. truly,

D. WEBSTER.

The demurrer was overruled,¹ but upon the merits the bill was dismissed.² This was in the last year of Shaw's practice, and was the last great case in which he was engaged as counsel. It was taken to the Supreme Court of the United States, where the rulings of the Massachusetts Court were sustained.³

In those days lawyers' fees were regulated largely

¹ 6 Pick. 376.

² 7 Pick. 344.

³ 11 Peters 420.

by agreement amongst themselves. A schedule of charges was adopted as the lowest which could honorably and reasonably be received, and members of the bar solemnly bound themselves "not to receive less fees or compensation than are herein expressed, nor any commutation or substitute therefor." The first list of established fees was adopted in 1796, "taking into consideration the great depreciation of money, the abridgment of the number of days attendance formerly taxed in defaulted cases, according to the more ancient law, and the general inadequacy of the fees hitherto paid in many cases to the services performed in the line of our profession." In 1819, fees were substantially increased under a resolution of which the following was the preamble: —

Taking into consideration that the rules of the Supreme Judicial Court require that nine years, at least, should have been passed in literary and professional pursuits, to qualify a man for admission to that Court as an attorney thereof, and two years practice therein as an attorney, to qualify him for admission as a counsellor thereof, and also that those who take upon themselves to perform professional duties are, and ought to be, holden in law and honor to indemnify their clients for all losses or damages which are occasioned by negligence or want of professional knowledge; and lastly, that the members of the profession are never applied to if the party can obtain, without their agency, the rights which the laws of the land secure to him.

The rates fixed by these rules seem sufficiently modest, as a few examples will show: For advice and

consultation when the property in dispute exceeded five hundred dollars, the charge was five dollars. For a letter demanding payment of a sum over five hundred dollars, before suit, two dollars. For arguing a case to the court or jury in the Supreme Court, twenty dollars. For collecting money not exceeding one thousand dollars, a commission of two and one half per cent.

But they were not absolute, for they established the lowest compensation only, and, as was carefully provided, were not intended "to restrict gentlemen from taking higher compensation in cases of difficulty or magnitude." In 1827, ninety-seven counsellors in full practice, four attorneys at the Supreme Judicial Court, and twenty-five attorneys at the Court of Common Pleas, had signed the bar rules. This number probably comprised substantially all of the Boston bar.

Shaw's fees seem to have been small even at the height of his practice, when he could well demand compensation much higher than the minimum charges established in the fee schedule. For an argument before the full bench of the Supreme Court his charge seems commonly to have been one hundred dollars, and his retainers were often not over ten or twenty dollars. He treated his clients with great consideration, as is instanced in the following occasion. In 1825, a fire occurred in his office on Court Street, and many of his papers were burned. He had acted for many years as counsel for Nathaniel Cushing, and after his death rendered a bill for services covering a considerable period of

time. After making a charge for a note of the deceased to the amount of sixty dollars, he adds this:—

I have an impression that I have another due bill for about \$60.00 given me upon some occasion by Mr. Cushing for money lent or paid for him, but I have not a sufficiently definite recollection of it to make it the subject of a charge unless some memorandum of it appears among Mr. Cushing's papers.

Yet notwithstanding his moderate charges he succeeded in accumulating a competence during his years of practice. Shortly before his death, in a hand which little showed the infirmities of age, he carefully compiled a list of his property and debts in order that those upon whom the duty might fall could more easily administer his estate. His property, which consisted mostly of real estate, aggregated, at his valuation, substantially one hundred and fifty thousand dollars, which amount was reduced by debts of some fifty-seven thousand dollars. It is unreasonable to suppose that much of this property could have been accumulated after he went on the bench, as the salary of the Chief Justice was then hardly more than enough to provide a bare living. Webster is authority for the statement that Shaw's professional income, in his last years of practice, was from fifteen to twenty thousand dollars a year. These figures would indicate a relative position at the bar of that time which perhaps four times the sums named would be required to represent now.

But after all the life of the practising lawyer furnishes but little of permanent interest for the records

of time. Absorbing as his pursuits are, and of vital importance though his undertakings be, there remains little for the annalist to record. He is but the lever to overcome the inertia of the law. His client's interest is his own, and his identity is merged in that of the cause which he espouses. His cases as soon as won become dead things, from the burial of which he turns to new and living issues. His personality, if marked, may live through the second generation, but hardly beyond. No greater advocate ever lived in this country than Rufus Choate, yet now little more than his name remains. We take his greatness on faith from those who tell us he was great, without full ability to judge for ourselves from what we can see, or hear, or read. Like the singer, the voice of the advocate is stilled in death, and only the echo remains, which in turn soon fades.

So it is that in the life of Lemuel Shaw but little can be said of the last ten years of his practice at the bar. For him and for his clients they were years of far greater importance than the preceding decade, but there is now hardly more to be said of them than of the life of a busy merchant engrossed in forwarding profitable ventures. He was active, successful, and prosperous. More than his share of the important litigation of the time came to him. Anyone who has the desire to know of the cases in which he acted as counsel can readily find them scattered through the first twenty-five volumes of the Massachusetts Reports. But he would be bold or foolish who would try to rouse interest in them here.

After his second marriage, though his family in-

creased in size and his means were augmented, he still continued to live in the house on Kneeland Street where he first began housekeeping. Not until 1831, after he had gone on the bench, did he remove to larger quarters in a better part of the city. The house on Mount Vernon Street where he passed the last thirty years of his life remained, until the death of his youngest son in 1915, in almost exactly the same condition as when he lived there. In the dining-room hung two notable portraits, one of Mrs. Shaw's mother, Hope Savage, by Gilbert Stuart, the other of her grandmother, Mrs. Samuel Phillips Savage, by Copley. The beautiful old mahogany furniture with which the house was filled also came, mostly, through the second Mrs. Shaw from the Savages. On the second floor, at the back, was the Chief Justice's study, lined to the ceiling with his law books. On the same floor, on the street side, was his bedroom with its huge four-posted bed and the steps he used to mount its height, and at the bedside stood the armchair in which he died. Few houses, even in that part of Georgian Boston which is still left so charmingly intact, revealed an interior more harmoniously adorned with distinctively fine old furniture, marred with no incongruous additions of modern design.

Although he was fond of travel, we have no record of any journey undertaken after his excursion to the White Mountains until after he went on the bench. The walk from his house to the office, twice a day, which he had to vary by only a few steps to enter the Court-House, was his beaten track during these

years. Through this busy time his interest in literature, the theatre, and his delight in social intercourse, furnished his sole means of diversion outside the family circle.

In 1830, when he was fifty years old, came the event which radically changed his life and opened the way to what was to be his real career, for which, in retrospect, all the preceding years of his life had been but a period of preparation.

On July 25, 1830, Isaac Parker, who had been a Justice of the Supreme Judicial Court since 1806, and its Chief Justice since 1814, died suddenly at his home in Boston. During the very week of his death he assured Shaw, to use the latter's words, —

Not in a boastful spirit, but with apparent feeling of humble gratitude to Heaven for the favor, that during the twenty-four years that he had held his seat he had never been prevented by ill health for a single day from being in the place where his official duty called him, in every part of the Commonwealth.

Shaw, as president of the Suffolk Bar, was chairman of a committee of that body instructed to consider and report what measures might be taken relative to the death and funeral of the dead Chief Justice.

There was an old rule of succession by which in case of vacancy the senior Associate Justice was promoted to the Chief Justiceship. This custom had never been broken but once, and on the death of Chief Justice Parker powerful influence sought to have it followed. But Governor Lincoln had long

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known Shaw and held him in such high regard that he determined to break precedent and make an appointment directly from the bar.

Governor Lincoln had been in college with Shaw, and there, to use his own words, "came to be made acquainted with the rank which he had already there attained as a diligent and accurate scholar. In forensic exercise he was distinguished for clearness of perception, logical argument, and strength and force of expression." The Governor had also been associated with Shaw in the Legislature, serving with him on the Committee on New Trials, corresponding to the Judiciary Committee of to-day. The two had likewise been together in the Constitutional Convention of 1820, and were both appointed managers by the House in the impeachment of Prescott in 1821. Lincoln himself had also been a member of the Supreme Bench in 1824, leaving it the following year to become Governor, and it was there that he came to have a fine appreciation of Shaw's ability as a lawyer. "Through two terms at *nisi prius* and one term of the law court in the County of Suffolk," he said, "in case after case and for week after week, I was called to witness the thoroughness of research, the acumen of perception, the ever-abiding equanimity of temper and self-possession which he brought to the management of causes, and it was the result of such observation which prompted me at a later day, and in a different station, to do that act of service to the Commonwealth, the country, and the cause of jurisprudence in proposing him for the place."

The Governor consulted Webster with reference to his intention to appoint Shaw, and found him in hearty accord with his proposal. Lincoln had fears, however, that Shaw would not accept the office, and asked Webster to use his efforts to persuade him to do so. Webster, accordingly called upon Shaw and made the offer on the evening of the 22d of August, 1830. The next morning Shaw "peremptorily declined." Upon being informed of Shaw's refusal, the Governor immediately wrote Webster the following note:

MY DEAR SIR, — I feel entirely overwhelmed by the difficulty which your communication presents, and will call upon you in fifteen minutes at your study.

As a result of this visit a further message, almost in the form of entreaty, came from the Governor; a promise to reconsider the decision was given by Shaw; the nomination was postponed until the next day; and further interviews were held between Shaw and Webster. Webster's own highly interesting account of his talks with Shaw is reported in these words: —

✓ I approached him upon the subject. He was almost offended at the suggestion. "Do you suppose," said he, "that I am going at my time of life to take an office that has so much responsibility attached to it for the paltry sum of three thousand dollars a year?" "You have some property," I replied, "and can afford to take it." "I shall not take it under any circumstances," was his answer. I used every argument I could think of. I plied him in every possible way, and had interview after interview with him. He smoked and smoked, and, as I entreated

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and begged and expostulated, the smoke would come thicker and faster. Sometimes he would make a cloud of smoke so thick that I could not see him. I guess he smoked a thousand cigars while he was settling the point. He declared by all that was sacred he would resist the tempter. I appealed to his patriotism. I said he was a young man, and should take it for that reason. A long judicial life was the only useful one to the State. His decisions would give stability to the government, and I made him believe it was his duty, — as I think it was under the circumstances.¹

This argument, urged by Webster, and reinforced by leading members of the bar, acting doubtless at Webster's suggestion, ultimately carried the point, and at last a reluctant assent was given. Webster always claimed the credit of prevailing upon Shaw to accept the appointment.

Massachusetts is indebted to me for one thing, if for nothing else [he said, years later]. I have been the cause of giving her a Chief Justice to her highest court for more than a quarter of a century; one unsurpassed in everything that constitutes an upright, learned, and intelligent judge. Massachusetts is indebted to me for having Judge Shaw at the head of her judiciary for thirty years; for he never would have taken the place had it not been for me. Although he accepted the office with the greatest reluctance, he has filled it with unsurpassed ability; and to-day there is not in the world a more upright and conscientious and able judge than Chief Justice Shaw. He is an honor to the ermine. For that, I repeat, the people of Massachusetts owe me a debt of gratitude, if for nothing else.²

¹ From a contemporary newspaper account repeated in Harvey's *Reminiscences of Daniel Webster*. (1877.)

² Harvey, *Reminiscences of Webster*.

And Judge Thomas, a contemporary and colleague of Shaw, agrees that Webster's influence was probably the decisive factor in accomplishing Shaw's capitulation.¹

However that may have been, and it is very likely that Webster and Judge Thomas were correct in estimating the weight of the influence of the great expounder of the Constitution, it remained for Shaw's son in later years to bring to light a bit of paper which shows how the mind on which the force of Webster's eloquence had been exerted went to work after the door had closed upon his majestic form. Choate was accustomed, as a form of mental exercise, to draw up a brief on both sides of every case which came out in the law Reports, and then to write a decision upon the merits of the arguments. Thus did Shaw approach the consideration of this important crisis in his life, in the same fashion that Choate used more playfully.

Memorandum.

Whether I shall accept the appointment of Judge.

Against it: —

I shall in some measure sacrifice ease and independence; it will be more laborious. I shall lose something in part of present emolument. I shall be more absent from my family at a time when my presence might be useful to my children. I shall miss the opportunity of travelling, of making tours and journeys, and be confined principally to the pale of the Commonwealth.

¹ Judge Benj. F. Thomas, *Chief Justice Shaw*, written for the Massachusetts Historical Society.

In favour:—

Although I shall have a good deal of labor, I do not know that it is more irksome — in many respects it is less so — than that of the Bar. There will be considerable intervals of leisure. Although the emolument will not be so great as that which I have been receiving, yet it is more regular, permanent, and secure. At fifty the labors of the Bar begin to become irksome, and many a man who has in early life enjoyed a full practice is apt to decline after that period.

The situation is a highly honorable and useful one, which, if the duties of it are ably and acceptably discharged, will lay the foundation of an honorable and lasting name.

The above “if” is with me the great cause of apprehension and alarm. Upon this I confess I am influenced more by the judgment of others than my own. I am conscious that I cannot thus discharge the duties; they assure me that I can. I have only one consolation, that I have often thought the same in regard to other arduous undertakings and yet upon trial have found my strength equal to the occasion. If I undertake this great office, God grant it may be so here.

It was said of Shaw by one of his contemporaries that he was one of the very few men he ever knew whose high qualities were not opposed and enfeebled by the counteracting weaknesses of vanity, the love of distinction, applause, and popularity. His great hesitation and first decision on the question of accepting the appointment seemed to rest upon his distrust of his own ability to rise to the requirements of the office. In this respect it would seem as if the second argument of Webster, strengthened by those of other professional associates whose opinions he

valued, may well have been of service in overcoming his misgivings by a preponderance of the evidence, if not beyond a reasonable doubt.

Upon the next day he writes to his wife, whose absence at this critical time he sorely regrets: —

The deed is now done. I have been nominated to-day by the Governor as Chief Justice, and nothing remains but to make every exertion and preparation to discharge the new and arduous duties which the office will impose.

A day later he writes: —

My nomination was announced in the papers this morning. I have received many congratulations on the subject. I am assured in a manner which I believe to be sincere that the appointment will give satisfaction. These are very gratifying proofs of confidence and regard, but those who give them know little of the solicitude and anxiety which I feel on the subject.

The new Chief Justice received his commission on August 30, 1830, and took his seat the following September Term in Lenox, Berkshire County.

His first utterance from the bench, though not strictly judicial, came in the nature of a quasi-official address upon the life of his predecessor, the late Chief Justice Parker, in which he was given an opportunity to exercise the literary style which he had already developed.

His early experience in writing was now to serve him well. The faculty of clear and forceful expression is very necessary to the judge of a court of last resort. He must not only know the law, but must have the ability to state it in terms which can leave

no doubt of his meaning. The legal style is supposed to be dry and categorical. Generally speaking, perhaps, such are its characteristics. But they result from the necessity of clearness and relevancy. Grace and elegance are qualities which the majority of hard-pressed jurists have little time to cultivate.

Shaw's opinions are lengthy, but have the clearness of lucid reasoning and the force of sound logic. They are always more than a string of bald assertions and statements of law supported by cited authorities. But his extrajudicial utterances were apt to be somewhat ponderous. An extract from his words upon this occasion at Lenox gives an illustration:—

A temperate indulgence of sympathy for the dead is not inconsistent with the most faithful and energetic discharge of duty to the living. Nor is a sincere and ardent public expression of attachment and veneration towards the memory of distinguished public men without its moral uses. It tends to awaken a just sensibility to merit, to excite and invigorate our moral and intellectual powers, to enkindle a more ardent love of virtue, to inspire us with a just sense of the importance of persevering exertion, of unspotted integrity, of faithful and disinterested devotion to the public service, and thus to animate us with more ennobling views of life, its pursuits and objects. It enhances the value of reputation, "that reputation which follows, not that which is run after"; not the popularity which arises from the venal, the interested, or the temporary applause of multitudes, but that reputation which consists in the deliberate and lasting approbation of the wise and the good, and which, next to the smiles of heaven and the consciousness of rectitude, is the best reward of public services. The character and virtues, the

just sentiments and useful actions of distinguished men, preserved in the annals, and cherished in the recollections of a grateful people, constitute their richest treasures.

The Chief Justice then proceeded to give a sketch of the life of Judge Parker, and a history of the court from colonial days. He traced its development from early times, when the full bench sat in all cases. Several justices sometimes charged the jury in the same case giving them conflicting and contradictory opinions upon points of law. Then developed the *nisi prius* system which tended to diminish the "glorious uncertainties of the law." At the end he has this to say of his conception of the province of a judge: —

The ultimate object of all laws, and of all jurisprudence, is to do justice between parties; and the judge who, by patient research and persevering investigation, can unravel a complicated case, seek out its governing principles with their just exceptions and qualifications, and without violating the rules or weakening the authority of positive law, can apply those principles in a manner consistent with the plain dictates of natural justice, may be considered as having accomplished the most important purpose of his office.

The work of a biographer of a judge is largely completed when he has traced his life from the cradle to the bench. Once in that seat his every act, and look, and almost thought, is open to scrutiny. No other work of public service is performed under such critical conditions. Every case the judge hears is in the open court-room. The papers before him are public property. The arguments addressed to him

can be heard by every one, and the briefs submitted are for such as may care to read. So his own words are for the ears of all, and whatever he writes lies in the public files, irrevocable and immutable. The law may be changed by subsequent pronouncement, or otherwise, but the judge's words remain as spoken or written. There can be no private revision, no withdrawal, and no suppression. The same degree of openness attends his daily life. Almost literally his time is spent in full view of the people. Whoever has the desire to do so can see him at work and observe and comment upon the manner in which it is done. To a degree that is not perhaps fully appreciated the judge's life is one of rare singleness of purpose. By his position he is debarred from participation in all other public life. He can in no respect enter into the excitements and vicissitudes of politics. His very opinions upon public questions must be repressed, for at any moment he may be called upon in the performance of his duty to pass upon them in some aspect.

Hence it is that little remains of the judicial life for the chronicler to reveal. The threshold of the home cannot be crossed nor the privacy of the family invaded. No wonder, then, that the lives of most judges seem dull and bare in retrospect. It is only where such men, through the eminence they have attained upon the bench, have achieved a permanent distinction which causes their names to be spoken with reverence in the profession, that it becomes of service to study their progress to the point in life when they emerged into full view. Then, in

Shaw's own words, "They not only incite the soul to the love of virtue, and point out the path that leads to her abode, but they become the practical leaders and guides to all those who desire to walk therein."

With this thought in mind we have traced, with some degree of fulness, the life of Chief Justice Shaw up to the time of his appointment to the bench in the hope that it might hold something of interest, or at least in satisfaction of curiosity, to those of his profession and outside it who acknowledge him to be the greatest figure in the judicial history of New England. The manner of life and the efforts of such men leading to the attainment of their high position, to repeat Shaw's words again, "speak to their successors in the language of encouragement, of hope, of confidence."

Possibly we might well stop at this point, and there may be little profit in going further. From this time on the achievements which made him famous, and have caused his name to live as a jurist rather than lie in obscurity as a successful practitioner, as would have happened had he followed his first inclination and refused the appointment, are a part of the law of the land.

Shaw's opinions run through fifty-six volumes of the Massachusetts Reports. If they were collected and published separately they would fill a goodly fraction of that number of large volumes. He who would classify, or summarize, or codify them would furnish no less than a full and complete treatise on nearly every branch of the law. Only such subjects

as have been developed since his time by changed conditions have not been illumined by his genius. It is plain that this is no place in which to attempt to catalogue or describe his opinions. His work is accessible to all, and it speaks for itself. His words must lie in the books where the law has placed them, not to be perused for amusement or entertainment or for general instruction, but still resorted to hundreds and thousands of times in the course of each year by those who are in the pursuit of the right and the truth in the law.

But we must not lose sight of the fact that the work which made Shaw famous was that which was done after he became a judge. His life is of interest, not merely because he was appointed Chief Justice, but because of what he accomplished as Chief Justice. And although we cannot undertake to describe his opinions or include them here, yet there remain many things of importance to be noted before the full significance of his work is felt.

It is difficult to describe why he was great. Doubtless opportunity, in the shape of the times, had much to do with it. Rather, perhaps, would it be more correct to say that great as he was, the times revealed his greatness. The day in which he lived was one of expansion. The Government was new. The written Constitutions of the States and the country had yet to be expounded and fitted to the constantly increasing needs and complexities of State and National life. The questions of States' rights and slavery were beginning to loom darkly. The resources of the interior and western parts of

the country had hardly been opened, and railroads and steamboats were just beginning to come into common and extensive use. Towns were growing into cities, and more crowded communities were feeling the necessity of the further development of means of local transportation. Extension of commerce and the increasing magnitude of business ventures were leading to more frequent adoption of the corporation by financial organizations. The supply of large settlements with the elemental necessities of water and light gave rise to the formation of public service companies. All these and many other conditions called for new applications of old principles of the law.

The law never has been and never will be finished and complete. Its basic principles are comparatively few. But the combinations of their application are boundless. Its elasticity is never stretched to the breaking point. It will include and bind within its fundamentals the most novel as well as the most complicated conditions.

It was the fitting of the ancient fabric of the law to new requirements of public need that was Shaw's task. In many respects he was to make, rather than follow, precedent. No account of his life and work would be complete without attempting to deal in some measure with a few of the questions upon which he was called to light the way, and to show his relation to some of the great problems set for the country.

CHAPTER VI

CONSTITUTIONAL LAW — SLAVERY — THE CONSTITUTIONAL CONVENTION OF 1853

LONG before Shaw took his seat on the bench the people of the country had heard of the doctrine of judicial supremacy. To some extent they knew the right of the judiciary to declare legislative enactments to be invalid. This was in reality no new principle. It had been announced and maintained by Coke in the early seventeenth century in his memorable struggle with King James I. It was acknowledged by Blackstone when he said: —

Man, considered as a creature, must necessarily be subject to the laws of his Creator. . . . This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. . . . No human laws are of any validity if contrary to this.¹

In the days of the colonies the principle took concrete form. The Privy Council, acting as a court of final appeal from the colonial courts, found occasion to declare colonial acts invalid, and in Massachusetts as early as 1639 the court had refused to enforce an order of the King in Council, on the ground that it was powerless to do so under the charter.² This right of the court had also been maintained in Massachusetts when a resolve of a town meeting,

¹ Blackstone's *Commentaries*, vol. 1, pp. 41-43.

² *Frost v. Leighton*, 2 *Am. Hist. Rev.* 229; Thayer's *Cases on Const. Law*, vol. 1, pp. 40-47.

voting its minister a dwelling-house, was held, in a suit brought to collect a tax levied for that purpose, to be void as against the fundamental law.¹

James Otis had asserted, in speech and writing as early as 1761, the limitations of the legislative body, and one of the reasons given for resisting the enforcement of the obnoxious Stamp Act was that it was "against Magna Charta and the natural rights of Englishmen and therefore, according to Lord Coke, null and void."²

After the Revolution, in a number of States up to the year 1803, acts of the Legislature were declared void as being against either the fundamental law or the terms of the Constitution.³

Then came, in 1803, the famous decision of Chief Justice Marshall in *Marbury v. Madison*⁴ in which he declared the right of the Federal Court to set aside an act of Congress as unconstitutional. Before this the power of the Federal Courts to declare the acts of State Courts invalid where they were found to conflict with the Constitution of the United States had hardly been doubted. The distinction, however, between such a judicial function and that which asserts the same power with reference to a coördinate branch of the National Government is appar-

¹ *Giddings v. Browne, Hutchinson Papers*, vol. 2, p. 1.

² John Adams's *Works*, vol. ix, pp. 390, 391; Haines, *Judicial Supremacy*, p. 72.

³ These cases are collected and summarized in Haines's *Judicial Supremacy*, pp. 74-121. Attention is there directed to what has been claimed to be an early Massachusetts precedent, before 1788, where an act of the Legislature was declared unconstitutional. The authority of this case cannot be established, however.

⁴ 1 Cranch, 137.

ent, and the opinion of Marshall in *Marbury v. Madison*, which rather asserted the right as a fact than demonstrated it by argument, failed to satisfy some of the leading lawyers of the country. It is worthy of notice that, although *Marbury v. Madison* was decided when Marshall had been upon the bench but two years, it is the only case during his thirty-five years of service in which his court undertook to declare an act of Congress invalid.

It is true that Marshall's great constitutional opinions were rendered at short intervals from this time on, but they were such as dealt with the constitutional powers of the Central Government, the limitations of the States, and the relation between the two. It has been claimed that Marshall's strong Federalism influenced him in these opinions. This may well be true, for as a matter of pure judicial reasoning little fault could have been found had he supported the opposite position. As late as 1825 so able a judge as Chief Justice Gibson, of Pennsylvania, in a dissenting opinion, denied the right of a State Court to set aside legislative acts where such right is not expressly conferred by the Constitution.¹ This opinion by Chief Justice Gibson, Professor Thayer declared to be the most searching argument on the subject with which he was acquainted.²

The extent of the power reposed in the courts under this principle, however, was probably never widely understood or appreciated until attention

¹ *Eakin v. Raub*, 12 Sargent & Rawle, 330.

² J. B. Thayer, *Life of John Marshall*, p. 63.

was directed to it by decisions in which the control was definitely and decisively applied. The fact that the existence of this authority and the need of exercising it must always be determined and declared by the very tribunal claiming it, might well at first tend to create a dangerous jealousy of the Courts in the Legislature. Quite probably also in a quarrel between Legislature and Judiciary, the people would take sides with the former, forgetting that in the latter lay their only protection against unfair and discriminating laws.

When courts are passing upon the question of the rights or disabilities of suitors generally, they maintain a position so completely unbiassed that the slightest interest in the subject-matter of the suit is sufficient, by a delicate and immemorial usage, to disqualify a judge from sitting on the case. When, however, the right of the court is challenged, of very necessity there is no tribunal other than the court itself to define its own jurisdiction and powers. This function, so far as the judges are concerned, is of course strictly impersonal, but nevertheless the court itself, in a sense, is in interest, and in that attitude it stands before the people who have created it. Jealousy of judicial authority therefore was something to be reckoned with if unseemly controversies were to be avoided. As a warning to Massachusetts in this respect stood the experience of some States where, when the courts first declared legislative acts invalid, they were warned not to do it again, and impeachment proceedings even were attempted.

It was, then, highly desirable, in the days when this right and duty of the courts was first being called into practice, that it should be performed with the utmost caution and circumspection. It has been claimed, with evident truth, that it would have been far better had Marshall, in *Marbury v. Madison*, argued the matter more carefully and fully, that thus the case might have carried greater conviction to the mind and understanding that its principle was sound.

Shaw certainly must have felt this, and wisely decided that his course should not be open to the same criticism. In considering that *Marbury v. Madison*, when Shaw wrote his first constitutional opinion, was twenty-seven years old, in addition to the fact that the Federal Court had not since then declared any act of Congress invalid, it must be borne in mind that the Supreme Court of Massachusetts was dealing with the citizens of that State, at much closer range with the people than the Supreme Court at Washington, and, generally, with matters of much more vital interest.

In those days the hand of the National Government was not felt, as it is now, by all classes of citizens throughout the country. In its relation to daily life the Central Government hardly seemed to touch the people. The Federal Judiciary then had not assumed the important and tremendously powerful place it occupies to-day. It is safe to say that in Massachusetts the Supreme Judicial Court seemed a far more important tribunal than the Supreme Court of the United States. It is doubtful

whether Joseph Story, who in 1811, at the age of thirty-two, was appointed a Justice of the Supreme Bench at Washington, would then have been tendered the honor of an appointment to the highest court of his own State.

So it was, doubtless, that the people generally were much more interested in the decisions of their State Courts than in those from Washington, and so it was that Shaw, appreciating this fact and fresh from the atmosphere of the bar, always highly critical of the judiciary, thought it wise to announce and reiterate the principles which were to govern his court in passing upon constitutional questions.

Shaw's wisdom and tact in dealing with the situation are now plainly evident. The ability and depth of his discussion of the law, with his apt and convincing faculty of illustration of principles by familiar examples, conveyed understanding and carried conviction. By his tact in announcing full confidence in the Legislature, a confidence which he really felt, he disarmed suspicion of any attempt to encroach upon the province of that body. By his firm insistence on the right of the court to exercise the power, he discouraged further argument upon the question of that right. His announcement of the care and caution with which the court would proceed in all such cases, giving to the act on trial for its validity the same benefit of the doubt which is given to the individual who is on trial for his life, assured the other branches of the Government and the people at large that the court would not lightly exercise its power.

Up to the time of Shaw's appointment to the bench but one case had come before the courts of Massachusetts in which the Legislature had been held to have exceeded its powers. A resolve of February 15, 1813, had declared that the statute of limitations was suspended as to certain claims held by one Holden against the estate of Hannah Ranger. This resolve, it was decided in 1814, was unconstitutional, for the obvious reason that in effect it enacted a new and different rule of law for the government of one particular case.¹ Not for thirty-five years was another resolve declared unconstitutional. In 1847, the Legislature confirmed the sales in fee of lands in which the grantors held but a life interest, without making any provision for compensation to the remaindermen. In 1849, this was held in part to be unconstitutional on the ground that it deprived one person of his property and transferred it to others without compensation. The court in its opinion felt itself "bound to presume that the effect and operation of this part of the resolve escaped the notice of the Legislature, and that it could not have been their intention to do what is in fact done by this portion of the resolve in the present form."² In both these instances the resolves which were declared invalid were in the nature of private acts, affecting the interests of none but the parties named. The opinions in neither of these cases discussed the broad question of the power of the court to declare statutes unconstitutional, the acts in

¹ *Holden v. James*, 11 Mass. 396.

² *Sohier v. Massachusetts General Hospital*, 3 Cush. 483.

question being too patently discriminating in favor of an individual to require comment.

It was not until *Fisher v. McGirr*¹ was decided, in 1854, that the Chief Justice wrote an opinion declaring an act of the Legislature unconstitutional. But in several cases before that, where, however, the legislation had been upheld, Shaw had discussed the powers of his court in constitutional questions.

In the first case involving a consideration of the Constitution which came before him,² he announced his views upon this subject as follows: —

If an act purporting to be a statute passed by the Legislature is not warranted by the powers vested in the Legislature, it is clear that such act cannot have the force of law; and that it is the duty of the court so to declare it, whenever it is claimed to be enforced as such. But this is a high and important judicial power, not to be exercised lightly, nor in any case where it cannot be made to appear plainly that the Legislature have exceeded their powers. It is always to be presumed that any act passed by the Legislature is conformable to the Constitution and has the force of law until the contrary is clearly shown.

In the next case which came before the court the same ideas were again expressed.³

In considering the question, whether the act passed June 5, 1830, providing for the enclosure and appropriation of Cambridge Common is a constitutional act, having the force and effect of law, the delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when

¹ 1 Gray, 1.

² *Norwich v. County Commissioners of Hampshire*, 13 Pick. 60.

³ *Wellington et al., Petitioners*, 16 Pick. 87.

called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. Still, however, it cannot be doubted, and I believe it is nowhere denied, that in a limited government like ours, acting under a written Constitution with numerous and detailed provisions, a Constitution which is in itself perpetual and irrevocable except by the people themselves, and which imposes many restraints upon the power of the Legislature by express provisions and many others by necessary implication, and where the same Constitution has provided for the establishment of a judiciary as a coördinate department of the Government, with power in all cases to expound the laws, to declare what has and what has not the force of law, and to apply them to the investigation and adjustment of the rights, duties, and obligations of citizens, in the actual administration of justice, it is clearly within the power, and sometimes the imperative duty, of courts, to declare that a particular enactment is not warranted by the power vested in the Legislature, and therefore to the extent to which it thus exceeds the power of the Legislature, it is without efficacy, inoperative, and void.

Thus did Shaw create in advance a confidence in the decisions of his court in dealing with what he must have foreseen would be a constantly increasing and widening branch of the law, in which the jurists of this country would have to find and clear their path alone without the help of any markings or guidance from the common law of England, upon

the expounding of the ancient principles of which and in adapting them to new and varying uses and conditions, the courts had to this time been intent.

One of Shaw's greatest constitutional opinions, as well as his most lengthy and exhaustive, was given in *Commonwealth v. Alger*,¹ in 1851. This case involved the right of the Legislature to establish a harbor line in Boston Harbor beyond which no wharf or other structure should be built into the sea. The case assumed a double aspect, involving first, the question as to whether the owner of the upland had property to low-water mark, and second, whether the legislation in question was valid. As to the first point Shaw has written the most exhaustive judicial treatise known on riparian rights derived under the colonial charters and ordinances. He had already held, in a case decided nineteen years before this,² that the ownership of land in Plymouth, in which colony no ordinance could be found on the subject, extended to low-water mark, basing his reasons, not on positive enactment of law, but upon the expediency of following a settled rule of property rights, and in that case he had stated that the right had been expressly granted in the Massachusetts colony by ordinance. This *dictum*, however, had evidently been insufficient to silence claims to the contrary, and in *Commonwealth v. Alger*, the first case in all these years which brought the point directly before the court, he undertook to settle this highly important question of property rights for all time.

¹ 7 Cush. 53.

² *Barker v. Bates*, 13 Pick. 255.

The second part of the opinion deals with the constitutional phase of the case and establishes broadly the lines which courts have since followed in dealing with that wide branch of legislative authority, ever varying in its application to new demands, the police power. This right, of course, could not be denied, and there was nothing new in Shaw's definition of it, although his illustrations, as always, are copious and convincing. "Principles are tested by taking extreme cases" was one of his most serviceable rules of thumb. But here his addition to the law of the subject consisted in the declaration of the principle by which the Legislature, in enacting, and the courts in reviewing, legislation of this class should be governed: —

Wherever there is a general right on the part of the public and a general duty on the part of a landowner, or any other person, to respect such right, we think it is competent for the Legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. . . . Things done may or may not be wrong in themselves, or necessarily injurious or punishable as such at common law; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known, and authoritative rule which all can understand and obey. In the case already put, of erecting a powder magazine or slaughter house, it would be indictable at common law and punishable as a nuisance, if in fact erected so near an inhabited village as to be actually dangerous or noxious to life or health. Without a positive law, everybody might agree that two hundred feet would be too near, and that two thousand feet would not be too

near; but within this wide margin who can know what distance shall be too near or otherwise? An authoritative rule, carrying with it the character of certainty and precision, is needed. The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance; builders of houses need to know to what distance they must keep from the obnoxious works already erected, in order to be sure of the protection of the law for their habitations. This requisite certainty and precision can only be obtained by a positive enactment, fixing the distance within which the use shall be prohibited as noxious and beyond which it will be allowed, and enforcing the rule thus fixed by penalties. (See also *Commonwealth v. Tewksbury*, 11 Met. 55; *Dunham v. Lamphere*, 3 Gray, 268.)

What a stricture is found in these words upon the doctrine of a "rule of reason" to be applied by the courts in each individual case, as it was to be evolved more than a half-century later!

In a leading case, which has since been followed the country over,¹ Shaw held that the supplying a community with water was a public function, and that a company chartered for that purpose could, as a public service corporation, be authorized by the Legislature to take land by eminent domain. The same right, he decreed, could be granted to a railroad company,² and the right of the State to require licenses of dealers in commodities of various kinds, the use or sale of which is a matter of public concern, was upheld in *Commonwealth v. Kimball*.³

¹ *Lumbard v. Stearns*, 4 Cush. 60 (1849).

² *Boston Water Power Company v. Boston & Worcester Railroad Company*, 23 Pick. 360.

³ 24 Pick. 359.

In the face of a *dictum* of a majority of the Supreme Court of the United States, to the effect that Congress alone, to the exclusion of State Legislatures, had the power to enact laws on the subject of fugitives from justice, Shaw maintained that it was competent for any State to make all such laws as in the judgment of the Legislature might be necessary to secure the peace and promote good order within its borders, holding that a State law providing for the apprehension and detention of persons charged with the commission of offences in other States is not repugnant to the Federal Constitution. This decision is now universal law.¹

The influence of Shaw's opinions on the Constitution was widely felt. The bench and bar, without precedents to direct them, naturally turned to Marshall and Shaw for guidance: to Marshall as the head of the tribunal whose word as a last resort was final; to Shaw as the chief of the State Court, the opinions of which as precedents have always been regarded with the greatest respect. For if it be thought that the extent of his contribution to the jurisprudence of the country was confined to the limits of his own State, any lawyer will point out the error. The jurisdiction of Shaw's court is bounded, territorially, by the confines of Massachusetts. But the weight of his opinions knows no such limits and has been felt the country over.

His influence on the development of constitutional law, it is safe to say, has been second only to Marshall's. His ability to keep before him funda-

¹ *Commonwealth v. Tracy*, 5 Met. 536.

mental and elementary principles was one of his greatest qualities. His insistence upon this, in approaching the discussion of any new constitutional question, grew to be almost an obsession, so constantly was it demanded. One of his last cases,¹ written when he was seventy-six years of age, contained this paragraph: —

In considering constitutional provisions, especially those embraced in the Declaration of Rights, and the amendments of the Constitution of the United States, in the nature of a bill of rights, we are rather to regard them as the annunciation of great and fundamental principles, to be always held in regard, both morally and legally, by those who make and those who administer the law, under the form of government to which they are appended, than as precise and positive directions and rules of action; and, therefore, in construing them, we are to look at the spirit and purpose of them, as well as the letter. Many of them are so obviously dictated by natural justice and common sense, and would be so plainly obligatory upon the consciences of legislators and judges, without any express declaration, that some of the framers of State Constitutions, and even the convention which formed the Constitution of the United States, did not originally prefix a declaration of rights.

Thus, in the ripeness of his wisdom and experience did he reiterate and repeat his often pronounced view of the Constitution as he conceived it, a document commending in a large measure the welfare of the country to the good sense and conscience of the judiciary.

¹ *Jones v. Robbins*, 8 Gray, 329.

Shaw's abhorrence of the principle and practice of slavery was deep and strong. In his address to the members of the Massachusetts Humane Society, delivered in 1811, when he was but thirty years old, he alluded to the slave trade as "one continued series of tremendous crimes."

In his article in the "North American Review" of January, 1820, he gave further expression to his ideas upon the subject in a review of Senator King's speeches on the Missouri Question. The "North American Review," in which Shaw's essay appeared, was not the same magazine which is now published under that name, but was essentially a Boston institution which sprung from the Anthology Club, a literary society of the early nineteenth century. In view of the severe condemnation of the decisions of Shaw when he was called upon later to interpret the Fugitive Slave Law, it is important to note the full strength of his feelings toward slavery as expressed in this article at a time when he was free to speak his mind upon the moral aspect of the question as distinguished from the legal rights which the Constitution had conferred.

We take it to be universally agreed that the direct trade in slaves, that the act of depriving a man of his liberty, transporting him from his native country and selling him in perpetual bondage in a foreign country, is an unqualified act of injustice and cruelty; that it is immaterial to this purpose whether the person thus deprived of his liberty and all his natural rights is obtained by open force and violence, by bursting on the midnight security of the peaceful dwelling and overpowering the

helpless and unarmed family, or by fraud and cunning, by tampering with the avarice and stimulating the treachery, rapacity and cruelty of barbarous petty chiefs. . . . Considering as we do the original act of depriving a free person of his liberty and reducing him to slavery, under whatever pretence, except as a punishment for an offence of which he may have been convicted by a competent tribunal absolutely and of itself unjustifiable and criminal, so as a general rule we consider the act of holding such a person in slavery to be a continuation of such criminality. No lapse of time, no continuance of abuse, can convert wrong into right. No less is it unjustifiable in our view to hold the innocent offspring of such slave in perpetual slavery. Without taking into consideration the incalculable evils which slavery inflicts on society, we may venture to pronounce, upon this single view of the case, that it is utterly irreconcilable with any notion of natural justice that one set of men may rob another of all the rights and blessings of this life and even of the knowledge and hopes of another.

In this article he expressed the opinion that wrong as the practice of slavery was, yet a sudden, violent, and general emancipation was not to be advocated.

Powerful considerations of National safety require at least the temporary continuance of this great evil. But let it not be forgotten that a practice wrong in itself, yet justified by necessity, must be limited by that necessity. We hold it, therefore, to be a duty of those who influence public opinion, and of those who exercise any authority in States where slavery exists, to do all in their power to ameliorate the condition, and limit and diminish the number of slaves, and to provide for their liberation as speedily and as extensively as the safety of these several States will admit.

It was the duty of Congress, therefore, in the writer's opinion, to restrain the introduction of slavery into the new States. The article concludes with an examination of the question of the right of Congress to enact such legislation, and the conclusion is reached that the power is clearly within the limits of constitutional authority. It closes with these words: —

When we think of these momentous consequences, we feel a solemnity of mind before which all party questions, all the sophistries which lively talents can enlist in any cause, sink into the dust; and if it be not too late we would even now most earnestly implore Heaven to send that same solemnity into the minds of all whose voices are to settle this mighty question. It is with the most unaffected earnestness that we declare our opinion that the day on which the Missouri Question is decided in Congress will be the most eventful day in our history.¹

¹ There is evidence that Shaw did not lose his keen interest in the question after he went on the bench. When the matter of the admission of Texas as a State was before Congress in 1844, he must have written to Choate, his friend, then in the Senate, on the subject, for in his papers is found the following letter: —

16 March, [1844].

HONBLE LEMUEL SHAW, —

DEAR SIR, — I have just had the pleasure of receiving your letter and will seek a conference with Mr. Winthrop at once. Till the new Secretary arrives I suppose we could not definitely conclude anything and when he does come *it is from Virginia*. The value of a member of the Cabinet from one's own state is not quite appreciated. I will do however all I can. There is no doubt that if the two thirds can be found in the South we shall have Texas into the Union and a pretty little war with Mexico and all the . . . under her flag to boot. But there is much virtue in *an if*. I am,

Very faithfully,

Your obedient servant,

R. CHOATE.

Not long after he was placed upon the bench, the author of these lines was called upon to deal with the question strictly as an officer of the law, and not as a moralist. To the judge the legal proposition was as clear as to the man was the moral principle. By the judge the law must be enforced even though based upon principles of which the man did not approve. The law must be changed in the way provided by the Constitution, and not nullified by those who had sworn to enforce it.

In *Commonwealth v. Aves*,¹ decided in 1836, Shaw had occasion to free upon *habeas corpus* a colored girl named Med who had been brought to Massachusetts by her mistress who was visiting relatives in the North. When she was about to return to the South, taking with her the slave, the process of the court was invoked to determine the girl's status under the laws of this State. Shaw's decision was based upon the grounds that slavery was contrary to natural right and could not exist in Massachusetts. All persons, therefore, except fugitives, who came within the limits of the State were free, whatever their condition might be elsewhere. Though in another State they had been slaves, here they were entitled to the protection of the law and to their liberty. The court was of opinion that "an owner of a slave in another State where slavery is warranted by law, voluntarily bringing such slave into this State, had no authority to detain him against his will, or to carry him out of the

¹ 18 Pick. 193.

State against his consent, for the purpose of being held in slavery.”¹

This decision was followed in 1841 by another concerning a negro boy seven or eight years old who was born and reared as a slave in Arkansas, and came into Massachusetts as a personal attendant of his master's wife, who was in the latter State on a visit to friends. He was brought before the court on *habeas corpus*, where it appeared that his master's wife did not claim the boy as a slave and did not intend to carry him back to Arkansas unless he wished to go. The court held that the boy was too young to give any valid consent to be removed from a State where he was free to one where he would be a slave, and ordered him to be delivered into the

¹ In this case Rufus Choate and Ellis G. Loring appeared as counsel for the Commonwealth, and C. P. Curtis and Benjamin R. Curtis argued that the right of property in the colored girl had been lost. The latter Curtis was subsequently appointed a Justice of the Supreme Court of the United States, in 1851, and there delivered his famous dissenting opinion in the *Dred Scott* case. In that opinion Justice Curtis cites and follows the opinion of Chief Justice Shaw in *Commonwealth v. Aves*. Over the opinion in the *Dred Scott* case arose the controversy between Chief Justice Taney and Justice Curtis which probably helped to influence the latter soon afterwards to resign from the bench. After the opinion of the Chief Justice had been read in consultation and in open court, Judge Curtis prepared and read his dissenting opinion, and subsequently permitted it to be published. The Chief Justice, however, contrary to the rules of his court, did not file his opinion with the clerk, but withheld it, and made material additions thereto, so Curtis claimed. The clerk received orders from the Chief Justice that no one should receive a copy of his opinion, which was subsequently filed, until it was published by the Reporter. The clerk, following this order, refused to send a copy of the Chief Justice's opinion to Curtis upon his request. Then ensued a lengthy and increasingly bitter correspondence between the colleagues. These letters are set forth in full in George Ticknor Curtis's memoir of Benjamin R. Curtis.

custody of guardians who had been appointed for him by the Probate Judge.¹ Then came a decision in which the slave of a naval officer who came ashore from a ship in the harbor was declared to be free.²

These decisions were quite in accord with the sympathies of the abolitionists, and loud praise was bestowed upon Shaw. "A solemn decision," said Sumner, "now belonging to the jurisprudence of this Commonwealth, declares that slavery is contrary to natural right, to the principles of justice, humanity, and sound policy." And again, "The judiciary, always pure, fearless, and upright, has inflicted upon slavery the brand of reprobation." How partisan this praise was, however, and how absolutely without effect it was upon the attitude of the Chief Justice, whose duty as a judge surmounted his convictions as a man, was to be seen a few years later when he was to receive, and to resist and withstand, the full strength of the storm of abolitionist scorn.

In February, 1851, Shadrach, a slave, was arrested in Boston as a fugitive and taken before United States Commissioner Curtis, who declared that he was subject to the Fugitive Slave Law and ordered his rendition. While the matter was being heard before the Commissioner, Richard H. Dana, who, as one of the strongest abolitionists of the time, was always ready to volunteer his professional services in opposition to the enforcement of the act, procured Shadrach's permission to act as his coun-

¹ *Commonwealth v. Taylor*, 3 Met. 72.

² *Commonwealth v. Fitzgerald*, 7 Law Rep. 379.

sel and went before Chief Justice Shaw with an application for a writ of *habeas corpus*. The Chief Justice gave him little encouragement, and pointed out to Dana what he considered to be defects in the form of his petition, in a manner which seems to have caused Dana to complain that Shaw was prejudiced against his cause or afraid of interfering with the conduct of the Federal authorities. Dana's account of this interview, taken from his diary, is interesting, but biassed.¹

The matter never came before the court formally, however, for while Dana had withdrawn to correct some of the faults in his petition the slave was suddenly rescued from the hands of the marshal, hustled from the court-room by a crowd of friendly spectators in a rush which was so sudden and violent as partly to tear the clothes from his body, and spirited to a place of safety.

It may be true, as Dana complains, that the Chief Justice endeavored to find technical deficiencies in his papers. In view of the violence with which the Fugitive Slave Law was then being discussed, and the highly wrought state of public feeling on the subject, with the probability in view that his court would at some time be called upon to interfere in the attempted enforcement of the act, it is impossible to believe that Shaw had not given serious thought to the legal phases of the subject. Shaw the man was as much opposed to the principles of slavery as Dana or Sumner. But as the chief of the highest court of the Commonwealth his opinions

¹ Adams, *Life of Richard Henry Dana*, vol. I, p. 180.

could not be affected by his personal beliefs as to the advisability of this particular law, any more than his conduct could be affected by his opinion as a citizen of the expediency or in expediency of any other bit of legislation which in his judicial capacity he was sworn to enforce. Dana and Sumner, on the other hand, were enthusiasts, carried away by their ideas of the natural rights of man, placing those rights over everything in law, advocating the disobedience of any law of the land which came directly or indirectly in conflict with what they considered to be the higher unwritten law, and ready to sacrifice all, even their lives, to the furtherance of their views. In cases of this nature where they appeared as counsel they occupied the position of those who had volunteered their professional services in behalf of principles which they held as men. They were, therefore, not advocates in the usual sense, and appeared before the court as abolitionists rather than as lawyers. The spirit of the reformer brooks no opposition and frets at the voice of reason. Shaw, who believed in their fundamental principles, could not as a judge countenance their methods. Obedience to the existing law was his obligation as a citizen, and enforcement of the law was his first duty as a judge.

It was in a frame of mind, then, which could not understand or appreciate the high and calm judicial view of the Chief Justice, that they found him standing as a barrier in their path. In their criticisms of the Chief Justice they do not attack his law, but rather see fit to accuse him of timidity. Lack of

courage was the only reason to which they could assign his support of a law of which, they well knew, he disapproved as an auxiliary to a system which was odious and cruel. No one at this day can deny the injustice and even absurdity of this criticism. It would have been cowardice in Shaw, not courage, to succumb to the pressure of popular clamor. It would have been dishonesty, not integrity, to have been influenced by his general views on slavery.

But notwithstanding what is now self-evident, Dana, in the heat of conflict, said that Shaw was "a man of no courage or pride." But even in his strictures is found an unconscious tribute to Shaw in the mildness with which he expressed his disapproval of the conduct of the Chief Justice as compared with others. Other judges, whose views were far less important than those of "the Chief," came in for condemnation much more severe. One judge was described as exhibiting "partisan zeal" in upholding the Act of 1850, while another was "a mere party tool and a bag of wind at that."

Closely following the case of Shadrach came Sims's case, two months later.¹ In this case also Dana appeared as counsel assisting Robert Rantoul, Jr., who made the main argument. When a writ of *habeas corpus* was first applied for on April 4, it was briefly argued and refused on the ground that no sufficient cause for granting it was shown in the petition. Three days later another hearing was given before the full bench, and the case was argued at length.

¹ *Sims's Case*, 7 Cush. 235.

Sims was a slave who had escaped from his owner in Georgia, was apprehended in Massachusetts, and was about to be returned to Savannah under the provisions of the Fugitive Slave Act. The application for a writ of *habeas corpus* was argued on the morning of April 7, 1851. On the afternoon of the same day Shaw denied it, deciding that the Fugitive Slave Law was constitutional and that Sims must be returned to the South. The opinion, for perfect phrasing, completeness of historical reference, and argumentative strength, could not have been surpassed if months had been occupied in its preparation. Proceeding with impressive solemnity and with inexorable logic, Shaw's words show the workings of an absolutely honest legal mind, moving to an inevitable conclusion with the relentless force of the law of gravity. Shaw saw only the few great points in the case before him. With his customary habit of mind he resolved the questions before him into basic groups and proceeded to build upon them the structure of his reasoning. Another judge with his strong opinions on slavery, living in the abolitionist atmosphere of New England, would perhaps consciously or subconsciously have found a way, either upon the main controversy or upon collateral issues, to free the slave. But Shaw's mind ran true. His later associate, Judge Thomas, who did not agree with the Chief Justice in this decision, says:—

The Chief Justice was so simple, honest, upright, and straightforward, it never occurred to him there was any way around, over, under, or through the barriers of the Constitution,—that is the only apology that can be made for him.

Shaw announced that he considered himself bound by precedent in the Sims case, but his opinion was obviously the result of his own mature reasoning, based upon principles from which he could not diverge. So important did he deem it to be that the views of the court upon this great subject be fully set forth, and that the hostile spirit of the community be met by the calm and reflective reasoning of the court, that he added to the opinion as it was delivered a supplement before it was published in the printed volumes of decisions. He thus summarizes his conclusions: —

Slavery was not created, established, or perpetuated by the Constitution. It existed before; it would have existed if the Constitution had not been made. The framers of the Constitution could not abrogate slavery, or the qualified rights claimed under it; they took it as they found it and regulated it to a limited extent. The Constitution, therefore, is not responsible for the origin or continuance of slavery. The provision it contains¹ was the best adjustment which could be made of conflicting rights and claims, and was absolutely necessary to effect what may now be considered as the general pacification by which harmony and peace should take the place of violence and war. These were the circumstances, and this the spirit, in which the Constitution was made; the regulation of slavery, so far as to prohibit states by law from harboring fugitive slaves, was an essential element in its formation; and the Union intended to be established by it was essentially necessary to the peace, happiness, and highest pros-

¹ U. S. Const. Article iv, sect. 2, cl. 3: "No person held to service or labor in one State under the laws thereof, escaping into another shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

perity of all the States. In this spirit and with these views steadily in prospect, it seems to be the duty of all judges and magistrates to expound and apply these provisions in the Constitution and laws of the United States; and in this spirit it behooves all persons, bound to obey the laws of the United States, to consider and regard them.

The distinction between the Aves case and that of Sims would seem to be apparent. In the former case the slave was not a fugitive, and being within the limits of Massachusetts, where there could be no slavery, was free. In the latter case the slave was a fugitive, and therefore came directly within the provisions of the Constitution, the supreme law of the land, which provided that he should be delivered up to his owner.

Notwithstanding this evident distinction, and in spite of Shaw's solemn and learned review of the historical reasons for the constitutional provision, and his reference to judicial authority and precedent for his action, his decision was loudly condemned by those whose passionate hatred for slavery had incapacitated them from sober reasoning, even of the weight of Shaw's. The Justice knew the prejudice with which he had to contend, and although he was dealing with a proposition which to him was simple and perfectly plain, his elaborate treatise on the law was a conscientious effort to make his position clear even to the most biassed mind.

Charles Devens, afterwards a Justice of the Supreme Court of his State, and Attorney-General of the United States, was then the United States

Marshal in Massachusetts, and it accordingly fell to his lot to carry out the order of the court rendering Sims to the authorities of Georgia.

On this occasion [wrote Webster in a letter to Millard Fillmore] all Boston people are said to have behaved well. Nothing ever exceeded the malignity with which abolitionists and free-soilers persecute all those who endeavor to see the laws executed. They are insane, but it is an angry and vindictive insanity. Fortunately the number is not large. They made every possible effort to protect themselves under some show of legal proceedings, but all their efforts failed. Every judge decided against them, and their judicial opinions taken together make a strong exhibition of legal authority. . . . Now we need one thing further, viz.: the conviction and punishment of some of the rescuers. After that shall have taken place, it will be no more difficult to arrest a fugitive slave in Boston than to arrest any other person.¹

Sims was carried back to Savannah and later was sold by his owner and sent to Tennessee. Devens was so much interested in the slave that he afterwards made an attempt to ascertain his whereabouts and was ready to contribute substantially to such sum as might be necessary to purchase his freedom. During the rebellion Sims escaped from his master in Tennessee, and made his way north to Boston. Lydia Maria Child and Devens aided him while he remained about Boston, but after the war he went back to the place of his slavery. When Devens was Attorney-General, the former slave was made a messenger in the Department of

¹ Webster to Millard Fillmore, April 13, 1851, *Writings and Speeches*, vol. xvi, p. 606.

Justice at Washington, but lost that position after Devens went out of office.

Sumner was elected United States Senator on April 24, 1851, less than three weeks after the decision in the Sims case. There can be no doubt that his election was influenced materially by the decision, in that the strong sentiment of the community demanded a representative of anti-slavery in Washington when it was clear that no deviation from the strict authority of the law was to be expected on the part of the courts.

During some of the hearings in rendition cases, the fear of open violence was so strong that a barricade of chains was stretched about the Court-House, and no one was permitted to enter except court officials, jurors, counsel, witnesses, and others having business there, unless by written permit of the United States Marshal. Even the venerable Chief Justice himself had to stoop to get under the chains when he entered the Court-House. This incident led to a galling speech from Wendell Phillips at Faneuil Hall.¹ Chief Justice Wells, of the Court

¹ "Did he not know that he was making history that hour when the Chief Justice of the Commonwealth entered his own court bowing down like a criminal beneath a chain four feet from the soil? Did he not recollect he was the author of that decision which shall be remembered when every other case in Pickering's Reports is lost, declaring the slave Med a free woman the moment she set foot on the soil of Massachusetts, and that he owed more respect to himself and his own fame than to disgrace the ermine by passing beneath the chain? There is something in emblems. There is something, on great occasions, even in the attitude of a man. Chief Justice Shaw betrayed the bench and the courts of the Commonwealth, and the honor of a noble profession, when for any purpose, still more for the purpose of enabling George T. Curtis to act his melancholy farce in peace, he crept under a chain into his own court-room."

of Common Pleas, however, refused so to humble himself, and insisted that the chains be lowered to permit him to pass.

Demonstrations of hostility to the law reached their climax in 1854 when Anthony Burns was taken into custody as a fugitive slave and was ordered to be returned. During the hearings before Commissioner Loring, in addition to the barriers of chains, cannon were placed in position commanding the approaches to the Court-House, and sentries paraded outside the building. A meeting was held in Faneuil Hall, and after it was dismissed, a crowd assembled in the vicinity of the Court-House, shots were fired, and a police officer was killed. Marks of bullet holes remained in the Court-House for many a day to attest the violent and fanatical spirit which prompted this assault upon the law. Subsequently, Theodore Parker, Wendell Phillips, and Thomas Wentworth Higginson were indicted for the murder of the officer, but were discharged without a trial by reason of a flaw in the indictment.¹

On the day when Burns was conveyed out of the State the shops in the neighborhood of the Court-House were closed and draped in black, and a coffin hung suspended over State Street. Flags were flying with unions down, Court Square was filled with

¹ This flaw in the indictment had not been noticed by counsel for the prisoners and was pointed out by Judge Curtis. Theodore Parker subsequently published, in a book of two hundred and twenty-one pages, a speech which he had intended to deliver to the jury, in which he spoke scathingly of the judge whose ruling had saved him from a trial, and gave to his own counsel all the credit of raising the point of law upon which the indictment was quashed. George Ticknor Curtis. (*Life of Benjamin R. Curtis.*)

troops, and from nine o'clock in the morning until nightfall the city was virtually under martial law. Burns was marched to the dock in a hollow square of deputy marshals, each armed with pistols and sabre, under a strong guard of artillery, marines, and a body of lancers. Thus was the might of arms invoked to enforce the decrees of the law.

Probably never in the history of Massachusetts has justice been administered under circumstances so hostile and in surroundings so openly intended to affect the action of the courts. In the court-room counsel, with however little in the way of authorities to depend upon, decorously enough argued that their clients were entitled to the rulings requested. But the real force brought to bear upon the judges was that of a threatening, hostile public spirit, which demanded, almost openly, that the courts should find a way to circumvent the obnoxious act. "No law can stand another such strain," declared Shaw.¹

¹ Ellis G. Loring, the United States Commissioner who signed the order delivering Burns, was the particular object of attack by the abolitionists. It is interesting to note that in 1836 he acted as counsel with Rufus Choate in the *Aves* case. (See *Commonwealth v. Aves*, 18 Pick. 193.) At the time when the Burns case came before him as United States Commissioner, Loring also held the office of Judge of Probate for the County of Suffolk. As a result of the storm aroused by his action in that case, the Massachusetts Legislature, in 1855, passed an act which provided that no person holding a judicial office under the laws of the United States should hold any judicial office under the Constitution and laws of Massachusetts. This act gave Judge Loring's enemies the weapon of attack they desired. Immediately came the public demand that he resign. Judge Loring stuck to his guns and refused to relinquish either office. In 1855, proceedings for removal by address were started in the Legislature, and after a hearing it was voted that he be removed. Governor Gardner refused to make the order. In 1857, another attempt was made by the Legislature, and again the same Governor refused to

Following close upon Burns's rendition came the passage of the Personal Liberty Law in Massachusetts. Many of the strongest and wisest men of the North were greatly opposed to this piece of legislation. There can be no doubt that the provisions of the act were plainly unconstitutional in that they directly conflicted with, and practically nullified, the Fugitive Slave Law. Shaw was of that opinion, but his lips were sealed except when on the bench, and he could not lift his voice or wield his pen against its passage.

After he had resigned, however, in 1860, he was free once more to express his opinions as a citizen, and his last public act was to take the form of a solemn appeal to his fellow-citizens to rectify the mistake. South Carolina had then summoned her convention to decide the question of secession, and it was apparent that a crisis was at hand. The aged former Chief Justice, as strong for the Constitution and the Union as ever, felt impelled to make a final attempt to save the country by peaceful means. He believed that the South had just cause for complaint against the Northern States which had passed the Personal Liberty Bills, and hoped that if the offensive measures could be repealed the South might yet be content to stop short of secession. Accordingly he headed an earnest plea to the citizens of Massachusetts urging the repeal of the act. This address, so it read, came from

take the step. A third time, in 1858, the Legislature addressed the Governor, requesting the removal of the obnoxious judge, this time successfully, and Governor Banks, newly elected, removed him from office.

private citizens of different political parties, neither holding nor desiring to hold public employment, having no interest in the subject which is not common to all, being impelled by no motive save the love of our country, and our sense of responsibility to God for the preservation and transmission of the priceless blessings of civic liberty and public order which his Providence has bestowed upon us. For our honest and profound convictions, for the cause of truth and right, for the sake of your own duties and welfare, we ask you to hear us.

It urged the fear that, at a time when a large part of the country was excited and alarmed and the foundations of government were shaken, unless the work of destruction were stayed, the Union would be broken into weak and shattered fragments. At such a time it was the great and solemn duty of the people of every State to consider whether any part of the conditions which prevailed could be laid to its charge, and if so, duty demanded that such cause should promptly be removed. The signers then stated that they were forced to declare their belief that Massachusetts had violated her compact with the other States by laws on the statute books, and that the Personal Liberty Law undertook to interfere with the officers of the United States in the performance of their duty. The appeal closed with these words: —

We know it is doubted by some whether the present is an opportune moment to abrogate them. It is said, — We grant these laws are wrong, but will you repeal them under a threat? We answer no. We would do nothing under a threat. We would repeal them under our own love of right; under our own sense of the sacredness of

compacts; under our own conviction of the inestimable importance of social order and domestic peace; under our feeling of responsibility to the memory of our fathers, and the welfare of our children, and not under any threat. We would not be prevented from repealing them by the conduct of others if such repeal were in accordance with our own sense of right. He who refuses to do a right thing merely because he is threatened with evil consequences acts in subjection to the threat; he is controlled by it; his false pride may enable him to disregard the threat; but he lacks courage to despise the wrong estimate of his own conduct, which conduct he knows would spring only from his love of duty. . . .

We beseech you to consider carefully this momentous subject; to act upon it justly and firmly, wisely, as becomes men to whose care so great privileges have been entrusted, and who are accountable to posterity, to the world, and to our Creator for their transmission unimpaired to our children. Let those whom you have delegated to represent you know your determination: cause them to obey it. Let not the public servants be above the people, who are their masters. See that they do right.

Shaw's signature headed the list. Then followed a long line of prominent and influential names, amongst them being Jared Sparks, Benjamin R. Curtis, Emory Washburn, Levi Lincoln, and Joel Parker.

It is plain that the entreaty would have had no effect even had it been more timely. The breach was too wide to be repaired, and the inevitable conflict was at hand. Shaw's petition was published in the daily papers on December 18, 1860. Five days later the convention of South Carolina unanimously passed an ordinance declaring that the Union was dissolved.

✓ Another decision of the Chief Justice, although rendered some years earlier than the Sims case, should be mentioned in connection with it, for the reason that the two were soon to be coupled in the movement against the judiciary in the second convention called to revise the Constitution of Massachusetts. In *Commonwealth v. Porter*,¹ decided in 1845, he had announced that it was the duty of the jury in criminal cases to receive the law from the court, and that in rendering a general verdict they had no right to decide the law in conformity to their own views.

There is no question but that at this time there was a growing feeling of jealousy at the power of the judges in the minds of many. For this the enforcement of the Fugitive Slave Law in the Sims case, so recently decided, the increasing frequency with which constitutional cases were being brought before the courts the country over, and the doctrine of the Porter case, were mainly responsible. Feeling must have run high in some quarters when the name of the odious Jeffreys was mentioned in connection with Shaw. Reference was also made to the trials for witchcraft, when Chief Justice Stoughton and his associates presided, instructing the juries that witchcraft was a crime punishable with death. After nineteen women had been hanged, the jury balked and returned a verdict of not guilty, against the instructions of the court. Thereupon Stoughton rose in anger, exclaiming, "We were in a fair way to

¹ 10 Met. 263.

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have rid the land of these emissaries of the devil, but now the Lord have mercy upon us," and left the bench.

The conservative and sober-minded majority of citizens, however, had unshaken confidence in the courts and discouraged all suggestions of radical change. In 1851, a proposition to hold a constitutional convention, the endorers of which had advocated a change in the method of appointing judges, ✓ had been rejected by a substantial majority of the voters. When, in the following year, it was again proposed, this time with success, that a convention be held, there had been no mention of the judiciary by either of the three political parties, and to all appearances that branch of the government was not to be disturbed. Upon the floor of the convention later, however, it was frankly admitted that this omission had been intentional, to mislead the people, in the fear that the convention would not have been called had any reference to the courts been made.

When the Constitutional Convention of 1853 was assembled, one of the changes advocated was that juries should expressly be given the right, in criminal cases, to determine the law and the facts of the case. ✓ This proposition resulted directly from the decision in *Commonwealth v. Porter*. The rule announced in that case was referred to in the convention as usurpation, indicating the gradual encroachments of the bench, always inclined to amplify its jurisdiction.

The other point upon which, concerning the judiciary, it was proposed to amend the Constitution at

this time, was with reference to the tenure of office. By the Constitution of the State it is provided that all judicial officers shall hold office during good behavior, although they may be removed by the Governor, with the consent of the Council, upon the address of both houses of the Legislature. The project was to limit appointments to a term of years, and even election by the people was advocated. In the long debate over this proposition the Sims case was freely used to illustrate the need of a means of making the force of public opinion felt by the bench. Shaw's name was frequently mentioned, but generally, even when coupled with severe denunciation of his decisions, with greatest respect.

Many eminent men were members of this assemblage, Charles Allen, Boutwell, Marcus Morton, Sumner, Henry Wilson, Sidney Bartlett, Anson Burlingame, Rufus Choate, R. H. Dana, Jr., Otis P. Lord, Robert Rantoul, Banks, B. F. Butler, John C. Gray, among them; and of the delegates were no less than nine men who were afterwards appointed to the bench. Butler was one of those who led in criticism of the judges, and Choate's famous speech in their defence was the greatest single event of the session. Undoubtedly, as was commonly believed at the time, his portrayal of the ideal judge had the Chief Justice as its model, and reference to his conduct in the Sims case is unmistakable. No account of Shaw could be complete without including this eloquent picture of him: —

In the first place, he should be profoundly learned in all the learning of the law, and he must know how to use that

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learning. Will any one stand up here to deny this? In this day, boastful, glorious for its advancing popular, professional, scientific, and all education, will any one disgrace himself by doubting the necessity of deep and continued studies, and various and thorough attainments, to the bench? He is to know, not merely the law which you make, and the Legislature makes, not constitutional and statute law alone, but that other, ampler, that boundless jurisprudence, the common law, which the successive generations of the State have silently built up; that old code of freedom which we brought with us in the Mayflower and Arabella, but which in the progress of centuries we have ameliorated and enriched, and adapted wisely to the necessities of a busy, prosperous, and wealthy community, — that he must know. . . .

In the next place, he must be a man, not merely upright; not merely honest and well-intentioned, — this of course, — but a man who will not respect persons in judgment. . . . He shall know nothing about the parties; everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If, on one side, is the executive power, and the Legislature, and the people — the sources of his honors, the givers of his daily bread — and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the “trepidations of the balance.” If a law is passed by a unanimous Legislature, clamored for by the general voice of the public, and a cause is before him on it, in which the whole community is on one side and an individual nameless or odious on the other, and he believes it to be against the Constitution, he must so declare it — or there is no judge. If Athens comes there to demand that the cup of hemlock be put to the lips of the wisest of men; and he believes that he has *not corrupted the youth, nor omitted to worship the gods of the city, nor introduced new divinities of his own*, he must

deliver him, although the thunder light on the untterrified brow. . . .

And finally, he must possess the perfect confidence of the community, that he bear not the sword in vain. To be honest, to be no respecter of persons, is not yet enough. He must be believed such. I should be glad so far to indulge an old-fashioned and cherished professional sentiment as to say, that I would have something of venerable and illustrious attach to his character and function, in the judgment and feelings of the Commonwealth. But if this should be thought a little above or behind the time, I do not fear that I subject myself to the ridicule of any one, when I claim that he be a man towards whom the love and trust and affectionate admiration of the people should flow; not a man perching for a winter and summer in our court-houses, and then gone forever; but one to whose benevolent face, and bland and dignified manners, and firm administration of the whole learning of the law, we become accustomed; whom our eyes anxiously, not in vain, explore when we enter the temple of justice; towards whom our attachment and trust grow even with the growth of his own eminent reputation. I would have him one who might look back from the venerable last years of Mansfield, or Marshall, and recall such testimonies as these to the great and good judge: —

The young men saw me, and hid themselves; and the aged arose and stood up.

The princes refrained talking, and laid their hand upon their mouth.

When the ear heard me, then it blessed me, and when the eye saw me, it gave witness to me.

Because I delivered the poor that cried, and the fatherless, and him that had none to help him.

The blessing of him that was ready to perish came upon me, and I caused the widow's heart to sing for joy.

I put on righteousness and it clothed me.

My judgment was as a robe and a diadem.

I was eyes to the blind, and feet was I to the lame.

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I was a father to the poor, and the cause which I knew not, I searched out.

And I brake the jaws of the wicked, and plucked the spoil out of his teeth.

Give to the community such a judge, and I care little who makes the rest of the Constitution, or what party administers it. It will be a free government, I know. Let us repose, secure, under the shade of a learned, impartial, and trusted magistracy, and we need no more.

But even the eloquence of Choate could not control the tide of feeling. The convention adopted both the suggestion to permit juries to decide the law as well as the facts in criminal cases and the change making the appointment of judges for years instead of life, and the new Constitution was submitted to the people. When the vote was taken, those who had attempted to deceive the people in proposing the convention found that their fears that popular sentiment was against a change were well founded. The revised Constitution failed of ratification in every provision and the work of the convention went for naught. ✓

In 1855, the Legislature adopted some of the changes which the convention failed to bring about. The appointive offices of district attorney, sheriff, clerks of courts, and registers of probate were made elective, and this amendment was ratified by the people. In 1855 also, an act was passed, substantially in the terms of the rejected amendment to the Constitution, providing that juries in criminal cases should decide the law as well as the fact. With this matter the Chief Justice, however, had not yet ✓

done, and the constitutionality of the statute was immediately attacked, and brought before him for decision.

✓ In *Commonwealth v. Anthes*¹ he declared this statute unconstitutional in so far as it undertook to change the law, and in a majority opinion delivered what is perhaps the ablest historical and argumentative treatise ever written on the respective provinces of court and jury. It has since been accepted without question or criticism as the law of the subject, and no further attempt has ever been made to change the one feature of the administration of the jury system in criminal cases without which uniform interpretation and administration of the law would be impossible.

During Shaw's time many States succumbed to the movement for an elective judiciary, and since then more have followed in the same path. Just before Shaw went on the bench, Marshall, while he was still Chief Justice, had sat as a member of the convention to revise the Constitution of Virginia and had combated this tendency in an earnest speech in which he used these words:—

I have always thought, from my earliest youth until now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependant judiciary. Our ancestors thought so; we thought so till very lately; and I trust the vote this day will show that we think so still. Will you draw down this curse on Virginia?

¹ 5 Gray, 185 (1855).

Massachusetts has clung to the system of the fathers until in this respect she stands almost alone among the States of the Union. Whether this is for better or worse, as one may think, none can deny that Shaw himself, more than any other one man, is responsible for the retention of the life tenure. During his own time his judgments may have been the cause of much criticism by factions and classes whose clamors he refused to heed. But when his conduct came to be passed upon by the people of the whole State, the general honor and respect in which he was held had their effect, and a proposition to vote him out of office received short shrift. Whatever the bench might be in the abstract, in the concrete it was personified in the minds of his fellow-men by Judge Shaw. And however much zealous partisans might criticise his views on the Fugitive Slave Law, even they must have felt in their hearts that he was a man both honest and great, whose integrity and wisdom honored and blessed the Commonwealth he served. As one of his associates has said, "He stood in his place, and the billows broke at his feet." Since his day he has always been looked up to as the greatest figure which has ever appeared in the legal history of his State. Such a judge and such a judicial career could never have been secured otherwise than through an appointment for life.

After he had left the bench, and but a few months before his death, upon an occasion when his mind was directed in retrospect over his thirty years of service, his vision also went forward in hope and

warning for the future, and brought these words, his last public utterance: —

If amid the gusts and whirlwinds of political violence, of personal rancor and party rage, passion and force for the time bear rule, may we not still well hope that the calm reflection, the abiding reflection of the sober men of the Commonwealth will resume their sway, and enable a trustworthy judiciary to maintain the safety of the State. Above all let us be careful how we disparage the wisdom of our fathers in providing for the appointment to judicial office, in fixing the tenure of office, and making judges as free, impartial, and independent as the lot of humanity will admit. Let no plausible or delusive hope of obtaining a larger liberty, let not the example of any other State, lead you in this matter to desert your own solid ground, until cautious reason or the well-tried experiment of others shall have demonstrated the establishment of a judiciary wiser and more solid than our own.

CHAPTER VII

THE WEBSTER TRIAL

THE most celebrated case, in point of popular interest, in which Chief Justice Shaw ever presided, was the trial of Professor Webster for the murder of George Parkman, held at Boston in January, 1850.

Murder trials, even at this day when they are so common in occurrence, attract more attention than any other class of cases. This may be because of that innate taste for the sensational and morbid which seems to exist in the majority of persons, and the willingness to be shocked by the tales of moral and physical depravity which commonly form a part of the evidence. More likely, however, it is because of that ruthless baring and dissection of the elemental passions from which every intentional homicide springs and which we all must admit exist in ourselves in varying degrees of intensity.

Every little while comes a revelation of the strength of these passions in one in whom they seem to have been refined away. At such times the glaze of civilization and culture shows very thin in spots, and the law-abiding and decent citizen who has never had thoughts of violence is caught wondering to what extent the elements of chance and circumstance have determined his acts and fate, and whether or not, after all, he deserves much credit for the fact that he is not in jail.

"There but for the grace of God goes John Wes-

ley," said that celebrated Methodist divine as he saw a murderer being sent to the gallows, and "that, but for the throw of fate, might I have done," must be the thought of many a gentle and cultured man, when reading of the misdeeds of one who, to outward appearances, was of the same nature and disposition, and was as far from crime, as himself.

George Parkman was a wealthy and widely known citizen of Boston. No less well known and respected in the community was John W. Webster, a professor of chemistry at Harvard College and the Harvard Medical School, which was then situated in the building on Grove Street which subsequently and until recently was the home of the Harvard Dental School. Professor Webster had been the editor of the "Boston Journal of Philosophy and the Arts," and had edited "Animal Chemistry," and other works of Liebig's. He had been appointed to the professorship in the Medical School to some extent through the influence of Parkman, and the two men were friends.

In 1842, Webster had become financially embarrassed and had sought and secured a loan from Parkman. In 1847, this loan having been only partially repaid, the balance due was merged with the amount of a further loan from Parkman in a note for \$2432, which was secured by a mortgage of all Dr. Webster's personal property including his cabinet of rare minerals. In April, 1849, a substantial part of this indebtedness remained unpaid. At about that time Dr. Webster was again in necessitous circumstances, and applying to Parkman's brother-in-law, secured

from him an advance of \$1200, giving as security, without Parkman's knowledge, and without informing the brother-in-law that they were already mortgaged, a bill of sale of the same minerals. Dr. Parkman subsequently learned of this transaction and at once became bitter in denunciation of Webster's act and relentless in his demands for a settlement of the indebtedness due him.

Webster's resources were exhausted, and his distress at the insistence of Parkman was acute. Finally, on November 22, 1849, after threats of attachment and other action on the part of his creditor, Webster made an appointment for Dr. Parkman to call at the Medical College at 1.30 o'clock the next afternoon there and then to receive payment of the note.

On that day, at about the hour named, Parkman was seen entering the Medical School building. Here all trace of him was lost in the search which followed his failure to return home that evening.

Dr. Webster acknowledged having received the appointed call, and asserted that he had paid off his indebtedness, receiving the cancelled note, and that thereupon Parkman had departed immediately.

Suspicion did not seem to rest upon Webster at the first, and large rewards were offered for information as to the whereabouts of Parkman. Anonymous letters were received by the city marshal, one stating that the missing man had been taken on board a ship and there dealt with foully. Another suggested that he had been murdered in Brooklyn, and still another that the murder had taken place

on the Cambridge bridge and the body thrown into the harbor. These letters were subsequently introduced in evidence at the trial with proof that they were all written by Webster.

The hunt continued for a full week after the disappearance, but was unavailing. The Medical School building was searched, but no trace of the missing man was discovered.

In the mean time unusual conduct on the part of Webster had been observed at the Medical School. After Parkman's disappearance he had been present in his laboratory at unaccustomed hours. The doors to his rooms there, which were usually left unlocked, were carefully secured, and there had been delay in opening them in answer to knocks. Water had been heard running for an unusual length of time. Fires of great intensity had been built by him in his laboratory furnace.

Suspicious excited by these unusual occurrences led the janitor of the building to undertake to explore the contents of a private vault in the apartment of Dr. Webster, access to which could only be obtained by penetrating the brick wall which enclosed it. Working in secret, with his wife standing guard to warn him of the approach of Webster, the janitor finally penetrated the wall, and discovered a portion of a human body suspended from above by a grapple made of fish-hooks.

The immediate arrest of Dr. Webster followed. A further search of the premises revealed other parts of a body corresponding to that of Parkman. Search of the laboratory furnace revealed numerous parts

of human bones, and blocks of false teeth were found, which were subsequently identified by the dentist who made them as being those of Dr. Parkman. Other incriminating circumstances were disclosed, such as the purchasing of the fish-hooks with which the grapple was made from which that portion of the body hanging in the vault was suspended. Towels were discovered in the vault bearing Webster's initials; twine used by him was found similar to that on parts of the body; and blood spots on his clothing.

Upon this evidence an indictment was returned by the grand jury on January 26, 1850, and on March 19 of that year the prisoner was brought to trial in the old Court-House on Court Street in Boston.

The prominence in the community of both Parkman and Webster, the mystery which had continued for a week following the former's disappearance, and the ghastly discoveries in the laboratory of the accused had created tremendous interest in the case all over the country. This had doubtless been heightened by the reported attempt of Webster to kill himself by poison when he was apprehended, and by the fact that he had maintained the strictest silence since his arrest, and the line of his defence could only be conjectured. It is said that one of his friends in discussing the question of counsel with Webster first permitted grave doubts of his innocence to enter his mind when Webster expressed a desire to be defended by Rufus Choate. By somewhat whimsical reasoning the friend was led to think

that the prisoner's eagerness to invoke in his defence the assistance of the great advocate and persuader of juries did not betoken the utmost confidence in the justness of his cause.

Parker, in his reminiscences of Rufus Choate, is authority for the statement that Choate was asked to defend Webster, but refused, and quotes Choate as giving as his reason for so doing that Webster would not admit the homicide and defend on the ground that the killing was no more than manslaughter, on which claim he would have been willing to take the case. Upon this point Choate seems to have talked with Daniel Webster when first requested to undertake the defence, and Webster coincided with his view that the homicide must be admitted. Choate also thought that the defendant's counsel should announce publicly a theory of defence which would tend to turn the feeling of his guilt, which was rising in the minds of the community and which would be irresistible in court at the trial unless it was allayed, and that, too, not a moment was to be lost if he was to be saved. After Professor Webster's confession, Choate said that it admitted murder in law, and that he, Choate, would never have let him so word it.

At this time the great advocate was comparatively fresh from his great victory in the Tirrell murder case, in which, upon evidence nearly as strong as that in the Webster case, he had secured acquittals, first upon a charge of murder and then in a trial for arson, before Chief Justice Shaw, upon the seemingly preposterous theory of somnambu-

lism, claiming that the homicide if committed by the prisoner was done while he was asleep.

Had Professor Webster followed Choate's advice, and thereby gained him as an advocate, it is probable that a verdict of manslaughter would have been returned.¹

At that time the Statutes of Massachusetts provided that a capital trial should be held before three or more Justices of the Supreme Judicial Court, a number which at that time constituted a majority

¹ It is said that Franklin Dexter and Charles Sumner both urged Choate to take the case, and that the former argued with him for nearly three hours in an effort to induce Choate to do so, but unsuccessfully. Choate's opinion is said to have been that the defence should have proceeded along lines very different from those followed at the trial. A conversation with him on this subject is reported by Judge Lord who quoted Choate as follows: —

When the Attorney-General was opening his case to the jury and came to the discussion of the identity of the remains found in the furnace with those of Dr. Parkman, the prisoner's counsel should have arisen, and begging pardon for the interruption, should have said, substantially, that in a case of this importance, of course, counsel had no right to concede any point, or make any admission, or fail to require proof, and then have added, — "But we desire the Attorney-General to understand, upon the question of these remains, that the struggle will not be here. But, assuming that Dr. Parkman came to his death within the laboratory on that day, we desire the Government to show whether it was by visitation of God, or whether, in an attack made by the deceased upon the prisoner, the act was done in self-defence, or whether it was the result of a violent altercation." . . . But Professor Webster would not listen to any such defence as that. He then said that the only difficulty in that defence was to explain the subsequent conduct of Dr. Webster, and proceeded with a remarkable and subtle analysis of the motives of men, and the influences which govern their conduct, to show that the whole course of the accused after the death could be explained by a single mistake as to the expediency of disclosing what had happened instantly; that hesitation, or irresolution, or the decision, "I will not disclose this," adhered to for a brief half-hour, might, by the closing-in of circumstances around him, have compelled all that followed! . . . He concluded, "It would have been impossible to convict Dr. Webster of murder with that admission." (Brown, *Memoirs of Rufus Choate*.)

of the court, with the result that upon any question of law raised during the trial the undivided opinion of the bench would constitute a majority opinion of the court of last resort. Gradually, however, these requirements have been lessened, first in reducing the number of presiding Justices of the Supreme Judicial Court, then by transferring the trial of capital cases to the Superior Court, and finally by providing that a single judge shall preside there, as the practice now is. Whether this course signifies a diminishing sense of the importance of murder cases, in proportion to the somewhat ominous increase in the number of such trials throughout the United States as compared with other countries, or whether the Legislature has acted from a feeling that the great trial court of the Commonwealth can be relied upon properly to safeguard the lives of its citizens, is not clear. As an indication that the first mentioned is the true significance of the change is the fact that the Supreme Court retained jurisdiction to try actions of contract for some years after it lost capital cases. That the second suggestion is correct, and that the confidence in the trial court has not been misplaced, is evidenced by the records which show that error of law has been found in but one of the many murder cases tried before a single justice of the Superior Court.

At the Webster trial the full court sat, with the exception of Mr. Justice Fletcher, and the Chief Justice was attended by Associate Justices Wilde, Dewey, and Metcalf. Attorney-General Clifford, assisted by Mr. George Bemis as special counsel,

appeared for the Commonwealth, and the prisoner was defended by Pliny Merrick and Edward D. Sohier.

Careful arrangements had been made by the sheriff for the maintenance of order throughout the trial. Admittance was secured only by ticket, and one of these, entitled "Law Student's Ticket," bearing the name of Lemuel Shaw, Jr., was found in Shaw's papers after his death. In order that as large a number of the public as possible might be enabled to get at least a glimpse of the famous trial, the court-room was cleared at intervals, and a new throng of ticket-holders admitted in place of the former spectators.

In spite of the widespread interest in the trial and the consequent familiarity with the Government's case, it is interesting to note that the empanelling of the jury occupied but an hour and a half. The striking contrast between that interval and the time occupied in securing juries in cases of public interest at the present time is remarkable. It is only fair to assume that the dignity and impressiveness of manner of the Chief Justice in making inquiry of the jurors as to preconceived opinions, and his explanation as to what state of mind did or did not constitute bias or prevent candid judgment upon their part, had much to do with the prompt and conscientious responses to the statutory questions.

The trial continued for eleven days, the court sitting from nine in the morning until seven in the evening with an intermission of an hour and a half for luncheon.

On the second day of the trial, the crowd seeking admittance was tremendous. Every approach to the Court-House was filled with people. The wood-work in front of the door of the court-room was demolished by the crushing throng, and at one time the noise was such that a temporary cessation of proceedings became necessary. On Sunday, the jury was taken to church, passing between lines of spectators, amongst whom were the wives and children of some of them. They were not permitted to exchange words, however, or to do more than grasp a hand or receive a kiss from a child.

The evidence against the accused, which has been summarized above, came from a great number of witnesses, and formed a complete and convincing chain of circumstances indicating guilt. Remarkably few questions of law seem to have been raised during the trial. Objections to testimony were infrequent, and when made were often obviated by counsel voluntarily.

Among the witnesses who testified at the trial were Professor Eben N. Horsford, who was called to state the results of certain chemical experiments; and Oliver Wendell Holmes, who was then Parkman Professor of Anatomy and Physiology in Harvard University, a chair which was named in honor of the man for whose murder Webster was being tried. Palfrey, the historian, and Jared Sparks, then President of Harvard College, also were called.

Besides the testimony of numerous persons as to the good reputation of Webster, the main evidence for the defence came from seven witnesses, all of

whom swore that they had seen Dr. Parkman on the street in Boston on Friday afternoon after the hour when the Government contended he had been murdered. Each of these witnesses professed to have been well acquainted with the appearance of Dr. Parkman, and was positive he had seen him at a time when, on the Government's contention, he must have been dead. As each of these witnesses came to the stand without previous association with the others, the source of the testimony was undoubtedly honest and unbiassed, and furnishes another instance of the many cases of mistaken identity and of the unreliability of such testimony as compared with strong circumstantial evidence. In this connection it is interesting to note that at the trial evidence was offered by the Government, but excluded, that a person who strongly resembled Dr. Parkman had been seen about the streets of Boston before his death, and that after the trial it was stated in the press that the identity of the person referred to had been discovered in a resident of Springfield.

At the close of the arguments of counsel, the prisoner, who had not testified in his own behalf, was asked by the Chief Justice if he cared to address the jury. Thereupon Webster arose, and delivered the remarkable speech which created such an unfavorable impression upon those present that it is thought to have destroyed his last chance of a mitigated verdict or a disagreement. In it he made no direct personal assertion of his innocence. He complained that his counsel had not used evidence in their possession which if laid before the jury would

be sufficient to establish his innocence. He took occasion to attempt to explain several of the minor points against him as brought out by the evidence, but nowhere throughout his somewhat lengthy remarks is to be found the protestation of injured innocence.

The Chief Justice thereupon began his charge to the jury, "with a voice greatly disturbed by emotion and a countenance indicative of great sorrow and distress."

Probably no charge ever delivered in this country has been followed as a precedent so frequently and so closely as this memorable effort. With the dignity of expression and the clearness of thought and language which always characterized his statements, he expounded the law of homicide in terms which have been followed closely in nearly every murder trial from that day to this.

Upon one point only has his explanation of the law in this case ever been criticised, and in that respect the Chief Justice was following the law as laid down in *Commonwealth v. York*, decided in 1845. That case reaffirmed the old principle that, in case of an intentional killing, no circumstances appearing tending to justify, excuse, or palliate the act, the law implies the malice which is a necessary element of the crime of murder. The burden is then upon the accused to show such circumstances by the preponderance of the evidence. This statement of the law has been criticised as throwing upon the defence the burden of proof of a fact, while all that is necessary to entitle him to an acquittal is a reasonable

doubt as to any of the necessary elements of the crime, including, in a case of murder, the element of malice. If the close reasoning of the Chief Justice in the opinion in *Commonwealth v. York* is followed, it will be seen that this criticism cannot be justified as a matter of legal refinement. It is there pointed out that the principle never applies except in a case of secret killing where absolutely no circumstance appears from the Government's case which can explain it. In such a case, before the jury can be asked to consider any fact or circumstance as tending to explain the killing and so reduce the grade of offence or justify the homicide, such fact must be established by a preponderance of the evidence, otherwise it is not a fact or circumstance and cannot influence the minds of the jury even to produce a reasonable doubt.

It is not profitable for present purposes to discuss this proposition, and the subject may well be dismissed with the observation that the principle, though sound, is purely theoretical, inasmuch as no case can practically be conceived where the proof of the homicide will not also involve the disclosure of some attendant facts and circumstances for the consideration of the jury in passing upon the question of malice. Although the principle has never been overruled, it is now rarely given to juries because it is never found necessary to apply it to a concrete case.

The definition of reasonable doubt given by the Chief Justice is probably the one most used in explaining this common, but often misunderstood,

phrase. It may well be quoted here as being of general as well as technical interest: —

Then, what is a reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there be reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; — a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law should go further than this, and require absolute certainty, as it mostly depends upon considerations of a moral nature, it would exclude circumstantial evidence altogether.

Shaw's explanation of the nature of circumstantial evidence is still given, in his very words, in many cases where the nature of the proof is of that character and requires judicial reference. It is too lengthy to be set forth here, but might well be read

to dissipate what seems to be a long-standing prejudice against a kind of proof which is least fallible and affords the smallest opportunity for mistake and error, a prejudice which wherever found exists almost surely because of misconception and imperfect understanding of the meaning of the term itself.

No greater tribute can be afforded to a judicial utterance than that it shall be adopted and quoted universally upon occasions where need arises for explanation of the principles expounded. That such tribute has been paid to Shaw's charge to the jury in the Webster case, no one who is in any degree familiar with the administration of criminal law throughout the country will attempt to deny. It must be noted that no new principles of law were established or any novel application made of old principles. A charge to the jury is an attempt to explain to laymen certain principles of law, often complex and elusive, by which important and vital action by them is to be governed. Its success or failure as a means of reaching a true verdict almost always depends upon the clearness and simplicity with which those principles are set forth, and the distinctness with which, after it has been delivered, the jury are enabled to perceive which way their duty lies.

How well the Chief Justice had performed his task in this case is attested, not only by the profession which for two generations has followed his words closely and used them for guidance in thousands of cases, but by the action of the jury which had the solemn task of pronouncing the verdict. This

is shown by a communication from one of the jury, published after the trial, from which the following is an extract:—

At that very time, with the light which the able charge of the Chief Justice afterwards gave us on several points of the law and the evidence, I think I speak the sentiments of nearly, if not quite, all the jury, when I say, that they were as fully prepared for their verdict, as they were when they retired to the jury-room, after listening to the most able and eloquent pleas of the prisoner's senior counsel and the Attorney-General; so strongly, so fully, had the evidence pointed to the prisoner as the guilty man, AND TO NO ONE ELSE. After the jury had gone to their room, — with the various evidences of guilt spread out on the table before them, and the door locked upon them, shut out, as it were, entirely from the world, with nothing but the eye of the Omniscient God upon them, — so painful was the sense of responsibility, so unwilling were they to come to the result which all felt they must come to, that thirty to forty minutes were spent ere anything was done; when, at last, the voice of the foreman was heard calling them to order, and reminding them of their duty, however painful. And, when they had all taken their seats around the table, then it was that one of the jurors rose and said, "Mr. Foreman, before entering upon the further consideration and decision of this most important matter, I would propose that we seek for divine wisdom and guidance." The proposition met with a cordial response, and the foreman called upon a juror to offer prayer. This was done, most feelingly and sincerely. We then proceeded to the most trying and painful part of our arduous duty. The various articles which were put into the case were examined by the jury, and particularly those things which seemed to bear most strongly against the prisoner. The final decision of the question was resolved into three parts: First, Are the remains of a human

body, found in the Medical College, on the 30th of November, 1849, those of the late Dr. George Parkman? Second, Did Dr. George Parkman come to his death by the hands of Dr. John W. Webster, in the Medical College, on the 23d of November, 1849? Third, Is Dr. John W. Webster guilty, as set forth in the indictment, of the wilful murder of Dr. George Parkman? When the vote on the first question was put, twelve hands arose immediately. Some little discussion then took place, when the second question was tested, and twelve hands at once arose. The third — the most important question of all — was next to be tried. Quite a pause ensued. One juror, in his sympathies of kindness for the prisoner (who was his personal acquaintance or friend) and his afflicted family, shrunk from the “fiery ordeal.” “Can’t we stop here? — can’t the law be vindicated and justice satisfied, if we pause here? Must we take the *life* of the unhappy prisoner?” Some discussion ensued: the mind of the juror seemed more calm; and he expressed his readiness to vote on the *final* question, which was then put, and twelve hands arose. The die was cast, and John W. Webster was pronounced *Guilty of Murder*.¹

It must be remembered that at the time when this case was tried there was no statute forbidding the court to charge upon the facts. It was within the power of the court at that time, as it is not now, to express an opinion as to the weight of evidence. Yet this Shaw carefully refrained from doing. After stating the principles of law which applied to the case, he reviewed the evidence, leaving, without expression of opinion, each fact in the chain of proof relied upon for the consideration of the jury. A careful reading of the charge will verify the state-

¹ Bemis, *Report of the Webster Case*.

ment that in no instance did he lay himself open to the claims which were subsequently made of charging upon the facts. In no respect would his charge have been objectionable after the passage of the statute which deprived the court of the power and right of commenting on the evidence. It is merely another proof of his genius for clear and explicit statement if, after his summary of the evidence, it seemed all to point one way and to permit of but one finding.

Yet after the verdict of guilty was pronounced, a marked hostility to the action of the jury was revealed, and criticism of the charge of the Chief Justice was declared which for openness and violence has rarely been equalled. It then became manifest that a strong feeling existed outside the immediate vicinity of Boston, in New York and other parts of the country, that Webster should have been acquitted, or at least convicted of no more than manslaughter. The reason given for this view was that there was room for a reasonable doubt as to what happened at the time he was killed, and that the death of Dr. Parkman had not been satisfactorily proved.

Shaw himself attributed much of the adverse criticism to the inaccurate reports of the trial published in the newspapers. His own words were, "As their main object was to satisfy the eager curiosity of their readers by the earliest intelligence, most of them were defective and many extremely erroneous."

"If the jury had prayed less and deliberated more, they could not in any event have gone beyond

a verdict of manslaughter," was one comment. The verdict was denounced as unwarranted and extraordinary, and its legal accuracy was doubted. The case was singularly mismanaged according to one opinion, and the result was ascribed to Boston's determination to convict and was even attributed to a "packed jury." The action of the jury was compared with the "devoutness of the Puritans in burning witches and hanging Quakers to the glory of God"; and they were described as acting in a stupor, reflecting the impression given them by the Attorney-General and Chief Justice. The charge of the Chief Justice was termed "able, but sternly argumentative," and desirous of obtaining a verdict which would correspond with public opinion, and was described as a cool, gross, and palpable special plea against the prisoner. A Philadelphia paper printed an editorial headed "Judicial Murder in Boston," stating the belief that "judges, jury, and even the prisoner's counsel, have been awed by the wealth of the [Parkman] family." A New York newspaper declared that "pusillanimity or prejudice, or something worse, had swerved him [the Chief Justice] from the path of judicial integrity. Out of Massachusetts, and out of a limited circle in it, his judicial character is prostrated, and he will be the first of American judges associated in position and character with the band of cruel and corrupt English judges of whom Jeffries is foremost." A pamphlet of thirty-five pages was printed and circulated in New York entitled "A statement of reasons showing the illegality of that verdict upon

which sentence of death has been pronounced against John W. Webster for the alleged murder of George Parkman."

Chief Justice Shaw received many anonymous letters heaping him with abuse. "They also say," read one, "that you have in this case performed the double duty of judge and juror; and that it is owing to your outrageous charge that he was convicted. . . . It consigns your name to everlasting infamy, leaves you a reproach upon the State whose judicial power you wield, and a disgrace to mankind." Another wrote, "Your coat of arms will be and now is a gallows sable, with a chemical professor pendant." Other letters were also received purporting to come from the real perpetrator of the murder, or his accomplice, conscience-stricken at the conviction of an innocent man. Threats were made to the Chief Justice that if he ever sentenced Webster to die, he would not leave the Court-House alive. These alarmed Mrs. Shaw to such an extent that she insisted that the Judge's two sons should accompany him to and from the Court-House.

All criticism, however, was stilled when, on July 1, 1850, Webster, after having made one application for a pardon on the ground that he was entirely innocent of the murder, which was refused, sent to the Governor another petition containing a full admission of his guilt in killing Parkman, but asking for a commutation of his sentence. In this statement, which contained a full account of the homicide, Webster denied that his act was premeditated, but claimed that, angered by taunts and abusive lan-

guage, he struck Parkman a blow on the head with a piece of grapevine which was at hand. Although, as a matter of law, this fact, if true, would not have reduced the crime to that of manslaughter, yet the commutation of the sentence to life imprisonment would doubtless have been granted if this part of the confession had been accepted as true. The Committee on Pardons of the Executive Council, to whom the petition was referred, and the Governor himself later, expressed themselves as not believing the statement that the crime was not premeditated and declined to interfere with the sentence imposed by the law.

As the strictures upon Shaw's conduct of the case were all based upon the belief in Webster's innocence, or at least upon the ground that he had not been proved guilty, with his confession disappeared all reason for distrust in the verdict. One of the traducers of the Chief Justice was stricken with remorse, and wrote him a letter, this time signing his own name, expressing his sorrow that he had so maligned him. "Curious, wicked man as I am," he declared, "I will acknowledge myself wrong when convinced that I am so, and as our Maker has time and time again granted to both of us weak, erring mortals forgiveness for greater sins than the insult I perpetrated upon you, I therefore confidently appeal to your good sense to forgive my rudeness."

In pronouncing sentence upon Webster, the Chief Justice alluded to the painful necessity which fell upon him of voicing the dread doom of the law upon one whom he had met in friendly and social inter-

course. Dr. Webster had been a professor at Harvard for many years while the Chief Justice had served as Fellow and Overseer. At this moment, when he pronounced the words committing to death the wretched man in the dock before him, it is no wonder that, as the Reporter states, "the Chief Justice, with an utterance at times quite interrupted by emotion, addressed the prisoner." The only allusion made to former association with the condemned man by his judge was this: —

Circumstances which all who know me will duly appreciate, but which it may seem hardly fit to allude to in more detail, render the performance of this duty, on the present occasion, unspeakably painful . . . nothing but a sense of imperative duty imposed on us by the law, whose officers and ministers we are, could sustain us in pronouncing such a judgment.

Judges, since his time, upon whom has fallen the solemn duty of pronouncing sentence of death upon wretches of whom they know nothing but evil, have shunned the task to the extent of imploring some colleague, of sterner stuff, to do the work. Had Shaw's sense of duty been less profound, or had he been a weaker man, he would have availed himself of his acquaintance with the prisoner as a reason for declining to sit in the case. He did not waver, however, in his determination to do whatever his obligation to the law demanded, and performed his office, with private feelings repressed, the embodiment of stern, impartial justice.

On August 30, 1850, Webster was executed at the jail in Boston.

CHAPTER VIII

SHAW'S PART IN THE DEVELOPMENT OF THE LAW — RELIGIOUS CONTROVERSIES — PUBLIC SERVICE CORPORATIONS — SOME OF HIS OPINIONS

IN Chief Justice Shaw's time the bench was called upon to play a part in the religious agitation of the day. The Unitarian movement was in full swing, and everywhere in the vicinity of Boston churches were being rent upon the rock of Calvinism. Wherever ministers were settled for life, no change in the spirit of their congregations could accomplish a remission of the strict doctrine which came from the pulpit. But when the old ministers died and new ones had to be called to fill their places, the conflict came. Harvard College had gone over to Unitarianism practically in a body, students and faculty. In 1805, when the vacant Professorship of Divinity was to be filled, Dr. Henry Ware, a clergyman of pronouncedly advanced views, had been elected, in spite of the bitter opposition of Orthodox Overseers. Conflicts within churches frequently led to disruption and the formation of new societies. Then came the question as to whether the new or the old organization was entitled to the property of the society, and thus the dispute came to the courts.

The Chief Justice's second opinion, written in a case heard by him when he had been on the bench but two months, involved questions of church property, and was to have a very important bearing in

the religious conflict which was going on. The majority of the members of a Congregational church in Brookfield, as a result of the action of their pastor in severing his relations with the church, followed him to a new place of worship where he continued his ministrations. The cause of his withdrawal does not appear from the record, but we may well believe it to have been induced by the discord produced by clashes between liberal and conservative elements within the society or parish, a majority of which, as distinguished from the church composed solely of communicants, had become Unitarians and did not go with the pastor. So general was the exodus of old church communicants that but two of the men remained behind. Nothing daunted, however, these two called a new pastor, and the battle went on over the ownership of "certain tankards and other articles of church furniture" which both bodies claimed. This would not seem to be a very complex or difficult legal problem, in view of the fact that two cases had previously been decided¹ in which seemingly the very point at issue had been settled, to the effect that an adhering minority of a church, and not the seceding majority, constituted the church of the parish to all civil purposes. With the citation of these cases counsel had contented themselves by way of argument, and Shaw himself says at the beginning of his opinion that if considered as binding authority they would be sufficient to settle this case in favor of the plaintiff. But because, per-

¹ *Baker v. Fales*, 16 Mass. 503, and *Sandwich v. Tilden*, there cited.

haps of his origin and youthful training, the matter seemed of great importance to him, or because he thought the principles involved had not been elucidated with satisfactory clearness, he proceeded to give a lengthy opinion rendered in what soon came to be recognized as his characteristic, exhaustive, and illuminating style, speaking for all time upon the subject with which he had to deal: —

The church [he said] is composed of those persons, being members of such parish, or religious society, who unite themselves together for the purpose of celebrating the Lord's Supper. They may avail themselves of their union and association, for other purposes of mutual support and edification in piety and morality, or otherwise, according to such terms of church covenant, as they may think it expedient to adopt. But such other purposes are not essential to their existence and character as a church. Such is the general definition of a church.

¶ The Chief Justice goes on to separate and define the distinction between the church, the parish, the religious society, and the congregation, using as always his remarkable facility for graphic illustration to clarify and sharpen the hazy line of differentiation between bodies which commonly in interest and act were considered as one.¹

This decision became the object of much complaint from the Calvinists. Lyman Beecher said of the Unitarians: —

They have sowed tares while men slept, and grafted heretical churches on orthodox stumps, and this is still their favorite plan. Everywhere, when the minister dies,

¹ *Stebbins v. Jennings*, 10 Pick. 172.

some society's committee will be cut and dried, ready to call in a Cambridge student, split the church, get a majority of the society, and take house, funds, and all.

His daughter, Harriet Beecher Stowe, spoke more definitely of the manner in which the old sect regarded the courts:—

The judges on the bench were Unitarian, giving decisions by which the peculiar features of church organization, so carefully ordained by the Pilgrim fathers, had been nullified.

And later the Orthodox view was expressed as follows:—

Church after church was plundered of its property, even to its communion furniture and records. We called this proceeding plunder thirty years ago. We call it by the same hard name now. And we solemnly call upon those Unitarian churches, which are still in possession of this plunder, to return it. They cannot prosper with it, and we call upon the courts of Massachusetts to revoke these unrighteous decisions, and put the Congregational churches of the State upon their original and proper basis.¹

But in spite of these strictures, the doctrine of *Stebbins v. Jennings* was adhered to and followed in later cases.

In 1854, Shaw decided the famous case of *The Attorney-General v. Federal Street Meeting-House*,² in which the Presbyterians endeavored to recover the property of the Federal Street Church from the Unitarians to whom it had come through the in-

¹ M. A. DeW. Howe, *Boston*.

² 3 Gray, 1.

termediary of Congregationalism. The court here broke away from English and Scotch precedent and declared that a conveyance of church land, to be held "according to the tenures and after the same manner as the Church of England hold and enjoy the lands whereon their meeting-houses are erected," did not found a public charity, but that the religious society of the church could alter and change its form of worship at will. This decision was bitterly criticised, and Dana, in the privacy of his diary, charged the Chief Justice with "intense and doting" bias and prejudice: —

He [the Chief Justice] drew up the opinion, and when he came to read it, to the surprise of the court as well as to the astonishment of the bar, it contained an elaborate historical argument to show that there had always been religious freedom in Massachusetts, and that the word "Orthodox" used in the statute, was not used in any technical sense, but left each church to its own opinions as to what was orthodox.

It is no disrespect to Judge Shaw to say that a weaker argument never came from a sensible man. It was self-evidently wrong, and there was no way of accounting for it, but to admit that Judge Shaw had come to such a state of doting fondness as to create a bias that entirely perverted a sound and honest mind. Every man at the bar as well as on the bench saw the lamentable weakness it exhibited.

When the case came in its order to be printed the judges came to an agreement among themselves and spoke to the Chief Justice about it and told him that they could not agree to have that stand as part of the opinion. Judge Metcalf said he not only entirely dissented from it, but that he was not willing to have the sanction of the Supreme Court given to one side of the controversy

respecting the Hollis professorship. Judge Thomas and Judge Bigelow, who are both Unitarians, also attacked the opinion and demonstrated its fallaciousness. The Chief Justice made fight for a time, but was obliged to yield and took back the opinion and revised it, leaving out all those parts that related to religious freedom, and it is to be printed in that form.

The truth is Judge Shaw is a man of intense and doting biases in religious, political, and social matters. Unitarianism, Harvard College, the social and political responsibilities of Boston, are his *idola specus et fori*.¹

Bearing in mind the devotion of Dana to his abolitionistic principles, and the bitterness he had displayed when his radical efforts were thwarted by Shaw, it is to be feared that he and not the Chief Justice was the one whose views were influenced by "doting fondness." The authority of this case has been followed, although it has recently been doubted.²

But the Chief Justice, long before Dana made his note in his diary, had demonstrated that he could secure a fair trial in cases where bigotry in its bitterest form strove to rear its head. In 1834, he presided over the trial of the "convent rioters" for burglary and arson.³ In those days these were capital crimes, and associated with him on the bench in the trial were two other judges. The Ursuline Convent at Charlestown was broken into and burned by a mob on August 11, 1834, as a result of the same strong religious prejudice which led finally to the

¹ Adams, *Life of Richard Henry Dana*, vol. 1, pp. 353-54.

² *Sears v. Attorney-General*, 193 Mass. 551, 555.

³ *Commonwealth v. Buzzell*, 16 Pick. 154.

formation of the "American" or "Know-Nothing" party in 1854. Proximately, the exciting cause was a rumor that one of the nuns was confined there against her will, a report which was shown at the trial to have sprung from the fact that a nun had left the convent in a fit of temporary insanity and had been brought back while in the same condition. Religious prejudice early showed itself in this trial when the Attorney-General, stating that the prosecution was to be supported in part by the testimony of Roman Catholics, moved that the jurors should be inquired of as to whether they would believe under oath persons professing that faith. This question the court refused to put, and in other respects carefully excluded from the case all questions of a religious nature, ruling that such matters were wholly irrelevant and collateral. Shaw's conduct of this case was such that when he retired from the bench he received a letter from the Roman Catholic Bishop of Boston, expressing in the warmest of terms his admiration of the Chief Justice, and the confidence he had felt during the days of secret Know-Nothingism that "the cause of justice and of right was safe in his hands."

I have shared [he wrote] in the general regret that the Commonwealth and its citizens are no longer under the protection of the triple shield of your profound jurisprudence, your calm wisdom, and your incorruptible justice.

In 1851, the court was called upon to decide a dispute between rival branches of the Quakers in a case which was regarded as one of great importance

to the well-being of the Society of Friends. Here the Chief Justice had to determine which of two disputing bodies constituted the legitimate meeting according to the discipline and usages of the society. The question was one of much perplexity, arising in part from the peculiar method by which the vote of a meeting of Quakers is taken, not by a majority, but by "the solid sense of the aggregate body, having regard to age, character, judgment, piety, and numbers combined, to be gathered and ascertained by the clerk, who is uniformly the presiding officer." Of this uncertain method of ascertaining the will of an assembly the Chief Justice had this to say:—

In a numerous body of all ages and capacities there must be much uncertainty where the utmost honesty and impartiality prevails. But clerks must be human beings; and although in theory aided and assisted by an overshadowing power and wisdom greater than their own, yet it may be darkened and obscured by human predilections. If there be any strong party feeling upon a theological controverted question, or any other, the clerk will be something more than human if he do not participate in it.¹

Few matters seemed filled with greater perplexities than the conflict of laws. Here the difficulty was one of administration and selection. The trouble came not in ascertaining the law of the subject, but in determining which of two or more conflicting rules to apply. Citizens of different countries, for instance, might enter into a contract in a third country. This contract is to be performed in a

¹ *Earle v. Wood*, 8 Cush. 430.

fourth country, and suit upon it is brought in a fifth. In all five countries the rules of law applicable to the contract, although perfectly clear and well settled, are different. What rule is to govern, and where is the law of the contract? Upon this confused matter Shaw's power of analysis was brought into full play, and out of seeming chaos he brought order and harmony. In a series of three decisions he evolved rules which have since been followed in many jurisdictions, simple and full of good sense. By these it is established that the law of the place where the contract is made prevails in all questions as to the contract itself, its existence, nature, validity, effect, obligation, and construction. If the contract calls for the performance of an act in another country, the law of that country governs as to what must be done to accomplish the act. The nature of the remedy must be governed by the law of the place where suit is brought.¹ In the last two of these opinions the question is discussed with all the wealth of illustration and elaboration of which Shaw was capable. In these respects they are typical. As nearly as is possible the inherent difficulties of the subject were overcome, and the cases have become leading authorities.

Shaw's last public appearance before he was appointed Chief Justice was in July, 1830, when he attended a meeting of citizens in Faneuil Hall, convened to receive the report of a committee appointed

¹ *Pitkin v. Thompson*, 13 Pick. 64; *Carnegie v. Morison*, 2 Met. 381; *May v. Breed*, 7 Cush. 15.

to consider presenting a petition to the General Court seeking authority for the city of Boston to construct a railroad, or to subscribe for and hold stock in one. Shaw was chairman of this committee and drew the report which recommended that application be made for the right to subscribe for stock in a railroad to be established in a direction to facilitate intercourse between Boston and the Western States.

From that time on, when steam railroads were having their great beginnings and early development, the courts were frequently called upon to interpret the charters of the newly organized corporations, and to define the rights, obligations, and liabilities of the railroads on the one hand and the public on the other. The first charters granted for the building of railroads regarded them as iron turnpikes, upon which individuals and transportation companies were to enter and run their own cars and carriages, paying toll to the company for the use of the road.¹

But the true nature of the business of the railroads soon developed, and the character of the service which they performed took permanent shape. The public quality of this service was recognized judicially, and railroad companies at once were placed upon a different footing from ordinary business corporations. Early declarations were made by the courts that the railroads were a new species of highway, public in nature, although built with private

¹ *Boston & Lowell Railroad Company v. Salem & Lowell Railroad*, 2 Gray, 28.

capital. The cost of initial construction, as well as the cost of maintenance, ultimately was to be paid by the public in furnishing revenue from the transportation of passengers and merchandise. Because railroads were intended for the use and benefit of the people, the Legislature had the power to provide for building and maintaining them to the extent of taking property by eminent domain. By their construction private rights in property, and other public rights, might be much affected. The same qualities which made them useful also made them dangerous and required that great precautions be taken against harm.¹ There was thus a careful balancing between the rights and obligations of the railroads and the public respectively, the equilibrium of which must be preserved by the courts. The Chief Justice from the first established the power of the railroads to make all reasonable rules for carrying on their business, and declared it to be not only the right but the duty of carriers to make such regulations as were necessary to insure the safety and promote the comfort of their passengers.²

Other public service corporations disputed the right of the railroads to interfere with their privileges and property, and in some cases endeavored to block the development of the new mode of transportation. The court was thus called upon to harmonize these different forms of improvements, all of them designed to promote public convenience, and

¹ *City of Roxbury v. Boston & Providence Railroad Corporation*, 6 Cush. 424.

² *Commonwealth v. Power*, 7 Met. 596.

all alike entitled to consideration and respect. In dealing with the delicate and perplexing questions which arose, the Chief Justice assumed that in granting, limiting, and modifying the powers of each corporation as it was chartered the Legislature had in view the common public good which was the object of them all. In cases, therefore, where some interference was unavoidable because of conflicting legislative provisions, that construction was adopted which would limit or restrain the privileges of each company no further than was reasonably necessary in order to accomplish the end for which others had been established. Thus the turnpikes, highways, town ways, canals, and railroads were fitted into a complete system of public improvement, designed and fashioned as a whole for the general convenience and benefit of the people.¹

In *Norway Plains Company v. Boston & Maine Railroad*,² the nature of the liability of a railroad company for goods deposited in its warehouse after transportation was considered for the first time and settled. In the opinion of the Chief Justice in this case is found one of the best and clearest outlines ever written of the function and manner of growth of the common law: —

It is one of the great merits and advantages of the common law [he said] that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases,

¹ *Newburyport Turnpike Corporation v. Eastern Railroad Company*, 23 Pick. 326; *Boston Water Power Company v. Boston & Worcester Railroad Corporation*, 23 Pick. 360.

² 1 Gray, 263.

which would become obsolete and fail, when the practice and course of business to which they apply should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy, are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited, and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent and forms a rule of law for future cases under like circumstances. The effect of this expansion and comprehensive character of the common law, is, that whilst it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases of daily occurrence in the business of an active community; yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree precise and certain for practical purposes by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decisions, they must be governed by the general principles applicable to cases most nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is that when a new practice or new course of business arises, the

rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations to the new circumstances. If these cases are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial.

He presided over the first case ever brought in his court for the recovery of damages for personal injuries received in a railroad accident. This action, *Thompson v. Boston & Providence Railroad Company*, was tried in January, 1837, and the charge to the jury was delivered by the Chief Justice. As the first of a long line of cases of similar character which have come to crowd court calendars the country over, these initial statements of the law, as phrased by Shaw, have historic value.

The defendants in the case [he said] were incorporated, and had set up the public employment of carrying passengers. In assuming to carry on the business of conveying passengers, they came under the rules of law applicable to the running of stage-coaches for a like purpose. The object of granting an incorporation for such purposes was to create a capital large enough to carry on an

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enterprise which is beyond individual means. But all corporations so created are subject to the same rules that govern private individuals. If privileges are granted to them which are not allowed to individuals, it is in consideration of expected benefits to the public. Thus the reason why corporations like this are allowed to take private property is on the ground that it is for the public benefit.

The carrier cannot insure the safety of his passengers in any event; but he shall be responsible for the strictest care, attention, and diligence. Thus, if an individual or a company undertakes to carry passengers for hire in stage-coaches, the law requires that there shall be strong carriages, well-broken horses, careful and competent drivers, and that in the use of these there shall be great diligence; that is, a diligence suitable to the case. The law does not require the highest possible precaution, but that which is necessary to the occasion. This is exemplified in the case of a lawyer, or surgeon, or a pilot. They must possess the requisite skill and use the diligence necessary to perform the services required of them. The pilot must know the shoals and rocks, the course of the tides, and must use due precaution and diligence. A like diligence and skill is required of a stage-driver. These principles are applicable to long established modes of conveyance. But if a new mode is introduced, it is required that those who use it should apply all the science and skill applicable to it, as far as experience has enabled them to do so. They are bound to have the highest skill that science and the experience of the time will admit, and if any accident happens for lack of this, they are liable. The utmost possible care is not meant by this, as for instance stationing men on a railroad within speaking distance of each other. This might increase the safety, but if it involved an expense such as would destroy the profits and did not seem reasonable, the jury would probably think it ought not to be required. So in relation to a tele-

graph along the road to communicate the approach of a train. This is an experiment which has never been applied, and the jury will judge whether it could be necessary, or if any fault could attach to the corporation for the want of it. The law does not require precaution against all possible danger, but a reasonable and proper precaution, adapted to the nature of the case.

A passenger has no right to complain of the natural and probable consequences of this mode of conveyance, and all that is required is that the agents employed shall use all reasonable and necessary precautions. The specific character of this mode of conveyance is increase of speed, and of this the traveller takes the risk; the conductor employing diligently all the precaution that care and experience can give. Those who travel in steam cars are presumed to concur in this increase of speed, and if all precautions are taken, the risk incidental to it must fall on them.¹

The doctrine of public service corporations was extended in the case of *Lumbard v. Stearns*,² where it was held that an aqueduct company came within the class of enterprises designed for the public welfare. The Chief Justice held that the Legislature could charter a company to take springs, lands, and rights for the purpose of supplying a community with pure water. "The supply of a large number of inhabitants with pure water is a public purpose," he declared, and as such warranted the bestowal of the right of eminent domain.

Another line of cases which involved the consideration of many questions of first impression were

¹ From a newspaper report of the charge, revised by Shaw, found in his scrap-book.

² 4 Cush. 60.

those in which the mill acts were interpreted. Here, too, the interest of the public was involved, and that interest was recognized in a consideration of the general advantages to be derived from the establishment and maintenance of mills. The mill-owner was authorized to maintain his head of water, the law providing at the same time an adequate remedy for damages sustained by those whose land above was flowed. Almost the entire burden of elucidating these statutes devolved upon the Chief Justice, and in the long line of his decisions is found practically all the law upon the subject.¹

Commonwealth v. Temple (14 Gray, 69), one of Judge Shaw's last decisions, is one of his best. He there deals with the rights and duties of travellers on the highways, particularly with reference to street railways, then newly established in Boston. Here, in his eightieth year, the Chief Justice was called upon to strike a new path, and to lead, not follow. Here, too, at the close of his career, he again repeats his confidence in the elasticity and adaptability of the common law, and in its capacity, without legislation, to meet and cover developed and changed conditions.

But it is the great merit of the common law, [he declared] that it is founded upon a comparatively few broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowledged, and which at first are few and simple; but which, carried

¹ See *Palmer Company v. Ferrell*, 17 Pick. 58; *Williams v. Nelson*, 23 Pick. 141; *French v. Braintree*, 23 Pick. 216; *Cary v. Daniels*, 8 Met. 466; *Chase v. Sutton*, 4 Cush. 152; *Murdock v. Stickney*, 8 Cush. 113; *Gould v. Boston Duck Company*, 13 Gray, 442.

out in practical details, and adapted to extremely complicated cases of fact, give rise to many and often perplexing questions; yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require.

To the present generation of lawyers no rule seems to be more settled or elementary than the principle that an employer is not liable, at common law, to his servant for the carelessness of a fellow-servant. And yet until Shaw had been on the bench for twelve years this doctrine had not been announced in Massachusetts. The first of the long line of decisions which have held uniformly to this view was *Farwell v. Boston & Worcester Railroad*,¹ decided in 1842. The opinion by the Chief Justice has been cited and followed thousands of times throughout the country. The ordinary contract of service between employer and employee, as construed in this case, resulted from considerations of justice and policy, and the doctrine, though sometimes operating harshly in particular cases, has been universally approved as logically sound.

Shaw's decisions practically settled the law of negligence as it is now understood and extensively practised. The care which a person is required by law to use under given circumstances he defined to be "that kind and degree of care which prudent and cautious men would use; such as is required by the

¹ 4 Met. 49.

exigency of the case; and such as is necessary to guard against probable danger. A man who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use much less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.”¹ And in the same case he established the principle that a plaintiff could not recover for the negligence of another without showing that the injury was caused wholly by the act of the defendant, and that his own negligence did not contribute as an efficient cause to produce it. This decision has called forth the following comment from Justice Holmes in his “Common Law”: —

In such a matter no authority is more deserving of respect than that of Chief Justice Shaw, for the strength of that great judge lay in accurate appreciation of the requirements of the community whose officer he was. Some, indeed many, English judges could be named who have surpassed him in accurate technical knowledge, but few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest *magistrate* which this country has produced.

¹ *Brown v. Kendall*, 6 Cush. 292, 296.

In *Commonwealth v. Hunt*,¹ the Chief Justice formulated the definition of criminal conspiracy which has been used ever since. It is safe to say that few cases of this nature have been tried in the courts in which Shaw's definition has not been given, and almost always in the very words used by him. His discussion of the rights of labor in this case is also highly instructive and has performed great service in the development of the law with reference to labor organizations. It is here held that it is not unlawful or criminal for persons to form themselves into a society under an agreement not to work for one who should employ a person not a member of such society. This is the leader of the long line of cases which establish the right of labor unions to further the interests and improve the condition of their members by securing higher wages and shorter hours.

Chief Justice Shaw's definition of the degree of insanity which relieves one of criminal responsibility for an act is the most serviceable which has ever been written. Here, again, his words have been used innumerable times by courts in expounding the law to juries. In any well-used law library it is safe to say that the volume containing the report of this case will open of itself at the worn page at which the opinion begins. What plainer and safer rule could be formulated for guidance upon this difficult subject than the following?

In order to constitute a crime a person must have intelligence and capacity enough to have a criminal intent and

¹ 4 Met. 111.

purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. But these are extremes easily distinguished and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging; or so perverted by insane delusions, as to act under false impressions and influences. In these cases the rule of law, as we understand it, is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If then, it is proved to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner in committing the homicide, acted from an

irresistible and uncontrollable impulse. If so then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.¹

Eighteen years after the death of the Chief Justice, George Ticknor Curtis thus wrote of him: —

It has been my fortune in the course of a professional life of more than forty years to practise before some very distinguished judges. But I cannot mention the name of Chief Justice Shaw without saying that, in all the qualities which make a great judicial magistrate, — in strength of intellect, in depth of mental vision, in comprehensive grasp of every question, however difficult, that came before him, in application to it of the appropriate learning, and in the unquestioned and unquestionable poise in which he held the scales of justice, until one or the other ought to predominate, — I have known no man who was his superior. Chief Justice Marshall I never saw; Chancellor Kent I never saw upon the bench, although I once met him in private life. But when I name Taney, Story, Nelson, and Curtis, as among the judges before whom it has been more or less my lot to appear, and recall many others of deserved distinction in different States, of whom I have had personal observation, it will perhaps be allowed that my estimate of Shaw as a judge, unimportant as it is to his fame, has not been formed without sufficient opportunities of comparison with men of note and mark. . . . The opinions of this eminent person have always been received in the courts of other States of this Union, and in the Federal Courts, with a respect that has not been less than has been accorded to those of any other judge who has held a place in the judicial history of any part of the country.²

¹ *Commonwealth v. Rogers*, 7 Met. 500.

² George Ticknor Curtis in his memoir of his brother, Benjamin R. Curtis (1879).

And Senator Hoar says that the Chief Justice possessed beyond any other American judge, except Marshall, the "statesmanship of jurisprudence." "He never undertook to make law upon the bench, but he perceived with a far-sighted wisdom what rule of law was likely to operate beneficially or hurtfully to the Republic." When he did not see the way clearly and his vision of the future was obscured, nothing could exceed the caution with which he proceeded.

In the state of perplexity in which the law still remains in this country [he said, when construing a statute], I consider that the courts are called upon to proceed with extreme caution in deciding each particular case, to select among conflicting authorities those which appear to be best supported by principle, lest by attempting to proceed upon new and plausible grounds to extricate ourselves from present embarrassments, we may go counter to established principles, and thus increase instead of remove existing difficulties.

But when his gaze penetrated beyond the present into the days to come, as frequently, like a prophet's, it seems to have done, and when a principle shone clearly to his mind, he spoke for all time, generally and fearlessly, in enunciation of the law as he found it.

We have dwelt upon this, the greatest branch of his work, only long enough to call attention to some of the occasions in which he exercised marked foresight, and formulated law which has since been universally accepted and widely applied to ever-expanding combinations of modern instances. It may

be that if Shaw had never lived, or if his wisdom had been less profound, the results at which he arrived would have been reached in time by the combined action of many minds. Even so, he deserves the honor due the pioneer who has found the way and built the road. But his service was greater than this. It is not enough to pronounce the law. It must be explained if it is to be effective, and confidence in its righteousness must be inspired. In this field, Shaw stands without a rival. He had a rare faculty for making things clear, and from his reasoning his conclusions seemed to follow inevitably, commanding approval. He never permitted faith in justice to falter. As an expounder of the law he has had no equal.

CHAPTER IX

SPEECHES — MEMBERSHIP IN SOCIETIES — HARVARD UNIVERSITY — SALARY — TRAVEL

SHAW's utterances on subjects of general interest were remarkably few. His whole life and thought were devoted to the law with a singleness of purpose which is rarely equalled. There are few men of his eminence whose careers offer so little opportunity for the observation of the side play of genius, or whose course of progress has been so persistently and undeviatingly along the straight professional path. After his service in the State Legislature, he was not again in public life in the sense of participating in the discussion of great questions of the day. Before he went on the bench his efforts were unsparingly devoted to the interests of his clients, and no distracting thoughts were permitted to impair his efficiency in their behalf. After he was called to the highest position of professional trust and service within his State, his lips were sealed as to all matters of public concern except those which were directly involved in the cases argued before him. Even then he spoke not as an individual, but as the court.

He was the greatest lawyer of his time in New England. Yet his name, unlike Webster's and Sumner's, which are heard the country over, is rarely spoken except by lawyers. Choate's fame, being that of an advocate, is less enduring, but even now,

though fading fast, is wider, perhaps, though less secure, than that of the Chief Justice. Yet Shaw as a lawyer amongst lawyers has a place higher than any of the three. Had he remained at the bar, from there to be called into public service in the exciting and momentous years to come, as unquestionably he would have been had he consented, his speeches and writings upon affairs of state might have filled volumes, and his likeness in bronze and marble, instead of being confined to the limits of the Court-House, would have adorned many another public place. But his reputation as a lawyer and judge would undoubtedly have suffered correspondingly as his eminence as an orator or statesman increased. It must also be recognized that professional renown, though localized in a sense, may yet be very wide.

Shaw's opinions, covering a range of thirty years upon the bench, if collected and published together, would fill, it has been said, perhaps twenty large volumes. Many of them are read, carefully and critically, each year by numbers far greater than those whose eyes peruse the works of any statesman of the past. Yet his extra-judicial words during all this time, as we have stated, are very few. They were uttered casually only, and never with a view to exerting public influence. Besides his Humane Society address and his Fourth of July oration, he never seems to have spoken except upon ceremonial occasions, and even then but seldom.

On September 8, 1836, the two hundredth anniversary of the founding of Harvard College was

celebrated at Cambridge, attended in large numbers by alumni from all parts of the country. A huge pavilion was erected in the grounds in which was served the anniversary dinner. Edward Everett, then Governor, presided, and after a brilliant speech introduced, amongst others, President Quincy, Judge Story, and Chief Justice Shaw, who responded to the toast, —

The Bench of the Supreme Court of Massachusetts. She owes to Harvard thirteen Chief Justices; she repays no small part of the debt in giving the present incumbent to the Corporation of the College.

The Chief Justice, after declaring the debt which jurisprudence owed to the legal worthies who had received their education in the college, concluded as follows: —

But, it may be asked, how can an institution of learning do much to promote the knowledge and practice of that municipal law which regulates the common, ordinary, and daily affairs of life? I answer, much, every way. The law indeed, independently of all science, might furnish a series of practical rules, detached from the principles from which they were derived; a tenacious memory might acquire and retain them and apply them to many of the cases which are drawn into litigation in courts of justice. Such a system would be without dignity, and, to a great extent, without utility. It is as true in jurisprudence as in elegant literature, "a little learning is a dangerous thing." The empiric and sciolist may use his little knowledge of technical language, and his little skill in technical forms, to bad purposes, and thus render those instruments weapons of mischief, which were intended as instruments of defence. But true, thorough, and lib-

eral science is a source of wisdom and virtue, as well as power. Is it not in the deep and copious fountains of ethical science that we seek and find those principles of human right, of social duty, of natural justice, and of moral obligation, from which all sound, practical rules of law must be directly or intermediately drawn? Is it not by the aid of a close, inductive reasoning, of well-devised and well-digested rules of logic, that we select, trace, and apply those great principles to the actual regulation of human affairs, however vast or humble, however refined or complicated? Is it not from the choice and abundant stores of rhetorical science that those well appointed equipments are supplied which serve to give force to justice and efficacy to truth? Yes, sir, there is indeed a true and natural alliance between learning and jurisprudence, highly favorable, not to say essential, to both; for, whilst the law derives from learning its highest dignity, it is enabled in some measure to reciprocate the benefit by conferring on learning its best security. I offer, as a sentiment, —

“The Law; nurtured by an enlightened philosophy, invigorated by sound learning, and embellished by elegant literature, the most efficient support of constitutional liberty.”

In 1839, his native town of Barnstable also celebrated the two hundredth anniversary of its foundation. Great preparations were made for the event and a special steamer was sent from Boston conveying the invited guests and visitors. Next to Governor Edward Everett, the Chief Justice was the most important guest. Indeed, it is easy to believe that, in the town of his birth, although officially he had to be given the second place, unofficially he was regarded as the greatest man present. The orator of the day was John G. Palfrey, and at the din-

ner, which was regarded as the most important single feature of the occasion, the Chief Justice followed the Governor in responding to the toast, —

Cape Cod, — though she has few law-suits of her own, she is justly proud of having furnished the distinguished head of the Judiciary of the Commonwealth, to settle the disputes of her neighbors.

His speech was short, with little in it to interest those who were not within sound of his voice at the time, but from his papers we are given an insight into the care with which he prepared himself for every occasion of the kind. With a copy of his speech was found the following sentiments which he had composed, one of which, in accordance with the prevailing custom, he intended to propose at the close of his address: —

The Cape, our beloved birthplace; may it long be the nursery and the home of the social virtues, a place which all her sons and daughters, whether resident or absent, may for centuries to come, as in centuries past, delight to honor and to love.

The Cape; let not that soil be deemed sterile which yields a steady growth of intelligent and enterprising men, and of amiable and accomplished women.

The farmer and the seaman, each in his own way addicted to ploughing; let not him that ploughs the soil despise him who ploughs the ocean.

The memory of Rev. John Lothrop, the first minister of Barnstable, whom history describes as a man of learning, and of a meek and quiet spirit, a noble eulogium.

Of these he selected the first as the best, and with it brought his remarks to a close.

Perhaps the most interesting speech Shaw made while he was on the bench was delivered at the opening of the new court-house in Worcester in 1845. But even here, it will be noticed, his ideas have a distinctly professional cast. His opinions on architecture may not meet with general approval, for he seems to have failed to acknowledge that the line of beauty may be followed in even the humblest structure. But this oversight must be pardoned, in recognition of the fact that his first and last thought was for the law as the exemplification of human progress. The Court-House, the beauty of proportion, the signs of affluence, were but attributes of the law. They were great, not in themselves, but only as evidences of advance in civilization, in the forms of government, and in its administration. His eye in beholding the edifice in which he spoke saw first, wrought into visible and monumental physical form, the symmetry, dignity, strength, and utility of the Law. Shaw could appreciate the artistic line as such. He had that capacity for enjoyment, as was attested by his appreciation of the works of the masters. But at this place and time his sole considerations were for the government of laws which he upheld, and for the expounding of which this structure was reared. This speech is worthy of full quotation:—

Assembled as we are, for the first time in this spacious and massive edifice, appropriated by your care to the high social purpose, the administration of justice, in which it is our vocation to participate, it seems proper for us to pause, before entering upon the ordinary routine of busi-

ness and indulge in a few of the reflections which the occasion is fitted to suggest.

Architecture, although it has objects of utility, beyond those of painting and sculpture, yet like them, in addition to those purposes of utility, may minister to the refined taste of an enlightened people, and in this respect tends to mark the progress of a community in true civilization. Whilst contributing to the essential wants of a people, its progress and improvement manifest their advancement in the cultivation of good taste. Nor is this to be disregarded by those who look to the improvement of our social condition. It is too late in the age of the world to insist that society cannot look beyond a rigid utilitarianism, and must confine its regards to those wants, which regard our external condition only. Food, raiment, and shelter are without doubt essential to our well being, and any system which should not provide a supply for these wants would be defective. . . .

It is a dictate of this sentiment, that beauty and elegance can only be sought after all the demands of security, comfort, and accommodation, have been provided for. Sumptuous and expensive public buildings, therefore, can never gratify a chaste, cultivated, and refined taste excepting when they are raised by a community who have arrived at a condition of affluence. The erection of an expensive public building by a people in narrow circumstances, where their roads and bridges are deficient, the poor unprovided for, public worship meanly supported, schools and other public institutions stinted for want of means, would not only be unwise, but as great a departure from the dictates of good taste, as that of a man of small means who should erect a showy dwelling, whilst his children are suffering for want of education, and his family for the comforts of life. . . .

But these great and essential conditions being secured, it becomes a considerate and reflecting community, to surround this great safeguard of their best interests with

those external circumstances which are best calculated to secure the affection and command the respect of the people. And when the people are prosperous and affluent, and other wants are provided for, this object may be promoted to some extent, by a spacious, sumptuous, and well-constructed house, suited to the capacity and adapted to the cultivated taste of such a community. So far as it tends to promote order, harmony, dignity, and propriety of manners on the part of all those concerned as actors, parties, or spectators; so far as it tends to promote respect for the laws and to impress on the public mind a due sense of their importance, the expense of such an edifice may be justified upon the strictest principles of utilitarian policy.

Ours are not the times, nor are the institutions of your government those, which can spare any means by which the law may maintain its hold upon the affection and respect of the people. Everybody admits, in words, that the supremacy of the law is the safeguard of the people. But "*quid leges sine moribus.*" What can laws accomplish without the efficient coöperation of the people? Almost daily and from various parts of the country do we hear of the triumph of lawless violence, not by individuals only, but by masses, who openly set the law at defiance and violate the rights of life, liberty, and property, sacrilegiously placing blind rage and sanguinary cruelty upon the throne of justice and trampling under foot all that is dear in domestic, social, or political life. Let us not hug ourselves in fancied security on the consideration that these storms rage at a distance only, and whilst we hear their sound, their force has not reached our own peaceful Commonwealth. God grant that it never may. But it cannot be forgotten that our cherished Commonwealth has been the scene of similar outbreaks; that the Court-House of this county has been desecrated by the presence of armed men, assembled, not to support but to prostrate, the supremacy of the law. Let us then, with all humility,

be watchful and vigilant to guard against the causes which would lead to a state of things so disastrous. Let us by every means strive to promote a strong, healthy and abiding public opinion upon this subject. Let us guard against the influence of any theory, however alluring and however sincerely advanced by visionary enthusiasts, which, professing to follow the guidance of more refined humanity, impracticable and incompatible with the actual conditions of society, would seek to destroy the respect of the community for the law and its administration without which the dearest rights of humanity would be without protection.

If in the opinion of any man, or class of men, the law is defective or erroneous, the Constitution has provided the only mode in which it can be re-created, which is by the Legislature. But so long as it remains in force, it is to be respected as the law, not grudgingly and reluctantly, but with honesty and sincerity, because any departure from this fundamental rule of conduct would put in jeopardy every interest and every institution which is worth preserving. . . .

Here may the law be dispensed in purity; here may it ever manifest its supremacy not only in the sternness of its punishing, but in the beneficence of its protecting power. May all those who may be invested with the office of judges be endued with wisdom, be characterized by unending integrity, and the strictest impartiality, and bring to the exercise of their functions the learning, industry, and love of truth, which shall enable them to discharge their duties with fidelity. . . .

May the strictest honesty and honor ever mark the conduct of those who may stand here as attorneys and counsellors. May these walls resound with the tones of eloquence, of simple, natural, unaffected eloquence, flowing from a pure heart, which alone can reach the heart, never perverted to the purposes of chicanery or falsehood, but devoted to its proper and legitimate purposes, that of

detecting guilt, of manifesting innocence, and advancing right and justice.

And may all those of us who are concerned in the administration of justice be ourselves admonished by these reflections; be more deeply impressed with a sense of the responsibility devolved upon us by this high trust; and may we proceed to the discharge of our respective duties with a more resolute determination to perform our whole duty, by the blessing of Heaven, to the utmost extent of our powers, with strict fidelity.

The court-house in which Shaw delivered these words has in its turn given place to one of grander and more magnificent proportions and accommodations. The structure which filled him with such admiration and satisfaction would but poorly supply the increased needs of a city and county now grown beyond all semblance of the community of his time. Yet the present building, on the site of the old, bears phrasings of the thoughts which were uppermost in Shaw's mind during all his life. On the façade, chiselled in the granite, are the words:—

Obedience to law is liberty.

And in the interior, facing all who enter, is the inscription:—

Here speaketh the conscience of the
State restraining the individual will.

At a dinner of the Story Association held on July 15, 1851, at the Law School in Cambridge, Shaw spoke of the broad foundation of the great principles of the common law, without knowledge of which one could not be trusted either as a legislator or as a judge:—

It is a great mistake to suppose that the practical administration of justice in the best and truest acceptance depends on a set of arbitrary and conventional rules, to be artfully and specifically applied, in which he who has the best memory shall be most successful. The true view of the science of law is to regard it as founded on a just view of natural right and natural justice adapted and fitted to become a system of practical rules by reason and experience. Natural right gives the ground and sanction to every rule, but inasmuch as the dictates of natural justice are not exact enough for political purposes, legislative and judicial precedent come in aid to give precision and exactness to the rules. Take a single example: it is a plain dictate of pure and natural justice that an infant of tender years ought not to be bound by a contract, because he wants capacity to make one. It is equally clear that a person of years of maturity ought to be bound. But where draw the line of distinction? Reason alone does not determine that one is incapable at twenty years old and fully capable at twenty-two. Here judicial precedent or legislative enactment comes in aid, and fixes the period at twenty-one, as a general rule, and the law adheres to it afterward for the sake of the certainty of the general rule. Although, therefore, any rule adopted in the administration of justice should be founded in equity and natural justice, yet there is large scope for the use of positive law within the limits of natural right.

In 1856, the four Bridgewater united to celebrate the second centennial of the incorporation of the original town. At this time Chief Justice Shaw made one of the few addresses of the latter part of his life which did not relate in some way to the administration of justice. This was the interesting occasion when a member of the Pokanoket tribe of Indians attended as a representative of the descendants of

Massasoit, the friendly chief who sold to the white men the land upon which the town was located.

The red men have been driven towards the great water at the west [the Indian said], and have disappeared like dew; while the white men have become like the leaves on the trees, and the sands on the seashore.

Shaw was introduced with this sentiment, —

He reads upon the tablets of our quiet churchyard the memorials of his ancestors; on the tablets of our hearts he may read our welcome to the descendant.

Referring to the comparatively short space of time which had elapsed since the day when the territory covered by the town had been “wandered over by a handful of savages,” and the changes wrought therein, he said: —

May I, in this connection, be permitted to allude to a circumstance, somewhat curious in itself, which may aid the imagination in conceiving of and realizing the comparative shortness of this time? We all know, from well authenticated tradition, that Peregrine White was the first child born in the Plymouth Colony; that his birth therefore was at about 1620; and that he lived to be about eighty-five years old, thus carrying him to about 1705. Mr. Cobb, the centenarian of Kingston, died in 1803, at the age of a hundred and seven. Perhaps some who hear me may recollect him. I myself visited him at the commencement of the present century. He stated that he recollected Peregrine White and had seen him, and had heard him talk. And this might even be; for he must have been eight or ten years old when Peregrine White died. Paradoxical as it may seem, Mr. Cobb lived through a part of three centuries, — the seventeenth, eighteenth, and nineteenth. Born in 1696, and dying in 1803, he

lived four years in the seventeenth, during the whole of the eighteenth, and three years in the nineteenth century. These three lives, one, at least, still subsisting, — and probably many others, some of whom now hear me, — cover the whole period from the arrival of the Mayflower to the present time.

The personal habits of the Chief Justice were above reproach. Total abstainers were rare in his time, and he partook moderately and temperately of intoxicating liquors. But during almost the last year of his long life the vitriolic and libellous Wendell Phillips attacked him for attending a dinner at the Revere House at which wine was served. The dinner was a public one, given in honor of Paul Morphy,¹ the chess-player, at which, besides the Chief Justice, the President of Harvard College, the Mayor of Boston, Agassiz, Longfellow, and other notables were present, and Dr. Oliver Wendell Holmes was the toastmaster. The Chief Justice responded to the following toast: —

The judiciary of Massachusetts. Its learning and probity are not better known nor more honored in Boston than in New Orleans. Our guest, master of chess, is yet a student of a more complex science. He will be greeted to-night by words of welcome from the lips whose words of wisdom have long been stereotyped into law.

¹ Morphy was a youthful prodigy. The son of a New Orleans judge, he showed at a very early age a remarkable aptitude for chess. While still a stripling he came North, and after vanquishing all opponents went to England about 1857 to take part in an international match. His talent, however, was early extinguished. While still young he began to suffer from a mental trouble which persisted until his death.

Judge Shaw was received with six cheers, and proceeded to tell an anecdote of a practical printer who became a United States Senator, and who at a public dinner in his honor rose when called on for a speech, took from his pocket a roll of manuscript (here Judge Shaw suited the action to the word), and after apologizing for being unprepared went on to read his remarks. In what he said Shaw drew a comparison between the qualities necessary for a good lawyer and a good chess-player, and showed how many attributes must be common to both. The study of geometry, he said, is claimed to be valuable in preparation for the tactics of cross-examination. It requires the same sagacity to see the end from the beginning in one as in the other. A knowledge of geometry will enable the lawyer to form an image on the retina of the mind's eye and hold it there until he can convey the matter to the minds of those whom he addresses, and in many respects the pursuit of law requires the same traits as the game of chess.

Phillips's strictures upon this event took the form of an open letter addressed to Judge Shaw and President Walker. Phillips still treasured against the former a feeling of hostility for his attitude on the Fugitive Slave Law. But this attack on the venerable jurist exceeded in bitterness anything he had previously said against him. Strenuously as Phillips advocated other reforms it was strange that he was never struck with the thought of his own intemperance in abuse of speech.¹

¹ Few will care to criticise," he said, "if choosing some decent roof, you join your fellows and mock the moral sentiment of the

Shaw was not given to preaching from the bench. But occasionally he felt called upon to point a moral from the conduct of an unfortunate. Whenever he did this it was not unnecessarily, but from a sense of duty. At such times, as Phillips says, he became very earnest, and descriptions of his manner say that his voice "choked with emotion." It was the custom of the judges of those days in pronouncing sentence of death to address to the wretched convict who was hearing his doom a discourse more or less extended upon the error of his way. Had Phillips but known, it had happened fully twenty years before he chose this shining mark for the target of his scorn that the Chief Justice, in the exercise of a painful duty, felt called upon to utter words which had been turned to account by the advocates of total abstinence, and which had been printed and circulated as a temperance tract.

A man named Nathan Smith burst into his wife's

community by a public carousal. But while you hold these high offices, we, the citizens of a Commonwealth whose character you represent, emphatically deny your right to appear at illegal revels in a gilded grog-shop, which, but for the sanction of such as you, had long ago met the indictment it deserves. Again and again, Mr. Chief Justice, have I heard you at critical moments, in a voice whose earnest emotion half checked its utterance, remind your audience of the sacred duty resting on each man to respect and obey the law; assuring us that the welfare of society was bound up in this individual submission to existing law. How shall the prisoner at the bar reconcile the grave sincerity of the *magistrate* with this heedless disregard of the *man* of most important laws? If, again, the times should call upon you to bid us smother justice and humanity at the command of statutes, we may remind you with what heartless indifference you treated the law you were sworn and paid to uphold, and one on which the hearts of the best men in the State were most strongly set."

room one night and murdered her in the presence of her children. He was tried, convicted, and sentenced to be hanged. In condemning him to the gallows the Chief Justice spoke in part as follows: —

It appears by the whole tenor of the evidence that for many years you have been in the habit of indulging in the intemperate use of ardent spirits, and for several years to an increased and mischievous extent. . . . Until you had permitted yourself to indulge in this intemperate excess, nothing appears to show that you were not amiable, respected, and happy, a hard-working and industrious man, with a beloved family and a happy home. But after you had become addicted to the habitual use of intoxicating liquors, all this was sadly reversed; you were occasionally visited by delirium and sickness; you became separated from your wife; your children were scattered; your home was abandoned, and you became a pauper and an out-cast. . . .

But it is the peculiar attribute of Divine Providence to bring good out of evil, and to teach lessons of wisdom as well by evil as by good examples. . . . It is adding another and most impressive instance to the thousands of examples already existing showing incontrovertibly that intemperance is the prolific mother of misery, vice, and crime.

It was to be expected that a man of Shaw's prominence would be a member of many societies. Most of those to which he belonged had a serious purpose of existence, and a number are still among the famous institutions of the country. His official duties made constant demands upon him, and the careful preparation of his opinions, involving exhaustive research, could absorb limitless time. The burden of

the judge of a court of last resort can never be laid aside. He has always on his mind some question of perplexity which, when settled and disposed of, is immediately succeeded by another. Like Sisyphus he is always toiling toward the summit of his mountain of work, but never reaches the top. Shaw's membership in societies, therefore, probably led to slight participation in their activities, with occasional exceptions.

In 1831, he was elected one of the sixty members of the Massachusetts Historical Society, one of the most illustrious institutions of its kind in the country. This is the oldest historical society in America, and was formed in 1794 for the collection, preservation, and diffusion of materials for American history. Until 1833 it met in a room over the arch in the Tontine Crescent, on the south side of Franklin Street, Boston. This home was very simple, and Shaw is recorded as having humbly asked at one of the meetings if the resources of the society would enable it to purchase three more wooden chairs. From there the assembly room was moved to the new building of the Provident Institution for Savings on Tremont Street, opposite the Granary Burying-Ground. This building was owned at first partly and later wholly by the society, and Shaw contributed the sum of fifty dollars toward the fund of five thousand dollars which was raised for the purpose of acquiring the property. Since 1899 the organization has occupied a beautiful building on the corner of Boylston Street and the Fenway.

Shaw was actively interested in the purpose of

this society and frequently attended and spoke at the quarterly and annual meetings. His photograph, taken with the members of the society in 1855, gives a striking illustration of his appearance at the time. He is placed at the left of the president, who is sitting in the chair used by Governor Winslow. Josiah Quincy is on the other side, and with them are Jared Sparks, Edward Everett, Charles Francis Adams, and William H. Prescott. In the middle of the group on a table is King Philip's samp bowl, which was used by the society as a ballot-box. Shaw was then in his seventy-fifth year, yet time seems not to have touched his shaggy crown of hair and its lustre is undiminished. He is also shown in another picture of the society taken in 1858, here, too, seated on the president's left, with his huge white beaver hat in hand.¹

In 1856, when Mr. Thomas Dowse, of Cambridge, gave his splendid library of about five thousand volumes to the Historical Society, one volume was delivered in hand to Mr. Winthrop, the president, as an earnest and evidence of the whole gift. This volume was a copy of "Purchas, his Pilgrimes," and the Chief Justice could not refrain from making the pun that the society now had the book "by gift, and not by Purchas."²

On one occasion at a meeting of the society, Shaw narrated an interesting interview he had many years before, "when visiting with a friend the battle-ground

¹ Massachusetts Historical Society's Proceedings, 2d Series, vol. 6, p. 77.

² Joseph A. Willard, *Half a Century with Judges and Lawyers*.

of Bunker Hill with a man who was one of the working party sent to the hill on the night of June 16th to work upon the fortifications; by which it appeared that, although the working party was at entire liberty to leave when the troops came and took possession, this party voted to a man to stay and fight out the battle.”¹ This mention of Shaw is also made in the records of the society’s proceedings, concerning the house in which the members then had their meetings: —

The estate having been confiscated by the Government because its owner was a Tory, when the commissioners were putting it up for sale an old colored man, a slave, who had long served in the Vassal family, stepped forth and said that he was no Tory but a friend of liberty, and having lived on the estate all his life he did not see any reason why he should be deprived of his dwelling. On petitioning the General Court a resolve was framed granting Tony a stipend of twelve pounds annually. About 1810, after Tony’s death, Cuba, his widow, went to the State Treasurer to get her stipend, but it was found that the resolve did not include herself. Mr. Shaw, then a member of the House, presented her petition for the continuance of the grant. It met with favor, and the annual sum was voted to Cuba during her natural life.

Shaw was president of the Society for Propagating the Gospel among the Indians, from 1837 to 1861. This was an association formed in 1787 which took up the work formerly performed by two societies of somewhat similar names chartered in England in 1649 and 1701. At one time it manifested much activity in the employment of missionaries.

¹ Massachusetts Historical Society’s Proceedings, 1st series, vol. 3, p. 99.

Shaw was the first secretary of the Washington Benevolent Society composed of ardent Federalists and organized in 1812. The first draft of the constitution of this organization, commending Washington's Administration, and pledging the members to use their best efforts to support the Constitution in its original purity, was in Shaw's handwriting. At first the society was very active and held meetings twice a week for the admission of members, and quarterly meetings when addresses were delivered. A public celebration was given on April 30, the anniversary of the inauguration of Washington as President. Its activity was short-lived, however, and in 1819 the society ceased to hold meetings, and in 1824 was dissolved. Josiah Quincy, Edward Everett, and William H. Prescott were among the members.

Shaw was also a member of the Pilgrim Society and was concerned with the raising of funds for the erection of a monument to the memory of the Pilgrims and a building for the accommodation of the society.

In 1824, he was made a Fellow of the American Academy of Arts and Sciences, and in 1845 he became a proprietor of the Boston Athenæum, continuing as such until his death. The share held by him then passed to his son Lemuel, who served as secretary from 1857 to 1861 and as a trustee from 1862 to 1864.

The Friday Evening Club and the Law Club held meetings more purely social in character, which were much enjoyed, as were also the gatherings of the Boston Library Society, an organization in no way

connected with the Boston Public Library, but similar to the Athenæum, although long since outstripped by the latter in size and importance.¹

The Chief Justice always took a great interest in Harvard College and was closely connected with it for the last part of his life. He took the degree of A.M. three years after his graduation, and shortly after his promotion to the bench, in 1831, was made a member of the Board of Overseers, upon which he served till 1853, when he resigned. He was president of the Phi Beta Kappa Society from 1832 to 1837. In 1834, he became one of the Fellows, remaining such until death. During his service upon these boards he saw Everett, Sparks, and Felton inaugurated as presidents of the university. In 1841, with President Quincy and Judge Story, he was appointed by the corporation to solicit contributions to the college library, and the three in performance of this duty made personal calls upon gentlemen from whom they had reason to hope for subscriptions.

¹ The Friday Club was composed of thirteen prominent men of Boston who met in the afternoon at the houses of the members for the purpose of friendly intercourse. The most prominent member, next to Shaw, was Benjamin R. Curtis, the Justice of the United States Supreme Court who dissented from the opinion of Chief Justice Taney in the Dred Scott case. In 1855, the full membership of the club was as follows: Charles P. Curtis, Thomas Motley, Nathan Hale, Benjamin R. Curtis, George Hayward, James K. Mills, Lemuel Shaw, Francis C. Gray, Nathan Appleton, Charles H. Warren, William Sturgis, Thomas W. Ward, and Thomas B. Curtis.

The Law Club was composed, in 1858, of the following members: Rufus Choate, — Carter, Nathan Hale, Charles G. Loring, William P. Mason, Peleg Sprague, Chief Justice Shaw, Judge Putnam, Judge Wilde, and Thomas A. Dexter.

Quincy described these expeditions as "exploring for uncertain treasures." He served as a member of the first board of trustees of the Museum of Comparative Zoölogy, which was founded in 1859. In 1831, he received the degree of LL.D. from Harvard, and was similarly honored by Brown University in 1850. When the "Society for the Promotion of Theological Education in Harvard University" was founded in 1816, he became one of the annual subscribers to that object. In 1826, he contributed to the subscription for funds with which Divinity Hall was built.

In 1840, Judge Story and Simon Greenleaf sent a joint letter to Shaw stating that "we are desirous of embellishing the Law department of this institution with likenesses of the distinguished jurists of our country, of which we have commenced a collection, and having seen a striking likeness of yourself by Clevinger, we respectfully request you to place a copy of it at our disposal for that purpose." The Chief Justice's answer to this request can be seen to-day in the bust which reposes in the reading-room of Austin Hall at Cambridge.

In 1848, Shaw was active in an attempt to induce Rufus Choate to accept the Dane Professorship of Law at Cambridge. The Harvard Law School, under the able direction of Judge Story, who with remarkable ability held a professorship there while at the same time a member of the Supreme Court of the United States, and engaged in writing the legal textbooks which perpetuate his name, was in a flourishing condition. Judge Shaw was much inter-

ested in the school, both as a lawyer with a high regard for the dignity and responsibilities of his own profession, and as an Overseer and Fellow of the University. In Shaw's opinion, —

It was regarded as an institution to which young men could be beneficially sent from every part of the country to be thoroughly trained in the general principles of jurisprudence, and the elementary doctrines of the common law, which underlie the jurisprudence of all the States. This reputation which is believed to be well founded, was attributable, in a great measure, to the peculiar qualifications, and to the efficient services of Judge Story, in performing the duties of his professorship.

After Story's death, a worthy successor to him was sought, and attention was directed to Choate by Shaw, who described him as follows: —

At once an eminent jurist and an advocate conspicuous for his commanding and persuasive eloquence, whose services, if they could be obtained, would render him eminently of use in the Dane Law School. Indeed he was too prominent a public man to be overlooked, as a candidate offering powers of surpassing fitness for such a station.

Consequently the professorship was tendered to Choate, in the hope that, having apparently retired from political life, he might find it agreeable to his inclinations and tastes to accept the offer. It was recognized, however, that Choate would never agree to renounce his practice at the bar entirely, partly because the salary of the professorship would be much smaller than the income his practice afforded, but more, perhaps, because of his love of advocacy and his profound delight in practice. Nor was it

desired that he should do so, for Shaw expressed the opinion, which was shared by the other members of the corporation :

That in appointing instructors for an academical institution designed to instruct young men in the science of jurisprudence, and in part to fit them for actual practice in the administration of the law in courts of justice (an opinion, I believe, which they hold in common with many who have most reflected on the means of acquiring a legal education), it is not desirable that an instructor in such institutions should be wholly withdrawn from practice in courts. Law is an art as well as a science. Whilst it has its foundation in a broad and comprehensive morality, and in profound and exact science, to be adapted to actual use in controlling and regulating the concerns of social life, it must have its artistic skill which can only be acquired by habitual practice in courts of justice. A man may be a laborious student, have an inquiring and discriminating mind, and have all the advantage which a library of the best books can afford, and yet without actual attendance on courts and the means and facilities which practice affords, he would be little prepared either to try questions of fact or argue questions of law. The instructor, therefore, who to some extent maintains his familiarity with actual practice, by an occasional attendance as an advocate in courts of justice, would be better prepared to train the studies and form the mental habits of young men designed for the bar.

Accordingly, a plan was devised by which the duties of the professorship would be so arranged as to permit Choate's attendance at Washington during the entire session of the Supreme Court there. At that time the Law School year was divided into two terms, the first beginning in September and ending near the middle of January, the second beginning

March 1 and continuing to July. The session of the Supreme Court began the first week in December and ended the middle of March. Shaw said: —

The advantages to Mr. Choate seemed obvious. When it was previously known that he might be depended on to attend at the entire term of the Supreme Court, we supposed he would receive a retainer in a large proportion of the cases which would go up from New England, and in many important causes from all the other states.

The plan, however, failed to secure Choate's approval. It involved the relinquishment of all jury trials, and this he probably could not bring himself to do. The Chief Justice's own account of his attempt to secure his services for the Law School closes as follows: —

Mr. Choate listened attentively to the proposals, and discussed them freely. He was apparently much pleased with the brilliant and somewhat attractive prospect presented to him by this overture. He did not immediately decline the offer, but proposed to take it into consideration. Sometime after, perhaps a week, he informed me that he would not accede to the proposal. He did not state his reasons, or if he did, I do not recollect them.¹

In 1843, the Legislature, in an attempt to retrench in matters of expense, reduced the salaries of all State officers, including those of the judges. When Shaw was appointed Chief Justice the salary was thirty-five hundred dollars a year, and by this measure it was reduced by five hundred dollars. When this step was being debated, the Chief Justice prepared a protest in the shape of an address

¹ Brown, *Memoir of Rufus Choate*.

to be presented to the Legislature, stating his view that the proposed act was contrary to reason and justice, the spirit of the Constitution, and the best policy of the Commonwealth. But on the very evening when this paper was being prepared, the act was adopted, and it never was presented. In this address he argued that the Constitution, by declaring that permanent and honorable salaries should be established by law for the Justices of the Supreme Judicial Court which might be enlarged if found insufficient, strongly implied that the salaries should not be diminished. A judge who had taken office under a fixed salary had made a quasi-contract with the State, under which he was entitled to receive that salary without diminution so long as he remained on the bench. As a matter of expediency, also, he argued, a judge should receive an honorable and permanent salary, which, although it might not equal the amount he could be expected to earn in private practice, yet should be sufficient to enable him to live upon it in his accustomed manner, support his family, and educate his children. He concluded with a reference to himself, in which he stated that he had no hesitation in saying that, although it was his belief that had he not been on the bench his income would have been at least twice his salary, yet he had never regretted making the pecuniary sacrifice.

When he came to prepare his response to the address from the bar after his retirement in 1860, his written remarks contained a reference to this matter, and to his attitude upon it, but for some reason he

did not read this part with the rest. His feelings on the subject were so strong that he would not draw his salary at the reduced figure, but refused to touch it.

In 1844, the Governor, in his message, urged the Legislature to repeal this act and restore the salaries of the judges to their former figures. The Committee on the Judiciary, by a majority report headed by Leverett Saltonstall, took the view held by Shaw that the act reducing the salaries was unconstitutional and a breach of good faith on the part of the State. Acting upon the report of this committee, the Legislature restored the salaries to the old amount, and in addition made up the deficiency resulting from the deduction.

Although one of the objections to accepting the Chief Justiceship noted by Shaw before his appointment was his thought that he would "miss the opportunity of travelling, of making tours and journeys, and be confined principally to the pale of the Commonwealth," yet he does not seem to have felt the restriction upon his movements to the extent he feared. Although never an extensive traveller, he was far from being "content to breathe his native air on his own ground" to the same degree as his former pupil, Sprague. Travel in his time was not the matter of ease and luxury it has become to-day, and a trip to Europe was more the event of a lifetime than the annual holiday of modern years. Yet excursions in his own country were taken to a considerable extent, and in 1853 he enjoyed a journey abroad.

In this country his travels included a visit to Niagara and Canada and a stay in Washington. He also voyaged to Chicago by way of the Great Lakes in 1845.

His travels abroad comprised a tour of England, Holland, the Rhine, Switzerland, and France. In London he visited Westminster Hall and heard a law argument there. He had a letter to Baron Alderson, and was entertained by him at his home. He also bore letters of introduction to the American Minister, who had him to dine at Portland Place, Lord Chief Justice Campbell, Lord Lyndhurst, the Earl of Rosse, Earl of Clancarty, Lord Derby, the Lord Lieutenant of Ireland, and Guizot and de Tocqueville in Paris. The Duke of Marlborough threw open Blenheim Palace for his inspection. At Oxford the Chief Justice lived during his stay in rooms at Brasenose College which had been placed at his disposal, and attended the sheriff's dinner at the opening of the Assizes. The dinner seems to have been a grand affair attended by the magistrates and leading men of the county and university, but not by the judges, whom etiquette forbade to accept an invitation from the sheriff. In the course of the speech-making, Shaw was alluded to as an American judge and stranger of distinction, and his "health was drunk in such a manner that it was impossible to avoid rising to return thanks for the honor"—which he did. What he said, upon his own admission, "was received with all external marks of favor and satisfaction."¹

¹ Samuel S. Shaw, *Lemuel Shaw, Early and Domestic Life*.

CHAPTER X

CLOSING YEARS AND DEATH

THE summer of 1860 found the Chief Justice in his eightieth year, of unimpaired vigor of mind and with little visible sign of bodily decrepitude. For thirty years he had sustained the growing burden of his office, and each of these years had added to his reputation as a judge and to the respect and veneration in which he was held throughout the State and country. His last opinions show the workings of a mind as clear and robust as when his term of service began. But unremitting toil bore upon him at the last with such increasing weight that he was conscious that his work in life was nearly done and that his service to the law lay behind him. He wisely wished to leave his work while the line of his achievement showed not a break or a waver.

In June, 1860, he disclosed to his colleagues his intention of resigning, which drew from them the following letter:—

Your associates upon the bench received in silence and with emotion too profound for immediate utterance the announcement of your purpose at an early day to resign the office of Chief Justice of the Supreme Judicial Court. Before that purpose is made public or irrevocable we should not do justice to our feelings if we did not say to you that while we cannot fail to recognize your perfect right to select your own time for withdrawing from the exhausting labors of your office, and while we know how

well your long and honorable career in the public service has entitled you to enjoy the repose you seek in advancing age, yet each of your associates would wish that time deferred as long as would be consistent with your own comfort and happiness. We feel that our own loss as well as that of the whole community by that course would be irreparable. You may be assured that you have the unabated affection, confidence, and reverence of your associates, and of the people of the Commonwealth. With this expression of our feelings and renewedly declaring the gratification we should have in every year which could be added to the period of our official connection, we remain, with the highest respect and friendship, your associates,

CHARLES A. DEWEY.

GEO. TYLER BIGELOW.

EBENEZER R. HOAR.

THERON METCALF.

PLINY MERRICK.

On the 21st day of August, 1860, he resigned his position and withdrew to private life.

Two weeks later the bar of Berkshire County, where his court was then sitting, with peculiar propriety recognized the close of the career which had begun there in the fall term of 1830. In the same court-room where Shaw had first taken his seat resolutions were first presented expressing the regret of the bar at his resignation, recalling "the acuteness and power of his intellect, his sound and varied learning, his patient and faithful investigation, his sensibility to the natural justice and equity of particular cases, and yet his inflexible regard to the uniformity of established legal principles."

A few days later a meeting of the bar of the whole Commonwealth was held in Boston, and an ad-

dress was prepared, adopted, and signed by a committee representing all the counties of the State. Butler says that he, as chairman of the committee, was the author of the address, and that he took great pains with it, feeling every appreciative word from his very heart.¹ These sentiments congratulated Shaw upon his full enjoyment of health and undiminished vigor of intellect, and thanked him in the name of the people of Massachusetts for his long and beneficent public service, and for the distinction which he had conferred upon the tribunal over which he had presided. His service to the law was described in these words:—

It was the task of those who went before you, to show that the principles of the common and the commercial law were available to the wants of communities which were far more recent than the origin of those systems. It was for you to adapt those systems to still newer and greater exigencies; to extend them to the solution of questions, which it required a profound sagacity to foresee, and for which an intimate knowledge of the law often enabled you to provide, before they had even fully arisen for judgment. Thus it has been, that in your hands the law has met the demands of a period of unexampled activity and enterprise; while over all its varied and conflicting interests you have held the strong, conservative sway of a judge who moulds the rule for the present and the future out of the principles and precedents of the past. Thus too it has been, that every tribunal in the country has felt the weight of your judgments, and jurists at home and abroad look to you as one of the great expositors of the law.²

¹ Butler's Book, p. 1002.

² This address is printed in full in 15 Gray 602. The original, and Shaw's reply, are in the possession of the author.

After framing this memorial the committee proceeded in a body to the house of the former Chief Justice, where it was read to him by Levi Lincoln, who as Governor had placed him on the bench. Shaw made the following reply, his feelings at times overcoming him to the extent that he broke down in his expressions:—

GENTLEMEN OF THE BAR OF MASSACHUSETTS:—

Your presence on this occasion, at the close of a judicial life, now somewhat extended, and the very kind and warm-hearted expressions in which you have felt justified in communicating your approbation of my judicial course, offered in this hour of parting, are most welcome and acceptable. It affords me an opportunity which I have long desired and now readily seize, to express to the government and people of the Commonwealth, and more especially to the entire bar of Massachusetts, my hearty thanks for the kind and marked respect with which they have uniformly honored and cheered me personally from the first moment of my appointment to the present time; and more especially for the confiding and indulgent, I might almost say the forbearing spirit, in which my professional brethren have regarded all my efforts towards the performance of the great duties with which I have been entrusted.

Be assured, my friends, this is no new or sudden feeling awakened by strong expressions of regard incident to the close of a career of judicial administration; it has rather resulted from my recollection of constant intercourse which has actually existed between judge and advocate in trials, sometimes involving the most interesting and exciting topics, and leading to earnest and animated debate. If, upon such or any similar occasion, a momentary spark of resentment was excited at any supposed wrong, I am happy to believe that the feeling was

but momentary, yielded to any reasonable explanation, and was forthwith forgotten. This abiding reliance upon the good will of my professional associates, the advocates at the bar, to do justice to my motives and to think favorably of my judicial acts, was early and deeply impressed upon me; impressed indeed with so much force and effect, as to become a practical ground of relief and comfort in the performance of responsible duties, the weight of which would have otherwise been almost too oppressive to be borne.

But now that my judicial labors are finished, and the responsibilities attending them have terminated, nothing could be more consolatory to my feelings, than the deliberate approval of my judicial course, by those most conversant with the contests and struggles of the forum, most concerned in maintaining the justice and efficiency as well as the honor and dignity of our jurisprudence, most capable of forming a true estimate of judicial character.

Gentlemen, in this slight retrospect of my judicial course, indeed in reviewing the whole course of my life, I desire in this solemn hour to express my sincere and devout gratitude to that benignant and overruling Providence, who has crowned my days with innumerable blessings, without whose sustaining aid all human strength is but weakness, and the highest human exertions but vanity. May the smiles of that Divine Providence ever rest on the administration of justice, and on all the great civil and social interests of our beloved Commonwealth, to invigorate the mind, to warm the hearts, and to enlighten the consciences of all those engaged in their administration.

Gentlemen of the committee, my brethren, associates and friends, as I recognize in you the representatives of the bar of Massachusetts, and in meeting you for the last time, I feel that it is no meeting of strangers. In regard to most of the members of our profession, indeed all of them who approach my own position in point of age, I have been associated with them not only in the labors of a

common and honorable profession, in the interesting connection of judge and advocate in the actual administration of justice, but in the relations of friendship and social attachment. It is in a consciousness of this relation, and not, I hope you will believe me, in any feeling of arrogance, that I receive with grateful satisfaction the very strong expressions of commendation, in which you sum up your estimate of my official course. I know the source whence it originates, and the feelings which clothe and accompany it, and the purpose it is intended to accomplish; and I have yet to learn that an approving judgment is less the true exponent of the mind that utters it, or less dear to one on whom it is bestowed, because conveyed in expressions tinged by the colors and warm with the glow of affectionate feeling. The termination of the interesting relations which have so long and uninterruptedly continued, seems a fit occasion for laying aside reserve, and speaking from the fulness and sincerity of the heart.

Gentlemen, pardon me in glancing a moment at the future, so far at least as to express a hope and prayer for the continued prosperity of institutions to which our lives have been dedicated. My hope rests on the enlightened character of the people of Massachusetts. I have already, from my own experience of the habitual respect of this community for the judiciary and its officers, spoken of the support and encouragement which it has afforded me under the weight of judicial responsibilities.

You will not, I am sure, ascribe to me the vanity of believing these favorable regards to proceed from any consideration personal to myself. No, gentlemen, I believe, and I rejoice in the conviction, that a noble veneration for the judiciary department of the Government, and respect for those to whom it is entrusted, is the pervading sentiment of the great body of the freemen of Massachusetts; that it nourishes and sustains an abiding conservative principle, favorable to the independence

and stability of the judiciary, as the foundation of public peace, and the security of private rights. Much, very much, was done by the wise founders of our Commonwealth to give force and effect to those principles and to maintain the just power of the judiciary, as among the essential elements of good government. . . .¹

Gentlemen, in terminating a long course of professional and judicial life, and in taking leave of those with whom I have so long labored in the study and practice of the law and in the administration of justice, I am happy to bear a strong testimony to my high sense of the influence and power of the legal profession, when honor, integrity and a conscientious regard to duty are its true characteristics. On you, gentlemen, and your associates and successors, as the professed ministers of the law, it depends to maintain this character. From your ranks, subject to your training, must be drawn all those who are called to the office of judges; in truth, the value and efficiency of the jurisprudence of Massachusetts is committed to your charge. And my last earnest hope and prayer for yourselves and successors, and for all the people of our beloved Commonwealth, is, that through an honorable practice of the law, and a faithful administration of justice, they may long continue to enjoy the inestimable blessings of liberty, safety, and peace.

The venerable man, however, was not to be permitted by fate to enjoy even a brief period of repose from his long labors. After his retirement there still remained a number of opinions for him to write, and in the preparation of these he busied himself. He had long been a sufferer from asthma, and the fall after his resignation did not bring the relief usually experienced with the passing of summer. An affection of the heart also was noticed by

¹ The paragraph omitted is quoted *ante*, p. 188.

his physician, which, however, was not thought to be of a serious nature. During the following winter he was confined to his house, suffering much discomfort from the asthma, but still persisting in his efforts to finish his work. Although he rarely ventured abroad during the last two months of his life, he worked upon his unfinished opinions, and kept his own books of account almost to the day of his death, making all entries in a clear hand, regularly, and in good order.

On the 29th day of March, 1861, he was driven out in the afternoon and took dinner with his family according to habit. He came downstairs that night unassisted, but late in the evening showed a marked change, lapsing into delirium from which he never emerged to consciousness. In his disordered rest he imagined himself once more in the court-room performing his accustomed functions of office. Through the long night the watchers at his bedside, and other sleepless inmates of the household, heard his incoherent addresses to imaginary juries, of which almost the only intelligible words, "Gentlemen of the Jury," were repeated over and over again.¹ On the morning of the 30th he died gently and without suffering. His devoted wife

¹ This reversion of the mind of a dying judge to the court-room has been noted in two other conspicuous instances. The last words spoken by Chief Justice Parsons, the greatest of Shaw's predecessors, were these: "Gentlemen of the jury, the case is closed, and in your hands. You will please retire and agree upon your verdict." (Theophilus Parsons, Jr., *Memoir of Theophilus Parsons*.) And thus spoke Lord Chief Justice Tenterden with his last breath: "And now, gentlemen of the jury, you will consider of your verdict." (Lord Campbell, *Lives of Chief Justices*, vol. 3, p. 335.)

had kept a careful record of his last days. The following entry closes her diary: —

Friday, 29 of March, '61.

Mr. Shaw had a bad night. About 12 he rode through the city, came home and took some refreshments such as wine and water. He laid down and appeared very restless. His mind was continually talking about bondages, corporations, and business of all kinds. Samuel stayed up until two o'clock in the morning. I then got up, sat up awhile and called Lemuel up. He did not suffer in appearance but his voice I hardly could understand. When I returned from calling Lemuel I found him just rising to sit in his chair. I led him to his chair. He appeared to breathe better, — not one word did he say, but expired Saturday morning about thirty minutes before eight o'clock. Dr. Hayward came, but it was too late. Not a struggle did he have, but literally he fell asleep.

His funeral, notwithstanding a violent snow-storm that obstructed many of the railroads, was largely attended. The Governor, judges of the courts, the President and Fellows of Harvard College, members of the Suffolk Bar, delegations from the bars of other counties, and representative citizens generally were present. The preacher took for his funeral sermon this text, "A just man and one that feared God." He was buried in Mount Auburn Cemetery in Cambridge.

Many memorial meetings were held at which sincere and profound tributes of respect to the dead Chief Justice were paid in terms of admiration and veneration. These in themselves would fill a volume of eulogy and praise. We can quote but briefly from them here.

At the presentation of resolutions by the bar to the Supreme Judicial Court the Attorney-General said, in offering them, that he could not remember a time when Shaw was not the venerable Chief Justice of the Commonwealth, "holding a secure position in the affections of its citizens, and by universal acknowledgment in fact, as well as in station, the chief of the jurists."

Chief Justice Bigelow, Shaw's successor, responded, in part:—

With a simplicity of character and truthfulness almost childlike, he united a sagacity and clear insight into the motives and actions of others, which enabled him to detect deceit and hypocrisy at a glance. Firm, courageous, and inflexible, he was also gentle, affectionate and kind. But above all—and this, if anything, was the leading feature in his character—he had that clear and unerring judgment, that just perception of the right, that instinctive knowledge of the true relations of things, which may be best described as good, sound, Anglo-Saxon common sense.

The different societies to which Shaw had belonged paid their tributes of respect. Before the Academy of Arts and Sciences, Charles G. Loring delivered an address from which this extract is taken:—

No subject was presented, whether of morality or civil polity, of science or of art, concerning which he did not instinctively seek the ascertainment of its fundamental law, its reduction to first principles. It mattered not whether it were the government of a State or the construction of a contract; the revolution of a comet, or the circulation of the blood; the working of a steam engine or a machine for the manufacture of a pin. . . .

In his remarks before the Historical Society over the loss of its valued member, Professor Parsons said:—

He carried with him to the bench ability, industry, learning, cautious and comprehensive sagacity, and absolute integrity; and upon him rested all the hopes which characteristics like these would inspire and justify. But I have thought it one of his most remarkable peculiarities that these high qualities were never in him opposed and enfeebled by those counteracting weaknesses and proclivities which other men have suppressed and overcome, but very few have found no need of overcoming. For example, vanity, — and I mean by this the love of distinction, applause, and popularity, — has been called a universal passion; but it had no place in him. . . . So, too, if we look at a lower proclivity, — the care for one's own interest or position, and the wish to strengthen their foundations and insure their permanence, — we shall seldom find those who occupy a high place and fill with activity and usefulness a wide sphere, who do not need to remember that they must learn to forget self; but this thought, this caution, never came to him; and there never was any reason for its coming. . . .

CHAPTER XI

APPEARANCE AND MANNER — CHARACTERISTICS — HOME LIFE — HIS WORK — POLITICS AND RELIGION

WHATEVER of interest or profit there is in the study of the life of Chief Justice Shaw must lie in a survey of what he did and the methods and means by which he accomplished it. There is little to be gained through the use of general terms and the exercise of adjectives. Greatness defies description. It must be seen, and felt, and heard to be appreciated. An attempt to describe a great man too often results in the use of a string of threadbare platitudes.

It is needless to tell the lawyer why Shaw was great. Almost daily he reads the decisions which are the chief basis of the distinction which is his by common accord. Others must take the fact of his greatness largely upon faith, and to recognize clearly the reasons for his eminence must study the law for themselves. Professional achievement can be fully appreciated only by members of the same profession. Nothing remains, therefore, but to speak of some characteristics of the man and his work which have not thus far been mentioned, but which are necessary for a full description of his deeds and personality.

Shaw looked the judge. The influence of solemnity of procedure and surroundings is a constant adjunct of the law. Experience has shown that formality in the court-room is most conducive to satisfactory

results, and that decorum and some degree of ceremony are necessary accompaniments of the proper exercise of the functions of a court. We need to be reminded constantly of the majesty and dignity of the law, and the irresistible weight of its decrees. No one could be unmindful of these things when he looked at Shaw upon the bench. His frame was large and powerful, although he was not tall in stature. His movements were slow and somewhat ponderous. He was also slow of speech, and his voice was deep and low. So deliberate was his utterance that sometimes the children at home thought he had quite finished what he was saying, when he only paused in thought. His face was grave and massive, but it could brighten with humor or be suffused with tenderness. His pastor, the Reverend Orville Dewey, thus described him:—

A form in whose ample dimensions neither intellect nor feeling was buried, but which was but the larger and more sensitive vehicle for both; a face such as we rarely see, in which not only grave and mature wisdom seems to have seated itself, but in which each separate, prominent, protuberant feature appeared to have been a post of keen attention and observation, and over which, if something like somnolence seemed at times to gather, as is often the case where deep thought broods, yet could it brighten into humor, or soften into tenderness.

Said another of his contemporaries, "Had Michael Angelo seen his head, he would have made a Moses of it." His head was surmounted by a mane of tousled chestnut hair which gave his wife much trouble. Every morning before he went to court she

would see that it was nicely brushed. His first act on reaching the court-room usually was to thrust his hand through the smoothed locks, ruffling them into their customary shagginess; and in this unkempt state, and not with his crown carefully smoothed by the hand of a loving wife, does his likeness meet the eyes of posterity in his portraits. His hair kept its color and lustre throughout his long life, and locks cut from his head after death, and kept by his widow in an old Florentine brooch which she wore, show hardly a trace of white.

His best-known and most striking portrait is by Hunt and hangs over the bench in the court-room at Salem. This was painted in 1859 at the request and expense of the Essex Bar Association "in appreciation of the great public services of His Honor and the unsullied purity of his private and judicial life." A small sketch of it is in the gallery of the Massachusetts Historical Society. Another portrait hangs in the old court-room at Lowell, and two more are in the court-house in Boston. His likeness was also engraved upon bank-notes issued by a Cape Cod bank, which were in circulation in 1859. A bust by Clevinger, modelled in 1839, is in the Boston Athenæum, and a copy adorns the Supreme Court-Room in Boston. Others are at the Harvard Law School and in the court-room at Barnstable.

More than once has his appearance been described as leonine. Rufus Choate is reported to have said, when watching a sculptor at work upon the figure of a lion, "Why, that is the best likeness of Chief Jus-

tice Shaw that I ever saw." To the great advocate as well are ascribed other descriptions, through the keen wit of which we can see his great admiration and respect for the Chief Justice. His biographer gives us the following account of a conversation which occurred in court where Choate was waiting for a case to be called: —

Mr. Choate and I were sitting at the bar, being concerned in the next case. As I looked up at the bench the large head of the Chief Justice presented itself settled down upon his breast about as far as it could go, his eyes closed, his hair shaggy and disordered, having on a pair of large black spectacles which had slid down to the very tip of his nose, and his face seeming to have discharged for the time every trace of intelligence. I looked and then looked at Mr. Choate whose eyes had followed mine, and then said to him that notwithstanding the curious spectacle he sometimes furnished us I could not look at the Chief Justice without reverence. "Nor can I," he replied. "When you consider for how many years, and with what strength and wisdom, he has administered the law, — how steady he has kept everything, — how much we owe to his weight of character, — I confess I regard him as the Indian does his wooden log, curiously carved; I acknowledge he's ugly, but I bow before a superior intelligence."¹

From another source the same story comes in somewhat different form, to the effect that at a law-club meeting Choate gave as a sentiment "The Chief Justice! We contemplate him as the East Indian does his wooden-headed idol, — he knows that he is ugly, but he feels that he is great."²

¹ Brown, *Memoir of Rufus Choate*.

² Parker, *Reminiscences of Rufus Choate*.

His manner upon the bench was dignified and impressive. He did not have great fluency of speech, and his words had weight rather than brilliancy or eloquence. It is hard to conceive any of his reported speeches, whether from the bench or elsewhere, to have been uttered otherwise than in a deliberate manner. In this respect his style was much more like that of Webster than of Choate. Then, too, like Webster, his appearance as he spoke filled the eye and compelled attention. Deliberate delivery and good personality were two qualities upon which he laid great weight in declamation. This appears from notes made on the margin of his programme of the speaking exhibition given by members of the two junior classes of Harvard College, which he attended as a member of a committee to visit the university in 1821. His pencilled comments upon the different declaimers were such as these: "A good faced person, — declamation inclining to monotonous, — too rapid." "Declamation passable, rather rapid." "Declamation pretty good, a little too rapid." "Declamation very clever, slightly injured by a bad face." "Very stiff, — affectation, — action bad, — personality good, — small beer, mighty frothy, mighty flat."

This weight of manner caused jurors to give close attention to his instructions and led to better understanding than careless or unimpressive utterance. "Let Judge Shaw give instructions to the worst set of men in the Commonwealth who ever constituted a jury," said a speaker in the Constitutional Convention of 1853, "and we know they

would regard his testimony." A grand jury at Ipswich were so "deeply impressed with the importance and value of the sentiments contained in the charge of His Honor Chief Justice Shaw," that they formally requested a copy for the press. The Chief Justice complied, and the charge was printed at the expense of the jurors.

Although he is said to have been delightful in conversation, and to have had a fund of anecdote from which he drew liberally in friendly intercourse, yet it is difficult to believe that he was much given to jest. No characteristic of lawyer or judge seems more likely to survive than this, and the traditions of the bar are filled with anecdotes of repartee and humor. The almost utter lack of such reminiscences of Shaw indicate pretty clearly that he did not have this tendency. It is true that Senator Hoar gives a story of the judge's early youth which seems to indicate promise in this respect. A plate of buttered toast was being passed and by some chance came to little Lemuel first. He carefully selected and removed the undermost slice. His mother reproved him, saying, "Why Lemuel, you should n't do that. What if every one did the same thing?" "Then every one would get a bottom slice," was his ready answer. Another tale concerns Harrison Gray Otis, who was a brilliant and fluent speaker. Shaw was told that Noah Webster was about to bring out a new dictionary containing three thousand new words. "For heaven's sake," was his comment, "don't let Otis get hold of it."¹ But a brilliant

¹ Historical Magazine, vol. viii, p. 185.

and flashing wit undoubtedly would have left more vivid reflections than these lonely instances, and their absence has much significance. His mind was of too serious cast, and he was too absorbed in his work, to turn aside for levity. It is believed that a careful examination of his judgments and opinions will fail to disclose an instance where he availed himself of an opportunity to be facetious. Every case was to him, as well as to the litigants, a serious matter, and before him at *nisi prius*, we may well conclude, no case was ever "laughed out of court."

The Chief Justice was no respecter of persons or of cases. He gave to the youngest practitioner the same willing ear and respectful attention that he accorded to the leaders of the bar. He bestowed upon the smallest case the same careful consideration with which he judged the one involving thousands. To him the question of dollars and cents was of no importance. The legal principle involved was the only thing that appealed to him, and a great question of law was as likely to come up in a case involving a few dollars as in one over millions. As an instance of this we have an incident which occurred in a trial before him at Worcester. He was giving his decision in a small case involving the question of whether a calf was exempt from attachment.¹ The contrast between the weighty words of the Chief Justice and the trivial question he was discussing seemed to provoke the mirth of some of the lawyers present. "The old man paused and

¹ *Carruth v. Grassie*, 11 Gray, 211.

said with much emotion, 'Gentlemen, this may seem to you a trifling case, but it is a very important question to a great many poor families.' And," the narrator says, "it increased the regard of every man present for the Chief Justice, to find that he had a heart to be so touched, and to be thus reminded that not only the great principles of constitutional law and liberty, and the most important rights of property, but also the minutest interests of the humblest poor, were the objects of his anxious care, and equally sacred and safe in his keeping."¹ In another case involving the value of a load of hay, after expressing his regrets that a cause "involving so small an amount of property should have taken a course which will probably subject the parties to a heavy expense in costs," he proceeded to render a lengthy opinion granting a new trial.²

His consideration for the feelings of others an instance related by his granddaughter will serve to illustrate. One evening at home, when the household was gathered on the lower floor, he was called to the door to see a stranger. Shaw courteously invited him in, and taking him aside listened attentively for a considerable time. At the end of the interview he graciously saw his visitor to the door and bade him good-night. On his return to the family, they inquired who the man was, and why he had been treated so considerately. "My dears," Shaw explained, "he wanted me to lend him some money. I could not give it to him, but I knew it must have been very hard for him to have to ask

¹ 1 Allen, 598.

² *Hill v. Rewee*, 11 Met. 268.

for it, and it seemed to me that the least I could do was to treat him with kindness and respect."

Of his brusque manner upon occasions there can be no doubt. Dana complained of it when he sought the Chief Justice with an application for a writ of *habeas corpus* in a fugitive slave case, and hints of it come to us from anecdotes of the time which have survived. After a rebuke from the bench, Choate, in a voice inaudible to the Chief Justice, but heard, as it was meant to be, by the bar, sarcastically soliloquized, "The Chief Justice isn't much of a lawyer, but what a polite and amiable man he is."

At another time a belated and excited lawyer rushed into court one morning while the opening proclamation was being made by the crier, and interrupted the solemn announcement by addressing the court on a motion to amend. "There is one amendment you can make without a motion," was the gruff response from the Chief Justice; "your manners, sir." At another time the Judge was calling the list, and asked an attorney present what he wished to have done in one of his cases which was then reached. The attorney was unfamiliar with the case, and replied that, although his name appeared as counsel, he really knew little about it at that time. "I did n't suppose you knew anything about the case," replied the Chief Justice; "I only asked you what you would have done with it." Another lawyer was arguing a case in unconscious imitation of the vivacious manner of Choate. "Look at the statutes, Your Honor, look at the statutes," he cried, waving a volume before the

court. "Look at them yourself, sir," retorted the glowering Chief Justice, raising his shaggy head.

Butler was asked once where he was taking an immense mastiff which he had in leash. "Down to the Supreme Court," was the reply. "I thought I would show him the Chief Justice so as to teach him to growl." In the Constitutional Convention of 1853, also, Butler in his attack upon the Chief Justice spoke of his severity in dealing with counsel. George S. Hillard, a brilliant and accomplished lawyer, met the criticism with the retort, "While we have jackals and hyenas at the bar, we want the old lion upon the bench, with one blow of his huge paw to bring their scalps over their eyes." Butler was no favorite with the Court, as he was well aware, although for this he claims to have borne no ill will. He says in his book that Shaw was the most learned and the ablest judge in the State, and was of the finest qualities of head and heart. "Liking or disliking a man did not interfere with his doing him full justice on the bench." When the address from the bar was read to Shaw at his house he came forward to Butler, who was present, and said, pressing his hand, "And this, too, to come from your lips, and inspired by your kindness."¹

Shaw's gruff manners at times doubtless made it hard for the lawyers, particularly the younger ones who feared an impatient word more than their elder brothers. Judge Washburn, in his early days, told his partner, Senator Hoar, that he dreaded the law term of the court, and sometimes felt that

¹ Butler's Book, pp. 1001, 1007.

he would rather lay his head on the rail and let a train of cars run over it than argue a case before the Chief Justice.

Although upon the whole he was a willing and patient listener, and could never hear too much, as long as the argument stuck to the point, it must be admitted that his impatience at discursive and irrelevant talk was apt to show itself in visible or audible signs of displeasure. This habit grew upon him to the extent that his manner has been described as "uncourtly, not to say rough."¹ There was no ill will in this, however, or intentional rudeness. His mind was so honest that almost instinctively it rejected sophistry, and so open that its processes were apparent. He was not at all times the inscrutable judge, over whose countenance passed no reflection of the workings of his mind. The reaction of his brain from the impact of fallacy was so prompt and natural that with it, as naturally, came instant expression of disapproval. Sometimes it was in the form of reproof so rugged as to cause distress.

We have the assertions of those who knew him best that this seeming rudeness was unconscious. It arose from preoccupation and from the intentness with which his mind was fixed upon the subject before him. Whenever he was asked his reason for saying something which had given pain he expressed the greatest surprise that his words had offended, and regret that he had been so misunderstood.²

¹ 10 *Albany Law Journal*, 314.

² Bigelow, C.J., 1 Allen 605. See also 15 *Albany Law Journal*, 99.

But this trait, although it had its root in his virtues, required explanation, and is the only respect in which apologies or excuses have ever had to be made for him. Shaw himself mentions the fault in his farewell address, and his colleagues and friends upon occasion readily covered it with assurances of his kindness and tender heart. If his years upon the bench had been fewer perhaps these impatient words would have given a permanent tinge to his reputation. But through long years of association the bar came to understand him thoroughly, and generally he was held in warm regard that did not spring wholly from admiration for his talents. All knew that his affections were strong and his compassion deep and readily stirred. Many had seen him so moved by sympathy and emotion that he could hardly speak. "He was singularly emotional," said one of his friends; "the utterance of a noble sentiment, the witnessing of a generous action, the unexpected appeal to any of the exalted principles of our nature, the suffering of a fellow-being, however humble, would suffuse his eyes and cause his lips to quiver and his voice to tremble, alike on the judgment seat and in the privacy of social intercourse." In one of the reported cases he appears to have interposed and stretched a point, "to prevent the injurious consequences proceeding from accident and misfortune," where counsel, in anxiety over the illness of a child, had neglected to take proper steps to protect his client,¹ and his former pupil and partner, Sidney Bartlett, said of him that

¹ *Cutler v. Rice*, 14 Pick. 494.

he had "ready sympathies, a trusting nature, and an unselfish heart."

One of Shaw's greatest characteristics was his lack of pride of opinion, or conceit. "We never knew so great a man who had so little," said Judge Thomas, who had argued with him, and differed from him, in the consultation room. "With a subtlety of logic quite unequalled among men whom I have known, he retained to the very last the docility of childhood, and those who know him will always recur to this childlike character of his nature." His hold to principle was strong and tenacious, but on the question of the application of principles to facts he was open to conviction and always ready to yield.

You will admit that this Commonwealth never saw a more perfect embodiment of truth than is presented in the person of the eminent magistrate now presiding over its Supreme Court [wrote one of his talented contemporaries]. The water with which he was baptized was taken from the very well in which Truth lives.¹

Another tribute, printed the day after his death, says: —

His judgment was purified from conceit, vanity, pride, and self-will, and was prompted and inspired by a deep and controlling love of truth and light, and this austere intellectual conscientiousness, which would as soon tell a lie as hazard a sophism, gave a grandeur to his mind and impressiveness to his decisions.

¹ George Stillman Hillard, *Letters of Silas Standfast*, on proposed changes to Constitution.

A contemporary at the bar said of him:—

I have known men who were not weakened by vanity nor negligent of duty, but who could not readily forget a conclusion which they had once formed, or a word or act by which they stood committed. Perhaps strong men are those who are most often harmed by this form of selfishness. What they have said or done is theirs, — is them. It has become a part of their identity, and it is scarcely possible for them to throw it off. But of this weakness Judge Shaw seemed to have not one particle. The profession over which he presided knew this, and perhaps the public knew it. For myself I have had some occasions to ask him to revise an opinion, to change a conclusion, or modify some course which he had recommended; and sometimes I have succeeded and sometimes I have failed. But I say unhesitatingly he was the only man I ever knew who could again consider a question upon which he had once passed with the same perfect and unencumbered freedom of inquiry as if it were presented to him then for the first time. Nor was this the effect of watchful and successful resistance to this common weakness; it came from the fact that in the discharge of duty, of any duty, the thought of self never intruded.

And one of his colleagues had this to say:—

He had no pride of opinion or overweening confidence in his own judgment. No one could be more open to conviction or more ready to yield his own views, when concession involved no sacrifice of principle. And when he was compelled to differ he did it with no affected distrust and with entire deference to the opinions of those with whom he could not concur.

But for proof of this we do not have to rely solely upon the testimony of his contemporaries and associates. The Chief Justice left lasting evidence of

it in the records of his cases. Before he had been on the bench two years he had occasion, while sitting with the full court, to write an opinion overruling his own decision upon the case at *nisi prius*.¹ Mature reflection and argument had convinced him that his rulings at the trial were wrong. He not only acknowledged his mistake, but insisted upon writing the opinion, declaring the error, himself. His rulings at *nisi prius* were not infrequently reversed, and the above is not the only instance in which he wrote the opinion of the full court setting aside his own action as a single justice. The last occasion when this occurred was but a short time before his death. In a trial before him at Salem, in 1858, the plaintiff sought to recover damages from persons who broke and entered his shop and destroyed liquors found there. The defendants claimed that their acts were justifiable on the ground that the shop was a place used for the sale of intoxicating liquors, and hence, under the early prohibitory act of 1855, constituted a nuisance. Shaw instructed the jury in accordance with this view, and ruled that it was the common and lawful right of all to destroy liquors unlawfully kept for sale, using such force as was necessary to reach them. When the case was argued before the full bench, however, he admitted that he had been in error, and prepared a memorandum of decision, reversing the rulings at the trial, holding that a private person can abate a common nuisance only when it is a special injury to himself, and has no right to break into a building

¹ *Fiske v. Framingham Manufacturing Company*, 12 Pick. 67.

to destroy liquor kept there unlawfully. Shaw's death came before he had written the full opinion in this case, but his memorandum was printed in the Reports and serves as the opinion of the court.¹

Throughout the State Shaw was revered as no other man of his time, except perhaps Webster. Senator Hoar, who knew him well, says that he was venerated as if he were a demi-god, and in his native county as a God. The solidity of his personality, his trueness to principle, and the never-wavering constancy with which he kept his way, inspired a confidence which was deep and unshaken. The attitude of the bar toward him is typified by Rufus Choate who appeared before the Chief Justice more frequently perhaps than any lawyer of the day. At a capital trial held in Springfield Choate appeared for the defence assisted by an associate. In one of the discussions between court and counsel the associate rose to reply to a suggestion of the Chief Justice with some show of anger. Before he could utter a word, however, Choate touched his arm with a restraining hand and whispered, "Do not reply hastily. Remember that with him, and under him, life, liberty, and property are safe." At another time, when looking at a portrait of Sir Matthew Hale, Choate remarked, "A very great judge, but not greater I think than the Chief." His simplicity of manner, life, and thought endeared him as well to all outside the court-room and beyond the circle of the bar. The following story of the

¹ *Brown v. Perkins*, 12 Gray, 89.

worshipful attitude of the people toward the Chief Justice has often been told. One winter when the court was sitting at Barnstable, Judge Merrick, one of his colleagues, slipped on the icy steps and fell, breaking three ribs. The old janitor ministered to the injured judge as he lay, awaiting the coming of the doctor, groaning in severe pain. Searching for the bright lining to what seemed to be a pretty dark cloud, the janitor remarked soothingly, "Well, Judge Merrick, how thankful you must be it was n't the Chief Justice."¹

His interest in matters outside his profession was fresh and general. Odd as it may seem he gave much attention to mechanical things. A new and complicated machine filled him with delight, and a visit after court to some shop in which a new device was in operation was often a source of great pleasure. In a scrap-book kept by him are to be found clippings relating to such varied subjects as these: seventeen-year locusts, root-pruning, shooting stars, potato soap for washing, the Mormon Bible, filtering cisterns, and artificial stone. At a meeting of the Academy of Arts and Sciences, he made extended remarks on the benefits which would result to agriculture from an increased production of grain for the distillation of alcohol to be used in making camphene, a new burning fluid, which was expected to take the place of sperm oil.² At another meeting

¹ Autobiography of Seventy Years, George F. Hoar, vol. II, p. 393.

² American Academy of Arts and Sciences, *Proceedings*, vol. II, p. 317.

he read a paper on the use of granite as a building material, giving a history of its quarrying and use about Boston, and an account of the discovery of the art of splitting stone by the use of wedges.¹

Natural history also claimed a share of his attention. We have already noticed that he joined a botanical excursion to the White Mountains in 1816, and much later we find evidence that he had sent a specimen of an unknown plant, which he discovered in his walks, to Dr. Bigelow for analysis. He was a member of the Massachusetts Horticultural Society and of the Berkshire Agricultural Society.

In literature he was deeply and widely read. His interest in the dead languages was not maintained to any great extent after leaving college, but other branches were followed with diligence, as his membership in the Athenæum and Library Society implies. He also appreciated the arts, and was a great admirer of the strong drawings of Hogarth. Much entertainment and relaxation were afforded by the theatre, and his appreciation of Macready led him to attend an entertainment given by the actor in Papanti's Hall upon the occasion of taking leave of his Boston friends.

In his home life he was simple, kindly, and affectionate. He gave and accepted many invitations to dine, and this furnished an opportunity for the indulgence of that social intercourse which he so

¹ American Academy of Arts and Sciences, *Proceedings*, vol. iv, p. 353.

much enjoyed. His interest in the social events of his household extended to the minutest details. An illustration of this is found in the following memorandum written in his own hand containing careful directions for the coming-out party of his daughter:—

1. To have company on 23 Dec. Thursday evg. 8 o'cl.
2. Invitation in name of Mrs. Shaw and Miss Shaw. To invite about 200. Billets to issue one week before.
3. To have both parlors prepared for dancing and have two or three musicians, sideboard, piano and book-cases to remain in their places, one row of chairs and settees, in parlor carpets to be taken up.
4. Dining-room to be open for company.
5. Tent large chamber for supper. Tent small chamber for drawing-room. Cards, etc., till supper and then door open and to be used with the supper-room.
6. Study for gentlemen's ward-room. Two adjoining chambers for ladies do. All the beds in lower chambers to be taken down.
7. Supper at half-past 10. Part of the company to go out, the balance to be dancing. Afterwards the remainder to go.
8. Oakes and some friends to be selected by him to act as managers, receive company at the parlor door and introduce them to Mrs. and Miss Shaw, and afterwards superintend the dancing. They to remain below with the younger company, whilst the older part first go.
9. Supper, — scalloped and stewed and fried oysters, sliced ham, tongue and sandwiches, rolls, blanc-mange, patés, truffes, etc., etc., ices, lemon, vanilla, etc., salad, lemonade, sherry wine, champagne, claret.

The greater part of his time at home was spent in his book-lined study on the second floor, where he wrote his opinions. He was fond of children, particularly those of tender age, and in the memory of one of his grandchildren there still lives a vivid picture of his truly terrifying aspect when on all fours, playing the lion, he burst out at her from under a table. His dignified demeanor caused the elders to stand somewhat in awe of him, but not so the children, with whom he frequently used to play and frolic. He was particularly kind and sympathetic with those who were afflicted and unfortunate. To his delicate granddaughter he was especially tender and loving, seeking to spare her in every way. He often took her to ride with him in his chaise, and was at great pains to explain to her all objects of interest encountered during the drive. Sometimes his explanations, such, for instance, as the reasons for charging tolls on toll-bridges, went somewhat over her head, but his intentions were of the kindest, and he was greatly loved in return. Of the affection of his children for their father the following letter from his son Lemuel, accompanying a New Year's present, bears witness:—

MY DEAR FATHER, — As the present is the first recurrence of this season of gifts and good wishes that I have ever had it in my power to present to you any token of my love and affectionate respect, I desire to avail myself of it. I can think of no more acceptable gift than the accompanying *Life of Judge Story*, a contemporary and friend of yours, written by an affectionate and admiring son; and believe me, although I perhaps cannot express my feelings toward you in the same eloquent and impass-

sioned manner which Mr. Story does towards his father, they are none the less real and fervent.

I am, my dear father, your affectionate son,

LEMUEL SHAW, JR.

January 1, 1852.

Shaw was fond of playing whist, and at the end of a week delighted to sit down at home for a rubber. Mrs. Shaw had religious scruples against playing on Saturday night and would seek to evade the call by escape upstairs. When her husband caught sight of her passing the door on her way through the hall, he would call out, "Hope, come here and have a game," and the dutiful wife always obeyed.

To his wife, Hope Savage, he was devotedly affectionate. Soon after his marriage in 1827, he wrote this letter to her father, at Barnstable: —

On this first occasion of addressing you in the intimate and endearing relation which my late marriage with your daughter has established, I should be unwilling to make it a letter of mere formality and ceremony; and yet I can hardly trust myself with the expression of those strong feelings with which I am actuated. Her friends are emphatically mine, and I participate with her in the strong, unshaken, and unchangeable feelings of filial love and respect with which she regards her parents. After the repeated declarations which I have made to her, to her friends, and to the world, it is hardly now necessary to say anything of the strong and constant affection which I feel for my dear wife; but I may add, and I do it with the sincerest pleasure, that a more intimate acquaintance with her feelings, her principles and views, which my short experience has afforded, has served to confirm and strengthen my feelings of love, respect, and admiration, which are already so deeply impressed upon my heart,

and to give me higher sense of the value of the blessings I enjoy in this alliance. Her good sense, kind feelings towards all around her, her perpetual exertions to render others happy, her quiet and unpretending energy of character, her kind and delicate attentions to my mother, and the parental tenderness manifested towards my children, are perpetually adding new claims to my gratitude and affection.

These, my dear sir, are not intended as ordinary professions, but as expressions of the true and simple feelings of my heart. They are not to be lightly hazarded or frequently repeated. But I have thought it due to myself to advise the parents of my dear wife, once for all, how highly I appreciate the affections of one who is dear to them, how sensible I am of the present sacrifice which they have made in parting with her, and how readily and cordially I shall desire to share with her in every act and statement of filial love and duty, and to consider her parents as my own.

Your affectionate son,

LEMUEL SHAW.

His method of work while upon the bench was most laborious and painstaking. His notes in cases tried or argued before him were voluminous. These were carefully preserved by him and bound, and have since been presented to the Social Law Library in Boston, comprising fifty-two volumes of closely written manuscript. Not only did the Chief Justice make full notes of the testimony, but of the arguments of counsel as well. In cases argued before the full court his minutes were equally complete, and no point made or authority cited escaped his recording pen. Many of his charges to the jury were fully outlined beforehand, and his statements of law, when an involved point had to be explained, were

generally prepared in advance and committed to writing. His pronouncements of sentence upon prisoners condemned to death were always written out and read from manuscript.

Dissenting opinions were conspicuously few while he was upon the bench. Decisions which were not unanimous were merely announced to be those of a majority of the court, without further explanation. Occasionally, however, a dissenting judge, notably Judge Thomas, felt called upon to express his views, but it is believed that only one case can be found in his thirty years of service where the Chief Justice wrote a minority opinion. In one other instance the court was evenly divided upon the question of granting a motion for a new trial on the ground of misdirection in law, and the motion, therefore, could not prevail and judgment was entered on the verdict.¹

Shaw was charged, sometimes, with dominating the bench, but those who knew him best acquit him of any desire to rule or to override the opinions of others. He was much beloved by his associates, and never professed to be wiser than they. He was great in consultation, and the orderliness of his mind and his unerring judgment were of invaluable assistance there. "When his associates in council had fallen into apparently inextricable confusion, the slow, cautious, and comprehensive reasoning of the Chief, interposed after all had spoken their views, would as if by magic bring order out of chaos and turn the entire bench to his views."

¹ *Guild v. Guild*, 15 Pick. 129.

Of his literary style we can hardly do more than repeat that his opinions must be read to be appreciated. But without attempting to generalize we may well speak of a few of the most striking characteristics of his work.

In explaining the law to juries and in sharpening lines of distinction, nothing is of greater assistance than apt illustration. Chief Justice Shaw recognized this, and put the principle into practice with the greatest success. A few examples will suffice to show his facility in this respect. A case was before the court in which the principle is announced that an award of arbitrators to whom the parties have submitted their differences will not be set aside for a mistake made in drawing conclusions or following erroneous rules or theories, but only where the arbitrators were deceived or misled as to an important fact. To mark the distinction the Chief Justice used the following illustration:—

Suppose it were referred to arbitrators to measure a large area, where it would be necessary to run lines through woods by the aid of a compass. Suppose through fraud or accident a piece of steel had been so placed near the compass as to disturb the regular action of the needle, and this wholly unknown to the arbitrators, who were thus led to adopt false courses as true, as the basis of computation. If this fact could be afterwards proved, it would, we think, be good ground to set aside the award. But if they adopted a theory of magnetism in regard to the actual variation of the compass, alleged to be erroneous and leading to the adoption of a similar erroneous series of courses; although it should be pronounced erroneous by other philosophers, conversant with all that

is known of the science of magnetism, whatever might be their number or weight of authority, we think they could not be heard by a court and jury, because it would not tend to prove the kind of error or mistake which had misled the constituted judges in the case, but would appeal from their decisions in a case where they have exercised their judgment. So, to put one more instance, suppose in making mathematical computations they had used tables of logarithms, believed by them to be correct, but which are afterwards shown to be erroneous. It would be a mistake that misled them. But if they adopted, purposely and deliberately, a process of mathematical reasoning which they believed to be correct, their award could not be impugned by the testimony of other mathematicians tending to show that it was erroneous.¹

In one case his field of illustration ranges from a desert isle in a savage country, through China, to familiar principles of commercial law and bills of exchange.² In another, to explain certain ideas of natural justice, he uses the primitive figure of an Indian who has agreed to deliver a given number of carcasses of venison; applying the same principle to a more advanced stage of civilization he instances the farmer and his crops; and thus, through more complicated conditions, to the question at bar.³

A typical illustration of the use of extreme cases, so frequently resorted to by him in testing the application of a new principle, is found in one of his last opinions, rendered in 1859.⁴ The Essex Com-

¹ *Boston Water Power Company v. Gray*, 6 Met. 131.

² *Carnegie v. Morison*, 2 Met. 381.

³ *May v. Breed*, 7 Cush. 15.

⁴ *Commonwealth v. Essex Co.*, 13 Gray, 239.

pany, a corporation chartered for the purpose of constructing a dam across the Merrimac River, to create a water power, had accepted an act authorizing an increase of its capital stock on condition that it should be liable for all damages occasioned by the dam to the owners of fishing rights above it. The company paid large sums of money for such damages, and later was indicted for not complying with a subsequent statute requiring it to make a new fishway around the dam. The court tested the power of the Legislature to pass the law, which virtually avoided the charter, in this wise: —

Does this come within the power of the Legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such a lot from a third party; could the Legislature prohibit the company from holding it? If so, in whom should it vest; or could the Legislature direct it to revert in the grantor, or escheat to the public; or how otherwise? Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the Legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases — for extreme cases are allowable to test a legal principle — the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted. .

Another attribute of the Chief Justice which added greatly to his usefulness in explaining issues to juries, and in making his opinions of service as precedents, was his ability to reduce a case to its simplest elements. In nearly every case he decided we find him insisting upon this: that questions shall first be stripped of their complexities and reduced to basic principles. After dissecting the mass and baring the fibre, he will proceed to fit the facts to principles, but not before. "This case involves such a variety of persons and dates that it seems complicated; but I believe that a close examination and distinct understanding of these particulars will render the case exceedingly clear," he announced in approaching the consideration of a question in characteristic manner.¹ He never got lost in a multitude of details, and frequently had occasion to remark that the arguments of counsel seemed to him to have deviated widely from the point. How much of the time of courts and juries is occupied in getting clearly in mind the real and vital questions in a case! How simple of solution are the majority of questions put before them when clearly stated! How conspicuous is the success of counsel or judge who has the seemingly rare faculty of clear statement! The Chief Justice possessed this power to a marked degree.

If his opinions sometimes appear diffuse and discursive, it is not for the want of clearness of vision, but rather because of his tendency to discuss the principle as well as the case. Charles Sumner said

¹ *Fay v. Cheney*, 14 Pick. 400.

in a letter to Theodore Parker, who had written inquiring as to the comparative merits of Shaw and Parsons: —

Shaw's productions are his judgments in the Reports of Pickering, Metcalf, and Cushing, — a goodly number, — and all having a uniform stamp. He is always verbose, but instructive, and deals with his cases strongly. . . . His opinions, like Story's, are too long; but they are less interesting than Story's, have less life, and lack his learning.

From Sumner's prejudiced pen this is very much like praise. But Sumner was not a great lawyer. Although he had started his career in that profession, he soon became absorbed in more exciting and less technical matters, and at this time his attitude toward Shaw was highly critical. There was a certain amount of truth however in his statement that the Chief Justice's opinions were too long. He loved discussion. He was loath to decide a case upon written briefs. He wished to hear the oral arguments of counsel, to ask questions and receive suggestions, to clear up perplexing points. His judgments, delivered orally from the bench, are said to have seemed greater than those drawn up with the pen and read in the Reports. He probably allowed himself even greater latitude in speech than in writing, but breadth of discussion and occasional repetition are less readily criticised when heard than when read. Repetition is highly necessary in oral instruction. Reference will answer the same purpose in print. But Shaw's amplifications, even when unnecessary, always serve an illuminating purpose.

Instead of being content to announce a doctrine,

referring to decided cases in support, he insists on stating the principle in his own words, making further reference unnecessary. This feature of his opinions is to a great extent what renders them so satisfying to the lawyer. They are not mere briefs, dogmatic in statement, and copious in reference, but rather treatises on the law of the subject in hand, complete and comprehensive in themselves, requiring no further search for instruction or authority. Indeed, absence of citations becomes one of the chief characteristics of his decisions. In many cases he discusses and states the law at length without referring to a single authority. His opinion in *Bardwell v. Ames* (22 Pick. 333), twenty-four pages in length, deciding an important and complicated question of mill privileges and water rights, cites not a case from beginning to end.

Nor does he confine his discussion to the bare, and often technical, question before him, as courts of last resort by press of business are frequently forced to do. On the contrary, so inclusive are his opinions that he seems to reach out beyond the points directly in issue to seize, examine, and analyze every suggestion or claim. "It may be proper to remark in passing," he would say in pausing to dispose of some side issue. An instance of this is found in a case involving nothing more than the ownership of a stick of timber found upon the seashore.¹ "A question was suggested rather than distinctly argued by the counsel," to use Shaw's own words, "Whether the right of the proprietors of land bounding upon

¹ *Barker v. Bates*, 13 Pick. 255.

the sea or salt water have propriety to low-water mark." Instead of disregarding this suggestion, or dismissing it with a *quære*, he proceeds to deal with it at length as an attack upon a settled rule of property rights which "it would be extremely injurious to the stability of titles and to the peace and interest of the community to have seriously drawn in question." The suggestion therefore is fully discussed, and the case decides that the boundary of the owner of the upland extends to low-water mark in all parts of the Commonwealth.

The Chief Justice was proverbially slow in rendering his decisions. At the time of his death he had not completed his work in this respect, and his memoranda had to serve in at least two cases for want of more extended opinions.¹ An amusing incident serves to illustrate this propensity of the Chief Justice, as well as the audacity of Butler, who was then beginning to be a thorn in the flesh of many a judge and lawyer. A case was called which met with no response for the plaintiff. The Chief Justice directed that the plaintiff be non-suited, whereupon Butler arose and mildly suggested that he appeared for the plaintiff, and hardly thought the case could thus summarily be disposed of. "Why not?" demanded the Chief Justice. Butler replied, "I argued that case a year and a half ago before Your Honor, and have been waiting for a decision ever since." "Pass it," was the only comment from the bench to the clerk.²

¹ *Russell v. Howe*, 12 Gray 147. *Brown v. Perkins*, *ibid.*, 89.

² Willard, *Half a Century with Judges and Lawyers*.

Sometimes the patience of attorneys was exhausted at the delay, and polite inquiry followed. In a letter to the Chief Justice, written in 1846, thus hesitatingly complains counsel: —

I have been requested to inquire whether a decision may be expected in *Taylor v. Wilson* at the next meeting of the court. The case was argued about two years since and was supposed to have been delayed in order that the arguments in the Phoenix Bank cases might be first concluded. Perhaps the case has been overlooked and you will excuse my directing the attention of the court to it.

The reporter of decisions, too, harassed by the printer, had also at times to beg the Chief Justice for copy.

In 1836, the Legislature made an inquiry into the causes of delay in the publication of decisions of the court, and Shaw was called on by the Committee on the Judiciary for such statement on the matter as he might choose to make. In his reply he stated that the whole of the time devoted to each session in the several counties was required to hear the increased number of cases for argument; with the resulting necessity that the cases heard must be reserved to be considered and decided later. The business of the court also had been sensibly and rapidly increased by the growing number and magnitude of cases in equity.

Perhaps [he concludes] among the reasons which retard the publication of the Reports may be considered that provision of law which makes it the duty of the reporter to report all cases argued by counsel without allowing him any latitude of discretion in selecting the more valuable

cases. There are many complicated cases of law and fact highly proper to be received and argued wherein it requires a long and elaborate statement to present a lucid arrangement of facts to point out intelligently the application of the rules of law to the case, in which, however, no new rules are either decided or discussed, which therefore can scarcely be regarded as of much value in point of precedent, and which swell the bulk without adding much to the value of the publication.

The inquiry resulted in the passage of the act of 1838 requiring that decisions in all cases decided before September 1 in each year should be published by that date. It seems to have been impossible for the court to live up to this requirement, however, for in the Constitutional Convention of 1853 we find Butler, in his vigorous attack upon the court, commenting severely upon its failure to comply with this law, which, he asserted, was being constantly and flagrantly violated. He stated that while he could, in July, get the decisions of the Court of Queen's Bench in England argued in May, he could not in 1853 secure any decisions of the Massachusetts Supreme Court rendered since 1850.

In 1852, when the question of increasing the number of the Supreme Judicial Court from five to six judges was under consideration, Shaw again explained, in a letter to the Senate Judiciary Committee, the delay in rendering and printing decisions, as follows:—

After a complicated cause has been elaborately argued and has been considered by all the judges until they have come to some degree of unanimity or majority of opinion,

it seems necessary, before finally deciding it, that some one be especially charged with the duty of a careful re-examination to see that no fact or point of law has been overlooked or mistaken, and to review all the authorities cited. If anything has escaped proper attention, or any information, objection, or impediment is discovered to the conclusion to which the court may have inclined, it is reported back to be reconsidered. Otherwise an opinion is to be drawn up, to be submitted to the judges for their approval or modification. In this way a good many opinions are drawn up before they are delivered or the result stated in court. But when this is not done, and the opinions are delivered *viva voce*, it is found so difficult for the reporter to get a full, precise, and accurate statement of the opinions, and it is so desirable for the judge who delivers it that it should be as complete and fit for the public eye as he can make it, that he is induced often to make an entire draft, or a very full revision, of the reporter's minutes. In all cases when judgment is not entered at a law term it is made the duty of the judges to communicate to the reporter a statement in writing of their opinion or judgment in the case. These duties, incumbent upon the judges singly, when neither holding court nor meeting together regularly for consultation, are so large and onerous that they fill up the entire time of every judge, and, speaking for myself, I regret to say that they often accumulate to such a degree that it is impossible to accomplish them in the time within which, I am sensible, they ought, if practicable, to be done.

The Chief Justice made out his case, and the membership of his court was increased by one as he recommended. But it seems to be pretty clear, notwithstanding his excuses, that he was slow in handing down his decisions, and that his work was done as deliberately as it was thoroughly. While this tend-

ency may have given rise to complaint at the time, it is now, like some small imperfection in a single stone of a classic pile, overlooked and disregarded in contemplation of the symmetry and dignity of the whole. Judge Thomas was probably correct in attributing the delay to his anxiety to do right and a desire for most thorough investigation and consideration. But it may be that the Chief Justice had not fulfilled his hope, expressed to his mother in early life, of overcoming the "strong and inveterate habit of procrastinating," and his own frank acknowledgment would seem to indicate that at times he was none too methodical. One of his opinions, rendered in 1835, begins as follows: "This cause has remained a long time undecided, having been argued at the law term of 1834, and by some accident has been overlooked and omitted."¹

¹ Two important questions inevitably arise in reviewing the life of any great man. What was his religion and what his politics? In the answer to one or the other of these questions is found the essence of the title to fame of many a man who has lived in history. To say that Hamilton was a Federalist is to give in a word the key to much of his enduring work. To describe Channing as a Unitarian is to tell why his name has lived to this day. The judge can have no politics, no religion. But the man, who veils his personality beneath the judicial robe, has both, and to his private conscience religion and politics may be of as much concern as those matters are

¹ *Commonwealth v. Markoe*, 17 Pick. 465.

to him who makes them subjects of frequent and public announcement,

In politics Shaw was a strong Federalist. The principles of that party continued to prevail in Boston with undiminished strength long after they were waning elsewhere. The enthusiasm with which the French Revolution was regarded by a large section of the people was viewed with distrust by the conservative party which held the belief that the people could hardly be trusted to the fullest extent in matters of government. After that irruption had run its bloody course, it was frequently used as a terrible illustration of the dangers of unlimited popular control. Thus Shaw, in his Humane Society Speech in 1811, referred to the "ferocious despotism that has desecrated the fairest portion of Europe," which the "English Party," as the Federalists were sometimes called, as opposed to the "French Party," or anti-Federalists, regarded as the natural and direct outcome of the Revolution. In making this allusion he expressed the earnest hope that no party feeling would be imputed to him. "God forbid that on this solemn occasion I should cherish or impart an ungenerous prejudice, so inauspicious to its design." In his Fourth of July Oration in 1815 he again declared that "the American Revolution has suffered an irreparable injury by being compared with that of France," and asserted that "after a few feverish years of liberty, this horrible revolution terminated, as all reflecting men had foreseen that it must terminate, in a government of physical force, a cruel, ferocious, military despot-

ism. The rule of Bonaparte was little more than a continued scene of oppressive outrage and contempt of social rights." Then, too, the Federalists of Boston, for local reasons if for no others, were bitterly opposed to the Embargo Act of 1807. In the effort to harm England by that restriction the local interests of New England were disregarded, and the people of Boston writhed under the destructive effect it exercised upon their commerce. In his Fourth of July Address Shaw made this reference to that unpopular act: "Let us hope that the day of idle theory, of frivolous experiment, and of dangerous trifling with our great national interests, which commenced with the Administration of Mr. Jefferson, has passed away, and that it will be succeeded by the prevalence of good sense and practical measures."

Joseph Story was almost the only man of prominence in the vicinity who held anti-Federalist views. His attitude at one time in his early career was so seriously disapproved of that to some extent he suffered social ostracism on that account. Later on, he changed his views and strongly advocated the repeal of the Embargo Act.

The War of 1812 was extremely unpopular in Boston. The city advocated steps to conciliate England rather than antagonize her, to the end that ships tied up at the wharves might again be sailing the seas freighted with the cargoes of commerce. The animosity of the people even gave expression to principles of States' rights at which, a generation later, they would have held up their hands in horror. Shaw shared the convictions of the time, and

had often expressed a strong and decided opinion of the war. After it was ended, however, he exerted himself to restore good feeling, and cautioned against the perpetuation of prejudice against England which, he feared, too much glory in our own independence might involve. He reminded the people that "the commercial and intellectual intercourse which, with liberal views, we maintain with England, may be of the most beneficial and interesting nature arising from the community of origin and language. From her we have derived our laws, learning, taste, literature, and science, our principles of government and our love of liberty."

Shaw had his share in the exciting discussions over the Tariff of 1828. In 1824, he stood with Webster in the cause of free trade, or protection for revenue only. In 1827, when the question again came to the front, and a more pronounced protectionist measure was before Congress, Webster changed his views and came out strongly in favor of it. Shaw did not follow him in this, however, but held to his former opinions. Although Webster's view prevailed largely in the North and West, a strong group in New England were with the South in opposing the further extension of the principle of protection, and were active in their opposition to the measure which John Randolph, of Virginia, called, "a bill to rob and plunder nearly one half of the Union for the benefit of the residue." In 1828, Shaw was put at the head of a committee of merchants and others in Boston appointed to memorialize Congress on the subject, and he prepared an

exhaustive report which a free-trade newspaper of Philadelphia declared "is written with a master's hand and cannot fail to be admired for the force of its reasoning, the temperate language in which it is expressed, and the taste displayed in its composition."

The report was very lengthy, but the principle it contended for is to be found in the following brief quotation: —

It is an abuse of the power of Congress to impose duties for revenue, when it is carried to such extremes as to prohibit imports, and consequently lessen our export trade, destroy revenue, burden one part of the nation with heavy taxes for the benefit of another, which we claim constitutes the wrong, and which we contend is neither in accordance with the spirit nor letter of a constitution which was intended to guarantee equal laws, equal rights, as well as equal burdens to all who live under it.¹

The protest was of no avail, however, and against threats of secession on the part of some of the Southern States the bill was passed. It is believed that Shaw never came to take any other view of this question, but held to his free-trade principles.

During the campaign which preceded the election of Lincoln, in 1860, Shaw was strongly urged to permit the use of his name as a candidate for elector at large on the Union ticket. This party was organized to present a conciliatory ground on which both North and South might stand. Its platform

¹ "No more powerful statement of the argument against high protection can be found. I have been surprised that the modern free-traders have not long ago discovered it and brought it to light." (George F. Hoar, *Autobiography*, vol. II, p. 386.)

made no mention of the subject of slavery, but merely pledged the party to maintain "the Constitution of the country, the Union of the States, and the enforcement of the laws." It was hoped by its promoters that, owing to the breach in the Democratic Party in the South, the Union ticket would prevail in the Southern States, and would find substantial support in the North, and that its success at the polls would avert the threatened rupture between the two sections of the country. The appeal to Shaw for permission to use his name concluded as follows: "In this state of things your appearance at the head of our electoral ticket as a revered mediator between the Northern and Southern extremes of party, would, in our humble opinion, be in entire conformity with your honored career, of vast importance to the country, and a crowning title to its grateful veneration."

Shaw's views on the questions presented have not been recorded. Probably he was a supporter of the Party, otherwise the use of his name would hardly have been requested in such a formal way. That his views were conciliatory, and that he was in sympathy with Unionist principles, is indicated also by the fact that soon afterward, in December, 1860, he headed the list of signers of an appeal to the Legislature urging the repeal of the Personal Liberty Act.¹ But probably because of his advanced years, or disinclination to have his name appear on a political ticket, he declined the proffered nomination for elector on September 4, 1860.

¹ *Ante*, pp. 177-79.

Shaw was brought up in an atmosphere of strict Calvinistic Congregationalism. In his youth the revolt from its narrow and severe principles had gained but little progress and had hardly penetrated to the remote district on the Cape in which his childhood was spent. When he came to Cambridge, however, Unitarianism had acquired headway, and was making its greatest advance in Boston and at the university. It was only natural that the young man should be affected by the tendency of the times and the influence of the example of many of the best men about him. Although he was opposed to the spirit and practice of slavery as strongly as any of the Abolitionists, yet, as we have seen, he was bound by his allegiance to the law to discountenance and balk their radical and illegal methods. Upon the freedom of his mind in religious questions, however, no constitution imposed either check or control, and here he was at liberty to break from precedent and follow wherever freedom called.

He was young in years and in practice when the contest over the Hollis Professorship came, and he heard his college charged with apostasy in the dispute which resulted in the founding of Andover Seminary. In this controversy he took the side of his *alma mater*, and then doubtless for the first time acknowledged consciously to himself that any change had come about in his religious beliefs. Later, when the "Boston religion" was given the name of "Unitarian," and the question, "Are you of the Boston religion or the Christian religion?" was no longer answered with the counter-question, "Are you a

Christian or a Calvinist?" the Chief Justice, as one of the governing board of the college, became an integral part of its religious tendencies and liberal views. The tenets of his youth were moderated and ungenial principles humanized and tempered. He was a sharer of what came to be recognized as Orthodox Unitarianism, and refused to follow the new protesting movement of Emerson and Parker. His spirit was satisfied with the advance from doctrinal to ethical religion, but would proceed no further.

Although he was always a pew-holder and constant attendant at the services of the New South Meeting-House on Church Green, and drafted the plan of consolidation when that society attempted to combine with the Brattle Street Church, serving on a committee to accomplish that end, Shaw was not a communicant. This greatly troubled the pastor, the Reverend Alexander Young. After planning many times to speak to him about it, one evening, in 1844, Mr. Young called at the house of the Chief Justice to endeavor to persuade him formally to adopt the doctrine he professed. He found other company present and was obliged to depart without the sought-for interview. The next day, however, he wrote his parishioner a long letter exhorting him to join the church. He called Shaw's attention to the fact that he had always been a constant attendant at service, and had ever been deeply interested in the welfare of the parish, and that it had been much to the pastor's surprise when he came to the parish not to find his distinguished name

enrolled as a communicant. This omission he had hoped from year to year would be supplied, and he had many times thought of speaking of it, but had delayed hoping that Shaw would act without suggestion.

When you were promoted to the highest judicial office in the Commonwealth [the letter ran], an office which I deem as sacred as it is venerable, I thought that you would not longer delay your public acknowledgment of the truth and worth of duty. I know that your two immediate predecessors on the Supreme Bench, Chief Justices Parsons and Parker, were received members of Christian churches. I suppose that all their predecessors were so without exception. I had come to regard it as a kind of qualification for the high and honorable place, and accordingly have been constantly expecting that you would take this important step. . . . Your parentage from a pious Gospel minister, your education under an eminently religious mother, your regular attendance on public worship, your interest in the services, and your standing and character in the community, all authorize us to believe that you are worthy of this privilege and that you would adorn the doctrine you profess.

Shaw's reply to this appeal has not been preserved. It must have been a refusal, for his name was never entered upon the list of church members. But whatever his reasons for declining to subscribe to doctrine, there is no doubt that his mind was devoutly cast. Throughout his life we find most sincere expressions of his reverence and faith in Divine Providence. These were uttered in the publicity of the court-room in solemn adjuration of the necessity of abiding by the laws of God and man, in the

privacy of his own chamber, and in the solitude of mid-ocean. No better words can be found with which to close a consideration of his life than those he used in paying tribute to the memory of his dead friend, Webster: —

Whilst devoting ourselves faithfully, and with all our powers to the discharge of our duties, those duties which we fondly flatter ourselves are high and important, and which do indeed touch the dearest earthly interests of men, and of communities, let us never forget, that amidst these, as part of these, and necessary to their just performance, there is one duty never to be overlooked, that of a steady and constant regard, and of a frequent and solemn reflection on the higher subjects of life, death, and immortality; that, whether we live or die, we may be found in the way of duty.

THE END

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