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**GENESIS AND BIRTH OF THE
FEDERAL CONSTITUTION**



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GENESIS AND BIRTH OF THE FEDERAL CONSTITUTION

*Addresses and papers in the Marshall-Wythe School
of Government and Citizenship of the
College of William and Mary*

EDITED BY

J. A. C. CHANDLER, PH.D., LL.D.

President of the College of William and Mary

"We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Carta"—(*Mr. Justice Brown in Mattox vs. U. S., 156 U. S., p. 243*)

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PREFACE

In the summer of 1920 a movement was inaugurated to establish at the College of William and Mary the Marshall-Wythe School of Government and Citizenship, and a committee consisting of Messrs. Alton B. Parker of New York, Albert J. Beveridge of Indiana, William Marshall Bullitt of Kentucky, Hampton L. Carson and William A. Glasgow, jr. of Philadelphia, H. Snowden Marshall of New York, and J. K. M. Norton, Robert R. Prentis, H. St. George Tucker and Thomas H. Willcox of Virginia, kindly consented to sponsor the movement.

Soon thereafter a circular was issued by Judge Alton B. Parker, chairman of the committee, from which the following extracts are taken:

THE MARSHALL-WYTHE SCHOOL OF GOVERNMENT AND CITIZENSHIP

AT THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA

"Next after that truth on which the eternal welfare of man depends, what study can be so important to the youth of this republic as that of our own institutions? What work of man deserves so much to engage your attention as those charters in which your rights and your duties are alike defined? What philosophy so worthy of your profoundest thoughts as the philosophy of government? . . . The function of a sovereign citizen is an affair not of right alone but of duty also; and he who presumes to act in that exalted character, far from being subject to no law but his own will, no reason but his own caprice, is exercising a high duty to which he is called by God Himself, whose unworthy instrument he is, in his great work—the moral government of man."—JUDGE BEVERLY TUCKER, to his Law Class at William and Mary, in 1845.

To inculcate sane views of our form of government is conceded to be an important function of education. The

intelligent exercise of American citizenship, as a patriotic duty, must be regarded as a subject of major importance in our colleges.

The establishment of such a school at the ancient College of William and Mary, founded in 1693, at Williamsburg, Virginia, is contemplated. No better site could be selected than this, midway between Jamestown and Yorktown, where many stirring scenes in our colonial and revolutionary drama were staged. The very atmosphere is an education in the science of government—like a laboratory to the physical sciences.

No college has higher claims upon the Nation. She educated Thomas Jefferson, who drew the Declaration, Edmund Randolph, the able coadjutor of Madison in the Federal Convention, and James Monroe, who gave us the Monroe Doctrine.

Founded in 1779 and continuing to the Civil War, William and Mary's Law School was the oldest in this country. Its sole predecessor in the Anglo-Saxon world was the Vinerian Chair at Oxford, where Sir William Blackstone lectured. Chief Justice Marshall, the expounder of the Constitution, was a law student at William and Mary, under George Wythe, Signer of the Declaration, and father of legal instruction in America.

This law school educated four justices of the United States Supreme Court, more than half the judges of the Virginia Court of Appeals, and countless incumbents of *nisi prius* courts, both State and Federal.

* * *

The great need of present-day education is to train the coming generation to a conception of the duties of citizenship as well as its privileges. The treatment for anarchy should be prophylactic rather than curative. This school is

intended, not for expectant lawyers alone, but for expectant citizens; though the full course will have in view an adequate preparation for public life in legislative, educational, or diplomatic lines, as well as legal. It is, however, an academical course, designed to lead to the A. B. degree. The preliminary subjects are already being given at the College, as follows:

First year: English, Mathematics, Science, Latin.

Second year: English, Latin, French (with Spanish or Italian as electives), Political Science, History, Psychology.

Third year: History, Economics, Philosophy, Finance and Commerce.

The plan is to enlarge the foregoing by adding two chairs:

1. JOHN MARSHALL CHAIR OF CONSTITUTIONAL HISTORY AND LAW

Designed as a memorial to the great Chief Justice. It would show the gradual evolution of government from the very beginnings, teaching history from its economic and political rather than its military side. It would review the Greek forms of government and leagues, which were familiar to the draftsmen of our Constitution (and had been taught to a number of them at William and Mary), and on which some features of our Constitution were modeled. (Fiske, "Political Ideas," p. 76; Freeman, "History of Federal Government," Ch. 5.)

It would discuss the Roman form and subsequent European developments therefrom, and follow with a series of lectures on the English Constitution, to which special attention would be paid.

The different colonial governments would then be taken up, with the successive steps toward union, followed by the Confederation and culminating in the Constitution.

Then would follow a discussion of its development along the paths blazed out by Marshall, and a political history of the country to the present day.

Attention would be given to state constitutions, especially to the management of municipalities, which is one of the problems of the day.

The subject of parliamentary law, so useful to the large number who may be called on to preside at directors', stockholders' or public meetings, will be treated.

2. GEORGE WYTHE CHAIR OF GOVERNMENT AND INTERNATIONAL LAW

This would be a memorial to the first professor of the first chair of law in any American college, the preceptor of Jefferson, Marshall, and Clay. Its course of study would supplement the first course by treating specially of our international relations and obligations, and by comparing our government with other forms.

As this is necessarily tentative, it would be subject to such modifications as experience might dictate.

It is impossible to overemphasize the value of such a school. The tendency to overlook the fundamentals of government is largely responsible for present-day difficulties. The proposed Marshall-Wythe School of Government and Citizenship offers to all who are interested in the maintenance of American institutions a channel for productive investment. It is the serious, constructive effort of the college which produced such men as Marshall, Jefferson and Monroe, to equip its students for the problems of today.

A survey shows that a large number of students now at William and Mary will teach in the public schools. They will help to mould the next generation. Under this system of training, each can be made a centre for the diffusion of true governmental principles in the community where he teaches.

The College of William and Mary now admits women. It is imperative that these new voters be given opportunity to prepare themselves for intelligent use of the ballot.

* * *

The foundation of such courses of instruction has been endorsed by the Executive Committee of the American Bar Association. Resolutions of approbation have been passed by the Board of Directors of the National Security League and other organizations.

The plan should appeal especially to our brethren of the bar, whose influence has always been on the side of sanity in government.

Such a school, to succeed, must have men of the highest type as instructors.

It will require an endowment of two hundred thousand dollars to secure two such men, and subscriptions are solicited.

(Signed) ALTON B. PARKER, Chairman.

The course was formally begun at the College on January 14, 1921, on which occasion the General Assembly of Virginia attended in a body and the opening address was made by Judge Parker. This was followed during the remainder of the college term by the other addresses contained in this volume (except that two of them were written subsequently to complete the course). In addition, Hon. Hampton L. Carson has kindly permitted the use of his presidential address before the American Bar Association, which has been inserted as an introduction.

The College felt under too much obligation to the eminent gentlemen who gave these addresses to undertake any sort of censorship, so that they have been printed exactly as delivered. This may involve some duplication—perhaps, some conflict—but it will not detract from their interest.

In offering to the public this series of addresses we wish to express our most grateful appreciation to each contributor for his interest in our efforts to develop the Marshall-Wythe School of Government and Citizenship. We feel also that the efforts that they have made to instill into the youth in attendance upon this college the right ideals of American citizenship based upon a knowledge of the evolution of our governmental concepts will be fruitful in stimulating study on the part of all who examine these essays. If one thing is essential above another in American society to-day, it is an appreciation of the ideals of the founders of our government.

I desire, without detracting from the contributions of all the eminent gentlemen who have aided in this course, to express in particular my thanks to a distinguished alumnus of the college, R. M. Hughes, LL.D. of Norfolk, for it was he who arranged the course of lectures and secured the cooperation of those who delivered the addresses.

J. A. C. CHANDLER.

Williamsburg, Va. .

March 11, 1924.

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APPENDIX

CHIEF JUSTICE MARSHALL AND HIS WORK*

"The Union and a government competent to its preservation."

By Robert W. Hughes, LL.D.

FELLOW CITIZENS: Coming from the low-lying seaboard beyond the Chesapeake to this beautiful plateau of the Susquehanna; from a people differing much from Pennsylvanians in extraction, pursuits, and local institutions; crossing the courses of grand rivers, and the boundaries of great States; and standing here, amid surroundings in extreme contrast with those left behind, a stranger among strangers, unknowing and unknown, still I am at home; still, in the patriotic realization of a common citizenship, I feel that this is my country, these my countrymen.

If I had come from the mountains of the Canadian frontier, or from the everglades of Florida, or from the Pacific front of our far western domain, and stood here as I stand now, even then I could say with the affectionate loyalty of an American citizen, your country is my country, your flag my flag.

How shall we estimate the gratitude we owe to the founders of our national government, which affiliates and harmonizes sixty millions of people, and, combining together forty States and Territories, molds into a single nationality an empire as diverse and extensive as the Continent of Europe? Except the Divine Author of our blessed religion and His holy apostles, no body of men in all time ever builded so beneficently for mankind as those who

* An address delivered at Franklin and Marshall College, Pennsylvania, June 14, 1887.

founded the American Union and devised the marvelous system of our republic of republics.

The history of Europe, our fatherland, seems but little else than a demonstration, to the shame of humanity, of the audacious theory of Hobbes, that war is the natural state of mankind. If upon the map of England, Scotland, and Ireland, the three countries whence the ancestors of most of us came, a red spot were marked wherever man has shed the blood of his brother, race warring against race, nation against nation, clan against clan, and, most sorrowful of all, sect against sect, how deeply crimsoned would be its color! How would the insensate parchment blush at the frailties of human nature! So truly was it written:

Lands intersected by a narrow frith
 Abhor each other. Mountains interposed
 Make enemies of nations, who had else,
 Like kindled drops, been mingled into one.

Well did the men of 1789 profit by these fearful lessons of the past. They took care so to order that European history should not repeat itself in the New World. They made it the cardinal aim to bring the discordant States into one family under an organization that should not contain within itself the seeds of dissolution. They sought to combine all the States under one strong government, having the substance as well as the form of power, having the faculty of self-preservation and the prestige of sovereign autonomy. As the States were the aggregation of citizens under governments adequate to the purposes of local administration, they enlarged the scheme and combined those bodies themselves into a republic of States under a government invested with the exclusive control of national affairs, and armed with powers adequate to all purposes of national administration. They took care to provide the essential requisite in each instance of plenary powers; those

of the States in local, and those of the Union in national, concerns. The most anomalous feature of the system was their empowering the national government to act directly upon the people *en masse*, and not, as before, limiting its action exclusively to the States as organic bodies. They so ordered that the national government was as much at home among the people as the governments of the States themselves.

Before their day the wit of man had not conceived a scheme of international federation more substantial than that of league, resting upon treaty, with tenure of life at the will of each contracting power. The statesmen of 1789 discarded this fragile conception. They disdained a league, they established a government of States.

Another anomaly characterized the national system which they ordained. They were not more jealous of executive than of legislative and popular usurpation. They were not more firmly of opinion that the welfare of the governed requires the limitation of regal prerogative than that a curb should be put upon the demos itself. Accordingly, by carefully drawn charters or constitutions, they limited the powers left to the States and set out a precise schedule of those which they granted to the nation. As the enforcement of the constitutions of the States had been entrusted by their authors to the respective State judiciaries, so they conferred the power of interpreting and enforcing the national constitution upon one national supreme court and its ancillary tribunals. Thus was devolved upon the judges of America a function previously unknown to jurisprudence; a function the most august that could be conferred upon public servants. Not merely were the courts to arbitrate as usual the controversies that arise between man and man, but it was made their duty, when occasion arose, to declare to the legislatures, to the executives, or to the constituent citizenship of the States, and the nation, that

this or that statute, this or that proceeding, is repugnant to the organic law, and therefore null, void, and forbidden. They were made governors of the government itself; and though not themselves armed with the power of the veto, they were endowed with the conservative prerogative of voicing the organic law whenever invoked for the prevention of abuses of power.

ONE OF THE MARVELS OF HISTORY

The success of the founders of the national government in devising its plan and in securing its inauguration is one of the marvels of history. It was a marvel that the plan was conceived at all, of combining a series of plenary governments in harmonious subordination to a common one, itself, in its sphere, a government of plenary powers. It was a marvel that thirteen independent States, so recently successful in throwing off one domination, should have consented, under any persuasion, to as supreme an act of self-abnegation as the surrender of the highest prerogatives of sovereignty. It was a marvel that, after such a union had been formed upon the basis of a written Constitution, that instrument itself, under the attrition of local jealousies and sectional animosities, had not been speedily construed by time-serving judges into a meaningless form of words, without substance, without vitality, without authority. We owe the successful inauguration of such a government chiefly to the influence of the great character of George Washington. We owe the establishment of the National Constitution, in the full force and efficacy of its real meaning, and in the plenitude of its grand design, to the judicial firmness, the intellectual courage, the sterling virtue, and the strong character of John Marshall.

There is a fanciful "theory of our national existence" which pretends that from the landing of the cavaliers at Jamestown, and the Puritans at Plymouth, throughout the

infancy of the colonies, and down to the treaty of peace with Great Britain, in 1783, the English-American colonists were already a nation; and that their concerted conflicts with the French and Indians, their united struggle for liberty, and their common Declaration of Independence were proofs that the nation already existed, and was not, and did not need to be, afterward formed. If this had been so, why the alarm of Washington, Franklin, Hamilton, Dickinson, Carroll, Pinckney, and their compatriots at the distractions which prevailed in the years succeeding the peace? Why the failure of the first convention which met at Philadelphia to devise a system of mutual commerce? Why the doubts and anxieties which beset the delegates who afterward assembled at Annapolis, during the whole period of their deliberations? Why the hazards and obstructions which imperiled the adoption of the Constitution after it was proposed, at every stage of its ratification? If the States newly endowed with sovereignty and independence were, by some political alchemy—unperceived by contemporary statesmanship and undescribed by contemporary history—already a nation, when their most intelligent citizens met “to form a more perfect union than the old confederacy, to establish justice, to insure domestic tranquillity, to provide for the common defense, to promote the general welfare, and to secure the blessing of liberty to themselves and their posterity,” then the founders of our national government were but the enactors of a senseless drama, were but pretentious attitudinizers before the world and before posterity, and were not public benefactors worthy of the veneration and gratitude in which their countrymen have been wont to hold them.

It is well that the centennial retrospections of the present period should be taken by the American people. It is well that our countrymen should be called at intervals to restudy

the times that tried men's souls, and renew their knowledge of the events that distinguished the decades of 1770 and 1780. It is well that the partisan fictions which would rob of the gratitude of posterity the great men who then so laboriously laid the foundations of American prosperity and happiness, should be subjected to examination and to the indignant repudiation which they deserve. If there is anything true in history, it is the fact that the men of 1787-89, from disjointed and discordant States, and from a chaos of conflicting interests and opinions, with pains and difficulty, against indomitable opposition, constructed the American Union as an original achievement. It is a fact that, until they succeeded in this arduous work, there had been no semblance of an existing nationality, except the circumstance of a common language and the accident of the possession of contiguous territory. Such was the violence of feeling in some quarters that, as mild a man as Oliver Ellsworth declared of an Eastern State that it had a spirit which would make a Tophet of the universe.

So far as it respected the form of the government established at that period, has it not proved adequate to the purpose of harmonizing the interests and administering the concerns of a continent? The only rational objection ever urged against popular government, was the difficulty of administration. The democracy of a single locality may readily meet in council and declare their will. But how impracticable did it seem, to evolve a common *consensus*, when the numbers of the self-governing came to be counted by millions of suffragans, and the extent of the territorial jurisdiction came to be expressed in thousands of miles. Could there have been a more successful or happy solution of a problem so difficult as that which was devised in 1787 of combining the States themselves into a republic, and giving the common government power to act directly upon the

people of the States, a system which found happy expression in the motto *E Pluribus Unum*?

Among the objects at which the founders aimed, as declared by themselves, was to "insure domestic tranquillity." That indeed was the supreme object, the *raison d'être*, of the system they were devising.

The paramount aim having been to establish a government that should combine in permanent and peaceful union the States and peoples of a continent, I come to ask, did its founders succeed in so difficult and ambitious an object: for it were idle to pronounce their eulogy if they failed? The inquiry at once brings into contemplation the sectional war, which for a time desolated the land, and during which we drank so deeply of the cup of European experience. Does that deplorable occurrence discredit the statesmanship of 1789, and prove the government then formed to have failed in its primary purpose? I approach the inquiry without dismay.

For any vices which the men of 1789 may themselves have incorporated into the national organization, they are responsible to history; but neither are they, nor is their system, accountable for vices, whether patent or latent, which inhered in the organisms of the States. They possessed only delegated powers. They were at liberty neither to reject nor reform the material of which they were to build. It was essential that every one of the thirteen States then occupying the territory which had been wrested from the mother country should be brought into the system. To have discarded a single State, much more half of them, would have been, by that fact, to have planted discord and rivalry as perennial growths in the land. They were under the necessity of bringing in every existing State: and, having no commission to reform, of admitting each with whatever vice or imperfection might belong to it.

CAUSE OF SECTIONAL CONFLICT

It is a fact of universal recognition that slavery was the cause and the subject of the sectional conflict of 1861-65. But the institution had grown to maturity before the framers of the Constitution of 1789 undertook their task. Ineradicable by voluntary and peaceful means, inexterminable by any device or contrivance within their own invention, those men could do no otherwise than to build notwithstanding and over it, and, while deploring its existence, to leave to time and events the work or the accident of its extinction.

The time did come for the extinction of slavery; and though the event occurred as the result of a bloody and desolating war, yet that conflict grew out of the existence of a vice inhering in the organisms of the States; and not originating in, belonging to, or more than inferentially and regretfully referred to in the Constitution formed by the statesmanship of 1789. And may I not claim that the harmony of sections which was so speedily restored after 1865, and is not soon to be disturbed, and which the country has since enjoyed, has rescued that statesmanship from the brief eclipse which it suffered, and constitutes even a more triumphant vindication than if the eclipse had not occurred?

Have we not a right also to conclude that the fraternizing influence which the national government had exerted before the outbreak of war had much to do in tempering the spirit with which it was conducted by both the combatants? Those wars only are attended with irremediable evil which have their instigation in the hatred of combatants for each other. Was there an officer or intelligent soldier in either of the armies engaged who, in hatred and malice, thirsted for the blood of his adversary? Do I tax the generosity of my audience unduly when I assert that the sentiments of

the combatants on both sides of that conflict were thoroughly patriotic? Not in the spirit of apology or crimination, but in illustration of the motive which actuated those who fought in opposition to Pennsylvania, I recur to the historical circumstances. Encumbered as they were with an institution harmful to themselves alone, which had been thrust upon their ancestors against unremitting protest; which had been augmented throughout the colonial period by the persistent agency of exterior governments and classes, insensible to remonstrance; and which had finally grown into proportions that rendered any external interference with it hazardous to society; how could their effort to resist such interference be fairly ascribed to any other motive than an earnest patriotism? Would the world have respected our Southern soldiers, could they have respected themselves, if they had not resisted invasion with the resolution of patriots, and defended their homes and firesides with the bravery of American fathers, brothers, and sons?

The wrongfulness of slavery may be conceded; but this we know, that the supposed victims of the institution were the only class in the community where it was, who profited by its maintenance. From fetish worshipping savages they became qualified for the high franchises of American citizenship. How my own people dealt with this institution, bore themselves toward it, and suffered and are still suffering from it, is for the judgment of history, to which we confidently and proudly appeal. For the purpose of the present occasion, this only need I maintain: that those who apparently fought for its continuance were actuated by no malice toward their adversaries, and solely by the promptings of a devoted patriotism.

The war accomplished its object. Slavery was overthrown; and compensation for the sorrows and desolations of the conflict, however inadequate, came in the fact of its

overthrow. And though fratricidal, it has left, even in the cup of the saddest mourner, none of the dregs of hatred and malice. A grievous national evil has been uprooted; a great national benefaction achieved; and the consolatory truth recorded anew, that from the conflicts of patriots ever comes good to the republic.

Was ever civil war followed by more cordial reconciliation? Was ever internecine strife succeeded by fewer animosities? And to what is the restored peace of sections, so complete, more largely due, than to the pacific influence which the great institutions founded in 1789 had exerted before the occurrence of the conflict, and have continued to exert, with redoubled potency, at every moment since its termination?

I have disdained to consider the power of the national government to crush out dissension: which it has in common with Russia, Prussia, and Great Britain. Its right and tenure of existence rest solely upon its capacity to fraternize the millions of freemen who own its allegiance, upon the catholic basis of moderated liberty, impartial justice, and equal laws provided by the men of '89.

The fame of John Marshall rests upon the part he had in establishing and solidifying the government which has been the subject of my inadequate laudations. His best memorial is that Constitution to which he gave power and authority wherever the territory of the United States extends, and the stars and stripes of America float. From the convention of 1789 he received a parchment; and he made it the supreme law of States, the crucial law of laws, and standard of American legislation. The architects of 1789 made the draft of an ideal structure; he erected the building which they designed, of stanchly fitted timber, and of strength to withstand the shocks of revolution and the vicissitudes of time.

JOHN MARSHALL'S YOUTH

John Marshall was reared in the Piedmont County of Fauquier, Virginia, under the shadow of the Blue Ridge. His father was an agriculturist of exceptional intelligence and worth who possessed a landed estate of moderate proportions and value, and combined land-surveying with that noblest of occupations. This father was his first and principal teacher, conjointly with a mother who was the educated daughter of an educated clergyman. It was in this manner he received instruction in the elementary studies usually pursued in primary schools, and was thoroughly grounded in the English classics. He had the benefit of but a single year's tuition in a public academy; and that was in Westmoreland, the county of the Washingtons and Lees. He returned home to receive private instruction in Latin from an English clergyman who had taken charge of the parish to which his family was attached. He afterward enjoyed the advantage of readings in law under the direction of Chancellor Wythe at Williamsburg; and of lectures in natural, moral, and political science at William and Mary College, from President and Bishop James Madison, a cousin of the statesman.

John Marshall was Virginia-born, of Virginia-born father and mother. He was the product of the social life, the intellectual and moral training, and the political and religious thought of his native colony. Like Washington, Henry, Jefferson, Madison, and other leading men of his State, he became more conspicuous than the mass of his compeers; but he was only one of tens of thousands of men who were like him in moral, intellectual, and social characteristics. He came of Church of England stock; distinguished for loyalty to the English crown, allegiance, and faith. His nativity was in a colony founded for the English crown; by Englishmen proud of the English laws,

name, and church; who had come over the water, not as refugees or exiles, but as protégés and agents of the rulers and ruling powers at home.

Memorials of the loyalty of the Virginian people to the royal personages and titled worthies of England are still to be read on the map of all that part of the State which had been populated before 1775. The colony itself was called Virginia, after that virgin queen who was its projector. Elizabeth City, Elizabeth River, Jamestown, James City, Henrico, Prince Edward, Caroline, Charlotte, Louisa, King George, King William, Prince William, Williamsburg, William and Mary, King and Queen, Fluvanna, Rapidan, North Anna, South Anna, Gloucester, Lancaster, Westmoreland, Cumberland, Stafford, Fairfax, Buckingham, Rockingham, Brunswick, Mecklenburg, Lunenburg, Halifax, Amherst, Albemarle, Nelson, Pittsylvania, Fincastle, Botetourt are names which bespeak a loyalty as indiscriminating as devoted. Such were the dominant sentiments, and such the political and social auspices, in and under which John Marshall was born and raised.

Virginia having been a colony in which loyalty to the British crown and affection for the home country were the warp and woof of popular sentiment, to what must we ascribe the remarkable fact that at the time of Marshall's majority she had assumed a leading and controlling part in the movement for separation? An exceptional cause must have existed for the extreme revolution which had occurred in her political sentiments. That cause is easily discovered. Through the avarice of crowned heads and leading officials in England, interested in the slave trade, and in maritime expeditons fitted out for its prosecution, the colony of Virginia, more than any other, had become so populated with Africans, that general alarm had come to pervade the community for the well-being of the colony and even safety of the social fabric. The mother country

refused to realize the degree of this appalling danger, and turned a deaf ear to the remonstrances which continually went to her on the subject. It was a danger that did not admit of vehement public discussion, and was, by that fact, the more paralyzing to the loyalty of the colonists. In other respects the grievances of Virginia were identical with those of the more Northern colonies. But in respect to this peculiar danger her grievance was cumulative, and was for that reason even more trying to her traditional loyalty.

VIRGINIA'S GRIEVANCE

An expression of it was made a prominent feature of Mr. Jefferson's original draft of the Declaration of Independence in a paragraph containing these sentences:

He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty, in the persons of a distant people, who never offended him, captivating and conveying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. . . . Determined to keep open a market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce.

Mr. Bancroft says that "these words express precisely what had happened in Virginia, which, as well as other colonies, had perseveringly attempted to repress the slave trade; while the king had perseveringly used his veto to protect it."

Thus it appears, that on the part of Virginia the war of 1776 was, like the later one of our own times, a war of self-protection from the same danger, returning in another form. History but repeated in 1861 the rôle of 1776.

MARSHALL AS A SOLDIER

John Marshall was born in 1755, and was just attaining his majority when the Declaration of Independence was

adopted. His twenty years of youth had occurred in the period when the minds and conversation of his elders were engrossed with the momentous topic of separation, and with the causes which were making it more and more inevitable. How could so clear and comprehensive a mind, thus daily tutored, have become other than thoughtfully solicitous for the reasons of the solemn measures then constantly debated? In this period of anxious thought, this epoch of momentous problems, he was too young to be more than a listener. He was fifty years younger than Franklin, twenty-two than Washington, twenty than Adams, nineteen than Patrick Henry, twelve than Jefferson, and four than Madison. In his twentieth year he had been of the first to enlist in the Continental Army, and he remained in the field as a private or captain until active hostilities had ceased.

As member of a company of which his father was captain, he fought against Lord Dunmore in the battle and victory of Great Bridge, in 1775. His command soon repairing to Washington's army, he was in the battles of Iron Hill, Brandywine, Germantown, and Monmouth. He was with Washington in the bitter winter at Valley Forge, and was assigned by him, though a mere youth, to important special duties. His cheerful and joyous nature relieved the despondency and gloom of that dark crisis of the Revolution. He was with Mad Anthony Wayne at the storming of Stony Point, and was in the engagement at Paulus Hook. He was a prompt, diligent, faithful, cheerful, brave, and self-sacrificing soldier, throughout a camp life of four years.

It was in consequence of his being engaged with these humble and patriotic duties, that he failed to be associated in the public councils with the statesmen of the Revolutionary period.

But the close of the war found him attained to the age of manhood, qualified and equipped to take his destined part

in the great work of devising a plan of national government, and imparting to it the guarantees of enduring stability. It was then that, standing shoulder to shoulder, and moving side by side with James Madison, their mother State began to contemplate with pride and felicity the conspicuous conduct and beautiful character of two of the most talented and conscientious statesmen that ever labored for the welfare of America.

MARSHALL AT THIRTY-TWO

Marshall was thirty-two years old when the convention of '87 met in Philadelphia to devise a scheme of national government. Men who had already achieved exceptional prominence in his State were delegated to represent her there, and he was prevented, by the misfortune of being a young man, from being chosen as a member of that historical body. It is well known that the Virginia plan of Union was the one that was preferred, and with judicious modifications, adopted at Philadelphia; and it is one of the enigmas of American history, that when this plan of Virginia came to be submitted for ratification, it encountered a more determined and formidable opposition from herself than from any other State. It was as a member of the State convention, called at Richmond in 1788, to decide whether or not Virginia should enter the proposed Union under the Constitution promulgated at Philadelphia, that Marshall began the brilliant civil career which made his name one of the most conspicuous in American annals. As coadjutor with Edmund Randolph, Madison, and others in advocating in convention the ratification of the Constitution, he was brought into ardent contestation with a formidable array of renowned men, headed by Patrick Henry, George Mason, and William Grayson—men who undoubtedly for a time represented a majority of the body. It is difficult to discover in the published arguments of those who were opposed

to ratification, sufficient grounds for their resistance to a measure of such obvious expediency and necessity as that of the Union of the American States. Only by reading between the lines of those debates can we discover the real cause of opposition, the *monstrum horrendum* which filled the breasts of some of the best patriots of the day with apprehension of the danger that would result from merging a commonwealth filled with African slaves into such a union, under such a government, as was proposed. They felt that the exclusive right of the domestic government to deal with this dangerous institution, exempt from external interference, was a right essential to self-preservation, and would *ex necessitate rei* be jeopardized if the State should pass under the dominations of a national government invested with control over matters of general welfare. While Madison and Marshall shared intensely in these apprehensions, yet they had such faith in the conservative influence of national institutions, and such confidence in the beneficent spirit and policy which would inspire the general government, that they were content rather to run the hazard of that single danger, than to leave the country a prey to the local jealousies, rivalries, and animosities that would have full course in separation, and might become in all quarters, bitter enough, as described by Ellsworth, to make a "Tophet of the universe." Here was a signal manifestation of that faith in the catholic influence of national institutions, which was displayed in the character of Marshall throughout his civil and judicial career. It was impossible that such a character and such talents as his should not have exerted a great influence in the Virginia convention of 1788, and his contemporaries united in ascribing to him a large share in bringing that body to a vote for ratification. The action of Virginia upon the question was equivalent to the acceptance of the Constitution by the States yet undecided, which soon occurred; and Madison and Mar-

shall, the favorite sons of their mother commonwealth, at once took rank among the most conspicuous statesmen of the Union.

HIS EARLIER PUBLIC SERVICES

A seriatim recital of the details of the life of John Marshall would not befit the present occasion. The interesting biography of Mr. Flanders, the tasteful and affectionate pen picture drawn by Judge Story, the eloquent eulogy pronounced shortly after his death by your own Horace Binney, and the recent scholarly oration delivered at the unveiling of his statue at Washington by Mr. Rawle, another Pennsylvanian, have rendered useless the repetition of a story so well and so often told. A rehearsal of it by me would be like an attempt to gild refined gold. How he married a beautiful and delicate girl of Richmond who was the object of a tender and affectionate care which was the uppermost thought of a busy life—how he moved from Fauquier to Richmond, the more successfully to pursue the profession whose members in two hemispheres honor him as one of its most illustrious ornaments; how he was continually called upon to serve the city of his residence in the legislature of the State, and responded at personal sacrifice as long as a sense of duty seemed to enforce the appeal; how, in the conduct of suits involving large amounts and questions of rare difficulty and novelty, he held rank as leader at a bar second in learning, talent, and reputation to no other in the newly united States; how, at the personal solicitation of Washington, leaving with reluctance this congenial and lucrative theater of intellectual gladiation, he entered the halls of Congress, and became there a leader among the intellectual giants of those days; how he was sent by President Adams as envoy extraordinary and minister plenipotentiary to the Directory of France, where this honest servant of a virtuous republic, when approached

with the coarse intimation that he could not obtain a hearing unless the doors of audience were first opened by a *douceur* to the wretches with whom he was to treat, rejected the overture and returned home, to receive the plaudits alike of political foes and friends; how he was shortly afterward offered two places in the Cabinet of the President, and declined them; how he subsequently accepted the office of secretary of state, and left on file in that department a series of state papers which have been guiding landmarks in the foreign policy and diplomacy of our country ever since; how, from secretary of state, he was elevated to the exalted position of chief justice of the United States—these things are part of the public history of our country known to every citizen of intelligence.

PRIVATE AND SOCIAL VIRTUES

It would be interesting also to dwell upon his private and social virtues which threw a charm around his fireside and domestic life; upon the rare combination of probity and wisdom uniformly manifested in his public and personal conduct; upon the natural dignity and considerate propriety that marked his whole deportment; upon his love of truth and deep sense of moral and religious obligation; his love of home and taste for the pleasures of the domestic circle; his respect, courtesy, and kindness for the female sex; his benevolence and charity which was an innate sentiment of heart—but these personal traits have been so delicately and graphically depicted by his most intimate associate upon the bench that a repetition of them would but dull the picture.

It is reasonable to conjecture that if Marshall had not been transferred from political life, he would have succeeded Monroe in the Presidency. It was the good fortune of the country that he was assigned to another field of duty. It was no disparagement of the two chief justices

who had actually occupied the seat before him to say that they had been little felt in the exercise of the functions of the high position which they held. Courts of justice can only act through the medium of pending suits, and possess no other function than that of pronouncing judgment in cases at law and in equity submitted for adjudication. In the first years of the national government but few cases could arise under conditions which brought them within the jurisdiction of the Supreme Court. They were so few in the time of Jay that even while holding the office of chief justice he went abroad on a protracted foreign mission. Judge Ellsworth, to whom the country owes the judiciary act of 1789, which was, second only to the Constitution itself, "the most wonderful work ever struck off at a given time by the brain and purpose of man," was on the bench too short a time, before his own mission to France, to deal with more than the few important cases that had matured for his consideration. Judge Marshall ascended the bench in full time, untrammelled by precedents, to settle the principles which should govern the decisions of the Supreme Court on the important questions which were just beginning to come under its jurisdiction.

The proprieties of the occasion forbid my indulging, before an audience of laymen, in a technical exposition of the principles of political and constitutional law which Judge Marshall enforced in the high office of chief justice. The more important of his decisions went searchingly into the theory and character of the national government, into the correlative powers of the State governments, and into the rights and duties of the States and nation toward each other.

I need not premise that two distinct theories touching the powers of the national government were respectively maintained by the two great political parties of Judge Marshall's day. To use his own language, one of them "contemplated

America as a nation, and labored incessantly to invest the Federal government with powers competent to the preservation of the Union. The other attached itself to the State governments, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members."

Judge Marshall belonged, from the beginning, to the party which insisted upon strengthening the Federal Government. He believed in his conscience, that the intention of its authors was to establish a strong government of independent powers and resources, and that the interests of the country required an effectuation of that intention. He ascended the supreme bench thoroughly infused with this preconception; and, possessing the courage of his convictions, he interpreted the Constitution in accordance with what he conceived to be its real design. It may not occur to the superficial student of the controversy which so long divided opinion between the champions of State sovereignty and Federal supremacy to inquire what was the underlying sentiment which animated the party who, for three-quarters of a century, resisted every measure tending to increase the strength and independence of the Federal Government. It had its principal seat and constituency in the Southern States, and its prime object was the protection of the slave institution from external interference. Mr. Madison defined the line of adverse opinion when he said, in the Convention of 1787, "the States were divided into different interests, not by their difference in size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interests in the Southern United States. It did not lie between the larger

and smaller States; it lay between the Northern and Southern."

THE QUESTION OF SLAVERY

Parties formed themselves at the outset on this question of slavery. The Federalists, under Washington, espoused the cause of Union and Nationality. The Republicans first opposed the Union, and then, as a means of protecting the peculiar interests of the South, asserted the doctrines of State Rights, and promulgated, chiefly in the interests of slavery, the tenets of that political school.

The mission of the State Rights party from the beginning of the Union was to defend the institution of slavery. In fulfillment of the mission it advanced the doctrine that the States were independent sovereignties, that the Union was but an alliance between sovereignties, and that therefore no set of States had a right to look into the internal economy of another set of States. The object was to relieve the conscience of the North from any sense of responsibility on the score of slavery, and to prevent any interference by the States exempt from slavery in the internal management of those encumbered with the institution. It was a conservative theory maintained for a patriotic purpose.

For a time the doctrine answered its object. When the Union was originally formed the North and South were in equilibrium, having about equal political and material strength. At first there were no great physical agencies, like railroads, steamboats, and telegraphs, operating to annihilate distance, to compact widespread territories, and to consolidate the interests of extended regions.

But in course of time, the effect of these great mechanical agencies was to undermine the local powers of the States, and to nationalize the Union. And, as the interests of the country grew more and more national, and the public mind became more and more favorable to national ascendancy,

the conscience of the nation grew more and more averse to slavery. So that, by the year 1860, of all the population of the United States, twenty-five millions of whites were opposing and only six millions of whites upholding the institution.

Under the pressure of these circumstances, the State Rights party had for some time felt that their doctrine could no longer serve the purpose of protecting the slave institution. Its fortunes were felt to be desperate, and its case to require an extreme remedy.

There was but one recourse for the protection of the institution, and that was secession. It was tried, and we all know what the result proved to be in 1865. Slavery was completely abolished. The Union was nationalized. There was no slave institution left to defend. There was no further use for the doctrines of State rights in their extreme application, and the nation entered upon a new career. How fortunate was it that a war with some European power was not pending when secession was thus ventured upon!

With the experience of these later events in mind, how vividly do the dangers which beset the Union in the adolescent period of its existence present themselves to the vision! That the Union should have been formed at all is marvelous in the extreme—that it should not have perished in the early years of its existence seems little less than a miracle due to a Providence ever benignant to our country.

MARSHALL'S GREAT WORK

The disturbing force which in 1861 eventually accomplished a temporary dissolution of the Union on the line of slaves or no slaves had been felt potentially in obstructing its original formation, and, after this event, in embarrassing the efforts of Washington's school of statesmen to give vigor, authority, and paramount sovereignty to its government. Against this force Judge Marshall found himself

constantly arrayed; and it is largely due to his cogent reasoning and unflinching courage, both in legislative debate and in lofty deliverances from the supreme bench, that the edifice of our national government was firmly compacted in its framework, and fitted to withstand the formidable hostilities which constantly beset it. His conspicuous activity and efficiency in the task which seemed providentially assigned to him, of confirming to the national government the functions granted by the Constitution, brought him into painful antagonism with the most honored and popular men of that portion of the Union of which he was a native and devoted citizen. Whenever he was at home, he found himself in an atmosphere of opinions adverse to those in which his convictions held him, and he felt keenly the disagreeable incidents attending such a state of affairs. Yet, nerved by rectitude of purpose, and thrice armed in the faith that his cause was just, his course knew no variability nor shadow of turning; and his conduct in the great office of chief justice furnishes the most conspicuous example, in judicial history, of courage enlightened by vigorous intellect, overcoming influences the most imposing, formidable, and persuasive that ever coöperated to swerve a great jurist from the path of duty. It is fortunate that, although living and dying a slaveholder, he yet gave the best energies of his life to strengthening a government for which that class of citizens felt and inculcated an unyielding jealousy. It was fortunate for the country that so able a man, occupying for a third of a century the controlling office of chief justice, should have entertained the political opinions on which he acted. How he came to espouse them was best explained when he wrote: "I am disposed to ascribe my devotion to the Union and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time when the love of the Union and resistance to the claims of Great

Britain were the inseparable inmates of the same bosom; when patriotism and strong fellow feeling with our fellow-citizens of Boston were identical; when the maxim 'United we stand, divided we fall,' was the maxim of every orthodox American. I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States who were risking life and everything valuable in a common cause believed by all to be most precious; and where I was in the habit of considering America as my country, and Congress as my government." Such was his own explanation of the manner in which, though Virginia-born, he was a Federalist *intus et in cute*. Yes, "the Union and a government competent to its preservation," were the fond creed of his entire public life. Yes, "America is my country," was the sentiment which inspired alike the young soldier at Valley Forge and the chief justice at Washington.

After thirty-four years of service in the most exalted position known to our laws, in the metropolis of your own State, at the advanced age of eighty, he who had been the chief instrument in making the national government "competent to the preservation of the Union," died the peaceful death of a Christian and patriot. A President of the United States, speaking of him, has condensed a volume of eulogium in a single sentence: "He found the Constitution paper, and he made it a power; he found it a skeleton, and he made it flesh and blood."

His principal glory is the Constitution, to which he gave life and power; and John Marshall, the patronym of the noble college which you have called in his honor, is a name that will ever be associated with the strength, stability, and grandeur of the American Union. And as that Union has now been relieved of the danger which attended its birth and imperiled its existence for nearly a century, let us hope that its destiny shall be to endure for all time.

GEORGE WYTHE

By Rosewell Page, Lt. D.

THERE has just been erected in St. John's churchyard a granite monument whose bronze inset contains the statement of the birth and death of George Wythe, the jurist and statesman, and that he was "The teacher of Randolph, Jefferson, and Marshall. First professor of law in the United States. First Virginia signer of the Declaration of Independence."

Although more than one hundred years have elapsed since the death of Chancellor Wythe, at his home near Fifth and Grace streets, Richmond, and this stone is the first marking of the place where his mortal remains were laid, not since Plato's time, perhaps, has any teacher been made more illustrious, judged by the performance of his disciples. Like so many other great men of Virginia, his name and work, illustrious as they were, are almost forgotten.

He lived in a great age and measured up greatly to its requirements.

His grandfather, Thomas Wythe, had come from England in 1680 and settled in the county of Elizabeth City, where he married Anne Shepherd, daughter of John Shepherd. His father was Thomas Wythe of the same county, for which he was a burgess from 1718 to 1726. His mother was Margaret Walker, daughter of George Walker and granddaughter of Rev. George Keith. By these strains he was associated with two of the most notable families in Virginia, from the former of which have come writers, explorers, and statesmen, and from the latter have come in

our own time the late distinguished president of the Court of Appeals, Judge James Keith, and other notable Virginians of that name still residing in northern Virginia. There is a question, I am told, as to the Keith relationship as set out.

George Wythe was born in 1726 and belongs to that array of great men taught by their mothers. He attended William and Mary College and studied under his uncle-in-law Stephen Dewey in Prince George County. He settled in Williamsburg, where he reached distinction at the bar and in 1754 was appointed attorney general by Governor Dinwiddie in the absence of Peyton Randolph. He succeeded Armistead Burwell as a burgess from the city of Williamsburg which he represented until 1756. He moved to Spottsylvania County for a short time and married Anne Lewis, a daughter of Zachary Lewis. In 1758 he was back in Williamsburg and served as a burgess for the college until 1761.

In that year he returned to Elizabeth City and was burgess for that county until 1769.

In 1765 he opposed Patrick Henry's resolution on the Stamp Act as being premature; though, in June, 1765, he was on the committee of correspondence and protested against the Stamp Act, and had drawn the remonstrance to the House of Commons which was adopted by the House of Burgesses in 1764. "In the Norton correspondence (*Tyler's Quarterly*, Vol. III, No. 4, p. 289, April, 1922) Wythe is shown writing from Williamsburg in the summer of 1768 ordering eight or ten gallons of the best arrack in carboys properly secured, and some gardenseed, an elegant set of table and tea china, with bowls of the same of different sizes, decanters and drinking glasses, an handsome service of glass for dessert, four middlesized and six lesser dishes, and three dozen plates of hard metal, 100 skins of writing parchment prepared for enrolling our acts of Assembly on,

several bundles of bed quilts, two pieces of blanketing, and as many of rolls for servants, 10 or 12 pairs of shoes and two slippers for himself, and one or two other articles, and a bonnet for Mrs. Wythe. Also an handsome well built chariot, with the device sent painted on it, as well as a copper plate with the arms of Virginia neatly engraved, and some impressions of them to be pasted on books belonging to the House of Burgesses." In 1775 he was clerk of the House of Burgesses in which year he was elected a member of Congress. In 1776 he was a member of the Congress which signed the Declaration of Independence written by his former pupil, Thomas Jefferson, and in the same year he was on the committee to revise the law of the commonwealth of Virginia—a position which he was well qualified to fill not only because of his great learning and familiarity with the law and public affairs but because he had been the compiler of the Code of 1769.

In 1777 he was Speaker of the House of Delegates and in the same year was one of the three judges of the Chancery Court established by law. In 1779 he was professor of law in William and Mary College, and it is said that he was the first professor of law in the United States. It is also said of him that he was the first judge to rule an act of the General Assembly as unconstitutional.

In 1787 he was elected a member of the convention which met in Philadelphia and adopted the Constitution of the United States, but like Dr. McClurg he was not present when the Constitution was signed. Inasmuch as Edmund Randolph and George Mason who were present refused to sign, the three Virginia deputies who did sign it were George Washington, John Blair, and James Madison, Jr.

In 1789 George Wythe resigned the professorship of law in William and Mary College and became the sole chancellor of the State by which title he is best known. In 1788 he was vice president of the Virginia convention

which ratified the Constitution of the United States, Edmund Pendleton being the president. That convention met on the second of June, 1788.

The Virginia members of Congress who signed the Declaration of Independence were George Wythe, Richard Henry Lee, Thomas Jefferson, Benjamin Harrison, Thomas Nelson, Jr., Francis Lightfoot Lee, and Carter Braxton. Maryland signed just above them and Pennsylvania just after them. There are well-known stories told of the grim pleasantries of the members at that instant. One is that as Charles Carroll of Maryland signed his name, which is just above that of George Wythe, to that immortal document, some one observed "Carroll, they'll never catch you; there are so many Charles Carrolls in Maryland"; whereupon that gentleman took up the pen and added "of Carrollton." Another story is that as the Pennsylvania delegation were signing some one remarked, "We must all hang together!" "Or else we all hang separately," replied Benjamin Franklin.

We can well imagine how that distinguished group of Virginians respected the character of George Wythe when an examination of the signatures shows that his name stands first as already mentioned: above that of Thomas Jefferson, the author of the paper himself; above that of Richard Henry Lee, the Cicero of the Revolution; above that of Thomas Nelson, Jr., who had brought from Virginia the resolutions of the Virginia convention directing Virginia's representatives in Congress to declare for independence; which resolutions had been drawn by Patrick Henry and offered by himself. I love to think that the Virginia delegation stood back to yield precedence to the great man whom they and the people of Virginia in common, so greatly loved and revered.

In preparing this sketch of Chancellor Wythe I have considered the great work that he did as judge of the High

Court of Chancery where his opinions rank with those of his great pupil, John Marshall, who owed so much to him in what he did in establishing the Constitution of the United States; for it was in the convention of 1788 already referred to as having met in Richmond to ratify the Constitution that George Wythe as chairman of the committee of the whole offered the resolution for the adoption of the Constitution of the United States by that convention.

NOTES OF CASES

I have been fortunate enough to have in the making of the following notes, the volume of Wythe's "Reports" formerly owned by Judge Peter Lyons, on which Judge Lyons has in his own hand marked and commented upon the "comments" of Chancellor Wythe. Judge Lyons represented the Parsons in the "Parson's Cause" at Hanover when P. Henry emerged into history. After Judge Pendleton's death he was president of the Court of Appeals, which at that time was composed of President Edmund Pendleton, Peter Lyons, William Fleming, Paul Carrington, James Mercer. November 12, 1793, Henry Tazewell qualified in place of Mercer who died during the term. March 15, 1796, Spencer Roane qualified in place of Henry Tazewell, resigned.

In 1779 Judge Lyons was judge of the General Court, and ex officio judge of the Court of Appeals. In 1789 he was judge of the New Court of Appeals of five judges. In 1803, president on death of Judge Pendleton.

Decisions of Cases in Virginia by the High Court of Chancery with Remarks upon Decisions by the Court of Appeals, reversing some of those Decisions.

Copyrighted by George Wythe
Title of Book 1795

Richd, Printed by Thomas Nicholson, MDCCXCIV.

William Dawson, plff. and Beverley Winslow, deft.	} P. 110 (I give the comments of the Reporter, RP).
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"This doctrine is not peculiar to us nor to our times. In Athens, the sentences of their *diallacterioi*, who were judges chosen by

the parties, differing from other arbitrators only in being sworn, were not reversible, as we learn from the Oration of Demosthenes against Midias." In "Wilkins vs. Taylor" Note, "Why Gordian Knot," "the touxnoutas amadzas ho desmos," etc.

In note to Devisme & Smith, London Merchants, vs. Henry Martin & Co., London Merchants, Wythe, the reporter says:	}	do., p. 134
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The writer of these notes, differing in this point with three capital English judges, is aware that he will be regarded with a fastidious eye by men whose veneration for the *Westmoasterian oracles* is equal to the veneration of the ancients for the *dodonean* and *delphic* oracles; but when he has *reason*, the only despot to which he professeth unconditional submission, on his side, he will venture to differ with any man.

Wythe disapproves the determination in the case between *Solomons vs. Ross* for these considerations, etc.

In *Farley vs. Shippen* (do., p. 142) the Court of Appeals say, "When out of empires violently dismembered (which was the case between America and Great Britain) separate, and independent nations are formed, such of the evils which must happen, both during the conflict and after it, may be cured by treaties between nations when tranquility is restored, more humanely than by fulminating the panoply of escheats, forfeitures, and confiscations, involving in distress and ruin many people on both sides innocent, otherwise than by a fiction, of the injuries which caused the separation."

To the above statement the great Chancellor Wythe adds as a note: "May we not hope the period not to be far distant, when the regum ultima ratio will give place to modes of disceptation, rational, just and humane for terminating national differences of every kind? What nation, by their example, is fitter than Americans, to recommend those modes!"

In *Hinde vs. Edmund Pendleton and Peter Lyons, Admrs. of John Robinson*, (do., p. 146) The court deals with *by-bidding* at a sale of slaves, saying "he bid the pretium affectionis which is unlimited and which was therefore—*What the By-Bidder and His prompter pleased!*"

The chancellor's note is "Men most commend him who most deceives them, because

" 'Doubtless the pleasure is as great
Of being cheated as to cheat.'

as Butler hath observed, when they are cheated out of their senses only; but when by a deception they are injured in their property, they are not disposed to commend him who deceived them."

In Edmund Pendleton *vs.* Thos. Lomax (do., p. 90) Wythe says as to a divided court, in a criminal prosecution being an acquittal of the accused. "Æschylus in his Eumenides informs us that such was the dictate of Minerva in the case of Orestes, when there was the same number of judges on each side, when he was tried for slaying his mother."

In Rose against Pleasants and others (do., p. 153) as to the valuation of land in tobacco by tobacco inspectors:

After citing extracts from the opinion and decree of the Court of Appeals, there is added by the chancellor:

A commentary upon this opinion and decree.

(Quoting). "*There is error in the said decree.*" He adds bitterly, "That decree surely was not erroneous entirely, although it was reversed entirely."

(Quoting). "*The parties having chosen certain persons to value the land purchased, none others could, without their mutual consent, be substituted to perform the same.*"

Wythe adds, "but upon this principle the Court of Appeals are supposed to have deviated in a subsequent part of their decree."

(Quoting). "*The power delegated to those persons was merely to value the land, and not to adjust the accounts, or settle other disputes, between the parties.*"

Wythe adds, "one of the reversed decrees set aside everything that those persons did, and the other approved nothing more of what they did than that part which the correcting decree established; namely, the valuation of the land in sterling money."

(Quoting). "*No time being fixed for the valuation to be made, etc., it ought to be governed by circumstances at the time of making the valuation, and not at the time of the contract, and no objection arises from the situation of the country, etc.*"

Wythe adds, "the persons appointed by the parties to value

the land in tobacco compared the values of land and tobacco with sterling money, and declared the value of so much tobacco to be equal to the value of the land, because those articles being each equal to the same quantity of sterling money are equal to one another."

(Quoting). "*What the valuers did in adjusting the accounts between the parties was not only void in exceeding their powers, but improper in the exercise of what they assumed in their allowing credits to Mr. Ross, etc.*"

Wythe adds, "For the same reasons these credits are disallowed by the reversed decrees."

(Quoting). "*Neither law nor custom do warrant the scaling of a tobacco payment made in discharge of a tobacco debt.*"

Wythe adds, "this part of the correcting decree ministereth occasion to enquire whether the debt in this case which is confessed to have been originally a tobacco debt after what had happened remained a tobacco debt. . . . The men chosen . . . perform the business in such a manner, that the Court of Appeals annihilate the part relative to the conversion of the money into tobacco, establishing the other part of the referee's act, that is, in money."

After citing another long paragraph from the opinion of the Court of Appeals, Wythe adds briefly: "Between this paragraph and any sentiment in the reversed decree no discrepancy appeareth."

To another paragraph of the opinion he adds, "When a case like this shall be shown, perhaps a precedent for the reversed decree may be shown."

In reply to another statement in the opinion, he adds, after referring to what was uncertain in the testimony before the lower court.

"Whosoever can show what else would be done with it,
—— erit mihi Magnus Apollo."

He then goes into logarithms as to the four cases in *compound interest*, to prove how, when principal, time, and rate of interest are given, to find the *amount*, at the end of that time, at compound interest.

In *Hill vs. Gregory and Braxton vs. Gregory* (do., p. 15), quoting the opinion of the Court of Appeals, Wythe adds "the doctrine contained in the proemium to the latter decree, was not controverted in the present case, nor is recollected to have been controverted for almost two centuries before it in any case, and is thought not to have required at this day grave dis-

cussion and the sanction of solemn decision" (as to relief in equity against mistake or accident and of unconscionable and oppressive use of a judgment at law made by one party to an agreement recovered against another).

Then he adds, "The words *"there is no error in so much of the said decree* (that is, the decree of the high court of chancery) *as sustains the suit for relief*" seems an approbation of something done by the judge of that court in sustaining the suit for relief: but if by any effort of him the suit for relief was sustained, the effort must have been like the *vis inertiae*, for it was as inert in sustaining the suit for relief as the ground whereon the Capitol stands, is inert in sustaining that edifice."

Again, the chancellor in his comment on the opinion of the Court of Appeals, says, "The agreement included in this opinion is an enthymema, an imperfect syllogism, in which one proposition is suppressed. If the agreement be cast in the figure of a perfect syllogism, *the major proposition* would be by law, if a debtor, who oweth money on several accounts making payments, do not at the times of payments, or before, direct in which of those accounts, the payments shall be entered to his credit the creditor may enter the payments to the credit of the debtor in any other account subsisting between those parties.

"The minor proposition would be: But Carter Braxton who owed the money on several accounts, viz, on account of bills of exchange, protested, and on account of a bond, making payments, did not at the time of payments, or before, direct that to his credit, on account of the protested bill of exchange, the payments should be entered. And the conclusion would be: therefor the creditor, Fendal Southerland, might enter the payments to the credit of the debtor, Carter Braxton, on account of the bond. With this conclusion the reversed decree accorded.

"It is said to be erroneous, and if it be so, it must be erroneous either because the major proposition is false; or because the minor proposition is false; for if those premises be true, the conclusion is unavoidable; and the decree according with it cannot be erroneous."

He goes on to analyze the opinion, using the same inexorable logic as follows: "The two paragraphs contain four distinct propositions: but between any one of them and the conclusions, or any one of the conclusions, or between all the propositions and all or any of the conclusions doth not occur one single instance of a middle term to connect the extremes together."

After supplying the middle term which results in the conclusion different from that found by the Court of Appeals, he adds:

“By what form of ratiocination can one or two, or all of the conclusions mentioned be deduced from that proposition? If neither, why was it stated?”

In *Maze vs. Hamilton* (do., p. 44) the chancellor says: “The judge of the High Chancery Court who is bound to adopt the decrees of the Court of Appeals, register them, and enforce execution of same, when he performing this duty, in such an instant as the present, where the sentence for which he is compelled to substitute another, was the result of conviction, imagines his reluctance must have in it something like the poignancy which Galileo suffered when having maintained the truth of the Copernican in opposition to the Ptolemaic System, he was compelled by those who could compel him to adjure that heresy.”

In the same case under the head of “Commentary” after quoting a paragraph of Judge Pendleton’s decision, he writes “instead of this farrago of text and gloss, let the unsophisticated words of the act be substituted.” . . . And further, quoting, he adds, “This may pass for demonstration with those who have sagacity to discern a concatenation of the arrangement with what is said to be shown by it.” And when the Court of Appeals said: “I am sure the interpretation is more natural, more proper, etc.,” he adds: “Confidence cannot determine what interpretation is more natural, etc., with the principles of justice.”

In his “Remarks” to “*Williams vs. Jacob and Wife*” (do., p. 49) he says: with reference to the act of the General Assembly from which any man with a military warrant might extrude the proprietor . . . in his anguish of soul, he could only “bemoan his misfortune in some such terms, perhaps, as *dulcia linquimus arva* and mutter to himself, *Impius haec tam culta novalia miles habebit?*”

In *Burnsides vs. Reid* (do., p. 50), the chancellor says in a note, “The climax of rights here attributed to the statute seems to have been fabricated by companies of land mongers, who, not content with the extravagant license granted them by orders of council, perhaps as beneficial as if they had been boundless, wished to convert them into monopolies.”

On page 53 he adds, under “Remarks,” “The decree is admitted to be erroneous by him who delivered it, and who de-

clared, at the time, that it did not accord with his own opinions; but that it was congruous, as he believed with the sentiments of the Court of Appeals, he was mistaken; but, perhaps to avoid such a mistake will not seem easy to one who peruseth the reversing decree, and endeavoreth to connect the conclusion with the premise."

He further adds, "this naughty decree . . . is repeated almost literally although it is said to be reversed entirely."

In *Roane et al. vs. James Innes, Attorney General; Jacquelin Ambler, Treasurer; and John Pendleton, Auditor* (do., p. 68) the chancellor's note is, "By this doctrine, the officer who was thus unluckily discharged would have the thirst of Tantalus.

"Nee bibis inter aquas, nec poma natantia carpit, Petronius Arbitr."

In *Hilton vs. Hunter* (do., p. 88), he says, "This specimen of refutation seemeth not less happy than compendious. It is economical; for by it are saved the expenses of time and labor requisite, in a dialectic investigation which is sometimes perplexed with stubborn difficulties. It is a safe mode; for fallacy, if it exists in the refutation, cannot be detected."

The year after George Wythe had signed the Declaration of Independence, there was born in the County of Hanover in the parsonage of a Baptist minister, a man child, who was to become perhaps the most famous citizen of the United States in his time, Henry Clay by name. When a youth of sixteen he wrote in the clerk's office in the city of Richmond and there formed the acquaintance of the great man of whom I am writing who, at that time, presided over the court of which Peter Tinsley, Esq., was clerk. The judge invited young Clay to his house, who nearly fifty years afterward wrote of him, "My first acquaintance with Mr. Wythe was 1793 in my sixteenth year, when I was a clerk in his court and he then probably three score and ten. His right hand was disabled by gout or rheumatism and I acted as his amanuensis and wrote the cases he reported. It cost me a great deal of labor. Not understanding a single Greek character, to write citations from Greek authors which he inserted in the copies of his report sent to Mr. Jefferson, to Samuel Adams, and one or two others I copied them by imitating each character from the book.

"Mr. Wythe was one of the purest and best and most learned men in classical lore that I ever knew. . . . His countenance was full of blandness and benevolence and he made in salutation to others the most graceful bow that I ever witnessed."

Of Chancellor Wythe, Jefferson has spoken in the most affectionate and appreciative way:

"The pride of the institution of William and Mary is Mr. Wythe, one of the Chancellors of the State and a professor of law in the College; he is one of the greatest men of the age, having held without competition the first place at the bar of our general Court for 25 years and always distinguished by most spotless virtue. He gives lectures regularly and holds moot courts and parliaments wherein he presides and the young men debate regularly in law and legislation learning the rule of parliamentary proceeding and acquire the habit of public speaking.

"The tragedy of his death January 8, 1806, must be alluded to though it were well that it might be overlooked. He was poisoned by a great nephew in whose behalf he had made his will devising him the greater part of his estate. The old Chancellor lived long enough to revoke the will and disinherit the ungrateful and guilty kinsman who was discovered after his death to have committed forgery of his great uncle's name and attempted to avoid detection by the additional crime already referred to.

"The great County of Wythe, which has so recently furnished the Chief executive of the Commonwealth, was named after the patriot whom I have herein described."

At the end of his will was written by the great Virginian:

"Good Lord most merciful, let penitence
Sincere to me restore lost innocence;
In wrath my grievous sins remember not;
My recent faults out of thy record blot
That, after death's sleep, when I shall wake
Of pure beatitude I may partake.

GEORGE WYTHE (Seal)."

At a great dinner presided over by Colonel Linn Banks, Speaker of the House of Delegates, aided by William H. Fitzhugh of the Senate as vice president, given in Richmond in 1822 to Henry Clay and George M. Bibb of Kentucky, who were there upon matters of state, among the twenty-one toasts drunk, the last but one was offered by Mr. Jos. C. Cabell:

"The memory of George Wythe—the patron of genius, and the friend of youth!"

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