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LAWYERS IN LITERATURE*

By HON. EUGENE M. PRINCE†

The mere mention of literary lawyers doubtless will suggest immediately to many learned minds the famous literary proposal of Dick the Butcher to Jack Cade (King Henry VI, Second Part, Act IV, Scene 2). "The first thing we do, let's kill all the lawyers." Part of this paper is designed to show that that would not be a good idea. Let me add that the reference to Jack Cade & Co. will be the only reference herein to the law in Shakespeare, because Shakespeare is so full of legal incidents and references that the subject if undertaken would crowd out everything else.

In rebuttal of the suggestion about killing all the lawyers, consider first what such a thing would do to our state and country, many of whose greatest names are members of the bar—names familiar to everyone. But the standing of lawyers in the community can be proved without reliance upon a list of names, however illustrious. Technical logicians will immediately recognize such a list as an *argumentum ad hominem*, which involves the logical fallacy of talking to the person and not to the point. Therefore, to prove that lawyers should not be killed, but rather should be held in particular respect by their fellow citizens, documentary evidence is offered, free of fallacy and from unimpeachable sources, namely, Webster's Dictionary and the Encyclopedia Britannica.

Presumably most American males aspire to be gentlemen. Underscore "gentlemen." According to Webster's Dictionary the word "esquire" is a synonym for lawyer. Underscore "esquire." The Encyclopedia Britannica under the title "precedence," and using that word in the sense of "priority . . . or superiority . . ." lists eighty steps of precedence; number 1 is top and number 80 bottom. You will be pleased to know that the King of England is number 1; that number 79 is esquires, and that the cellar spot, number 80, is gentlemen. Hence lawyer-gentlemen outrank by one step all their friends and associates who are gentlemen only.

While the lawyers are proud of thus outranking almost everyone they meet, they reflect with humility that on Britannica's scoreboard they are still far below not only the King of England, but also such well-known human stratifications as masters in lunacy (number 47 as against number 79), masters of horse, gentlemen of the privy chamber, and eldest sons of

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younger sons of peers. Britannica's article on precedence is recommended to your earnest consideration.

Now getting back on the main line, namely, that of considering lawyers from a literary standpoint, we see at once that lawyers in literature could be approached from many points of view. One would be through biographies of great lawyers. This thought will not be pursued beyond the obvious suggestion that such a biographical study would reflect almost the whole history of our country, and indeed of all countries having civilized forms of law. To illustrate, please call to mind how much is to be learned from biographies of John Adams, Jefferson, Lincoln and Webster—let alone other hundreds of great lawyer-statesmen, judges, and practitioners at the bar. Someone once said that if he could write a people's songs he would not care who wrote their laws, and somebody else said that this was not a wise remark, wherein he had a point. Lawyers would be the last to question the value of songs, but it is certainly true that no song ever had the effect on people of the Declaration of Independence or the Constitution of the United States.

This suggests another point of approach to lawyers and literature, *i.e.*, through strictly legal writings, including court decisions. Some of these have literary as well as technical merit, in which connection you probably will think of Justice Holmes or Dean Ames. I want to illustrate, however, from a less rarified atmosphere by quoting one of the most famous opinions of the Supreme Court of California. The case is *Robinson v Pioche*, 5 Cal. 460, decided in 1855. Robinson fell into a hole in the sidewalk in front of Pioche's store. Pioche defended Robinson's suit for damages on the ground that Robinson was drunk when he fell. The trial court instructed the jury that Robinson could not recover if drunkenness had contributed to his injuries. The jury, following these instructions, held for the defendant. On appeal the Supreme Court of California wrote its opinion in six lines:

"The Court below erred in giving the third, fourth and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it."

Unfortunately the direct simplicity of *Robinson v. Pioche* is not the invariable practice today of lawyers, or, sad to say, of many judges, who use big words instead of simple words, and ten words where one will do. The point is made by the description once applied to a well-known lawyer—he is a man of a very few thousand words. In opposition to prolixity and in support of the contention that legal documents should be in simple English, Mr. Charles A. Beardsley, a former president both of the California

State Bar and the American Bar Association, wrote an article in the San Francisco Recorder some years ago. Quotations follow:

“ ‘Another form of wastefulness is the expenditure of words beyond the income of ideas.’

* * * * *

I have heard the argument advanced that simple language cannot properly be used in the law, because law is a ‘learned science,’ and because ‘the higher the level of culture, the less plain and simple the language.’ [I dissent and quote]

* * * * *

St. Paul, a truly venerable authority, in his first epistle to the Corinthians, chapter 14, 9th verse: ‘So likewise ye, except ye utter by the tongue words easy to be understood, how shall it be known what is spoken? for ye shall speak into the air.’

The fact that law is a learned profession is no reason why, when what we mean is

‘Twinkle, twinkle, little star,
How I wonder what you are
Up above the world so high,
Like a diamond in the sky’

we should write or say

‘Scintillate, scintillate, globule vivific,
Fain would I fathom thy nature specific
Loftily poised in either capacious,
Strongly resembling a gem carbonaceous.’ ”

Notwithstanding such good advice as that just read, it must be kept in mind also that precision of meaning is the aim and object of much legal writing, and is to be achieved even at the cost of a few extra words. This is not so important in a jury speech, but is always important in formal documents—pleadings, statutes or contracts. When into these is introduced a word of doubtful or double meaning, then a potential lawsuit is created. To illustrate, I offer an incident from the saga of Howe & Hummel, who practiced in New York with great acclaim and financial success from about 1870 until shortly after 1900, by which time Howe had died and Hummel had been disbarred. According to their biographer, Richard H. Rovere, they were the perfection of “shysters,” a word which, according to the same source, perpetuates the obnoxiousness of one of their contemporaries, a certain Attorney Scheuster (Shoister). Judges fell into the habit of using as a term of rebuke—“Don’t act like Scheusters”, the name, euphonized into shyster, has carried on to glory as we know

Anyway Hummel was defending three Egyptian dancers accused by Anthony Comstock, self-appointed censor of public morals, of giving an

unlawful public exhibition—underscore “*public*”—to wit, a dance consisting of a “lewd and lascivious contortion of the stomach.”

Hummel, moving to dismiss the charge, argued that the stomach is a sac wholly within the abdomen, and that its contortions, if any, could not be *publicly* perceived. They would be perceptible, if at all, only from inside the body of the performer. The defendants were accordingly dismissed.

Hummel would have had no point here if the indictment instead of referring to the stomach had specified “middle abdominal muscles and their cutaneous covering.” However, I do not think this would have changed the result of the case, because the judge probably believed that the defendants were nice girls and thought unfavorably of Mr. Comstock, so might willingly have accepted Hummel’s second point of argument that the ladies, being Mohammedan, were performing a religious dance enjoined upon them by the Koran.

Before leaving lawyers and their writings, one word should be said about the poetics, so-called, in which lawyers and judges occasionally indulge. Such indulgence is usually unfortunate. There are it is true tremendous exceptions, one of whom was Sir Walter Scott; another was Robert Lewis Stevenson, but he was one of those who forsook the law and made literature his profession. For the most part lawyers active in practice and judges on the bench maintain a strict amateur status as versifiers. Their efforts have a remarkably *even* quality, but *even* in the sense illustrated by the man’s remarks about one of his office employees, “Miss so and so has the most even disposition of anyone I ever saw—it is always bad.”

We turn now from flesh and blood lawyers to lawyers in fiction. On this subject a little study discloses the fact that very few literary works have a lawyer as a central figure—a lawyer-hero—whereas books with lawyer characters or with legal situations entering into the plot are many as the sands. To illustrate the distinction, the high point in *The Caine Mutiny* is undoubtedly the court martial, of which Lt. Greenwald, the defense attorney is the star. But *The Caine Mutiny* is not a legal novel, nor is Lt. Greenwald its central figure. Similarly, the trial of Effie Deans in Scott’s *Hear of Midlothian* is one of the most damaging episodes in the book, but the *Heart of Midlothian* is not a legal novel. Consequently, Elmer Rice with his fine play, *Counselor at Law*, Erle Stanley Gardner with *Perry Mason*, Arthur Train with *Mr. Tutt*—strictly lawyer characters all—are more originally creative than may be generally recognized.

The reason for the scarcity of lawyer-heroes in fiction becomes apparent on reflection. Let me illustrate by definition; by finding out what a lawyer is. Doubtless you have your own ideas on this subject, but here is a definition given by the *Journal of Legal Education* (1948-49, Vol. 1, p.

257), a highly dignified source, the author being highly dignified also, namely, Dean Prosser of Boalt Hall. This definition occurs in an article entitled "Lighthouse No Good," which begins thus:

"A month or two ago a professor of law at the University of Washington sent me a quotation which ever since has been weighing on my mind. It is reported to have been spoken by a West Coast Indian, sitting on a rock and looking out to sea, under circumstances which I do not know. It reads as follows:

'Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog come in just the same.'

That quotation has been haunting me. I have the feeling that it has some application to something connected with the law."

The article thence proceeds to deal with certain differences between a law professor and a practicing lawyer, the latter being defined as a man who spends his life

"doing distasteful things for disagreeable people who must be satisfied [but never are satisfied with anything but complete success, and often not even with that], against an impossible time limit and with hourly interruptions, from other disagreeable people who want to derail the train, and for his blood, sweat, and tears he receives in the end a few unkind words to the effect that it might have been done better, and a protest at the size of the fee."

Such a man as above described simply has no time to be a hero. He is too prosaic to make good fiction. Hence when fictional lawyers are needed the colorful scalawags usually get the call. And when an epigram is to be written it is seldom in praise, but usually like the following couplet, the authorship of which I do not know:

"Lawyers, they say, like scissors keen,
Cut not themselves but what's between."

The bar dislikes cracks of this kind, but not to the extent of being greatly affected in disposition or appetite. It recalls the advice of Leonardo Da Vinci:

"Patience serves as a protection against wrongs as clothes do against cold. For it you put on more cloth as the cold increases it will have no power to hurt you."

There is one type of lawyer who fortunately has failed to get into the hero-in-fiction class, though bids for heroic stature have been made a few times in the flesh. These bids have come from those who proceed, often from governmental jobs, against large corporations—really big ones, like Bell Telephone or United States Steel, and claim they manifest great cour-

age by so doing. A good reason why this type of activity has not produced fame in fiction becomes apparent on reading an article by the late Alva Johnston in the *New Yorker*. His article dealt with a corporation baiter Thurman Arnold. Said Mr. Johnston (from the *New Yorker* of January 31, 1942, p. 46. By Alva Johnston "Thurman Arnold's Biggest Case")

"Arnold's greatest ally has been the press. All ambitious young reporters delight in writing attacks on big industries because it gives them that St. George against the dragon feeling. Any good young journalist wants to be regarded as a 'fearless' journalist. There is actually, however, no more fearlessness in assailing a big corporation than eating a double banana split. There is no fight in big corporations. They are timid and helpless. Anybody who would attack a big corporation would hit a woman."

As indicated a moment ago, there are few literary works of fiction wherein a lawyer is the central figure, but there are books, plays and poems without number which have characters connected with the law, or in which a legal situation is part of the plot. This makes legal literature out of lots of things which ordinarily are not thought of that way. Thus, Whittier's *Maud Muller* is one of the best-known American poems. Its only connection with lawyers is that one of the central characters is a judge, a high-born gentleman who was impressed by *Maud Muller's* country beauty and rustic charm as she "raked the meadows sweet with hay," but who nevertheless passed by to marry, to his later regret, a selfish woman of high degree. Whittier thought things should have been different, using the famous couplet:

"For of all sad words of tongue or pen
The saddest are these: It might have been."

Frances Bret Harte was thereby inspired to write one of the best of parodies—"Mrs. Judge Jenkins, Being the Only Genuine Sequel to 'Maud Muller.'" In Bret Harte's version she became Mrs. Judge Jenkins, had twins,

"And the judge was blest, but thought it strange
That bearing children made such a change.

For Maud grew broad, and red, and stout,
And the waist that his arm once clasped about

Was more than he now could span, and he
Sighed as he pondered, ruefully,

How that which in Maud was native grace
In Mrs. Jenkins was out of place;

And thought of the twins, and wished that they
Looked less like the men who raked the hay

On Muller's farm, and dreamed with pain
Of the day he wandered down the lane.

* * * * *

For, had he waited, he might have wed
Some maiden fair and thoroughbred;
For there be women as fair as she,
Whose verbs and nouns do more agree.

* * * * *

If, of all words of tongue and pen,
The saddest are, 'It might have been,'
More sad are these we daily see:
'It is, but hadn't ought to be.' "

Another parody, this time on Robert Southey, and legal in the sense that the characters include the lawyer and his wife, is Lewis Carroll's "Father William":

" 'You are old,' said the youth, 'and your jaws are too weak for anything
tougher than suet;
Yet you finished the goose, with the bones and the beak—
Pray, how did you manage to do it?'
'In my youth,' said his father, 'I took to the law,
And argued each case with my wife;
And the muscular strength which it gave to my jaw,
Has lasted the rest of my life.' "

Many years ago Dean Wigmore of Northwestern Law School published "A List of Legal Novels" (2 Ill. L. Rev. 574), *novels* only; poems and plays are excluded. Even so the list adds up to 119 authors and 382 books, and since these are so diverse in subject as Sherlock Holmes, Don Quixote, and The Count of Monte Cristo, we obviously cannot even start talking about them. Rather we will hasten to a conclusion with one or two general observations.

A generation ago anyone writing of lawyers in literature would certainly have said a great deal about Dickens and Scott. Either author could easily take up far more time than we can spend today.

Dickens' Bleak House has been characterized as the greatest legal novel. A great novel it certainly is, with its incredibly powerful opening paragraphs wherein "at the very heart of the fog sits the Lord High Chancellor in his High Court of Chancery." Dickens' works contain many legal figures; nearly all caricatures, with such names as Mr. Guppy, the clerk, Snagsby, the law stationer, Sergeants Snubbin and Buzfuz, Lawyer Phunky, Dodson & Fogg.

Let us try only one flavor of Dickens, and this from Oliver Twist. The point involves the common-law rule that wives acted on the coercion of

their husbands. Mrs. Bumble, wife of the beadle, had unlawfully possessed herself of a certain gold locket and ring taken from Oliver's mother as she lay dying. Mr. Bumble was taxed with the crime, and following the example of Adam, endeavored to shift responsibility to the descendant of Eve.

"'It was all Mrs. Bumble. She *would* do it,' urged Mr. Bumble, first looking round to ascertain that his partner had left the room.

'That is no excuse,' replied Mr. Brownlow. 'You were present on the occasion of the destruction of these trinkets, and indeed, are the more guilty of the two in the eye of the law; for, indeed, the law supposes that your wife acts under your direction.'

'If the law supposes that,' said Mr. Bumble, squeezing his hat emphatically in both hands, 'the law is a ass—a idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law, that his eye may be opened by experience.' " (pp. 15–16).

A novel always mentioned in old-time lists of legal novels is Trollope's *Orley Farm*. It is touched here only for a side purpose, that of making a quotation from Dr. Samuel Johnson, used sometimes to justify Mr. Furnival, the lawyer, in undertaking the defense of Lady Mason against charges of forging a will and giving perjured testimony to support it:

"'And what do you think,' asked Boswell, 'of supporting a cause which you know to be bad?' 'Sir,' replied the moralist, 'you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why, then, Sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.' "

I am sincerely sorry that we cannot follow a few other literary characters a little bit on their ways—starting perhaps with Chaucer's *Man of the Law*—talking some about Sir Walter Scott, a great literary figure who was a practicing lawyer and working court clerk, a man who knew much more about lawyers than Dickens and treated them fairly as Dickens did not—and certainly not forgetting law-trained William S. Gilbert and his compatriot, Arthur Sullivan. *Gilbert & Sullivan* is another subject in itself; it is full of law and lawyers; fortunately much of the best of *Trial by Jury*, *Iolanthe*, and their fellow masterpieces, is widely known from renditions on the stage.

This paper has touched a little upon literary attacks made upon lawyers,

courts and the administration of justice generally. Concluding with a serious word, let me say that we see much more sinister attacks being made on many fronts today. For them to be withstood it is necessary that the administration of justice hold the confidence of fair-minded men, and to that end that there be fulfilled continuously and always the injunction of the Prophet Amos, "let judgment run down as waters and righteousness as a mighty stream."