

JOSEPH STORY.

1779-1845.

BY

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THE most conspicuous fact in the life of Joseph Story is that he was appointed a justice of the Supreme Court of the United States at the early age of thirty-two years. He was appointed by President Madison in November, 1811, to fill the vacancy caused by the death of Mr. Justice William Cushing of Massachusetts. He took his seat at the February term in 1812, and was the youngest judge who ever sat in the court. The wonder excited by this appointment disappears to some extent when we reflect upon the conditions under which it was made. In the first place the field from which the vacancy had to be filled was limited. It was almost necessary that the new appointee should be taken from the eastern States, and quite probable that he would come from Massachusetts, which included the district of Maine, and that he would be in political agreement with the administration. Another fact of importance is that in 1811 the Supreme Court of the United States had not attained the great emi-

nence which it now holds, and a place upon it was not so highly prized.

With the accession of Marshall to the office of Chief-Justice in 1801 and the decision in *Marbury vs. Madison* in 1803, declaring that an Act of Congress repugnant to the Constitution is void, the Supreme Court began to assume new importance. Jefferson was among the first to discern its growing power. Unfortunately, however, he looked upon the court with the eyes of a great party leader. Although a man of wonderful insight and skill in discovering and using political forces, he never grasped the sound and statesmanlike conception that the function of the court in construing the constitution is strictly judicial, wholly above and outside the field of party politics. In a letter to Gallatin, written in September, 1810, after the death of Cushing, he says:¹

At length, then, we have a chance of getting a Republican majority in the Federal Judiciary. For ten years has that branch braved the spirit and will of the nation, after the nation had manifested its will by a complete reform in every branch depending on them. The event is a fortunate one, and so timed as to be a God-send to me.² But who will it be? The misfortune to Bidwell removes an able man from the competition. Can any other bring equal qualifications to those of Lincoln? I know he was not deemed a profound common lawyer; but was there ever a profound common lawyer known in any of the Eastern States. Sullivan had the reputation of pre-eminence there as a common lawyer. But we have his history of land titles, which gives us

¹ Jefferson's Works, vol. IV, 548.

² This refers to the famous *batture* case. (See *Hildreth 2d Series*), vol. III. 143-8.

his measure. Mr. Lincoln is, I believe, considered as learned in their laws as anyone they have. Federalists say that Parsons is better. But the criticalness of the present nomination puts him out of the question. As the great mass of the functions of the new judge are to be performed in his own district, Lincoln will be most unexceptionable and acceptable there; and on the supreme bench equal to anyone who can be brought from thence; add to this his integrity, political firmness and unimpeachable character, and I believe no one can be found to whom there will not be more serious objections.

The Lincoln here referred to is Levi Lincoln, who had been attorney-general in Jefferson's cabinet. To him the appointment was first tendered. In fact he was appointed and commissioned, but declined, notwithstanding "a private and pressing letter"³ from President Madison himself. He declined on account of the condition of his eyes. Next, Alexander Wolcott of Connecticut was nominated, but the Senate refused to confirm him.⁴ At one time Jefferson suggested the name of Judge Tyler of Virginia, as a candidate.⁵ After the rejection of Wolcott, John Quincy Adams was appointed, but he preferred to remain at St. Petersburg, where he was then minister of the United States. Finally, on the suggestion of Mr. Ezekiel Bacon, a member of congress from Massachusetts, the President nominated Joseph Story. Jefferson had no love for Story, and in a famous letter written in 1810 had described him

³ Madison's Works, vol. IV, 489. Letter to Jefferson.

⁴ Hildreth (2d Series), vol. III, 241.

⁵ Professor J. B. Thayer's John Marshall, p. 53.

as a "pseudo-Republican." After the death of Cushing another vacancy had been created in the Supreme Court by the death of Mr. Justice Chase of Maryland, a Federalist. This event relieved the appointment of a successor to Cushing of some of the "criticalness" referred to by Jefferson. Gabriel Duvall of Maryland was nominated as the successor of Chase and he and Story were commissioned on the same day. The only Federalist judges then left on the Court were Marshall and Bushrod Washington.

There is a strange silence in the letters of Madison as to the appointment of Story. What opinion the President held of his qualifications is unknown except as it may be inferred from his action. In truth the appointment was a great service to the Federal judiciary and to the country. Although his name was the last to be mentioned, Story surpassed in legal attainments all others who had been suggested for the office. In 1805 he had published at Salem a volume of Pleadings in Civil Actions, which consisted principally of forms, but contains also some original notes. In 1809 he edited Chitty on Bills of Exchange and Promissory Notes, and in 1810 Abbott on Shipping. In 1811 he edited an American edition of Lawes' Pleading in Assumpsit. In a recent interesting case, *The Eliza Lines*,⁶ his distinguished successor in the Supreme Court, Mr. Justice Holmes, refers to a statement by "Mr. Story" in his Abbott on Shipping as an authority, a compliment not often

⁶ 199 United States Reports, 119, 127 (1905).

paid by that court to the assertion of a young lawyer under thirty-two. His first opinion may be read in 7 Cranch, 115, in *United States vs. Crosby*. The point decided is simple, but the language used shows an accurate and confident hand. After stating the material facts, Judge Story says: "The question presented for consideration is whether the *lex loci contractus* or the *lex loci rei sitæ* is to govern in the disposal of real estate. The court entertain no doubt on the subject, and are clearly of the opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."

Before considering further his work upon the bench it will be well to glance at his previous history and training.

He was born September 18, 1779, at Marblehead, in the County of Essex, Massachusetts. The house where he was born is still standing on Washington street. The unique round cradle in which he was rocked may be seen at the Essex Institute in Salem. His father was Dr. Elisha Story, a physician and surgeon of reputation, who practised in Boston until 1770, when he removed to Marblehead. He was a sturdy Whig, and active in the revolutionary movement, and served in the Revolutionary War. He kept a diary, of which portions were published in the *Marblehead Messenger*, and have been used by writers investigating the history of the time.⁷ Judge

⁷ I am indebted to Hon. Robert S. Rantoul of Salem for knowledge

Story's mother was Mehitable Pedrick, the daughter of an opulent merchant of Marblehead. She was the second wife of Dr. Story to whom she was married in 1778, when but nineteen years of age. She had the courage to assume charge of a family of seven children, the fruit of Dr. Story's first marriage, and gave birth to eleven children of her own, of whom Judge Story was the eldest. Her grandson, William W. Story, who was born in 1819, says that in her old age "she was impatient of being assisted, preferring to do for herself, loved to take the lead, was constantly busy, and never could believe that she was aged. It is plain that Judge Story inherited good qualities from both parents. His mother encouraged ambition, and used to say: "Now, Joe, I've sat up and tended you many a night when you were a child, and don't you dare not to be a great man." She lived to witness the whole of his brilliant career, and died in 1847, at the age of eighty-nine.

Marblehead was a fishing town which had suffered much during the Revolution. Doctor Story's practice required him to visit a large number of families. His son knew those families from his youth. He early exhibited quick powers of observation and acquired a knowledge of the habits of the people which was useful to him as a judge. As

of the existence of this diary, and for information regarding many matters of local family history relating to Judge Story which could not readily be found in books. He also most courteously extended to me the privileges of the Essex Institute in the preparation of this essay, for which I am under great obligations to him.

a child he was deeply impressed by the ocean. When in 1826 he first saw Niagara Falls he wrote that the sound was "like the roar of Marblehead shore during a very heavy Northeast storm."

The first record of his attendance at school is at Marblehead Academy, where he was one of the earliest scholars. As usual in such academies, exhibitions were given. "On one of these occasions the exercises began with an oration by Master Watson on the subject of heroism, in which a pleasing and useful contrast was drawn between the characters of Cæsar and Washington. This was followed by a Latin oration in which Master Story appeared to great advantage."⁸ At this Academy he began his preparation for college, but in the autumn of 1794 a difference with the master led to his withdrawal from the school, with the approval of his father. He finished his preparation by his own exertions, with such aid as he could obtain from the town schoolmaster, and entered the freshman class at Harvard at the end of the January vacation, in 1795. His college chum was Joseph Tuckerman of whom he wrote in 1831: "From the first moment of my acquaintance up to this hour there has been a most unreserved friendship between us. Not a shadow has ever obscured it; not a chill has ever passed over it." His most distinguished classmate was William Ellery Channing. At graduation in 1798 the English oration, then considered the first honor, was

⁸ Samuel Roads's *History of Marblehead*, p. 261.

awarded to Channing, and the poem, which was the second honor, to Story.

After leaving college he returned at once to Marblehead and began the study of law. He states in a sketch of his life, written in 1831, that at the beginning of the Revolution his grandfather, William Story, "held, I believe, the office of Registrar in the Court of Admiralty." Other than that Judge Story's family does not appear to have had any previous connection with the law. His choice of the law as a profession seems to have followed as a matter of course from his temperament, and tastes, and previous studies. At Marblehead he entered the office of Mr. Samuel Sewall, then a member of Congress, and afterwards a justice of the Supreme Judicial Court of Massachusetts. As usual with office students, he was thrown almost wholly upon his own resources. In the sketch above referred to he has left a vivid picture of his trials as a student.⁹

I shall never forget the time, he says, when having read through Blackstone's Commentaries, Mr. Sewall, on his departure for Washington, directed me next to read Coke on Littleton as the appropriate succeeding study. It was a very large folio, with Butler's and Hargrave's notes, which I was required to read also. Soon after his departure I took it up, and after trying it day after day with very little success, I sat myself down and wept bitterly. My tears dropped upon the book and stained its pages. It was but a momentary irresolution. I went on and on, and began at last to see daylight, aye, and to feel that I could comprehend and reason upon the text and the comments. When I had

⁹ Story's Miscellaneous Writings, pp. 19, 20.

completed the reading of this most formidable work I felt that I breathed a purer air, and that I had acquired a new power.

He next took up "the severe study of special pleading" and acquired a relish for it, "by repeated perusals of Saunders' Reports." He also read "that deep and admirable work upon one of the most intricate titles of the law, Fearné on Contingent Remainders and Executory Devises," and made a manuscript abstract of all its principles. In January, 1801, he removed from Marblehead to Salem, on the appointment of Mr. Sewall to the Supreme Judicial Court, and entered the office of Mr. Samuel Putnam, who was afterwards, in 1814, appointed a justice of the same court.

In his youth Judge Story had an inclination for writing poetry. This habit, never wholly abandoned, probably contributed to form his easy and flowing style. The following motto, which appeared in January, 1802, at the head of the Salem Register, is credited by old citizens of Salem, now living, to his pen:

Here shall the press the people's rights maintain,
Unaw'd by influence and unbribed by gain;
Here patriot truth its glorious precepts draw,
Pledg'd to religion, liberty and law.

While studying law he composed a poem called *The Power of Solitude*, referring to it in one of his letters in 1798 as "the sweet employment of my leisure hours." He re-wrote this poem with additions and alterations, and published it with some shorter

poems in 1804. During his lifetime after he became famous this little volume was a curiosity, and in 1844 a copy of it in the Harvard library was kept chained to the shelf. There is now a copy in the library of the Harvard Law School, but apparently time can do the office of chains in protecting poetry, and it stands unfastened.

He was admitted to the bar at the July term of the court of Common Pleas in Essex County, at Salem, in 1801. He began his practice in the old house built by Deliverance Parkman at the corner of North and Main streets, referred to in Hawthorne, an etching of which may be seen at the Essex Institute. The great struggle for the presidency which ended in the fall of the Federalists from national power was then just over. Political feeling in Salem and Essex was excited and bitter. There the Federalists were all-powerful. Judge Story's father was a Republican, and he held the same political opinions. He took a firm and decided stand in upholding his principles, at a time when as he states, "I scarcely remember more than four or five lawyers in the whole state who *dared* avow themselves Republicans." At first he was opposed as a political heretic, and to some extent at least was ostracised socially. Gradually the Republicans gained in strength. Divisions arose among the Federalists over the embargo and non-intercourse measures of the administration. Against the pronounced and dominant sentiment of the party and their own financial interests some in-

fluent Federalists supported the government. "In Salem, then almost the rival of Boston in maritime trade, resolutions condemning the embargo were defeated by the influence of William Gray, said to be the largest ship-owner in the world, one of those who had followed the example of John Quincy Adams in supporting the policy of the government."¹⁰ That was in 1808. In 1810 the Republicans carried the state, electing Elbridge Gerry and William Gray, Governor and Lieutenant Governor, besides a majority of the House and one-half of the Senate. Republican success, instead of mollifying party feeling, added fuel to the flame. When in August, 1813, George Crowninshield brought back from Halifax the bodies of Captain Lawrence and Lieutenant Ludlow, who had been slain almost in sight of the people of Essex gathered on hills and housetops to witness the fight between the *Chesapeake* and the *Shannon* off the coast on the first of June in that year, Federalists in Salem would not look at the procession nor permit their children to do so.¹¹ Rufus Choate saw the procession as a boy in the crowd of spectators, and never forgot the impression it made upon him.¹² The use of the North Meeting House was requested for a eulogy, "on account of its size and the fine organ it contains." The committee of the proprietors

¹⁰ Hildreth (2d Series) vol. III, 89.

¹¹ Essex Institute Historical Collections, vol. XXV, 91; vol. XXXVI, 112-113.

¹² C. F. Adams, *Life of Richard H. Dana*, vol. I, 259.

made answer that they "had no authority to open the house for any other purpose than for public worship."¹³ "The service took place in the Howard Street church, where a famous eulogy was delivered by Judge Story." After his admission to the bar the Federalists in Salem gradually lost their overwhelming political power. With the accession and aid of influential families, like the Whites, the Stones, the Crowninshields, the Forresters and other interests, the Republicans built up and maintained for a time a strong local party. Although Story was disliked for his politics nothing could ever be said against the purity of his character, and his success was foreseen. It is related that Judge Sewall in discussing his course with Chief-Justice Parsons at a dinner party said: "It is in vain to attempt to put down young Story. He will rise, and I defy the whole bar and bench to prevent it."

Public honors began to come to him early and continued to follow him. In 1800, before his admission to the bar, he was selected by the town of Marblehead to deliver the eulogy on Washington at the public exercises held after his death. In 1803 he was appointed naval officer of the port of Salem, but declined. In 1804 at Salem he was invited to deliver the annual oration on the Fourth of July. In 1805 he was elected a member of the legislature of Massachusetts as a representative from Salem, each

¹³ First Centenary of the North Church and Society, pamphlet, Memorial sermon, 58.

town at that time being entitled to at least one representative. He was reëlected annually until 1808, when he was chosen a member of Congress, to fill the vacancy caused by the death of Mr. Jacob Crowninshield. He remained in Congress only one session, that of 1808-'09, and declined reëlection. He was then returned by the town of Salem to the Massachusetts Legislature in 1810. In January, 1811, on the appointment of Honorable Perez Morton to the office of attorney-general he was elected Speaker, and on the organization of the new House in May, 1811, was reëlected Speaker. He held this office at the time of his appointment to the bench.

For a young man of thirty-two, in a community where the dominant interests were hostile and disposed to ostracise him, that is a remarkable record.¹⁴ It is accounted for in part by his ability and the charm of his personal manner. That he was an ardent and outspoken Republican there can be no doubt. In 1805 he wrote:¹⁵

Convinced every day more and more of the purity of the Republican cause, and believing it to be founded on the immutable rights of man, I can not and will not hesitate to make any sacrifice for its preservation.

It was also true, as he wrote in the sketch of his life above referred to:¹⁶

¹⁴ "I remember my father's graphic account of the rage of the Federalists, when Joe Story, that country pettifogger, aged thirty-two, was made a judge of the highest court." *Figures of the Past*, by Josiah Quincy, p. 188.

¹⁵ *Life and Letters of Joseph Story*, vol. I, 106, by W. W. Story.

¹⁶ *Story's Miscellaneous Writings*, 27.

A Virginia Republican of that day was very different from a Massachusetts Republican, and the anti-federal doctrines of the former State then had and still have very little support or influence in the latter State, notwithstanding a concurrence in political action upon general subjects. I was at all times a firm believer in the doctrines of General Washington and an admirer of his conduct, measures and principles during his whole administration, though they were to me mere matters of history.

He also was an admirer of Hamilton, and spoke of him as one of the greatest men of the age in which he lived. While in the Massachusetts Legislature he was a leader in securing the enactment of laws fixing the salaries of the judges on a permanent and honorable basis. While in Congress he advocated an increase of the navy, against the solid opposition of Republicans from the middle and southern states. To the taunt that England would capture our navy he said:¹⁷

I was born among the hardy sons of the ocean, and I can not so doubt their courage or their skill. If Great Britain ever obtains possession of our present little navy it will be at the expense of the best blood of the country, and after a struggle which will call for more of her strength than she has ever found necessary for a European enemy.

Finally, in accordance with the sentiment of New England, he advocated the repeal of the embargo and braved the hostility of Thomas Jefferson.

Considering that the financial interests of Salem were controlled by Federalists, his record at the bar is even more surprising than his success in politics.

¹⁷ Hildreth (2d Series) vol. III, 124.

Unexpectedly to himself business soon began to come to him. He did not remain at the bar long enough to win fame as a trier of causes, nor to prove that he possessed the gifts necessary to obtain eminence as an advocate. There is a record of one case in New Hampshire where he carried off the verdict against the renowned Jeremiah Mason. His name first appears as counsel in the Massachusetts reports in 1807, in the case of Bartlett vs. Willis. From that time until, and including, 1812 he appeared in thirty-six causes, reported in volumes 3 to 9 Massachusetts Reports. At February term, 1810, he argued the great case of Fletcher vs. Peck,¹⁸ as counsel for the defendant in error in the Supreme Court of the United States. His legal business was principally in Essex County, but he was beginning to get important retainers from Boston, and contemplated moving thither.

His appointment to the Supreme Court was wholly unsought, but was promptly accepted. In a letter to Nathaniel Williams of November 30, 1811, he says:¹⁹

Notwithstanding the emoluments of my present business exceed the salary I have determined to accept the office. The high honor attached to it, the permanence of the tenure, the respectability, if I may so say, of the salary, and the opportunity it will allow me to pursue, what of all things I admire, judicial studies, have combined to urge me to accept.

¹⁸ 6 Cranch's Reports, 37.

¹⁹ Life and Letters, vol. I, 201.

The salary of a justice of the Supreme Court at that time was \$3,500. His income from his practice was between \$5,000 and \$6,000, and was increasing. That was a large income for those days. The highest professional income from the law in New England was said to be that of Theophilus Parsons, amounting in 1806 to \$10,000 a year, when he accepted the office of Chief-Justice of the Supreme Judicial Court of Massachusetts. The controlling considerations in the mind of Story in reaching his decision seem to have been the opportunity to pursue congenial studies, and to have a career. To this attitude of mind he steadily adhered. In 1816 when William Pinkney the great lawyer of Maryland was appointed minister to Russia he offered to transfer to Judge Story the whole of his business, the profits of which amounted to \$21,000 a year. This offer, made under conditions which would probably have secured to him a large portion of that great business, was declined.

Not long after taking his seat upon the bench an opportunity came to Judge Story to exhibit to the bar and the country his judicial view of the Federal Constitution and government. One of the cases argued at the first term at which he sat was Fairfax's Devisee vs. Hunter's Lessee. It was an action of ejectment brought by Hunter to recover possession of a tract of 788 acres of land in the Northern Neck of Virginia. Hunter claimed title under a patent granted to him by the state of Virginia in

1789. The land was owned originally by Lord Fairfax, who died in 1781, and devised it to his nephew Denny Fairfax, a British subject who was at the time of his uncle's death an alien enemy, and by the common law incapable of holding title to real estate. Hunter contended that certain Acts of Assembly of Virginia had vested the Fairfax title in the state, and although there had been no office found, that the patent of the state was valid and had conveyed the title to him. Denny Fairfax died while the suit was pending, between 1796 and 1803. Martin succeeded to his right as heir at law and devisee, and relied upon a treaty with Great Britain, removing the disability of alienage in certain cases, to support his title. If the treaty of the United States applied his title was good.

The case had a long and strange history. Originally begun in 1791 in the district court of Winchester, judgment was rendered in that court in 1793 for the original defendant, sustaining the Fairfax title. The case was then taken to the Virginia Court of Appeals. It was argued in 1796 and reargued, after a lapse of thirteen years, in 1809. In 1810 the Court of Appeals reversed the judgment of the district court, denied the right claimed under the treaty of the United States, and gave judgment for Hunter. Then by writ of error under the twenty-fifth section of the Judiciary Act of 1789 the case was taken to the Supreme Court of the United States.²⁰ This

²⁰ See Munford's Reports, 218-238 (1810).

writ of error was argued February 27th, 1812, Chief-Justice Marshall and Judge Washington being absent. The court took time to consider, and on March 15th, 1813, Story delivered the opinion of the Court reversing the judgment of the Court of Appeals and sustaining the Fairfax title, that is the title of Martin.²¹ A mandate then issued to the Court of Appeals commanding that such proceedings be had in the cause "as according to right and justice and the laws of the United States, and agreeably to said judgment and instructions of said Supreme Court ought to be had." This aroused "the sleeping spirit" of the Old Dominion.²²

The next step was in the Court of Appeals where the question was argued whether the mandate should be obeyed. According to a note of the reporter, in addition to the arguments of counsel regularly employed in the cause, "Messrs. Nicholas and Hay expressed their sentiments in consequence of a request from the Court to the members of the bar generally." The judges delivered opinions *seriatim*, and joined in the following statement, viz.:

The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of Congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that

²¹ 7 Cranch's Reports, 603.

²² 4 Munford's Reports, 1, 59 (1813).

the writ of error in this case was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court; and that obedience to its mandate be declined by this court.

Again the cause was transferred by writ of error to the Supreme Court of the United States. It was argued at February term, 1816, and decided March 20th.²³ It was equal in importance to any cause which had ever been decided by the court, and the work of drawing the opinion was assigned to Judge Story. He had written the opinion in the first stage of the case, but that involved merely a question of title to real estate. In its present stage the case involved the theory and almost the existence of the Federal government. There had been other litigation in the Virginia courts over the title of Lord Fairfax to lands in the Northern Neck. Professor Thayer refers²⁴ to the case of Hite vs. Fairfax,²⁵ where Marshall was counsel for the tenants of Lord Fairfax. Whether this fact had any connection with the assignment of the case to Story can only be a matter of conjecture. It is certain that, from whatever cause, a great opportunity came to him early in his judicial career.

It was his first opinion in a case requiring the discussion of an important question of constitutional law, and he clearly indicates that he fully understood its

²³ 1 Wheaton's Reports, 304.

²⁴ Thayer's Marshall, p. 24.

²⁵ 4 Call's Reports, 42 (1786).

magnitude. Near the beginning of the opinion he says:²⁶

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm that, upon their right decision rest some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution itself.

In a paragraph stating the general scope and object of the Constitution in language worthy of Marshall himself he anticipates the principle contained in the great sentence of the Chief-Justice in *McCulloch vs. Maryland*: "In considering this question, then, we must never forget that it is a constitution we are expounding."²⁷ He then deals with the grant of the judicial power which is the part of the Constitution directly involved in the case. The leading points of the argument are:

1. The whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

2. But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might, but would arise in the State courts, in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

²⁶ 1 Wheaton's Reports, 324.

²⁷ 4 Wheaton's Reports, 407.

3. The judicial power of the United States, by the very terms of the grant extends to such cases. Not being within the original jurisdiction they must therefore fall within the appellate jurisdiction; and the twenty-fifth section of the judiciary act, which authorizes the exercise of this jurisdiction in the specific cases by a writ of error is supported by the letter and spirit of the Constitution.

4. This jurisdiction can rightfully be exercised over the State courts, and need not necessarily be exercised by direct action of the court upon the parties. It is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion.

The judgment of the Court of Appeals was again reversed, and apparently this was the end of the litigation. In *Williams vs. Bruffy*,²⁸ Mr. Justice Field stated that the appellate jurisdiction over the judgments of the state courts, "passed beyond the region of discussion in this court more than half a century ago. As early as 1816, in the celebrated case of *Martin vs. Hunter*, this court, in an opinion of unanswerable reasoning from the general language of the Constitution asserted its appellate jurisdiction over the State courts in the case mentioned in the Act." This jurisdiction was still further contested and enforced a few years later,²⁹ in one of Chief-Justice Marshall's great cases, the case of *Cohens vs.*

²⁸ 102 United States Reports, 248 (1880).

²⁹ Thayer, *Cases on Constitutional Law*, vol. I, 123.

Virginia,³⁰ and in 1858 in *Ableman vs. Booth*,³¹ but the first and indeed the decisive blow in the controversy was struck by Judge Story.

At the time he wrote this opinion asserting so vigorously the Federal power, Judge Story regarded himself as a Republican in politics. On February 22, 1815, after the peace, he wrote:³²

Never was there a more glorious opportunity for the Republican party to place themselves permanently in power. They have now a golden opportunity. I pray God it may not be thrown away.

He then suggests a series of important measures for the creation of great national interests "which shall bind us in an indissoluble chain." The only instance in which he was present at a political meeting or engaged in a political discussion after his elevation to the bench was in December 1819, when he attended a town meeting in Salem, and opposed the proposed Missouri Compromise. Apparently he was in sympathy with the administration of John Quincy Adams. After the election of President Jackson there was a change in his political tone. In a letter to Professor Ashmun in 1831 he refers to an effort to repeal the 25th section of the Judiciary Act, and says:³³

You may depend that many of our wisest friends look with great gloom to the future. Pray read, on the subject of the

³⁰ 6 Wheaton's Reports, 264.

³¹ 21 Howard's Reports, 506.

³² Life and Letters, vol. I, p. 254.

³³ Life and Letters, vol. II, 49.

twenty-fifth section, the opinion of the Supreme Court in *Hunter vs. Martin*.³⁴ It contains a full survey of the judicial powers of the general government, and Chief-Justice Marshall concurred in every word of it.

In 1840, after the nomination of Harrison he writes: "I confess that, desponding as I habitually am on all subjects, I feel more encouragement than I have felt for a long time." It is quite probable that with advancing age, and dissatisfaction with the course of President Jackson in the Cherokee case and in other matters, his Republican principles in politics were gradually modified, if not wholly abandoned. On the other hand his views as a lawyer and judge upon the nature of the Federal constitution and government and their relation to the constitutions and governments of the states as written in *Martin vs. Hunter* were lifelong convictions, consistently and vigorously asserted from the beginning to the end of his life. In administering the Bankruptcy Act of 1841, of which he is stated to have been the author,³⁵ he held in an opinion in the Circuit Court that an attachment on *mesne* process in an action in a state court pending at the date of the bankruptcy was not a lien within the saving clauses of the Act, and ordered an injunction to issue restraining the prosecution of the action in the state court.³⁶ This decision led to a famous controversy

³⁴ 1 Wheaton's Reports, 304.

³⁵ See Lowell, Bankruptcy, paragraph 332.

³⁶ *Ex parte Foster*, 2 Story's Reports, 131 (1842).

with Chief-Justice Joel Parker of New Hampshire, begun in *Kittredge vs. Warren*.³⁷ Judge Story adhered with characteristic tenacity to his point that the attachment was not a lien, but after his death it came before the Supreme Court in *Peck vs. Jenness*,³⁸ and was decided in accordance with the view of Chief-Justice Parker. The fundamental and vital matter involved in this controversy, however, was the effective administration of the Bankruptcy Act. In *Ex-parte Christy*,³⁹ Judge Story carefully expounds the scope and object of the Act, and argues that "it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could exercise no effective control."

This case has been justly criticized for its attempt by dictum to dispose of important questions not raised by the facts, but it is valuable as exhibiting Judge Story in his true character as an asserter and defender of the paramount quality of the Federal power in all cases within its jurisdiction. In the controversy with Judge Parker over the Bankruptcy Act he was animated by the same conviction with which he wrote the opinion in *Martin vs. Hunter*.⁴⁰

³⁷ 14 New Hampshire, 509 (1844).

³⁸ 7 Howard's Reports, 612 (1849).

³⁹ 3 Howard's Reports, 292 (1844).

⁴⁰ 1 Wheaton's Reports, 304.

As a judge he accepted naturally and without hesitation the large and liberal conception of the Constitution which is now firmly established by the decisions of the Supreme Court. So conceived, if wisely administered, it secures to the American people a career without limits in space or time. It is like the promise of Olympian Jove to the Romans:

*His ego nec metas rerum nec tempora pono;
Imperium sine fine dedi.*

It was truly said by Jefferson, in the letter to Gallatin above quoted, that the great mass of the functions of the new judge would be performed in his own district. The first circuit, which was allotted to Judge Story, embraced Massachusetts, New Hampshire and Rhode Island. It was the principal maritime district of the country, and the business in it was much increased by captures and forfeitures incident to the embargo and non-intercourse measures of the government and by the War of 1812. The age and infirmities of Judge Cushing had caused an accumulation of arrears. Judge Story attacked the docket with characteristic energy. In one of his earliest decisions he stopped the practice of appealing from the district court to the circuit court in cases which had been tried by a jury in the district court, and pointed out that the proper way to bring up such cases was by writ of error after final judgment. The opinion explains that the process of appeal in a common law action was peculiar to the New England states, and based upon statutes.

One hundred and thirty cases improperly appealed were struck from the docket of the circuit court by a single blow.

The nature and extent of the admiralty jurisdiction were very imperfectly understood in America at that time. The Federal Constitution in the grant of judicial power provided that it should extend "to all cases of admiralty and maritime jurisdiction." Judge Story at once took up the study of admiralty with ardor. His characteristic tendency to exert the Federal power to its full extent was quickly exhibited. In 1812 he wrote in regard to the admiralty: "I have no doubt that its jurisdiction rightfully extends over every maritime contract and tort, and the more its jurisdiction is known the more it will be courted." In *DeLovio vs. Boit*⁴¹ he decided that a contract of marine insurance, no matter where executed, was subject to the admiralty jurisdiction. The opinion is elaborate, and collects all the learning upon the question which was accessible at that time. It was the beginning of a great discussion and was cited as an authority in many courts. Finally, in 1870 the precise question in *DeLovio vs. Boit* reached the Supreme Court and the admiralty jurisdiction was sustained. Mr. Justice Bradley, in delivering the opinion of the Court, said:⁴²

The learned and exhaustive opinion of Justice Story, in the case of *DeLovio vs. Boit*,⁴³ affirming the admiralty jurisdiction

⁴¹ 2 Gallison's Reports, 398 (1816).

⁴² *Insurance Company vs. Dunham*, 11 Wallace's Reports, 36.

⁴³ 2 Gallison's Reports, 398.

over policies of marine insurance has never been answered, and will always stand as a monument of his erudition.

In the meantime, between 1816 and 1870, by a series of decisions of the Supreme Court the admiralty jurisdiction had been vastly extended both in respect to locality and subject matter in accordance with his liberal views. In construing the constitution, in one respect the court has gone far beyond Judge Story. In *The Thomas Jefferson*,⁴⁴ he accepts the English rule then in force by which as to locality admiralty jurisdiction is limited to the sea and to waters within the ebb and flow of the tide. In *The Genesee Chief*,⁴⁵ and later cases this limit was transcended and the jurisdiction extended to "all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide."⁴⁶ Thus the court without the aid of legislation, indeed, disregarding an Act of Congress passed in 1845 and reputed to have been drawn by Judge Story, has rested this vast jurisdiction upon the few simple words in the constitution.⁴⁷

Judge Story's decisions upon the circuit are reported in thirteen volumes, by Gallison, Mason, Charles Sumner, and his son, W. W. Story. Among them are many cases of great value and interest. In

⁴⁴ 10 Wheaton's Reports, 428 (1825).

⁴⁵ 12 Howard's Reports, 443.

⁴⁶ 11 Wallace's Reports, 25.

⁴⁷ *The Eagle*, 8 Wallace's Reports, 15 (1868).

view of the important part played by business corporations in the industrial development of the United States the only case mentioned here will be taken from that field. In *Wood vs. Dummer*,⁴⁸ Judge Story announced the doctrine that the capital of a corporation in certain circumstances becomes a trust fund for the payment of its debts, a rule which has been of great practical value. The case is further interesting for his kindly method in criticizing the bar, the bill having been badly drawn, and also for his direct and lawyer-like handling of the question whether the purchaser of a bank note payable to bearer is an assignee of a *chose* in action. "He is an original holder."⁴⁹

During the period covered by his work in the circuit Court Judge Story wrote opinions in two hundred and eighty-six cases in the Supreme Court. Of these two hundred and sixty-nine are reported as the opinion of the court or of a majority. Three were concurring opinions, and fourteen dissenting opinions. He wrote four dissenting opinions on questions of constitutional law, one being in the lifetime of Marshall, in *Houston vs. Moore*.⁵⁰ In *Ogden vs. Saunders*,⁵¹ the only case in which Chief-Justice Marshall was in the minority upon a question of constitutional law, Justices Story and Duvall con-

⁴⁸ 3 Mason's Reports, 308.

⁴⁹ 3 Mason's Reports, 314.

⁵⁰ 5 Wheaton's Reports, 1 (1820).

⁵¹ 12 Wheaton's Reports, 213.

curred with him in the question upon which he wrote his dissenting opinion. Judge Story wrote the opinion of the majority of the court in five cases in which Marshall dissented; and in four of the cases in which he dissented during Marshall's life, the Chief-Justice wrote the opinion of the majority. This record of his work is a sufficient answer to the assertion sometimes made by lawyers, that Judge Story, after his accession to the bench, was dominated by Chief-Justice Marshall.

One of the four cases in which Judge Story dissented, and in which Marshall wrote the opinion of the court, is the celebrated case of *The Nereide*.⁵² It involved a question in the law of prize of great practical importance at that time, but of little moment now, by reason of the Declaration of Paris of 1856. The case will always be memorable for the importance which it once had, and for the display of judicial and forensic power which it called forth. During the War of 1812 Manuel Pinto, a Spanish subject, chartered the *Nereide*, a British vessel, for a voyage from London to Buenos Ayres and return. He put on board a cargo owned in part by himself and partners and other Spanish subjects, and in part by British subjects. The *Nereide* was an uncommissioned vessel, but sailed under British convoy, and armed. On the voyage out she became separated from her convoy and was captured by an American privateer, the *General Tompkins*, after a

⁵² 9 Cranch's Reports, 388.

brief engagement. Pinto was on board the *Nereide*, but took no part in her defence. She was taken to New York, and there libeled with her cargo in the District Court. The vessel and the English portion of the cargo were condemned without a claim. The Spanish portion of the cargo was also condemned in the District Court and the sentence was affirmed on appeal in the Circuit Court, but reversed in the Supreme Court. The glowing argument of Pinkney, famous among lawyers and law students, describing the *Nereide* as a "*discordia rerum*; a centaur-like figure, half man, half ship; a fantastic form, bearing in one hand the spear of Achilles, in the other the olive branch of Minerva," and so forth, drew from the Chief-Justice a fine compliment, but was coldly turned aside for "its only imperfection, its want of resemblance." The court applied the rule that "a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean," and declined to make an exception upon the ground that the ship was armed. Judge Story contended that by putting his goods under the protection of belligerent guns the neutral had allied himself with the enemy and lost the protection of neutrality. "The doctrine," he said, "is founded in the most perfect justice that those who adhere to an enemy connection shall share the fate of the enemy." The decision was announced in March, 1815. The next volume of admiralty reports to arrive from England contained the case of *The Fanny*, decided by Lord

Stowell in July, 1814, in which he assumed the rule to be as Judge Story, without knowledge of his decision, had contended in *The Nereide*. Lord Stowell held that neutral goods in an armed merchant ship of a belligerent were subject to condemnation as lawful prize, and decreed salvage to the recaptor.⁵³ The point came before the Supreme Court again in *The Atalanta*.⁵⁴ The court adhered to its position in *The Nereide*, Chief-Justice Marshall declaring it to be a principle of the law of nations that the goods of a friend are safe in the bottom of an enemy, "and so long as it is acknowledged, this court must reject constructions which render it totally inoperative." On the other hand, the name of Judge Story, on a question in the law of prize, carries weight throughout the world. Sir Robert Phillimore states: "It is hardly too much to say that his agreement with such an authority as Lord Stowell does constitute a balance in favor of the proposition which those great jurists have deliberately sanctioned in most elaborate judgments."⁵⁵

Judge Story's policy upon the important question of expressing dissent may be collected from his declarations. In *The Nereide*,⁵⁶ which was his most important dissent up to that time, he says: "Had this been an ordinary case, I should have contented

⁵³ 1 Dodson's Reports, 443.

⁵⁴ 3 Wheaton's Reports, 409 (1818).

⁵⁵ Phillimore's International Law (3d Ed.), vol. III, 551.

⁵⁶ 9 Cranch's Reports, 388. See page 455.

myself with silence." In *Oliviera vs. United Insurance Co.*⁵⁷ he refrained from expressing his dissent at the earnest suggestion of Mr. Justice Washington, who "thinks (and very correctly) that the habit of delivering dissenting opinions on ordinary occasions weakens the authority of the court and is of no public benefit." In *Briscoe vs. Bank of Kentucky*,⁵⁸ he stated that he was of opinion "that upon constitutional questions the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent." In this case it should be said that his feelings seem to have been deeply moved. In addition to the work of writing opinions he was vigilant and active on matters of practice, made rules for the circuit court and drew up the rules promulgated in 1842 by the Supreme Court governing equity practice in the courts of equity of the United States. He also made many recommendations to Pinkney, Webster and other influential legislators for extending the Federal jurisdiction and improving the Federal laws.

In the face of this record of achievement on the bench it will seem ungracious if not unreasonable to assert that the intellectual gifts which Judge Story possessed in the highest perfection and which he took most delight in using were not those of a judge. By nature he was a teacher and jurist. A judge is,

⁵⁷ 3 Wheaton's Reports, 183 (1818).

⁵⁸ 11 Peters' Reports, 257, at page 350.

before all else, a magistrate, clothed with a portion of the power of the government and charged with the duty of administering public justice between citizens or between citizens and the state. In pronouncing judgment or sentence he is limited strictly to the proved facts and the established law. These restrictions do not apply to the professor or jurist. He is permitted and indeed required to develop each legal principle in all its details. He may assume without limit any facts which may be material for illustration. To a mind like that of Judge Story, well nigh insatiable in acquiring knowledge, and eager to traverse the whole field of jurisprudence, the limitations of the judicial office would ordinarily be more or less galling. Fortunately for him he came to the bench at a time when a number of important subjects had not been touched by judicial decision, and he had an opportunity to declare the law upon them for his successors. With Kent he shares the honor of introducing and establishing correct principles of equity in the United States. In Admiralty and Prize he had an opportunity similar to that of Lord Stowell, and in commercial law similar to that of Lord Mansfield. There was in his mind, however, a tendency to idealize which occasionally carried him to some extent beyond the law and weakened his practical soundness as a judge. This, it is submitted, is manifested by his suggestion that a court of equity might with propriety insist upon decreeing a specific per-

formance of all *bona fide* contracts.⁵⁹ In *La Jeune Eugenie*⁶⁰ he held that the slave trade was contrary to natural justice and moral duty, and therefore in violation of the law of nations. Subsequently the question came before the Supreme Court in *The Antelope*,⁶¹ where Chief-Justice Marshall said that in considering the question, "this court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law," and followed the doctrine of Lord Stowell in *The Louis*.⁶² Judge Story did not dissent. To the same mental tendency may be referred the doctrine stated in *Hunter vs. Martin*, that the whole of the Federal judicial power should be at all times vested in courts created under Federal authority. As is well known, Congress has not acted in accordance with that policy in executing the provisions of the Constitution relating to the judicial power. It is not contended here that a tendency to idealize is wholly to be condemned in a judge. On the contrary, if wisely used, it may be of great benefit, and lead to improvement in the law. The point to be especially noticed in connection with the career of Judge Story is, that by reason of this tendency, which made him ambitious to improve and reform the law, and of his desire to range over the whole of any subject with which he had to deal, he was likely in time to become restive under

⁵⁹ 2 Story's Equity Jurisprudence (2d Edition) paragraph 717a.

⁶⁰ 2 Mason's Reports, 99 (1822).

⁶¹ 10 Wheaton's Reports, 211 (1825).

⁶² 2 Dodson's Reports, 210 (1817).

the restraints of the bench, and to seek the more unconfined and inviting fields of general jurisprudence.

Attractiveness was lent to his judicial work in the beginning by the charm of congenial associates. In 1808 he wrote to a friend, in describing the Chief-Justice: "I love his laugh,—it is too hearty for an intriguer,—and his good temper and unwearied patience are equally agreeable on the bench and in the study." In 1812 during his first term as a judge, he wrote: "My brethren are very interesting men, with whom I live in the most frank and unaffected intimacy." The first break in this companionship came in 1823, with the death of Brockholst Livingston. Then followed Mr. Justice Todd in 1826; Bushrod Washington in 1829; Mr. Justice William Johnson in 1834, and the Chief-Justice in 1835, leaving Judge Story and Mr. Justice Duvall, who had resigned in 1835 and who died in 1836, as the sole survivors of the court of 1812. Marshall died July 6, and in October following Judge Story, at the request of the bar of Suffolk County, delivered in Boston a discourse upon his character and services. One favorite theme upon which he often dilated is repeated in this discourse. Speaking of the relation of confidence and friendship between Marshall and Colonel Pickering, Judge Story says: ⁶³

It shows that great minds (and perhaps great minds only) fully understand that exquisite moral truth, that no man stands in another's way in the road to honor; and that the world is wide

⁶³ Story's Miscellaneous Writings, 674.

enough for the fullest display of the virtues and talents of all, without interrupting a single ray of light reflected by any.

This applies with even more felicity to the relation between Marshall and himself. In the firmament of jurisprudence they shine as stars, but neither detracts anything from the splendor of the other.

Then came the question of the succession. On the 24th day of the month in which Marshall died, Judge Story wrote to the reporter, Peters:⁶⁴

As to the Chief-Justice's successor, I do not even venture to hazard an opinion, or even a conjecture. I shall wait events. Whoever succeeds him will have a most painful and discouraging duty. He will follow a man who can not be equalled, and all the public will see, or think they see, the difference. A situation which provokes a comparison so constant and so discouraging, is not enviable. Let me only add, for your eye, lest there be some idle conjecture elsewhere, that I have never for a moment imagined I should be thought of. So that I am equally beyond hope or anxiety.

Whatever may have been the expectations of his friends, the conditions were not favorable for the appointment of Judge Story. Andrew Jackson was President. In 1834 Story had written concerning him:⁶⁵

Everything here except the President's will is as uncertain as it possibly can be. And I confess myself humiliated at the truth, which can not be disguised, that though we live under the form of a republic we are in fact under the absolute rule of a single man.

Jackson on his side had spoken of Story as "the

⁶⁴ Life and Letters, vol. II, 201.

⁶⁵ Life and Letters, vol. II, 154.

most dangerous man in America,"⁶⁶ although at a dinner in 1833 Story writes, "the President specially invited me to drink a glass of wine with him." The chief-justiceship was too important an office to be given to "the school of Story and Kent," as Jackson had described it. Taney of Maryland was appointed to the place and commissioned in March, 1836. He took his seat as Chief-Justice at the January term, 1837. If Judge Story felt any disappointment he did not express it. In 1837 he wrote to Charles Sumner, "The Judges go on quite harmoniously. The new Chief-Justice conducts himself with great urbanity and propriety." Conflicts of opinion, however, among the members of the court, were impending destined to result in defeat and discouragement for Judge Story and in his determination to retire from the bench.

Among the cases pending when Taney took his seat was *Charles River Bridge vs. Warren Bridge*. It had been in the court since 1830, and was argued at great length in 1831. This appears from a letter of Judge Story to Professor Ashmun, dated March 10.⁶⁷ Mr. Webster was counsel for the *Charles River Bridge* and upon the back of a memorandum of notes of the argument of his opponents now in the possession of Mr. Justice Richardson of the Superior Court of Massachusetts, made the following indorsement:

⁶⁶ Life and Letters, vol. II, 117, 119.

⁶⁷ Life and Letters, vol. II, 51.

Charles River Bridge vs. Warren Bridge. Washington, March 10, 1831. Argued: the last important Constitutional question I expect ever to discuss at the bar. D. W.

There was a division of opinion in the court, as appears in a letter of Judge Story to Jeremiah Mason of December 23d, 1831,⁶⁸ which shows that he was preparing an opinion in the case, which he requested Mason (who of course was not engaged as counsel) to read. In March, 1832, Judge Story refers to the case again, in a letter to Professor Ashmun, stating that it was not decided. "Some of the Judges," he says, "had not prepared their opinions when we met; and Judge Johnson has been absent the whole term from indisposition." The case remained undecided until January term, 1837, when it was reargued, and was decided in February of that year.

The facts were briefly these:⁶⁹ In 1640 the Legislature of Massachusetts granted to Harvard College a ferry between Boston and Charlestown. In 1785 Thomas Russell and others petitioned the Legislature for the privilege of building a bridge over Charles River between Boston and Charlestown, "where an ancient ferry had been established." This petition was granted, and the petitioners were

⁶⁸Memoirs of Mason, 336, 337.

⁶⁹A valuable note entitled Historical Statement in Relation to Charlestown Bridge, prepared by Hon. George G. Crocker, Chairman of the Boston Transit Commission, will be found in the Fifth Annual Report of the Commission, Appendix C. I have made use of it in preparing the above statement of facts.

incorporated as the proprietors of Charles River Bridge. The corporation was authorized to construct a bridge, and to charge tolls according to a schedule established by the third section of the Act. The term of the franchise was forty years, during which time the corporation was required to make an annual payment of two hundred pounds to the President and Fellows of Harvard College. At the end of the term the bridge was to revert to the Commonwealth, "saving to the college a reasonable annual compensation for the annual income of the ferry which it might have received had not the bridge been erected." The bridge was rapidly constructed, 1470 feet in length, and 42 feet in width, and was opened with great ceremony on June 17th, 1786. Judge Story states:⁷⁰

It is well known historically, that this was the very first bridge ever constructed in New England over navigable tide waters so near the sea.

The capital of the proprietors consisted of one hundred and fifty shares of the par value of 100 pounds each, or about \$75,000. The bridge proved very profitable, and it is stated that in 1826 an original proprietor of a single share had received back his principal with interest, and a surplus of \$7,000.

In 1792 Francis Dana and others were incorporated as the proprietors of the West Boston Bridge, with a charter modeled after that of the Charles

⁷⁰ 11 Peters' Reports, 610.

River Bridge. The West Boston Bridge was some distance from the Charles River Bridge, and connected Boston and Cambridge. The proprietors of the Charles River Bridge contended that the West Boston Bridge would diminish their income, and the Legislature extended the franchise of the Charles River Bridge for thirty years, making a term of seventy years, which would expire in 1858.

In 1785 the population of Boston was 17,000 and of Charlestown 1,200. The population was increasing, and in 1825 that of Boston was estimated at about 60,000, and of Charlestown in 1820 at about 7,000. In spite of the strenuous opposition of the proprietors of the Charles River Bridge, an act incorporating the Warren Bridge corporation was passed in March, 1828. A right to take tolls similar to that of the Charles River Bridge was granted, but the term of the franchise was limited as follows:

When said proprietors shall be reimbursed the money expended in building the bridge and necessary expenses with five per cent. interest, the property shall revert to the commonwealth, provided that the term of taking the tolls shall not exceed six years.

Until such reversion they were required to pay to Harvard College one-half of the sum required to be paid by the proprietors of the Charles River Bridge, who were to that extent relieved from their obligation.

The new bridge was to connect points not far from the Charles River Bridge at either end. It was practically certain that the income of the Charles

River Bridge would be seriously impaired as soon as the new bridge was opened, and that it might be destroyed if the Warren Bridge was made free by the Commonwealth at the expiration of the term of six years.

Immediately upon the passage of the Act the proprietors of the Charles River Bridge began proceedings in equity in the Supreme Judicial Court of Massachusetts. Webster and Lemuel Shaw were their counsel, and filed a bill to prevent the erection of the new bridge. A motion for a preliminary injunction was denied, and in October, 1829, the cause was heard upon the merits. January 12th, 1830, the judges delivered their opinions. Upon the question whether the Act of 1828 impaired the obligation of a contract, the Court was equally divided, Chief-Justice Parker and Justice Putnam, for the plaintiffs, and Justices Morton and Wilde for the defendants. Upon the question whether the new bridge was a taking of the property of the proprietors of the old bridge, the Court stood three to one, Justice Putnam alone maintaining the affirmative. The result was that the bill was dismissed, and the case was promptly taken to Washington.

Between the first and the final arguments great changes had taken place in the Supreme Court. Taney had succeeded Marshall, and Justices Johnson and Duvall were succeeded by Justices Wayne and Barbour. In Massachusetts Chief-Justice Parker died in 1830, and was succeeded by Lemuel

Shaw, one of the counsel for the plaintiffs. Judge Story was pressed to take the office, but had no inclination for it, and declined.⁷¹

Between 1830 and 1837 great changes had also taken place at the bridges. After the denial of the preliminary injunction, the construction of the new Warren Bridge was pushed forward, and the bridge was opened on Christmas day, 1828. The new bridge immediately took two-thirds of the traffic of the Charles River Bridge. In March, 1836, the Warren Bridge became free, and the proprietors of the Charles River Bridge opened their draw, which closed the bridge. The decision of the court came soon after, at a time when the community was greatly excited.

The opinion of the court sustaining the act incorporating the Warren Bridge was delivered by Chief-Justice Taney. Judge Story delivered a long dissenting opinion in which Justice Thompson concurred. The effect of the decision was to impose another check or limit upon the influence of the Dartmouth College Case, which held that the grant of a franchise is a contract, and protected as such against the legislative power of a state by the Federal constitution. While it was not denied by the court that the grant to the proprietors of the Charles River Bridge was a contract it was held that in construing the grant nothing would be implied in its favor, but that it would be construed strictly in favor

⁷¹ Life and Letters, vol. II, 73.

of the public. On the other hand Judge Story contended that such a grant should be construed favorably to the grantee. He said:⁷²

To sum up, then, the whole argument on this head, I maintain that, upon the principles of common reason and legal interpretation, the present grant carries with it a necessary implication that the Legislature shall do no act to destroy or essentially to impair the franchise; that (as one of the learned judges of the State Court expressed it) there is an implied agreement that the State will not grant another bridge between Boston and Charlestown, so near as to draw away the custom from the old one; and (as another learned judge expressed it) that there is an implied agreement of the State to grant the undisturbed use of the bridge and its tolls, so far as respects any acts of its own, or of any persons acting under its authority. In other words, the State impliedly contracts not to resume its grant, or to do any act to the prejudice or destruction of its grant.

Approval of his opinion and disapproval of that of the Court came to Judge Story from many quarters. Daniel Webster wrote, that "the opposite opinion had not a foot nor an inch of ground to stand on." Chancellor Kent looked upon the decision as immoral. He read to the end of the opinion of the Chief-Justice and then "dropped the pamphlet in disgust." In June, 1837, he wrote:⁷³

It injures the moral sense of the community and destroys the sanctity of contracts. If the Legislature can quibble away or whittle away its contracts with impunity the people will be sure to follow.

⁷² 11 Peters' Reports, 646.

⁷³ Life and Letters, vol. II, 270.

Judge Story shared these feelings, although his language was more moderate. He wrote to Judge McLean in May:

I think I may say that a great majority of our ablest lawyers are against the decision of the Court, and those who think otherwise are not content with the views taken by the Chief-Justice.

He was deeply affected and discouraged by the decision. At the same term he delivered dissenting opinions in two other important cases of constitutional law, *Briscoe vs. Bank of Kentucky*, and *New York vs. Miln*. His feelings appear from a letter written in April to Harriet Martineau: "I am the last of the old race of judges. I stand their solitary representative, with a pained heart, and a subdued confidence." On returning home he determined to resign, but was dissuaded by friends. Apparently he had considered the subject of resignation before. In November, 1836, he wrote to Reverend John Brazer: "I have now no other desire than to give my remaining days to the science of jurisprudence." In 1838 he returns to the subject and writes from Washington to his wife: "I wish with all my heart I were no longer a judge, but able to do without the office." In 1843 he was absent during the whole of the annual sitting of the Supreme Court for the first and only time, through illness. In 1845 his resolution to resign was formed, and in June he wrote to Chancellor Kent:⁷⁴

⁷⁴ Life and Letters, vol. II, 538.

This is the last year I shall be a Judge of the Supreme Court, and in the early autumn my resignation will be given in. Henceforth I shall devote the residue of my life and energies to the law school exclusively.

He was then in his sixty-sixth year, and might reasonably look forward to some years of exclusive study and labor in a field where he had already won renown and expended much of his strength.

On June 2d, 1829, Mr. Nathan Dane, author of Dane's Abridgment of American Law, in a communication addressed "to the President and Fellows of the corporation of Harvard University," proposed to found a professorship of law. In the fifth paragraph of his letter of proposal he says:⁷⁵

As the Honorable Joseph Story is, by study and practice, eminently qualified to teach the said branches both in law and equity, it is my request that he may be appointed the first professor on this foundation, if he will accept the office, and in case he shall accept the same, it is to be understood that the course of his lectures will be made to conform to his duties as one of the Justices of the Supreme Court of the United States.

Judge Story accepted, and in August delivered an inaugural discourse, on assuming the professorship. He had been one of the first to recognize and advocate the importance of law schools as a means of preparing for the practice of law. In 1817 in reviewing David Hoffman's book on *A Course of Legal Study*, in the *North American Review* he said:⁷⁶

⁷⁵ Life and Letters, vol. II, 3, 5.

⁷⁶ Miscellaneous Writings, pp. 91, 92.

We have another motive, besides the intrinsic value of the work, for commending it earnestly to the perusal of our readers. It will demonstrate to the understanding of every discerning man the importance, nay, the necessity of the law school which the government of Harvard College have, so honorably to themselves, established at Cambridge. No work can sooner dissipate the common delusion, that the law may be thoroughly acquired in the unmethodical, interrupted, and desultory studies of the office of a practising counsellor.

To demonstrate the advantages and necessity of the law school and win for it the support of the legal profession and the public was the work which he had to do, and which he accomplished. The Dane professorship was not the beginning of the Harvard Law School, but it marks the beginning of its success.⁷⁷ The Royall and University professorships existed before the gift of Mr. Dane was made, but the Harvard Law Quinquennial contains the names of only five students in the year 1829. The name and reputation of Judge Story at once attracted students. In 1830 there were thirty-two students, and in 1845 one hundred and thirty-two. Law schools had then passed beyond the state of experiment.

The acceptance of the Dane professorship by Judge Story required a change of his residence. This was a serious matter at his age. He had built a house on Winter Street near Salem Common, now Washington Square, and was the center of a circle of friends and relatives who had gathered about him.

⁷⁷ See an article on the Harvard Law School by Mr. Louis D. Brandeis of the Boston Bar, *Green Bag*, vol. I, 10.

John Forrester, a son of the great merchant of the preface to the *Scarlet Letter*, married his sister Charlotte, and built a fine residence facing the Common. This house is now the home of the Salem Club. Other members of Judge Story's family had built on the northerly side of the Common. In September, 1829, immediately after his inauguration as Dane professor, he removed to Cambridge.

As a teacher of law his success seems to have been due to his great reputation, and his remarkable personality. The best evidence of his power is the testimony of lawyers who were his pupils in their youth. Richard H. Dana, who rendered the nation a service during the Civil War by his argument of the famous *Prize Cases*,⁷⁸ attended the Law School between 1837 and 1840. In a letter written in 1851 he says:

Of the character of Judge Story as a teacher, it is needless for me to speak. His pupils in all parts of America, whatever may be their occupation or residence, or whatever the lapse of time, will rise up as one man and call him blessed. He combined in a remarkable manner, as has been said by everybody, the two great faculties of creating enthusiasm in study, and creating relations of confidence and affection with his pupils. Do you remember the scene that was always enacted on his return from his winter session at Washington? The school was the first place he visited after his own fireside. His return, always looked for and known, filled the library. His reception was that of a returned father. He shook all by the hand even the most obscure and indifferent; and an hour or two was spent in the most exciting, instructive, and entertaining descriptions of the events of the term.

⁷⁸ 2 Black's Reports, 635.

Another pupil, Mr. George W. Huston, who graduated in 1843, says: "He was easy of access and beloved by the young men. An eloquent lecturer and often 'loomed' as the young men called it." It was easy to draw him from the point. "A single question during a lecture would set the judge off at a tangent, and this was apt to be done every day."⁷⁹ A writer in the *Green Bag*,⁸⁰ whose name is not printed, but who was in the law school with Rutherford B. Hayes and George Hoadley, says:

I had not enjoyed a sight of him until, as a law student, I confronted him at his professorial desk. I lost attention to that first lecture in contemplating the great jurist and in musing upon my knowledge of what he had achieved. When he presided at the moot courts which he had established for the *nisi prius* practice of the students or for their views upon a stated controversy, generally patterned from some case in his circuit, Professor Story was the embodiment of geniality and seemed as pleased with the proceedings as would be a child at blindman's buff. His constant tenet to students was "the nobility and attractiveness of the legal profession."

His method of teaching, if it can be called a method, was simply that of lectures and text-books. Its success and charm were due to his remarkable personal gifts, which could not be communicated to a successor. He taught the generation of lawyers who flourished under him to look to the law school as the proper place to begin legal study. The introduction of a new system of teaching the law, exhibit-

⁷⁹ Harvard Law Review, vol. XI, 122.

⁸⁰ Volume IX, 49.

ing to the student its origin and growth in the reports, was reserved for another name, his successor of a later generation, the late Professor C. C. Langdell. Judge Story's work brought about the transition from study in offices to study in established schools of law, and his gifts as a teacher were adapted to that end. Mr. Dana says:

I do not believe that such a peculiar combination of qualities to constitute a teacher of the science of law to young men, will be likely to be found again for many generations.

The Dane foundation provided that the holder of the professorship "should prepare and deliver and revise for publication, a course of lectures on the five following branches of Law and Equity, equally in force in all parts of our Federal Republic, namely: The Law of Nature, the Law of Nations, Commercial and Maritime Law, Federal Law and Federal Equity, in such wide extent as the same branches now are, and from time to time shall be administered in the courts of the United States, but in such compressed form as the professor shall deem proper." Josiah Quincy, who became President of the University in the same year that the Dane Professorship was founded, asked Mr. Dane if he thought it was possible that Judge Story would fill up that extensive outline. He replied, "Yes, sir. I know the man; he will do this and more; for, uncommon as are his talents, his industry is still more extraordinary." Judge Story's attention was quickly directed to this portion of his duties. In a letter to

Professor Ticknor from Washington in 1830 he says: "I shall be glad to return home, and work with the Law Students. I am impatient for leisure to prepare some written lectures, for there is a terrible deficiency of good elementary books." At once he went to work, and with incredible rapidity produced treatises upon the following subjects, viz.: In 1832, on Bailments; in 1833, on the Constitution, three volumes, and an abridgment of the same in one volume; in 1834, on Conflict of Laws; in 1836, on Equity Jurisprudence, two volumes; in 1838, on Equity Pleading; in 1839, on Agency; in 1841, on Partnership; in 1843, on Bills of Exchange; in 1845, on Promissory Notes. The dates given are of the first editions. After reading the treatise on Conflict of Laws, Chief-Justice Marshall wrote: "I wonder, too, how you ever have performed so laborious a task." That he should have written all the treatises above named in addition to his work as teacher and judge, in the space of ten years, is a feat which might well excite the wonder of all men. His habits of work, as stated by his son, account for it in part.⁸¹

He arose at seven in summer, and at half-past seven in winter, never earlier. If breakfast was not ready he went at once to his library and occupied the interval, whether it was five minutes or fifty, in writing. When the family assembled he was called, and breakfasted with them. After breakfast he sat in the drawing-room, and spent from a half to three-quarters of an hour reading

⁸¹ Life and Letters, vol. II, 103.

the newspapers of the day. He then returned to his study and wrote till the bell sounded for his lecture at the Law School. After lecturing for two and sometimes three hours, he returned to his study and worked until two o'clock, when he was called to dinner. To his dinner (which on his part was always simple) he gave an hour, and then again betook himself to his study, where in winter time he worked as long as the daylight lasted, unless called away by a visitor or obliged to attend a moot court. Then he came down and joined the family, and work for the day was over.

His mobility of mind and power of concentration, if the testimony of his son is to be accepted literally, were simply marvelous. Cheerfulness he cultivated as a duty, and he was always light-hearted and joyous, notwithstanding he had suffered more than his share of domestic sorrow. His first wife died a few months after their marriage. By his second wife he had seven children, of whom only two, William Wetmore Story, the sculptor and author, and Louisa, who married Mr. George T. Curtis, survived him.⁸² In spite of all his cares he preserved the enthusiasm of youth to the end of his life. His humor was something unique. In August, 1845, the Law School held a festival to celebrate the completion of an addition to its building, and he presided. He introduced a colleague in these words: "Mr. Professor Greenleaf: The best evidence of his law

⁸² In December, 1804, he married Mary Lynde Oliver, who died in June, 1805. In August, 1808, he married Sarah Wilde Wetmore, who survived him. The Wetmore Memorial, a copy of which may be seen at the Essex Institute, contains the names and ages of their children, and other facts of family history.

is his law of evidence." It is related that on some public occasion, he toasted Mr. Edward Everett thus:

Eloquence flows
Where Ever-ett goes.

And Mr. Everett replied:

However high one may climb in the legal profession in this commonwealth he will always find one Story higher.

In order to form a just judgment upon Judge Story's work as an author it is necessary to understand the conditions under which he wrote. Before 1830 there were but few legal text-books upon the common law which could serve as models. Littleton's Tenures was a masterpiece, but it was a statement of the feudal law, and was overlaid with Coke's notes. The publication of Blackstone's Commentaries in 1765 marks a new epoch, and no one appreciated the influence of Blackstone's book better than Judge Story.⁸³ All his own books were named Commentaries. It may be said they were all constructed in pursuance of a common plan, which may be collected from the preface to his earliest work, the Commentaries on the Law of Bailments. In Blackstone, according to Judge Story, "Bailments occupies little more than two pages; and even these contain some incorrect statements." The only other text-book on the subject was the treatise of Sir William Jones. In the dearth of systematic treatises on

⁸³ Miscellaneous Writings, p. 74 *et seq.*

the common law it was natural that he should consider the style and method of the continental writers, as he had been required to study them in performing his work as a judge in commercial and maritime law. In an interesting paragraph in the preface to his *Bailments*, he says:

There is a remarkable difference in the manner of treating juridical subjects, between the foreign and English jurists. The former almost universally, discuss every subject with an elaborate, theoretical fulness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with a few exceptions, write *Practical Treatises*, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to follow them out into collateral consequences. In short, their treatises are but little better than full *Indexes* to the *Reports*, arranged under appropriate heads; and they are often tied together by very slender threads of connexion. They are better adapted for those to whom the science is familiar, than to instruct others in its elements. It appears to me, that the union of the two plans would be a great improvement in our law treatises; and would afford no inconsiderable assistance to students in mastering the higher branches of their profession.

While Judge Story does not avow that his object was to combine the two plans in the composition of his various books, it is probable that this view had great influence upon their form and arrangement. Few books on the common law pay so little attention to the cases in the text as do Judge Story's, although the cases were fully cited in the notes, and without doubt had been diligently read by him.

In point of substance also the Continental writers

had a great influence upon him. Passages from the French Civilians and from the Roman law are found in nearly all of his books. His attention had been attracted in that direction years before. In 1817 in a letter to Henry Wheaton in regard to a volume of Wheaton's reports he said:

I particularly admire those notes which bring into view the Civil and Continental law; a path as yet but little explored by our lawyers. They are full of excellent sense and juridical acuteness. In my judgment there is no more fair and honorable road to permanent fame, than by thus breathing over our municipal code the spirit of other ages.

In the preface to his work on Bailments, a subject which invited borrowing from the civil law by reason of the method used by Lord Holt in *Coggs vs. Bernard*, Judge Story says Mr. Dane "suggested to me at an early period the propriety of my presenting, in all my labors upon commercial law, some view of the corresponding portions of commercial jurisprudence of continental Europe." In the next place he relates it as his own belief "that an enlarged acquaintance with the continental jurisprudence, and especially with that of France, would furnish the most solid means of improvement of commercial law" in America. "Mr. Chancellor Kent has led the way in this noble career." In this connection it may be well to quote a passage written by Chancellor Kent after he was appointed a judge of the Supreme Court of New York in 1798:⁸⁴

⁸⁴ *Memoirs and Letters of Kent*, p. 117.

I made much use of the *Corpus Juris*, and as the judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. I could generally put my brethren to rout and carry my point by my mysterious wand of French and civil law.

Common law lawyers have looked with doubt and suspicion upon any attempt to introduce civil law principles into the common law. The best method of using foreign law is probably along the line suggested by Professor James B. Thayer in an address at the meeting of the American Bar Association in Detroit, in 1895. "That," he says, "is the best use of the Roman law for us, as a mirror to reflect light upon our own, a tool to unlock our secrets." While the importance of the study of Roman or civil law is fully conceded, it is useful mainly for purposes of comparison. A fine example of the efficient practical use of a Roman law principle may be seen in the opinion of Lord Blackburn in the great case of *Angus vs. Dalton*.⁸⁵

The Commentaries of Judge Story, issuing as they did in rapid succession, greatly increased his fame. In England he had long been known by his decisions and through correspondence with Lord Stowell and other distinguished lawyers and judges. After the publication of his Commentaries on the Constitution, which were translated into both French and German, and his Commentaries on the Conflict

⁸⁵ 6 Appeal Cases, 740, 817 *et seq.*; Gray's Cases on Property, vol. III, 141, 175 *et seq.*

of Laws, his reputation was also established on the continent of Europe. He published second and even third editions of some of the treatises during his life. Many of them are still in active use, as Bailments, in 9th ed.; on the Constitution, in 5th ed.; Equity Jurisprudence, in 13th ed.; Equity Pleading, in 10th ed.; Partnership, in 7th ed. The income to him from these books at one time was large. It was stated in Lanman's Dictionary to be as high as \$10,000 per annum, but there is reason to believe it reached a higher figure. There is still other evidence of the excellence of Judge Story's Commentaries. In reviewing Snell's Principles of Equity, a learned writer says:⁸⁶

Its basis is evidently the commentaries of Mr. Justice Story on Equity Jurisprudence; whole pages with slight verbal alterations, are taken from that storehouse of learning, which forms also, even more unmistakably, the groundwork of Mr. Josiah W. Smith's Manual of Equity Jurisprudence.

The Equity Jurisprudence is one of Judge Story's most popular books and is still widely read and cited. Large portions of Story on Agency have also reappeared in other more modern works upon the subject.

It is melancholy to state that in spite of Judge Story's prodigious record of achievement, he died with his work unfinished. Charles Sumner, who had been on intimate terms of friendship with him since 1831 when he was a student in the Law School,

⁸⁶ American Law Review, vol. VII, 141.

and who had frequent conversations with him in regard to his schemes of authorship, wrote that Judge Story contemplated writing treatises on the law of Shipping, Insurance, and Equity Practice.

The whole subject of Admiralty, embracing the Prize and Instance branches, in their history, jurisdiction, and practice, stood next in order, and he hoped to present it, as it never yet had been presented, with completeness and symmetry. To this work Chief-Justice Marshall often pressed him, saying that of all persons in Europe or America, he was the most competent to do it. This labor was to have been followed by one grander still, on the Law of Nations.

The last book from his hand was sent to the press early in 1845. During the summer he was hard at work disposing of his cases, preparatory to sending in his resignation as a justice of the Supreme Court. Early in September he took a slight cold, which was followed by a violent stricture and stoppage of the intestinal canal. From the first he believed the attack would be fatal, as it proved. The end was characteristic of the man. Calling his wife to him he said: "I think it my duty to say to you, that I have no belief that I can recover; it is vain to hope it; but I shall die content, and with a firm faith in the goodness of God. We shall meet again." He lingered a few days and died September 10th, 1845.

As a general rule the death of a judge or jurist is little known or noticed outside the circle of his own family and friends. Judge Story was universally beloved and his death was followed by widespread mourning. A meeting of the Suffolk County bar,

held on the day of his funeral in the Circuit Court room in Boston, brought together an assemblage of lawyers which has rarely been equaled in the United States. Chief-Justice Shaw, then in the midst of his career as Chief-Justice, occupied the chair. George Tyler Bigelow, afterwards Chief-Justice of the Supreme Judicial Court, was secretary of the meeting. Judge Davis, who had long been Judge of the District Court, and was then in retirement, Judge Sprague, who was then Judge of the District Court, and whose fame is one of the traditions of Massachusetts, were both present. Judge Putnam, in whose office in Salem Judge Story had been a pupil in 1801, and who had recently retired from the Supreme Judicial Court, was also present. At the bar and present at the meeting were Daniel Webster, Jeremiah Mason, Benjamin R. Curtis and Richard H. Dana. In language worthy of a statesman and lawyer when speaking of a jurist and judge, Webster addressed the meeting. After referring to the world-wide grief that would be caused by Judge Story's death, he said:

Sir, there is no purer pride of country than that in which we may indulge when we see America paying back the great debt of civilization, learning and science to Europe. In this high return of light for light and mind for mind, in this august reckoning and accounting between the intellects of nations, Joseph Story was destined by Providence to act, and did act, an important part. Acknowledging, as we all acknowledge, our obligations to the original sources of English law, as well as of civil liberty, we have seen in our generation copious and salutary streams turn-

ing and running backward, replenishing their original fountains, and giving a fresher and a brighter green to the fields of English jurisprudence.

The influence of Story, however, does not stop at the confines of English jurisprudence. An eloquent voice from Germany proclaims that "the true jurists of all times and countries speak the same language."⁸⁷ To Papinian and Gaius and Pothier and Savigny as well as to Stowell and Mansfield, Joseph Story was a brother jurist and kindred spirit.

No sketch of his life would be adequate which did not refer to his activity in other fields than the law. He was one of the incorporators of the Merchants' Bank of Salem, and its President from 1815 to 1835. He was one of the incorporators of the Institution for Savings in the Town of Salem and its Vicinity, now Salem Savings Bank, in 1818, and a Vice-President from 1818 to 1830. He was active as a citizen in Salem and "by his exertions in town meeting, dressed curbstones were furnished at the public expense to all land owners who would pave with brick the sidewalks before their premises." He took a prominent part in organizing the Essex Historical Society, out of which came the well-known and highly useful Essex Institute. In Cambridge he was the leading citizen. In 1818 he was elected a member of the Board of Overseers of Harvard University, and held that office until 1825, when he was elected a Fellow, or member of the corporation, an

⁸⁷ Ihering, *Geist des R. R.* in section 37.

office which he held at his death. In 1820 he was a member of the Convention to revise the Constitution of Massachusetts. He was active in the establishment of the famous cemetery at Mount Auburn. He delivered the address at its consecration, and was a member of the board of trustees from 1831 to his death in 1845. In 1836 when the Charles River Bank issued new bank bills there was an engraved head of Judge Story on one side and of President Quincy on the other.

In religion he was a Unitarian and an active member of the church. From his youth he was the devoted and active friend of religious freedom. In a letter to his wife in 1844, after writing the opinion of the Supreme Court in the great case of Girard College he said:

You know that I have ever been a sturdy defender of religious freedom of opinion, and I took no small pains to answer Mr. Webster's argument on this point, which went to cut down that freedom to a very narrow range.

He delivered historical and literary addresses on various occasions, and during all his life was a lover of literature. He knew French well, at any rate for purposes of reading, but it is not certain that he could use it in speaking or writing. German in his day was not taught in college. In a letter in 1799 he says: "I regret exceedingly my ignorance of the German tongue." This defect seems never to have been repaired. He read Latin. Virgil was his favorite among the Roman poets, and "he never

traveled without a little pocket edition, which is marked all over by him." For Horace he had slight regard.

The exquisite genius of Virgil teaches us that the physical appearance of a great man is always a matter of interest. The attentive reader has no doubt long had in mind questions like those of Dido to her illustrious guest: "Now what were the horses of Diomed like? and how large was Achilles?"

Nunc quales Diomedis equi? nunc quantus Achilles?

As a young man Judge Story was handsome. His hard work wore upon him, and at forty he looked old. His son, William W. Story, the lawyer who became one of our greatest sculptors, has left a description of his physical traits, which is here transcribed, with slight omissions:

He was about five feet eight inches in height, solid and square in build, with a well-knit and active figure. In his movements he was restless and impulsive, walking very rapidly and with a quick, short step, and glancing vivaciously about him. In his youth his hair was auburn and clustered around his head in thick ringlets. By the time he became a Judge it began to wear away from his temples and crown. During the last portion of his life his head, in the front and upper part, was bald, saving a slight tuft of hair on the forehead, and was surrounded behind by a thick mass of fine silvery hair. His forehead was smooth and round, rising domelike over his prominent and flexible eyebrows, beneath which glanced two eager blue eyes. His mouth was large and full of sensibility. The muscular action of his face was very great, and its flexibility and variety of expression remarkable.

His laugh was clear and hearty; his voice was of medium pitch, and great variety of intonation. "His face was a benediction." The author of the *Life and Letters* has here described in language the same figure which as a sculptor he has expressed in marble. In the statue of Judge Story, which may be seen at the chapel in Mt. Auburn, the head is small but symmetrically shaped, and the marble face shines with a mild and attractive light. To any student of the law who may be near Boston, that statue is worth a journey to Mt. Auburn to see. The photograph which accompanies this sketch is from a portrait by Charles Osgood, the original of which is at the Essex Institute.

In conclusion, what judgment shall be passed upon this extraordinary man? In this age of specialists there is a tendency to approach his work with a feeling that so much work by one man and in so many fields cannot have been done well. A partial answer is found in the manner in which Judge Story's work has stood the test of time. It may be conceded that other judges and jurists have excelled him in single qualities. Judge Curtis wrote in more terse and exact language, better suited to the statement of the law. Professor Langdell analyzed legal conceptions with more acuteness and thoroughness. Judge Gray exhibited the capacity to collect and state with greater accuracy in massive monuments the learning and wisdom of the reports. Marshall surpassed him in far-seeing sagacity and in convincing logical power.

The strength of Judge Story lay in the number and diversity of his gifts, combined with a herculean capacity for labor. Although a learned man, he was the master of his learning and not its slave. His mind was youthful and progressive to the end, and he represented the best aspirations of American law and life. His moral quality was singularly pure. As a citizen, in the ordinary relations and activities of life, he was ideal. Tried by the quantity, quality and variety of his legal work, and by the influence which it has exerted and is still exerting upon the law, he is the foremost jurist America has produced.

⁸⁸ Life and Letters, vol. II, 552.