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## CURIOSITIES OF THE LAW : A CASE IN PUNCTUATION

By DUDLEY G. WOOTEN

It would be a most commendable achievement if some one would do for the Law what Isaac Disraeli, the father of Lord Beaconsfield, did for Literature. That scholarly English Jew contributed a vast and valuable fund of writing to the assets of British letters during a long life of intellectual industry, but the most celebrated of his works was undoubtedly his "Curiosities of Literature," a series of volumes issued over a space of forty years, and which unfortunately are little read nowadays. They are a veritable treasure-house of interesting and instructive facts about literature and literary men, anecdotal and critical miscellanies, dealing with historical events and curious incidents in the lives and productions of the great and near-great in the realm of learning. Although the field is equally as wide and varied, and fully as fruitful in its attractions, no such work has ever been accomplished for the Law and its votaries. Desultory and fugitive volumes have been published from time to time, dealing with notable trials, recounting memorable experiences of the bench and bar, collecting the wit, eloquence, resourceful expedients, and dramatic exploits of the best known advocates and jurists; but no one so far has written an adequate account of the Law as it has been followed and illustrated in the many famous forensic controversies of England and the United States, to go no further. Such a production would afford the most diverting and keenly fascinating set of miscellanies in all literature, for it would blend the practice and the philosophy of the Law, and exhibit at once the triumphs of native genius, the trophies of intellectual training, the skill of tried and tested

mental poise, and the highest standards of both moral and physical courage. Likewise, it would portray in the making the tenets and traditions of politics and government, and present in concrete form the movements of public opinion and the development of popular institutions. Such a work would not concern itself too much with the sensational and spectacular features of noted criminal cases, for these relate for the most part to the iniquities of individuals, whose infamy has indeed been remembered for its enormity, but whose importance ceased with the passing of the perpetrators. Rather should such a narrative contain the lineaments of those legal and judicial contests that were "the brief and abstract chronicles of the times," mirroring in their progress and results the dominant passions and prejudices of a critical era, exposing the wisdom or the folly of eminent tribunals, and demonstrating how surely the law in its evolution is but a form of social control, adapting itself to the needs and sometimes to the weaknesses of social conditions, usually guided by a supreme ideal of justice and truth, but occasionally perverted to despotic or ignoble ends. These phases and facts are not generally to be discovered in the formal records of decided causes, nor are they disclosed in the learned opinions of distinguished judges. They are to be found in the temper of contemporaneous events, the prevailing trend of public sentiment, the exigencies of the crisis that provoked the controversy, and their mingled tragedy and comedy are but the manifestations of the fanaticism, the folly, the lofty motives or the grovelling character of the men engaged and the measures involved. Every legal conflict of real historical significance has had this background of contemporaneous circumstances, and if its true but hidden spirit is fully brought to light, it will enliven the dead record with vibrant interest, and breathe into its dry and tedious formulas the flame and fury of antagonisms long since stilled and almost forgotten.

The judicial annals of England are particularly rich in these notable historical causes, the mere recital of whose names unrolls before the memory and imagination the whole panorama of scenes and struggles the most momentous in English political, religious and social development for the last four hundred years. In the seventeenth century the trials of Guy Fawkes and Titus

Oates, the tragic fate of Stafford and Charles I., the arraignment of the Seven Bishops, the career of Lord Jeffreys and his "bloody assizes" — all of these constitute dramatic evidences of the course of religious bigotry and intolerance, of royal obstinacy and arrogance, of popular credulity and fanaticism, and of the steadily increasing power of public opinion in the shaping of Britain's policies and institutions. Coming down to a later period, the numerous prosecutions for criminal libel in connection with the publication of revolutionary books and pamphlets, inspired by the recent events in America and France, furnish striking examples of the reaction of English conservatism towards French radicalism, and afforded splendid exhibitions of the courage and loyalty of English lawyers in defence of liberty of thought and freedom of speech. Such were the repeated trials of John Wilkes, the prosecution of Jean Peltier for libelling Napoleon Bonaparte, the trial of the publisher of Thomas Paine's "Age of Reason," the case of *Rex v. Forbes et al.*, involving all the bitter hatreds of Irish patriots against the Orangemen. In those famous combats such advocates as Lord Erskine, Sir James Mackintosh, William C. Plunket, and John Henry North established their imperishable renown as superb orators and fearless champions of equality before the law; while the modern law of libel, with its privileges of political discussion, was formed and vindicated. And when was there ever a sadder or more tragic case than that of Queen Caroline, the disowned wife of George IV., unmasking the scandals and intrigues of a corrupt prince, displaying in all its splendor the magnificent eloquence of Lord Brougham, and invoking a political revolution by its appeal to the sympathy of the English people? The inside story of all of these celebrated legal conflicts, with the background of contemporaneous public sentiment, would make a volume of the Curiosities of the Law, of transcendent interest and sound instruction.

The short chronicle of American judicial and legal transactions, by comparison with the age-long record of the English courts, affords only a few causes of historical value, but those which constitute examples of a similar character are not inferior in charm and importance. *Marbury v. Madison* is nowadays cited as a precedent for a fundamental principle of constitut-

ional law, but its real origin and controlling motive underlaid the struggle between the fast-waning Federalists and the rising power of Jefferson's new party of Republicanism, while its background was shadowed by the malignity of personal and party rancor. The trial of Aaron Burr for treason set the stage for the performance of the most brilliant coterie of lawyers ever assembled in any court, and demonstrated the genius and wisdom of the ablest jurist who ever sat upon the American bench; but behind these open proceedings, and transcending them in actual significance, lurked the spirit of fierce partisanship, the treachery of influential military officials, the romance of the frontier and the forest, the dreams of an empire yet to be born in the Southwest, and the complications of national and international politics.

The *Dartmouth College Case* is known to the lawyer and the layman as authority for the inviolability of contracts, but it is not generally known that for a long time scandal and secret imputations of corruption and cowardice against the most honored names in American judicial annals obscured the record and in some quarters discredited the authority of that epochal decision. Happily, those malicious mendacities were conclusively disproved, although now and then some ignorant or jaundiced critic of the Supreme Court seeks to revive the libellous attacks that followed close upon Webster's signal victory. Nearly everybody has heard of the *Dred Scott Case*, baleful precursor of the Civil War, but very few, even among lawyers, know its true import or its actual consequences. It, too, was made the subject of the vilest insinuations of bargain and collusion between the illustrious Chief Justice and the President of the United States, for sectional and political ends; and the gentlest, purest, most amiable of modern jurists went to his grave burdened and saddened by the cruel aspersions of unscrupulous partisans. Chief Justice Taney was made to say, in the current slang of that bitter era, that "the negro has no rights that the white man is bound to respect." He said and intimated no such thing. What he did say and what the decision announced was the law then, is yet, and ever has been in all countries where human slavery has existed as a legal status and a social institution. The mistake of the *Dred Scott* decision was not an error of law by the court, but a fatal assumption of jurisdiction to decide a political and

moral problem upon a record that warranted no decision at all; the motives of the judges who rendered it, through the mouth of the Chief Justice, were the noblest and most patriotic, but they sought to settle a question that was not properly before them, and which, under the then prevalent conditions, no court should have undertaken to dispose of. This famous case, in itself, is one of the curiosities of American legal history.

The period following the Civil War, which was veritably the dark age of American law and politics, if the time comes when its amazing inconsistencies and involutions can be dispassionately considered, furnishes a tumultuous series of curiosities, in legislation, in judicial usurpation, and in legal absurdities, the like of which perhaps never before transpired in a country devoted to the reasonableness of the Law and the righteousness of free government. Most of that medley of revolutionary transactions has nowadays only an academic interest, but someday it should be examined and recorded as a lesson in the possibilities of perverted public sentiment. The greater part of the misfeasance and malfeasance in the realms of legal and judicial action occurred in that section of the Union which fell victim to the disasters of the Lost Cause; but some of them were of universal national concern. The so-called War Amendments to the Constitution, whatever may have been their wisdom and necessity, were proposed and adopted in direct antagonism to the theory upon which the War had been fought and won, which was that Secession was an impossible achievement in "an indestructible Union of indestructible States." Yet, in order to procure the requisite number of States to ratify those Amendments, and to so organize Congress as to enact the Reconstruction Measures, it became necessary to treat the lately seceding States as if they were out of the Union and not to be counted in the enumeration of ratifying votes. If Mr. Lincoln had lived, no such palpable contradiction and repudiation of the principle for which he had conducted the great struggle would have been perpetrated; for, with his usual quaint mingling of wit and wisdom, he had said: "It matters not whether the Southern States could go out of the Union or not, they are back home now, and we will act accordingly." But Reconstruction was forced on the South, as the only way to avoid the manifest violation of law

and logic involved in the adoption of the Amendments, and it brought with it a train of devastating consequences the most deplorable and degrading. The attempted impeachment of President Andrew Johnson at the inception of that troublous era was one of the concomitant results of that policy of constitutional innovations, and its curious features present one of the most anomalous situations in the history of American politics. Notwithstanding his Southern birth and environment, his antecedents, character and career, although remarkable for the forcefulness of his personality and the success of his ambitions, were totally at variance with Southern social traditions and distinctions. He was distrusted in the North and despised by the old dominant element in the South, and so his effort to stem the tide of Reconstruction legislation failed of approval in both sections, and his offensive obstinacy served to aggravate the spirit of revolutionary oppression of the Southern States that ruled Congressional leaders at that Crisis. The true and adequate story of that controversy has not yet been told, and its exposition remains for the future writer of legal and political miscellanies. The last echoes of that memorable, but not creditable, complication were heard in the Presidential contest before the Electoral Commission, ten years later. Thus, first and last, the incidental effects of Congressional Reconstruction of the South witnessed two extraordinary judicial spectacles—the trial of a President before the Senate sitting as a high court of impeachment, with the Chief Justice presiding, and the decision of a Presidential election by a tribunal unknown and un contemplated in any method of procedure provided by our form of government.

It was, however, in the practical operation of the Reconstruction Measures that the most curious, not to say monstrous, legal complications arose. At this time it is almost impossible to realize what that era of discord, confusion, lawlessness and general breaking down of civilized restraints meant in the South. The utter demolition of the customary safe-guards of legal security and political rights was so complete that it appears incredible in normal times, while the reign of violence, disorder, extravagance in government, corruption in politics, and despotism in the tribunals established for justice created a condition of desperation among the people and of reckless tyranny among

those exercising the functions of power, that has had few parallels in history. In one Southern State four-fifths of the Legislature were negroes who could neither read nor write while the Supreme Court was composed of negro judges equally as illiterate and ignorant. The test oath for citizenship and suffrage, called the "Iron-clad Oath," disfranchised almost the entire intelligent white population, by excluding from civil and political rights all persons who had served in the Confederate armies, or in any way aided, abetted or sympathized with the Confederate cause. This placed all the institutions of law and government in the hands of the small minority of whites, whose disloyalty to the secession movement was a sure badge of their social inferiority and lack of identity with the great mass of the people, and some five millions of recently emancipated slaves, necessarily destitute of the simplest qualifications for citizenship. Ruling and directing this heterogeneous minority of political incompetents were the horde of "carpet-baggers"—aliens from the North, who swarmed into the South like a pest of locusts, devouring the small substance of property left from the war, misleading and inflaming the ignorant and irresponsible negroes, domineering with insolent airs over a proud and sensitive people, whose spirit was already smarting under the defeat of the struggle in which they had spent every energy and resource of the land they loved and cherished. Added to these imported leaders were a few Southern men of ability and influence, but whose sympathy and support were given to the Reconstruction governments, and to whom was applied the sinister and significant name of "scalawags." For a period of approximately five to seven years this combination of evil and degrading influences exercised absolute sway over most of the Southern States, electing and controlling governors, legislators, judges, peace officers, and the whole machinery of civil and political administration. That this is not an over-drawn picture of the situation is demonstrable by the record of those days. It was far worse than the era of military occupation that immediately followed the close of the War, and it reduced the country to destitution and the people to despair. It was this state of affairs that produced such organizations as the original "Ku Klux Klan," and led to a series of lawless outbreaks the history of which



is contained in some forty bulky volumes of the reports of a Congressional investigating committee.

The character of legal and judicial proceedings that accompanied such a system of government may be imagined, it can hardly be described. The desperate methods resorted to for overthrowing the tyranny and debauchery of that regime were justified by the necessities of the case, and an account of the manner in which State after State finally resumed its institutions from this abject bondage would present many and marvellous examples of the invincible spirit of American freedom wherever it exists. For the purpose of this article, and as a contribution to the curiosities of the law of that exceptional period, we will mention a celebrated case that was tried before the Supreme Court of Texas, and which marked the liberation of that State from "carpet-bag" rule. Two methods of "Reconstructing" the States lately in secession were tried, one by *Presidential* action, upon Mr. Lincoln's theory that whether those States had actually left the Union was immaterial, since the war for secession had been won by the Union and the seceding States were to all intents and purposes just where they were when the war began. It was in pursuance of that logical doctrine that President Johnson issued his proclamation, calling upon the eleven States recently constituting the Southern Confederacy to form new governments within the Union, electing their State and local officers as aforesaid, reorganizing their institutions to conform to the new conditions which had been created by the defeat of the secession movement, and resuming their former status and relations as members of the United States federation. In 1862, during the War, Congress had passed an Act under which all persons who would take an oath to support the Constitution and laws of the United States in future might, with certain exceptions to be determined by the President, be granted pardon and amnesty for having participated in the "Rebellion," and President Johnson availed himself of the provisions of this law to extend to the majority of the people in the recently seceding States the benefits of amnesty; thus restoring to them all rights of citizenship. The result of this method of Reconstruction was not at all satisfactory to the radical leaders then in control of the government at Washington, for it enabled the

Southern States to reorganize their loyal governments and to resume their Federal relations, without any civil disability arising out of their participation in the War. Hence, Congress took the matter out of the hands of the President, passed the law prescribing the "ironclad oath," disfranchising the great body of Southerners, and then inaugurated the hateful system which bore so heavily upon the South for the next several years, known as *Congressional* Reconstruction. Under those laws the military commanders in the Southern States were authorized to remove from office all State and local officers chosen under the Presidential method, if deemed "impediments to Reconstruction," to appoint their successors, and to order elections for new officers and for the formation of new State constitutions, in which the persons unable to take the test oath—who were practically the vast majority of the electors—had no voice:

Pending the execution of the President's plan of Reconstruction above described, he appointed a provisional governor of Texas, with plenary power and discretion to do what might seem proper to carry that plan into effect. Meantime, Federal troops were kept in the State to preserve peace and order. The provisional governor appointed State officers, except the judges of the Supreme Court, and called a constitutional convention composed of delegates to be elected by qualified voters who had taken the amnesty oath before mentioned. That convention met in February, 1866, and remodelled the State Constitution to correspond with the status produced by the late War, which was equivalent to readopting the Constitution of 1845 under which the State was annexed to the Union. An election for State and local officers was held in June, 1866, and the Legislature convened in August following. All of this transpired peaceable and satisfactorily, and it appeared that Texas was to resume the even tenor of her way in the restored Union of States. But the extreme radicalism of those in power in the national Congress repudiated these orderly proceedings, as not consonant with their purpose and policy to "reconstruct" the South under the control, as they expressed it, of "the friends, not the enemies, of the Union." Under the methods of Congressional legislation as contained in the various Reconstruction Measures, the work the President had done in rehabilitating the State was summar-

ily undone by the military authorities. On July 30, 1867, the Commanding General of the military district issued an order removing the duly elected governor of the State as "an impediment to reconstruction," and appointed in his stead the man whom he had defeated by an overwhelming popular majority the year before. Thus what purported to be a civil government was established under the direct management of the military power, being in effect the same as a conquered province subject to a governor-general. The District Commander proceeded to reorganize the entire civil administration by removing all the lately elected officials, and appointing their successors, including the judiciary, and a new constitutional convention was called to enact an organic law for the State conformable to Congressional ideals. The "iron-clad oath" being now in full force, it was assured that the great body of white voters would be barred from participation in the election of delegates to this convention, and also from voting upon the adoption of the instrument that should be framed and for the election of the officers to be chosen thereunder. The convention met June 1, 1868, adjourned from time amid great disorder and confusion, and finally dissolved without definite adjournment, most of the delegates having gone home in disgust. A Constitution, however, was framed and adopted in November, 1869, under the direction of the military officers conducting the election, at which time also new State and local officers were chosen. The new Constitution did not disfranchise as many of the white citizens belonging to the better class as the extremists had desired, and by degrees that class regained to a considerable extent its influence in politics. But for the next four years the State was victimized, oppressed and plundered by the corrupt combination before described, until the situation became so intolerable and ruinous that intelligent men of substance and character, without regard to party ties, organized to overthrow this despotic and degrading system. Of course the Democratic party became the unit of political action, and it drew to its support most of the leading Republicans whose business interests and civil rights were imperilled by the extravagant and corrupt legislative and executive policies of the Reconstruction government, the head of which had rendered himself odious in the eyes of all the best men in the State. This Govern-

nor, Edmund J. Davis, was an old Texas citizen, having been a judge before the War, but during that conflict he raised a Federal force to invade Texas from Mexico, and his conduct since he became chief executive had been characterized by the grossest disregard of law and many acts of despotic and insolent oppression. His name had become a synonym for everything despicable in the estimation of a great majority of the respectable white population. He took the office in January, 1870, and his term was fixed at four years by the Constitution of 1869, or until his successor was elected and qualified. Meantime, owing to the fast-growing opposition to his administration, and the fact that, by operation of the amnesty which was being extended to the voters who had been disqualified by participation in the War for Secession, the popular majority had gained control of affairs, a Democratic legislature was elected in 1872, and enacted a law changing the method of holding elections, so that instead of the polls being held at the county seats for four successive days, they were to be open as formerly in the several voting precincts of the counties for one day only. This change became a vital point in the subsequent litigation, as the four days election was a Reconstruction device, the exact purpose of which is not obvious, but the necessity for which arose from the abolition of precinct elections and the requirement that voters must go to the county seats to cast their ballots.

In 1873 the movement for the overthrow of the Reconstruction regime culminated in a strenuous campaign for the election of the Democratic candidates for State and local offices, the election was held in December of that year, and the entire Democratic ticket was victorious by decisive majorities all over the State. Governor Davis had been the Republican candidate for re-election, representing the radical elements of the Reconstruction party. Immediately he determined to defeat the result of the election if possible, and to hold over indefinitely, in default of a successor being elected and qualified. The Supreme Court as then constituted was composed of three judges, all of them appointed by Governor Davis, two of whom were "carpet-baggers" who came to the State after the War in connection with the military occupation, and the third belonged to the class known as "scalawags," all of them being political henchmen of

the Governor's party, although they were not without ability and judicial learing. The plan was to have this Court declare the election held in December, 1873, null and void, because not held in conformity with the Constitution of 1869. To raise this issue a fictitious or feigned case was originated. The decision of the Court is reported in Volume 39, Texas Supreme Court Reports, page 709, under the title of *Ex parte Rodriguez*. A Mexican named Joseph Rodriguez was arrested at Austin upon a warrant from Houston, charged with having voted illegally at the late election, and he applied to the Supreme Court for the writ of *Habeas Corpus*, to procure his discharge from custody, on the ground that the election being illegal, null and void, he was guilty of no offence. The ablest lawyers in the State at once enlisted on both sides of this legal contest, and the argument before the Court was prolonged, eloquent, and characterized by great research and ability. It was generally felt that the Court would respond to its political obligations, rather than to the law of the case, but that did not deter the volunteer counsel for the State from presenting their contentions fully and fearlessly. The question involved arose in this manner. The election had been conducted under the recent act of the Legislature, providing for holding the same at the several voting precincts in each county for *one day*, as had been the law prior to the Reconstruction era. Section 6, Article III, of the Reconstruction was in these words:

"All elections for State, district, and county officers shall be held at the county seats of the several counties until otherwise provided by law; and the polls shall be open for four days from 8 o'clock A. M. to 4 o'clock P. M. of each day."

It was argued in favor of the validity of the law passed by the Legislature, and of the election held thereunder, that the Section of the Constitution quoted clearly recognized the power of the Legislature to change the method of holding elections when deemed proper and necessary; that the holding of elections for four days was rendered necessary on account of the inconvenience and impossibility of all voters in the county attending the polls at the county seat, which they could have done under the old system of voting at their respective precinct polls; and that this necessity having been removed by the restoration of precinct voting, the constitutional provision for four days vot-

ing was no longer necessary or applicable, and should be considered as having been superseded by the legislative act. On the other hand, it was contended by counsel for the relator that the two portions of Section 6, Article III, of the Constitution, separated by the *semi-colon*, entirely independent of each other, and that a change by the legislature from county seat voting to precinct voting did not and could affect the latter portion of the Section, referring to the holding of elections for four days. The case aroused public interest to a fever heat, the lawyers engaged in the argument indulged in bitter political animosities and personal reflections, the Court was manifestly uneasy and nervous, but it did its duty to the Governor who made it, rather than to reason and logic, and held that the election was null and void. In a very elaborate opinion, with a disquisition on grammar, punctuation, and syntax, the learned judges decided that the whole issue was disposed of by the *Semi-Colon*, which completely separated the *places* of voting from the *time* for voting, thus establishing two independent purposes of the Section involved, and that, therefore, the Legislature could not change the length of time the polls should be open, although it might change the places where the polls should be located. The indignation with which this decision was greeted by the public was instantaneous and fierce, and it was not short-lived. The judges were at once called the "semi-colon judges," the Court itself was named the "Semi-colon Court," and from that day forward no Texas lawyer ever cited any decision of the Court that rendered the judgment in the Rodriguez case, while by common consent of bench and bar the several volumes of the Supreme Court Reports containing decisions by the judges who delivered the opinion in that controversy have been excluded from consideration in the courts of the State. Many of those decisions are of great weight and wisdom, for the "semi-colon judges" were capable men in their profession, but so intense and inveterate was the public hostility excited by their action, and so firmly fixed was the general conviction that the decision was controlled by party bias and political servility, that they and all their works have been consigned to obloquy in Texas, ever since they made a quibble of punctuation of greater moment than a sane rule of constitutional interpretation. When the "semi-colon decision" was announced it

met with universal derision and contempt, the newly elected officers at once prepared to take possession of the positions to which they had been chosen by the people, volunteer troops from all parts of the State gathered at the capital to support the movement, old soldiers and officers who but a few years before had followed the banners of the Confederacy assumed once more their warlike functions, and the new Governor and his associates in the administration occupied the state-house, ready to use force if necessary. Governor Davis appealed to President Grant for Federal troops to protect his claim to continue in office, but upon the opinion of the Attorney-General the President refused this request, and in a few days Reconstruction rule had come to an end, to be recalled only as a bitter and evil memory of the past.

This Texas case is thus mentioned at length, not only as one of the curious and dramatic incidents in the annals of that abnormal period of American institutions, but because, properly understood, it furnishes some valuable and suggestive lessons in the history of law and government in the United States. It illustrates the fundamental love of freedom, justice, equality, and orderly procedure among Americans everywhere in the Republic. What happened in Texas then could and would have happened in any other American state under like circumstances. It did happen in similar conditions, with more or less variation, in other Southern States during the Reconstruction era, until finally the North came to realize that what the South asked for and was prepared to obtain at any cost, was the same thing that Otis and Adams in Massachusetts, and Henry and Jefferson in Virginia, had demanded and fought for at the threshold of the Nation's independence—the enforcement of the doctrine that all governments derive their just powers from the consent of the governed, and that rebellion to tyrants is obedience to God. Long ago the Supreme Court of the United States declared that the true spirit and genius of the American conception of political institutions is not to be found in the formal and necessarily narrow provisions of the Constitution, but in the wide and wise and universal principles of freedom and righteousness set forth in the Declaration of Independence. That this is an innate and instinctive trait of the American ideal of government, has been demonstrated often and emphatically in the judicial and legisla-

tive annals of the Union. The Dred Scott decision was a correct exposition of primary principles of the law of property rights, but its tenor and purpose were so misrepresented and perverted by public opinion, misled by partisan criticism, that the Court that rendered it was scandalized and discredited, and to this day no lawyer likes to cite the case as an authority. Like the Rodriguez case, just discussed, it demonstrated that the judgment of the courts, the acts of officials, the transactions of government, must ultimately come to the bar of popular approval or condemnation, and be tried by the fundamental test of the original truths and doctrines upon which all free institutions are to be judged in a republic. The same thing has been proved many times and in many places, both in this country and in England, since the same underlying political principles belong to both nations. If the "Curiosities of the Law" is ever adequately and sympathetically written, its most valuable topic will be to illustrate this fact by the historical cases in which it has been exhibited.