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Racialism and the Rights of Nations

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CURIOSITIES OF THE LAW

ONE RESULT OF LAW ENFORCEMENT

It is often said that the way to get rid of a bad law is to enforce it. The writer does not wholeheartedly assent to this doctrine in the sense that the *only* way to get rid of a bad law is to enforce it, but while a student at Yale Law School he heard from Professor Vance, author of Vance on Insurance, an interesting illustration of this doctrine.

The story concerns Chancellor Wythe of Virginia, the first law teacher in America, preceptor of John Marshall, Thomas Jefferson, James Monroe, Henry Clay and scores of other distinguished men. Wythe, himself, was scarcely less distinguished. He was a thorough scholar, a sound lawyer and an upright judge. He had a bent toward classical scholarship and at the age of eighty learned a new language. He was a member of the Virginia House of Burgesses, member of the Continental Congress, signer of the Declaration of Independence, on the judiciary of the Old Dominion in the Supreme Court, and for twenty years was sole Chancellor of State. He was, perhaps, the first judge in the western hemisphere to lay down the cardinal principle in 1782 that a court can annul a statute repugnant to the constitution, thus forerunning Marshall in the famous case of *Marbury vs. Madison* by many years. Wythe's first claim to fame, however, is as a teacher of law. He was the first professor of law in the New World and second in the English speaking world, Blackstone being first. When he died Jefferson said of him that he was "the honor of his own and the model of all future times".

My story, however does not concern his life so much as his leaving of it. When a very old man he had drawn a will leaving the bulk of his property to a great nephew. Late one night Wythe and the nephew quarreled at the old man's home and the latter threatened to go down to his office next morning and revoke the will which made the nephew his heir. This quarrel was overheard by an old negro mammy in the service of the chancellor. The next morning the nephew called early before the old gentleman was out of bed and

was seen by the negro mammy to step into the dining room where the dishes were already prepared for the chancellor's breakfast. The chancellor came down, ate his breakfast, was taken violently ill and died. By the rude chemistry of that day it was believed he died from arsenic poising. What the old mammy had seen was, of course, reported and public feeling ran to fever heat against the nephew.

There was however, a statute in Virginia at that time and similar statutes prevailed in other states that the testimony of a negro slave could not be received in evidence in a criminal case against a white man. It was evident therefore that if the rule of the statute were enforced there would be no evidence upon which the nephew could be convicted. William Wirt, then a comparatively young man, later to become the compeer of Webster, was assigned to the nephew's defence. Wirt was greatly troubled as to the conflicting duties between himself as a citizen of the Old Dominion and as attorney for the defense. He went to John Marshall for advice. Marshall told him there was only one thing for him to do, that this was a government of law and not of men; that Justice must pursue its established course and that Wirt had no alternative except to invoke the protection of the statute for the defense of the nephew. In saying this Marshall knew that the old chancellor whom he loved almost as a father would go unavenged to his grave. Wirt took Marshall's advice, objected to the competency of the negro mammy when she was placed upon the stand by the state, her evidence was excluded and the nephew acquitted, although his guilt was palpable. The sequel is that the case attracted so much attention that at the next session of the legislature the rule of evidence under which the guilty man escaped was repealed. If the court had not enforced it in this celebrated case which attracted the attention of the whole commonwealth, it is likely that the statute would have remained on the books for many years and that many other guilty defendants would have gone free.

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