

# American Legal History – Russell

Joseph G. Baldwin, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI A Series of Sketches* (1853)

## THE BAR OF THE SOUTH-WEST

There is no greater error than that which assigns inferiority to the bar of the South-West, in comparison with that of any other section of the same extent in the United States. Indeed, it is our honest conviction that the profession in the States of Tennessee, Alabama, Mississippi and Louisiana, are not equalled, as a whole, by the same number of lawyers in any other quarter of the Union,-- certainly in no other quarter where commerce is no more various and largely pursued.

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It is a remarkable fact, that the great men of every State in the Union, were those men who figured about the time of the organization and the settling down of their several judicial systems into definite shape and character. Not taking into the account the Revolutionary era--unquestionably the most brilliant intellectual period of our history--let us look to that period which succeeded the turmoil, embarrassment and confusion of the Revolution, and of the times of civil agitation and contention next following, and out of which arose our present constitution. The first thing our fathers did was to get a country; then to fix on it the character of government it was to have; then to make laws to carry it on and achieve its objects. The men, as a class, who did all this, were lawyers: their labors in founding and starting into motion our constitutions and laws were great and praiseworthy: but after setting the government agoing, there was much more to do; and this was to give the right direction and impress to its jurisprudence. The Statutes of a free country are usually but a small part of the body of its law--and the common law of England, itself but a judicial enlargement and adaptation of certain vague and rude principles of jurisprudence to new wants, new necessities and exigencies, was a light rather than a guide, to the judges of our new systems, called to administer justice under new and widely different conditions and circumstances. The greatest talent was necessary for these new duties. It

required the nicest discrimination and the soundest judgment to determine what parts of the British system were opposed to the genius of the new constitution, and what parts were inapplicable by reason of new relations or differing circumstances. The great judicial era of the United States--equally great in bar and bench--was the first quarter of this century. And it is a singular coincidence that this was the case in nearly every, if not in every, State. Those were the days of Marshall and Story and Parsons, of Kent and Thompson and Roane, of Smith and Wythe and Jay, and many other fixed planets of the judicial system, while the whole horizon, in every part of the extended cycle, was lit up by stars worthy to revolve around and add light to such luminaries. Mr. Webster declared that the ablest competition he had met with, in his long professional career, was that he encountered at the rude provincial bar of back-woods New Hampshire in his earlier practice.

And this same remarkable preëminence has characterized the bar of every new State when, or shortly after emerging from, its territorial condition and first crude organization; the States of Tennessee, Kentucky, Alabama, Mississippi and Louisiana forcibly illustrate this truth, and we have no question but that Texas and California are affording new expositions of its correctness.

A fact so uniform in its existence, must have some solid principle for its cause. This principle we shall seek to ascertain. It is the same influence, in a modified form, which partly discovers and partly creates great men in times of revolution. Men are fit for more and higher uses than they are commonly put to. The idea that genius is self-conscious of its powers, and that men naturally fall into the position for which they are fitted, we regard as by no means an universal truth, if any truth at all. Who believes that Washington ever dreamed of his capacity for the great mission he so nobly accomplished, before with fear and trembling, he started out on its fulfilment? Probably the very ordeal through which he passed to greatness purified and qualified him for the self-denial and self-conquest, the patience and the fortitude, which made its crowning glory. To be great, there must be a great work to be done.

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In a new country the political edifice, like all the rest, must be built from the ground up. Where nothing is at hand, everything must be made. There is work for all and a necessity for all to work. There is almost perfect equality. All have an even start and an equal chance. There are few or no factitious advantages.

The rewards of labor and skill are not only certain to come, but they are certain to come at once. There is no long and tedious novitiate. Talent and energy are not put in quarantine, and there is no privileged inspector to place his *imprimatur* of acceptance or rejection upon them. An emigrant community is necessarily a practical community; wants come before luxuries--things take precedence of words; the necessities that support life precede the arts and elegancies that embellish it .

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And where can a man get this self-reliance so well as in a new country, where he is thrown upon his own resources; where his only friends are his talents; where he sees energy leap at once into prominence; where those only are above him whose talents are above his; where there is no *prestige* of rank, or ancestry, or wealth, or past reputation--and no family influence, or dependants, or patrons; where the stranger of yesterday is the man of mark to-day; where a single speech may win position, to be lost by a failure the day following; and where amidst a host of competitors in an open field of rivalry, every man of the same profession enters the course with a race-horse emulation, to win the prize which is glittering within sight of the rivals. There is no stopping in such a crowd: he who does not go ahead is run over and trodden down. How much of success waits on opportunity! True, the highest energy may make opportunity; but how much of real talent is associated only with that energy which appropriates, but which is not able to create, occasions for its display. Does any one doubt that if Daniel Webster had accepted the \$1,500 *clerkship* in New Hampshire, he would not have been *Secretary* of State? Or if Henry Clay had been so unfortunate as to realize his early aspirations of earning in some backwoods county his \$333 33 per annum, is it so clear that Senates would have hung upon his lips, or Supreme Courts been enlightened by his wisdom?

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Unquestionably there is something in the atmosphere of a new people which refreshes, vivifies and vitalizes thought, and gives freedom, range and energy to action: It is the natural effect of the law of liberty. An old society weaves a network of restraints and habits around a man; the chains of habitude and mode and fashion fetter him: he is cramped by influence, prejudice, custom, opinion; he lives under a feeling of *surveillance* and under a sense of *espionage*. He takes the law from those above him. Wealth, family, influence,

class, caste, fashion, coterie and adventitious circumstances of all sorts, in a greater or less degree, trammel him; he acts not so much from his own will and in his own way, as from the force of these arbitrary influences; his thoughts and actions do not leap out directly from their only legitimate head-spring, but flow feebly in serpentine and impeded currents, through and around all these impediments. The character necessarily becomes, in some sort, artificial and conventional; less bold, simple, direct, earnest and natural, and, therefore, less effective.

What a man does well he must do with freedom. He can no more speak in trammels than he can walk in chains; and he must learn to think freely before he can speak freely. He must have his audience in his mind before he has it in his eye. He must hold his eyes level upon the court or jury--not raised in reverence nor cast down in fear. \* \* \* To illustrate what we mean--let us take the case of a young lawyer just come to the bar of an old State. Let us suppose that he has a case to argue. He is a young man of talent, of course--*all* are. Who make his audience? The old judge, who, however mild a mannered man he may be, the youth has looked on, from his childhood, as the most awful of all the sons of men. Who else? The old seniors whom he has been accustomed to regard as the ablest and wisest lawyers in the world, and the most terrible satirists that ever snapped sinews and dislocated joints and laid bare nerves on the rack of their merciless wit. The jury of sober-sided old codgers, who have known him from a little boy, and have never looked on him except as a boy, most imprudently diverted by parental vanity from the bellows or the plough-handles, to be fixed as a cannister to the dog's tail that fag-ends the bar:--that jury look upon him,--as he rises stammering and floundering about, like a badly-trained pointer, running in several directions, seeking to strike the cold trail of an idea that had run through his brain in the enthusiasm of ambitious conception the night before:--these, his judges, look at him or from him with mingled pity and wonder; his fellow-students draw back from fear of being brought into misprision and complicity of getting him into this insane presumption; and, after a few awkward attempts to propitiate the senior, who is to follow him, he catches a view of the countenances of the old fogies in whose quiet sneers he reads his death-warrant; and, at length, he takes his seat, as the crowd rush up to the veteran who *is to do* him--like a Spanish rabble to an *auto da fe*. What are his feelings? What or who can describe his mortification? What a vastation of pride and self-esteem that was? The speech he made was not the speech he had conceived. The speech he had in him he

did not *deliver*; he "aborted" it, and, instead of the anticipated pride and joy of maternity, he feels only the guilt and the shame of infanticide.

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But suppose the debutant does better than this; suppose he lets himself out fully and fearlessly, and has something in him *to* let out; and suppose he escapes the other danger of being ruined by presumption, real or supposed; he is duly complimented:--"he is a young man of promise--there is some 'come out' to that young man; some day he will be something--if--if" two or three peradventures don't happen to him. If he is proud,--as to be able to have accomplished all this he must be,--such compliments grate more harshly than censure. He goes back to the office; but where are the clients? They are a slow-moving race, and confidence in a young lawyer "is a plant of slow growth."

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In the new country, there are no seniors: the bar is all Young America. If the old fogies come in, they must stand in the class with the rest, if, indeed, they do not "go foot." There were many evils and disadvantages arising from this want of standards and authority in and over the bar--many and great--but they were not of long continuance, and were more than counterbalanced by opposite benefits.

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In trying to arrive at the character of South-Western bar, its opportunities and advantages for improvement are to be considered. It is not too much to say that, in the United States at least, no bar ever had such, or so many: it might be doubted if they were *ever* enjoyed to the same extent before. Consider that the South-West was the focus of an emigration greater than any portion of the country ever attracted, at least, until the golden magnet drew its thousands to the Pacific coast. But the character of emigrants was not the same. Most of the gold-seekers were mere gold-diggers--not bringing property, but coming to take it away. Most of those coming to the South-West brought property--many of them a great deal. Nearly every man was a speculator; at any rate, a trader. The treaties with the Indians had brought large portions of the States of Alabama, Mississippi and Louisiana into market; and these portions, comprising some of the most fertile lands in the world, were settled up in a hurry. The Indians claimed lands under these treaties--the laws granting

preemption rights to settlers on the public lands, were to be construed, and the litigation growing out of them settled, the public lands afforded a field for unlimited speculation, and combinations of purchasers, partnerships, land companies, agencies, and the like, gave occasion to much difficult litigation in after times. Negroes were brought into the country in large numbers and sold mostly upon credit, and bills of exchange taken for the price; the negroes in many instances were unsound--some as to which there was no title; some falsely pretended to be unsound, and various questions as to the liability of parties on the warranties and the bills, furnished an important addition to the litigation: many land titles were defective; property was brought from other States clogged with trusts, limitations, and uses, to be construed according to the laws of the State from which it was brought: claims and contracts made elsewhere to be enforced here: universal indebtedness, which the hardness of the times succeeding made it impossible for many men to pay, and desirable for all to escape paying: hard and ruinous bargains, securityships, judicial sales; a general looseness, ignorance, and carelessness in the public officers in doing business; new statutes to be construed; official liabilities, especially those of sheriffs, to be enforced; banks, the laws governing their contracts, proceedings against them for forfeiture of charter; trials of right of property; and elegant assortment of frauds constructive and actual; and the whole system of chancery law, admiralty proceedings; in short, all the flood-gates of litigation were opened and the pent-up tide let loose upon the country. And such a criminal docket! What country could boast more largely of its crimes? What more splendid rôle of felonies! What more terrific murders! What more gorgeous bank robberies! What more magnificent operations in the land offices! Such McGregor-like levies of black mail, individual and corporate! Such superb forays on the treasuries, State and National! Such expert transfers of balances to undiscovered bournes! Such august defalcations! Such flourishes of rhetoric on ledgers auspicious of gold which had departed for ever from the vault! And in INDIAN affairs!--the very mention is suggestive of the poetry of theft--the romance of a wild and weird larceny! What sublime conceptions of super-Spartan roguery! Swindling Indians by the nation! (*Spirit of Falstaff, rap!*) Stealing their land by the township! (*Dick Turpin and Jonathan Wild! tip the table!*) Conducting the nation to the Mississippi river, stripping them to the flap, and bidding them God speed as they went howling into the Western wilderness to the friendly agency of some sheltering Suggs duly empowered to receive their coming annuities and back rations! What's Hounslow heath to this? Who Carvajal? Who Count Boulbon?

And all of these merely forerunners, ushering in the Millenium of an accredited, official Repudiation; and It but vaguely suggestive of what men could do when opportunity and capacity met--as shortly afterwards they did--under the Upas-shade of a perjury-breathing bankrupt law!--But we forbear. The contemplation of such hyperboles of mendacity stretches the imagination to a dangerous tension. There was no end to the amount and variety of lawsuits, and interests involved in every complication and of enormous value were to be adjudicated. The lawyers were compelled to work, and were forced to learn the rules that were involved in all this litigation.

Many members of the bar, of standing and character, from the other States, flocked in to put their sickles into this abundant harvest. Virginia, Kentucky, North Carolina and Tennessee contributed more of these than any other four States; but every State had its representatives.

Consider, too, that the country was not so new as the practice. Every State has its peculiar tone or physiognomy, so to speak, of jurisprudence imparted to it, more or less, by the character and temper of its bar. That had yet to be given. Many questions decided in older States, and differently decided in different States, were to be settled here; and a new state of things, peculiar in their nature, called for new rules or a modification of old ones. The members of the bar from different States had brought their various notions, impressions and knowledge of their own judicature along with them; and thus all the points, dicta, rulings, off-shoots, quirks and quiddities of all the law, and lawing, and law-mooting of all the various judicatories and their satellites, were imported in the new country and tried on the new jurisprudence.

After the crash came in 1837--(there were some *premonitory fits* before, but *then the great convulsion* came on)--all the assets of the country were marshalled, and the suing material of all sorts, as fast as it could be got out, put into the hands of the workmen. Some idea of the business may be got from a fact or two: in the county of Sumpter, Alabama, in one year, some four or five thousand suits, in the common-law courts alone, were brought; but in some other counties the number was larger; while in the lower or river counties of Mississippi, the number was at least double. The United States Courts were equally well patronized in proportion--indeed, rather more so. The white *suable* population of Sumpter was then some 2,400 men. It was a merry time for us craftsmen; and we brightened up mightily, and shook our quills joyously, like goslings in the midst of a shower. We look back to that good

time, "now past and gone," with the pious gratitude and serene satisfaction with which the wreckers near the Florida Keys contemplate the last fine storm.

It was a pleasant sight to professional eyes to see a whole people let go all holds and meaner business, and move off to court, like the Californians and Australians to the mines: the "pockets" were picked in both cases. As law and lawing soon got to be the staple productions of the country, the people, as a whole the most intelligent--in the wealthy counties--of the rural population of the United States, and, as a part, the *keenest* in all creation, got very well "up to trap" in law matters; indeed, they soon knew more about the delicate mysteries of the law, than it behooves an honest man to know.

The necessity for labor and the habit of taking difficulties by the horns is a wonderful help to a man; no one knows what he can accomplish until he tries his best; or how firmly he can stand on his own legs when he has no one to lean on.

The range of practice was large. The lawyer had to practise in all sorts of courts, State and Federal, inferior and Supreme. He had the bringing up of a lawsuit, from its birth in the writ to its grave in the sheriff's docket. Even when not concerned in his own business, his observation was employed in seeing the business of others going on; and the general excitement on the subject of law and litigation, taking the place in the partial suspension of other business, of other excitements, supplied the usual topics of general, and, more especially, of professional conversation. If he followed the circuit, he was always in law: the temple of Themis, like that of Janus in war, was always open.

The bar of every country is, in some sort, a representative of the character of the people of which it is so important an "institution." We have partly shown what this character was: after the great Law revival had set in, the public mind had got to be as acute, excited, inquisitive on the subject of law, as that of Tennessee or Kentucky on politics: every man knew a little and many a great deal on the subject. The people soon began to find out the capacity and calibre of the lawyers. Besides, the multitude and variety of lawsuits produced their necessary effect. The talents of the lawyers soon adapted themselves to the nature and exigencies of the service required of them, and to the tone and temper of the juries and public. Law had got to be an every-day, practical, common-place, business-like affair, and it had to be conducted in the same



spirit on analogous principles. Readiness, precision, plainness, pertinency, knowledge of law, and a short-hand method of getting at and getting through with a case, were the characteristics and desiderata of the profession. There was no time for wasting words, or for maneuvering and skirmishing about a suit; there was no patience to be expended on exordiums and perorations: few jurors were to be humbugged by demagogical appeals; and the audience were more concerned to know what was to become of the negroes in suit, than to see the flights of an ambitious rhetoric, or to have their ears fed with vain repetitions, mock sentimentality, or tumid platitudes. To start *in medias res*--to drive at the centre--to make the home-thrust--to grasp the hinging point--to give out and prove the law, and to reason strongly on the facts--to wrestle with the subject Indian-hug fashion--to speak in plain English and fervid, it mattered not how rough, sincerity, were the qualities required: and these qualities were possessed in an eminent degree.

Most questions litigated are questions of law: in nine cases out of ten tried, the jury, if intelligent and impartial, have no difficulty in deciding after the law has been plainly given them by the court: there is nothing for a jury to do but to settle the facts, and these are not often seriously controverted, in proportion to the number of cases tried in a new country; and the habit of examining carefully, and arguing fully, legal propositions, is the habit which makes the lawyer. Nothing so debilitates and corrupts a healthy taste and healthy thought, as the habit of addressing ignorant juries; it corrupts style and destroys candor; it makes a speech, which ought to be an enlightened exposition of the legal merits of a cause, a mere mass of "skimble skamble stuff," a compound of humbug, rant, cant and hypocrisy, of low, demagoguism and flimsy perversions--of interminable wordiness and infinite repetition, exaggeration, bathos and vituperation--frequently of low wit and buffoonery--which "causes the judicious to grieve," "though it splits the ears of the goundlings." I do not say that the new bar was free from these traits and vices: by no manner of means: but I do say that they were, as a class, much freer than the bar of the older States out of the commercial cities. The reason is plain: the new dogs hadn't learned the old tricks; and if they had tricks as bad, it was a great comfort that they did not have the same. If we had not improvement, we had, at least variety; but, I think, we had improvement.

There was another thing: the bar and the community--as all emigrant communities--were mostly young, and the young men cannot afford to play the pranks which the old fogies safely play behind the domino of an

established reputation. What is ridiculous, in itself or in a young man, may be admired, or not noticed, in an older leader with a prescriptive title to cant and humbug; it is *lese majesty* to take him off, but the juniors with us had no such immunity. If he tried such tricks he heard of it again; it was rehearsed in his presence for his benefit--if he made himself *very* ridiculous, he was carried around the circuit, like a hung jury in old times, for the especial divertisement of the brethren. \* \* \* more loyal to the professional obligations, or more honorable in inter-professional intercourse and relations. True, there were exceptions, as, at all times and every where, there are and will be. Bullying insolence, swaggering pretension, underhanded arts, low detraction, unworthy huckstering for fees, circumvention, artful dodges, ignoring engagements, facile obliviousness of arrangements, and a smart sprinkling, especially in the early times of pettifogging, quibbling and quirking, but these vices are rather of persons than of caste, and not often found; and, when they make themselves apparent, are scouted with scorn by the better members of the bar.

We should be grossly misunderstood if we were construed to imply that the bar of the South-West, possessing the signal opportunities and advantages to which we have adverted, so improved them that all of its members became good lawyers and honorable gentlemen. Mendacity itself could scarcely be supposed to assert what no credulity could believe. All the guano of Lobos could not make Zahara a garden. In too many cases there was no sub-soil of mind or morals on which these advantages could rest. As Chief Justice Collier, in Dargan and Waring, 17 Ala. Reports, in language, marrying the manly strength and beauty of Blackstone to the classic elegance and flexible grace of Stowell, expresses it, "the claim of such," so predicated, "would be *pro tanto* absolutely void, and, having nothing to rest on, a court of equity" (or law) "could not impart to it vitality. Form and order *has* been given to chaos, but an appeal to equity" (or law) "to breathe life into a nonentity, which is both intangible and imperceptible, supposes a higher power--one which no human tribunal can rightfully exercise. *Æquitas sequitur legem.*" This view is conclusive.

We should have been pleased to say something of the bench, especially of that of the Supreme Court of Alabama and Mississippi, but neither our space nor the patience of the reader will permit.

A writer usually catches something from, as well as communicates something to, his subject. Hence if, in the statements of this paper, we shall encounter the incredulity of some old fogy of an older bar, and he should set us down as little better than a romancer in prose, we beg him to consider that we have had two or three regiments of lawyers for our theme--and be charitable.

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