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CHIEF JUSTICE RUTLEDGE.

AN ADDRESS BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA.

BY HENRY FLANDERS, ESQ.

GENTLEMEN:—For more than two centuries after the battle of the Boyne, the Irish, in every generation, in greater or less numbers have crossed the seas, and sought new homes in America. And this is true whether they have been of Celtic, or Saxon descent. The increase and success of Irishmen in this country has been remarkable.

Some years ago, I happened to be at Pittsfield, Massachusetts, on a summer's vacation, and went one night to see an Irish play which proved to be very jovial and amusing. The audience was a crowded one, and particularly numerous with blackeyed, blackhaired, and rosy cheeked Irish girls, whose charms would have aroused the susceptibilities, and disturbed the peace of any company of law students, anywhere, and for the time being, at least, have banished Coke and Blackstone entirely out of their minds.

The principal part in this comedy was admirably played by a stalwart actor, who in one of the scenes strode across

NOTE: This address upon the life of Chief Justice Rutledge was delivered by Henry Flanders, Esq., before the students of the Law Department of the University of Pennsylvania in December last, and through his courtesy, and with his permission, we are enabled to publish it.—Ed.

the stage with shillalah in hand, exclaiming, "If there is any man prisint who denies that Washington is the Capital of 'Ould Ireland' let him show himself." I am bound to say, that no man "prisint" accepted the challenge.

But long before Washington became the Capital of "Ould Ireland," Dr. John Rutledge left the northern part of the green island, and established himself in Charleston, South Carolina, as a practicing physician. His wife whom he married there, was a woman whom nature and education had liberally endowed, and who became the mother of John Rutledge, the second Chief Justice of the United States, and the subject of my lecture to-day He was their eldest child and was born at Charleston, in 1739. His father conducted his early education, but after his death, which occurred when his son was eleven years of age, he pursued his studies, classical and otherwise, for several years, under the charge of Rev. Mr. Andrews, an English clergyman and rector of Christ Church Parish. Before he had quite reached the age of seventeen, he entered the office of James Parsons of Charleston, a Colonial barrister of repute, and remained with him for two years, and then proceeded to London to complete his studies at the Temple. He remained there three years, was then called to the bar, and returned home.

Before he landed he was retained in his first case by a gentleman who was the defendant in a suit for breach of promise and who had gone down the harbor in a pilot boat, to meet him. There are many instances of lawyers who obtained great distinction at the bar, but who remained unknown and unemployed for years, before getting an opportunity to display their abilities in Court. Lord Mansfield felt the stings of poverty, as well as of disappointment, while awaiting clients. Two years elapsed before he got a fee. When fairly launched, however, he was soon receiving an income of £3000 per annum. Eldon got only half a guinea during his first year, and he was thirty, before his success was assured. He had then argued the case of Ackroyd v. Smithson.

Rutledge, when he landed at Charleston, was only twenty-two years old; but he was already retained in a cause, and though it was his maiden appearance in a court of justice, he showed such precocious ability and readiness in conducting it, that he won not only the

verdict but unfading laurels as an advocate. Ramsey, the historian of South Carolina in speaking of Rutledge's first case says, his eloquence astonished all who heard him. His fee was 100 guineas. Business flowed in upon him. He was employed in the most difficult causes. His powers as an advocate Ramsey thus describes:

"His ideas were clear and strong—his utterance rapid but distinct—his voice, action, and energetic manner of speaking, forcibly impressed his sentiments on the minds and hearts of all who heard him. In reply he was quick—instantly comprehended the force of an objection—and saw at once the best mode of weakening and repelling it. He successfully used both argument and wit for invalidating the observations of his adversary: by the former he destroyed or weakened their force; by the latter he placed them in so ludicrous a point of light that it often convinced, and scarcely ever failed of conciliating and pleasing his hearers. Many were the triumphs of his eloquence at the bar and in the Legislature; and in the former case probably more than strict impartial justice would sanction; for judges and jurors, counsel and audience, hung on his accents."

"I asked General Pinckney," says Mr. Fraser, in his Reminiscences of Charleston, "about Mr. John Rutledge's style of speaking. He told me that it was strong and argumentative, and remarkable for close reasoning; and said that it resembled Mr. Dunning's (the celebrated Lord Ashburton) more than that of any speaker he had ever heard. Now in General Pinckney's day, Mr. Dunning was the most celebrated advocate in England."

Blackstone's Commentaries first appeared in 1765. Many of the old black-letter lawyers were very angry at this simplification of the law. It took away a certain mystery that surrounded it, lifted the veil of the temple, so to speak, and made the profession more easily accessible to the multitude. Be this as it may, I suppose there is no question that in mastering the black letter law, Coke on Littleton, etc., the mind is invigorated by the study, as the muscles of the mountain climber are hardened into strength and endurance by the strenuousness of his efforts.

Twiss, in his life of Lord Eldon, quotes a letter of Eldon's, to a young friend, in which he advises him to read Coke on Littleton again and again.

"If it be toil and labor to you," he says, "and it will be so, think as I do when I am climbing up to Swyer or to Westhill (high grounds at Encombe, commanding extensive views) that the world will be before you when the toil is over; for so the law world will be, if you make yourself complete master of that book. At present, lawyers are made good, cheap, by learning law from Blackstone and less elegant compilers. Depend upon it, men so bred will never be lawyers, though they may be barristers whatever they call themselves . . . . If you promise me to read this (Coke on Littleton) and tell me when you have begun it, I shall venture to hope that, at my recommendation, you will attack about half a dozen other very crabbed books which our Westminster Hall lawyers never look at. Westminster Hall has its loungers as well as Bond-street".

Mr. Webster, on the other hand, joins issue with Lord Eldon. "A boy of twenty," he says "with no previous knowledge of such subjects, cannot understand Coke. It is folly to set him upon such an author. There are propositions in Coke so abstract, and distinctions so nice, and doctrines embracing so many distinctions and qualifications, that it requires an effort of not only a mature mind, but a mind both strong and mature, to understand him. Why disgust and discourage a young man by telling him he must break into his profession through such a wall as this?" (*a*)

But whatever the merits of the discussion as to the superiority of the old or new method of studying the law; whether with Coke or Blackstone, Rutledge was compelled to adopt the method of Coke. He was called to the bar before Blackstone's Commentaries were published. More than this, he had won his spurs as lawyer and advocate, had married a charming wife, and was acting *pro tempore* as attorney-general of his native province, before he possessed a copy of Blackstone, and before too, he had passed his twenty-fifth year! His distinction already as lawyer and as citizen is attested by his election to the Commons House of Assembly, where he aroused both Assembly and people by the splendor of his youthful eloquence against the royal Governor's pretension to decide who was and who was not legally entitled to sit in that body, and is attested, moreover, by his election in the following year by the Assembly itself as a

a Works of Daniel Webster, vol. I, xxviii.

delegate (with Thomas Lynch and Christopher Gadsden) to the Stamp Act Congress which met and organized in New York on the 7th day of October, 1765; Rutledge, being the youngest member, and having just reached the age of twenty-six.

In the Congress he played a conspicuous part, and was chairman of its most important committee; namely, to prepare a petition to the House of Lords; Edward Tilghman of Maryland, and Philip Livingston of New Jersey, being the other members of the committee. When Rutledge returned to South Carolina, on the adjournment of the Congress, he found a state of wild excitement still existing. The Bar evinced a disposition to comply with the Act. The people generally were violently opposed to this attitude of the lawyers. They sought the obnoxious stamps, and whenever found, seized and sent them back to England in the sloop of war which brought them over, and moreover, they compelled the Chief Justice to drink "damnation to the Stamp Act." After the Stamp Act was repealed Rutledge resumed his practice, and his attendance on the provincial legislature. It was the golden period of his professional career. The large means he now acquired were for the most part swallowed up in the losses and devastations of the Revolutionary War.

That momentous conflict was precipitated by the continued pretensions of England that she had the constitutional right to impose a tax on the colonies as a source of revenue and not merely as a regulation of trade. This led to the Congress of 1774.

Rutledge was chosen one of the delegates to that Congress. In the convention that elected him he made an eloquent speech in favor of giving the delegates unlimited authority, and when he was asked if they abused their unlimited authority what was to be done: "Hang them," he shouted.

He went to the Congress of 1774, desirous to preserve the British connection, but events were too strong for him, and he yielded to the general sentiment of his country. And when finally South Carolina, in advance of the Declaration of Independence, established a state government, he was elected its first President. Throughout the war he played a

great and decisive part, and when it became an internicine struggle in South Carolina, the Legislature delegated to him and his council the extraordinary power "to do everything that appeared to him and them necessary for the public good." This was practically investing him with the dictatorship. How he exercised this unlimited power, I will quote a sentence from the Memoirs of Light Horse Henry Lee: "An accomplished gentleman" said Lee, "a profound statesman, a captivating orator, decisive in his measures and inflexibly firm, he infused his own lofty spirit into the general mass." General Greene, also, said of him, "He is one of the first characters I ever met with."

Time would not allow me to recount the events of the war in South Carolina. It was a bloody scene in the drama of the Revolution and the final act was the surrender of Cornwallis at Yorktown. The war was ended by the treaty of peace in 1783, and the following year Rutledge was elected by the Legislature of his State, senior judge of the re-organized Court of Chancery. Much as Rutledge's contemporaries rated his forensic, legislative and executive abilities, they still regarded his administration of the law as among his first titles to public respect and confidence. His penetrating mind readily discerned the bearings and relations of the causes brought before him, and he seldom failed to place his decisions on grounds obvious and satisfactory to all parties.

The government of the Union under the Articles of Confederation proved feeble and inefficient, and inspired neither respect abroad, nor confidence at home. The Federal Convention, which assembled at Philadelphia, in 1787, afforded the only hope that a remedy might be devised to reinforce the falling fortunes of the State.

Rutledge was a delegate from South Carolina. I can only briefly state the part, the important part, he took in the deliberations of that distinguished assembly. He was opposed to associating the Judges of the Supreme Court with the executive in the revisory veto power. He thought the Judges of all men, the most unfit to be concerned in the exercise of that power. The Judges ought never to give their opinion on a law, until it comes before them, when sitting as a court.

He proposed that the executive authority should be exercised by one person, should be appointed by the National Legislature, and declared ineligible to a second term. He was opposed to a popular election of the chief magistrate. He thought, too, it should be a condition of his eligibility, as well as of the Judges of the Supreme Court and members of Congress, that they possess a clear, unencumbered estate, the amount to be fixed by the Convention.

He was opposed to restricting the right of suffrage to free-holders, in elections for choosing representatives to Congress. He was opposed to creating federal tribunals, except a single Supreme Court. The State tribunals, he said, were most proper to decide in all cases in the first instance. The right of appeal, would be adequate to secure National rights and uniformity of judgment. He was vehemently opposed to giving the Federal Government, a negative, in all cases whatsoever on the legislative acts of the several states. "If nothing else, this alone would damn, and ought to damn, the Constitution. Will any State ever agree to be bound hand and foot in this manner? It is worse than making mere corporations of them, whose by-laws would not be subject to this shackle."

He was opposed to any prohibition of the slave trade. He declared that religion and humanity had nothing to do with the question. Interest alone is the governing principle with nations.

Oliver Ellsworth, a future Chief Justice of the United States, agreed with him. "Let every State" he said, "import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves. What enriches a part enriches the whole; and the States are the best judges of their particular interest."

Rutledge was in favor of declaring the *habeas corpus* inviolate. He did not conceive that its suspension could ever be necessary, at the same time, through all the States.

Rutledge did not approve all parts of the Constitution, neither did Dr. Franklin, but both gave to the whole their assent. Rutledge signed it, and in the State Legislature, where the question was, would they call a convention to act upon it, ardently and eloquently supported it. The Convention was called and ratified it by a majority of sixty-seven.

On the organization of the government, under the Constitution, the judiciary act provided for the appointment of a Chief Justice and five Associate Justices, who were to constitute the Supreme Court of the United States. On the 26th of September, 1789, Washington nominated John Jay as Chief Justice, and John Rutledge, James Wilson, William Cushing, Robert Harrison, and John Blair, as Associate Justices. They took precedence in the order of their appointment.

Although Rutledge accepted this appointment, he never sat on the bench of the Supreme Court as an Associate Judge. He was elected Chief Justice of the Court of Common Pleas by the Legislature of South Carolina, on the reorganization of the Courts of Law and Equity, and surrendered his seat in the Federal Court.

He presided in the Common Pleas, for the first time, on the 9th of March, 1791.

(Mr. Flanders here cited several cases from Bay's Reports to illustrate Chief Justice Rutledge's manner of dealing with questions of law.—Editor.)

These cases, I suppose, may be taken as indicating the general character of the litigation in South Carolina more than a century ago. Real estate law and commercial law were administered there as in London, without much difference I suspect, arising from local legislation.

Chief Justice Rutledge continued in the Court of Common Pleas a little more than four years. Washington anticipating that Jay would resign the office of Chief Justice of the Supreme Court of the United States, inquired of Rutledge, whether in that event, he would accept the vacant post. Rutledge's affirmative answer and Jay's resignation reached Washington the same day. The President, at once, directed the Secretary of State to make Rutledge an official offer of the vacant post, and also to inform him that his commission as Chief Justice would bear date July 1, 1795, when Mr. Jay's would cease, and would be presented to him on his arrival at Philadelphia, for the August term of the Court.

Meanwhile, Jay's treaty reached Charleston. It produced a terrible excitement. Jay and his treaty were burnt in effigy; the British flag was dragged through the streets

and finally burnt before the doors of the British consul. A public meeting was called, and a large concourse assembled in St. Michael's Church. Judge Matthews presided, and Chief Justice Rutledge addressed the well-nigh frenzied citizens.

He began by saying that it was styled a treaty of peace, unity, commerce and navigation, but in fact it was an humble acknowledgement of our dependence upon his majesty; a surrender of our rights and privileges for so much of his gracious favor as he should be pleased to grant. That the first article securing friendship and peace to people of every degree, was extending favor to all those who were under banishment, or amercement, which was improper.

He adverted to the frequent inattention to the proper use of words throughout this production. Diplomatic characters were generally particular in this respect; and it was inconceivable how such perversion of terms should take place. His majesty *will* withdraw his troops within the boundaries assigned by the treaty of peace. *Will,* he contended, implied it as a favor. It should have been *shall* withdraw his troops. It is not impossible to conceive it a matter of will, even in his most gracious majesty. But the whole of this clause, he contended, was improperly introduced.

Mr. Jay should have demanded an unconditional relinquishment of those posts as a right; till which was granted, and until Lord Granville had given orders to Lord Dorchester to that effect, open, to be sent to our President, to be by him forwarded, he should not have opened his lips upon the treaty. It was prostituting the dearest rights of freemen, and laying them prostrate at the feet of royalty. "Assigned by the treaty of peace," was an expression that ought not to have been admitted by one who knew the territory to have been fought for, to have been attained with our freedom, and who should have insisted upon the possession of it. He adverted to the tricks, easy to be discovered, in every article and clause of the treaty, that were put upon our envoy. But his admitting that it is uncertain whether the River Mississippi extends so far Northward as the Lake of the Woods, as to be intersected by a line drawn due West from the Lake of the Woods in the manner

mentioned in the treaty of peace, and, where as no doubts had arisen what river was truly intended, under the name of the river St. Croix, are the grossest absurdities; particularly when assented to by a man who absolutely signed that treaty. And had before him maps, that excluded both uncertainty and doubt. To be diplomatically chaste, it should have been, "as we are uncertain, and whereas doubts have arisen with us, etc."

The appointment of the commissioners was a measure that could operate to the advantage of but one party—The British—in case it should be properly conducted; but he asserted that the chance was greatly against fairness, and he doubted not that it would be little better than a direct relinquishment of all it was intended they should decide upon. After observing that he hoped a full discussion would take place this day, he insisted that there was but one article or clause in the whole that had the appearance of reciprocity—an idea requisite in the inception of the treaty—or conferring an advantage on the United States; and that was the one allowing us the West India trade—a deception; a trick that added insult to the injury.

In pointing out the improprieties of negotiations of any kind with England, the Chief Justice was led to the state of the French successes. He lavished the highest encomiums on that brave and heroic nation. The Alexanders, the Caesars, and the Charles of Antiquity, gave place to a whole nation of heroes. Their deeds of heroism were great: but nobler ones were daily enacted in all parts of France. As a nation, she had conquered all her opposers—Holland owned her conquest, Prussia felt her energy, Germany retired from her arms, Spain was suing for peace and the perfidous, boasting, assuming nation, Great Britain, that had arrogated for ages power never possessed, that assumed the sovereignty of the sea, and monopolized the commerce of the whole world, was hoping for peace upon whatever terms France might grant it." To negotiate she could not hope. She was reduced to the last gasp; and were America to seize her by the throat, she would expire in agonies at her feet.

One thing appeared to him right—it was justice, and he hoped his country would always maintain it—he alluded to the intent of the articles that secure to British creditors

their debts in the United States. He would allow them their just demands, but we ought not to be bound to do it by treaty. To take the power of deciding upon those claims from our State Courts; to manifest a want of confidence in the Supreme Court of the United States, and submit them to a few commissioners, was ridiculous and inadmissible.

This speech, and you must observe that it is only a newspaper abstract of it, produced an immense sensation. The Federal leaders were astounded. It added fuel to the flame of excitement which swept over the country when the character of Mr. Jay's treaty became known. And the Federal leaders were still more astonished when it also became known that Washington had already appointed Rutledge the successor of Jay as Chief Justice.

He first sat on the bench of the Supreme Court as Chief Justice at the August Term, August 21st, 1795. He delivered the opinion of the court in a prize case; (Talbot v. Janson, reported in 3rd Dallas 133) and the only formal opinion, I think, he delivered in that Court.

His bearing as a Judge was graceful and courtly, tinged says Mr. Wharton in his State trials, (Page 36) "with that haughtiness which in later years had marked him, though his natural impetuosity had been subdued by the approach of age and the weight of long public service." After the adjournment of the court his mind evinced symptoms of mental disorder. And when the Senate met in December (1795) that body declined, and in view of his state of health, properly declined, to confirm his appointment.

His name and fame, however, were left untouched and untarnished, and they are a part of the glories of his country's history. He was a great forensic orator, a great judicial magistrate, a lofty, high-minded statesman, who rendered for thirty years or more, great and important public service—before the war, and during the war—in the councils of his own State; in the Continental Congress; and in the formation of the Federal government.

And so long as that government shall endure, the memory of his great qualities, his ardent patriotism and devotion to the public welfare, should be cherished and preserved.