SAMUEL FREEMAN MILLER.*
ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES.

Washington is often spoken of as the Founder, and Lincoln as the Savior of our Country. Great as their achievements are they did not accomplish their patriotic service alone. It is right to recall those who stood at their side in places almost as burdensome and responsible and whose faithful and able service in offices less conspicuous, made the founding and saving of the Country possible.

The two periods which Washington and Lincoln typify required not merely able executives, but great, and I may almost say, creative Judges, for, to use the words of Chief Justice Fuller: "Great problems crowded for solution." One was the time of the adoption and first operation of our highly novel Constitution, and the other the time of the adoption and first operation of its great and highly novel Amendments. Jurists of capacity were needed and they were not wanting in either period to the Bench or the Bar. Without doubt or question, Chief Justice Marshall stands as the great judicial figure of the earlier age, though he came to the Bench only when Washington had been a little more than a year in his tomb at Mt. Vernon.

I venture the belief that the dominant judicial figure of the later years of the rebellion and the period of the reconstruction was not Chief Justice Taney, who was Marshall's immediate successor, and so deeply identified with the Dred Scott decision, whom death removed from the bench so late as October 12, 1864. Not Chief Justice Chase, who followed him upon the bench in December of the same year. His health was soon broken, his influence and services impaired by political activity and the embroilment attending the impeachment of the President, Andrew Johnson, and he was burdened with a presence more imposing than his judicial gifts. He died of apoplexy on May 7, 1873, leaving by no means the highest mark on the judicial history of his time. His successor, Chief Justice Waite, was a plain and almost obscure man, a lawyer

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of Toledo, Ohio, a classmate of Hon. Wm. M. Evarts at Yale, had been one of our representatives at Geneva in the Alabama award, and was appointed by President Grant, January 21, 1874, after the Senate had proved unwilling to confirm the nomination of a far more distinguished lawyer, Caleb Cushing, apparently because it transpired that Mr. Cushing and Jefferson Davis having been members of President Pierce's cabinet, on the outbreak of the Civil War Mr. Cushing wrote Mr. Davis a friendly letter.

The plainness of Mr. Waite continued during his tenancy of the Chief Justiceship. His death occurred at Washington, March 23, 1888, and Chief Justice Fuller, the present learned incumbent, was commissioned July 20th in the same year. During all the terms of two and part of the terms of the first and last of these several Chief Justices, in the less conspicuous place of Associate, there sat till his death the subject of this sketch, Justice Miller, and during all that time, it is submitted, his was, more than any other, the controlling and dominant mind upon the bench, especially in the momentous questions of Constitutional construction. It seems then worth considering his origin, his training, his appointment to and his services upon the bench.

Samuel Freeman Miller was born at Richmond, Kentucky, April 5, 1816, as Judge Embry said after his death, "twenty-four miles from the home of Henry Clay, and twelve miles from the historic spot where Daniel Boone laid the first rude foundations of civilization on the soil of Kentucky." He was a poor boy, the son of a farmer of German ancestry who had emigrated from Pennsylvania to Kentucky in 1812 and married there the daughter of a family which had come to Kentucky from North Carolina. The first twelve years of his boyhood were spent on his father's farm. After that, and until he was fourteen years old, he studied at the schools of Richmond, including a high school spoken of as "excellent." He left school to work in a local drug store as a clerk. There medical books fell in his way and he read them eagerly, planning to become a physician. In 1836, he entered the Medical Department of Transylvania University (now the University of Kentucky), and graduated therefrom in 1838. He went back to Richmond to practice his new profession, but shortly removed to Barbourville, Knox County, Kentucky, a little settlement of four hundred inhabitants in the mountains, not far from Cumberland Gap and near the Tennessee and Virginia borders. There he practiced as a country doctor with no competition for over ten years, riding day and night, with his drug store in his saddle bags, over the rough mountain roads of

that sparsely settled region, to minister to the sick, where none were rich and most were very poor.

Certain influences began, however, to alienate him from this useful but obscure vocation. A debating society in Barboursville seems to have offered its principal social and intellectual diversion, and there Miller discovered and exercised logical and controversial powers which gave him the leadership. He shared the office of a local lawyer and began to look into law books. Gradually his interest and his ambition turned away from the medical profession until he felt an utter aversion to it. During these years he filled his unoccupied time by reading law (doing this secretly lest it injure his medical practice), and in 1847 was at last admitted to the bar, when over thirty years of age.

He was an enthusiastic follower of Cassius M. Clay, and more for the sake of the Whites than from sympathy for the Blacks, he was strongly opposed to slavery. He entered politics, and seems to have been a candidate for County Attorney. Then he sought to be chosen a delegate to the State Constitutional Convention, but seems to have been supplanted by another candidate from his own county. He vigorously supported General Taylor for the presidency. Taylor was elected and Kentucky gave him its twelve electoral votes; but the attempt to amend the State Constitution so as to do away with slavery failed, and Miller, who had, with characteristic vehemence, supported it, was at "outs" with his party and his community. He decided that he would no longer live in a slave State.

Mr. Miller was now nearly thirty-five years old, married, and the father of two children. In 1850, he took his slaves with him to Keokuk, Iowa, and there, with uncalculating generosity, emancipated them. In Keokuk he established a home and opened a law office. With surprising rapidity, he attained a leadership of the bar of the State and of the new Republican party with which that State has been so conspicuously identified.

As Judge Woolworth, of Omaha, his intimate friend and associate, said: "It was a favorite theory of Judge Miller that a country town is the best place for a young lawyer. He valued its opportunities for reflection and study; its close and sharp contact with various characters; the development of individuality which it favored. He thought these conditions aided the slow and, therefore, solid growth of self-dependence and force of character which make the strong lawyer. These advantages he often set off against those of the large city and gave them preference."

The force of his personality and his power of application were equally extraordinary; and within ten years he was generally considered "the ablest man of his age at the bar in his State," though but little known beyond its borders. Mr. Attorney-General Miller, in addressing the Supreme Court at the time of Justice Miller's death, said: "In 1862, President Lincoln found Mr. Miller in Iowa, as a few years before the country had found Mr. Lincoln in Illinois, devoting his life to a somewhat obscure and unremunerative, though for the place and time, successful practice of the law."

In many eulogistic addresses delivered and articles printed concerning him at his death, it is stated that he steadily declined all political office and devoted himself consistently and exclusively to his profession. This is a common euphemism concerning eminent men, and in this, as in most cases, it seems to be untrue. His political activity in Kentucky we have mentioned.

It appears that Mr. Miller pressed his own claims as candidate for Governor of Iowa against the then Governor Kirkwood who desired a renomination. Kirkwood was successful and later became Senator of the United States and Secretary of the Interior, but while Governor he aided in securing Miller's advancement to the bench and thus removed from the State a dangerous and powerful political rival.

Laurels are seldom of spontaneous growth in our public life. They have generally been vigorously cultivated for years by the sweat of the brow which they at last adorn. It was plainly so in Miller's case.

In 1862 the Supreme Court of the United States was reorganized, as to its circuits; and two vacancies in the court were created by the death of Mr. Justice Daniel and the resignation of Mr. Justice Campbell. The passage of the act of reorganization was said to have been delayed by the rival claims of aspirants from the different northwestern States for the judicial seats to be filled. Mr. Miller had secured the recommendations of the bars of his State and of Minnesota, Kansas and Wisconsin.

The *National Cyclopædia of American Biography* says, speaking of his appointment to the bench, that Mr. Miller was personally on terms of warm friendship with Mr. Lincoln, but that "it was not this alone that brought to him this high position." This seems erroneous. The Hon. John A. Kasson, formerly member of Congress from Iowa and our Minister to Austria and Germany, has printed a letter in which he says that Mr. Miller was recommended for appointment by the bars of several States in the northwest cir-

cuit, and he adds: "When, at his request, I called on President Lincoln to ascertain the cause of delay in his nomination, I found that his reputation as a lawyer had not then even extended so far as to Springfield, Illinois, for the President asked me if he were the same man who had some years before made a frontier race for Congress from the southern district of Iowa, and had trouble about the Mormon vote." Mr. Kasson corrected this impression and told the President that he deemed impartiality and equanimity essential qualities of Mr. Miller's mind, and that "nature herself had fitted him for the administration of justice."

During the pendency of the matter, Governor Kirkwood, Senator Harlan and two or three members of Congress from Iowa called on Mr. Lincoln, and Mr. Harlan as spokesman said: "We have called, Mr. President, to see you again in regard to that appointment, as we are anxious that it should be made," to which the Governor added: "It is one that would give great satisfaction to the people of Iowa, and is, we think, a very fit and proper one to be made." Thus far no office nor the name of the man to fill it had been mentioned, Mr. Harlan and those with him, supposing that the President knew what office and to what person for it they alluded. Mr. Lincoln, relieving his legs from their accustomed twist, turned around to his table, picked up his pen, and drawing a paper to him as if to make the appointment in compliance with their wishes, said to them: "What is the office and whom do you wish to be placed in it?" Mr. Harlan replied: "We wish to have Mr. Miller of Iowa chosen by you to the vacancy on the Supreme Bench." "*Well, well,*" replied the President, replacing his pen and pushing back his paper, "*that is a very important position, and I will have to give it serious consideration. I had supposed you wanted me to make some one a Brigadier-General for you.*" The callers left with no assurance as to their success.

In a letter of 1888, Justice Miller himself says: "My appointment was known to depend upon such an arrangement of the Judicial Circuits by a bill then pending in Congress, as would include Iowa in a circuit entirely west of the Mississippi River. To this end all three of the gentlemen named contributed their best efforts, but Mr. Wilson, being on the Judiciary Committee of the House to which the bill was referred, was especially efficient. As soon as the bill was passed as they desired, Mr. Grimes drew up in his own handwriting a recommendation of my name for one of the two places then vacant on the Bench of the Supreme Court, to be laid before the President. This he signed, and, assisted by Mr. Harlan, the other Iowa Senator, procured twenty-eight (28) of the thirty-

two senators then in Congress to sign it also, the latter number (32) being all that was left of that body after the secession of the Confederate Senators. Mr. Wilson circulated a similar recommendation in the House of Representatives, and it received the signatures of over one hundred and twenty (120) members, which was probably three-fourths of those in attendance.

"I do not know or remember who presented these petitions to the President, but he afterwards said, in my presence, that no such recommendations for office had ever been made to him."

The recommendations were successful, and President Lincoln almost at once (July 16, 1862, at 9:00 P. M.) sent the nomination of Mr. Miller to the Senate, by which it was promptly and unanimously confirmed. His commission dated from the day last given and he took his seat in December of that year. Mr. Miller was the first Justice of the Supreme Court of the United States ever appointed from beyond the Mississippi, as the late Col. David B. Henderson, of Iowa, was the first Speaker of the House of Representatives from the Western side of that great river.

It is, perhaps, of interest to recall that President Lincoln's appointees to the Supreme Bench were five in number and all from the West: Justices Swayne, Miller, Davis, Field and Chief Justice Chase. President Roosevelt's two appointments, on the other hand, have gone one to the West (Justice Day) and one to New England (Justice Holmes).

The appointment of Justice Miller met with high favor, as was natural, in the community where he was best known; but his name seems to have been wholly unrecognized by the eastern press. Thus *The Weekly Gate City*, a newspaper of Keokuk (Justice Miller's home), in an editorial concerning the appointment published July 23, 1862, said of him: "He is the model, the *beau ideal* of a Western Lawyer and a Western Judge, and his advent to the Bench cannot fail to create a sensation even in that fossilized circle of venerable antiquities which constitute the Bench of the Supreme Court of the United States." On the other hand, the *New York Tribune* of July 26 discusses the appointment and says, editorially: "Mr. Miller's name is printed 'Samuel' in the dispatches, but we presume it is Daniel F. Miller, the first Whig Member of Congress ever chosen from Iowa." And it says further that no appointment has yet been made to the other Justiceship vacant, but mentions "Daniel" Davis, of Illinois, as a candidate, undoubtedly meaning David Davis, who later received the appointment.

The circumstance shows how unfamiliar each name was in the East, yet, from the time of the taking his seat until the time of his

death, Justice Miller was regarded, not perhaps as the most enlightened, certainly not the most learned, but, it is believed, as the strongest man on the bench, and as one who united integrity with conviction.

Justice Miller's preparation for his great office consisted of ten years of practice as a country doctor and twelve years as a country lawyer. It seemed most inadequate, and this must have been obvious to himself. However, he always insisted that his medical studies had been of great service to him in preparing him by the pursuit of natural science to systematically take up the mastery of law. He seems to have resolved to overcome this lack, and so, with remarkable industry and power of assimilation, he now went through every reported case decided by the Supreme Court of the United States from its institution until he took his seat, reading and re-reading them until his mind had fully appropriated them.

In the case of *Calais Steamboat Company v. Van Pelt's Administrator*, 2 Black, 393, we find his first printed opinion, a brief, positive dissent, covering about a quarter of a page. Chief Justice Fuller said at Justice Miller's death: "His style was like his tread, massive but vigorous. His opinions from his first in the second of *Black's Reports*, to his last in the one hundred and thirty-sixth *United States*, some seven hundred in number (including dissents), running through seventy volumes, were marked by strength of diction, keen sense of justice and undoubting firmness of conclusion."

Judge Woolworth said: "His first opinion, in the *Wabash Case* reported in 2 Black, and his last in *Re Burrus*, the last of the judgments of the last term, reported on the last page of 136 U. S., not only bear traces of the same hand, but they are not greatly unequal in accuracy of statement, force of reasoning, and that felicity of judicial style which make his judgments models of such compositions."*

He early identified himself with the construction of the Constitution and more often than any other justice he was assigned to prepare the opinion of the Court in constitutional cases. He, himself, told Hon. John A. Kasson "that he had given during his term on the Bench more opinions construing the Constitution than all which had previously been announced by the Court during its entire existence."

*Judge Woolworth, it would seem, is in error in calling Judge Miller's opinion in the *Wabash Case* his first opinion; that and the dissenting opinion in the *Calais Steamboat Co. v. Van Pelt's Admr.*, were both delivered at the December Term, 1862, and no further date is given in the report; but the latter case is found at page 372 and the former at page 448, which seems to intimate the order of their announcement.

There were, during his service, far more experienced lawyers and more eminent legal scholars upon the Bench (as in the case of Mr. Chief Justice Taney and Mr. Justice Gray), but there was not so positive a character. He had no doubts. With honest and unfaltering, and, it may be added, justified self-confidence, he sought to solve the many profound and difficult questions presented by the circumstances of the Rebellion and the succeeding Reconstruction.

Lord Mansfield said, as became a great Judge: "I never like to entangle justice in matters of form and to turn parties round and round upon frivolous objections, where I can avoid it;"¹ and Miller's mind was like his in this respect. It was sometimes said of him, as the Attorney-General recalled at his death, that, "he was wont to sweep away the law in order that justice might prevail." He was often impatient of the distinctions made by the law when he thought them artificial, and was, for instance, never reconciled to the legal difference between real and personal property. On such points as this, his learned associate, Mr. Justice Gray, used to lament, perhaps unnecessarily, that a mind of such power and aptitude had not been duly grounded in the law.

Hon. Joseph Choate said of Justice Miller at the time of his death: "He took his place upon the Bench at a time when one-half of the country was excluded from any participation in its affairs, and he sat there during the whole period that has followed, until at last it would appear that, by his aid, almost every question of irritation and division that could possibly arise between different sections and interests of the American people had been finally set at rest."

Chief Justice Fuller admirably said of Miller: "The suspension of the *habeas corpus*; the jurisdiction of military tribunals; the closing of the ports of the insurrectionary States; the legislation to uphold the two main nerves, iron and gold, by which war moves in all her equipage; the restoration of the predominance of the civil over the military authority; the reconstruction measures; the amendments to the Constitution, involving the consolidation of the Union, with the preservation of the just and equal rights of the States—all these passed in various phases under the jurisdiction of the Court; and he dealt with them with the hand of a master."

Justice Miller made often but slight reference to preceding decisions, but stated his own conclusions clearly and with an accent almost of contempt for any other view. These opinions had none of the high lucid persuasive amenity of Marshall, but they were direct, vigorous, positive, and withal, honest.

1. *Trueman v. Fenton*, Cowper, 544.

He is thought to have held the line very steadily and firmly between State and Federal power and competency. For instance, he held that a United States Marshall who levies a writ of attachment upon the goods of the wrong man may be sued for the trespass in the State Courts and there made to respond in damages;² and in the so-called *Slaughter House Cases*, in one of his most famous opinions, he held that the State of Louisiana could grant to a corporation the exclusive privilege of maintaining stock-yards and slaughter-houses in a region including the city of New Orleans and nearly twelve hundred square miles of territory, and could close all other such yards and houses within such territory and forbid them further operation, that such a grant of monopoly violated no provision of the amended Constitution and was not taking property without compensation or denying the equal protection of the law, but was a mere police regulation over which the State had plenary authority.³

In the very last opinion written by Justice Miller in the Supreme Court, he held that a District Court of the United States has no authority in law to issue a writ of *habeas corpus* to restore an infant to the custody of the father, when unlawfully detained by its grandparents, holding that the "custody and guardianship by the parent of his child does not arise under the Constitution, laws or treaties of the United States and is not dependent on them . . . that the relations of father and child are not matters governed by the laws of the United States and that the writ of *habeas corpus* is not to be used by the judges or justices or courts of the United States except in cases where it is appropriate to their jurisdiction."⁴

On the other hand, he denied the power to the State to authorize a municipality to contract debts or levy taxes for other than a public object, and therefore held city bonds issued to aid a private manufacturing enterprise, even when sanctioned by a State statute, void. In this case he used the following language, perhaps as often quoted as any of his utterances:

Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is, in its very nature, unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defense, any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of

2. *Buck v. Colbath*, 3 Wallace, 334.

3. *Slaughter House Cases*, 16 Wallace, 36.

4. *In re Burrus*, 136 U. S. 586.

the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. The State of Maryland*, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent imposed by the United States on the circulation of all other banks than the National Banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says "Webster's Dictionary," "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state. Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."⁵

The foregoing passage has been constantly referred to by writers and speakers in favor of free trade as showing the inherent injustice and unconstitutional tendency of a protective tariff.

Miller upheld strongly the power and duty of the Federal Executive to protect the Federal Judges in the discharge of their duty, and wrote an opinion holding that a special deputy marshall might be assigned to attend a Justice where there was just reason to believe him in danger while executing his office, and that such deputy might take life if necessary in defending his charge. He held further that the act of such deputy would then be his official act as a Federal officer in discharge of duty, and that the Federal Courts could and should discharge him on *habeas corpus* from the custody of a State Court wherein he was held in a criminal prosecution for such act. This was in the famous case, *In re Neagle*, where such deputy, in protecting the venerable Justice Field from a murderous assault by David S. Terry, shot and killed the latter.⁶

Justice Miller's views which were expressed as dissenting opinions not unfrequently were ultimately adopted by the Court and became its prevailing decisions in affairs of the greatest scope. Thus, in opposition to the platitudinous Chief Justice and the majority of the Justices, Miller maintained, in *Hepburn v. Griswold*,⁷ the power of the Federal Government to make its paper notes legal-tender for the discharge of all obligations past or future, supporting

5. *Loan Association v. Topeka*, 20 Wallace, 655.

6. *In re Neagle*, 135 U. S. 1.

7. 8 Wallace, 603.

himself largely by the opinions of Marshall. The views of Miller, as is well known, prevailed in the later decisions, and the earlier case was, on this point, overruled.⁸ He is believed to have aided in shaping the statutes in question and to have frequently advised the various administrations in legal matters.

In the same way Miller dissented from the doctrine affirmed by the majority, in *State Tax on Railway Gross Receipts*,⁹ that a State could tax the gross receipts of a railway operating an interstate business. He said: "I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a state compel citizens of other states to pay to it a tax, constituting a toll, for the privilege of having their goods transported through that state by the ordinary channels of commerce." This view seems sustained by the later decision of *Philadelphia & S. Steamship Company v. Pennsylvania*,¹⁰ where the former decision is questioned and in part disapproved.

Mr. William A. Maury, in an article upon Justice Miller, contributed to *The Juridical Review of Edinburgh* (January, 1891), finds in Miller's mind a "happy union of originality and conservatism," and thinks that his opinions in the *Slaughter House Cases* and in *Murdock v. Memphis*,¹¹ especially exemplify the conservatism. The question involved in the latter case was the construction to be given to the Act of February 5, 1861, amending the Judiciary Act of 1789. It was contended that, under the language of this amendment, the Supreme Court of the United States, when reviewing the proceedings of a court of last resort in which a Federal question was claimed to be involved, should consider all the questions involved, Federal or otherwise, and render final judgment in the whole case. It was also urged that it could consider only the technical record of the State court. The majority of the court held (Miller writing the opinion) that the Supreme Court might look not only at the record but also at the opinion of the State court to determine the questions actually decided; that it was essential to the jurisdiction of the Federal Supreme Court, that a Federal question was raised and presented to the State court and decided by it against the plaintiff in error; that this appearing, the decision would be examined to ascertain whether the Federal question was correctly adjudicated; if so, judgment would be affirmed; if not, then, if there were other issues broad enough to maintain the judgment

8. *Legal Tender Cases*, 12 Wallace, 457.

9. *Railroad Co. v. Johnson*, 15 Wallace, 195; 15 Wallace, 284.

10. 122 U. S. 326.

11. 20 Wallace, 614.

and proper for determination by the State court, it must still be affirmed without reviewing the soundness of the rulings on such other questions; and that if the Federal question must control the whole case, then the Federal Supreme Court would reverse if it had been erroneously decided and either render such judgment as the State Court ought to have rendered or send the case back to that Court for further proceedings.

Justices Clifford, Swayne and Bradley, three out of the eight Justices participating, dissented. Chief Justice Waite took no part as the case was argued before his appointment. The effect of a different holding would have been to almost destroy the independence of the State Judiciary. Even as to questions in no way involving the "Constitution, laws, or treaties of the United States," wherever a Federal question was in any way raised in connection with matters fit for State cognizance, the Federal review of the whole case would have been possible.

Justice Miller, throughout the critical period of his service, stood like a rock for the powers of government in general; but while determined to find for the national government all that was necessary for its adequate maintenance, he was equally resolved that the State governments should not be destroyed or unnecessarily crippled. In other words, he thoroughly accepted and in our court of last resort loyally maintained with unswerving conviction and dominating personality our constitutional form of government; and his judicial leadership from 1862 to 1890 was of paramount importance in preserving its integrity. A war the most bloody and most costly of modern times had been fought for State Rights. They had lost in the trial by battle; and the most just and reasonable claims of independence on the part of the States shared the odium of those which led to the contest. The questions arising went of necessity to the Federal Supreme Court; and there Justice Miller, a Southerner who had left the South for principle's sake, "a mastiff-mouthed man," to use Carlyle's phrase, held the field against all comers for the doctrine that the Federal government should be maintained in vigor and efficiency, but that the State government should neither perish nor sink into insignificance. His was an inestimable service if we value our form of government.

Marshall wrote the opinion in *Marbury v. Madison*,¹² holding that executive officers in the United States could be compelled by mandamus to discharge ministerial duties which they were bound to perform and as to which they had no discretion. Justice Miller

12. 1 Cranch. 137.

wrote the opinion in the *United States v. Schurz*,¹³ applying this doctrine to the case of Hon. Carl Schurz, Secretary of the Interior, who, after a land patent had been signed by the President and recorded in the Register of Patents, made an order that it should not be delivered. The proper District Court was authorized to issue a writ to compel Mr. Schurz to deliver this patent, and it was held that he had, at this stage, no power over the title and no right to retain the patent. Mr. Schurz had acted in accordance with precedent which was thus corrected. The Chief Justice and Justice Swayne dissented. In a supplemental opinion, also written by Justice Miller, it was held that Mr. Schurz must be adjudged to pay the costs of this proceeding.

In *Johnson v. Towsley*¹⁴ and *United States v. Throckmorton*,¹⁵ Justice Miller wrote the opinions upholding the conclusiveness of the action of the land officers in issuing patents, but scrupulously preserving to those injured the right to equitable relief in private suits on the ground of fraud and deception practiced upon the unsuccessful party. These judgments were most substantial contributions to the foundations of land titles, which in much of the country rest wholly upon such government patents.

As an example of Justice Miller's desire and ability to do away with technical and artificial rules, one may cite his opinion in *Lovejoy v. Murray*,¹⁶ in which he held that the recovery of a judgment against one of several joint and several trespassers was no bar to a later judgment against another for the same trespass, holding "the whole theory of the opposite view is based upon technical, artificial and unsatisfactory reasoning;" and again, that while the principles invoked "may well be applied in the case of a second suit against the same trespasser, we do not perceive its force where applied to a suit brought for the first time against another trespasser in the same matter." This wholesome decision was cited to the English Court of Common Pleas in *Brinsmead v. Harrison*,¹⁷ but, though referred to with great respect by the judges, they characteristically adhered to the more technical English view and declined to follow it.

When, in 1877, the serious contest arose between Mr. Hayes and Mr. Tilden as to the Presidency, involving controversy as to the electoral votes of Louisiana, Florida and South Carolina, and as to one elector from Oregon, Congress passed a bill for a presidential

13. 102 U. S. 378.

14. 13 Wallace, 72.

15. 98 U. S. 61.

16. 3 Wallace, 1.

17. *Law R.*, 7 Com. Pls. 547.

electoral commission consisting of five Senators, five Representatives and five Justices of the Federal Supreme Court. Four of the Judges were named (by their Circuits) in the Act, and Justice Miller of the eighth was one of these; and these four chose as the fifth, Justice Bradley.

From the first, Justice Miller, as was inevitable from the type of his mind, took an active and imperious part with the Republican majority, pressing for expedition and exclusion of testimony and acting throughout with the eight commissioners who out-voted the seven. It need not be alluded to as a judicial service, but it was a political service for which his undoubting and resolute disposition especially fitted him.

Justice Miller delivered many addresses on occasions of importance which, as his office and his ability assured, were well received. They generally sounded a confident note of conservatism, for his was a "path-keeping mind." At the celebration of the Centennial of the Constitution in Philadelphia, September 17, 1887, Justice Miller was the orator and spoke with reverent affection of the instrument he had so often been called upon to construe. With accustomed constancy he expresses in this address his dominant ideas in support of a strong Federal Government, yet with due regard for the rights of the States. He says: "If experience can teach anything on the subject of theories of government, the late Civil War teaches unmistakably that those who believe the source of danger to be in the strong powers of the Federal Government were in error, and that those who believed that such powers were necessary to its safe conduct and continued existence were right," and again, "In my opinion, the just and equal observance of the rights of the States and of the general government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country and to its existence for another century, as it has been for the one whose close we are now celebrating."

This, with an address given at Michigan University dealing with the Dartmouth College case, and the manuscript of ten lectures on the Constitution of the United States, read by Justice Miller before the Law School of the National University at Washington, was published in 1891, after the author's death, under the title of "Miller on the Constitution of the United States." This work has those merits of clearness and positiveness which marked all his utterances, but has met with little recognition or success. Most lawyers do not know of its existence. Blackstone and Kent are more distinguished for their commentaries than for their judicial opinions; but the opposite is true of Miller.

When we consider the severity of his judgment on most legal treatises, the obscure fate of his posthumous volume is affecting and instructive. Officials, even those who do their public work well, if they wish to scorn the scholar and publicist, should seldom attempt to compete with him.

Beside the ordinary kindness, which, as husband and father, he evidenced to wife and children, Justice Miller lovingly watched over an invalid sister; he showed unfailing affection to a venerable mother who attained her eighty-third year and who, for the last twenty-five years, was blind; he gave a home to a nephew while obtaining his professional education. The writer is permitted to extract the following from a private unpublished letter of Justice Miller to this nephew, dated Washington, October 17, 1881:

It has been one of my wishes for several years past that when you and X— should have graduated from Cornell I could see my way to get some places under the government where you could study law and attend one of the very good law schools here until you were prepared to begin the practice.

I have a place in the Patent Office promised for X— to begin next month and I look for him home now every day. While looking out for X—, Col. — told me he thought by some changes in his office of U. District Attorney he could give X— a clerkship at \$600 or \$700 per year. When I had secured X— the place in the Patent Office at \$900 per year I asked Col. — to let you have the clerkship in his office. He readily agreed to this, but in completing his final arrangements with the assistant which he must have and with the money which the law allows him, he finds he has but \$500 per annum to give a clerk. This he authorizes me to offer you, counting it from the first day of the month. Of course if you had to pay board this would do you no good. But with your Aunt's approval and with my own free wishes and earnest desire I offer you a home in my house for the next two years and we all hope you will find it to suit you to accept it.

It is possible that after you come we may get you some more remunerative place than this one Col. — offers. I think this could be done easily if your politics had been of the right sort, or if you had been simply neutral. I do not mention this with any view to a change for I know you too well to believe you would do so, nor would I wish to see you do it for the sake of an office. I mention it as a reason why I cannot so easily do for you what I have done for X—. With Col. —, who has the appointment of his own clerks, your politics is a matter of no consequence.

What is here offered is not much, but as something better may come, and as it will familiarize you with the details of a large practice and enable you to graduate at a good law school, I have thought it might be worth your consideration. Lida is at home. The house is filled with carpenters, plumbers, etc., etc.

All send love to your mother and to the family and are anxious that you should find it to your interest to come and live with us.

Affectionately your uncle,

SAM. F. MILLER.

Justice Miller seems to have excited and returned a warm affection in his relations to his brother Justices. It was feared that on his appointment he might collide with the venerable Chief Justice Taney; but on the other hand, a rare and tender regard sprang up between these men so opposite in their views. At the end of their first year of service together, as the Judges separated to attend their Circuits, the aged Chief took his younger associate by the hand and said: "My Brother Miller, I am an old and broken man. I may not be here when you return. I cannot let you go without expressing to you my great gratification that you have come among us. At the beginning of the term, I feared that the unhappy condition of the country would cause collisions among us. On the other hand, this has proved one of the pleasantest terms I have ever attended. I owe it greatly to your courtesy. Your learning, zeal and powers of mind assure me that you will maintain and advance the high traditions of the Court. I predict for you a career of great usefulness and honor."

Mr. Henry E. Davis has preserved a statement of Judge Miller as to the Chief Justice, which is a most interesting supplement to this. "He once said to me," says Mr. Davis, "when I came to Washington. I had never looked upon the face of Judge Taney, but I knew of him. I remembered that he had attempted to throttle the bank of the United States, and I hated him for it. I remembered that he took his seat upon the Bench, as I believed, in reward for what he had done in that connection, and I hated him for that. He had been the chief spokesman of the Court in the Dred Scott case, and I hated him for that. But from my first acquaintance with him, I realized that these feelings toward him were but the suggestions of the worst elements of our nature; for before the first term of my service in the Court had passed, I more than liked him; I loved him. And after all that has been said of that great, good man, I always stand ready to say that conscience was his guide, and sense of duty his principle."

Chief Justice Chase declared that "beyond question, the dominant personality now upon the Bench, whose mental force and individuality are felt by the Court more than any other is Justice Miller, who is, by nature, by intellectual constitution, a great jurist." And a leading law journal spoke of his death as removing "the most conspicuous legal figure in the United States."

Twice Miller was pressed for the Chief Justiceship—upon the death of Taney and of Chase. Judge Williams has recorded his interview with President Grant on the latter occasion during a memorable ride at Long Branch. "I told him," he says, "I was in favor

of the appointment of Justice Miller for reasons then apparent to me, which need not here be repeated, for his judicial career has made them known to all the people of this country. The President replied that he had reflected not a little upon the subject, and had decided not to make an appointment from the Bench. He expressed the highest admiration for Justice Miller, but said in substance that Justice Swayne was a judge of great experience and abilities, and the senior of Justice Miller upon the Bench, and he could give no good reason for subordinating his claims to those of Justice Miller. He spoke in high terms of Justices Strong and Bradley, and declared he was quite unable and altogether unwilling to decide which one of these distinguished jurists was entitled to the preference. He also expressed doubts as to the expediency of promoting a Justice to the Chief Justiceship; 'for,' said he, 'if that policy is adopted when the Chief dies, his associates will become rival candidates for the place, and thus feeling might be engendered that would disturb the harmony and affect unfavorably the efficiency of the Court.' He gave as another reason for his decision, that there was no precedent for promoting an Associate Justice to the head of the Court, and he was not disposed to innovate upon what he considered a salutary practice, and so with these kind and gentle words were nipped as with a killing frost the budding hopes of more than one aspirant for the Chief Justiceship of the United States."

It is said that on the death of Chief Justice Waite, President Cleveland for some days hesitated between Miller and Carlisle as his successor, but was ultimately controlled by the same reasons that prevailed with President Grant when Waite was appointed.

Justice Miller might have retired from the Bench with his full salary, some years before his death; but he retained his strength to almost the last, enjoyed his work, and scouted the idea of retirement.

In the last summer of his life, when seventy-five years of age, he declared in a characteristic utterance: "I have never been more capable of work than I am now. I cannot be idle. I must do something, and there is nothing I can do or like to do as well as the work which my office devolves upon me. Why, then, should I retire?"

On the 19th of May, 1890, Judge Miller read from the Bench in Washington his last opinion, and the Court adjourned for the term. He went his Circuit; and in a visit to Colorado, was inconvenienced by the climate, which was not congenial to him. His wife's illness, however, detained him there.

On October 2, 1890, at St. Louis, he sat upon the Bench for the last time. He went back to Washington with strength abated rather than recruited by the summer's respite, and visited the rooms of the

Court. As he returned, when in sight of his home, he was stricken down with apoplexy. After some hours of failing consciousness, the end came. He died at his home, October 13, at near eleven o'clock at night. The funeral services were held in the Supreme Court-room, October 16. The chair at the right of the Chief Justice was vacant, draped in black. There were no other mourning decorations.

They laid on the coffin among the flowers a wreath of autumnal oak-leaves—a fit symbol. They sang that hymn, dear to stricken hearts, "Abide With Me, Fast Falls the Eventide." Rev. Dr. Shippen conducted the Unitarian services. Rev. Dr. Bartlett, of the Presbyterian Church, exhibited the customary banalités of funeral addresses, characterizing him as "A great American man," and comparing him in fecundity to the Mississippi Valley. As night fell the western-bound train bore his body with the little group of mourners and Chief Justice Fuller and Justice Brewer, representing the Court, towards his old home, Keokuk.

For three years Justice Miller had served as the President of the National Unitarian Conference. He was one of the founders of the Unitarian Church at Keokuk and he drew up its articles of incorporation in 1853; and there, where he had retained his membership, the last funeral ceremonies were held at the time of his burial.

Although so long the senior Associate Justice, and so predominant in the consultation-room, Miller never forgot while on the Supreme Bench that he was not the Chief Justice. His interruptions of counsel were fewer than those of his weaker associates, but they were apt to be pertinent and sometimes disastrous to the speaker, carrying the assurance that the Court "was not with him and never would be."

Justice Miller's sternness, his desire to dispatch business and the scant ceremony with which he dealt with tediousness or delay left many wounds among the bar of his Circuit. He was apparently unaware of these traits, and he certainly gave to and received from kindred and friends a warm and enduring affection. In his address before the New York Bar in 1878, he said: "A vile and overbearing temper becomes sometimes in one long accustomed to the exercise of power unendurable to those who are subject to its humors," and he suggested that it be made cause for removal.

The writer owes to a gifted Chief Justice this illustrative anecdote. A young lawyer had submitted a motion to Justice Miller at the Circuit and met the usual humiliating treatment. As he turned back he met a fellow-member going up in turn for a like purpose and they condoled together. "Well, what are you going

to do?" said the first. "Oh," answered the other, "I'm going up to be stamped all over by that damned old Hippopotamus."

Yet Senator C. K. Davis, after speaking of his "rugged and frosty, sometimes, yet always kindly manner," says: "I was always more pleased to see him in the administration of justice in trying jury cases than in any other aspect in which I viewed the man. His patience with the jury; his blunt, plain manner in which he led and instructed them; the appropriate humor with which he sometimes enlivened the tedious details of the trial, and his occasional reproof of counsel or witnesses, will long be remembered." And Mr. Garland said that when Justice Miller first held court at Little Rock "the means sometimes that he used to discipline us in these new ways were not entirely agreeable to us at the time, and to some extent we flinched under his affectionate chastisement, but when he left Little Rock, at the close of that term, there was not a member of that bar who did not esteem and admire him, and he has had their unbroken affection ever since."

He was a large man, six feet in height and weighing over two hundred pounds. His features, too, were large, and his clear-cut Roman profile and the velvet cap which he wore on the Bench in his later years made him a noticeable classic there. He generally walked to and from the Court, and only used a carriage on special occasions. The newspapers at his death said that he was worth "\$100,000 or so," but, unfortunately, they were mistaken.

A writer in *Harper's Weekly* at the time of his death (October 18, 1890) says: "Personally, Justice Miller was a hearty, genial, democratic man. His life was laborious. He loved his profession and his work. He was usually in his office in the basement of his house on Massachusetts Avenue, at work on the opinions which fell to his lot to prepare, when he was not in the Court-room. An occasional dinner at the White House or in the Supreme Court set, which is traditionally at the head of the society of Washington, and a game of whist now and then, constituted his social pleasures. He saw everyone who called, was interested in a wide range of subjects, especially of the practical kind, but most of his literature was found in the law books. When he wandered from them, like a good many other jurists, he found delight in fiction. To the last he preserved his extraordinary intellectual vigor and, to within a year, his wonderful physique."

Justice Miller married first a Miss Ballinger, of Kentucky. By her he had three daughters. One died in early girlhood. Another married George B. Corkhill, Esq., then of Mt. Pleasant, Iowa, afterwards for long United States District Attorney for the District of

Columbia. Her death occurred about 1870. The third married W. F. Stocking, Esq., of New York, and still survives.

After the death of his first wife, Judge Miller in 1857 married Mrs. Eliza W. Reeves, widow of Lewis R. Reeves, Esq., of Keokuk. Her maiden name was Winter and she was born at Sharon, Pennsylvania, in 1828. Her death occurred at Washington, December 1, 1900, of heart disease, she having outlived her husband ten years. There were two children of this second marriage—Mrs. Lida M. Touzalin, of Colorado Springs and New York, and Mr. Irvine Miller, late of Springfield, Ohio.

Justice Miller died poor and left no income to support his widow. An appeal was published in the *American Law Review* for a subscription for her benefit.

The memorial presented for the Bench and Bar of Nebraska by Mr. Woolworth, says of him: "Impatient of incompetency of counsel and inconsequence of argument, he gladly accepted all real aids to correct conclusions. . . . His reasoning was direct, rapid, accurate and certain, so that in the result the impression was not of the process so much as of the power of the demonstration. To him may be applied Charles Lamb's description of the Old Benchman of the Inner Temple: 'His step was massy and elephantine, his face square as the lion's, his gait peremptory and path-keeping, indivertible from his way as a living column.' . . . When not exercising his magistracy, the severity of the judicial mien gave way to kindly and gentle impulses. He was easy of approach, gracious and complacent." Again Mr. Woolworth says: "He was a very human man, he loved the wit of pithy speech and anecdote, the music of song and stringing, the speed of the horse, the game of endless combinations and various change and skill, the pleasure of the table, and the splendor of a noble woman." This is an eloquent idealization of the venerable Kentuckian.

Chief Justice Fuller, replying to the address of the Bar on Justice Miller's death, appositely and with great beauty said: "His last years were suffused with the glow of the evening time of a life spent in the achievement of worthy ends and expectations, and he has left a memory dear to his associates, precious to his country, and more enduring than the books in which his judgments are recorded."

So he sleeps in the quiet city on the western bank of the great river, where he freed the black slaves whom he brought from Kentucky, and where his twelve years of achievement at the Bar lead up to the great office which he so long and ably upheld, and "his works do follow him."

Washington, in his letter to the President of Congress, submit-

ting the results of the Constitutional Convention, describes it with his customary moderation as "that Constitution which has appeared to us as most advisable." The two chief guides to the due understanding of "that Constitution" are, and must forever remain, the opinions of Chief Justice Marshall, of Virginia, and Associate Justice Miller, of Iowa. More than any others, they have written its glossary and share what we hope is the immortality of that great charter of our rights, that precious epitome of our fundamental and paramount law.

Charles Noble Gregory.

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