

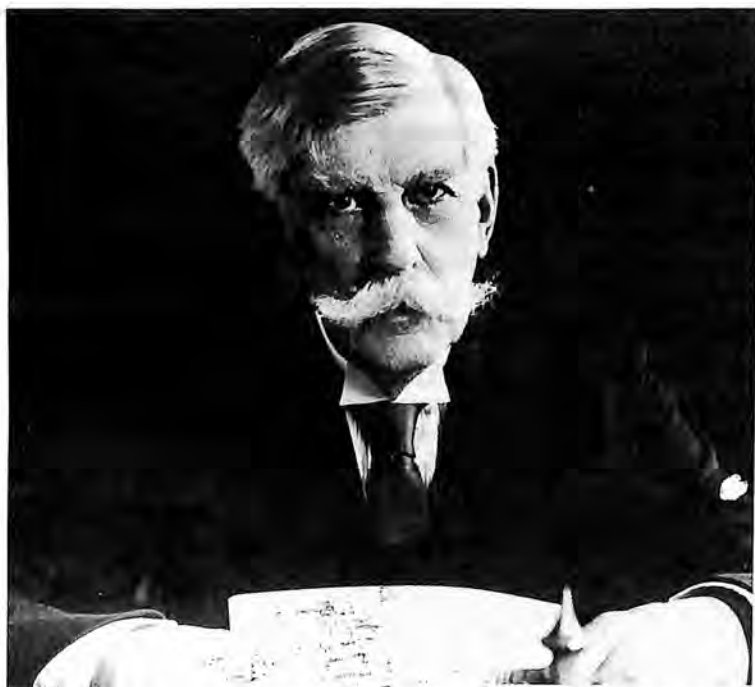


## JUSTICE HOLMES' WASHINGTON

By  
Richard H. Wagner\*

2002 marks the one-hundredth anniversary of the appointment of Justice Oliver Wendell Holmes to the Supreme Court and of his taking up permanent residence in Washington. Holmes felt his life was at its most vivid in Washington and his speeches and correspondence give a flavor of his way of life in Washington.

When Holmes' appointment was confirmed by the Senate, he and his wife, the former Fanny Bowditch Dixwell, closed down the house in Boston which had been his father's house and their home for some 13 years. Wendell burnt piles of his personal papers while Fanny burned most of her critically acclaimed needlework, which had been exhibited in New York and Boston. Holmes confided to Lewis Einstein: "It is the devil of a job to transport all one's belongings five hundred miles when one is over sixty, but it is vitalizing; you get



A bittersweet rivalry existed between the son and his famous progenitor, Dr. Oliver Wendell Holmes Jr. Indeed, it was not until his move to Washington that "Wendell" (shown above) came out of the shadow of the famous "Autocrat of the Breakfast Table."



Harvard Law School Art Collection

In Boston Fanny Bowditch Dixwell Holmes had become known as eccentric and shy, but Dr. Holmes described her as a "... helpful, hopeful, powerful as well as brilliant woman. And, indeed, Fanny took care of all the minutiae of life for the Justice and his household.

rid of dead matter, and the circulation is improved. . . One has to continually to throw off excreta if one wants to feel the blood to one's fingertips." However, he said in remarks at a Tavern Club dinner, "[b]urning old papers which have cumbered and annoyed one for thirty years, while it gives one for a moment a sigh of freedom, makes one feel a little later that it is the freedom of a cut flower — one little root in the past is gone."

Having broken with the past, Holmes had a favorable first impression of his new hometown. "The whole place is like a large country town from the absence of large business and manufactures. One sees and hears crows (which I adore) and wild birds light and sing." However, Washington was in the midst of transforming itself into a major city. It already had impressive buildings, statues of past statesmen and na-

*Continued on page 8*



## A Letter from the President



Most members belong to the Society because they support and enjoy its many good works that promote improved public understanding and awareness of the Court's history. However, the mechanics behind how the Society develops and the programs and publications that seek to fulfill its educational mission are not immediately apparent, and merit some periodic explanation.

Each quarter the Society's Executive Committee meets to hear reports from its various standing and ad hoc committees and to vote on such action as is required to introduce new initiatives or maintain existing ones. This meeting is usually proceeded in the preceding days and weeks before it by meetings of the various committees that desire to bring business before the Executive Committee.

In that we have recently completed the first two quarters of Fiscal Year 2002, which runs from July 1, 2001 to June 30, 2002, it seems to me a propitious time to provide members with a status report that summarizes the high points of those reports heard by the Executive Committee at its February meeting.

The first order of business at the Executive Committee meeting was a status report on Society Vice President Frank Jones, who has been hospitalized since December suffering from some unexpected complications from a surgery he had undergone before Christmas. I was pleased to report that while Frank's recovery has been more difficult than he had hoped or expected it to be, that he was indeed on the mend, and the Executive Committee voted to prepare a motion commemorating its concern and best wishes. Frank has been a long-time stalwart of the Society whose industry and thoughtful approach to problems has contributed immeasurably to the organization's success, and we all look forward to his return to the fold.

Following opening remarks, the Committee usually turns to financial reports—first in terms of fund raising or development and then to our performance against budget estimates. There is method in this, in that the Executive Committee finds it useful to hear from the Development and Budget and Finance Committees before being asked to consider potential budget requests from the various other committees.

Despite the general economic downturn last Fall, the Development Committee was pleased to be able to report that its fund-raising efforts had been performing even with and, in some cases, ahead of estimates the Executive Committee had approved for this Fiscal Year's budget. This allowed the Society to post a modest surplus for the first two quarters despite some shortfalls in other areas of the Society's operations.

Three factors contributed to this surplus, two of which I can report on directly, and the third of which I can allude to only in passing, as it involves a major donor whose generosity is eclipsed only by its humility.

The first of these factors, I am pleased to report, involves the altruism of our members. Each year when members are asked to renew their membership, they are afforded an opportunity to make an additional contribution over and above their dues. This year's request asked Society members to contribute to the Annual Fund and these added gifts have so far accumulated to nearly \$12,000 in FY 2002. These are gifts above and beyond the call of duty and the Society is most grateful to these volunteer donors.

The second factor aiding in the development of this surplus, is the high rate of Board participation in the Annual Fund. As a result of a determined effort, I am pleased to report that during the last twelve month cycle, all but one of the Society's seventy some odd Trustees have contributed to the Annual Fund. As a result of this, and member contributions, the Annual Fund has generated over \$130,000 in the first two quarters, which is but a few thousand dollars below our goal for the whole of the Fiscal Year. Accordingly, we have every reason to believe that the Annual Fund will well exceed projections in FY 2002.

The third contributing factor to our cautiously optimistic financial outlook at this mid-year stage involves our special donors. While I cannot mention all of them by name in this abbreviated space, the Society has received major contributions during the course of the year from some of its most loyal institutional and private donors. While the Society is grateful to all of its major donors, I would particularly like to thank Dorothy Goldman, Lexis-Nexis, the Park Foundation, the National Endowment for the Humanities, the National Historic Publications and Records Commission, Dwight Opperman, the Park Foundation, the United Parcel Service Foundation and, of course, the West Group, which has been among the Society's most dedicated supporters over the years.

In addition, while I can not mention them by name, in that they have a policy of not seeking public recognition for their many fine works, there is a Washington-area foundation

that deserves much credit for rescuing the Society from a very difficult time this past Fall with a generous, albeit anonymous contribution. As has been the experience of most non-profit organizations, other than those directly related to the post-September 11<sup>th</sup> disaster relief efforts, the Society saw a sharp downturn in its revenues in the areas of new membership dues and gift shop sales during the second quarter. Our position in the latter regard was particularly vulnerable in that the Court, where our gift shop is housed, was occasionally closed during the quarter for security reasons, and Washington's tourism experienced a sharp corresponding decline during this period.

It seemed likely that the Society might be forced to adopt some Draconian measures in reducing its budget in response to declining revenues from these critical sources. Indeed, we drew up contingency plans that involved delaying or eliminating some of our program commitments should the situation require a more conservative fiscal posture. Thankfully, our anonymous benefactor stepped in, volunteering substantial assistance in the Society's time of need, and we are most grateful for that critical support, as well as that of our various other donors who fortuitously stepped up to the plate when the call went out for help.

As a consequence, while the Society is adopting a circumspect attitude toward most new initiatives at the moment, while it awaits along with the rest of the country some signs of an economic recovery, we are able to proceed with business as usual for most of the Society's existing operations.

The Acquisitions Committee is continuing to act upon requests by the Court Curator's office for assistance in acquiring items of historical significance for inclusion in the permanent historical collection. The Annual Meeting Committee has confirmed that the 2002 Annual Meeting will take place on Monday, June 3<sup>rd</sup> and that Justice O'Connor will deliver this year's Annual Lecture. The Facilities Committee reports that all is well with the Society's headquarters at Opperman House, and that it is busy adding an off-site computer storage system to enhance the Society's data security.

The Publications Committee reports that it has nearly concluded an agreement with Random House and the Harlan family to republish on a commercial basis the Malvina Harlan manuscript that recently appeared in the *Journal of Supreme Court History*. This publication will not only bring this intriguing work to a broader audience, but is likely to yield a significant financial return to the Society. I should mention, in this regard, that Justice Ginsburg was the moving force behind this project, not only in bringing the manuscript to the Society's attention in the first place, but in persuading our Board of Editors of its historical value. Without its appearance in the *Journal*, which came as a consequence of he championing, the manuscript likely would have continued to languish unnoticed in the Library of Congress for many years to come.

Also at the Executive Committee meeting, the Program Committee reported that it had settled upon reenacting one of the Court's historically significant cases for this year's

## WANTED

In the interest of preserving the valuable history of the highest court, The Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature and any other materials related to the history of the Court and its members. These items are often used in exhibits by the Court Curator's Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisition's Committee at the Society's headquarters, 224 East Capitol Street, N.E., Washington, D.C. 20003 or call (202) 543-0400. Donations to the Acquisitions fund would be welcomed. You may also reach the Society through its website at [www.supremecourthistory.org](http://www.supremecourthistory.org).

National Heritage Lecture. The National Heritage Lecture is a cooperative program between the Supreme Court Historical Society, the U.S. Capitol Historical Society and the White House Historical Association. Hosted by each of the co-sponsors every three years on a rotating basis, the 2002 program is likely to be scheduled in September and will feature a reenactment of *Gibbons v. Ogden*.

The Program Committee also recommended that the Fall lecture series will focus on the Supreme Court during national emergencies, and feature cases and issues that relate to the Court's role in dealing with national exigencies. That series will probably begin in October and probably two of the five parts will be held in locations other than Washington to afford Society members elsewhere in the country an opportunity to attend Society programs. The Program Committee hopes that this will prove feasible in future years as well, so that it can locate programs all around the country on a rotating basis and will be seeking to develop cooperative arrangements with other regional sponsors to make this possible.

The Executive Committee will next meet in early May, a month before the Annual Meeting. In a report subsequent to that meeting I will again endeavor to keep members apprised of what their Society is doing, and perhaps begin to look at plans for the coming year.

*Leon Silverman*

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## PUBLICATION OF "IN CHAMBERS" OPINIONS

The first published collection of in chambers opinions by the Supreme Court Justices took Cynthia Rapp, Staff Attorney in the Clerk's Office, over six years to complete. A three-volume work titled *A Collection of In Chambers Opinions By the Justices of The Supreme Court of the United States, 1925-2000*, represents an important new resource for Supreme Court practitioners and scholars. The first collection of its kind, it covers 418 opinions in this unique class.

The introduction to the volumes provides more information about these unique records of the Supreme Court:

In chambers opinions offer a unique opportunity to study the reasoning of an individual Justice sans input from the rest of the Court. These opinions also offer the only insight into the criteria used by the Justices to decide when to grant an application, as such guidelines are not contained in the Court's Rules. This collection attempts to gather the in chambers opinions written from February 14, 1926, to November 18, 1998, in one publication. In addition, several indices to the opinions are provided, including chronological, alphabetical, and topical lists, lists sorted by Justice, and by disposition, and a list of cases that were orally argued in front of a Circuit Justice. In the 418 opinions indexed, 235 applications were denied and 177 were granted. Since 1926, only 26 of the 45 Justices that have served have written an in chambers opinion. The current Chief Justice, William H. Rehnquist, has the distinction of having written more in chambers opinions than any other Justice, with a total of 108. . .

The Court assigns each Justice to a particular federal circuit. As Circuit Justice, the Justice is responsible for handling applications arising in cases from state and federal courts within his or her circuit. In most instances, within a few days after receiving the application the Circuit Justice will simply write "denied" on the application. On occasion, however, a Circuit Justice will issue an opinion explaining the reasons for his or her action. These opinions are referred to as in chambers opinions. Neither the application nor the in chambers opinion is circulated to the full Court. Unlike opinion writing, where the Justice has time to deliberate over what is written and time to have a draft revised several times, in chambers opinions are often written in a very short time frame often at odd hours. Justice Marshall issued an in chambers opinion in *Spunk v. Wainwright*, a capital case at 12:15 a.m. 442 U.S. 1308 (1979). Hours before, at 7:35 p.m., then Justice Rehnquist had issued an in chambers opinion in the same case. . . . The majority of the opinions are just a couple of pages, although some go on for several pages. The longest is 16 pages.

### SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_. OCTOBER TERM, 1926

NICOLA SACCO, ET AL. v. HENDRY

[August 10, 1927]

Mr. Justice Holmes.

This petition was presented to me this tenth day of August, 1927, and was argued by counsel for the petitioners. I am unable to find in the petition or affidavits as I understand them any facts that would warrant my issuing the writ. I have no authority to issue it unless it appears that the court had not jurisdiction of the case in a real sense so that no more than the form of a court was there. But I cannot think that prejudice on the part of the presiding judge however strong would deprive the Court of jurisdiction, that is of legal power to decide the case, and in my opinion nothing short of a want of legal power to decide the case authorizes me to interfere in this summary way with the proceedings of the State Court.

Above, is a copy of the In Chambers opinion written by Justice Oliver Wendell Holmes, Jr. in the famous Sacco-Vanzetti case. Sacco and his associate were sentenced to death. The verdict was appealed to the Supreme Judicial Court of Massachusetts, the Governor, and ultimately, to Holmes as the Circuit Justice. Sacco was executed 12 days after this opinion was written.

*Laird v. Tatum*, 409 U.S. 824 (Rehnquist, Circuit Justice, 1972). . . .

Some of the interesting facts to be gleaned from reading the volumes are the fact that Chief Justice William H. Rehnquist holds the record for writing the most in chambers opinions, while Justice Hugo L. Black holds the record for brevity. Another interesting fact is that during the period 1926-1980 a Justice would occasionally entertain oral argument on such special applications.

In addition to the opinions themselves, the volumes also contain alphabetical, chronological, and subject matter indices as well as lists of opinions sorted by Justice and by case disposition. Rapp, who handles the emergency applications for the Clerk's Office, became interested in the project when she found there was no comprehensive source for the Court's in chambers opinions.

Returning to the material found in the introduction of the volumes, Rapp provides further historical insight about this important tradition.

"[I]t is difficult to determine exactly when the Justices began issuing in chambers opinions. Part of the difficulty lies in the fact that except for important decisions of the Court, the Court's opinions were not all reduced to writing until March 14, 1834, when an order required that all opinions of the Court be filed with the Clerk. And it was not until 1883 that every opinion of the Court was published. These changes, however, did not affect the publication of opinions written by an individual Justice. In chambers opinions were not reported in a routine manner until the 1969 Term, when they began appearing in the United States Reports. Prior to this time most could be found in unofficial Supreme Court reports. . . .

In another section of the Introduction, Ms. Rapp comments:

The Justices have stated that a decision on an application is not a decision on the merits. *E. g.*, *Russo v. Byrne*, 409 U.S. 1219, 1221 (Douglas, Circuit Justice, 1972) ("My authority is to grant or deny a stay, not to determine whether the Court of Appeals is right or wrong on the merits.") Applications to a Circuit Justice currently include requests for bail, certificates of appealability, extensions of time, injunctions, and stays. In the past, a Circuit Justice might have also received an application for a writ of habeas corpus or a writ of error or appeal. One such opinion found in the archives is worthy of mention. A habeas application submitted by the assassin of President Garfield was denied by Justice Bradley in 1882. Individual Justices no longer entertain writs of habeas corpus. . . .

In a paragraph discussing the delivery of applications to the Circuit Justice (applications are now filed through the Clerk's Office), Rapp mentioned an interesting exception to the rule.

In 1970, two attorneys hiked six miles into the woods to deliver a request for a temporary injunction to Justice Douglas. After arguing the merits of their case the attorneys left the application with Justice Douglas, who told them he would make a decision and leave the result on a tree stump the following day. They found a handwritten note denying the request

on the tree stump the next day. The case was *Dexter v. Schrunk*, 400 U.S. 1207 (1970), and the story about the unusual filing appeared in the *Oregonian* Newspaper on September 1, 1970.

Continuing on the subject of oral argument in special appeals, we learn

"... [i]t was possible that the Circuit Justice would either *sua sponte* ask for oral argument on an application or grant a party's request for oral argument. Oral argument before a Circuit Justice was a rare occurrence, and the last documented argument took place in 1980. From 1926 to 1980, there were 40 arguments before an individual Justice on applications that ultimately resulted in in chambers opinions. Applications on which oral arguments were held but no written opinion followed are not included in this opinion. On at least one occasion the application itself was made orally. . . . When the Rules were revised in December 1989 the reference to oral argument was omitted. Rule 22.1. The argument sessions appear to have been somewhat informal proceedings held in the Justice's Chambers or, if the Justice was not in Washington, where the Justice was at the time. . . . There is no evidence the arguments were open to the public, and there is some evidence that they were closed to the press."

A limited number of three-volume sets was prepared by the Court's Publications Unit, so the work is not available on a wide basis at this time. However, the material has been sent to several publishers to see if there is interest in publishing the volumes for the public. Until such publication takes place, volumes are available in the Court's Library and at the Supreme Court Historical Society.

This collection of in chambers opinions provides easy access to fascinating material not readily available to past students of the Supreme Court. Ms. Rapp and her assistants have provided an important guide to this, most personal, form of Supreme Court opinion. The Society is honored to be the recipient of a set of this special printing of *In Chambers Opinions*. Special thanks to Cynthia Rapp and her assistants and to Clerk William Souter for providing this important addition to the literature of the Supreme Court.

*The Twenty-seventh Annual Meeting of the Supreme Court Historical Society will be held on Monday, June 3, 2002 in the Supreme Court Building in Washington, D.C. The first event of the day will be a lecture given in the afternoon by Associate Justice Sandra Day O'Connor. Annual business meetings of the General Membership and Board of Trustees will take place starting at 6 PM. The Black Tie Reception and Dinner will start at 7 PM. There is no charge to attend the lecture, but a reservation and confirmation are required.*

*Reservations for the Annual Reception and Dinner will be taken in the order in which they are received. We apologize in advance that space constraints dictate that not all members wishing to attend the Reception and Dinner can be accommodated. Please return your reservation request and payment upon receipt of the invitation. Confirmation or notification of waitlist status will be provided to each applicant. Members should receive invitations approximately 30 days prior to the event.*



## IN SEARCH OF JOHN ARCHIBALD CAMPBELL



John Archibald Campbell was described by the Governor of Alabama as: "... not only profoundly learned in the Common law; but his knowledge of civil law is as extensive and accurate as that of any lawyer outside of Louisiana."

Recently, Mr. Thaddeus Holt of Point Clear, Alabama contacted the offices of the Society to donate a box of materials he had acquired while doing research on Associate Justice John Archibald Campbell. Most of Mr. Holt's materials were acquired in the period from 1947-1958 when he was doing research for an article on the Justice. When he offered the materials he cautioned that they were not catalogued or indexed, but might be of interest.

In an initial review of the materials, the Editors have been struck by the volume of personal correspondence between Mr. Holt and individuals to whom he wrote seeking information about Justice Campbell. Mr. Holt was a practicing attorney in Birmingham, Alabama who pursued research on Justice Campbell as a personal effort. His correspondence includes letter to and from family members, as well as noted scholars of the period. The personal letters in the collection are of great interest, and shed light on many aspects of the Justice's life. Many of the responses to his queries reflect frankness and a keen desire to assist in the project.

Some of the earliest materials in the collection date from 1947 when Mr. Holt undertook the task of attempting to verify the precise dates on which Justice Campbell took the Judicial oaths, as well as the exact date of his death. The oldest letter in the file was written by Thomas E. Waggaman, who was Marshal of the Supreme Court of the United States 1938-

1952, and is addressed to the Honorable D. Laurence Groner, Chief Justice United States Court of Appeals, Washington, D.C. The Marshal wrote to Judge Groner because he had learned he was the grandson of Justice Campbell. The Marshal's letter to Chief Justice Groner reads:

Judge Dobie, in reply to an inquiry regarding the dates of the taking of the Judicial oaths by several early members of our Court, informed me that you are a grandson of Justice Campbell. As such, may I trespass upon your time to inquire if you can throw any light on the date of the taking of his Judicial oath.

Connor, [author of a biography of Justice Campbell published in 1920 correspondence in the files indicates the Campbell relatives did not hold the volume in very high esteem] unfortunately, in his biography, did not supply a date for the taking of the oaths. However, he states that the Justice died on March 12, 1889; our old list gave March 13, 1889.

As I am trying to correct our figures, any contributions to accuracy that you may be able to give, will be much appreciated.

In a letter of reply, Judge Groner wrote:

*I do not know the dates Judge Campbell took the oath of office, but I do know that his commission was dated March 26, 1853. He resigned in April 1861 and died in Baltimore March 12, 1889. Sorry I cannot help your records further.*

On June 3, 1947, Mr. Waggaman wrote to Judge Groner again:

Enclosed please find Photostats of Justice Campbell's first pay voucher for your files, as other nuisances in the future may ask questions concerning the Justice and these may be of assistance in answering.

In 16 L. Ed. 4, I find a table crediting the Justice with having been "sworn in December 6, 1853," which date I shall use for lack of a better, subject to future correction; notwithstanding the fact that he was seated on December 5, according to our minutes.

The reader assumes that the phrase "other nuisances" must be in reference to a comment made by Judge Groner in his letter of request.

The photostatic copy of the Treasury Department Warrant which authorized the first pay voucher for Justice Campbell indicates that on 26 August 1853 the request for payment was recorded by the Register. The warrant was signed by the Secretary of the Treasury and reads in part:

*G i v e n under my hand and the seal of the Treasury, this twenty ninth day of August in the year one thousand eight hundred and fifty-three and of Independence the seventy8th.*

Other photostatic copies that appear in the file close to the correspondence from Marshal Waggaman include a certified copy of a letter written to the President of the United States by H. W. Collier, Governor of Alabama, in which Governor Collier presents the name of Justice Campbell for pos-

sible appointment to the Supreme Court. The first portion of the letter reads:

Sir

*Allow me to present to you the name of my friend, John A. Campbell, a member of the bar of Alabama, for the seat on the Bench of the Supreme Court made vacant by the death of Mr. Justice McKinley. Col. C. is, I suppose about forty four years of age, with a mind remarkably adapted to his profession. I became acquainted with him more than twenty years ago, and upon my first acquaintance I discovered he was a young man of astonishing quickness and accuracy of perception, with corresponding powers of analysis. He has continued steadily to add to his stock of legal and general information, until he has entitled himself, to a position in the front rank of his profession in the United States. He is not only profoundly learned in the Common law, but his knowledge of the civil law is as extensive and accurate as that of any lawyer outside of Louisiana. If in that state he has a superior in that Department of Jurisprudence (which I do not admit), I am confident that his studious habits with a brief practice upon the Bench, would make him the equal of the ablest of Jurists. Besides, he reads and speaks the French and other modern languages with unusual accuracy for a native citizen of the United States.*

Another item in the collection is a copy of a thesis written by James Robert Maxwell Alston, Jr. titled *John Archibald Campbell: State's Rights and the Federal Union 1829-1861*. Mr. Alston reviews Campbell's career in light of this particular issue, also providing biographical material including an account of Campbell's appointment to the Supreme Court Bench.

"John A. Campbell had six appearances before the Supreme Court of the United States at its December Term of 1851. In the most important of these "a cause celebre" of American jurisprudence was argued by Campbell for the plaintiff and Daniel Webster for the defense. The case concerned the rights of Myra Clark Gaines to title to her father's estate under the civil laws of Louisiana. Though the case had an extraordinary history both before and after Campbell's argument, it is relevant here only as the most important steppingstone of Campbell's career.

After his presentation of Mrs. Gaines' case before the Circuit Court at New Orleans a local paper had said,

The name of this distinguished gentleman is heard on every side, and appears to be in the mouths of every one. His wondrous argument in the Gaines case has all but immortalized him, so lucid, forcible, and convincing was it. . . Mr. Campbell has reaped the field clean and garnered up for himself a rich harvest.

. . . On that occasion the lawyer had won the case for his client on an argument which was to settle the claim finally nearly forty years later. [In 1889 Campbell made his last appearance in the case, as an attorney arguing before the Supreme Court of the United States, at which time the case was



Myra Clark Gaines' land claim case came before the Supreme Court 21 times.

finally resolved.] However, on the appeal to the Supreme Court in 1852 Mrs. Gaines' claim was denied. Campbell's argument was nevertheless impressive in defeat as it had been in the Circuit Court success. Its impression was so forceful that it led the Justices of the Supreme Court to unanimously recommend Campbell's appointment to that bench. Justice McKinley's death in January of 1852 had left a vacancy on the Court which was only filled by the confirmation of Campbell's appointment in March of 1853.

The death of Judge McKinley made a vacancy and that vacancy was supplied by one recommended by the Justices—Judges Catron and Curtis bearing their letters of recommendation to the President.

Though Campbell's appointment was not a result of the "spoils system" of political favors, it was due in a large measure to his known views on slavery and state's rights as well as to his brilliant legal record. In 1852 President Fillmore had nominated Senator George E. Badger of North Carolina to fill McKinley's seat, but Badger's views on the slavery issue prevented his obtaining the necessary confirmation from the Senate. However, the States Rights forces in the Senate were wholeheartedly in favor of Campbell's appointment and held sufficient political strength to control its future. . . Thus, when President Pierce forwarded Campbell's nomination to the Senate in March, its confirmation was immediate, and

*Continued on page 14*





Library of Congress

The new Justice and his wife, Fanny, lived initially in the New Willard Hotel built on the site of the previous hotel. Capt. Holmes had once been refused accommodation in the "original" Willard. The building still stands in recognizable form on Pennsylvania Avenue.

tional heroes as well as broad tree line avenues. The Park Commission had published a plan calling for a series of museums and galleries lining the Mall, a reflecting pool near the Washington Monument, a memorial to Abraham Lincoln at the opposite end of the Mall from the Capitol, and a bridge across the Potomac to connect the Mall area to Arlington National Cemetery.

At first, the Holmeses stayed at the New Willard Hotel not far from the White House. It had opened a year before and was called the New Willard because it had been built on the site of the original Willard Hotel, a landmark establishment which had hosted presidents and world leaders but which had refused accommodation to Holmes when he was a young Army officer in the Civil War. The new version was twelve stories high with a décor that included floor to ceiling columns, luxurious wall coverings, plush carpets, and detailed mosaic floors. The Holmeses must have enjoyed their stay because they returned again as guests before moving into their second house in Washington, and to dine on numerous occasions as well as "to watch in the New Year and to watch the crowd" in 1916. The New Willard Hotel, refurbished in 1986, is one of the few Holmes venues that still performs much the same function that it did in Holmes' day.

From the Willard, the Holmeses moved into a rented house that Fanny had found at 10 Lafayette Place, NW once again not far from the White House. However, the house was small and there was not enough room for all of the furniture and books which they had brought from Boston or for formal entertaining. In addition, the owner was returning to reclaim his residence. As a result, within a year, Fanny, who appears

to have shouldered all such tasks, was once again looking for a new home.

In November 1903, the Holmeses moved into 1720 I Street, NW a four story red brick house of eighteen rooms in a row of such houses a few blocks from the White House. "I really think you could say it was a pleasant place in a modest way, and the sun streams in at the back, and I feel settled for good in a place which is mine. The Boston house never ceased to be my father's." It had a "deep backyard with room for shrubs and small trees . . . and no danger the sunlight will be cut off by a big apartment house." "We had a sort of housewarming tea . . . which pleased me as I thought the house seemed to hold the guests with a kind of spacious embrace that was not devoid of elegance. In fact, I love it and am happy to wake in it every day."

1720 I Street provided the setting for much of Holmes' life. In those days, the justices did not have chambers. As a result, Holmes, clad in a mohair jacket and slippers, would write his opinions and do his reading in his library. On Monday afternoons, the Holmeses would hold "at homes" at which they would entertain visitors and the various "young sportsman who hunt the law with me" would come "to play with us." The new house afforded the couple sufficient room that the childless couple were able to take in and raise his teenage niece Dorothy who was now alone in the world. It was here that Fanny died in 1929. It was here that Holmes spoke to a nationwide radio audience in a program honoring him on his ninetieth birthday, and here, two years later, that Chief Justice Hughes broke the news to him that it was time to resign. It was here that Holmes died two days short of his ninety-fourth birthday in 1935. Unfortunately, nothing remains of the house which was such a large part of Holmes' life in Wash-



Library of Congress

Justice Holmes moved to a home in Lafayette Square across from the White House. Upon entering the square, he told his clerk, "The last time I walked here, [during the Civil War] I was ankle deep in mud. There were signs along the street: 'Undertaker, Bodies embalmed while you wait' . . ."



Collection of the Curator, Supreme Court of the United States

Appointed to the Court at the age of sixty-one, Holmes was a vigorous and handsome man, known for his sartorial correctness. He usually walked from his home near the White House to the Capitol Building for sessions of Court.

ington. 1720 I Street is now a steel and glass office building on a block which is populated entirely by similar commercial structures.

Donning a cutaway coat, a stiff shirt, and highly polished shoes, Holmes generally would walk to court following a route which took him to Lafayette Square, past the White House and along Pennsylvania Avenue to the Capitol. In the early years, he would often be accompanied on the return route by Justice Edward Douglass White. Holmes liked to take long strides but his more portly companion preferred a more leisurely pace. In the cold winter air, Holmes would suggest that they move quickly so as to avoid a chill. White would agree and for a minute the pace would quicken but soon they returned to a gentle stroll. Holmes continued walking all or part of the way to and from the Capitol well into his tenure on the Court, often accompanied by Justice Louis Brandeis in later years.

Sometimes the scenery on his walks would inspire Holmes. On one winter's evening when World War I was raging in Europe, "I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman's statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner's opera, below the skyline there came from little globes the pallid discord of the electric lights. And I thought to myself the Gotterdammerung will end, and from

those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside it, and as I gazed, after the sunset and above the electric lights there shone the stars."

Holmes usually found both oral argument and the court's conferences boring. "We waste two thirds of the day in solemnly spouting our views and our differences . . ." Moreover, the places where such activities took place did nothing to make the experience more pleasant. During Holmes' entire tenure, the Court occupied hand-me-down facilities in the Capitol. It heard arguments in the Old Senate Chamber which, as the name indicates, was the home of the Senate until it moved to more spacious quarters in 1860. The new courtroom boasted a vaulted ceiling, a row of marble pillars behind the bench, and busts of former justices. Still, it was a less than ideal courtroom, close and overheated with the only windows hidden by the large draperies. The Court's conference room and library was a floor below in the Old Supreme Court Chamber. It too was practically windowless and overheated. Today neither the Old Senate Chamber nor the Old



Library of Congress

In the first years of his service on the Bench, Holmes frequently walked home from Court with Chief Justice Edward Douglass White whose home on Rhode Island Avenue still stands.

Continued on page 10



Continued from page 9

Supreme Court Chamber look the way they did in Holmes' day. The former has been restored to look the way it did when the Senate occupied that room while the latter has been restored to the days of John Marshall.

"Most of my life is in [my] house and the Capitol." However, when he did have free time, Holmes liked to go on drives to local points of interest. While he generally preferred a horse and carriage, he did hope that the new automobiles would replace horses in the city. On one outing to the Washington Zoo, "[a] tigress spat at me as long as I was in sight and the wolves seemed to both fear and hate." Holmes did not view this behavior as a reaction to his jurisprudence but rather attributed it to the fact that he was wearing "a tall hat".

On another occasion, Holmes drove to the airfield at Anacostia to watch Charles Lindbergh land an airplane and then take off again. The then 88 year-old Holmes was invited to take off with the famed aviator but "I declined, and fell back on my formula that the joy of life consists in the neglect of opportunities."

"The Spring here is more enchanting than I have known it elsewhere," he wrote Canon Patrick Sheehan. On a late Spring visit to Georgetown with Fanny "a glimpse of the park -- noble oaks -- the air full of the smell of box and roses and . . . the yelling of birds" almost made "life seem fair once more" until "a glance at the *New Republic* . . . [threw] the customary gloom over life".

In the evenings, the Holmeses would often stay at home with Fanny reading aloud while Wendell played solitaire. However, during their early years in Washington, they were often invited to accompany President Theodore Roosevelt and the First Lady to the theater or to dine at the White House. Indeed, until their falling out over Holmes' dissent in *Northwestern Securities Co. v. United States*, 193 U.S. 197 (1904), the

Holmeses were known as intimates of the Roosevelts. The distinguished architectural firm, McKimm, Mead, and White, were working with First Lady Edith Roosevelt to restore the house to its original Palladian lines and décor. In addition to the physical refurbishment, the Roosevelts were also breathing life into the social affairs that took place at the White House by inviting writers, historians, artists, and philosophers, as well as the occasional Rough Rider to dinners and social affairs. As a result, the Holmeses found themselves in what author Owen Wister described as "an American salon".

Holmes was "amused with the dining out." However, the conventions of Washington society dictated that a man of Holmes' position be seated with the wives of senior politicians at such affairs. As Fanny observed: "Washington is full of famous men and the women they married when they were young." As a result, Holmes was deprived of the flirtatious conversations with bright young women that he had enjoyed in Boston. Still, Washington had drawn Fanny out of the reclusive shell which she had built for herself in Boston and "as my wife goes with me everywhere I have all the companionship I need."

For culture, Holmes enjoyed visiting the Library of Congress where he would buy surplus etchings or exchange pieces from his collection for pieces that the Library no longer desired. In fact, he confessed to his friend Sir Frederick Pollock, he had "profited from my position" because he was allowed to visit the print collection and "wallow in potentialities" when the Library of Congress was closed due to the influenza epidemic of 1918. Holmes was upset, however, when the book sellers in "this one horse place" could not furnish him with a copy of a volume recommended to him by Pollock. Still, when he contributed some of his father's manuscripts to the Library of Congress -- "my mite toward making Washington a center of cultivation" -- he admitted, "with



(Left) Washington was a vibrant in city in 1902. This view down Pennsylvania Avenue from the Treasury Building grounds to the Capitol Building gives a sense of the bustle and activity. (Above right) The new Justice and his wife became frequent visitors to the White House and briefly became part of the intimate circle of President and Mrs. Theodore Roosevelt.



Library of Congress

all its short comings it has some great advantages."

In the summers, the Holmeses would escape the Washington heat by retreating to their house, Beverly Farms, on the Massachusetts coast. However, even in this picturesque rural setting "Washington looms a cloud on the horizon. Happy though I am here, there is my most vivid life." Accordingly, "I play solitaire and get 8 hours sleep, drink little or nothing and try to accumulate strength for the 8 months high pressure of my Washington work."

The Holmeses' remains lie across the Potomac in Arlington National Cemetery. Chief Justice William Howard Taft was instrumental in arranging for the site when Fanny died. "I have a lovely spot in Arlington toward the bottom of the hill where the house is, with pine trees, oak, and tulip all about, and where one looks to see a deer trot out (although of course there are no deer). I have ordered a stone of the form conventional for officers which will bear my name, Bvt. Col. and Capt. 20th Mass. Vol. Inf. Civil War- Justice Supreme Court, U.S.-March 1841- His wife Fanny Holmes and the dates. It seemed queer putting up my own tombstone-but these things are under military direction and I suppose it was necessary to show a soldiers' name to account for my wife".

\*Richard Wagner is an attorney in the litigation department of Verizon in New York. His article on Justice Holmes and the Titanic appeared in an earlier issue of the Quarterly.



Collection of the Museum of the City of New York

## THE PLAYBILL

REGISTERED IN U.S. PATENT OFFICE

### FOR THE ROYALE THEATRE

The courtly Oliver Wendell Holmes and his out-of-fashion Fanny were celebrated in a play, "The Magnificent Yankee". The couple's relationship thrived during their Washington years.



During the years of Holmes' service, the Supreme Court sat in chambers in the Capitol Building that had formerly been occupied by the United States Senate. In this photograph, the page putting out papers on the Bench was Streit Cunningham, who succeeded his older brother, Austin Cunningham, in this service. Sadly, Streit Cunningham was killed in action during the Second World War.



## WARNER W. GARDNER

*An appreciation by his Friends and Colleagues*

Bennett Boskey recently provided a copy of a tribute written to Warner W. Gardner. Like Mr. Boskey, Mr. Gardner has been a contributor to the *Quarterly* and the *Journal of Supreme Court History*, writing about his experiences as a clerk at the Supreme Court of the United States. In recognition of his many contributions to the legal profession, it seems appropriate to excerpt some of the material and offer our congratulations to Mr. Gardner on his many accomplishments.

Warner Gardner is a member of the Columbia Law School class of 1934. At this writing [September 2001], he is in his 92<sup>nd</sup> year. His capacity to think clearly and to express himself precisely remains undiminished.

A few of his many friends and admirers, some of them colleagues who are grateful for the significant contribution he made to their success at the bar, have concluded that some tangible recognition should now be made, both of his remarkable ability and of his contributions to the nation and the legal profession. Accordingly, we have joined to establish the Columbia Law School Warner W. Gardner Summer Research Fellowship.

In reviewing his career, one conclusion emerges: Although he spent most of his life working with persons of high competence and talent, it never took long for all to recognize that he was smarter and better at what he did than almost everyone else.

To begin, he is probably the only graduate of a major law school who, after failing to be elected to the law review (he was teaching at another university during his first year), was recommended by the faculty to serve as law clerk to a Justice of the Supreme Court of the United States. He clerked for Harlan Fiske Stone, later Chief Justice, . . . and has ever since been widely regarded as at least one of Stone's best. He then joined the Office of the Solicitor General under Stanley Reed and later, in what seemed to some a few months, he became First Assistant, in which capacity he served Robert Jackson and Francis Biddle. He argued over a score of cases before the U.S. Supreme Court. He may be the only person who argued three dissimilar cases consecutively. This was at a more leisurely time when each party was allowed one full hour of argument.

Gardner moved on to become Solicitor to Secretary of Labor Frances Perkins, and then Solicitor to Secretary of the Interior Harold L. Ickes. He served as a Captain and then a Major in the top-secret Ultra branch of Army Intelligence. (The project on which future Justice Lewis F. Powell also served.) He worked with the British at Bletchely and had occasion to engage in a lengthy debate before generals Eisenhower and Devers. After the war he returned to the Department of the Interior, leaving to start a private practice with Francis M. Shea with whom he had served at the Department of Justice.

Shea & Gardner, starting with but two lawyers, grew slowly into one of Washington, D.C.'s premier firms. It



In the early years of his career, Warner Gardner, worked closely with three Justices. He clerked for Justice Harlan Fiske Stone, and worked in the Office of the Solicitor General with future Justices Stanley Reed and Robert Jackson.

quickly became well known . . . for the high quality and excellence of its work. That was substantially attributable to Warner Gardner . . .

Warner Gardner wrote quickly and effortlessly, with a gentle wit. He rarely used little-known words to display his erudition. His special gift was that the word that meant precisely, rather than approximately, what was in his mind was immediately at the tip of his pen. At the same time the inevitably interesting turn of phrase, or an unusual analogy, made even his routine correspondence fun to read. . . .

We add, . . . a few samples from the many hundreds of documents he wrote that give pleasure to those who were fortunate enough to be in the vicinity at the time.

He was asked to review a draft amicus brief in the U. S. Supreme Court involving the esoteric issue of quasi-in-rem jurisdiction. The opening sentence read: "It is hard to explain why the principle that controlled the decision below has come to be known as the Doctrine of Princess Lida of Thurn, since it was laid down a few years earlier with greater clarity in *Williams v. Pennsylvania Railroad*." The draft returned with a phrase added after the fifth word, in Gardner's hurried script, "save for the charm of its title."

"Footnotes are like wolves," he once wrote, "in being held in wide and unfounded disfavor." To which he added a footnote: "The disfavor is sometimes professional as well as popular. Ken Davis recently told me with pride that his latest treatise on administrative law had no footnotes. Sure enough, it didn't, with the result that useful elaborations of authorities were omitted, while much material that in a footnote could be skipped was forced on the reader's attention."

He filed a claim with the Army Board of Contract Appeals. After three years of postponements, changes in the

composition of the Board, restructuring and change of name of the Board, lost documents, and refilings, the only tangible thing that had happened was a briefing schedule that was later ignored. Gardner then filed an action in what was then known as the U.S. Court of Claims. The central section of his brief bore the title, "The Plaintiff Has Been Sufficiently Exhausted By Its Administrative Remedies." Oddly enough, it was later learned that some of the judges were offended by levity in a serious matter. Even so, the claim was upheld.

[Gardner set forth in a document to members of his firm, certain rules of conduct expected of an attorney at Shea & Gardner.] It has been suggested that. . . it might be appropriate to remind everyone of a practice which we have always considered valuable. That practice is one which calls for com-

plete candor with the court or agency before which we appear, whether it helps or hurts the argument which we are developing. By way of example: Cases adverse to our position are cited, whether or not known to our opponents. However strained our distinction of adverse cases may be, we try to avoid misstatement of what they say. We doubt that a case is ever lost by this sort of candor. We believe that we are helped, and some cases even won, when we are before a court which knows this to be our practice. . . . We note, too, that adherence to this practice produces, probably without cost, a warm glow of virtue spiced by a malicious sense of superiority to one's opponent.

*The Society joins with Mr. Gardner's other colleagues in applauding his long and distinguished career in the law.*

## HIGHLIGHT FROM THE ACQUISITIONS COLLECTION

One of the earliest goals set by the Board of Trustees of the Society was the acquisition of important and meaningful artifacts and memorabilia relating to the history of the Supreme Court. To that end, the Acquisitions Committee has endeavored to obtain by gift, and occasionally by purchase, items that will be of significance to the history of the Court.

In the first decade of the Society's operation, efforts were directed to obtaining furnishings, portraits and busts for use in the Supreme Court Building. Many of the portraits are currently displayed in public areas of the building, and many of the best pieces of furniture have been used to furnish the Justices Dining Room and its anteroom.

In late 1999, Society Vice President, Dorothy Tapper Goldman, made a significant contribution to the collection when she donated an extensive collection of autograph materials and visual images. The text of one of the documents in her collection appears below. Written by Justice Samuel Nelson to E. W. Stoughton, he discusses his concerns about the possible dissolution of the Union over the issue of slavery. Recent efforts have focused upon the acquisition of documents and memorabilia of significance to the Court and its members.

Readers with items of historical significance, or who are aware of the existence and availability of such items, are encouraged to contact Acquisitions Committee Chair, Patricia Butler at the Society's office, to make known this information. A fund has been established to enable the purchase of items, and donations to this fund are greatly appreciated. Donations of items to the collection, however, are extremely welcome, as the funds available for such purchases are limited.

My dear Sir,

You need not trouble yourself about your case on the calendar as it will not be reached, tho' we should be glad to have had it otherwise as we should have [had] the pleasure to have seen both you and Mrs. S. We shall, probably, adjourn soon after inauguration.

As to prospects of peace I saw some of the Comm[issioners] last evening. There is still great obstinacy on part of most of the republicans of the north and especially from New England and New York. The impression is that unless Mr. Lincoln takes the adjustment in his own hands and co-operates with Gov. Seward, there will be no peaceful settlement. There is obviously a part hostile to Seward in his own ranks and perhaps the fate of the country may turn upon this question which side triumphs.

If the side of Greeley & co. prevails and gets Lincoln in their keeping the Union will be dissolved [and we will have] the free and slave states before the expiration of the month of March.

I am hopeful, however, that Lincoln's policy will prevail—and that the patriotic and peaceful will in extremis triumph and consolidate the present states yet together.

I cannot think when the question is presented to Lincoln whether he will administer the Cons. over the present Union or over a fragment of the north, that he will see the necessity of conciliation and peace. He may halt at the yawning gulph [sic] and survey the perils that encompass him.

Mrs. N. & Anna wish to be remembered to Mrs. S. and Miss Susan—as well as

Your friend  
S. Nelson

Written to:  
E. H. Stoughton Esq.



Campbell continued from page 7

popular sentiment was virtually unanimous. Commending his appointment the *New York Times* said: "His mind is singularly analytical. Added to all, and crowning all, his perfect character is of the best stamp, modest, amiable, gentle, strictly temperate, and inflexibly just."

While many of the items donated by Mr. Holt have not yet been catalogued, his contribution provides a source of information on an important Justice. Although his arrival on the Bench was greeted with enthusiasm from all around the country, Campbell served in difficult times, when Congress and the country were deeply divided. The Court was a reflection of this division as well. An astute man, Campbell foresaw the time when the slavery issue would overflow the temporary dams that had prevented it drowning the Union. Indeed, he advocated an amendment to the Constitution that would protect permanently the rights of slave states. In his opinion, the Constitution provided no legal basis for the continuance of slave-holding, so he advocated providing a legal justification through such an amendment.

Dedicated to seeking a peaceful solution to the escalating hostilities, Campbell was eventually overtaken by events. He remained in Washington even after the secession of Alabama, carrying out his normal judicial role and attempting reconciliation. However, as he expressed in a letter written to his friend David Chandler in November 1860, he was committed to the people of Alabama and the South and had determined years ago it was his "obligation was to follow the fortunes of her people." As Mr. Alston observed in his thesis:

"When the Confederate government was established creating a separate and opposing government on the soil of his home state, Justice Campbell was placed in a uniquely embarrassing position." Even so, he remained in Washington several months longer hoping to negotiate a peaceful resolution to the demands of the Confederacy. He attempted to get Seward to meet with a commission from the Confederate Government hoping to create a compromise and prevent outright warfare. Ultimately, his attempts failed and the nation was catapulted into civil war. But as Mr. Alston observed: "... no man put forth greater efforts to prevent it than John A. Campbell. . . Campbell had remained in Washington several months 'at a considerable cost to his personal integrity in the hope that he might aid in the peaceful restoration of the Union.'" In fact, it appeared that Campbell's actions only delayed the inevitable for a few weeks. "For so slight a reward Campbell had sacrificed much in personal honor in the eyes of his fellow southerners. . . ."

Years later Campbell wrote to Benjamin Curtis, a former colleague on the Supreme Court Bench:

You are aware that I was not a patron or a friend of the secession movement. My condemnation of it and my continuance in the supreme court were regarded as acts for which there could be no tolerance. When I returned to Alabama in May 1861, it was to receive coldness, aversion, or contumely from the secession population. I did not agree to recant what I had said, or to explain what I had done; and thus, instead of appeasing my opponents, I aggravated my offense."

Spurned by most of his countrymen in the South,



**SOUTHERN CHIVALRY — ARGUMENT VERSUS CLUB'S.**

Campbell's service on the bench saw rising contention between the South and the North. This cartoon illustrates an incident that took place on the floor of Congress in 1856 when Representative Preston S. Brooks of South Carolina severely beat Massachusetts Senator Charles Sumner. Brooks was enraged by remarks Sumner made against his cousin Senator Andrew Pickens Butler and against Senator Stephen A. Douglas.



President Lincoln and his cabinet were faced with the daunting task of trying to hold the Union together. In 1861, Edward Seward, Secretary of State, proposed waging war against most of Europe in an attempt to unite the nation. Many believe his meddling in the Fort Sumter crisis brought on war. Back row, left to right: Gideon Welles, Secretary of the Navy; Montgomery Blair, Postmaster General; and Caleb B. Smith, Secretary of the Interior. Middle row, left to right: Abraham Lincoln; Salmon P. Chase, Secretary of the Treasury; and Edward Bates, Attorney General. Front row, left to right: William H. Seward, Secretary of State; and Edwin M. Stanton, Secretary of War.

Campbell was sucked reluctantly into the machinery of the Confederate government. He spent the first months after his return to the South funding charitable good works he personally organized, all aimed at relieving suffering occasioned by the war. Turning down all offers of offices of political significance initially, he consented eventually to serve as the Assistant Secretary of War with oversight of the conscription laws. This role he performed with humanity, justice and compassion. One of the first members of the Confederate government to recognize the cause of the South was doomed, Campbell advocated an early termination to hostilities to prevent further bloodshed. He met with Lincoln at Hampton Roads in 1864, and by April 1865, he was the only high ranking member of the Confederate government still resident in Richmond. Had Lincoln lived, it is probable Campbell would have played a large part in the repatriation of the South. Instead, he was imprisoned for a time, and released months later to find his property in Mobile, from which he hoped to make a living, had been destroyed. His personal fortune had been depleted sustaining his family and in funding charitable deeds.

Phoenix-like, Campbell rose from the destruction of his life, and returned to the practice of law in New Orleans. By 1873 he was the undisputed leader of the Southern Bar. He returned that year to the Supreme Court of the United States, this time to argue in the famous case styled the *Slaughterhouse Cases*. In 1883 he came before the Supreme Court in *New Hampshire and New York v. Louisiana*, in which "he won for the state of Louisiana the right of freedom from suit by another state on behalf of the claims of their citizens." In this judgment he achieved a victory for the rights of states, a cause he had espoused for many years.

Mr. Holt's collection is a welcome addition to the Society's collection, and it has been received with gratitude. The papers and materials will be catalogued and become part of the library collection. Donations from other members would also be welcomed. If you are interested in donating something to the collection, please contact the staff at the 224 East Capitol Street, NE address.

(Please see story on page 13 for information about another important acquisition.)



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