Denver Law Review

Volume 3 | Issue 9 Article 3

January 1926

# A Romance from the Year Books

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To make the Record useful, we propose to provide brief reports of current trial court decisions, reports of Denver Bar Association meetings and activities, as well as articles by members of the local bar upon subjects of interest to the profession.

To make it interesting to the readers, we will try to besprinkle the foregoing with a bit of humor, some philosophy, and whatever original and vigorous thought can be attracted to our columns.

Articles on professional subjects will be solicited by the editors but manuscripts on any subject will be carefully read and considered for publication. Controversial topics will not be unwelcome but must be handled in an original manner, vigorously, and with some degree of tact. No anonymous manuscripts will be considered.

The editors promise to do their utmost to make this publication one to be proud of. It is your job no less than ours and with your active help during the coming year we shall not fail.

# *A Romance From the Year Books*

By Hon. John H. Denison
*Associate Justice of the Supreme Court of Colorado.*

The yearbooks are rightly regarded as pretty dry reading; in fact, if they had been taught in the public schools, the 18th amendment would have been unnecessary; but even in them romance appears. Indeed, why not? Many a novel and drama centers around a lawsuit and they are records of lawsuits.

Here is a report [1] of a case in Y. B. 1, Edw. II, p 11 (Selden Ed.), A. D. 1308, Paris v. Page. "Simon of Paris brought writ of trespass against Walter Page, bailiff for Sir Robert Tony, with others and complained that on a certain day they took and imprisoned him wrongfully and against the peace. Passely [2] for all except the bailiff, answered that they had done nothing against the peace; and for the bailiff he avowed the arrest for the reason that Simon is the villein of Robert, whose bailiff Walter is, was found at Hecton in his nest, [3] and Walter tendered to him the office of reeve and he refused and would not submit to justice, etc."

Toudeby [4] rehearsed the avowry and said that to this avowry he ought not to be answered, for that Simon is a free citizen of London and such has been for ten years, and has been the King's sheriff at said city and has rendered account at the Exchequer; and this (said he) we will aver [5] by record; and to this very day he is an alderman of the town, and we demand judgment whether they can allege villeinage in his person. And Herle [6] "With what they say about his being a citizen of London we have nothing to do; but we tell you that from grandam and grandam's grandam he is the villein of Robert, and he and all his ancestors, grandsire and grandsire's gransire, and all those who held his lands in the manor of Hecton; and Robert's ancestors were seised of the villein services of Simon's ancestors, such as ransom of flesh and blood, marriage of their daughters, tallaging

(1) The proceedings were, of course, oral and in Law French; we have abbreviated the English translation.

(2) Counsel for defendants.

(3) This is the technical or colloquial name of the place of residence of the villein, at which he is attached to the land as villein.

(4) Counsel for plaintiff.

(5) i. e. prove.

(6) Another counsel for defendants.

them high and low, and Robert is still seised of Simon's brothers by the same father and same mother. And we demand judgment whether Robert cannot make avowry upon him as upon his villein found in his nest. [1]

*Toudeby.* We are ready to aver that he is a free man and of free estate, and they not seised of him as their villein.

*BEREFORD, J.* I have heard tell that a man was taken in a brothel and hanged, and if he had stayed at home no ill would have befallen him. So here. If he was a free citizen, why did he not remain in the city?

At another day Toudeby held to the assertion 'Not seised of him as his villein nor of his villein services.'

*Passely.* Whereas he says that we were not seised of him as of our villein, he was born in our villeinage, and there our seisin began, and we found him in his nest, and so our seisin is continued. We demand judgment.

*BEREFORD, J.* One side pleads on the seisin, and the other side pleads on the right: in that way you will never have an issue.

*Herle.* Seized in the manner that we have alleged.

*BEREFORD, J.* The court will not receive such a traverse. You must say that you are seised of him as your villein and of his villein services.

And so (the defendants' counsel) did. Issue joined.

What plot could be better laid for a wild tale by Rider Haggard, DeMorgan, Conrad or Mary Johnston? Here is Simon back in his home, visiting his parents and his brothers and sisters, risking seisure as the serf of the land on which he was born; he has run away ten years before and made his way in the city of London, and with what success! He becomes the king's sheriff of that city. The records of London show that. Simon Paris was sheriff in 1302 and 1303 and the records of his election still exist; his will is on record yet. He becomes alderman and while alderman revisits his birthplace and there is seized by the lord of the land to which his villeinage appertains, into which state he was born. Why, in the name of common sense, didn't he stay in the city and not risk himself? So thinks the judge, expressing his thoughts in the above picturesque manner. Had Toudeby advised him that he would be safe because he was a free citizen of London as shown by his office of sheriff and alderman? Toudeby so pleads but is overruled. The judge hates to hold the plaintiff, but fears he must and is almost angry with him for thrusting such duty on the court by his recklessness, but, remembering his duty as a judge, and with masterly logic, he compels the defendant to plead affirmatively the villeinage and so forces the real ultimate issue—villein or not—and sends that issue to a jury for trial. [1]

We are interested to know the outcome. The report, as set forth in the yearbook series of the Selden Society, vol. 1, page 13, adds to the Y. B. report the pleadings as they were finally made up in the record. The practice was, that by oral pleading in Law French before the judge the issue was discovered and agreed on, and thereupon the clerk made up the record showing such issue in Latin. A jury is ordered for the octave of Michaelmas, 1308, but a verdict is not obtained until 1312; then Sir Robert Tony and others of the defendants are dead.

What were the reasons for this delay? Did the courts lend their aid to the plaintiff through delay that proof of his ancestry might be wanting; and were they influenced by his prominence and power as an alderman of the great city in which the courts were centered? Did he fear the influence of Sir Robert Tony in Norfolk and so delay until his death?

[1] If not found in his nest it seems he could not be taken. A v. B, Y. B. 21-2 Edw. I, 205.

[1] He had so held before. Anon. Y. B. 33-5, Edw. I, 205.

No one can tell; but at last the jurors say upon their oath "That on the day and year aforesaid Simon was a free man and of free estate, and that Robert never was seised of him as of his villein and that Walter and the others on the day and year aforesaid took Simon in the king's highway at Necton and led him against his will to Robert's manor in the same town and detained him there in prison from the hour of terce until vespers, to his damage of one hundred pounds", and the judgment on the verdict is "Thus it is considered that the said Simon recover his said damages against the said Walter Page and Geoffrey De-Tony and the same Walter and Goeffrey are in mercy."

The damages were very heavy for a few hours' imprisonment. A hundred pounds at that day had the purchasing power of perhaps five hundred today, about equivalent to $5,000.

Why did the jury give this? Were they in sympathy with the poor serf who had run away and made a distinguished man of himself, or is our whole idea of this story wrong and was it a case of mere mistaken identity, the jury thinking that the defendants had been grossly negligent in their mistake? Probably not the latter, for, were that so, there would be no reason for the solicitude of his counsel in trying to escape the direct issue, villein or not; and why would he be in or near the nest?

On what theory did Simon escape? My guess is that the King's highway, where the jury said he was taken, was not his nest. The nest was probably limited to the land held by his father or perhaps even to the hearth, as suggested in A. v. B., Y. B. 413, 21-22 Edw. I, 447-8. We can imagine the witnesses [1] testifying that he was or was not in the highway when taken, the counsel fencing and disputing about the effect of such testimony, the court, glad to give them a chance to find for him, charging the jury to find specially whether the plaintiff was taken there, and, if he was, to give him such damages as they should think fit, and the jury eagerly, probably without leaving the box, rendering their verdict. But, whatever the reason, we, six hundred years later are glad the jury found as they did, and so, notwithstanding the sorrows of the defendant, the verdict has no doubt increased the sum of human happiness.

Apart from the romantic phase the proceedings in this case are most interesting to the student of the history of common law pleading—but of that perhaps another time.

[1] The jury of this date were witnesses and could find a verdict without evidence other than their own knowledge. Forsythe Tr. by Jury. 135.

## BYGONE BARS

The old French-Celtic word "bar" meant "rail," while the Breton word meant "a branch of a tree," from whence its application to the polished brass foot-rest of the thirsty and to the limb of the law is easily accounted for.

But, as time went on, this pet word of ours became descriptive of many other things—bars of music, sand bars, obstacles and obstructions in general, the enclosed place in court where counsels stand, the place in court where the prisoner stands to plead, the court itself, and finally the legal profession.

Where, in all etymology, can anything be found which is at once so logical and so full of poetry as the story of the development of this little word?

See how naturally the story unfolds. We start with bar as a brass rail. Bars of music follow—a very natural concomitant of bibulous fellowship, we are told. With this beginning, it is but logical that we should set out on the voyage of life in a somewhat uncertain state, run aground

on a sand bar, and then, of course, find ourselves behind prison bars. Obstacles and obstructions are then set in the path of justice by counsel who plead at the bar of the court. We are then called before the bar for sentence and the word bcomes the official name of the court and of the legal profession.

Finally, we note in the Standard Dictionary, that "Bar," is the official abbreviation for barrister, barleycorn, and barrel. This despite the fact that to bar means, in one sense to prohibit.

—J. C. S.

# *A Forgotten Celebrity*

By Hon. C. S. Thomas

*Former United States Senator from Colorado.*

I wonder if anything is more evanescent than fame or notoriety; and wondering still, I wonder if "seeking the bubble reputation", is worth while, whether "at the cannon's mouth" or otherwise. In the vast majority of instances the game is hardly worth the candle; for some men fall away from the spotlight during life and the mantle of oblivion covers most of us before the grass upon our graves is yet green. The living are too much engrossed in their own affairs to give much thought to the memory of the dead or to spend their time in stimulating the expended energies of those falling out of the ranks.

But every condition has its compensations. Those of us who hang on or hang over, whose memories are freighted with vanished events, and traditions and personalities, can revive some of them at times, for the edification or amusement of our junior contemporaries. And since some men are born both to point a moral and adorn a tale, a very brief review of one of them may not be without interest to the bar if not to the general public.

Thomas M. Bowen, member of the Constitutional Convention and Justice of the Supreme Court of Arkansas, Judge of the District Court, and United States Senator from Colorado, was one of these. He was nothing if not picturesque. Reputed natural son of Senator James H. Lane of Kansas, member of the first Legislative Assembly of that State, and of the first regiment of Kansas Volunteers in the Civil War, he reached Arkansas in the course of time and determined to stay there.

His opportunity came with reconstruction, which brought him pelf and political position. As Chairman of the Constitutional Convention, he so manipulated its action as to secure an adjournment of its sessions, subject to his call. He then declined to reconvene it until he should be guaranteed a place upon the bench of the Supreme Court, if the proposed Constitution were ratified. The guaranty was given and his scheme was realized.

The Chief Justice of this remarkable court was "Poker Jack" McClure. Injunctions being valuable at the time and the Supreme Court being clothed with both original and appellate jurisdiction, McClure and Bowen did a flourishing competitive business in granting writs to rival parties. If one favored a plaintiff the other would be equally gracious to a defendant. Litigants were thus made immune against each other until they came to terms either with themselves or with the court. The latter was said to have made more out of the practice than the former. At any rate Bowen