

PROCEEDINGS.

SEMI-ANNUAL MEETING, APRIL 27, 1887, AT THE HALL OF THE
AMERICAN ACADEMY OF ARTS AND SCIENCES, BOSTON.

THE President, the Hon. GEORGE F. HOAR, LL.D., in
the chair.

The following members were present (the names being
arranged in order of seniority of membership) : Edward E.
Hale, Charles Deane, George F. Hoar, Andrew P. Peabody,
George Chandler, Thomas C. Amory, Nathaniel Paine,
Joseph Sargent, Stephen Salisbury, Samuel A. Green,
Elijah B. Stoddard, George S. Paine, Edward L. Davis,
William A. Smith, Charles H. Bell, James F. Hunnewell,
Egbert C. Smyth, John D. Washburn, Thomas W. Higgin-
son, Albert H. Hoyt, Charles C. Smith, Francis A.
Walker, Hamilton B. Staples, Edmund M. Barton, Charles
Devens, Thomas L. Nelson, Lucius R. Paige, Franklin
B. Dexter, John J. Bell, Charles A. Chase, Samuel S.
Green, Justin Winsor, Henry W. Haynes, Edward I.
Thomas, Solomon Lincoln, Andrew McF. Davis, J. Evarts
Greene, Henry S. Nourse, William B. Weeden, Ebenezer
Cutler, Reuben Colton, Robert N. Toppan, Henry H.
Edes, Frederick J. Kingsbury, Edward Channing, Lucien
Carr, Frank P. Goulding.

The Recording Secretary read the records of the last
meeting, which were approved.

The same officer reported from the Council their recom-
mendation that the following named gentlemen be elected
to membership in the Society :

REV. HENRY WILDER FOOTE, of Boston ;

JAMES PHINNEY BAXTER, Esq., of Portland, Maine ;

As resident members.

JOHN BEDDOE, F.R.S., of Bristol, England ;

EDWARD HURLBURT THOMPSON, Esq., of Merida, Yucatan ;

As foreign members.

All of these gentlemen were declared elected, a separate ballot being taken on each name.

CHARLES A. CHASE, A.M., read a report which had been prepared by him and adopted by the Council as a part of their report to the Society.

NATHANIEL PAINE, Esq., Treasurer, submitted his report in print, and EDMUND M. BARTON, Esq., Librarian, read his report.

The reports above named being before the Society as the report of the Council, the Recording Secretary read the following letter :

71 CHESTER SQUARE, *April 27th, 1887.*

MY DEAR MR. WASHBURN :

I sincerely regret that on account of my health I shall not be able to attend the semi-annual meeting of the American Antiquarian Society to be held this day : an occasion of the deepest interest I am sure it will be. As a slight mark of my kind remembrance I enclose one hundred dollars for the addition of any books, to any department of the library, which the gentlemen interested may think best.

Very respectfully,

R. C. WATERSTON.

It was unanimously voted that the Secretary be authorized to return the grateful acknowledgments of the Society to the Rev. Mr. WATERSTON for his generous and timely gift.

CHARLES C. SMITH, Esq., moved that the report of the Council be adopted and referred to the Committee of Publication.

Mr. WASHBURN, seconding the motion of Mr. SMITH, spoke of the unusually interesting character of that portion of the report which related to the charitable and educational trusts of England, and especially of the casual illustrations therein given, of the power of imagination to illumine and make picturesque even

——“brawling courts
And dusky purlicus of the law.”

Indeed, in no proceedings of a serious nature, not even in the writing of history, has the aid of the imagination been more signally and successfully invoked, than in the very difficult branch of the law which relates to perpetuities in connection with charitable uses. In the application of what is known in the books as *cy pres*, the Court seems in many instances to have resolved itself into a tribunal of the imagination. What would the testator have probably done, or have been content to do, had he known before his death or period of incapacity, that the charitable dispositions contained in his will could not, for reasons of law or fact, be carried into execution? The very hall in which we are assembled calls to mind the early Massachusetts case of the American Academy vs. Harvard College, in which Chief Justice Shaw, then recently appointed to the bench, delivered a memorable opinion on the subject of the bequests of Count Rumford. One of the most interesting contributions to the literature of the law, valuable hardly less as an historical than as a legal discussion, is the opinion of Chief Justice Gray of Massachusetts, in the recent and leading case of Jackson vs. Phillips.

The doctrine of *cy pres* (the imaginative department of the law of trusts) has not received in the American courts an interpretation exactly identical with that of the courts of England, but as this is not a professional discussion, it is not necessary to point out the distinction. Nor, in an extemporaneous expression, is it desirable to more than glance at the picturesque nature of any of them. The

mention, however, in the report, of Christ's Hospital where Thomas Newcome "said '*Adsum,*' and fell back," calls to mind a case in Vernon's Chancery Reports, memorable and curious alike for the character of the defendant, the nature of the bequest, the tone of the discussions, and the successive and diverse judgments of court. It was an information by the Attorney-General against Richard Baxter, author of the "Saint's Rest" and the "Call to the Unconverted," no stranger, alas! to courts or prison. Poor suffering Baxter, worn by disease, and dying daily, had, by the will of Robert Mayot, a beneficed clergyman of the Church of England, been bequeathed the sum of 600l., to be distributed by him amongst sixty *pious ejected ministers*. The testator adds, "I would not have my charity misunderstood. I do not give it them for the sake of their non-conformity: but because I know many of them to be pious and good men, and in great want." The Attorney-General alleged in the information that the charity was against law (the Act of Uniformity, as will naturally occur to the professional or historical student), and invoked the imaginative discretion of the court.

Baxter's answer and the arguments on each side are quaintly interesting. The Lord Keeper said he had no doubt in the case and would decree the charity (that is the use) void, and that in accordance with his Majesty's pleasure the money should be applied for the building of Chelsea College. But it was then urged that if the charity was void the money ought to remain with the executor; but the court said it was the *use* which was void—not the charity. Then it was thereupon claimed the charity ought to be applied *eodem genere*, and the testator having desired to benefit *ejected ministers*, at least it should be decreed to go "amongst the clergy." And this view prevailed with the Lord Keeper, who thereupon decreed it for the maintenance of a chaplain for Chelsea College, instead of for the building.

This was in 1684, but after the due and proverbial delay, the case came before the Lords Commissioners at Trinity term, 1689 (not long before Baxter's death), and they reversed the decree of the Lord Keeper. Although these were described as *ejected ministers*, and so *as a class* under the ban of the Act of Uniformity, yet, as the testator was himself a conformist, and Baxter in his answer swore that he also was a conformist, it might well have been the intent, and the court would imagine the testator so expressing it, that, though these men are ejected ministers, their wants are to be supplied and their necessities relieved, not because they are *ejected*, but because they are *needy* and *suffering* men. And, indeed, the words of the testator, quoted from his will, quite naturally bear, even call for, that interpretation. And so the Lords Commissioners adjudged the use *not void* and ordered the money to be paid out and distributed according to the will. Whether Baxter actually did this, or whether he was then so far gone in controversies and sufferings that this pleasure was denied him *in propria persona*, is not at this present moment remembered. The whole story of Baxter's connection with courts and prisons, as set forth by Orme and Calamy, is touching and pathetic in the extreme, but perhaps hardly germane to the motion before the meeting.

Rev. EGBERT C. SMYTH, D.D., remarked that a new charitable trust had recently been established at Oxford for the education of independent clergymen.

Mr. HOAR added an expression of the hope that the subject of the report would in due time be considered by the writer in its relation to similar trusts in this country.

Mr. SMITH's motion was then adopted.

The President laid before the Society, reading briefly from the manuscripts, three letters of Earl Percy, who was in command of the British detachment at Lexington and Concord.

The first, dated May 6th, 1771, is signed Percy, is addressed to his relative, Bishop Percy, and encloses a manuscript song of considerable merit. The writer affects to have received it from a person who assured him he got it from an officer of the Royal Scotch. But it seems clear that this is a mere playful fiction, and that the song is by Lord Percy himself. The song is in his handwriting. On the corner of the sheet which contains it, is written in the Bishop's hand, "Composed by Earl Percy, 1771."

The other letters are signed Northumberland, written after the author came to the dukedom. It is agreeable to think of this young officer, like Burgoyne and André, as a votary of the muses. I am not aware that he is mentioned as an author in any biographical sketch.

COVE OF CORK, May 6th, 1771.

DEAR SIR.

I am to return you many thanks for your Letter, & the Hermit of Warkworth which I assure you I admired very much. I have by accident met with a Scotch song in this Island which I never saw before; whether it is an old one or not I dont know, but the Person who gave it me, assured me he got from an officer of the Royal Scotch that was quartered here about two years ago, & told him it was a very old one. However as I know you to be curious in these matters I have enclosed it to you. We have at last got our Route, & march tomorrow se'night for Dublin, where we shall arrive the 27th. If it is in my power to do anything for you there, I desire you will let me know I beg my best Comp^{ts}. to M^{rs}. Percy & am

Your very sincere Friend

PERCY.

To

The Reverend

D^r. Percy

Northumberland House

London

Free

Percy

A SCOTCH SONG.

Composed by Earl Percy, 1771.

1st.

My Annie ye're the bonniest Lass
 That 'ere gave Sheperd Glee,
 And tho' fu' blithe young Jeanny was,
 She's nae sae blithe as ye.
 Then come awa my Bonny Lass,
 Flee to your Soger's Arms,
 Our daies in muckle bliss we'll pass
 Free frae a' dread Alarms.

2d.

Your lip's sae saft, your Breest's of Sna,
 Twa Di'monds are your Eyne.
 Your Beauty stole my heart awa,
 I wad that ye were mine.
 Then come awa my bonny Lass &c.

3d.

When 'ere ye trip it o'er the Lee
 Or thro' the bonny Broom,
 Wi' ye to gae my heart's a' Glee,
 Without ye 'tis a' gloom.
 Then come awa &c.

4th.

When ainsie ye're mine, there's Nane by word,
 Or Deed, dare to affend ye.
 For I can wield my trusty sword,
 And aye wull I defend ye.
 Then come awa &c.

5th.

Fu' blithe and gay's a Soger's Life,
 Ye ken it well enough,
 Free frae a' sorrow, frae a' strife,
 Tis better nar the Pleugh.
 Then come my Lassie come awa,
 Gar the Pleughman gang his gait,
 Ye are sae blithe, ye are sae bra
 A Soger Lad's your fate.

[Extract from the Bp's answer.]

“The late most important Enquiry on which the House of Commons has been so long engaged, and which so entirely engrossed every attention in England could not but attract a similar notice here, and though it brought to light great improprieties of private conduct, which very justly deserved censure, yet removed imputations of public mis-

conduct which had been so industriously and universally propagated that they were every where rec^d. with implicit credit, and therefore their confutation and removal is a great public benefit. So that the Enquiry has proved advantageous is the opinion of many judicious persons."

ALNWICK CASTLE, 14th. Oct^r. 1804.

MY DEAR LORD

At the same time I thank you for your Letter of the 5th. I must lament to perceive it written and signed by another hand. It is not indeed much easier for me to write the answer, for as the fingers of my right are become rigid & contracted I hold my pen with much difficulty & some pain; even the hot milk has [not] been able to preserve me from the consequences of my disorder, & indeed I have been for some time obliged to relinquish the medicine, from the heat of the milk having too much relaxed the coats of my stomach.

It afforded me much satisfaction to find that the minds of the generality of the Irish had been weaned from their predilection for French Principles. The Imperial Title assumed by Buonaparte, suits ill with the Republican system, & I entertain no doubt but the Emperor of the French Republick, will prove as great a Tyrant, as any of the Emperors of the Roman Republick formerly.

My Brother has hitherto been permitted to remain on his Parole quietly at Geneva. For a little while they removed his son to Verdun, but they allowed him very soon to return to his Father. By the last Letters I understand they were both in perfect health, & appear to be in good spirits. Lady Beverley and her Daughters are safe in England, but not without having had some alarms, as they came over in the same Packet with Mr. Drake.

The Duchess, & my Daughters, unite with me in compliments & the best of Wishes to you, & M^{rs}. Percy. My sons are both absent from us; Lord Percy at Cambridge, & Algernon at Eton. I am certain you will be pleased to know, that Lord Percy is continuing a third year at the University, altho a Nobleman, at his own particular Desire.

Adieu My Dear Lord, & be assured I ever am, with the greatest regard

Your sincere Friend
and obedient Serv^t.

NORTHUMBERLAND.

NORTH^d. HOUSE, 23^d. Jan^{ry}. 1809.

ans'wd. 23^d. March 1809.

MY DEAR LORD.

Three days ago I had the pleasure of receiving your Lordship's letter of the 7th., which in common with others was delayed by the deep snow, & bad weather, we have had lately. It afforded me very great pleasure to learn that your Lordship's health continued so good. I flatter it continue the same for many years to come. M^r. Meade is too young to be afflicted as yet with the Rheumatism. I have lately received great benefit from taking every morning about three or four grains of the Columbo root in powder, in a thin dish of chocolate, at breakfast. It mixes perfectly with the chocolate, which entirely takes off the bitter taste of the columbo root. This I would recommend to M^r Meade; as my disorder is at last discovered to be clearly Rheumatick, & not gouty. Would they had made this discovery some years ago.

I did not know where M^{rs}. Turnbull resided, till I received your Lordship's Letter. I am very sorry to find she is under any difficulties, & shall take the Liberty of writing to Colonel Isted upon the subject.

Lord Paget is just arrived, & has brought an account, that Gen^l. Junot attacked our troops near Coruña, after the Cavalry were embarked, & the Infantry just on the point of embarking. The British troops fought with the greatest coolness and bravery, & repulsed the enemy in every point, aching [*sic*] several Prisoners. We have however lost S^r John Moore, who was killed by a cannon shot, together with L^t. Col: Napier, & L^t. Colonel Mackenzie. S^r. David Baird is very severely wounded, & has been obliged to have his arm amputated. L^t. Colonel Wynch is likewise wounded. The dispatches are not yet arrived, so that the particulars are not known. They are however hourly expected, as the Vessel, on board of which the officer is who is bringing them, sailed from Coruña an hour before Lord Paget. The action took place on the 16th. of this month.

The Duchess, Lord Percy, & the rest of my family desire I will offer their compliments, & best wishes to your Lordship, M^r. & M^{rs}. Meade, together with my own.

I have the pleasure to be with the greatest Esteem & Regard

My dear Lord
Your Lordship's
Most sincere Friend
& obedient Servant

NORTHUMBERLAND.

The Right Reverend
The Lord Bishop of Dromore.

The President also called the attention of the Society to a brief sketch of its former president, Hon. JOHN DAVIS, which had recently come to his notice. It is an admirable portraiture. It is contained in a little book entitled, Gallery of American Portraits, by George Watterston. This collection of very spirited sketches was published in 1830. It is now nearly forgotten.

Watterston was Librarian of Congress, 1825-29. He published several works, among which were: *Memoir on the Tobacco Plant*, Washington, 1817, 8vo. *Letters from Washington*, 1818, 12mo. *Course of Study Preparatory to the Bar or the Senate*, 1823, 12mo. *Wanderer in Washington*, 1827, 12mo. *The Lawyer: or Man as he ought not to be*, Charlestown, Mass., 1829, 18mo. *Tabular Statistical Views of the Population, Commerce, Navigation, Public Lands of the United States* (jointly with Van Zandt and Nicholas Biddle), Washington, 1829, 4to. *Continuation of same*, 1833, 8vo. *Gallery of American Portraits*, 1830, 12mo. *New Guide to Washington*, 1842, 18mo; 1847, 18mo; 1848, 18mo.

JOHN DAVIS.

[From Gallery of American Portraits].

Mr. Davis is a native of Massachusetts, and has been a member of the House of Representatives for about six years. He does not often address the body to which he belongs; but when he does, it is with great ability and

effect. He is sedate, grave, and circumspect, reflecting intensely on the subject brought up for discussion, and speaking only when it is of such a nature as to require the lights and energies of superior minds. On such occasions he investigates profoundly, prepares himself with facts to illustrate and develope, and comes forth as a most eloquent and powerful advocate. His mind is capable of constant, laborious, and intense application; is clear, acute, and vigorous; not easily swayed by ingenuity, or led astray by feeling; seeking truth, through all the meanders of subtlety, and drawing her into light, and presenting her in all her native and undisguised loveliness. Like the well trained hunter, he is never driven from the pursuit of the game by false scents, but perseveres, whatever may be the irregularity of the course or the obstructions of the way, till he brings out the truth, and exposes the fallacies of those who have endeavored to conceal it. His information on the great questions of national policy is extensive and accurate, and his reasoning solid and irresistible. His positions are laid down broadly, and demonstrated with clearness. He never loiters on the outskirts of his subject, or strives to amuse his hearers by pretty conceits or idle verbiage. He deals in demonstration, and when he brings his proposition to a close, it is like the *quod erat demonstrandum* of the mathematician. Almost every mind is satisfied, or finds it difficult, if not impossible, to extract the wedge he has driven in. His speeches are fine specimens of practical logic and accurate reasoning, close, clear, and conclusive. Mr. D. does not deal much in theory; he is more practical than speculative, and bends his whole powers to produce conviction, without aiming at beauty or splendor of diction in what he says. His thoughts are "apples of gold," but not "in a net-work of silver." His style is plain and unostentatious, and suited to the weight and gravity of the subject which he discusses, and though correct, is not very flowing or ornamented. His frame is large, and apparently muscular; his countenance grave, and marked by the traces of thought, and exhibits great shrewdness and penetration. As a legislator, he is vigilant and active, always at his post, and always prepared to support or resist, by his eloquence or vote, any measure which may be introduced into the House that he conceives to be conducive or injurious to the interests of the nation.

The letters and the biographical notice were referred to the Committee of Publication.

J. EVARTS GREENE, Esq., presented and read a paper on the subject of the Roxbury Latin School, which was with the thanks of the Society referred to the Committee of Publication.

ANDREW McF. DAVIS, Esq., said: During an examination of the early records of Harvard College, which I made last winter, I met with a curious error in the transcription of a will, by means of which the College authorities seem to have had doubts raised in their minds whether there was not an alternative title for the Colony of New Haven. There was evidence also that this doubt lingered in their minds for fifty years. I found in the records what seemed to me to be an explanation of the error. The explanation, although plausible, did not carry absolute proof within itself and I inserted an inquiry in the March number of the *Magazine of American History*, asking assistance from others in procuring evidence that the explanation was correct. When I published this inquiry I had no idea that the records themselves would furnish this proof, but feared that it would be necessary for this purpose to discover the original will in England. A further examination of the College archives has, however, placed me in possession of material bearing upon the subject, which is practically as satisfactory as though I had seen the original will, and enables me to say that the explanation of the error, which was suggested in the *Magazine of American History*, may be regarded as proved to be correct.

The circumstances under which the error occurred and the discovery of the proof of its origin will be found in the following statement:—

In 1670, William Penoyer of England gave an annuity from his estate in Norfolk for "exhibitions." The phrase in the original will in which the testator specifically desig-

nated the manner in which the scholarships should be assigned read as follows: "With the residue thereof two fellows & two schollars for ever shall be educated, maintained, & brought up in the Colledge called Cambridge Colledge in New England, of which I desire one of them as often as occasion shall present, may be of the Lyne or Posterity of the said Robert Penoyer if they be capeable of it & the other the Colony of now or of late called New Haven Colony," etc. A copy of this clause was received by the Treasurer. Whether he forwarded the copy which he received or made a second copy does not appear, but a copy received from the Treasurer was produced at a meeting of the President and Fellows held in August, 1671, and was entered in full upon the College Book in connection with the records of that meeting. By the time that the clause of the will relating to these exhibitions, found its way upon the College Book, it had become transformed so that the phrase "The Colony of now or of late called New Haven," read "The Colony of Nox or of late called New Haven." There are in the early College books several collations of the exhibitions and trust funds. The Penoyer will is entered in these books four times; once in Book 1, twice in Book 3 and once in Book 4. Each time the error is repeated.

That the College authorities were puzzled by the phrase "The Colony of Nox or of late called New Haven," and that they thought there might have been some reason for Penoyer's use of the alternative title for the Colony of New Haven, is shown by the fact that it is several times recognized in the assignments of this exhibition. In 1679, "James Alling and Noadiah Russell both schollars of the Colonie of Nox or New Haven," were designated to receive the Penoyer annuity. Increase Mather and Thomas Brattle, in their correspondence with Samuel Crisp, the representative of the Penoyer estate, both dwell upon the fact that students from the Colony of Nox received the benefits of

the trust. Mention is made, either in the records or in Leverett's Diary, of students from the "Colony of Nox," or in more guarded phrase as "being supposed to be a scholar belonging to the Colony formerly called the Colony of Nox," in 1694, in 1716 and in 1721. Later than this I have found no reference to the Colony of Nox. Founded in the Records of Harvard College in 1671, it lived in the same seclusion until 1721 and then for a time disappeared from history. In 1862 allusion was made to it by Mr. Sibley in a note to a paper which was published in the Proceedings of the Massachusetts Historical Society. No attempt was made at that time to follow up its history.

At first sight it may seem strange that the College officials should have perpetuated this blunder for so many years. It must be borne in mind, however, that they were extremely anxious to have those from whom they might hope for gifts understand that trusts would be administered according to the intentions of their founders. They met with this phrase in what they supposed to be a correct transcript of Penoyer's will. Penoyer had relatives in America and evidently had friends in the Colony of New Haven. In describing the Colony he had apparently used a name with which they were not familiar, but it seemed as though this alternative title was used for designating more particularly a colony which had but recently lost its identity. In 1662 the charter granted to Connecticut had comprehended the Colony of New Haven. The very circumstances which led Penoyer to describe the Colony as having now or of late the title with which he was familiar, rather than by the new name to which he had not become accustomed, contributed to sustain the error. It does not require any great stretch of the imagination to bring before our eyes the scene of the discussions in which Increase Mather, Thomas Brattle, Leverett, Wadsworth and Henry Flynt participated, in seeking for an explanation of the phrase. The doubt whether it meant anything and the

preponderance of the feeling that it was wiser after all to recognize it, is apparent in the records and in the official correspondence of the College.

Without being able to assert positively how and when the error was discovered, it may be stated as probable that when Henry Flynt compiled his list of benefactors of the College, which was completed in 1722, he examined the certified copy of the will which had been transmitted from England, and with the matter fresh in his mind from assignments by the Corporation of the Penoyer annuity in 1721, solved the question of the origin of the Colony of Nox. The coincidence of the disappearance from the records of allusion to the Colony of Nox, with his work in overhauling the College papers, points almost conclusively to Flynt as the discoverer of the error.

The fact that there was a correct copy of the will, or at least of that portion of it relating to the College, is made certain by a reference in Dr. Andrew Eliot's Donation Book, to "an attested copy of Mr. Penoyer's will, MS. papers No. 25." The copy of the will extended upon the pages of the Donation Book purports to have been made from this attested copy. The phrase in question is correctly transcribed and reads "now or late." Since the compilation of that book the papers of the College have been assorted and bound in volumes. The attested copy of the Penoyer will has disappeared, but the correct transcript in the Donation Book furnishes evidence that the error originated either in the Treasurer's office or in the records themselves.

The clue which enabled me to unravel the mystery of the "Colony of Nox," was gained by a marginal entry "now or of late called New Haven Colony," abreast of the words, "Colony of Nox or of late called New Haven Colony," in one of the College books. Similar explanatory entries have been made against several of these entries which contain allusions to the Colony of Nox. These marginal

entries would be in themselves a sufficient guard against the resurrection of the error, did they include all allusions in the records to the Colony of Nox, or were they in themselves so entered as necessarily to attract the attention of the reader. As a matter of fact, however, there are several allusions to the Colony of Nox, against which no marginal notations have been made, and it is also true that no marginal notation would necessarily attract the attention of a searcher of the records. Throughout this period, the margins of the College books are filled with notations. They constitute a sort of topical index, the use of which a person making a thorough analysis of the records would naturally reject. For that reason it is perhaps as well that the history of the rise and fall of the Colony of Nox should be put on record.

Prof. FRANKLIN B. DEXTER read some letters of peculiar interest, and Mr. REUBEN COLTON presented an abstract of a diary kept by Mr. Edward H. Thompson during an exploring expedition in Yucatan. The Society, with thanks to Prof. DEXTER and Mr. COLTON, requested that the letters and the diary be furnished for the use of the Committee of Publication.

The meeting was then dissolved.

JOHN D. WASHBURN,
Recording Secretary.

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