The Pioneer of American Jurisprudence.*

The pioneer, whatsoever may be the value he places upon his own work, is usually destined to have a just estimate of his services made only by those who in after years enjoy their benefit. Contemporaries may admire and appreciate his boldness, his energy, his activity, — may even pronounce him brilliant; but a correct view of his work in the perspective of history can only be acquired when time has created that perspective. The pioneer James Wilson, whose works have just been republished after the lapse of ninety years, may now be assigned his true position among the architects of our constitutional system. And did not his contemporaries appreciate his ability? Most truly: he was honored as a learned jurist; his

*Wilson's Works. Being Lectures upon Jurisprudence and the Political Science. By James Wilson, Associate Justice of the United States Supreme Court; with Introduction and Notes by James DeWitt Andrews. In two volumes. Chicago: Callaghan & Co.

friends awarded him hearty praise; and the abuse of envious enemies enlisted the warmer attachment of his friends. But not in his generation could a just discrimination assign to his labors, or to those of his co-laborers, their relative or comparative value or importance. Who could then have foreseen, for instance, the subsequent decision in the Dartmouth College case, to be followed by a long train of adjudications establishing corporate rights under charters? Who could then have anticipated the desirability of ascertaining and locating the earliest assertion of the constitutional principle that a legislative contract is protected against legislative encroachment? Who could have foreseen the judicial career of a Marshall, or have believed possible a civil war between the adherents of Webster's constitutional views and the partisans of Calhounism? The great creative work of Wilson as a constitutional jurist could scarcely have been assigned its true position in our juridical edifice at any time prior to the late war; now, it may be.

James Wilson was a pioneer in more senses than one, and he planted the advanced posts of our modern jurisprudence in more than one field. His published works consist chiefly of his lectures on general American Jurisprudence, delivered in the Law School of Philadelphia in 1790–92. These lectures are a body of general commentaries on the whole field of law; anticipating Kent's work as an American commentator, though not so minute or detailed as Kent's. He was a philosophical jurist, given to *a priori* investigation, tracing principles to their sources, and testing them by the touchstone of truth; in this respect he anticipated not only Austin, but Bentham also, with whom he was contemporaneously engaged in criticising Blackstone's praises of the English Constitution. The acknowledged ability of Mr. Justice Wilson ensured him, as a lecturer, a large audience, among whom was the first President. His well-known views as to the essentially national character of the Federal government, then a doubtful experiment in the minds of most Americans, were enforced in these lectures with a convincing logic that may well reassure the wavering now as it did then. Among our constitutional historians, Curtis assigns him a place "as one of the first jurists in America"; and Landon says, "he surpassed all others in his exact knowledge of the civil and common law, and the law of nations." Such was no doubt the estimate made of him by the first President, who appointed him one of the Justices of the Supreme Court at its organization; for Washington had long before sent to him his nephew, Bushrod Washington, as a law student, ignoring in so doing the eminent lawyers of Virginia. When Wilson's untimely death checked prematurely the career of a great constitutional jurist, it was his former student, Bushrod Washington, who was appointed to succeed him, by the second President, who thereby evinced his own appreciation of the preceptor as a jurist.

More than any other of the Revolutionary leaders, Wilson seems now to have been the pioneer constitutional jurist, the first to clearly apprehend and to distinctly state many of the fundamental principles of the new political system. As early as 1774, he declared that "all men are by nature equal and free," in a published pamphlet on "The Legislative Authority of the British Parliament," in which he demonstrated in a masterly way the want of such authority to legislate for the American Colonies, fortifying his position by both historical and judicial precedents, and outlining the whole constitutional claim of the colonists to exemption from Parliamentary taxation, and to recognition as fellow-subjects with the English, in allegiance to the same prince, and entitled to the same rights under the British Constitution. In a speech delivered in January, 1775, he enunciated the doctrine of the Declaration of Independence, that the King had violated the British Constitution by conniving at the usurpations of Parliament, and proposed for adoption by the Pennsylvania Convention a resolution declaring that the act altering the Massachusetts charter, the Boston port bill, and the act quartering soldiers upon the colonies, "are unconstitutional and void, and can confer no authority upon those who act under color of them; that all force employed to carry such unjust and illegal attempts into execution is force without authority; that it is the right of British subjects to resist such force; and that this right is founded upon both the letter and the spirit of the British Constitution." The doctrine of the sovereignty of the people, as the true source of all political power, was early adopted by him, was embodied with his assent in the Federal and State Constitutions, was enunciated in his argument in the Pennsylvania Convention in favor of the adoption of the Federal Constitution, and was illustrated frequently in his lectures before the Law School, with a lucidity and fervor not surpassed in the opinion he rendered as a Justice of the Supreme Court in the case of Chisholm *vs.* Georgia. He was

an earnest advocate of the dual system of government, Federal and State, which was introduced by the Constitution of 1787, and his expositions of its advantages were peculiarly distasteful to its opponents.

The "obligation clause" of the United States Constitution has been a bone of contention among jurists and students of the law. Learned lawyers have pertinaciously insisted that the framers of the Constitution never intended it to apply to grants by the legislature of charters of incorporation. Critics have denounced the Supreme Court of 1819 for having invented the idea, in the Dartmouth College case, that a corporate charter was a legislative contract, which must be held inviolable just as a different legislative grant had been held in Fletcher *vs.* Peck. It is now known that at the very time when the legislature of Georgia repealed its grant of 1795, Hamilton stated his conviction that such legislation was a violation of the "obligation clause," and predicted the decision in Fletcher *vs.* Peck, which was rendered after his death. It is now known, too, that Wilson, to whom is generally ascribed the introduction into the Constitution of the phrase "obligation of contracts," had, prior to such use of that phrase, announced positive and uncompromising views on the subject of repeal of corporate charters. In a pamphlet published in 1785, he considered the proposition that the legislature of Pennsylvania should repeal the charter granted by it in 1782 to the Bank of North America. Upon the broadest constitutional grounds, viewing the state legislature as unhampered by any express restrictions upon its powers, he argued against the possession of any power by the legislature to repeal an act creating a private corporation after its acceptance by the incorporators. Such a charter he declared to be "a compact, to be interpreted according to the rules and maxims by which compacts are governed." This, the earliest known argument on the subject, shows the views of the man who introduced the phrase "obligation of contracts" into our jurisprudence. The criticism is often made that while the decision in Fletcher *vs.* Peck, as to a legislative grant of land, may have been sound, this by no means warranted the extension of the principle to grants of charters, as in the Dartmouth College case. But Wilson's argument, made two years before the Constitution was framed, anticipates both the ruling in Fletcher *vs.* Peck and that in the Dartmouth College case, as a proposition inherent in constitutional jurisprudence. It seems impossible to doubt that this argument was influential in shaping not only the views advanced by Webster, the advocate, but those adopted by Marshall and the other judges, in the great case in which that proposition became embodied in our system. The editor of this new edition of Wilson's works has appropriately emphasized this argument, now reproduced, as not the least valuable of his contributions to our constitutional precedents.

If his only achievement had been his opinion in the case of Chisholm *vs.* Georgia, Wilson would have thereby won distinction. During his term of nine years' service as a Justice of the Supreme Court, very few constitutional cases were litigated. This one is the only extended opinion pronounced by Wilson as a judge; but it is "a lion." The great and fundamental question arose as to the relative rank and place of the States and the Central Government, in the American constitutional system. The court, with but one dissent, decided that the Constitution subordinated the states to the nation, and subjected a state to the suit of a private individual. On the foundation of this decision rests the governmental fabric of the United States; for a contrary conclusion would have made the Union but a rope of sand. Two of the judges, Jay and Wilson, were by previous training and study prepared to state their conclusions in opinions replete with juridical learning, and the opinions of both are constitutional landmarks. It is no reflection upon the great character and attainments of Chief Justice Jay to say that his opinion is, in respect of scholarly diction and lucidity of reasoning, surpassed by that of his colleague Wilson. The latter set to himself, in this decision, the task of answering the question, "Do the people of the United States form a Nation?" This question is illustrated by copious classical, historical, and juridical references, presented with the vivacity of an earnest debater, the answer constituting a thesis in which the broad observations of a scholar, the close analysis of a jurist, and the profound researches of a philosopher are happily united. The freshness of his diction relieves the aridity of a dry subject, without detracting from its juristic value. His distinctions between statehood and sovereignty, his terse assertions of the sovereignty of the people, his illustrations of the inherent characteristics and the high honor of that sovereignty, and his close analysis of all the governmental questions involved in the American system, might to-day

be well taken as a text-book by the student of our institutions. He found the people of the United States asserting by implication, in the Federal Constitution, their sovereignty, and the implication sufficed him. "In an instrument well drawn, as in a poem well composed, silence is sometimes most expressive. To the Constitution of the United States, the term sovereign is totally unknown. There is but one place where it could have been used with propriety. But even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves 'sovereign' people of the United States; but, serenely conscious of the fact, they avoided the ostentatious declaration."

In his lectures on jurisprudence, Wilson was not only original, but far in advance of his time; for such a course of lectures, if now first presented, would attract wide attention, and be worthy the authorship of any jurist of the day. They are merely general in their character, traversing with broad sweep the field of jurisprudence. Their merit lies in their exposition of first and fundamental principles and in the lecturer's fine analysis. Government, constitutions, laws, legislation, and the administration of justice, are collated and connoted as parts of one system. Sovereignty is analysed and traced to its source in the individual man. In the mental characteristics and capacities of man are found the basic principles of not only the true conceptions of sovereignty and government on the one hand, but of the rules of judicial evidence on the other. A full modern treatise on evidence might be based upon Wilson's admirable chapter on the subject, in which, on *a priori* principles, the lecturer discloses fourteen distinct sources of that information which the mind recognizes as evidence. Understanding of this classification is aided by the lecturer's previous illustrations of thought, conception, belief, and judgment as operations of the mind; and those illustrations are now seen to be not merely theoretical and discursive, but practical and pertinent. These lectures are not only modern in their style of treatment of the subject, an American anticipation of what has been called the English theory of jurisprudence, but they are thoroughly American in spirit. The author's terse definition of a constitution is, "that supreme law, made or ratified by those in whom the sovereign power of the state resides, which prescribes the manner according to which the state wills that the government should be instituted and administered." His account of the history of former confederacies, including in the list not only those which became operative, but also the ideal confederacy of European powers which was the dream of Henry IV., shows the growth of the idea of confederacy as leading up to our present system of a Federal Republic, and contrasts its excellences with the defects of all its predecessors. He expounds with some detail the characteristic features of the new American system, and patriotically contrasts the American and British Constitutions, to the disadvantage of the latter. His national feeling was so marked that he treated Federal and State Constitutions as together composing one system, a practice to which our jurists are now returning.

It is not uncommon at the present day to exalt the United States system of government to high rank among the governmental experiments which the world has seen tried. A century ago, patriotic Americans hoped for the success of their new experiment, amid many forebodings and more doubts. But Wilson, studying it in the light of history and with the insight of a philosopher, acquired a faith in its capacity which exceeded hope; and, at its very inception, he deliberately recommended it to his fellow-citizens of Pennsylvania, in a public address, as "the best form of government which has ever been offered to the world." This is not vain glorification of a fabric which Judge Wilson had helped to erect, for he gives abundant reasons, at every step in his arguments, for the faith he entertains, and demonstrates the correctness of his conclusions. His writings deserve a place, as preliminary instruction in the fundamentals of our government, not only in every law school in the land, but in every institution which aims to assist in the study of Government, Civics, or Political Economy.

JAMES OSCAR PIERCE.