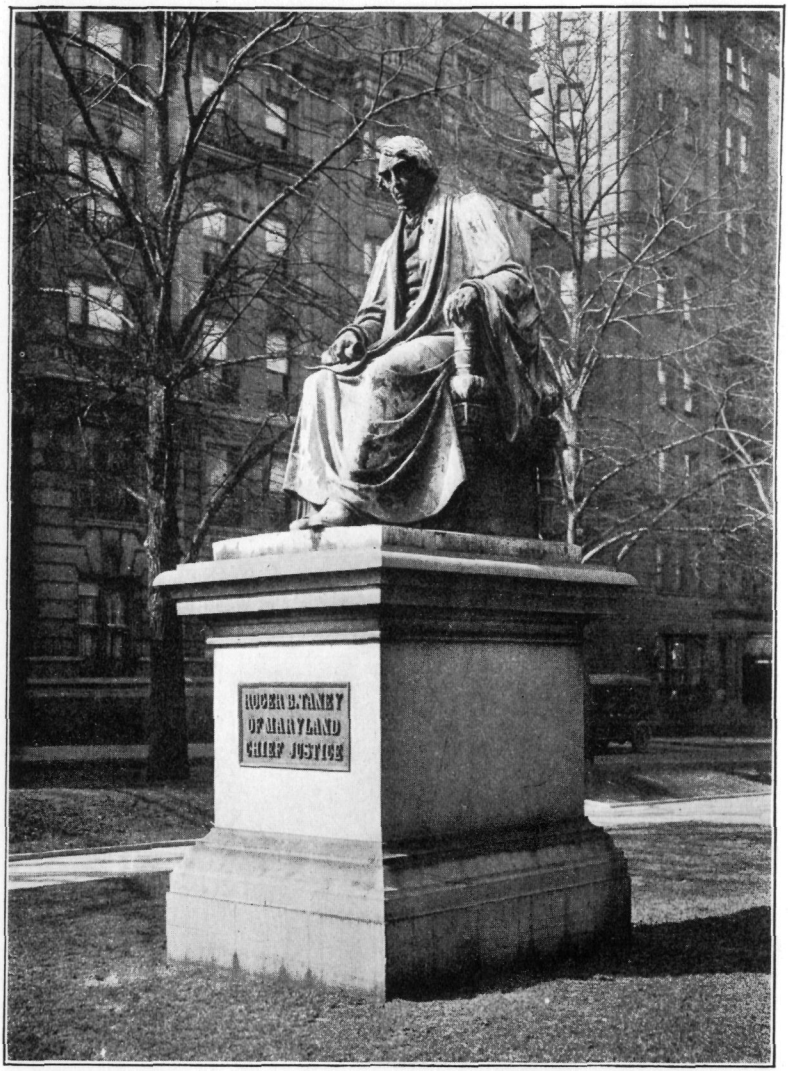

By William H. Rinehart *Washington Place, Baltimore*

STATUE OF ROGER BROOKE TANEY

LIFE OF
ROGER BROOKE TANEY

Chief Justice of the United States Supreme Court

BY

BERNARD C. STEINER

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CHAPTER XV

The Civil War (1861–1864)

The National election of 1860, at which Lincoln was chosen President, was almost immediately followed by the secession of South Carolina, and the Gulf States soon imitated her example. The "irrepressible conflict" had come to a point where the decision must be made as to whether the union of States should continue to exist one and indivisible, or should be riven into two confederacies. The attempt to save the Union *with* slavery, which Taney had made in the Dred Scott case, had forever failed. The attempt of the Free State men to destroy slavery was far as yet from success. Most men in the North realized, as did Lincoln, that the first duty of the time was to lend every effort toward the preservation of the National Government and not to permit the country to be divided into States, "discordant and belligerent." To many, the question of duty was a doubtful one. Allegiance could be given to one power only and, when a State voted to secede, a man of high integrity might hesitate, if he had professed fealty to that State. In Virginia, George H. Thomas and Robert E. Lee were both men of great conscientiousness, but their decisions as to this point were diametrically opposite. In Maryland, a border State, where the ties of friendship and kinship were close with Pennsylvania on the one side and with Virginia on the other, the two conflicting forces strove; on the one hand to carry the State over to the Confederacy, and on the other to retain her within the Union. The year of the Presidential canvass opened with five justices from the Slave States upon the Su-

preme Court Bench. Of these Daniel of Virginia died during 1860 and Campbell of Alabama went with his State when it seceded, albeit somewhat unwillingly.[1] Catron of Tennessee and Wayne of Georgia, remained loyal to the Union in spite of the secession of their States. Wayne was the senior of the Associate Justices, and, therefore, he presided over the Court during Taney's illness and after his death. Of the loyalty of Taney himself, there never seems to have been a question at the time. He took no open part in the discussion that raged about him, but his silent influence was thrown on the side of the Union.[2] Campbell, wrote at Fort Pulaski on July 10, 1865, that Taney, in his last interview with Campbell "acquiesced in the propriety" of the latter's resignation. On April 29, 1861, Campbell, informing Taney that he had resigned his judgeship, expressed in strong language "the profound impression that your eminent qualities as a magistrate and jurist have made upon me. I shall never forget the uprightness, fidelity, learning, thought, and labor that have been brought by you to the consideration of the judgments of the court, or the urbanity, gentleness, kindness, and tolerance that have distinguished your intercourse with the members of the court and bar. From your hands I have received all that I could have desired and in leaving the court, I carry with me feelings of mingled reverence, affection and gratitude."

[1] Southern Historical Society Papers. 52 Am. Law Rev. 162, Article by Judge H. G. Connor of North Carolina. See also Connor's Life of Campbell, pp. 140 and 149.

[2] On December 4, 1860, Senator Saulsbury of Delaware proposed the appointment of a commission to be composed of ex-President Millard Fillmore, ex-President Pierce, Chief Justice Taney, George M. Dallas, Edward Everett, Thomas Ewing, Reverdy Johnson, Horace Binney, J. J. Crittenden, and George C. Pugh, to confer with a like number of commissioners from the Confederate States, in the endeavor to restore peace and preserve the Union. (Moore's Rebellion Record, Vol. II, Doc. 103.)

On March 4, Lincoln took the oath of office, administered to him by Taney. He had now sworn in seven Presidents, a record which has not been equalled.[3] The bent and fragile figure of the aged jurist, clad in his black silk gown, standing beside the tall gaunt statesman, made a striking picture, which must have led bystanders to feel that the Chief Justice would hardly swear in another President, and, considering the condition of the country, to wonder whether another President would ever present himself to take the oath of office.

A little more than a month after Lincoln's inauguration, Fort Sumter fell and the the Sixth Massachusetts Regiment forced its way through the streets of Baltimore, on the nineteenth of April, struggling against a mob. For a time, the control of the city was in doubt, until General Benjamin F. Butler, with Union forces, seized Federal Hill, which commanded the centre of Baltimore, on the night of the thirteenth of May. All was excitement and the Union leaders felt that the Southern sympathizers must be sternly repressed. Lincoln authorized the suspension of the writ of *habeas corpus* in the cases of such persons and their arrest by military officers.

This suspension of the writ of *habeas corpus* brought Taney into a sharp conflict with the National Administration. He stood firmly for a strict adherence to the Constitution, as he interpreted it, and his stern courage prevented him from cringing for a moment. At 2.00 a.m. on May 25, 1861, John Merryman, a member of a prominent Baltimore County family, was arrested in his own home by a military force acting under orders of Major-General William H. Keim, commanding in

[3] Schouler, VI, p. 5.

the State of Pennsylvania, and was committed to the custody of General George Cadwalader, commanding at Fort McHenry, in Baltimore.[4] On the next day, Sunday, May 26, George Hawkins Williams, one of Merryman's counsel, went to Fort McHenry and had an interview with General Cadwalader, who refused to permit Williams to have, or to copy, or to read the paper under and by which Merryman was detained in custody.[5] Taney stated later than Merryman appeared to have been "arrested upon general charges of treason and *rebellion*" *without* giving the names of the witnesses. Upon the petition of Merryman, a writ of *habeas corpus* was then issued by Taney, sitting at chambers in Washington, addressed to the commandant of the fort, directing him to bring Merryman before the Chief Justice, in Baltimore, upon Monday. When the writ was taken to General Cadwalader he accepted service, but declined to produce Merryman. He sent Colonel Lee, his aide, who appeared in court, with regrets, giving as his excuse the reasons that the arrest was made,[6] "by the orders of the Major General commanding in Pennsylvania, upon the charge of treason, in being publicly associated with, and holding a commission as lieutenant in a company having in their possession arms belonging to the United States and avowing his purpose of armed hostility against the Government," and that the President of the United States had authorized General Cadwalader to "suspend the writ of *habeas corpus* for the public safety." General Cadwalader showed courtesy to Taney and sent by Colonel Lee a respectful letter to the Chief Justice,

[4] See Tyler, pp. 640 and ff.

[5] Tyler, p. 641

[6] Tyler, p. 421. 1 Moore's Rebellion Record Diary 82, Docs. 301, 2 Scharf's Maryland 430.

who had come to Baltimore.[7] He stated that Merryman had been arrested, without his knowledge nor direction, by Col. Samuel Yohe at General Keim's order, and had been brought to the fort by Colonel Yohe's order. Calwalader had been "informed that it can be clearly established that the prisoner had made often and unreserved declarations of his association" with an "organized force, as being in avowed hostility to the Government, and in readiness to coöperate with those engaged in the present rebellion against the Government of the United States." The officer's position was a difficult one and he felt that he must execute the "high and delicate trust" so that "in time of civil strife, errors, if any, should be on the side of the safety of the country." Yet he hoped that he and Taney could "coöperate in the present trying and painful position, in which our country is placed" and that they would not, "by any unnecessary want of confidence in each other, increase our embarrassments." He, therefore, requested that Taney would "postpone further action," until instructions could be received from President Lincoln. Taney, however, refused to delay, but he promptly issued an attachment against General Caldwalader for contempt and made the attachment returnable upon Tuesday. Washington Bonifant, the Marshal, took the writ to Fort McHenry and sent in his name at the outer gate. The sentry did not permit the marshal to enter and the messenger returned with the reply that there was no answer to the card. Upon receiving this information, Taney said that the "Marshal had the power to summon the *posse comitatus* to aid him in seizing and bringing before the Court the party named in the attachment;" but, "since the power

[7] Tyler, p. 643. 4 Nicolay and Hay 174.

refusing obedience was so notoriously superior to any the Marshal could command, he held that officer excused from doing anything more than he had done." The scene was a dramatic one. The infirm and aged Chief Justice sat on the bench surrounded by a group of interested auditors. The afternoon was a gloomy one and the low voice of Taney could scarcely be heard, so that the listeners gathered closer and closer around him, in order that they might understand what he said. Taney then stated that the detention of Merryman was unlawful[8] because: The "President, under the Consti-

[8] Tyler, p. 645. The following memorandum is of great interest:

"I was present at the hearing, in May, 1861, by Chief Justice Taney, of the Habeas Corpus case of John Merryman, who had been arrested for having taken part in the burning of the bridges over the Gunpowder and other streams (by direction of the Civil authorities), after 19 April, 1961, and who was confined at Fort McHenry, Baltimore.

"The hearing was in the United States Court Room, on the first floor of what was commonly called the 'Old Masonic Building,' on the East side of St. Paul Street, half way between Lexington and Fayette Streets.

"I remember very distinctly the Aide de Camp of General Cadwalder, who commanded at the Fort, in full uniform, with red sash and wearing his sword (and I remember wondering whether wearing a sword was proper in a Court Room), entering and coming up to the right of the seated Chief Justice (but not close to him). I was standing nearly between the two, and the scene is in my mind like a photograph.

"The officer said that General Cadwalder had directed him to say that the President of the United States had suspended the writ of Habeas Corpus, and, therefore, he could not produce John Merryman—or closely to that effect. And he then retired. The Chief Justice thereupon ordered the Clerk of the Court to issue a Writ of Attachment to bring General Cadwalader into Court, returnable next day.

"The next morning, at about 12 o'clock, I think, the Chief Justice took his seat, and called for a return to that writ. The United States Marshal stated that he had gone to Fort McHenry (the evening before?) but was refused admittance at the gate, and so had been unable to serve the writ. The Chief Justice, after a few words about the failure to obey the writ, proceeded: 'Under these circumstances, I might order the Marshal to summon a *posse comitatus*, but as it is notorious that it would be met by a superior force, I will not require it. In a few days, I will file a written opinion with the Clerk of the Court,

tution of the United States, *can not suspend the privilege of the writ of habeas corpus*, nor authorize a military officer to do it; (2) a military officer has no right to arrest and detain a person not subject to the rules and articles of war for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control, and, if the party is arrested by the military, it is the duty of the officer to deliver him over, immediately, to the civil authority, to be dealt with according to law." After this statement, Taney remarked that he would put his opinion in writing and file it in the office of the Clerk of the Circuit Court before the end of the week.

Accordingly, on June 1, the Chief Justice filed his famous opinion in the case of Ex parte Merryman.[9] For

and direct him to have a copy placed in the hands of the President of the United States, so that that high Officer may perform his Constitutional duty of seeing that the laws are enforced.' These were almost his exact words, if not identically the same.

"During both sittings he never varied from his manner of calm dignity.

"I have a distinct mental picture of the venerable Chief Justice, on one of these mornings, walking across the pavement into the Court House, leaning on the arm of his grandson, R. B. Taney Campbell, and passing through a crowd of respectful and sympathizing, but silent spectators.

McHENRY HOWARD,
5 May, 1919."

"Major William M. Pegram, at the meeting of the Maryland Historical Society, in April, 1919, also gave an interesting account of this event, of which he was an eye-witness.

[9] Tyler, pp. 423, 646; Taney's Dec., 246, 9 American State Trials 880; Moore's Rebellion Record, I, Diary 92. In a letter to Conway Robinson, written on April 10, 1863, he stated that he had left out, in the composition of the opinion, two references he wished he had included, viz.: (1) that the Declaration of Independence stated that one reason for the revolt of the Colonies was that the King "has affected to render the military independent and superior to the civil power," and the Constitution was framed on the principles of the Declaration; and (2) that Thomas Mifflin, President of the Confederation Congress, when accepting the resignation of Washington's command of the army, at Annapolis in 1783, said to him: "You have conducted the great military contest

once, Tyler's grandiose manner is not one whit too grandiloquent in writing that "there is nothing more sublime in the acts of great magistrates that give dignity to governments, than this attempt of Chief Justice Taney to uphold the supremacy of the Constitution and the civil authority in the midst of arms." He recognized no truth in the maxim, "*Inter arma, silent leges,*" and he fearlessly performed his duty, though the aged jurist knew what peril he might incur, and remarked, as he left the house of his son in law, James Mason Campbell, that "it was likely he should be imprisoned in Fort McHenry before night; but that he was going to court to do his duty."[10] The opinion plainly stated that he "had supposed it to be one of the points of Constitutional Law, upon which there was no difference of opinion[11] and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by Act of

with wisdom and fortitude, invariably regarding the rights of the civil power through all disasters and changes." Taney closed his letter with the remark that Washington's conduct contrasted, "finely and nobly," with that of "the military men of the present day." (Tyler, p. 460.)

Biddle (Const. Hist., p. 193) speaks of the ex parte Merryman opinion as "this admirable expression of the law upon a subject involving the right of a freeman of protection against arbitrary arrest and punishment" and as "a fitting conclusion to the long and distinugished life of the Chief Justice." He criticises Binney's defence of Lincoln. Mikell (4 Gt. Am. Lawyers 188) enthusiastically wrote that there is "no sublimer picture in our history than this of the aged Chief Justice—the fires of Civil War kindling around him, . . . serene and unafraid, while, for the third time in his career, the storm of partisan fury broke over his devoted head."

[10] Tyler, p. 427. Tyler's suggestion that the scene should be perpetuated in a painting has never been carried out, but I hope that it may yet appear among the mural decorations of the Baltimore Court House. Geo. T. Curtis (B. R. Curtis's Life I 240) spoke of the opinion in ex parte Merryman as a "noble Vindication of the writ of Habeas Corpus," which will command the admiration and gratitude of every lover of constitutional liberty, as long as our institutions shall endure."

[11] Tyler, p. 647.

Congress." He commented upon the fact that "no official notice" had been "given to the courts of justice, or to the public, by proclamation or otherwise," that the President claimed this power. Reference was made to Jefferson's request to Congress, at the time of Burr's conspiracy, to determine whether the public required the suspension of the writ and then Taney boldly flung down the gauntlet, saying that he believed "that the President has exercised a power which he does not possess under the Constitution." The respect which Taney held for the high office that Lincoln filled required a plain and full statement of the grounds of the Chief Justice's opinion, so as to show that the legality of the President's act was questioned, after "a careful and deliberate examination of the whole subject."

The clause of the Constitution, which authorizes the suspension of the privilege of the writ of *habeas corpus* is in the ninth section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. After the grant of powers to Congress, the Constitution guards "certain great cardinal principles, essential to the liberty of the citizens, and to the rights and equality of the States by denying to Congress, any power of legislation over them, which might have been "attempted, under the pretext that it was necessary and proper to carry into execution the powers granted." "The great importance which the framers of the Constitution attached to the writ of *habeas corpus* to protect the liberty of the citizens is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers—and even in these cases, the power is denied, and its exercise prohibited, unless the public safety shall re-

quire it." Congress may, in truth, judge conclusively, as to the requirement of the public safety. "but the introduction of these words is a standing admonition to the legislative body of the danger of suspending" the writ.

It is the second article of the Constitution, Taney continued, that provides "for the organization of the executive department and enumerates the powers conferred upon it and prescribes its duties. And if the high power over the liberty of the citizen, now claimed, was intended to be conferred on the President, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of this power." The article carefully limits his authority and his powers, in relation to the civil duties, as well as those belonging to his military character. "He may not even arrest any one charged with an offence against the United States," in Taney's opinion, "nor can he authorize any officer, civil or military, to exercise this power," for the fifth article of the Amendments to the Constitution expressly provides that no person "shall be deprived of life, liberty, or property without due process of law—that is judicial process." Even if Congress suspended the privilege of the writ of *habeas corpus* and a "person, not subject to the rules and articles of war, was afterwards arrested and imprisoned by regular judicial process," Taney held, that "he could not be detained in prison, or brought to trial before a military tribunal," without violation of the Sixth Amendment, assuring the accused the right to a public jury trial.

The President's only power, where "the life, liberty, or property" of a private citizen are concerned, in Taney's view, was that given him in the third section of

the second article, "which requires that he shall take care that the laws shall be faithfully executed." That clause meant that "he is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself; but he is to take care that they faithfully carried into execution, as they are expounded and adjudged by the coördinate branch of the Government, to which that duty is assigned by the Constitution." In other words, in exercising this power, the President acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.[12]

Taney believed that these "provisions in the Constitution" were "expressed in language too clear to be misunderstood by anyone" and that they

> left no ground whatever for supposing that the President, in any emergency or in any state of things, can authorise the suspension of the privilege of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of *habeas corpus*, and the judicial power also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessity of government for self defence, in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution.

[12] The inconsistency of this position with that taken by Taney's friend, Andrew Jackson, in the Cherokee Cases, can not escape any reader who recalls the period of Jackson's presidency. Taney's view here is far at variance with that of the man who said, "John Marshall has made his decision, now let him enforce it." At that moment, a stirring blast upon Taney's bugle horn would have been worth a thousand men, but he gave no encouragement to the forces of union and in the minds of his friends, the Perine family, he left the impression that he sympathized with seccssion. This impression may not have been correct, but Taney was blameworthy in so acting as to leave this impression.

After a somewhat extended account of the experience of England with the writ of *habeas corpus* under the Stuarts, which account Taney drew from Blackstone and Hallam and which he gave, because he maintained that the provision in the Fifth Amendment was "nothing more than a copy of the like provision in the English Constitution," he turned to American precedents and found them easily. Story's Commentaries[13] and Marshall's opinion in Ex parte Bollman and Swarthwout[14] distinctly placed the power to suspend the writ in the hands of Congress.

Taney could not forget that the suspension of the writ was not the only point involved, but he foreshadowed the ground later taken by the Court, forbidding the establishment of military law, when the Civil Courts were available,[15] and he insisted that, up to the time of Merryman's arrest, "there had never been the slightest resistance, or obstruction, to the process of any Court, or Judicial officer of the United States in Maryland, except by the military authority." Therefore, the military officer, who "had reason to believe" that Merryman "had committed any offence against the laws of the United States," ought to have gone to the proper legal authorities and followed the ordinary course of the law.

If the authority confided by the Constitution to the judiciary may, "under any circumstances, be usurped by the military power at its discretion, the people of

[13] III Sec. 1336.

[14] 4 Cranch 95.

Willoughby (Supreme Court, p. 75) wrote that "when President Lincoln refused obedience to Taney's decision in the Merryman case, he acted in an unconstitutional manner." The "dilemma in which Lincoln was placed was the result of a form of government with limited powers."

[15] Ex parte Milligan.

the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer, in whose military district he may happen to be found." Such was the hard dilemma, which Taney placed before the country. He had exercised all his power, but that power had "been resisted by a force too strong" for him to overcome. He could only order that the proceedings be filed in the Circuit Court and that a copy be sent to the President, in the hope that "the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him."

"The natural strength" of the aged jurist's intellect had not been abated, when he penned this opinion. For forcibleness, perspicacity, and convincing logic, it was not exceeded by anything he ever wrote. Undoubtedly, Taney was legally right and Lincoln was legally wrong. Undoubtedly, Lincoln's course was dangerous and, if acquiesced in, might well have been a detrimental precedent in the time of a less scrupulous and less devoted successor. Yet the reader must regret that the Chief Justice showed in his words, no appreciation of the facts that the life of the country was at stake in those days and that to Lincoln much was to be forgiven because he loved much. The occasion offered Taney a magnificent opportunity to give men a clarion call to patriotic fulfilment of their Constitutional duties and to personal services to secure the preservation of the Union. The opinion is the product of the mind of a lawyer, not of that of a statesman, of a man who loved his country, but whose love was encrusted in legality. Taney sent a copy of the opinion to Lincoln, who apparently took no notice of it, a fact which must cause

regret as a blemish in the character of the great President. Merryman was finally released without trial[16] and a fierce war of pamphlets arose over the question of his arrest and detention. Lincoln's position found its chief support in a pamphlet entitled "the Privilege of the Writ of Habeas Corpus" by the great Philadelphia lawyer, Horace Binney. Taney's position found its leading advocate in his former associate on the Supreme Court Bench, Judge Benjamin R. Curtis.[17]

Lincoln felt that he should defend his position[18] and, in the original draft of his message to Congress at the following session, wrote:

> In my opinion, I violated no law. The provision of the Constitution that the privilege of the writ of *Habeas Corpus* shall not be suspended unless, when in cases of rebellion of invasion, the public safety may require it, is equivalent to a provision—is a provision that such privilege may be suspended when, in cases of rebellion or invasion, the public safety does require it. I decided that we have a case of rebellion and that the public safety does require the qualified suspension of the writ of Habeas Corpus, which I authorized to be made. Now, it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, I cannot bring myself to believe that the framers of that instrument intended that, in every case, the danger should run its course, until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.

[16] 3 Scharf's Md. 430.

[17] Life of Curtis, I, p. 350 and p. 459. S. S. Nicholas of Kentucky in a separate pamphlet and R. L. Buck in the Danville Quarterly Review for December, 1861, also warmly upheld Taney's contention.

[18] 4 Nicolay and Hay 176. See 6 Richardson's Messages and Papers of the Presidents 25 for final form.

Lincoln's logic is not convincing and has not convinced the American people. Congress by statute[19] vested the right of suspending the writ of *habeas corpus* in the President and that Statute impliedly asserted that the power to authorize such suspension was placed in itself alone. Winthrop, in his "Military Law"[20] sums up the whole matter, by saying that Taney's "ruling has been concurred in by a series of decisions in the United States and State Courts and by other recognized authorities."

A curious sequel to this incident occurred in the Confederate States. Alexander H. Stephens, Vice President of the Confederacy, was bitterly opposed, during the latter part of 1864, to the attempts of Jefferson Davis to act in the same way as Lincoln had done. On December 5, he wrote his brother, Linton, from Richmond, that he had read Taney's opinion on the preceding day. "It is a great paper, I will try to have it reprinted in Georgia. It sets at naught the prevailing opinions here on the power of Congress over this great writ of right,"[21] and on Christmas Eve, with the same purpose, he went to the *Whig* office and offered the proprietors $250, if they would republish Taney's decision.[22]

When he wrote his "Constitutional View of the War," some years later, he had not changed his high opinion of the value of Taney's opinion, the text of which he printed in an appendix to the book. "In the decision," he wrote, "will be found those vital principles of our federal compact—made for war as well as for peace—

[19] Act of 1813, chapter 81.
[20] Pages 53–57.
[21] Johnston and Browne's "Life of Stephens," p. 475.
[22] Life of Stephens, p. 476.

which should ever be the guide of all in authority, whether in the civil or military service, and which will remain forever to be studied and cherished by every true friend of the Constitutional Liberty in this Country."[23]

Taney's bitterness against the action of the President was so great that when his wife's grandnephew, McHenry Howard, came to bid him goodbye before starting South to enlist in the Confederate Army, two or three days before June 1, Taney said to the young man: "The circumstances under which you are going are not unlike those under which your grandfather (Col. John Eager Howard) went into the Revolutionary War."

Yet, Taney's detachment from partisanship was such that he left the impression on his ardent young relative that "he held to his lofty ideal of being at the head of one of the three great coördinate departments of government under the Constitution, and confined himself to his duties in that high office."

Taney's own view upon secession and the proper policy to be pursued toward the sister States, was that it were better to permit the South to depart from the Union, as he showed in a letter he wrote ex-President Franklin Pierce from Washington, on June 12, 1861, in answer to one from Pierce expressing approval of the opinion in the Merryman case.[24]

His sentiments were expressed nowhere else in writing, as far as I know, and are so important that they should be reproduced in full. Taney wrote:

> Your cordial approbation of my decision in the case of the *habeas corpus* has given me sincere pleasure. In the present

[23] Vol. II, p. 414.

[24] The letter is printed in 10 Am. Hist. Rev. 368.

state of the public mind, inflamed with passion and seeking to accomplish its object by force of arms, I was sensible of the grave responsibility which the case of John Merryman cast upon me. But my duty was plain—and that duty required me to meet the question directly and firmly, without evasion—whatever might be the consequences to myself.

The paroxysm of passion into which the country has suddenly been thrown, appears to me to amount almost to delirium. I hope that it is too violent to last long, and that calmer and more sober thoughts will soon take its place; and that the North, as well as the South, will see that a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors, and which, end as it may, will prove ruinous to the victors as well as the vanquished. But at present, I grieve to say, passion and hate sweep everything before them.

The Merryman case was not the only thing which troubled Taney at this time. He had invested his "very small fortune," entirely, in Virginia state stock.[25] After he removed from Baltimore to Washington, he appointed a friend, Mr. D. M. Perine, as his attorney in fact, to collect the interest through the Union Bank, where Taney still kept his account. In the latter part of June 1861, Mr. Perine sent the order for its payment as usual and had it returned to him unpaid, on account of a law recently passed by Virginia, forbidding the "payment of dividends to stockholders in the non-seceding States." A few days later, the Union Bank received a letter from its Richmond correspondent requesting the return of the order and stating that an attempt would be made to have the interest paid. Mr. Perine wrote Taney to ask his opinion and, on July 18,

[25] Tyler, pp. 479–482.

Taney replied from Washington, refusing to consent that any steps be taken to collect the money. He wrote his friend:

> I cannot receive the money. It is true it is due to me from the State; but . . . . if mine is paid, it is a matter of favor and not of right, under the existing law of the State. If I were a private individual, I would accept it; but, in my official position and in the present posture of public affairs, I cannot consent to an exception in my favor, when other stockholders in Maryland are refused one.
>
> I am sensible that this proposition has arisen from the personal kindness of friends in Richmond, who know that public life has not enriched me; and I am very sure that it never entered their minds that anyone would suspect them of unworthy motives in offering, or me in receiving it. But yet I think the offer was made inadvertently and under the impulses of kind feelings which prevented them from looking at the interpretation which baser minds might put upon the offer. Malignity would not fail to impute unworthy motives to them and me, and in the present frenzied state of the public mind, men, who do not know my Virginia friends or me, would be ready to believe it.

The letter is one of a high-toned, upright gentleman, but the loss of the income must have tried Taney sorely.

In December, 1861, the Supreme Court met as usual, there being two vacancies on the Bench. Taney was ill a great part of the term and yet he took an active part in the work of the tribunal. Justice McLean had died and Taney delivered a brief eulogy over him.[26] He also delivered a number of short opinions upon matters of practice, as was his wont.[27] He held that to

[26] 1 Black 12.

[27] (1) Brown v. Hart, 1 Black 38, Writ of error and service of citation on lawyer; (2) Wabash and Erie Canal v. Beers, 1 Black 54, finality of decree of Circuit Court; (3) Hecker v. Fowler, 1 Black 95, writ of error not on record;

have a review of the action of a State Court on the ground of violation of the State Constitution the point must have been raised in the Court below.[28] In other cases, he decided that it was not negligence to present on Monday for payment, a check drawn on Saturday;[29] and that, though a corporation is not a citizen within the meaning of the Constitution, yet there was a legal presumption that its members are citizens of the State in which the corporation had its legal existence.[30] He refused to grant a writ of prohibition against the execution of the penalty of death imposed upon a man for engaging in the African slave trade, which had been declared to be piracy,[31] In two cases, he discussed the limits of the admiralty jurisdiction,[32] holding that, while the Court had never regarded the federal admiralty powers restricted to those used in England, yet it did not claim all civil law powers for admiralty courts.

The year of 1862 wore away, with its unsuccessful Peninsular Campaign in Virginia of the Army of the Potomac under McClellan and the unsuccessful Maryland campaign of the Army of Northern Virginia under Lee. Lincoln filled the vacancies in the Supreme Court by the appointment of two Union men, Justices Clifford and Field. The Session of the Supreme Court, which opened in December 1862, was the last at which Taney presided. His health was clearly failing and he

(4) U. S. v. Knight, 1 Black 488, procedure as to reopening a case concerning land ownership in California; (5) Maguire v. Tyler, 1 Black 195. He dissented (p. 203) in a case involving a Louisiana land title, as he thought there was no jurisdiction.

[28] Farney v. Towle, 1 Black 350; Hoyt v. Sheldon, 1 Black 516.

[29] Brown v. Hart, 1 Black 38.

[30] Ohio & Miss. R. R. v. Wheeler, 1 Black 286.

[31] Ex parte Gordon, 1 Black 503.

[32] Bags of Linseed, 1 Black 108; Steamer St. Lawrence, 1 Black 522.

delivered only three opinions at that term and these were brief and in unimportant suits.[33]

The most important event of this term in which Taney took active part was the decision of the Prize Cases, which involved the question as to whether Civil War existed before Congress declared it on July 13, 1861, and, consequently, whether Lincoln had the right to blockade the coasts of the Confederate States prior to that time.[34]

Richard H. Dana wrote that it was a "difficult and delicate task" to satisfy the Supreme Court that the executive had possessed this right, without "weakening a claim to treat the Confederates as rebels," and that there was a common belief that the Court at the outset "was inclined to very different views, some even doubting the right to use force against the rebels." The decision was in favor of the lawfulness of Lincoln's establishment of the blockade; but Taney joined with Justices Catron and Clifford, in agreeing with Justice Grier's dissenting opinion, and the decision was made by the narrow majority of one.

During the sitting of the Court, Justice Wayne wrote Taney, suggesting that the Justices call upon the President, on New Year's Day, 1862. Too great bitterness had entered Taney's soul to permit him to do this and he briefly responded that he expected to have

[33] (1) Callan v. May, 2 Black 543, concerning real estate in the District of Columbia. He held that the allowance of an appeal does not show that the judge granting it thought the appellant was right. (2) Congdon v. Goodman, 2 Black 574. The controversy was held to be not a Federal but State one. (3) De Kraft v. Barney, 2 Black 714, another case from the District of Columbia Court. Jurisdiction must come through money involved, or a right the value of which may be calculated in money, not through a guardianship of the person and property of children.

[34] See T. K. Lothrop's Charles Francis Adams, vol. II, p. 414. 2 Black 635.

guests on that day and, besides, that he knew of no binding custom which should cause it to be necessary for the justices to make such a call.[35]

In February 1863[36] Taney wrote the Secretary of the Treasury a powerful protest against the levy of an income tax of three per centum upon the salaries of federal judges. He appealed to the Constitutional provision that the compensation of the judges "shall not be diminished during their continuance in office" and, properly, claimed that the tax was such a diminution. This provision of the Constitution is not only plain, but is one of the "most important and essential" ones. "The articles, which limit the powers of the Legislative and Executive branches of the Government," Taney wrote, "and those which provide safeguards for the protection of the citizen in his person and property, would be of little value, without a Judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement, warp their judgments."

He spoke thus of the matter:

> The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth and are of a character that requires it to be perfectly independent of the other departments. And in order to place it beyond the reach, and even above the suspicion of any such influence, the power to reduce their compensation is especially withheld from Congress and excepted from their power of legislation.

Although the act was in so far "unconstitutional and void," there was no way to bring the matter before the

[35] 13 Md. Hist. Mag. 167.
[36] Tyler, 432.

Secretary except by letter, for no judicial proceeding upon this question could with propriety be heard and decided by any judge, since all had an interest in it. Taney was unwilling to "leave it to be inferred," from his silence, that he admitted or acquiesced in the right of the Legislature to diminish, in any way, the salaries of judges. "Having been honored with the highest judicial station under the Constitution," Taney continued, "I feel it to be the more especially my duty to uphold and maintain the constitutional rights of that department of the Government, and not by any act or word of mine, have it supposed that I acquiesce in a measure that displaces it from the independent position assigned to it by the statesmen who framed the Constitution." He requested that the protest be placed on the public files of the Treasury Department. The Secretary, Salmon P. Chase, who afterwards succeeded Taney as Chief Justice, took no notice of this letter and, after waiting for several weeks, Taney, with the assent of his fellow Justices, had the letter entered on the Court's records.

Taney was unquestionably right in his contention and, in April, 1872, the Treasury Department changed its practice and ceased to deduct any part of the Judges' salaries.

About this time, must be dated two manuscript opinions which are in the New York Public Library. One dealt with paper money and the possibility of Congress making it, by enactment, a legal tender for the payment of debts. Taney denied the power to do this, as it was neither granted in express terms, nor incident to a power conferred, nor necessary and proper to carry out such a power. The power to emit bills of credit had been denied to the States and was not con-

ferred on Congress. Congress had power to fix the value of foreign coin, to prevent States from making such coin a legal tender at an exaggerated value; to coin money, that is to stamp marks of value on bits of metal; and to borrow from willing lenders; but these powers are far different from the power to clothe paper money with the qualities of legal tender.

The other opinion was against the constitutionality of the conscription law. The Confederacy which existed prior to the Constitution was a mere league of independent States. Under the Constitution, a line of division was marked out and each government was independent of the other in the sphere assigned to it. "Neither owes allegiance to, or is inferior to the other," Taney continued. "The citizen owes allegiance to the general government to the extent of the powers conferred on it, and no further, and he owes equal allegiance to the State, to the extent of the sovereign power they reserved." He shows in his discussion, the old fatal dualism, the old failure to distinguish between fealty and allegiance, the old refusal to acknowledge that no man can serve two masters. Neither government, in Taney's view, "could lawfully afford protection to the citizens beyond the limits of their respective powers, no allegiance can be claimed or is due, from the citizen to either government beyond those limits." It is a divided allegiance.[37] The "sovereignty of the general government is not a general and pervading one" and "the sovereignty of the State, to the extent of the reserved powers, is wholly independent of the general government."[38] Congress may raise armies exclusively under federal control, but these

[37] He cited Ableman v. Booth to prove this statement.

[38] He cited the 11th Amendment to the United States Constitution to prove this.

national forces must be volunteer. If conscription is constitutional, the militia of the States is absorbed in the army. Great Britain raised her armies by volunteering and such was the contemporaneous interpretation of the power given Congress. The war power of the federal government is as clearly defined in the Constitution as is the peace one. Under any other interpretation, the government created by the Constitution is put aside and a temporary one is installed in its place. The State has the sole right to enlist the militia, yet, under the conscription law, the Federal Government can disorganize the States, as their officers are not exempted, though Federal officers are. Taney added, "I speak of the Constitutional and lawful powers, not of the physical power which the Constitution had placed in the hands of federal government." The "Federal government pervades the whole nation and is supreme in its field, but it is limited" in its sphere. "The State sovereignty preserves tranquillity in the State, and guards the life, liberty and property of the individual citizen and protects him in his home and in his ordinary business pursuits."[39]

An interesting light on Taney's character is afforded in connection with the working of the draft.[40] His negro body servant Madison, who had waited upon Taney so long as to become indispensable to the Chief Justice in his extreme old age, was drafted. Taney's physician. Dr. Grafton Tyler, had long known that Madison had organic disease of the heart and was, therefore, disqualified. Taney also knew it; but when Dr. Tyler

[39] The Supreme Court, in the December Term 1917, decided that the Draft Law of 1917 was constitutional in the case of Arves v. U. S., 38 Sup. Ct. Rep. 159.

[40] Tyler, p. 482.

proposed to make an affidavit to that effect, the old Roman refused to permit the servant to be so excused, but paid $100 for a substitute for him.

Taney's last official duties were performed in connection with the Spring Term of Court in Baltimore, in 1863. In May, one Carpenter came before him there. For failing to obtain a permit prescribed for trade in Maryland, Carpenter's goods had been seized. Taney held that these executive regulations were void, and the acts done thereunder were illegal. He maintained[41] "if these regulations had been made directly by Congress, they could not be sanctioned by a court of justice whose duty it is to administer the law according to the Constitution of the United States." There was no doubt, but that "the United States have no right to interfere with the internal and domestic trade of a State. . . . . Undoubtedly, the United States authorities may take proper measures to prevent trade or intercourse with the enemy."

Nevertheless, "a civil war or any other war, does not enlarge the powers of the Federal Government over the States or the people beyond what the compact has, given to it in time of war. . . . . Nor does a civil war, or any other war, absolve the judicial department from the duty of maintaining, with an even and firm hand, the rights and powers of the Federal Government and of the States, and of the citizens, as they are written in the Constitution, which every judge is sworn to support." The aged justice, again, insisted against the truth of the saying: "*inter arma, leges silent.*"

The last decision which is known to have been given by Taney was one in the Circuit Court at Baltimore, on June 3, 1863, in the case of "The Claimants of a

[41] Appleton's American Annual Cyclopedia, 1863, p. 202.

large lot of merchandise versus the United States."[42] The goods had been seized by the Provost Marshal in October, 1862, after the persons from whom they had been taken, had "been seduced and betrayed into the purchase of the goods by the Provost Marshal's officers," as Taney bluntly put the matter. The agent of the Provost Marshal had wormed himself into the confidence of the family of one of the owners of the goods, had exhibited forged permits and clearances, had placed in the carpet bag of his supposed associate letters addressed to persons residing in the South, and had induced him to load the goods on a schooner with the view of carrying them from North Point on the Patapsco River to Virginia. The agent went with him, until the vessel was overhauled and stopped by a Federal tugboat. Taney "could recall no similar case in the jurisprudence of this country or England." He "could see no possible benefit to accrue to the government from such a seizure that would, in any way, compare with the great evil that would arise from a court of justice countenancing such conduct by a condemnation of the goods. It would encourage officers to betray the weak and imprudent into all sorts of violation of law and would be demoralizing, in the extreme, to the officers themselves." He was at a "loss to see how any court of justice could condemn property under the circumstances of this seizure, unless the means employed be also countenanced." The parties who claimed the goods came "from the South and, perhaps, intended to return on the first favorable opportunity;" but they had not engaged in any illicit trade previously and the goods "were not of a hostile character, tending to aid or arm those in rebellion against the government." In his

[42] Tyler, p. 436.

fierce indignation, Taney denied that the goods were, "at the time of the seizure, proceeding from Baltimore to Virginia. The claimants may have desired to carry them there and may have thought they were going there," but "the substantial fact is"—and after that fact Taney ever sought—"that they were going to Marshal McPhail's office." The law required that both the goods and the vessel carrying them be forfeited, and this "vessel belonged to the Government officers!" He summed up the case, by saying that vessel and "goods were, although unknown to the claimants, in the custody and control of the Government officers all the time, and cannot be condemned under the libel in this case, even though the Court should overlook the immorality of the proceedings and look only at the case in its legal aspect." The goods, or their appraised value, were ordered to be returned to the claimants. As Taney said there was no probable cause for the seizure, the Marshal had to pay the "damages and costs sustained by the claimants." Tyler rightly styles these acts of the Federal officers as "vile practices," and this and other instances of these practices did much to cause a large part of the people of Maryland, for a whole generation, to feel hostility to the Republican party, which was in control of the Federal Government during the Civil War.

There was a pleasant side to Taney's life, even during the troublous days of the war. Yearly, on his birthday, he received a letter of compliment from the Judges of the Court of Appeals of Maryland, which he acknowledged with the more pleasure, because he considered that, whatever of merit he had achieved, he owed to his "training in the Maryland Courts and the Maryland Bar."[43]

[43] Tyler, p. 449.

A few old friends were still left and to one of them, Mr. Justice James S. Morsell of the Circuit Court of the District of Columbia, Taney sent a photograph, as a token of friendship, in the spring of 1863.[44] The recipient was the last of the friends of Taney's youth in Calvert County, who "were remembered with great warmth of affection" by him. Judge Morsell was the older of the two. "They were born in the same neighborhood and were playmates, hunting wild game in the woods, and fishing and bathing in the streams and rivers of their native county," and were linked together "by their youthful joys," as Tyler writes, "in an enduring friendship." Morsell, in his note of acknowledgment of the photograph, referred to the "highly prized, early, and long continued friendship," between them.

His relations with the officers of the Supreme Court were very pleasant, so that Tyler wrote, some seven years after Taney's death, in his somewhat florid style, that "his very name warms their hearts and brightens their countenances. . . . . Such was the charm of his manner that every newly appointed officer, was, at his very first interview, brought to regard him with affectionate reverence." As a proof of this fact, Tyler quoted Ward Lamon,[45] who had been appointed Marshal of the Court by President Lincoln, as saying: "Chief Justice Taney was the greatest and best man I ever saw. I never went into his presence on business that his gracious courtesy and kind consideration did not make me feel that I was a better man for being in his presence." So too Mr. Meehan, the Librarian of the Court, exclaimed: "What a glorious old gentleman the Chief Justice is! He always treats me in such a way as to

[44] Tyler, p. 450.
[45] Page 448.

increase my respect for myself." Tyler's remark upon these speeches is that there was a notable combination in Taney of "such an iron will, such a determined purpose, such undaunted courage, and all the heroic elements of character," with "such a delicate sentiment of kindness, manifested in his courtesy." The biographer found the "source" in "his charity of heart and his high breeding."

Not only the officers, but also the Associate Justices of the Supreme Court venerated him. On his eighty-seventh, and last birthday, in March, 1864, when he was detained at his home by indisposition, he was waited upon, in a body, by his brethren, who paid their respects officially to him and "tendered him their congratulations on the returning anniversary of his birthdays." Mr. Justice Wayne, who presided in Taney's absence over the Court, adjourned the session early to make this visit with his associates and, after they left the house, the officers of the Court with several members of the Bar and a few friends waited on Taney, who received them with "urbanity and affability."[46]

Taney's friend, Severn Teackle Wallis, who was afterwards his eulogist, wrote him annually from Baltimore on these birthdays and always received appreciative replies from the aged judge.[47] In 1863, after thanking Wallis for his sincere and cordial approval of his conduct and praising Wallis for his course of opposition to the National authorities which had led to an incarceration in Fort Warren, from which Wallis had just been released, Taney's gloomy feelings led him to continue: "At my advanced age, I can hardly hope to see the end of the evil times on which we have fallen.

[46] Tyler, p. 455.
[47] Tyler, pp. 458, 459.

But I trust you will live to see the civil power restored in Maryland to its supremacy over the military and the homes and firesides of its citizens once more safe under the protection and guardianship of law." A year later Taney's gloom had deepened, yet curiously enough, he never quite lost hope of the Republic and so he wrote:

> I have not only outlived the friends and companions of my early life; but, I fear, I have outlived the Government of which they were so justly proud, and which has conferred so many blessings upon us. The times are dark with evil omens and seem to grow darker every day. At my time of life, I cannot expect to live long enough to see these evil days pass away; yet I will indulge the hope that you, who are so much younger, may live to see order and law once more return, and live long enough to enjoy their blessings.

After all, there was an ineradicable root of Federalism in the man and his hope for Wallis found abundant fulfillment, for the latter lived until 1894.

Another Baltimore friend, David M. Perine, also corresponded with him and, from time to time, entertained him at his country seat near Baltimore. On the eve of his birthday in 1862, Taney wrote Perine[48] and in the letter, with great piety, expressed his "gratitude to the Giver of all good, that I have been so long spared to those I love and that age has not been without true and tried friends to comfort and solace it. And among the foremost in that number, I need not say how sensible I am of your constant and unwearied friendship for now nearly forty years, and never forget the proofs you have given of it, in the darkest and most sorrowful scenes of my long life." He had been saddened by the misery which had so suddenly come upon the United States; but, though he saw no immediate hope

[48] Tyler, p. 452.

of an improvement in affairs, he serenely continued: "God's will be done; and we must meet it with the best faith of Christians and the firmness and courage of manhood."

A year and a half later,[49] his letter to Perine was still gloomier. He never recovered from the slight put upon the Judiciary by the disregard of his opinion in the Merryman case, and the downfall of slavery, or the brightening prospect of Union success came but little into his vision when he wrote. He had been very ill and had suffered from the depression which naturally comes to an ill man, especially an aged one. He was again in his office, but had not left his home. He felt as "well as usual, but not so strong" as before his illness. During the hot season, he wrote that he had "often thought of the pleasant days I have passed at your house, enjoying the fresh country air and walking over your grounds. But my walking days are over." He had no thought however, of resigning his position and hoped to "linger along to the next term of the Supreme Court. Yet very different, however, that Court will now be from the Court as I have heretofore known it. Nor do I seen any ground for hope that it will ever again be restored to the authority and rank which the Constitution intended to confer upon it. The supremacy of the military power over the civil seems to be established; and the public mind has acquiesced in it and sanctioned it. We can pray for better times and submit with resignation to the chastisement which it may please God to inflict upon us." His prognostications as to the future of the Supreme Court were fortunately untrue and the next generation saw that tribunal restored to its pristine position of dignity and influence.

[49] On August 6, 1863, Tyler, p 454.

When his eighty-seventh birthday came, he wrote Perine, thanking him for his letter and, with more cheerfulness, told him that: "At the age of eighty-seven, I cannot hope to see many more birthdays in this world and can hardly hope to live long enough to see more peaceful and happier times. You I trust, who are so much younger than I am, will be spared to see and enjoy them."[50] Mr. Perine's son, Mr. E. Glenn Perine, sent him a carved walnut cigar box as a birthday gift in 1864, and Taney's graceful note of thanks—a model of such an epistle, told the donor that Taney "took much pleasure in showing your birthday present to the Judges of the Supreme Court and other friends, who did me the honor of paying me a birthday visit, and having its beauty and taste admired by them all." His courtesy and thoughtfulness thus lasted until the very end of his life.[51]

Several months later, on June 24, 1864, he sent his photograph to his niece, Mrs. Alice Key Pendleton, wife of Hon. George H. Pendleton, together with a graceful note. With the photograph, he enclosed a sentiment which seemed to him, "although applicable to any situation in life," to be "especially fit to be borne in mind by every Judge, who, in the present time, is called on to administer and maintain the law."[52] He remembered she had studied Latin and so copied, in the original, four lines from the third Ode in the third Book of Horace's Odes:

> Justum et tenacem propositi virum—
> Non civium ardor prava jubentium,
> Non vultus instantis tyranni
> Mente quatit solida.

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[50] Tyler, p. 455.
[51] Tyler, p. 456.
[52] Tyler, p. 465.

In writing Tyler concerning her uncle, Mrs. Pendleton spoke of the "beauty of his life and character" and said that the sentiment "has a noble signification, as emanating from him. So truly is it the precept and example of his life."[53]

To the end of his life, Taney was a "constant reader of current literature" and enjoyed novels. The *British Quarterly Reviews* and *Blackwood's Magazine*, he read "with singular interest." Tyler informs us that[54] "newspapers, on all sides of politics, he had read to him daily. He had been fond of Macaulay's "History of England" and of Campbell's "Lives of the Chief Justices" and of the "Lord Chancellors of England." Shakespeare was one of his favorite authors.

In one of his later illnesses, Samuel Tyler sat up with him at night.[55] After Taney was convalescent, whenever Tyler would come to see him, Taney would lie in bed, smoking a cigar, and talk with Tyler "to such a late hour, that one of his daughters would come into the room to break up the conversation. The topics of conversation were such as showed as great familiarity with every day life as any gentleman at any age would possess." Dr. Grafton Tyler, for many years the Chief Justice's physician, remarked often that Taney was "like a disembodied spirit; for that his mind did not in any degree participate in the infirmities of the body."

Whenever friends came in to see him, he "inquired about everything that was going on."[56] During the autumn of 1864, he gradually failed in health and died, on October 12, in his eighty-eighth year. Friends car-

[53] Tyler, p. 467.
[54] Tyler, p. 485.
[55] Tyler, p. 457.
[56] Tyler, p. 484.

ried his body from Washington to the cemetery of the Jesuit Novitiate in Frederick, where they placed it beside that of his mother for whom he kept his love to the very last.[57] Two members of the Frederick Bar, to whom Tyler dedicated Taney's life, Judge Richard H. Marshall and James M. Coale, with the consent of Taney's family, placed over Taney's grave a plain flat stone—a suitable memorial of the simple life of the jurist.[58]

[57] Tyler, p. 485.
[58] Scharf's Chron. of Baltimore, p. 631.