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The Unfolding of Law in the Mountain Region[1]

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We are assembled in the chief city of the Rocky Mountain Region. It is a country old in history, but new in its final development. The days of Spanish romance rested on the land. Then came long years of scattered wilderness life. Finally a new civilization suddenly developed its unique laboratory of law and of order. There are men now living who have here seen the law emerge from its primitive forms and pass through its seething phases until at length it reached what perfection modern law now possesses. Of no other portion of the United States can this be said. This is the theme to which I address myself.

The southern reaches of the Rocky Mountains were rich in history when the masts of the Mayflower were still saplings in the forest. Fray Marcos de Niza had seen, but seen in vain, the strongholds of the Zunis. Coronado had sought and failed to find the fabled riches of Quivira. Eighty years before Elder Brewster saw the Rock of Plymouth the Spanish conquerors found that on the Rock of Acoma, in the wastes of what is now New Mexico, there flourished, as from times then lost in the past there had flourished, a civilization with its fixed rules of conduct and of property rights. That civilization still flourishes, with its own common law.

The years that followed the earliest explorations were long years of invasion, attack, settlement, repulse and resettlement. Harried by the nomadic Indians and distrusted by the sedentary tribes, the arms of Spain and the power and culture and love of the Church crept together into the foothills and through the valleys. With them went the law of Spain. When at last in 1692 de Vargas came to Santa Fé in triumph, in the same year in which Salem was troubled by witchcraft, the law of the invader was definitely established. It remained without interruption until General Kearney bore the flag of our own country into the capital of New Mexico more than one hundred and fifty years later.

[1] An address delivered at a joint meeting of the American Bar Association and The Colorado Bar Association at Denver, July 14, 1926.

For more than a century after the first Spanish settlement the military governors sent expeditions to the north and into the region where we are now gathered; but the native tribes were mere wanderers, and there were no cities to conquer and little to add to the wealth of New Spain. In the meantime French explorers and traders had crept into the wilderness and worried Spain in its assertions of control over the unsettled country. After the disastrous defeat of a military movement against French and Indians in 1720, and supposedly in what is now western Nebraska, the French were permitted to continue their operations upon the territory in this quarter without much more than official protest.

At length Louisiana passed from France to Spain and back again to France, and finally much of the northern portion of the mountains came to the United States through the Purchase in 1803. But even then there was no law north of the Arkansas River. Major Zebulon Pike came into the country in 1806 by authority of the government. With him came the first evidence of possible future business for a lawyer.

It appears that a few years earlier William Morrison, of Kaskaskia, Illinois, had sent his agent, Baptiste LaLande, to Santa Fé with a stock of merchandise to sell for him. LaLande disposed of the goods at a large profit, but he seems to have liked the climate of the country and perhaps thought it unwise to hazard a long return journey through savage lands merely for the purpose of delivering the cash to his principal. He deemed it best to remain among the New Mexicans and to employ the new capital in trade for himself and to become a prosperous citizen; and this he did. When Major Pike came to the region he had with him a man named Robinson, who had been commissioned by Morrison to collect the debt from LaLande. Robinson pushed on into the Spanish country for that purpose, but, alas, poor Robinson landed in jail and the collection business received a setback from which it took years to recover.

For almost thirty years thereafter there was no definite settlement north of New Mexico, and, even then, what there was confined itself to private trading posts, where the law was that of the autocracy of the Trading Company or the strong arm of the trader. The country west of the Continental Divide belonged largely to Mexico. East of it the land north of the Arkansas River knew only trappers, traders and roving Indians. The north bank of the Arkansas itself was the magic line of advance and retreat. Here men could settle free from the law of Mexico and undisturbed by any law of the United States. Thus with impunity they could smuggle their wares into the Southern Republic and from it import their whiskey into the No Man's Land. Happy were the isolated traders who lived along the border in the far and unorganized Indian country, remote from all process and from all legal execution.

The first real northern movement in the establishment of a government of law in the region came in 1847 with the settlement of the valley of the Salt Lake in Utah by the Mormons. They had trailed through the desert and across the mountains, and under a remarkable man they began the establishment of a remarkable theocracy in a land then part of Mexico.

For several years their law was entirely that of the spiritual leaders. The presidency of the church was not only the religious head, but it was also the source of temporal law. The president himself discouraged litigation as a "condescension far beneath his people and as opening the door for the admission of every unclean spirit." During the migration itself the law was ordained by the ecclesiastical leaders. For illustration, at one of the stations of the western march it was ordered—(but more from motives of economy than of morals or of industry)—that no corn should be made into whiskey, and that if any man prepared to distill whiskey or alcohol his corn should be taken and given to the poor. It would appear that the prevailing illicit taste was Bourbon. It would also appear that the law permitted no referendum.

There was a scattering of Gentiles in the new community and it was difficult for them to believe that exact justice was measured out by the bishops. For other reasons, however, it soon became apparent that there must be some governmental authority with power recognized by the United States, for the region had passed into our possession. The Mormons met the situation by organizing the provisional and unauthorized "State of Deseret"—Deseret being the honey bee of the Book of Mormon.

A constitution was adopted which purported to cover the country north to Oregon, east to the Rocky Mountains, and west to the Sierra Nevadas, including a point of contact with the Pacific Ocean. It predicated its right upon the recital that as all civil government originating within the Republic of Mexico had been abrogated by the Treaty of Guadalupe-Hidalgo, and as congress had failed to provide for the civil government of the region, the establishment of a free and independent government had become necessary.

The law of the church was the law of the people. No property was allowed to be held for speculation, taxes were levied for

public purposes, all mining was discouraged, and the ideal of life lay in flocks and fields and worship. With the coming of the State of Deseret came more stable conditions. A legislature was created and a formal system of courts and procedure came into existence. The law, however, was not founded on the common law, but largely on the Book of Mormon, for the people, the church and the government were the same. However enforced, it worked out with satisfaction, at least to the Saints, and, notwithstanding Gentile complaints, early and disinterested observers stated that justice was impartially administered.

Respect for the courts was exacted. In this, one ancient prerogative of the common law was wiped away. The losing litigant and the defeated lawyer did not have the alternative right of going to the tavern and berating the court. Conduct of this sort resulted in fine or imprisonment to teach a proper regard for the law itself. With this state of affairs, it is said upon authority that "no lawyer succeeded in making much impression on the pockets of the community."

It does not seem that the Mormons desired or hoped that the State of Deseret should remain an independent government. What they wanted was the stability which every new and reputable civilization rightfully demands. They immediately petitioned congress for recognition as part of the Union. Their memorial stated the situation thus:

> WHEREAS, we are so far removed from all civilized society and organized government and also by natural barriers of trackless deserts, everlasting mountains of snow, and savages more bloody than either, so that we can never be united with any other portion of the country in territorial or state legislation with advantage to ourselves or others, etc.

Looking backward from the standpoint of more modern material development, the fear that they could *never* be united with the other portions of the country is interesting; but from their own angle of vision the word did not seem too strong. In 1850 the Territory of Utah was created, and a definite system of jurisprudence began to function.

Texas had come into the Union in 1845, but so far as the Mountain Region was concerned its undefined claims of territory had merely complicated the situation as to any enforcement of law. Mexico had flung its tremendous private grants of land along its own northern border, and these with their involved questions of Spanish law in American environment have stood to haunt the courts to this day. Many of these grants were small

empires in themselves. Fraudulent though some of them may have been, there was a sound purpose underlying them. Their very size and location resulted in a boundary passed to the defense of the grantees and thus aided the grantor in the establishment of settled conditions and in protection against savage tribes far from the seat of the Mexican government itself.

The larger portion of the Mountain Region was later in development than the remainder of the continental territory of the United States, notwithstanding its early partial exploration. It was crossed by the migration to California, brought about by the discovery of gold there in 1848; but in their haste those Argonauts were not interested in stopping to develop a country of natural beauty but of forbidding aridity and of no apparent prospects. The Rocky Mountains were looked upon from an Eastern point of view as a natural frontier to be set as the unimportant western boundary of prairie settlement and development. They were not regarded as containing the possibility of future statehood or the necessity for the immediate enforcement of law.

Gold was the magic medium that suddenly changed the entire aspect. It brought about a more urgent and concentrated effort for the speedy establishment of some definite forms of law than the entire country had ever known. It led directly to the formation of the mountain territories.

The struggle for law in a new country is always an interesting thing, and nowhere has it been more enlightening than in the Rocky Mountains. It has been the same in one form or another in all of the states of the Mountain Region, but in none of them more complicated or strenuous than where we are now assembled. If there were no other reason, however, the fact that this is a joint session of the American Bar Association and The Colorado Bar Association and that the present year marks the semi-centennial of the admission of Colorado as a state might justify special consideration of the things that happened here. This combination of meetings is a peculiarly happy one for the speaker, for whatever in this address may be charged with inaptness for either one of the Associations may find a blind refuge in the fact that another Association is in session.

The situation locally differed in one respect from that found elsewhere in American history, for it involved the evolution of law and of self-government by large masses of people suddenly finding themselves congregated in a new and unoccupied land in which no law had ever been enforced, and beyond the practical jurisdiction and effective protection of any form of govern-

ment. It differed from that of Utah with its pre-arranged theocratic government. It differed from that of California, which had a developed civilization long before gold was found in Sutter's mill race. It differed from that of the slow spreading of an agricultural population into new fields to which the old laws are thus gradually transported.

The gold rush to the Pike's Peak Region in 1858 therefore found the country unfitted for formal law enforcement. What is now Colorado was then made up of a part of the Territory of New Mexico, a part of that of Kansas, a part of that of Nebraska, and a part of that of Utah; and there were large areas of unorganized Indian country in which even the theoretical application of any local law was of doubtful existence.

The movement of population was one of men from all parts of the country converging without prearrangement to a common point. They were of no one origin, habitation or training save that, largely, they were Americans. Many of them were highly educated, most of them were intelligent, and all of them had, temporarily at least, severed their ties to tempt fortune. They came into a barren country, hundreds of miles from even a primitive frontier government. With differing religions, social antecedents and schools of thought, they suddenly found themselves in urgent need of the protection of the law and its processes. The law was of the very essence of the thing which the gold hunter demanded for the safety of his individual operations as against every other man whose hand was reaching into the common treasury of nature. They could not wait as isolated pioneers, nor could they with hope of success call upon remote and practically inaccessible courts. They quickly found themselves constituting separate and congested mining camps and supply towns, and the immediate necessity for definite law and its enforcement was presented.

The common law was useless in their mining operations, for the land was that of the federal government. Every prospect hole dug upon it and every placer bar worked was dug or worked through technical tresspass. No satisfactory analogy could be found in the Mexican law, by which every discoverer of a mine of the precious metals on government domain was compelled to pay a royalty to the government itself upon the metals extracted. Our federal government had not yet spoken, but its lack of repudiation of a similar trespass in California pointed the way.

Therefore the people established their own mining districts, with their own regulations. By popular vote they laid down the rules which they thought fair in handling the land to which none

of them had title save that of possession under an uncomplaining sovereign owner. At general meetings and by majority approval they fixed the size of mining claims, the labor to be bestowed upon them, the forfeitures of possession to be enforced for failure to work the properties, and all kindred matters. This subject has been discussed in treatises on mining law, and it is not now intended to enter upon it in any detail. Let it suffice to say that the Supreme Court of the United States finally declared that the policy of the government had always recognized an unlimited right of mining in those who chose to enter upon and take the risks of the business. This right resting upon tacit consent passed at length into definite federal legislation. The interesting point of the matter is that the new rules of law developed themselves from customs seemingly at variance with existing law, and that when the legal contentions became justiciable the courts found a way to take the rules themselves into American jurisprudence without the aid of an Act of Congress.

It was not, however, the mere title and working of mining claims that demanded protection. The whole social compact was involved. Therefore the miners in each locality and by popular meetings established their own courts, which our Saxon and Norse ancestors would have recognized as at one with their folk-moots. In both there was free speech for all, fair discussion, and final judgment by the people themselves. The miners of each community framed their own simple but effective codes of criminal and civil law. The form was nothing; the substance was everything. They elected such judicial and other officers as they thought the necessities required, and by mass meeting adopted such statements of law as they thought fair. All of the officers were accountable to a general meeting, and every defeated litigant had a right of appeal, sometimes to a jury and sometimes to a readily-called general meeting. The judgment of the meeting was final. There was no other court to which to look.

The questions in the cases were simple, for the laws were simple. For illustration, the first Miners' Court in the Colorado region was that organized in the Gregory District immediately after the discovery of the Gregory lode in May, 1859. The criminal code of the district shows a freedom from that prolixity which law-writers condemn. I quote:

> Sec. 1. Any person guilty of wilful murder upon conviction thereof shall be hung by the neck until he is dead.
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> Sec. 2. Any person guilty of manslaughter or homicide shall be punished as a jury of twelve men may direct.

Sec. 3. Any person shooting or threatening to shoot another, using or threatening to use any deadly weapons except in self-defense, shall be fined a sum not less than Fifty nor more than Five Hundred Dollars and receive in addition as many stripes on his bare back as a jury of six men may direct, and be banished from the district.

Sec. 4. Any person found guilty of petit larceny shall be fined in a sum double the amount stolen, and such other punishment as a jury of six men may direct, and be banished from the district.

Sec. 5. Any person found guilty of grand larceny shall be fined in a sum double the amount stolen and receive not less than fifteen nor more than three hundred lashes on his bare back, and be banished from the district and such other punishment as a jury of six men may direct.

So far as the record goes, there is no suggestion that any man ever questioned the meaning of the Miners' Laws or quibbled over their construction. Even the criminal was quite sure what the words "murder," "manslaughter" and "homicide" meant; but if he had doubts, the ultimate public meeting to which he might appeal would soon advise him.

Little attention was paid to imprisonment as a punishment. The immediate necessity was that the community be rid of evildoers so that law-abiding men could go about their lawful business; therefore hanging and banishment constituted the important punishments. Whipping was a close third, as it produced its results without interfering unduly with the affairs of the district or imposing upon it the burden and expense of maintaining a jail.

There were many trained lawyers in the region, and some of them thereafter became of great eminence in their profession; but they had come as miners, and not as lawyers. They participated as miners in framing the local laws, but the early movement in that regard was not theirs as lawyers. The new communities disliked lawyers as such. They felt that they could settle their own controversies with fairness as between men, and without involving themselves in matters which they thought unfitted for the needs of a busy community where each man was intent on his search for fortune. The laws of some districts specifically forbade the appearance of a lawyer in any case, but provided that if a litigant chanced to be a lawyer his adversary should then have the aid of some other lawyer in presenting his own side of the case.

The establishment of Miners' Courts spread rapidly throughout the Mountain Region. Their developing rules quickly extended on the civil side of the law. Within a year the trained legal mind began to assert itself, and provision was made for pleadings. These were conformable in some cases to federal practice—(though there was none in the region)—and in other cases to certain of the Kansas Statutes, but then only so far as those statutes might appear consistent with the laws and local affairs of the particular district. Gradually, workable codes sprang up, which expressly or impliedly recognized the causes of action of the common law and their ordinary methods of enforcement. In one of the districts, however, the miners resolved that while they recognized the settled principles of law, they deplored all unnecessary litigation, and that all attempts "to cut down or take the legal or equitable rights of miners or claimholders when clearly secured by previous existing law shall be considered incendiary and revolutionary, and all persons offending shall be considered as ineligible to any of the rights and privileges secured to miners and claimholders by the laws of this district."

Here was *stare decisis* with a vengeance. What a hopeless environment in which to expect a modern Chitty to make a living! But, crude though it was, it was a splendid manifestation of the earnestness of the demand for law, for order and for peace. And how remarkable that it should have occurred within present memory!

Through it all there was an awakening of new modes of thought. It is now clear in this state that a right to the use of water is real property; but long before it was definitely made clear a meeting of miners had flatly, though somewhat bluntly, resolved:

"That all water claims shall be held as real estate *and not jumpable.*"

All men knew what the law visited in the case of unlawfully seizing or "jumping" another man's mining claim; and the words "and not jumpable" added more force to the resolution than would a volume on legal interpretation.

There were cases of conflicting jurisdiction of districts, and in one instance, when a judge of a foreign district had assumed power over matters thought to be beyond his jurisdiction, the meeting of the complaining district settled the question by defying the judge, solemnly declaring him a violator of everything, including "the law of nations," and resolving to resist his encroachments at all hazards.

Contemporaneous with the courts of the mining camps, there grew up similar popular tribunals in the valleys. One class of

them was called "People's Courts." These devoted themselves to punishing the greater crimes. They worked in harmony with the other courts as the latter gradually became established, but did not surrender their own authority when it was found necessary to exercise it. They were not mobs or vigilance committees. They were organized by formal, though popular, meeting, which selected judges, a sheriff, a clerk, and at times a jury. The cases proceeded with formal rulings, the defendant was given the benefit of counsel, and a verdict of conviction was finally submitted to the meeting for its approval or rejection. There were many acquittals, and in 1859 and 1860 there were no more than six convictions for murder in Denver.

A traveler in the region at that time has left this record of one of the trials:

> Before leaving the city we witnessed the execution of a German who had been found guilty of murder after a fair trial in the provisional court held beneath the shade of some large cottonwoods below the city, a rope circle marking its limits, while a carpenter's bench not only furnished a seat for the judges, a bar for the pleaders, but the general furniture of the court. After a trial which occupied the better part of two days, the German, who was an ignorant, uncouth specimen of his race, was found guilty of wilful and premeditated murder by three judges and the sentence of death by hanging was considered the proper punishment; but before sentence was passed the verdict was referred to the people for ratification, and the general acclaim was in its favor. The prisoner was then asked if he had anything to say, and he arose and addressed the people in a few unintelligible words whereby he insisted that the act was committed in self-defense, this being the purport of his whole harangue. Sentence was then passed to the effect that on the following day he be hanged between the hours of 2 and 4 o'clock P. M.

It may be added that when the execution took place it was preceded by religious services, in which the prisoner joined, and that he confessed his crime.

In July, 1860, a murder occurred, and the criminal escaped. He was pursued and captured on the southern border of Kansas; but the authorities at Leavenworth refused to surrender his custody to the officer. The sheriff returned to Denver and procured authority which satisfied the situation. The prisoner was brought back, tried, found guilty, and hanged. It has been written in the unpublished manuscript of a pioneer that, "the long pursuit, the capture, the rescue, the surrender, the transportation

through a wilderness country for more than a thousand miles by one man, the long and sharply contested trial and the orderly execution by an isolated community just struggling into existence has probably no parallel in history."

In the same year the first formal presentment was employed at a People's Court. It exhibited the uncertainties of the people themselves as to just where the venue should be laid and as to just what their governmental jurisdiction was. It likewise expressed their underlying purpose of developing law as law and not as violence or the rule of a mob. It is this:

> The People of the Pike's Peak Gold Region vs. Patrick Waters.
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> The People of the Pike's Peak Gold Region assembled at the City of Denver the 19th day of December, 1860, do find and present that on or about the 30th of November, A. D. 1860, at the said Pike's Peak Gold Region one Patrick Waters did make a felonious assault on one Thos. R. Freeman then and there being, and him, the said Thos. R. Freeman, with premeditated malice did murder and slay, contrary to all laws of God and man.

We approach the larger question of definite government of more than local and transitory power. The demand for protection through the establishment of courts was but part of this larger demand. Notwithstanding the nominal existence of a Kansas County, which purported to include the immediate region where we are now gathered, there was a serious question whether the jurisdiction of Kansas itself existed. This was on account of the terms of the Organic Act of the Territory of Kansas and its relation to unorganized Indian country. Therefore the situation was met locally in a variety of ways, inconsistent though persistent.

Late in 1858 a delegate was elected to go to Washington and press for the organization of a territory. Congress gave him no serious consideration; and the suspicion that new territories might soon become new states, to be aligned on one side or the other of the developing slavery question, made his case hopeless. Even the obvious reason for some form of government—that the region was remote and inaccessible—proved to be a reason urged against the organization of a new territory.

At the same time the people elected a representative to the Kansas legislature. He secured some recognition, but little else that was practicable at long range; and the people went about their business as best they could, some of them professing to recognize Kansas supremacy, others denying it, and all struggling

to the same end through such shifting methods as they could devise. In 1859 a probate judge was elected in Denver, but it is quite uncertain what Kansas County was thought to be holding the election. Everywhere the actual administration of affairs was purely local.

Then came another of those curious manifestations of the struggle for government through unlawful means. Within a short walk from the location of the building where we are assembled the people met and solemnly resolved upon the organization of a new and independent state of the Federal Union—the State of Jefferson, to be named for no political reason, but in honor of the Master of the Louisiana Purchase. The address urging co-operation in the movement pressed the fact that the region was remote from the nearest possible seat of government. The intervening country was a barren wilderness, swept by savage tribes, and "the time necessary for communication with any such authority was so great as to make such reliance almost a farce." It was said:

> What criminal will be deterred from the commission of crime when his judge is separated from him by seven hundred miles of arid waste? Government of some kind we must have and the question narrows itself down to this point: Shall it be the government of the knife and the revolver?

The matter proceeded in a most orderly way. At a general election a formally prepared constitution was submitted, as well as the alternative of a territorial form of government. The plan for a state was defeated; that for a territory was adopted. The State of Jefferson therefore went "glimmering," but some of the provisions of its proposed constitution are now incorporated in the constitution of the State of Colorado. The constitutional law of a state is, after all, the one great democratic expression of the mass of the people.

Thereupon the Territory of Jefferson was organized, and at an election late in 1859 a governor and other officers were chosen, trial courts were established, and a supreme court created. The legislature enacted a set of conservative laws, some of which are still the basis of present property rights. The new courts functioned, but the old courts also remained. In the mountains the people were loath to surrender a local jurisdiction that had been satisfactory. In the outlying valleys there was a feeling that perhaps, after all, Kansas had some authority, exercised or not; and, for precaution, realty titles were commonly referred to the courts constituted on that theory. People's Courts were still

arranged for the important criminal offenses. In Denver an association of landowners, fearful of their status under shifting jurisdictions, set up their own tribunal. The municipal government—such as it then was—increased the confusion by establishing municipal courts, which, for good measure, were given power far beyond local matters. In the meantime the courts of the Territory of Jefferson had plenty of work, and the supreme court proceeded with due formality and through men of ability.

It is doubtful whether so friendly an admixture of jurisdictions has ever been seen elsewhere, or so little friction in working out the desired result. There was a curious comity between courts. At times changes of venue were permitted from one court to another, although they claimed no common governmental basis. At one time the same prosecuting attorney was elected for several such courts, and he could accommodate personal preferences for jurisdiction.

The Territory of Jefferson endured through two sessions of its legislature and two elections of officers; but recognition by the federal government was approaching and it found difficulty in maintaining its organization until it faded away upon the establishment of the Territory of Colorado in 1861. It had served its purpose. When at last a lawful government with its lawful courts succeeded to the primitive conditions there was no desire to repudiate what had gone before. Upon the contrary, and to settle all question as to prior legal action in civil causes, the legislature specifically validated all proceedings growing out of any judgments or decisions rendered in former times by Miners' Courts or other tribunals where both parties had appeared or had had notice. The activities of those courts had not ceased immediately upon the creation of the new territory, and therefore the validation was extended to acts performed as late as a year after that event.

Looking backward from the point of view of today it is difficult to visualize the state of affairs as it developed in the Mountain Region. Our familiarity with the present prevents a proper perspective. It has been said of the early courts, however, that their officers were rarely charged with improper conduct, and still more rarely correctly so charged. Of the bar it was the frequent comment that its members were more interested in the development of stable conditions than in the assertion of technical positions. In consequence even in the days of a variety of courts of doubtful jurisdictional foundation an attack upon the authority of any of them was practically unknown.

There is no longer any reason for attempts at provisional

government in the United States. It is not difficult, however, to imagine what we ourselves would have done or tried to do had we found ourselves in the wilderness with a growing population, a rapid increase in the accumulation of property, a natural yearning for some fixed rule of action, and an honest demand for orderly government and the protection of society. There were provisional forms of government adopted in other mountain states than those to which attention has been particularly directed, but they all rested upon the same underlying human need. Much earlier the Tennessee country had expressed it for a brief time, and perhaps with less real necessity, in the State of Franklin. In the Mountain Region of the west the provisional governments went still farther and held the lamp of law and order until it could be passed clean and lighted and in the fullness of time to less trembling hands.

As fixed conditions came from time to time, the direction the law should take became important. The sources of political title and the character of the country itself presented questions as to how far the common law of England had been or should be adopted.

The New Mexican situation was complicated. When Kearney took possession in 1846 a civil code was prepared. It provided, among other things, that "all laws heretofore in force in this territory which are not repugnant to or inconsistent with the constitution of the United States and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this territory." This code was made up in large measure of existing Mexican laws and of Missouri statutes. The Missouri coloring was probably due to the fact that Kearney committed the preparation of the code itself to two Missourians, who were volunteers in his campaign. Much of this code has remained as the law to this day.

The Organic Act by which the Territory of New Mexico was created in 1850 provided that, "the Supreme Court and the District Courts respectively shall possess chancery as well as common law jurisdiction." The legislature could not make laws in conflict with this Act. When, therefore, at a late date the question became acute, the Supreme Court of New Mexico said that congress did not intend by the use of the words "common law" to "speak into existence" the common law of England "in all its fullness"; that when the territory was acquired it was inhabited by an enlightened people, possessed of a complete system of law, and that it could not have been the intention of Congress to strike this down and by equivocal words to impose

laws which bore little resemblance to those by which the people had always been governed. The court, therefore, held that a just interpretation of the Organic Act required a protection of all rights of persons and things, whether arising under the former Mexican civil law or under the common law, the Acts of Congress, or the statutes of the territory.

In 1876 the New Mexican legislature enacted that the common law "as recognized in the United States" should be the rule of decision. The courts held this to mean the common law as applicable to the local conditions and circumstances, and that the statute did not constitute a repeal of the existing local statutes. Thereupon they sustained the provisions of Spanish laws of the eighteenth century, which had been continued in force by the general declaration of the Kearney code.

In the Mountain Region farther north the common law had never obtained. The acquisition of the country occurred long after the American Revolution and from nations enforcing the civil law. The incorporation of the common law was, therefore, necessarily by legislative enactment. Unlike the action of certain states recognizing the common law on the ground that it came with our ancestors, or employing the date of the Revolution as the time of its adoption, the subject was entered upon in a more tentative way and with more freedom of future action.

Virginia was the general source of the statute enacted in Colorado in 1861. The Virginia statute had passed to Indiana in 1807 and to Illinois in 1819; but in 1845 the latter state had already qualified the form of the statute by guarding against inapplicable portions of the common law. This was the thought that appealed to the Mountain Region. Accordingly, Colorado adopted the common law, but only and by specific limitation "so far as the same is applicable and of a general nature." The liberty thus reserved has never been abused by the courts, and it has been of the utmost value in building up a new country. In addition, in enforcing the common law, the courts have not felt hampered by any inquiry as to the date when any particular rule was announced in England.

Later on, Wyoming made clear its position by confining its adoption to the applicable portions of the common law. Montana enacted that: "In this state there is no common law in any case where the law is declared by the code or the statute."

Two things have stood out through the entire development: The desire to conform to the rules of the common law, and a full recognition of the fact that those rules could not be made applicable in certain vital matters.

For illustration, reference may be made to the law of tres-

pass. The outlying prairies of the Mountain Region possessed an early value almost entirely as ranges for cattle. The strict rule of the common law that compels every man to keep his cattle upon his own land or respond, at least in damages, for trespass on the lands of another, would have meant impossibility of existence for the pioneer settlers in a land of sparse vegetation. The federal government long recognized the right of pasturage on its lands as being by implied license where the lands were left open and no act of government had forbidden their use. As between private land owners the common law rule was universally deemed inapplicable.

The primitive early conditions of certain eastern states were thought at times to warrant a somewhat similar departure, but the matter was vital to the west as it developed. Here the new rule that he who objected to cattle ranging upon his private lands must protect those lands from such trespass was treated as requiring no statute, but as being a legal upgrowth of the necessities of life. It was soon counterbalanced, however, by statutes permitting a land owner to fence his land, if he desired, with a prescribed character of fence. In that event the right to damages was accorded him when his actual *close* was broken.

The courts did not declare that there had been any change in the law. Unlike certain of the older portions of the country, there was no legislation or legislative assumption that justified a conclusion that the common law had been abrogated. Upon the contrary, the judicial view was that the rule of the common law in this regard had never existed in the region. Finally the Supreme Court of the United States sustained this position, and it added to the argument by pointing the fact that much of the territory had come from Mexico with its civil law. On this departure from the common law the entire cattle industry was built up. It not only made life in the region possible, but in a measure supplied the east with food. Now the open ranges are gone, and the stockman has become a farmer; and as the reason for the new rule is failing, the rule itself is being narrowed.

For illustration again, the law of dower could receive little consideration, through the very necessities of the situation. The roughness of life in a new mining field made the region at first largely a "man's country," with the women left at the old homes, some to be brought west if things went well, and others unceremoniously abandoned. There were men who, for reasons good or bad, came with changed names, and burning their bridges behind them. The possibility of procuring the deed or release of a distant and perhaps unknown woman was remote. In mining claims dower was unthinkable; in business generally it was impracticable. At first it was ignored, and partly by custom, partly by statute, and partly by judicial decision it passed from view. In Colorado it has been said that, "it is common knowledge that the husband's estate by courtesy like the right of dower of the wife has had no existence or recognition in this state."

In 1869 the same rights were abolished by statute in the Territory of Wyoming. Thereafter and as part of the policy of the federal government to restrain and punish the practice of polygamy in the territories of the United States, congress provided for a dower protection of the widow. The courts of Wyoming so construed the Act as to apply to Utah alone, and this was approved by the federal Supreme Court. Gradually others of the mountain states abolished the common law right.

The extinction of this right, however, was coupled with or followed by a grant more valuable in many cases than the former right itself. Quite generally the wife was given rights as a *femme sole* in a way the common law had never dreamed, and the widow was granted a larger portion of the estate of her intestate husband than the law had known. In this state, for example, it has been said as to the legal status of a wife's property and her authority to deal with it during her life, that "she has no husband."

The law of community property as between husband and wife had entered into portions of the general region with the civil law. Arizona, New Mexico and the Pacific states have clung to it as a legacy from Mexican days passed on with a definite continuity of population and of settlement. Its underlying thought is that of partnership, and that marriage creates this relationship as to the property resulting from the labor of both or either of the partners. Dower could not well be engrafted where the law of community prevailed; and where the Mexican law did not exist, and dower was not countenanced, the field was opened wide. In the latter class of cases, however, additional protection was given the wife through homestead Acts requiring her consent to the alienation of the family homestead itself.

The greatest departure from the common law developed in the law of waters. The entire Mountain Region is arid as compared to the east and to portions of the Pacific coast. As the population grew the engrossing question became that of water and its use in agriculture. There was little early controversy in New Mexico, for the civilization was an old one. A new situation was presented, however, as development progressed farther north through the individual ventures of an American population and in a region where the Mexican influence had not been asserted.

California had met somewhat the same question, but under different circumstances. The climatic conditions were different, there was a partial survival of Mexican law, and upon the admission of the state there was already an adoption of the common law. In addition, the local customs permitting a diversion of the water of a natural stream for private use were looked upon in California as a branch of mining law. They constituted a possessory right, finding its origin and its hoped-for recognition in the sovereign land title and implied license of the federal government. It was some time before the courts there could accept the variation from common law principles as applicable to agriculture. Ultimately in California there resulted the establishment of the law of appropriation, side by side with that of riparian rights. In substance the theory was that riparian rights to the use of water exist and attach to the land as soon as the land becomes private property, and that they are protected against adverse private appropriations of water made thereafter, while the same private lands and their riparian rights are subject to adverse appropriations made while the lands themselves were public. For present purposes it is unnecessary to consider how this split doctrine has worked out in practice.

The situation was met in the Rocky Mountain Region in a radically different way, which the very aridity of the country seemed to suggest. The right to the use of running water was looked upon as a common heritage, to be taken into private and permanent possession through diversion and use. These factors combined to form a legal appropriation recognized as against similar appropriations according to the relative dates of the appropriations themselves. It was the law of "first come, first served." There was no acknowledgment of the existence of any theoretical or implied federal grant. The matter was treated as one of local sovereignty in the disposition of a property right considered as inherent in the very nature of things.

The adoption of a rule of law based on this theory is one of the most interesting of American legal developments. It came without prior sanction and in a new country and at the hands of judges who could visualize the future. It came quietly through a Colorado court declaration that:

> The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature whenever such laws assert a controlling influence.

It was ten years after this announcement before any case arose presenting a controversy between a riparian claimant and a hostile appropriator of water from the same stream. Nevertheless the early declaration had been accepted as practically wiping away all claim of the existence of riparian rights to the use of water. Thereupon and rapidly the rule developed that the common law doctrine had not been abrogated, but had never existed.

This fundamental departure met with approval in the Mountain Region until what is now known as the Colorado Doctrine was in general force. With it and with the law of irrigation generally, corollaries have grown which would have shocked the legal conscience of Lord Coke, but which illustrate how the law is, after all, the servant and not the master of advancing civilization.

The nature of the valleys of the region is such that in some there are large streams, in others rivulets; in some there are large tracts of land, in others little soil. It may be that where the fertile land lies there is little water, and that where the streams are large there is little valuable land. No substantial legal difficulty was found in this. If the private right of priority by appropriation could be found at all in the use of water, it was a short step for the courts to declare, as they did, that: "It would be an ungenerous and inequitable rule that would deprive one of its benefit simply because he has by large expenditure of time and money carried the water from one stream over an intervening watershed and cultivated land in the valley of another." Thus the law passed over the mountains until now there are canals which divert water naturally tributary to the Pacific Ocean and deliver it for use upon lands within the drainage area of the Gulf of Mexico.

So also the law has found no objection to the use of the streams themselves as carriers of water delivered to them from other streams. Thus it has developed that such water is caused to flow as much as a hundred miles in its new channel before it reaches the place of its final diversion and use. This and a variety of other lawful practices are the natural outgrowth of the thought that the place of use and the method of delivering the water to that place are immaterial so long as other claimants are not injured. A riparian owner of land is not injured, for he has no riparian right to the water, and so far as another private appropriator of water is concerned, there is no injury unless his prior right of appropriation be infringed.

The normal flow of the natural streams has now substantially

been appropriated, and the present effort is for the conservation of flood waters. This in itself produces new questions, to which the courts are addressing themselves, unhampered by the common law and unaided by much precedent, but guided by the necessities, and by the practical developments of the past, and by nature itself.

The work of the law of waters is not yet done notwithstanding its beneficial and remarkable results in turning a desert into an agricultural empire. A system based on individual rights, however, may ultimately embarrass the development of the common estate; and that economic fact is gradually appearing. If streams existed in the arid region in full proportion to the land and its needs, there would be no question. As it is, great areas must forever remain unirrigated and, seemingly, much watered soil must be uneconomically used.

The early settlers scattered almost at random along the courses of the streams. Therefore it was not possible to establish such a physical sequence of appropriations, consistent with private priorities, as would permit the primary use of water near the headwaters of the stream and a recurrent use of the return flow as it passed to lower areas along the same stream. Nevertheless there are many cases where this would be desirable economically. It was not possible to fortell what lands or altitudes would prove most important in raising crops of the highest value, or those requiring water at specific periods of the season. It was not possible to foresee the ultimate coming of an industrial population which, though late in time, would demand water for its operations. It is for the future to determine how such matters shall be met.

The common law of England grew under conditions which upheld the rights of the riparian land owner in the flow of a stream. Nevertheless it warranted the limitation that prevented his complaint except as against "unreasonable" adverse private diversions. Is it not possible that for the common weal, and by means hereafter to be found legal, the time may come when the absolute and exclusive private right of an appropriator of water in the Mountain Region may find itself subject to limitations for the general good which may then be found "reasonable"?

The American frontier has closed. No longer is there a broad and open field for new legal thought or action. The Mountain Region is still a land of beauty of peak and of plain, but not a country of legal or political isolation. It has long been part of the common whole, in which the general law of the land vibrates, and to which it has made its contribution as its law has unfolded.

A Rectangular Ceremonial Room

By Jean Allard Jeancon

The use of rectangular as well as circular rooms for ceremonial purposes appears to date from a remote period. In the early days of research, in the southwestern part of our country, there appeared to be only one type of room devoted to non-secular uses, but later investigations proved that this was not correct. Dr. J. Walter Fewkes has the following to say with regard to rectangular kivas or ceremonial rooms:

"The rectangular kiva is a structure altogether different from a round kiva, morphologically, genetically, and geographically. It is peculiar to the southern and western pueblo area, and while of later growth, should not be regarded as an evolution from the circular kiva."[1] He further adds:

"The word kiva is restricted to subterranean chambers, rectangular or circular, in which secret ceremonies are or were held."[2]

The following quotation from the writer's report on his excavations in the Chama Valley in 1919 shows that the rectangular ceremonial room or kiva occurs in ruins of a late prehistoric period: "Four rooms (rectangular), which I judged were ceremonial rooms from objects found in them, were in the same relative location in each row . . . on the east, north, west, and south sides of Plaza No. 1. . . . None of these had a bench or other distinguishing feature such as occurs in a kiva or kisu."[3]

It will be seen from these brief remarks that the statement that rectangular ceremonial rooms were used in prehistoric days has a definite foundation. That they should have persisted down through the modern times is not surprising. The necessity for subterranean rooms being in a large measure done away with in historic days, and the breaking down of ancient customs and traditions by the coming of the Spaniards, and later by the Americans, gave the Pueblos a greater freedom in building, and ceremonial rooms, still incorporated in the main village groups, became very common.

Amongst the Rio Grande peoples the circular kiva persisted for some time after the advent of the white men, but in many cases the rectangular one took its place. Amongst the Hopi the problem of excavating in the hard cap-rock of the mesa tops

[1] J. Walter Fewkes, *Antiquities of Mesa Verde National Park. Spruce Tree House.* Bull. 41. Bureau of American Ethnology, 20.
[2] J. Walter Fewkes, *Antiquities of Mesa Verde National Park. Cliff Palace.* Bull. 51. Bureau of American Ethnology, 48 (footnote).
[3] J. A. Jeancon, *Excavations in the Chama Valley.* Bull. 81. Bureau of American Ethnology, 8.

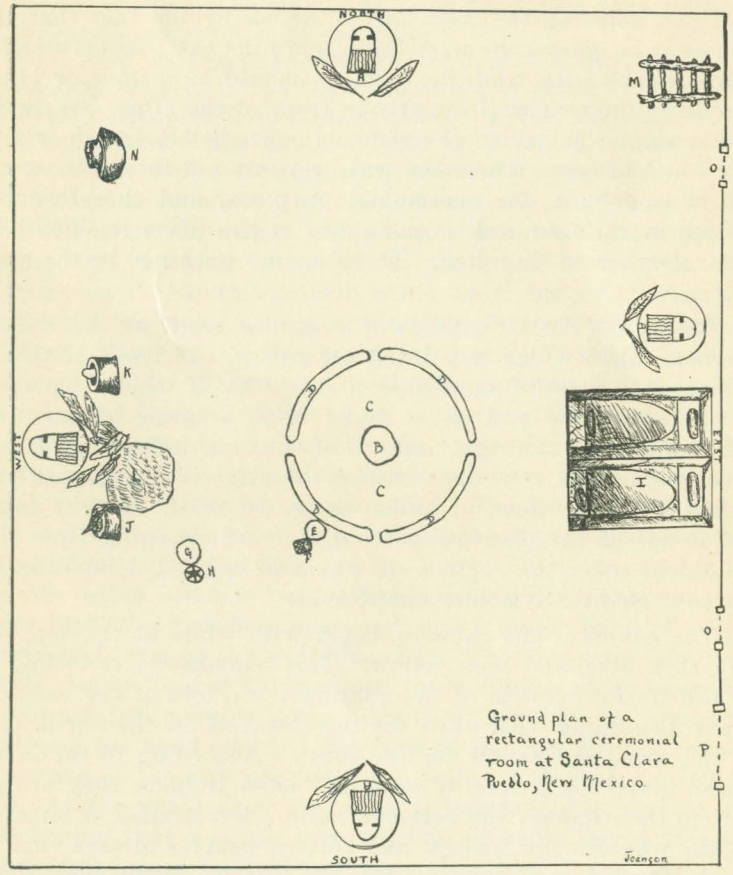
undoubtedly influenced them to build above ground, and as the kiva could be easily incorporated in the main groups, as much a matter of protection and of disguise as for convenience, we find rectangular kivas above ground there.

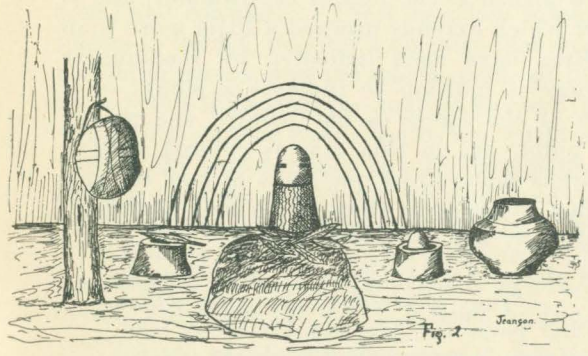
Very early, in ruins of older villages, we find rooms where there has been a concentration of ceremonial objects, and while this does not necessarily infer that the rooms themselves were used ceremonially, yet we sometimes find wall decorations and other features that indicate such use. As we come down to more modern times we find that specific sacradotal functions have been assigned to rectangular rooms, and that this, at some period unknown, has resulted in the rectangular kiva. The rooms thus designated became something more than repositories of sacred and ceremonial paraphernalia, and assumed the position of actual sacred or religious places.

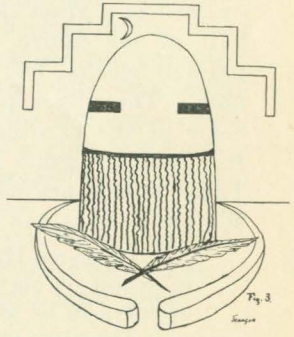
It was the writer's good fortune in 1926 to have the privilege of visiting such a room in the pueblo of Santa Clara, New Mexico, and to be, possibly, one of the first white men to see and enjoy its sacred precincts. The room is situated back of a living room in the house occupied by a member of one of the sacred fraternities controlling its functions. Entry was gained through a low door in the east wall, and while there cannot be any doubt that some of the ceremonial objects were very old, yet they have been repainted, and some objects are of more recent date.

The house in which the room is located is one of the older ones of the village, with a beautiful old roof, and floors of mixed adobe and animal blood. The dimensions of the room are about 10 by 12 feet, and as the floor is pretty well taken up by the ceremonial paraphernalia, it is somewhat crowded, and would not hold over eight or ten persons during a ceremony. As can be seen from the ground-plan (Fig. 1), additional space is occupied by posts supporting the roof. These are not arranged in special manner, but are placed so as to best fulfill their function in the same way as they are in other secular rooms.

There are two windows in the east wall. The floor of the room being nearly three feet higher than that of the room through which one must pass to enter it, these windows look upon the roof of the lower one. The raising of floors in interior rooms, in consecutive levels, is a common feature in the Rio Grande pueblos, and occurs very often in prehistoric ruins of that section of the country. The rooms are usually built one back of the other, three deep, the front room having the lowest floor level and the rear one the highest. The front or exterior room is used as a sleeping room, the second one is used as a kitchen, and the rear one for storage purposes.







Upon entering the room one is struck by the fact that the main altar is against the west wall facing the east; this is strictly in accordance with tradition. There should be a door or other opening in the east wall directly in front of the altar, but owing to the manner in which the room is constructed, the door is a little south of east. The room was probably not intended, at the time it was built, for ceremonial purposes, and therefore the opening in the east wall is not quite in the place it should be with reference to the altar. There are no openings in the west wall.

The altar (Fig. 2) consists of a reredos, made by the wall of the room, upon which is painted a rainbow. In front of this is an elongated cone of sandstone, at the foot of which is a mass of feathers, hawk and eagle, lying upon a large fragment of buffalo hide. On the right and left of the hide are mortar-shaped sandstone vessels. On the north of the altar is a large jar containing a reserve stock of pollen or sacred meal. On the south of it is one of the posts supporting the roof; hanging from this is a shield upon the surface of which is painted a nondescript figure, of possible symbolic significance.

The colors of the rainbow begin with white at the top, red next, then blue, and then yellow. This sequence is according to the Rio Grande system of designating the colors of the cardinal points: beginning with white for the east, red for the north, blue for the west, and yellow for the south. According to the information given the writer by various Pueblo Indians, they always turn, in their dances and ceremonies, in a left-handed or sinistral circuit, whereas the Navajo and related peoples always turn in a right-handed or dextral circuit, the Pueblos going against the sun circuit and the others going with it.

The conical stone is placed at the foot of the rainbow, and is dressed in a grass skirt which extends upward a little more than half of the figure. Eyes have been indicated by rectangular painted marks, but there is nothing to indicate a mouth or a nose. The upper part of the figure is not painted the proper color of the cardinal point, but in this case is colored yellow. In winter the grass skirt is replaced by one made of pine boughs. These stones are similar in form to those described by Dr. J. Walter Fewkes and called by him Corn Goddesses:

> In many Hopi altars the Hopi have a "cone" made of wood or clay, . . . They represent Muyinwu, which appears to be another name for Alosaka, the Germ God. . . . They are survivals of very ancient idols, as several similar objects made of stone found in cliff ruins on the Mesa Verde are so similar in form that they have been regarded as practically the same.[4]
>
> Next in importance to the idol of the Sky god is that of Muyinwu, the Corn Mountain or Germ Goddess, which occupies a prominent place on the majority of Hopi altars. The archaic form is a conical stone or wooden object called the corn hill or corn mound.[5]

On the north and south of the cone are sandstone vessels about 18 inches in height and about the same diameter at the bottom and tapering somewhat as they rise from their base. The one on the south contains water from the first rainfall in the spring, and has an eagle wing tip feather with which to asperge. The container on the north has in it water from the first snowfall in the autumn, and also contains a large, cone-shaped stone painted white. Both of the containers are painted black on the outside. In making the ceremonial aspersions during the summer the sprinkling is always done to the southeast, and during the winter to the northeast. The fragment of buffalo hide in front of the altar is used to make burial moccasins for the custodian of the shrine.

The south altar is very simple, having only the cone, the upper part of which is painted red, and a single band of yellow in terraced form on the wall behind it. The east altar is equally simple, being located to the north of a couple of mealing bins containing two metates, some baskets with pollen or ceremonial meal, and the hand stones. The cone of the east altar is painted white, and on the wall back of it is a yellow disk representing the sun. At the north altar the cone is painted blue, and on the wall behind it is a single terraced line of red. Below this line is a crescent moon painted in yellow (Fig. 3).

In the center of the room is a sort of "world shrine" with four ceremonial openings pointing northeast, northwest, southwest, and southeast. There is a low raised wall, not over three inches in height, making a circular inclosure broken by the ceremonial openings, and the whole inside of this space, not occupied by a post supporting the roof, is covered with white ceremonial meal. On another post close to the world shrine is hung a drum used in the rain ceremonies. In the northeast corner is a ladder leading to a hatchway in the roof, and formerly this was the only means of access to the ceremonial chamber.

There is not room in this short article to go into the esoteric meanings of the colors and other things connected with this ceremonial room, but the writer intends to do so at a later time.

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[4] J. Walter Fewkes, *Fire Worship of the Hopi Indians*. Ann. Report Smithsonian Institution, 1920, 602.

[5] J. Walter Fewkes, *Idols in Hopi Worship*. Ann. Report Smithsonian Institution, 1922, 388.

The Custer Battle

By A. J. Fynn

The regional zone extending along latitudinal lines from the middle of Montana to the middle of Wyoming, and from the Black Hills to the western boundaries of Yellowstone Park, is an area of special attractions even in a region of super-abundant attractions. A majestic series of northwardly flowing rivers—the most conspicuous being the Shoshone, Big Horn, Rosebud, Tongue, and Powder, all pouring into the peerless Yellowstone—gives a strikingly unified aspect to the whole panorama. The water bodies, generally, whether streams or lakes, are fringed with luxuriant trees. The mountain ranges are generally less elevated and more isolated than those found in adjoining states farther south, but there is no dearth of formidable chains with snow-capped peaks worthy of comparison with any of their kind in neighboring commonwealths. Intermingled with bluffs and valleys are stretches of level lands, scores of miles in circumference, on which today are luxuriant grain fields and herds of thrifty live stock. Everywhere beautiful wild flowers greet the eye, and song-birds gladden the ear. The timber lands are scarce except in the mountains. The skies seem to present a more sober appearance than do those of Rocky Mountain states nearer to the equator. The clouds lie in long shreds across the sky, and not so much in the form of thick, dark masses.

Strange, inexpressible feelings come over the visitor as he wanders over this section of earth, and meditates upon the exceptional life and stirring events of the more or less remote past. Here dwelt in their long-continued customary state of hostility to one another some of the most fearless, energetic and powerful Indian tribes of the North American continent. Here were ideal grazing lands for multitudes of buffalo, an animal that comprised the indispensable sustenance of the natives. The discovery of paying gold in the Rocky Mountains and the rapid advance of railroad lines into the buffalo country, along with the quick disappearance of wild food-furnishing animals in general, alarmed the natives and brought forth vehement protests. When new trails and forts were demanded in order to develop the new mining industries in the northern Rockies during the sixties, powerful chiefs, such as Red Cloud, Crazy Horse, Sitting Bull, and a score of other prominent leaders, threw themselves into the contest and stood ready to oppose with every means at their command further intrusions on the part of the white man. Movements on the Bozeman road, the Fetterman massacre, and even

the unsuccessful engagement of Crook on the Rosebud, were convincing arguments that the Yellowstone country was not a place for playing war as a means of amusement.

Those few fleeting years were strenuous for all concerned, but the natives held to their policy with odds in their favor. Knowledge of the country, profusion of numbers, and desperate determination to succeed were powerful factors in the contest. In 1868 a treaty was made granting this territory exclusively to the Sioux.

The finding of gold in the Black Hills was reported by an Indian woman and in 1874 a government expedition under the direction of George A. Custer was sent to investigate. The information returned was flattering, and white men of every caste and character began to rush into the region irrespective of claims or treaties. Government restrictions were of no avail in the hands of gold-seeking mobs. Singly or in small groups adventurers pushed westward over to the banks of the Cheyenne, Tongue, and Powder rivers, into the very heart of Indian possessions. Unpleasant encounters at once took place. Some hot-headed newcomers proposed to organize expeditions at once and drive the natives out of the whole region. Many tribes arose, and the Sioux and Northern Cheyennes traversed the country on murderous expeditions. They were joined by many malcontents from the agencies.

To meet the crisis the Government, in May, 1876, fitted out an expedition in charge of General A. H. Terry. Twelve companies of cavalry, the Seventh Regiment, consisting of some seven hundred men, were placed under the command of General George A. Custer, a daring young man still in his thirties, who in the Civil War had gained great distinction as a cavalry officer.

Outfitting at Fort Abraham Lincoln, North Dakota, the cavalry was divided into two wings, commanded by two distinguished officers, Major Marcus A. Reno, and Captain F. W. Benteen. Some four hundred additional men consisting of infantry, cavalry, and friendly Indian Scouts, made up the rest of the expedition. These were under the command of Colonel John Gibbon. A supply steamer named "Far West" was sent up the Missouri and on up the Yellowstone to the mouth of the Rosebud.

The first problem was to find the enemy, and after the discovery of rather fresh trails, it became evident to the soldiers that the hostiles were camped on the Little Big Horn, an eastern tributary of the Big Horn. This tributary flows northward, carries a moderate volume of water, and in June is swollen by the melting snows from the Big Horn mountains. After consulta-

tion it was decided that Gibbon was to come up the Little Big Horn from the north and plan to arrive in the vicinity of the Indian camp on the twenty-sixth or twenty-seventh of June. Custer was to march southward up the Rosebud, pass westward over the ridge lying between the two water courses, and reach the Indian camp from the south when Gibbon would be due from the north. At the same time, Crook's forces were to be expected from Fort Fetterman. With the troops thus distributed it was believed that the tribes would be pushed into a single body and brought to terms. After a forced march Custer came over the divide on the twenty-fifth of the month, one day earlier than agreed upon. He planned at once to make an attack. The camp stretched along the west bank of the Little Big Horn for a distance of four miles, and consisted of several thousand Indians (estimated as high as fifteen thousand), of whom three or four thousand, at least, were warriors, under the ablest chiefs and medicine-men of the whole region. Among these were Gall, Rain-in-the-Face, Sitting Bull, Two Moons, Crow King, Crazy Horse, Red Cloud, and several others.

Dividing his forces into three fighting battalions, keeping one company, under Captain McDougal, to protect the indispensable pack trains, Custer sent Reno across the Little Big Horn to attack the enemy from the south, but furious antagonists, rushing in upon the troops from three sides and threatening to surround and annihilate his little force of less than two hundred, caused him to return across the river and resume fighting on the eastern bluff. Benteen, with three companies, was to pass farther to the south and west and attack any enemies he might meet. Finding no Indians in his locality, and hearing the fighting in the direction of Reno's men, he tramped over the rougher ground to assist Reno. Custer, with five companies comprising less than three hundred men, passed along the prominent ridge standing out somewhat to the east of the tortuous Little Big Horn, and came in toward the northern border of the camp, four or five miles away from the pack train on which he was dependent for ammunition. The battle-ground was unfamiliar to him and the vast number of the enemy had not been suspected, although he had been warned by his own Indian scouts, especially Bloody Knife.

On the west side of that prominent grassy ridge, at a distance perhaps of a half mile from the bed of the crooked stream, stands today a group of gravestones, indicating the few square rods of ground upon which the little band was, within probably less than a half hour, surrounded and slaughtered.

Since not one of Custer's command escaped to tell the story of the leader's death, much information has been obtained from the Indian participators, although generally they gave this with much reluctance.

At the semi-centennial memorial in June of this year, white men and Indians who were participants in the battle of long ago met on the famous battle-field, exchanged courtesies, and re-told many events connected with this unparalled tragedy.

Discussions relating to the management of the expedition and the fatal results have been many, and not always in good temper. Reno has been blamed for his retreat, but to one standing on the extended field occupied by his little band, with hundreds of infuriated warriors rushing in upon him from three sides and likely to surround him completely, with the stream between him and the ammunition train, his conduct seems justifiable.

Custer's arrival before the approach of Gibbon, his men and horses tired on account of that long hurried march, his lack of knowledge concerning the topography of the country and the number of Indian occupants of the camp, the indefinite mandate to Benteen, and the questionable orders to Reno, had much to do with the result, despite the gallant conduct of the officers and soldiers in general, and especially the climactic heroism of the three Custer brothers and the immortal band that perished with them.

The skill of Benteen and Reno in defending the pack train on that memorable day, and the approach of Gibbon and Terry on the twenty-seventh, caused the Indians rapidly to gather their worldly goods and scatter in various directions into the mountains. Thus closed the battle of the Little Big Horn, a tragic, imperishable part of American history.

The three-day observance of the Custer casualty was attended in June of this year by visitors from every part of the United States. Thousands of automobiles darkened the ridges and ravines of the battle-ground. The famous Seventh Cavalry with its magnificent military band contributed much to the success of the program. The most impressive feature of the whole occasion was the burial, in military fashion, of the bones and accoutrements of a recently unearthed Reno soldier.

There were rodeos and dances in profusion. Some important phases of the program were impeded and omitted on account of the crowds. To the writer one important feature seemed lacking. With thousands of interested and information-seeking citizens at hand, with an especially large proportion of the

younger generation looking on in wonder and admiration, it was regrettable that some western George William Curtis or Chauncey Depew could not have stood on that battle-field and thrilled the multitudes with the recital of the bravery of the soldiers sleeping beneath their feet, and draw lessons from the changes of attitude between the races during the last fifty years, and have predicted the glorious future of this thoroughly united nation. Such an opportunity comes seldom, and this one should not have been lost. One of the many rodeos could have been profitably omitted for this phase of substantial and instructive entertainment.