

LITERARY REFERENCES

To the Bag:

Professor Henderson's article on the citation of literature in legal opinions (11 GREEN BAG 2D 171) used a methodology that may pose some difficulties, particularly when researching literary references in older cases. In ages past, lawyers were intimately familiar with classic works, and often assumed similar erudition on the part of their fellow attorneys. Their style was therefore more allusive or indirect – and it would be hard to find these references in Westlaw. A century or more ago, the norm of citing sources was not so heavily emphasized as now. Thomas Jefferson's famous reference to slavery as being like "holding a wolf by the ears," for example, or his comment to James Madison that the Constitution should be torn up every 19 years because "the earth belongs usufruct to the living" actually borrowed lines from classical literature that he probably assumed his readers knew. (Terence's *The Mother-In-Law*, and Lucretius' *De Rerum Natura*, respectively.)

My own favorite literary reference in law comes from the 1910 divorce case, *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910). A husband sought a divorce against his wife of six years on the ground that her great-grandfather was a black man, and therefore under the "one-drop rule" she was black. This he found intolerable. The North Carolina Supreme Court rejected his petition, and Chief Justice Clark took the opportunity of his concurring opinion to berate him for bringing a case "so void of merit." "The plaintiff by earnest solicitation," he wrote, "persuaded the defendant to become his wife in the days of her youth and beauty. She has borne his children. Now, that youth has fled and household drudgery and childbearing have taken the sparkle from her eyes, and deprived her form of its symmetry, he seeks to get rid of her, not only without fault alleged against her, but in a method that will not only deprive her of any support while he lives by alimony, or by dower after his death, but which would consign her to the association of the colored race, which he so affects to despise." *Id.* at 62.

Clark then went on to refer to an argument made by the hus-

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band's attorney, who had depicted "the infamy of social degradation from the slightest infusion of negro blood" by quoting "from a great writer not of law, but of fiction, the instance of a degenerate son who sold his mulatto mother 'down the river' as a slave." *Id.* This reference was to Mark Twain's last great novel, *Pudd'nhead Wilson*, which happens also to be Twain's most blistering attack on racism and the evil of the one-drop rule. Evidently Clark had read the book, for he answered this by noting that Twain's villain "was punished" for his "crime" – a crime which "surely was not greater than that of this husband and father, who...deems it perdition for himself to associate with those possessing the slightest suspicion of negro blood, but strains every effort to consign the wife of his bosom and the innocent children of his own loins to poverty and to the infamy that he depicts. The jury did not find with him, and he has no reason to ask any court to aid him in such a purpose." *Id.* at 62-63. It is safe to say that in this case Twain's powerful assault on the ludicrous injustice of the one-drop rule had a significant effect.

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