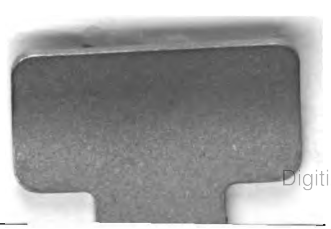
The green bag



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CALEB CUSHING.

BY WILLIAM C. TODD.

ONE of the most eminent men of his time for his long and distinguished career as a jurist, statesman, and diplomatist, and for the versatility of his gifts and his great learning, was Caleb Cushing.

Caleb Cushing was born in Salisbury, Mass., just over the river from Newburyport, Jan. 17, 1800. His first ancestor in America was Mathew Cushing, who came from Hingham, Eng., in 1638, and settled in Hingham, Mass. His father was John N. Cushing, who removed to Newburyport in 1802, and became one of the most successful shipmasters and merchants of that place. Young Cushing was prepared for college by Michael Walsh, author of a noted arithmetic, and was graduated from Harvard in 1817. Mr. George B. Emerson, a classmate, said that though one of the youngest, he was the most distinguished member of a class including many who in after years became celebrated. For two years next succeeding his graduation he was employed at Harvard as a tutor in mathematics and natural philosophy, — a position given only to the best scholars. While there he became specially interested in plants and minerals, and took many long walks to gather them, and formed, it is said, the best collection of Essex County specimens then in existence. He spent hours, too, in the evening studying the constellations. In 1819 he gave a poem before the Harvard chapter of the Phi Beta Kappa Society.

Resigning his place as tutor, he studied law with Hon. Ebenezer Moseley, of Newburyport, and at the Harvard Law School, and on his admission to the bar opened an office at Newburyport. In 1823 he married Caroline Elizabeth, daughter of Judge Samuel S. Wilde, a most accomplished lady, author of "Letters Descriptive of Public Monuments, Scenery, and Manners in France and Spain," which was very favorably reviewed by Alexander Everett in the "North American Review." She died in 1832, and he never married again. They were childless.

Mr. Cushing at once became prominent in his profession, though the Essex County Bar at that time had a galaxy of able lawyers, among whom was Rufus Choate, of the same age, born within a dozen miles of him, who perhaps never had his equal in the United States as a jury lawyer. By contact with these men his powers were stimulated and sharpened. At the same time he entered warmly into the political questions of the day, made frequent contributions to the literary periodicals and the newspapers, and in 1826 published a history of Newburyport. He began life with that indomitable energy and industry which he ever maintained.

In 1825 Mr. Cushing was chosen representative to the Massachusetts Legislature, and in 1826 was elected State Senator, and in both positions was prominent. Too close application, however, had impaired his health, and in 1829 he visited Europe with his wife and remained there two years. Much of this time he spent in Spain, of which country he made a special study, and in whose language he acquired

an unusual proficiency. On his return he published "Reminiscences of Spain," a work in two volumes, which was favorably received, as up to that time this country had been but little visited by American travellers.

Mr. Cushing represented Newburyport in the Massachusetts Legislature in 1833 and 1834, and in 1834 was elected to Congress, where he served till March 4, 1843.

From the first his ability was recognized. Mr. Webster said that "Mr. Cushing had not been six weeks in Congress before he was acknowledged to be the highest authority on what had been the legislation of Congress on any given subject." It was a period of the keenest party feeling, for it was during the close of General Jackson's administration and all of Van Buren's. New questions were constantly arising, some of them of a constitutional nature, and they were discussed with an ability that had not been surpassed before, and has not been since. General Jackson was opposed to the United States Bank, vetoed bills for its recharter, withdrew from it the Government funds, and deposited them in different State banks, which lent the money freely and encouraged speculation. Then came the severe financial panic of 1837. The result was general discontent with the party in power, unaided now by General Jackson's popularity, and the overwhelming election of General Harrison in 1840.

Into all the discussions in Congress and before popular assemblies, Mr. Cushing threw himself with all his vigor, and with an ability that gave him a national reputation. The campaign of 1840 was probably the most remarkable in American history. It was the first when large crowds were assembled at political gatherings in every part of the country, for the building of railroads to all the great centres of population had then first made such gatherings possible.

The leading feature of the campaign was the introduction of new means of influencing the masses. General Harrison had been nominated because of his supposed availability, and one of his opponents, to disparage him, had said he lived in a log hut, and drank hard cider. This was taken up as a rallying cry by the Whigs, and log cabins and cider barrels were carried in all the processions, the barrels always empty at the end of the route, if not at the beginning. General Harrison's simplicity of life was contrasted with the alleged extravagance of Van Buren, who was said to use "gold spoons." Many popular songs were composed and sung, full of taking phrases that wonderfully excited the crowds. One that is remembered ran thus in the chorus, —

> "Hurrah, hurrah, hurrah,
> For Tippecanoe and Tyler too,
> For Tippecanoe and Tyler too,
> And with them we 'll beat little Van,
> Van, Van, Van is a used up man."

One of the largest of the mass meetings was that on Bunker Hill, September 10, presided over by no less a man than Daniel Webster, and addressed by the most distinguished men from all over the country, of whom are recalled Ogden Hoffman, so celebrated as a jury lawyer, Benjamin Watkins Leigh, Reverdy Johnson, then a young man, and Governor Pennington, of New Jersey, besides many orators from New England. The writer was then a boy, an ardent Whig, anxious above all to look on the face of Daniel Webster, and well remembers the enthusiasm and excitement of the occasion. All the prominent men who took part have passed away except Robert C. Winthrop, then a young man, who called the convention to order, and who still survives, — a noble remnant of what seems to have been an heroic age of great men.

In this Harrison campaign Mr. Cushing took an important part. He wrote a life of General Harrison, which was extensively circulated, and made speeches continually, one of which I heard. The meeting was presided over by a man who up to that time

had been a leading Democrat, but who had been unable to withstand the strong drift to the Whigs, and had suddenly changed his party. Long before the election it was evident which party would win, especially when the hitherto strong Democratic State of Maine elected a Whig governor, as it was expressed at the time, —

"Maine went hell-bent
For Governor Kent."

The election of Harrison and the prominence in it of Mr. Cushing would seem to have opened up great possibilities for him, intimate as he was with Mr. Webster, the new Secretary of the State; but in one short month the President died, was succeeded by John Tyler, who vetoed Mr. Clay's Bank Bill, and the Whig party, led by their great chief, broke away from the President, and — it is not too strong a word to use — hated him. Whether wise or unwise in his action, there is no doubt President Tyler was actuated by honest motives. General Fessenden, the father of William Pitt Fessenden, stated to me at the time that Mr. Webster so believed, and had said to him that if it had been a matter of argument he could have reasoned with him; but when Mr. Tyler had put it as a matter of conscience that he could not sign what he believed to be an unconstitutional bill, he could say nothing.

Mr. Webster alone of the Cabinet remained; and Mr. Cushing, sympathizing with the course of President Tyler, also adhered to him, and of course lost the favor of the Whigs, and cast in his lot with the Democrats, with whom he in future acted. He was nominated for Secretary of the Treasury, and his fitness was not questioned; but the party of Mr. Clay transferred their dislike of Tyler to all his adherents, and he was rejected. He was soon after sent as Commissioner to China, and negotiated our first treaty with that country, securing to us great commercial advantages. His success was a matter of national congratulation, for the anti-Chinese feeling had not then arisen. On his return, he was again chosen representative to the State Legislature, — an office his home was ever proud to bestow on him.

The Mexican war began in 1846, and in 1847 Mr. Cushing raised a regiment, mainly at his own expense, went to the war as its colonel, served till its close, and returned with the rank of Brigadier-General. The war was not popular in New England, for it was regarded as waged for the extension of slavery, and no one could foresee its immense influence over the future of our country by the acquisition of California. To Mr. Cushing, however, it was the war of his country, and it enabled him also to gratify a natural taste for military affairs. While in Mexico he was nominated by the Democrats as their candidate for Governor of Massachusetts, but with no hope of an election in that strong Whig State.

Newburyport was incorporated as a city in 1851, and Mr. Cushing served as its first mayor.

In 1851 and 1852 he was a member of the Massachusetts Legislature, and was the leader of the opposition to the coalition that elected Mr. Sumner to the United States Senate.

In 1852 he was appointed a Justice of the Supreme Court of Massachusetts, discharging his duties to the admiration of the Bar, who wondered at his familiarity with the reports, and the profound knowledge of law shown in his decisions, drawn as he had been so long from active practice. To prepare himself he read in nineteen days the fifty-seven volumes of Massachusetts reports.

The Democratic convention for nominating a candidate for President met at Baltimore June 12, 1852. There were several candidates. The friends of each were persistent; and after 35 ballots in which his name had not been presented, Franklin Pierce was nominated on the 49th ballot, by a vote of 282 to 11 for all others. The nomination was a surprise to the country, as he had never been publicly spoken of for the position, and it was regarded as one of those

unexplained accidents of which history is so full. The newspapers of the day recounted the astonishment of Mr. Pierce, to whom a boy brought the news as he was on a visit to Mt. Auburn cemetery. The truth is, however, it was the successful culmination of an arrangement planned by Mr. Cushing, General Butler, Paul R. George, and a few others, in anticipation of a dead lock at Baltimore, to spring Mr. Pierce's name on the convention. Mr. Cushing had several times visited Mr. Pierce in regard to it, and leading men in different States had been conferred with, and all the details agreed upon. I had been told this long since by men familiar with the inside history of the political events of that period, but all have passed away who were actors except General Butler. Wishing to verify this statement, and also wishing his opinion of Mr. Cushing, whom he had known so intimately, I addressed him a letter, to which the following is his reply, and is of value as explaining an important event in American history, not before understood by the public.

BOSTON, MAY 2, 1891.

DEAR SIR, — My professional and other engagements are such that I cannot go into any discussion worthy of General Cushing, yourself, or myself, as to his great endowments as a lawyer and his great learning and ability as a statesman. I hold him in the highest reverence.

As to the question you put me in relation to the nomination of Gen. Franklin Pierce as President, the matter was fully considered by the three gentlemen you name, and the Hon. Charles G. Atherton, and the Hon. Henry A. Wise, of Virginia, immediately after the death of Judge Woodbury in 1851, and the means to present his name in the manner it was presented fully determined upon; so that while the presentation of General Pierce's name was a surprise to the general public, it was not to the well informed and active members of the convention which nominated him.

I am very truly yours,

BENJAMIN F. BUTLER.

Many circumstances combined to make the election of Mr. Pierce a triumphant one, and he received 254 votes to 42 for General Scott. On the formation of his Cabinet, one of great ability, and the only one in our history unbroken during a whole administration, Mr. Cushing was made Attorney-General.

During Pierce's administration the Anti-slavery sentiment was continually growing stronger in the North, intensified by the troubles in Kansas, the attack on Mr. Sumner, and other causes not now to be entered into. The Republican party, just formed on the Anti-slavery issue, was fast gaining control of the North, having absorbed the Whig party and drawn largely from the Democratic. The great moral question of slavery was debated in Congress and at the fireside, by the press and the pulpit, in all its aspects, almost to the exclusion of every other subject, and the historian of this administration will discuss it more with reference to this question than any other. Many difficult questions connected with our domestic and foreign affairs came before the law department, and the ability with which they were met is conceded. The opinions of Mr. Cushing while Attorney-General fill three volumes of the fifteen up to that date, and no less an authority than William Beach Lawrence said, "They constitute in themselves a valuable body of international law." President Pierce stated that, however able Mr. Cushing was in his department, he was equally well fitted for every other position in the cabinet; and it is said that when a question arose about which all the other members were in doubt, it was referred with confidence to Cushing.

In 1857, 1858, and 1859, he was a member of the Massachusetts House of Representatives, active and attentive to all his duties. A memorable debate on national affairs occurred between him and the late John A. Andrew.

In 1860 he was a delegate to the Democratic National Convention at Charleston, S. C., was chosen its president, and was one of the seceders that met at Baltimore. He

supported Breckenridge as the only Democratic candidate who could hope to win. President Buchanan sent him to Charleston to confer with the secessionists, but with no result. The "irrepressible conflict" was at hand, and as we look back upon it, sad as were the loss of life and all the horrors of the civil war, it seems the only way by which we could have gained that great blessing, as all North and South now regard it, —the abolition of slavery.

After the war began, Mr. Cushing offered his services to his country, as he had before done in the Mexican war, but Governor Andrew for reasons satisfactory to himself declined them. But Mr. Cushing never knew what it was to be idle, and his time was fully occupied in important cases, as one of the recognized leaders of the American Bar. The different departments at Washington largely demanded his valuable services, and not a few high officials received credit to which he was entitled for able papers and opinions.

In 1866 Mr. Cushing was appointed one of three commissioners to codify the laws of Congress, and in 1868 was sent to Bogota, in consequence of a diplomatic difficulty. General Grant, whose friendship for him and confidence in him are well known, appointed him, in 1872, one of the counsel to settle the Alabama claims at the Geneva conference, and the favorable results to American interests were largely due to his efforts. He could speak French fluently, the language of the conference.

In 1873, when the Senate had refused to confirm Williams as Chief-Justice on the ground of incompetence, General Grant nominated Mr. Cushing, remarking, as was said, that he would nominate one whose knowledge and ability they could not question. The nomination was withdrawn, however, through the efforts of a son of Newburyport, now deceased. In 1874 he was nominated and confirmed as our minister to Spain, where our relations then required a representative of peculiar fitness, and he remained there till 1877. This was his last public position, the remaining years of his life being devoted to his profession.

Until the last there seemed to be no mental decay, though it was perceived that he was losing physically that power of endurance that had ever been so remarkable. When he became conscious of disease, he consulted a physician, and studied medical books, to learn all about his case, as had been his custom on every subject. Realizing how little could be done, he prepared calmly for the end. To one who asked about his health he replied, "I have what I have never had before, seventy-nine years." He talked but little about himself, and preferred to be alone. A little before he died, he requested his friends to leave him, which they did, supposing he wished to sleep; and when they again entered his room he had passed away. He died Jan. 2, 1879. Time had been very gentle with his external appearance, and he was a handsome man to the last. As he lay in his casket at the funeral, dressed as in life, with the sword he had worn in the Mexican war by his side, his face was as calm and natural as if in sleep; and as I gazed at him, I could but wonder what had become of all those vast acquisitions of knowledge that had been stored in that great brain, now so cold and lifeless. Many of his old friends were there to pay their last token of respect to his memory, among whom was General Butler, who gazed long on the remains of his old friend.

This condensed abstract of his life — for to speak in detail of his different official acts and the prominent legal cases in which he was counsel would require a volume, instead of the limited space of a magazine article — shows that but few Americans ever filled so many and so distinguished positions. That he was one of the most learned men the country has ever produced cannot be doubted, — learned not as most men are in one branch, nor in a few, but in almost every department of knowledge; and in nothing was he superficial.

One of his most marked traits was his

industry. Thomas H. Benton once said to the writer that he thought himself the most industrious man he had ever known in public life with the exception of John Quincy Adams. Yet neither of these men was more industrious than Caleb Cushing. After his return from his early visit to Spain he was blessed with good health and a remarkably vigorous constitution, and would toil all day and study or journey at night, and never seemed to know fatigue. I never went by his house at Newburyport, when he was at home, be it ever so late, that I did not see a light in his room; and it was known to be his habit to work till after midnight, then throw himself on a lounge for a few hours' rest, and at daylight resume his labor. Whatever point came up, however trivial apparently, he would not rest till he was satisfied. A bank officer said that Mr. Cushing once asked him what name was given to the part left after a check had been torn from a check book, and he could not inform him. A few days after he received a letter from Mr. Cushing with the single word "stub." If Mr. Cushing wished for information, he was not above seeking it from every source. An associate in Washington told me he would go into the street and ask the meanest-looking negro, if in that way he could learn what he wished to know. His thirst for knowledge that might be useful to him was universal, and he gave away his plants because they drew too much attention from other things. He was omnivorous in his reading. I took tea with him at the house of his niece not long before he died, and during the conversation he turned to a niece and said, "Margaret, I see the ladies are to wear so-and-so the coming season," giving in detail the new fashions. It was not easy to start a topic of which he was ignorant. When Webster's Unabridged Dictionary first appeared, he read it all through, word by word, and corrected its mistakes.

He had a remarkably retentive memory that never seemed to lose what it had once gained. Few could quote so freely and accurately from ancient and modern authors. His speeches are full of classical allusions, and show how familiar he was with all classes of literature. His ready memory enabled him to call up as occasion required all the stores of his long and eventful life, and this made him a formidable antagonist. This power made John Quincy Adams so much dreaded by his opponents in debate during his closing years in the House of Representatives. What others knew imperfectly he knew fully. The opportunities of both these men had been large and fully improved, and it would be difficult to name any other of our public men who could be compared with them in the extent of their acquirements.

Mr. Cushing was a methodical man; every paper was in its place, and nothing disturbed him more than to have any one disarrange the order of his office. He used often to speak of the time lost by many from a want of this habit. He was punctual in his appointments. A Washington real-estate man once wished to show him a piece of property, and asked at what hour he should call for him. The reply was at five the next morning. The man was not accustomed to such early hours, but was advised by one who knew Mr. Cushing to be prompt; and as he drove to the door at the appointed time, Mr. Cushing was on the steps.

Mr. Cushing excelled as a linguist, speaking French, Spanish, and other modern languages with fluency, and was said to be able to converse with all the foreign ministers at Washington in their own tongue. It has been stated even that in China he transacted his official business without the aid of an interpreter. One of the last times I saw him was in a railway car, and he was reading a French newspaper.

Mr. Cushing's mind was so well disciplined that he could at once arrange his thoughts and bring his knowledge to bear on any given point. Some of his best efforts were extemporaneous, in reply to an opponent, for then he was in his element. The Hon. E. F. Stone,

in his able address before the Essex Bar, has given an instance where some one in the Massachusetts Legislature had quoted from an old speech to show his inconsistency.

"Cushing was uneasy under the attack, and the moment it was finished he sprang to the floor, and defended himself with great spirit in a speech of about fifteen minutes, which for rapid, overwhelming, and powerful declamation was never surpassed in that hall. The effect was electrical. The House and gallery broke out in the most tumultuous applause, which the Speaker tried in vain to suppress; and the member from Monson, instead of scoring a point against Cushing, suddenly found himself on the defensive, and was glad to beat a hasty retreat and withdrew from the field." When able, however, he prepared his speeches with care.

As a speaker Cushing ranked high. He was choice in use of language, seeking from the copious vocabulary at his command the best word to convey his meaning, sometimes an unusual one. He had a power of clear statement, so effective in an orator, and so marked a trait in Daniel Webster. His sentences were well constructed and vigorous, — with his mind they could not have been otherwise. He had a good voice, a distinct enunciation, spoke slowly unless excited, and with much emphasis, and held the attention of his hearers. He was logical, appealing more to reason than to passion. He was persistent to the end in whatever he engaged.

Mr. Cushing was a brave man, and never feared an antagonist. Shortly after he entered Congress, an old member from a State where the Code was recognized as the true way to settle difficulties, and who had made himself feared, attempted to browbeat the new young member; but Cushing replied in a way that called out the applause of the House and galleries, and ended by declaring himself responsible for his words, there or elsewhere.

Mr. Cushing was called a cold man. He was not demonstrative, and certainly had but little of that "magnetism" said to be a trait of some public men. He was naturally retiring, and not generally social, because not caring for the conversation of most social gatherings. He had but little of what is called "small talk." A gentleman at whose fireside he often sat said he would remain silent, absorbed in his thoughts, till some topic was started requiring information, or leading to discussion, when his interest would be aroused, and he would talk for hours. He was accessible, kind, freely giving advice to his friends and neighbors in their troubles; and when he joined, as he often did, in their fishing excursions, he was one of the most agreeable of companions, and laughed and joked with the merriest. A lady said to me that the only time she ever called at his home he took her over his house, and in one room he had preserved every little thing that had been his mother's, — surely not an evidence of a cold heart. In his habits he was simple, abstemious, indifferent to food, dress, and outward display.

Mr. Cushing was reproached as not enough in sympathy with the great reforms of the day, especially with the Anti-slavery sentiment. In 1836 Henry A. Wise threatened in Congress to plant slavery in the North, and in an indignant speech Mr. Cushing replied: "You may raze to the earth the thronged cities, the industrious villages, the peaceful hamlets of the North; you may plant its soil with salt, and consign it to everlasting desolation; you may transform its beautiful fields into a desert as bare as Sahara. . . . But I assure every gentleman within the sound of my voice, you shall not introduce slavery into the North." He was a lawyer, however, and had been a judge, and from his whole training had been accustomed to look at the legal aspects of every question; and for that reason he, Daniel Webster, and other statesmen of that period opposed the abolition agitation as against the Constitution which they had sworn to obey. They took

the ground that the North had consented to recognize slavery to gain the Union, and however opposed to its existence, the compact should be observed by the North as much with regard to slavery as to every other provision. With the leaders of the abolition movement it was the "higher law" of justice and humanity they were bound to obey, and not the Constitution, — that, as some of them declared, was a "league with hell," — and they justified the invasion of John Brown, and made a hero of him. I once heard Wendell Phillips say in an impassioned speech — and America has produced but few such wonderful orators — after Massachusetts, in obedience to the Fugitive Slave Law, had returned a slave, "God *damn* the Commonwealth of Massachusetts;" and in a speech after the war began, he said that when he heard of the attack on Fort Sumter, in his joy he threw his hat as high in the air as he could throw it, knowing that by war only could slavery be abolished. The most eloquent speeches of Webster, Choate, and other orators of that period were on the value of the Union. Mr. Cushing felt as they did, and in a Fourth of July oration delivered at Newburyport, in 1850, on the occasion of laying the corner stone of the new City Hall, the Union was his topic. After depicting the blessings of the Union, the calamities that would follow disunion, the dangers to which the Union was exposed, and urging his hearers faithfully to observe and maintain both the letter and spirit of the Constitution, he closed thus: —

"The living men who uttered the Declaration of Independence have all passed away from time to eternity. But their spirits watch over us from the bright spheres to which they have ascended. We stand in their presence. They shall be our witnesses as we solemnly renew this day our vows of unalterable attachment to the Union, and that —

"'. . . nor steel, nor poison,
Malice domestic, foreign levy, nothing'

shall prevail against it, and to this we pledge our lives, our fortunes, and our sacred honor, so help us God!"

When Mr. Cushing dismissed the Democratic Convention at Charleston, his last words were: "I pray you, gentlemen, in returning to your constituents and the bosom of your families, to take with you as your guiding thought the sentiment, — the Constitution and the Union."

As the theme for Fourth of July eloquence the preservation of the Union and the danger of a dissolution can no longer be used. No one fears now; the crisis has been passed, the great cause of bitterness between the North and the South has been removed, and both sections are glad. But this generation, looking backward, can hardly realize how dark the future of their country seemed to many honest men a few years before the war, and how they dreaded a sectional conflict.

Mr. Cushing was called ambitious. So were Daniel Webster, Henry Clay, and a long list of prominent men of the past; and now almost every young talented American expects to be President, — and with some reason, in the light of our past history. Yet he certainly followed his convictions, more than pure ambition in his career, or often he would have adopted a different course; would have abandoned old ideas, and followed the drift of public opinion, as did other prominent Massachusetts men, to their great personal advantage.

His personal integrity no one ever questioned, — a rare virtue in a public man, as we have learned by many modern examples. He was indifferent to money, and disregarded it in his public and professional service.

He was called a partisan. If to be a partisan means to follow one's party blindly, he was too independent, too strong in his own opinions, to be one. He was born more to command than to obey; to be a leader rather than a follower; to impress his own views on others, not to receive theirs. If he had been a devoted partisan, he would

have followed Henry Clay rather than the fortunes of John Tyler, by which he lost the favor of New England. Then if he had joined the Republican party, as most Northern Whigs did, as intimated before, it is not easy to predict to what a position he might not have risen. He must be credited with sincerity in his action, or he showed far less practical wisdom than most men are supposed to possess. He lived at a time when but little charity was shown for difference of action or opinion, and when men who had freely exposed their lives for their country, and were willing to do it again, were denounced as its most dangerous foes by men who had shunned the battle-field and whose only devotion during the war had been to themselves. Few have even justice from their own generation, — that it is the duty of posterity to render.

The death of Mr. Cushing called out a general feeling of regret all over the country. He had for years withdrawn from party politics, and his learning and legal ability and experience had been devoted to the government at a time when they were specially needed, and all had recognized their value. At many gatherings leading men were glad to bear testimony to his great qualities. At a meeting at Washington called to pay respect to his memory, the late lamented and brilliant Richard S. Spofford, — who had been more intimately associated with him, probably, than any other man for a quarter of a century, — after speaking of " those superb attainments and powers that made him second to none among publicists and statesmen," continued: " When in a later age some great orator of the Republic, the Pericles of its meridian splendor, or, if that is inevitable, the Demosthenes of its declining period, here in this grandest of Capitals, shall revert to our times and recount their history, few names upon the roll of our civic fame will seem to him and those whom he addresses more illustrious than his in honor of whom we are assembled. . . . By all will it then be clearly recognized that the true rank to be assigned to him is that of one among the greatest of statesmen, the most learned of lawyers, the most patriotic of citizens, the most accomplished of men; and that, occupying this pre-eminent position, so great and valuable were his public services that it may truthfully be said that in his day and generation he was one of the pillars of the Republic."

Robert C. Winthrop, whose praise is always golden, before the Massachusetts Historical Society, after enumerating his great services, said: " He has certainly gone through as great a variety of responsible and conspicuous public services as has ever, I think, fallen to the lot of a Massachusetts man. . . . Differing from him far more frequently than I could agree with him, and by no means prejudiced in his favor, I was all the more a trustworthy witness of his varied ability, his vast acquirements, his unwearied application, and his force and skill as a writer and speaker. Nor can I forget the many amiable traits of his character, which prevented differences of opinion or of party from sundering the ties of social intercourse. He knew how to abandon a policy or quit a party without quarrelling with those whom he left behind."

The late Charles W. Tuttle, whose early death was so much regretted, and who was in the same law office with Mr. Cushing for some years, once said: "Mr. Cushing was endowed with extraordinary intellectual powers, with an uncommonly fine physique, and a vigorous constitution. Externally Nature had stamped him as a man of distinguished character. Such was the versatility of his talents that he could master with equal facility any subject. Had he so determined, he could have gone down to posterity one of the greatest scientists or the great philologist of the age, as he was a great jurist and statesman. His capacity and equally great memory, his unwearied industry, his scorn of delight and love of laborious days, enabled him to conquer all knowledge. I know of no subject of intellectual contemplation that

lay outside the range of his meditation and study. Like Bacon, he took all knowledge for his province."

Hugh McCulloch, Secretary of the Treasury under Lincoln, Johnson, and Arthur, in his very interesting volume, recently published, "Men and Measures of Half a Century," in giving his impressions of Edward Everett, says: "He was perhaps the finest classical scholar of the day, the greatest linguist that ever went to Congress, except Caleb Cushing. It was said of Mr. Cushing that he could translate all the European languages. While in Congress there came to the State Department a document that no one in the Department could interpret. Upon the suggestion of some one who had heard of Mr. Cushing's reputation as a linguist, it was sent to him, and he translated it without difficulty. Mr. Cushing was a ready and effective speaker, and a very able and learned lawyer. He was one of the few men whose voice could be heard in the old House of Representatives, and who never spoke without commanding the attention of the members."

Hon. Horatio G. Parker, of the Suffolk Bar, was in a position to form a clear judgment of Mr. Cushing, and by request has written out his opinion of him.

"You have asked me in a few words to give some idea of that eminent man Caleb Cushing as a lawyer.

"He was in form and feature a fine specimen of manly beauty, power, and elegance.

"At the bar he always showed that he was perfectly familiar with the facts and law of his case, showing as thorough preparation as industry could give. His manner in examining witnesses was plain and direct, but very searching, and you felt when he left a witness that the examination, whether direct or cross, had accomplished its intended and perfect work.

"In addressing a jury, he was quiet and clear, very attractive, and when occasion required, bold, powerful, and rising to the height of eloquence.

"He was accomplished in every duty a lawyer could be called upon to perform. Whether to draft a statute, write an argument, preside at a jury trial, or decide and write opinions upon cases before the full court, he was equally competent and ready. He had attainments which enabled him to do what very few lawyers could. I very well recollect seeing him dictate an opinion in a Mexican land-grant case to three amanuenses at once, one writing English, one French, and one Spanish. He easily kept the three busy.

"As an instance of his grasp of principles of law and ability to frame concisely a statute which should accomplish a broad and deeply reaching change in the law of real estate, Chapter 29 of the Acts of Massachusetts for the year 1852 may be cited. The Act reads: 'Aliens may take, hold, convey, and transmit real estate.' I was told by a member of the State Senate at the time that Caleb Cushing drew the Act. The statute now exists in the same words in Public Statutes of Massachusetts, Chapter 126, Section 1.

"The statute has never been amended, and the Court has never been called upon to construe it further than to say that it applies to aliens resident abroad.

"Mr. Cushing sat upon the bench in Massachusetts only from May 22, 1852 to March 7, 1853, when he resigned to accept the position of Attorney-General of the United States in the Cabinet of General Pierce. He entered upon his duties as Judge as one fully equipped, and performed them with such ease, naturalness, and success as to command the approval, respect, and admiration of all.

"His opinion in Popkin et al. *vs.* Sargent et al., 10 Cush. 327, may perhaps be referred to as a model of what an opinion may be in soundness of law and clearness and grace of expression. The case is upon the construction of a will, and is a wonderful expression of the cardinal principle that in the construction of a will the intention of

the testator must govern, while at the same time the circumstances surrounding the testator, as well as the testator's peculiarities and views, should be learned and considered in ascertaining that intention.

"It is an admirable statement of the law, and a most lucid illustration of applying law to conditions and circumstances to be either strengthened or tempered thereby. No one would go far astray in the principles of construing a will who should first read the opinion in Popkin et al. *vs.* Sargent et al.

"How Mr. Cushing succeeded as Attorney-General is sufficiently attested by the volumes of his opinions, and the comments made upon them by eminent jurists of this and other countries.

"But the lawyer is only one phase of Mr. Cushing, and the most eminent lawyers seldom do more than write their names in water.

"I had the highest regard for and confidence in Mr. Cushing's ability, integrity, and patriotism. It is well known what confidence those in authority placed in him during the war, and how often they availed themselves of his gifts, accomplishments, and abilities during our darkest days. I heard him say at nearly the end of the war that he considered the way in which the Administration had kept up the courage and confidence of the people and had availed itself of the resources of the country as worthy of much praise."

The relations of Mr. Cushing with Daniel Webster were very intimate, and he often rendered his friend aid in the way it was not infrequently asked. The seventy-seventh birthday of the great statesman was celebrated, Jan. 18, 1859, by his friends at Boston, when Mr. Cushing presided, and speeches were made by Rufus Choate and others. Some extracts are given from his speech on that occasion as a good specimen of his style; as an indication, also, of how strongly Mr. Webster impressed his contemporaries.

"We, friends, associates, admirers of Webster, assemble on his birthday, not to mourn him dead in the silent grave where his mortal body lies interred, but to rejoice in the immortality of his glory, to honor him as living still, with all his native majesty and strength of lineament and proportions, in our hearts, in the veneration of his countrymen, in the respect and honor of the world.

> "'Death makes no conquest of this conqueror,
> For now he lives in fame, though not in life.'

"'Quicquid ex Agricola amavimus, quicquid mirati sumus, manet, mansurumque est, in animis hominum, in aeternitate temporum, fama rerum.' To the commemoration of all this we have dedicated ourselves this evening; and fitly we do so, gathered around this flower-decked board, with harmonies of the eye and ear to animate us, and with "feast of reason" to crown that of sense, — as in the Athenian or Roman days men sat at the banquet table with garlanded images of their honored dead on the seats beside them, in re-vivified presence as it were, so — their souls overflowing with speech and song — to celebrate the memory of the heroic persons of the Republic. . . .

"My own respect, admiration, and attachment for Webster, beginning at an early date, and acquiring new strength with every day of a constant and most confidential intimacy through life, settled down into that condition of mind regarding him which rightly belongs to the contemplation of one of Plutarch's men. How it would startle and move us, if Demosthenes were to step out from behind the curtained shadows of history, to rouse the fierce democracy of another Greece against the ambition of another Philip; or a Cicero, in his ample robe and purple-bordered tunic, hurling his consular anathemas at Catiline, or pouring forth his senatorial invectives on the head of Mark Antony. Yet have we not all heard and seen this? Ay, but we may have heard it as though hearing it not, and seen it as though seeing it not. Just as the infinite and eternal God is with us always, though

invisible but in his works, so God's vicegerents on earth, to whom he has vouchsafed the gift of genius, of wisdom, and of eloquence, and whom he has thus delegated and sent to be the world's leaders, are with us; and them we see, them we elbow in the streets, them we hear of carelessly in the senate, the council chamber, or the field. Then we come at length to know, as one of them leaves the earth to its fate and ascends to his congenial heaven, and we then see, perchance too late, by the long train of light which illumines his upward path, that a demi-god and not a man had been with us the while, working out with strong will the inscrutable providences of the Almighty. It may be, and it often is, that the scales of inadvertence fall from our eyes long before the hero man is transfigured by death; it may be, and often is, that not before then does he rise up from the dust into which he has been overwhelmed and borne down by the brute weight and stolid mass of our passions and prejudices. Sometimes he is a Washington, and the world bows down at once in deferential reverence before its foremost in virtue and glory; sometimes he is a Prometheus, chained to Caucasian cliffs in resentment for the good he has done, or a Samson Agonistes in the work-house of the Philistines. And so in this hurly-burly of life, the world's ears filled with dissonant cries as of the multitudinous voices of the sea, men come and go, with various fortune or estimation, according as the lights or shadows of time fall upon their pathway and their persons. Yet that Webster was one of those predestined men of history, none who saw him, either in his public or private manifestations, none who knew him, could doubt. I certainly never did; and it was a source of never-failing interest to me to witness, in life, the working of that great spirit, gigantic in force and sublime in virtue, despite all its infirmities, as it now is to contemplate him in death, with his traits softened by time and distance, and yet brightened into distinctness by the reflected rays of a beam of light from the celestial splendors of the throne of God."

In this same speech Mr. Cushing states that Mr. Webster and himself constantly conferred together in their common adherence to President Tyler.

Mr. Cushing's publications were "History of the Town of Newburyport" (1826); "Practical Principles of Political Economy" (1826); "Review of the Late Revolution in France" (1833); "Reminiscences of Spain" (1833); "Growth and Territorial Progress of the United States" (1839); "Life of William H. Harrison" (1840); "The Treaty of Washington" (1873), and many speeches and addresses. Of these by far the most important is "The Treaty of Washington," by which the different questions at issue between Great Britain and the United States, and especially the Alabama claims, were settled, and which are fully discussed by one who took a leading part, and was thoroughly informed of all the facts. To the historian this work will be invaluable. The American side is presented ably, and with the warmth of an advocate, for the author was intensely American in his feelings. The importance of this treaty is shown in the following extract: —

"We have gained the vindication of our rights as a government; the redress of wrong done to our citizens; the political prestige in Europe and America of the enforcement of our rights against the most powerful State of Christendom; the elevation of maxims of right and justice into the judgment-seat of the world; the recognition of our theory and policy of neutrality by Great Britain; the honorable conclusion of a long-standing controversy, and the extinction of a cause of war between Great Britain and the United States; and the moral authority of having accomplished these great objects without war, by peaceful means, by appeals to conscience and to reason, through the arbitrament of a high international Tribunal."

According to Mr. Cushing's request, he was buried by the side of the wife from

whom he had been so long separated, and to whose memory he had been devoted. His grave is on the highest point of the old cemetery at Newburyport, overlooking a place that had been his home for nearly four-score years, and that had been dear to him. Surely it can be said of him for his services to his country, as was said of honored men in the days of Rome, "De republica bene meruit."

LEGAL EMERGENCIES.

ALTHOUGH the processes of law are proverbially slow, there are many occasions when lawyers must act with promptness where a lack of promptness or knowledge of the law may result disastrously to the interests of their clients. This is notably the case in the drawing of wills. It often happens that a lawyer is roused out of bed late at night to go to the bedside of a dying person and perfect a will disposing of large amounts of property. To do this with expedition, complying with all the requisite forms, while death is literally waiting at the door, is a task that requires a man of cool head and self-possession. Surrogates' courts bear testimony to the frequency with which the wishes of testators have failed to be carried out, because of the failure to comply with some almost trifling detail. In one case the lawyer was so slow in making out the paper that the testator died before the requisite formalities were complied with. In another case a quick-witted lawyer, who saw that there was not time to complete a will in a case where the property consisted of money in bank, adopted the expedient of making out checks for the heirs, which were duly signed and acknowledged, and the heirs got their money the next day, without being obliged to wait a year for executors.

In commercial crises lawyers have to do a good deal of quick work in putting business affairs in shape to meet an emergency. The bankrupt generally desires to save parts of the wreck for this or that creditor, or for relatives, or for himself; and the papers must be drawn in due form to elude the vigilance of the unfortunate creditors who get left. Bankruptcy business has become a special branch of law; and there are some lawyers who have become very expert at it, so that upon short notice and with brief time in which to work they can arrange the affairs of a bankrupt firm so as to dispose of the assets according to the wishes of their clients.

There is room and need for quick wit in the actual trial of cases in court. It is one thing to prepare a case with careful consideration of the facts and due application of the law to those facts. It is quite another thing to be able to handle a case in open court under the spur of competition with sharp opposing counsel or a testy court. In every large law firm the work is divided like that in a factory, and to each is assigned a particular part of the case. The one who tries it must be a man of rapid judgment and resources. He must be able to meet surprises, to discern men, to divine hidden motives, to snap at the prejudices of jurors or judges, and to seize the advantages of the moment. There is no end of need for quick wit in questions of identity. In an extradition case, which depended entirely upon identity, the defendant had been fully identified. The defendant's counsel slyly got his client to change his coat in court with another man of similar appearance, and in a few minutes the witness was led easily to identify the wrong man.

A quick-witted and daring Western lawyer once saved a guilty client from sure conviction on a charge of poisoning. It was proved

that the poisoning had been done by means of certain cakes, a portion of which was produced in court. When the counsel for the prisoner had finished his speech he said, —

"And these, gentlemen of the jury, are some of the alleged poisoned cakes. We declare to you, gentlemen of the jury, that these are not poisoned cakes. They are as harmless cakes as ever were made, and in order, gentlemen of the jury, to show you that these cakes are not poisoned, I will eat one of them right here in your presence."

And he did eat one. He took good care, however, to leave the room at the earliest opportunity and to make a bee line for an adjoining room, where he had an emetic in readiness and an antidote. But the jury never heard about the emetic or the antidote until the lawyer's client had been acquitted.

On another occasion a witness had been detailing with great minuteness certain conversations which had occurred several years before. Again and again the witness testified to names and dates and precise words, and it became necessary for his cross-examiner to break him up. This was done by a very simple device. While the witness was glibbly rattling on his testimony, the cross-examiner handed him a law book and said:

"Read aloud a paragraph from that book!"

"What for?" inquired the witness.

"I will tell you after you have read it," said the lawyer; and the witness accordingly read aloud a paragraph of most uninteresting matter about lands, appurtenances, and hereditaments. Then the lawyer went on and asked him a few more questions about his memory, and the witness was positive that his memory was very good. Suddenly the lawyer said, —

"By the way, will you please repeat that paragraph you just read about lands, appurtenances, and hereditaments?"

"Why, of course I could not do that," replied the witness.

"You must have a queer memory," retorted the lawyer, "since you can repeat things that you say occurred year ago, and you cannot repeat what you read a moment ago."

The witness was nonplussed, and the jury was obviously amused at his discomfiture.

A quick-witted lawyer thinks on full gallop. Many successful cross-examiners have been men who could keep up a running fire of jokes and comments, and never lose sight of the main point, who could lead a witness along by suavity and politeness and acquiescence and apparent obsequious deference into pitfalls of contradiction. Such men will let a smart witness talk on until he drops some unfortunate expression that subjects him to being pounced upon and demolished at one fell swoop.

A leading counsel for the defendant in an accident damage case, where the injury had been occasioned by a jet of steam scalding the complainant's back and neck as he was driving past the defendant's place, argued to the jury that the plaintiff was guilty of contributory negligence, and should have looked up to avoid the accident The quick-witted counsel for the complainant retorted: "Oh, no; if he had looked up, instead of suing for damage to the back of our head, we should have to charge you for the loss of both eyes."

In a trial for burglary the people's witness showed that he was on watch in the hall, when he heard some one fumbling with the lock of the door, and that he then slyly turned the knob so that the thief could come in easily. The glib-tongued lawyer for the prisoner at once said: "Why, your honor, this witness was the real burglar, for it was he and not my client who really opened the door." The result of this timely remark was that the prisoner got off with a light sentence for an attempt at burglary.

A good deal of quick work is often required of lawyers in the filing of liens on real estate or other property, in cases where the obligations are many and the assets few, and the first comer is the only one who gets service. A good deal of wit is often displayed

in the method of making a levy. Benjamin F. Butler, when he was a young lawyer, got a wide reputation for sagacity by attaching the water-wheel of a mill in an action for debt. It used to be a common thing for lawyers obtaining judgments against the city to attach the pictures in the governor's room of the city hall. — *Ex.*

THE ORDEAL IN AFRICA.

IN Africa, where humanity is at its worst, and godless races of men are the rule, the ordeal in its most cruel shape is universally practised. When Father Dos Santos tried his skill christianizing the Kaffirs, he found them full of faith in their three ordeals, — the xoqua, lucasse, and calang. The first-named consisted in licking a bar of red-hot iron; the second, in drinking a bowl of poison, bringing instant death to the guilty; and in the third, the accused drank a bitter beverage, the smallest quantity of which sufficed to choke him, if he deserved it. Merolla mentions several ordeals in vogue among the natives of Congo, such as passing a red-hot iron over the naked leg; drinking water in which hot iron had been quenched; putting a soft banana root into the delinquent's mouth, that would infallibly stick to his teeth if he were guilty; and administering a composition of serpent's flesh and the juice of herbs, called bolungo, that caused the guilty one to swoon away. In another a wizard took a long woollen or linen thread, and holding one end himself, gave the other to the supposed thief; he then applied a red-hot iron to the middle of the thread, and if it burned, which was not very unlikely, the accused had to make good the article stolen. Equally simple was the manner of settling disputes as to the ownership of property. Two obstinate fellows being at law together, and the truth being hard to be got out of them, the judge summons them both to appear before him, where being come, he fixes to each of their foreheads a sea-shell, and at the same time commands them to bow down their heads; and he from whom the shell first drops is taken for the liar.

The natives of death-dealing Sierra Leone have boundless faith in the judicial powers of an infusion called red-water, possessing violent emetic and purgative properties. Supposing Quashee is suspected of bewitching a neighbor, or accused of mistaking somebody else's belongings for his own, he betakes himself to the nearest town, and informs the head-man that he wishes to drink the red-water there. If the head-man is agreeable, Quashee takes up his quarters in the town, keeping himself as private as possible for two or three months, until he receives the regular three days' notice of the day of trial. The trial takes place in the open air, in the most public manner. The accused, having fasted for twelve hours, takes his place on a stool some three feet high (standing on a number of fresh plantain leaves), with one hand resting on his thigh, and the other held up in the air. A circle, eight feet in diameter, is then drawn round the stool, into which the public are forbidden to intrude. The ceremony begins by the ring being entered by the concocter of the red-water, carrying the necessary ingredients, — a brass pan, a pestle and mortar, and a large calabash. After exhibiting the bark, and ostentatiously working his hands and his tools, the operator sets to work at grinding the bark into powder, mixing it with water in the pan, and stirring it until it froths, when it is pronounced fit for use. Certain prayers are pronounced, and

Quashee solemnly enjoined to confess his guilt; he declines, and the ceremony proceeds. Washing his mouth, that all may see he has nothing therein, he eats a little rice, and calls down curses upon his own head if he is guilty of the crime laid to his charge. The red-water is then handed to him, about half a pint at a time, and drunk as quickly as possible; the dose is repeated, eight, ten, twelve, or sixteen times, until the rice is ejected from the stomach upon the plantain leaves. If that desirable consummation be effected, Quashee is again a free man, and more than that, is held in high honor for the remainder of his life as one who has drunk the red-water. Should the draught prove inefficacious, he receives the punishment allotted for his offence; but if, unluckily, the red-water acts as a purgative — the "spoiling of the red-water," as it is termed — he is punished by being sold into slavery. Sometimes he contrives to escape this in his own person; but in such a case the punishment hangs over his descendants; and a young fellow may be sold as a slave, because his grandfather or grandmother spoiled the red-water years before he came into the world. The ordeal of red-water, or something equivalent to it, is practised by all the negro tribes north of the Zambesi.

In Equatorial Africa the ordeal drink is a poisonous draught called *mboundon*, which helps materially to thin the population. The Equatorial savage can hardly believe in any great man dying a natural death; he must have been bewitched by somebody; so, when a chief dies, the fetich-man has to find out who is responsible for the untoward event, and for his reputation's sake, he is sure to find out that somebody bewitched the dead man; and whoever he names is compelled to drink the mboundon. M. du Chaillu saw three unfortunate women succumb to the fatal test, and as they fell, their heads were struck off. "I have seen," says that enterprising writer, "a poor drinker fall down dead, with blood gushing from his eyes, nose, and mouth, in five minutes. It is not surprising that many negroes run away from home, never to return, rather than risk such a fatal test."

The tangena of Madagascar is another poison ordeal through which intended victims sometimes pass unscathed. In 1860 the governor of Mananjara accused certain individuals, of whom he wished to get rid, of violating the law forbidding Christian worship. Accused and accuser were summoned to the capital to abide the test of the tangena. In this instance it was tried vicariously, the supposed Christians being represented by three of the queen's slaves, who drank the poison without injuring themselves; it was given to a dog, and he too survived the trial. This was conclusive. The accused were liberated; and the governor, hoisted with his own petard, was put to death. This ordeal was afterwards abolished by Radama II., who, as he struggled in the hands of his assassins, was able to say what few savage kings could: "I have shed no blood!"

Nowhere in Africa do we find anything like the smoke ordeal existing in the Canaries, when the Guanches peopled the famous Fortunate Isles, and used upon one occasion to settle the right to the throne. In the year 1377 King John of Castile sent a fleet, under Martin de Avendano, to ravage the courts of England and France. The fleet was dispersed by adverse winds, and the admiral's ship took refuge at Lancerota, where the Spaniards received a hearty welcome. Avendano became a guest at the king's palace, and made himself so agreeable to his entertainer's wife, that a half-Spanish princess was added to the royal family. The Princess Yeo afterwards became the wife of one who eventually acquired the throne, and bore him a son; but when the time came for the latter to succeed his father, the Guanches disputed his right to the throne, on the ground that his mother was not of noble blood, being the daughter of a stranger. A council was held, and it was resolved to shut up Yeo with three female slaves in the house of King Gonzaniero, and

there smoke them. By the advice of a friendly old woman, Yeo contrived to conceal a large sponge moistened with water in the room, and when the smoke became troublesome, held it to her mouth and nostrils; and so it came to pass that when the door was opened, her companions were found dead; but Yeo stepped triumphantly out of the chamber, to be at once declared noble and legitimate, and see her son acknowledged as the rightful monarch of the islands. — *Chambers' Journal.*

ON A MORTGAGEE IN POSSESSION.

As one wrecked in mid-ocean, who surveys
From his lone islet how the boundless main
Bears neither help, nor hope that e'er again
His foot shall tread the city's crowded ways;
And, sinking, sees, with memory's inward gaze,
The white sails filling seaward, and the strain
Of mast and spar, and so recalls with pain
Youth's golden vision of Saturnian days:
So stands the man surrounded by a sea,
Whose perils scarce with pain he shall surmount,
Who takes possession as a mortgagee.
Beati possidentis? Nay, the fount
Of evil shall possession to him be,
From whom the law exacts a strict account!

Lays of a Limb of the Law.

THE SUPREME COURT OF GEORGIA.

I.

By Walter B. Hill, *of the Macon (Ga.) Bar.*

In law reform Georgia has been in advance of all her sister States. Whether or not this is a mere local boast which has been suffered to go uncontradicted because it has only been aired on domestic soil, can best be tested by throwing down the challenge on this wide arena. Georgia's claim to this particular pre-eminence rests on the Judiciary Act of 1799, and on codification, which was provided for by the Constitution of 1798, and finally adopted in 1861. Both of these facts have had a large influence in her judicial history. The Judiciary Act of 1799 provided that "all suits shall be by petition to the Superior Court," thus sweeping away all distinction between the forms of actions; of these petitions the sole requirement was that they should "plainly, fully, and distinctly" set forth the plaintiff's cause of action, thus dispensing with all purely technical averments. The Act further provided that the defendant's answer should make the issue, and abolished "special pleading." So that while the Massachusetts Court[1] were laboriously striving to preserve a judgment from the awful slip of a "whereas" in the writ, and were teaching William Cullen Bryant[2] that —

> "In the nice sharp quillets of the law,
> Good faith! he was no wiser than a daw,"

Georgia had simplified her law of pleading, and recognized the juridical truth that the substance of right is more important than the science of statement.

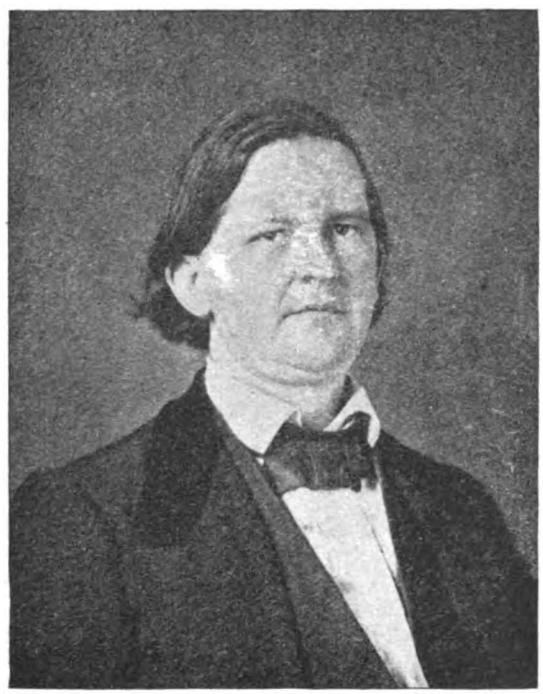
The second ground upon which Georgia bases her claim of priority is codification. The Constitution of 1798 contained this provision: "Within five years after the adoption of this Constitution, the body of our laws, civil and criminal, shall be revised, digested, and arranged under proper heads, and promulgated in such manner as the Legislature may direct." In a message to the General Assembly in 1827, Gov. John Forsyth said: "The authors of the Constitution obviously contemplated the revision, digest, and arrangement of the written *and unwritten* law of the State, and the publication of the whole in the most useful form."

The proposed work, however, was never actually begun until 1858, when the General Assembly provided for a commission "to prepare for the people of Georgia a Code which should as near as practicable embrace in a condensed form the laws of Georgia, whether derived from the Common Law, the Constitutions, the Statutes of the State, the Decisions of the Supreme Court, or the Statutes of England of force in this State." The work was completed in 1861. The result, embracing a codification of large portions of the common law and equity, was adopted by the Legislature, its operation being postponed until 1863. There had been in other States, before this time, revisions of statutes labelled "Codes" upon their backs; but incontestably the Georgia experiment was the first real code adopted in any State. It attracted at the time (1861–1863) little attention at home, and none abroad. *Inter arma silent leges.* The master-mind in the codification was Thomas R. R. Cobb, whom Georgians regard the greatest lawyer of his time. He had "taken all law for his province," was profoundly versed in the civil as well as the common law, and accomplished in his short career a prodigious amount of labor. He was the second Reporter of the Supreme Court of the State; and this fact is made the

[1] Coffin *v.* Coffin, 2 Mass. 360.
[2] Bloss *v.* Tobey, 2 Pick. 320.

occasion (if apology be needed) for the appearance of his picture among the illustrations of this article.

The influence of the two facts upon the judicature of the State is this. The simplification of procedure, secured by the Act of 1799, was doubtless one of the causes which explains the long satisfaction of the people of the State with the administration of the law by the Superior Courts; for it was not until 1845 that the Supreme Court was organized, though it was authorized by a constitutional amendment in 1835. The influence of the Code has been seen in the decisions of the court. A large body of legal principles is settled,—formulated in definite shape. A Georgia court need only cite a section of the Code in cases where a judge in another forum would devote several pages to the exposition of the doctrine involved, and reference to authorities supporting the proposition. Doubtless this has diminished the value of Georgia adjudications in other jurisdictions; but it has made the decisions shorter, and has enabled three judges, without committing more than gradual suicide, to keep up term by term with an enormous docket of about six hundred cases per annum.



THOMAS R. R. COBB.

EARLY JUDICIAL HISTORY.

A few words are proper in relation to the judicial system of the State prior to the organization of the Supreme Court. The State was divided into circuits (six in number, afterwards increased to ten), and law and equity was administered by the Superior Courts, presided over by one judge. Fortunately, some of the ablest men in the State held these offices; among others, William H. Crawford, once a cabinet officer and formidable candidate for President; Augustin S. Clayton, afterwards United States Senator; Augustus B. Longstreet, author of the "Georgia Scenes;" Walter T. Colquitt, equally eminent in law, politics, and religion, who would argue a case, make a political speech, and preach a sermon all in the same day; John McPherson Berrien, afterwards Attorney-General under President Jackson; Robert M. Charlton, afterwards in the United States Senate; and L. Q. C. Lamar, the father of the present Justice Lamar of the Supreme Court of the United States. There are no records of the decisions of these courts, except in the Eastern Circuit, from which various decisions made between 1805 and 1811 were reported by T. U. P. Charlton, and from 1811 to 1837 by R. M. Charlton. To avoid variance between the rulings in different circuits, the judges of the Superior Courts in 1830 "resolved to hold a convention semi-annually for the purpose of advising with each other and discussing freely and fully all questions of a doubtful or complex character, which might arise before each in their respective circuits, and thereby enable each judge to decide such question in the light of the united wisdom of the whole Georgia bench." This was a sort of General Term convened by the voluntary act of the

judges. The result of these deliberations is found in two volumes, — "Dudley's Reports" and "Georgia Decisions." None of the reports mentioned are, strictly speaking, "authority" in Georgia. They are seldom cited, and the books themselves are not generally found in the library of the Georgia lawyer. Most of them have been bought up by the travelling law-book agents to be sold to libraries that "want everything extant." In cases involving the construction of early Georgia statutes, they have great weight by virtue of the maxim, *Contemporanea expositio*, etc.

After earnest and long-continued exertions by the leading minds of the State, combating a strong popular prejudice, the Supreme Court was organized in 1845. Its jurisdiction is not limited as to amount. The most trivial controversies in the courts of *pie poudre* make grist for its mill. It has adjudicated a squabble over a canary-bird; and through the medium of *certiorari* cases the court is the regulator of the gyrations and contortions of that drum-major of the law, the justice of the peace.

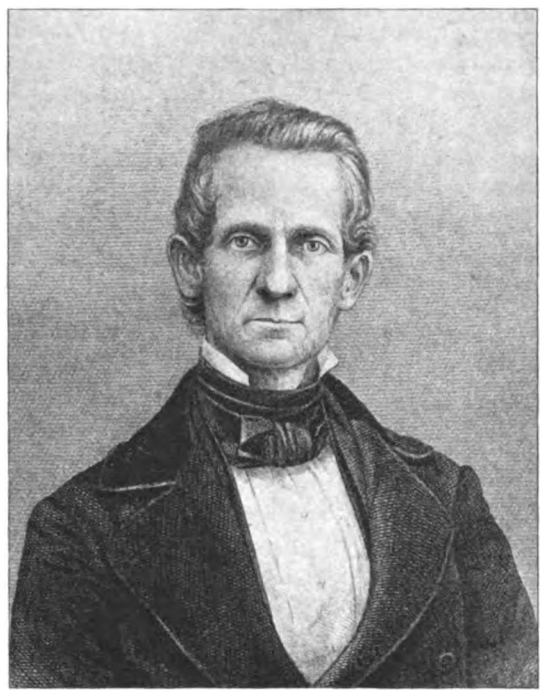
MEMBERS OF THE COURT.

The first judges of the Supreme Court were Eugenius A. Nisbet, Joseph Henry Lumpkin, and Hiram Warner, — a noble triumvirate. The latter reigned in 1853, and his place was filled by Ebenezer Starnes. Judge Nisbet was succeeded in the same year by Henry L. Benning. In 1855 Charles J. McDonald took the place of Judge Starnes, and in 1859 he resigned, and Linton Stephens became a member of the court. Judge Benning left the judicial for military service in 1860, and his seat was filled by Richard F. Lyon. In 1861 Charles J. Jenkins went on the bench, and remained until 1866, when he was succeeded by Iverson L. Harris. In the same year Dawson A. Walker filled the vacancy created by Judge Lyon's retirement. In 1867, upon the death of Lumpkin, Warner was appointed Chief-Justice. Reconstruction supervened, and in 1869, under a new Constitution, the Governor appointed Joseph E. Brown Chief-Justice, and Henry Kent McCay and Hiram Warner, Judges. The former resigned in December, 1870, and Osborne A. Lochrane was appointed. He resigned in 1872, and Warner became Chief-Justice, his place as Judge being filled by W. W. Montgomery, who in turn was succeeded by Robert P. Trippe, in February, 1873. In 1875 Judges McCay and Trippe resigned, and Logan E. Bleckley and James Jackson went on the bench. In 1880 the latter, upon the resignation of Warner, became Chief-Justice, and the vacant seat was filled by appointment of Willis A. Hawkins. In 1880 Judge Bleckley resigned, and was succeeded by Martin J. Crawford; and Judge Hawkins's place (he not being a candidate for election) was supplied by Alexander M. Speer. In 1882 Samuel Hall succeeded Judge Speer, and in 1883, upon the death of Judge Hall, Mark H. Blandford became a member of the court. On the death of Jackson in 1877, Bleckley was made Chief-Justice; and in 1887, upon the death of Judge Crawford, Thomas J. Simmons was elected. In January, 1891, Judge Blandford was succeeded by Samuel Lumpkin; so that the court as now constituted consists of Chief-Justice Bleckley, and Justices Simmons and Lumpkin.

These are the "dry-as-dust details" of the judicial record. Yet how inspiring is the fact that in this long record there is not one unworthy name! Without exception, each has possessed ability for his station. Not one was ever suspected of corruption or corruptibility. The glorious significance of facts like these is too often ignored, as men forget to thank God for the sunshine.

During the period covered in the foregoing enumeration the methods of selection have several times varied from that of appointment by the Governor to that of election by the Legislature. The third method of popular vote has never been tried; so that we have never had a judge who, in the words

of Rufus Choate, "was tost on the blanket of a popular election." The oscillation between the two methods first mentioned shows that after the trial of either for any considerable period of time, the objections thereto attract general attention, and public opinion turns to the other method, lapse of time having softened the impression of the objections to the latter. There have been some notable refutations of the arguments used against each method. Thus Warner, a Democrat, was elected by a Whig Legislature in 1845, and appointed by a Republican Governor in 1869. Hall, who had no political backing or popularity, and whose only claim to the office was in his legal learning, was chosen by the vote of the General Assembly in 1882.



EUGENIUS A. NISBET.

It is not possible within the limits of this article to embrace a biographical sketch of all the judges whose names appear in this long catalogue, — a list on which frequent resignations refute a well-warranted maxim of American politics. A reasonable principle of exclusion would seem to be to omit notice of the living judges, except the present occupants of the bench.

It is not invidious to say that the judges whose reputations are greatest beyond the limits of their State are Eugenius A. Nisbet and Logan E. Bleckley. If State celebrity alone be considered, Joseph Henry Lumpkin and Hiram Warner would rank with them.

In order to individualize the pen-portraits which I am to attempt, I shall endeavor to single out in each case a sharp and clean-cut feature; but I trust that this method, which does not admit of mention of many qualities which shade and set off the salient characteristics, will not lead to the misconception that my subjects were lacking in these concurrent but subordinate excellences. It must also be understood that the political distinctions and services of those who are to be sketched do not come within the scope of this article.

Eugenius A. Nisbet easily excels all his compeers as a perspicuous and polished expositor of the law, in its principles and precedents. The writers of the text-books, the judges of other courts, and such annotators as Hare and Wallace indulge in frequent quotations from his decisions. He is the only Southern jurist (along with Judge Bleckley) admitted into that legal Walhalla, — Snyder's "Great Decisions by Great Judges." He loved to "scatter the flowers of polite literature over the thorny brakes of jurisprudence;" and although his opinions are not ornate, yet the simple elegance and rhetorical finish of his opinions were doubtless largely due to his literary taste and culture.

The following extract from the decision in Culbreth *v.* Culbreth, 7 Ga. 64 (quoted by Mr. Snyder), in which he held that money paid under a mistake of the law could be recovered back, is a fair specimen of his style: —

"There is a clear and practical distinction between ignorance and mistake of the law. Much of the confusion in the books, and in the minds of the professional men, upon this subject, has grown out of a confounding of the two. It may be conceded that at first view the distinction is not apparent; but it is insisted that upon close inspection it becomes quite obvious. It has been ridiculed as a quibble, but we shall see it has been taken by able men, and acted upon by eminent courts. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake; but a mistake always involves ignorance, yet not that alone. The difference may be well illustrated by the case made in this record. If the plaintiff, the administrator, had refused to pay the distributive share in the estate which he represented, to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea that, being ignorant of the law, he is not liable to pay interest on their money in his hands. But the case is, that he was not ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief, by paying the money to them. The ignorance, in this case, of their right, and the belief of the right of the defendants, and action on the belief, constitute the mistake.

The distinction is a practical one in this, that mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions of the mind, undeveloped in action; whereas a mistake of the law, developed in overt acts, is capable of proof, like other facts."

His associate, Judge Warner, has referred to his decision in Wilder *v.* Lumpkin, 4 Ga. 208, holding a retroactive statute void, as one of his ablest judgments.

In Moody *v.* Davis, 10 Ga. 410, he thus describes the relation of the bar to the bench: "As officers of the court, the duties of counsel are not in conflict with those that devolve upon them as the representatives of a party. They are the *friends of the Court*, enlisted with him in the sublime work of discovering the truth, and dealing out justice between man and man. It is not the duty of counsel to suggest points of law which are against his client; but it is his duty to insist upon no point which he knows to be contrary to the law. Whilst judgment alone belongs to the judge, enlightenment is the province of the lawyer; and I apprehend that no judge can be found so presumptuously vain or so flagrantly unjust as not to recognize, and that too with grateful emotions, the aid which he derives in the discharge of his duties, more solemn than belong to any other functionary, from an able bar." This is not excelled in its simple force by the description of D'Aguesseau, in which he declares that the bar is "placed for the public good between the throne of justice and the tumult of human passions;" nor by the splendid tribute which Mr. Justice Harlan in his response at the Centennial Celebration of the Supreme Court paid to the services of the bar in the aid which their arguments had rendered in the adjudications of that great tribunal.

I have said that Judge Nisbet's opinions were often quoted. In one notable case it appears that due credit has hardly been given him. As the instance may raise a delicate question as to the extent to which judicial appropriation may go, it will be interesting to bring out the precise facts. In the case of Mitchum *v.* The State, 11 Ga. 615, Judge Nisbet discusses the effect of the argument by counsel upon facts not in evidence before the jury. In the case of Tucker *v.* Henniker, 41 N. H. 317, the New Hampshire Court deal with the same subject and reach the same conclusion. The opinion is delivered by Judge Fowler. At the close of the opinion the latter cites Mitchum *v.* The State in words and figures only, but in no other way does he give credit to that decision. The deadly parallel column will show the similarity of language used. The unimportant changes and omissions are sufficient to preclude the idea that quotation marks were intended to have covered the language, and

had been left off by the reporter or printer. If the case be one of unwarranted appropriation, the sin (as Mr. William Allen Butler says of Bracton's plagiarism from the civil law) cannot be called original sin. Perhaps the grievance of the Georgia jurist is aggravated by the fact, stated by Judge Seymour D. Thompson, that the New Hampshire case has become a leading one, and the principles there enunciated have become a part of American law, the source being recognized as the New Hampshire decision. The reader can form his own opinion from the following comparison: —

From 11 *Ga. R.*

"The rule is, that it is contrary to law for counsel to comment upon facts not proven. He represents his client, — he is the substitute of his client; whatever the client may do in the conduct of his cause, therefore, his counsel may do. In relation to his liberty of speech, the largest and most liberal freedom is allowed, and the law protects him in it. The right of discussing the merits of his cause, both as to the law and the facts, is indispensable to every party; the same right appertains to his counsel. The range of discussion is wide,— very wide. He is entitled to be heard in argument upon every question of law that may arise in the cause; in his addresses to the jury it is right to descant the facts proven or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when that is impeached by direct evidence, or by the inconsistency or incoherence of his testimony, his manner of testifying, his appearance, or by circumstances. His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination. To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempts, and indecency in words or sentiments is a contempt. This is a matter of course in the courts of civilized communities. Nor is it matter of form merely; for no court can command from a civilized public that respect which is necessary to an efficient administration of the law, without maintaining in the business of the court that courtesy and dignity and purity which characterize the intercourse of gentlemen in private life.

"But farther; every person accused is entitled to be tried by a jury, and according to the laws of the land. This is the greatest of all the privileges conferred by Magna Charta, and it is guaranteed by our own fundamental law. Now I assume that this privilege is violated, if counsel are permitted to state facts and comment upon them in argument against the adverse party, which are not before the jury by proof regularly submitted. The accused is not only entitled to have a trial by a jury of twelve men, but is entitled to have his trial conducted according to the cause and usage of the common law. 'By the law of the land,' as used in the great Charter, has been understood due process of law, that is, indictment or presentment; but that is not now the only meaning of these words. They mean that the party charged shall be indicted, arraigned, and tried according to the rules of law and the established usages of the courts. Trial by jury, —

From 41 *N. H. R.*

"It is irregular and illegal for counsel to comment upon facts not proved before the jury as true, and not legally competent and admissible as evidence. The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause, may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.

"To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentiments is contempt. This is a matter of course in the courts of civilized communities, but not of form merely; for no court can command from an enlightened public that respect necessary to an efficient administration of the law, without maintaining in its business proceedings that courtesy, dignity, and purity which characterize the intercourse of gentlemen in private life.

"But, farther, every person against whom an accusation is made, or a suit brought, is entitled to be tried by a jury, and according to the laws of the land. This was the greatest of all the privileges conferred by Magna Charta, and is guaranteed by our own fundamental law. This privilege is substantially violated, if counsel are permitted to state facts and comment upon them in argument against the adverse party, which are not before the jury by proofs regularly submitted. The party accused or prosecuted is not only entitled to have a trial by a jury of twelve men, duly constituted, but to have his trial conducted according to the course and usage of the common law, and the established rules of judicial proceedings. An essential element in the trial by jury is that the verdict shall be rendered according to the facts of the case, legally produced before the jurors. They are sworn to give their verdicts according to evidence, and if they find without evidence, or against

how imperfect a privilege would that be, if the forms of law were abandoned, if the rules of evidence were disregarded? An essential element in the trial by jury is that their verdict shall be rendered according to the facts of the case, legally produced to them. They are sworn to give their verdicts according to evidence; and if they find without evidence, a new trial will be granted. They cannot even render a verdict upon knowledge within their own breasts; but if a juryman has knowledge of facts pertinent to the issue, he may be sworn. The law, with great carefulness, prescribes rules by which facts are to be submitted to the jury. Testimony must be relevant, — the best evidence the nature of the case admits must be produced; hearsay is excluded; interest in the witness will disqualify, etc.; and, by our own Constitution, in criminal cases the witnesses are to be confronted with the prisoner. He has in all cases the right of cross-examination. All these and many more rules are prescribed for the ascertainment of the truth of those facts upon which verdicts are to be rendered.

"When counsel are permitted to state facts in argument, and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said, in answer to these views, that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in any degree influence the finding, the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then without doubt the jury have nothing to do with them, and the lawyer no right to make them. And just here the argument might be rested. It is not reasonable to believe that the jury will disregard them. They may struggle to disregard them, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to character of counsel, his skill and adroitness in argument, and the naturalness with which the statements stand connected with other facts and circumstances in the case. To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath, — without cross-examination, and irrespective of all those precautionary rules by which competency is tested."

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Judge Nisbet's mental organism had one singular defect; on the subject of spelling his mind was a howling wilderness. He could not spell nor learn to spell the commonest words. His method of orthography resembled a cyclone in chaos, — a law unto itself. I have seen a letter from him in which he spelled "secession" three ways; he drafted the ordinance of secession for Georgia, but never learned to write that historical word. He humorously confessed his phonetic but revolutionary methods with the alphabet, and cheerfully submitted to the reporter's revision of his decisions.

An anecdote he loved to tell is in order. He concluded a decision with the maxim, *Id certum est quod reddi certum potest.*

The decision was adverse to the side represented by a strong-minded but utterly illiterate practitioner, who sometimes tarried at the wine-cup with the usual consequences to his eyes. He said, in protest, "Judge, I think it was bad enough to lose my case; I never expected to be called a red-eyed possum."

Joseph H. Lumpkin was a fountain of eloquence, both at the bar and (as will be explained) on the bench. He had a magnetic personality, a handsome presence, a commanding figure, a graceful bearing, a winning voice, a persuasive manner, a brilliant imagination, fervid sensibilities, strong intellectual power, — the whole panoply of the born orator. As an advocate before the jury, his power was prodigious. Stories are told of jurors who, in spite of the interposition of the court, at times made audible responses to his fervid appeals, and at other times sprang in excitement to their feet. This is tradition, and tradition only. There is no record which preserves a solitary evidence of the power of Lumpkin, or Walter T. Colquitt, or Benjamin H. Hill, or Robert Toombs, or William Dougherty as advocates. Richard Henry Wilde, a Georgia lawyer, and not the equal of any of these, wrote one poem of twenty-four lines, and has achieved an immortality which all their purely professional labors failed to secure. How true are these words of a Connecticut judge: —

JOSEPH HENRY LUMPKIN.

"Some of the most vigorous brain-work of the world is done in the ranks of our profession. Our work concerns the highest of all temporal interests, property, reputation, the peace of families, liberty, life even, the foundations of society, the jurisprudence of the world, and sometimes the arbitrations and peace of nations. The world accepts the work, but forgets the workers. The waste hours of Lord Bacon and Sergeant Talfourd were devoted to letters, and each is infinitely better remembered for his mere literary diversions than for his whole long and laborious professional life-work. The victory gained by the counsel of the seven bishops was worth infinitely more to the people of England than all the triumphs of the Crimean war. But one Lord Cardigan led a foolishly brilliant charge against a Russian battery at Balaklava, and became immortal. Who led the great charge of the seven confessors of the English Church against the English crown at Westminster Hall? You must go to your books to answer. They were not on horseback. They wore gowns instead of epaulettes. The truth is, our work is like that of the little insects that in the unseen depths of the ocean lay the coral foundations of uprising islands. In the end come the solid land, the olive and the vine, the habitations of man, the arts and industries of life, the havens of the sea and ships riding at anchor. But the busy toilers which laid the beams of a continent in a dreary waste are entombed in their work and forgotten in their tombs."

It is necessary to explain the statement that Lumpkin was eloquent *on the bench.* He was accustomed to deliver his opinions orally. During the first years of its existence the court was peripatetic. It sat in

circuits, at the principal towns within these divisions. It was no uncommon thing for crowds of the people to attend the sessions of the court, especially on the days when the decisions were to be delivered. In pronouncing an opinion in any case in which the question involved touched any great principle of constitutional liberty or popular right or domestic happiness, or which in any way touched the human heart, Judge Lumpkin gave full vent to his marvellous powers of oratorical expression. He was "a very priest-justice," in the happy phrase of Judge Seymour D. Thompson, commenting on this singular tradition. Unfortunately, there was no stenographer to record these remarkable utterances. Judge Lumpkin did not write out his judgments until afterwards, — after the heat of the argument and his own fresh interest in the case had passed away. He did not love to write; he could not tolerate the labor of revision. He was utterly careless of his reputation. The result is that although his opinions are scattered from the first to the thirty-fifth volume of the Georgia Reports, they wholly fail to convey any adequate impression of his greatness and his power.

HIRAM WARNER.

And yet, after this heavy discount, there is enough in the records to show his character and vindicate his work in the development of the jurisprudence of Georgia. He appears as the ardent lover of justice. In one decision he says: "After all, where lies the justice of the case? I always dig deep for that, and when found, nothing but imperious legal necessity can prevent me from enforcing it." [1] The apparently opposite spirit is voiced in the utterance of Judge Benning: "There is but one question for a court, — What is the law?" [2] These divergent tendencies are but different aspects of the same truth, — justice according to law. And yet if there is a difference in the two mental attitudes exhibited by these statements, that of Lumpkin is to be preferred. For those technicalities which are great principles in concrete forms he had judicial reverence; but with those which never rested on a principle, or in which the principle had ceased to be vital, he was ready to play the iconoclast. A specimen of his dealing with such topics is to be found in his remarks about seals.

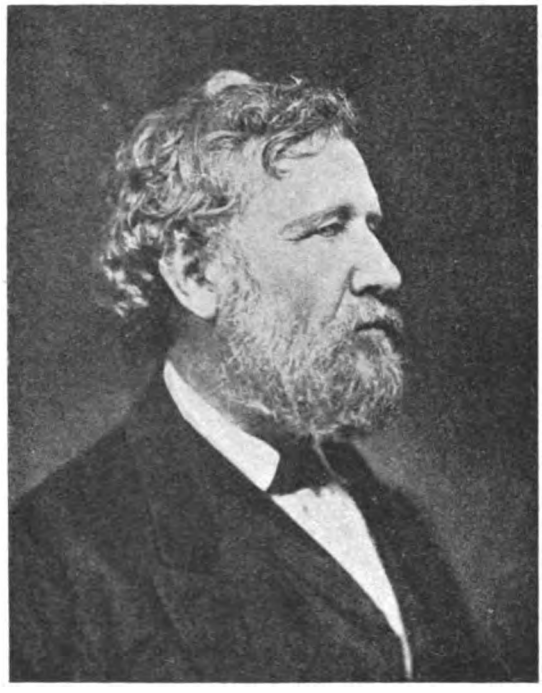
The question in the case [3] was whether a writ of error was amendable by attaching the seal of the court. Judge Lumpkin says: —

"What magic, I ask, is there in our own seal? True, the Clerk has attested this writ of error in his official name, and by his private seal, and in obedience to it, the Clerk of the Circuit Court has certified and transmitted to this court all the records and papers of the file in the court below, which are necessary to enable us to hear and determine properly this cause upon its merits. But then we look in vain on this writ for the three pillars supporting an arch, with the word 'Constitution' engraven within the same, emblematic of the Con-

[1] 26 Ga. 30. [2] 19 Ga. 393. [3] 13 Ga. 253.

stitution, supported by the three departments of government, legislative, judicial, and executive; the first having engraven on its base, Wisdom, the second Justice, and the third Moderation, and then on the right of the Executive column, a man standing with a drawn sword, and resembling most strikingly the figure and attitude of our most worthy and excellent Chief Magistrate. But I forbear.

"*Illi robur et aes triplex.* He would be a bold Judge, indeed, who would venture to decide an issue of law in the absence of this speaking device. There is a charm in that arch, — a spell in those pillars, — an inspiration in the eye of that fierce-looking swordsman, which guarantees a faithful administration of justice, although simply and but very imperfectly impressed on the foolscap paper on which the writ of error is printed, instead of wax or some other tenacious substance.



HENRY L. BENNING.

"To whom we are indebted for the change in our seal, I am not antiquarian enough to state. The old devices I always venerated; to one side the scroll on which was engraved the Constitution of the State of Georgia and the motto, *Pro bono publico*. On the other side, an elegant house and other buildings, fields of corn, and meadows covered with sheep and cattle; a river running through the same with a ship under full sail, and the motto, *Deus nobis haec otia fecit.* The latinity as well as the piety of this seal commend themselves to my hearty admiration. They will challenge a comparison, even on the score of architectural taste too, with the arch resting on three pillars. But then the capital defect in the old seal — who does not anticipate me? — was the absence of that cocked-hat swordsman! Without this addendum it is difficult to decide that any public document can impart absolute verity. This it is, I am sure, that has exerted such a controlling influence over the judgment of my dissenting brother, with his well-known military propensities.

"The Act of 1845 authorizes this court to establish and procure a seal. My recollection does not serve me whether the State coat of arms was selected as the device. I take it for granted it was. If so, where, upon any seal attached to any writ of error or citation returnable to this court, are these three potent and cabalistic words, — wisdom, justice, and moderation? Do not these constitute a part of the seal just as much as the seal does a part of the writ of error? Is it the seal of this court without them? If so, how much, and what portions of it may be omitted and still leave a good seal? Would it be a seal without the arch, without the pillars, without the motto? I forbear even whether to put the question whether it would be a seal without the military effigy, without that cocked-hat swordsman? Of course it would be a nullity. As well talk about a man without a body!

"For myself, I am free to confess that I despise all forms having no sense or substance in them. And I can scarcely suppress a smile, I will not say 'grimace irresistible,' when I see so much importance attached to such trifles. I would cast away, at once and forever, all law not founded in some reason, natural, moral, or political. I scorn to be a 'cerf adscript' to a thing obsolete, or thoroughly deserving to be so."

Judge Lumpkin was on the Supreme Bench from 1845 to 1866. This period was twice as great as that of the continuous service of any other Judge. During the whole time such was the esteem inspired by his lofty

character, and such was the magnetism of his personal influence, that he was the most forceful personality on the bench. It was during the period above mentioned that the judicial system of Georgia was developed. The part which Lumpkin played in expounding and expanding the Judiciary Act of 1799, and subsequent legislation, was something like that of Chief-Justice Marshall in the development of the Federal Constitution.

No account of Judge Lumpkin would be complete which did not mention his zeal and his labors in behalf of temperance. Into that moral reform he threw his best energies. No subject outside of the eternal issues of religion affords so fine a field for eloquence as that; and Judge Lumpkin's thrilling speeches are still living by their echoes in the lives of thousands of his fellow-men.

Hiram Warner.

There is something romantic about the early incidents of Judge Warner's life. "A boy, some nineteen years of age, left his paternal home in New England to seek fortune and fame in a land of strangers. His only patrimony was the intellect the great Father had given him; his only assurance of success, the consciousness of its possession. The few dollars in his pocket when he embarked were lost in shipwreck; severe illness, nigh unto death, followed that disaster; the charity of Sisters of Mercy at Charleston, where first he landed on Southern shores, nursed and restored the penniless lad to health; alone, unfriended, he wended his way to Georgia, and finding an acquaintance in the teacher of a school at Sparta, this acquaintance was informed of his situation, and employed him as his assistant."

After reviewing his career, Chief-Justice Jackson said in a memorial address: —

"How does the lustrous life of this Yankee youth illustrate the old and maligned South! With what light does it shine on the page of her history, exhibiting to impartial generations and nations that our fathers were never a hand's-breadth behind their children in welcoming to homes and hearts all who came to dwell beneath her sun, to honor and elevate to office and emolument the men who deserved them! How completely does this light disperse the clouds and scatter to the winds the imputation on our ancestors that ancestral blood was the road to fortune and fame in their midst, and that a Southern aristocracy sat enthroned in the Southern heart, and dominated its pulsations, and dictated its preferments!"

It is worthy of mention that at Greenville he was the preceptor in law of Lyman Trumbull, the eminent lawyer, judge, and senator of Illinois.

Vigor was the distinguishing characteristic of Chief-Justice Warner. It was the quality impressed by his massive frame, his powerful intellect, his resolute will. His physical tenacity was illustrated by a painful experience, *horresco referens*. In 1865 a party of bummers attached to the victorious Federal army, having been informed that Judge Warner had a large quantity of gold, hanged him, as a means of coercing from him a statement as to where it could be found. Thrice was this gentle experiment repeated; and after the third ordeal he was left for dead. Although he was then about sixty years of age, he survived the severe physical shock, and lived in robust health under the most exacting judicial labors until 1880.

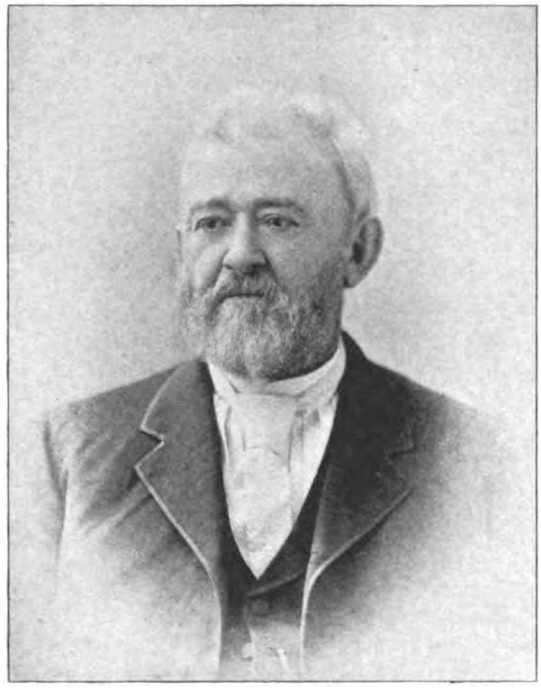
Judge Warner's decisions deal only with the point to be decided. They are examples of direct statement and strong reasoning.

In the period after the war there was a craze among the people for relief legislation, relief from debts. Stay laws, large homestead exemptions, scaling ordinances (authorizing juries to readjust liabilities on Confederate and ante-bellum contracts), and other similar legislation were demanded by the popular will. The other members of the court at that time were in sympathy with the object of these laws, and held them constitutional. Judge Warner strenuously antagonized the whole system of relief legislation.

In one decision he doubtless exceeded judicial propriety by remarking in a dissenting opinion that he did not purpose to "embalm himself in judicial infamy" by concurring in the decision of the majority. He lived to see the whole scheme of relief pass away in the recovered prosperity of the State, and to find himself sustained by the Supreme Court of the United States (Gunn *v.* Barry, 15 Wall. 610) in holding that the homestead exemption was not protected from the lien of a judgment obtained prior to the passage of the homestead law.

Ebenezer Starnes.

Although not the equal of the first great triumvirate, this Judge brought to the discharge of his high duties that patient attention which Malebranche has aptly called "a natural prayer for light," and that diligence which enabled him to "labor terribly." He was a man to whose sagacity the people looked for guidance in trying times; and in the period between the military rule in Georgia in 1865 and reconstruction, he was one of a commission appointed to formulate a code of laws for the government of the freedmen. The work of the commission was never published; and the surviving members are not over-solicitous to own their connection with it. The matter is interesting chiefly on account of the evidence that it furnishes that even the wisest men in that day were "slow of heart to believe" how radical a change the results of the war had wrought in the status of the negro race.



RICHARD F. LYON.

Richard Malcolm Johnson, the well-known Southern writer, says that in literary accomplishments Judge Starnes surpassed all his contemporaries at the Georgia Bar.

Sharswood and Budd, in their notes to a case in "Leading Cases on Real Property," call him a learned Judge, and cite with approval one of his decisions on the statute *de donis*.

Charles J. McDonald.

This Judge came upon the bench after long executive service as Governor of the State. It has been thought that the value of executive experience to the Judge, especially in dealing with quasi-political questions, can be traced in the career of Chief-Justices Marshall, Taney, and Chase. Though the decisions of McDonald are not polished, and seldom go outside of the special facts of the case in their reasoning, yet he was regarded as a good Judge, and a man of strong intellectual grasp.

Henry L. Benning

was a man of robust intellect, and notably fond of logic dialectics. The most striking characteristic of his decisions was the logical form in which he cast them. Syllogism and dilemma were his favorite moulds of thought. His mental attitude in the examination of a case has already been indicated by the sentiment quoted in contrast with that of Judge Lumpkin.

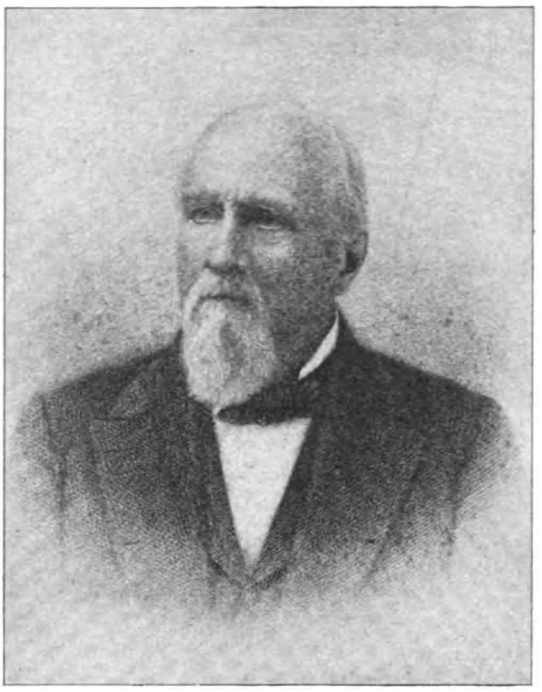
Judge Benning won great celebrity in the

Civil War. "Stonewall" Jackson had pre-empted that designation, but General Benning won another that had the same meaning. His military title was "Old Rock." He was more sure to be at the post of duty than the post was to be there itself; and he held his brigade in battle with impregnable firmness. Brave and determined as he was, he was also one of those who "got over the war" as soon as it was decided. In his old age he enjoyed those well-merited rewards, — "love, obedience, honor, troops of friends."

Linton Stephens

was a brother of the more distinguished Alexander H. Stephens; and it is not improbable that he would have been more prominent, if not thus overshadowed. By many men of discrimination who knew and appreciated both the brothers, he was regarded the abler man of the two. Alexander H. Stephens had the advantage of a unique and vote-rallying invalidism; while Linton's robust physique left him without any such claim on the popular sympathy.

As a Judge, his opinions are the shortest in the Georgia Reports. He saw what he saw clearly. Doubt, "with its thousand-fold pinion," did not hover over his intellectual processes. He went straight to the controlling point in the case, and ended the matter. It was said of him: "He disdained to cite much authority. He preferred to become authority."



CHARLES J. JENKINS.

Charles J. Jenkins.

This Judge's service on the bench was only an episode of his life. He was a member of the Supreme Court during the war, and few cases of importance or general interest came before him. Litigation of the ordinary sort was practically suspended in Georgia from 1861 to 1865. There were not a few habeas corpus cases in those days. In one of these Mr. Toombs represented the relator, and in the argument said that "no court would dare do" what he claimed would result from the consequences of the decision he was deprecating. Judge Jenkins fairly cowed the fiery orator by stopping him and saying from the bench, "Mr. Toombs, this court dares do anything that is right." Judge Jenkins was Governor of the State when reconstruction "deposed" him. He is justly regarded as one of the greatest and purest men Georgia has produced.

The period covered by the incumbency of the Judges already mentioned brings the history of the court to the close of the war. Fortunately, Georgia was preserved from the judicial eclipse which befell some of her sister States during the troublous times that followed the year 1865.

Judge Dawson A. Walker went on the bench as a Republican; but even partisan criticism accords to him purity and ability as a Judge.

Iverson L. Harris

belongs to the same period, though not to the same party. He was a man of bold, original thought, trenchant in style of expression. He believed that the capacity of law for improvement was one of its marked characteristics; and was in full sympathy with all legislation and "judge-made law" looking to its reform. His mental attitude upon this general subject may be discovered in his admirable eulogy of Judge Lumpkin: —

"He lived to see the wise and beneficent principles into which he had expanded the germs of our crude, disjointed, technical, and incongruous Jurisprudence, embodied and bound up in terse yet perspicuous definition, furnishing rules of uniform and essential service, by which the controversies of men could be adjusted, in that masterly portion of our Code which is generally understood to be the work of his beloved son-in-law, the late Gen. Thomas R. R. Cobb, the ardent and enthusiastic child of genius, the Christian patriot, and great lawyer. . . .

"Looking back over the gradual development of our system, the jurist of the present day will most probably deem it fortunate that the tribunal through which this has been chiefly effected was organized under the auspices of a fresh mind, full of knowledge, enthusiastic, and in the vigor of manhood, — of one who had early imbibed much of the sceptical spirit of Bentham as displayed in his treatise on the Rationale of Judicial Evidence.

"I am inclined to think, had Judge Lumpkin been older when called to the bench, — had he become the head of a school, withdrawn from the contests of the bar, with reputation established by previous judicial service, when technical learning was cultivated assiduously and technical justice rigorously enforced; admired, caressed, and imitated, his opinions received as oracles, — it is questionable whether the change of which we are so sensible would have occurred. Men of the class referred to repose in their early habits and creeds; they do not re-examine the foundations of their early opinions, nor are they patient when these opinions are doubted or questioned. So long as this class continue to control or even influence the thoughts of others, little that looks to change or advancement can be expected from it. Old lawyers, like old warriors, adhere with tenacity to the routine of the old systems in which they were educated, and which have been the occupation of their manhood."

JOSEPH E. BROWN.

The court as constituted after the adoption of the new Constitution in 1868 formed the ablest tribunal that had occupied the bench since the organization in 1845. The Chief-Justice was Joseph E. Brown (afterwards United States Senator), of whom, by the principle of exclusion already fixed, it is not contemplated that this article should speak. By a habit of early pronunciation, Senator Brown has forever linked his name with the word judg-*ment;* and the association of ideas is aided by the fact that in perfect self-poise, in knowledge of men, in comprehension of the people, in intuitive perception of public opinion, in adaptation of means to ends, in many varieties of successful achievement, that rare faculty has seldom had a more complete exemplification.

OMICHUND vs. BARKER.

Sm. L. C. 455, 7th Ed. *Temp.*, 1745.

[*An oath, not being a distinctively Christian institution, may be administered according to any form binding on the conscience of the witness, provided he believe in a deity who will reward or punish him according to his deserts.*]

THE dusky Gentoo
(Whoe'er *he* may be),
The obdurate Jew,
And the heathen Chinee,
Though he swear in a manner peculiar,
To swear as he chooses is free.

For in Orient clime,
When they meant to be true,
The men of old time
Looking up at the blue,
By the powers immortal they sware it—
We swear by the Deity too.

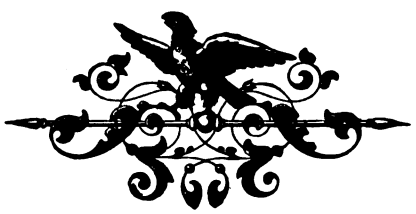
From Homer of old
To Grotius the sage,
The vows are enrolled
Of each varying age;
And an oath is e'er sacred in Tully,
And Tillotson's eloquent page.

What matters the rite,
If we kiss with our lips
The Gospels, or light
Touch the hands and the tips
Of the toes of a reverend Brahmin,
Or request to be broken in chips,

Like the saucer we break
As we speak it? Ah, no;
Little odds *that* will make,
If we think that below
Hereafter the bad will be punished,
But the good with the good niggers go.

So the dusky Gentoo,
And the far Carribee,
The obdurate Jew,
And the heathen Chinee,
Though he swear in a manner peculiar,
To swear as he chooses is free.

Lays of a Limb of the Law.



HUMOR OF THE BENCH.

By Clark Bell, Esq., *of the New York Bar.*

Mr. Justice Charles G. Garrison, of the Supreme Court of New Jersey, has more than usual judicial appreciation of humor, and he has furnished me with an illustration of rustic intelligence recently occurring upon a trial before him. The action was ejectment. A country lad, aged twenty three or four years, a son of the plaintiff, was put on the stand to testify as to a line fence. He gave his testimony in so low a tone of voice that Judge Garrison said to him, "Speak so these gentlemen can hear you," pointing to the jury. "Why," said he, with a beaming smile, "are these men interested in Pop's case?"

In another case the terms of the description in a deed being ambiguous, Judge Garrison left it for the jury to determine what the words used meant. Defendant's counsel deemed his construction plainly right, and said to the jury that he considered there was nothing to argue about; whereupon plaintiff's counsel began his closing argument as follows: "Gentlemen of the jury, if, as my learned brother says, the words here used are so plain that the wayfaring man though a fool could not err therein, his honor would not have found it necessary to leave any question to the jury."

Mr. Croake James published a work entitled "Curiosities of the Law and Lawyers," from which we quote an amusing incident. At the Old Bailey it was customary to sentence all the prisoners convicted at one time. On one occasion Baron Graham, in the discharge of this duty, omitted to sentence one John Jones who had been brought up for that purpose. The learned judge was about to conclude, when the court officers informed his lordship of the omission, whereupon Baron Graham said with great solemnity, "Oh, I am sure, I beg Mr. Jones's pardon," and then gravely sentenced him to transportation for life.

The "American Law Review" publishes, as a splendid example of judicial rhetoric, a sentence from the decision of the Supreme Court of Missouri in the case of Ames *vs.* Scudder (14 S. W. Rep. 530), from the conclusion of the opinion of one of the judges, the following: —

"In my humble opinion such a theory of the law is only equalled in its world-embracing comprehensiveness by the Missionary Hymn; places an administrator in this State on the same pedestal where the oration of Phillips places Napoleon the Great, — making him proof against perils, endowed with ubiquity."

I do not know Chief-Justice Bleckly of the Supreme Court of Georgia personally, though I have had correspondence with him, and I know how high he stands in public estimation, and with what respect he is held by the Georgia Bar. He contributed a short sketch of his life and career to form a part of the forthcoming work on the "Supreme Court of the North American States and Provinces," which was recently published in the "Medico-Legal Journal." The sketch is replete with rare humor. The concluding sentence is a sample: "In person he is tall, angular, and ungraceful; and though he has a passion for beauty, no trace of that enchanting quality is visible upon his own face. He himself admits to his confidential friends that he is ugly." Those who know him or have seen his portrait will readily appreciate that no other man or woman in Georgia would have made that statement except the Chief-Justice himself.

"I saw in El Paso, Texas, a justice who made an affidavit against a man for larceny (it was the justice's property that was alleged to be stolen) before himself. He

issued the warrant to himself, he arrested the defendant himself, brought him for trial before himself, and was himself the only witness in the case. The defendant was convicted." — GEORGE F. MOORE, Esq., Address before the Bar Association of Alabama, August, 1890.

The "Journal of Jurisprudence of Edinburgh" gives the following good story of Mr. Justice Day, of England. "One of the quiet humorists of the English Bench is Mr. Justice Day. A saying is attributed to him, as having been made at the recent Leeds assizes, which did not get into the reports. One witness deposed that the defendant spoke of the plaintiff as a 'damned thief.' The defendant's counsel at once interposed in correction, 'A damned thief of a lawyer, my lord.' 'That addition,' Mr. Justice Day said, in his calm and philosophic way, 'renders the saying perfectly innocuous.'"

Mr. Irving Browne, the versatile editor of the "Albany Law Journal," is responsible for the following bit of judicial humor. "In the early days a certain judge was Chief-Justice of Wisconsin. He was not, to say the least, considered the ablest man that God ever made, and it was notorious from his decisions, whenever he tried to write one, that he owed his elevations to fortuities other than juridical. He was a very small man, and well formed, and had above all, or rather below all, an extremely shapely foot. One of his associates, Justice B——, was a very large, ungainly man, awkward and homely, and, to add to it all, had a club foot. He was the brains of the Supreme Court Bench, however. One day, in riding circuit, Judges A—— and B—— stopped at a wayside tavern, and were accommodated with one room, with two beds in it. Each judge stretched himself on a bed, and lay quietly until Judge A——, looking up, saw Judge B—— looking intently at his (Judge A——'s) foot. 'What are you thinking about, Brother B——?' said Judge A——. "Well, Judge A——," said Judge B——, "I was thinking that if I had your foot, I would be almost willing to have your head.'"

A Mr. Justice Partridge, an English magistrate, upon authority of the "Pall Mall Gazette," quoted approvingly as to veracity by the "London Law Journal," recently sentenced two boys brought before him and convicted of stealing unripe pears from a Mr. Hammersmith, Solicitor, to the following terrible punishment: He condemned each of the boys "to eat the remainder of the unripe fruit," and added the following awful *brutum fulmen*, as he delivered his fearful sentence, "that he hoped the pears would make their stomachs ache."

The following amusing anecdote, which was contributed by a member of the Steuben County, New York, Bar, to the "Knickerbocker Magazine," is said to relate to Judge Helm, who resided at an early time in Bath, N. Y., and became one of the Judges of the Court of Common Pleas: "Among them was a jolly old Virginian, Judge H——, a sportsman of the old school, of buff breeches and fair top-boots, well known throughout the country for genial habits and generous hospitality. He had been appointed a judge of the Court of Common Pleas. Though little versed in legal technicalities, he possessed a fund of genuine common-sense, which made him a good judge. On one occasion, in the absence of the first judge, it fell to him to charge the grand jury. The substance of the charge, so characteristic of the man and of his opinions, is here given: 'Gentlemen of the Grand Jury, — In the absence of the first judge, it becomes my duty to address you. If you expect much of a charge, you will be disappointed, as it will be nothing but a squib. I see among you many gentlemen who understand the duties of grand jurors better than I do. I need only say, then, you know your duties, go ahead and perform them. The sheriff has handed me his criminal calendar, by which it appears he has five poor devils in jail for various offences, —

two of them are for horse-stealing. Now, gentlemen, there are grades in crime, and common-sense would indicate that the punishment should be in proportion to the criminality of the offence, as exhibited by the circumstances of each case. That, I suppose, is the law; if it is not, it ought to be so. You will understand what I mean by this, when I inform you that one of these scamps stole a slab-sided Yankee mare, while the other took a Virginia blood-horse. Two others are indicted for mayhem, — one of them for biting off a negro's nose, which I think exhibits a most depraved appetite; the other for gouging out an Irishman's eye, a most ungentlemanly way of fighting. I hope you will look well to these fellows. The last is a poor cuss who stole a jug of whiskey. The article is so plenty and cheap that it may be had by asking anywhere; and stealing it is the meanest kind of offence, and deserves the severest punishment that the law will permit. The great men at Albany have made it our special duty to charge you in regard to private lotteries. What is the mighty crime involved in this business I cannot see, when hustling and pitching coppers is tolerated; but I suppose they know, and as the law makes it our duty, I charge you to look out for them. Sheriff, select two constables, and march these men off to their duties.' "

CHAPTERS FROM THE ANCIENT JEWISH LAW.

By David Werner Amram, *of the Philadelphia Bar.*

I. THE RIGHT TO DIVORCE.

IT is difficult, if not impossible, to determine when the custom of granting a bill of divorcement was first instituted among the Hebrews. In the year 621 B. C. the book of Deuteronomy was discovered or written, and in the twenty-fourth chapter is found the earliest record of such a custom. It provides that "if a man hath taken a wife and married her, and it comes to pass that if she finds no favor in his eyes, *because he hath found some shameful thing in her,* and he writes her a bill of divorcement, and gives it into her hand and sends her away out of his house; and she departs from his house, and goes and becomes another man's wife; and if the latter husband hates her, and writes her a bill of divorcement, and gives it into her hand, and sends her away out of his house, or if the latter husband who has taken her as his wife should die, — then shall her former husband, who had sent her away, not be at liberty to take her again to be his wife, after she hath been defiled, for it is an abomination before the Lord; and thou shalt not bring sin upon the land which the Lord thy God giveth thee for an inheritance."

This law does not expressly sanction divorce; but it speaks of the act of sending away the wife with a letter of divorce as of a custom well known and established. It was the ancient common law of the land which authorized this act; and the purpose of the law in Deuteronomy was simply to qualify it, by providing that the divorced woman could never again marry the man who had divorced her, if she had been married to another man. There is here a curious blending of the purely legal and the ethical view of the question. The divorced woman was not forbidden to contract a second marriage, but having done so, was forbidden from ever remarrying the first husband who had divorced her; the law favored the continuity of the marriage relation, and looked on divorce with disfavor;

so that the law intimates that the wife, even after having been divorced, still has clinging to her some of the duties of wifehood. Although recognizing the second marriage as perfectly lawful and valid, the law considers it a sort of adultery as far as the first husband is concerned. This is the sense of the clause which prevents the remarriage of the divorced woman to her first husband after she has been married to another; for at Jewish law the adulteress was obliged to leave her husband, and he was not permitted to condone her crime; and in this case, like an adulteress, the divorced woman can never again return to her first husband, although *before* she has contracted the second marriage her husband may take her back again, and in fact is in the opinions of the Rabbis recommended to do so. When read in this light the saying of Jesus (Matt. xix. 9), "Whoso marrieth her which is put away doth commit adultery," is seen to have been a logical outgrowth of the Jewish law, the fundamental principle of which was that a wife *ought to remain* a wife forever. Rabbi Meir said: "The man who marries a divorced woman is not to be classed with him who has sent her away; for the latter has sent a bad woman out of his house, and the former has taken her in. The second husband ought to divorce her; for if he does not," continues the Rabbi, somewhat facetiously, "she will be the death of him; for it is written, 'If the latter husband . . . writes her a bill of divorcement, or if the latter husband should die; and indeed he deserves death, for he hath taken into his house an evil woman.'"

Under what circumstances and for what causes may a man divorce his wife? Is it a purely private act, or the subject of judicial interference? On these points the theory and the practice of the ancient Hebrews differed widely.

The law above cited simply states two instances when a divorce is given, by way of example: "If she find no favor in his eyes, because he hath found some shameful thing in her," and "If he hate her." The Rabbis, however, believing that the law restricted divorce to these cases, set about interpreting their meaning; and the discussion as to the sense of the phrase, "some shameful thing," lasted for several centuries.

The schools of Hillel and Shammai, two distinguished teachers of the first century B. C., were divided on this question. The followers of Shammai were the "strict constructionists," holding that only actual indecency was a proper cause for divorce; whereas the school of Hillel, the "loose constructionists," would allow divorce for any reason which destroyed domestic peace and happiness. Rabbi Akiba, who lived in the second century B. C., emphatically said that a man may divorce his wife when he finds another more beautiful than she; that no restrictions could be placed on his right to send her away whenever it pleased him. It is but fair to Rabbi Akiba to say that he was himself a model husband, who openly confessed to his students at the college that the influence of his wife had made him love the law and devote himself to its study.

The theory of the law was finally settled by a *dictum* of Raba, an eminent Babylonian teacher, who said that if the husband gives a divorce for no cause, the law will recognize it as perfectly valid, and will not compel him to restore his wife to her conjugal rights. Under such rulings it might be expected that divorce would be as common as marriage among the Hebrews; but in fact divorce was almost as rare as murder. For while the Rabbis were discussing the theory of the law, they took good care that the practice should be made so difficult by rules, as to the writing, signing, and delivery of the bill of divorcement, that the whole matter was necessarily thrown into the hands of the judges; for no man could, without professional assistance, safely traverse the perplexing maze of legal inhibitions and restrictions that barred the way to a divorce. "No one," concludes the "Seder

Ha-Get" (Rules of Practice in Divorce), "should busy himself with divorce matters unless learned in the law of divorce; for the minutiæ are numerous, and one can easily err, whereby the divorce is invalidated, and the children born of the second marriage are bastardized. And God save us from such mistakes!"

The one essential condition to a valid divorce was that the husband should give his wife a bill of divorcement; and the Rabbis seized upon this fact to remove the entire act out of the irresponsible hands of every man into the court of law, where the first duty of the judge was to bring about a reconciliation of the parties. Indeed, there is an ancient tradition that Aaron, the high-priest, had, in the exercise of such *quasi*-judicial functions, reconciled many a couple who had applied for divorce.

The many restrictions and the general policy of the law soon settled the rule of practice, that no divorce would be granted except for cause shown, and only *coram judice*. The old theory that the husband had a *right* to divorce his wife continued to flourish for a long time, but only as a theory; for in practice, already in the first century of the present era, this right of the husband had been overruled. In the eleventh century many Jews, under the influence of the general laxity of morals, took great liberties with the right of divorce; whereupon Rabbi Gershom of Mayence decreed the "Kherem," or sentence of excommunication, against any man who divorced his wife against her will without cause, and allowed a divorce *ex parte* only when the woman had been proved guilty of immorality or crime.

The right to give a bill of divorcement had never been conceded to the wife; nor does the *Tora* recognize her right even to sue for divorce. This defect of the written law was supplemented at an early date by the Rabbinical law. The Rabbis saw that in many cases it would be barbarous to compel a woman to continue to live with a man unfitted physically or morally to be her husband. In such cases they allowed her to sue for a divorce, and on proper proofs of the husband's disability would compel him to give her the letter of divorce. Originally, the causes recognized as valid were few, and limited to cases where the husband could not perform his duties toward his wife; if she sued for divorce for any other cause, she lost her "Kethuba" (Dotalium) and all her property rights in her husband's estate. After the organization of the Mohammedan courts in the seventh century, Jewish women were wont to turn to these for divorce; since under the Koran they did not, as under the Jewish law, lose their property rights. To prevent this defection, Rab Hunai and Mar Raba, the two leading Rabbis of the time, ordained (about 675 A. C.), that in all cases the wife could sue for divorce without loss of her property rights.

This decision practically gave husband and wife equal standing before the Jewish law in matters of divorce.

LONDON LEGAL LETTER.

LONDON, Dec. 5, 1891.

I THINK it was at the close of my last letter that I referred to the matrimonial cause of Russell *v.* Russell, which fell to be tried this term. The case has just been heard, and the verdict given. It excited even greater interest in legal, social, and general circles than was anticipated, — the high rank of the parties, as well as their youth, lending an unusually dramatic complexion to the proceedings. The respondent, Earl Russell, is grandson of the first and great Earl Russell, better known as Lord John Russell of Reform Bill fame; his son, Viscount Amberlay, predeceased his father in 1876, leaving the present peer an orphan at ten years of age. The boy was sent to Winchester School, and subsequently to Oxford, being entered at Balliol College, where he developed tastes for socialism, radicalism, vegetarianism, and oriental religions. He acquired no mean knowledge of such subjects as electricity, and being far from a wealthy man, he works hard as a partner in some electrical business at Teddington. In 1890 Earl Russell married Miss Mabel Scott, the second daughter of Lady Selina Scott; his bride was only twenty-one. Unfortunately, their married life from the first was unhappy, and they only lived for five months together, their disagreements resulting in the present suit for judicial separation, brought by the youthful Countess against her husband, who is twenty-seven, on the ground of cruelty. The trial has lasted for four days; the petitioner was represented by the Solicitor-General, Sir Edward Clarke, and Mr. Lewis Coward, a popular and prosperous junior. The Earl employed five counsel, led by that doughty advocate, Sir Charles Russell, who, of course, is no relation of his noble client. The Judge was Sir Charles Butt, President of the Probate Divorce and Admiralty Court, now happily restored to health after a long and trying illness. When the case opened, public sympathy was strongly with the Countess; but as the evidence proceeded the conduct of the Earl came to assume a less serious aspect; and when Lord Russell left the witness-box, it was apparent that he would in all probability succeed in resisting his wife's petition for judicial separation. This anticipation was fulfilled; at the close of the Judge's summing up, the jury promptly found a verdict for the Earl. While the finding was no doubt on the whole a just one, public opinion is fairly unanimous that the husband had not always pursued the gentlest methods in dealing with his wife. His tastes are scientific, mechanical, and methodical; hers those of a woman of fashion, unaccustomed to restraints of any kind; consequently it is not so very surprising that misunderstandings should have occurred.

The Salvation Army never allows itself to remain long in the background. A trial at the Old Bailey, before Mr. Justice Hawkins, has just ended, in which various members of the "Army" were accused, among other charges, of conspiracy and unlawful assembly in respect of conduct pursued by them at Eastbourne. Eastbourne, as is well known, is a fashionable watering-place, and for a long time past the Salvationists have been conducting a series of operations there, organizing demonstrations, and on Sundays creating disturbances, by means of processions and brass bands, in the teeth of municipal statutes and regulations. The roughs, who occupy the lower parts of the town, were not slow in scenting this opportunity of gratifying their rowdy propensities, and accordingly a great number of disgraceful scenes have taken place, — the Salvationists never appearing without crowds of roughs bearing down on them, pelting them with mud and filth, and on several occasions breaking up their musical instruments and banners, and inflicting various personal injuries. The number of combatants on both sides made it impossible for the force of police, at the disposal of the magistrates, to interfere efficiently. I don't think almost any one, however much the riotous scenes may be regretted, approves of the conduct of the Salvation Army at Eastbourne. They have gone there with the avowed intention of asserting their right to do as they please. The townspeople, of all degrees and shades of opinion, are enthusiastic in supporting the Mayor and magistrates in their efforts to enforce the municipal regulations; and there is no doubt that the followers of "General" Booth will have to give in. The trial referred to ended by the jury finding the delinquents guilty of unlawful assembly, and acquitting them on the other charges. The verdict, for technical reasons, will

probably be set aside, and so the ultimate result is uncertain.

The lawyers of Wales are of opinion that they have a grievance. A few weeks ago, a vacancy in the County Court Bench occurring, the appointment was bestowed on a Mr. Cecil Beresford, godson to Lord Salisbury. Mr. Beresford, it is true, had never enjoyed a large practice, but was undoubtedly sufficiently qualified for the post. Not so thought some of the dwellers in the principality, who now demand that for the future County Court judgeships should be conferred on Welsh-speaking barristers; it is contended that in petty cases, especially where the parties appear and conduct their cases in person, a knowledge of the vernacular is, if not altogether indispensable, of extreme importance on the part of the judge. All this is more or less conceded; but the Welsh members of Parliament, who have been agitating in the matter, are obliged to admit that there are at the most not more than three Welsh-speaking barristers whose professional qualifications are adequate for the fulfilment of judicial functions; and until quite recently there were not so many. Gallant little Wales is nothing loath, when occasion offers, to assert her nationality.

During November we heard about nothing but education. The triennial School Board Election was pending, and the rival educational parties filled the air with their shouting. When the actual day for voting arrived, more interest was evinced by the electors than on previous occasions. The result was a triumph for religious, economical, and withal efficient education.

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The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

WE have numerous inquiries from subscribers as to the cost of binding the back numbers of the "Green Bag." We therefore desire to say to those who wish to have numbers bound, that our charge for binding, in half-morocco, is $1.50 a volume. Postage or expressage on parts *to be paid by the sender.* We deliver the bound volumes *free of charge.*

THE suggestions contained in the following letter from a Kansas correspondent are excellent, and the Editor trusts that some of the readers of the "Green Bag" may feel inclined to act thereon: —

Editor of the "Green Bag":

I thought some time ago of writing to you to make a feature in your magazine of a brief history of lawsuits, — that is to say, a lawyer shall tell you, in writing, the history of some interesting lawsuit, the ins and outs, what his client said when he came to him, what legal proposition seemed at first to be involved, — stating the legal proposition the same as it would be stated in the opinion of the court; then the bringing of the action, the legal points that rose in it, the unexpected defence which the defendant made, the law which the defendant invoked, citing the authorities, how the case was conducted, how it got into the Supreme Court finally, was reversed, and so on. In other words, brief legal romance, not written for the purpose of showing how individually smart any lawyer is, because it should be written impersonally, but at the same time truthfully. It seems to me that I have had several cases that would make most elegant legal romances, and illustrate novel propositions of law.

What do you think of opening up such a storehouse as that? Can you not prepare rules and regulations, reserving to yourself the right to condense manuscripts? and can you not make a very interesting series of articles of a really instructive character? and can you not build up, by that means, a circulation for your magazine among the law schools? It looks to me as if young law students would appreciate a feature of that kind, and like to read the magazine.

Very truly, E. F. W.

HERE are two good stories, kindly furnished by a Pennsylvania correspondent: —

Editor of the "Green Bag":

DEAR SIR, — You can use this incident for your magazine if you choose. A country justice who had been asked by one of his clients to prepare a will for him once came to me to receive some information regarding the proper manner of preparing it. Not wishing to display too great an ignorance on the subject, and wishing at the same time to imply an intimate knowledge of the early history and legislation on the subject, he startled me with the query, "Mr. ——, I 've been asked to prepare a will for a neighbor of mine, and I 've called to find out what are the latest acts of Assembly regarding wills."

Another just occurs to me. A lawyer (God save the mark!) at this bar perpetrated the following in dead earnest. The question was whether the Squire, who was on the stand before a Master, was accustomed to take the acknowledgment of the wife separate from her husband. "I object," interposed this limb of the law; "you can't prove a custom by one witness."

FOR the following a Florida correspondent is responsible: —

To the Editor of the "Green Bag":

DEAR SIR, — In case you deem the inclosed item of legal "facetiæ" worth printing, you are welcome to the same. It struck me as being very funny, for the reason that the J. P. was so perfectly frank and honest in what he had done as to justify me in asserting (which is doubtless the fact) that he believed he had done an eminently proper and usual thing. The story is literally true, and is as follows: —

Not long ago a cause was appealed to the Circuit Court of P—— County, Florida, from a Justice of

the Peace in a remote, thinly populated district. At the end of the Bill of Exceptions is the following note to the honorable Judge above: "It is proper for this court to say that this court did, and still does think, that the verdict of that jury was contrary to the law and the evidence, and that this court probably ought to have granted a new trial. But as five out of the six jurors were owing this court (who, when not on the bench, keeps a large general merchandise store), and would have felt offended at a setting aside of their verdict, this court prefers to have your honor review the case. (Signed) J. P. H., *Justice of the Peace.*"

LEGAL ANTIQUITIES.

No person shall put to sale any pins, but only such as shall be double-headed, and have the heads soldered fast to the shank and well smoothed; the shank well shaven; the point well and round filed, canted, and sharpened. (34 and 35 Henry VIII. cap. 6.)

ALL persons above the age of seven years shall wear upon Sabbaths and holidays, upon their heads, a cap of wool, knit, thicked, and dressed, in England, upon pain of forfeit for every day not wearing, three shillings and fourpence. (13 Eliz. cap. 19.)

IN 1376 Jack Cade's men beheaded all the lawyers they could find.

FACETIÆ.

TOM JONES, a newly elected constable in one of the "hoop-pole" districts of West Virginia, had received his first writ of execution, wherein he was commanded "to levy of the goods and chattels of John Brown," etc.

In some way Jones had formed the opinion that to make a valid levy it was necessary that he should place his hands upon the property to be taken on execution. With this legal requirement uppermost in mind, and armed with the necessary document, he wended his way to the pasture-field of defendant Brown. Therein, quietly feeding, were two or three gentle old milch cows and a young wild-eyed heifer calf.

Stealthily approaching the cows, Jones laid his hands on each in turn, repeating each time, with a voice bristling with authority, "Consider yourself levied upon."

The young heifer had been watching these legal proceedings with open-eyed amazement and fear, and as Jones approached her she sidled off. Again and again Jones attempted to touch the calf, but without success. Filled with wrath, and with visions of damage-suits for dereliction of duty, he made a wild spring for the calf, while the calf, equally agile, and with head and tail erect, made a wild dash for liberty. Away they raced at a 2.40 speed, now Jones gaining, and now the calf, — the constable filled with official wrath, the calf with deadly fear. Just how this race might have terminated is hard to tell, had not the calf stumbled in making a jump over a small brook, and going headlong into the water; Jones, close behind, with a terrible splash went in after the calf, lighting astride of that animal, and catching her by one ear, he brought his fist down with terrible emphasis on her back, with the withering legal yell, "and now, d——n you, consider yourself levied on."

THE following anecdote of a minor light of the Irish bench, though not precisely a "bull," pure and simple, belongs more or less to that fertile family. A wife had suffered untold cruelties at the hands of a barbarous husband, and in self-defence she "took the law of him;" but just before the time she relented, and told the judge she wished to leave the punishment and the case to God.

"I regret, my good woman," replied the great official, "that we cannot do that; the case is far too important."

INDIGNANT LAWYER. If we can't get justice in this court, we shall carry the case up. Your honor may mark my words.

THE JUDGE. I have marked them, sir. They will cost you ten dollars.

JUDGE GREENE, of the State of ——, is a good lawyer, and somewhat of a stickler for niceties of

pronunciation. Ex-Judge Dennison, in arguing a motion before him, had occasion to refer to Browne on Torts, and pronounced the author's name as though it were spelled "Browny." The Judge passed the first mistake without notice; at the second he shrugged his shoulders; at the third he said, "The name is Brown, not Browny, brother Dennison."

"But it is spelled B-r-o-w-n-e," said the counsel, in his deep measured tones; "and if that does not spell Browny, what does it spell?"

"'Brown,' of course," sharply answered the Judge, whose patience was becoming ruffled. "My name is spelled G-r- double e-n-e, but you would not call me 'Greeny,' would you?"

Mr. Dennison turned to his books, saying, apparently to himself, but loud enough to be heard all over the court-room, "That will depend upon how your honor decides this motion." — *Harper's Magazine.*

A CERTAIN gentleman of most pronounced color practises in the Justice Court of Richmond City; and while he possesses no education, yet he has, by sheer force of natural wit, gained a practice of several thousand dollars a year. A short time ago he represented, before the Police Justice of that city, the interests of a son of night who had been arrested for creating a disturbance on the public highway. In response to a question of the Justice as to why he made the disturbance in question, the accused answered: "Well, Boss, lemme tell yuh des zakly how come it. I wuz a-goin' down de road, an' presny de Spayet ob Gawd tuck hol' er me, an' I des 'gin fo' to holler ter de peples fer ter git up and 'fess deir sin; 't wa'n' me dat raise de 'sturbance, Jedge, 't wa'n' me, 't was de Spayet o' Gawd." The Judge, not passing on this novel defence, turned to our practitioner, saying, "This is your client, is he not?" "Yas, sir, dat he is." "Well, what have you to say for him?" "Well, yo' honor, I don' see nut'n' in de worl' fer ter do but sing de doxol'gy and 'smiss de case." The case was "'smissed."

A FEW years ago a railroad company, in one of the river counties of Ohio, brought suit to appropriate land for right of way, and the case was heard before Judge B. and a jury. The Judge, a bluff, honest old Democrat, frequently imbibed rather too freely of his favorite Bourbon, and when fairly under its influence his judicial opinions were apt to get mixed with his politics; and on such occasions he was inclined to be more forcible and profane than usual in urging what he regarded as sound principles of his party. While the jury in the case referred to was out viewing the premises, the old Judge filled up on his favorite beverage, and when it returned he was fully prepared to deliver his charge, which he did in the words and figures following: —

"Gentlemen of the Jury, it is a fundamental principle of the Democratic party to oppose corporations. This railroad is one of 'em. Give 'em hell!"

NOTES.

AN incident that is certainly uncommon, if not unprecedented, occurred in South Wales recently. In the County Court at Bridge End, before Judge Williams, a case was heard involving £50 ($250), which was claimed as compensatory damage for injury caused by careless driving. Judge Williams was compelled to leave by train at the regular hour for the adjournment of the court, and could not therefore postpone the case until the next day. As the case was not ended at that time, at least one important witness remaining to be examined, Judge Williams, with the lawyers and the other witnesses, took the train and travelled to Llantrissant. During the journey the case was proceeded with, the remaining witnesses being examined. On arriving at Llantrissant, the party adjourned to the station-master's office, where Judge Williams gave a verdict for the plaintiff in the amount claimed.

THE Vice-Chancellor of Cambridge University (England) imprisoned a girl in the "spinning house" for walking with a student in the university, acting in accordance with an ancient university law giving him that power. The granting of a rule *nisi* calling upon the Vice-Chancellor to show cause why a writ of *habeas corpus* should not be issued was at once applied for, on the ground that there was no charge known to the law as the

offence of "walking the streets with a university man." The court has granted the application for rule *nisi*, declaring that no immorality was charged; and the municipality has determined to present a bill to Parliament that will deprive the university of its authority in such cases.

Recent Deaths.

JUDGE SILAS M. CLARK, a Justice of the Supreme Court of Pennsylvania, died on November 20. He was born at Elderton, Penn., in 1834. After graduation from Jefferson College at Canonsburg, in 1852, he was Principal of Indiana Academy for two years, and then became a student of the law under William M. Stewart of Indiana County, and was admitted in 1857 to the bar of that county. He was a member of the State Constitutional Convention of 1872–1873, and was among the foremost in the practice of his profession until his election, in 1882, as an Associate Justice of the Supreme Court of Pennsylvania. The strong characteristic of Judge Clark, as a lawyer, was his readiness to seize and present the essential features of each case, which he always did so clearly and forcibly as to be easily understood by layman and lawyer alike. Eloquent in speech, he knew when he had said enough, and whether arguing a question of law before the court, or a question of fact before a jury, he presented his case simply, concisely, and without unnecessary waste of words. In his death the State loses the services of one of its purest and able representative men.

(An excellent portrait of Judge Clark was published in the February (1891) number of the "Green Bag.")

JUDGE RUFUS PERCIVAL RANNEY died at Cleveland, Ohio, December 6. He was born at Blandford, Mass., Oct. 13, 1813. When he was fourteen years old, his father moved to a farm in Freedom, Portage County, Ohio, where Rufus was brought up with but small educational advantages, yet by manual work and teaching he obtained the means to fit himself for college. He studied for a short time at Western Reserve College, which he left to study law in Jefferson, Ohio. He was admitted to the bar in 1838, and was taken into partnership by Benjamin F. Wade. In 1845 he opened an office in Warren, Trumbull County. He was chosen by the Legislature a Judge of the Supreme Court, and in 1851 was elected by the people, under the new Constitution, to the same office, which he held till 1857. In that year he was appointed United States District Attorney for Ohio, and in 1859 was defeated as the Democratic candidate for governor. In 1862 he was again elected a Judge of the Supreme Court, but in 1864 resigned and resumed practice in Cleveland. He was at one time President of the State Bar Association, and in 1875 was President of the Ohio Board of Managers of the Centennial Exposition at Philadelphia.

THE venerable jurist, GEORGE W. DUNN,[1] Missouri's most noted *nisi prius* judge, died peacefully at his country home, one mile north of Richmond, Mo., on Saturday evening, Oct. 24, 1891. For more than half a century Judge Dunn was a conspicuous figure in the jurisprudence of his adopted State; and few are the lawyers who have been at Missouri's Bar, for any length of time, who will not cherish tender memories of "The Old Roman," as he was called by his admirers long before that title was given to Judge Thurman of Ohio. To the older members of the bar he was courteous and patient in hearing, and to the young beginner he was ever ready with kindness and encouragement. He was, like most of our great men, born a farmer's son, near Harrodsburg, Mercer County, Ky., Oct. 15, 1815. His father, Maj. Lemuel Dunn, a pioneer farmer of the Blue Grass State, justly celebrated for its beautiful women, brilliant orators, and eminent jurists, was a son of Michael Dunn, a native of Virginia, and a soldier under Washington in the war for American independence, whose parents came to Virginia from Ireland. His mother was Sarah Read Campbell, from an old Virginia family, also of Irish descent. From this ancestry came Judge Dunn's strong sense of justice, yet always tempered with mercy. Major Dunn died in 1829, when the subject of this sketch was in his fourteenth year, leaving his family but little besides the farm on which they resided; and the future jurist, being the eldest of several children,

[1] For much of the data for this sketch the writer is indebted to an obituary in the "Richmond Conservator," by Hon. George W. Trigg, its editor.

was compelled to labor hard for the support of the family, only attending school in the log schoolhouse of the period during the winter months. Later he attended a term or two at Cane Run Academy, the principal institution of learning in his native county. Here he evinced considerable ability, particularly in mathematics, in which he excelled over his classmates. At the age of nineteen he was forced by poverty to leave school and engage as a clerk in a dry-goods store at Nicholasville, Jessamine County, Ky.; but here he continued to apply himself closely to his studies, and in his twentieth year borrowed some elementary books and began the study of law. He studied, and taught school for a support for three years, contriving by the strictest economy to save in that time money enough to attend the Law Department of Transylvania University, being a member of the Class of 1836–1837. Among his classmates were Beriah McGoffin, afterward governor of Kentucky; Richard Yates, afterward governor of Illinois; Hon. Otis Singleton of Mississippi, and Judge Samuel H. Woodson of Missouri. At the close of his term he was licensed to practice law, and in the spring of 1839 settled at Richmond, Mo., and began his wonderful career as lawyer and judge, practising his profession in all the counties of the then large Fifth Circuit, which comprised nearly all the west quarter of the State. He travelled over this circuit on horseback, from county seat to county seat, for years, in the companionship of Gen. A. W. Doniphan, Lewis and Amos Rees, Hon. D. R. Atchison, Judge William T. Wood, Judge James H. Birch, Gov. Willard P. Hall, Gov. Austin A. King, and the late Chief-Justices Henry M. Vories and Robert D. Ray, probably the most able and brilliant bar ever at one time in any circuit of this country. He was counted the peer of any of them at the bar, and superior to them all as a trial judge. He survived them all, — Judge Ray's demise having only preceded his a few weeks.

In the early part of 1841 Mr. Dunn returned to his old home in Jessamine County, Ky., and was married to the sweetheart of his boyhood, Miss Sarah Martha Henderson, who was a loving companion to him nearly half a century, and now survives him and all their children, — five being born to them, — all of whom died some years before the husband and father. She was a daughter of Bennett Henderson, and a granddaughter of Col. Joseph Crockett, a Revolutionary officer.

Judge Dunn's official career began in the spring of 1841, when he was appointed Circuit Attorney of his circuit to fill a vacancy, and in 1844 was elected to the office for a full term without opposition, holding it until the fall of 1848, — seven years in all. During these years he was not only an efficient and vigorous prosecutor of all the criminal cases in his circuit, but skillfully attended to a very large civil practice as well. Jan. 1, 1849, he was elevated to the Circuit Bench of the Fifth Circuit by appointment, to succeed the Hon. Austin A. King, who resigned the office to take his seat as governor of Missouri. He was elected Judge of the same circuit, in 1851, for a term of six years, and was re-elected in 1857; in 1861 he retired from office, declining to take the test-oath required by the Drake Constitution. In 1863 the people again elected him Judge of the Circuit; but he was ousted in 1865, along with the other officers of the State, by the vacating ordinance of the Constitution. He then engaged in the practice of law, and followed it with marked success until 1874, when he was again elected Judge of the Fifth Circuit, and by re-election held the office continuously until Jan. 1, 1887, when he surrendered it to his able successor, Judge James M. Sandusky, the present incumbent, — ill health having caused Judge Dunn to peremptorily refuse a re-election in 1886. He possessed a singular hold upon the affections of the people, and was never defeated in a popular election; he could have reached the Supreme Bench of the State had he aspired to it, but he always declined to allow his name to be used in that connection, being content to rest his fame as a lawyer and judge upon his briefs and affirmed decisions, which are numerous in the reports of our Supreme Court from the ninth to the ninety-ninth volume inclusive, and extend over nearly fifty years of the legal history of the State.

Judge Dunn's decisions have met with fewer reversals at the hands of the Appellate Courts than any judge in the State, although he held the office of Circuit Judge almost thirty years, and disposed of an immense volume of business in his large circuit. He, when at the bar, was never counted an orator; but he argued to a court or jury in a frank yet logical and forcible manner that always carried with it the conviction that he

was honest in his assertions, and coupled with his great legal learning made him a dangerous opponent in any forum. He was fond of literature, and his mind was enriched from vast general reading and study, and he sometimes sought to forget the perplexities of the law, and the wrangles of the lawyers, by wandering into the realms of poesy; and in 1882 a number of his poems were collected and published in a handsome volume. Many of them are rare gems of thought and feeling; one of them, "The Temple of Justice," the last stanza of which, here subjoined, portrayed the hope of his life, which was realized in the fullest measure.

"Through coming ages will our temple stand,
The grandest product of man's mind and heart.
Its dome and spire point to the better land,
Its walls and towers attest the builder's art;
I only ask to bear an humble part
In fashioning the work, — to have my name
Inscribed upon its walls ere I depart;
I ask but this, and make no other claim
To that which heroes bleed for, and the world calls
Fame."

A great legal mind and a kind and honest heart are at rest, but in the hearts of the people his memory will long survive.

WILLIAM A. WOOD.

REVIEWS.

THE POLITICAL SCIENCE QUARTERLY for December opens with a timely article, by Prof. A. D. Morse, of Amherst College, on "The Democratic Party;" its historical origin and its present tasks. Paul L. Ford describes the non-intercourse policy of the colonists in 1774, under the "Association of the First Congress." Charles B. Spahr, writing of "The Single Tax," vigorously combats the practicability of Mr. George's panacea. Prof. F. A. Giddings discusses "Sociology as a University Study;" Prof. D. G. Ritchie, of Oxford, contributes valuable material in the "History of the Social Contract Theory;" M. Ostrogovski presents a careful and exhaustive study of "Woman Suffrage in Local Self-Government;" and Dr. Frederic Bancroft, with recent publications as his text, writes sympathetically of "Lincoln and Seward," and critically of "Their Latest Biographers."

THE NEW ENGLAND MAGAZINE for December makes its appearance in a delicate white cover, with gilt lettering. It is particularly well illustrated, and all the articles are interesting, without being slavishly Christmasy. The stories are fully as good as those in some of the bigger magazines; and one by Herbert D. Ward, called "Only an Incident," is as true and pathetic as anything by Gogol or Tolstoi. It is an analysis of emotions under the influence of peculiar circumstances. A number of new artists are finding a channel for their talent in this progressive magazine, and they are making it the equal of any magazine now published. An interesting series of papers, "Stories of Salem Witchcraft," by Winfield S. Nevins, is begun in this number. The first article gives an account of the witchcraft cases in New England previous to 1692; the outbreak in Salem Village; the court and places of trial. A full history of the trials of accused persons, and copious quotations from the remarkable testimony in the court files are given; and the article is embellished with many portraits and drawings now published for the first time, and made specially for this series. The article is particularly interesting at this time, as the one hundredth anniversary of this remarkable delusion is now approaching.

THE Christmas number of SCRIBNER'S MAGAZINE contains ten illustrated articles, in which is represented some of the best work of well-known artists, including L. Marchetti, Albert Moore, Howard Pyle, E. H. Blashfield, F. Hopkinson Smith, Herbert Denman, and Victor Pérard. Following the precedent of previous Christmas issues, there is an abundance of short fiction. There are a poetic legend of the first Christmas tree, entitled "The Oak of Geismar," by Henry Van Dyke; a stirring tale of the Franco-Prussian War, "A Charge for France," by John Heard, Jr., with illustrations by Marchetti, the eminent French artist and pupil of Detaille; an artist's story of "Espero Gorgoni Gondolier," by F. Hopkinson Smith, with the author's own illustrations; another of George A. Hibbard's charming short stories, entitled "A Fresh-water Romance," a tale of the great lakes, the interest of which centres about an old propeller; and "A Little Captive Maid," by Sarah Orne Jewett. Thomas Bailey Aldrich contributes a charming tribute to the memory of James Russell Lowell, entitled "Elmwood."

THE December ARENA comes freighted with able thoughts on living issues, and a rich supply of lighter material. A thrilling novelette, by Helen Campbell, is entitled "In the Meshes of a Terrible Spell." It deals with hypnotism and insanity, is of absorbing interest, and possesses great scientific value. Hamlin Garland gives a delightful character sketch of Western life, entitled "Uncle Ripley's Speculations." Among the great thinkers who contribute serious essays to this number, are Camille Flammarion, the distinguished French astronomer, Prof. T. Funck-Bretano, of the Academy of Science of Paris, Rev. C. A. Bartol, D.D., Edgar Fawcett, George Stewart, D. C. L., and the Hon. David A. Wells. Admirable full-page portraits are given of J. G. Whittier and Edgar Fawcett.

PERHAPS the article in the December number of the COSMOPOLITAN, which will be read with the widest interest, is that on "Rapid Transit," by Capt. Lewis M. Haupt, which is illustrated by every conceivable suggestion that has been made upon rapid transit. Mrs. Burton Harrison begins a new novel, "The Daughter of the South;" and another Southern article is by a gentleman who was a Confederate officer, and is entitled "Social Life in Richmond during the War." T. V. Powderly contributes an article under the Christmas heading, "On Earth, Peace, Good-Will toward Men," explaining the great progress made in the cause of humanity during the past twenty-five years. The number contains one hundred and forty illustrations, by such famous artists as Wilson de Meza, C. D. Gibson, Count Jacassy, Theodore R. Davis, Dan Beard, Lee Woodward Zeigler, and George Wharton Edwards.

HARPER'S MAGAZINE for December is a brilliant Christmas number, unrivalled in the beauty, appropriateness, and interest of its contents. It opens with a superbly illustrated article on "The Annunciation," by Henry Van Dyke, including among its pictures reproductions from the famous paintings of Fra Angelico, Botticelli, Vander Weyden, and others of the old masters. William McLennan, the new Canadian writer, contributes a Christmas legend, "La Messe de Minuit," which is appropriately and beautifully illustrated. Another strikingly attractive feature of the number is a musical pastoral, "The Maid's Choice," composed and written by W. W. Gilchrist, and comprised in a series of eleven quaint drawings by Howard Pyle. An article which will receive much attention and provoke no little discussion is contributed by Mark Twain, and is entitled "Mental Telegraphy, — a Manuscript with a History." Shakspeare's comedy, "Measure for Measure," is beautifully illustrated from drawings by Edwin A. Abbey, and appropriately described and commented upon by Andrew Lang. Walter Besant describes "A Walk in Tudor London." The other contents are varied and interesting.

THE second part of Mr. James's "Chaperon" opens the ATLANTIC MONTHLY for December. This is followed by a paper (to be the first of a series of such articles) on "Joseph Severn and his Correspondents." Miss Harriet Waters Preston and Miss Louise Dodge have a paper on "A Torch-Bearer," — the torch-bearer in this instance being the Abbot of Ferrières, by name Servatus Lupus. There is a short story of Italian life, by Harriet Lewis Bradley; Prof. A. V. G. Allen writes sympathetically of "The Transition of New England Theology," — a paper which is based on the teachings of Dr. Hopkins; and Mr. Lafcadio Hearn continues his Japanese sketches in a paper on "The Most Ancient Shrine of Japan," — a shrine never before visited by a foreigner, and the treasures of which Mr. Lafcadio Hearn describes with his usual vivid color. The essay on "Richard Third," by the late James Russell Lowell, will be read with much interest.

THE Christmas CENTURY is pervaded with the spirit of Christmas, and both directly and indirectly touches upon the Christmas celebration. The frontispiece is a reproduction of the painting of "The Holy Family," by Du Mond, a young American artist, who presents in this picture an original conception of the subject. The number also contains engravings of modern pictures relating to Christmas as follows: "The Arrival of the Shepherds," by H. Lerolle (with a poem by Edith M. Thomas); "The Appearance of the Angel to the Shepherds," by P. Lagarde; "The Annunciation to the Shepherds," by J. Bastien Lepage; "Holy Night," by Fritz Von Uhde, and a Madonna by Dagnan-Bouveret, accompanied by a poem by Mary Dodge, entitled "An Offertory." Quite appropriate to the season also is Mr. Still-

man's article on "Raphael," accompanied by Mr. Cole's engraving of "The Madonna of the Goldfinch," and three other examples of Raphael's work. Relating to the season also are four stories: "The Christmas Shadrach," by Frank R. Stockton; "A Christmas Fantasy, with a Moral," by Thomas Bailey Aldrich; "Wulfy: A Waif," a Christmas sketch from life, by Miss Vida D. Scudder; and "The Rapture of Hetty," by Mrs. Mary Hallock Foote, the last dealing with a Christmas dance on the frontier, and illustrated by a full-page drawing by the writer.

BOOK NOTICES.

LAWYERS' REPORTS ANNOTATED, Book XII. All current cases of general value and importance. Decided in the United States, State, and Territorial Courts, with full annotation by ROBERT DESTY. The Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1891. $5.00 net.

Our readers have by this time been made fully aware of our opinion as to the merits of these Reports; and this present volume calls for no detraction from, nor addition to, the praise we have heretofore given them. Mr. Desty's annotations continue to be as valuable as ever.

THE AMERICAN STATE REPORTS, containing the cases of general value and authority decided in the Courts of Last Resort of the several States. Selected, reported, and annotated by A. C. FREEMAN. Vol. XXI. Bancroft-Whitney Company, San Francisco, 1891. $4.00.

This last volume of this admirable series is in every way equal to its predecessors. Decisions are reported from the Courts of California, Connecticut, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, New York, Ohio, and Pennsylvania.

SUNDAY. LEGAL ASPECTS OF THE FIRST DAY OF THE WEEK. By JAMES T. RINGGOLD, of the Baltimore Bar. Frederick D. Linn & Co., Jersey City, N. J., 1891. Law sheep. $3.50.

The laws regulating the Observance of the First Day of the Week are wholly statutory; and this volume of Mr. Ringgold's gives in a compact form the Statutes of the several States relating to the subject, and cites many interesting and valuable decisions arising under them. To these is added a Chronological View of the Decrees of Councils, Emperors, etc., respecting Sunday observance. The book is a very readable one, and should be serviceable to the profession.

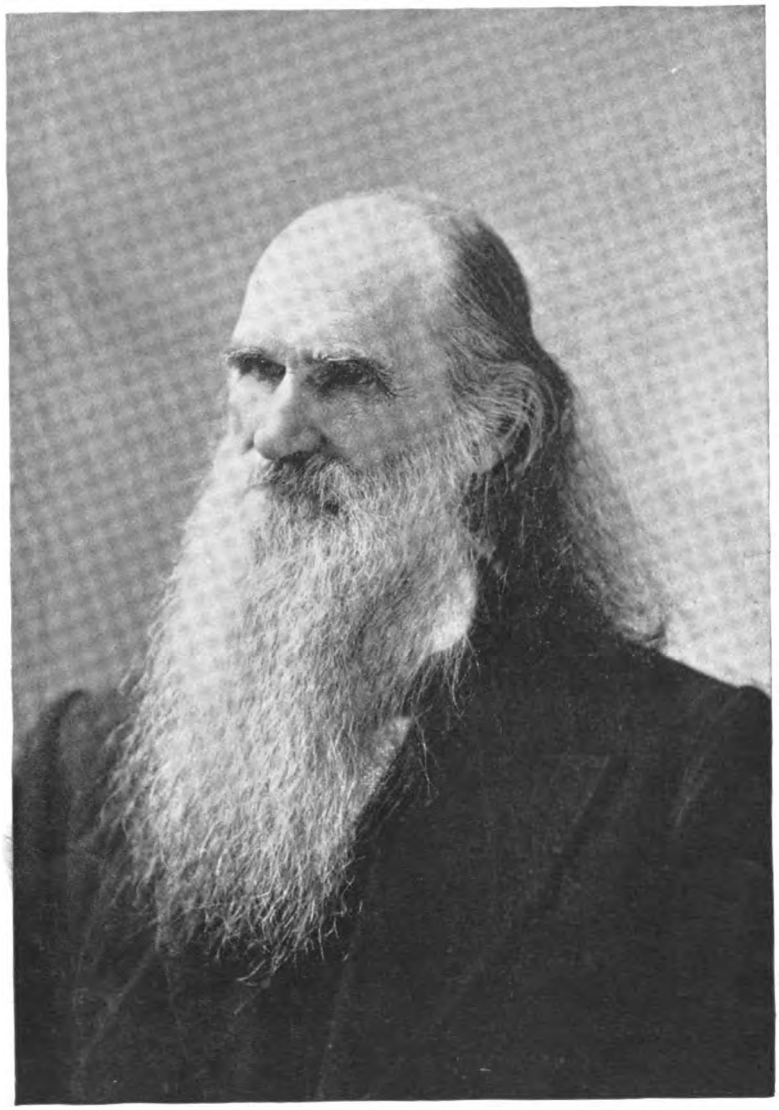
GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES, ENGLAND, AND CANADA. Refers to all reports, official and unofficial, first published during the year ending September, 1891. Annual, being Vol. VI. of the series. Prepared and published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1891.

This latest volume of the admirable series of Digests published by the Lawyers' Co-operative Publishing Company, contains some 2,200 pages, embodying *eighteen thousand* or more decisions reported since the last digest was issued. An examination of its contents brings one to a realizing sense of the immense amount of work done by American and English judges in a single year, and one is disposed to question the desirability of preserving every decision rendered by all these interpreters, good, bad, and indifferent, of our laws. The fault is in the system of reporting, and not in the makers of the digest. As long as every case decided goes into the reports, of course it is necessary that a complete digest should contain a reference thereto; but we venture the assertion that all of our State Reports might be cut down at least one half in volume, and still retain all that is of real value.

Of this Digest as a digest. we have only words of the highest commendation. It leaves nothing to be desired.

SUPPLEMENT TO THE REVISED STATUTES OF THE UNITED STATES. Prepared and edited by WILLIAM A. RICHARDSON, Chief-Justice of the Court of Claims. Government Printing Office, Washington, 1891.

This work covers the Statutes, general and permanent in their nature, passed after the revised Statutes, and in force at the end of the Fifty-first Congress. The high reputation of the Editor is a certain guarantee that the work has been thoroughly and efficiently done; and every lawyer having business in the United States Courts will find this book indispensable. A new feature has been introduced of referring in the margin where acts are noted to both the previous and the subsequent pages of the volume. This adds vastly to the value and convenience of the work.



JOHN ANDREW & SON CO.

Truly Yours
L. E. Blackley

The Green Bag.

VOL. IV. No. 2. BOSTON. FEBRUARY, 1892.

A LETTER TO POSTERITY.

SOME humorous compliments fabricated by the *good* humor of the "Albany Law Journal" [1] have rendered me conspicuous in the eyes of that restless part of mankind, the seekers after photographs and biography. To supply photographs is only to increase the cost of living, but to concoct autobiography involves psychological distress, especially to a person whose stock of materials is no larger than mine.

One of the applicants for a sketch of my life insists that I ought to lay open my career and expose my true inwardness to posterity. Protesting that my reluctance has been overcome by his importunity (that is, by an irresistible force impinging upon a movable body), and that it would never have yielded to anything less powerful, I have written with my own hand the following epistle to that portion of the human race for whose enlightenment my kind-hearted tormentor is so anxious.

ATLANTA, GA., A. D. 1891.

TO POSTERITY: *Greeting.* I regret that I shall be absent when you arrive, and that we shall never meet. I should be pleased to make your acquaintance, but it is impossible to await your coming, the present state of the law of nature being opposed to such dilatory proceedings. There is no hope of amending that law in time for my case. Though aware of your approach collectively as a body of respectable citizens, I shall never hear of a single individual among you. Nor is it likely you will ever hear of me by name, fame, or reputation, unless with the aid of a microphone of extraordinary power. Nevertheless, if the highways between the ages remain in good condition and repair, this communication, though virtually anonymous, may possibly reach you. In that event I bespeak for it your attention for one moment per generation, which, on a fair division of your valuable time, will be my full share and something over. I claim no vested right to your notice. If I have any color of title, it is contingent upon the quality of my services to the public as a member of the Supreme Court of Georgia. Of these services there is documentary evidence, though of a perishable nature, in certain volumes of the Georgia Reports,[1] to which I refer with unaffected diffidence. I must not be understood as requesting you to read all of my opinions, but on the contrary, I give friendly warning not to read half of them, unless you desire to undergo a certain drowsy experience which is commonly called being bored. In that state of feeling scores of them were written. It is not to be expected that the reader would suffer less than the writer. I have a theory that such writings might be terse, crispy, graceful, animated, and entertaining; but mine afford few specimens of that kind. Yet, to treat them with justice, I am sensible that they are not more dry than those of some other judges.

I came to the bench as an Associate Justice of the Supreme Court in the summer of 1875, and resigned early in 1880, worn down and tired out. My last deliverance was "In the Matter of Rest," [2] a brief judicial poem. I would conciliate the critical taste of future generations by craving pardon, not for the verses, but for the doubtful decorum of reciting them from a seat traditionally sacred to the oracles of prose. The loss of my ability to labor without great fatigue made me long for rest, but did not weaken my conviction that labor is the twin brother of happiness, — the moral of the poem. Others might have suggested it as well or better in prose, but I could not. Perhaps I ought to confess that divers other poems (happily none

[1] See, besides other instances, vol. xxiii. p. 264.

[1] 54 to 64 Ga. 77 to 83, and some not yet published.

[2] 64 Ga. 452.

of them judicial) may be laid to my charge. During most of my life I have had a strong and to me unaccountable propensity to metrical transgression. Over and over again have I suffered the pains and penalties of poetic guilt. Besides a score or two of convictions, I have had many trials and narrow escapes. But even now I am not a hardened offender, for a bashful hesitation always tempers my gallantry with the Muses.

My resignation was the result of overwork, and overwork was the result of my ignorance of the law, together with an apprehension that I might be ignorant when I supposed I was not. To administer law it is desirable, though not always necessary, to know it. The labor of learning rapidly on a large scale, and the constant strain to shun mistakes in deciding cases, shattered my nerves and impaired my health. In its effect on the deciding faculty, the apprehension of ignorance counts for as much as ignorance itself. My mind is slow to embrace a firm faith in its supposed knowledge. However ignorant a judge may be, whenever he thoroughly believes he understands the law of his case, he is ready to decide it, — no less ready than if he had the knowledge which he thinks he has. And he will often decide correctly, for the law *may* be as he supposes, whether he knows it or not. My trouble is, to become fully persuaded that I know. I seem not to have found the law out in a reliable way. I detect so many mistakes committed by others, and convict myself of error so often, that most of my conclusions on difficult questions are only provisional. I reconsider, revise, scrutinize, revise the scrutiny, and scrutinize the revision. But my faith in the ultimate efficiency of work is unbounded. The law is too often unknown, but is never unknowable. I finally settle down, painful deliberation ceases, and I doubt no more until I am engaged in writing out the opinion of the court, when I discover perhaps that the thing is all wrong. My colleagues are called again into consultation; we reconsider the case, and decide it the other way. Then I am satisfied; for when I know the law is not on one side, it must be on the other.

I remained in private life until January, 1887, when on the death of Chief-Justice Jackson I became his successor. My term of office will expire with the year 1892.

I will now recount briefly the principal events of my personal history prior to the beginning of my judicial career. I was born in the woods, amid the mountains of northeastern Georgia, July 3, 1827. My native county, Rabun, had then been organized but seven or eight years, up to which period it was the wilderness home of Indians, — the Cherokees. At eleven years of age I commenced writing in the office of my father, who at that time was a farmer without any lands and tenements, and with very few goods and chattels. He lived on a rented homestead, one mile from Clayton, the county town, and was clerk of three courts, — the superior, inferior, and ordinary. He was a man of strong intellect, fair information, and some business experience. He had been sheriff of the county. A more sterling character was not in the world, — certainly not in that large group called the middle class, to which he belonged. Loyal to truth, he scorned sham, pretence, and mendacity. He was a native of North Carolina, as was my mother also. His blood was English and Irish combined; hers German.

I gradually acquired skill in office business, and more and more of it fell to my share, till at length I could give all of it competent attention. In this way, and by observing what was done and said in the courts, I contracted a relish for law, and became familiar with legal documents and forms of procedure. The statutes, strange to say, were pleasant reading, and at intervals I read them with assiduity. Of course, my comprehension of them was imperfect, and still more imperfect was my mastery of the Constitution of the State and that of the United States. But I had a boy's acquaintance with all these, or with most of them, by the time I was seventeen. At that age I borrowed Blackstone and some other elementary books, and entered upon the study of law in earnest. There was no resident lawyer in the county; so I read alone, going once or twice to an adjoining county to be examined by some attorneys who took a friendly interest in directing my studies. One of these was the late Judge Underwood, to whose memory I have from the bench paid a tribute in such words as I could command in an extemporaneous address,[1] but not such as he deserved.

Having prepared myself crudely for admission, I was admitted to the bar in April, 1846, shortly before I was nineteen. Though for the

[1] See 83 Ga. 817.

following two years I had a monopoly of the minor practice, and a fraction of that which was of some importance, the litigation of one sparsely settled mountain county which fell to my share was too inconsiderable to break the continuity of my studies, or rather my legal meditations. I was absorbed, and had visions. I saw Sovereignty. I beheld the Law in its majesty and beauty. I personified it as a queen or an empress. It was my sovereign mistress, my phantom lady.

Oh, lady, lady, lady!
Since I see you everywhere,
I know you are a phantom, —
A woman of the air!
I know you are ideal,
But yet you seem to me
As manifestly real
As anything can be.
Oh, soul-enchanting shadow,
In the day and in the night,
As I gaze upon your beauty
I tremble with delight.

If men would hear me whisper
How beautiful you seem,
They should slumber while they listen,
And dream it in a dream;
For nothing so exquisite
Can the waking senses reach, —
Too fair and soft and tender
For the nicest arts of speech.

In a pensive, dreamy silence
I am very often found,
As if listening to a rainbow
Or looking at a sound.
'T is then I see your beauty
Reflected through my tears,
And I feel that I have loved you
A thousand thousand years.

My professional income for these two years, not counting insolvent fees, amounted to between thirty-five and fifty dollars per annum. Having no means with which to establish myself elsewhere and wait for a clientage, I determined to suspend practice and engage in a more lucrative department of labor until I could accumulate a small capital. I sought and obtained employment as book-keeper in the State railroad office at Atlanta. In this situation I remained for three years, my compensation ranging from $40 to $66 per month. In the fourth year I was transferred to Milledgeville, then the capital of the State, being appointed one of the Governor's secretaries, at a salary of $1,200. A new incumbent of the executive chair was inaugurated in November, 1851, and both my health and my politics needing repairs, I returned to private life. I had saved enough from my earnings to supply me with the skeleton of a library, and to support me some months as a candidate for practice. In March, 1852, being then nearly twenty-five years of age, I opened an office in Atlanta, and my thoughts and dreams were again of law and of nothing else. The phantom lady haunted me as before, and seemed as beautiful as ever. Indeed, though I had been cool, I had been constant in my devotion to her through the four years I was out of her service. Clients gradually ventured within my chambers, and I soon had a moderate prosperity, due chiefly to acquaintance made in railroad circles during my three years' service as a railway clerk. In 1853 I was elected to the office of Solicitor-General for my judicial circuit, which embraced eight counties. My term of service was four years, in the last of which happened the crowning success of my whole life, — I was married. Until 1861 I continued the practice in Atlanta. The first battle of Manassas, *alias* Bull Run, occurred while I was in a camp of instruction, endeavoring to acquire some skill in the noble art of homicide. By nature I am pacific. The military spirit has but a feeble development in my constitution. Nevertheless, I tried the fortunes of a private soldier for a short time in behalf of the Southern Confederacy. I was discharged on account of ill health, after a few months' service in Western Virginia, without having shed any one's blood or lost any blood of my own. The state of my martial emotions was somewhat peculiar: I loved my friends, but did not hate my enemies. Without getting "fighting mad," I went out to commit my share of slaughter, being actuated by a solemn sense of duty, unmixed with spite or ill-will. When I consider how destructive I might have been had my health supported my prowess, I am disposed to congratulate "gentlemen on the other side" upon my forced retirement from the ranks at an early period of the contest. To the best of my remembrance, I was very reluctant but very determined to fight. However, all my military acts were utterly null and void. After my discharge from the army, I served the Confederacy in much of its legal busi-

ness at and around Atlanta. Occasionally I took part, also, in short terms of camp duty as a member of the militia. In 1864, about the time General Sherman left Atlanta on his march to the sea, I was appointed to the office of Supreme Court Reporter. After reporting two volumes, the 34th and 35th Ga., I resigned that office. This was in the spring of 1867. From that time till I was appointed to the Supreme Bench in 1875, I practised law continuously in Atlanta.

Such education as I received in my boyhood was acquired at the village academy of my native county, an institution of meagre resources and a limited range of instruction. Although in the course of a somewhat studious lifetime I have added considerably to my early stock, the plain truth is that while not illiterate, I am destitute of real learning, lay or legal. My highest aspiration, so far as this life is concerned, is to do good judicial work. Service is better than salary, duty more inspiring than reward. My devotion to law is the spiritual consecration of a loving disciple, a devout minister.

L. E. Bleckley.

THE LITERATURE OF LAW.

By Ernest W. Huffcut.

THE divorce of law and literature seems in these latter days to be wellnigh complete, and one never hears that a professor of literature in our schools of polite learning refers his students to legal literature for examples of elegance or eloquence; yet historically it is probably true that no two branches are more closely united and interwoven. Indeed, it may not be too much to say that the earliest and most characteristic and original literature in all languages is the literature of law. It is, moreover, not only literature but the highest form of literature, — poetry. Reference has already been made once or twice in the pages of the "Green Bag" to this early connection between law and poetry; but no one, I think, has pointed out the reason for it. There is, however, an excellent reason why all early literature is in verse, and why much of it is concerned with law. Of all the knowledge of mankind which it is most essential for a people to preserve, the knowledge of their laws is of the first importance. In an age when there is no written composition, this knowledge must pass from generation to generation by verbal transmission. But the enormous burden to the memory of a great and growing body of law, and the danger of transmitting verbal errors which would work great mischief in the application of legal rules, suggest the reason why a rhythmic verse should be adopted as the vehicle for such transmission. Such a form aids the memory, and at the same time guards against a corrupt rendering of the laws. It is therefore naturally adopted by primitive peoples, and where written composition succeeds to oral tradition the forms of the latter are preserved and perpetuated.

These considerations explain much that is curious and grotesque in both law and literature. They aid us to understand why the versified literature of ancient India contains in the same measured rhythm its religion, its ethics, and its laws; why many of the laws of Solon were preserved in his Elegiacs; why the ancient Irish code, the Senchus Mor, is partly in verse; why among Germanic peoples "all solemn legal proceedings were accompanied by poetry;" and why in every system of law many traces of these early poetic forms are yet to be found. According to Strabo, the Turditans, the most cultivated tribe of the Ibernians, possessed monuments inscribed with laws in verse reputed to be six thousand years old. In the primitive Roman law the *carmina* are

supposed to have been preserved in the Saturnian rhythm; while in a more cultured age, according to Teuffel, "the more national a poet is, the more prominent the position the law holds in his writings;" and it is related of Terence that he regarded a play of Luscius as of small account, because of a flagrant error in it in a statement of the civil law. It must be confessed, however, that this last criticism is over-harsh, and might result in the condemnation of half the plays of modern times. The "stage law" of Mr. Jerome K. Jerome seems, after all, to be a piece of necessary literary mechanics.

Scherer, in his "History of German Literature," has an interesting chapter on the primitive literature of the Aryans, and especially of the Germanic branch. A quotation from Mrs. Conybeare's translation will not be inapt in this connection:—

> "There were no written laws, but the priest proclaimed the fixed laws as approved by the people. He was the 'mouthpiece' and guardian of the laws. These promulgations of the law often described in detail the circumstances of actual life which the law covered; and this gave rise to real poetry, whose charm lingers even in the later written code."

As is well known, early Germanic poetry is alliterative; and this feature still persists in much of our modern legal literature, as in the phrases "house and home, spick and span, weal and woe, hand and heart, stock and stone, kith and kin, bed and board, wind and weather," etc. Scherer gives an example of a sentence of banishment by which the condemned is to be a fugitive and an outcast everywhere and always, — wheresoever fire burns and grass is green, child cries for its mother or mother hears a child; as far as ship sails, shield glitters, sun melts snow, feather flies, fir-tree flourishes, hawk flies through the long spring day; while the wind lifts its wings; wheresoever the welkin spreads, or the world stands fast, winds roar, and waters flow into the sea. The old forms of oaths were in an alliterative verse, an echo of which remains in the modern phrase, "the truth, the whole truth, and nothing but the truth!"

Early law had not only a poetic form but a dramatic form as well. Sir Henry Maine has shown in his "Ancient Law," and more fully in his "Early History of Institutions," that the technical formalities in the primitive law of procedure are simply "a dramatization of the Origin of Justice." Thus, in the venerable *Actio Sacramenti* of the Romans, there was a pretence of a quarrel between two armed men, of the accidental appearance of the prætor, and of a submission by the disputants to his arbitration; and if by chance the prætor should fail thus happily to appear, then our primitive wranglers lay a wager on the issue of their quarrel quite like a pair of modern wranglers. The dialogue which took place in this legal drama has developed into the modern art of pleading. It was poetic in form, and came to have a semi-sacred meaning to pleaders, and particularly to the special pleaders who delighted to get an adversary nonsuited for suing for a bull instead of a "leader of the herd," or a goat instead of a "browser upon leeks." Similar dramas were also enacted in the English law of procedure, — as in the action of ejectment and in the procedure by fines and recoveries. In the making of contracts and the conveyance of property, other survivals of these ancient legal dramas persisted down to a very late day, while many marriage ceremonies preserve hints of the early drama of chase and capture. How much literature may owe to these mimic combats and proceedings one can hardly venture to assert; but it is surely safe to ascribe to them some influence in the growth of the dramatic art.

Aside from its poetic form, legal writing may also claim some consideration as literature. Teuffel declares that "jurisprudence is the only part of literature which was developed by the Romans in a manner throughout national." Sir Henry Maine

holds a similar opinion, and while expressing surprise that so little is known of "the chief branch of Latin literature," declares that "it was the only literature of the Romans which has any claim to originality; it was the only part of their literature in which the Romans themselves took any strong interest, and it is the one part which has profoundly influenced modern thought." In the history of English law not so much can be said for its literature, but nevertheless much of that literature is far from mean. The early literature is in Latin or Norman-French, from the influence of which the lawyers were long in escaping. Of the modern legal literature, that of Blackstone, Kent, Maine, Pollock, and some others, is worthy to stand beside the best literature of theology and science, as specimens of style perfectly fitted to its purpose. Of case-law writers the list is too long even to begin an enumeration; but among recent jurists the names of Sir George Jessel and Francis M. Finch will occur at once to all readers of the reports as two authors whose opinions are as classic in style as the essays of Lowell or Curtis.

This discussion has led us far afield, but it may serve to make clearer a fact too often forgotten, — that law touches at some point every conceivable human interest, and that its study is, perhaps above all others, precisely the one which leads straight to the humanities. It is not strange, in view of its history, that so many of its followers stray into the more attractive fields of literary art. It is not strange that so many literary artists seek in it the subject-matter of their art, or that the greatest poem of the age, "The Ring and the Book," should reproduce the archaic phenomenon of a poetic legal treatise. And perhaps we may now be able to appreciate better than ever before, the admirable restraint which the accomplished editor of the "Albany Law Journal" has exhibited in not turning the entire body of English law into what would doubtless be instantly welcomed as the Great English Epic.

THE ACCUSED.

By George F. Tucker.

I.

PROFESSIONAL men are always exposed to witticism and gibe. It is common to question the professions of the clergyman, and to stigmatize acts which are improper, though innocent, as evidence that the obligations of his office rest lightly upon him; to denounce the physician for the imposture of pretending to treat exceptional cases requiring skill which he does not possess, and for his reticence when questioned as to the condition and prospects of his patient; and, finally, to hold up the lawyer as one who thrives upon the misfortunes of others, and accomplishes his ends by artifice and falsehood rather than by fairness and truth. These accusations are the thoughtless declarations of the disappointed and unfortunate, or of those whose opinions are formed upon the judgments of others or upon mere report. A reference to literature proves that the charges are peculiar to no age or locality. To place the professional man in ridiculous situations and to represent him as destitute of sincerity and honor, seems to have been and to be one of the prerogatives of the stage. The members of the other professions must take up the cudgel for themselves; we propose to vindicate the lawyer from at least the charges of the day. The act which misrepresentation declares to be the offspring of cunning and design, truth often extols as the child of pure purpose and lofty incitement.

Clients sometimes fail in eliciting the information from their counsel which they think should be communicated without reserve. They arraign the attorney for coldness and inattention; and if their tongues are busy (as they frequently are), the legal gentleman is made to suffer in the judgment of the community. Soon rumor does its part, and mysterious charges of equivocation and duplicity are heard and credited. Clients who thus injure the reputation of a lawyer are generally men and women who live on the accumulations of successful ancestors, or those whose tastes and pursuits only occasionally bring them into contact with practical men. Their dissatisfaction is without justification, and their injuries are more fancied than real. The truth is, they are generally the authors of their own misfortunes. They approach a lawyer as if they were about to submit to an inquisitorial proceeding. They first state their claim in a hypothetical way; and when enjoined to be frank and explicit, present the favorable features of the case, and only admit, after a rigid cross-examination, that they are aware of any facts or possible developments which may injure their prospects or prevent a recovery. People of this kind know so little of men and affairs that they cannot make allowance for possibilities; and so they misinterpret the real purpose of their adviser. Every interview with him is undertaken as a task. In suspecting his sincerity they recall popular stories of the fraternal relations of opposing counsel. They entertain the notion that he must be hostile to their interests because he does not frankly hold out assurances of success. Unfortunately the other "adviser" — the third party, who is always ready with foolish suggestions — whispers his or her suspicions, and thus augments the mischief. The subject, however, is not without amusing features. While all professional men, as already observed, are severely criticised in general terms, yet in particular cases the relations between spiritual adviser and those who solicit his counsel, or between physician and patient, are of a cordial and affectionate nature. There is something ludicrous in the difference of feeling mani-

fested by a woman who belongs to the class of inexperienced clients adverted to, in referring to her physician or clergyman and in referring to her legal adviser. The tone of voice, independent of the purport of the observation, indicates her partiality to those whose peculiar province it is to touch the sensitive cords of the emotional nature, or to allay one's troubled feelings in the treatment of a real or a fancied malady. Tenderly does she refer to "my doctor" and "my minister;" but the merest allusion to "my lawyer" shows that that gentleman is regarded with aversion and distrust.

Not a few who have occasion to consult an attorney are quite as much displeased with what they regard as studied silence upon material circumstances as with the unwillingness to hold out great hopes of success. The clergyman and the physician recognize in special cases the necessity of caution and reticence, but sometimes they perpetuate their dominion (and properly too),—the one by an optimistic presentation of the consolations of religion, and the other by stilling apprehensions and encouraging hopes. A lawyer acquires discretion with years. Prudent counsels and discreet deportment are obligatory upon him when he is the custodian of another's purse. He knows the peril of confiding intended measures to a client of unguarded lips. That general would have little hopes of success who should disclose to his adversary the strength and resources of his army, as well as his proposed tactics in the approaching battle.

In the popular estimate of the attorney due allowance is rarely made for the difficulty of dealing with men and women of widely different proclivities and dispositions. One person has a high, and another a low standard of morality. The former's susceptibility to moral impressions may render the transaction of business rapid and easy; the latter's obtuseness may lead directly to defeat. The writer has in mind a female client who employed him to undertake a delicate mission, the success of which was likely to depend upon the view which those who were to be approached might entertain of her reputation and character in previous years. Her name had not been above reproach; and the domestic bereavement from which she had long suffered, and about which the mission was to be undertaken, would probably never have come to her had her life been always discreet. It was necessary for the writer to communicate his apprehensions. To his surprise the woman indignantly rejoined: "No one can find fault with me. I have always had a good name in the community. *I have always paid my bills.*" It was difficult to impress upon her that the gentlemen whose favorable judgment she was to solicit would be governed by other considerations than her mere promptness in the discharge of her pecuniary obligations. How manifold are these difficulties which beset the practitioner, rising, as it were, like artificial barriers stretched across a path! Alas! how unkind are often both the client and the public in their allusions to the lawyer's task! One client complains because the attorney is too slow in adjusting interests; he openly charges him with a malicious desire to prolong litigation in the hope of personal profit, forgetful of the fact that the remuneration of a lawyer is not always proportionate to the labor expended and the time consumed, and that protracted litigation, in particular, rarely brings commensurate reward. A lawyer's anxiety to precipitate a settlement is, if conveyed to his adversary by word or action, the surest method of strengthening the latter's confidence in his case and of inspiring him with hope. A client of the kind referred to pops into the office at all hours with unreasonable queries and suggestions, reminding one of an automaton popping out of a box upon the touching of a spring: "What do you say to this?" or "What do you say to that?" or, "What do you say to the other?" are the constant questions of this indefatigable individual. With all his weakness, he has pene-

tration enough to see that he is exhausting the patience of his lawyer, and so he pursues the unwarranted course of settling behind the lawyer's back. His surprise is great if the lawyer expects or asks anything more than a nominal fee; his surprise is greater when the lawyer upbraids him for his furtive unfairness. Another client proposes to push the suit to the bitter end: "I will have the law on him," is his favorite remark. It is immaterial to him if the law happens to look with disfavor on his claim. He is convinced that some great benefit is likely to accrue from the mere commencement of litigation. New developments only make less certain the chances of success, and the lawyer becomes more and more outspoken in advising discontinuance of the suit. Displeased with what he calls the cowardice or indifference of his counsel, he withdraws the case from his hands and seeks a more congenial adviser, without forgetting, however, to declare openly that he has good ground for suspecting collusion between his discarded lawyer and the opposing counsel.

But there are distrustful lawyers as well as distrustful clients. The object of distrust is to the lawyer what the financial adventurer is to the broker or banker of good standing and means, but with this difference,—that the adventurer is without pecuniary resources, while the party whom the attorney distrusts is generally a man of possessions and influence. He is a man of that furtive glance which betokens studied measures, of ready response impelled by accurate intuitions, of fortunate tact, of experience which he puts to constant advantage, of great happiness in eliciting information without putting himself under obligations to his informant, and of the valuable faculty of not making himself particularly offensive to those upon whom he imposes. He is distrusted, not disliked. This creature only appears in the attorney's office in the discharge of some social errand or to make an inquiry of a personal nature. He enters a friend, and never departs a client. He accomplishes his end on the street, in the horse-car, in the train, at the dinner, at the reception, at the fireside. How skilful he is in the employment of hypothesis! How artfully he refers to the last great law case which has attracted public attention! How delicately he passes an observation upon a friend's proposed action, which he fears may be prohibited by some provision of law! The lawyer is conscious of the imposition when he imparts the information, but he can hardly resist the fascination of the importunity. There are clients and clients, — that is, those who compensate the attorney well and those who only partly compensate him; but this individual is neither. He is at first regarded as a kind of "quasi-client," one who will some day prove a source of pecuniary blessing; but this idea is not long entertained. The lawyer gives him up as the sportsman at last gives up the bird which has led him over field and through swamp, wood, and bramble without coming within range of his gun.

But it is said that the average attorney is neither proficient nor profound. Those who are supposed to be sensible sometimes complain that he will not answer an apparently simple question until he has fortified himself by an examination of the law. His prudence should be to his credit. It is said of the ablest lawyers that they are diffident of their own powers. When we consider that in the English-speaking nations alone there are, roughly estimated, five million pages of law literature, we must applaud rather than condemn the attorney who makes no claim to universal information. "Why, dear me!" said the old lady who saw for the first time a meagre law library in a country office. "All them books on law? Why, I thought they had the whole thing in a volume, and that the lawyers changed it round just as they pleased." The ignorant and thoughtless are probably misled by individual assumption and pretence. Certain lawyers sometimes gain a reputation by answering without reflection or investigation any question that may be put to them, but it is not always a permanent reputation; the people

often find them out. On the other hand thoughtful men appreciate the perplexities and embarrassments which beset the attorney; they accept without complaint the frank admission of an honest lawyer that his conclusion may not be reliable, as he has arrived at it only through processes which may be shown to be illogical and misleading. Nice discernment in the investigation of the facts of a case, aided by a careful interpretation of relevant laws, has often led to conclusions afterwards declared by the courts to be utterly worthless. After all, true safety is in the avoidance of that "experience," the reputation for which is gained by the assumption of knowledge and by dignified arrogance, and in reliance upon the opinion which its author is candid enough to admit may be rendered valueless by the operation of those uncertain causes which seem to attend nearly every human effort and action.

But there is a universal complaint, — lawyers are not practical. One hears this observation from all classes. It seems to afford people great satisfaction to attribute the miscarriage of fanciful aspirations to their attorney's inability to appreciate practical points and details. The impression is a wrong one. The course pursued by many in seeking advice is ill-advised, if not senseless. There are lawyers of every description, and life is not long enough to enable the average man to gain real proficiency in more than one department of law. Hence he who seeks enlightenment of a criminal lawyer upon business of a commercial nature should, when his plans are thwarted and his hopes shattered, place the blame where it belongs, — on himself. It is natural, of course, that business men should sometimes find their legal advisers slow to grasp exceptional problems and complicated facts. But let the merchant remember that while he himself is familiar with affairs peculiar to his own environment, the business lawyer is called upon to grapple with questions begotten by conflicts and embarrassments, arising in a great variety of trades, employments, and commercial enterprises. The merchant's especial knowledge may be comprehensive; the business lawyer's general information is of greater service and value. To vindicate our position we need not resort to rhetorical enlargement; our appeal is to history. Who will deny that the remarkable mercantile progress of the English-speaking races is not in a measure due to the help afforded by lawyers familiar with commercial affairs, in shedding light upon dark and difficult paths, in suggesting the reasonable and practical course to be pursued where questions are not quite susceptible of deductive reasoning, in unravelling entanglements requiring patient and intelligent treatment, and in promoting the establishment and indicating the methods of management of the great institutions which have facilitated and still facilitate the trade and commerce, not only of English-speaking people, but of the world? No one can attain to intellectual perfection. He is the superior man whose memory is enriched by diversified facts, and whose reason is enlightened and whose reflections are liberalized by the discipline and attainments of years. His superiority may be questioned by the tongue; but the reliance placed upon, and the confidence reposed in it demonstrate a certain, although perhaps not candid acknowledgment.

THE LAW OF THE LAND.

I.

FROM LAW TO LAWYERS.

By Wm. Arch. McClean.

LAW is the all-powerful tail that wags this curious dog of a world. Society is bound together, dependent upon law for its preservation. Men respect the rights of fellow-men by reason of the consequences of the law following a disregard thereof. Every day the rights of thousands are preserved by fear of recourse to law. Each hour, minute, and second, mankind relies upon law to protect the faith upon which the business of the world is done. It is law that prevents the commission of wrongs, and punishes the wrong when done.

And what is law? Blackstone, in the very beginning of his immortal work, says that "law is a rule of action prescribed by a superior power," and then proceeds to enlighten the reader as to the various species of the law and their interminable branches, dragging the uninitiated through the depths of corporeal and incorporeal hereditaments to lose him in tenures, freehold, and entailed estates; or, further on, teasing him with visions of how he may or may not inherit a fortune — all these fortunes have a predisposition for the vaults of the Bank of England — through his maternal grandfather or paternal great-grandfather, or if he is a collateral heir, how far out the relationship may go before he lose his rights of representation, and thereby his fortune.

After the foreign brain has swallowed a few large doses of this legal pottage, it is apt to feel choked, or as though it had wandered into an asylum of idiotic words that made its gray matter more idiotic than themselves. But take it in small doses, well chew and swallow slowly, and the eyes of the soul will open in wonder and awe by reason of the beauty, power, and symmetricalness of this hand-book of the common-sense of the ages, and upon it will be bestowed a reverence, as making plain the law that commands what is right and prohibits what is wrong, so that to each and every one may be preserved his rights and liberties.

Municipal or civil law is the branch of law most familiar to mankind, it is the "law of the land;" and this, Blackstone tells us, is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." That supreme power in these United States the preamble of our great constitution proclaims in its first words to be "We, the people,"— a supreme power that never changes, is always sovereign, and is the true royalty, so that subjects need no longer with fickleness cry, "The king is dead, long live the king!" Here we are all kings and subjects.

It has been seen what Blackstone says law is; but what is law? Law is the sifted common-sense of ages and civilizations. It is the richest cream of the common-sense of the universe, dedicated by man to the preservation of humanity. If it is this sifted common-sense, why do we hear of unjust laws, the law's delays, the miscarriages of law, and what not, until it seems that one must be bereft of all common-sense to appeal to law? Why?

The sieve has been the work of mortal hands, the meshes have been imperfectly plaited, and errors have slipped through. This cause time, to a certain extent, will remedy, when this sifted sense is resifted through some new sieve,— the gift of the wisdom and experience of centuries, invented by a later age.

This resifting will be an endless, eternal,

and everlasting labor, if the American legislator, ignorant and arrogant for the greater part, persists in swelling our annual and biennial statute books with a mass of nonsense, immature and ill considered, with class legislation, with the pet bills of impudent blocks who can scarcely frame a correct sentence, and with other varieties of unhatched stuff.

Blackstone gives a picture of what a lawmaker should be, and there are few of his prototypes to be found in the American legislature. It is one who has studied the laws of the past, of all countries, of all civilizations, and has made himself acquainted with the results wrought by these laws when administered; one who is well posted upon the laws of the present, and who in framing a bill to become a law, will keep in sight this knowledge, to avoid the mistakes of the past and correct the evils of the present law. Until some such qualifications are exacted in the American lawmaker, our statute books will be crammed with stupid nonsense, and our reports with decisions reversing and modifying decisions not yet cold.

There was an American legislator-elect who once visited a certain wise man, and told him that he had been duly elected a member of the legislature of his State, and with a certain smack of importance asked him what he should do, what bills he should frame to make his name immortal in the law of the land? The wise man laconically answered: "Only this,—vote nay on every bill presented, and yea on every bill to repeal existing law, and earn your country's gratitude. There is too much law; the country is governed too much." It was an answer that was probably not appreciated, because it did not flatter the wisdom of the asker.

Notwithstanding the errors and mistakes of the law, frequently commented upon by press and people, the fact remains that nine out of every ten, yea, ninety-nine out of every hundred, of the decisions of the courts of the country are based on good common-sense, intelligently distinguishing between right and wrong, regardless of technicalities. It is the exception that a decision is rendered with the qualification that it is unjust, but must be so made on account of existing law.

That justice and right are the embodiments of the great mass of the decisions of the land is due in greatest measure to the crowning glory of American law as administered,—the judiciary,—an able, brainy, impartial, and unpurchasable judiciary.

It is entirely of the decisions of courts of law we are speaking, and not of verdicts of juries. The truth is, the majority of the lawyers of the country use every device in their power to win their ends, exhaust every effort, before they give their cases to juries, and only adopt that method as a *dernier ressort*. The cause of this is the desire to avoid the awful uncertainty and insecurity that is more or less an element of every jury. It is the attorney with the gifted tongue that is the friend of juries; and he has good cause, because his friendship is reciprocated by the juries swayed by his eloquence, regardless of the legal merits of the case.

From law to lawyers. What is a lawyer? "The consummate villain of the universe," "The finesse of trickery and cupidity," cries this and that one. Hold, will you? I have the floor, and repeat, What is a lawyer? He is an officer of the court, presumed to be learned in the law, whose duty it is to facilitate the administration of the law and the preservation of the rights of mankind. The mistake is made in imagining law and lawyers as separate and distinct from each other. The lawyer is a means to an end, and is the means provided by law to see that a right is protected or a wrong avenged. He is the sworn officer of the courts of law for this purpose.

Lawyers as a body are being continually found fault with, blamed with innumerable vices they never have, ridiculed, held up to derision and contempt by the paragrapher and caricaturist, until the wonder is that there is a mortal with a right that has been violated who has the courage to enter the

den of this monster, and then only to find him much like other men.

The world, the professions, are full of scamps; yet there is one reason why the legal profession should have less scamps proportionally than any other profession. It is that there is no worldly calling under the sun that, in addition to an extensive apprenticeship, demands of the applicant an unqualified and unconditional oath before the portals are opened to him, except the legal profession. Listen: —

"You do swear that you will support the Constitution of the United States and Constitution of this Commonwealth, and that you will behave yourself in the office of attorney within this court, according to the best of your learning and ability, and with all good fidelity, as well to the court as to the client; that you will use no falsehood, nor delay any person's cause for lucre or malice."

Having taken the oath, he becomes a sworn officer of the court. Let him violate the oath he has taken, let him deceive the court in order to win his ends, let him lie professionally, and in the twinkling of an eye he may be without a profession, an outcast from the law forever. The lawyer to be a scamp perjures himself to become one.

Law as administered by courts furnishes many glimpses of life that must be interesting to other than the professional mind.

Take, for instance, this paragon of legality, — the lawyer, a privileged character of the world. You can talk to him and at him, and your confession of folly or otherwise is as naught, as though confided to a wooden post or to that old friend the lamp-post; for "professional communications between a client and his legal adviser are protected, and the attorney cannot be compelled to disclose communications." This is surely right; for if mortal could not confess to his lawyer, how would the latter know how to help his client? Yet law makes an occasional exception to this rule. The attorney, while the parties are in a state of friendliness, may be trying to keep them at peace by being the legal adviser of both. In such a case what the parties may have said or done to each other that was not in the course of the attorney's employment as attorney for them, or not in the nature of a professional communication to or from him, or matters communicated from each in the presence of the other, are not privileged from disclosure, and the attorney may be required to show on the witness-stand how he manages these rope-walking legal adventures. It may not be impertinent to add that the lawyer generally proves himself equal to these rare occasions with an explanation.

Courts, while disposing of the weighty problems of mankind, do not despise such smaller matters of life as an adjustment of one's right to a position in air or space. A room is rented on the second floor of a house, the building burns, and the rent is paid for such room to the date of the fire. But that is not enough for the greedy landlord, who not only does not rebuild his house, but sues the tenant for payment as nominated in the bond to the end of the term. This episode requires the court to divest itself of this specimen of common-sense, that "the lessee is discharged from his covenant to pay rent by the burning of the building, so that enjoyment of space in air demised to him becomes impracticable."

Men die; but when the Irishman becomes compelled to resort to this extremity, his friends and relatives cannot resist the temptation of celebrating the event with a wake at the expense of the dead man. Courts, however, discourage these festivities, by refusing "to burden an estate with the cost of a ceremony which, under the pretence of honoring the dead, simply panders to the appetites of the living." A wake lately in question stood fire; for the court considered it so exceptionally frugal, being "cheese and crackers and tobacco," that it was ordered to be paid by the estate, with the comment that "a banquet less provocative of hilarity could not be well imagined."

SKETCHES FROM THE PARLIAMENT HOUSE.

INTRODUCTION.

By A. Wood Renton.

THE rise and progress of the substantive and adjective law of Scotland is one of the most curious episodes in ancient or modern times. Under the Norman and early Angevin Kings, the laws of Scotland and England were practically identical. The proof of this assertion would weary the minds of our legal brethren in America without informing them; but the testimony of Lord Kames is conclusive as to the fact. "When one dives," writes that great lawyer (Essays, I.), "into the antiquities of this island, it will appear that we borrowed all our laws and customs from the English. No sooner is a statute enacted in England, but upon the first opportunity it is introduced into Scotland, and accordingly our oldest statutes are mere copies of theirs. *Let the Magna Charta be put into the hands of any Scotchman, ignorant of its history, and he will have no doubt that he is reading a collection of Scots statutes and regulations.*" By the end of the thirteenth century, however, the policy of the English kings, animated as it was by an overmastering desire to conquer both Scotland and France, had loosened the early bond of sympathy between Northern and Southern Britain, and had driven France and Scotland into each other's arms. The alliance thus formed is known in history as the *Ancient League* (*la ligue ancienne*). It lasted, with occasional and trivial interruptions, for several centuries, and affected the life and thought of Scotland profoundly. M. Francisque-Michel, in his remarkable dictionary of the Scottish language, has traced French influence in every chapter of the public and private history of the Scottish nation. The terminology of Scottish architecture, commerce, science, politics, and religion is saturated with words of French origin. But this is not all. The style in which old Scottish houses were built, the methods and the weapons of Scottish warfare, the secrets of Scottish culinary skill, the very manner in which a Scotchman opens his oyster,[1] were all imported or inherited from France. Let us trace this strange phenomenon in this department of law. The following Scots legal terms are of French origin: a bankrupt is *dyvour* (Fr. *devoir*); both in Scotland and in France the bankrupt was compelled to wear the *bonnet vert;* a barrister is *advocate* (Fr. *avocat*); a solicitor is *procurator* (Fr. *procureur*); to exonerate a defendant is to *assoilzie* him (Fr. *absoillé*); to attach for debt is to *compryse* (Fr. *comprendre*); a man's property or means is his *valiant* (Fr. *vaillant*); to bribe is to *creish* (*graisser la palme*). But the affinities in question go much deeper than these. We have seen that the early Scots and English laws were practically identical. Now at the end of the fourteenth century, when the Ancient League was in full operation, France had quietly adopted, while England was slowly rejecting, the *jus civile* as the basis of her substantive law. *Erelong the law of Scotland too was assimilated to that of Rome.* A curious instance of this change — for which France and not Holland[2] must have been responsible — will be found in

[1] This point was brought under the notice of the writer some years ago by the late Professor Lorimer of Edinburgh University. The whole subject is discussed in the 30th volume of the "Journal of Jurisprudence."

[2] Holland and France were the only two European countries that had adopted the Roman law with which Scotland was at this time intimately connected. But the effects of Dutch influence on Scots law are *known;* viz., the naturalization of a few technical terms, the introduction of the *jus gentium*, and the suggestion to Stair of some of the maxims of the *jus civile*. — Mackay's *Life of Stair*, pp. 34, 35.

the doctrine of legitimation *per subsequens matrimonium. Regiam majestatem*, — the Institute of pre-Reformation Scots law — copying the English *Statute of Merton*, declares that "albeit the child, gotten and borne as said is, be the common civill law of the Romans . . . is lawful, nevertheless conforme to the law of this realme, he may nae waies be suffred or heard to claim anie heritage as lawfull heire." By the end of the seventeenth century, Scots law had ceased to respect its English model, and we find Lord Bankton saying (i. 121) that "when a man owns himself father of a child begotten out of lawful wedlock, and thereafter marries the mother, this is a legitimation of the child to all effects as if it had been lawfully begotten." The last illustration, that we will give, of the influence of France upon the law of Scotland shall be a rapid survey of the points of historical resemblance between the Supreme Courts of the two countries. Each bore the venerable name of Parliament.[1] Each had its chancellor, its president, its dean (Fr. *doyen*), its advocates and procurators, its extraordinary lords (Fr. *pairs*). In each the clerical element was important, the judges being chosen in equal numbers from the spiritual and temporal sides. Each was stationary (*sedentaire*). In each the judges were subjected to preliminary examination. A new Scotch judge has still to hear certain "trial" cases before the solemnity of his elevation is complete. The Scots *Acts of Sederunt*, or rules made by the Court of Session under statutory authority, have an analogue in the French *arrêts*. The privileges of the French and the Scotch bars were practically identical, and the procedure in the Court of Session was in various respects akin to that in the Parlement de Paris.

The external facts in the history of the Parliament House were as follows: Modelled by James V., after the Parlement de Paris, it was formally recognized in an Act of 1537 (c. 36). Its judges, who are called senators, were at first fifteen in number. The Statute 11 Geo. IV. and 1 Will. IV., c. 60, § 20, reduced them to thirteen. The Court of Session, as at present constituted, consists of two Chambers, the Inner and the Outer House. The former is subdivided into the "First Division" and the "Second Division," which exercise a concurrent appellate jurisdiction over the Outer House. The latter contains five courts, each of which is presided over by a "Lord Ordinary." The remaining judges are divided between the two courts in the Inner House. At the head of the "First Division" is the "Lord President," who is styled "Lord Justice General" in his capacity of chief member of the Supreme Criminal Court, "the High Court of Justiciary." The *preses* of the "Second Division" is the "Lord Justice Clerk."[1]

In Henry Cockburn's "Memorials of his own Time," the judicial life of Scotland in the eighteenth century is vividly portrayed. A few anecdotes from this interesting autobiography may entertain our readers, and form a fitting prelude to a series of "Sketches from the Parliament House" of to-day:

The "head" of the Scottish Bench in the eighteenth century was Braxfield, a man as able and as brutal as Jeffreys himself. "Let them bring me prisoners," said this judicial savage during the famous seditious trials of 1793, "and I'll find them law," and he kept his word. One poor wretch, accused of no other or worse crime than innovation, alleged by way of defence that "our Saviour was a reformer." "Muckle he made of it," Braxfield retorted; "he was hangit." Lord Eskgrove was more humane than Braxfield, but incorrigibly pedantic and stupid. On one occasion he was condemning a tailor to death for having stabbed a soldier. His lordship thus enumerated the aggravating circum-

[1] Parliament House (Edinburgh) and Parlement de Paris. The Supreme Court of Scotland is also called "The Court of Session" and "The College of Justice." It was expressly modelled by James V., after the Parlement de Paris.

[1] Cf. Law Journal, August 23, 1890.

stances: "And not only did you murder him, whereby he was bereaved of life, but you did thrust or push or pierce or project or propell the lethall weapon through the belt of his regimental breeches, which were His Majesty's." The same foolish person before administering the oath to a young lady who had come into court to give evidence deeply veiled addressed her as follows: "Young woman! you will now consider yourself as in the presence of Almighty God and of this High Court. Lift up your veil, throw off all modesty, and look me in the face!" A still more amusing story is told of another "ornament" (?) of the Bench in those days,—Lord Hermand. Two young gentlemen, who were great friends, went together to the theatre in Glasgow, supped at the lodgings of one of them, and passed the whole night in the improper but not uncommon amusement of drinking rum. In the morning they quarrelled; one was fatally stabbed; and in due time the other was tried and convicted for manslaughter. The majority of the judges were in favor of a short sentence of imprisonment. But the voice of Hermand was still for transportation. "We are told," he said, "that there was no malice, and that the prisoner must have been in liquor. In liquor! Why, he was drunk! And yet he murdered the very man who had been drinking with him. They had been carousing the whole night, and yet he stabbed him, after drinking a whole bottle of rum with him! *My Laards, if he will do this when he's drunk, what will he not do when he's sober?*" At the Ayr Assizes in 1780, Lord Kames tried for murder a man named Matthew Hay, with whom he had been in the habit of playing chess. The jury brought in a verdict of guilty. "That's checkmate to you, Matthew," said his lordship. The author of this brutal jest was the Mansfield of Scotland.

(*To be continued.*)

THE SUPREME COURT OF GEORGIA.

By Walter B. Hill, *of the Macon (Ga.) Bar.*

II.

HENRY KENT McCAY had an intellect of mathematical precision in its operations. He was a devoted student of law, and is regarded as one of the ablest judges that ever occupied the Georgia bench. After his resignation, succeeded by several years' practice of his profession, he was urged upon the President for the appointment of District Judge for the Northern District of Georgia. While the nomination was pending, Judge McCay visited Washington, and was introduced to Mr. Brewster, Attorney-General. Afterwards some friends of Judge McCay called upon Mr. Brewster with the purpose of submitting to him some evidence of the professional and judicial qualities of their candidate. The Attorney-General stopped them. "I have met Judge McCay," said he, "and I have seen in his face the whiskey of the law." The idea of the distinguished law officer of the Government seemed to be that devotion to legal science would impress itself upon the countenance. Wordsworth had a kindred thought, when, describing the Highland maid who haunted glen and brook, he wrote

> "Beauty, born of murmuring sound, shall pass into her face."

Who has not fancied that he has read in the faces of great lawyers and judges the signs of devotion to the alluring beverage of which the Attorney-General spoke?

Judge McCay was appointed to the judgeship of the Federal Court, succeeding Hon. John Erskine, who retired at the age of seventy, "full of years and honors," having administered the law so well during times that tried men's souls as to win the approval of all classes of citizens. Judge McCay held this office until his death. The most notable case which came before him was that of Weil *v.* Calhoun, Ordinary (25 Fed. Rep. 865), in which the anti-prohibitionists, defeated in the local option election in Atlanta, endeavored to obtain an injunction against the declaration by the State officers of the result of the election, upon the ground that the statute under which the election was held was unconstitutional in that it failed to provide compensation for the loss of money invested in a brewery prior to the passage of the act. Judge McCay's decision overruling this point, anticipated by several years the decision of the Supreme Court of the United States on the same subject.

Osborne A. Lochrane.

Chief-Justice Lochrane was a native of Ireland, and at the age of twenty was a clerk on a meagre salary in a store at Athens, Georgia. But the republic is opportunity. He lived to fill the highest position on the bench of his adopted State, and to occupy the far more lucrative post of general counsel for the Pullman Car Company. He was a man of most genial nature. Charles Phillips has said of Curran that he was a "convivial deity." So was Judge Lochrane. The *savoir faire* and *savoir vivre* were united in him with such sagacity and strength of intellect that success seemed to champion him as a favorite son. As usual in such cases, your solid man (solid and stolid!) descanted on the showy and attractive qualities of his person and manner as the whole explanation of his easy success. But Judge Lochrane sustained himself on the bench and at the bar in a way which proved the incorrectness of such narrow criticism. It was a marked type of "conversion" which he exhibited in later years, when uniting himself with an

evangelical church and throwing himself with ardor into the prohibition campaign in Atlanta, he suited the action to the word, and emptied a well-supplied wine-cellar.

Willis A. Hawkins

was the most skilful practitioner that ever went from the Georgia Bar to the Supreme Bench. He could hear from the lips of a witness a piece of testimony that ruined his case, and receive from a judge an adverse ruling on a vital question with a smile that made the jury believe he had scored a triumphal point. In personal and mental characteristics he bore a striking resemblance to the late Matt. H. Carpenter. Judge Hawkins's incumbency on the bench was only an episode in a long career as a successful lawyer. His place was at the bar. He was born for the contests of the forum ; and while his ample legal knowledge and well-disciplined mind would have made him an able judge, yet the bench gave no opportunity for the display of those rare qualities which made him the admiration of the court-room in the trial of cases.

Martin J. Crawford.

Sergeant Ballentine ascribes to Lord Lyndhurst the remark that when he selected a judge he "chose a gentleman ; and if he knew a little law, so much the better." Judge Crawford was the ideal gentleman, — he had the urbanity which is well called "surface Christianity;" and he knew, not a little law, but much of it. What he did not know while on the bench he learned by laborious study, and his death was one of the many instances of that new phase of "judicial murder" which is wrought upon the overworked and underpaid judges of many appellate courts. He was a conscientious, diligent, and able judge.

Samuel Hall

was a marked type of the unworldly devotee of the law, — a man who loved the law dearly for its own sake, for the pleasure of exercising his intellect in its science, and who received but never *collected* fees. When he got a new case that interested him or puzzled him, he became wholly unconscious of all the universe beside. In the friendly badinage of his brethren at the bar, "he behaved like a dog with a new-found bone, — he went off and caressed it." The stories told of him on such occasions — that he would forget to go home, but stay all night in his office, taking no note of time — are true *de jure*, if not *de facto*. He had a marvellous memory, — a wonderful combination of the philosophical memory that co-ordinated principles and of the mechanical memory that enabled him to cite cases by the volume and page. He was a thorough lawyer and a learned judge.

Chief-Justice Bleckley aptly said of him :

"The one avocation of his life was the study, practice, and administration of law. He rises up before us, unique and colossal, as the lawyer — pre-eminently the lawyer — of Georgia. The exclusiveness with which he devoted himself to his profession is one of the bonds of sympathy which attached me personally to his career. Such exclusiveness has been the endeavor of my own life ; and he was amongst the few of my contemporaries who have embraced and adhered to this undivided aim. He dedicated himself to the noble profession of which he was so brilliant an ornament, so able an exemplar.

"In thus comparing him with myself, or myself with him, I make no pretension to that fulness and richness of legal learning to which he attained. It was his great distinction that he knew law, that he had no narrow limits in his legal learning. He explored the widest fields, and all departments of every field. The elementary principles, the reported cases, all treatises, essays, and discussions of legal subjects were familiar to him. When a novel question arose, he knew where to go for authority, and his search was never fruitless. I venture to say that he never entered upon a legal investigation or pursued a legal inquiry without meeting with some return, some really fruitful return, for his labor. And then his faith in labor was beautiful. He believed in it. He thought, as I do, that there is scarcely a problem in the law

but can be solved by thorough and diligent labor. He was willing to perform it, and he expected it to yield adequate results; and with him it rarely failed to do so. His very name is a tradition of industry and learning. As long as the people of Georgia now living shall hear his name pronounced, this characteristic of the man will rise up in their memory.

"And with all his intellect and all his power, he had the simplicity of a child. He put on no airs, made no extravagant pretensions, contested eminence or pre-eminence with no man. He was content to stand upon his work and its results, and never urged himself into the foreground to attract attention.

"The end came; and no soldier falling in battle ever more truly perished for his country than did Judge Samuel Hall. He died in the public service and of the public service. The labor he performed for his country cost him his life. Those who know of his last work and his last illness must without hesitation link them together as cause and effect."

HENRY KENT McCAY.

Judge Hall delivered the opinion sustaining the will of David Dickson, — a *cause célèbre* (78 Ga. 442), — by which a fortune, immense measured by local standards, passed from a white testator, ignoring his white relatives, to the child of his negro concubine. The case is strong proof that justice in the courts of the South is color-blind. The following is a quotation from the decision: —

"Tried by these rules, we cannot say that Dickson's will is unquestionably and beyond a doubt against public policy. We know of no constitutional provision or statute, or any decisions of our courts, nor are we aware of any principle of the common law, which holds it to be immoral or wrong for the putative father to make provision for his illegitimate child, whether that child be white or colored; or for the illegitimate offspring of such child, whatever the complexion of such offspring may be; or for any one who has lived in violation of the public law, and thereby become a criminal, either to a greater or less extent, unless that provision is the result of a previous understanding, that led to the commission of the offence, and induced a breach of the law and sound public policy of the State.

"We have seen that such an understanding is not to be lightly inferred from facts and circumstances of doubtful import and meaning, or which may admit of different constructions, — one consistent with, the other opposed to, unquestioned policy. The legislature has not seen fit to declare that the tendency of such provisions would be promotive of immorality, and would induce the formation and continuance of such illicit cohabitation, and for that reason to prohibit them, as has been done by the provision cited from the Code of Louisiana. Whether such inhibition would be good or bad policy, is not for us to determine. The question is one upon which there has existed, and still exists, a contrariety of opinion, as will be seen by what was said by Lumpkin, J., in the case of Beall *v.* Beall, cited above. And this being the case, its solution is entirely beyond the scope and functions of the judicial department of the government. If judges would avoid uncertainty and fluctuations in the administration of the law, and render it uniform and consistent, they should follow the admirable advice given by Lord Chancellor Bacon to a magistrate whom he was about to swear into office, 'Look to your books for the law, and not to your brain.' Above all,

they should not give themselves up to guidance and direction of their feelings and sentiments; for this would unquestionably lead to excessive irregularity, fluctuations, and doubt. They would then realize that the fame which follows is better than that which goes before, and would avoid the supreme folly of mistaking the plaudits and shouts of the multitude of their contemporaries for the trumpet of fame. Loyalty to the law and rigid adherence to the rules it prescribes is, to the enlightened magistrate, the plain path of duty, and in pursuing it he can fall into no error nor run into any kind of danger."

Judge Hall found himself in one case in a close place. Section 217 of the Code of Georgia provides that "a unanimous decision of the Supreme Court cannot be reversed or materially changed except by a full bench, and then after argument had in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument the court, in its decision, shall state distinctly whether it affirms, reverses, or changes such decision."

It seems that in one case a full bench laid down an opposite rule to one established by a former decision, without counsel citing, or the court noticing, the former ruling; and when the question was presented by a third case whether the first or second decision was the law, there were only two judges on the bench, and the question was left for determination by a full court. Judge Hall stated the dilemma thus: —

"To guard against misapprehension, it may be well to state that where a principle has been settled by a unanimous judgment of a full court, and afterwards the reverse of it is laid down as correct by a like unanimous judgment of a full bench, without an observance of the conditions prescribed by this section of the Code, or without any reference to the first judgment, as sometimes unavoidably happens, we do not intimate an opinion as to which ruling, the first or last, we would be obliged to follow, were this point raised and insisted upon."

The maxim *stare decisis* has a new meaning when judges thus come to *stare at their decisions;* but the predicament is not so bad, after all, as that of two other courts mentioned by John M. Shirley, in an address before the American Bar Association (Sixth Report, p. 208): —

"Elliott *v.* Stone, 12 Cushing, 174, was decided at the October term, 1853, Chief-Justice Shaw delivering the opinion. The same case, between the same parties, was decided at the October term, 1854. The facts, in both cases, are precisely the same, with a single exception, and that is expressly stated in the last opinion to be immaterial. The two decisions are directly in the teeth of each other. The last opinion contains no reference whatever to the former one; but it is evident that the court had entirely forgotten both the former case and the opinion.

"Not to be outdone, Mr. Justice Bell, a judge of great learning and ability, in Hazeltine *v.* Colburn, 31 N. H. 466, decided the same point both ways in the same opinion, to the great bewilderment of succeeding judges."

James Jackson

was a man of acute and vigorous intellect, but the secret of his power was in his heart. He was full of affection, sympathy, and religious zeal.

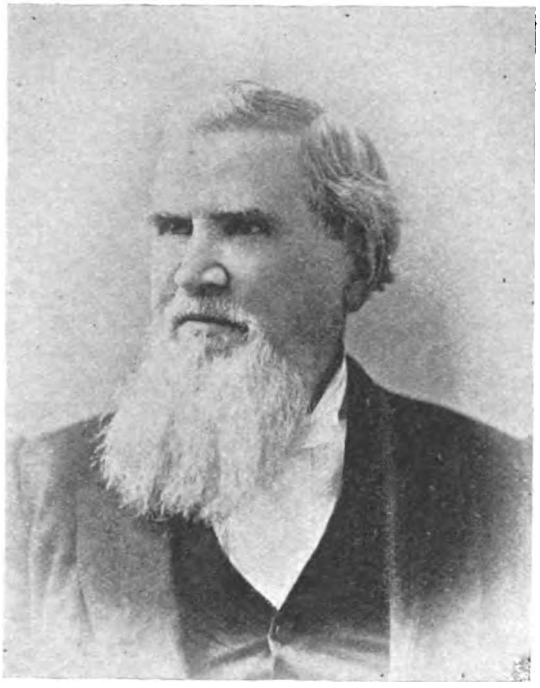
> "In Israel's Court there sat no Abethdin
> Of more discerning eyes or hands more clean."

He was a grandson of James Jackson, who in the early history of the State resigned his seat in the United States Senate, and came home to antagonize and expose the "Yazoo fraud." He was Governor when that result was accomplished, and by concentrating the sun's rays through a glass, "called down the fire from Heaven" to consume the infamous bill. By right of inheritance there came to Chief-Justice Jackson that hatred of fraud, covin, and deceit, that enthusiastic love of justice, which breathes through his decisions. He was the most eminent layman of the church to which he belonged, and a lay preacher as well.

His successor in the office of Chief-Justice aptly said of him and his judicial work: —

"Law is the rule of duty. Love, in its relation to law, is the sense of duty. His love and his law, taken together, insured recognition of the rule; his vivid realization of the sense of duty added to his power tenfold as a discerner of law. When he could not see it with the eye, he found it by the touch. He could feel it in the darkness, and find the law by his moral discernment. In that faculty or capacity I do not think he has ever had an equal in our history, — certainly not within my observation. Learning might fail, light might fail; but feeling never, or very rarely, did fail. If the law was right, he nearly always found it; when he could not discern it by sight, he identified it by the touch of his conscience and his heart. If you will examine the testimonials he has left us in the Reports, you will find that he very rarely mistook it.

"This was in harmony with his whole character. He combined strength and delicacy, force and softness. He was the eagle without the talons or the beak; he was the dove without the weakness or the timidity. He was a fine combination of strength and tenderness: and this combination availed him in all his relations and in all the labors of his life. As a lawyer, as a judge, he employed feeling as well as thought; and these were in such complete balance and harmony that one never misled or misdirected the other. It is, perhaps, not unusual to find men with great power of mind associated with defective moral powers, or to find men of great power of feeling associated with weakness of intellect; but here were strength of mind and moral stamina together. He went forth to do the work of the world, as far as it was assigned to him, thus equipped, thus armed; and he did that work with skill, fidelity, and power, and it will be felt after him, as we feel it now."



SAMUEL HALL.

This sketch has now approached the era of the present occupants of the bench. It may not be amiss to mention the fact that the relations between the Supreme Bench and Bar of Georgia have always been cordial, — uninterrupted by any unseemly antagonisms. The Supreme Court Judges for several years past have always adjourned to attend the meetings of the Georgia Bar Association. This is not only a recognition of the usefulness of such an organization, but affords an opportunity of friendly social intercourse which is highly appreciated by the bar. It may well be doubted, however, whether any member of the bar would dare to play a practical joke upon the Supreme Court, as Howell Cobb (the same who was afterwards Secretary of the Treasury) did, in the days before the war. At Milledgeville, when the court first met there, the sheriff of the county, who was *ex officio* sheriff of the court, asked Mr. Cobb what were his duties as sheriff of the court, stating frankly that he did not know what was expected of him, and that he disliked to show his ignorance by asking one of the judges. Mr. Cobb replied, "Just do with them as you do with a jury. When court adjourns, follow them to their room, and lock them up till they agree." Under these directions, the sheriff locked up the judges until long after supper, when he returned to inquire if they had "agreed." It was only by Mr. Cobb's importunity that the sheriff escaped punishment for contempt.

Samuel Lumpkin.

Justice Lumpkin is a son of Joseph Henry Lumpkin, who was a nephew of Chief-Justice Lumpkin and of Gov. Wilson Lumpkin. No name in Georgia is more highly honored than the one he bears.

Judge Lumpkin was a member of the State Senate in 1878–79, and as Chairman of the Committee on Railroads participated largely in framing the excellent Railroad Commission Law, which has been in force since that date.

He was elected Judge of the Northern Circuit in 1884; re-elected, without opposition, in 1888, and was recently, at the age of forty-two, elected to the Supreme Bench, without opposition.

At the time this article is written, none of Judge Lumpkin's decisions have been published. His long and successful career as Circuit Judge, followed by the compliment of a unanimous election to the Supreme Bench, is universally regarded as the prophecy of a distinguished service in this tribunal. The pang of losing his dearest case is softened for the lawyer who believes that the judge has listened well to all that he has said. Judge Lumpkin's manner on the bench will always afford that mitigation to counsel disappointed by a decision.

[The interval elapsing between the preparation and publication of this sketch permits a reference by way of postscript to some of Judge Lumpkin's opinions. Good specimens of his judicial work are the decisions in Ozburn *v.* The State, 13 S. E. Rep. 247; Johnson *v.* Bradstreet Co., Ibid. 250; O'Connell *v.* E. T. V. & G. R. R. Co., Ibid. 489; Pritchard *v.* Savannah St. R. R. Co., Ibid. 493. In the second case cited, the question was whether an action for libel survived the death of the plaintiff, under a statute providing that "no action for . . . injury to the person . . . shall abate by death." Judge Lumpkin says: —

"'Person' is a broad term, and legally includes, not only the physical body and members, but also every bodily sense and personal attribute, among which is the reputation a man has acquired. Reputation is a sort of right to enjoy the good opinion of others, and is capable of growth and real existence, as an arm or leg. If it is not to be classed as a personal right, where does it belong? No provision has been made for any middle class of injuries between those to person and those to property, and the great body of wrongs arrange themselves under the one head or the other. Whether viewed from the artificial arrangement of law-writers or the standpoint of common-sense, an injury to reputation is an injury to person; and oftentimes an injury of this sort causes far more pain and unhappiness, to say nothing of actual loss of money or property, than any physical injury could possibly occasion. As already suggested, it is of great importance to arrive, if possible, at the intention of the Legislature as to the meaning to be given to the words, 'injury to person.' We have endeavored to show that the legislative intent may, to some extent, be arrived at by reference to the place in the code which the amended section occupies; and we have also endeavored to show that the common-law meaning of the words, 'injury to person,' includes libel, slander, and the like. Having reached this point in the discussion, we may also invoke another rule for the construction of statutes, namely, that where words have a definite and well-settled meaning at common law, it is to be presumed, unless some good reason to the contrary appears, that this same meaning attaches to them when used in a statute."]

Thomas J. Simmons.

Justice Simmons came to the bench after long and distinguished service in the State Senate and upon the Circuit Bench. His mind is characterized by that rare and valuable faculty "the genius of common-sense." His intellect intuitively perceives the substance of the case, and is under no temptation to get away from it. This is the temperament that makes safe and conservative judges. His associate in judicial work, the Chief-Justice, has alluded in a public address to the dangers of the subtle type of intellect. He says: "By nothing are we so sure of being deluded as by subtle and ingenious argu-

ments discovered by ourselves. All the serpents outside are not half so dangerous as the one that slips about in our own garden."

Arthur Hugh Clough has referred to this mental type in the lines, —

> "With him there went
> A self-correcting and ascetic bent
> Which from the obvious good kept him astray,
> And set him wandering on the longest way."

By this introspective and speculative habit of thought, Judge Simmons is not embarrassed. He would be the last man whom his acquaintances would think of as liable to any mistake of judgment.

JAMES JACKSON.

A fair specimen of his style is afforded by his decision in the case of the State *vs.* Thomas Woolfolk. This monster had in one night killed nine of his relatives who stood between him and a coveted inheritance. The bloody butchery included three generations of his kinspeople, — from an aged grandmother to an infant child. If ever any case of hideous crime could by its atrocity justify a court in upholding a verdict of guilty, in the face of error in the record, it was this. But a new trial was granted on account of circumstances growing out of the very heinousness of the prisoner's offence.

The extract referred to is as follows (81 Ga. 559, 560) : —

"The facts are, in substance, that at the conclusion of the opening argument for the State, the crowd in the court-room applauded. The Judge took no notice of this applause except to rap with his gavel. And when counsel for the State was making the concluding argument, 'from the crowd in the rear of the court-room came, in an excited and angry tone, the cry, "Hang him! Hang him! Hang him!" and some of the crowd arose to their feet.' The Court rapped with his gavel and ordered the persons removed, but states that he does not know whether his order was carried into effect by the sheriff or not. Shortly after, another person sitting within the bar and near the Judge cried out, 'Hang him!' The Court ordered him removed, and he was carried down the back stairs. It is not known whether the jury knew that this person was carried out or not. All the jurors make affidavit that these things had no influence upon their minds; and from my own knowledge of the character of these gentlemen, I have no doubt that they believed this to be true. But can any man say with certainty that such things have no influence upon him? Can any of us know how far our minds are influenced by applause or excitement of a crowd which surrounds us? Can any of us say, even in this court, that this or that piece of testimony, or this argument of counsel, has not influenced our minds? Can any of us say that on the trial of one of the most heinous crimes ever committed in this State or any other, the applause of the crowd, the fierce cries of 'Hang him! Hang him!' from members of the crowd, followed later on by a repetition of the same cry from the lips of one of the most highly respected and esteemed citizens of the community, would have no influence upon their minds? Our minds are so constituted that it is impossible to say what impression scenes of this kind would make upon us, unless we had determined beforehand that the prisoner was guilty or innocent. The question here is not what effect these things did have upon the

minds of the jury, but what effect they were calculated to produce. We cannot determine what effect they did have, but it is apparent what effect they were calculated to have.

"But counsel for the State argued before us that the defendant had no right to complain of these things. Whether this be so or not, we think the court below should have put the seal of its condemnation upon this conduct. We think the Judge should have stopped the argument of the State's counsel then and there, and ascertained the guilty parties, and should have punished them to the extent of the law. He should have taught them that the law was supreme; that the trial of a man for his life, however heinous the crime charged against him might be, was a serious and solemn thing, and that the law would not permit a mob to interfere, either by applause or by threatening and exciting cries. By so doing he would have upheld the supremacy of the law, and would have shown to the jury that whatever verdict they might find, the law would protect them. It would also have shown them that the court was uninfluenced by the feelings and demonstrations of the crowd; and that it was still able to administer justice and to give the accused a fair and impartial trial. It would have given them a moral support, and would have tended to impress upon them the necessity of resisting such influences."

Logan E. Bleckley.

Chief-Justice Bleckley is as tall as Bishop Brooks, and every inch is pure genius. It is natural with him to think, speak, and act in an unconventional way; but the thorough saneness of his character is attested by the fact that this marked individualism never passes into eccentricity.

If I were asked to state in a word the most prominent characteristic of his mind, I should answer, provided I was first permitted to define the meaning of the word, Wit. I do not, of course, mean mere drollery, although that is continually springing up in his dryest decisions, like a fountain leaping from a bed of sawdust and

> "Shaking its loosened silver in the sun."

Sometimes the fun seems to be just for its own sake, as in a will case where one Potts was charged with making Cupid kin to cupidity by a mercenary marriage, he gravely asks, "Why may not a Potts marry for love?" Oftener pleasantry is used to expose error:

> "A gentler death shall falsehood die,
> Shot through and through with cunning words."

But it is not to these significations of wit that I refer. The definition that I would give would be that striking epigram of George Eliot, "Wit is wisdom raised to a higher power." It is a curious fact that perfect clearness of thought and expression often affects the mind like wit. The style of the late Judge J. S. Black had this remarkable quality. It is present in all of Judge Bleckley's utterances, legal and literary.

It is another form of illustrating the above definition to say that Judge Bleckley has a legal imagination. Lawyers whose practice has brought them before many courts, State and Federal, say that they never saw his equal in "catching a case" from the opening statements. And they are often amazed when by a flash of legal insight he discloses views arising on the record which months of laborious study have never enabled them to see.

In the selection of quotable extracts, the discussions of Judge Bleckley present an embarrassment of riches. The description of the lawyer who was cut off at twelve o'clock Saturday night with an undelivered speech has become familiar to the profession, through Mr. Snyder's book, "Great Decisions by Great Judges."

From a single volume of the Georgia Reports nearly all the following have been culled: —

"In Harriman against First Bryan Baptist Church, which involved a breach of contract to furnish a steamboat for an excursion for the society, the Judge says: 'A committeeman on board was threatened with a most profane form of immersion.'"

"In Kupperman against McGehee, he says: 'Trusts are children of equity; and in a court of equity they are at home, — under the family rooftree, and around the hearth of their ancestor.'"

"In Nussbaum against Heilbron, a son carried on business in the name of his father, because he felt that his own name was under a mercantile cloud. As Judge Bleckley expresses it: 'According to the charges of the bill, the father had no capital and the son no character. The man without character carried on business in the name and upon the credit of the man without capital.'"

"In Dee against Porter we find the following: 'It not infrequently happens that a judgment is affirmed upon a theory of the case which did not occur to the court that rendered it, or which did occur and was expressly repudiated. The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it.

"The pupil of impulse, it forced him along,
His conduct still right, with his argument wrong:
Still aiming at honor, yet fearing to roam,
The coachman was tipsy, the chariot drove home."

"In Forrester against State, the defendant undertook to evade the law against retailing intoxicating liquors without a license, by having his cook sell them in the kitchen. 'In the defendant's kitchen, by his servant, in his presence, and with his co-operation, through the responses, "Go to Mary" and "Give the money to Mary," the traffic was carried on. There is little doubt that the defendant was the deity of this rude shrine, and that Mary was only the ministering priestess. But if she was the divinity, and he her attending spirit to warn thirsty devotees where to drink, and at whose feet to lay their tribute, he is amenable to the State as the promoter of forbidden libations. Whether in these usurped rites he was serving Mary or Mary him, may make a difference with the gods and goddesses, but makes none with men.'"

ALEXANDER M. SPEER.

"In Lester against Lester, the question was about attaching a husband for contempt in refusing to pay alimony. This is what the Judge thought about it: 'If a man, though having health, will not work for the support of his wife and minor children, a court cannot assume direct control of his will and muscle and compel him to labor. To be idle (taking the consequences) is one of the privileges of a freeman, unless he is convicted penally of some offence, and put to work as a punishment. But while a civil court cannot order an able-bodied man to go to work, it can, in a proper case for alimony, order him to contribute so much money, at such and such times, to the maintenance of his dependent family, and leave him to provide the money by the free and voluntary exercise of his faculties, mental and physical, or by any other means at his command. The attachment will bring the actual resources of the respondent to a practical and decisive test. Pressure is a great concentrator and developer of force. Under the stress of an attachment, even the vision of the respondent himself may be cleared and brightened, so that he will discern ways and means which were once hidden from him or seen obscurely.'"

"In speaking of the power of amendment on appeal, in Burrus against Moore, he says: 'Curative measures are not restricted to the early stages of a case; our "court physicians" now treat chronic disorders as well as acute ones.'"

"In Dodd against Middleton, the Judge dissented in the following terms: 'If I could be reinforced here by the votes, as I am by the opinions, of the Supreme Judicial Court of Massachusetts and the Court of Appeals of New York. I could easily put my brethren in the minority; but as it

is, they are two against one, and I have no option but to yield to the force of numbers, — in other words, to "the tyranny of majorities." Though twice beaten, I am still strong in the true faith, and am ready to suffer for it (moderately) on all proper occasions.'"

"Courts of final review are bound by the rule of *stare decisis* both as a canon of public good and a law of self-preservation; nevertheless, where a grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated, the maxim which applies is *fiat justitia ruat cælum*."

Judge Bleckley has, of course, the defects of his qualities. The acute and subtle intellect will question and doubt, where minds of different cast will rest with certitude. The result of this highly critical faculty caused him great judicial travail, and in 1880 he broke down under his labors. His letter of resignation to the Governor was as follows: —

ATLANTA, GA., Jan. 22, 1880.

HIS EXCELLENCY, ALFRED H. COLQUITT:

DEAR SIR, — I hereby resign the office of Associate Justice of the Supreme Court for the following reasons: —

First, I am not sufficiently learned in the law to be qualified on a large and liberal scale for judicial functions. In consequence of this deficiency I rarely know how to dispose of difficult cases until after a degree of labor which exhausts me in mere preparation for deciding. It follows that I am generally behind in writing out my opinions. At present I am much behind.

Second, my health threatens to fail unless I change my mode of life.

This resignation is designed to take effect on the first day of the approaching February term.

Very respectfully your obedient, humble servant,

L. E. BLECKLEY.

There was universal confidence in the painful and unaffected modesty that prompted this letter; although in the opinion of the bar and the public there was a grim humor in it, coming from the one man in the State who was pre-eminently the best qualified for the bench.

The Governor's graceful reply was as follows: —

EXECUTIVE OFFICE, Jan. 26, 1880.

Judge LOGAN E. BLECKLEY, Associate Justice Supreme Court, Atlanta, Ga.:

DEAR SIR, — Your resignation as Associate Justice of the Supreme Court of Georgia has been received, and I hereby give you official notice of its acceptance, to take effect on the first day of the approaching February term.

Permit me to express regret that you should feel it due to yourself to close your official duties and retire voluntarily from the high trust you have so faithfully discharged. I must beg to dissent from your modest estimate of your qualifications, and to assure you that I would not feel justified in accepting your resignation based alone on that ground. The consideration of your health, however, leaves me no alternative.

With high respect for you personally and officially, I am, very respectfully,

Your obedient servant,

ALFRED H. COLQUITT.

The most interesting episode of the resignation, however, was Judge Bleckley's poem on Rest, which he read on leaving the bench. Coming as it did from one who was in a state of physical collapse from overwork, its recognition of labor as the divine law for man was full of bravery and pathos.

IN THE MATTER OF REST.

Rest for hand and brow and breast,
For fingers, heart, and brain!
Rest and peace! a long release
From labor and from pain:
Pain of doubt, fatigue, despair, —
Pain of darkness everywhere,
And seeking light in vain!

Peace and rest! Are they the best
For mortals here below?
Is soft repose from work and woes
A bliss for men to know?
Bliss of time is bliss of toil:
No bliss but this, from sun and soil,
Does God permit to grow.

During Judge Bleckley's retirement and recuperation he had time, between the intervals of consulting practice to which he

sparingly returned, to deliver a number of literary addresses. The most remarkable of these were a series on Truth, — "Truth in Thought and Emotion," "Truth in Conduct," and "Truth at the Bar." From these and other papers I extract a few paragraphs at random.

"Energy in goodness is often attended with a corresponding energy in well-meant evil. A striking instance of this is furnished by the history of religious persecution. Not many centuries ago it seems to have been one of the most sacred duties of a good man to burn a better one than himself."

THOMAS J. SIMMONS.

The following extracts from a Commencement Address contain a frank recognition of the demoralized state of Southern opinion, and a courageous assertion of his own principles: —

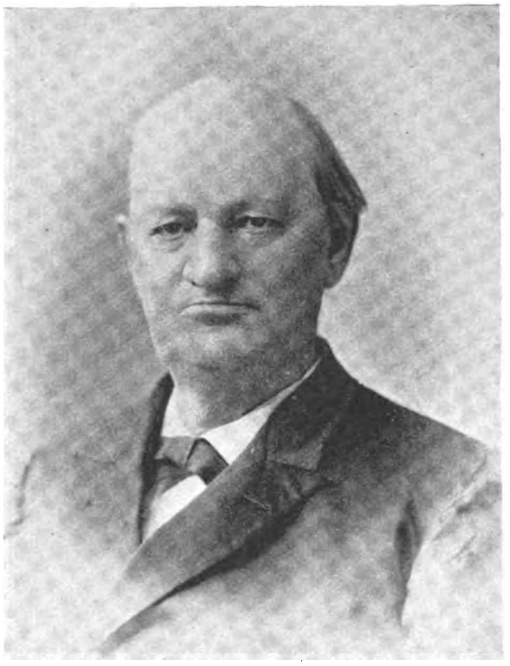
"And I will venture to add, at the risk of meeting with some dissent possibly in my audience, certainly beyond it, that there is the same reason for rigid honesty in politics and public life, in elections and with electors and elected, as in ordinary private business or personal conduct. The political devil is no more to be fought with fire without terrible consequences to the best interest of the community, than is the devil of avarice or envy or ambition, or any other of the numerous devils which infest society."

"I speak from a standpoint quite outside of politics and party lines, and what I say may be too visionary and theoretic for practical working; but if we have reached a stage of degeneracy where virtue has ceased to be practical, and where vice and fraud are forces of such potency that they can be met and resisted only by forces of like kind, I think wisdom is already a lost art, that we are on the confines of perdition, and that erelong we shall tumble over the wall and be swallowed up in the pit."

The following paragraphs are selected from "Truth at the Bar," — an acute and metaphysical statement of the philosophy of legal procedure: —

"Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them. That a just debt is unrecognized, a just title defeated, or a guilty man acquitted, is no evidence that justice has not been done by the court or jury. It may be the highest evidence that justice has been done, for it is perfectly just not to enforce payment of a just debt, not to uphold a just title, not to convict a guilty man if the debt or the title or the guilt be not verified. It is unjust to do justice by doing injustice. A just discovery cannot be made by an unjust search. An end not attained by just means is not attainable at all; ethically, it is an impossible end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can; but if either has to fail, it must be justice of substance, for without justice of procedure courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail. As well might a man put out his eyes in order to see better, as for a court to stray from justice of procedure in order to administer justice of substance."

"The problem, How not to tell the truth without telling a lie, is suggested for solution over and over again, not only to lawyers, but to physicians, bankers, brokers, merchants, mechanics, farmers, even perhaps to clergymen, and, it may be, to the very ladies. Nothing would simplify intercourse for business, pleasure, civility, and ceremony so much as to give truth the right of way through all human affairs. Those of us who dislike the trouble of suppressing, and are skilled in arts of evasion, could heartily wish this were practicable; but it is not. It would be wiser to grant free passage to a cyclone. In the use of truth the lawyer is eclectic; say, if you please, he is economical. But so is everybody else, and rightly so. A discreet silence is as much, and perhaps as often, the dictate of virtue as of interest or shame. A man who does not know how to keep truth in the house knows still less how to put it out of doors. It would be much safer practice to disclose nothing than to disclose everything. Universal silence would do less harm than universal and unlimited communication. The world would be happier dumb than with no power to hush.



MARK H. BLANDFORD.

"'The day is no better bestowed than the night,
And darkness is precious, as well as the light.'"

Judge Bleckley does not, like Blackstone, take a rose-colored view of the law. Its delays and its fossils are thus described: —

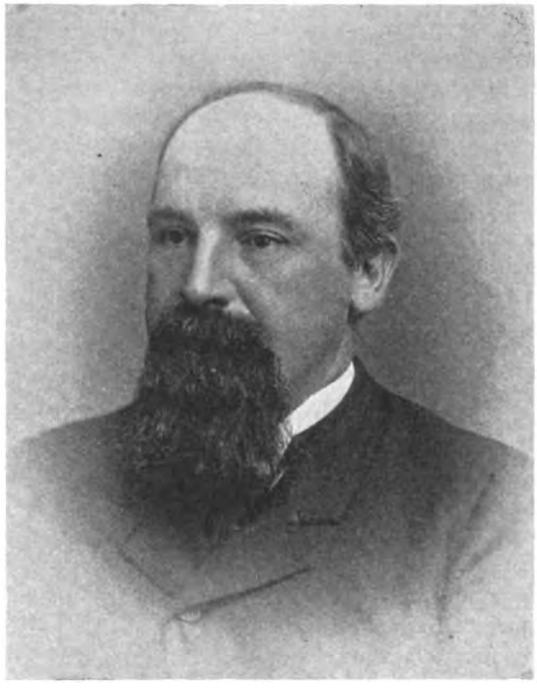
"Those capital prizes of science termed fossils are especially odious. They are stigmatized by the practical with the very superlatives of aversion and contempt. A fossil is lost matter, corresponding, in physical reprobation, to a lost soul in the spiritual. Stripped to its essence, it is time petrified by malediction, the past preserved by a curse. The law, intensely modern, always leagued in sympathy with the present, always devoted to the practical, favors no fossils but its own. These it cherishes — sometimes too fondly — as priceless gems, inherited from ancestral opulence, the hoards of those grand old legal millionaires, the early sages."

"The profession will always number among its members some typical lawyers, envoys from the past to the present, messengers and expounders of precedent."

"Time is the increasing factor, the growing element of modern life. Progress is the realization, in short time, of what formerly occupied long time. At least this is one form of progress, and that form with which we of the nineteenth century are in immediate contact, — a century that, if measured by results in some of the spheres of human activity, might well count for a thousand years. How is it with practical remedial jurisprudence? Is it up with, or is it behind the age? Compare it with other business, public or private, — with operations of the War Department, the Navy, the Treasury, the Post-Office, the Interior; with commerce, manufactures, banking, transportation, mining, farming; with the venerable and conservative vocations of teaching and preaching, — with anything, and what is its relative position? The main bulk of the world-work is ahead of it. Several branches of that work — for instance, the postal service, general transportation, commerce, and manufactures — are so far in advance that the law seems to crawl, whilst they go on wings."

The following discussion of intellectual honesty has an autobiographic interest: —

"No man on earth knows enough at any given hour to qualify him to be a judge of the Supreme Court of Georgia. Such, at least, is my opinion. I have long since proved that I have never known enough at any one time to suffice for the duties of a single day. Every day I needed more knowledge than I had, and every day I acquired more. Only by so doing could I meet and discharge the demands made upon me by current business. An inventory of my permanent outfit for judicial functions would show the following particulars: First, a clear and impressive realization of my own ignorance, along with an alert faculty for distinguishing between what I know and what I do not know; secondly, a fair acquaintance with the general principles of law; thirdly, the power — partly natural and partly acquired — to discriminate between true law and most of the counterfeits or imitations of it; and fourthly, a determination to ascertain, if possible, the true law of each case, at any cost of care and labor.



SAMUEL LUMPKIN.

"With an outfit so restricted as this I have found it practicable to turn off judicial product of an average quality, though on a few occasions I have had to hire help by the day's work, at an expense of more than half my *per diem*. 'To thyself be true' has its first and deepest application to the processes of our thinking; to the discipline, scrutiny, and analysis of our thoughts. He who is unfair in dealing with his own mind unfits himself for fair dealing with other minds. In consequence of having committed actual fraud upon himself, he attempts to commit constructive fraud on all to whom his arguments are addressed. He need not mean or intend to deceive, — for one who offers the fruits of self-deception to others, though ever so honestly, attempts unwittingly to deceive by the very offer; and he does deceive by it if the offer is accepted. The counterfeit coin which passes as genuine is none the less counterfeit because he who offers and he who takes it both believe it to be good money. The great security for honest argument is honest thinking. And one essential of honesty is accuracy, at least in those minds which are capable of accuracy. Perhaps there are some which are incapable of it, but of this I am not certain.

"It is incumbent upon every mind that thinks with a view to argument or discussion, whether in the field of morals, politics, theology, legislation, law, or general science, to be perpetually on its guard against self-deception. Only by so doing can it shun fraudulent negligence, though it may not intend to commit fraud in fact. As to the latter kind of fraud, there ought to be no doubt of its turpitude. To steal a conclusion and profit by it to another's injury should be regarded as no less forbidden in the court of conscience than to steal an article of property. A larceny committed by false logic or florid rhetoric, used intentionally to mislead, deserves rebuke quite as much as would a false reckoning in casting up an account, and thus producing a false balance by design. Fair-mindedness, honest thought and its honest utterance, without the petty pride that too often attends exceptional frankness, would, if generally prevalent, contribute more than all other forces to the discovery and dissemination of truth. I speak not of an absent virtue, but of one which has always been in the world. It prevails widely, but it ought to be universal."

The concluding paragraph of the following dissertation on "Doubt" probably expresses a state of mind not uncommon in the theological ferment of our times: —

"Correctness of thought is conformity of thought to things, and of thought to thought. I have never met any person who believed he did not know that which he knew; but nothing is more common than for us to think we know what we do not. We never mistake our knowledge for ignorance, except perhaps in extreme metaphysics; but we constantly mistake our ignorance for knowledge. And the remedy for this, so far as there is a remedy, is the practice of mental candor until it becomes a fixed habit, the cultivation of an intellectual conscience. He whose opinions are all convictions is as reckless intellectually as he is morally whose assertions are all categorical. Conviction has no more right to go beyond evidence and just inference than statement has to go beyond conviction. A man should be hardly less careful not to deceive himself in thought than he is not to deceive others by expression. It is as hurtful to truth to decide when we ought to doubt, as to doubt when we ought to decide. We should feel no reluctance to confess our ignorance always to ourselves, and when circumstances call for it to others. The phrase, "I don't know," honestly and fairly used, humbles us; but when so used, it covers much the larger part of truth. We should use it honestly and fairly, both to ourselves and others; always, however, remembering that we are not to deny, even in thought, the existence of a thing because we do not know of its existence. It is the lack of such knowledge that constitutes ignorance. This lack is the very stuff of which ignorance is made. If we knew all existences, taking the term as including both the actual and the potential, we should know everything, for there is nothing else to know. We have no more warrant for dogmatizing at random negatively than affirmatively. The forms of language force us very often to be dogmatic in expression, but this does not oblige us to be dogmatic in thought. If we attempted to communicate in discourse all the qualifications and all the shades and degrees of qualification that we realize, or ought to realize, in thinking, we should only perplex or mislead our hearers. It has been remarked that no one ever means precisely what he says, for no one ever says precisely what he means. Doubt is a state of mind proper to any high degree of uncertainty. It is a question whether anything is uncertain in and of itself, — whether all contingency is not in knowledge, none of it in the objects of knowledge. The so-called contingent events of to-morrow are at this moment uncertain to the whole human race; but if they are known to God, they have certainty relatively to him. He never doubts. Whether we will or not, we must live with uncertainty and die with it. Relatively to us it extends over a part of truth as surely as certainty does over another part. To doubt too much is to carry over by self-deception the certain into the uncertain; to doubt too little is to carry over by self-deception the uncertain into the certain. Not to do either should be a matter of solicitude with every lover of truth. The repose of conviction is very desirable and very seductive. To doubt is never pleasant, often painful, sometimes agonizing. And in so far as this prompts to inquiry and urges us to decision, it is very useful; but when it induces us to decide without inquiry or evidence, or without the proper use of them, the result is like declaring victory before fighting the battle. If we were so constituted that we could not doubt, what security would there be for truth? What could more cripple the mind than to deprive it either of the power of doubting or the power of believing? To face frankly and fairly the terrors of uncertainty requires courage. Indeed, to think at all, responsibly, rationally, and with absolute fidelity to truth, upon many subjects requires the highest degree of courage. It is easier, perhaps, to stand before a loaded cannon and see the match applied, than to adopt a conclusion utterly destructive to past convictions long cherished, and to the authority upon which they rested, in a matter of vital interest and of personal concern."

In 1887, on the death of Chief-Justice Jackson, Judge Bleckley returned to the bench as his successor. Since that time he has done continuous work; but having found that the body is not an indestructible machine, he works with more regard for physical limitations. He has given much attention to the matter of reducing the unnecessary work of the court. An Act of the Legislature was recently passed, which allows the plaintiff in error to specify in his bill of exceptions only such parts of the record in the court below as bear upon the exceptions. The opposite party may

specify others, if he thinks other portions necessary. This gets rid of much chaff in every case, and saves expense to the parties. It is understood that this measure originated with the court.

Judge Bleckley is the author of a very useful device to secure a fair statement of the case at the outset of the argument. A rule of court requires the Reporter of the court to prepare an abstract or statement of each case, either party having leave to suggest additions or corrections.

Judge Bleckley's disclaimer of learning, "lay or legal," is of a piece with his reason for resignation in 1880. His point of view is the pinnacle which not many so-called learned men ever reach, — the knowledge of the extent of the domain of ignorance. He is one of the few men in Georgia who could hold his own in a discussion of German metaphysics. But this is one of many diversions which he has resolutely denied himself in a stern devotion to the law, — a devotion which he so well described, because drawn from his own experience, in the beautiful tribute to Justice Hall, and to which he refers, both in earnest and in jest, in his "Letter to Posterity," published elsewhere in this number. What form of self-denial is at once so bitter and heroic as that of the intellectual man who, with capacity and desire to "take all knowledge for his province," calls back his faculties from the universe of thought, study, and speculation which they seem created to explore, and concentrates them on a single line of human activity, because, forsooth, the mind is "chained to a body of death," and the butcher's bill must be paid, and good work on the one task in hand requires the sacrifice?

The high reward of such a sacrifice — the thought which reconciles the man of genius with the word of bar and bench — has never been so aptly expressed as by Judge Oliver Wendell Holmes, — "the subtle rapture of a postponed power;" "the intoxicating authority which controls the future from within by shaping the thoughts and speech of a later time;" "such men are to be honored, not by regiments moving with high heads to martial music, but by a few others, lonely as themselves, walking apart in meditative silence, and dreaming in their turn the dream of spiritual reign."

IN THE PROBATE REGISTRY.

IN a very dark and dreary,
Grim and suicidal room,
Stands a lawyer weak and weary,
Like a spectre from the tomb.

Round about on shelves are numbered
Wills that iong ago were made;
Like their makers long they've slumbered
In the places where they're laid.

Yet the lawyer on is reading,
With a very anxious look,—
It appears as if he's feeding
On the dirty, musty book.

For he on its greasy pages
Great attention does bestow;
What's the theme that him engages,
You, no doubt, would like to know.

Ah! he loves a maiden madly,
But he won't propose until
Very rev'rently and sadly
He has read her father's will.

Lays of a Lazy Lawyer.

TYRREL'S CASE AND MODERN TRUSTS.

By Prof. James B. Ames.

"THE strange doctrine of Tyrrel's case." [1] "The object of the legislature appears to have been the annihilation of the common-law use. The courts, by a strained construction of the statute, preserved its virtual existence." [2] "Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to." [3] "This doctrine must have surprised every one who was not sufficiently learned to have lost his common-sense." [4] Such are a few of the many criticisms passed upon the common-law judges who decided, in 1557, that a use upon a use was void, and therefore not executed by the Statute of Uses. It has, indeed, come to be common learning that this decision in Tyrrel's case was due to "the absurd narrowness of the courts of law;" that the liberality of the Chancellor at once corrected the error of the judges by supporting the second use as a trust; and "by this means a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance." [5]

This common opinion finds, nevertheless, no support in the old books. On the contrary, they show that the doctrine of Tyrrel's case was older than the Statute of Uses, — presumably, therefore, a chancery doctrine, — and that the statute so far accomplished its purpose, that for a century there was no such thing as the separate existence in any form of the equitable use in land.

The first of these propositions is proved by a case of the year 1532, four years before the Statute of Uses, in which it was agreed by the Court of Common Bench that "where a rent is reserved, there, though a use be expressed to the use of the donor or lessor, yet this is a consideration that the donee or lessee shall have it for his own use; and the same law where a man sells his land for £20 by indenture, and executes an estate to his own use; this is a void limitation of the use; for the law, by the consideration of money, makes the land to be in the vendee." [1] Neither here nor in Benloe's report of Tyrrel's Case [2] is the reason for the invalidity of the second use fully stated. Nor does Dyer's reason, "because an use cannot be ingendered of an use," [3] enlighten the reader. But in Anderson's report we are told that "the bargain for money implies thereby a use, and the limitation of the other use is merely contrary." [4] And in another case in the same volume the explanation is even more explicit: "The use is utterly void because by the sale for money the use appears; and to limit another (although the second use appear by deed) is merely repugnant to the first use, and they cannot stand together." [5]

[1] Digby, Prop. (2 ed.) 291. [2] Cornish, Uses, 41, 42.
[3] Sugden, Gilbert, Uses, 347, n. 1.
[4] Williams, Real Prop. (13 ed.) 162.
[5] Hopkins *v.* Hopkins, 1 Atk. 591, *per* Lord Hardwicke. See also Leake, Prop. 125; 1 Hayes, Convey. (5 ed.) 52; 1 Sanders, Uses (2 ed.), 200; 1 Cruise, Dig. (4 ed.) 381; 2 Blackstone, Com. 335; 1 Spence, Eq. Jur. 490.

[1] Br. Ab. Feff. al Uses, 40; Gilb. Uses, 161 *accord.*
[2] Benl. (ed. 1669) 61.
[3] Dy. 155, pl. 20. [4] 1 And. 37, pl. 96.
[5] 1 And. 313. See also 2 And. 136, and Daw *v.* Newborough Comyn, 423: "For the use is only a liberty to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use."

This notion of repugnancy explains also why, in the case of a conveyance to A, to the use of A, to the use of B, the statute does not operate at all. The statute applies only to the Chancery use, which necessarily implies a relation between two persons. But A's use in the case put is obviously not such a use, and therefore not executed. The words "to the use of A" mean no more than for the benefit of A. But it is none the less a contradiction in terms to say in the same breath that the conveyance is for the benefit of A and for the use of B. B's repugnant use is therefore not executed by the statute. Anon. Moore, 45, pl. 138; Whetstone *v.* Bury, 2 P. Wms. 146; Atty.-Gen. *v.* Scott, Talb. 138; Doe *v.* Passingham, 6 B. & C. 305. The opinion of Sugden to the contrary in his Treatise on Powers (7 ed.), 163-165, is vigorously and justly criticised by Prof. James Parsons in his "Essays on Legal Topics," 98.

The second use being then a nullity, both before and after the Statute of Uses, that statute could not execute it, and the common-law judges are not justly open to criticism for so deciding.

Nor is there any evidence that the second use received any recognition in Chancery before the time of Charles I. Neither Bacon nor Coke intimates in his writings that a use upon a use might be upheld as a trust. Nor is there any such suggestion in the cases which assert the doctrine of Tyrrel's Case.[1] There is, on the other hand, positive evidence to the contrary. Thus, in Crompton, Courts:[2] "A man for £40 bargains land to a stranger, and the intent was that it should be to the use of the bargainor, and he in this court [Chancery] exhibits his bill here, and he cannot be aided here against the feoffment [Bargain and sale?] which has a consideration in itself, as Harper, Justice, vouched the case." Harper was judge from 1567 to 1577.

As the modern passive trust, growing out of the use upon a use, is in substance the same thing as the ancient use, it would seem to be forfeitable under the Stat. 33 Henry VIII. c. 20, § 2, by which "uses" are forfeited for treason. Lord Hale was of this opinion, which is followed by Mr. Lewin and other writers. But it was agreed by the judges about the year 1595 that no use could be forfeited at that day except the use of a chattel or lease, "for all uses of freehold are, by Stat. 27 Henry VIII., executed in possession, so no use to be forfeited."[3] There is also a *dictum* of the Court of Exchequer of the year 1618, based upon a decision five years before, that a trust of a freehold was not forfeitable under the Stat. 33 Henry VIII. Lord Hale and Mr. Lewin find great difficulty in understanding these opinions.[1] If, however, the modern passive trust was not known at the time of these opinions, the difficulty disappears; for the freehold trust referred to must then have been a special or active trust, which was always distinct from a use,[2] and therefore neither executed as such by the Statute of Uses nor forfeitable by Stat. 33 Henry VIII.

In Finch's Case,[3] in Chancery, it was resolved, in 1600, by the two Chief-Justices, Chief-Baron, and divers other justices, that "if a man make a conveyance, and expresse an use, the party himself or his heirs shall not be received to averre a secret trust, other than the expresse limitation of the use, unless such trust or confidence doe appear in writing, or otherwise declared by some apparent matter." But the trust here referred to was probably the special or active trust, and not the passive trust. The probability becomes nearly a certainty in the light of the remark of Walter, *arguendo*, twenty years later, in Reynell *v.* Peacock.[4] "A bargain and sale and demise may be upon a secret trust, but not upon a use." And the case of Holloway *v.* Pollard[5] is almost a demonstration that the modern passive trust was not established in 1605. This was a case in Chancery before Lord Chancellor Ellesmere, and the defendant failed because his claim was nothing but a use upon a use.

Mr. Spence and Mr. Digby cite the following remark of Coke in Foord *v.* Hoskins,[6] as showing that Chancery had taken jurisdiction of the use upon a use as early as 1615: "If *cestuy que use* desires the *feoffees* to make an estate over and they so to do refuse, for this refusal an action on the case lieth not, because for this he hath his proper remedy by a subpœna in Chancery." "It seems," says Mr. Digby, "that this could

[1] Br. Ab. Feff. al Uses, pl. 54; Anon. Moore, 45, pl. 138; Dillon *v.* Freine, Poph. 81; Stoneley *v.* Bracebridge, 1 Leon. 6; Read *v.* Nash, 1 Leon. 148; Girland *v.* Sharp, Cro. El. 382; Hore *v.* Dix, 1 Sid. 26; Tippin *v.* Cosin, Carth. 273.

[2] f. 54, a; Cary, 19 s c., where the reporter adds: "And such a consideration in an indenture of bargain and sale seemeth not to be examinable, except fraud be objected, because it is an estoppel."

[3] 1 And. 294.

[1] Lewin, Trusts (8 ed.), 819.

[2] Bacon, Stat. of Uses (Rowe's ed.), 8, 9, 30; 1 Sanders, Uses (5 ed.), 2, 3; 1 Rep. 139 *b*, 140 *a*.

[3] Fourth Inst. 86.

[4] 2 Rolle, R. 105. See also Crompton, Courts, 58, 59.

[5] Moore, 761, pl. 1054.

[6] 2 Bulst. 336, 337.

only apply to a use upon a use."[1] But if the *cestuy que use* here referred to were the second *cestuy*, he would not proceed against the *feoffees*, for the Statute of Uses would have already transferred the legal estate from them to the first *cestuy*. It would seem that Coke was merely referring to the old and familiar relation of *cestuy que use* and *feoffees* to use as an analogy for the case before him, which was an action on the case by a copyholder against the lord for not admitting him.

The earliest reported instance in which a use upon a use was supported as a trust seems to have been Sambach *v.* Dalton, in 1634, thus briefly reported in Tothill:[2] "Because one use cannot be raised out of another, yet ordered, and the defendant ordered to passe according to the intent." The conveyance in this case was probably gratuitous. For in the "Compleat Attorney," published in 1666, this distinction is taken: "If I, without any consideration, bargain and sell my land by indenture, to one and his heirs, to the use of another and his heirs (which is a use upon a use), it seems the court will order this. But if it was in consideration of money by him paid, here (it seems) the express use is void, both in law and equity."[3] On the next page of the same book the facts of Tyrrel's Case are summarized with this addition: "Nor is there, as it seems, any relief for her [the second *cestuy que use*] in this court in a way of equity, because of the consideration paid; but if there was no consideration, on the contrary, Tothill, 188." As late as 1668, in Ash *v.* Gallen,[4] a Chancery case, it was thought to be a debatable question whether on a bargain and sale for money to A to the use of B, a trust would arise for B. Even in the eighteenth century, nearly two hundred years, that is, after the Statute of Uses, Chief-Baron Gilbert states the general rule that a bargain and sale to A to the use of B gives B a chancery trust with this qualification: "*Quære tamen*, if the consideration moves from A."[1]

In the light of the preceding authorities, Lord Hardwicke's oft quoted remark that the Statute of Uses had no other effect than to add three words to a conveyance must be admitted to be misleading. Lord Hardwicke himself, some thirty years afterwards, in Buckinghamshire *v.* Drury,[2] put the matter much more justly: "As property stood at the time of the statute, personal estate was of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after (I wonder how they ever happened to do so)." The modern passive trust seems to have arisen for substantially the same reasons which gave rise to the ancient use. The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the Chancellor at length compelled the faithless legal owner to perform his agreement.

[1] Digby, Prop. (3 ed.), 328. See 1 Spence, Eq. Jur. 491.

[2] Page 188; Shep. Touch. 507 s. c.

[3] Page 265. Compare also pages 507 and 510 of Shep. Touch.

[4] 1 Ch. Ca. 114.

[1] Gilbert, Uses, 162. But in 1700 the limitation of a use upon a use seems to have been one of the regular modes of creating a trust. Symson *v.* Turner, 1 Eq. Ab. 383. The novelty of the doctrine is indicated, however, by the fact that, even in 1715, in Daw *v.* Newborough, Comyn. 242, the court, after saying that the case was one of a use upon a use, which was not allowed by the rules of law, thought it worth while to add: "But it is now allowed by way of trust in a court of equity."

[2] 2 Eden, 65.

SOME MISSOURI "YARNS."

By Hon. William A. Wood.

I.

COUNTRY lawyers in Missouri have always been wont to congregate of evenings during the session of Circuit Courts, either in the office of some popular member of the bar, or in the favorite tavern's parlor, which the ladies usually abandoned to them at "court time," and relate amusing "yarns" of the profession. The joke often pointed toward certain present members of the company, who generally bore the martyrdom in good humor; in earlier times ordering the "toddy" from the hotel bar, but modernly confining themselves to the milder stimulant, — cigars. The following are a few of the "yarns" the writer remembers either to have heard on such occasions, or to have personally observed; some of them, at least, are founded upon actual occurrences. The subjects of some of them are among the most profound jurists and skilful practitioners of Missouri's brilliant bar; and the stories are here told in the kindliest spirit, with the belief that if any who happen to be "hit" recognize themselves, they will "save no exceptions," knowing that the intention herein is to cheer some overworked and weary brother of the bench or bar.

In the early settlement of Missouri the leading bar for the Northwest resided at what is now called Old Sparta, in Buchanan County. Here Gov. Willard P. Hall, Chief-Justice Henry M. Vories, and Attorney-General James B. Gardenhire began the practice in about 1840. One of the three about that time tried a case in what is now Gentry County, involving the levying upon and selling of property which was by statute exempt from execution. The property sold consisted of some stands of honey-bees in old-fashioned log gums. The attorney introduced his proof, and read to the jury that part of the then statute which held exempt from execution "to the head of a family working animals to the value of $150," being intended to cover oxen, which were the principal working animals of that day, as well as horses and mules. "Now, gentlemen of the jury," said he for the plaintiff, "I have proved that these bees were worth less than $150, and I will leave it for you to say what is a more *working* animal than a bee." His opponent could not break the force of this argument, and the future Chief-Justice won his case.

In Platte County, Missouri, in an early day, an old Tennessean was made justice of the peace. A leading attorney of that section, who was later on prominent in national councils, in trying a case before him had occasion to refer to a law but recently enacted by the Legislature, and brought along a copy of the Session Acts, — in that day a very insignificant volume. He read the Act in question to the justice, who listened patiently; and when the attorney ceased reading, relieved his mouth of an accumulation of tobacco-juice, and said, —

"Mister ——, whut war thet thar letle book you-uns wus re'din' outen?"

"That, sir," said the attorney, "is the Statutes of Missouri."

"You-uns cain't pull the wool over we-uns no sech way, 'Square," said his honor; "thet thar letle book ain't no bigger 'n a Tennysee almernack. I 'cides the case ag'in you-uns, 'Square; and if you-uns 'spects to plee in this hayer cote ag'in, you-uns 'll hev to go 'ith we-uns over 'long o' the still-house, and treat to the licker."

The defeated attorney good-naturedly "treated to the licker," in the hope of getting a better hearing next time.

Early in the seventies, just before Judge C—— of Missouri retired from the bench, Colonel ——, a very ostentatious lawyer, afterwards a Missouri Congressman, was trying a case to a jury, Judge C—— presiding. Colonel —— objected to the admission of certain evidence; but Judge C——, refusing to allow him to argue the question in the presence of the jury, overruled his objection. Colonel ——, who is a very large, tall man, rose to his full height, assumed an air of injured dignity, and said, —

"Your honor, I want to know if after practising at the bar for nearly a quarter of a century I am a jackass."

The court mildly surveyed the angry barrister over his iron-rimmed spectacles, and replied, —

"Mr. ——, that is a question of fact for the jury; the court will not pass on it. Take your seat, sir."

The late Judge L—— of St. Louis, a profound lawyer, was particular to eccentricity in the care of his splendid library. An eminent attorney residing in a country district recently related to me an anecdote of his peculiarity in this respect. The attorney wanted to use a certain text-book in a case on trial in a county-seat not far from St. Louis. Not having time to get it from the publishers, and knowing that Judge L—— had a copy, he telegraphed him for the loan of it. The book came promptly by express, and with it a printed slip, the price of the book filled in with a pen, reading about as follows: "This book cost me $—. Do not damage it, or break or turn down the corners of leaves, or mark same; if you do, keep the book and remit me the price stated." The attorney read the slip, left it on his desk, and carried the book to the court-room where he was engaged in the trial. During the progress of the trial opposing counsel got hold of the book, and marked and turned down the corners of several leaves where he desired to refer in his argument. After the case was through, the attorney who borrowed the book, forgetting the injunction of Judge L——'s slip, returned it to him. In a few days he was surprised to again receive the volume by express, together with a letter from Judge L——, saying: "You have marked and turned down several leaves in the book I loaned you; keep it and send me the publisher's price, which is $—." The attorney kept the volume, remitted Judge L—— its price, and tells his experience as a lesson to members of the bar who carelessly mark and mar law-books.

The following is supposed to be a joke manufactured by one Supreme Judge at the expense of another; but I am told there is no real foundation for the "yarn."

Some years ago old Bill —— lived in Jefferson City, and made a precarious living by trading horses, and playing an occasional game of "sledge" with a railroad or steamboat hand.

One of the Associate Justices of the Supreme Court, a dignified six-footer, kept bachelor lodgings near the Capitol grounds. Old Bill, on some tryst or other, was seen late at night on two or three occasions near these lodgings apparently waiting for some one. The Associate Justice spied him, and the unaccountable notion seized him that Bill was waiting around to do him harm. He astonished his associates, who considered him a brave man, by telling them of his fears. The Chief-Justice was a small man, with twinkling black eyes, and very fond of a joke. Late one evening he met Bill, and the idea struck him of having some fun at the expense of his big associate; so he said to Bill, —

"Bill, you trade horses some. Judge —— wants a good saddle-horse, gentle but pretty brisk. Do you know of one that will suit him?"

"I think I do," said Bill, willing to make a few dollars by the trade.

"Well," said the Chief-Justice, "let's go over to his rooms and see him."

When they reached the Associate Justice's lodging, which was on a ground-floor,

the Chief-Justice fell behind and a little to one side, and told Bill to knock on the door. Bill rapped, and the Associate Justice opened the door, and peering out into the dusk, saw Bill, his imagined enemy, standing in silence looking at him in his peculiar way. He threw up his hands and fell backward in a swoon from fright. The Chief-Justice, instead of enjoying his joke, had to go to work in disgust to resuscitate his frightened brother and calm his fears. It is needless to say the Associate Justice never liked the Chief-Justice after he got "onto" the joke.

A former Chief-Justice of Missouri was very dark-skinned, always wore a browned and foxy old silk hat, and during his vacations professed to be quite a farmer. Some of the irreverent alleged that he captured the rural vote in this way. On a hot August day the judge with a team and breaking-plough was essaying to turn over a piece of stubble near his residence, wearing a suit of old clothes, but keeping on his favorite old silk tile. A couple of farmers who seldom came to the county-seat passed along the highway, and one of them failed to recognize the Chief-Justice in his husbandman's garb, but knew he resided there. When they were well opposite him, the farmer in question, pointing to the judge and speaking so he could hear him, innocently remarked to his companion, "Say, Bill, if I was Judge ——, I 'll be d——d if I 'd allow that durned nigger to plough with a plug hat on." The joke was so good the judge told it on himself at the next session of the court.

One of the brightest corporation lawyers formerly of Missouri's Bar relates the following on himself. He was living in a country town, had just married, and was beginning to win fame and practice, but sometimes with a few boon companions he would engage in a game of "draw poker" at a few cents "ante," to make it interesting. Some "black sheep," who probably thought he had been too well "fleeced," gave the game away to the grand jury, and they were all indicted. The weekly paper published the docket just before court, as is the custom; and E——, without thinking of his own case, carried it home to his young wife. She in looking over the paper discovered on the docket "State of Missouri *vs.* E——," and exclaimed, much frightened, "My dear, what in the world does this mean?" E——, with a characteristic readiness, by which he often saved a weak case, glanced at the paper unconcernedly and said, "Oh, that's nothing, dear; they have to have so many State cases before court can run; and as there were not enough for this term, I told the clerk to put one down against me."

Will. J. Knott, the lawyer editor of the "Hannibal Journal," furnishes the data for the following: Popular Ed Silver of Jefferson City, one of the ablest lawyers in the State, and some years ago rightly called by the ladies "that handsome young private secretary of Governor Hardin's," is still a bachelor, though not an "old" one, and is very much attached (his friends think needlessly so) to a frowsy-looking dog he owns, called "Boze."

Ed says he is a bird-dog; but he has never been known to either "set" or "stand" anything wearing feathers. Ed excuses him on this point, because he says his pressing professional duties have prevented him giving Boze a proper education.

Some months ago Ed took Will Zevely, the State law librarian, out in his buggy one afternoon to rehearse one of his speeches to him and get his opinion of it. They were accompanied, as usual, by Boze, who followed at the rear of the vehicle when they started.

Ascending the long hill west of the capital city, Ed suddenly discovered that Boze was missing!

"Say, Zev," said he, "durn me if I don't believe somebody 's stole Boze."

They both stood up in the buggy and surveyed the country, including the bold and beautiful bluffs on the Callaway side of the river, for at least a mile and a half in every

direction. Then Ed turned the outfit round, drove down the hill, and they made a thorough search of Goose Creek bottom. Still no Boze could be found.

Zevely, to assuage his friend's grief, suggested that as it was a very hot day, Boze might have grown weary of the long trot and concluded to go back home.

Ed sadly and solemnly responded that he had never known Boze to do such a thing before.

"I fear, Zev," said he, "that the worst has happened to him, and I shall never again hear his sweet, peculiar howl at night. I am sorry I ever scolded him for fondling my Sunday clothes with his dirty paws."

At this juncture they met a "wayfaring man" in the person of a small negro boy.

"Say, boy," said Ed, "have you seen anything of a yellow dog with white spots on his neck and shoulders around here?"

"A yaller dawg wid white spots on him?" responded the little African, with what Zevely thought was a peculiar twinkle in his eyes.

"Yes," said Ed, "I'll give you a great big dollar if you'll find him for me."

The boy grinned and said, "Mister, mebby that 's yer dawg under the buggy thar?"

Sure enough it was. In fact, Boze had been trotting along under the buggy all the while, to get protection from the hot sun's rays. Ed paid the dollar, and made Zevely promise not to tell the story "up town;" but it got out, and its divulgence lies between Boze and the little negro.

LONDON LEGAL LETTER.

LONDON, Jan. 5, 1892.

AS I write, the Christmas recess draws to a close. St. Thomas's Day, December 21, saw the last of the Michælmas Sittings for 1891; we resume our labors, some of us only our patient vigils, on the 11th of January, 1892.

For six days the metropolis was enveloped in an impenetrable fog. Night and day it held its grip; only now and then did the banished light avail to produce the aspect of a dim dawn. Traffic was sometimes almost entirely suspended; dealers in Christmas wares found that the hope of their gains was gone, and those whose business or public duty did not compel them to stir abroad crouched within doors by the hearth, as though a plague were in the streets. The atmospheric spectre did its worst on Christmas Eve and Christmas Day; for so dense was the darkness that but few invited guests were able to present themselves at the Yuletide feasts to which they were bidden.

Since the court rose, the city has lost by death its principal legal dignitary, Sir Thomas Chambers, the Recorder. In my September letter I referred to the rumors then afloat as to his probable retirement and possible successor. Sir William Mariott, Q.C., the Judge Advocate-General, whose name I suggested, is, so far as one can judge, the most likely nomination. The position is one held in high repute; its holder is not only Chief-Judge of the Lord Mayor's Court, but tries prisoners regularly at the Old Bailey as a Commissioner of the Central Criminal Court; moreover, at State ceremonies, in which the corporation participates, he is their official mouthpiece.

The wills of some great lawyers have recently been proved, — the late Baron Huddlestone's for £64,579; that of Mr. Charles Freshfield, the celebrated solicitor, for an amount exceeding a quarter of a million. The wills of lawyers are oftener than not great surprises, — men who have been credited with vast fortunes, and who had certainly earned immense sums, leaving a comparatively moderate pile, and *vice versa*. It was expected that Baron Huddlestone would leave a far larger fortune; but, I think, without sufficient reason. In his day he no doubt enjoyed a very large practice; but it was not of the sort which implies habitually great fees. Mr. Justice Hawkins, still happily spared to us, is reputed to have taken more money away with him from the bar, when he became a judge, than any man of his generation. Charles Freshfield was of the firm of Fresh-

field & Williams, who probably enjoy the greatest solicitor's business in Great Britain. They boast, and not without reason, that the young counsel whom they dower with their support inevitably reaches the bench; of course it is a very limited and select class of counsel, young or old, who can number Messrs. Freshfield & Williams as clients.

The Hon. George Denman, senior judge of the Queen's Bench, has been figuring of late as the *justus et tenax propositi vir.* Personally one of the handsomest of the English judges, he owes much of the ease with which he bears the strain of age to the athletic exercises of his youth. Although he wearied his mind at Cambridge to the extent of becoming senior classic, he corroborated his doughty frame by rowing in the University boat, wherein, manfully striving, he attained unto honor, albeit the post he held in that academic craft I cannot more precisely affirm, by reason of my inexpertness in navigation. It was this typical Englishman, then, who a few weeks ago tried the most romantic case heard for several years in our tribunals, known here as "The Great Pearl Case." As is common on such occasions, the pen of the ready artist was busy in transferring to paper approximate likenesses of witnesses and other personages whose features might be supposed to interest the public. A certain junior counsel was thus engaged, when of a sudden the artistic occupation of his faculties seemed to strike the august judge as a signal impropriety; he ordered the trembling sketcher to desist on pain of instant expulsion from court should he persist in his frivolity, — and the judge further intimated that he would at once order out of court any counsel whom he might detect in the act of making drawings. The *ratio decidendi* is rather obscure; it may have been that to Mr. Justice Denman it seemed profane for a mind devoted to his own high profession to dally with the transient arts of the casual limner. Whatever the judge's motives may have been, he made it clear that his resolution was not second to that of the Horatian hero.

We are rebuilding old London as fast as ever we can. A long stretch of hoary tenements is being dismantled in Chancery Lane, with a view to the erection of some imposing piles. The principal fault of most of our new public buildings is the excessive height to which they are run up; from some points of view an imposing effect is in this way secured, but one feels that there is a limit to everything.

The January number of the "Law Quarterly Review" contains, as frontispiece, an admirable likeness of the editor, Sir Frederick Pollock. Our legal journalism is proud to own him as its head. A very large circulation is scarcely attainable by so purely technical a magazine as "The Law Quarterly Review;" even lawyers interested in its contents are satisfied with glancing through its pages at their club. It appeals to specialists, and to specialists who are not always interested in each other's specialties. The expert in copyhold tenure regards what is called the Law of Patents as a branch of law merely by courtesy; while the practitioner, who distinguishes with inevitable insight two apparently similar mechanisms, cannot confidently assert what copyhold tenure is, or whether it survived the legislation of Charles II.

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The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

WE have received a charming souvenir of the fourth annual banquet of the Allegheny County Bar Association. It comes in the form of a diminutive *green bag*, in which is enclosed the *ménu* provided on that interesting occasion. If the bag were only larger, we might find it of great assistance in our editorial duties; but we doubt if we could fill it with anything half so "entertaining" as its present contents.

JUDGE MURRAY E. POOLE, of Ithaca, N. Y., furnishes the following list of distinguished alumni of Union College of Law, Chicago: —

Author: 1877, W. H. Whittaker, law writer.

Journalists: 1871, Charles E. Hasbrook, of the Kansas City "Times;" 1884, Charles L. Rhodes, of the Chicago "Daily News."

Judge State Appellate Court: 1866, Gwynn Garnett, Ill.

Judge State Circuit Courts: 1863, Oliver H. Horton, Chicago, Ill.; 1866, James H. Selover, Mo.; 1874, Richard W. Clifford, Chicago, Ill.; 1876, Benjamin R. Burroughs, 3d Circuit, Ill.

Judges County Courts: 1862, Charles B. Garnsey, Joliet, Ill.; 1865, William J. McCoy, Morrison, Ill.; 1870, Alexander J. Nisbet, Anna, Ill.; 1870, James M. North, Boulder, Col.; 1878, Richard J. Prendergast, Chicago.

Judge City Court: 1861, Frank M. Annis, Aurora, Ill.

Judge Probate: 1883, Sewall W. Abbott, N. H.

Judge: 1875, James G. Burke, Aberdeen, Dak.

Lawyers: 1861, Homer Cook; 1864, Elijah B. Sherman; 1867, Frederick A. Smith; 1878, George M. Rogers; 1880, Elbert C. Worthington; 1881, James R. Mann; 1884, James E. Babb; 1885, George V. Lanman.

Lieutenant-Governor: 1874, William J. Campbell, Ill.

Mayor: 1876, Hempstead Washburne, Chicago.

Members Congress: 1865, Jonathan H. Rowell, Ill.; 1876, James R. Williams, Ill.; 1876, James H. Ward, Ill.

Members Assembly: 1860, James E. McPherran, Ill.; 1870, William A. Phelps, Ill.; 1876, R. M. Ireland, Ill.

Poet: 1869, Eugene J. Hall.

Presidential Elector: 1871, Moses J. Wentworth, Ill.

Professor in College: 1870, Andrew F. Craven, San Francisco.

Public Leader: 1871, Moses J. Wentworth, Pres. Calumet Club, Chicago.

A MARYLAND correspondent propounds the following conundrum: —

Editor of the "Green Bag":

The question may have been passed upon elsewhere, and therefore not so new as your correspondent may suppose.

A dentist of our place sued a doctor for dental services, which included a charge for two gold fills. The doctor admitted one fill, but denied the other.

Justice B—— was about rendering his decision according to the preponderance of testimony rejecting one of the fills, when the dentist, catching the mind of the justice and the drift of his decision, sprang to his feet, saying, "I demand, in verification of my testimony, an inspection of the doctor's mouth. I believe this is my legal right." "I want to say to you, sir," said the doctor, reddening perceptibly, "that your demand will not be complied with. I regard your suggestion as a personal insult and outrage."

The justice, deeming the question new and important in its consequences to the cause pending before him, has reserved his decision, to enable the dentist to produce authority to sustain his claim of right to a thorough examination of the doctor's jaws.

Respectfully, X.

LEGAL ANTIQUITIES.

IN 1568 a child was beheaded for having struck her parents; a lad of sixteen was also sentenced to death for only threatening to strike his mother.

In 1220 a child was crucified in Norwich, England; and another, aged nine, at Lincoln in 1225.

In the year 1547 a law was promulgated, by Henry VIII., "that women should not meet together to babble and talk, and that all men should keep their wives in their houses."

In the Minster at Beverley is an old stone seat, upon which was this inscription: "Hæc sedes Lapidæ 'Freed-Stoole' dicitur — Pacis Cathedra; ad quam refugiendo perveniens omni modom habet securitatem." That is: "This stone seat is called Freed-Stoole, or Chair of Peace; to which if any criminal flee he shall have protection."

FACETIÆ.

The late Judge Ranney, of Ohio, was seldom beaten in a lawsuit, and only once did opposing counsel get him cornered. In an important suit, one time, Judge Stevenson Burke was pitted against him. Ranney made his argument, and cited authority after authority to strengthen his position. Then Judge Burke arose, took up the Ohio statutes, and began reading a profound opinion which entirely upset Ranney's argument.

"Who handed down that decision?" thundered Ranney.

"One Rufus P. Ranney, Judge of the Supreme Court of Ohio," quietly replied Burke; "and what is more, none of his decisions have ever been reversed."

There was a roar of laughter from the court-room, and all Judge Ranney could say was that he knew more now than when he made that decision.

The magistrates in a cathedral city were recently hearing applications for renewals of licenses. A solicitor had been retained on behalf of some good people who desired to have the renewal of certain licenses refused. In the course of his argument the solicitor made frequent references to Sharp *v.* Wakefield, until at last the patience of the worthy but ignorant mayor being exhausted, he leaned over and said: "Look 'ere, Mr. Blank, we are local people, and this is a local case; we don't know anything about either Sharp or Wakefield. We never heard of either of 'em, and their opinion will have no weight with us. They are not local people, and we intend to decide these cases on local grounds." The solicitor was crushed. — *The Jurist.*

Not long ago a younger member of the bar, conversing with an old veteran in the profession who had passed the fourscore years allotted to man, suggested that a great many changes must have taken place since he began the practice of the law.

"Yes, yes," said the old gentleman, "a great many wonderful changes have taken place in my lifetime. Why, the infernal regions have cooled down a great deal since I was born."

The young lawyer not long afterward repeated this remark to another veteran member of the same bar who knew the first old gentleman's peculiarities and weaknesses very well.

"Did he say that?" asked the second veteran.

"He did," said the young man.

"Well, now I understand; that 's what he 's been waiting for all these years."

A carpenter having neglected to make a gibbet that had been ordered by the hangman, on the ground that he had not been paid for the last one he had erected, gave so much offence that the next time the Judge came to the circuit he was sent for.

"Fellow," said the Judge, in a stern tone, "how came you to neglect making the gibbet that was ordered on my account?"

"I humbly beg your pardon," replied the carpenter; "had I known it had been for your lordship, it would have been done immediately."

Chaquette, who was recently tried at Rutland, Vt., for murder, and defended under an insanity plea, had been a thrifty man, had saved $1,500 or $2,000, and was therefore able to hire a number of lawyers for his trial, including a well-known St. Albans practitioner. When the trial was ended and the bills came in, however, Chaquette objected to them with great vigor as exorbitant, and

somebody reported the fact to the St. Albans lawyer.

"What is that?" he asked.

"Why, Chaquette says that the lawyers' bills are simply outrageous."

"Is that so?" exclaimed the St. Albans man. "Great Scott! after all that has been done, that man goes and *has a lucid interval!*"

A LAWYER'S APPETITE.

"FRIEND WHITE," said Mr. Smith one day
(Smith was an epicure),
"Though lawyers are well fed, they say,
You 're hungry, I am sure;
So let your musty law books be,
And come and dine to-night with me."

"Thanks for your kindly sympathy,"
Said White, with lofty smile;
"But after all, it seems to me,
'T is hardly worth my while,
For there 's enough — as you 'll infer —
Provision in the statute, sir!"

JEAN LA RUE BURNETT.

NOTES.

A SUBSCRIBER sends the following case of contributory negligence in Ireland (from the "Spectator" of November 28): —

"A quarrel had taken place at a fair, and a culprit was being sentenced for manslaughter. The doctor, however, had given evidence to show that the victim's skull was abnormally thin. The prisoner, on being asked if he had anything to say for himself, replied: 'No, yer honor; but I would ask, was that a skull for a man to go to a fair wid?'"

THE most virtuous man would, ten times at least in the course of his life, be considered a fit subject for the gallows, were he to submit all his thoughts and actions to the rigid scrutiny of the laws of his country. — MONTAIGNE.

A BRAVE French officer, now on the retired list, who lost his right arm in the Franco-Prussian War, appeared as a witness before a court in a city in the south of France a few weeks ago. When called upon to swear that he would tell the truth, in the customary manner, the officer naturally raised his left hand. The counsel for the defendant objected to the witness at once, on the grounds that "an oath taken with the left hand was worthless." The learned judges were unable to decide the question, and withdrew to an anteroom for consultation. In a few minutes the Solons reappeared, and the President read the following decision, from a literary and patriotic point of view, worthy of a Monsieur Prudhomme: "In consideration of the fact that when the glorious remnants of our army appear in our courts to respond to their legal duties, we cannot demand that they take oath with those limbs which they have lost in the service of their country, we decide that the oath just made with the left hand of the witness is admissible."

AN attorney was telling about the meanest man in the country. He got into trouble in New Hampshire, and, said the lawyer, "he hired about the best lawyer in the State of New Hampshire, and the lawyer worked hard on the case, neglecting his other business for this client. Well, the man got off, but he never paid his lawyer a cent for his work." One man in the group was well acquainted in New Hampshire, and he asked who the lawyer was. "Well," said the teller of the story, blushing a little, "maybe he was n't the best in the State; but at any rate, he worked like a dog on the case. To tell you the truth, I was the lawyer myself." The next check that was brought to the group was paid by "about the best lawyer in the State of New Hampshire."

Recent Deaths.

ON Oct. 29, 1891, at his home in Trenton, Mo., Judge Rezin A. DeBolt died, after some months' illness from a cancerous affection. He was born on a farm in Fairfield County, Ohio, in 1828, and remained a farmer-boy until, in his seventeenth year, he was apprenticed to learn the trade of tanner, served his apprenticeship of three years, and worked at the trade eight years thereafter, giving all his spare time to perfecting his education and the study of law. His only schooling

had been in the country district schools of his native county, and after a hard struggle and the bravest perseverance he was admitted to the bar of that county in 1856, when he was twenty-eight years old. He practised there two years, and removed to Trenton, Mo., where he resided until his death, and rose to a pre-eminent position at the bar, there being probably but two gentlemen in his circuit who approached near him in legal acumen, or force and brilliancy as an advocate and orator. When the Civil War began, in 1861, Judge DeBolt recruited a company of brave young Missourians for the Union service, and was elected their captain. While leading his men in charge at the battle of Shiloh, April 6, 1862, he was taken prisoner, and detained in Rebel prisons several months, when he was exchanged, and again entered the service as Major of the Forty-fourth Missouri Volunteer Infantry, and was mustered out as such in 1865. In 1863, while home on a sick-furlough, he was elected Judge of the Eleventh Missouri Circuit, and held the office by re-election to Jan. 1, 1875, discharging its duties from the close of the war in 1865 with marked ability. In 1874 he was elected to Congress as a Democrat, took his seat in that body March 4, 1875, held the office until 1877, when he returned to the practice of his profession, and pursued it with marked success until prevented by the sickness which caused his death. He was a profound lawyer, a forcible, brave, eloquent, and, when occasion required, a fiery orator on the hustings and in the forum, yet was courtly and gentle withal to the highest degree. In 1889 he was elected Grand Master of I. O. O. F. for Missouri, and was Grand Representative from his State to the Sovereign Grand Lodge of that order at the time of his death. Judge DeBolt was twice married, first to Miss Maria M. McCleery, of Lancaster, Ohio, June 19, 1849, by whom he had six children, — three of whom are living and three dead. After her death he was married, Oct. 12, 1869, to Miss Lauristine U. Dinsmoor, a native of Canada, but who was reared in New York, who survives him, with the seven children of their marriage. She is a highly accomplished lady, and assisted the Judge greatly in his political and legal ambitions; and when he was Grand Master of I. O. O. F. of Missouri in 1889, she was elected to the highest office of the feminine branch of the order in the State.

WILLIAM A. WOOD.

HON. DANIEL BARNARD, Attorney-General of the State of New Hampshire, died in Franklin, N. H., on January 10. He was born in Orange, N. H., on Jan. 23, 1827, and received his education in the district schools and academies of his native State. In 1851 he went to Franklin and studied law with Hon. George W. Nesmith and Hon. Austin F. Pike, who were then in partnership. Upon being admitted to the bar, in 1854, he formed a law partnership with Mr. Pike, which continued till 1863, when he withdrew and went into practice alone. In 1860 and 1862 he represented the town of Franklin in the Legislature, and in 1865 and 1866 was elected to the State Senate from the district in which he resided. He filled the office of President of the Senate during his last term in that body. In 1870 and 1871 he was elected a member of the Governor's Council, and in 1872 was a member of the National Republican Convention at Philadelphia. From 1867 till 1872, when he declined a reappointment, he served as solicitor of Merrimac County, and on Feb. 3, 1887, he was chosen attorney-general to succeed Hon. Mason W. Tappan, deceased, and held this office at the time of his death. In 1867 Dartmouth College conferred upon him the honorary degree of Master of Arts. The deceased was a man who in professional and social life enjoyed the respect and esteem of people to an eminent degree. He was an industrious, well-read lawyer of marked ability, and occupied a conspicuous place in the front rank of his profession. In practice he was always faithful to the interests of his clients, and in the performance of his public duties he adhered inflexibly to a course dictated by his remarkably keen and seldom erring sense of right.

Hon. RICHARD PRATT MARVIN died in Jamestown, N. Y., on January 11, at the age of eighty-nine years. He was one of the best known jurists of the State of New York, a man of great ability and sterling integrity.

He was born in Fairfield, Herkimer County, N. Y., Dec. 23, 1803, and was a lineal descendant of Reinold Marvin, one of the original settlers of Hartford, Conn. The early years of his life were passed on a farm. In 1826, after having obtained a common-school education and some knowledge of Latin, Mr. Marvin began the study of law in the office of George W. Scott, in Newark, Wayne

County. Subsequently he studied in the office of Mark H. Sibley in Canandaigua, and in that of Isaac Seeley in Cherry Valley. He was admitted to practice in May, 1829, at New York City, and settled in Jamestown, where he resided for many years. In 1835 he was elected to the assembly, and in 1836 and 1838 was chosen to represent the thirty-first district in Congress, serving throughout the whole of Van Buren's administration. While in Washington he was admitted to practise in the Supreme Court of the United States, on motion of Daniel Webster. In 1846 Mr. Marvin was a member of the convention that prepared a new constitution for the State. Among those who served with him were Ira Harris, Charles O'Conor, and Samuel J. Tilden; and Mr. Marvin was almost the last, if not indeed absolutely the last, survivor of that famous body. In 1847 Mr. Marvin was elected a justice of the Supreme Court. In January, 1855, he was appointed to the Court of Appeals. In November of that same year he was re-elected to the Supreme Court, and in 1863 he was reappointed to the Court of Appeals. In 1863 he was elected for a third time to the Supreme Court, serving until 1873. Altogether he was on the bench something over twenty-four years.

WILLIAM C. RUGER, Chief-Judge of the New York Court of Appeals, died at his home in Syracuse, N. Y., on January 14. He was born in Oneida County, N. Y., in 1824. His father came to Syracuse about 1850, bringing his son William with him; and the father and son practised law together until the father's death. William then formed a partnership with Edward Jenney, being a member of the State Committee, and with W. J. Wallace, now Judge of the United States Circuit Court. The firm did a large business.

He was elected Chief-Judge of the New York Court of Appeals in 1882, and filled the position in a most able manner.

(An excellent portrait of Judge Ruger was published in the "Green Bag," August, 1890.)

HON. GEORGE VAIL HOWK, Judge of the Floyd Circuit Court, and ex-Judge of the Supreme Court of Indiana, died at his home in New Albany, Indiana, on January 13.

Judge Howk was of pioneer stock, his father, Isaac Howk, having been one of the early attorneys of Indiana when a Territory. He was born at Charlestown, Clark County, Sept. 21, 1824, and was therefore in his sixty-eighth year at the time of his death. He attended Ashbury University, now DePauw University, at Greencastle, and was graduated from that institution in 1846. He then studied law in the office of Judge Charles Dewey, one of the early Judges of the Supreme Court of Indiana, and was admitted to the bar at Charlestown, then the county seat of Clark County.

The public services of Judge Howk were many and varied, and in every position he so conducted himself as to merit and receive the approval of his fellow-citizens. For two years he was City Judge of New Albany; during fourteen continuous years he represented the people of his ward in the Common Council of that city; he was Judge of the Court of Common Pleas for two years; two terms were passed as State Senator from Floyd and Clark Counties, and one term as Representative from Floyd County. In 1876 he was elected Judge of the Supreme Court, and held that position for two consecutive terms, — twelve years in all. He was renominated in 1888, but was defeated in the general election, after which he returned to New Albany, and re-entered the practice of law. Last year he was appointed by Governor Hovey, an old classmate and friend, to the Judgeship of the Floyd Circuit Court, to fill the vacancy caused by the sudden death of George A. Bicknell.

THE people in the central-western part of Ohio were shocked at the sudden death, from apoplexy, of ex-Judge CHARLES M. HUGHES at his home in Lima, Ohio, on the 11th of January. He had been attending to the duties of his practice only the day before, full of vigor and apparent health. His demise removes from the Ohio Bar one of its ablest members, who had something more than a local habitation and a name. His life was a busy one. Born in the city where he died, he was admitted to the bar, served gallantly through the War of the Rebellion, was twice elected prosecuting attorney, and twice probate judge of his native county. In 1878 he was elected judge of the Common Pleas Court of the first subdivision of the third judicial district of Ohio, and served as such for two terms. He was a natural-born judge. Perhaps no one had fewer decisions overruled or modified. Well grounded in the principles of the

bia College. Baker, Voorhis, & Co., New York, 1891. 2 vols. Law sheep. $12.00.

This work of Professor Keener's is most admirably adapted for the purpose for which it is designed, being a combination of text-book and leading cases. To the student it will prove a veritable boon, as in a single work he has before him not only an able exposition of the principles of the law governing contracts, but also a full exemplification of the manner in which those principles have been applied. The great difficulty which besets the student of law is not the acquiring of the rules and principles upon which the law is grounded, but it is the being able to appreciate and understand the application to be made of them in any given case. If, when a principle is thoroughly mastered, the student can at once be shown just how that principle has been applied in a variety of cases, then the whole matter becomes firmly and deeply rooted in his mind, and he is prepared to meet similar questions when they may arise in practice. This, as we understand, is just what Professor Keener seeks to accomplish in this work. At the beginning, two chapters are devoted to the rules governing "The Formation of Contracts" and "The Matter of Contracts;" then follow a number of leading cases to which these rules have been applied. Then come more rules, followed by more cases, and so on. With such a work to aid him, any diligent student ought to become thoroughly imbued with both the principles and their application. We think the author made a mistake in not entitling these SELECTIONS as arranged for the "profession" as well as for law students, for certainly they will prove almost as useful to the experienced practitioner as to the beginner.

THE CODE OF CIVIL PROCEDURE IN NORTH CAROLINA, with Notes and Decisions to December, 1891, with the Rules of the Supreme and Superior Courts, and the adjudications thereon. By WALTER CLARK, LL.D. Edwards & Broughton, Raleigh, N. C., 1892.

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work is shown; examples of the work of Low, Vedder, and Cox in the group of papers on American illustrators; pictures by Eugène Morand, a French artist new to an American audience; and reproductions of sketches in chalk by Washington Allston. Of particular interest to lovers of art and literature are the articles on "Paris Theatres and Concerts," by William F. Apthorp; "Bayreuth Revisited," by H. E. Krehbiel; "American Illustration of To-day," by W. A. Coffin; and "Some Unpublished Correspondence of Washington Allston."

IN the January ARENA Hamlin Garland's much-talked-of novel of the modern West opens brilliantly. The publishers of the ARENA claim that this will be "the great American novel;" and certainly it bids fair to be by far the strongest work that has yet come from the pen of the brilliant "novelist of the West." This issue also contains strong papers, by Alfred Russel Wallace, on "Human Progress: Past and Future;" Prof. A. N. Jannaris, Ph. D., of the University of Greece, Athens, on "Mohammedan Marriage and Life;" Henry Wood, on "The Universality of Law;" Ex-Gov. Lionel A. Sheldon, on "Louisiana and the Levees;" D. G. Watts, on "Walt Whitman;" Charles Schroder, on "What is Buddhism?" and several other able papers.

THE January number of LIPPINCOTT'S MAGAZINE is marked by several new features: the first of sundry stories and sketches illustrating journalistic life and labors; the first of a series of articles on athletic subjects; an editorial department headed "As it Seems," containing brief essays and comments on various topics of the time, literary and other; and notices of several recent books, given in the form of dialogue. The complete novel, "The Passing of Major Kilgore," is by an experienced journalist, Mr. Young E. Allison, formerly of the Louisville "Courier-Journal."

THE January ATLANTIC presents the following attractive table of contents: "Don Orsino," I.–III., by F. Marion Crawford; "Boston," by Ralph Waldo Emerson; "James Russell Lowell," by Henry James; "Birds and 'Birds,'" by Edith M. Thomas; "John Stuart Mill and the London and Westminster Review," by C. Marion D. [Robertson] Towers; "Down by the Shore in December," by Thomas William Parsons; "The Creed of the Old South," by Basil L. Gildersleeve; "The Missing Interpreter," by Herbert D. Ward; "The Greatest Need of College Girls," by Annie Payson Call; "Why Socialism appeals to Artists," by Walter Crane.

THE personality of no man in America to-day possesses greater interest for English-speaking peoples all the world over than that of Phillips Brooks, the newly elected Bishop of Massachusetts. One of the most interesting articles in the New Year's magazines is that on "Phillips Brooks," by Julius H. Ward, in the NEW ENGLAND MAGAZINE for January. It gives an account of the great preacher's early manhood, his homes, his haunts, and his work. Among the other articles in this number are "The Master of Ravenshoe," by Arthur L. Salmon; "The City of St. Louis," by Prof. C. M. Woodward; and "Stories of Salem Witchcraft," by Winfield S. Nevins. There are several short stories of unusual interest.

THE COSMOPOLITAN begins the new year well, and its January number is filled with good things for its readers. "Old New York," by James Grant Wilson, illustrated with views of the city in the last century, will make young New Yorkers open their eyes as they contemplate the vast changes which have taken place in the last hundred years. "The Columbus Portraits," by William Eleroy Curtis, contains many rare old portraits, and much valuable information. Joseph W. Richards has an interesting paper on "Aluminum, — the Metal of the Future." "In Camp with Stanley," by A. I. M. Jephson; "A Daughter of the South," by Mrs. Burton Harrison; and "The Special Correspondents at Washington," by T. C. Crawford, are included in the other contents.

BOOK NOTICES.

SELECTIONS FROM LEAKE'S ELEMENTS OF THE LAW OF CONTRACTS AND FINCH'S CASES ON CONTRACTS, arranged as a Text-Book for Law Students. By WILLIAM A. KEENER, Professor of Law and Dean of the Faculty of Law in Colum-

bia College. Baker, Voorhis, & Co., New York, 1891. 2 vols. Law sheep. $12.00.

This work of Professor Keener's is most admirably adapted for the purpose for which it is designed, being a combination of text-book and leading cases. To the student it will prove a veritable boon, as in a single work he has before him not only an able exposition of the principles of the law governing contracts, but also a full exemplification of the manner in which those principles have been applied. The great difficulty which besets the student of law is not the acquiring of the rules and principles upon which the law is grounded, but it is the being able to appreciate and understand the application to be made of them in any given case. If, when a principle is thoroughly mastered, the student can at once be shown just how that principle has been applied in a variety of cases, then the whole matter becomes firmly and deeply rooted in his mind, and he is prepared to meet similar questions when they may arise in practice. This, as we understand, is just what Professor Keener seeks to accomplish in this work. At the beginning, two chapters are devoted to the rules governing "The Formation of Contracts" and "The Matter of Contracts;" then follow a number of leading cases to which these rules have been applied. Then come more rules, followed by more cases, and so on. With such a work to aid him, any diligent student ought to become thoroughly imbued with both the principles and their application. We think the author made a mistake in not entitling these SELECTIONS as arranged for the "profession" as well as for law students, for certainly they will prove almost as useful to the experienced practitioner as to the beginner.

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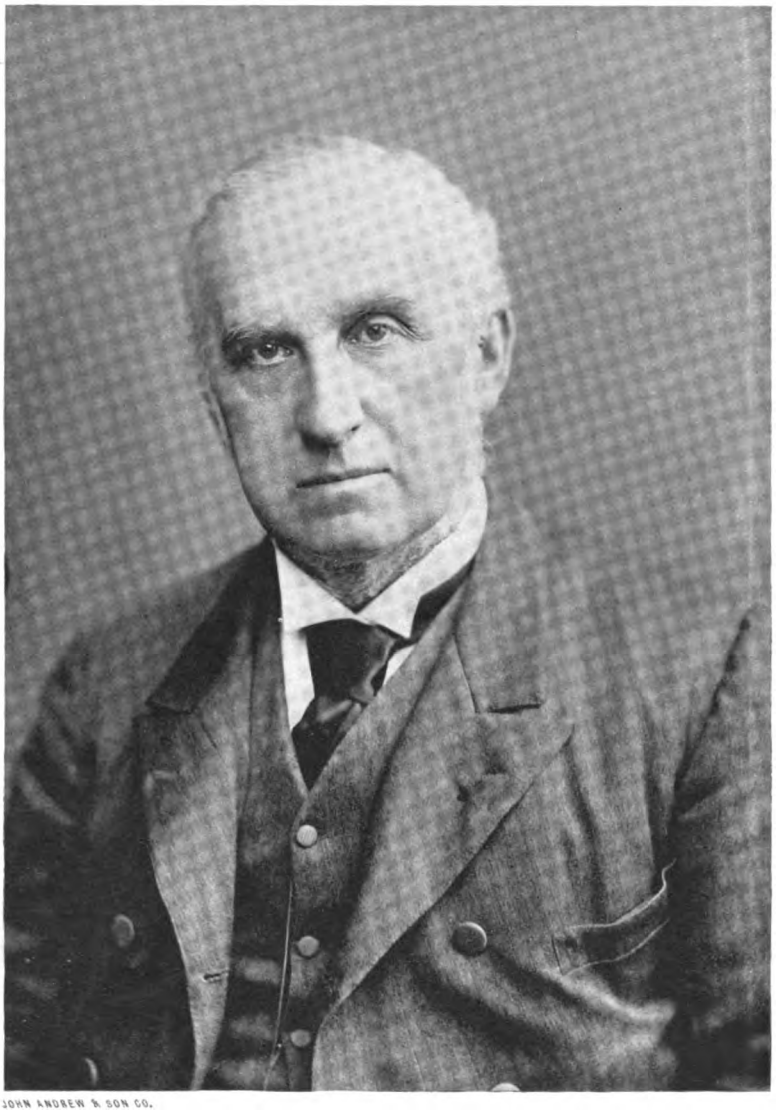

JOHN ANDREW & SON CO.

SIR CHARLES RUSSELL, Q.C.

The Green Bag.

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THE ENGLISH BENCH AND BAR OF TO-DAY.

IV.

SIR CHARLES RUSSELL, Q. C.

CHARLES ARTHUR RUSSELL is the eldest son of Arthur Russell, Esq., of Seafield House, County Down, Ireland, and was born in 1833. He was admitted to Lincoln's Inn in 1856, was called to the bar in 1859, became a Queen's Counsel in 1872, and has held the office of Attorney-General during each of Mr. Gladstone's last two administrations. From 1880 to 1885 he was M. P. for Dundalk; since 1886 he has sat in the House of Commons for the English constituency of South Hackney. Such are the leading dates in the ex-Attorney-General's career.

Tall, strongly built, white-whiskered, chubby-faced, lynx-eyed, Charles Russell (the Christian name of "Arthur" has no share in his glory) is known by sight to all habitués of the High Court of Justice. He seems indeed to be an almost integral part of the English judicial system; and one can hardly believe that the common law courts would still presume to go on existing if he and his snuff-box and his eye-glass and his red pocket-handkerchief were withdrawn from their midst. The official Law Reports and the newspapers have contained scarcely a cause of first-class importance during the last twenty years in which he was not briefed by one side or the other, sometimes, as in the Bend Or Case, by both. To give an exhaustive account of a life so fertile in great events would obviously be impossible within the narrow limits of such an article as the present; and we shall therefore content ourselves with a sketch, enlivened by illustrations and anecdotes, of the chief forensic qualities of our English Hortensius.

Let us find out, in the first place, what Sir Charles Russell is not. He is not, in the strict sense of the term, a specialist. There is no branch of law that he has made peculiarly his own. Sir Horace Davey would beat him with ease on a question of settlements. In a patent litigation he would be no match for Sir Richard Webster. In a heavy admiralty action, that we know of, he was badly defeated by Mr. (now Mr. Justice) Butt, over whose intellect, nevertheless, in the Colin-Campbell divorce suit, he subsequently exercised an influence that ill-natured persons might have been disposed to call "undue." We may take it, then, as indisputable that, except in "turf" cases, — which are rather technical than legal, — Sir Charles Russell has neither the specialist's narrowness nor his power. Again, this great advocate is not an orator, and is no master of style. His voice is husky, and his language is commonplace where it is not constrained. Sir Henry James "only needs a little rousing" to make him far surpass his old friend and rival, both in persuasiveness and in rhetoric. Finally, — and at this point dispraise must end, — Sir Charles Russell does not owe his unique reputation to unvarying success. He has had his own failures, and has made his own record of blunders and mistakes. Sir Edward Clarke has been, at least in recent years, a more successful verdict-getter.

Wherein, then, does Sir Charles Russell's great strength lie? First, in the variety of his powers. He is not a very great lawyer; but he possesses a wide general knowledge of law, coupled with ability to convert it into special knowledge at any point and at any moment. It may well be argued that this is a higher and more serviceable gift than any "specialism." Again, the ex-Attorney-General is neither a statesman nor even a first-class politician; but he is a reliable, fair-minded, and capable parliamentary debater. He is at the same time an effective speaker, although not an orator, an unequalled master of legal tactics, a cogent reasoner, a skilful jury lawyer, and the greatest living cross-examiner at the bar. Endowments so varied and so harmonious entitle Sir Charles Russell to a foremost place in the ranks of contemporary lawyers. But it is not only in the rare combination of his mental qualities that Sir Charles Russell's eminence consists. In his intellectual equipment there are two faculties (we have noticed them already), either of which would have sufficed to mark him out as the first advocate of the day. As a forensic tactician he has no living rival. In the Colin-Campbell divorce suit he was opposed to Mr. R. B. Finlay, Q. C., a Scotchman by birth, and able and stubborn, with all the ability and stubbornness of his race. Russell "engineered" the action with consummate skill, and literally swept his rival from the field. This is a kind of art that the *litera scripta* is powerless to portray. Its exercise must be witnessed or felt. In another litigation the counsel for the plaintiff, in moving for a new trial, complained that "the Attorney-General had carried the verdict with a rush." "If we were to yield to that contention," said the Lord Chief-Justice, "it would be necessary for us to grant a new trial whenever Sir Charles Russell was 'on the other side.'" As a cross-examiner, Russell is supremely great. His insight into men's motives and characters is all but superhuman. He never bullies, except in the rare cases when a witness (like the famous Le Caron) is beating him at his own weapons; and he never fails to make his "points" artistically, nay, even dramatically. "Write the word *hesitancy*," was his first question to the hapless Pigott. The idea of this memorable cross-examination, it may be observed in passing, seems to have been suggested to Sir Charles Russell by Sir Frederick Thesiger's method of dealing with the forger Provis in the Smyth Baronetcy Case; just as the striking introduction to his speech for Mr. Parnell — "Who are the accusers?" and "Who are the accused?" — appears to have been inspired by a masterpiece of Cardinal Newman's.[1]

Sir Charles Russell is not over-popular in chambers. Both to solicitors and to his juniors he is apt to be imperious; and he is said to engross the talking at a conference, as Lord Macaulay used to do at a dinner-table. On one occasion a consultation was in progress in Sir Charles's chambers; the late Attorney-General was monopolizing the attention of the solicitors, and the junior counsel, an Irishman by birth, vainly endeavored to make his voice and his opinions heard. At length the great advocate paused for a moment to take breath, and the pent-up fury of his colleague burst forth. "I would have you understand, Sir Charles Russell," he exclaimed, in a rich brogue, "that this is a consultation, and not a lecture." This story may not be true; but it is eminently characteristic, and therefore worthy of preservation.

Sir Charles Russell carries his imperiousness and impetuosity with him into court. In the case of Pearce *v.* Foster (17 Q. B. D. 536), — an action for wrongous dismissal, brought by a confidential clerk against his employers who had promptly dismissed him from their service for gambling on the Stock Exchange, — he treated Mr. Justice Grove with an impatience that amounted almost to

[1] Lectures on the Present Position of Catholics in England, p. 121. The Edgbarton Tradition.

rudeness. In the Colin-Campbell divorce suit, when the liability of certain written proofs to inspection during the cross-examination of a witness was in question, he would not rest satisfied with the ruling of Mr. Justice Butt, who presided at the trial, but persisted in pressing his own view. Possibly Sir Charles Russell would justify such conduct by a reference to Lord Brougham's questionable doctrine as to the duty of a counsel to his client. But a simpler explanation is at hand. A warm-hearted and impulsive Irishman cannot but display a certain degree of tenacity and heat. Students of the evidence taken by the Parnell Commissioners, and of the second Crawford *vs.* Crawford & Dilke trial will remember several amusing fracases between Sir Charles Russell and Sir James Hannen. In 1889 Russell accepted a brief for the defence of Mrs. Maybrick, who was tried at Liverpool, before Mr. Justice Fitz-James Stephen, for the murder of her husband by arsenical poisoning. His great effort on behalf of Mr. Parnell and his followers had told upon his strength, and it is said that he undertook the prisoner's case with reluctance. A somewhat unusual incident occurred in the course of the trial. Sir Charles Russell had directed his cross-examination so as to impugn the expert evidence brought by the Crown for the purpose of showing that Mr. Maybrick had been poisoned by arsenic. At the close of the case a written statement by the prisoner was read, in which she admitted having administered a white powder to her husband, but said that she had done so in ignorance of its character, and at the urgent request of the deceased. It was obvious that this curious statement bore out in some measure the very theory that Sir Charles Russell had labored to destroy; and the jury returned a verdict of "guilty." It speaks volumes for the skill with which the defence had been conducted, that the prisoner's suicidal admissions influenced the public mind less strongly than the conflict of expert testimony that Sir Charles Russell had succeeded in establishing. The Home Secretary, Mr. Henry Matthews, himself a great lawyer, revised the whole evidence in the case, and did practical, though not logical, justice to the prisoner by sentencing her to penal servitude for life. The Queen *vs.* Maybrick may profitably be compared with The Queen *vs.* Jessie MacLachlan, in which Mr. Rutherfurd Clark, an eminent Scotch counsel, now a judge in the Second Division of the Inner House of the Court of Session, had to deal, and dealt successfully, with a "statement" as embarrassing as Mrs. Maybrick's.

A Roman Catholic by religious persuasion, Sir Charles Russell is still debarred by law from the Chancellorship. But this disqualification may erelong be removed, — a bill with this object (popularly known as the "Russell Relief Bill"!) having been introduced into Parliament last session.

The ex-Attorney-General is a whist-player after the keen and precise methods of Mrs. Battle.

LEX.

LAWYERS AS BIOGRAPHERS.

By Theodore W. Dwight.

IT is a fact that has not often been recognized that lawyers are among the best biographers. There are good reasons for their success in this character. The qualities developed in professional practice manifestly lead in this direction. Their eagerness and energy in collecting evidence, their trained skill in sifting and weighing it, their habit in making statements to courts that are not exaggerated but will be sustained by the proof, their reticence as to themselves, their practice as to sinking their own personality in the interests of their clients, are in full demand in the character of biographer. These qualities are sometimes dimmed, if not effaced, in the matter of partisan biography; but where the biographer is of a judicial temper, or has no personal ends to subserve, they lead to signal success. Add to these the power to strip off from the subject all that is immaterial, and to bring forward only the salient points of life and character, and to present these clearly and effectively, and his work will be likely to be of the kind that the world does not willingly let die.

Illustrative instances crowd upon the memory. Two or three in English biography may be named: Boswell's "Life of Johnson," Roger North's lives of his distinguished brothers, and Lord Campllbe's "Lives of the Lord Chancellors and Chief-Justices."

In regard to Boswell, there may be some hesitation. He was certainly reared in a legal atmosphere. His father, Lord Auchinleck, was a stern but noted Scotch judge, who looked upon his much more noted son with great disfavor on account of his trivialities and frailties. The latter, however, was a barrister, "rode the circuits" when he could sit upon his horse, and learned by observation how causes should be tried if he did not try them himself. He thoroughly understood the capital art, in Samuel Johnson's case, of drawing out his client, and showing him at his best even at his own expense. What discredit he might personally obtain was as nothing in comparison with the opportunity given by him to Johnson to display his powers, and the excellences as well as the weaknesses of his character. He had Johnson, as it were, before a jury composed of the whole English people, and he allowed him to speak for himself, at most directing his thoughts or jogging his memory, or, where he was an unwilling witness, leading him forward by an appropriate cross-examination. His work, being founded on sound and philosophical principles, will last as long as the English language endures.

It is not possible to give such unqualified praise to Lord Campbell. He labored under the great disadvantage of being compelled to obtain almost all of his materials, not from the living subject, but from other writers. His information comes to him at second hand. It is necessarily colored by the passions and prejudices of those from whom he derived it. It is accordingly not so lifelike as the work of Boswell. One principal reason for the difference is that he could not cross-examine or seek for explanation. He could not discuss questions with the subject of his Memoirs. For this reason it was impossible for him to reach the vivacity, freshness, and infinite charm of Johnson's replies to Boswell's questions. Lord Campbell has accomplished much under adverse circumstances, his legal training having been of great service to him, both in collecting materials, arranging them skilfully, and omitting that which should be passed over or suppressed. Again, Campbell does not conceal himself so skilfully as Boswell. He is often seen, like a prompter, at the shifting of the curtains.

Boswell also has this supreme advantage in the race for immortality, — that he has the race-ground as a preserve, which no one else can traverse, while the field over which Campbell passed can be trodden by other and perhaps surer feet.

The third biographer already mentioned, Roger North, belongs to the class of Boswell rather than that of Campbell. His work all depends upon personal observation. Though he was an actor in the scenes which he describes, he had the power of self-effacement, in the presence of his subject. The fact that his labors are devoted to the lives of his brothers whom he dearly loved suffuses his biographies with a glow of affection that enlists sympathy, while the vigor and charm of his descriptions awaken an intense interest. Though he lived a long time ago, yet the period during which he was on the stage is deeply interesting and instructive, for he describes the lives and conduct of our English ancestors when the American colonists drew their life and perhaps education from England, and when their thoughts, aspirations, and weaknesses were thoroughly English.

It should be added that the legal training to which these writers (Boswell, North, and Campbell) were subjected, led them clearly to fix in their minds the true limits of a biography. They have kept steadily in view the fact that it was the record of a single life and no more, with its origin, ancestry, education, hopes, trials, vicissitudes, failures, triumphs, and close. A biography *may* be written so as not to be distinguishable from a history. We may call to mind in our own time the six bulky volumes of Professor Masson, of Edinburgh, on the life and times of John Milton. We ask, as we turn it over, Why call it a "life"? The history of England is before us, with John Milton sometimes present, and at other times hardly a passive spectator. Boswell and North, with others of their class, have not made this mistake, and we thank them for it.

It is the principal object of this paper to bring to notice the merits of Roger North as a writer, and to show the intrinsic value at the present time of his writings.

Lord Campbell, in his life of Lord Keeper Guilford, has made much use of Roger North's biography. As the purpose of this paper is, as has been said, to disclose his merit as a writer, and not at all to magnify or vilify Lord Guilford, and as its materials have been *wholly* derived from original sources, it will be of no consequence that some of the same incidents may be now referred to as attracted the attention of Lord Campbell.

The Norths were descended from an ancient family. The head of it in the time of Charles II. was Lord North, Baron of Kirtling in Cambridgeshire. The family consisted of six sons and four daughters "who lived to appear in the world, besides some who died in minority." The second, third, and fourth sons were highly distinguished men, the most prominent being Lord Guilford, Keeper of the Great Seal under Kings Charles II. and James II. We are told that in this "numerous and diffused flock there was not one scabby sheep."

Our biographer treats most fully of the life of his highly successful brother, Francis North, Lord Guilford. He calls him his "best" brother, not because he was the most virtuous, but because he was the most successful in life, and most able to help his friends, including Roger. It falls in his way, in tracing the career of Lord Guilford, among other things to give his views of the legal education of the day, and to show forth the "art of rising" in his profession.

The real inquiry then was, How shall a young man without estates and of a sprightly and merry disposition, fond of society, with "an airy and volatile mind," go forward in the law, for which he had no love? Roger had heard Francis (Lord Guilford) say more than once in his early manhood that if he had been sure of a hundred pounds a year to live on, he had never been a lawyer. But as circumstances were, he was convinced that

without acquiring a capacity of making a solitary life agreeable, no man could pretend to success in the law, applying to himself the lesson that the London citizens used to their apprentices, "Keep your shop, and your shop will keep you." He would neither attend dancing nor fencing schools, notwithstanding "the pretended advantages that the *female faction* propose from those assemblies."

Francis used to attend "the commons constantly in the hall (at the Temple) at noons and nights, and fell into the way of putting cases (as they call it) which much improved him. He used to say that no man could be a good lawyer that was not a put-case."[1]

In reading the law reports much abstinence was practised. There were about fifty volumes of reports at that time, but they are declared to be "almost innumerable." But it is truly said by Roger that "to spend weeks and months wholly in reading them is like horses in a string before a loaded wagon." It was well, as he urges, to "mix some *institutionary reading* with them, as after a fulness of the reports in the morning about noon to take a repast in Stamford, Crompton, or the Lord Coke's Pleas of the Crown, and also to look over some of the antiquarian books, as Britton, Bracton, Fleta," etc. There was no Blackstone then to give the student a systematic outline of his work.

More stress was then laid upon "discourse" than anything else. Francis North would talk over the law with his friends at commons or over a chop, quoting from the Earl of Nottingham that one "should study all the morning and talk all the afternoon, because a ready speech (if it be not Nature's gift) is acquirable only by practice, and is very necessary for a bar practicer." It is said in this connection, that after the fire[1] of the Inner Temple which destroyed the old cloisters, it was considered, by the authorities in charge, whether they should be rebuilt or not; and their reconstruction was urged by Mr. Attorney Finch, on the ground that the students should have a place to walk in in the evenings and put cases, and it was so ordered. The utterance of old Sergeant Maynard, the best book lawyer of his time, is quoted, that the law is "ars bablativa." So searching was this jurist in his studies, that when he travelled in his later years he took with him one of the old year books to divert him on his journey, and said he chose it before any comedy. At this point, our author most truly remarks, "*a true notion of the use of anything*, however out of the road of common approbation, will administer such a superlative taste" as this.

The next stage in education was to attend the courts, not merely in such causes as one might chance to have, but for the purpose of training. While Francis North intended in the end to join the King's Bench bar, he attended, for the purpose of learning pleadings, etc., in the Common Pleas, since the time of that court was not then taken up with factious contentions as at the King's Bench, "where more news than law is stirring."

The final step in education was an attendance upon the "moots" in the Middle Temple, which were then carefully performed, but in our author's time had fallen into disuse. Upon this decay he remarks: "It is hard to give a good reason (bad ones are prompt enough) why they are not well attended now."

So eager was North in the pursuit of his profession that he sought to manage cases

[1] The practice of one lawyer putting supposed cases to another for solution goes far back in the law. It appears to have often taken place in walking. So bad a man as Scroggs was noted as a put-case. North says that he had seen him for hours together before the courts sat, stand at the bar with an audience of students over against him, putting of cases and debating so as suited their capacities and encouraged their industry.

[1] It is said that some of the gentlemen of the Inner Temple would not endeavor, at the fire, to preserve the goods that were in the lodgings of absent persons, because, as they said, it was against the law to break up any man's chamber (Clarendon's Life, p. 347). This is a signal instance of the enormous tenacity of red tape in the practice of the common law.

while yet a student, and unable to practise above-board. He was contented to "underpull," taking various suits for country friends and relations. In bringing, on one occasion, chancery business to a solicitor, he was offered a commission usual then (perhaps now) "for encouragement to them that brought business." To his credit, he declined the offer.

About this time in the experience of the young lawyer, the author turns on a side light, showing the roughness and coarseness of the old Lord North, his grandfather, and it may be of that of the aristocracy of the period. He was very tyrannical and vindictive, "having taken a resolution never to be in the wrong." He cared not whom he persecuted, nor how unjustly nor unreasonably, if it tended, as he thought, to justify anything he had done. The more mistaken he was, the more violent was he in his proceedings, as if by that means he was to set himself right. His son, Sir Dudley North, father of Roger, was an eldest son of a peer, at the age of sixty-three, but would never put on his hat or sit down before his father unless he enjoined it. This old lord happened to have an unfaithful servant, and was yet so blind to his vices that he had determined to promote him. Francis, at the suggestion of his father, gently remonstrated with the old man. At this the old lord became thoroughly vexed, and lapping his cloak about him as he used when angry, went to his cabinet, and took out a codicil he had made to his will, and carried it to his son Dudley, saying: "Look here, son, I had given Frank twenty pounds a year; but he has offended me, and here is his reward;" and so threw the codicil into the fire. But we are told that the old lord still made use of Frank for his diversion, and "teeth outward" was kind to him; but he did not forget, after the young lawyer had gone up to London, to have a letter written to him, at the bottom of which were words in Latin to the effect that "he should not offer his advice before he was asked." Roger adds the reason of this reminder was "that the bitterness of his (Frank's) repentance might not wear off;" for the twenty pounds' annuity was gone forever. Such was parental or grand-parental training in high quarters in England in the seventeenth century.

It being now time for the young lawyer to come fully upon the stage of action, there is a sparkling and loving description by Roger of his figure, bearing, rules as to dress, manners, habits, and whatever else may serve to characterize the man and give him to the reader sharpness of individuality. In this vivid description there are some interesting touches. It is stated that cadets of noble family were then accustomed to go into the country sporting on horseback, and that twice a week there was killing of deer. The method then was for the keeper with a large cross-bow to wound the deer, and two or three disciplined pack-hounds pursued till he dropped. The "cadet," it is to be presumed, got the credit of a successful hunt. Another fact of interest is that it was then in good form for a young gentleman in search of information or diversion to visit shows, lectures, "and even so *low* as to hear Hugh Peters preach." Hugh Peters was a striking figure of the day in New England as well, with little regard for ecclesiastical conventionalities. When he made his close of his sermon, he told his congregation that "a gifted brother had a desire to hold forth; and then up rose Sir Peter Pet; and he, though a mere layman, prayed and preached his turn out." Sir Peter lived to be an old man in town, — few thought that he had been once a preacher. He and Lord Anglesey at the Revolution published books, wherein one of the chief performances lay in the commending of each other. It would seem that "mutual admiration" societies are more ancient than has been commonly supposed.

The first thing done when Francis was called to the bar was to obtain a "*practising* chamber." A chamber, to be of this class, must not be above two pair of stairs high. The ground floor was not so well esteemed as one pair of stairs, but better than two; and

the price corresponded with the estimate. Scraping together about three hundred pounds sterling, Francis "bought his life" in a corner chamber, one pair of stairs up. It was a dismal hole and dark, where his near relations first sought him out. He was once asked if he took fees from these. "Yes," he said; "they come to do me a kindness, and what kindness have I if I refuse their money?"

Our good friend Roger, as he goes along, lets in much light upon the ways of the prominent members of the bar, among other things showing the finesse to which they resorted in humoring the judges. He is not slow to assert that a judge for the most part thinks that person the best lawyer that respects most his opinion. The bar acted upon that theory. Francis North frequently gave up a point that went against the grain of a judge, hoping that on some later occasion of more importance he would gain credit to mislead him. The same thing is reported of old Sergeant Maynard, then of singular repute for honesty and integrity. Such artifices as these would be scarcely creditable in our time. This and other like facts lead us to rejoice in the belief that there is going on in social affairs an ethical evolution.

The ways of Francis North outwardly prospered. From a humble beginner he soon became "cock of the circuit," and every one that had a trial rejoiced to have him on his side.

At an early stage of his career he met with a serious mishap which nearly cost him his life. Though a sober man, he had become on one occasion very drunk. This happened through the agency of an entertainer, — a judge, it is true, but of that silly class who think it the very mystery of hospitality to lay their guests under the table. Poor North in his intoxicated condition was sent home upon a very sprightly nag, which in the end left his rider in a frog-pond, who but for a timely rescue would have lost his life. Roger North, with his usual good judgment, yet in advance of his age, records the following sensible comment: "As for such entertainments as these, it is a great pity that the tokens of *barbarity* should yet remain; and much more that the consequences, often fatal, should be as braves [boasts] of conquests, with a people who would take it ill not to be accounted civilized, wise, and learned." For the utterance of such a sentiment, Roger North was no doubt deemed visionary and a "crank" in his day; but now, two hundred and more years later, it finds a most hearty and responsive echo in the breast of every truly civilized man.

As a rule, however, Francis North was free from every vice that interfered with a rapid rise in the profession. He was a devoted student. For example, he made it a rule to read Littleton (that is, the pure Littleton, without Coke's comment) through every Christmas during the whole time of his practice. He treated this work as a legal classic, and as the foundation of conveyancing, and judged it necessary that it should be remembered with exactness.

There were reasons for his professional advancement beyond his legal merits. Though educated as a Puritan and Presbyterian, he became a thorough-paced courtier, with no excessive scruples. It was to be expected that he would advance rapidly to the position of King's Counsel; and then to that of Solicitor-General, and in the end to higher honors.

At the turning-point in his career he thinks it well to be married. Marriage is not treated either by him or his biographer as a matter of affection, but rather as a means of gaining social status and personal advantage. In the final analysis, it is a question of rent-roll. That mercenary arrangement in England known as a "marriage settlement" comes into operation. It is treated as a matter of hard cash on the part of the lady or her friends, balanced on his side against brilliant prospects. Roger North at the bottom of his heart is dissatisfied with such views. In apologetic words he dis-

closes his "best" brother's weaknesses in this direction. He argues that a life as sketched by a biographer should be a picture, which cannot be good if the peculiar features are left out. Scars and blemishes as well as beauties ought to be expressed. Otherwise it is but an outline filled up with lilies and roses, so that in describing various essays at marriage he intends to be "more solicitous and declaratory than elsewhere."

He had good reason to be apologetic for the sketch. What he gives of his brother's course of conduct must have been truly humiliating. The only valid excuse, poor as it is, is that it was not peculiar to Francis North. The biographer gives but a picture of the then current methods of English society. Husbands buy their wives, and fathers and mothers sell their daughters. North's conduct is disclosed with such undisguised frankness as to make the purchase and sale uncommonly conspicuous.

There were at least four projects in succession of marriage. These are so curiously illustrative of the manners of the time that we pause to refer to them.

It was a matter that sat very hard upon our lawyer's spirits, as to the way in which he should give a fair answer to the preliminary question that was sure to be asked, "What jointure and settlement?" He used to own that he had but one rood of ground in the world that yielded him any profit, which was Westminster Hall, — truly a meagre showing, unless he might have added, as Finch did, his bar gown, valued at £20,000.

His first encounter was with "an old usurer of Gray's Inn," presumably a brother lawyer of the note-shaving and money-getting sort, to whom he made a visit, and who nonplussed him by inquiring what estate his father intended to settle upon him for maintenance of wife and children. To this the cunning Francis replied, that when he was pleased to declare what portion he intended to give his daughter he would write to his father and report his answer; and so they parted. The biographer frankly shows the mercenary character of the proposals by the candid remark that if his brother had had "real estate to settle, he should not have stooped so low as to match with the daughter; and "*thenceforward* he despised the alliance."

He next essayed the "flourishing widow" of an intimate friend, who was very rich. Never was lady more besieged with wooers. No less than five younger brothers sat down before her at one time; "and she held them in hand, as they say, until she cut the thread, and after a clancular proceeding and match with a jolly knight of good repute, she dropped them all at once, and so did herself and them justice." This matter evidently worried our lawyer, for "he was held at the long saw above a month doing his duty as well as he might, and that was but clumsily, for he neither dressed nor danced, when his rivals were adroit at both, and the lady used to shuffle her favors amongst them affectedly, and on purpose to mortify his lordship,[1] and at the same time be as civil to him with like purpose to mortify them. All this was very grievous to him, that had *his thoughts upon his clients' concerns*, which came in thick upon him, to be held in a course of bopeep play with a crafty widow;" and he was never more rejoiced than when told that Madam was married. Being sick now, not of love but of mortification, he turned his mind from undertaking any more such projects, and so he went on his way. This is an emphatic warning to a young lawyer who would wed, not to have his thoughts exclusively upon his clients' concerns.

But what he was pleased to call his affections were to be tried at least once more. This time the proposition comes from the lady's father, Lord Mayor of London, *through a city broker*. The good mayor had many daughters to settle in life, and those "reputed beauties" too. The fortune was to be £6,000. The lawyer dined with the alderman, and liked the lady, "who (as the way is)

[1] Francis was not at *that* time "his lordship," though he afterwards became so.

was dressed out for a muster." On coming to definite proposals, the portion shrunk to £5,000. Upon that the negotiations ended. Our lawyer had not gone far, before Mr. Broker (following) came to him and said Sir John (Lord Mayor) would give £500 more at the birth of the first child. But that would not do. Not long after this despatch his lordship was made the King's Solicitor-General, and then the broker came again with news that Sir John would give £10,000; but no, after such usage the suitor would not proceed, if he might have £20,000.

Such was the effect of making matrimony a pure matter of business. Roger North, who manifestly represents the color of his time, has no thought of wounded affections. At most there is no more than wounded pride and stinging mortification at a defeat in a game pursued, like other games, for the pecuniary stakes at issue. Still, his taste and tact were such that he would like to have even a bargain made in good form, with polished accessories. In these respects his brother Francis was painfully deficient.

At last chance produced a glorious proposition which succeeded, being pregnant with all advantages of honor, person, and fortune. Such is the statement of the biographer.

Francis North, having now settled down in life, passed through the various grades of Solicitor-General, Attorney-General, Chief-Justice of the Court of Common Pleas, and Lord Keeper. It is only proposed now to follow him further in his character of judge, as he goes to hold court in the country circuit. He chose the western circuit, and Roger went with him. He chose that circuit because the territory abounded with royalists. The notes made by our author on these journeys, concerning the country and the habits of the people, with his reflections, are truly ingenious and philosophical, and deserve mention.

His remarks upon the county of Cornwall are highly interesting. He says that there was no opportunity of penetrating into Cornwall, because the judges took the first town (Launceston) upon the borders capable of receiving them. Perhaps this was from a regard to safety, for he further informs us that "the Cornish men are very fierce and contentious, and *strangely given to indict one another.* The traverses of these indictments tried at the assizes "make good fodder" for the lawyers, for they are always many, and beyond what are had in most of the circuits, besides being "*well-metalled* causes." Certainly no lawyer can be blamed for liking a "well-metalled" cause, when the metal is of the right kind. This spirit of litigation is said to prevent bloodshed, which would follow if revenge did not have that vent. In other words, a lawsuit in its essence is but a battle with the weapons changed.

The author was much attracted by the condition of things at Bristol, "their trade being chiefly with Nevis or Virginia; and rather than fail, they trade in men, as when they sent small rogues taught to pray for transportation, and who actually received it *before any indictment* found against them, for which my Lord Jeffries *scoured* them." So there was a little tenderness and sense of justice even in the heart of Jeffries. At Bristol christenings and burials were beyond imagination. "A man who dies worth £300 will order £200 of it to be laid out in his funeral procession."

Though the Lord Chief-Justice Guilford was not easily terrified, he dreaded the trial of an alleged witch, and liked to have some other judge sit in the criminal court when such a trial came on. One reason of his dislike, not often referred to in these cases, was that there was a popular rage "at the heels of her" demanding her death. The judges had not sufficient firmness to resist this outcry, though they knew better. This seems to have been the difficulty with a number of the judges. They were not so wickedly vicious as they were timid and weak.

On finishing an account of Bristol, there is a fine description of the establishment of the Duke of Beaufort at Badminton, where

Roger stayed a week, and observed "the Duke's princely style of living," — above any other, except crowned heads. The Duke had about two hundred persons in his family, all provided for; and in his chief house, nine original tables, covered every day. He himself sat where the whole lay in his view, and had power *to do what was proper for keeping order among them*, and it was his charge to see it done. The women had their dining-room, and were distributed in like manner. As to the Duchess, every day in her life in the morning she took her tour, and visited every office about the house, and so was her own superintendent. At half-past eleven the bell rang for prayers. And so at six in the evening, while the Duke and Duchess were so placed *that they could see if all the family were there.* If any one chose a glass of wine, he could either go down into the vaults, which were very large and sumptuous, or at a sign given, servants attended with salvers, etc., *but no sitting at a table with tobacco and healths.* "A princely style of living," indeed, both in its bounty and its rigor. During the week of his stay the entertainment exhibited incomparable variety. The whole picture is a highly pleasing one of luxury in living joined with the closest attention to domestic business affairs, though the Duke was Lord Lieutenant of four or five counties and Lord President of Wales. The life of a great nobleman was then no sinecure. The days of gilded youth and pampered age had not yet arrived.

As the travellers went along, their curiosity was insatiable. They visited cathedrals, country-seats, and collieries with a deep and intelligent interest, while Roger in his usual way described them in well-chosen and pellucid words. At Newcastle they saw the first railways in existence, laid from the collieries to the river Tyne. The owner of the colliery would purchase a "way leave" over the land between the coal-pit and the river, and would be required to pay twenty pounds per annum for the mere right of way over a rood of ground. The practice then was "to lay rails of timber from the colliery down to the river, exactly straight and parallel; and bulky carts are made with four rowlets [wheels] fitting these rails, whereby the carriage is so easy that one horse will draw down four or five chaldron of coals." Here is the germ of the iron or steel railway, the general device being the same, with a change of material.

But the border country between England and Scotland beyond all else was of absorbing interest. The principal avocation there before the union of the two countries had been the stealing of cattle. The thief had only to cross the border and he was safe. Extradition was unknown. After the union, the old habit continued. To check it, the Crown created a mixed commission of oyer and terminer called the Border Commission, half English and half Scotch, which made short work of the thieves, hanging eighteen at a single session of the court. When the Norths were there, violent suspicion was practically sufficient for conviction. When the Chief-Justice hesitated in one case to convict for want of evidence, a Scotchman who was a Border Commissioner leaned forward and said to him in his broad Scotch: "My laird, send him to Huzz [us], and yees ne'er see him mair."

From Newcastle the judges' route lay to Carlisle. The Northumberland sheriff gave them at one and the same time a dagger, a knife and fork, and a penknife, having one eye for a fight and the other for dinner. But we in our time have clearly advanced beyond the Northumbrians; for while their sheriff left the travellers to their own defence, our marshal stands behind the judge at dinner, and at the moment of supreme danger himself takes a hand in it, while the nation looks on and applauds. The brothers passed through several manors. The tenants were bound to guard the judges through their respective manorial precincts. "Out of their precinct they would not go, no, not an inch, to save the souls of them. They were a comical sort of people, riding upon

negs, as they call their small horses, with long beards, cloaks, and long broad-swords with basket hilts hanging in broad belts [so] that their legs and swords almost touched the ground, and every one in his turn, with his short cloak and other equipage, came up cheek by jowl, and talked with my lord judge."

Was not this marked boldness and independence of spirit, rustic though it was, largely attributable to the manorial customs and the course of procedure in the manorial courts, where the tenant could face his lord, and insist on his customary rights? In the light of such facts we can readily see why our Massachusetts ancestors, in obtaining their patent from the crown, desired to hold according *to the customs of the manor* of East Greenwich, in Kent.

When the travellers reached Carlisle, they found good ale and small beer supplied from the houses of the prebends of the church, and they boasted of brewing it at home.

The northern districts did not then abound in wealth, for it was observed that nearly all over the North "the common people walked barefoot, and the children leaped as if they had hoofs, and those shod with iron." It seems incredible that the England of to-day could a little more than two hundred years ago be the England described by Roger North.

Notwithstanding the author in general speaks slightingly of the "female faction," he cannot avoid a passing and glowing tribute to "an incomparable lady," the Countess of Pembroke, then deceased. She had had with other noble qualities surpassing generosity, so that no person ever made her a visit that went away without a present, ingeniously contrived according to the quality of the person. Roger, in recounting this fact, adds with a sigh, "and we were sorry that we could not be witnesses of that piece of grandeur." So say we all.

At Lancaster they first saw "candle" coal, burning till it was all consumed without leaving any cinder. "It was lighted by a candle like amber, and the grate stands not against the back of a large chimney as common coal-grates, but in the middle, where ballads are pasted round, and the folk sit about it working or merry-making." But the greatest wonder they saw was the "burning well." Petroleum had, no doubt, come to the light of day. Roger's description of it will bear quoting: "The manner of it is this: *First* in some place where they know the sulphurous vapor perspires (often in a ditch) they dig up a turf and clap it down in its place again; and then they are ready for projection. When the show company are come, a man takes up the turf, and after a little puffing of a brown paper match, gives fire, and instantly the hole is filled with a blue spirituous flame like brandy. It seemed to waste, and I believe it would not have burnt in that manner long; but while it was burning they put water in the hole, and the flame continued upon the water as if it had been spirits. And some people said they used to boil eggs there." It occurred to no one that the burning substance was in the nature of oil; but it was assumed to be a vapor which permeated the water as water through sands. This early discovery of the inflammable qualities of petroleum seems to have attracted no practical attention at the time, as it was merely regarded as a curiosity, being wrongly interpreted. A hundred years later petroleum was observed at Lancaster again.

The record of the journey of the brothers closes at Lichfield, where they listened to a noble church service performed at the cathedral, "with more harmony and less huddle" than in any other church in England. The cathedral church, after being ruined in the Civil War, had then been fully restored by the zeal and diligence of Bishop Hacket, by "barefaced begging." No gentleman lodged or scarce baited in the city to whom he did not pay his respects by way of visit, which ended in plausible entreaties for some assistance towards completely rescuing his distressed church from its calamities. His success was signal.

At this point in the very midst of the biography let us also pause for lack of space, with the assurance that a reader of it to its end will find ample reward in its skilful characterization of the men of a day not so very far removed from our own, in sparkling anecdote, in wise suggestion, all clothed in racy and idiomatic words, and though at times biassed by friendship or animosity, always open and sincere. The spectacle of four brothers, all making a figure in the world, and all bound together not merely by kinship but by the ties of a strong, manly, and enduring friendship, is of itself animating and instructive to an intelligent and appreciative reader. Moreover, one of them being a judge of the highest court in England (Lord Keeper), another at the bar, the third a great merchant and man of affairs, and the fourth an eminent divine, master of Trinity College, Cambridge, and for some time Clerk of the Closet to his Majesty, the group must have wielded a marked influence in the commonwealth. Had they been thoroughly bad men, inspired by malevolent designs, they might have menaced social order. Fortunately they were not, if we may believe the biographer. He has supplied to posterity the materials for a sound judgment as to their frailties and virtues, and so we may leave them. Even though the period which Roger North records should lose its interest, though this is quite unlikely, the biography with all its faults will endure, as it is not a eulogy, but a picture of the men of a stirring time, and is thoroughly human and true to nature after the manner of a photograph, but possessing what a photograph lacks, the charm of natural and well-harmonized colors.

North's own words upon this point will make a fitting close to this article: "I fancy myself a picture-drawer, and aiming to give the same image to a spectator as I have of the thing itself which I desire should here be represented. As, for instance, a tree, in the picture whereof the leaves and minor branches are very small and confused, and give the artist more pain to describe than the solid trunk and greater branches; but if these small things were left out, it would make but a sorry picture of a tree. History is, as it were, the portrait or lineament, and not a bare index or catalogue of things done; and without the how and the why all history is jejune and unprofitable."

A LEGAL BEGGAR.

By George F. Tucker.

HE 's not a slave to common vice,
For none can say he owes a cent;
His tailor never asks him twice;
He always promptly pays his rent.
But when he opes his neighbor's door,
He shows his moral nature's flaw
By pacing up and down the floor,
And boldly begging points of law.

THE JURY SYSTEM AND ITS CRITICS.

By Albert C. Applegarth, Ph. D.

If ever the history of the concluding years of the nineteenth century be impartially written, one of the chief functions of such an investigation will doubtless be to record the iconoclastic spirit unfortunately so prevalent in our day and generation. No department of human knowledge enjoys immunity from the devastating attacks of the agnostic. Unholy hands are unhesitatingly laid upon subjects the most sacred as well as the most venerated. A so-called Higher Criticism, the legitimate progeny of the pantheistic German faith and an arrant scepticism, claims to be reconstructing the Holy Evangel. In reality, however, these efforts look rather towards the complete demolition of the Inspired Word.

Traditions in which our forefathers were reared, and in the happy possession of which they peacefully expired, are remorselessly surrendered to the Philistines. We have lived long enough to be informed that William Tell is simply a fabrication of some frenetical imagination; and the day has at last arrived when the existence of Joan d'Arc is considered chimerical, — nothing more than a mere phantasmagory. From the profundity of theology, from the delights of history, this restless spirit, this mania for reformation, — nay, rather for obliteration, — has transmigrated into the serene regions of the law.

In many quarters the boisterous winds of opposition are already attempting in their wild career to annihilate institutions so dear to the hearts of those who have preceded us in the journey of life; and perhaps it may not be error to affirm that of those thus assailed, trial by jury enjoys the distinction of being pre-eminent.

The origin of this system of adjusting disputes carries the investigator far back into the annals of time, and eventually envelops him in the twilight of fable. Almost as far back as the history of the Germanic races extends, we discover this provision for impartiality existing in a more or less developed condition. Just why twelve members should have been selected as the number for a petit jury is difficult to conjecture, — certainly a theme upon which speculation has little or no utility. Ancient writers on jurisprudence affirm, however, that the number of its components was taken from the fact that there were twelve apostles, or because the tribes of Israel were of equal numerosity. At present such teleology assumes the semblance of a mere jest; but in the days of crusaders and martyrs this derivation may have possessed more potency. At any rate, this method of essaying to determine the equity of contests held high place in the affections of our ancestors, and it has now become so deeply rooted in the foundation of all English social systems that much that is glorious and venerable clusters around it. Indeed it may be alleged, without appreciable error, that any attempt aimed at its destruction would be almost tantamount to an effort to reorganize our civilization.

Originally, the jurors seem to have been selected from the friends of the respective litigants, and they have invariably been chosen from the locality where the individuals reside. Owing to this circumstance, it is to be noticed, in passing, that as a rule the jury is a representative body. It is composed of no one class; and on account of this composite character, it has the confidence of the contestants to an extent it never could have were the members drawn exclusively from philosophers, scientists, or any other single avocation. They are, moreover, selected by lot. No one can buy a position on the jury. Nor by any system

of divination can a particular panel ascertain in advance what cases may be assigned to them for determination. This avoids the suspicion of partiality or contrivance. It does more; it also excludes the idea of fealty or accountability to a principal or a superior.

Another matter which is very much in favor of a jury is that it is not an official body. As we have just observed, the jurors are not selected on political issues. They cannot aspire, therefore, to re-election; and this fact confers on them a degree of fearlessness which would otherwise be extremely difficult of acquisition. In the opinion of the writer, however, there never has been or can be such a thing as absolute justice.

If Astrea ever had her habitation among humanity, she has centuries ago removed to some unexplored planet. Even if she were to return, the assertion is hazarded that she would not be understood or appreciated. Strange as it may appear, men as a class do not care for strict abstract justice. What the major portion of the race much more desires is to receive what, in their judgment, passes for justice. And to attain this desideratum, owing to the peculiarities of the jury system previously mentioned, this device seems to be admirably adopted.

Of course, however, no one human invention embodies in itself every commendable feature. All systems have their disadvantages, together with their advantages. The jury enjoys no exemption. Although strenuous precautions are taken to insure impartiality, it is more than probable that some of the number will be biassed in the verdict given. Ofttimes mere prejudice or passion is allowed to dominate their action. For instance, all lawyers know that where the adversary is a woman, the large percentage of chances for success are on her side, irrespective of the merits of the controversy. This doubtless comes from the natural chivalry implanted in the breast of every right-thinking man. At such times we involuntarily recall our sainted mothers, our loving sisters, our devoted wives; and the conclusion is instantly reached that such women could do no wrong.

From this position to the necessary "therefore" is an easy logical step; hence the verdict. It remains to be remarked also that in this instance intuition frequently proves to be a safe guide; for often indeed it is man's inhumanity to woman that makes the countless millions mourn. So deep in truth is this instinct of gallantry towards femininity implanted in the masculine heart that its eradication appears almost, if not altogether, hopeless. If ever the day should dawn when women compose juries and wear the ermine, then the legally inclined of our descendants will be emancipated from the difficulties which for the present must continue to perplex the ordinary attorney even to the verge of distraction.

But opponents moreover allege that petit juries are irreconcilably opposed to corporations. As a matter of experience, it must be acknowledged that this accusation is generally sustainable. In the great majority of cases, however, this *animus* is primarily due to the oppression that too frequently characterizes many of these artificial entities. The author has been in some localities — in places where corporations were operated in a manner at which some utilitarian persons go out of their way to sneer — where it would be rather difficult to secure a verdict adverse to the company in question. And, as a matter that defies successful controversion, it may be averred that companies which remember that their employees are human have nothing to apprehend from this reputed hostility. On the whole, then, it appears that whatever animosity exists towards these monstrous aggregations of capital is not without its redeeming features This antipathy simply tends to realize what would otherwise be unattainable, — equal protection and rights before the law for Lazarus as well as for Dives.

Admirably equipped as the jury is for the adjudication of many of the contests arising

between man and man, there are some questions which appear to lie beyond its province. Such, for example, are the intricate and voluminous business cases that are occasionally docketed in court. These matters require the careful, deliberate, and mature consideration that only an intelligent mind, prepared by previous training to understand the intricacies of the evidence adduced, can bring to bear upon them. It would seem only the dictate of reason, therefore, to contend that such affairs should be tried before the court, or before a Board of Referees especially selected and qualified for this purpose.

It is frequently declared, in a spirit of ridicule, that petit juries "move in a mysterious way their wonders to perform." But if a reflecting mind will pause even for a moment, the *raison d'être* for these alleged anomalies is not far to seek.

In the judgment of the writer, it is to be discovered principally in the provision which requires a unanimity of opinion. In capital cases such policy is doubtless a wise regulation; but in civil actions this very stipulation often causes an absolute reversal, or a mere travesty of justice. If a rich defendant can secure one member of a jury, it will be impossible for the plaintiff to obtain that redress to which the equity of his suit entitles him. Or, if a juror — only one — be prejudiced against a cause, he can successfully resist all efforts at terminating the matter. The remedy for this evil — and few are sufficiently contumacious to deny that it is a most glaring defect — lies in so amending our present practice as to allow a case to be decided by a majority of "the gentlemen who sit in the box." But just what this number should be is a matter of detail that calls for the most elaborate consideration. It would appear, however, that the adoption of a three-fourths vote would be free from any serious objection. It may be a comparatively easy matter to influence one man; but the chances of success in this direction would be immensely diminished when you were compelled to arrange with three or four. With the inauguration of the proposed reform would doubtless vanish that disgraceful spectacle which at present so frequently disgusts the populace and the legal profession, — I mean where substantial rights are defeated because one obstinate individual refuses to modify an ill-formed, or worse, a possibly purchased opinion. The introduction of this innovation — to wit, a majority verdict — seems, moreover, to be the only path out of the labyrinth. Experiments in other directions have resulted in no tangible benefit. The ancient methods of incarceration and inanition, in particular, have failed most lamentably as well as signally.

It would also have a material tendency to increase the respectability of juries, if the best as well as the average men were compelled to serve. At present, excuses instead of reasons are received for non-attendance. For such purposes the representative persons, those occupying the highest stations in any community, ought to be selected. Business ought not to be regarded as sufficient ground for exemption. Under these circumstances such compulsory absence from the office or the marts of commerce would then be classified with sickness, or travel to recuperate health. In short, it would become a matter of necessity, to which submission would be made. Only, then, in cases of personal indisposition, or for some equally valid reason, should a person be permitted to escape this duty. And the great advantage about this method of procedure would be that with its enforcement the burden would be so diffused as to be scarcely perceptible to any individual.

When we are compelled to request a hearing in court, we all desire to have our causes fairly adjudicated. Let us then not endeavor to evade our responsibility to our fellow-citizen when the conditions are reversed. Let us rather bear in memory the injunction of the great and all-wise Judge, who commands, "Do unto others as you would they should do unto you."

THE SUPREME COURT OF MINNESOTA.

By Hon. Charles B. Elliott, *of Minneapolis.*

I.

THE history of the highest court of a State is not the least important part of the history of the Commonwealth. Although the least showy, the judiciary is by far the most efficient instrument in forming and developing the characteristics which distinguish the people of one community from those of another. To write a true and complete history of the Supreme Court of a State would require a minute study and analysis of its decisions affecting private as well as public rights. These decisions become the measure of business morality, and thus powerfully influence and direct the every-day life and habits of the people. The court is the balance-wheel of the political system; its steady wisdom operates as a break upon the hurried action of the people and their legislative representatives while acting under the pressure of public excitement.

I do not propose here to attempt such a minute study of the history of the court, as there is another view from which the subject may be approached which is scarcely less important. The personal element enters largely into the history of jurisprudence. The flow of law must be through a personal medium, and during its passage the law of refraction is liable to influence the result. The legislature may, in the plenitude of its wisdom and power, enact a statute for a certain purpose; but whether in fact such statute will ever become the law of the land may depend upon the mental peculiarities of the members of the court which is called upon to construe and apply it to the multifarious circumstances of life. There are few statutes which a court may not construe into a nullity. So every court has its peculiarities, which are but the reflections of the personal characteristics of the men who constitute it. "One judge of high moral perceptions and a tender and instructed conscience will see clearly the requirements of natural right in the case, or the correct application of written law or judicial precedents. Another judge, unscrupulous, passionate, unlearned, or vindictive, may utterly fail either to perceive or apply the right."

The body of the law now in force in this country is the work of the judges. Mansfield, before the days of legislative fecundity, created the commercial law of Great Britain; Marshall created a system of constitutional law very different from that contemplated by the constitutional convention which constructed his text, or the successive congresses which sought to embody their ideas in statutes. It is hardly too much to say that a great judge creates the laws which in theory he declares. In a contest between such a judge and the legislative power, his decisions will percolate through and ultimately undermine any legal structure the legislature may create.

Minnesota is as yet a new State, and its Supreme Court of Judicature is without traditions. No ancient portraits of famous judges in wig and gown look down upon their successors. Portraits indeed hang upon the walls of the court-room, but they are of men who have recently passed away, or of those whose voices are still heard before the court. The history of the State is encompassed by the life of a single generation, and the founders of the commonwealth are still with us in the flesh. One member of the territorial court is a leader of the bar to-day, while another is a distinguished Federal judge.

Minnesota has had no judicial monarch, no monarchy of a single mind to interrupt the republic of judges. The average member-

ship of the court in character and learning has been high, and to almost every member may truly be applied the eloquent language of Bishop Horne: "When he goeth up to the judgment-seat he putteth on righteousness as a glorious and beautiful robe, to render his tribunal a fit emblem of that eternal throne of which justice and mercy are the habitations."

On the 23d of December, 1846, Morgan L. Martin, the territorial delegate from Wisconsin, introduced into Congress a bill for the creation of the Territory of Minnesota; but it was not until the 3d of March, 1849, the day before the inauguration of President Taylor, that the bill organizing the new Territory was finally passed and became a law.

Section 9 of the Organic Act provided "that the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief-justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said Territory annually. The said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts, by one of the justices of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointment, respectively reside in the district which shall be assigned to them."

AARON GOODRICH.

On the 19th day of March, 1849, President Taylor appointed the members of the first territorial Supreme Court. Governor Ramsey reached St. Paul on the 27th day of May, 1849, and on the first day of the following June issued a proclamation declaring the new government duly organized, with the following officers: Alexander Ramsey of Pennsylvania, Governor; C. K. Smith of Ohio, Secretary; Aaron Goodrich of Tennessee, Chief-Justice; David Cooper of Pennsylvania and B. B. Meeker of Kentucky, Associate Justices; J. L. Taylor, Marshal; and H. L. Moss, United States Attorney. On the 11th day of the same month the Governor issued a second proclamation, dividing the Territory into judicial districts in accordance with the requirements of the Organic Act.

The first district was composed of the county of St. Croix alone, and to this was assigned the Chief-Justice. The second district comprised the region north and west of the Mississippi River, and north of the Minnesota River, and of a line running due west from the head-waters of the Minnesota River to the Missouri. To this district Judge Meeker was assigned. The third district, to which Judge Cooper was assigned, comprised the country west of the Mississippi River and south of the Minnesota River. The same proclamation provided that terms of court should be held, to continue one week, — in the first district at the village of Stillwater on the second Monday,

in the second district at St. Anthony Falls on the third Monday, and in the third district at Mankato on the fourth Monday, of August, 1849. Thus was the wilderness organized, and the machinery for its government provided. It was an illustration of the modern practice of transplanting the entire machinery of government in advance of the governed. The land was little more than a wilderness. The entire population, exclusive of Indians, could not have exceeded one thousand. The census taken four months after the passage of the law organizing the Territory, and after the rush of emigrants had set in, showed four thousand six hundred and eighty souls, of which three hundred and seventeen were connected with the army. West of the great river the Indians held undisputed sway, from the southern line of the State north to the embryonic city of St. Paul. The banks of the Mississippi could show but two or three habitations of white men. St. Paul contained one hundred and fifty inhabitants and thirty buildings. But these few pioneers were buoyant and hopeful of the future. "The elements of empire were plastic yet and warm, awaiting but the moulding hand of the thousands soon to come." On the 28th of April, before the arrival of the territorial officers, "with but a handful of people in the whole Territory, and a majority of these Canadians and half-breeds," the first issue of the first newspaper ever published in Minnesota saw the light. It could not be called a metropolitan sheet, and it was issued under somewhat discouraging as well as unusual circumstances.

BRADLEY B. MEEKER.

Some of the conditions ordinarily supposed to be necessary to journalistic success were wanting, as the editor informs us that he "had no subscribers. The people did not want politics, and we had none to give them. We advocated Minnesota, morality, and religion from the beginning." We are also informed that the first number of the paper was printed in a building through which "all out-doors is visible through more than five hundred apertures; and as for type it is not safe from being pied on the galleys by the wind." About the time the new judges reached the field of their future labors, this paper was urgently advising settlers then swarming into the Territory to bring with them tents and bedding.

It was to this crude and unformed community, planted in the depth of the wilderness, near the roaring falls of St. Anthony of Padua, that Chief-Justice Goodrich and Justices Meeker and Cooper came early in 1849, bearing with them the commissions of President Taylor enjoining them to administer justice to the inhabitants thereof, and charged with the duty of laying the foundation of the jurisprudence of the great State of the near future.

The first Chief-Justice was born in Cayuga County, New York, on the 16th day of July, 1807. In 1815 his father moved to western New York, where the son spent his minority upon a farm, receiving such

education as could be conferred by the country schools.

After reading law for a time, he removed to Tennessee, where his legal studies were completed and practice commenced. In 1847 and 1848 he was a member of the State Legislature, being the only Whig who ever represented the district.

During the three years he sat as Chief-Justice he seems to have given general satisfaction, although, by reason of his short period of service and the limited amount of business transacted, he failed to leave any impression on the jurisprudence of the State. His inclinations seem to have been rather literary and archæological than legal. After retiring from the court, he devoted his time to such studies until 1861, when he was appointed by President Lincoln to the position of Secretary of Legation at Brussels, where he remained until 1869.

DAVID COOPER.

Upon the organization of the State in 1858, Judge Goodrich was appointed a member of a commission charged with the duty of preparing and reporting to the Legislature a Code for the State. Although favoring liberal rules of practice, as was evidenced by his dissenting opinion in the first case decided by the Supreme Court, he was a firm believer in the saving grace of the common law and on this commission opposed the adoption of the code system. His views were embodied in an elaborate minority report.

One of the reasons given for his dissent was the excessive cost of justice under the code system. Its popularity with the lawyers was compared to that of Diana with the jewellers of Ephesus, — "Know ye not by this our craft we beget our wealth?"

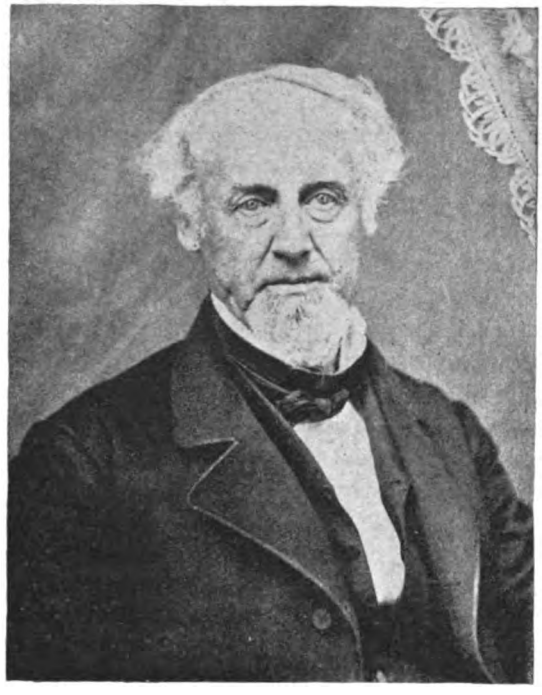
In 1860 he was a member of a commission to prepare a system of pleading and practice, with instructions to report within a few days. An elaborate report was laid before the Legislature within the time, which creates a suspicion that the Chief-Justice, like Franklin, was in the habit of carrying systems of government in his pocket, ready for any emergency that might arise.

The principal result of his labors while in Europe was a work entitled "A History of the Character and Achievements of the so-called Christopher Columbus," which was published in Philadelphia in 1874. This is a work of considerable interest and ingenuity. It is sought to be shown that the great Christopher's real name was Criego, and that while pursuing the honorable career of a pirate of many years' experience, he came into the possession of the log of some worthy mariner who had been gathered to his fathers, and thereupon set up as a great discoverer.

Judge Goodrich was an active partisan of Seward, and labored and voted for him for President in the Convention of 1860. After his return from Europe he continued to reside in St. Paul until his death. John Skinner Goodrich, a brother of the Chief-Justice, was a judge of the Supreme Court

of Michigan in 1850, and two other brothers were members of the Senate of that State.

Bradley B. Meeker was born at Fairfield, Connecticut, in 1813. Although descended from Robert Meeker who established the town in 1650, the father of Bradley was in poor circumstances, and unable to give his children an education. After many struggles with adverse circumstances, the youth came under the notice of Governor Thomlinson, under whose patronage he was sent to Weston Academy and subsequently to Yale College. After leaving college he settled at Richmond, Madison County, Kentucky, where he commenced the study of law while engaged in teaching as a means of support.



ANDREW G. CHATFIELD.

After admission to the bar in 1838, he practised his profession at Richmond until 1845, when he removed to Flemingsburg in the same State. Here he soon became a leader in the movement for a constitutional convention for the revision of the State Constitution.

Through the influence of John Bell, President Taylor appointed Mr. Meeker one of the Associate Justices of the Territory of Minnesota. This position he held, performing the duties with credit, until the commencement of the Pierce administration in 1853, when he was succeeded by Moses Sherburne. Judge Meeker wrote but seven decisions, all of which appear in the first volume of the Reports. After leaving the bench he never engaged in active practice, but devoted himself to real-estate transactions, with indifferent success, although he finally accumulated a competence. He was active in the life of the new community, was somewhat eccentric in his habits, and seems to have been in demand as a public speaker.

He was a member of the Democratic wing of the Constitutional Convention of 1857, and there advocated an appointive judiciary.

During the year 1857 the people of the Territory were suffering from "hard times;" and Judge Meeker advocated a plan which he thought would relieve debtors and at the same time make Minnesota a haven of rest for the financially troubled of other lands. In November of that year he wrote to a member of the Legislature a letter from which I quote the following: —

"You are now in a position to do Minnesota good service, and I know you well enough to know that you will do all in your power to promote her best interests. Now, something must be done, or northern Minnesota will be a pauper country within two years. I have thought much about the matter, and have at last fallen upon the following relief measures. In the first place, I want you to pass a law prohibiting all our courts of justice from rendering any judgments for debts due by contract or judgment contracted or rendered out of Minnesota for the term of five years from the passage of such law. Now, the effect of such a legislative act would be this: all the embarrassed men of business, whether manufacturers, merchants, or mechanics, would wend their way with their families and friends to Minnesota in the spring, where they could enjoy legal repose from the demands of their creditors, and establish them-

selves anew. This step, so merciful in these days of pecuniary depression and oppression, would revive emigration again to Minnesota, and fill it with enterprise and money."

Judge Meeker lived in Minnesota but a short time after retiring from the bench, and died while temporarily stopping at a hotel in Milwaukee, Wisconsin, in 1873.

David Cooper was born July 22, 1821, at a place known as "Brooks Reserve," in Frederick County, Maryland. In 1831 the family removed to Gettysburg, Pennsylvania, for the purpose of giving an elder brother James, subsequently United States Senator from Pennsylvania, an opportunity to pursue his legal studies. After a short time spent at Pennsylvania College, David Cooper commenced the study of law in the office of his brother at Gettysburg. After being admitted to practice, in 1845, he removed to Louistown, in Mifflin County, where he soon became known as a very successful lawyer. After a legal and political career somewhat brilliant for so young a man, Mr. Cooper was, at the early age of twenty-eight, appointed one of the first Associate Justices of the Supreme Court of Minnesota. Judge Cooper seems to have been rather a difficult person to get along with, and soon made many enemies. His ability was unquestioned, but his irascible temper was the cause of much trouble to himself and his friends. Judge Flandrau writes: —

"Judge Cooper was a very industrious and painstaking lawyer, but irascible in the highest degree. He so fully identified himself with the cause of his client, that fair criticism from opposite counsel of the merits of the case would be construed into a personal affront, and he never forgave a judge who decided against him. With all these peculiarities, the judge had a very genial side to his nature."

The conduct of certain Federal officers gave rise to bitter complaints. In January, 1851, a local paper printed a savage article on "Absentee Office-Holders," in which Cooper was characterized as a "profligate vagabond." This abusive publication led to a street encounter between the editor and a brother of Judge Cooper.

Like Meeker, Cooper was eccentric. He was a gentleman of the old school, and to the end of his life wore the ruffled shirt and laced cuffs of a past generation. After retiring from the bench in 1853, he practised law in St. Paul until 1864, when he removed to Nevada. The career commenced so auspiciously amid the brilliant successes of youth ended in darkness in an inebriate asylum at Salt Lake City.

In accordance with the Governor's proclamation, the first term of the district court was organized in St. Croix County, August 2, 1849, at the village of Stillwater. This was the first court ever held in Minnesota. Chief-Justice Goodrich presided, and Judge Cooper sat as an associate.

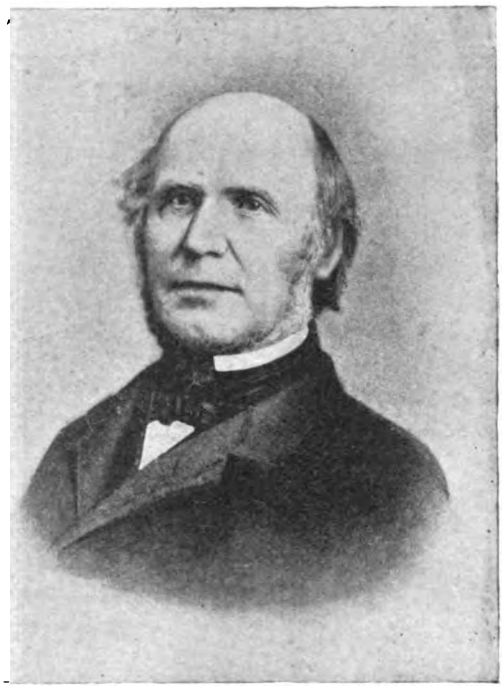
As usual, the lawyers had preceded the courts, and had evidently been kept waiting for some time, as the paper announced that "about twenty of the lankest and hungriest were in attendance." We find the following account of this first court in the "Chronicle and Register" for August 5: —

"The proceedings were for the first two or three days somewhat crude, owing to the assembling of a bar composed of persons from nearly every State in the Union, holding all their natural prejudices in favor of the courts they had recently left, and against those of all other places in Christendom. But by the urbanity, conciliatory firmness, and harmonious course taken by the court, matters were in a great measure systematized, and business finally despatched to the satisfaction of all concerned. The industry and impartiality of the court were matters of commendation on all sides."

The editor then proceeds to compliment the prosecuting attorney upon his ceaseless energy and firmness, and the landlord and citizens of Stillwater upon the sumptuous hospitalities extended to the visiting citizens. One startling feature of the great event duly chronicled was the fact that one of the jurymen wore boots.

In the second district the court convened "at the house of Mr. Bean, on the west bank of the Mississippi, at the falls of St. Anthony." The grand jury was duly sworn; and it is interesting to know that Mr. Justice Meeker's charge was able, and "characterized by sound legal and philosophical lore."

After retiring to "the old mill in the vicinity for deliberation," it was found that the community had failed to provide them with any derelictions to investigate; and the term of court came to a sudden close, with nothing to render it memorable other than its position chronologically in the legal history of what is now the city of Minneapolis.



MOSES SHERBURNE.

Much ceremony attended the launching of the judicial ship in Mr. Justice Cooper's district. A spacious warehouse was fitted up and gorgeously decorated for the occasion. Governor Ramsey and Chief-Justice Goodrich occupied seats with the presiding justice. Justice Cooper's charge to the grand jury was a somewhat flowery and elaborate affair. After listening to its flowing periods, our editor decided that, although a young man, the Justice possessed "a discriminating mind, competent knowledge of the law, suavity of manners, and much personal dignity. Minnesota may be proud of her judge." It was subsequently discovered that but three of the members of the jury could understand the English language; and possibly to prevent the utter waste of judicial eloquence, the charge was printed in full in the next issue of the village newspaper.

The first term of the Supreme Court was held at the American House in St. Paul, on Monday, July 14, 1850, Chief-Justice Goodrich and Justice Cooper being present. About this time a certain Englishman named Edward Sullivan made a tour through the Northwest, and, as is common with such travellers, published his "impressions." From this book, entitled "Rambles and Scrambles in North and South America," I quote the following picturesque bit: —

"The Chief-Justice of Minnesota was holding his session at St. Paul. The bar of the hotel was the court-house. The Judge was sitting with his feet on the stove on a level with his head, a cigar between his lips, and a chew as big as an orange in his mouth, and a glass of some liquor by his side. The jury were in nearly the same elegant position in different parts of the room; and a lawyer, sitting across a chair and leaning his chin on the back of it, was addressing them. The prisoner was sitting drinking and smoking, with his back to the judge, and looking the most respectable and least concerned of the party. Although it struck me that there might be a good deal of justice, there was very little dignity, in the application of the law in Minnesota."

The learned writer then proceeds to enlarge on the usual topic, the weakness of an elective judiciary, and attributes the lack of dignity in the Minnesota Court to the fact that the judges were elected by "a majority of the members of the House of Assembly." This latter learned observation on the method of electing Federal judges seems to corrobo-

rate the contention of the Chief-Justice that Mr. Sullivan's description of the court was purely apocryphal. It appears that by this time there was no occasion for the journalist to lament the lack of "politics" in Minnesota; and the Chief-Justice always contended that the description of his court was furnished the traveller by political enemies who were seeking to undermine him at Washington.

Political excitement ran high in the Territory in 1851, and factional quarrels led to the resignation of Chief-Justice Cooper. He was succeeded, Nov. 13, 1851, by Jerome Fuller of New York, who served until Dec. 16, 1852, when he was succeeded by Henry Z. Hayner. It seems impossible to acquire any information about Hayner, who was Chief-Justice from Dec. 16, 1851, to April 7, 1852. He never presided, and it is believed that he never came to Minnesota.

R. R. NELSON.

When the Pierce administration came into power, March 4, 1853, all the Federal officers in the Territory were removed. On April 7 William H. Welch became Chief-Justice, and Andrew G. Chatfield and Moses Sherburne Associate Justices. The new Chief-Justice was a native of Connecticut, and a graduate of Yale College and Law School. He came to Minnesota in 1850, residing first at St. Anthony and subsequently at St. Paul. After serving four years under the appointment of President Pierce, he was reappointed by President Buchanan, and remained in office until the organization of the State government in 1858.

Andrew Gould Chatfield was born at "Butternuts," Otsego County, New York, Jan. 27, 1810. His parents were natives of Connecticut, and of good Revolutionary stock. His maternal grandmother was a member of the Ruggles family, a name well known in the legal and political history of the Empire State. Enos Chatfield, the father of the Judge, removed from Connecticut to New York, where he accumulated some property, but lost it through a defective title.

His children were thus thrown upon their own resources. After acquiring the rudiments of an education by private study in the fitful light of the historical pine-knot after laborious days of farm labor, Andrew went to Hamilton Academy, where he remained for some time. At the age of twenty-one he removed to Steuben County, New York, and commenced the study of law in the office of Henry F. Cotton at Painted Post. In 1833, after three years' study, he was admitted to the bar of the county court. During the same year a partnership was formed with James Birdsell, and the practice of law commenced in the village of Addison in Steuben County.

In November, 1838, Mr. Chatfield was elected a member of the Legislature as a Democrat, to which party he faithfully adhered during his long life. He soon became prominent as a leader of his party, and was re-elected for three successive terms.

In 1841 he served as chairman of a committee to investigate the affairs of the Erie Railway, a corporation which had received State assistance in the form of a loan of $3,000,000.

At the completion of his duties on this committee, Mr. Chatfield returned to private life and the practice of his profession. In 1845 he was again elected to the Assembly, where during the session of 1846 he served upon a committee, of which Samuel J. Tilden was chairman, charged with the duty of devising a plan for the settlement of the difficulties between landlords and tenants which had given rise to the "anti-rent" riots.

This report was an important event in the history of the anti-rent troubles. During the same session Mr. Chatfield served as chairman of the Judiciary Committee and Speaker, to fill a temporary vacancy caused by the extended absence of the regular Speaker. At the close of the session he was appointed one of a committee to investigate the alleged frauds in connection with the enlargement and repairs of the various canals of the State. For the greater part of a year he devoted himself to the arduous duties which devolved upon this committee. Mr. Chatfield was also a member of the Constitutional Convention of 1846. At this time perhaps no young man in political life in that State stood higher or had more brilliant prospects; but the ten years of public service had left but little time for the accumulation of money, and the necessity of providing a competence for his family induced a removal to the new West. He settled at what is now Kenosha, Wisconsin, and was soon elected county judge, which office he held but for a short time.

CHARLES E. FLANDRAU.

In 1853 Judge Chatfield, while in attendance upon the Supreme Court at Washington, met Gen. H. H. Sibley, then delegate from Minnesota. Sibley's glowing description of the new land filled him with a desire to locate within its bounds; and as the Federal offices were then being filled by President Pierce, Mr. Chatfield was, upon the recommendation of General Sibley, appointed one of the Associate Justices of the Supreme Court of the Territory.

His commission was dated April 7, and in June following the new Justice removed to Mendota, and entered upon the duties of his office. Judge Chatfield held the first court in almost every county then organized west of the Mississippi River.

His journeys from county to county were made upon horseback, and along the "Indian trail," then the only highway through the greater part of the huge judicial district. On one of these journeys his eye was attracted by the wonderful beauty of the prairie bordering on "Roberts Creek" adjoining the "Big Woods," and he resolved to make the spot his future home. A town was soon after surveyed, and named Belle Plaine. A stock company was formed, and for some time it seemed that the projectors of the new town would realize the fortune their enterprise deserved. But the crisis of 1857

brought disaster, and an assignment for the benefit of creditors followed. Judge Chatfield retired from the bench in 1857, and resumed the practice of the profession.

"During his term in Minnesota," writes Mr. J. F. Williams, "he had become widely acquainted with the people of the Territory, and was much respected by them as an upright citizen, a learned lawyer, and a gentleman of high honor and cultivated mind. As years rolled on, they brought him increasing honors from a widening circle of friends. Wherever he went his venerable and dignified appearance made him an object of respect. His large experience of men and public affairs, and his quick perception made him an agreeable companion." He frequently attended the conventions of his party in the State; and although not taking a very active part in politics, his advice was always eagerly sought. At various times he received the nominations of his party for Chief-Justice, Attorney-General, and Member of Congress; but in the then condition of parties in the State an election upon the Democratic ticket was hopeless. At an advanced age Judge Chatfield was again raised to the bench. In 1870 he was appointed Judge of the Eighth Judicial District of the State, which position he held until his death, Oct. 3, 1875, at his rural home in Belle Plaine. Over his grave there stands a granite monument bearing this inscription: —

"The able and upright Judge, the honest man. Erected by the bar of the State."

WILLIAM H. WELCH.

Moses Sherburne was appointed one of the Associate Justices by President Pierce in 1853. He was a native of Maine, having been born at Mount Vernon in March, 1808. After being admitted to the bar, he located at Phillips, where he resided until his removal to Minnesota. At the time of his appointment he had filled a judicial position for many years. He took his seat at the January term, 1854, and served until 1857.

After retiring from the court, he continued to reside in St. Paul, and practised law with much success until his death in 1868. Judge Sherburne was a man of more than average ability. He was an influential member of the Constitutional Convention of 1857, and in 1858 was a member of a commission appointed by the Legislature to revise the general laws of the State. He was an eloquent speaker, and won for himself the title of "the old man eloquent."

One of the first acts of President Buchanan's administration was the appointment of Rensselaer R. Nelson and Charles E. Flandrau as Associate Justices of the Supreme Court of the Territory, in place of Justices Sherburne and Chatfield.

The names of Nelson and Flandrau are closely identified with the judicial and political history of the Territory and State. Judge Nelson was born in Coopertown, New York, on the 12th day of May, 1826. His father, Samuel Nelson, was for many years one of the most eminent judges of the Supreme Court of New York, and later Associate Jus-

tice of the Supreme Court of the United States.

Young Nelson inherited his father's legal ability. Graduating from Yale in 1846, he soon after entered the law office of James R. Whiting in New York City, but completed his studies at Coopertown, where he was admitted to the bar in 1849.

After a short time spent at Buffalo, Mr. Nelson decided to try his fortune in the far West; and the 12th day of May, 1850, saw the future jurist climbing the long pair of rickety stairs which led from the steamboat-landing to the upland, where a few cheap frame and log houses, stumps, rocks, and ungraded streets indicated the future city of St. Paul.

The young lawyer's first interview with a leading citizen was far from encouraging. Hearing that the young man had designs of practising law in St. Paul, the gentleman was deeply moved with compassion. "My dear young man," said he, "I sincerely pity you. We have a population of six hundred; and fifty of them are lawyers, the most of them starving. I advise you to take the next boat East, because you have no chance here. We have too much trouble with the lawyers here already."

Mr. Nelson did not take the well-meant advice, but opened an office, and continued to practise his profession until 1854, with a good measure of success. In 1853 he had the honor of refusing a nomination as delegate to Congress. In 1854 he removed for a short time to Superior, Wisconsin, where he took an active part in the organization of the new county of Douglass, and held the office of District Attorney.

Returning to St. Paul in 1855, the practice of the law occupied his attention until 1857, when he was appointed an Associate Justice of the Supreme Court, and immediately entered upon the duties of the position. Judge Nelson served until Jan. 1, 1858, when the territorial court was superseded by the State court. But one general term of the court was held after Judge Nelson's appointment, and but two opinions written by him appear in the Reports. This, however, conveys but a very inadequate conception of the amount of judicial work done by him during his brief term of service. A large amount of chamber work devolved upon him as the judge of the district court residing at the capital; and it was in this capacity that he rendered a decision in one of the *causes célèbres* in the early history of the State.

THE SIREN TURN-TABLE.

By Irving Browne.

[*A railroad company, maintaining a turn-table, on its own lands, about six hundred feet from two highways, and having upright guy bars, is not bound to keep it locked or guarded, and a child injured while playing on it cannot recover.*[1] *Daniels* vs. *N. Y. etc. R. Co., Mass. Sup. Jud. Ct. Sept.* 1891.]

A TURN-TABLE reared its posts in air
In a railroad company's yard,
Enticing small boys to wander there
In absence of padlock or guard.

Young Daniels rode on the merry-go-round,
Uncaring for life or limb;
The wicked Fates, with malice profound,
Quick turned the table on him.

He came to the court, and prayed relief
Of a monetary kind;
Unfeelingly thus beyond belief
Responded that Justice blind:

"My son, you were doing very wrong
On the company's land to pass,
Disturbing the quiet air with song,
And disarranging the grass.

"The gentlemanly directors may not
Be forced to adopt any mode
Of guarding such a secluded spot,
Five hundred feet from the road.

"Much better to take your mother's hand
And walk on the Common green,
Or with the most cultured youth of the land
Sail boats on the Frog Pond clean;

[1] To the same effect, St. Louis, etc. R. Co. *vs.* Bell, 81 Ill. 76; S. C. 25 Am. Rep. 269; McAlpin *vs.* Powell, 70 N. Y. 126; S. C. 26 Am. Rep. 555; Frost *vs.* Eastern, etc. R. Co., 64 N. H. 220; *Contra:* Railroad Co. *vs.* Stout, 17 Wallace, 657; Kans. Cent. Ry. Co. *vs.* Fitzsimmons, 22 Kans. 686; S. C. 1 Am Rep. 203; Keffe *vs.* M. & St. P. Ry. Co., 21 Minn. 207; S. C. 18 Am. Rep. 393; Nagle *vs.* Mo. Pac. Ry. Co., 75 Mo. 653; S. C. 42 Am. Rep. 418; Evansich *vs.* Ry. Co., 57 Tex. 126; S. C. 44 Am. Rep. 586; R. Co. *vs.* Bailey, 11 Neb. 332.

"Or with a proper descriptive book
The menagerie's lessons crave,
Or on Sunday take a pious look
At your dear old grandfather's grave.

"This court cannot have any sympathy
With rude and boisterous sport,
If we ever were boys, time long gone by,
We did nothing of the sort.

"Listen not to the siren-singing
Of turn-tables, swings, or carts,
For misery ever they 're bringing
To those who yield to their arts.

"And allow this instruction holy
On your infant mem'ry to fall:
'Though the mills of the gods grind slowly,
They grind exceedingly small.'"

THE ROMANCE OF THE LAW.

By Robert T. Barton.

From a Paper read before the Virginia State Bar Association.

WHO that has ever wandered among the graveyards and ancient buildings of Europe has not experienced the pleasing sensation of making in imagination the dead who were once the living there live again? I do not mean merely the mighty dead, those who played their rôles of kings and queens, nor yet the mightier than they, the real kings of men who ruled armies and navies and made and unmade kings and kingdoms, nor yet even those monarchs of literature, thought, and philosophy, — a Carlyle with his gravestone carved Humilitas, nor a Scott who needed no stone to tell of his genuine modesty. I do not mean all these or the like of these. I mean a quiet evening in an English graveyard far from the madding crowd, where the time-worn and moss-covered stones still faintly tell you the names, the ages, the deaths, the loves, — sometimes the hates, — and the virtues of those who have slept under the turf full three hundred years. One knows by heart the public history of those times, and how men fared, and what their common occupations were. Hence it needed no far flights of fancy to make those dead live once more; to gather their relations to each other from the brief narrative of their monuments, — their ages, and what they did, and when they died, and who they loved. There right before you is the same landscape that they

had looked upon, — the roads and streams and fields, nay, often the very houses and churches which were there when they lived and moved, — and it becomes an easy transition to carry yourself back through those centuries gone by, and live again with them the lives they there had spent. What an insight does not such an experience give one into what did in fact transpire on those scenes in those times, as compared with the impressions that the best and most dramatic of historians is able to afford. Now some impressions just such as these come to me sometimes, as I am searching my reports for precedents or expressions of legal principles, and I have thought that back of them there may be something more than this mere castle-building which seems to be the first and most obvious fruit of such reflections.

These books of Reports are an ancient graveyard. These cases are the once living, now dead, actors on the world's stage. Their names are as the titles on the marble monuments.

I lay my hand somewhat at random upon what seems to be a very dry case indeed. The record says that it was a suit upon a negotiable note for quite a large sum of money; a printed form was used, issued by the bank of A——, in the city of X——. The word A—— had been erased, and the note was made to read instead "payable at the bank of B——, in the city of X——." It appears in evidence that all the parties concerned transacted their business at the bank of B——, and that the note was meant by all of them to have been filled up as the printed form with the mere written change in the place of payment indicated. Only by accident was the printed form of the bank of A—— used; and when observed by the party who was negotiating the loan, thinking to make the note as he knew all of the parties would have desired it to be, he took his pen and changed the word A—— to B——. The drawer of the note was insolvent, and the endorser defended the suit on the note on the ground of the erasure and change made in the place of payment after he had signed it. The court held that the endorser was excused from liability, and the plaintiff had besides the costs to pay.

So the case appears in the books, and that is all we seem to know or care about the matter. That is all that concerns the searcher after a precedent, and that is all that concerned, or perhaps ought to have concerned, the court.

Now, to get at what I call "the romance of the law," — those things that follow after, but do not often appear from the record, — I have to tell you a mainly true though very common story, sufficiently disguised, however, to prevent identification of case or people, and I have changed the conjunction of real circumstance and case.

There was a woman, the widow of a professional man, and her little children. Like all the rest of us, he had earned his money freely, and spending it in the same way in comfort and luxury, he had not hardened those he left behind against the possibilities of adversity. Well, there came, of course, the broken-up household, with all its wretched details of a public auction of trifles sacred by a thousand untellable ties, — mere chairs and tables, however, to those who bought them, — strangers in a home where he had once been lord and lover. Then the smaller dwelling and the narrower circumstances, where, nevertheless, there came after a while substantial comfort on what was left after death had stopped the source of plenty.

Then came the investment of all the means of living in that negotiable note; the mere well-intended accident of the erasure; and the judgment of the court, completing the wreck which death had left unfinished. Why should we ever, if we can help it, realize or dwell on the pain, the anxious apprehension, the wakeful nights, the wasted health, and grinding care which play havoc while the law delays. Opinion day in the court of last resort has come at last. The judge has perhaps found the principles involved in this case of more than ordinary

interest, and he has taken some pride in the well-constructed sentences by which he unconsciously pronounces the doom of four living and innocent people. Then the next case is called; and that is all of it, except so far as, put in its appropriate place on our shelves, we may from time to time take down the book and use the case as authority in some other case.

Happily, perhaps, we don't know anything at all about the widow, and the veil is not lifted to us to see that little household when the news comes to it of what occurred on opinion day, — a veritable judgment day indeed to them. Nor need we fret our righteous souls with following the story to its last chapter; the world is full of just such stories: the vain essay to work out a living with hands that were not taught to toil; a not unwelcome grave, and a scattered flock of little ones to climb for years the weary stairs of stinted dependence.

This is a sad but too often an over-true picture, and, alas! a part of the panorama that it seems improper should pass before the judicial eyes, or that they should admit the sight of, even if the thing stares them in the face, or seeing which, that they should think or care about at all. How far judges should be led to think and care for such things is one of the matters which has suggested this as the subject for these reflections.

But I want a little further insight into the causes and consequences of decided cases, to make somewhat more apparent, if I can, what now and then comes to me as possibly in some sense the larger and more comprehensive motive for judicial decisions; an element of their structure which has sometimes been too rigidly excluded by the orthodoxy of *stare decisis*.

Having in mind that questions of property and of the social relations are the most absorbing things that make up a man's life, the disturbance of the normal condition of which sends him fluttering out of his propriety, like the eccentric gyrations of some ill-fitted but power-driven piece of machinery, I lay my hand almost at random on some reported cases of another nature than that to which I have before referred. I open instinctively at a case from the divorce courts.

I find some statutes giving as cause for the dismemberment of the marital relations "any such misconduct as permanently destroys the happiness of the petitioner, and defeats the purposes of the marriage relations;" and other statutes which give the power of divorce whenever the court in its discretion thinks that to grant the prayer of the petitioner would be "conducive to domestic harmony and consistent with the peace and morality of society," and then our own more limited and rational statute prescribing the cause to be "cruelty, reasonable apprehension of bodily hurt, abandonment, or desertion."

I want to discover, if I can, exactly what the court is able to know or to find out about all this from the cases presented by the record, and how far, with the means at its command of doing right, its judgment really reaches towards the root of the matter, or is capable of either curing or avenging the disturbing cause in any given case.

Here in a case open before me I find a judge who seems to think (possibly from his own domestic experience) that austerity of temper, petulance of manner, rudeness of language, want of civil attention, and occasional sallies of passion are the necessary incidents of the connubial state, and are to be as naturally expected, and possibly more so, than chops and coffee for breakfast.

Now this judge, reading correctly from the authorities, says that such incidents as these, and the like, "may all be the effect of habit or of a bad education, and should, in the general, be borne with by the wife, as the best means of disarming them of their effects, and securing to herself connubial happiness."

And having fortified himself with these philosophical reflections, in support of which

he might have quoted not a few authorities from the printed books, the learned judge moralizes further, that "good morals as well as good policy require that the door should not be opened wider;" and addressing himself to the task of applying the established prescriptions to the maladies of the case before him, he gives us this glimpse of the process which carried him through his diagnosis: —

Referring to the testimony, the judge says that it appears that "rude language was occasionally used by the husband to his wife; yet such language was not *often* repeated, and when used, seems to have been the effect of a momentary excitement, which soon passed away, or of a grumbling bluntness in his manner of expression, which seems to have been more the effect of habit than of ill-will, and which should have been disregarded by his wife. The only personal violence charged in the bill is that which immediately preceded the departure of the wife from the home of her husband. And it is not even charged in the bill to have been so violent as to inflict on her serious injury. And taking into consideration the denial of the answer, it is certainly rendered questionable, from the proof, whether she was struck by the husband at all; or if stricken, whether the stroke exceeded a slight slap, to which he was provoked by the excitement of the moment, and perhaps by the irritating language and conduct of the wife. Indeed the only witness who attempts to prove that anything more than a slap was given to her is her own daughter by a former husband, who says she did not see her mother stricken, but saw the defendant have hold of her arm, trying to lead her into the house, and saw his hand raised several times, and heard the strokes struck, but was not in a situation to see them. On the contrary, the defendant denies that he struck her, or intended to use any violence towards her; but that in the scuffle, and her efforts to wrest her arm from his hand, her hair fell down on her face, and the only thing he did was to place his hand on her face to replace her hair. And the daughter of the defendant, who was also present, states that she punched him in the breast several times, and she heard no strokes from him, but saw him raise his hand once, and motion it like he slapped her, but saw no slap."

Well, the judge, in the discretion allowed him by the law, thought that under the circumstances a divorce would not be conducive to domestic harmony (although he did not suggest what would be), and that it would not be consistent with the peace and morality of society. He, no doubt, knew from the pleadings and the evidence more of the case than he found it necessary to repeat in his opinion, and having reached a conclusion, which was the best, perhaps, poor man, that he could frame, and the nearest to righteousness that the machinery of the law rendered possible, if he gave the matter any more thought, which was not at all probable, it was most likely with a gratified sense that he had fitted his little judicial saw exactly into the lines of the pattern which the words of reported precedents had drawn out for him, and it tickled him to death to think how nicely he had turned the curves of slippery principles, and had buzzed up into and out again from the sharp angles of narrow and difficult distinctions.

It is not for one of us who did not know the case, to say that the judge did any less than his whole duty; but will any man who can read at all between the lines find his mind and heart consenting that the law did by this case exactly the fair and full thing, — applied a stroke that really reached down to the root of the weed and tore it out, instead of merely cutting off its wretched top, and letting the noxious thing grow again with renewed vigor?

The most fertile imagination may, perhaps, find some difficulty in discovering the romantic part of a case like this, where there is a cross-fire of step-daughters, a husband whose rude language and surly demeanor is

excused by the court on the ground that it was merely *from the force of habit*, and a wife hysterical and yet masculine and muscular enough to be able to punch her lord and master in the breast several times. Nevertheless, I have in mind a case whose record makes it very like to this, and yet through whose outside history have run the finest lines of the romantic and sentimental; where all the impulses of love, hate, meanness, tenderness, courage, self-sacrifice, and revenge have played on human hearts until some of them have hardened like adamant, and others, like withered flowers, have lost all the fragrance and bloom which by right of living Nature had given them a claim to own.

Now, before I try to explain the practical import (for such an aim I have) of what I fear you may be disposed to regard as a too transcendental theory of the workings of the law, I turn for a few moments from that class of cases whose faults seem to me to consist in the sense of inadequacy with which their results impress you, to another class of cases for whose consequences also you must ordinarily look beyond the record, but the blame for which is the more readily to be put where lies the responsibility, and the remedy for which can be suggested with at least a greater freedom from the apprehension lest in trying to cure one ill you invite the possibility of creating others.

I could, of course, by merely turning over the pages of some of these books which lie before me while I write, find case after case whose proceedings show that when at last it came to judgment it had reached a hoary age; but both you and I have too many such in constant remembrance which have never gotten into the books, or if there have coyly concealed their ages, to make research in the books of reports at all necessary.

I recall at this moment a case which started in the year 1827 with a dispute over a sum of about $1,200, which had been put in the hands of the general receiver as a sort of stakeholder. Only dim tradition and the most sparse and unsatisfactory entries from time to time on the order book, and thin and faded notes for decrees filed among the few papers that have survived through all these years, give partial information of what occurred when the old case was young. In 1882, however, the fund had accumulated with compound interest until it had reached to near $15,000, and by the merest good luck it was saved. Had action been delayed six months longer the $15,000 would not have been worth 15,000 cents to court or owner. Then a grandson (with several *greats* to him) of one of the primeval litigants looms up out of the dark, and discovers this accumulated and long-neglected fund. His first and wisest step was to make it safe, which he succeeded in doing.

Then came the revived litigation, which had stopped years before because, apparently, there was nobody left with strength enough to litigate. All the parties to the suit were long since dead; all the lawyers, and there were many of them, who had figured in the case were dead; all the judges, except one, who had ever made a decree in the case were dead, and that one, venerable man, was long since off the bench; all the clerks who had ever recorded decrees, and all the commissioners who had made reports, were dead; the very court-house in which the case had been originally heard had been pulled down, and a new court-house, facing in another direction, had been built on the old site; and even the clerk's office in which the case had had its first birth (rule) day had been destroyed and a new clerk's office built, and that in its turn had become old. The case had turned and twisted in a tired sort of way on its docket so long that it had lost its original name, and by way of clerk and lawyer had taken on some newer name, so that its own father would not have recognized it. Under cover of this, and weary with being called at in an unknown tongue, or at least in an unknown name, it had at last sneaked off the docket altogether, under the pretence of some seven-year rule or other. Well, the

court could n't exactly tell now to whom the money did in fact belong (poor court, how could it after all those years?); but it conceded that the money did not belong to it, and, considering the length of time it had kept it, that was quite an important concession for it to make. So the court made a sort of random shot, somewhere in the neighborhood of the owner, and directed the fund to be divided among certain of the Great Greats, their wives and children, to the third and fourth generation. Now, this was fairly a good thing for the grandchildren; for if those who had been really entitled to the money had gotten it, these grandchildren would not have gotten it in all likelihood, to say nothing of the share that fell to the lot of those who helped in the getting of it. But who is there to speak for the long ago dead grandfathers, who perhaps waited and fretted and pined and died years and years before the court was induced finally to try its skill as a marksman? Now, those people, good and bad, whose gravestones topple on the burial-hill hard by, had a better right to that money than the generation that got it, and who can say how many a romance in their lives there was or might have been because they did not get their own? Yes, it is probably all the same to them now, for they all lie up there together in that sweet and green Mt. Hebron, — the litigants and the lawyers, the clerks and the judges, the commissioners and the witnesses, and those who tore down and those who built up the buildings again; but whatever more of want, of anger, of disappointment and unhappiness there came into this world because the court kept back that money, who will tell, unless it be entered up by the great clerk in the great book? And if that be so, is it in accord with the obvious fitness of things that the charges there shall be to the account of those who suffered them, rather than of those who made or let them be?

But have these days and these things that should not be, entirely gone by? Is the cry of the law's delay but the muttering of the unsatisfied? Is the public that thinks it better to give half its own loaf to whoever claims it rather than risk losing it all while it waits for justice an utterly unreasonable and mistaken creature? There never was a real public wrong that was not greatly exaggerated before it was righted; but I believe there never was a great complaint made for which the public did not have great and real reason to complain.

I don't think it has yet been quite forty years since that prince of reporters gave the case of Jarndyce *v.* Jarndyce to the public; and see you, my brethren of the bench and bar, whether these words be not still as true as when they were uttered: —

> "This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatics in every madhouse, and its dead in every churchyard; which has its ruined suitor with his slippered heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to moneyed might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not one honorable man among its practitioners who would not give — who does not often give — the warning, 'Suffer any wrong that can be done you, rather than come here.'"

These things which we all know, but which we say we ought not, in a case in court, to let ourselves know, because justice properly represented is so very blind, are like to the case of Madame Sévigné (was it not?), who having been a witness to some inappropriate conduct between a gentleman and a lady who was not his own wife, upon being asked about it, said, oh yes, she had seen it but she did not believe it, — these things which we know, but which the blindness of justice teaches us we should shut out from our eyes, and what I have termed the "romance of the law."

To a greater or less extent they creep into the record of a case; but it is seldom they make their appearance, or can in their na-

tures be made to appear in real force, — such as that the court may call them a part of the pleading and evidence. Nevertheless, in some shape or form we do find out about them, and we know them to be the real parts of men's lives, and that they are largely the things which are in fact won or lost by litigation.

So far as the immediate and even the remote results of delay are concerned, the responsibility for that is not far to seek. It belongs either to the mistaken and inadequate machinery of the law, and whose defects it behooves the law-makers to repair; or else it belongs to those who run that machinery, and who should be made to mend their own ways; or yet it may be (and that surely sometimes is the case) that there are not men enough, with time enough, to do the work as it should be done, or those who have been appointed to the task have not energy enough or skill enough to do it. This, like the other, is a defect that the people, who are the sufferers, must do the mending of.

We are struggling with propositions about the reform of our Common Law methods, and we have very zealous advocates *pro* and *con;* and yet the Common Law, with all its forms, its robes, and its ceremonies in the shape of the much abused system of special pleading, gives justice with a quicker hand ten times, while Chancery waits and withers the very heart out of subject and suitor.

After more than three hundred years, must we still couple "the law's delay" to "the oppressor's wrong, the proud man's contumely, the pangs of despised love, the insolence of office;" or having found quick remedies in our republican institutions for three out of these four, must we concede the evil of the first, but supinely admit that progress and civilization have neither cui nor mitigation for the worst in the list?

I do not believe that there is no cure, or mitigation at least, for any evil but death. I say again that there never was a great public complaint that was not the expression of some great, real evil; and all history teaches us that as a rule there comes a wild extravagance and a breaking down of images before the cure comes; and that those in whose power it is to provide a remedy, if they wait, may fall the victims. I believe that the senseless outcry against the bar as a profession is largely the wail of those who really suffer from the defects of a system, and who cannot know or find out from whence their torture comes. I do not offer a cure or even a mitigation here; but I believe that if we lift up our voices as it becomes those who know these things to do, there will soon or late come out of the knowledge of what the evil is, a remedy, at least in part.

Let dreams of perfection be the idle hobby of those who do not work. I recognize that the unattainable lies very far short of that. But I do believe that even in our own little day Truth, to reach the feet of which is at least the theory of every endeavor of our profession, may find a way of touching the things of which it treats with Ithuriel's spear, — a light, an insufficient touch perhaps, — so that disrobed of those torn garments of technical and narrow construction, which are so often the refuge of the idle and the unskilled, disfigured and disgraced no longer by adherence to customs which belong to a time every vestige of whose environment otherwise has vanished, the fair form of Justice as administered in Chancery may stand before us as naked of such deforming raiment as God Almighty sees her, and we shall neither be afraid nor ashamed to look upon her.

SKETCHES FROM THE PARLIAMENT HOUSE.

I.

THE LATE LORD PRESIDENT INGLIS.

By A. Wood Renton.

TO write a series of papers on the Parliament House of to-day which did not contain a careful and appreciative sketch of the great lawyer, judge, and jurist over whose recent loss all Scotsmen are mourning, would be an act of literary treason.

The Right Honorable John Inglis, late Lord President of the Court of Session and Lord Justice General of Scotland, was born at Edinburgh in 1810. His father, the Rev. John Inglis, D.D. (1763–1834), was a prominent divine in the Church of Scotland, over whose General Assembly he long exercised an almost despotic sway. Inglis was educated first at the famous High School of Edinburgh, then at the University of Glasgow, and afterward at Balliol College, Oxford, whence he carried off a B. A. (1834) and an M. A. (1836) degree. In 1835 he was admitted to the Faculty of Advocates. The subsequent facts in his professional career may be grouped around a few dates. From February till May, 1852, Inglis was Solicitor-General. From May till December, 1852, and again from February till June, 1858, he was Lord Advocate. For six years (1852–1858) he was "Dean" of the Faculty of Advocates, — an honorary office of French origin (Fr. *doyen*), which in the Parliament House is as much coveted as the best offices of profit under the Crown. In 1858 Lord Justice Clerk Hope[1] died, and Inglis succeeded him, with the title of Lord Glencorse. In February, 1867, he became President of the First Division and Lord Justice General of Scotland. He died in the end of August, 1891. It remains to speak of him as advocate, lawyer, and judge.

Inglis's reputation as an advocate now rests almost entirely on his wonderful defence of Madeline Smith. On June 30, 1857, Miss Madeline Hamilton Smith, the daughter of a well-known Glasgow architect, was brought to trial before three judges of the Court of Session, Lord Justice Clerk Hope, Lord Ivory, and Lord Handyside, on a charge of having poisoned her lover, Emile L'Angelier. The salient facts in this *cause célèbre* were as follow: Miss Smith had been accidentally introduced to L'Angelier, who was a Frenchman by birth and morals. They speedily became intimate; the clandestine character of the amour added to the danger, and in a short time Miss Smith had been seduced. From the letters that passed between them, it is hard to say which was the seducer. Marriage appears to have been contemplated. But Mr. Smith had other views for his daughter, and she became engaged to a Mr. Minnock. L'Angelier suddenly developed an obstinacy of character which Miss Smith had not anticipated. He said to her in effect: "You are my wife before Heaven; you have signed yourself so hundreds of times; I hold in my hands damning proofs of your guilt, and if you venture to carry out the proposed union, I will use them and expose you to the world." Entreaty, reproach, and defiance were power-

[1] A good story is told of this judge, among others. On one occasion he was out shooting and came to a tempting field of turnips, which in Scotland are vulgarly called "neeps." Hope proceeded to march through them in pursuit of game. Suddenly a stentorian voice was heard shouting, "Come oot o' that." The judicial sportsman turned round and saw the peasant to whom the field belonged, furiously gesticulating, and making evident signs to the shooting-party to retrace their steps. "My man," said Hope, "do you know who I am? I am the Lord Justice Clerk of Scotland." "I dinna care *wha's clerk* ye are," retorted Hodge; "ye come oot o' these neeps!"

less to shake L'Angelier's resolution. Then Miss Smith changed her tone, and wrote to him again in the language of love. Meanwhile she had been purchasing considerable quantities of arsenic, as she alleged, for her complexion. L'Angelier had gone to the Bridge of Allan in Stirlingshire. She wrote to him there. On receipt of her letter, he returned to Glasgow, went to his lodgings, and soon afterwards went out, for the purpose, as his landlady thought, of seeing Miss Smith. Early next morning he came back in mortal agony. He had every opportunity to say where he had been, but the poor fellow turned his face to the wall and died. Post-mortem examination and chemical analysis clearly established that L'Angelier's death had been caused by an enormous dose of arsenic. Miss Smith was forthwith arrested and charged with the murder.[1] The prosecution was in the hands of the ex-Lord Justice Clerk (then Lord Advocate) Moncrieff, and Inglis was retained as leading counsel for the defence. That he *did* defend Madeline Smith with consummate ability and secure her acquittal, is the only authentic circumstance known to the public in connection with this case. But we cannot refrain from putting on record a few of the dramatic, if not altogether historical incidents that have gradually gained a place for themselves in the story of The Queen *vs.* Madeline Smith. The weak point in the case for the Crown obviously was the absence of direct testimony that L'Angelier *did* go to see Madeline Smith on the night of his death. But the ingenious mind of the Dean of the Faculty had determined, it is said, on another, or at least a second, line of defence. Arsenic was a metallic poison which would sink at once to the bottom of a cup of coffee or cocoa, — the medium of administration suggested by the Crown. It was therefore impossible that L'Angelier could have received from the hands of Madeline Smith the enormous dose of poison which the chemical analysis showed that he had taken. If well founded, this argument clearly supported the hypothesis of suicide suggested by the defence. But was it well founded? Inglis, so the story goes, summoned to his aid an eminent analyst, and demonstrated to him by experiment that arsenic would sink to the bottom of a cup of cocoa. The analyst made no answer, but took the cup from the advocate's hand *and stirred the contents with the spoon.* The arsenic was at once temporarily suspended in the cocoa! "Good-night," said Inglis; "we shall not require your evidence at the trial."

Public opinion in Scotland is still divided on the question as to whether the Dean believed in his client. According to one set of *raconteurs*, he thought her innocent; according to another set, he not only knew her to be guilty, but had in his possession, nay, insisted upon having from her, a written confession of guilt. If this latter statement is true, Inglis did what no other advocate in modern times has done, — even Mr. Phillips in Reg. *vs.* Courvoisier did not court an avowal of the prisoner's guilt, — he adopted to the full the cynical theory of advocacy which Manzoni puts into the mouth of the learned Dr. Azzecca-Garbugli, — "chi dice le bugie al dottore . . . è uno sciocco che dirà la verità al giudice. All' avvocato bisogna raccontarle cose chiare; a noi tocca poi a imbrogliarle."[1]

A circumstance which, if true, tends to show that Mr. Inglis was doubtful of the innocence of his client, is related by one who was present at the trial. Every morning while the case was going on and the prisoner's fate hung in the balance, Mr. Inglis nodded and smiled to her as he entered the court, and thus silently impressed the jury. When the negative verdict of "Not proven" was returned, Miss Smith is said to have looked down from the dock to catch the glance of her counsel. But Inglis sat with

[1] She was charged also with a previous *attempt* to murder; but the jury returned a verdict of "Not guilty" on this count of the indictment, and therefore we forbear to dwell upon it.

[1] *I promessi sposi*, p. 41.

his head buried in his hands, and gave no sign! It is time, however, to descend once more to the *terra firma* of fact. The Lord Advocate conducted the case for the Crown with almost judicial moderation. He proved the motive for the alleged crime; he showed that L'Angelier's death was undoubtedly caused by arsenic; he ridiculed the hypotheses of accident and suicide; and finally, he showed that the prisoner had actually had in her possession large quantities of the very poison by whose agency L'Angelier's life had been taken away. Only one link seemed wanting. Sir James Moncrieff was *unable to prove that on the night before his death L'Angelier had seen Miss Smith at all.* Inglis followed with perhaps the finest speech ever delivered in a British court of law. "The charge against the prisoner," he began, "is murder; and the penalty of murder is death." Having thus overwhelmed the minds of the jury with the gravity of the issue they had to try, he adroitly threw the responsibility for the famous letters upon L'Angelier; dwelt on the utter and all but admitted failure of the Crown to prove the *attempt* at murder (for which the prisoner was also indicted); enlarged upon the absence of any proof that on the fatal night the prisoner and L'Angelier had met; and concluded with a passionate warning to the jury not to lift the veil that Providence had drawn over the mystery, but to leave it, if need be, to that great day of assize on which the secrets of all hearts should be revealed. The result is matter of history, and has already been noticed in this paper.

Inglis was even more illustrious on the bench than at the bar. He became the Cairns or the Selborne of Scotch judicial history; and his judgments are justly famed for combined strength and elegance of diction, and for profound and accurate knowledge of law. He was regarded with extraordinary veneration by his professional brethren, among whom his name will ever be a word with power, though his tall, erect figure, his noble carriage, his courteous manners, his rich voice will give dignity and grace to the Parliament House no longer.

LONDON LEGAL LETTER.

LONDON, Feb. 3, 1892.

IT is impossible to commence my letter this month without a reference to the lamented death of H. R. H. the Duke of Clarence and Avondale. On the day when the mournful event occurred, the question was raised whether the courts would continue to sit. No precedent for the course to take on such an occasion had occurred since the death of the Prince Consort thirty years before, when Sir Alexander Cockburn, the Chief-Justice who was sitting at the Guildhall, determined that it would be best not to interrupt public business; and the same view commended itself the other day to the judges. The Lord Chancellor, who happened to be presiding in Appeal Court No. 1, said, on taking his seat: "I have received a communication of an event which will cause grief to the whole nation. After consideration, however, we think that we shall best be doing our duty by continuing to administer justice." In his own court the Lord Chief-Justice, Lord Coleridge, said: "We have received direct information from Marlborough House confirming the sad news of the Duke of Clarence's death. We have considered what is most fitting to be done in these circumstances, and we have come to the conclusion that it will be most seemly to continue the administration of justice in the name of the Queen. *Pallida mors æquo pedes pulsat.*" Similar statements were made in other courts. On the funeral day, however (Wednesday, January 20), the courts adjourned at two, the entire business of the country almost being suspended during the hours of the mournful ceremony at St. George's

Chapel, Windsor. Impressive memorial services were held between the hours of three and four in the afternoon, both in the Temple Church and Lincoln's Inn Chapel. Both buildings were thronged by immense audiences, composed of judges, queen's counsel, barristers, and their friends. The service in the Temple Church was read by Dr. Vaughan, the Master of the Temple, and Canon Ainger, the preacher; while at Lincoln's Inn Dr. Wace, the preacher, and the Rev. C. I. Ball, the chaplain, officiated. Both services were prefaced with Chopin's magnificent Funeral March, and closed with the Dead March in Saul; while the special anthems and hymns were very carefully and effectively rendered. The late Duke of Clarence was a "Bencher" of the Middle Temple.

We are in the throes of an agitation for what is called Legal Reform. Even here on the spot it is by no means easy to determine whether the grievances alleged are substantial, or are not rather the difficulties which would, in one form or another, be met with under any possible system. In no department of human affairs is perpetual and uninterrupted motion possible; friction and its results assert themselves everywhere. The most obvious point for criticism in our legal system consists in the very large arrears of causes which await trial. In the Chancery Division of the High Court it is said that existing arrears could be overtaken, and similar accumulations for the future averted by the appointment of an additional judge; while at Common Law the reformers put their fingers on the circuit system and say, "Mend or end that, and all will be well." There can be no doubt that the circuit system requires at least investigation. Several times in the course of the year the greater number of the Common Law judges set out for all parts of the country, and with their dignified state and retinue impose upon the provincial imagination a due conception of the majesty of English Justice. Unfortunately, it is not infrequently the case that there are no causes for a judge to try when he arrives at his destination; this is what is called a "maiden" circuit, entitling the judges to receive a pair of white gloves, as a symbol of the prevailing innocency of the neighborhood, which also gives his lordship the opportunity of ventilating some pleasant rhetoric, in which he compliments the lieges on their immunity from crime. A graceful ceremony enough, and fully consonant with the mellow and traditional ease of our constitutional usages, but one not so obviously defensible on modern commercial principles, when the austere critics step forward to inveigh against the unnecessary waste of public time and public money. One of the suggestions is that the judges of the Queen's Bench should be relieved by extending the criminal jurisdiction of recorders and Courts of Quarter Sessions, and by concentrating the provincial business, criminal and civil, in a few large centres, while the effective disposal of Common Law cases would be secured by continuous sittings in London and Middlesex in never less than six Nisi Prius courts: such is part of the scheme formulated in the "Law Times," a weekly paper which, under the able and energetic editorship of Mr. Crump, Q. C., has for long prominently identified itself, if it has not to some extent even initiated, the reform movement. If for no more practical purpose than to intimate their respect for public opinion, the judges held a solemn conclave the other day under the presidency of the Lord Chancellor, as they are entitled to do in accordance with the provisions of the Judicature Act of 1873, to consider the procedure and administration of the courts and the general working of the legal system. The judges' meeting was thus wittily caricatured in the columns of the "Pall Mall Gazette": —

JUDGES IN COUNCIL.

An Unreported Meeting.

The proceedings of the Council of Judges, through their lordships' natural diffidence, not having been made public, the following realistic notes of what actually occurred may be of national interest: —

The meeting having been summoned for eleven o'clock, all the Chancery judges were in attendance at the stroke of the clock. They were closely followed by Mr. Justice Wright, who promptly complained of the Lord Chancellor's unpunctuality, and cited a case to show that a judge who was *non est* had been held to be a nonentity. Mr. Justice Chitty was suggesting that the Chancellor should make an affidavit to that effect, when Lord Halsbury entered and promptly took the chair.

Some of the other common law judges having strolled in, the proceedings commenced. Lord Halsbury said that in the few moments he could spare from attendance at the House of Lords he had called this meeting to discuss what they had done which they ought not to have done, or not done which they ought to have done. Mr. Justice Wright here objected to any ecclesiastical phraseology. The Chan-

cellor made a note of the objection by a dash on some blotting-paper. At this moment Lord Coleridge arrived, causing some disturbance in the proceedings. The Chief-Justice having embraced the Chancellor and the Master of the Rolls with much emotion, and having smiled benignly on the other judges, took his seat, where he reposed for the rest of the sitting.

Lord Halsbury said the first question to consider was whether the Civil Service order for compulsory retirement at sixty-five applied to the Judicature branch. He spoke without prejudice, being himself above all such jurisdiction; but he had on his list of applicants for possible vacancies several distant connections — Mr. Justice Hawkins, who had just come in, here interpolated that he had never considered himself a member of the *civil* service. (Laughter.) Mr. Justice Wills said if his conscience would allow him he would retire at once. Mr Justice Denman wished to inform the court that he would rot in his seat first.

The Chancellor thought it would be best to proceed to the next subject; namely, the blockheads in Chancery, — he meant the block in the Chancery Division. He was sure his learned brethren would be glad to hear that her Majesty, by his advice, had determined to appoint two new judges for that division (cheers from the Chancery judges, and cries of "Name!"); namely, Mr. Justice Mathew and Mr. Justice Vaughan-Williams. (Sensation.) Lord Coleridge, having just awoke, "ventured to propose a vote of thanks for the transfer of two such estimable colleagues of his own humble self. They had been already mortgaged to the Chancery Division, and now they were forever foreclosed. *Hinc illæ lachrymæ.*" The other Queen's Bench judges unanimously supported this vote; Mr. Justice Collins hoping they would enjoy themselves as much as he had in the Divorce Court last summer. A whispered colloquy now took place between Lord Halsbury and Lord Coleridge. During the pause Mr. Justice Lawrance was heard to inquire, "How the jeuces — he meant how the judges — of the Queen's Bench were to get along?" Lord Halsbury now resumed that no doubt it would occur to many to remark that this would diminish the strength of the Common Law bench. But he was of opinion, after consulting with the Lord Chief-Justice, that this could be remedied in two ways. First, he meant to throw the Admiralty and Probate work into one court. This would release Mr. Justice Jeune. (Murmurs.) Secondly, he regretted to say that the judicial time might be more, or rather less, economized. He was told by Lord Coleridge that some judges were not in their places by 10.30 A. M. (Here there were loud protests, and the proceedings becoming animated, the Chancery judges left the Council.) Lord Halsbury moved that the judges should enter the times of their arrival and departure in a public note-book. Mr. Justice Hawkins moved as an amendment that this should be done by the judges' clerks. This was carried by a large majority.

Lord Halsbury said that the only other topic for discussion was the circuit system, on which he moved three resolutions, — one for its extension, one for its limitation, and one for its total abolition. The divisions were equal on each proposal, and the Chancellor gave his casting vote in favour of all three. It was hereupon decided to reserve the matter for further consideration.

Mr. Justice Grantham then rose to move the health of the Chancellor, the Crown, the country, and her Majesty's Judges. Lord Justice Bowen moved, as an amendment, "that, the health of her Majesty's judges being ever under the tender solicitude of the Bar, they should go on to the previous question." "That question undoubtedly was," he said, "Why had they come there? or, as he should prefer to put it, Why should they not go?" This was greeted with uproarious cheers, and the Council dispersed at 1 30 P.M., the Lord Chief-Justice having already previously been called away by urgent domestic affairs.

The various alterations and changes proposed are without number, and in many instances of too technical a character to be of general interest. It is not likely that any very radical measures will be adopted in the near future, nor would this be desirable. The bulk of the proposals made by one and the other are too clearly empirical and inconsistent to support the hope that even the best of them would be better than what it is affirmed they ought to supersede.

* * *

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

IN his address on "Legal Journalism," delivered before the Illinois State Bar Association, Mr. Irving Browne gracefully compliments the "Green Bag." Speaking of the different law journals, he says: —

"Finally, that the bar are not completely engrossed in the practical is strongly evidenced by the success of a picturesque Boston monthly (The Green Bag), just entering on its fourth year, and boldly professing to be 'useless but entertaining,' the latter of which it decidedly *is*, and the former of which it decidedly is *not*.

WE fear that the following Michigan incident is not the only example to be found of perverted justice: —

ADRIAN, MICH., Jan. 25, 1892.

Editor of the "Green Bag":

A case occurred before a Circuit Court Commissioner in this city, which shows how little it sometimes requires to turn the scales of justice.

This commissioner, besides holding court, practising law, and raising geese, is an insurance agent. When recently informed that the Circuit Court had reversed one of his decisions, he remarked that he thought at the time he decided the case that he decided it wrong and it would be reversed on appeal; but if he had decided it against the plaintiff he would have lost his insurance, worth thirty dollars.

THE following good story comes from a Wisconsin subscriber: —

JANESVILLE, WIS., Jan. 16, '92.

Editor of the "Green Bag":

DEAR SIR, — An old woman who had lived with her husband many years consulted one of our young attorneys in regard to obtaining a divorce. She stated that her husband had deserted her, but she did not care so much about that; that he had not supported her properly, but she did not care so much about that; that he had sometimes been cruel to her, but she did not care so much about that; that he sometimes had used abusive language to her, but she did not care so much about that; but, she said, "he ain't a Christian." The young man was rather perplexed, and carried the matter to his preceptor, who, having heard the statement of the case, advised that instead of bringing an action for divorce, he bring an action for *conversion*.

Yours respectfully, J. M. W.

A PENNSYLVANIA correspondent favors us with the following: —

MY DEAR "GREEN BAG," — Years ago an old Penna. "Dutch" constable, named John Krieger, after making his quarterly return to the Sessions, was in the habit of calling for a little advice for some friend of his, usually putting the case hypothetically. One, I remember, he put thus: "Misther Schkwier, I vill you vonst somdings tell: posen I voot zell a feller somdings un he not bay me, 's isch a falsch petence, hah?" To which I answered: "Of course; any thing else, John?" "Na, dat vos juscht vot I tolt em; goot-pye."

The style of the inquiry reminds one of Justinian's definition for a very different thing, namely: "If a man sue, alleging that he has a right to the usufruct of a field, or a house, or a right of driving his cattle, or of drawing water on the land of his neighbor, this is a real action."

H. L. F.

THE following legal points in the famous Fisk Will suit and Cornell University are contributed by Judge Murray E. Poole, of Ithaca, New York: —

John McGraw, a wealthy lumber-dealer of Ithaca, New York, died May 4, 1877, leaving all his property to his only child, Jennie McGraw, who afterwards married Prof. Willard Fisk, of Cornell University.

At her death without issue, she left $300,000 to her husband, and several large bequests to other relatives, and made Cornell University residuary legatee of the remainder of her property, estimated to be worth $1,500,000, for a library and its support.

Had this bequest been carried out, it would have given Cornell one of the largest libraries in the world.

Professor Fisk retained Charles P. Bacon, Esq., a graduate of Cornell and an intimate friend, to contest the will, and young Bacon associated with him Gov. David B. Hill.

The contestants claimed: —

I. That the Charter of the University limited the amount of property which it could hold to $3,000,000, and that it already held that amount.

II. That she had given more than one half of her property to a charitable institution, rendering the will void under the law of the State of New York.

The University retained Hon. Samuel D. Halliday of Ithaca, who associated with him Judge Edwin Countryman of Albany.

The University contended: —

I. That the University did not own $3,000,000 worth of property, nor anywhere near that amount, and therefore could receive the whole or nearly all of the bequest. That the Western lands given by the United States Government were only held in trust, and therefore not a part of their absolute possessions.

II. That she had not given more than one half of her property to a charitable institution. That her estate, instead of being free, was encumbered with great debts, which made its value much less than was generally supposed.

Judge Douglas Boardman, ex-Judge of the New York Supreme Court, was the executor of her will, as he was also of her father's will.

The surrogate sustained the will, but the New York Supreme Court reversed his decision, which view was sustained by the New York Court of Appeals and the United States Supreme Court.

Governor Hill retired from the case on being elected Lieutenant-Governor and *ex-officio* trustee of the University, and Judge George F. Comstock, of Syracuse, took his place for the contestant, who had now associated his wife's other relatives with him in the suit.

Senator George F. Edmunds appeared for the University in court at Washington.

The decision of the court was that inasmuch as the university had the power of alienation of the Western lands, it therefore held the title in fee, and therefore already held the full amount which it was entitled to hold under the charter.

Chief-Justice Fuller and Justice Lamar dissented from the opinion of the court.

LEGAL ANTIQUITIES.

THE old minute books of the New York courts contain some interesting entries showing the wonderful changes that have been made in the past century in the criminal laws, particularly in the methods of punishing offences.

Patrick Halfpenny was convicted in the New York Oyer and Terminer in April, 1784, of "offering to pass *scienter* counterfeit bills of exchange," and the following judgment was rendered: "And it is considered by the Court now here that the said Patrick Halfpenny, for his said offense stand in the Pillory for one hour on the 10th instant between the hours of ten and two of the clock of the same day, and that he stand committed for three months: then to be discharged on payment of costs."

In the case of James McHanna, who was convicted of larceny on the same day, the record states: "On motion of the Attorney General the prisoner was set to the bar for judgment and it being demanded of him in the usual manner and form what he could say for himself why judgment of Death should not be passed against him According to Law, he prayed the benefit of clergy which was granted by the Court. Thereupon Ordered that the said James McHanna *als dicts* James Maurey be branded in the brawn of the left Thumb with the letter T in the presence of the Court, and that the Sheriff execute this order immediately, which was accordingly done."

John McKay, having been convicted of stealing a watch, was set to the bar of the Court, — "Whereupon it was ordered and adjudged that the said John McKay for the larceny aforesaid be whipped 39 Lashes on his bare back from the waist upwards, at the public Whipping Post on the first day of May next between the hours of Eleven o'clock in the forenoon, and one in the afternoon of that day, and the Sheriff of the City and County of New York do see this Judgment Executed."

A prisoner convicted of perjury was fined twenty pounds, imprisoned six months, and his usefulness thereafter as a witness destroyed, by the judgment which provided that he was "never to be received as a witness on the face of this Earth."

William, a negro, was sentenced to be whipped, the prisoner to be "carted round town, and receive the lashes at such public places as the Sheriff directs."

FACETIÆ.

A CERTAIN Mr. H—— once called upon Rufus Choate in the fall of the year, and asked him to accept a retainer in a certain case. Mr. Choate resolutely declined, and said that every minute of his time was taken up till Christmas. Mr. H—— quietly laid before him a bank-note for $500. Mr. Choate put it in his waistcoat-pocket, remarking, "Not a thing to do till the Fourth of July."

A CERTAIN learned judge at the Four Courts, says the "Law Gazette," is wont to doze during the more or less uninteresting speeches of counsel, and from time to time to awaken to ejaculate an odd remark in the course of a speech. An eloquent Q. C. was lately addressing his lordship on the subject of certain town commissioners' right to a particular water-way. In his address he repeated somewhat emphatically, "But, my lord, we must have water, we must have water." The learned judge thereupon awoke, and startled the bar with the remark, "Well, just a little drop, thank you, just a little. I like it strong."

THE chaplain of a convict prison asked one of his flock, who was in durance vile for manslaughter, what man he had killed. "It was a woman, my wife, and not a man," he replied; "but, sir," he continued, "it was altogether a private matter, with which the public has no concern."

JUDGE BIDDLE, the wit of Court-house Row, had before the bar of justice the other day a woman who wept most bitterly over her misfortunes. Her sobbing shook the court-room, and her tears, of no mean size, coursed in a great stream down her cheeks and to the floor. While she wept thus profusely, a prominent lawyer chanced in, who, seeing the prisoner and hearing her cries, asked of the bench, "What 's the matter with her?" "I 'm sure I don't know," was the judge's reply. "Apparently she 's waiting to be bailed out." — *Philadelphia Record.*

DANIEL WEBSTER, when in full practice, was employed to defend the will of Roger Perkins of Hopkinton. A physician made affidavit that the testator was struck with death when he signed his will. Webster subjected his testimony to a most thorough examination, showing, by quoting medical authorities, that doctors disagree as to the precise moment when a dying man is struck with death, — some affirming that it is at the commencement of the disease, others at its climax, and others still affirming that we begin to die as soon as we are born.

"I should like to know," said Mr. Sullivan, the opposing counsel, "what doctor maintains that theory?"

"Dr. Watts," said Mr. Webster, with great gravity, —

> "The moment we begin to live,
> We all begin to die."

"I WANT to contest my wife's will," said a countryman, breaking into a lawyer's office.

"Is she dead?" inquired the lawyer, for the want of something better to say.

"You bet," blurted out the visitor; "I would n't be contestin' it ef she wurz n't. You never knowed that woman, I guess."

A CERTAIN eminent leading counsel was celebrated at the bar for the following mode of examining a witness: —

"Now, pray listen to the question I am going to ask you. Be attentive; remember, you will answer as you please; and, remember, I don't care a rush what you answer," etc.

Lord Brougham, somewhat weary of these oft reiterated remarks, resolved to mortify the utterer of them; and one day, meeting him in the street, thus accosted him: "Ha! is it you, C——? Now, pray listen to the question I am going to ask you. Be attentive; remember, you will answer what you please; and, remember, I don't care a rush what you answer. *How are you?*"

THE LAWYER'S WISH.

MY friends, if you have aught of good to say
Of me or mine, oh, do not wait, I pray,
Till I am dead, then on my tombstone white
Your words of praise and commendation write;
For, though I like not flatt'ry, I am free
To state my wish, and that is, as for *me*
I'd much prefer the "taffy" while I live
To all the epitaphy you could give.

JEAN LA RUE BURNETT.

NOTES.

THE Supreme Court of Nebraska has handed down a decision in a very queer and unusual case, it being the case of the State *ex rel.* Thomas J. Scheibley against the school board of Ponca, Dixon County. This is the case wherein Scheibley applied for a peremptory writ of mandamus to compel the school board to reinstate in the Ponca high-school his daughter Anna, who was expelled because she refused to study grammar, which was a part of the established course. The court holds that parents have the right to make a reasonable selection from the prescribed studies for the children to pursue, and this selection must be respected by the trustees, as the right of the parent in that respect is superior to that of the trustees and the teacher. The court also held that it is apparent that the excuse of the school board and teacher is insufficient, and that they were not justified in expelling Anna Scheibley from the school, wherefore a peremptory writ of mandamus is awarded her for reinstatement.

A POLICEMAN of New Bedford, Mass., filed a petition for a writ of mandamus to compel the mayor and aldermen to reinstate him as a police-officer of that city. He had been found guilty of soliciting money for political purposes, which was a violation of a rule of the Police Department, but he contended that he had a right to express his political opinions. Judge Holmes, in giving the opinion of the full court (Massachusetts Supreme), said: "A person may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." — *To-day.*

EVERY good detective has to some extent his own way of working, which is varied, of course, according to the circumstances. We may say, however, that as a rule the Parisian agent has a freer hand, and works in a somewhat bolder, more self-reliant manner than his English colleague. This follows from his isolation; he is less helped by "information received," and too badly paid to buy it; so he is forced to acquire it by his own exertions.

A favorite method is to assume the disguise of a workingman or hawker; and here it may be said that the use of an elaborate make-up exists now only in books. Every zealous hand has his own little wardrobe, and the simpler the better; the most effectual disguises are those which best assimilate the wearer to common life. The Parisian has two in particular, — the blouse and the workman's apron. "Shadowing" is always done by two men, one some little way behind the other. Each carries a change of dress, to wit, a blouse wound sash-wise round the waist, and a casquette carried inside the shirt. The moment the first man fancies himself perceived, he gives place to the second, and dropping behind slips the blouse over his jacket, and exchanges his felt hat for the casquette. Thus metamorphosed, he resumes his place. — *The Saturday Review.*

THE decision of the court-martial just held at Bégiers is one of the most eccentric that have yet gone upon record. A cavalry sergeant, it seems, had been guilty of gross ill-treatment towards one of the recruits. Having lost patience with the novice, he ordered the man's hands to be tied behind his back as he sat on his horse, and the result was that in taking a jump he fell and broke his arm. The sergeant was arraigned before a Council of War at Bégiers; and his counsel asked that he might be acquitted, not because the charge of ill-treating a recruit could be refuted, but because the "anarchist press had made the matter the subject of a violent attack on the army in general." Extraordinary, almost incredible, as it may appear, the court took this view of the case, and promptly discharged the prisoner, as a gentle hint to civilians to mind their own business. — *Evening Post.*

IN the case of The United States *vs.* C. N. Caspar, of Milwaukee, who was charged with using the mails for the transmission of obscene literature, Judge Jenkins administered a scathing rebuke to Mr. Comstock, who had resorted to most extraordinary methods to obtain evidence against the defendant.

"The Court," said the judge, "cannot approve the conduct of the government officer who has lured the defendant into the commission of a crime. I am aware that such methods are often pursued in dealing with alleged criminals, but I am not willing to lend my assent to such doctrine. If government officers cannot detect criminals and enforce laws without resorting to dishonest practices, they

had better resign their positions. Mr. Comstock is known as a very zealous agent in preventing the spread of obscene literature; but in this case, instead of appealing to State law, which is ample for the emergency, he has seen fit to assume the name of another and lure the defendant into crime. There are some things in this world that are much worse than sending obscene matter through the mail. One of them is the practice of fraud and lying, of which Mr. Comstock has apparently been guilty. He may be able to reconcile such conduct to the laws of God and morality, but this court is not."

This outburst of righteous indignation against the means often employed by these self-constituted guardians of the public morals will meet with hearty approval.

Recent Deaths.

DAVID CLOPTON, Associate Justice of the Supreme Court of the State of Alabama, died on February 5. He was born in Putnam County, Ga. At Macon, Ga., Judge Clopton was fitted for college, and he was graduated from Randolph-Macon, in 1840, with the first honors of his class. After leaving college he read law at Macon under A. H. Chappel, and was there subsequently admitted to the bar. He was twenty-one years of age when he began the practice of law at Griffin, Ga., and from there, at the end of eighteen months, moved to Tuskegee, Ala, where he was living at the outbreak of the war. He represented his district in the United States Congress in 1859–1860, and was a seceding member in 1861. In the spring of the latter year he enlisted as a private in the Twelfth Alabama Infantry. In the fall of 1861 the people of his district elected him Representative to the regular Confederate Congress, of which body he remained a member to the end of the Confederacy. He returned to Tuskegee, resumed the practice of law, and in the fall of 1866 moved to Montgomery, where he formed a partnership with George W. Stone (the present Chief-Justice of the Supreme Court) and Gen. James H. Clanton, under the style and firm name of Stone, Clopton, & Clanton. General Clanton having been killed in 1869 at Knoxville, Tenn., the firm became Stone & Clopton. This firm existed until Stone was appointed by Governor Houston (1876) to the Associate Judgeship of the Supreme Court. After that Judge Clopton formed a partnership with Hon. H. A. Herbert and William L. Chambers, which partnership lasted four years. Mr. Herbert's desire to remain in Congress led to its dissolution, and Mr. Chambers entered the banking business. In 1885 Governor O'Neal appointed Judge Clopton to the Supreme Court Bench to fill a vacancy, and in the following year he was elected for the regular term of six years.

As a lawyer, judge, statesman, and citizen, Judge Clopton was an ornament to his adopted State; and his death leaves a gap which it will be hard to fill.

WILLIAM H. KING, one of the best known lawyers of the State, and one of the leading members of the Chicago Bar, died February 6. Mr. King was born in Clifton Park, Saratoga County, N. Y., Oct. 23, 1817. After receiving a common school education he entered Union College, from which institution he graduated in 1846. In 1879 the college conferred upon him the degree of LL.D. Immediately after graduation he studied law with the Hon. John K. Porter, of Waterford, N. Y., and was admitted to practice in 1847. He remained in Waterford until 1853, when he went to Chicago. During his long residence in that city he held many places of honor and trust. He was one of the founders of the Chicago Law Institute, and one of its first presidents. He was for several years President of the Chicago Board of Education, and King School was named for him. He was also a member of the State Legislature, and was recognized as one of the ablest debaters and best orators of that body.

ROSCOE B. WHEELER, a prominent lawyer in Detroit, died on February 2. He was a native of Michigan, and was born at La Grange, June 5, 1848. In 1872 he moved to Detroit, and a year later became a resident of Niles, where he engaged in the manufacture of baskets. He afterward located at Peru, Ind., and engaged as travelling salesman for Gardner, Blish & Co., at that time the most extensive manufacturers of baskets in the United States. Later on he returned to this city, and worked for a time in the Beckwith foundry, and still later went to Detroit and opened a patent-law office, where he resided until his death.

When Mr. Wheeler engaged in the practice of patent law, he found a business that was at once congenial to his tastes, and to which he was naturally adapted. He was one of the pioneers in this line of work in the State, and amid many discouragements built up a business of which any man might be justly proud. In the trial of interference and infringement cases he was often pitted against some of the best legal talent of his profession, and always with credit to himself and satisfaction to his clients. He was also an inventor of ability. As a man he was possessed of those genial qualities which made him a valued friend and excellent citizen, a kind husband and indulgent father. He was stricken down just as manhood's powers were reaching their zenith, and pleasant memories of the man will long remain with those who knew him best.

REVIEWS.

THE MICHIGAN LAW JOURNAL makes its first bow to the public with its February number. It is a fitting companion to the journals published by the other law schools in the country, and the University of Michigan has reason to be proud of its offspring. Tastefully gotten up, filled with valuable and interesting matter, this new venture ought to meet with a cordial reception, and we have no doubt that it will. Among the more important articles in this number are "Embarrassments to Legal Education," by Prof. J. C. Knowlton; "Methods of Appointing Presidential Electors," by Hon. Thomas M. Corley; and "Three Corporation Cases in 139 U. S.," by Hon. Alfred Russell.

THE initial article in the NEW ENGLAND MAGAZINE for February is one dealing with the life and work of Corot, the great French painter, written by his godson, Camille Thurwanger. "Some Letters of Wendell Phillips to Lydia Maria Child" will recall many memories of the great orator. All interested in the material development of New England will turn to George A. Rich's article on "The Granite Industry in New England," which is illustrated by Louis A. Holman and J. H. Hatfield. Walter Blackburn Harte contributes a critical estimate of Walt Whitman's work and genius, and a short story of journalistic life called "John Parmenter's Protégé." Sam. T. Clover writes a clever article on "The Prairies and Coteaus of Dakota." Winfield S. Nevins's valuable series, "Stories of Salem Witchcraft," is continued; and Caroline Hazard contributes a story, "A Tale of Narragansett." C. M. Lamson writes on the "Churches of Worcester."

ALTHOUGH last in the table of contents, the article of first importance in the February CENTURY is the one written by Mr. C. C. Buel on "The Degradation of a State; or, The Charitable Career of the Louisiana Lottery." The article is the result of a personal investigation by the author into the history, methods, and designs of this just now notorious institution. The other contents of this number are "The New National Guard" (illustrated), by Francis V. Greene; "Characteristics," III., by S. Weir Mitchell, M.D.; "The Jews in New York," II. (illustrated), by Richard Wheatley; "Recent Discoveries concerning the Gulf Stream" (illustrated), by John Elliott Pillsbury; "Richard Henry Dana," by Darwin E. Ware; "Pioneer Days in San Francisco" (illustrated), by John Williamson Palmer; "Reffey," by Wolcott Balestier; "Titian" (illustrated), by W. J. Stillman; "De Hant er Buzzard's Nes'" (illustrated), by Virginia Fraser Boyle; "The Australian Registry of Land Titles," by Edward Atkinson; "Original Portraits of Washington (illustrated), by Charles Henry Hart; "Heart of Hearts," by Katharine Lee Bates; "Monsieur Alcibiade," by Mrs. Burton Harrison: "The Naulahka," a Story of West and East," IV., by Rudyard Kipling and Wolcott Balestier.

HARPER'S MAGAZINE for February contains the beginning of a remarkably attractive series of papers describing a canoe voyage in 1891 down the Danube, "From the Black Forest to the Black Sea," by Poultney Bigelow. Julian Ralph contributes to this number "A Skin for a Skin," in which he describes the fur-trading industries of British North America and the operations of the once powerful Hudson Bay Company. Another paper of peculiar historic as well as local interest is an account of the "Old Shipping Merchants of New York," written by George W. Sheldon. A valuable article on "The Royal Danish Theatre," illustrated by Hans Tegner and others, is contri-

buted by William Archer. The very interesting series of "Personal Recollections of Nathaniel Hawthorne," by Horatio Bridge, is continued. "Athelwold," a tragedy in five acts, by Amelie Rives; "The Little Maid at the Door," a story of the New England witchcraft delusion, by Mary E. Wilkins; "Marie," another of William McLennan's inimitable French-Canadian sketches; and "Fin de Siècle," a delightfully entertaining character sketch by Robert C. V. Meyers, make up the fiction of this number.

BESIDE the complete novel, "Roy the Royalist," by William Westall, in LIPPINCOTT'S MAGAZINE for February, an interesting table of contents is provided for the readers of that popular journal. Mr. Chambers of the "New York World" contributes an interesting paper entitled "The Managing Editor;" and Mr. Hermann Oelrichs a solid article on "The Science and Art of Swimming." Topics of national importance are handled by Julian Hawthorne, who has lately been interviewing the heads of departments at Washington, in "Secretary Rusk's Crusade," and by Henry Clews, who writes with authority of "The Board of Trade and the Farmer."

SCRIBNER'S MAGAZINE for February contains an unusual number of illustrated articles, namely: "Station Life in Australia," by Sidney Dickinson; "A Model Working Girl's Club," by Albert Shaw; "American Illustration of To-day," second paper, by William A. Coffin; "The Revenue Cutter Service," by Percy W. Thompson and Samuel A. Wood; "Washington Allston as a Painter;" and "The Arctic Highlander," by Benjamin Sharp. The fiction includes short stories by Octave Thanet, Edwin C. Martin, Bliss Perry, and the sixth instalment of "The Wrecker," by Robert Louis Stevenson.

A MERE glance at the table of contents of the February ATLANTIC discloses a feast of literary good things. The bill of fare is as follows: "The Pageant at Rome in the Year 17 B. C." by Rodolfo Lanciani; "With the Night," by Archibald Lampman; "Don Orsino," IV., V., by F. Marion Crawford; "The Nearness of Animals to Men," by E. P. Evans; "A Venetian Printer-Publisher in the Sixteenth Century," by Horatio F. Brown; "Her Presence," by Louise Chandler Moulton; "The Descendant of the Doges," by Harriet Lewis Bradley; "What French Girls Study," by Henrietta Channing Dana; "Home-Thrust," by Charlotte Fiske Bates; "An Echo of Battle," by A. M. Ewell; "A Journey on the Volga," by Isabel F. Hapgood; "Studies in Macbeth," by Albert H. Tolman; "The Border-State Men of the Civil War," by Nathaniel Southgate Shaler; "The League as a Political Instrument;" "The Short Story;" "Indian Warfare on the Frontier."

SIR EDWIN ARNOLD, who has been enjoying an interesting trip through the United States, has made a careful study of the conditions which govern the family in Japan, and embodies his ideas in a paper called "Love and Marriage in Japan" in the February number of the COSMOPOLITAN. The article is illustrated by the quaintest possible Japanese sketches, running down the sides and across the bottom of each page. An excellent photograph of W. D. Howells serves as a frontispiece, and his work as a writer of fiction is reviewed in the same number by H. H. Boyesen. The President of Johns Hopkins University gives a most practical paper for parents on "Boys and Boys' Schools," illustrated by cartoons of the famous Attwood. Murat Halstead turns back lovingly to his early farm days, and tells of the "Pets and Sports of a Farmer Boy." The petroleum industry, fully illustrated: "An Afghan Story," by Archibald Forbes; "The Story of the Brazilian Republic," by Adams, late minister to that country; and "The Leading Amateurs of the United States in Photography," are other leading articles of the month.

BOOK NOTICES.

THE STUDY OF CASES. A Course of Instruction in Reading and Stating Reported Cases, Composing Head-Notes and Briefs, Criticising and Comparing Authorities, and Compiling Digests. By EUGENE WAMBAUGH, Professor in the Law Department of the State University of Iowa. Little, Brown, & Co., Boston, 1892. Law sheep, $3.50 net. Cloth, $3.00 net.

In this work Mr. Wambaugh treats of a subject of the greatest importance to legal practitioners, and one which, strange to say, has never before engaged

the attention of any of our legal writers. A knowledge of the proper methods for determining the pertinence and weight of reported cases is, unfortunately, confined almost exclusively to what we may term "expert" lawyers, and the young practitioner is frequently perplexed and in doubt as to whether certain decided cases have or have not any real bearing upon the subject-matter he may have in hand. In the opening portion of this volume Mr. Wambaugh fully and yet concisely explains the best methods for determining the pertinence of reported cases, and, that the student may acquire a mastery of these methods by actual practice, the remainder of the volume is devoted to cases for study. The intention of the author is "that the student shall state the cases, discover the doctrines of law established by them, compose head-notes, point out *dicta*, make all possible comments as to the weight of the decisions, and compile a digest. We know of no work of greater importance to the student, or one which will render him more material aid in preparing for the practice of the law, than this volume of Mr. Wambaugh's. It should be adopted as a text-book by every law school in the country.

A Selection of Leading Cases in the Criminal Law (founded on Shirley's Leading Cases), with Notes. By Henry Warburton. Stevens & Sons, London, Eng., 1892. Cloth, $2.70.

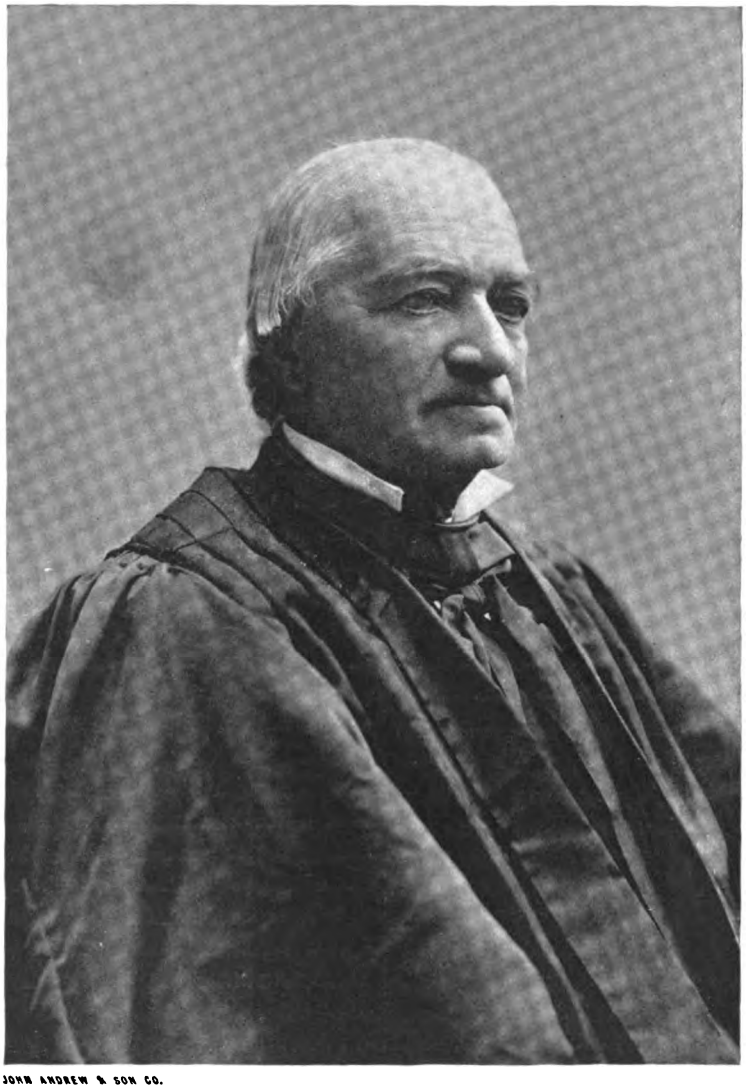
This work is founded on Shirley's Leading Cases in the Criminal Law, and the author's aim has been to make the collection of cases given of general use for practitioners as well as for students. The principal offences and points of procedure with which a practitioner in criminal law has to deal will be found to be fully covered in this volume. The author has had the advantage of bringing to his aid a long experience in criminal practice, and his selections have been made with care and good judgment. The notes are very full, and contain much valuable matter.

Pleading at Common Law and under the Codes. By George Wharton Pepper, A.B., LL.B. Edward Thompson Company, Northport, Long Island, N. Y., 1891.

This admirable monograph on Pleading was originally prepared for the American and English Encyclopædia of Law, by Mr. Pepper, who is the Lecturer on Pleading in the Law School of the University of Pennsylvania. It has been reprinted in its present form for the use of the students who are under Mr. Pepper's instruction. Its use, however, will not be limited to that one law school, for we are sure that other lecturers upon the subject will be glad to avail themselves of this excellent work. It is a remarkably clear and concise presentation of a subject which the average law student finds exceptionally difficult. We heartily recommend it to our legal teachers as well as to students.

A Treatise on the Law of Private Corporations, divided with respect to Rights pertaining to the corporate entity as well as those of the corporate interests of members, Remedies for the enforcement and protection of these rights and interests, and Legislation amending and repealing charters, regulating rates and conduct of business, and taxing stock franchises and other corporate property. Containing a full and complete exposition of principles both ancient and recently developed, with references to authorities in England and all the States down to date of publication. By J. Carl Spelling, of the San Francisco Bar. L. K. Strouse & Co., New York, 1892. Two vols. Law sheep, $12.

Considering the number of works on this important subject which are already at the command of the profession, a writer must indeed be bold who dares to venture into this well-worked field. A careful examination of Mr. Spelling's treatise, however, demonstrates the fact that good as previous works on Private Corporations may have been, there was still room left for improvement, and the author has not been slow to avail himself of the opportunities presented to him. In one respect, certainly, the present work greatly excels its predecessors, and that is in the division of the subject. This division is fully illustrated in an analytical plan which precedes the opening chapter, and which will prove of great value to the reader. Subjects which have heretofore been treated in isolated chapters are classed and subdivided according to their relation to the whole subject. On one point we fully agree with the author, who does not believe that there is any special merit in citing numberless cases. He believes, and so do we, that the citation of one or two of the latest decisions in a State wherein former decisions in the same State are cited and reviewed will yield space which can be better devoted to development of principles than to a long string of cases, which will necessarily come to the notice of the practitioner upon examination of the latest decisions. Mr. Spelling's notes are very full, and evidently prepared with great care; and in cases where the law is unsettled or the decisions conflicting, he does not hesitate freely to express his individual opinion. Altogether this work is a valuable addition to our legal text-books, and should receive an appreciative endorsement by the profession.



JOHN ANDREW & SON CO.

Jos: P. Bradley

The Green Bag.

VOL. IV. No. 4. BOSTON. APRIL, 1892.

MR. JUSTICE BRADLEY.

BY FRANK W. HACKETT.

I HAVE been asked to prepare a sketch of the late Mr. Justice Bradley, of the Supreme Court of the United States, who died at his home in Washington on the 22d of January last. In complying with the request, I am not unmindful that the scope of this publication admits of presenting but little more than the merest outline of what he was as a lawyer, a judge, and a man.

JOSEPH P. BRADLEY[1] came of a line of sturdy English ancestry. The earliest of the name in this country was Francis Bradley, the date of whose coming from England is said to be 1638. From the records of the New Haven Colony, it appears that in 1650 Francis Bradley was a cadet in the family of Gov. Theophilus Eaton. In 1660 he removed to Fairfield. He was married to Ruth, daughter of John Barlow, an ancestor of Joel Barlow, the poet. The subject of this sketch was the fifth in descent to bear the name of Joseph.

In 1791 his grandfather removed from Connecticut to Berne, a little town in Albany County, N. Y., about eighteen miles southwest from the city of Albany, in the region of the Helderberg Hills. Here on an elevated spot, situated amid beautiful scenery and in sight of the Catskills, the future Justice was born, March 14, 1813. His father, Philo Bradley, was a farmer well-to-do in circumstances, whose liking for books was attested by the small but well-selected library that he owned, consisting mainly of historical and mathematical works. "My grandfather," says the Justice, in notes upon the Bradley genealogy, "had followed the joint trade of tanner, currier, harness and shoe maker. He dug and built tan vats as soon as he had settled his farm. We always tanned our own leather, and some for our neighbors. We made our own harness and shoes." After alluding to sundry other means of self-support that marked the lot of the farmer of that day, he concludes significantly: "I presume that very few men can look back to such absolute independence as this. Of course, such a variety of employment occupied almost every hour of the year; and the devil could very seldom find idle hands on our farm for his purposes."

His great-grandfather was a soldier of the Revolution, and his grandfather served in the War of 1812. They both reached a hearty old age, and the Justice could remember them well. His mother was Mercy, daughter of Daniel and Hannah (Howland) Gardiner, of Newport, R. I. She was a woman of superior mental endowments. The son touchingly says of her: "The charm of our home depended greatly on the good sense, native shrewdness, sweet temper, and unalloyed goodness of my mother." Mr. Justice Bradley loved to tell his children how, when discouraged over a lesson, she would gently draw him to her side, and with a word or two start him on

[1] His baptismal name was Joseph. The letter "P" he adopted by way of distinction; it is not the initial letter of a name.

the right road, leaving him to surmount the difficulty for himself.[1]

Joseph was the eldest of eleven, — six boys and five girls. He did his full share of work upon the farm, and made himself generally useful, as was expected of the oldest boy. One of his duties used to be, when but a mere lad, to haul wood and other products of the farm to Albany for a market; and while toiling over the long hilly roads, perhaps of a dark winter's night, he would be working out the processes in his head of some mathematical problem. He did his farm work thoroughly, and became expert at it.

As a boy he evinced a desire for knowledge that would not be satisfied until he had got to the bottom of things. His mother taught him the alphabet, with the result that the little fellow appeared to cherish an idea of his own as to the precise number of letters that belonged in it. "Is that all?" he inquired; nor was he content with the assurance that there were no more. His mother wisely let him alone. Taking down a volume almost as big as himself, he began turning leaf after leaf until he had actually gone through it, from cover to cover, in his persistent search.

Only a few months' schooling was to be had; but Joseph made the most of it, for he was eager to learn. A book — whether of history, theology, poetry, it mattered not — was to him a delight. His uncle had charge of a circulating library,[2] the volumes of which the boy devoured, as indeed he did all the reading matter of the village on which he could lay hand; but it was observed that he early showed a marked preference for a book that taxed his thinking faculties, such as a mathematical work or a treatise on logic. He was a natural mathematician, and he had soon mastered the principles of surveying. Knowing as he did all the farmers of the neighborhood, he was, it seems, at no loss for employment among them as a surveyor. At the age of sixteen he taught a country school, a source usually of more self-discipline than income; and he repeated the experiment for several successive winters.

Young Bradley was resolved to go to college, and to earn the money to pay his own way there. This absorbing purpose in view, he was gladdened at receiving the offer of a clerkship in a store in New York City. Dressed in a suit of homespun, made by his good mother, he went to Catskill Landing, meaning to take the steamboat down the river. When the boat came in sight, our young friend was standing expectant upon the wharf. It so happened — for winter was not far off — that ice had formed along the shore; and the steamboat, after making two or three ineffectual attempts at a landing, veered off and stood down the stream, her last trip for the season. The youthful traveller turned away slowly, it seeming to him almost that the chance of a lifetime had gone. Reaching home, he was met by the kind-hearted minister of the Dutch Reformed Church, the Rev. Abraham Myers. The worthy man drew from young Bradley his story, and upon the spot offered to take him into his family, and to teach him Latin and Greek in preparation for college. This generous proposal accepted, a prospect seemed to open before the ambitious youth that he too might some day become a minister.

In 1833 Mr. Bradley was entered as a freshman at Rutgers College, New Brunswick, N. J., the resort chiefly of young men from families of the Dutch Reformed faith. Here he at once proved himself a remarkable scholar. Indeed, so rapid were his strides that he was soon promoted, and allowed to join the class of 1836. He was somewhat older than the average of the class that he had now entered, and he easily took the lead. What most astonished every one was the

[1] His taste for mathematics came from her. Once turning to a young relative, he asked: "What day of the week was the Fourth of July, 1776?" Getting no reply but a shake of the head, he said (illustrating): "This is the way you do it;" and added: "My mother could have answered that at once."

[2] Another uncle generously gave him a thousand dollars to expend in the purchase of law books, upon his admission to the bar.

extent to which he ranged through the library of the college; for it is told of him that scarcely a book, pamphlet, or manuscript was to be found there with whose contents he had not gained some acquaintance. Among those of his classmates who subsequently reached distinction were Cortlandt Parker (his room-mate), the well-known lawyer of Newark; Frederick T. Frelinghuysen, late Secretary of State, both of them his devoted friends; and William A. Newell, afterward Governor of New Jersey.

While at college he completed a course in theology, but before graduation he had given up the plan of becoming a minister, and had decided to study law as a profession. Consequently, in November, 1836, after a few months spent in teaching a classical school, he entered the law office of Archer Gifford, of Newark, a gentleman of respectable attainments, then Collector of Customs. Some of Mr. Bradley's friends, thinking perhaps the example of his preceptor a good one to follow, managed to secure an appointment for the young student as an inspector in the Custom House, to aid in his support while gaining a profession. "I want to feel myself qualified to be Chief-Justice of the United States," said he to a confidant at this period. In 1839 he passed an examination before the full court at Trenton, and shortly afterward opened a law office at Newark.

The incidents attending Mr. Bradley's thirty years at the bar differed but little from those that usually mark the career of the successful American lawyer. The winter of 1841 he spent at the State capital studying legislation and writing letters to the Newark "Daily Advertiser," a journal of which he long remained an occasional contributor. His letters from Trenton attracted wide and favorable attention for fulness and precision of statement. About this time the Camden and Amboy Railroad Company were obliged, in order to silence public clamor, to meet an investigation of their accounts. Mr. Bradley was recommended as a young man skilful at figures and a good business lawyer. The officers of the company engaged his services; and so gratified were they at his management that they retained him as permanent counsel of the road, of which he became also a director. He was likewise made actuary of a mutual life insurance company, in which capacity he devised a new system of life-tables.

Among the more important cases in which he was of counsel are the Meeker Will case, the Passaic Bridge case, the New Jersey Zinc and the Belvidere Land cases.[1] His defence of Harden, a Methodist minister, indicted for wife-poisoning, and the still more celebrated case of Donnelly (tried for murdering a friend at Long Branch), brought him into prominence as an intrepid and powerful advocate. Mr. Bradley's admission to the bar of the Supreme Court of the United States was moved by Mr. Ewing, Dec. 27, 1848.

Notwithstanding his large and constantly increasing law practice, Mr. Bradley managed to set apart no inconsiderable portion of his time for the study of subjects outside of his profession. He applied himself to scientific investigation, to problems of the higher mathematics, to astronomy, physics, and mechanics. With the principles of botany, chemistry, geology, and kindred sciences he became thoroughly familiar; and he kept pace with the new discoveries that from time to time were being made in these departments. As if this were not enough, he added other foreign languages to those which he had already known, reading the works of many great authors in the original. He became, for instance, one of the most accomplished Biblical scholars in the country. So constant was he in his study of the Scriptures, that he always kept beside him a

[1] As an instance of his indefatigable industry in mastering every detail involved in a case, it may be mentioned that while preparing to argue a question relating to the water-power at Paterson, he set to work and with his own hands conducted a series of experiments to ascertain the pressure of a flow of water under varied conditions, as to size of orifice, and the like, reaching the result through mathematical calculations and formulas of his own.

copy in the original Greek, which even at church he never failed to consult. He delivered in various places, just before coming to the bench, lectures upon the English Bible, in order to correct misstatements current upon the subject. During the later portion of his life his linguistic acquirements would have been considered remarkable in a professed student of languages.[1]

He let no day pass that he did not, with tenacity of purpose seldom equalled, labor to widen the boundaries of his knowledge, and to make all that he had learned so truly his own that he could call it into use at a moment's notice. "In order to be an accomplished lawyer," he has said, "it is necessary, besides having a knowledge of the law, to be an accomplished man, graced with at least a general knowledge of history, of science, of philosophy, of the useful arts, of the modes of business, and of everything that concerns the well-being and intercourse of men in society. He ought to be a man of large understanding; he must be a man of large acquirements and rich in general information." Such was his conception of the standard to be striven for in the profession he had chosen.

Mr. Bradley was a Whig, and afterwards a Republican. In 1862 he ran for Congress, but he was defeated by the candidate of the Democratic party. His name headed, in 1868, the Grant and Colfax electoral ticket of New Jersey. At the outbreak of the Rebellion, although he had been conservative to the last degree for the sake of peacefully preserving the Union, Mr. Bradley came forward, and in words of ringing eloquence appealed to the people to sustain President Lincoln, and uphold the flag. This timely public utterance was most helpful to the cause. To his active patriotism was it due that the New Jersey railroads at this crisis put their entire equipment at the free disposal of the government.

The reputation of such a man could not, of course, be confined to one State or neighborhood. President Grant, on the 7th of February, 1870, sent to the Senate the name of Mr. Bradley, to be an Associate Justice of the Supreme Court of the United States, a selection that met with very general approval. The nomination (as well as that of Judge William Strong, of Pennsylvania, which had been sent in at the same time) was confirmed, and Mr. Justice Bradley was assigned to the fifth, or Southern Circuit. Aside from the honors of the office, Mr. Justice Bradley had reason to welcome his elevation to the bench because of his health, which imperatively required a change of scene and of occupation.[1]

The Supreme Court opinions of Mr. Justice Bradley, reported in the sixty-seven volumes from the ninth of Wallace to the one hundred and forty-first United States, inclusive, extend over a formative period of our judicial history. These opinions deal with a variety of subjects, — with questions of constitutional law and of the construction

[1] It is told of him that a lady once showed to him a ring, on which was an inscription, which she said she had applied to many learned men to translate, but she had found no one to decipher. He thereupon purchased books upon Arabic, and set himself to the study of that tongue. At a later day he had the satisfaction of telling her what the inscription meant.

[1] To the intimate friend of his student days, already referred to, he writes, April 3, 1870: "As to my elevation to the bench, the words of Coleridge keep coming to my mind: —

> 'It sounds like stories from the land of spirits
> If any man obtain that which he merits,
> *Or any merit that which he obtains.*'

And I ask myself does not that indeed apply to me? Am I not really one that hath obtained that which he doth not merit? I often feel so. I often think how many, many men there are who are far superior to me, and far better fitted for the place to which I have been called. And then I am driven again to look for aid from above. I have contemplated and tried to appropriate this morning the words of Solomon (1 Kings iii. 7–9): 'O Lord my God, thou hast made thy servant [judge]; and I am but a little child: I know not how to go out or come in. And thy servant is in the midst of . . . a great people, that cannot be numbered nor counted for multitude. Give therefore thy servant an understanding heart to judge [this] people, that I may discern between good and bad; for who is able to judge this . . . so great a people? I repeat this prayer very often, as bad a Christian as I am; and I hope it may be answered."

of acts of Congress, or of State legislatures, with proceedings at civil law, with suits in admiralty and marine insurance, with patent causes, railroad litigation, the validity of municipal bonds (especially bonds in aid of railroads), with habeas corpus; in short, with well-nigh every subject of legal inquiry embraced within the jurisdiction of this great tribunal.

No man ever sat upon the bench of the Supreme Court of the United States, who in the extent and variety of his knowledge has surpassed Mr. Justice Bradley. He was a very learned man; at the same time his learning was not a clog. On the contrary, it was of inestimable value to the Court, so practical was his turn of mind. He possessed that first requisite for largest usefulness upon the bench, a keen perception of the precise limits beyond which the language of a decision ought not to go. At the argument he was surprisingly quick to detect what the facts of a case really meant; and when he put a question to counsel, it went straight to the point.

Acute as he was to discover nice or even subtle distinctions, he viewed a legal controversy in its largest aspect, and sought to apply to it broad principles of justice. It has indeed been said of him that he was not free from an inclination to bring into prominence a line of reasoning that had scarcely occurred to his brethren; and such was the persistency of his nature, to push it to undue bounds in a subsequent case. This trait, however, we may regard as incident to qualities with which only a great judge is endowed; namely, foresight to discern the need of moulding the law anew to meet the changing condition of the times, and courage to take the step. Mr. Justice Bradley's opinions, as the bar well know, are logical and persuasive; and their style is of transparent clearness. No one can read them without being impressed with the intellectual grasp and the extraordinary mental resources of their author.

The retirement, in 1880, of Mr. Justice Strong left it open for Mr. Justice Bradley to be transferred to the third circuit (Pennsylvania, New Jersey and Delaware), and the change was accordingly made. It may be remarked, in passing, that upon his circuits Mr. Justice Bradley was prompt and efficient in the despatch of business, and popular with the bar.

The electoral commission of 1877, and Mr. Justice Bradley's services thereon, have passed into history. It is no secret that he entertained serious misgivings as to the wisdom of subjecting the Supreme Court to the strain of such a responsibility, — a strain that by reason of events not to be foreseen came to bear with special weight upon himself. Nevertheless he met this new duty with the like integrity of purpose and perfect fearlessness that marked the performance of his customary judicial labors. Aspersion and falsehood he bore in silence, content to await the verdict that the country should give, after the passions of the hour had cooled.

In 1859 Lafayette College conferred upon him the degree of Doctor of Laws. College and historical societies and other bodies from time to time invited him to deliver addresses before them, most of which have been printed. Of these I may specially mention a lecture delivered in 1884 to the law students of the University of Pennsylvania, upon "Law as the Bond and Basis of Civil Society." Discourses at such seasons are apt to assume the didactic form, and however useful and appropriate to the occasion, are ordinarily of little permanent value. Not so this production. Had its author given nothing else to the public, this address alone would, I venture to assert, have entitled Mr. Justice Bradley to rank among the most profound thinkers of his day.

The Justice's pen was busy in various directions. He contributed two articles — one on Law, the other on Government — to the American Supplement of the Encyclopædia Britannica (1889). Sketches of Salmon P. Chase in Johnson's Encyclopædia (1875), and of John Marshall, in the Cyclopædia of

American Biography (1888), reveal with what skill he could portray character. "Some men," he writes, "seem to be constituted by nature to be masters of judicial analysis and insight. Such were Papinian, Sir Matthew Hale, and Lord Mansfield, each in his particular province. Such was Marshall in his. They seemed to handle judicial questions as the great Euler did mathematical ones, with giant ease." Felicitous words these from one who, it is not too much to say, was himself worthy of being styled "a master of judicial analysis and insight.[1]

In October, 1844, he was married to Mary, youngest daughter of Chief-Justice Hornblower, of New Jersey. Mrs. Bradley, a son, and two daughters, survive him.

The Justice's home in Washington was on I Street, at the corner of New Jersey Avenue. The house had been built by the late Stephen A. Douglas, and for a brief season occupied by that distinguished Senator. A spacious room, originally designed for a ballroom, accommodated the Justice's law library, which numbered upward of five thousand volumes. A still larger general library attested the scholarly and catholic taste of its owner. It is to be remarked of the latter collection that it was not the mere accumulation of years, but a result of rigid selection, — almost as many books went out as came in, given away to be replaced either by a better edition or by better works.[2]

Mr. Justice Bradley was a reader of novels, and extremely fond of poetry.[3] Of later years he had made as pecial study of Shakspeare. In history, biography, and genealogy he seemed, if you conversed with him, to know something of the personal details of almost everybody that ever was heard of.

The Justice wrote apparently with ease, his habits of thought being so exact that the first expression stood little in need of being corrected. As proof of this fact one has only to consult certain note-books in which he was accustomed to write down his observations on various subjects, whether mature reflections, or the thoughts of the moment. While there is a finish to the composition, hardly an erasure is to be seen. These are not commonplace books, filled with extracts from other men's writings, but a collection of brief essays, as it were, on all sorts of topics. Much of what he has here written is of special value.[1]

Mr. Justice Bradley was a man of slight build, a little below the medium height. His face denoted intellectual force and great firmness. In repose it was grave; but the moment that he spoke (and his voice was deep and penetrating), his eye kindled, and his countenance was full of animation. He was quick in movement, and one could plainly see that he was a man of positive character. He had a strong temper; at times even was passionate, though his passion quickly subsided. In manners the Justice was an example of the old school courtesy, — reserved toward strangers, to those who shared his acquaintance frank and genial. His friends were those of a lifetime, for he was warm-hearted and re-

[1] In 1875 he took out a copyright for a Perpetual Almanac. Among his printed articles, also, was a learned discussion of the subject of the day and date of Christ's crucifixion, considered astronomically.

[2] A gentleman lately told me that, being interested in the study of Egypt, he wanted to consult a famous book, — "The Book of the Dead." He could not find a copy in the public libraries of Washington or of Philadelphia. Happening to call however on Mr. Justice Bradley, and to mention this subject in conversation, he discovered that the Justice owned not only the book itself, but numerous commentaries thereon.

[3] I have heard from one who was present that one evening he read aloud to the company a poem of Browning. After asking each one in turn for an opinion as to its meaning, he proceeded to give his own interpretation, — an intellectual treat more wonderful, says my informant, than the poem itself.

He was likewise very fond of music; and in his study at Newark, he used to keep at work and listen at the same time to music played at his request in an adjoining room.

[1] Here are to be found such topics, for example, as Foreign Coins, Thomas Hobbes, Jewish Cycle, William the Silent on Toleration, Fit Expression, Epochs in English Literature, John Selden, Age of Egyptian Civilization, Coins — Proclamation Money, Position of Venus when at its Greatest Brightness, Family Happiness, Flow of Water through Circular Pipes, etc., etc.

sponsive, nor could any man have been more loyal in his attachments. To inferiors in station he was most considerate and kindly. The servants of his household would, as the phrase goes, "do anything in the world for him."

Though it may not be said that he cared greatly for society, except so far as it brought him into the company of men and women of intellectual tastes, he liked to have his friends visit him, and he was delightful as a host. The pleasure his conversation afforded rendered him everywhere a welcome guest. Equipped as he was to talk well upon any conceivable topic, he was modest in sharing the conversation; for he had not about him a particle of display. He possessed a store of anecdote seemingly inexhaustible, upon which he could draw to enliven the company. Nature had dealt bountifully with Mr. Justice Bradley, for to all the rest she had added that rarest of gifts, genuine humor.

The next morning after a small dinner-party that took place about a year ago, I wrote down a few notes of the conversation, to preserve something of what Mr. Justice Bradley had said. I print an extract, which may be relied upon, I think, as being almost his very words.

Mr. Justice Bradley — we were speaking of juries — said he was once taken by the constable for a juryman. "I was walking one morning, rather plainly dressed, near the City Hall, when a man came up and said, 'Do you live in the District?' I said, 'Yes.' 'Own property in the District?' 'Yes, I do; but what's that to you?' 'Well,' he said, 'I want you to come with me.' 'What for?' 'I want you to serve on a jury; they are short of a juryman in there, and I'm sent out to get one.' (This was only a short time after I had come to Washington.) 'How long will it take?' 'I don't know,' said he; 'it may take two or three days.' 'But I haven't time, I'm busy.' 'Oh, they all say that; I don't accept any such excuse as that.' So I walked along a little way toward the building, as if I were going in. 'But I've business to attend to,' said I. 'Oh, well, your business can wait.' 'No, it can't, — I've got to go to the Capitol; I've important things to attend to there.' At first I had thought I would let him take me in, and then I would tip the wink to the Judge; but I concluded I would n't go so far as that, so I said to him: 'Are you in the habit of putting Justices of the Supreme Court of the United States in your jury-box?' 'Why, are *you* a Justice of the Supreme Court?' 'Yes,' said I. 'What name?' 'Bradley,' said I; and after I had told him, he concluded to let me go."

Mr. Justice Bradley told this in a charmingly dramatic way.

Mr Justice Bradley said that Davis used to tell a story that after he had sat a short while on the bench, Caleb Cushing argued a case. He made a learned argument with some extraordinary propositions in it. When the judges had retired, Davis said to the Chief-Justice (Taney), "Well, is that your famous Mr. Cushing? I don't think he makes much of a law argument." "Oh," said Taney, "you don't understand our brother Cushing. The fact is, Brother Cushing has no convictions."

Bradley mentioned Cushing's going to New Jersey to ask the Court to reverse its decision, and permit the bill to be amended, and new matter stated, — all of which was unlawyerlike. He talked two or three hours; the Court went out, and in a few minutes returned, and overruled his motion.

I asked him if he thought Cushing would have made a successful Chief-Justice had he been confirmed.

"Well," said B., in a quizzical way, "had everything shaped itself right, he might. The letter that was exhumed was made the pretext for rejecting him." B. thought Cushing's work in China was the best he ever did. B. spoke in high terms of a letter drafted by Mr. Webster on this occasion to the Emperor of the Celestial Empire, as being finely conceived, — about a page of type, — most admirable diplomatic paper.

While at the bar in Newark it happened that several books out of his library, borrowed by his intimate friend, Mr. Frelinghuysen, for a temporary purpose, had been detained rather longer than usual. The two lawyers met each other every day. Mr. Bradley gravely caused an advertisement to be conspicuously inserted in the daily newspaper, headed "Lost or Stolen," and describ-

ing the missing volumes. Within twenty-four hours the books came home.

One day while handling some article, he twice let it fall accidentally to the floor. Upon picking it up for the second time, he was heard to say: "Gravity seems to have a spite against me."

Soon after rooms in the new post-office building at Philadelphia had been got ready for the United States Courts, Mr. Justice Bradley went to that city to hold a term of court. Upon entering the building he was accosted by one of the janitors, who, taking him for a casual visitor, assumed to show him over the various floors. The stranger appeared to be interested in what he was permitted to see. When they had come to a finely furnished room, just off from the court-room, he inquired of the guide what room it was. "Oh, this is for the judges; but they have n't arrived yet." Laying aside his umbrella, and taking off his hat and coat, he quietly remarked: "One of them has."

In the library chamber where the Justice prepared his opinions are evidences of his taste for mechanics, such as a locker for tools; and a variety of handy tools were even kept in the drawer of his writing-desk. Here order and method prevailed. To this room he would retire to study and to write far into the night. But no matter how late he worked, he invariably rose at six o'clock in the morning, — a habit that he adopted when a young man, and rigorously pursued all his life. Of late years upon rising he would make himself a cup of coffee and boil an egg, and then set to work. He preferred to do his own copying and writing; and rarely employed a private secretary. In the day-time his little grandchildren would run in and out of this room, sure of a kindly welcome; nor did their presence disturb him, for he loved to have them near, and they were equally devoted to him.

What the world calls genius is nothing else, some writer has said, than the art of repeated endeavor. The success that attended the life we have been contemplating was wrought out by an indomitable will that held each waking hour to its own proper duty. "What is life but its works?" he asked. To a friend he wrote: "All that I ever did in the world was done by dogged and unyielding perseverance." Mr. Justice Bradley knew no idle moments. Not by any means that he neglected physical exercise. He early accustomed himself to horseback riding, and kept up the habit; and he likewise enjoyed long walks. But for his chief diversion he turned to books; for out-of-door recreation he busied himself in running a meridian line, or setting up a sun-dial. If he took a walk in the fields, it was to bring home specimens; for he loved the country, particularly the hills and mountains. Fourscore years of such activity meant a capacity to make himself useful far beyond our powers to estimate.

I have but inadequately conveyed to the reader a conception of the extraordinary range of subjects in the domain of human knowledge, with which this eminent man had made himself conversant. I may say, however, with Bishop Burnet, in his Life of Sir Matthew Hale: "There is great encouragement in this, that I write concerning a man so fresh in all people's remembrance, that is so lately dead, and was so much and so well known, that I shall have many vouchers who will be ready to justify me in all that I am to relate, and to add a great deal to what I can say."

Above all, Mr. Justice Bradley's long and busy life exemplified day by day the graces of a consistent Christian character.

Mr. Justice Bradley was a great judge. He was more than that: he was a great man.

THE ACCUSED.

By George F. Tucker.

II.

THERE are numerous methods of procedure and modes of dealing which excite petulant criticism. The determination of the attorney to pursue a certain course at all hazards is regarded by some as an indication of hardness of heart. A lawyer is thought to be incapable of tender impressions. He is charged with indifference as to the result of the litigation in which he is engaged, when, in fact, his anxiety is more intense and his hopes of success are greater than those of his client. He whose duty it is to thwart plots of extortion and robbery, and to whom are disclosed plans and purposes which are born of rivalry, malice, envy, greed, foolish ambition, domestic discord, and general disregard of moral principle, may see the wisdom and propriety of caution, reticence, and circumspection; but to charge him with a kind of inhuman indifference in offering counsel or settling disputes is ungenerous and unfair. The charge is answered by the fidelity with which he carries the secrets of the counting-room and the family, by his disapproval of plans whose disclosure may bring sorrow and ruin to the fireside, by his careful management of interests which affect the innocent and helpless, and by his kindness to the unfortunate members of his own profession. We cannot dismiss this subject without reference to the more serious charge of dishonesty. The expressed purpose of entrusting funds to a lawyer for care and investment is deprecated by many with significant shrugs of the shoulder, and captious utterances about the unsavory reputation of lawyers in general. We desire to call the attention of the defamer to the fact that probably over one half of the many millions of money held in trust in this country is in the hands and under the control of members of the legal profession, and that they have been guilty of very few breaches of trust within the last fifty years. The peculation of the few requires neither comment nor apology, nor need we resort to encomiums upon the conservative and upright management of the many. The comparison of the respective records of business men and attorneys in the administration of trusts is highly favorable to the latter. The writer asks the indulgence of the reader in quoting from one of his own volumes a passage pertinent to the subject: —

> "It would seem that a man's availability for the position of trustee should depend upon something besides character, position, ability, experience, and wealth. It is probable that one half of the investments of existing trust estates are in unregistered securities payable to bearer and capable of manual delivery. The opportunity thus offered a trustee to hypothecate them for his own obligations may, in the hour of temptation, be eagerly embraced. The position of trustee, therefore, should be rarely filled by a man whose business relations are such as to necessitate the hiring of money. For this reason lawyers and men who have retired from active business generally prove the most reliable."

The courts, of course, receive their share of the censure, and bear a generous part of the opprobrium. There are two classes of people who denounce the machinery which seems indispensable to the conduct of causes, and the lawyers who both set that machinery in motion and then attend to its circumvolutions with untiring vigilance. The first includes those who have a limited acquaintance with practical affairs; for example, kind-hearted and motherly women, who are not exactly, like Cowper's old cottager, in the lack of resources, —

> "Pillow and bobbins all her little store," —

but whose horizon is bounded by the limits of the back-yard, where the children play, and whose knowledge of the world is colored by the narratives of neighbors or the partial judgments of their husbands. The second embraces those who have had some experience in the courts, the remembrance of which only intensifies the irritation and chagrin inflicted by defeat. A good measure of the mortification is due to the recollection of the failure to make good the prediction, "When I get into court I 'll handle that lawyer on the other side without gloves if he tries to make any trouble for me." Those who compose these two classes advocate the abolition of all tribunals and the repeal of all laws. They hope for a kind of poetical millennium; they talk as if lawyers created the courts, and were responsible for the deportment of those whose misfortunes are due to their own indiscretion and folly. They concur in the sentiment which the poet attributes to Rob Roy, —

> "What need of books?
> Burn all the statutes and their shelves;
> They stir us up against our kind,
> And worse, against ourselves."

They advance their extravagant theories in disregard of the teaching of history, that some provision is necessary for the adjustment of differences so long as human nature and human actions make differences possible. Much has come to us from sacred and profane history illustrative of the necessity of tribunals designed to afford relief or redress to the helpless and unfortunate. Reference may well be made to the stirring life of Saint Paul. What suggestive pathos there is in those words in the last chapter of 2 Timothy, which declare that at the first defence all men forsook him! The chapter itself is partly a recital of wrongs inflicted by his prejudiced opponents. There is another narrative in the life of the same great man which presents a graphic incident illustrative of the need of courts for the hearing and determination of causes. Aroused by the artfully expressed apprehensions of Demetrius, the people of Ephesus rushed into the theatre and gave vent to the senseless clamor so characteristic of a mob. "Some therefore cried one thing, and some another; for the assembly was confused, and the more part knew not wherefore they were come together." But the man of authority made himself heard; as the tumult ceased, he reminded his hearers of the security afforded by law; and certainly no words could have been chosen more fitting to the occasion or more likely to pacify the throng than these: "If Demetrius and the craftsmen which are with him have a matter against any man, the law is open, and there are deputies; *let them implead one another.* But if ye enquire anything concerning other matters, it shall be determined in a lawful assembly."

Finally, the lawyer is denounced for depleting his client's purse. The legal profession seems to be regarded as an institution for the furtherance of merciless exactions. Most people make no allowance for the principles of average and discrimination; they believe not only that the lawyer charges all that he thinks that he can get, but that in most cases he obtains very much more than his services are worth. The truth is, the income of the average lawyer who may be called successful is only about a third of what he is generally believed to make; and we assert that the remuneration which in most cases seems so large to the world is, when considered in the light of analysis, no more disproportionate to the service rendered than is the amount of the ordinary workman's wages to the benefit which his labors confer. Let us approach the subject in the spirit of fairness. The successful practice of law is almost impossible without the faculty to grasp and assimilate facts and ideas, which faculty is made more active and serviceable by the aid derived from a liberal education. There are however exceptions to the rule, as there are eminent lawyers of the present day who were not so situated in their early years as to avail themselves of the advantages af-

forded by the advanced schools and colleges; but they have attainments gained from studious application in the closet or from investigations made in occasional moments snatched from the labors imposed by some early employment. In either case years are consumed before the study of the law is begun, and afterwards several years more are devoted to the actual study itself. Then come the feeble beginnings, the gradual learning how to apply principles to subjects of inquiry, and the generous bestowal of services without adequate remuneration. So the toiler plods, and finds himself forty years of age or more before he is able to make satisfactory progress upon his toilsome journey. He knows well that in the calculation of chances not many more years are likely to be his. Is he not justified, therefore, especially at the maturity of his powers, in considering loss of time, the value of his education, and the knowing how to afford relief by counsel or action, as matters which should contribute to the making of a charge? If we assume that his charges are exorbitant, the truth remains that he rarely gets rich. Up to the year 1887 one of the largest estates ever left by a lawyer in Massachusetts was appraised at less than four hundred thousand dollars. Within a few years two citizens of that Commonwealth, who made their money in commercial pursuits, have each left estates of about twenty million dollars. These observations suggest a brief treatment of a kindred subject, — the origin of the notion still entertained by a few that professional and literary men should work without hope of liberal reward. The biographies and autobiographies of many distinguished authors tell sad stories of suffering and despair. Great literary efforts have been undertaken and accomplished under circumstances calculated to discourage the bravest heart. The incitement has been the hope of compensation sufficient at least to provide food for a suffering stomach and clothing for a sickly body. The biographer and critic, however, seem to begrudge the pittance requisite for those necessary purposes, evidently believing that the poet should sing and the author write in reliance upon the inspiration of genius, and in entire indifference to the comforts or amenities of life. This idea may have originated in that early age when the minstrel trudged from door to door dependent upon the bounty of his auditors, but, from the more reasonable standpoint of modern times, it is unworthy the contemplation of the most sentimental dreamer. If we turn to the legal profession, we find that its members, in the time of the Roman Republic, were interdicted by the Cincian law from demanding a fee for services rendered. The design seems to have been to keep the profession above the mere level of a mercenary calling. The reception by the lawyer of money from his client has always been attended in England by formal regulations; from which the inference may be drawn that the lawyer is supposed to work from an enthusiastic love of his profession, and with the expectation of only moderate recompense. We assert that this view or principle, if it may be so called, is founded on a misconception of real rectitude of motive and intention. The principle of political economy that good pay assures good work is exemplified in the professions, as well as in other callings or employments. Greed is not to be commended, but the desire to accumulate is as justifiable in the professional man as in the merchant or mechanic. The imperative need of providing for a suffering wife and dependent children, or the desire to lay away something for future exigencies and demands, is as pure an incentive as ever stirred the pompous Roman, whose orations have come down to us as the masterpieces of his age. To illustrate the subject let us consider an episode in the life of Cicero. Milo was tried on a charge of murdering Clodius. The popular excitement was so intense as to alarm all thoughtful citizens. Clodius had been the idol of the rabble, who, when the intelligence of his death was received, were incited by the Clo-

dian family to acts of violence. Hence Pompey, apprehensive of an outbreak, placed, on the day of trial, strong bodies of troops in the forum and in the avenues which led to it. The whole city was in commotion, and the termination of the trial was awaited by the friends of good government with anxiety and fear, and by the adherents of the deceased demagogue with ominous declarations and threats. An unusual scene was presented to Cicero as he rose to defend the accused. The interest excited and the danger impending would have furnished a less timorous man with inspiration; he would have grasped the opportunity of emphasizing the urgency of reaching a conclusion uninfluenced by threats and regardless of results. But Cicero seems to have been terrified by the demonstrations of the rabble; although it is said that he was partly reassured by the vast numbers of approving citizens who looked down upon him from the roofs and windows of neighboring houses. However, his agitation increased; his effort was unproductive of effect, and his client was sentenced to banishment. A splendid oration has come down to us as that pronounced by the advocate on this memorable occasion, composed, however, after the trial had taken place. This production is said to have evoked from the exiled Milo the famous exclamation: "If Cicero had spoken thus, I should not now have been eating figs at Marseilles." Opinions may differ as to the result of Cicero's efforts under different circumstances, and under the direction of different motives; but, in our judgment, Milo would have eaten the figs at Rome or at his neighboring villa, had Cicero delivered his defence, not merely from a conviction of the innocence of his client, but in anticipation of liberal remuneration in the event of an acquittal. It is refreshing to turn to an incident in the life of the great Lord Erskine. That remarkable advocate was asked by a friend how he dared in his first argument, which was a brilliant success, to face Lord Mansfield upon a certain point when he was so clearly out of order. He replied: "I thought of my children as plucking me by the robe, and saying, 'Now, father, is the time to get us bread.'"

We have hastily recounted some of the popular opinions upon the practices of members of the legal profession; but there is another side to the subject, and we must be fair. A word is proper in recognition of the service of those who speak of the practising attorney in language which approaches encomium. These are brought into such close relations with their legal adviser as to appreciate the difficulties peculiar to the profession he practises. They extol rather than defame; they sympathize with rather than condemn. They make due allowance for efforts which fail of success through events which cannot be controlled; they appreciate the difficulty of attempting the solution of problems which deal with every subject of human inquiry, from the trifling details of common life to the complex affairs of state; they learn the wisdom of not increasing their attorney's perplexity or of imposing new burdens upon him by officious interference and petulant remonstrance; and when they speak of him in his absence, as they sometimes do, they pay tender tributes to his character and life. Could he listen he would hear himself defended from the charge of negligence and indifference, of yielding to the government of caprice and of accomplishing his aims by artful means; he would hear himself extolled as one of enlarged views and clear understanding, ready with sympathy when required, sagacious in selecting the course to be pursued, and clever and careful in pursuing it; and, above all, endowed with that nice discernment and instinct which ever incite to subserve the ends of justice and to promote peace.

RICHARD HENRY DANA.

I.

O SPIRIT dauntless, whom no danger moved,
Who loved the heaving vastness of the sea,
With zest its threat of gale and tempest proved,
And salty wastes found sweet with liberty;
When the earth-bounding heaven, sphered above
Thy country, with the muttering storm did lower,
When the massed engineries of hate and love
Thundered and flashed with elemental power,
Like was thy course as when on voyaging bound, —
Steered, veering always by the central star,
Unseen or seen, straight or rough capes around,
Where thy soul's pointers led thee, wide and far,
Sure of the port, gold-gated, that would bless
With peace, in freedom's law of righteousness.

II.

Let fops and worldlings sniff, and pick apart,
At foibles carp, — shades that great virtues throw, —
And try in vain to brand, with specious art,
Thy life with failure. Thee they could not know.
Statesman and jurist with no curule seat,
A patron to the sailor and the slave,
One prompt the face of jealous power to meet,
Withstand, and speak the truth, the hard cost brave,
Leader of hopes forlorn that must be led,
If country, honor, freedom are to live;
Of God's elect thou wert, and of such bred;
Thee patriot saints thy place with them shall give,
Whose strength in faith and courage ever lies,
Whose unsought glory crowns self-sacrifice.

DARWIN E. WARE *in Century Magazine.*

SKETCHES FROM THE PARLIAMENT HOUSE.

II.

THE LORD PRESIDENT.

By A. Wood Renton.

THE late Lord President Inglis, although a stanch Conservative, is said to have clung to his office long after both inclination and failing health would have led him to resign it, in the hope that Mr. J. B. Balfour, who has twice held the Lord Advocateship under Mr. Gladstone's regime, and is reputed to be the profoundest and most versatile lawyer at the Scotch Bar, might be his successor. But the Fates ordered otherwise; and when, in August, 1891, Lord Glencorse went over to the majority, the Marquis of Salisbury was still in power, and the Right Hon. James Patrick Bannerman Robertson was chief law officer of the Crown for Scotland. As Lord Advocate, Mr. Robertson had the right of "advising" the Queen as to the appointment of a new Lord President. To all intents and purposes the office was in his own gift, and he gave it to himself. The incident might well have provoked adverse criticism. Lord Salisbury has recently been accused of nepotism in having conferred the First Lordship of the Treasury on his nephew, Mr. Arthur Balfour, the ex-Chief Secretary for Ireland. But Mr. Balfour was a man of tried ability and courage, respected by those who hated and feared him the most; and the Conservative party, almost with one voice, called for his promotion. Here, however, one would have thought, was a fair and tempting field for Liberal invective. Mr. Robertson, it might have been said with some semblance of force, was, forensically speaking, a young man. There were others whose claims were stronger than his, and in any event he ought not to have preferred himself before them. Strange to say, none of these criticisms have been forthcoming. Not a single Liberal member, candidate, or paper, so far as we are aware, has sought to make political capital out of Mr. Robertson's appointment; and he has gone to the bench amid a chorus of approval, in which the loudest voices have been those of his old political opponents. Only the gifts and graces of the new Lord President himself can have brought about such a result.

The following are the main facts in Lord Robertson's career. He is the younger and only surviving son of the late Rev. R. J. Robertson, of Forteviot, Perthshire. Born in 1845, he was educated at the University of Edinburgh, and joined the Scotch Bar in 1867. His success was both rapid and enduring. One has no difficulty in analyzing the mental qualities that achieved it. Mr. Robertson commenced his professional career with a good natural equipment. His appearance was impressive; his manner courteous; his physique — no slight element in forensic success — all that could be desired. He had a clear intellect, a tenacious memory, and great facility of expression. Industry and practice did the rest. He soon ceased to draw pleadings or make guinea motions, and was recognized to be a brilliant and daring yet trustworthy advocate. Then he began to take part in political life. Mr. Gladstone was in power; he had just succeeded in dragging the country into that Egyptian war, compared with which, in the words of a clever American, the Chinese enterprises of M. Ferry were quite staid and respectable; and General Gordon was supposed to have perished in the Soudan. Public feeling was in a somewhat electric state; and Mr. Robertson called attention to himself by some fiery

and able speeches, in which he declared that the country would demand an account of Gordon's blood from the Liberal government. It became obvious that Mr. Robertson was not less fitted for parliamentary, than he had shown himself to be for legal work. In 1885 he carried Buteshire against a Liberal candidate, and entered the House of Commons as Tory Solicitor-General for Scotland. He became at once the foremost debater among the legal members on either side of the House. Sir Charles Russell, Mr. J. B. Balfour, Mr. Lockwood, and even greater luminaries in the political firmament than they — Sir Edward Clarke, Mr. R. B. Finlay, and Mr. Asquith — were eclipsed by his brilliance. His good-natured colleague, Mr. J. H. A. Macdonald, was out of the competition altogether. The government came to rely on Mr. Robertson as a valuable henchman, and he was put up to defend its policy not only on Scotch, but on Irish, English, and foreign questions. On one memorable occasion he was compelled to return a one hundred guinea brief, in order that he might support the Irish Crimes Bill at a Wednesday's afternoon debate! In 1889 he piloted the Local Government (Scotland) Bill through the House of Commons with a skill that evoked the commendation even of Sir William Harcourt. Indeed, the remarkable thing in Mr. Robertson's parliamentary life was, that whatever he did "prospered well." An intelligent foreigner, taking his knowledge of English public men only from that section of the press which is opposed to them, would form a somewhat mean idea of the intellectual and moral qualities of English statesmanship. According to the Conservative organs, Mr. Gladstone's public utterances are "unworthy," "tortuous," and "verbose;" Mr. Morley is "a mere litterateur;" Sir William Harcourt is "a political swashbuckler." According to the Separatist press, Lord Salisbury is "flippant," Mr. Balfour is "led away with schoolboy rhetoric," Mr. Goschen is "a turncoat," and Mr. Chamberlain "a renegade." The late Lord Advocate of Scotland is the only public man within recent years whose speeches were always listened to, answered, and criticised respectfully. While a torrent of abuse was being poured upon the heads of older and possibly abler men, Mr. Robertson was always "forcible," "amusing," and "ingenious."

In the Parliament House Mr. Robertson was, and will no doubt continue to be, a universal favorite. Like the late Lord Justice Holker, the late Baron Huddleston, and the present Lord Justice Clerk of Scotland, he was known among his contemporaries by an affectionate abbreviation of his name. There is no *cause célèbre* with which his reputation is peculiarly identified; but he has been for many years an integral part of the forensic life of Scotland. His practice at the bar was very large and lucrative. In one recent case he is said to have received a cheque for five hundred guineas along with his instructions, — a fee not by any means unusual according to English standards, but very rare among the learned gentlemen who play at what Henry Erskine called "the shilling tables" north of the Tweed.

When Inglis became Lord Justice Clerk in 1858, he was believed to be only a brilliant advocate. In a few years he had shown that he possessed eminent judicial powers; and when death took him he was recognized as one of the greatest jurists of the century. Mr. Robertson has ascended the bench with a forensic reputation hardly less bright than that of Inglis. We cordially hope that he will display the same judicial gifts as his illustrious predecessor.

LEGAL INCIDENTS.

X.

A CASE OF CIRCUMSTANTIAL EVIDENCE.

THE following thrilling story comes from the lips of a well-known member of the Pennsylvania Bar: —

"A very bad and dishonest failure had occurred, in which a certain trusted clerk seemed to have been guilty of the larger share of the crime. He, with his employer, was arrested and charged with the crime. The clerk stoutly protested his innocence, and denied all knowledge of the fraud or any connection with his employer. However, there was a chain of circumstantial evidence woven around him which was exceptionally strong, and which his counsel could not break down, although he was firmly convinced himself of his innocence. The clerk was convicted and sent to jail for a term of years.

"After being confined in prison for about a year the poor fellow's mind began to weaken, and finally he broke down completely. He was taken from prison, and transferred to a hospital for the insane. All the time the clerk continued to protest his innocence. After he had been confined in the hospital three or four years, certain facts in the failure were elicited which clearly proved that the unfortunate clerk was entirely innocent of having committed any crime. Of course steps were immediately taken to secure the pardon of the man; the facts were laid before the Pardon Board at their next meeting, and an order was given for his immediate release.

"It now became the delicate duty of the counsel in the case to break the happy intelligence to the pardoned clerk. But the question that confronted them was what could be done to restore his reason, and would he believe the news? If his mind could not be restored, he could not be taken away. What could be done? After a consultation between the counsel on both sides of the case, it was agreed to call upon the poor clerk, and make an attempt to rouse him from the apathy and lethargy into which he had fallen. This they decided to do by accusing him again of the theft of the funds. Whenever this subject was broached he always roused himself and became greatly animated, always vigorously denying it.

"While his mind was aroused by this stimulus, it had been decided that one of the counsel was to announce that the matter had been fully investigated, and his innocence firmly established. The parties to this strange drama assembled in the room of the stricken man. He sat silent and immovable, with his head in his hands. As the old and ever-rankling charge of dishonesty fell upon his ears, the effect was exactly that which had been foreseen and expected. He slowly raised his head. Looking his pseudo-accuser straight in the eye, he repeated, in a loud tone of voice, with a rising inflection and with great energy, 'It is a lie.'

"The critical moment had come. The lawyer who had prosecuted him and secured his incarceration, then stepped up to him and said, 'You are right; it *is* a lie, and you stand before the community a vindicated man. I have the order for your release in my pocket.' Then the lawyers stood off to watch the effect, hoping that the joy at the prospect of release and vindication would have the effect of putting the clerk again in his right mind. But no sign of joy overspread the man's features; his face bore its usual stolid expression. It seemed to have no apparent effect upon him.

"The clerk turned his face towards the speaker, as if he did not understand him. Then his head fell forward, and the man was precipitated upon the floor at the feet of the lawyers. A single glance sufficed. He was dead."

THE SUPREME COURT OF MINNESOTA.

By Hon. Charles B. Elliott, *of Minneapolis.*

II.

THE location of the seat of government is a great event in the history of a Territory or State. The territorial capital of Minnesota had been located at the village of St. Paul; but in 1856, through some occult influence, the Legislature suddenly passed an act providing for its removal from St. Paul to St. Peter.

In the course of the contest an application was made to Judge Nelson for a writ of mandamus to compel the territorial officers to remove from St. Paul. Great interest was felt in the decision of this question. Judge Nelson denied the application. The opinion, delivered at chamber, does not appear in the Reports; but the manuscript is preserved in the records of the State Historical Society, and is an interesting record of one of the most exciting events in the history of the Territory.[1] The decision was based upon the ground that the Legislature had exhausted its power and authority to locate the seat of government by previous legislation.

On the 11th day of May, 1858, President Buchanan nominated Judge Nelson as Judge of the United States District Court for the district of Minnesota, and the nomination was at once confirmed without the reference of his name to a committee. From that time to the present, Judge Nelson has ably discharged the onerous duties of the high position to which he was called, and is now the oldest judge in point of service on the Federal bench.

Charles E. Flandrau was born in New York City in 1828, and obtained his early education at Georgetown, D. C. At the age of thirteen he made an attempt to obtain a midshipman's warrant in the navy, but was unsuccessful on account of his extreme youth. Determined upon a seafaring life, he shipped before the mast, and in that capacity made several voyages, occupying in all three years.

By this time the life of a common sailor had lost its charm, and we soon after find the young man in New York City learning the business of mahogany sawing. After three years spent in this business, he decided to study law, and entered the office of his father, with whom he afterwards formed a partnership which continued until 1853. But progress was too slow, and the attractions held out by the recently created Territory of Minnesota were sufficient to draw him to the Northwest. In the latter part of November, 1853, the firm of Bigelow & Flandrau opened an office in the village of St. Paul.

The practice of law in Minnesota in those days was neither arduous nor particularly lucrative. Railroads, corporations, and the various aggregations of capital which now furnish employment for lawyers, were then unknown. The probate courts were without work. Criminal and commercial law occupied almost the entire attention of the courts. The lawyers took such practice as came to them in the courts and land offices, and in the mean time speculated in real estate. Consequently in 1853–1854 we find Mr. Flandrau engaged in exploring the Minnesota valley, and negotiating for the purchase of lands for capitalists.

Impressed with the future of this region, and not being burdened with practice in St. Paul, he concluded to locate at Traverse des Sioux, then the only settlement in that part of the Territory. Business still failed to come, and the young lawyer engaged in the somewhat unusual practice of *attracting* the wolf *to* his door. A dead pony placed within

[1] Since the above was written, I am informed that the manuscript was destroyed by fire.

easy range of the window of the law office attracted the prairie-rovers, and supplied the young lawyer with a species of practice probably not the least remunerative that came to that poor office in the wilderness. A paternal government (possibly as a delicate method of assisting a poor but proud profession) paid a bounty of seventy-five cents per scalp. But times grew brighter as emigration came that way, and Mr. Flandrau remained at Traverse des Sioux until 1864.

For a time he held the office of clerk and district attorney of Nicollet County. In 1856 he served one term in the territorial Council, but resigned before the end of the term. In 1856 he was appointed by President Pierce agent for the Sioux Indians, but resigned this position after about a year's service, and was again elected a member of the territorial Legislature.

LAFAYETTE EMMETT.

On July 17, 1857, President Buchanan appointed Mr. Flandrau Associate Justice of the Supreme Court of the Territory. But one general term was held during his term, and no opinions appear in the reports of the period written by Judge Flandrau. He held several terms of the district court, and became noted for the rapidity with which he despatched business. At the convention of the Democratic party held in 1857 for the nomination of State officers under the new Constitution, Judge Flandrau was nominated and subsequently elected an Associate Justice of the Supreme Court for a term of seven years.

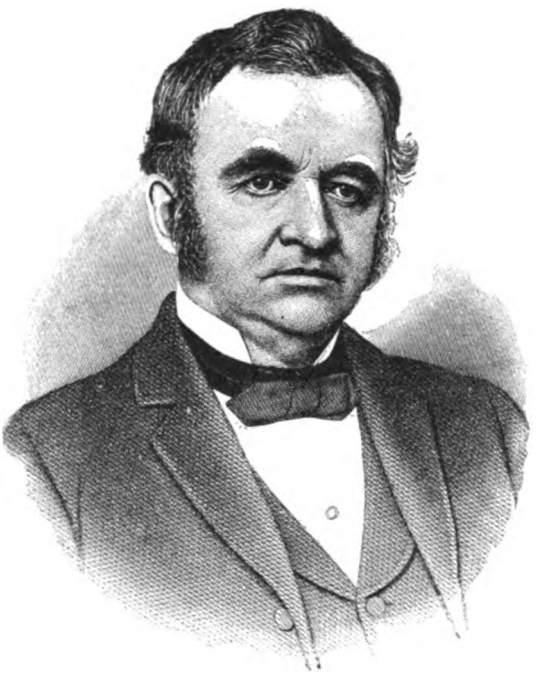
Judge Flandrau's decisions during these seven years are found in Volumes II. to IX. inclusive of the State Reports. He apparently did more than his share of the work; and some of his decisions display not only great industry and untiring research, but unusual ability and learning. In the case of Mason *vs.* Callender, 2 Minn. 359 (302), he wrote a decision which covers twenty-six pages of the Report, and is an elaborate commentary upon the law and morals of interest. This case is followed by the court in Dyer *vs.* Slingerland, 24 Minn. 267, while stating that a contrary rule would meet with their approval if the question were an open one.

Judge Flandrau rendered distinguished service to the State during the Sioux outbreak in 1862, and was in command at the battle of New Ulm. In commemoration of this battle, a monument has recently been erected, upon which is a fine medallion portrait of the commander. In the spring of 1864 Judge Flandrau resigned his position as Associate Justice, and went to Nevada, where he entered into partnership with his former associate Judge Atwater.

After a year spent in Nevada, he removed to St. Louis, where he remained for a short time, but soon located at Minneapolis. In 1865 he was the Democratic candidate for Governor of Minnesota, but was defeated by William R. Marshall. In 1869 he was the candidate of the same party for Chief-Justice against C. G. Ripley, but the latter was

elected. In 1870 Judge Flandrau returned to St. Paul, and is now in active practice as a member of the firm of Flandrau, Squires, & Cutcheon.

The record made by the territorial Supreme Court is eminently respectable, and but few of its decisions have been in terms overruled. During its life, from June 1, 1849, to May 24, 1858, there were filed one hundred and sixty-one decisions, all of which are reported in the first volume of the State Reports. Naturally the greater number are devoted to questions of pleading and practice, and the various proceedings common in a new country, where the courts are chiefly engaged with questions of a commercial character. The adjective as distinguished from the substantive law principally engaged the attention of the court. The judicial machinery had to be put in running order, and the bar instructed in the arts of applying the science of the law. The administration of justice was in a chaotic condition, and many of the important questions had to be decided on first impression and without a guiding precedent.



ISAAC ATWATER.

The first decision filed by the territorial court was in the case of Desnoyer *vs.* L'Heraux. This was an appeal from the decision of the Chief-Justice sitting as district judge, who had instructed the jury that upon an appeal from a justice's court, "if the evidence offered by the plaintiff would warrant a recovery, they would find for the plaintiff without reference to the declaration." This instruction was held erroneous. The case is of no importance; but the following language from a dissenting opinion of Chief-Justice Goodrich is of interest:—

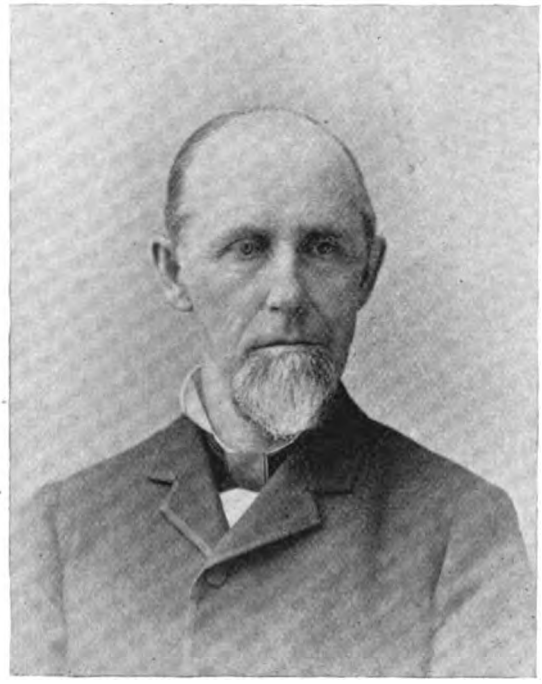
"When I reflect that Minnesota is now in its infancy, and that its jurisprudence may be seriously affected by the strict construction and rigid adherence to ancient forms and technicalities recognized by this court, and in view of the great legal reforms going on in Europe and America, I am admonished, by evidence not to be mistaken, that the time has arrived in which laws are to be made and administered for the furtherance of substantial justice."

The Constitution of the new State, which was adopted Oct. 13, 1857, provided that the judicial power of the State should be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as the Legislature might from time to time establish by a two-thirds vote. The Supreme Court should consist of a chief-justice and two associate justices; but the Legislature might, when it should be deemed necessary, increase the number of associate justices to four. It should have original jurisdiction in such remedial cases as might be prescribed by law, and appellate jurisdiction in all cases both in law and equity. There should be no trial by jury in the Supreme Court. There should be one or more terms in each year at the capital, and terms might be provided for in the several districts by the Legislature upon a two-thirds vote.

The sessions of the court have always been held at the capital. The court consisted of three members until 1881, when the number of Associate Justices was increased to four. The Judges are elected by the electors of the State at large. The first Chief-Justice after the organization of the State in 1858 was Lafayette Emmett, with Charles E. Flandrau and Isaac Atwater for associates.

Judge Emmett was born, May 8, 1822, at Mount Vernon, Knox County, Ohio. He resided there with his parents during his minority and early manhood, receiving a common-school education.

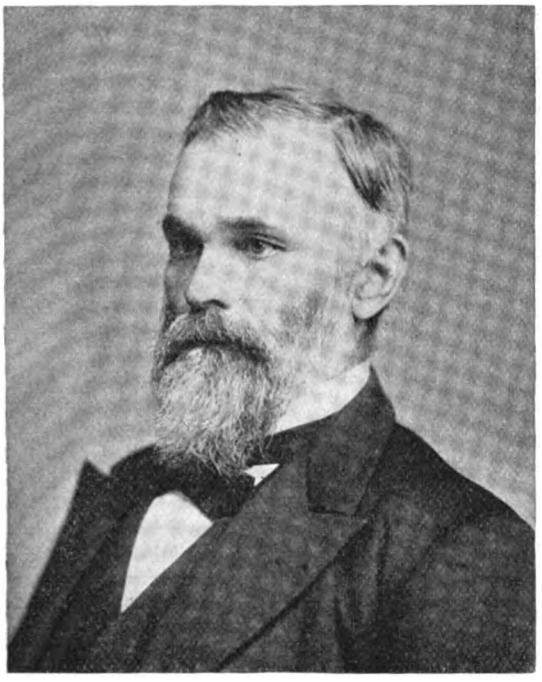
His father was of Irish and Scotch parentage, his mother of German and English stock, — for several generations natives of this country. His grandfather Emmett was a soldier of the Revolution, and served under General Morgan at the battle of the Cow Pens. His father served under General Cass during the War of 1812.



THOMAS WILSON.

In 1839 Mr. Emmett entered the office of Columbus Delano, subsequently Secretary of the Interior, and remained there until 1843, when he was admitted to the bar. Three years later he was elected prosecuting attorney of his native county, and served one term. He was married in 1850, and removed to Minnesota in 1851. Upon the advent of the Pierce administration, Mr. Emmett became Attorney-General of the Territory, by appointment of Governor Gorman, and continued to hold the office under Governor Medary. He was a member of the Constitutional Convention, and was elected Chief-Justice at the first election of State officers. After serving a full term of seven years, he again opened an office in St. Paul. In 1872 he removed to Faribault, Minnesota, and subsequently, in 1874, became the Democratic candidate for Chief-Justice, but was defeated with his party. Since 1885 Judge Emmett has resided in Las Vegas, New Mexico. His judicial record is found in Volumes II. to IX. inclusive of the Reports, and will bear creditable comparison with that of his predecessors or successors.

Isaac Atwater was born, May 3, 1818, at Homer, Cortland County, New York. His early life was spent on a farm. At the age of sixteen he went to Auburn to attend an academy. After enduring many hardships not necessary to describe in detail, but common to the life of a poor student, a solid pecuniary basis was secured by the appointment to a position as gardener at a salary of five dollars a week. After a period of teaching, the portals of Yale were reached in 1840, and from this institution he was graduated four years later. Three years were spent in securing a diploma from the Yale Law School. After a short time spent in practice at Buffalo, he removed to Minnesota and opened an office in St. Anthony. The Legislature of 1850 elected the young lawyer a Regent of the State University. As a member of the Board of Regents, and as its Secretary and Treasurer, he was largely instrumental in securing for the University the beautiful site it now



JAMES GILFILLAN.

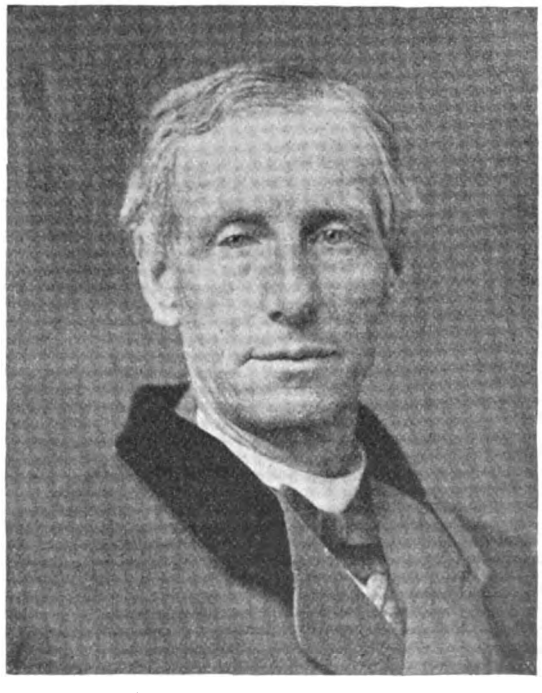
occupies, and in laying the foundation of the great institution which now confers honor upon the State.

In 1852 Mr. Atwater was appointed by Governor Ramsey to the position of Reporter of the Supreme Court of the Territory. In 1853 he was elected district attorney of the county of Hennepin. In 1857 at the first State election he was elected one of the associate justices of the Supreme Court, and entered upon the duties of the office early in 1858. In 1864 he resigned, and removed to Carson City, Nevada. After a few years spent in this frontier town, he returned to Minneapolis, where he has since resided. Since retiring from active practice, Judge Atwater has devoted much time to labors of a municipal and educational character, and has held many offices of trust. His judicial record is found in Volumes II. to IX. of the Reports.

Chief-Justice Emmett was succeeded by Thomas Wilson. Judge Wilson was a member of the Constitutional Convention of 1857, and upon the admission of the State became the first Judge of the Third Judicial District, serving until July 1, 1864.

He was born in Tyrone County, Ireland, May 6, 1827, and came to this country when a child. He graduated from Alleghany College, Meadville, Pennsylvania, in 1852. After three years spent in the study of the law, he was admitted to the bar at Meadville, and at once located at Winona, Minnesota, where he soon became known as a successful lawyer. Upon the resignation of Judge Flandrau in 1864, Governor Miller appointed Judge Wilson to fill the vacancy. On the 1st of January following, he became Chief-Justice by election, and remained in office until July 14, 1869, when he resigned. Since returning to active practice, Judge Wilson has been universally recognized as one of the leading lawyers of the State.

Originally a Republican, he became a Democrat in 1872, and is now one of the leaders of that party in the State. In 1887 he was elected a member of Congress from the first district, and served one term. In 1890 he

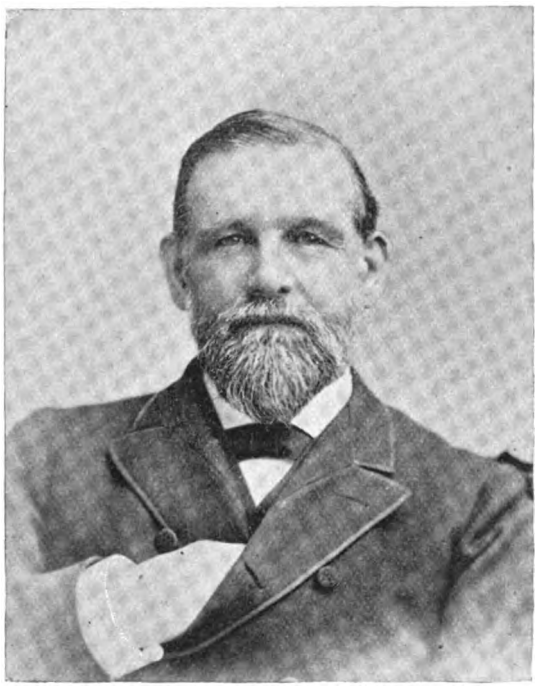


CHRISTOPHER G. RIPLEY.

was the Democratic candidate for Governor of the State, but was defeated by Governor Merriam.

John McDonough Berry was born at Pittsfield, in Merrimac County, New Hampshire, on the 18th day of September, 1827, and died at Minneapolis on the 8th day of November, 1887, after twenty-three years of continuous service as an Associate Justice of the Supreme Court.

Judge Berry was prepared for college at Phillips (Andover) Academy, and graduated from Yale College with the Class of 1847. Three years later he was admitted to the bar, and began practice at Alton, Belknap County, where he remained for two years.



S. J. R. McMILLAN.

After a short stay at Janesville, Wisconsin, he located at Faribault in 1853, where he continued to reside until his removal to Minneapolis in 1879. He served as a member of the lower house of the territorial Legislature in 1856, and of the State Senate in 1862, being chairman of the Judiciary Committee each term. During the years 1860 and 1861 he was a member of the Board of Regents of the State University. In 1864 he was elected a Justice of the Supreme Court, and qualified and took his seat in 1865.

His first reported opinion is in the case of Bidwell *vs.* Madison, 10 Minn. 1 (13); and the last in Wyvelle *vs.* Jones, 37 Minn. 68, filed June 8, 1887.

Judge Berry's term of service was longer by many years than that of any other member of the court, and the twenty-seven volumes of the Reports evidence the fidelity, industry, and learning with which he discharged the duties of his high office. His influence in moulding the jurisprudence of the State has been greater than that of any other one man. Patient, judicial, impartial, and clear-sighted, he was a safe and a wise judge. He was always careful and painstaking in the examination of cases before him, and devoted to their consideration great labor and research.

He was a diligent and careful student, not only of the books of the law, but also of general literature. Having received the best classical education the country could give, he never lost his love for what is best in ancient and modern literature. Judge Berry took the State Law Library under his personal supervision, and devoted much time and attention to the selection and classification of its books. In ancient Egypt the president of the judges wore suspended about his neck by a gold chain a small image made of precious stones. The name of this image was Truth, and the decisions of the court bore its impress. Although Mr. Justice Berry wore no outward emblem of precious stones, he too placed the stamp of truth and justice upon his work.

Upon the resignation of Chief-Justice Wilson in July, 1869, James Gilfillan was appointed as his successor, with the general understanding that he should be the candidate of his party at the next election; but the Republican convention which met in

September of that year nominated a comparatively unknown man for that position.

Prior to that time the higher judicial offices had been, by consent of all parties, kept out of politics. In this instance this salutary rule was broken, and the nomination of Christopher G. Ripley, of Fillmore County, was the result of political trading in the convention. As Mr. Ripley was not well known, his nomination caused much dissatisfaction throughout the State, and he was the subject of very bitter attack by political enemies.

The St. Paul "Daily Pioneer," the leading Democratic paper of the State, referred to him as a "fourth-class country pettifogger, fitted possibly to conduct a limited practice in a justice's court," and asserted that a party which would afflict such nominations upon the people "ought to be debarred from holding conventions." The Democrats nominated Judge Flandrau, but Ripley was elected by a large majority.

JOHN M. BERRY.

Christopher Gore Ripley was born in Waltham, Massachusetts, on Sept. 6, 1822. His father was Rev. Samuel Ripley. His mother, Sarah Alden Bradford, was a direct descendant of Governor Bradford of Plymouth Colony, and of John Alden. After graduating from Harvard University, and also from the Law School, Mr. Ripley continued the study of the law in the office of Franklin Dexter of Boston. In 1855 he removed to Minnesota, and located first at Brownsville and later at Chatfield, where he continued to live until 1874. Judge Ripley was a quiet, scholarly gentleman and a good lawyer; but during his term as Chief-Justice he was suffering from ill-health, which prevented him from acquiring the reputation which doubtless he otherwise would have established. In 1874 he resigned, and returned to his former home in Massachusetts, in the hope of regaining his health, but died at Concord in 1881.

Samuel J. R. McMillan, who succeeded Ripley as Chief-Justice in 1874, was born at Brownsville, Pennsylvania, Feb. 22, 1826. After graduating at Duquesne College in 1846, he entered upon the study of the law, and was admitted to the bar in 1849. In 1852 he located at Stillwater, Minnesota, where he engaged in practice until elected Judge of the First Judicial District at the first State election.

This position he held until July 6, 1864, when he was appointed Associate Justice of the Supreme Court. Upon the resignation of Chief-Justice Ripley, Governor Davis appointed Judge McMillan Chief-Justice, and George B. Young Associate Justice, to fill the vacancy thus created. Judge McMillan was Chief-Justice from April 7, 1874, to March 10, 1875, when he was elected United States Senator, to succeed Alexander Ramsey. He served as Senator two terms, but was defeated for a third term by Dwight M. Sabin, and is now engaged in the practice of law at St. Paul.

George B. Young and Greenleaf Clark were members of the court for a short time by appointment. Judge Young was ap-

pointed April 6, 1874, and retired Jan. 11, 1875. He was born in Boston in 1839, and educated at the Boston Latin School and Harvard University, graduating from the academic department at Harvard in 1860, and from the Law School three years later. After a period of practice in New York City, he came to Minnesota and located in Minneapolis about 1870. His appointment was a great surprise to the bar and the community. When Chief-Justice Ripley retired from the bench, it was generally conceded that his successor should come from Minneapolis, and the people of that city almost unanimously united in recommending F. R. E. Cornell for that position. Much to the astonishment of the public, Governor Davis named Associate Justice McMillan as Chief-Justice, and George B. Young as McMillan's successor.

GEORGE B. YOUNG.
(From a photograph taken while he was on the bench).

Mr. Young had resided in the State but about four years, and Mr. Cornell's friends were very indignant that he should be passed over, and the great professional prize given to so young a man. "Governor Davis has committed an enormous blunder," wrote the editor of a Minneapolis paper, "or else he is a prophet and the people of Hennepin County are fools." In the light of Judge Young's subsequent brilliant career at the bar, many people now believe that the Governor was endowed with at least a measure of prophetic vision. In the few months of his term Judge Young gave ample evidence of fine judicial ability. At the November election Mr. Cornell was elected, and Judge Young returned to the bar. In 1878 he was appointed by the Legislature to revise the statutes of the State, which service he performed in a manner very satisfactory to the bar of the State. He is at present the official reporter of the decisions of the Supreme Court, and lecturer on the Conflict of Laws in the Law Department of the University of Minnesota.

F. R. E. Cornell was born in Coventry, Chenango County, New York, Nov. 17, 1821. He was graduated from Union College in 1842, and was admitted to the bar of the Supreme Court at Albany in 1846. Immediately thereafter he commenced the practice of law at Addison, Steuben County, where he remained until 1854. He was a member of the State Senate of New York for 1852 and 1853. In the year 1854 he removed to Minneapolis, which was his home until his death.

Judge Cornell was a member of the State Legislature in 1861, 1862, and 1865, and Attorney-General of the State from Jan. 10, 1868, to Jan. 9, 1874. In November, 1874, he was elected Associate Justice of the Supreme Court, and qualified and took his seat on the 11th of the same month. He died in Minneapolis on the 23d day of May, 1881.

Judge Cornell was an able lawyer. I cannot better characterize him than by quoting from an address delivered by the late ex-Attorney-General Gordon E. Cole, himself one of the ablest lawyers of the Northwest:

F. R. E. CORNELL.

"My opportunities for forming a correct estimate of his character and talents I believe to have been unusual, meeting him at the bar, first as prosecuting officer while he was engaged in the defence, afterwards when he had become Attorney-General and prosecutor, and I was employed for the defence. In later years I had the good fortune to be associated with him in a very important civil case in the Federal courts, until, at the close of the litigation in the trial court, he was removed from the case by his appointment to the Supreme Bench. In the subsequent progress of the cause in the Supreme Court of the United States, he was succeeded by a gentleman who then stood, and still stands, at the head of the bar of the country, with a reputation and fame only circumscribed by the territorial boundaries of the nation. The opportunities of measuring Judge Cornell's powers by contrast with those of the highest, I believe I did not abuse. I do not think that my judgment was swayed by personal friendship. At any rate, it was deliberately formed, and has been since carefully reviewed; and I then thought, and still think, that in every attribute which contributes to form the character of a great lawyer, Judge Cornell was the peer of his successor, and that a reversal of opportunities would have produced a corresponding reversal of station, fame, and reputation. The salient feature of Judge Cornell's character as a lawyer was the unerring certainty with which his mind glided from premise to conclusion. I have often had occasion to note and to admire the rapidity with which, with almost the precision of intuition, he would arrive at the correct solution of a difficult legal problem then first submitted to his attention; the comprehensive glance with which he would instantly sweep the entire subject, and grasp all its qualifications and limitations. While his high character and standing in the State made him the constant recipient of civil honors, . . . and his position was always conspicuous, yet a marked characteristic of the man was his innate modesty. In self-conceit he seemed absolutely wanting, and yet no man that I ever knew had a more constant and abiding confidence in himself. No man who has ever embellished and adorned the bench or official position in this State was ever more conspicuously distinguished for the perfect purity of his public and private character than our lamented friend."

Greenleaf Clark was appointed one of the additional Associate Justices for which pro-

D. A. DICKINSON.

[illegible] was made by the law of 1851, and served from March 4, 1851, to Jan. 12, 1852. Judge Clark is a native of New Hampshire, and a graduate of Dartmouth College and the Harvard Law School. He came to Minnesota in 1856, and has ever since, except while on the bench, been engaged in practice in St. Paul. He is a member of the Board of Regents of the State University, and has devoted much time and careful attention to the affairs of that institution.

The Court as at present constituted is, James Gilfillan, Chief-Justice, and Charles E. Vanderburg, William Mitchell, Daniel A. Dickinson, and Loren W. Collins Associate Justices.

GREENLIEF CLARK.

Chief-Justice Gilfillan was born at Bannockburn, Scotland, March 9, 1829, and was brought to the United States by his parents before he was a year old. Dr. Johnson's remark concerning Lord Mansfield may also be applied to the Chief-Justice. The family settled at New Hartford, Oneida County, New York, where the son labored upon a farm until sixteen years of age. He commenced the study of the law in Chenango County, and subsequently attended a law school at Balston Spa. After being admitted to the bar in 1850, Mr. Gilfillan went to Buffalo, where he remained until 1857.

In the spring of that year he removed to Minnesota, and was engaged in the successful practice of his profession until the commencement of the Civil War. In 1862 he entered the military service as Captain of Company Seventh Minnesota Infantry, and served the first year upon the frontier, guarding the Sioux Indians. In 1863 he went South, and served with the Seventh Regiment until he became Colonel of the Eleventh Minnesota, which he led until the close of the war.

In July, 1869, Colonel Gilfillan was appointed by Governor Marshall to fill the vacancy caused by the resignation of Chief-Justice Wilson. Christopher G. Ripley was elected Chief-Justice in the autumn of 1869, and on the 7th of January Judge Gilfillan retired, and resumed the practice of the law in St. Paul.

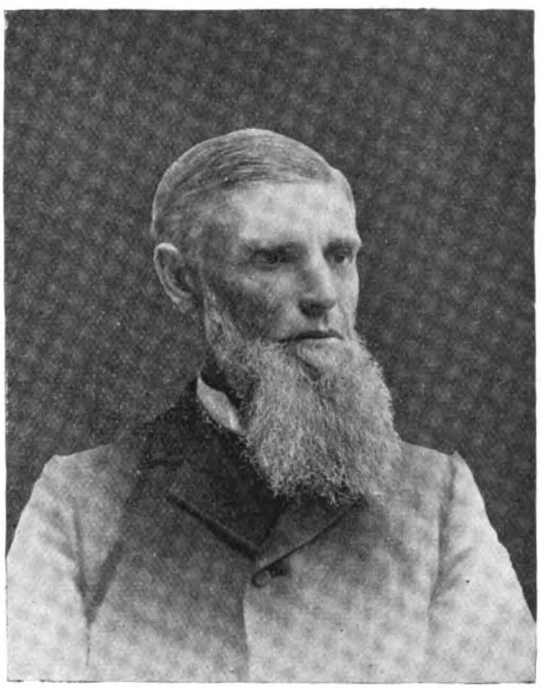
In March, 1875, Chief-Justice McMillan was elected United States Senator, and Mr. Gilfillan was appointed by Governor Davis to fill the vacancy. In the November following he was elected for the full term of seven years, and has through successive re-elections remained in office until the present time.

In 1881 the court was called upon to decide a question of vast importance to the State. Minnesota in its early history, like almost all the Western States, recklessly loaned its credit for the encouragement of railway building. The first Legislature of the State passed what is known as the Five Million Loan Bill, and under it bonds were issued to the amount of $2,275,000.

But little work was done toward the construction of the roads, although the State subsequently obtained title through foreclosure proceedings to about two hundred

and fifty miles of graded road, the franchises of the companies, and about five million acres of land. The dissatisfaction growing out of the issue of these bonds finally crystallized in a movement for repudiation, and in 1860 an amendment to the Constitution was adopted which prohibited the passage of any law levying a tax or making other provision for the payment of the principal or interest on the bonds without a reference of the same to the people.

Here the matter was allowed to rest until about 1877, when a movement was made toward a readjustment of the dishonored bond. In 1881 the Legislature passed a law providing for the adjustment of the bonds which designated the judges of the Supreme Court as a commission to make a settlement. This act was held unconstitutional in State *vs.* Young, 29 Minn. 474, as impairing the obligation of a contract, and as an attempt on the part of the Legislature to delegate its legislative powers.



WILLIAM MITCHELL.

The decision was a very elaborate one, and was written by Chief-Justice Gilfillan.

Subsequently, in Secombe *vs.* Kittelson, 29 Minn. 555, in a decision written by Mr. Justice Mitchell, the validity of the amendment to the Constitution under which the bonds were originally issued was upheld, and the bonds were ultimately paid, under an arrangement equally satisfactory to the holders and to the people of the State.

Charles E. Vanderburgh became a member of the court in November, 1881, after an extended term of service as a Judge of the Fourth Judicial District. Born at Clifton Park, Saratoga County, New York, Dec. 2, 1829, his early youth was passed after the fashion of the average American boy of the period. The multifarious duties of a farmer's boy, the educational facilities of a district school, the discipline of character through the responsibilities of a teacher, the private study of the law under the direction of a friendly attorney, and at last the bar, — how many men famous at the bar have trodden this thorny pathway to success and honor!

Judge Vanderburgh was admitted to the bar of New York in January, 1855, and in the following year removed to Chicago. After remaining there a short time, he continued his journey northwest, until he reached Minneapolis, where he formed a partnership with F. R. E. Cornell.

The new firm soon acquired a large and successful business, which continued until 1859, when Mr. Vanderburgh was elected district judge. This position he held until January, 1882, when he became a member of the Supreme Court. He has been a resident of Minneapolis since 1856, and is very active in work connected with the church and Sunday-school.

William Mitchell was born near Drummondsville, County Weldon, Province of Ontario, Nov. 19, 1832. Removing to the United States in early life, he received his education at Jefferson College, Pennsyl-

vania, from which institution he graduated in 1853. After two years of teaching in an academy at Morgantown, West Virginia, he commenced the study of the law and was admitted to the bar in 1857. In the spring of the same year Mr. Mitchell located at Winona, Minnesota, where he was engaged in the practice of the law until elected Judge of the Third Judicial District. This position he held from Jan. 8, 1874, until March 14, 1881, when he was appointed by Governor Pillsbury one of the additional associate justices of the Supreme Court for which provision was made by the law of 1881. Judge Mitchell served one term as a member of the Legislature in 1859. Although a Democrat in politics, his ability and universally recognized fitness have kept him in office in a Republican community without opposition.

CHARLES E. VANDERBURGH.

Daniel A. Dickinson is a native of Vermont, and was born at Hartford, Oct. 28, 1839. Having lost both his parents, his youth was spent under the guardianship of his grandfather at Mendon, New Hampshire. After graduating from Dartmouth College in 1860, he read law with Smith M. Reed at Plattsburgh, New York. Admitted to the bar in 1862, he immediately entered the naval service, and served as paymaster until 1865. After three years' practice at Plattsburgh, he removed to Minnesota and located at Mankato, where he practised law until January, 1875, when he became Judge of the Sixth Judicial District. This position he held until June 3, 1881, when he was appointed by Governor Pillsbury as the successor of Mr. Justice Cornell.

Loren Warren Collins was appointed by Governor Merriam to fill the vacancy caused by the death of Mr. Justice Berry. Judge Collins was born at Lowell, Massachusetts, in 1838, and came to Minnesota in 1854. He entered the army August 9, 1862, and served throughout the war, being brevetted Captain, March 30, 1865. After the war he commenced the practice of the law at St. Cloud, and was county attorney of Stearns County for ten years. Judge Collins belongs to that small class of men whose light cannot be concealed beneath the political bushel of an opposition political party with a large normal majority. He was a member of the Legislature in 1881 and again in 1883, and served as one of the managers of the impeachment proceedings which resulted in the removal from office of E. St. Julian Cox, Judge of the Ninth Judicial District.

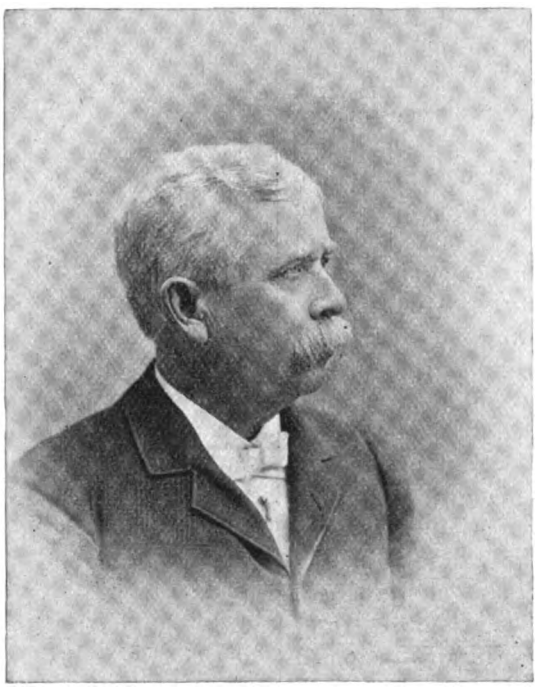
On the 17th of April, 1883, he was appointed Judge of the Seventh Judicial District, which position he held at the time of his appointment as a member of the Supreme Court in 1887.

The Clerk of the Court is an elective officer, the term of office being four years. The incumbents of the office have been, with the dates of their election, James K. Humphrey, 1850; Andrew J. Whitney, 1853; George W. Prescott, 1854; Jacob J. Noah, 1858; A. J. Van Vorhes, 1861;

George F. Potter, 1864; Sherwood Hough, 1867; Sam. H. Nichols, 1876; J. D. Jones, 1887; Charles P. Holcomb, 1891.

The Attorney-General of the State is an executive officer; but the office is so intimately connected with the Supreme Court that I give a list of the distinguished lawyers who have held the office: Lorenzo H. Babcock, 1849; Lafayette Emmett, 1853; Charles H. Berry, 1858; Gordon E. Cole, 1860; William Colville, 1866; F. R. E. Cornell, 1868; George P. Wilson, 1874; Charles M. Start, 1880; W. J. Hahn, 1881; Moses E. Clapp, 1887.

The official Reporters of the court have been William Hollinshead, 1851; Isaac Atwater, 1852; John B. Brisbin, 1854; M. E. Ames, 1856; Harvey Officer, 1857. Mr. Officer was reappointed in May, 1858, and held until Jan. 30, 1865, when he was succeeded by William A. Spencer, who held the office until June 15, 1875, when the present incumbent, George B. Young, formerly a judge of the court, was appointed. The Reporter has always been appointed by the court, and receives a salary from the State. The copyright of the books belongs to the State. The Reports have now reached Volume 46, and are increasing at the rate of about four a year. In addition to the original edition, there is a reprint of the first twenty volumes, with annotations by Chief-Justice Gilfillan. By the practice of the court based on General Statutes, 1878, c. 63, sec. 4, the headnotes in each case are prepared by the judge writing the opinion.



LOREN W. COLLINS.

Several of the members of the court have at various times been engaged in the work of compiling and revising the statutes of the State. Judge Young's revision of 1878 has already been referred to. By an act of March 13, 1858, Aaron Goodrich, Moses Sherburne, and William Hollinshead were appointed a commission to compile and arrange the public laws then in force, including the revision of 1851.

Two reports were made by this committee, — one signed by Sherburne and Hollinshead, and the other by Goodrich, — but neither was accepted by the Legislature. Judge Sherburne and Mr. Hollinshead afterwards prepared and published a compilation of the general laws as a private enterprise.

In 1863 the Legislature appointed S. J. R. McMillan, Thomas Wilson, Andrew G. Chatfield, and E. C. Palmer a commission to revise the laws, with instructions to lay their report before the session of the Legislature of 1864. Judge Chatfield declined to serve as a member of the commission, and the magnitude of the work was such that no report was made in 1864, and the committee was given more time.

When Judge McMillan and Judge Wilson became members of the Supreme Court, they withdrew from the commission, and the work was completed by Mr. Palmer and Gordon E. Cole.

SOME MISSOURI "YARNS."

By Hon. William A. Wood.

II.

MANY years ago, when nearly all the western half of Missouri was in one circuit, old Judge C—— was the first judge of it, holding the office several years. Sam ——, just admitted to the bar, had located at the county town where the old judge resided, and to get acquainted, started with him on his annual tour over the circuit. Sam was a fine "toddy" mixer; and the old judge, who was fond of it, soon became correspondingly fond of Sam. They arrived one Sunday at a county-seat, and the judge asked Sam to room with him, which invitation he gladly accepted. Sam was courting the judge's daughter, a fact of which the judge was unaware; and on their first night's rooming together the judge spent several hours writing a charge that he intended to read to the grand jury next day, while Sam put in the time writing a letter to his girl, which he wanted to close with a nice original verse of poetry. The judge generally drank about a quart of "brandy toddy" on going to bed, and finishing his work, asked Sam to go and prepare it. Sam told him he was trying to indite a little poem to a young lady friend, but could only get one couplet to suit him.

"Read it, Sam," said the judge.

Sam blushingly read, —

"She has red rosy cheeks
And dark rolling eyes — "

"Pshaw, Sam!" said the judge; "you go on and make that toddy. I'll finish your poem. I used to write lots of it when I was young; most good lawyers write poetry when young."

Sam went down to the bar-room, and spent extra time on the toddy. On his return he found the old judge had gone to sleep after writing the following couplet, —

"A foot like a bacon ham,
And about the same size."

Sam, although he afterward married the young lady and became a great lawyer and politician, did not send her the poem her father kindly helped him to write.

A resident of Nebraska a few years since sent his application for admission to the bar to the circuit clerk at K——, a little county-seat in Missouri far from any railroad, presumably thinking he would get an easy examination. When the court convened he was on hand the first day, and a committee appointed to examine him. He was an uncouth specimen, endowed with an unlimited amount of "cheek," but did not get the sort of committee for that to qualify him for the bar. The examination disclosed the fact that he was non-resident the State, and failed to disclose even slight legal learning on his part; so the committee refused to recommend his admission, and his application was denied by Judge D——. He was examined out of court in the evening, and came into court the next morning to learn the result. He stood at the railing of the bar, hat in hand, and inquired of the court what he had done with his application. Judge D—— informed him that he could not be admitted, and kindly advised him to study longer and try for admission where he resided. The disappointed applicant looked at the judge, cast a critical glance over the members of the bar sitting inside the railing, and said, "Well, Jedge, from the looks of you fellers I must be the first one that ever failed to git admitted in this court." He was allowed to depart for Nebraska in peace.

Judge D——, one of Missouri's most eminent circuit judges, and Colonel G——, a very

able and now venerable trial lawyer, began practice together in the same county-seat more than half a century ago, and continued there until the death of the judge not long since. They were never partners, but the respect and confidence they always bore each other was beautiful to behold. The judge was on the circuit bench of the State probably a greater number of years than any other judge, and had many little idiosyncrasies that were innocent yet amusing. One was a habit which he had when holding court in his home town of never opening court in the morning unless Colonel G——, who resided on a farm and was sometimes a few minutes late, was in the court-room. The judge would ascend the bench, take his seat, look over the room for his old friend, and if he were absent would say, —

"Mr. G—— is not in; Mr. Sheriff, call Mr. G——."

Nothing more would be done until Colonel G——, who was generally near enough to hear the sheriff's call, came puffing into the room, as though in great haste; when the judge would say, —

"Open court, Mr. Sheriff; Mr. G—— is now present.

A gentleman who is now General Superintendent of a great railroad running out of the Columbian World's Fair city, began life by trying to practise law in a Missouri village. One of his first cases was before his father, who was a justice of the peace. After a stormy wrangle between the young attorney and his adversary, the old gentleman decided the case against his son's client. The young man gave vent to some expressions of indignation, gathered up his books, and started to leave the room. His father pushed his specs on to his forehead, and began mildly to lecture him, saying, —

"Young man, do you expect to make your living practising law?"

The son, who had by this time reached the door, shouted back, as he retired from the field, —

"Not before such a d——d fool court as this."

He abandoned the law, and engaged in railroading with great success.

At the close of the war Judge C—— was still on the bench in a north Missouri circuit. H——, who had been a quartermaster in the United States army during the war, and who possessed no legal learning whatever, only a slight education, but an immense surplus of "gall," located in a little backwoods county-seat in Judge C——'s circuit, and essayed to make a living without labor, as he had done during his four years as quartermaster. Some one entrusted a note to him to collect by suit, and he managed to get a sort of petition filed and summons served; but before court convened the defendant died. The case was called by Judge C—— on the first day's docket, and H—— managed to make it known to the court that the defendant was dead.

"What do you want done with the case, Mr. H——?" said the court.

H—— was nonplussed, but after standing for a moment, his "cheek" came to his aid.

"Your honor," said he, "I will take an order of publication."

"Well, Mr. H——," said Judge C——, in his wiry-edged voice, "can you name a paper that circulates where the defendant has gone?"

A ripple of laughter passed over the court-room at H——'s expense, and during the confusion a bright but then struggling young lawyer, now general counsel to one of the largest railway systems in the world, suggested to him to get the case revived against the estate of the deceased defendant, which was accordingly done.

A probate judge in C—— County, Missouri, a Scotchman and full of Scotch wit and resources, was one day greatly annoyed by a pettifogger of the most virulent type, who was trying a case before him and a jury, asking witnesses incompetent questions, and

when the court sustained objection to them, getting up and senselessly haranguing the court and jury, trying thus to get before the jury what he could not legally prove. Finally, he had his most important witness on the stand asked an incompetent question, and the court sustained an objection. The attorney got up, and began a long speech about what he intended to prove by the witness, addressing his remarks to the jury, trying in an unfair way to influence them. While he faced the jury, the witness, the court, and the door of the room were nearly behind him. Our Scotch jurist motioned toward the door, and said to the witness in an undertone, "You are excused." "For good, Judge?" said the witness. "Yes," responded the court; and the witness, who was glad to get away, departed through the door. The pettifogger finished his talk to the jury and the crowd, and turned to resume his attack on the witness, when his dismay and astonishment were amusing to those knowing the cause.

A long-haired, hairy-faced, large-footed native of the Grand River swamps, after having made fires in winter and swept out in summer in a country lawyer's office for seven or eight years, was by an indulgent court admitted to the bar. He located in K——, a little county-seat, and began trying to practise. A young woman whom an old gentleman had taken in her infancy to his home and reared as his own child, sued his estate for the value of her services during the time she had lived in his family. The widow was executrix, and employed our Grand River tyro as counsel, along with a fairly good lawyer. In looking up authorities on the case, the good lawyer read one to his co-counsel, which held in such cases "that the decedent stood *in loco parentis* to the child, and services could not be recovered for unless there had been a special contract for pay." And this seems to be the law in most of the States. The Grand-Riverian made the opening argument, and undertook to quote from the authority in question to the probate court: "Why, sir," said he, "this old man was a *locust in parenthesis* to this girl, and she can't recover in this suit." The executrix won, and the product of the Grand River country has since been probate judge of a far-western county of Kansas.

In a northwest Missouri county, some fifteen years ago, a young fellow was admitted to the bar, not because of his knowledge of law, but because his and his wife's relations all said he was a natural orator. His first case was before a jury in a country J. P.'s court, and when he came to address the jury, he began as follows: "Gentlemen of the jury," said he, "had I the ability of Daniel Webster or the eloquence of Henry Clay, I would *ravish* this entire community." The justice and constable were several minutes suppressing the applause, mostly made by the young man's relatives in the audience.

During the last annual meeting of the Missouri Bar Association, at the celebrated Excelsior Springs, an eminent appellate judge, a most genial gentleman when off duty, spent an evening with some country members who relished a stronger refreshment with their cigars than spring water. The hours passed pleasantly until some one suggested that it was two o'clock, A. M.; and all retired to the elegant Elms Hotel, to their respective rooms. The appellate judge roomed with a distinguished federal judge, who had retired before him, but who awakened on his entering the room. The hotel is provided with electric bell service; and in each room is an annunciator, with an index pointing upward, resembling the face of a clock, with the hands at twelve. Our appellate judge, whose vision was a little "misty" from being out with "the boys," spied it, and pulling out his watch, remarked to his room-mate, "Judge, my watch is about two hours too fast," and proceeded to set it back to the time apparently indicated by the

annunciator. The federal judge confidentially "gave him away" next day to one or two members, and enjoyed a good laugh at his expense, which was good-naturedly received by the victim of the joke.

A leading member of the Missouri Bar, a tall and dignified Southerner, while a splendid lawyer and advocate, is very slow of speech, having a natural impediment which he cannot overcome. On a hot summer afternoon he began to argue a case to a judge, who, well-nigh worn out by a long session, and somewhat irritable, thoughtlessly remarked to the advocate, as he began slowly: —

"Cut it short, Major ——, cut it short."

The attorney flushed, paused for a moment, but recovered himself, and concluded his argument, when the judge took the case under advisement and retired to his chambers. He had scarcely seated himself at his desk, when Major —— entered, and seeing they were alone, locked the door, and put the key in his pocket. He advanced toward the judge, drew his tall, powerful form up to full height, and with anger and determination gleaming in his eyes, said, —

"Judge ——, you insulted me a few hours ago, without cause. I 'cut it short' for no man, and we will settle the matter while here alone." The judge was thoroughly alarmed, and after apology and much persuasion the advocate forgave him. But the judge told a friend that on no battle-field during the Civil War was he more frightened than during those few moments in chambers.

A handsome and brilliant advocate of the North Missouri Bar is addicted to stimulating freely during each term of the court, so that by the end of the term he is usually what the boys term "comfortably full." At the end of a term not long since, he was in this condition, and his co-counsel was submitting to the court motions for new trial and in arrest in a case in which they had that day been defeated, so as to appeal. He caught some of the words of what was going on, and stepping to the side of the other attorney, with much difficulty steadied his tall form erect. The court said, —

"Let the motions be overruled, and you can perfect your appeal."

"Yes, your honor," said the bibulous attorney, "just — hic — let the motions be *overfiled*, and — hic — we 'll 'peal the case."

At Moberly, Missouri, recently, a lady while passing along the street was bitten by a vicious dog. She went before the proper authority and made complaint, whereupon the justice issued a warrant for the apprehension of both the dog and its owner. Upon trial, the evidence was to the effect that the dog was a dangerous animal, and the owner, although knowing the fact, had failed to guard properly against accidents liable to result from his wicked disposition. After hearing the evidence and exhaustive argument of counsel, *pro* and *con*, Judge McNinch, the justice, fined the owner $5, with costs, and sentenced the dog to death. The owner, however, appealed his case, and obtained a stay of execution in the dog's behalf, pending the result of a trial in the circuit court. The justice required him to give bond for the good behavior of his brute, and that he would produce him for execution, in the event the judgment was affirmed by the appellate court.

APPEALS AGAINST HUMAN INJUSTICE.

THE right of might has often enough perverted justice; and those who have misused their power and their office to obtain the condemnation of the innocent have been brand-marked by history. When the weak has been overborne by the strong, in the consciousness of his innocence, he has in certain cases appealed from the unrighteous judgment of the human judge to the righteous Judge of all the earth.

That such appeals should be made was in fact encouraged by the practice in the Middle Ages of submitting doubtful cases to the judgment of Heaven. Trial by ordeal was nothing else but this. When two men appeared before the judge, and one swore one thing and the other swore the exact opposite, the judge remitted the case to the Judge of all the world, and bade them fight the matter out, in full confidence that victory would be on the side of the innocent. The ordeal of plunging the arm in boiling oil, or of walking over red-hot ploughshares, was also an appeal to God. Cunegunda, the wife of the Emperor Henry II., was charged — so ran the legend — with infidelity, and was forced to prove her innocence by walking barefoot over red-hot ploughshares. The story is not historically substantiated; but it is quite certain that such ordeals were undergone, and they were a direct appeal to the judgment of Heaven.

There were many ways in which the decision of Heaven was arrived at. Richardis, wife of Charles the Fat, had to prove her innocence by walking in a waxed linen dress between two blazing piles of logs. Another form was that of plucking a ring from out of a caldron of boiling water. Another was the cold-water. Another form was to offer blessed bread to the accused, who said, "If I be guilty, may this bit of bread choke me."

Unhappily, with the abolition of the ordeal, in place of it in all European lands, save England, came the use of torture for the extraction of a confession. The fact of appeal to Heaven to give right judgment being acknowledged in Europe, naturally gave occasion to those who had been wrongly sentenced to appeal away from their unjust judges to the highest court of all, — that in heaven.

In 624 sat the Council of Macon, before which Eustace, Abbot of Luxeuil, was summoned by one Agrestin, a former monk of Luxeuil, who charged him with observing certain peculiarities which had come from Ireland with the founder, Saint Columbanus, and were, indeed, common to the Celtic churches, but which Agrestin considered as schismatical, because contrary to Roman usage. The gentle Eustace explained that he followed the customs of the founder, and justified the usage of Luxeuil; but as Agrestin always returned to the charge, and the bishops in conclave seemed dubious how to decide, he exclaimed: "In the presence of these bishops, I, the disciple and successor of him whose institute you despise, cite you to appear, within a year, along with Columbanus, at the Divine tribunal, to plead the case against him there." The solemnity of this appeal awed the prelates who leaned to the Roman usage, and they urged Agrestin to be reconciled to his former abbot; and the latter, who was gentleness itself, offered him the kiss of peace. But Agrestin refused it. Before the end of the year he was slain by the blow of an axe by a serf in an ignoble brawl.

Robert Grostête, Bishop of Lincoln, had many a struggle with Pope Innocent IV. against papal encroachments on the rights of his see. According to Knyghton, the old chronicler, a year after his death the Bishop appeared to the Pope, and called to him: "Stand up, wretched one, and come to judgment!" As the Pope hesitated, he raised his pastoral crosier and struck Innocent on

the breast, so that he died on the following day, Dec. 7, 1254.

At the opening of the thirteenth century Absalom was Archbishop of Lund, in Sweden. There was a tract of land held by the church of Lund in conjunction with a wealthy bonder, and as much controversy and quarrel arose from the double rights, the Archbishop asked the bonder to divide the land equally between him and the see. The bonder, weary of the strife, consented. The Archbishop and he proceeded one summer day to measure out and parcel the land in dispute. As Absalom would trust none but himself, he held one end of the rope, and bade the bonder hold the other. Whilst thus engaged he shouted to the other to pull harder and stir his stumps, as they had a long day's work before them. The bonder, nettled, tugged at the rope and jerked the Archbishop off his feet, so that he fell backwards on some stones and cut his head. Absalom, in a great rage, declared that the bonder had rendered himself liable to excommunication, and that he would be placed under papal ban unless he put his case unreservedly into his hands. The farmer, finding himself powerless to resist, did so; when Absalom condemned him to surrender to the church his portion of the coveted estate. The bonder was thus reduced from the position of a wealthy man to one of small means. The vexation preyed on his mind, and he fell ill. Finding himself dying, he sent for a priest, and promised him his best horse and saddle and bridle if he would ride, the moment the breath was out of his body, to Lund, and summon Archbishop Absalom before the throne of God to answer for the injustice done him. The priest did as required. On the 21st of March, 1201, he appeared before the Archbishop and pronounced his summons. At once Absalom turned deadly pale, fell out of his seat, and was taken up dead.

Ferdinand IV., King of Castile, is said to have been summoned within thirty days to answer before the heavenly Judge for a wrong he had done; and he died on the thirtieth day.

The Bishop of Sénez was preaching before Louis XV., and took for his text, "Yet forty days, and Nineveh shall be overthrown." He gave such a pointed account of the vices of the godless city and its king, that the whole court thrilled with uneasiness, believing he was warning the king; and when he concluded with a significant gesture and hand outstretched towards Louis XV., "Yet forty days, — and then overthrow," it was taken as a denunciation of, and warning to, the king. Within the time specified Louis XV. was no more, — May 10, 1774.

No more infamous a perversion of justice probably ever occurred than the condemnation of the Templars, whose wealth and power made them feared by the King of France; and the Pope, Clement V., surrendered the unhappy Order to the French King. Du Molay, grand master, was burned alive. As he mounted the funeral pyre, in a clear, calm voice he declared: "Before heaven and earth, on the verge of death, where the least falsehood bears like lead upon the soul, I protest that our sole guilt has been that we trusted the seductive words of the Pope and king." Then he cried: "Clement, iniquitous and cruel judge," — some accounts say he included Philip the Fair, the king, — "I summon thee to meet me before the throne of God." A year passed, and Clement and Philip were dead (1314).

An earlier story relates to the Council of Chalcedon (451), which condemned Dioscorus, sometime Bishop of Alexandria, for his Eutychianism. The monks had taken up eagerly the side of heresy, under one Barsumas. As they could not obtain recognition of the heresy by the Council, they fiercely shook their garments in contempt of the assembled fathers; and Barsumas loudly summoned Pulcheria, the Empress, whose influence had led to the assembly of the Council, to answer for it before the supreme Judge. She died a few days after, and Bar-

sumas at once took rank as a prophet among his followers.

Jerome of Prague was sentenced by the Council of Constance to be burned for his heresies. He appealed in loud tones: "To the sovereign Judge before whom you must all appear and answer for this judgment before a hundred years are passed."

A great judicial crime was the condemnation and burning of Urban Grandier. The story of the possessed girls of Loudun, in France, in 1625, is well known. The nuns were poor; they hired a house and received boarders. Some of these boarders were of a frolicsome disposition, and frightened the nuns with strange noises and freaks that made them suppose the house was haunted. At this time there was at Loudun an eloquent young priest named Urban Grandier, who was an object of jealousy to the canons of St. Croix, and they utilized the hauntings to effect his destruction. The nuns and girls became a prey to hysteria, and in convulsions declared they were possessed by devils sent to them by Grandier. On this accusation the unfortunate priest was condemned and burned alive. Before his death he solemnly cited his persecutor, the instigator of the whole infamous plot, to meet him before the throne of the Judge of all in the course of a month from that day; and exactly a month afterwards the man died.

Terence O'Brien was Bishop of Emly. When Limerick was besieged, Ireton, Cromwell's commander in Ireland (1651), sent him word that he would give him forty thousand pounds sterling, and permission to retire in safety, if he would exhort the people to surrender. This the Bishop refused, and Ireton excepted the Bishop from amnesty; he proposed to the besieged to bring him the head of the prelate, together with those of twenty men who had voted against surrender. If they would do this, he would spare the town. This was refused by the citizens. At length the city surrendered, and the Bishop fell into the hands of Ireton. The stern Puritan at once ordered the prelate to death. Bishop O'Brien turned to the General and said: "I summon Ireton, the arch-persecutor, to appear in eight days to stand before the heavenly tribunal, to answer for his deeds of cruelty." On the eighth day Ireton, stricken with the plague, was a corpse.

In Gothland a certain John Turson, who was innocent, was sentenced to death by a magistrate, off hand, seated on his horse. Turson protested his innocence, and summoned the judge to attend with him before the highest Judge. As Turson's head was struck off, the judge fell from his horse and broke his neck.

Meinwerk, Bishop of Paderborn, was abused by a certain monk with great violence and with many charges. The Bishop answered him: "Well, let us appear together before the Judge of both, and let Him decide between us." Singularly enough, the monk died on the same day (June 5, 1039) as did the Bishop.

One of the most horrible of the many crimes committed on both sides in the revolt of the Netherlands against Spanish rule was the execution of Nanning Koppezoon by the Dutch governor of Holland. "He bore," says Mr. Motley, "with perfect fortitude a series of incredible tortures, after which, with his body singed from head to heel, and his feet almost entirely flayed, he was left for six weeks to crawl about his dungeon on his knees. He was then brought back to the torture-room and again stretched on the rack, while a large vessel was placed inverted upon his naked body. A number of rats were introduced under this cover, and hot coals were heaped upon this vessel, till the rats, rendered furious by the heat, gnawed into the very bowels of the victim, in their agony to escape." When finally led to execution, the Calvinist minister, Julian Epeszoon, endeavored by loud praying to drown his voice, that the people might not rise with indignation; and the dying prisoner with his last breath solemnly summoned this unworthy pastor to meet him within three days

before the judgment-seat of God. It is a remarkable and authentic fact," continues Mr. Motley, "that the clergyman thus summoned went home pensively from the place of execution, sickened immediately, and died upon the appointed day" (1575).

George I. had been divorced from his wife, Sophia Dorothea, of Zelle, in 1694, and she remained in confinement for thirty-two years in the castle of Ahlen. She died on Nov. 13, 1726. Before her death, she wrote a letter to George, denying the charges that had been made against her, and solemnly citing him to appear before God's throne and there answer for his conduct towards her. In June, 1727, the English King arrived in Germany on his way to Hanover, as usual, when this letter was thrown in at the coach window, and fell on his lap. He tore it open, and was so alarmed — it is said — that he fell into a convulsion and died. He certainly was attacked with apoplexy on the road, and was carried a corpse from his coach (June 11, 1727).

We will conclude with a story that seems to be thoroughly authenticated. In the church of Barlt, in Dithmarschen, were two pastors. The one, Wattenbach, was head-preacher, and a man of very broad views. Along with him, in 1691, was a deacon named Hœsch, a severely Orthodox Lutheran. It seemed to the latter that the teaching of his superior sapped the foundations of Christianity, and he preached vehemently against his latitudinarian opinions. The parishioners sympathized with the head-preacher; and as Hœsch could not stir them up into zeal for orthodoxy, he laid a formal complaint against Wattenbach before the provost Hahn of Meldorf, who at once took the matter up; and a charge of heretical teaching was brought against Wattenbach in 1695, before the consistory at Rendsburg. The synod admonished both parties to peace. In 1699 Wattenbach was again summoned before the consistory, and was questioned as to his belief. He then admitted that he had indeed entertained rationalistic views, but declared that he had entirely abandoned them. The synod thereupon again dismissed the charge, and again exhorted to fraternal charity. In vain Hœsch and the provost Hahn, finding that the ecclesiastical authorities would not condemn and deprive Wattenbach, appealed to the King of Denmark and Duke of Holstein-Glückstadt; and a government commission deposed Wattenbach. This was made a grievance of by the ecclesiastical authorities, who, on the appeal of the accused, took the matter up, with the royal consent. Wattenbach was again acquitted, and Hœsch himself narrowly escaped suspension. A royal decree, dated Oct. 26, 1700, confirmed the decision of the consistory. But this did not produce peace. The affair assumed another aspect, and Wattenbach was again accused before a royal court, not now of heresy, but of something connected with the quarrel, the particulars of which are not recorded. Judgment was given on April 1, 1703, and sentence of expulsion from his cure was pronounced against Wattenbach at Glückstadt. When the pastor heard this, he asked if there were any appeal possible. He was told that there was none. Then he solemnly said: "I, John Caspar Wattenbach, refer my cause to Heaven. I cite the provost Hahn to appear this day twelve weeks, the Chancellor who has given judgment to appear this day fourteen weeks, and my prosecutor, the fiscal officer, at the same time, and all my witnesses who can testify to my innocence to attend within a year and a day before the Divine tribunal." A death-like stillness fell on the court. It was broken at last by the Chancellor, who rebuked the accused, and condemned what he had done as a profane act, as he regarded it. Wattenbach replied that the sentence of the court destroyed his repute, cast him and his family into utter poverty, and deprived him and his of their home. Having no other redress, he was forced to make this appeal. He then thanked the judge for his well-meant rebuke, and withdrew. He returned to Barlt to clear his

family and goods out of the parsonage, and died there sixteen days after the sentence, on Good Friday, April 16, 1703.

On the 24th of June the twelve weeks allotted to Provost Hahn had elapsed. It was Sunday, and, moreover, St. John the Baptist's day. The provost preached in the morning in the parish church of Meldorf, on a passage from the Gospel for the day (Luke i. 57–80). He felt perfectly well and in good spirits; and in the afternoon jokingly sent a message to the Chancellor to remind him that his time was up, but that no token appeared of anything being the matter with him. Before the messenger returned, he had fallen in an apoplectic fit and had breathed his last. Exactly on the day appointed, at the end of the fourteenth week, the judge also died; so also the prosecutor, on the same day; and within the twelvemonth every one of the witnesses summoned by Wattenbach to attest his innocence was dead.

This account was given by the provost Burchard, who sat in the consistory before which Wattenbach had appeared, and he says that all who were mixed up in the matter could attest the truth of what he relates. The registrars of the parish of Barlt certainly confirm some of the particulars. The son of Wattenbach became afterwards pastor at Colmar. That nervous terror may have in many cases worked the death of the men summoned is likely enough. Some of the stories recorded may have been invented *après coup*, but certainly not all. — *Chambers' Journal.*

LONDON LEGAL LETTER.

LONDON, March 5, 1892.

THE Recordership of the City of London has been conferred upon Sir Charles Hall, Q. C. M. P. In my February letter, as well as in a previous one, I indicated the likelihood of another selection, and my anticipation was the one which was most in favor at the clubs and other headquarters of authentic gossip; but for one reason or another Sir William Mariott's candidature raised a considerable amount of opposition, and he ultimately withdrew his name before the election. The annual salary attached to the office has been raised to £4000. This wise step was taken with a view to attract the services of the best lawyers available; the sum formerly paid was £3000. Recorders, although judicial officers, can sit in the House of Commons; and the Aldermen were determined that their Recorder should be a Member of the Legislature, and able to vindicate the rights and privileges of their ancient corporation when assailed, as they not infrequently are, by the free lances of the Radical party. Sir Charles Hall is a son of the late Vice-Chancellor Hall, and has himself made a mark at the bar, the bulk of his practice consisting mainly of Admiralty work; but what secured for him the unanimous support of all was his unique social position, which, united to his own high merits, stamped him as peculiarly qualified to fulfil the special functions of Recorder of London. He has always been one of the leading figures in the selectest circles of society, and an intimate friend of the Prince of Wales, who made him his attorney-general, — a post now devoid of the political and general importance it once enjoyed, but which confers no small distinction upon the occupant. The Prince has appointed Sir Henry James, Q. C. M. P., to succeed Sir Charles as his Attorney-General.

A widespread expression of regret has been occasioned by the death of Lord Justice Cotton, which occurred at the end of February. Ill health constrained him to retire from the bench in November, 1890, where he had sat as a Lord Justice of Appeal since 1877; on the occasion of his retirement Lord Esher, the Master of the Rolls, thus expressed the sentiments of the bench. After stating that Lord Justice Cotton's knowledge of law and equity was almost equally complete, he proceeded: "Its principles, its practice, its details, as decisions, as application, he had always ready. His powers of exposition and explanation were lucid in the highest degree. As a great lawyer, his predominant virtue was accuracy; as a great judge, his appreciation of law and facts was instantaneous; and patience and justice were his predominant virtues. His knowledge, quickness, lucidity, and inexhaustible patience made him as great and just a judge as has ever adorned the bench." Henry Cotton was born in 1821; he received his school education at Eton, from whence he went to Christ Church, Oxford. At the University he gained first-class honors in mathematics. He was called to the bar at Lincoln's Inn in 1846, and twenty years later became a Queen's Counsel. In 1872 he was appointed Standing Counsel for the University of Oxford, and as I have mentioned above, reached the bench in 1877. We have just had a new batch of Queen's Counsel appointed by the Lord Chancellor. One of these is Mr. H. F. Dickens, a son of the great novelist. Mr. Dickens secured a large and lucrative practice as a junior, and is expected to succeed as a "silk." He is a smart and lively speaker, and has a considerable reputation as a lawyer. In his chambers in the Temple is placed the historic table at which his father wrote most of his novels, — a family relic which the son naturally prizes very highly.

The Solicitor-General, Sir Edward Clarke, still further enhanced his reputation as a parliamentary orator the other night in the House of Commons. The occasion was the annual debate on the Disestablishment of the Church in Wales. The motion was brought forward by a Scotchman who sits for a Welsh constituency, Mr. Samuel Smith. The Government's reply was commenced by Sir Edward Clarke, whose speech reached a level of eloquence seldom attained nowadays in the House of Commons, and almost never by a lawyer. The Solicitor-General is on all hands admitted to be the most conspicuous Parliamentarian whom the bar has produced for many years.

The career of the most brilliant young man in England has been prematurely cut short. Mr. J. K. Stephen was the second son of that eminent judge, lawyer, and writer, Sir James Fitz-James Stephen, *Bart.* The son had many of his father's

solid qualities, and a brilliancy superadded, that was the admiration and envy of all his contemporaries. As a boy at Eton, and afterwards at Kings College, Cambridge, he showed that nature had endowed him with many of the unattainable gifts and graces of intellect and expression. He had the honor of preparing H. R. H. the late Duke of Clarence for the University. Although a member of the bar, he never took kindly to the drudgery of his profession, and preferred to find an outlet for his talents and energy in journalism and general literature. He lately resided at Cambridge, where his death occurred in the thirty-third year of his age. To a larger circle than his friends in London and Cambridge he became lately known by the publication of two volumes of verse, entitled "Lapsus Calami" and "Quo Musa tendis." Like many whose mental attainments leave those of their fellows far behind, Mr. Stephen was subject to moods of great depression. Mr. Oscar Browning, who was his master at Eton and afterwards his co-fellow at Kings College, contributed an interesting sketch of his quondam pupil and friend to the pages of the "Bookman" for March. He says: "He wrote to me on his birthday in February, 1891, saying that he was thirty-two on that day, and that nothing had been done for immortality. How little he foresaw that in a year he would be dead, and that his career would be noticed in glowing terms by nearly every important newspaper in England!"

To-day, the 5th of March, we are in the throes of the second County Council election for London. Among the candidates are a large number of "past Templars."

* * *

The Green Bag.

PUBLISHED MONTHLY, AT $3.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

SINCE the "Green Bag" came into existence, our contemporaries, appreciating the good example set them, have gone more or less extensively into illustrations. First the "Chicago Legal News" fell into line, and was speedily followed by other journals, until at last even the "Albany Law Journal" has decided to give its readers portraits of eminent lawyers. The "Central Law Journal" still holds back, but we expect soon to be able to record its entrance into the pictorial field. We, of course, feel extremely flattered that our brother Editors recognize the good points of the "Green Bag," and strive to imitate them.

WE wish every reader of the "Green Bag" would send in one or more of the best legal anecdotes which have been brought to his attention. Our "Facetiæ" column might in that way be kept filled with the brightest and wittiest sayings and doings of the profession throughout the country. Whenever you hear a good story, jot it down and send it to the Editor.

IN the sketch of Caleb Cushing in the January number of the "Green Bag," among his characteristics were noted his omnivorous reading and unwearied industry. As an illustration, it has been learned that when a young lawyer in Newburyport, he made an arrangement with the leading bookseller of the place to take all his new books at nine o'clock in the evening, and return them at eight the next morning. In that time, usually devoted to rest, he would gain a clear idea of their contents, and his wonderful memory always retained what he had once learned.

THE following communication will be read with interest: —

ALBANY, March 19, 1892.

Editor of the "Green Bag":

In preparing "The Giant Brakeman" for your periodical (published in December number, 1891), it occurred to me that it would have been a shrewd move on the part of the defendant's counsel to offer to measure the plaintiff as he sat in court. This, I learn, was done at the new trial; and the result was that he fell one inch short of the average height! It did not hurt his case, however; for he changed his testimony to conform to the altered facts, and swore he was walking forward to find a brake that would hold, when he was struck. Result, an increased verdict for plaintiff!

Yours truly, IRVING BROWNE.

LEGAL ANTIQUITIES.

ANY one who had prosecuted a man to death for a criminal offence used to obtain a "Tyburn ticket," which conferred upon him and his heirs male future exemption from serving on a jury. These tickets passed, like a freehold estate, from father to son.

JOSEPH WOOD and Thomas Underwood were condemned to death for stealing, neither being fourteen years of age, and the prosecutor no more than twelve. The judge decreeing it was necessary for the "public safety," and as an example to other "little boys," to cut them "off," they were accordingly executed at Newgate, July 6, 1791. A few weeks later, another child, hardly fifteen, was brought to the gallows for purloining 1*s.* 6*d.*

IT is remarkable that the oldest book of law in the German language is entitled "Spiegel," or "The Looking-glass," which answers to the English "Mirror of Justices." It was compiled by Eckius

de Reckaw. One of the Icelandish books is likewise styled "Speculum Regale." There is also, in Schrevelius's "Teutonic Antiquities," a collection of the ancient laws of Pomerania and Prussia, under the title of "Speculum." Surely all this cannot be the effect of pure accident.

FACETIÆ.

A GOOD story is gotten off on the legal profession, which runs about as follows: —

In a certain community a lawyer died who was a most popular and worthy man; and among other virtues inscribed upon his tombstone was this: "A lawyer and an honest man."

Some years afterward a Farmer's Alliance convention was held in the town; and one of the delegates, being of a sentimental turn, visited the "silent city," and in rambling among the tombs was struck with the inscription: "A lawyer and an honest man."

He was lost in thought, and when run upon by a fellow-hayseed, who, noticing his abstraction, asked if he had found the grave of a dear friend or relative, said: "No, but I am wondering why they came to bury these two fellows in the same grave."

JUDGE. Gentlemen of the jury, your verdict is decidedly mixed.

FOREMAN. Yes, your honor; it is in accordance with the evidence.

A YOUNG man was on trial for illegal voting, it being claimed that he voted when under age. His mother was on the witness-stand, and testified that the young man was of age when he voted.

COUNSEL. How do you know he was of age?

MOTHER. Because I am his mother and he was born on — (giving the date).

COUNSEL. Now, Mrs. Smith, please tell this jury some particular thing that happened that day that fixes it so firmly in your memory."

NECESSITY knows no law, and is generally too poor to hire a lawyer.

THE docket of a Dakota justice contains the following entry: —

Mapes *vs.* Wait. } Action for marriage.

The parties to this action appearing before me this 10th day of May, 1880, and having taken the oath prescribed by law, were by me adjudged to be duly married. The said Mapes resides on the northeast quarter of section ten in this township, and the said Wait resides on the southeast quarter of section eight; but they did to me on oath declare their intention of making their future home on said section ten.

———, *Justice of the Peace.*

AN old farmer from one of the back counties was the defendant in a suit for a piece of land, and he had been making a strong fight for it. When the other side began his speech, he said:

"May it please the court, I take the ground — "

The old farmer jumped up and sung out: "What 's that? What 's that?"

The judge called him down.

"May it please the court," began the attorney again, not noticing the interruption, "I take the ground — "

"No, I 'll be d——d if you do, either," shouted the old farmer, "anyhow not until the court decides the case."

MURDERER (to Judge). Is this my lawyer?

HIS HONOR. Yes.

"Is he going to defend me?"

"Yes."

"If he should die, could I have another?"

"Yes."

"Can I see him alone for a few minutes?"

JUDGE. One year and fifty dollars fine.

PRISONER'S LAWYER. I would like to make a motion to have that sentence reversed.

JUDGE. All right! Fifty years and one *dollar* fine.

SCENE, lawyer's office. Enter little girl, sobbing bitterly.

LAWYER. Why, little one, what 's wrong?

LITTLE GIRL. Are you Mr. Blank, the lawyer?

THE LAWYER. Yes. What is it you want?

LITTLE GIRL. I want — (*sob*) — I want — a divorce from my pa and ma.

NOTES.

We do not believe that either publishers or readers have any desire for the establishment of a censorship of the postal press. This, however, is what is proposed by the bill introduced in the National House of Representatives by Mr. Henderson of Iowa, on January 5; and more than that, it is proposed to concentrate this power in the hands of one man, the Postmaster-General. The following provision in the bill calls for serious reflection on the part of the American people:

"And the Postmaster-General *shall have full authority to declare what matter is non-mailable* under this act, so far as the transportation in the mails is concerned: Provided, That nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself: And provided further, That upon the continued mailing of newspapers or periodicals containing advertisements or other articles or items forbidden by this act to be transmitted in the mails, the Postmaster-General is hereby authorized *to declare said publication (including further issues thereof) non mailable.*"

Such legislation hardly conforms to democratic notions of a true republican form of government for a *free* people.

According to Lord Mansfield's definition, one of the attributes of a corporation is immortality.

The Code of Iowa permits "single individuals" to incorporate, thus opening to them the door to perpetual existence.

Whether it was the intent of the legislature to limit this precious boon to single individuals as contradistinguished from married persons, is an open question. If such was the purpose of the legislature, the law is a species of class legislation which should not be upheld by the courts.

The St. James's Gazette says: —

The following resolutions were submitted to the English Council of Judges by one of the junior judges with a view to facilitating the progress of judicial business: —

That judges shall commence business at the time appointed for the sitting of the court, or at least not more than fifteen minutes after such time.

That a judge of the Court of Appeal shall not interrupt counsel more than six times in the space of five minutes; other judges not more than three times in the same space of time

That judges, when they adjourn in the middle of the day for a quarter of an hour, shall return into court at the end of the quarter of an hour, or at least not more than half an hour after that time

That judges shall not sleep when on the bench for more than half an hour in the course of the day: and when two judges are sitting together, they shall not both sleep at the same time.

A New Jersey court has rendered a decision that a rooster that leaves the jurisdiction of its owner does not thereby become a wild beast subject to capture. The comfort that this decision might carry to belated Jerseymen out alone on a dark night and apprehensive of meeting a rooster that had left the jurisdiction of its owner, is mitigated by the announcement that an appeal has been entered. The defendant in the New Jersey case declares he will carry the matter up to the United States Supreme Court, and will maintain his contention that a wandering rooster becomes a wild beast, if it takes all summer.

The lawyer who drew up the following document, which was put in evidence by the defendant in a complaint for bigamy, acquired his linguistic resources under the elms of New Haven, but they have evidently been stimulated by the pure ozone of Minnesota. It is no wonder that the poor woman, accused of bigamy, thought that she had an iron-clad bill of divorce.

"Know all men by these presents: That we, Anna M. Paul, party of the first part, and Edward Paul, party of the second part, husband and wife, and both of Ramsey County in the State of Minnesota, for and in consideration of the mutual promises, covenants, and agreements hereinafter contained, have, and by these presents do hereby promise, covenant, and agree, each with the other, as follows to wit:

The said Anna M. Paul, for and in consideration of the covenants, agreements, and undertakings hereinafter contained and set forth, to be by the said Edward Paul kept and performed, hereby waives, surrenders, gives up, quitclaims, forfeits, and conveys to the said Edward Paul any and all right, title, interest, claim, and demand, either present or prospective, in possession or contingent, which she has or may have, either in law, conscience, morals, or equity (by reason of being the wife of said Edward

Paul), in or to any or all of the property, real or personal, of the said Edward Paul, in the State of Minnesota, and in or to any property, real or personal, which the said Edward Paul may hereafter acquire in the State of Minnesota, and in or to any and all property, real or personal, which the said Edward Paul has or may hereafter acquire anywhere on earth or elsewhere;

And she further agrees, forever hereafter to refrain from calling upon him for aid, care, succor, or support, or for domestic comfort of any nature whatever, or claiming him as her husband, or charging him with any liability for her support; and she further agrees, never again to call upon him or ask him to fulfil any of the offices of a husband, or the duties incident to the marriage relation.

On the other hand, the said Edward Paul, for and in consideration of the foregoing promises, agreements, and covenants made by the said Anna M. Paul, and to be kept and performed by her, does hereby covenant, promise, and agree, that from this day henceforth and forever, he will not claim or recognize the said Anna M. Paul as his wife; that he will not speak ill of her to any man, woman, or child on earth; that he will bridle his tongue, and in no way, shape, or manner slander or reproach her for any past or future acts; that from this day henceforth and forever he surrenders, waives, and gives up any and all authority over, claim upon, or interest in, the said Anna M. Paul, as his wife or otherwise; that he will seek no marital relations with the said Anna M. Paul; that he will let her entirely alone, and make no effort to pry into her affairs, and will treat and regard her as a stranger; that he will consider and treat any and all acts hereafter done by the said Anna M. Paul, as not of his business, and he further covenants that from this day henceforth and forever he gives, grants, and surrenders to the said Anna M. Paul her full and complete freedom and release from the marriage tie heretofore existing between them, and full liberty to make and form such connections, alliances, relations, and ties with any other men, women, or children as her own free will shall dictate and her and their desires, either physical, mental or moral, normal or abnormal, or any or all thereof, shall prompt; and he further covenants that never again will he pester, annoy, bother, call upon, seek any connection or intercourse with her, and will not complain if she seeks such with others; and he further waives, gives up, and surrenders any and all claim, title, property, or interest, either present or prospective, which he has or may hereafter have, in or to any property, real or personal, which the said Anna M. Paul has now or may hereafter acquire anywhere on earth or elsewhere.

And it is mutually agreed that upon the signing of these covenants, the said parties shall separate and live apart from each other forever as husband and wife, *and henceforth be to each other as a new and unread book, uncut, unopened, and untouched*, and that so far as the same can operate in law, that this agreement shall be taken and accepted by each of said parties as a full, absolute, and complete DIVORCE.

In witness whereof, and in solemn commemoration of this event, and in token of our full understanding and hearty accord in the foregoing, we have hereunto set our hands and seals, in the presence of each other, on the 29th day of August, 1890, at the city of St. Paul, Ramsey County, State of Minnesota, U. S. A.

ANNA M. PAUL (Seal.)
his
EDWARD + PAUL (Seal.)
mark.

Recent Deaths.

HON. EDWARDS PIERREPONT died in New York on March 6. He was born in North Haven, Conn., March 14, 1817. At the age of twenty-four years he graduated from Yale College, with the honors of his class. Remaining in the city after he had taken his degree, he studied law in the New Haven school, and at the end of his course began the practice of his profession at Columbus, Ohio. But circumstances induced him, five years later, to return to the East, when he at once, in 1847, resumed practice in the city of New York.

During the ten succeeding years Mr. Pierrepont met with a notable success at the bar; and one year later, when a vacancy occurred in the superior court by the death of Judge Oakley, he was chosen to fill the position. He remained upon the bench three years, and then resigned to resume the practice of his profession.

Until 1869 Judge Pierrepont continued his law practice in New York City, being engaged in several noteworthy cases in which he became associated with some of the leading practitioners at the bar.

Perhaps his most distinguished service was in connection with the trial of John H. Surratt, in 1867, for complicity in the assassination of President Lincoln. Immediately after his inauguration, President Grant appointed Mr. Pierrepont United States District Attorney for Southern New York; but he resigned the place fourteen months later, and

became an active worker in the movement against the Tammany ring, which began in the fall of the succeeding year, being one of the "committee of seventy."

In 1872 he was offered the Russian Mission by General Grant, which he declined.

At the annual commencement of Columbia College in New York, in 1871, he received the degree of Doctor of Laws, which honor was again conferred upon him two years later by Yale College. In March, 1874, he wrote a letter to Senator Sherman on the financial question, in which he advocated the resumption of specie payments. In April, 1875, he was appointed Attorney-General of the United States; and his connection with that office brought him prominently before the country through the attitude of the government toward the disturbances in Mississippi, and the prosecution of the St. Louis whiskey frauds. In the latter case his famous "whiskey letter" drew forth wide comment.

President Grant appointed Mr. Pierrepont Minister to England, May 23, 1876. He accepted the mission, leaving the attorney-generalship to Judge Taft.

Mr. Pierrepont was a man of erect, stately figure, with a large, intellectual head. His features were regular, and highly expressive of the mental and moral culture which was characteristic of the man. In his manners he was courtly and polite, but never familiar. He was a powerful and eloquent speaker at the bar and on all other occasions. His record as a public man and private citizen was unblemished.

REVIEWS.

We have received from the Interstate Commerce Commission the advance sheets of "Statistics of Railways of the United States." The entire volume will cover about 875 pages. This report gives comprehensive statistics covering the operations of railways for the year ending June 30, 1890, and a statement of earnings from passenger and freight service, together with operating expenses and fixed charges, for the nine months ending March 31, 1891. A marked feature of this report, which adds greatly to the value of its statistics, is the division of all statistics into ten territorial groups, as shown by the above map, by which the differences in conditions of operation in various parts of the country are clearly brought to notice. Formerly all statistics have been massed for the entire country, and the averages deduced have been for all the roads in the United States. The comparisons rendered possible by this report show marked differences in the different parts of the country.

The Atlantic Monthly for March opens with an article by the Rev. Brooke Herford, the popular clergyman, on "An Old English Township." Mr. Crawford continues his serial of Italian life, "Don Orsino;" and Miss Isabel F. Hapgood has a vividly written paper on Russian travel, called "Harvest-Tide on the Volga." Miss Agnes Repplier contributes an interesting essay on "The Children's Poets." Joel Chandler Harris has a short dialect story called "The Belle of St. Valerien." Edith Thomas, under the fanciful title of "The Little Children of Cybele," describes, in a half-serious, half-fanciful fashion, the habits of the swallow, the squirrel, the tortoise, the chipmunk, and other dumb pensioners of Nature. The most important article in the number, however, is "Why the Men of '61 fought for the Union," by Maj.-Gen. Jacob Dolson Cox, which furnishes another aspect of the principles involved in the contest between the North and South, and which will be read with interest by those who have enjoyed Professor Shaler's and Professor Gildersleeve's views on the same subject. Another important article is by Prof. George Herbert Palmer, of Harvard University, who writes on "Doubts about University Extension," — a scholarly paper, which will command the attention of the many persons interested in the work of university extension throughout the country.

The March Century is particularly interesting to the many thousands who have constituted the audiences of the famous Polish pianist, Paderewski, in different parts of the United States. These papers on Paderewski are parts of the musical series which the Century is publishing this year. The frontispiece is an engraving of Paderewski from a photograph; and in addition, a drawing by Irving R. Wiles is given, showing the great virtuoso at the piano. Accompanying these pictures are "A Critical Study," by the distinguished American pianist and composer, William Mason; "A Biographical Sketch," by Miss Fanny Morris Smith;

and a poem by R. W. Gilder, entitled "How Paderewski Plays." In this number Mr. Stedman's essays on poetry are begun. Mrs. Schuyler Van Rensselaer has an article on "St. Paul's Cathedral," which is brilliantly illustrated by Joseph Pennell. The United States Fish Commission is described by Mr. Richard Rathbun, a scientific member of the staff. Prof. Henry C. Adams presents a timely study of "The Farmer and Railway Legislation." Professor Boyesen tells of "An Acquaintance with Hans Christian Andersen." Col. Richard Malcolm Johnston, the popular story-writer, has a paper, illustrated by Kemble, on "Middle Georgia Rural Life." The Kipling-Balestier "Naulahka" is continued, as well as Dr. Weir Mitchell's "Characteristics." Hamlin Garland begins a serial in three parts, entitled "Ol' Pap's Flaxen." Dorothy Prescott, a new writer, makes a social study of the environs of Boston in an illustrated story called "Our Tolstoi Club." Miss Viola Roseboro' tells the story of "The Village Romance;" and Mrs. Burton Harrison (author of "The Anglomaniacs"), that of "Gay's Romance."

William Dean Howells's new novel, "The World of Chance," begins in Harper's Magazine for March. Julian Ralph contributes a graphic article on "The Capitals of the Northwest," and in another article, entitled "Talking Musquash," — which article is superbly illustrated from drawings by Remington, — the same writer concludes his wonderfully entertaining description of the Hudson Bay country and the fur-trading industry of the Northwest. The very interesting series of "Personal Recollections of Nathaniel Hawthorne," by Horatio Bridge, is brought to a conclusion. The second of the noteworthy series of Danube articles, "From the Black Forest to the Black Sea," strengthens the good impressions made by the first. It is written by Poultney Bigelow, and richly illustrated by Alfred Parsons and F. D. Millet. Mr. De Blowitz, in another chapter of his memoirs, entitled "Alphonso XII. proclaimed King of Spain," gives a characteristic account of a remarkable feat of journalism, which led to his appointment as chief correspondent of the "London Times" in Paris. With an article on the "London of George the Second," which is profusely illustrated by E. A. Abbey and others, Walter Besant brings his valuable and very popular series of London papers to a close.

The most interesting articles in the New England Magazine for March are "Recollections of Louisa May Alcott," by Mrs. Maria S. Porter; "Harvard Clubs and Club Life," by William Dana Orcutt; and "Milwaukee," by Capt. Charles King, the military novelist. The article on Harvard Club Life will attract a great deal of attention just now, when the newspapers are discussing the barbarities of the "fast set" at Harvard. It is beautifully illustrated, and gives a detailed description of the peculiar customs of the different college societies. Mr. Edwin D. Mead discusses the Chilian trouble, and takes the view that the United States has been made ridiculous by the recent explosion of war-brag. Everybody will read the article on "Louisa May Alcott" with interest. It reveals the home life of this noble woman as it has never been revealed before.

Capt. Charles King contributes the complete novel to Lippincott's Magazine for March. It is entitled "A Soldier's Secret," and is a vivid picture of army life. Under the heading "One Hundred Miles an Hour," Mr. Charles R. Deacon, of the Reading Railroad, discusses the facts and possibilities of railway speed, and rejects the popular notion that a faster rate necessarily means increased danger. Certain facts anent "Rebuilding the Navy" are set forth by Mr. Harry P. Mawson. This article is liberally illustrated. Mr. C. H. Herford, an English scholar who has given special attention to the Sagas and their reproduction in modern literature, gives an account of "Ibsen's Earlier Work," and especially his "grand and lurid drama," "The Vikings in Helgeland." There is a short story by Miss M. G. McClelland, and a brief sketch by Lillian A. North. The poetry of the number is by Anne Reeve Aldrich, S. Decatur Smith, Jr., Prof. Clinton Scollard, Ruth Johnston, and Nora C. Franklin.

Scribner's Magazine for March contains many noteworthy contributions. The opening pages have the widely announced last poem written by the late James Russell Lowell, entitled "On a Bust of General Grant," which is in the vein of Mr. Lowell's highest patriotism, ranking with the famous "Commemoration Ode." It includes a facsimile of one of the stanzas, showing the author's interlineations. Those interested in artistic sub-

jects will find two articles appealing particularly to their tastes, — the third and concluding paper by W. A. Coffin, on "American Illustration of To-day," with examples of the works of Abbey, Reinhart, Smedley, Frost, Pennell, Bacher, Thulstrup, Pyle, Gibson, Loomis, Sterner, and Van Schaick; and Mr. Apthorp's second article on "Paris Theatres and Concerts," — this one having particular application to the Opéra, the Opéra Comique, and the Conservatoire. The other noteworthy contents are "The Water Route from Chicago to the Ocean" (illustrated), by Charles C. Rogers; "Small Country Places," by Samuel Parsons, Jr.; "The Reflections of a Married Man," by Robert Grant; and "Speed in Locomotives," by M. N. Fomey.

THE contents of the March ARENA are sufficiently varied to interest all lovers of serious literature. The Rev. Minot J. Savage, the eminent liberal divine of Boston, contributes a remarkable paper on psychical research, giving many thrilling stories, for the truth of which he vouches. This paper is as interesting as fiction, although it is prepared in the interest of science. Prof. Joseph Rhodes Buchanan writes thoughtfully on "Full-orbed Education." Henry Wood contributes a paper of great ability and interest, entitled "Revelation through Nature." Gen. J. B. Weaver writes on "The Threefold Contention of Industry." Hamlin Garland describes in his graphic manner the Farmers' Alliance members of the present Congress. This paper is accompanied by nine photogravures. Hon. Walter Clark, LL.D., Associate Justice of the Supreme Court of North Carolina, furnishes a masterly argument in favor of governmental control of the telegraph and telephone. The other contents are all of much interest, and the number as a whole is one of the best yet issued.

ELIZABETH BISLAND opens the March number of the COSMOPOLITAN with an article on the Cologne Cathedral, beautifully illustrated from photographs. Adam Badeau, the ex-Consul-General to London, contributes some personal reminiscences of one of the grand dames of England at whose house he was an habituary, under the title of "Strawberry Hill and the Countess Waldergrave." M. H. de Young, Commissioner of the World's Fair from California, has a most interesting article on expositions, sketching the history of their rise and progressive development, and proving as far as bald statistics can, that the Chicago Fair will surpass all preceding ones. The illustrations accompanying this article display to the readers the architectural glories of the Fair buildings. Patience Stapleton's story, "The Trailing Yew," is concluded; and Oscar Fay Adams appears with a delightfully amusing and satirical sketch, entitled "An Archbishop's Unguarded Moment."

BOOK NOTICES.

ABRIDGMENT OF ELEMENTARY LAW, embodying the General Principles, Rules, and Definitions of Law, together with the Common Maxims and Rules of Equity Jurisprudence, as stated in the Standard Commentaries of the leading English and American Authors; embracing the subjects contained in a regular Law-course. Collected and arranged so as to be more easily acquired by students, comprehended by justices, and readily reviewed by young practitioners. By M. E. DUNLAP. Enlarged edition. The F. H. Thomas Law Book Co., St Louis, 1892. Law sheep, $3.00.

This volume is a veritable *multum in parvo*. Of a size which easily accommodates itself to one's pocket, it embraces between its covers abridgments of Blackstone's Commentaries; Pleadings, including parties to action, and forms of action; the Law of Evidence; the Law of Contract; Equity Jurisprudence: and Suggestions to Law Students. As a ready reference book for students, it possesses much value. The work is not intended as a substitute for text-books, but is simply designed to lighten the labors and shorten the work of the student in *reviewing* his course of reading preparatory to final examination for the bar.

THE AMERICAN STATE REPORTS, VOL. XXII., selected, reported, and annotated by A. C. FREEMAN. Bancroft-Whitney Company, San Francisco, 1892. Law sheep, $4.00.

This last volume in this valuable series of Reports is marked by the same care in the selection of cases reported which has distinguished its predecessors. Mr. Freeman has a happy faculty of discrimination which

renders his work invaluable to the profession. His annotations, as usual, display careful research, and add greatly to the value of these Reports.

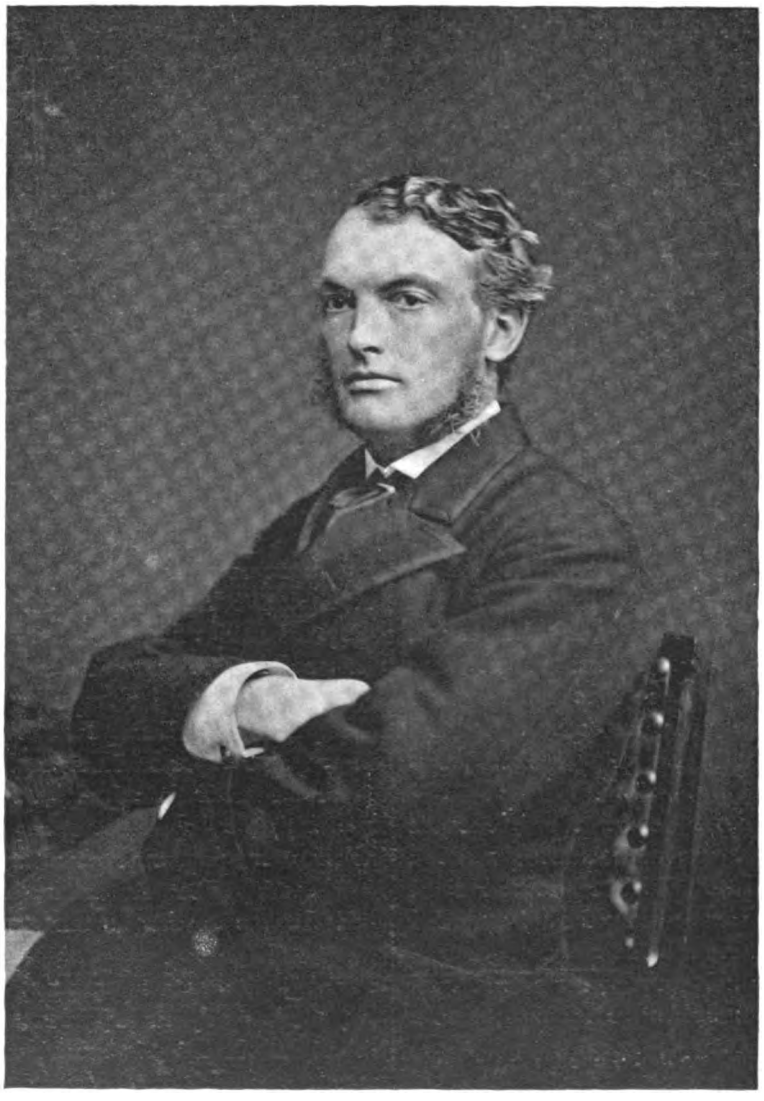
INSTRUCTOR IN PRACTICAL COURT-REPORTING. By H. W. THORNE, of the Fulton County, N. Y., Bar. 1892.

The design of this little work by Mr. Thorne is to instruct the would-be court reporter in the application of stenography to the recording of judicial proceedings, and to assist him to surmount the many obstacles which beset his path. Having been an official court-stenographer, the author is enabled to treat his subject in the light of personal experience, and his many suggestions will prove of interest and value to reporters. Aside from the primary object for which the work is designed, it will be of value to the practising lawyer in pointing out the best method of getting satisfactory work out of the stenographer. Law students also will find that it depicts a true picture of life in the court-room. The mechanical part of the book is very attractive.

A TREATISE ON THE LAW OF INSURANCE, FIRE, LIFE, ACCIDENT, MARINE, WITH A SELECTION OF LEADING ILLUSTRATIVE CASES, and an appendix of Statutes and Forms, by GEORGE RICHARDS of the New York Bar, and lecturer on Insurance Law in the School of Law of Columbia College. Banks & Brothers, New York and Albany, 1892. Law sheep. $5.00, net.

In this treatise, which is designed primarily for students, Mr. Richards happily combines the two prominent methods in use for teaching law; namely, the text-book and case systems. The first part of the book consists of a general treatise on the law of Insurance, which is admirably arranged and accompanied with numerous citations. The second part is made up of a selection of leading illustrative cases, which have been carefully compiled and edited with express reference to the corresponding chapters of the first part. We are glad to note a tendency on the part of our law teachers to avail themselves of the advantages of both of the two systems before referred to, and the student cannot fail to benefit largely by this liberal course. As the author well says, there are two things, all will agree, in regard to which a law-student ought to make himself an adept before he can hope to become a successful practitioner, — he must be able, upon a given statement of facts, to reach a correct legal conclusion, or else he cannot give good advice to his clients; and he must also be able to follow out a sound and logical course of reasoning to its legitimate result, or else he cannot win their cause before court or jury. For teaching these two lessons we think Mr. Richards has hit upon the proper method in this work. The principles of the law are first instilled, and their application then illustrated by leading cases. The book is one which should find favor with our law teachers, and we heartily commend it to their careful consideration. Although so especially adapted to the student's need, the treatise will nevertheless be found of much real assistance to the practising lawyer, furnishing as it does a ready reference manual on all important points likely to arise in Insurance litigation. It is, we believe, the first text-book treating specifically of STANDARD FIRE POLICIES, for the adoption of which several States have already passed statutes.

The appendix, containing classified lists of references to the NUMEROUS AND VARIED STATUTES passed by the legislatures of all the States, by which the law of the insurance contract has been modified and governed, together with a specimen of each class, will meet an urgent need, long felt by insurance companies and their legal advisers.



SIR HENRY JAMES.

The Green Bag.

VOL. IV. No. 5. BOSTON. MAY, 1892.

THE ENGLISH BENCH AND BAR OF TO-DAY.

V.

SIR HENRY JAMES, Q. C., M. P.

SIR HENRY JAMES, the great lawyer who refused the Lord Chancellorship for political conscience' sake, has had a strange and eventful history. His father, Mr. Philip Turner James, practised as a surgeon in Hereford, where the future Attorney-General was born on Oct. 30, 1828. He was educated at Cheltenham College, upon the Council of which he is still a highly popular member. After leaving school, James came to London, and was apprenticed to Scott Russell, who, with the aid of the famous Brunel, engineered the "Great Eastern." But fortune had a greater if not a wealthier career in store for the young apprentice than a partnership in a firm of ship-builders. In the suburb of Greenwich there was situated at that time one of those old-world clubs, half public-houses, half debating-societies, which figure so prominently in the literature and in the literary history of the eighteenth century. (Every one knows where Lord Thurlow got his first brief.) It was called the Belvidere; no one hears or knows anything of it now, but at the time of which we write it was a real and living force within and beyond the immediate neighborhood. Every class of society, every profession and trade, every mode of thought and speech, of belief and disbelief, sent its representatives there. Many of those who frequented the Belvidere afterwards became famous men, and handsomely acknowledged its value as a training-school for future success.

No better education for a Nisi Prius lawyer could well be conceived than to take a prominent and habitual part in the debates of this old-fashioned rhetoric club, where the atmosphere was so free, if not from tobacco-smoke, at least from conventionality; where discussion was bounded only by the limits of human speculation; where arguments were exchanged with a vigor worthy of Milton and Salmasius, and where minds of all fibres came into constant contact. Between the lawyers and the laymen in any society, a line of demarcation seems inevitably to be drawn. Ill-disposed persons might perhaps say that when the wolf is on one side of the stream, the lamb instinctively selects the other. The Belvidere was no exception to the rule. It was divided into two regular factions or parties, — the one lay, the other legal. At the head of the latter were Parry and Joyce, who afterwards gained great names for themselves in Westminster Hall. At the head of the former was Henry James. Popular, vivacious, and brilliant, he threw himself with ardor into the mock — yet from an educational point of view infinitely serious — debates which were held in this old-world inn. Soon he became conscious of his powers as an orator and debater, and forsook his quondam friends to join the ranks of his quondam rivals; he was admitted a student of the Middle Temple on Jan. 12, 1849, and was duly called to the bar on Jan. 16, 1852, sweeping the highest prizes which his society had to offer before him.

A few years later the court of the Lord Mayor of London, which had long been closed against all legal practitioners save the old city pleaders, who are said to have bought the exclusive right to audience within its walls, was thrown open to the whole profession. Westminster Hall then, like the High Court of Justice now, was crowded with able but briefless barristers. Nothing loath, these young gentlemen turned their energies towards the Guildhall, where the Mayor's Court was held, and soon destroyed the monopoly of the city pleaders in fact, as the legislature had destroyed it in theory. Foremost among the counsel whose early reputation was made in the Mayor's Court, were Henry James and his old rival of Belvidere notoriety, Mr. Serjeant Parry. These two soon distanced all competition, and reappeared in Westminster Hall with clients and briefs and money. In the old Court of Exchequer there were two little pews situated one at either end of the front row of seats. The occupants of these pews were called the Tubman and Postman respectively, and were chosen by the Chief Baron from the members of the bar who practised before him. These offices seem to have carried with them at least latterly no duties, and only one formal privilege, — the paramount right of pre-audience. But they were eagerly coveted as marks of distinction, and as a rule were conferred only on men whose names were already honorably known in the legal profession. In 1867 James was appointed Postman in the Court of Exchequer.

Two years later he became a Queen's Counsel (June, 1869). In January, 1870, he was made a Bencher by the Middle Temple. The Solicitor-Generalship, the honor of knighthood, and the Attorney-Generalship awaited him in 1873. From 1880 till the fall of the Gladstone ministry in 1885, he was again the first law-officer of the Crown. In 1886 Mr. Gladstone came back to power, and offered the Lord Chancellorship to his trusty Attorney-General. But Sir Henry James would be no party to the policy which expressed itself in the great Home Rule bill; he put aside the prize which he so richly deserved, and Sir Farrer Herschell ascended the woolsack. One ingenious person, whose name has escaped our memory and is not worth remembering, has the hardihood to suggest that Sir Henry James refused the Chancellorship knowing that he would not be re-elected Member of Parliament for Bury. It may be sufficient to state that the Lord Chancellor does not sit in the House of Commons, and that no re-election was necessary. Most men will be disposed to accept the explanation of his conduct that Sir Henry James gave in his speech against the first reading of the Home Rule Bill.

"I am aware," he said, "that it has now become a trite saying — every one says it — that we have come to a parting of the ways, and must make our choice. So far as I am concerned, there were two paths open to me. There was one which offered many attractions for me. My old colleagues had gathered upon it; and although their language has somewhat changed since the days of our association, yet I think I would have recognized their voices, and it is possible that a word or two of welcome may have fallen upon my ear. I should, too, have had the privilege — to me the great privilege — of following, with, however, an unequal step, a leader whose later triumphs, if I am not permitted to say I have shared, at least I have been allowed to witness. But I had to look beyond these inducements. I had to look to what this path leads; and as far as my erring perception goes, it leads to nothing except confusion and chaos, —

'Red ruin and the breaking up of laws.'

So, sir, I have turned to another path, dark and uncertain I admit, and rendered more difficult and dangerous by the acts of men who ought to have guarded it more carefully; yet I declare that through the shadow that envelops it, men who have venerated our Constitution may trace landmarks sufficient

to guide us to ends and results which will strengthen yet the power of a people, and maintain untouched the Empire of our Queen."

Separated as the Liberal Unionist party now is, by four years of bitter controversy and by the widest differences of political opinion, from their old associates, and steadfastly refusing as they still do, in spite of their numerical weakness, to coalesce with the Conservatives, it seems improbable that Sir Henry James's fidelity to principle will receive the outward and visible recognition which it deserves. Yet the unanimous voice of the legal profession has declared him worthy to be had in honor, and history and posterity will affirm the verdict. The present Parliament contains comparatively few lawyers who are good politicians, and only one who has displayed some of the qualities of statesmanship. Sir Charles Russell, Sir Richard Webster, Mr. Lockwood, and many others enter the House of Commons wreathed with the laurels of forensic victories, and forthwith sink into relative insignificance. Their debating powers are as keen as ever, but the atmosphere and the ground and the conditions of the contest have all been changed. With the exception of Sir Henry James, Sir Edward Clarke, Mr. Finlay, and Mr. Asquith are the only English lawyers in the House of Commons who are regarded by their leaders as really skilful and effective henchmen in a critical struggle. Sir Henry James's parliamentary reputation is quite as high as his legal. There is hardly a volume of Hansard which does not contain striking instances of his powers as a debater. His defence of Mr. Justice Keogh, in the riotous discussion to which the Galway Election Petition gave rise; his reply to Mr. Goschen, who is the greatest master of destructive criticism in the House of Commons, on the second reading of the Franchise Bill in 1884; and his speeches in defence of the Irish policy of the Government, may be taken as typical examples. But Sir Henry James's management of the Judicature and the Corrupt Practices Acts called forth the admiration and enthusiasm of his party, and gained credence for the rumor which was current after the general election of 1880, that he was about to become Home Secretary. The excitement of political life, and possibly the constitutional indolence with which his friends credit him, have prevented Sir Henry James from becoming a very great lawyer, in the sense in which those terms are applied to Cairns and Selborne, and his own compeer, Sir Horace Davey. That he could have placed himself on a level with the foremost men of his day, no one doubts. Sir Henry James has very remarkable natural gifts, — a singular facility in mastering and reproducing complicated details, and a keen insight into character and motives. As a cross-examiner he is second only to Sir Charles Russell; as an advocate, he rises to heights to which Sir Charles Russell never attains. In literary perception, and in the power of literary expression, he has no living rival at the English bar.

His appearance is familiar to every one who has had occasion to frequent the English courts. A tall man, with iron-gray hair, gray whiskers, dark, sunken, penetrating eyes, high brow, and clear-cut lips, Sir Henry James can neither come nor go without observation. His voice is husky till it is raised and cleared by strong feeling, and he speaks rapidly and with frequent gestures. He is the *doyen* of the English bar. No one is more popular, no one carries popularity more gracefully. If he were raised to the Chancellorship to-morrow, not a murmur of discontent would challenge the appointment.

LEX.

BRACTON AND HIS RELATION TO THE ROMAN CIVIL LAW.

I.

By W. W. Edwards.

AMONG the earliest writers on the Common Law of England, and one of great authority, was Bracton, whose treatise "de Legibus et Consuetudinibus Anglia" is the subject of the present "screed."

Henry de Bracton — or de Bretton, as he was sometimes called — was one of the English Justices Itinerant in the reign of King Henry III., and wrote about the year 1250. He was a doctor of the University of Oxford, where he took the degree of J. U. D.; and although he wrote in "Middle Latin," his style is clear and even elegant, and his manner of giving definitions of law terms and reasons for laws bears a striking resemblance to the writers of the Pandects, in their definitions and reasons. In their zeal to prove an English origin for the common law, a very few writers have been disposed to deny the authority of Bracton; but they have wholly failed to prove the grounds of their dissent, or give any good reasons for their opinion, while nearly all subsequent judges and writers have adopted his expositions of the law without qualification or doubt; and no one at this day can doubt but that the law as laid down by Bracton was the then accepted law of England. Bracton antedated all the Reporters that are known to us. The Year Books were not then written. He antedated all the writers and commentators on the common law, whose works are known to us, except Glanville, and the "Mirror of Justices."

Glanville wrote his "de Legibus" in the preceding reign, and only a few years prior to Bracton; but Glanville's treatise concerns the various kinds of writs and the courts, — in other words, was a work on jurisdiction and practice, and not a treatise on the system of law administered by the courts, any comments on the legal principles being rather incidental than otherwise. The same may be said about the "Mirror of Justices;" thus Bracton becomes the earliest writer who ever compiled the general body of the common law into a system. Whence, then, was that system of laws derived? Where and when did they originate? Were they to any extent derived from the Roman civil law, and the feudal law of Europe, or were they an underived and indigenous body of laws, grown up out of Acts of Parliament, councils, and the customs and practice of the courts "time out of mind"? This is not by any means a new question. A manifest reluctance has been displayed by Coke, Blackstone, and a few other writers on the common law of England, to concede that the common law was derived from the Roman civil law, or that it even borrowed any material portion from it. The continental civilians, on the other hand, always claimed that the common law judges and lawyers often *quoted* the civil law as law, but did not *cite* it. They seemed to take pride in the indigenous, rather than the exotic origin of their law. Has any one ever given a clear and satisfactory account of the rise and growth of the common law? Lord Coke, in the preface to his Eighth and Ninth Reports, attempts to give a short history of the rise of the common law; but the impartial reader must confess that this account is meagre, obscure, and unsatisfactory, and unsupported by facts. It falls far short of establishing the existence of an indigenous body of laws by which a commonwealth could be governed. At an early period in the history of the common law the English were a barbarous people, and land and cattle composed their chief wealth. Commerce and manufactures and the arts had not yet been transplanted into England to any great extent, and hence we would expect to find the laws chiefly concern per-

sons, crimes, cattle, and land. The feudal system, having been invented by the continental conquerors, was introduced into England, and thus became the foundation of the law governing landed property. In this article I do not propose to consider Bracton's treatment of the criminal law, nor of the law of wills and testaments and probate matters, as they are not administered in the king's courts, but in the ecclesiastical courts, which confessedly follow the civil law. Leaving out of view, then, these branches of the law, from what source were the other laws derived which constituted what is called the common law in *civil matters?* Where did Bracton find the body of law on which he commented? Evidently not, like many modern writers, from the reports of cases *published*, for there were none; but there, no doubt, were cases held in memory and tradition, which he used, as he sometimes cites M. de Pateshull's rulings as authority, but they constitute a very small portion of his law; nor did he get his law from previous common law writers, for there were none, and he cites none. But he professes to obtain his law from a diligent search among the judgments of the *just*, and their deliberations and responses, and compiled into one summary whatever he found worthy of note, under the order of titles and paragraphs, for a perpetual memory of the thing. (Bract. fol. 1, ¶ 3). It may be observed here that he cites no definite source; and what were the "vetera judicia justorum" which he so diligently scrutinized, he does not here inform us, but his work itself sufficiently shows. There are certain ear-marks, so to speak, by which the matter may be traced to its source. A careful examination of Bracton's treatise "de Legibus" will show the following facts regarding his work; and as he was a doctor of the civil law and well acquainted with it, the analogies and coincidences herein considered lead to the conclusion that his "de Legibus" was largely taken from the Institutes and Pandects of Justinian, so far as civil matters are concerned, as above limited. It will be observed that the Institutes and Pandects both set forth in a *proem* that two things are necessary to a prince; namely, arms and laws, — arms that he may subdue his enemies, and laws that he may properly govern his subjects. Such is the beginning of the Roman jurisprudence; and in a similar manner Bracton begins by declaring that the same two things are necessary to a king, and for the same reasons given in the Institutes. He also recognizes the distinction between *jus* and *lex*, as defined by the civil law. "Jus est ars boni et equi" (Dig. 1, tit. 1, de Jur.), or an unwritten law, as we would say; while *lex* is defined as "Lex est commune præceptum virorum prudentium consultum, delictorumque, quæ sponte vel ignorantia contrahuntur coercitio communis reipublicæ sponsio" (Dig. 1, l. 1, de Leg.), which Bracton defines in the very same words (Brac. de Leg. et Cons., fol. 2, ¶ 1). And Bracton further observes that *lex* signifies "omne quod legitur," — everything which is read, or written law (statute law); but he further says that *lex* and *jus* may be considered the same thing; and while he defines *lex* in the very words of the Digest, he never gives a hint as to where he obtained his definition. He explains that while other countries use "leges et jus scriptum," England alone uses a "jus non scriptum," and "customs," thereby implying that statutes at that time formed little or no part of the law of England. The compilers of the Digest give a brief historical account of the origin and rise of the Roman law; but Bracton does not attempt to give a history of the laws and customs by which England was governed. The English or common law being then a "jus non scriptum," it was not a *lex*, or statute law derived from Parliament or a decree of the king. From whence came it, and why is Bracton so reticent on the subject of its origin?

Bracton next proceeds to define *justitia* as the constant and perpetual desire of render-

ing every one his right (fol. 2.) Both the idea and the language are those of the Digest. So he also shows that the term *jus* sometimes means natural law or right, sometimes signifies civil law, sometimes the prætorian law, etc.; for the prætor is said to administer justice, even when he decrees *unjustly*, because relation is had, not to what the prætor actually has done, but to that which the prætor ought to do (fol. 3); and this illustration is taken *verbatim* from the civil law (Dig. 1, tit. 1, l. 11) without any reference or citation. He gives numerous other explanations of the term *justitia*, and winds up with "Quod percipit honeste vivere alterum non lædere, jus suum cuique tribuere," — the exact words of the Digest. So also his definition of Jurisprudence (fol. 3) is the language of the Digest (1, tit. 1, l. 10). His classification of law is much the same.

He treats of the status of persons in the same order, often using the same words and sentences in his definitions as are used in the Digest. He tells us that *servus* is derived from *servando*, preserving, because the commanders sold their captives, and thus preserved them, instead of killing them, — precisely as we are told in the Digest. Entire sections of the Digest are copied *verbatim*, without any reference, — which it would be too tedious to enumerate, and give references; hence only a small number are cited. His mode of treating of persons under authority of others is very similar to that of the Digest and Institutes, with this difference, — that slavery is treated of as modified by the *feudal law*, or, in other words, it is Roman slavery modified by feudal customs. And the *paternal power* is that of the Roman law, except, perhaps, that on coming of age a man and his family are released from the paternal power.

Bracton's first book is entitled "De Rerum Divisione;" it also includes the division of persons, in a similar manner to the Digest. Things are classified in his "Rerum Divisione" in the same way as in the civil law, and often *in ipsissimis verbis*. Land is denominated an *immovable*, — not *real estate*. Movables are defined the same as in the civil law, and are nowhere called *personal property*; hence the common law, according to Bracton, classified property as movable and immovable, as did the civil law.

In the second book Bracton treats "De acquirendo rerum dominio," — of acquiring ownership of things. This is the title of the entire second book. This title is the first title of the forty-first book of the Pandects, which Bracton copies very closely in many parts, notably in the first four chapters, which treat of the acquisition of property — ownership — by occupation, by fishing, by hunting, hiving bees, taming wild animals and birds, by alluvium, specification, confusion, finding, etc., etc., all of which is taken from the forty-first book of the Pandects without any reference, except that on folio 10 he refers to the Institutes, where, he says, the subject is more fully treated.

In chapter 4 he defines servitudes, which is copied from the Institutes. No one can compare this portion of Bracton with the Institutes and Pandects, without being fully satisfied of the source from which it was derived. The *law*, the *Latin*, and the *style* is that of the civil law.

The subject of donations is treated of more in reference to land than to other property, and in this the principles of the feudal law prevail; but as to other property the principles of the civil law generally prevail. The Roman lands were divided out among the soldiers, as a gift from the Roman people, and not from some prince or lord paramount, as in the feudal system, where the lord or donor remained owner of the fee simple. The Roman titles were allodial, while under the feudal system the donee was only a *tenant* (of some lord who assumed to give the land), paying rent, and owning only the use of the land under fixed conditions. Hence the Roman law must, of necessity, differ from the feudal law on the subject of donation, alienation, and possession of land. Bracton gives usucaption as one of the

modes of acquiring ownership, and on this subject he copies the civil law.

The subject of advowsons, which Bracton treats of at length, belongs rather to the ecclesiastical than the civil or municipal law.

In chapter 24 he treats of liberties or privileges granted to certain *vassals* by the king, to collect tolls or to be exempt from certain servitudes, etc.; and this, being a part of the civil or governmental polity of the realm, is not properly *law* in any sense. He next treats of confirmations, etc., which relate to the feudal law. In chapter 26 he lays down the law of *donations mortis causa*. He says there are three kinds, and defines each; all of which is taken from the thirty-ninth book of the Pandects, — the greater part *verbatim*, but without the slightest reference to the Pandects. He even copies the quaint illustration (ff. 39, T. 6, 24, § 2) although not in the precise words, "that a donation mortis causa is when the donor prefers to have the thing donated, rather than that the donee should have it; and that the donee should have it rather than the *heirs* of the donor." In one place he refers to the duty of testators making dispositions in favor of their *dominus*, or feudal lord, and of the church, and of the custom of some places, in which the church is to have the best work-beast, or the second best, or the third best, and in some places none at all, — which customs were not, so far as I know, derived from the civil law, neither did they become a part of the common law, since they were not general, but only local customs.

In the second book Bracton treats of wills and distribution of estates. On page 60 he lays down the law that after the debts of the deceased are all paid (including among debts the widow's *quarantine*, if her "dos," whatever that may be, was not assigned), the residue, or *peculium*, was divided into three parts, one of which was left for the children of the deceased if he had any, the second part went to the wife (widow) if she survived, and the third part was the disposable portion, which the deceased had the power to dispose of by will. But if there were no children, then the disposable portion was the moiety, and the widow took the other moiety; and in the same manner, if there were children and no widow, then the children took one moiety, and the other moiety was subject to disposal by the deceased by testament; and when there were neither children nor widow, then the whole was subject to the disposal of the testator. This, of course, applied to movables only, because the land was subject to the law of the feud.

In chapter 22 he treats of usucaption much in the manner of the civil law, although modified in some respects *materially;* and one of his modifications is that the length of time required in which to prescribe is not defined by law, but is left to the *discretion of the judges*, while in the civil law the time is always fixed.

In treating of sales (fol. 61), Bracton calls them by the name "emptio et venditio," which is the precise term used for them in the civil law; this term was translated by the old writers on the common law as "bargain and sale." Strictly, it means purchase and sale, or a buying and selling. This contract is defined by Bracton precisely as by the civil law, except in one important particular, and that is, delivery of possession of the thing sold. By the civil law the contract is complete so soon as the thing and the price are agreed on, although the price is not paid, nor earnest given. Neither delivery of the thing nor payment of price was necessary to perfect the sale, except in certain cases, as where a quantity of things were to be *weighed* or *measured out*, then *delivery* was necessary to complete the sale and transfer the ownership of the things; but Bracton says that until the thing is delivered, unless there is *earnest* given, or a written agreement, there will be a *locus penitentia*, and the contracting parties may recede from the contract with impunity. He says that the same principle applies as in feudal donations, — that without delivery the ownership of things cannot be

transferred. It is quite probable that this change in the Roman law was made to conform to the feudal notions about *livery of seizin*. Among the rude and ignorant people of that age, visible formalities were deemed of greater importance than among the more refined and better educated Romans; and as among the English at that early day contracts were not usually in writing, something was necessary to give notoriety to the fact of the transfer of title to property, and hence the formality of delivery, or livery of seizin, was adopted in the transfer of feudal lands, and by analogy given to the transfer of all property. The idea of delivery seems to be required more as a *proof* of the contract than as a material part of it; for by the giving of *arrha*, or reducing the contract to writing, the common law dispensed with delivery, and cut off the *locus pœnitentia*, and thereby conformed to the civil law. The giving of *arrha* (earnest money) was often used in the civil law to *evidence a sale*, but was not at all necessary to its completion; and we are told in the Institutes," Quod arrhæ nomine datur, argumentum est emptionis et venditionis contractæ." And Bracton, in treating of the effect of *arrha* (or *arra*, as he spells it) says: "Quod arrarum nomine datum est, argumentum est emptionis et venditionis contractæ" (fol. 61), — almost the same words. After all, then, it would appear that delivery was required by the common law more as an *evidence* of a sale than as being a portion of the contract itself, because when other sufficient evidence of the sale (as *arrha*, or writing) was present, delivery was dispensed with, and the law thus conformed entirely with the civil law. It will also be further noted that in the sale of things by *tale*, the common law as laid down by Bracton was identical with the civil law. The language and expressions used by Bracton in treating this subject are singularly similar to or nearly identical with those of the Pandects and Institutes. There is also another peculiarity about the law of sales as defined by Bracton, which tends strongly to show that the legal principles of sales were derived from the Roman law, and were not merely accidental similarities; that is, that the parties may agree that a certain person may fix the price of the thing sold, and that unless he fixes the price, or if he will not, or is unable, there will be no sale, because there is no price fixed. Such is the Roman law; and the language used by Bracton is so similar to that of the Institutes that one cannot but think it was copied. And again Bracton tells us that where earnest (*arra*) is given, if the vendee rues the bargain he forfeits the earnest, and if the vendor rues he must pay the vendee double the earnest he has received. This is precisely the case under the civil law. Bracton says that the thing sold is at the risk of the seller until delivery, and after delivery at the risk of the buyer, because the thing belongs to the seller until *delivered*, and to the buyer afterwards; and that any advantage or increase in the thing before delivery belongs to the seller, because "commodum ejus esse debebit, cujus est periculum." Such is the Roman law, and such the reasons for it, with this difference, — that in the Roman law the sale is sometimes *complete* before delivery, and the thing sold is in the ownership of the vendee, when under the same circumstances it would by common law be in the ownership of the vendor; but the principle of "Res perit domino" is equally applicable to both. He also tells us that where the vendor sells a thing as sound ("tanquam sanam") and without damage, and it is afterwards discovered that it is damaged or less sound, and was so at the time of sale, the vendor must take back the thing. Here "tanquam sanam" does not imply any promise or warranty of soundness, but only a failure to disclose the fault, and obtaining a fair price. The principle of "caveat emptor" did not seem to prevail in English law in Bracton's time to any great extent, although he says that a vendee is bound to "know the quality of the thing he buys," whether it is sacred or not sacred, *obligata* or not *obligata*. Still, when any one has sold a sacred thing

which is not subject to sale, the sale is not valid, and therefore he may proceed against the vendor; and he adds: "Quatenus sua interfuit non fuisse deceptum," — almost the words of the Institutes, "Quod sua interest, eum deceptum non esse" (Inst. 3, tit. 24, § V). The tenses only are changed; the verbs are the same. The warranties which Bracton says the vendor and his heirs are bound to make in cases of sale are to be considered hereafter.

Bracton next treats of letting and hiring ("de Locatio et Conductio,") which he says is next to "emptio et venditio," because as *emptio et venditio* are contracted so soon as the price is agreed upon, so it is "in locatio et conductio" (fol. 62). The twenty-fifth title of the third book of the Institutes commences in the same manner, almost in the same words. He declares that when any one lets his thing, whether movable or immovable, to another person, for a certain time, for a certain rent, the locator is bound to give the use of the thing leased to the conductor; and the conductor is bound to pay the rent (*merx*); and if the thing let and hired is an immovable, as a house, and such-like things, everything brought into or placed in the house will be bound for the rent, the same as in cases of pledge. The same principle is laid down in the Pandects (book 20, tit. 2, l. 2). He further says that if nothing is found on the leased premises, then resort may be had to the bodies of the tenants, if they can be found, in order that the lessor may require security, if none was provided in the beginning; but if the bodies cannot be found, the lessor may impute it to his own negligence and want of skill that he did not require security for his rent. And he adds that if any one should be tenant (*tenens*) either for life or in fee, and did not pay his rent to his landlord (*dominus*), he could be proceeded with by making *distress*. Here a distinction must be observed, as it is under the feudal law that this distress is made. In the former cases the *lessor* is called *locator;* here he is called *dominus*, a feudal lord. There the lessee is called *conductor;* here he is called *tenens*, one holding under a feudal lord. In the former case the rent is called *merces*, in the latter it is called *redditus;* showing that the law of letting and hiring was derived from the Roman law, and the law of tenant for life or in fee of feudal lands was derived from the feudal law.

On the death of the lessee (conductor) before the expiration of the lease, his heir succeeded to his rights, unless the lessee during his lifetime or at death provided otherwise. When the lease expired during the life of the lessee, the lessor could put himself in possession if he found the thing vacant. Whoever hires garments or ornaments or gold or silver, or work cattle for use and for hire, while he has the *custody* of the things leased, will be required to use the same care as the most diligent pater familias; and if he shows such care, he will not be responsible for the loss, but it will not be sufficient for him to show that he took the same care of the leased thing that he did of his own property, unless that was the care above mentioned. The *principles*, the *phrases*, and in most cases, the *words* used by Bracton in this chapter are those of the civil law. In the civil law under this title "locatio et conductio," the *emphyteusis* is properly treated of; but this sort of lease is omitted by Bracton, no doubt because of its similarity, or rather identity, to the feudal tenures, and is included in them as an estate in land. The emphyteusis was a perpetual lease of land on payment of an annual rent; and so long as the conductor paid the stipulated rent, the locator could never retake the land; but failure to pay the rent forfeited the lease. This contract in some respects resembled a sale, and in others a lease. Such was the notion of the feudal tenures.

THE CUP-AND-SAUCERER.

By Irving Browne.

PEOPLE *v.* GILLSON, 109 N. Y. 389.

[*A statute prohibiting the sale of any "article of food" upon the inducement of a gift, prize, premium, or reward to the buyer is unconstitutional.*]

THE legislature, in its zeal
To fortify the public weal,
Enacted that no person should,
On sale of article of food,
Unto the purchaser accord
A gift or premium or reward
As an inducement to the sale;
This, they considered, could not fail
To cut off much adulteration
And work a healthful reformation.

One Gillson sold coffee and teas,
And sought his customers to please
By offering them with each two pound
Their choice of cup and saucer found
Upon a neighboring counter spread,
All gay with green, blue, gilt, and red.
It seemed, that winter, Albany
Was choked with every kind of tea,
Like old historic Boston port,
And women joyed in every sort
Of kettle-drum and various scandal
As fatal as the raid of Vandal,
And as to Weller's great surprise,
Swelled wisibly afore one's eyes;
And men at breakfast dosed themselves
With coffee from said Gillson's shelves.

By such seductive, crafty offers
Gillson diverted to his coffers
Much of the trade his rivals had;
Which naturally drove them mad,

And they combined to prosecute
The naughty man by public suit
Under this beneficial act;
And having proved the damning fact,
The court promoted the benign
Enactment by a wholesome fine.

But Gillson hired him lawyers four,
Who knocked at the appellate door,
And there with wit and wisdom blended,
Before those awful gowns contended
This hygienic revolution
Was not within the constitution;
That any man might lawfully
Sell with his coffee or his tea
The chinaware appropriate,
And not exceed the usual rate
Which others charged for them alone.
"By various instances 't is shown
The world was ever ruled by 'boot;'
Whether upon the martial foot
Or in pursuit of peaceful trade,
A certain pathway it has made.
Noah, who was in cattle rich,
But wanted gopher-wood and pitch
To build his ark, and store of food,
That he might get a discount good
Called in his wandering herds and flocks,
Which were his affluent money-box;
To him unlocked their ready doors
Menagerie proprietors
And feed-men, who too quickly found
The meaning of that adage sound,
'Riches have wings,' and formed the wish
That all those cattle had been fish.
So patriarchal Jacob wary,
When from the hunter Esau hairy
He bought the primogeniture,
To make the bargain safe and sure.
He added craftily some bread
Unto the mess of pottage red.

When Solomon essayed to hire
His neighbor Hiram, King of Tyre,
To build the Temple, for his toil
He offered store of wheat and oil;
But that he might more profit see,
He threw in towns in Galilee,
Which when they came to sight of Hiram
He did not very much admire 'em.
And so the Tyrian merchantmen
And Carthaginian traders, when
They boldly sailed to Britain's isle,
The pictured natives did beguile
With cheap inducements and 'job lots'
Of girdles, beads, and showy pots; —
The founders of our common law
Were caught with glittering gewgaw.
The pious, thrifty Puritan,
In buying with a frying-pan
A township of the Indian land,
Gave waters of a scorching brand;
And so the honest Hollander
In purchasing the Mohawk fur
Threw in with gaudy flannel caps
Some gallons of the strongest Schnapps.

"'T is not the age of business cards,
Of 'dodgers' littering up the yards,
Of overhanging glittering signs,
Of hand-bills with their crude designs,
Which vex the street and spoil the fences,
And swamp the profits in expenses;
But 't is the age of chromo-art,
Which brightens humble house and heart,
And adds to dwellings of the poor
The beauty of the rich man's door,
Gladdens the weary housewife's eyes,
And stills the fretting children's cries.
The indispensable milkman
Delivers cream in patent can;
Butter comes home on wooden plates,
In pictured box the sugared cates;

The lard in useful pail of tin,
Oysters neat little kegs within;
A lucky man may get from far
His ginger in a 'hawthorn jar,'
And those who take in lager-bier
Do often have the bottles clear;
One may 'commute' for soda-water,
And buy five tickets for a 'quarter;'
The chop-house waiter loudly calls,
'We here give bread with *two* fish-balls!'
Free lunch is served at many a bar
From Maine to California*r*."

Here counsel paused to take a drink
And mop his brow, and seemed to think
Of soon reverting to his brief,
When quick observed the reverend chief:
"Judicial notice we will take
Of the last instance that you make;
Its force may not be well denied.
I think we 'll hear the other side."
But Dannaher's eloquence was lost;
They 'd not believe the trifling cost
Would have the slightest tendency
To hurt the coffee, or the tea,
Nor did they deem the choice to be
In nature of a lottery.

Thus Montignani's magic wit
The gist of the contention hit;
And so the art of selling tea
Is helped by cup-and-saucery,
And Gillson's rivals, I surmise,
May straightway go and do likewise.[1]

[1] Selling packages of coffee on which are pasted slips of paper marked "1 plate," for each of which slips, when presented to the seller, he gives a plate, is a violation of Code Pub. Gen. Laws Md., art. 27, § 185, which prohibits "any scheme or device by way of gift enterprise of any kind whatsoever." Long *v.* State, Court of Appeals of Maryland, March 24, 1891.

LEGAL INCIDENTS.

XI.

A NARROW ESCAPE.

"I LEARNED a valuable lesson," said a New Jersey judge, "shortly after I came upon the bench. A young man was put on trial for stabbing and killing another man in a quarrel. The counsel finished their summing up about three o'clock in the afternoon, and I gathered up the sheets of my written charge and faced the jury to address them. Had I delivered the charge as it was then prepared, the prisoner would have been convicted and hanged.

"'Gentlemen of the jury,' I began. There was a stir in the jury-box. One of the twelve men arose and said he was unwell; would I not defer the charge until morning? It was a request which I could not refuse, and therefore I adjourned court at once. That evening I worried over the case a great deal.

"Finally I concluded I would tear up the charge which I had prepared, study the evidence all over again, and write a new charge. In reviewing the evidence again my attention was caught by a fact which the counsel and I had overlooked, or, at least, had thought was of little importance. This was the fact, that on the forehead of the murdered man there was a little scratch. We had all had our thoughts fixed so firmly on the fatal knife-wound in the stomach that this scratch had been ignored.

"The two men quarrelled, and the prisoner struck the other a blow in the face and knocked his hat off. Afterward they clashed again, and the fatal wound in the body was given. Now I asked myself for the first time, how did that fresh scratch get on the forehead? I pondered over the question half an hour, and conjectured that when that blow in the face was given and the hat knocked off, the murderer might have had his knife in his hand, and with that had done the scratching. Possibly he was whittling when the quarrel began, and for this had drawn his knife. The fact was apparently a trivial one, and yet it was really of high importance; for it showed less deliberation on the part of the murderer than if he had purposely taken his knife out of his pocket to do the killing. You see, if he had been carrying murder in his heart, he would have done the stabbing when he gave, instead, that blow in the face. According to my conjecture, he then had the knife in his hand and open; and the fact that he did not use it proved that then he had no desire to kill the man. That desire came afterward, and probably was but a momentary impulse.

"I felt that the point ought, at least, to be presented to the jury for their consideration, and the next morning I submitted it to them in my new charge. They jumped at it. Juries are always ready to spare a man's life; and they seized on this theory of mine, and brought in a verdict of murder in the second degree. I sentenced the man to the State prison, and some time afterward I asked his counsel what the exact truth about the murder was. In those days a man on trial for his life could not testify, and therefore we had not heard the prisoner's story.

"The counsel said his client denied to him all through the trial that he had done the stabbing at all, but after he was sentenced he acknowledged that he was the murderer. It all happened, he said, just as had been conjectured. He was whittling; they quarrelled; he struck the other man a blow in the face; later they had a scuffle and he used his knife.

"That man was innocent, I believe, of first-degree murder; but if I had delivered to the jury the first charge which I wrote, he would probably have been hanged. This lesson taught me never to be too sure about a prisoner's guilt or innocence."

THE SUPREME COURT OF INDIANA.

I.

By W. W. Thornton.

THE GENERAL COURT OF THE NORTHWEST TERRITORY.

BY the treaty of Paris, 1767, the country afterwards known as "The Northwest Territory" passed under the rule of Great Britain. When hostilities broke out between the mother country and this, the territory thus wrested from the French was an object of conquest.

George Rogers Clark, a young Virginian who had settled in Kentucky, was commissioned by the State of Virginia for this important work. On the 4th of July, 1778, he captured Kaskaskia, and on the 25th day of February, 1779, the post of Vincennes. By reason of this conquest Virginia claimed the right of sovereignty over a large portion of this vast territory, and in 1779 opened a land office for the sale of her western lands; but upon request of Congress she reconsidered her action and closed the office. The conquest bore fruit that the conquerors probably never expected; for because of this conquest the western boundary line of the United States was extended, by the treaty of 1782–1783, to the Mississippi River.

Besides the State of Virginia, which claimed ownership in a part of this territory, the States of Connecticut, Massachusetts, and New York also claimed each a respective share of it; but in 1784 Virginia, by a deed of cession, conveyed all her interest and claim in this territory to the United States, which act was followed by a like cession from Massachusetts in 1785, from Connecticut in 1786, and from New York, the latter having preceded them, in 1780.

Thus was paved the way for the now famous Ordinance of 1787. After providing for a Governor and Secretary, Congress declared, in that historic document, that "there shall be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction; . . . and their commissions shall continue in force during good behavior."

Pursuant to this ordinance, Congress on the 16th of October, 1787, appointed as judges of this court, Samuel Holden Parsons, John Armstrong, and James Mitchell Varnum. Armstrong declined the appointment, and John Cleves Symmes was appointed in his place, Feb. 19, 1788. After the formation of the Federal Union, the President re-appointed, by and with the advice and consent of the Senate, on the 20th of August, 1789, both Parsons and Symmes, and appointed William Barton, who declined, and in his stead George Turner, Sept. 12, 1789. Parsons dying, Rufus Putnam was appointed as his successor March 31, 1790, and Joseph Gilman in place of Putnam, who resigned, Dec. 22, 1796. Return Jonathan Meigs, Jr., succeeded Turner, who also resigned Feb. 12, 1798. Judges Symmes, Gilman, and Meigs remained in office until 1800.

These judges, with the Governor, also wielded legislative powers. They adopted various statutes of the thirteen original States, and created Common Pleas and Probate courts. As a court they had both original and appellate jurisdiction. In later years circuits were formed, and they were required to hold courts in them. All this was brought about by the legislation of the Governor and judges. One of these circuits was Knox County, which then embraced at least the present State of Indiana.

Usually this court, composed of these

three judges, was called the "General Court," but not unfrequently the "Supreme Court." While it was not the immediate predecessor of the Indiana Supreme Court, yet it was the first court that exercised appellate jurisdiction over the present territory of the State.

THE GENERAL COURT OF INDIANA TERRITORY.

On the 7th day of May, 1800, the Northwest Territory was divided, the greater part of what is now the State of Ohio being embraced in the eastern division, and the remainder constituting Indiana Territory, with the seat of government at Vincennes. The Ordinance of 1787 was continued in force, its provisions in one or two instances slightly modified.

In June, 1779, a court of civil and criminal jurisdiction had been organized at Vincennes, composed of several magistrates; but this was not an appellate court. It was a *nisi prius* court, and having also some legislative authority. The commandant at the post acted as its president. This court, however, was not the predecessor of the General Court authorized by the Ordinance of 1787, when Indiana Territory was severed from Ohio.

May 13, 1800, Harrison was appointed Governor of the new Territory, and on the next day John Gibson, a native of Pennsylvania, was appointed Secretary. The executive journal of the Territory, dated at "St. Vincennes, July 4, 1800," runs: "This day the government of the Indiana Territory commenced, William Henry Harrison having been appointed Governor, John Gibson Secretary, William Clarke, Henry Vanderburgh, and John Griffin judges, in and over said Territory." But the only officer present and acting was Gibson, who served as Governor until the arrival of Harrison, Jan. 10, 1801. He forthwith issued a proclamation, convening the Governor and judges in a legislative session two days later.

Under the Ordinance of 1787, the material parts of which remained in force after the separation of Ohio and Indiana, the Governor and judges constituted the legislature, with the power to "adopt and publish in the district such laws of the original States, criminal and civil, as" might "be necessary, and best suited to the circumstances of the district, and report them to Congress, from time to time, which laws" were to "remain in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress;" but afterwards the legislature was given "authority to alter them as they" might see "fit."

Three resolutions and six laws were adopted at the first session. The Governor and judges had only power to "adopt and publish in the district such laws of the original States . . . as" might "be necessary, and best suited to the circumstances of the district." Consequently they had no authority to pass a resolution, much less one not taken from the laws or resolutions of one of the original States. The three resolutions thus adopted were nullities. Two of the laws were taken from Kentucky; and a third one in part from Kentucky, and the remainder of them from Virginia. It is quite clear that the Governor and judges had no power to adopt a law of Kentucky; for they were only authorized to adopt "laws of the original States," and Kentucky was not one of these States. The Governor and judges continued as a legislative body until July 29, 1805. Their second session began Jan. 30, 1802; the third, Feb. 16, 1803, and the fourth, Sept. 20, 1803. At their second session they adopted two laws; at their third, one law and two resolutions; and at their fourth, eight laws and seven resolutions. One of the laws adopted at the fourth session was an original repealing act, a law they had no power to adopt.

The laws of the Northwest Territory adopted previous to the division were considered in force, upon the theory that the division of the old Territory was merely for administrative purposes; that the laws

were as much in force in the one part as in the other, and therefore that there was no need of re-enacting or re-adopting them. In fact, by a decision of the territorial court in 1803, a law passed in the Northwest Territory after 1800 was held to be still in force in Wayne County, which was added to Indiana Territory in 1802; and that, too, notwithstanding the fact that an entirely different law was in force in the remainder of Indiana. This construction of the laws of the Northwest Territory was of great importance to Indiana; for it had been clearly demonstrated that laws adopted from the original States were unfitted to the new country and inadequate. This was one of the factors which had brought about a change in the government of the Northwest Territory, previous to its division, by advancing it to the second stage of territorial government, and the election of a legislature which had the power to enact new laws fitted to the place, time, and people. These laws, thus adopted by the legislature previous to the division, were then, by the decisions of the courts, in force in the Indiana Territory.

ISAAC BLACKFORD.

But we are more interested in the first court of Indiana Territory than we are in the council of the Governor and judges.

The first session of the territorial court opened at Vincennes, March 3, 1801. Thus runs the record:

"At a General Court of the Indiana Territory, called and held at St. Vincennes the third day of March, in the year one thousand eight hundred and one. The commissions of the Judges of the General Court being read in Open Court, they took their seats, and present William Clarke, Henry Vanderburgh, and John Griffin, Judges. Henry Hurst, Clerk of the General Court, having produced his commission from the Governor and a certificate of his having taken the oath of allegiance and oath of office, took his place. [He was afterwards Clerk of the United States Court for the District of Indiana.] John Rice Jones, Attorney-General, produced his commission, and a certificate of his having taken the oath of allegiance and oath of office."

Then follows the return of the sheriff (but who he is, is not said), of "a panel of the Grand Jury," "nineteen good and lawful men."

After the impanelling of the grand jury, an order is entered for the examination of Robert Hamilton and Gen. Washington Johnston, on "the first Monday in September," "for counsellor's degree agreeably to a law of the Territory;" and another order for the examination, on the same day, for the same degree, of John Rice Jones.

The court then entered an order fixing rule days in the two vacations; prescribing the sheriff's duty in making returns to writs, and the clerk's in cases of appeal and writs of error. On request of the grand jury a stubborn witness was ordered to appear before them; and the coroner, Abraham Westfall, "returned the inquisition taken before him on the body of George Allen, deceased." James Johnson returned the examination of

several witnesses touching the murder of George Highland, and also the recognizance of two persons taken because of their having assaulted an Indian.

The stubborn witness having been brought before the grand jury, they returned two indictments, — one for murder, and the other for assaulting and beating the Indian. The last defendant appeared in discharge of his recognizance, taken at his preliminary examination; and the case of the first defendant was set for trial at the next term.

Thereupon the court entered an order for the examination of Gabriel Jones Johnston as counsellor, if he should be found to be a permanent resident of the Territory; and then, "Ordered that the court be adjourned till the term in course," signed, Wm. Clarke.

Such was the first day of the General Court of Indiana Territory. The court did not meet again until the first day of September. The court held two terms a year, March and September. The second term had but six days, but several cases were tried.

While the record of the first day recites that John Griffin appeared on that day, yet this statement is flatly contradicted in the proceedings of the first day of the March Term, 1802, when he appeared, produced his commission, and took his seat. He did not sit at the preceding September term.

On the first day of the March term, 1802, Benjamin Parke, John Rice Jones, and Gen. Washington Johnston produced their licenses as counsellors, and took the requisite oath. At subsequent terms these gentlemen were examined and admitted as attorneys at law; and all others had to pass through the same ordeal. But what must strike the practitioners now as singular was the examination by the court of the Attorney-General of the Territory, and his admission. He was commissioned by the President. Perhaps, however, this was to enable him to attend to civil business in the court, and not his official business; for he appeared in several criminal cases before even an order was made for his examination as an attorney at law. And so several other gentlemen appeared and transacted business before their admission, either as counsellors or attorneys; possibly the court of necessity was compelled to entertain their motions, or there would have been no business for the court, — even the Attorney-General's in his official capacity.

The first and second and only dockets or order-books of the General Court lie before the writer. The first contains 457 pages, and ends with the September term, 1810. The second begins with the March term, 1811, and ends on Tuesday, the 16th day of September, 1816, on the 120th page. The first is worm-eaten and shattered, and should be recopied; the second, in a good state of preservation. All the entries are clear, legible, and in a good hand.

William Clarke was evidently the president of the court, — for when present, his name is always first, and then on such occasions he signs the day's proceedings. After the September term, 1811, he no longer sat on the bench. Who he was, and whence he came, cannot now be told. He has been confounded with a brother of Gen. George Rogers Clarke, but this is error; for this brother of the General was the Clarke of Lewis and Clarke fame, who went overland to the Pacific coast in 1804. It is not often that the memory of a man so high in the affairs of a State has so completely faded from sight as that of William Clarke.

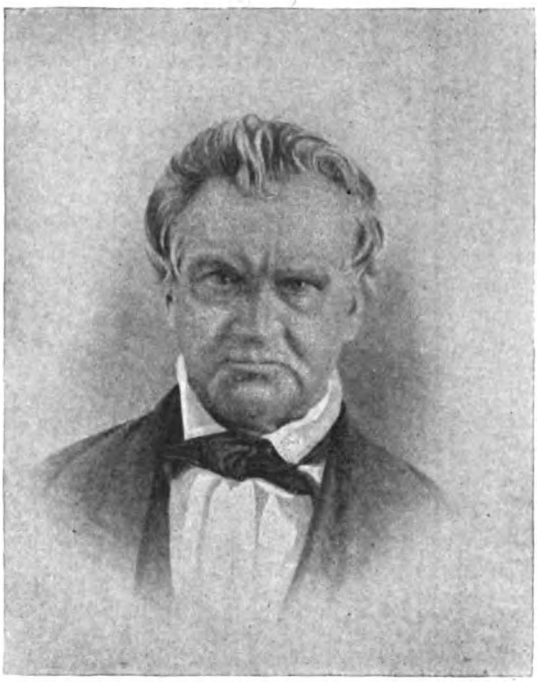
The same may be said of John Griffin, an associate of Clarke and Vanderburgh, whose official duties ended with the special May term, 1806.

Henry Vanderburgh invariably wrote his name with a capital B, and in the early laws his name is printed as Vander Burgh; but he himself wrote it as one word. He was a captain in the Fifth New York Regiment of Continentals, and as such served in the War of the Revolution. Soon after the close of that war he settled in Vincennes, and married into an old and distinguished

family, — the Racines. As early as 1794 he was probate judge and justice of the peace for Knox County. He was a man of much natural ability, and was the only member of the Council selected by President Adams from outside of Ohio in 1798, of which he became the president. In 1804 he approved the advance of Indiana Territory from the first to the second grade of territorial government.

He seems to have been a political bedfellow with William McIntosh, who became involved in a slander suit with Governor Harrison. He was a slaveholder, and a man of some temper.

Thomas Terry Davis first appeared in court as judge Sept. 6, 1803, when Benjamin Parke was the administration's candidate for Congress. Davis was recommended, although then judge, as the opposition candidate, and was beaten by a majority of only three votes; and yet it is quite evident that he did not actively oppose the Governor, for on March 1, 1806, he was appointed by that official Chancellor of the Territory, in place of John Badollet, resigned. He died at Jeffersonville, Nov. 17, 1807.



CHARLES DEWEY.

Waller Taylor succeeded Davis, and first appeared in court as judge Sept. 8, 1806, and continued as such until the court was dissolved by the admission of Indiana Territory as a State. Taylor was born before 1786 in Lunenburgh County, Virginia, and died there Aug. 26, 1826. He had only a common-school education. He served one or two terms in the Virginia legislature as a representative of his native county. In 1805 he settled in Vincennes. Nov. 24, 1807, on the death of Thomas T. Davis, he was appointed by the Governor Chancellor of the Territory. On his appointment by the President as judge of the territorial court, he resigned the office of chancellor. He succeeded John Griffin. Taylor was a proslavery man of decided cast, and trained with Harrison. In 1811 he was Jonathan Jennings's opponent in the race for Congress, but was defeated. At the battle of Tippecanoe he was a major, and served as aid-de-camp to Harrison. On the admission of the Territory as a State, Taylor, with James Noble (afterwards Governor), was elected, Nov. 8, 1816, to represent Indiana in the Senate of the United States, and was re-elected, serving until March 3, 1825.

Benjamin Parke, an intimate friend of Henry Clay, was one of the strong men of the State. He was born in New Jersey in 1777. With his young wife, whom he married at Lexington, Ky., he settled in Vincennes in 1801, where he opened a law office. Parke must have very early given evidence of ability; for he was appointed Attorney-General of the Territory, and first appeared as such at the September Term, 1804, succeeding John Rice Jones. He was a member of the first territorial legislature, which met July 20, 1805, and served in that capacity until he was appointed by the President a territorial judge. He took the bench Sept. 6, 1808, succeeding Thomas T. Davis.

At that time his associates were Vanderburgh and Waller Taylor. Davis and Taylor held the office of chancellor, notwithstanding that at the same time they were judges of the territorial court. Parke remained in office until the State was admitted into the Union, when he was appointed judge of the United States District Court, which office he held until his death. He had also served as a member of the first Constitutional Convention. At the battle of Tippecanoe he served as captain, and on the fall of Daviess he was at once promoted to the position of major, and became commander of the cavalry.

Of him General Harrison said: "He was in every respect equal to any cavalry officer of his rank that I have ever seen. As in everything else which he undertook, he made himself acquainted with the tactics of that arm, and succeeded in bringing his troops, both as regards field manœuvring and the use of the sabre, to as great perfection as I have ever known."

Parke acquired great influence over the Indians, and during the territorial government served as Indian agent. In a bank adventure at Vincennes with a couple of dishonest partners, he lost his wealth, and from thence had only his income as a lawyer and his salary as a judge to support him. After Harrison left that town, Parke moved to Salem, where he resided until his death, July 12, 1835, leaving no children surviving him. While there he took great interest in the education of the youth, and especially of his own children. He was beloved by all who knew him, and was in every way a Christian gentleman.

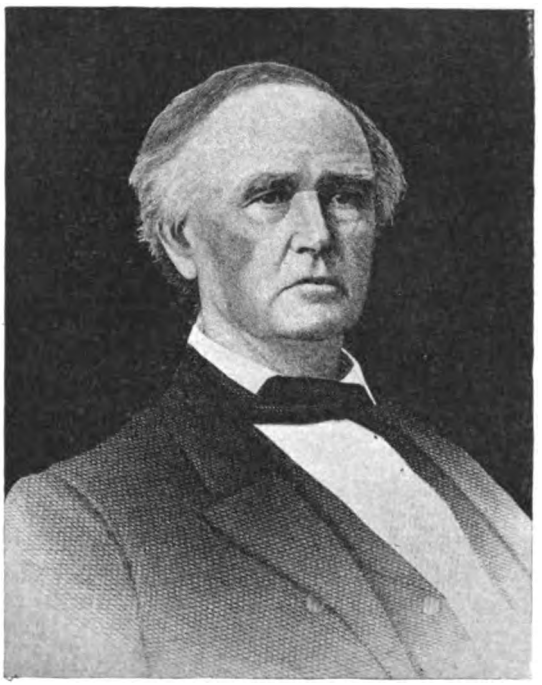
Parke was a lover of books, and had at his death the largest private library, perhaps, in the State. The present Supreme Court of the State owes much to him, for he was the founder of its now magnificent law library. Many of the books he presented to the library still remain on its shelves, with his autograph written therein. On Dec. 31, 1822, the legislature provided for a revision of the laws, conferring on him "full power to revise, alter, amend, abridge, enlarge, and model the statute laws" of the State, "so as to produce a comprehensive and systematic code, best fitted in his opinion to subserve the public interests and happiness." Parke was selected by the legislature for this purpose. The result of this was the Revised Statutes of 1824. For his labor he received $1,000.

James Scott was the last person appointed judge of the old territorial court, and he succeeded Vanderburgh. He evidently was somewhat of a new-comer, for he was not admitted to practice before the court as counsellor until April 10, 1811. He took his seat April 6, 1813. Of him more hereafter.

Two or three prominent characters are so connected with the old court that a sketch of it without reference to them would be incomplete. Among these is John Rice Jones, the first Attorney-General of the territory. Jones was a Welshman by birth, an accomplished lawyer, and a man of great vindictive oratorical powers. He was a proslavery advocate, and at the convention which met at Vincennes, Dec. 20, 1802, for the purpose of petitioning Congress to remove the restrictions on slavery in the Territory, he was made secretary. As early as 1786 he was General Clarke's commissary when he made an expedition up the Wabash against the Indians. He then properly resided in Virginia. The convention of 1802, after recommending the re-appointment of General Harrison as Governor, recommended the appointment of Jones as judge of the territorial court, although he then held the position of Attorney-General. At that time he was a firm political friend of Harrison, and evidently possessed much influence.

He served several terms as a member of the territorial legislature, and was a member of the Council. In 1808 he was a prominent candidate for Congress to succeed Benjamin Parke, who had resigned on his appointment as territorial judge, but was defeated. Dec. 4, 1806, the legislature by

resolution appointed Jones and John Johnson to revise and codify the laws; and as a result of this we have the compilation of 1807. Jones became involved in a political quarrel with Harrison, probably because he did not receive the appointment as judge of the territorial court in 1808 instead of Parke. The year after his defeat for Congress he went to Illinois, and in 1810 to Missouri. He was a member of the first constitutional convention of that State, and one of the judges of the State Supreme Court, which position he held until his death in April, 1824.



JEREMIAH SULLIVAN.

Gen. Washington Johnston was another prominent member of the bar. He was a native of Culpepper County, Virginia, came to Vincennes in 1793, and was the first attorney at the bar of Knox County of whom there is any record. He was one of the original organizers of the Masonic Grand Lodge of Indiana, in 1817–18. He was at first a pro-slavery man, but afterwards changed about; and was a member of the first territorial legislature. He was a candidate, on Parke's resignation, for Congress, but seems to have had no following; and opposed the division of Indiana and Illinois. In 1808, on the resignation of Jesse B. Thomas of Illinois, Johnston was elected in his stead Speaker of the Illinois territorial House of Representatives. In 1809, after a bitter contest, he was again elected a Representative, and also in 1810. He superintended the printing of the Acts of several sessions of the legislature. A number of his law-books are in the Supreme Court library, which contain his name in his own writing.

Thomas Randolph was the third and last territorial Attorney-General, succeeding Parke, Sept. 6, 1808. He was born in 1771, in Richmond, Va., and was a member of the celebrated Randolph family of that name, — a second cousin of John Randolph of Roanoke. He was a graduate of William and Mary's College, and served one term in the Virginia legislature. He was a *protégé* of Harrison. Randolph was a fiery and impetuous man, a friend and promoter of slavery. At the battle of Tippecanoe he fell a victim to the carnage of warfare; and he and Jo Daviess are buried side by side, by their friend Waller Taylor, on the field of slaughter.

It may be remarked parenthetically that the salary of the Attorney-General was, in 1803, $60 per annum, and in 1808, $100; while the pay of a judge of the territorial court was $700.

The court sat at Vincennes until 1813, when the seat of government was moved to Corydon, — the first session there being the September term of that year.

The General Court was a court of both original and appellate jurisdiction. Appeals lay to it from the Courts of Common Pleas and Circuit Courts; and writs of error were issued by it, running not only to both of these courts, but also to justices of the peace. In a number of instances the court delivered written opinions while sitting in its capacity as an appellate court, and they have been

entered at length in its dockets or order-books. None of these opinions has ever been published. The judges possessed the power to hold court in the circuits; and in the exercise of this power Judge Parke tried his first case, in Wayne County, riding all the way from Vincennes for that purpose alone, and having a log for a desk. It was a case of theft, — a theft of a twenty-five cent pocket-knife.

The most important case which came before the territorial court was that of Governor Harrison against William McIntosh for slander. McIntosh was a Scotchman, — a near relation of Sir James McIntosh, the English philosopher and statesman, and perhaps the wealthiest man at Vincennes. From being a close friend of Harrison he turned to a bitter enemy, and charged him with having cheated the Indians. In the spring of 1811 Harrison sued him for slander. Vanderburgh and Parke declined to sit, — the first because he was a personal friend of the defendant, and the other because he was a strong personal friend of the plaintiff. This left Waller Taylor as the sole judge. Elisors were appointed to select the names of forty-eight citizens as a panel from which the jury was to be taken. From these the plaintiff and defendant each struck twelve names, and from the remaining twenty-four the jury was selected by lot.

Thomas Randolph appeared for Harrison, and Ellis Glover and Gen. W. Johnston for McIntosh. The jury was impanelled April 10, 1811; the trial had the same day, beginning at 10 A. M., and lasting until 1 A. M. the next day, April 12, when a judgment for four thousand dollars was rendered against the defendant. The jury was out only one hour. McIntosh's land was levied upon to satisfy the judgment; and the Governor's agent, while the latter was in command of the army, bid it in. Afterwards Harrison restored two thirds of it to McIntosh, and gave the remainder to the orphan children of several distinguished citizens who fell in the War of 1812.

In 1814 a crisis arose in the territorial court. At the January session, 1814, of the legislature, a law was enacted reorganizing the courts of justice, and dividing the Territory into three judicial circuits. Parke, Taylor, and Scott were named as president judges, severally, of these circuits; and provisions were made for the appointment of three associate judges in each county. Judges Parke, Taylor, and Scott considered this law unconstitutional; and the former addressed a long letter to Governor Posey, assigning its invalidity as a reason for their not complying with its terms. As a result of this communication, the Governor called a special session of the legislature, which met Aug. 15, 1814, and removed the difficulty by providing for the appointment of president judges for each circuit.

THE OLD SUPREME COURT.

On the 19th of April, 1816, Congress passed an Act to enable the people of Indiana Territory to form and adopt a constitution for the new incoming State. On the 10th of June of the same year, duly elected delegates met in convention at Corydon, and nineteen days thereafter completed the "Constitution of 1816." On December 11 of the same year Indiana Territory became a State.

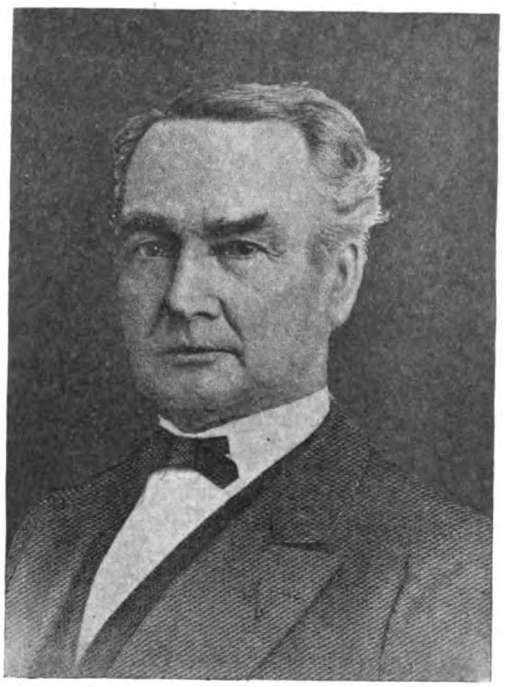
The newly adopted Constitution provided that "the judiciary power of this State, both as to matters of law and equity, shall be vested in one Supreme Court, in Circuit Courts, and in such other inferior courts as the General Assembly may from time to time direct and establish."

It also provided that "the Supreme Court shall consist of three judges, any two of whom shall form a quorum, and shall have appellate jurisdiction only, which shall be co-extensive with the limits of the State, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law." The General Assembly was authorized to give the Supreme Court original jurisdiction in

capital cases, and cases in chancery, where the president of the circuit might be interested or prejudiced.

The judges of the Supreme Court held their offices for seven years, if they should "so long behave well," and were to be made conservators of the peace throughout the State. They were to be appointed by the Governor, "by and with the advice and consent of the Senate." The court appointed its own clerk.

The legislature met at Corydon on Monday, Nov. 4, 1816, — more than a month before the State was admitted. On December 23 was enacted a statute, which took effect on the first day of the following February, for the organization of the Supreme Court, providing for two terms a year, — one commencing on the first Monday in May, and the other on the corresponding day in December. The court was authorized to sit in the county courthouse of Corydon. Each term was thirty days, if the business before the court required a term of that length of time; but the court was given the power to extend it indefinitely.



S. E. PERKINS.

The business then pending in the General Court of Indiana Territory was transferred to the Supreme Court; excepting such cases as were originally brought and then pending in the court at Vincennes and Brookville, which were sent to the Circuit Courts sitting at those two places. Any case brought in the court at Corydon could be sent, by order of the court, to the county where it originated, or where one of the parties resided. All appealed cases were retained.

When Indiana became a State she had less than seventeen counties; but during the first session of the legislature enough were created to make that number. The first judicial circuit was composed of the counties of Knox, Gibson, Warrick, Posey, Perry, Pike, and Daviess; the second, of Harrison, Clarke, Washington, Jackson, and Orange; and the third, of Wayne, Franklin, Dearborn, Switzerland, and Jefferson. Travel was almost impossible, and rivers and creeks were often unfordable. The steamboat had not yet appeared on the Western rivers, and in fact was yet an experiment. The raft, the dugout, and the pirogue were the only means of navigation.

Settlements were far apart. The Indians still lived within the borders of the State in goodly number. The population was only 63,897. In December, 1815, Wayne County had only 6,407 souls; Franklin, 7,370; Dearborn, 4,424; Jefferson, 4,270; Washington, 7,317; Harrison, 6,975; Gibson, 5,330; Knox, 8,068; Switzerland, 1,832; Clarke, 7,150; Posey, 1,619; Perry, 1,720; and Warrick, 1,415. Brookville had been laid out only five years, and had only eighty houses, "exclusive of shops, stables, and outhouses." Salisbury was then the county-seat of Wayne County, and had "about thirty-four houses, two stores, and two taverns;" and already Centreville — afterwards the county-seat — was menacing it.

Vevay had been laid out only three years, and had eighty-four dwellings, besides thirty-four mechanics' shops, a brick court-house, brick jail, brick schoolhouse, brick market-house, brick church, eight stores, three taverns, two physicians, a library of three hundred volumes, "a literary society" in which were "several persons of genius, science, and literature," and "two lawyers." (How lonely these two must have been!) Madison had sixty or seventy houses and a bank; Jeffersonville, having been laid out in 1811, had one hundred and thirty houses, a post-office, and a land-office. Clarksville, just below it, had only forty houses, "most of them old and decayed." New Albany, says an old chronicle, "a short distance below Clarksville, has been puffed throughout the Union, but has not yet realized the anticipations of its proprietors." Corydon had been a town only seven years, but had a stone court-house; and Paoli was just settled. Vincennes had a hundred houses, a population of about 1,000; and Terre Haute had just been laid out. Lawrenceburgh had about three hundred inhabitants, but was considered a town of much importance. Rising Sun had less than one hundred houses; New Lexington, fifty; Charlestown, one hundred and sixty, "chiefly of brick, a handsome court-house;" and Salem, eighty. The cities of Indianapolis, Crawfordsville, La Fayette, Frankfort, Logansport, Peru, Wabash, Huntington, Elkhart, South Bend, Kokomo, Anderson, Muncie, and Richmond, with many others in the northern part of the State, were unknown and undreamed of; and even Fort Wayne was only a trading-place. There was but little wealth, and land was too cheap and plentiful to seriously engage one in a legal contest for its possession. How many lawyers there were within the State it is impossible to state; but we have seen that Vevay had only two, and as that was the only town within the county, we may safely conclude that that county had within its borders only those two. Knox County, being the oldest and wealthiest, had more attorneys than any other county; but even here, if we may judge of the number, as shown by its records, admitted by the General Court of the Territory to practice, they were scarcely more than a dozen in number. In the entire State there were scarcely over fifty attorneys, — at the very most, far below one hundred.

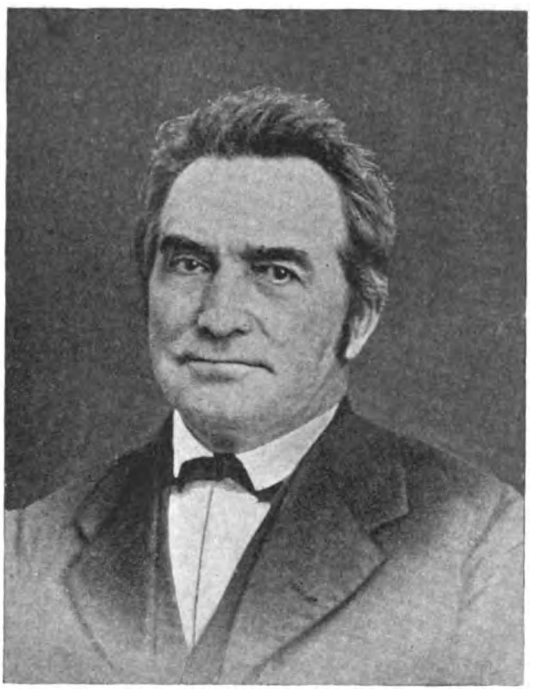
Governor Jennings appointed James Scott, John Johnson, and Jesse L. Holman as the first judges of the Supreme Court of Indiana. Their commissions bore date Dec. 28, 1816. "On the 5th day of May, 1817, the day appointed by law for the commencement of the first term of the Supreme Court, the judges appeared and took their seats," says Blackford. This was at the court-house of Harrison County, situated in Corydon. Henry Hurst, the clerk of the old territorial General Court, and afterwards of the United States Court for the District of Indiana, was the first clerk. But two cases are reported as decided at this term, one on the 6th, and the other on the 7th of May; and these cases were upon routine matters.

During the first vacation of the court, Judge Johnson died at his residence in Knox County, "universally esteemed," says Blackford, "as an honest man, and as an independent, intelligent judge." Isaac Blackford, Sept. 10, 1817, was appointed his successor, and took his seat at the first day of the December term, 1817.

The court continued to sit at Corydon until the seat of government was removed to Indianapolis by the Act of Jan. 20, 1824. The General Assembly convened at the latter place Jan. 10, 1825; and the Supreme Court, May 2, 1825. In 1819 the December term was changed to November; and from that time to the present the terms of the court have commenced in May and November.

At the end of their first terms of office Judges Scott, Holman, and Blackford were reappointed, and continued to serve until Dec. 28, 1830, when their terms ex-

the 28th of January, 1831, Ray reappointed Blackford, and Stephen C. Stevens of Jefferson and John T. McKinney of Franklin in place of Scott and Holman. The of Governor Ray to reappoint Scott olman was, as charged at the time, and ally believed, because they had de- d to aid him in his senatorial aspira- s. In August, 25, he and Black- rd were opposing andidates for the of- fice of governor, and he was successful over Blackford by a major- ity of 2,622; and Ray thought, no doubt, that he could make friends in the Black- ford ranks by reap- pointing him. The action of Ray in re- fusing to reappoint the full bench ren- dered him very un- popular.



WILLIAM Z. STUART.

The number of cases reported in the first volume of Blackford's reports do not show the number decided by the court. For instance, at the December term, 1817, three cases are reported as decided, while the complete record shows seventeen. The opinions as spread of record are much longer than as reported, often three or four times as long. This was a liberty that Judge Blackford took in reporting them; and we are not aware of any lawyer losing his case by reason of the abbreviated opinions, or of any client suffering in pocket or reputation by reason of their condensation. The volume is a fine illustration of what reports may be made when their publication falls into the hands of a master mind. Volume one has but four hundred and thirty-two pages of printed opinions, yet it covers the first ten years of the court's existence; and volume two, five years.

One of the important cases before the court, which is reported in the first volume, was that of Mary Clark, "a woman of color," says the reporter. A free woman of color above twenty-one years, she bound herself by indenture in the State, for a valuable consideration, to serve the obligee as a menial servant for twenty years. Upon a writ of *habeas corpus* she was released from custody, the court holding that she was "in a state of involuntary servitude;" "and having declared her will in respect to the present service, the law has no intendment that can contradict the declaration." Another important case was that of the State Bank. The bank was chartered in 1814, recognized by the Constitution of 1816, and by an Act of 1817 was made the State Bank, with one million dollars' capital. Having abused its power, the legislature authorized the bringing of a writ of *quo warranto* against it in the Knox Circuit Court, at the instance of the State. This was done; Moore, Dewey, and Nelson appearing for the State, and Tabbs and Test for the bank. Twelve charges of malfeasance were made against the bank, nine of which the jury found true. The lower court rendered a judgment declaring not only the rights and franchises of the corporation forfeited, but also seized its property. On appeal the first part of the

judgment was affirmed, and the second part reversed. The opinion is written by Judge Holman. It is full, exhaustive, and learned, worthy of the court and worthy of the case.

The first sixteen years of its existence the court decided eight hundred and sixty-five cases that are reported, filling the first and second volumes of Blackford's reports.

In May, 1836, Judge Stevens resigned, and Charles Dewey of Clarke County was appointed on the 30th of the same month, to fill the vacancy thus caused. About a year later Judge McKinney died; and May 29, 1837, Jeremiah Sullivan of Jefferson County was appointed to fill the vacancy thus occasioned.

One of the most important cases before the court during this period was that of Weinzorpflin against the State, in 1844. Weinzorpflin was a priest of the order of St. Meinrad, which has a monastery in the northeast part of Spencer County, near the Dubois County line, in as wild a part of the country as can be found in the State. It is a German order, and this settlement was made about 1840. At that time Spencer was a part of Vanderburgh County, and in this county he was indicted for committing a rape upon the wife of a neighboring settler. The case was one that excited great interest, and public opinion was against the accused. He was prosecuted by A. A. Hammond, afterwards Governor of the State, and S. Major, a famous lawyer of that day; and was defended by B. M. Thomas and O. H. Smith, the latter afterwards U. S. Senator. The case was bitterly contested; but public prejudice was too much for the accused, and he was sent to the penitentiary for five years. On appeal the case was affirmed, in an able opinion written by Judge Dewey, as long an opinion as he ever wrote. It is quite evident that the court felt the weakness of the evidence for the prosecution. He could not testify for himself; and the only witness to the alleged transaction was the woman, whose interest was certainly as great, if not greater than that of the accused. "In regard to the sufficiency of the evidence to justify the verdict," said the court, "we can only say that had we been in the place of the jury, we might, perhaps, have come to a conclusion different from theirs. But, one witness swore positively to the perpetration by the defendant of the crime charged upon him. The jury were, by the well-settled rule of the law, the exclusive judges of her credibility. If they believed her, they but acquitted their conscience in finding the defendant guilty. And after their verdict has undergone the revision and received the sanction of the Circuit Court on a motion for a new trial, we do not feel at liberty to disturb it on a question of the credibility of testimony."

Weinzorpflin still lives (or did a few months ago) an inmate of the monastery. The prejudices and passions of the day have melted away; and in the light of sober judgment and subsequent events he is no longer regarded by those cognizant of the facts, and by those who have examined them, as ever having committed the offence; yet he was the victim of a rule long adopted by the courts, and still in force, which is set forth in the language quoted.

On the 14th of January, 1845, Blackford was reappointed for a term of seven years from the 28th of that month. On the 21st of January, 1846, Samuel E. Perkins of Wayne County was appointed in place of Judge Sullivan, whose term had expired, until the end of the next session of the General Assembly; and on the 29th of the following January he was appointed for a term of seven years. On the 29th of January, 1847, Thomas L. Smith of Ripley County was appointed in place of Judge Dewey, to continue until the end of the next session of the General Assembly; and on Jan. 28, 1848, he was appointed for a like term of years.

The appointment of Perkins and Smith was the source of a quarrel between Governor Whitcomb and the State Senate. The Senate desired the appointment of Dewey

and Sullivan. Both were strong men and excellent judges, the former one of the strongest and best legal minds that ever sat on the bench. The reason Whitcomb gave for his refusal to appoint the old judges was the fact that the court docket was behind, and he believed it needed younger men to bring it up. But this statement was doubted. At first he sent to the Senate the names of Charles H. Test and Andrew Davidson (the latter several years afterwards elected judge), whose appointment the Senate refused to confirm. He then nominated E. M. Chamberlain and Samuel E. Perkins, with a like result. Then followed the names of William W. Wick and James Morrison, and they, too, were rejected. The legislature having reached the end of its term, adjourned, and the Governor then appointed Perkins and Smith until the next session of the Senate, when, upon reappointment, they were confirmed.

ALVIN P. HOVEY.

Blackford and Smith continued to serve until Jan. 3, 1853, when the judges, elected in accordance with the provisions of the Constitution of 1851, took their seats, and the new Supreme Court was created. Perkins was elected a member of the new court.

The old Supreme Court decided the first railroad case appealed at the May term, 1851.[1] It was simply a case of appropriation.

Until the court was reorganized, the salary of a Supreme Court judge was seven hundred dollars, the same as that of a judge of the Circuit Court.

When the seat of government was removed to Indianapolis, the court was authorized to sit in the county court-house. By an Act of 1832 they were authorized to adjourn "to any other house in the town of Indianapolis;" and the judges were given the privilege of occupying one of the rooms in the house on the Governor's Circle, "for a consultation room," either in term time or vacation.

Until 1833 the sheriff of the county where the court sat acted as sheriff of the Supreme Court; but in 1833 they were authorized to appoint a sheriff, and his duties and fees were fixed and prescribed.

In 1849 the clerk and his deputy were forbidden to practise in the court.

The old court was authorized to call a jury and summon witnesses to try an issue of fact, in a proper case; but this was a power probably never exercised, even in those cases where it had such original jurisdiction as the General Assembly was authorized by the Constitution to give it, and which it did. Afterwards the court was authorized to send such a case to a Circuit Court for trial.

The opinions of the court were required to be in writing, "except in cases and on subjects of an unimportant nature."

John Johnson.

Who was John Johnson, of whom we know so little, and who, so far as we now know,

[1] Pruitt *v.* Shelbyville Lateral Branch R. R. Co., 2 Ind. 530.

never delivered an opinion while on the bench? He was a Kentuckian, and an advocate of the institution of slavery. Near, if not at the beginning of the present century, he settled at Vincennes, and at once entered on the practice of law. He was elected to the territorial legislature, and with John Rice Jones, revised the laws of 1807. In 1809, when John Randolph, the pet of the Harrison faction and a rabid slavery advocate, was pitted against Jonathan Jennings, the antislavery candidate for Congress, Johnson was the third candidate, and it is said at the instance of Jennings. The latter was strong in the eastern part of the State, and Randolph in the western. When the vote was counted, it was found that Jennings had four hundred and twenty-eight votes, receiving nearly every eastern elector's ballot, while Randolph had four hundred and two, and Johnson eighty-one. Thus it was that Johnson drew from Randolph, and Jennings was elected by a bare plurality. Whether Johnson was a candidate at the suggestion of Jennings or his friends or not, yet it is evident that Jennings did not forget Johnson when he had the appointment of three judges of the Supreme Court. Johnson was a man of ability, was a member of the first constitutional convention, serving on at least three important committees. He died, as we have seen, in 1817.

James Scott.

James Scott resided in Clarke County, at Jeffersonville, and represented that county in the constitutional convention of 1816. He had previously served as Speaker of the territorial House of Representatives. He served fourteen years upon the bench. He was a Pennsylvanian, — "one of the purest men," says Oliver H. Smith, "in the State, a scholar, and a fine lawyer. The opinions of no judge of our Supreme Court up to the present day [1857] are, I think, entitled to stand higher with the profession than his. A strong common-sense view of the case enabled him to select the grain of wheat from the stack of straw, and say, holding it up to the parties, without discussing the chaff, 'It is my opinion that this is a grain of wheat.'"

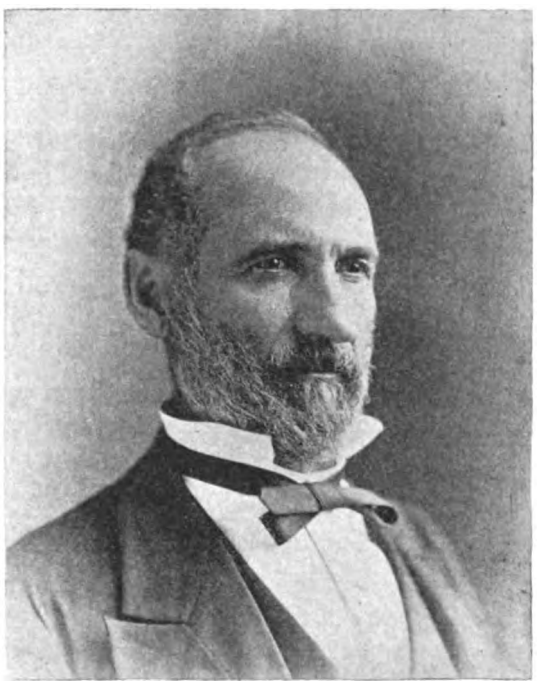
Jesse L. Holman.

Jesse L. Holman was born Oct. 24, 1784, at Danville, Ky. While an infant his father was killed by the Indians. Under discouraging difficulties he received a common-school education. Under the encouragement and auspices of Henry Clay, he published, before his majority, a novel entitled "The Errors of Education," in two volumes. Afterwards, becoming dissatisfied with the work, he burned all the copies he could secure. He studied law under Clay, at Lexington, and commenced to practise at Carrollton. Previous to 1810 he moved to Indiana, and settled near Aurora on a farm which he called "Veraestan." He brought with him a large family of slaves, descended to him, which he emancipated. In 1811 he was appointed prosecuting attorney of Dearborn County; in 1814 he was elected a member of the legislature, and the same year was appointed judge of the second judicial district. As we have seen, he was appointed judge of the Supreme Court in 1816, and served fourteen years. In 1831 he came within one vote of being elected to the United States Senate, being defeated by General Tipton. On the death of Benjamin Parke, he was appointed judge of the United States Court for the District of Indiana, the second judge of that court, and held the position until his death, March 28, 1842. He was a Baptist minister, and for years served as pastor of the Aurora Baptist Church. He was one of several who laid out the town of Aurora; and he not only manifested a deep interest in the schools of his native town and county, but took a deep interest in the organization of Indiana University. Of him Justice McLean said: "His mind was sound and discriminating. Of his legal record and acumen, he has left enduring evidence; but what most excited my admiration was his

singleness of heart." "A good lawyer," said Oliver H. Smith, "and one of the most just and conscientious men I ever knew." He was the father of Hon. William S. Holman, for many years, and at the present time, a member of Congress.

Isaac Blackford.

Isaac Blackford has had more influence upon the Supreme Court of Indiana than any man who ever sat upon its bench. Coming to the bench Sept. 10, 1817, he continued until Jan. 3, 1853, — a period covering the entire existence of the old court, with the exception of the few first months after its creation. He succeeded John Johnson. He sat longer upon the bench than any other man; and during that time he made his name, by his untiring accuracy and exact learning, familiar on two continents.



JAMES L. WORDEN.

Blackford was born at Bound Brook, N.J., Nov. 6, 1786. His father was a native of England, and died while Isaac was in his teens. At sixteen he entered Princeton College in a class of fifty-four. Among his classmates were three who became Governors of States, three United States Senators, and four judges of Supreme Courts. Blackford excelled in Latin and Greek, having even a critical knowledge of those languages. He delighted in books, and was proficient in astronomy and the higher mathematics. In his senior year he read Blackstone.

He read law at Morristown, in the office of Gabriel Ford, then the foremost lawyer in the State. In 1811 Blackford left New Jersey for Indiana, — why it is difficult to tell. Dewey came from Massachusetts because he was a bold man, possessing a daring mind, and having the energy which demanded the freer life of the then far West; but Blackford was the scholar to whom the cloister was more congenial, or the society and life of a thickly inhabited and long settled country more attractive. Walking to the Alleghany River, because of lack of means, he floated down that and the Ohio River to Lawrenceburgh, Ind., and presented a letter of introduction from Ford to Isaac Dunn. Shortly after his arrival young Blackford resumed the study of the law at Brookville; a little later he served as cashier of the Vevay branch of the Territorial Bank; and not long after this he edited a paper in Vincennes. In 1813 he became the first clerk and recorder of Washington County, and in December of the same year was elected clerk of the House of Representatives, then in session at Corydon. He was re-elected to this office in the following August, but resigned on his appointment as presiding judge of the First Circuit, a position which he held until January, 1816. Six months later, on his thirty-first birthday, he was elected to the House from Knox County; and when that body convened he was elected Speaker of the first House of Representatives of the newly formed State.

Blackford was chosen Speaker without

opposition. "His great fairness and unyielding integrity and natural fitness," said Senator James Noble, "won the respect and hearty good-will of us all, and we could n't find it in our hearts to oppose him."

Ten months later he was appointed Judge of the Supreme Court. At this time he was five feet nine inches in height, erect and very straight, delicately and slenderly shaped, cleanly shaven, and had a bright and genial countenance, and possessed exceedingly kind and conciliatory manners. He was exceedingly diffident, which increased with advancing years. It was said of him that "he looked too young for that high judicial station."

It was at the funeral of his predecessor that Governor Jennings informed him of his intention to appoint him to the vacant judgeship. As was usual on such occasions, Blackford lost his voice and could not speak; but somewhat regaining his composure, he besought the Governor not to carry out his intentions, urging his want of years, lack of experience, his limited knowledge, and the superiority of other men, half-a-dozen of whom he named. But the Governor refused to accept his advice.

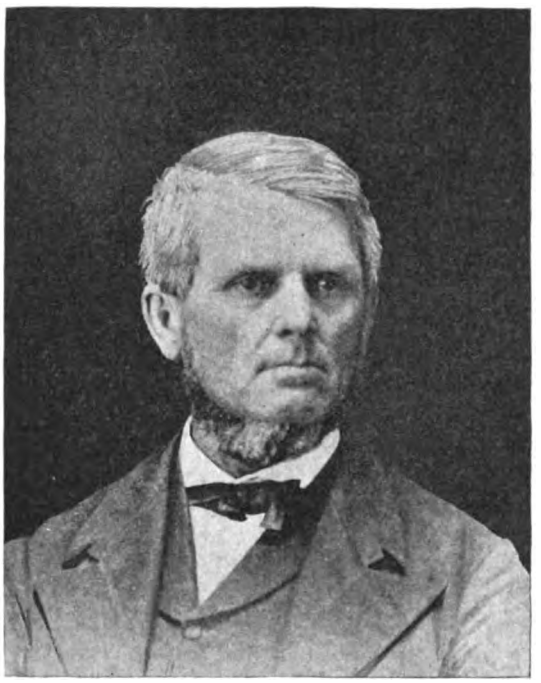
In mental calibre he was not the first in rank, even among the young men of his day; and he never was deemed a great lawyer and a profound jurist. In breadth of mind or mental vigor, Dewey was far his superior. Blackford was a man of precedent. "The principal characteristic of his mind," said an eminent lawyer, "is caution. He never guesses. He is emphatically a book judge. Declarations with him are nothing: precedent and good authority, everything." Blackford had a horror of being wrong, and an earnest desire to be right. His timidity and eagerness made him the slave of precedent, and to hesitate to act independently. Yet he possessed a concentration of legal acumen that enabled him absolutely to exhaust any question of law. Of him it has been said, as a judge of the Supreme Court of Michigan said to the writer of Judge Christiancy of that court, "that when he had given his opinion, his associates knew that he had exhausted the subject."

Blackford's reverence for judicial dicta sometimes led him into error. Thus, in The State *v.* Tipton (1 Blackf. 166) he wrote an opinion to the effect that the judgment of a court of competent jurisdiction respecting contempts could not be appealed from, relying upon the Case of the Lord Mayor of London (3 Wils. 188). For more than forty years this was the law of the State, until the question again passed under view, when it was found that the English case was not at all in point, while the whole current of modern decisions was the other way.

In the cases of Deming *v.* Bullitt (1 Blackf. 241) and Cunningham *v.* Flinn (1 Blackf. 266), he held that a demand made before bringing the action for a deed, where the owner of land had covenanted to convey as payment of the purchase-money and the money had been paid, in order to maintain an action for a specific performance, was not necessary. A few years later, the question arose in Sheets *v.* Andrews (2 Blackf. 274), after Sugden's work on "The Law of Vendors and Purchasers of Estates" had appeared; and on the strength of the statement of that eminent authority, Blackford overruled his two former opinions, holding that a demand first made was essential to maintaining the action. So in the case of Shanklin *v.* Cooper (8 Blackf. 41) is another illustration of his reverence of precedent. Twenty thousand dollars was involved. One French had executed two notes in New York, made payable in a bank in that State, in favor of Shanklin, who, in Indiana, indorsed them to Cooper. If the contract of indorsement was an Indiana contract, Shanklin was not liable under the facts developed at the trial; if it was a New York contract, he was liable. Judge Sullivan wrote an opinion holding the indorsement to be an Indiana contract, but before he filed it his term of office expired. The case was then assigned to Blackford, who found that in Rothschild

v. Currie (1 Ad. & E. N. S. 43) it had been decided that an indorsement was a contract which was governed by the law of the place where the note is payable, without regard to the place where the indorsement was actually made. This remained the law for fourteen years, when the case was in principle overruled in Hunt *v.* Standart (15 Ind. 33).

In 1824 Blackford was an elector on the Adams ticket; in 1832 he voted for Clay; but in 1836 he voted for Van Buren, and ever afterward was a Democrat. So long, however, as he remained on the bench he took no part in the political campaigns, nor in any way interested himself in party management. He was regarded as an eminently fair man, free from all entangling alliances, — one who was stronger than his party. Such a man is often taken up to oppose a ring candidate; and so was Blackford taken up in 1825 as an opponent to James Ray, who was unpopular, for the office of Governor. Blackford was not consulted. He received 10,418 votes to Ray's 13,040. After this Blackford was taken up as a candidate for the United States Senate, in the winter of 1825–26, and was defeated by one vote only, — the successful candidate being William Hendricks. It was owing to his personal popularity that Governor Ray, although his opponent in the gubernatorial race, reappointed him in 1830, declining, however, to reappoint his associates, Holman and Scott. In later life Blackford lost his popular hold upon the people, especially after his retirement from the bench. After the reorganization of the court by the adoption of the new Constitution in 1852, he desired to be retained on the bench, but was defeated by Judge Perkins. He even failed to get the nomination for Supreme Court Reporter. In 1852 Thomas A. Hendricks defeated him for the nomination for Congress; and afterwards becoming the Democratic nominee for State Senator, he was beaten by the People's Party.



ROBERT C. GREGORY.

His displacement from the bench was a severe blow to his pride. He privately declared that he would prefer to remain without pay than to withdraw after so long a term of service; but the cry for "new blood on the bench" was irresistible. After he retired from the bench, he opened an office for the practice of the law, but utterly failed It was noticeable that he was unfamiliar with the rules of evidence and practice, and frequently omitted from his papers important matters. He spoke hesitatingly, and under evident embarrassment. Tyros at the bar were often more than his match; and after a few attempts he refused to appear in court, confining himself to office work.

In 1855 he again reascended the bench, but in a different forum. The United States Court of Claims had just been created, and President Pierce appointed him judge of that court, saying that he knew of no man in the party better fitted to aid in its organization. This office he held until his death, Dec. 31, 1859, — the last day of the year, the

last day of the week, and the last hour of the day.

In all his long career no man ever suspected Blackford of dishonesty; his was an unsuspected integrity.

In private life he was a singularly pure man. An oath nor an obscene story never passed his lips. Outwardly he was not religious; but he frequently attended church, and was a firm believer in the truths of Christianity.

He was remarkably industrious and painstaking, working incessantly, having no set time in which to perform his judicial labor. When overcome with fatigue and Nature's demand for sleep and rest, his head often fell forward on his desk; and after long and unremitting labor he would frequently sleep thirty-six or forty-eight hours without intermission. He was decidedly a plodder, creeping at a snail's pace through whatever he had to do. He wrote and rewrote until he was satisfied with his opinions. His memory, too, was very deficient; an excellent illustration of which is afforded by the cases of Hawkins *v.* Johnson (4 Blackf. 21) and Vest *v.* Weir (4 Blackf. 135), in which there is a direct conflict, although a little over one hundred pages of the report intervene between them, — in which cases he prepared both opinions.

Blackford, outside of the law, was not a learned man. In early life he had a love for poetry, but that soon deserted him. His library contained over two thousand volumes, — the largest private library then in the State; but they were mostly legal works. He took little interest in anything beyond the law. His gifts to charity were small, — more to escape importunity than love of giving. He was passionately fond of oratory; especially that of Henry Ward Beecher, then a resident of Indianapolis. In the company of strangers he was painfully diffident; a rough criticism pained him beyond expression. Among his friends he was very happy, relating a good story; but he enveloped himself in a quiet reserve or dignity of manner that forbade anything like familiarity.

In 1820 he was married to Caroline McDonald, the daughter of his old preceptor in New Jersey; but the marriage was an uncongenial one, owing to the difference in their ages and habits. She died in a year, leaving a son, who died at the age of twenty. The death of his son was a great blow to Blackford. For more than a week he confined himself in his room, and only opened the door when it was clear to him that it would be broken down if he did not do so.

Blackford lived like a hermit. For twenty years he occupied a room in the Governor's house in the Circle at Indianapolis. He had a few chairs and a table of the plainest pattern. His floor was uncarpeted, and for years his bed lay upon the floor. He took his meals at a cheap boarding-house; and when specially engaged, or confined to his room by rheumatism, he lived for days on crackers and cheese, a supply of which he always kept by him. Shortly after the confirmation of his appointment as judge in 1843, he banqueted five of his Whig friends who had voted for him; and the banquet consisted of two pounds of hard-shelled almonds, a few crackers, and a single bottle of champagne. He cracked the nuts on the floor with his boot-heel.

Exercising such economy, and being continuously in office for a long time, he necessarily accumulated a considerable fortune. His connection with the Vevay bank gave him an insight into its gross frauds, and he resigned. Shortly afterwards it failed, and this shattered his confidence in moneyed institutions. He refused to trust them, and invested his earnings in land or town property, which in time became valuable. For years at a time he declined to draw his salary; and when the State paid in scrip drawing six per cent interest, he had his salary set off quarterly, but declined to draw it for six years, when he received a much larger sum than he would have otherwise received. He died a rich man, for the West.

Blackford owed much of his reputation, at

least beyond the State lines, to the excellent set of eight reports he edited. As early as 1822 his attention was drawn to the advantage of a systematic report of the opinions of the court; but the first volume did not appear until 1830, containing opinions extending over the first ten years of the court's creation. This report at once took its place beside the Massachusetts and New York reports. Of it Chancellor Kent said that it was "replete with the extensive and accurate law-learning, the notes of the learned reporter annexed to the cases being especially valuable." Said Washington Irving, then Secretary of our Legation at London, "I meet with it frequently, and I am often asked as to the antecedents of its author, whose name is quite familiar at Westminster." One thousand copies were printed of the first volume; seven hundred and fifty (1834) of the second; one thousand each of the third (1836), fourth (1840), and fifth (1844); one thousand five hundred each of the sixth (1845) and seventh (1847); and one thousand two hundred and fifty of the eighth (1850). They are Blackford's monument; and no better example of reporting can be produced in America or England.

The opinions reported in this series of reports are selected from a large number never reported. They all received the personal attention and revision of the reporter. He did not hesitate to correct the opinions of his associates, or even to remodel them. He studied the art of punctuation, and read the best books for style. In his opinion a misplaced comma was as inexcusable as a grammatical blunder; and on one occasion an entire signature (sixteen pages) was printed four times before the punctuation suited him. In the printing of the eighth volume the entire printing establishment was delayed three days, at the cost of $125, until the author had determined the correct spelling of "jenny," a female ass. He had spelled it with a "g," but finding it spelled differently, he was not content to let it pass until he had examined every book in his library. During the year 1843 he paid his printer $600 for loss of time occasioned by these delays. The publication of the eighth volume covered eighteen months, and he paid his printer $1,100 for delays and corrections. He had a standing reward with the printer for the discovery of errors; and he kept the sheets of each volume, as it was coming out, in the Supreme Court room, accompanied by a request that all errors be noted on the margin of the page containing the error. Ex-Governor Porter, our present Minister to Italy, noted an error in the use of the word "optionary." Several months afterward he was surprised to read in the papers his appointment as Supreme Court Reporter, to succeed Mr. Carter, recently deceased. Seeking the Governor, he tendered his acknowledgments, but was referred to Judge Blackford, who, he was informed, had urged his appointment solely on the recommendation of the discovered error.

Indeed the story is told that that eminent lawyer, Samuel Judah, used to boast that he secured a delay in the decision of a case in the hands of Blackford for three years, simply by suggesting to him that Kent and Story differed in the spelling of "eleemosynary;" and although this tale may not be true, it indicates the character of a man about whom such a story could be invented.

Such is a faint outline of Blackford, the judge, the jurist, the scholar, and the recluse, and the greatest special pleader ever in the State.

Stephen C. Stevens.

Stevens first appeared in public life as a member of the legislature of 1817 from Franklin County, and was chairman of the committee on revision of the laws. In 1824 he was a member of the same body from Switzerland County, being elected Speaker; and in 1826 was elected to the State Senate, serving two terms. Afterwards he removed to Madison, and was appointed judge, Jan. 28, 1831, resigning in May, 1836. He was an old-time Abolitionist; and in 1845 was the nom-

inee for Governor of the Liberal party. In 1817 he was one of eleven who organized the Grand Lodge of Masons for the State of Indiana. In 1851 and 1852 he interested himself in a projected railroad, only soon to find his accumulations of years swept away from him, and himself a pauper. The shock was too great for him to bear, and his mind was impaired. His delusion was that he was immensely rich, and he went about bargaining for houses and lands. In 1869 he was sent to the State Hospital for the Insane, with no benefit; and there he died Nov. 7, 1870, in abject poverty. It cannot be said that Stevens was a great lawyer, although he stood high at the bar. His painstaking, care, and industry made him a successful practitioner, and he possessed considerable power before a jury. As a writer he was diffuse and prolix, and his opinions contain many *obiter dicta*. He was one of the most laborious judges that ever sat on the Supreme Court bench.

John T. McKinney.

Judge McKinney was a resident of Franklin County, having his residence at Brookville. He was appointed Jan. 28, 1831, in the place of Judge Holman. He died in office in May, 1837; and Judge Sullivan succeeded him in office. Oliver H. Smith said of him: "General McKinney was a fair lawyer, and gave good satisfaction as a judge, but died before he had reached the meridian of life, or had been long enough on the bench to develop fully his judicial character. His opinions are sound law."

Charles Dewey.

Dewey was born in Sheffield, Mass., March 6, 1784, and graduated at Williams College with the honors of his class. In 1816 he settled at Paoli, Ind., and opened an office. His active mind and genial habits soon brought him a large practice in that and adjoining counties; he following the usual habit of lawyers at that day, "riding the circuit." In 1821 he was elected to the Legislature, and the next year made an unsuccessful race for Congress. In 1824 he moved to Charlestown, Clarke County, where he resided until his death. In 1832 he again made an unsuccessful race for Congress. Governor Noble appointed him, May 30, 1836, judge of the Supreme Court in place of Stevens, who had died; and he sat upon that bench eleven years. Dewey was a Whig, and Governor Whitcomb, a Democrat, refused to reappoint him, as we have seen. After the adjournment of the legislature he appointed Dewey and Sullivan temporarily, until the next legislature, and then sent in the names of two others as permanent appointments. The legislature refused to confirm them, and after the adjournment the Governor again offered him a temporary appointment; but Dewey declined to accept it until he received an assurance from the Governor that it should be made permanent. No doubt Whitcomb wanted to appoint Dewey to a full term; but he was diverted from his course by Ashbel P. Willard, afterwards Governor, and then a rising young Democrat; but he did not keep his pledge, and Dewey publicly charged him with having failed to keep faith with him.

On leaving the bench in 1847 he resumed the practice, and he and George V. Howk, afterwards himself a member of the Supreme Court, formed a partnership. Their practice was large and lucrative. In 1849 he was thrown from his carriage, and his leg was broken. He never fully recovered from the injury, and was always compelled to use crutches. He died April 25, 1862, and was buried at Charlestown. Dewey and Benjamin Parke were great friends and companions. His love of a good story was well known, and his wit was keen and incisive. Dewey was, perhaps, the most original mind that ever sat upon this bench. His reputation as a lawyer was very high when he was appointed judge, and many feared he would not maintain it on the bench; but all acknowledged that their fears were not realized. He had the happy faculty of going at once, in a very

few clear-cut sentences, to the core of the case. He cited few authorities. His opinions, consequently, are short, but perspicuous. There is no uncertainty about his meaning, or what he decides. He was, perhaps, the finest equity lawyer in the State, or who ever sat upon the Supreme Court bench.

Jeremiah Sullivan.

Judge Sullivan was born July 21, 1794, at Harrisonburgh, Va. His father, a Catholic, came from Ireland and married a Methodist woman. Of the two children from this union, the daughter died an infant. His father designed him for the priesthood, but Jeremiah preferred the law. He graduated at William and Mary's College. Having read law, he was about to enter on the practice, when the War of 1812 broke out, and he enlisted in the army. He rose to the rank of captain, for his "bravery and good conduct." At the close of the war, declining an offer of partnership with his old preceptor, he started for Louisville, Ky.; but upon his arrival at Cincinnati he was recommended to go to Madison, Ind., which he did, and there settled. In 1820 he was elected to the legislature as a supporter of Monroe, and was appointed one of the commissioners to lay off the site selected for the future capital of Indiana. In the legislature he proposed the name of Indianapolis for the new capital, and it was adopted, although at first received with derisive shouts of laughter. In 1824 he was defeated by William Hendricks for Congress. In 1829 he was appointed by Governor Ray one of the land commissioners to adjust the conflicting claims of Ohio and Indiana concerning the land granted by the United States for the construction of the Wabash and Erie Canal, and elicited the commendations of both Governors of the two States. His connection with the canal lasted until 1836. When appointed judge, May 29, 1837, to fill the vacancy occasioned by the death of McKinney, his associates were Dewey and Blackford; and he continued on the bench nine years. It may safely be said that the bench as a whole was never better than during their nine years. Dewey was a man of originality and power; Blackford of learning, scholarship, and acumen; and Sullivan of scholarship combined with power, though inferior to Dewey, and a graceful diction that has not been surpassed by any member of the Supreme Court bench. He was the ablest writer of the three. His opinions are models of legal composition. The decisions of the court at this period have been repeatedly cited by the Queen's Bench of England; and the court rose to a dignity and reputation unequalled by any of the newer States, and surpassed not far by any of the older. Although the characteristics of the three judges were radically different, yet they combined and served to procure for the bench this high reputation. In later life Sullivan was a Whig; and on the breaking out of the Rebellion he was an earnest supporter of the administration, one of his sons becoming a brigadier-general in the Union army. In 1869 he was appointed by Governor Baker judge of the Jefferson County criminal court; and at the following general election he was elected judge: but when he was to open court for the first time as a judge elected by the people, the members of the bar were shocked to hear that he had died only two or three hours before the morning hour for calling court. He died Dec. 6, 1870. Of him Hon. Joseph E. McDonald said, in a public address: "As a judge, he was learned and inflexibly just, and an ornament to the bench. As a practising lawyer, he was able and honorable, and an ornament to the profession. As a sincere Christian, he was an ornament to the church. As a man of exalted personal character, he was an ornament to society."

Thomas L. Smith.

Judge Smith held his office from Jan. 29, 1847, until the incoming judges of the new Supreme Court. He succeeded Dewey, and was a Democrat. When ap-

pointed he was considered a good lawyer; and he did not disappoint the bar while on the bench. His best opinion was in the case of the State of Indiana against the Vincennes University; and although the decision was reversed by the Supreme Court of the United States, the minority of the court, including Taney, concurred fully with his opinion. After he retired from the bench he resumed the practice at New Albany. He was the reporter of one volume of Indiana reports, a private enterprise, published in 1850 at New Albany. It is the smallest volume of any of the Indiana reports, and contains only twenty-one opinions not published in Blackford's and the other Indiana reports. It in fact falls in part between Blackford's eighth volume and volume one of the Indiana reports.

THE NEW SUPREME COURT.

On the 18th day of January, 1850, the General Assembly provided for the call of a convention of the people of the State, to revise, amend, or alter the Constitution of 1816. The convention met on the first Monday of the following October; and an entirely new constitution was framed, which took effect Nov. 1, 1851. By its terms, as amended in 1881, the judicial power of the State is vested in a Supreme Court, in Circuit Courts, and in such other courts as the General Assembly may establish, — the Supreme Court to consist of not less than three nor more than five judges, a majority of whom constitute a quorum; and the judges to hold their offices for six years, "if they so long behave well." The legislature is required to divide the State into as many districts as there were judges; and one judge is elected from each district, who must reside therein, "by the election of the State at large."

The Supreme Court is given jurisdiction by the Constitution co-extensive with the limits of the State, "in appeals and writs of error, under such regulations and restrictions as may be prescribed by law." It is also given such original jurisdiction as the General Assembly may confer upon it. Upon the decision of every case the court must "give a statement in writing of each question arising in the record of such case, and the decision of the court thereon." The General Assembly is required to provide by law "for the speedy publication of the decisions of the Supreme Court made under" the Constitution; but no judge of the court is "allowed to report such decision." The clerk of the court is elected by an election at large for a term of four years. The judges of the court are made conservators of the peace; their salaries can never be diminished during the term for which they are elected, and they are not eligible during such term "to any office of trust or profit under the State, other than a judicial office."

Neither the Constitution nor the statute requires of a judge any qualifications for the high office he holds. In this we have the reflex of the absurd clause of the Constitution, that "every person of good moral character, being a voter, shall be entitled to admission to practise law in all courts of justice." Indeed, more is required of an attorney than of a judge of the Supreme Court; for the latter is not required to have a "moral character," if he "behave well," or even to have been admitted to practise law. Thus the people have reserved to themselves the power to send any elector of the State to the highest (or to the lowest) judicial bench of the State, regardless of his fitness for the position; but the spirit of reform has not swept with such resistless might as to place upon the Supreme Court bench any one who was not a practising lawyer, nor men who have not stood at the head or in the very front rank of their home associates. The poorest judges, in ability and learning, have been the appointees of the governors, to fill vacancies caused by deaths and resignations. This is strong testimony and argument in favor of the popular election of the judiciary.

The Act for the organization of the Supreme Court was enacted May 13, 1852. By its terms the court was made to consist of four judges; the court to be held in the State House, or, by adjournment, in any other room in the city of Indianapolis. They were authorized to occupy for consultation any of the rooms of the building in the Governor's Circle, where the present Soldiers' and Sailors' Monument now stands. The two terms, then as now, began respectively on the fourth Mondays in May and November; and each term consisted of thirty days, and was enlarged by operation of law, "if the business thereof requires it." For each term, then as now, the judges choose one of their number chief-justice, who presides at their consultations and in court. Each judge takes his turn as chief-justice. The term of office of each judge begins on the first Monday in January after his election.[1]

An attorney-general to represent the State was not provided for until 1855. The court was authorized to appoint its own sheriff.[2]

On the 12th day of October, 1852, Samuel E. Perkins, Andrew Davison, William T. Stuart, and Addison L. Roache were chosen by the electors of the State judges of the Supreme Court over their opponents, Charles Dewey, David McDonald, John B. Howe, and Samuel B. Gookins; and they entered upon their duties Jan. 8, 1853. Perkins was Blackford's competitor for the nomination, and defeated him. He was the only member of the old court who was retained on the bench. Blackford's last opinion was Sloan *v.* Kingore (3 Ind. 549), delivered Dec. 24, 1852; and Smith's the Terre Haute Drawbridge Company *v.* Halliday (4 Ind. 36), delivered Jan. 1, 1853, the last day of the old court. Two opinions were delivered on that day. The first opinions of the new court were delivered Feb. 1, 1853. Stuart delivered three, and the other judges two each. No further opinions were delivered until the May term of that year.

The pay of the judges was only twelve hundred dollars per annum, three hundred dollars lower than it had been at one time for a judge of the old court. The new judges were all Democrats.

A new condition of affairs confronted the court. A wave of reform was sweeping over the State, and the new Constitution provided for a revision of the laws. The General Assembly was required to provide for the appointment of three commissioners, whose duty it was "to revise, simplify, and abridge the rules, practice, pleadings, and forms of the courts of justice." They were required to provide "for abolishing the distinct forms of action at law now in use, and that justice shall be administered in a uniform mode of pleading without distinction between the law and equity." They were also required "to reduce into a systematic code the general Statute Law of the State," and report the result of their labors to the General Assembly, with "recommendations and suggestions." Walter March, G. W. Carr, and Lucien Barbour were appointed the three commissioners, and reported a Civil Code, May 10, 1852, and a Criminal Code the 17th of the same month. The codes were almost literally adopted as reported. The model for the Civil Code was the New York Code of Civil Procedure; but the Codes of Kentucky and Iowa were resorted to by the commissioners.

The most striking feature of the Civil Code was the abolition of all "distinctions in pleading and practice between actions at law and suits in equity," and the substitution of "one form of action for the enforce-

[1] The clerks of the Supreme Court have been Daniel Lymmes, 1794–1804; Henry Hurst, 1804–1820; Henry Coburn, 1820–1852; William B. Beach, 1852–1860; John P. Jones, 1860–1864; Lazarus Noble, 1864–1868; Theodore W. McCoy, 1868–1872; Charles Scholl, 1872–1876; Gabriel Schmuck, 1876–1880; Daniel Royse, 1880–1881; Jonathan W. Gordon, 1881–1882; Simon P. Sheerin, 1882–1886; William T. Noble, 1886–1890; Andrew M. Sweeney, 1890–

[2] The State had an attorney-general from December, 1821, to 1831, when the office was abolished. His salary was $200.

ment or protection of private rights and the redress of private wrongs," denominated a "civil action." The only pleading allowed was the complaint by the plaintiff, the demurrer and answer by the defendant, and the demurrer and reply by the plaintiff.

The court found upon its docket a great number of cases that must be disposed of in accordance with the common law and chancery practice that had prevailed, and many cases thereafter appealed had to be treated in the same way; but all cases begun after the new Code took effect were governed by its provisions, and this entailed upon the judges a vast amount of original work. No doubt a prejudice against the new Code and a predilection for the old system prevailed both with the bench and the bar, although often unsuspected by those entertaining them. The New York Code had been in force five years, and the decisions of the courts of that State had not been free from a distrust of the new code. Indeed, it may be said that the early decisions of the courts of that State were less in harmony with the new method of pleading and practice than that of any other State adopting a code; and their decisions did not fail to have an effect upon the Indiana courts. But notwithstanding all this, the decisions of the Indiana Supreme Court are singularly in harmony with the spirit and letter of both the civil and criminal codes of the State. The provisions of the Constitution requiring all decisions to be reduced to writing and to be reported, soon swelled the number of reports far beyond their former number, and filled them with innumerable questions of practice, which, owing to these provisions, are repeated over and over. No State in the Union, unless it is the State of New York, has a set of reports containing as many decided questions of practice as Indiana; and herein the court has been placed at a decided disadvantage, because of the frivolous questions that encumber the pages of our reports, and the unavoidable conflicting decisions on minor and obscure points of practice. Since the new court was formed, its opinions fill one hundred and twenty-five volumes, averaging over six hundred pages per volume. To the profession the burden is intolerable, not only in the purchase of the volumes, but in wading through a vast amount of rubbish for kernels of new grain.

Not only did the court have two new codes to interpret, but it also had the whole body of the statute law of the State and the new Constitution. The first General Assembly after the new Constitution went into force reconstructed the entire body of the statute law of the State, so as to conform with the provisions of that instrument. Constitutional questions came thick and fast. The first question arose in Jones *v.* Cavins (4 Ind. 305), Nov. 28, 1853, concerning the office of county auditor; and Judge Perkins wrote the opinion.

In the temperance legislation of that day the court found its most serious and difficult questions. The first case on this legislation was Maize *v.* The State (4 Ind. 342), upon the Local Option Law of 1853. The court held that so much of that act as required a submission to the voters of the township, to determine whether intoxicating liquors could be therein sold, was unconstitutional, but that the remainder of the act could stand. Judge Stuart wrote the opinion. The principle governing this case was adhered to in Greencastle Township *v.* Black (5 Ind. 557), with respect to a township voting a tax for school purposes.

The result of these decisions was that the legislature passed in 1855 a prohibitory liquor law; but it too fell before the court. On the 30th of October, 1855, Judge Perkins, as a single judge of the court, delivered an opinion on the petition of one Herman for a writ of *habeas corpus*, holding the Temperance Act of 1855 unconstitutional (8 Ind. 545); and on the 20th of the following December a divided bench sustained his opinion.[1] In Beebe's case it was in effect held that the

[1] Beebe *v.* State, 6 Ind. 501.

prohibitory law was in direct conflict with the fundamental principles of civil government, as embodied in the Bill of Rights. It was then contended that the effect of this decision, in striking down the Act of 1855, was to leave that part of the Act of 1853 previously held valid in force; but here the advocates of temperance were doomed to disappointment; for the court held in a still later case (11 Ind. 482) that although the main part of the Act of 1855 was invalid, yet its general repealing clause was constitutional, and had the effect to repeal the Act of 1853. A most absurd conclusion, it must be said, and one that savored of party subservience; for the judges belonged to the party which opposed the stringent measures embodied in the Acts of 1853 and 1855. It is well to state that these decisions have been in effect overruled.

Another far-reaching decision was that in the case of the City of Lafayette *v.* Jenners (10 Ind. 70), in which the part of the school law authorizing cities and towns to establish public schools and to levy and collect taxes for their support was stricken down. The effect of this decision was far-reaching, and was a great blow to the public schools of the day.

It is true that the court was continually asserting that the strong presumption was that an act of the legislature was constitutional, that a law was not to be held invalid unless plainly in conflict with the Constitution, and that the court would hesitate long before striking down an act for that reason; yet one who now reads the decisions then rendered cannot help entertaining the thought that the court in a measure constituted itself a court of revision for the legislature, and struck down many acts that did not meet with its approval. "Public policy," even at that early day, was a subject of discussion in the opinions, and had its weight in determining the result. Yet it must be admitted that opinions were then rendered that have become landmarks in constitutional law.

Addison L. Roache resigned, and May 8, 1854, Alvin P. Hovey was appointed his successor. At the next general election, held Oct. 10, 1854, Samuel G. Gookins, a Republican, was elected as a successor to Judge Roache, — Hovey, a Democrat, not being elected to succeed himself.

On the 15th of August, 1857, William T. Stuart filed with the Governor his resignation, dated the 4th inst., "to take effect on the first Monday of January next" (1858). At the next general election (1857) Horace P. Biddle was a candidate for the office vacated by Stuart, and received 20,000 of a majority; but Governor Willard refused to issue him a commission. Biddle brought an action for a mandate to compel the Governor to issue to him the commission; but the Supreme Court decided that at the time the election was held there was no vacancy; that the resignation was only prospective, and could have been withdrawn at any time before it was accepted, and after its acceptance, with the consent of the Governor, and that Biddle had not been duly elected. Biddle was then a Republican, and the Governor and judges of the Supreme Court were Democrats. Since then their decision has been greatly impaired by subsequent decisions. The day after the decision was rendered, — Jan. 15, 1858, — Governor Willard appointed James L. Worden as Stuart's successor.

On Sept. 22, 1857, Judge Gookins also resigned, to take effect when his successor should be elected; but the Governor decided that this was no resignation. On the 10th of December following, the judge sent in another resignation, to take effect immediately; and on the same day James M. Hanna was appointed to fill the vacancy.

The reason for Judge Stuart's and Gookins's resignation was the low salaries paid them by the State. When the court was reorganized under the new Constitution, the salary of a judge was only twelve hundred dollars. In 1859 the salary of a Supreme Court judge was raised to two thousand dollars, in 1865 to three thousand, and in 1873 to four thou-

sand, where it now remains. An effort was made in 1891 to raise it to forty-five hundred, but failed.

On the 12th of October, 1858, Perkins and Davison were re-elected, and Worden and Hanna elected for the first time, for a term of six years from Jan. 3, 1859. The period covering the six years extending from 1859 to 1865 was a momentous one. At the October election, 1860, the State went Republican, and a Republican Governor and State officers were elected. Party feeling ran high. The southern portion of Indiana had been settled by people from the South, many of whom, if not a majority, were in sympathy with the cause of the Southern Confederacy. The legislature of 1863,[1] which was Democratic, — and so were the State officers, except the Governor, — refused to make the necessary appropriations to cover Indiana's portion of the cost of arming her quota of troops; and Governor Morton pledged his personal word in order to secure funds for that purpose.

An effort was made to compel Governor Morton to call an extra session of the legislature, on the ground that no appropriation had been made at the general session for the salaries and expenses of the State officers and institutions. Governor Morton contended that general statutes authorized the payment of such individuals and institutions, and in this he was following a precedent set by a former Democratic Governor. The interest on a large State debt was also due, for the payment of which no appropriation had been made; but this had also previously been paid under the authority given by general statutes. There was plenty of money in the State treasury to pay all these just claims. The Auditor of State was in favor of their payment, but all the remainder, except the Governor, opposed it; and these were spurred on by the hope of an extra session of the legislature, and by political capital.

[1] The legislature and State officers, except the governor, lieutenant-governor, and judges of the Supreme Court, are elected biennially.

Then was instituted a proceeding that was an outrage on the administration of justice. Several days after the legislature adjourned, the Attorney-General appeared before the clerk of the Marion Circuit Court with a sworn complaint for an injunction to prohibit the State Treasurer paying the interest due on the State debt, with an answer, and an order-book entry granting the injunction and entering final judgment. Upon the assurance of the Attorney-General that everything was correct, that official entered the proceedings in the order-book of the court, and gave the Attorney-General a certified transcript of the entire proceedings, in order to take an appeal to the Supreme Court. The Attorney-General was anxious to take an appeal at once. The next day, when the judge of the Circuit Court came to sign the record of the previous day, he denounced the proceedings, said he knew nothing of the case, and struck out the entire entry. In the mean time the certified copy had been filed in the Supreme Court clerk's office, and the Circuit Court clerk at once notified him of the action of the lower court. The court then proceeded to hear the case, and refused the injunction as prayed for. From this an appeal was also taken. Both cases came on for a hearing in the Supreme Court, the same counsel appearing in each case.

The parties were the same, the same question was involved in both cases, and the two appeals were from the same county; but the results of the decisions of the lower court were diametrically opposed to each other. One case was affirmed and the other reversed on the same day; and the State treasurer was tied up with thousands of dollars.[1] If the court was not cognizant of these facts and a party to the conspiracy, then it seems that "inductive reasoning is utterly fallacious."

One of the cases tinged with politics was Kerr *v.* Jones, 19 Ind. 351. Mr. Harrison, the now President, was elected reporter of the Supreme Court in 1860, for the term of

[1] See Ristine *v.* State, 20 Ind. 328; and State *v.* Ristine 20 Ind. 345.

four years. Aug. 7, 1862, he was commissioned colonel in the volunteer service, and accepted the commission, leaving a deputy in charge of his office. In the following October Michael C. Kerr was a candidate at a general State election for the office of reporter, and was elected. The court held that the acceptance by Mr. Harrison of the office of colonel vacated his office as reporter, and that Mr. Kerr was entitled to the office. The result of this decision was to deprive many individuals of county and township offices to which they had been elected before entering the volunteer service. In 1861 the legislature passed a statute authorizing township and county officers to retain their offices while serving in the volunteer service during their terms; but this act was pronounced unconstitutional.[1]

The legality of the legal tender quality of treasury notes early came to the front in Indiana. At the May term, 1862, the court, Judge Hanna dissenting, held the act of Congress making them a legal tender was constitutional and valid, and the banks of the State, by redeeming their paper in treasury notes, did not expose their franchises to forfeiture.[2] At the May term, 1864, the validity of the clause making these notes legal tender again came before the court in Thayer *v.* Hedges (22 Ind. 282.) In a long and discursive opinion written by Judge Perkins, in which Biblical quotations respecting money are quite prominent, the court held the act unconstitutional, notwithstanding its former opinion; but in view of the fact that the question was pending before the Supreme Court of the United States, the court said that "a petition for rehearing may, if the party desires, keep open the question, and save all rights as they may be finally settled by that tribunal." The opinion was unanimous. At the following November term the judgment was set aside. This was after the judges deciding the case had been defeated at the polls in their candidacy for re-election. In January, 1865, four new judges came to the bench, and within a few weeks thereafter they unanimously held the legal tender clause valid.[1] In thus changing front the Supreme Court of Indiana did no more than the Supreme Court of the United States afterwards did upon the same question.

In Griffin *v.* Wilcox (21 Ind. 370) the court decided that neither the President nor Congress had any power to suspend the writ of *habeas corpus;* and that the Act of March 3, 1863, attempting to indemnify officers for illegal military arrests, was unconstitutional, and afforded them no protection. This decision, so far as it relates to the Act of 1863, is contrary to the weight of authority.

Another important opinion was rendered in Warren *v.* Paul (22 Ind. 276), in which it was rightly decided that Congress could not require the use of internal revenue stamps upon judicial process issued by State courts.

At the October election of 1864, James S. Frazer, Jehu T. Elliott, Charles A. Ray, and Robert C. Gregory were elected, to take their offices Jan. 3, 1865. They were all Republicans. One of their earliest cases was upon the validity of the Legal Tender Act, as we have seen. Another was upon the Temperance Law of 1859. In Lauer *v.* The State (22 Ind. 461) the court had decided that the fourteenth section of that act was invalid, overruling thereby a former decision.[2] But in Reams *v.* The State (23 Ind. 111) the court held this section valid, following its earlier case.

One of the important cases decided by this court was that the provisions of the State Constitution prohibiting negroes or mulattoes from coming into the State were rendered nugatory by the provisions of the recently adopted amendments to the Federal Constitution.[3]

[1] State *v.* Allen, 21 Ind. 516.
[2] Reynolds *v.* State, 18 Ind. 467.

[1] Thayer *v.* Hedges, 23 Ind. 141.
[2] Thomasson *v.* The State, 15 Ind. 449.
[3] Smith *v.* Moody, 26 Ind. 299.

The old State House becoming inconvenient, the legislature in 1867 authorized the erection of a brick building, on ground owned by the State, for the use of the Supreme Court and the officers of State. The building was erected that year, and the law library of the State placed in it. It was here that the law library, as distinct from the general State Library, had its origin; for previous to that they were combined. The change was a very beneficial one.

The court about this time adopted the plan of making a statement of the case, or allowing the reporter to do so, and then writing its opinion. This method was only followed a few years, being far inferior to the practice of stating the case in the body of the opinion.

THE LAW OF THE LAND.

II.

A QUESTION OF DOLLARS.

By Wm. Arch. McClean.

WHAT do you suppose the law knows about dollars, medicine, chemistry, philosophy, and the thousands of other things it has yearly to consider, — what? Why, when doctors fall out, it must know more of medicine than the most learned of physicians; and so in each instance, as there is nothing under the sun upon which it may not have to express an opinion, which becomes the law of the land on that subject.

Well, what does law know about dollars? The United States Constitution says Congress shall have power "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." And we know that Congress makes a cheap dollar for the Chinese, a legal-tender dollar, a greenback dollar, a Bland silver dollar, and no end of denominations and fractions of dollars. The law knows what a Spanish milled dollar is, and thereby hangs this tale.

Money has value, which sometimes increases and diminishes. A certain man who lived in the City of Brotherly Love in 1793 thought he knew what good money and bad money was in those days. He was frugal, and therefore had a natural American itching for the money that was good. He was aware of the fact that to be in Philadelphia with certain species of money was deplorable, especially as, if he went out of a night with the boys, the uncle might have to be visited before morning; while if he had his pockets lined with Spanish dollars, the inner man never went half satisfied, and there was enough left besides to soothe the beastly headache of the next day.

This man — let us familiarly call him Dick Roe — spent many sleepless nights pondering upon the bewitching and exasperating subject of how to entice those Spanish dollars into his pockets; for he not only thought of the boys, but also of the little Roes that were coming on. He went about in the daytime with his weather eye crooked for a glimpse of those dollars. To him who waits, and while doing so digs around for substance, all things come, even the Spanish dollar.

It happened thus wise. Dick Roe owned a vacant lot in his native city, and some one wanted it more than he wanted to keep it; but as it was never well to display too much anxiousness to accommodate a purchaser in such a case, he assumed an air as though that lot could not be bought for money. Finally, the proposition came whether he would sell. Sell? why, he had never had such an idea, yet, come to think of it, he might be disposed to part with that lot if he obtained what he should have for it. What did he want? He would think over it; and here a brilliant Spanish dollar conception took possession of him, and he soon sent the purchaser word that he would sell for a certain price, but upon one condition.

The purchaser sorely wanted that lot, and he telephoned down by his messenger boy that he would take the lot at the price named and upon the unknown condition. At the first moment's leisure he hurried down to Roe, to find out what that condition was, and overtook his telephone playing mumble-peg on one of the city's squares.

It was a conspiracy between Old Roe and the Spanish dollar as an *in memoriam* for the little Roes. He reserved "the yearly rent or sum of ninety-five Spanish milled dollars and one third of a dollar, each weighing seventeen pennyweights and six grains at

least, on the first day of the first month," and fearing in time it might be forgotten which was the first month, added, "called January in each year, forever."

This is what goes by the name of a Philadelphia ground-rent. No one can appreciate what a convenient arrangement it is until he has bought and paid for a house in Philadelphia, and is aroused, early New Year's morning or some other morning, with the imperative demand that it must be paid for again, forever. The fault in the present instance was Dick Roe's, and his love for an eternal stream of Spanish dollars; and some fool who was willing to gratify that love.

What joy entered the soul of Dick Roe, April 30, 1793, the day he delivered his deed for that lot with its carefully worded reservation! Ah, the little Roes should never want, for he had still other lots to sell on the same conditions. The present might become the past, the future come to an end, and the millennium dawn, yet that eternal Spanish dollar reservation would go on forever. The annual stream of Spanish dollars would never cease, even though the Roes might.

Congress previous to this had enacted that "Spanish milled dollars" of "seventeen pennyweights and seven grains" were "a legal tender for all debts and demands . . . at the rate of one hundred cents for each dollar." Why Roe should be willing to receive dollars of one grain less weight can only be explained on the theory that these dollars were so fascinating that he was willing to receive even the old and decrepit dollars, the punched and plugged dollars, the baby-bitten dollars, only so that they were the Spanish milled dollars.

A combination was formed against that Spanish dollar reservation. The little Roes pooled their issues, sealskin sacks for the misses, and ball and bats and shot-guns for the boys. Dick Roe sadly scratched a few more hairs out of his head over this problem. At last he solved it by taking his loved reserved ground-rent of those everlasting flowing Spanish dollars unto the money-lender and selling it unto him.

Years passed; the ground-rent in that time changing ownership many times, as well as the title to the lot of ground. But as often as the change took place, "on the first day of the first month, called January in each year," Mr. Lot-owner would come unto Mr. Ground-rent and pay him his ninety-five and one third dollars; and as other dollars became just as valuable as those nice Spanish milled dollars of seventeen pennyweights and six grains at least, Mr. Ground-rent would condescendingly take whatever kind of good dollars Mr. Lot-owner might have.

Disaster lay in wait for the Spanish dollar. The coinage of the Spanish dollar ceased. It was not because the world had too many of them, but Spain wanted a new deal on the money question; she entirely changed her system of currency, and adopted a system in which there was no coin known as a dollar, and no coin which was the exact equivalent of that Spanish milled dollar.

Again the Spanish dollar proved the truth of that saying that misfortunes never come singly. In 1857 the United States government sat down upon it by passing an act to demonetize the Spanish dollar. In other words, it was no longer a dollar of one hundred cents to pay a debt of one hundred cents. It had become a dollar of one hundred cents only in name.

The reason of this is that it came under the rule that when the government or the law says a piece of silver is a dollar to pay a debt of one hundred cents with, then that silver piece is a dollar, whether it has or has not one hundred cents of silver in it. But when it says that that same piece is not a dollar to pay a debt of one hundred cents, then that thing is only worth its weight at the market value of silver.

After this the Spanish milled dollar kept going from bad to worse until in late years it is worth from about seventy-two cents to eighty-five cents in current money of the

United States. Or taking the average price at seventy-eight cents, then with $74.36 current money of this country, ninety-five and one third Spanish milled dollars could be bought, and a saving of about three cents less than twenty-one dollars effected.

In 1887 another native of the Quaker City found an idea. He was the owner of the lot sold in 1793, on which was the Spanish dollar reservation. He had figured out a great scheme; he was going to pinch that eternal ground-rent, that had been pinching him, to the tune of twenty-one dollars. After some skirmishing with about seventy-four dollars he captured ninety-five and one third of these Spanish coin, and awaited his opportunity. Along came the first day of the first month called January in the year 1888, and Mr. Lot-owner betook himself to Mr. Ground-rent to pay his New Year respects.

When Mr. Lot-owner intimated that his call was partly on business, Mr. Ground-rent pleasantly repeated "business?" with a rising inflection. Then Mr. Lot-owner handed him with his compliments his Spanish acquisitions, saying that the usual receipt in full for the ground rent for the year 1888 would answer his purposes. Thereupon Mr. Ground-rent became indignant, and spurned his early love; these dollars were a reflection upon the follies of his youth, and he refused to accept them. He wanted good modern dollars, worth one hundred cents.

Thus it came about that the law was appealed to for an expression of that sifted common-sense of the ages on this question of dollars. It was given.

Before it was given Mr. Ground-rent facetiously remarked that the Act of Congress making the Spanish dollar a legal tender should be read as part of the reservation, and that in that light it was not the Spanish dollar Mr. Roe was after in 1793, but the legal-tender quality in them. The court answered that that could not be done, as Mr. Roe wanted Spanish dollars of seventeen pennyweights and six grains, while only Spanish dollars of seventeen pennyweights and seven grains were legal tender; and further said, —

"Taking these words [the words of the reservation in the deed] in their ordinary sense, every one no doubt would hold that the contract is for the delivery of specific coin. . . and that if these are tendered, the ground-landlord has what he stipulated for. . . . And it consequently follows the general rule, that if the things stipulated for are tendered when the time arrives, and have depreciated during the interval, the creditor must bear the loss, as in the opposite event it will fall on the debtor."

Is not that reason? Is not that common-sense? And so Mr. Ground-rent in obedience to the law accepts the tendered Spanish dollars, and pockets his loss, while Mr. Lot-owner merrily pockets his winnings.

SKETCHES FROM THE PARLIAMENT HOUSE.

III.

BARON MONCRIEFF.

By A. Wood Renton.

THE ex-Lord Justice Clerk of Scotland can as ill be spared from a group of modern Scottish judicial silhouettes as his successful rival, the late Lord President. James, Baron Moncrieff, is the second son of Sir James Wellwood Moncrieff, some time a judge of the Court of Session, but best remembered by his courageous though fruitless defence of the murderer Burke, in 1828. His grandfather, Sir Harry Moncrieff, is familiar to all students of Henry Cockburn's "Memorials of his own Time," as the leader of the "Wild" or Evangelical party in the Church of Scotland in the beginning of the present century. Moncrieff was born in 1811, and, like every eminent Scotsman of his day, was educated first at the High School, and then at the University of Edinburgh. He was admitted to the Scotch Bar in 1833, two years before the late Lord President Inglis. The stars in their courses fought for him. Gifted by nature with an inheritance of influence, pecuniary comfort, character, and ability, and carefully educated, Moncrieff rose rapidly into practice. In 1850 he was made Solicitor-General for Scotland by the Liberal party. In the following year he was raised to the Lord Advocateship, — an office which he held almost without interruption till his elevation to the bench in 1869. During his tenure of the chief law officership, namely, in 1857, it fell to Moncrieff's lot to prosecute Miss Madeline Smith for the alleged murder of her lover, L'Angelier. The facts of this case have already been stated, and in some measure discussed in our sketch of Inglis. But Moncrieff's part in it was so important, and throws so much light on Scotch criminal procedure, that, at the risk of repetition, we shall refer to it again. Criminal procedure in England is mainly *litigious* in character. The judge is not so much a judicial or executive officer, with independent powers of investigation, as a State arbiter, bound to hear and decide between the cases made respectively by the prosecutor and the accused. In spite of our attorney and solicitor-generalships, and our directorships of public prosecutions, this is still the prominent feature of the adjective criminal law of England. A criminal trial is essentially a litigation. The prosecutor "opens," and has the right of reply; and unless he is a peculiarly fair-minded man, he presses the criminal charge home to the prisoner as keenly as if the latter were merely a defendant, and the question at issue a paltry dispute about the warrant of a horse, or the price of a suit of clothes. No more honorable advocate than Sir Alexander Cockburn ever practised at the bar of any country in the world; yet he summed up the case for the Crown against Palmer with as much vehemence as if he had been pleading for damages in an action for breach of promise of marriage. The conduct of Mr. Adolphus (of *Adolphus & Ellis* notoriety), who prosecuted Courvoisier for the murder of Lord William Russell, was a still more discreditable instance of the same juridical tendency. This gentleman endeavored to impress upon the jury that Courvoisier, being a foreigner, would naturally kill in order that he might rob with impunity; "opened" alleged facts which were triumphantly disproved; strained every circumstance in the prisoner's behavior into an indication or tacit admission of guilt, and so demeaned himself that but for the discovery of the deceased nobleman's missing plate, Courvoisier would

certainly have been acquitted. The system of private prosecution which prevails in England, and under which a prisoner is left (except in grave cases, and by the intervention of the judge) to secure his own counsel or to defend himself, is another illustration of the matter on hand. Scotch criminal procedure, on the other hand, is pre-eminently inquisitorial in character. Broadly and generally speaking, no such thing as private prosecution exists. At the head of the Scotch judicial system is the Lord Advocate, the supreme public prosecutor of Scotland. Below him in dignity, but exercising functions of the same kind, comes the Solicitor-General. In conducting the criminal business of the country, the law officers are assisted by advocates-depute, who prosecute in their absence, and by the crown solicitors, or "agents" as they are called, who prepare cases for trial. But this is not all. Every county or "shire" in Scotland has its "procurator-fiscal," who unites in his own person the functions both of coroner and of county prosecutor. This official investigates every case of sudden and suspicious death; prosecutes before the sheriff's court in a very large number of cases; determines whether or not prosecutions shall be undertaken, taking the advice of the advocates-depute if necessary; and prepares cases for trial at the circuit courts. Prisoners in Scotland are practically never left undefended. The public prosecutor is accustomed and required to conduct the case for the Crown with almost judicial moderation, and the prisoner's counsel has the inestimable advantage of the last word. Now, Moncrieff's speech in the case of Madeline Smith is, on the whole, the finest illustration that can be given of the tone expected from a Lord Advocate of Scotland conducting an important Crown prosecution; and the student of criminal jurisprudence who wishes to understand the distinction on which we have been insisting, cannot do better than compare it with Cockburn's speeches against Palmer.

Lord Moncrieff commenced by sweeping away the charge (which had been made against the Crown) of having dealt with the documentary evidence in the case in a loose and unsatisfactory manner. He showed that this was due to the fact that the prisoner had hastened the trial by availing herself of the remedy known in Scots law as "running letters," the effect of which was that unless the public prosecutor brought the case to trial within a certain time, she would be entitled to go free. He further contended that the facilities given by the Crown to the counsel for the accused in the preparation of the defence had been altogether exceptional, — a manuscript copy of all the documents on which the prosecution intended to rely having been put into their hands even before the indictment was served. And he pointed out that if Miss Smith's advisers felt that the rapidity with which the case had been prepared would or could be prejudicial to her interests, they might easily have secured a postponement of the trial. His lordship then proceeded to deal with the evidence, and laid before the jury a masterly synthesis of the facts. Excluding one by one the hypotheses that L'Angelier's death had been caused by accident, suicide, or disease, he dwelt on the prisoner's motive to get rid of L'Angelier, on her possession of the means whereby his death was undoubtedly caused, and on the curious coincidence between her several purchases of arsenic and L'Angelier's visits. His peroration was the only objectionable portion in his address. "Having gone through this case," he said, "with an amount of pain and anxiety which I cannot describe, I leave it entirely in your hands. I am quite sure that the verdict you give will be consistent with your oath and with your own opinion of it. I have but a public duty to perform, and I have endeavored to show you, as powerfully as I could, all the circumstances which I found to bear upon the case; nor should I have done so but from a solemn sense of duty, and *my own belief in the justice of the case.* If I had thought that

there were elements . . . which would have justified me in refraining from the painful task I have gone through, there is not a man in this court that would have more rejoiced at it. . . . But I see no escape for this unhappy girl, and there is but one course open to you if you come to the same conclusion." The passage in which the Lord Advocate expressed his "own belief" was, of course, indefensible, and brought down upon him the censure of the judge. But possibly it meant nothing more than that he did not feel justified in withdrawing from the prosecution.

Moncrieff's parliamentary career was long, brilliant, and useful. He sat in the House of Commons as M. P. for Leith (1851), for Edinburgh (1859–1868), and for the Universities of Edinburgh and Glasgow. He was a staunch Liberal, a formidable debater, and a highly honorable and honored politician. During his official life in Parliament he carried the bill that abolished tests in the universities and schools of Scotland; the Valuation of Lands Act, 1854; and the Bankruptcy Act of 1856. In 1869 Moncrieff was made Lord Justice Clerk of Scotland. In 1871 he succeeded to his father's baronetcy. In 1874 he was raised to the peerage as Baron Moncrieff, of Tulliebole (in Kinross-shire). In 1889 he retired from the bench. As Lord Justice Clerk, Baron Moncrieff hardly improved upon his high reputation as Lord Advocate. He was a good judge, — weighty, fair-minded, dignified, and sound. We shall have something to say of the part he played in the trial of Chantrelle when we come to sketch the life of Lord Trayner. But under his regime the Second Division of the Inner House acquired a bad notoriety for impatience, or, at least, for the practice of constantly interrupting the arguments of counsel; and the blame for this state of things has fallen, perhaps unfairly, on the Lord Justice Clerk. It must have been no easy task to preside over a tribunal among whose members were Lord Young and Lord Rutherford Clark.

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

THE following letter was called forth by Judge Bleckley's "Letter to Posterity," published in our February number: —

NEW YORK, 1892.

MY DEAR JUDGE BLECKLEY, — I have read your letter in much the spirit in which I suppose Gamaliel was listened to in the olden days, though certainly, unlike Gamaliel, you are no Pharisee.

The younger members of the bar naturally have sharp ears for words of wisdom which drop from the lips of older and more experienced men, and I think my contemporaries owe to you, sir, a debt of gratitude; for you have shown them that not even the *viginti lucubrationes annos* need necessarily dry up the fountains of the human heart, nor render the judicial heights of legal ambition cold, stark, and unapproachable.

I was particularly delighted with your confession of your inability to be always sure that your decisions were correct, because of the dogmatism which not infrequently infects many opinions. To be sure, if the law is not on one side it must be on the other, and to decide yourself one way and then submit with equanimity to having your colleagues decide the other, seems to me to be the attainment of the highest wisdom; for by so doing, you relieve yourself of all responsibility.

That you should enliven your labors in the law by an occasional tilt at the Muse is creditable alike to both your head and your heart. Truth, as I know it (only in small part, to be sure), loses nothing from wearing the garb of pleasantry; and rules of law are still applicable, though expounded in a vein of kindly humor. I followed with deep interest your account of your own professional growth, and my heart beat fast at your picture of the "phantom lady of the law" who engrossed your youthful imagination.

The "jealous mistress" who enthralled you can be no other than she who has held a fitful sway over my own affections, and I felt as I read that your own devotion was worthy of emulation.

Posterity will read and re-read your letter with delight, as no doubt the coming generation of Georgia lawyers will your opinions.

I cannot close without expressing the hope that I may hear from you again, and that some part, at least, of the wisdom you have attained unto may become my own possession. I am, sir,

Very respectfully yours,

FITZ FITZGERALD.

LEGAL ANTIQUITIES.

IN Queen Anne's reign the decree of the University of Oxford, in 1683, respecting passive obedience, was ordered by the House of Commons, in 1710, to be burned by the hands of the common hangman, as contrary to the liberty of the subject and the law of the land. In 1751 a seditious libel entitled "Constitutional Queries recommended to every true Briton" was ordered by the House of Commons to be burned by the hands of the common hangman in Palace Yard at 1 P. M., and the Sheriff of Middlesex was to attend and cause the same to be burned accordingly. When Wilkes's libel in the "North Briton," No. 45, was brought to the knowledge of the House of Commons in 1763, the House resolved that it was false, scandalous, and seditious, and tending to excite to traitorous insurrections, and ordered that it should be burned by the hands of the common hangman in Cheapside. But when the sheriff proceeded to see the order executed, the mob were violent, and pelted the officials with stones and missiles, and they burned a petticoat and jackboots in its stead.

IN the Rolls of Parliament, 1445, is a petition from the commons of two counties, showing that the number of attorneys had lately increased from six or eight to fourteen, whereby the peace of those counties had been greatly interrupted by suits. The Commons, therefore, petitioned that there shall be no more than six common attorneys for Norfolk, six for Suffolk, and two for the city of Norwich. The king granted the petition.

FACETIÆ.

In a Western city there dwelt a lawyer, crafty and subtle as a fox. An Indian of the Ute tribe named Simon owed him some money. The poor redman brought the money to his creditor and waited, expecting the lawyer to write out a receipt.

"What are you waiting for?" said the lawyer.

"Receipt," said the Indian.

"A receipt," said the lawyer, — "receipt! What do you know about a receipt? Can you understand the nature of a receipt? Tell me the use of one and I will give it to you."

The Indian looked at him a moment and then said: "S'pose maybe me die; me go to heben; me find gate locked; me see 'Postle Peter. He say, 'Simon, what you want?' 'Me want to get in.' He say, 'You pay Mr. J. that money?' What me do? Hab no receipt; hab to hunt all ober hell to find you."

He got a receipt.

In the county court at Toronto may be seen a venerable tar, who has found a haven in these legal precincts as a subordinate officer, after having been tossed on the ocean for many a year in "Her Majesty's" service. Not long ago, when the hour for adjourning a sitting of the court had arrived, the crier was absent, and the judge, turning to the quondam mariner, said, "Captain, adjourn the court." Trained to prompt obedience, the "captain" shouted in stentorian tones, "Oh yes! oh yes! oh — yes —" But of the mystic formula no more came to his command. Not to be foiled in the discharge of duty, he proceeded in his own fashion: "Ladies and gentlemen, you may consider this here court adjourned. Clew up your sails and heave the anchor. You must all be here at ten o'clock Monday morning. We will then weigh anchor and make sail. God save the Queen!" Astonished silence held all present for a moment, and then gave way to a peal of laughter, in which even "the court" was compelled to join.

Jim Webster was being tried for trying to bribe a colored witness, Sam Johnsing, to testify falsely.

"You say this defendant offered you a bribe of fifty dollars to testify in his behalf," said Lawyer Gouge to Johnsing.

"Yes, sah."

"Now repeat precisely what he said, using his own words."

"He said he would git me fifty dollars if I —"

"He can't have used those words. He didn't speak as a third person."

"No, sah; he tuck good keer dat dar was no third pusson present. Dar was only two, — us two. De defendant am too smart ter hab anybody list'nin' when he am talking about his own reskelity."

"I know that well enough, but he spoke to you in the first person, didn't he?"

"I was de fust pusson myself."

"You don't understand me. When he was talking to you, did he use the words, 'I will pay you fifty dollars'?"

"No, boss; he didn't say nuffin about you payin' me fifty dollars. Yore name was n't mentioned, 'ceptin' dat he tole me ef eber I got inter a scrape dat you was de best lawyer in San Antone to fool de judge and jury, — in fac', you was the best lawyer in de town fer coverin' up any kind of reskelity."

"You can step down."

An amusing incident happened in a Southern city court the other day. A Jew was on the witness-stand testifying against a negro who had stolen a pair of pantaloons from his store.

"How much are the pants worth?" asked Judge Thompson.

"Well, Judge," responded the witness, "it depends on the man who wants to buy them. I sell them to one man for six dollars, to another for five dollars, but you can have them for four dollars."

"Sir," responded his honor, in a disgusted tone of voice, "I want you to tell me what those pants are worth."

"Ah, Judge," said the Israelite, "take 'em for three dollars if four dollars don't suit you."

"Look, here," thundered the judge, "if you don't tell me the exact value of those pants, I will send you to jail for contempt of court."

"Well, then, Judge," pleaded the obtuse witness in a most insinuating tone of voice, "take 'em for two dollars. It is giving them away almost, but you can have 'em for two dollars."

By this time the people in the court-room were convulsed with laughter, and the judge himself was obliged to forget his disgust and join heartily in the laugh. He did not buy the "pants," however.

NOTES.

THE following decision, remarkable for the cogency and brevity of its logic, graces the pages of a Pennsylvania Report: —

"On Bill for an account between partners where one contributed money and the other time and skill, and the whole capital lost: *Held*, That there was no capital to return."

SAID one of the oldest and most successful legal practitioners of the city bar to one of his rising young students a short time ago: "My dear young fellow, never fail to remember that in the successful career of a lawyer there is no one item so important to his reputation as 'red tape.' You may smile at this remark, but it is as true as Holy Writ, and the proper use of it in binding up a legal document has saved many a court paper from being handed back for perfection or revision to its legal sponsor. In earlier life I practised in the court of one of the most particular judges in this Commonwealth. I presented, as I believed, a well-prepared report, which I asked for confirmation; and to my surprise the judge, unfolding it and looking it over, found a hundred and one faults, and directed me to prepare another one, 'put in better form,' as he said. I was utterly nonplussed. My time was so limited it was utterly impossible. An idea struck me. That night in my office I put on a showy outside wrapper, with a handsome endorsement of the title, with the most liberal supply of the widest red tape that I could find, in graceful bows. The next morning I nervously presented it again. The judge received it smiling, adding, 'That is the correct way all papers for the court should be drawn up.' There 's nothing like red tape." — *Philadelphia Press.*

A SUIT has been brought in a Colorado court against a coal company to recover damages in a large amount for personal injuries. The facts are that the coal company uses wagons and teams for the delivery of coal to customers, and of course employs drivers to superintend the teams. While in charge of one of the company's teams, a driver threw a chunk of coal at his mules; but his aim being bad, he missed the team and struck the plaintiff. It is alleged that the plaintiff was thereby greatly bruised and maimed, that he languished for a considerable time, suffering great bodily pain and mental anguish, etc., besides losing much valuable time, and incurring vast expense for medical attendance, nursing, etc.

The action against the company is based upon the allegation that the driver was incompetent to drive mules; that the company at all times was well informed of that fact, but notwithstanding continued to employ him, whereby all this damage to plaintiff resulted in the manner aforesaid.

The proposition that a coal company is bound to know that its driver can't hit a mule when he throws at it, at first blush appears somewhat startling; but if it can be shown that throwing coal at the team is a part of the driver's duty, it would seem to follow that the company is bound to employ none but drivers who can throw straight enough to hit the mule. Otherwise what protection has an innocent bystander against bad results of poor aim, as in this case?

THE following declaration in an action for breach of promise of marriage was filed a short time since in the clerk's office of a Minnesota Court: —

STATE OF MINNESOTA
COUNTY OF HENNEPIN, ss.

DISTRICT COURT.
FOURTH JUDICIAL DISTRICT.

JOHN W——, *Pl'ff.*
against
ETTIE ——, *Def't.*

The plaintiff alleges that on or about the 10th day of January, 1891, the plaintiff and said defendant kept company together, and thereby agreed to become husband and wife, to be married in lawful wedlock, and thereafter and before the commencement of this action said defendant wrongfully and without just cause deserted said plaintiff and used said plaintiff in a shameful decree, and caused him great harm and feeling and caused him great debterment to his mind and racked his fisical body to the damaged in the sum of five thousand dollars.

Wherefore, said plaintiff demands judgment against said defendant for the sum of five thousand dollars, and the costs and disbursements of this action.

Recent Deaths.

HON. JOHN K. PORTER, one of the most eminent lawyers of the New York Bar, died at Waterford, N. Y., on April 11. He was a son of Dr. Elijah Porter, and was born at Waterford Jan. 12,

1819. He received his early education at a classical school, of which David MacNeice, an Irish scholar and patriot, was president, at Lansingburgh Academy, Waterford Academy, and graduated from Union College at the age of eighteen. He was admitted to the bar, and soon obtained a prominent place in the front rank of the younger members of the profession. In 1848 Mr. Porter removed to Albany, and associated himself with Nicholas Hill, Jr., and Peter Cagger in the practice of the law. He was counsel during his life in many important cases, the most noteworthy being the trial of Guiteau, the assassin of President Garfield, in which he appeared for the people, and the Beecher trial, in which he was counsel for the defendant. In 1864 Mr. Porter was appointed a judge of the Court of Appeals, on the resignation of Judge Selden. At the next election he was returned by the people. In 1868 he resigned from the Court of Appeals and resumed the practice of law.

(We hope shortly to publish an extended sketch of Mr. Porter, with an excellent portrait. — ED.)

IN the death of Hon. Willard Saulsbury, Chancellor of the State of Delaware since 1873, and United States Senator from 1859 to 1871, the State of Delaware and whole country sustain a great loss. Chancellor Saulsbury was born in Mispillion-hundred, Kent County, Delaware, June 2, 1820. His early years were spent on his father's farm, and the rudiments of his education acquired at the schools in the vicinity of his home, near Burrsville. At thirteen years he was sent to an academy at Denton, remaining two years. He then spent one year as a student in Delaware College, at Newark, and one year at Dickenson College, Carlisle, Pa. At the age of about twenty years he became a student at law under the direction of James M. Bartol, late chief-justice of the courts of Maryland, and completed his legal studies in the office of Hon. Martin W. Bates, being admitted to the bar at Dover, Delaware, in April, 1845.

HON. PETER WOOD CRAIN, ex-judge of the Circuit Court of the First Judicial District, Maryland, and ex-member of the Maryland Court of Appeals, died in Baltimore on March 30. He was born Jan. 9, 1806. He received his elementary education in the common schools of the county; but his more advanced early studies were pursued at Charlotte Hall Academy, St. Mary's County, Maryland. Leaving the academy in his nineteenth year, he read law under the Hon. John Truman Stoddard, of Charles County, and afterwards attended law lectures given by Henry St. George Tucker, chancellor of Winchester, who had a large class of students, among them Gov. Henry A. Wise, of Virginia, the Hon. Charles James Proctor, afterwards minister to France, and other prominent men. Mr. Crain graduated in 1827, and began the practice of law in Port Tobacco, Charles County. His reputation as a lawyer was quickly established. In 1841 he was nominated, without his knowledge and consent, to the Legislature, and his election followed. Mr. Crain was appointed to his first judgeship in 1846, and served under the Governor's appointment until 1851, when, a new State constitution making the judiciary elective, he was elected, irrespective of party, to serve for ten years as judge for the First Judicial Circuit, comprising Charles, St. Mary's, and Prince George's counties. After the death of Judge Cochrane, of the Court of Appeals, Judge Crain was appointed his successor. Judge Crain afterwards, in 1867, retired from the bench, and resumed his law practice until 1878, when he retired.

HON. CHARLES D. DRAKE, late Chief-Justice of the Court of Claims, died in Washington, April 1. He was born in Cincinnati, Ohio, April 11, 1811. His education was received in the ordinary schools of Ohio and Kentucky, except a period of fourteen months, in 1823–24, spent in St. Joseph's College, Bardstown, Ky., and eight months in a military academy of Middletown, Conn. In May, 1833, he was admitted to the bar in Cincinnati. In 1834 he moved to St. Louis, but in June, 1847, he returned to Cincinnati. July, 1849, he was appointed treasurer of the board of foreign missions of the Presbyterian Church, which position he held till October, 1850, when he returned to St. Louis and resumed the practice of law. In 1859 he was elected a member of the Missouri House of Representatives, and in 1863 a member of the Missouri State convention. A year later he was elected a member of the new convention to revise the Constitution of Missouri, of which body he was vice-president. In January, 1867, he was elected United States Senator from Missouri for six years; but in December, 1870, he resigned this position

to accept that of Chief-Justice of the Court of Claims, from which he resigned in 1885. In 1854 he published "A Treatise on the Law of Suits by Attachment in the United States."

HON. CHARLES YOUNG, Judge of Probate, Prince Edward Island, died on March 26. He was born on the 30th of April, 1812, at Glasgow, Scotland, and was the younger brother of the late Sir William Young, Chief-Justice of Nova Scotia. He was educated at Dalhousie College, and studied law in his brother's office. He was called to the bar of Nova Scotia in 1838, and of Prince Edward Island the same year. In 1848 he was created a Q. C., being the first lawyer on Prince Edward Island to receive that honor. He represented Queen's County, and was afterwards appointed to the legislative council, of which he subsequently became president. He was attorney-general from 1851 to 1852 and from 1858 to 1865. He was administrator of the government of the island for four years, and was the first public man who advocated responsible government for this province. In 1852 he was appointed judge of probate, and judge in bankruptcy in 1868. While practising law he enjoyed a large and lucrative business. He was always the friend of the oppressed, took a deep interest in any movement to advance the interest of the people, and was an earnest advocate of religion and temperance, being president of the Prince Edward Island Auxiliary Bible Society. He received the degree LL.D. in 1858, and was offered a knighthood, but declined it.

REVIEWS.

"OUR Common Roads," by Isaac B. Potter, is the subject of the opening illustrated article in the April CENTURY. This is a subject which interests not only farmers, but all who go on wheels, whether propelled by horse-power or man-power. Professor Holden of Lick Observatory has a popular paper on "The Total Solar Eclipses of 1889," very curiously illustrated. Mr. Edward Robinson of the Boston Museum discusses the question, "Did the Greeks paint their Sculptures?" and gives very valuable testimony on this subject. This article is carefully illustrated. Mr. and Mrs. Pennell have an illustrated paper on "The Feast of the Marys" in Provence; and ex-Postmaster-General James discusses "The Ocean Postal Service." In Mr. Stedman's series on "The Nature and Elements of Poetry," the author endeavors to answer the fundamental question, "What is Poetry?" "Characteristics," by Dr. Weir Mitchell; "Ol' Pap's Flaxen," by Hamlin Garland; and "The Naulahka," by Rudyard Kipling and Wolcott Balestier, are continued. There are two illustrated short stories, — John Heard's "Starving at Taskoma," and "Some Passages in the History of Letitia Roy," by a Canadian writer.

THE central subject of all social questions, and one of the most widely discussed of the time, is the conditions of life among the "Poor in Great Cities." It has passed from the stage of discussion into one of practical experiment, directed by men and women of great experience and scientific knowledge. In the April number of SCRIBNER'S MAGAZINE is begun a series of papers in which authors and artists will co-operate to produce a truthful representation of the things already achieved. The authors have been chosen because of their personal experience and sympathetic study of the conditions which they describe. London, New York, Paris, Boston, Chicago, and Naples are among the cities to be represented in the series; and the list of authors includes Walter Besant, Joseph Kirkland, Hon. Oscar Craig, President of the State Board of Charities, Jacob A. Riis, author of "How the Other Half Lives," Madame Mario, and other authorities. The introductory article of the series describes "The Social Awakening in London," and is by Robert A. Woods, author of the notable book "English Social Movements." The other contents of this number are varied and interesting.

THE initial article in the NEW ENGLAND MAGAZINE for April is on "The Surpliced Boy Choirs in America," by S. B. Whitney, the organist and choirmaster of the Church of the Advent of Boston, and is beautifully illustrated. Miss Helen Leah Reed contributes an interesting article on "Women's Work at the Harvard Observatory," which is fully illustrated by photographs taken at the Observatory. Winfield S. Nevins concludes his series "Stories of Salem Witchcraft." Walter Blackburn

Harte, in "Progress and Poetry," claims that this age is as heroic as any other, and as worthy of the poets; he also gives a careful estimate of the work of James Whitcomb Riley. Rev. William H. Savage in a gossipy antiquarian strain gives the "Annals of an Old Parish," — Watertown, Mass. The article is finely illustrated. George Ethelbert Walsh contributes a good story called "A Summer Wooing," and other stories are contributed by Ethel Davis and May L. Adams.

THE April ARENA is rich in able, thoughtful papers. Its table of contents is as varied as it is inviting, as will be noted from the following: "Vital Statistics of the Negro," by Frederick L. Hoffman; "The Money Question," by Hon. John Davis, M. C.; "Volapük, the World Language," by Alfred Post; "The Speaker in England and America," by Henry George, Jr; "Rational Views of Heaven and Hell," by Rev. George St. Clair; "The Farmers' Alliance and its Leaders," by Annie L. Diggs (illustrated by two full-page portraits and four smaller photogravures); "Pontifex Maximus," by W. D. McCrackan; "A Remarkable Psychical Experience," by Louise Chandler Moulton; "How Uncle Nottoway squashed the Indictment," a Southern character sketch, by Will Allen Dromgoole; Part IV. of "A Spoil of Office," by Hamlin Garland; "Two Hours in the Social Cellar," by B. O. Flower.

HARPER'S MAGAZINE for April opens with Edwin A. Abbey's superb illustrations of "The Tempest," accompanied by Andrew Lang's interesting and scholarly comment. The principal illustrated articles are a graphic description of Lake Superior, "Brother to the Sea," by Julian Ralph; the third chapter of the famous Danube papers, "From the Black Forest to the Black Sea," written by F. D. Millet; "An Indian Fair in the Mexican Hot Country," by Sylvester Baxter; and "The Last Days of Percy Bysshe Shelley," by Guido Biagi. Other papers of peculiar importance and timeliness are "Western Modes of City Management," an article of great value for its suggestiveness, by Julian Ralph; "The Mystery of Columbus," a startling exposition of facts from contemporary records, by Eugene Lawrence. An intensely interesting chapter of geological history, "The Ancient Lake Region of America," is contributed by James Richardson. The fiction of the number includes the second chapter of Mr. Howells's new novel, "The World of Chance;" a characteristic short story by Richard Harding Davis, entitled "Eleanore Cuyler," illustrated by C. D. Gibson; and another French-Canadian sketch, "La Cabane," by William McLennan.

WITH the April number the COSMOPOLITAN completes its twelfth volume in a manner worthy the wide and growing popularity of this magazine. The leading article is on "Genoa, — the home of Columbus," written by Murat Halstead, and illustrated from photographs of all the principal relics of the great navigator which remain in Genoa. "Torpedoes in Coast Defence" is the title of a timely paper by Lieut. A. M. D'Armit of the U. S. Army. Wallace Wood treats of "Homes of the Renaissance" in an illustrated paper; and William H. Rideing is the author of a delightfully written and profusely illustrated article on "The Crew of a Transatlantic Liner." Other papers are "The Theatre of To-day," by Cora Maynard; "Two English Men of Letters," by Brander Matthews; "All Sorts and Conditions of Men," by Edward Everett Hale; "A Living Opal," by Ernest Ingersoll," and "Count Leon Tolstoi," a description of the family life of the great Russian novelist and reformer by a friend of his family. Beside all these attractions, the April COSMOPOLITAN is rich in fiction and poetry.

THE complete novel in LIPPINCOTT'S MAGAZINE for April, "But Men must Work," is by the well-known and popular author, Rosa Nouchette Carey. In the Athletic Series Julian Hawthorne sounds the praises of walking, which he considers the only proper mode of locomotion; and C. Davis English expounds the mysteries of Four-in-Hand Driving. The Countess Norraikow gives a brief history of the leading Nihilists, and traces the famine in Russia to heavy taxes and misgovernment. "Milk for Babes," a short but important article, by Mrs. Louise Hogan, discloses facts which bear directly on the health and life of children. There are short stories by Julien Gordon and George Edgar Montgomery. The poetry of the number is by Robert Loveman, Sibylla Vernon, Florence Earle Coates, Isabel Gordon, and Charles Washington Coleman.

MR. WILLIAM HENRY BISHOP begins his series of papers on "An American at Home in Europe" in the April number of the ATLANTIC MONTHLY. His first chapter is on "House-Hunting and House-Keeping in Brittany, Paris, and the Suburbs of Paris." "The Federal Taxation of Lotteries," by Hon. T. M. Cooley, late Chief-Justice of Michigan, will fully repay a careful reading. A cleverly composed "trilogy" on naval subjects will delight the lover of things nautical, — "Admiral Farragut," by Edward Kirk Rawson; "American Sea Songs," by Alfred M. Williams; and "The Limit in Battle Ships," by John M. Ellicott. For the fiction of the number we find some chapters of Crawford's "Don Orsino;" and a clever, baffling story by Henry James, called "The Private Life." An interesting study of the impressionist school of painters is furnished by Cecilia Waern, under the title of "Some Notes on French Impressionism."

BOOK NOTICES.

A TREATISE ON THE LAW OF IDENTIFICATION. A separate branch of the Law of Evidence. Identity of Persons and Things, Animate and Inanimate; The Living and the Dead; Things Real and Personal, in Civil and Criminal Practice; Mistaken Identity; *Corpus Delicti; Idem Sonans;* Opinion Evidence. By GEORGE E. HARRIS, of the Washington, D. C. Bar. H. B. Parsons, Publisher, Albany, N. Y., 1892. Law sheep, $5.00 net.

In this treatise Mr. Harris devotes himself to the discussion of one of the most important branches of the Law of Evidence, and one which is well worthy of consideration by itself. In a clear and concise manner the author treats of the identity of persons and things, living and dead, animate and inanimate; things real and personal, — in Civil and Criminal practice in England and America, as well as of the various means of identification. The subject is one of absorbing interest, perhaps more so than any other one branch of Evidence; and the author, availing himself of this fact, has given us a most readable as well as instructive book. The chapters on the identification of Real Estate, Ancient Records and Documents, and Personal Property are especially valuable to the general practitioner, while the criminal lawyer will find the work of the greatest aid and assistance. Mr. Harris has evidently exercised great care and good judgment in the preparation of the book, and has given to the profession a really valuable addition to the many treatises on the Law of Evidence. Typographically the volume leaves nothing to be desired.

THE AMERICAN STATE REPORTS, VOL. XXIII., containing the cases of general value and authority, decided in the courts of last resort of the several States, selected, reported, and annotated by A. C. FREEMAN. Bancroft-Whitney Company, San Francisco, 1892. $4.00.

This last volume of the State Reports is unusually rich in important decisions, which are accompanied by exhaustive and valuable notes by Mr. Freeman. The cases reported include decisions of the courts of California, Florida, Illinois, Kansas, Maine, Massachusetts, Missouri, New Hampshire, North Carolina, Oregon, Pennsylvania, Texas, and Wisconsin. The following cases, with the notes thereto, are especially worthy of mention for their value: King *v.* Rhew, 108 N. C; Gulf, etc. Rwy. Co. *v.* Brentford, 79 Tex. 619; and Chicago, etc. Rwy. Co. *v.* Chapman, 133 Ill. 96.

A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS. By MONTGOMERY H. THROOP. The J. Y. Johnston Company, New York, 1892. $7.75.

In this volume Mr. Throop has collected and arranged in a logical and convenient form the general rules of law relating to all public offices, from the highest to the lowest, and sureties in their official bonds. Intended, as it is, for general use, the book does not consider such statutory provisions as minutely regulate the powers, duties, liabilities, etc., of public officers, but the author confines himself to an exposition of the law as established by the adjudications of the courts of this country and England. In a word, the treatise develops the whole body of the law relating to public officers, whether the principles involve constitutional or statutory construction, or are of common law origin. The reformed ballot laws, the civil service law, proceedings to obtain possession of books and papers, common law crimes committed by officers, and the liability of sureties in official bonds are treated in an able and exhaustive manner. The publishers have taken unusual pains to assure an absolute freedom from error in the work, every citation having been carefully read and verified by their own editors in addition to the author's verifications, — a precaution which might with advantage be adopted by other publishers. That there is need of such a work as this treatise there can be no doubt;

and not only the profession, but every one holding public office, should heartily welcome the treatise as a valuable guide and assistant.

THE GENERAL PRINCIPLES OF THE LAW OF EVIDENCE, WITH THEIR APPLICATION TO THE TRIAL OF CIVIL ACTIONS AT COMMON LAW, IN EQUITY, AND UNDER THE CODES OF CIVIL PROCEDURE OF THE SEVERAL STATES. By FRANK S. RICE. The Lawyers' Co-Operative Publishing Co., Rochester, N. Y., 1892. Two vols. Law sheep, $11.00 net.

With the uncertainty and contradiction that prevail in the present law on Evidence, there is certainly, as the author says, a necessity for some standard of authority that will assist in harmonizing the discrepancies that pervade the Federal and State decisions. This work, by Mr. Rice, does not seem to us to meet this necessity. It can hardly be called a treatise, but is rather a collection of American decisions (State and Federal) carefully arranged under the appropriate heads to which they have reference. It is, in fact, a studious attempt to appropriately group and classify the latest utterances of authority upon every proposition that is avowedly or by implication involved in the proper evolution of the text. As an admirably arranged digest of American decisions upon this important subject, the work possesses much real value, and will be of assistance to the profession; but as a treatise covering the growth, development, and application of the principles which underlie the Law of Evidence, it will hardly supersede those older works which have long been, and still continue to be, regarded as standards.

THE LEGAL AND MERCANTILE HAND-BOOK OF MEXICO. By A. K. COMEY, Consul-General of Mexico at San Francisco, and JOSÉ F. GODOY, Vice-Consul of Mexico at San Francisco. Bancroft-Whitney Company, San Francisco, Agents for the Authors, 1892. Cloth, $4 00 net.

The growing importance of the trade relations between the English-speaking countries and the Republic of Mexico, as well as the fact that every year there is a noticeable increase in the amount of American and English capital invested in that country, renders it important that there should be published a book which contains all matters pertaining to the laws of Mexico affecting foreigners, and such other data and information as may be useful to the merchant, manufacturer, miner, and investor dealing in or with that country.

It is with that object in view that this publication has been undertaken; and the readers of the "Legal and Mercantile Handbook" will find in it, in a convenient form, and in the English language, all the information that they may need regarding the laws and commercial usages of the Mexican Republic.

The greatest care has apparently been taken in the translation of official documents, and all information comprised in the book has been obtained from official sources.

Special attention has been given to the translation of the customs tariff and of the regulations affecting the importation of merchandise into Mexico, as well as of the laws affecting the status of foreigners and those relating to mining; and it is the first time that those important laws have been translated into English and compiled in one volume.

The work will prove of value to all those having business relations with our sister Republic.

THE PRESUMPTION OF SEX, and Other Papers. By OSCAR FAY ADAMS. Lee and Shepard, Boston, 1892. $1.00.

Mr. Fay certainly wields a vigorous and cutting pen, and in this little volume of Essays spares neither the stronger nor the weaker sex. Some of the papers making up the contents originally appeared in the "North American Review," exciting much discussion and criticism when they were published. Whether or not the author's views are accepted by his readers, he has assuredly given them something to think about. Both men and women may claim that he is unfair and prejudiced, but it cannot be denied that there is much truth in what he says.

METHODS OF INSTRUCTION AND ORGANIZATION IN THE GERMAN SCHOOLS. By JOHN T. PRINCE, Agent Mass. State Board of Education. Lee and Shepard, Boston, 1892. Cloth, $1.00 net.

Any work on educational topics by Mr. John T. Prince, of the Mass. Board of Education, would be sure of a cordial reception by all educators and those interested in educational matters; but special attention will be attracted to this volume, which contains the results of his observation of the schools of Germany. The work gives a general idea of the organization of the schools, and such a view of their inner workings as may be helpful to teachers and school officers. An account of the work in Normal, High, Private, Industrial, and Elementary schools is given, and very interesting matter relating to Elementary Science and Observation Lessons.

The information regarding statistics and organization have been derived from many sources, and the authorities are given. The marginal notes will be of special value to members of Normal Schools and Reading Circles as well as to the general reader.

THE SUPREME COURT OF INDIANA, 1892.

Robert W. McBride. Walter Olds. Byron K. Elliott. John D. Miller. Silas D. Coffey.

The Green Bag.

VOL. IV. No. 6. BOSTON. JUNE, 1892.

THE SUPREME COURT OF INDIANA.

II.

BY W. W. THORNTON.

AT the fall election of 1870, John Pettit, Alexander C. Downey, James L. Worden, and Samuel H. Buskirk, all Democrats, were elected, their offices beginning the 3d of the following January. By an Act of Dec. 16, 1872, the number of judges was increased to five; and Governor Baker appointed, the same month, Andrew L. Osborn to the vacancy thus created.

The new judges were met with a crowded docket. Worden had served upon the bench, but the other four were new to the work.

During this period of the court the judges fell into the habit of writing long opinions, some of them being almost treatises upon the subject discussed. This was particularly true of Judge Buskirk. The practice thus inaugurated has left its mark upon many succeeding cases. Another growth that marred the decisions of the court for many years was the extreme technicalities it fell into in criminal cases. It was proverbial throughout the State that it was almost impossible to sustain a conviction in a criminal case, where able attorneys defended the criminal. For this Judge Worden was largely responsible; and the practice continued until 1881.

At the fall election of 1874 Horace P. Biddle was elected, as a Democrat, to succeed Andrew L. Osborn, his term beginning Jan. 1, 1875.

At the October election, 1875, James L. Worden was re-elected, and Samuel E. Perkins, William E. Niblack, and George V. Howk elected, their terms beginning Jan. 1, 1877. A charge of extravagance in the fitting-up of their rooms at the expense of the State was brought against the sitting judges, and this had much to do with the retirement of Judges Buskirk, Downey, and Pettit. This charge figured much in the campaign of 1876; and while it had little or no foundation, it served its purpose in the memorable and hotly contested political campaign of that year.

Judges Worden and Perkins were men who had much experience on the bench, — the former in the full manhood and vigor of mind; the latter in the decline. Judge Biddle had been on the bench two years, but as yet had not given evidence that his long and successful career on the *nisi prius* bench led the bar to expect of him. Judge Howk came fresh from the bar and a large practice, with a very decisive leaning to technicalities. Judge Niblack had just retired from a fourteen years' career in Congress, and of him it could not be expected that he was as well "up" in the practice as if he had not been in politics.

On Dec. 17, 1879, Judge Perkins died; and John T. Scott succeeded him, the 29th, by appointment.

The most noted case before the court during this period was The State *v.* Swift (69 Ind. 505), involving the validity of the constitutional amendments of 1880. In the spring of 1880 there had been submitted to

the electors of the State several proposed amendments to the Constitution. These proposed amendments changed the State election from October to November, the time of holding the presidential and congressional election. Of the votes cast for and against them, the amendments had received a clear majority; but that majority was less than one half of the votes cast at the same time, in the same ballot-boxes, for the several township trustees elected throughout the State. The court held that it would take judicial knowledge of the number of votes cast for township officers; and the amendments having received less than a majority of these votes, they had not received a majority of the ballots of all the electors of the State, and consequently were not legally adopted. The effect was to leave Indiana an October State. The decision was given while the Democratic National Convention was assembled at Cincinnati; and before that Convention Hon. Thomas A. Hendricks was a prominent candidate for the presidential nomination. The charge was made that the decision was a political one, — to throw Indiana back to an October State, and thus render it a pivotal State. This charge received color from the unjudicial manner in which Judge Worden privately announced the decision of the court a few minutes after it was rendered, instead of waiting until two o'clock in the afternoon, the usual time of handing down the opinions to the clerk. Judges Niblack and Scott wrote dissenting opinions.

However false the accusation may have been, it undoubtedly had its effect in the autumn election; for Byron K. Elliott and William A. Woods, Republicans, were elected to succeed Judges Biddle and Scott. They took their seats Jan. 3, 1881. The two newly elected judges were men of vigor and power, who had much experience on the *nisi prius* bench.

The legislature of 1879 provided for a commission to revise and codify the law of the State. James S. Frazer, David Turpie, and John H. Stotsenburg were appointed commissioners. Their revision of the civil and criminal codes, the Decedents' Act, the Penal Act, and the tax laws were adopted in 1881, substantially as proposed by them. The new codes introduced few new features in our statute law, but the Decedents' Act was radically new.

On the 1st day of December, 1882, Judge Worden, having declined a renomination, resigned, and William H. Combs was appointed, Dec. 2, 1882, his successor, serving until Jan. 1, 1883, when Allen Zollars, elected at the previous November election, succeeded him. On the 8th day of May, 1883, Judge Woods resigned, having been appointed judge of the Federal Court for the District of Indiana; and Edwin P. Hammond was appointed his successor, May 14, 1883. This rendered the election of a new judge necessary at the November election of 1884; and Joseph A. S. Mitchell, a Democrat, was chosen, his term beginning Jan. 1, 1885. The court now stood four Democrats and one Republican.

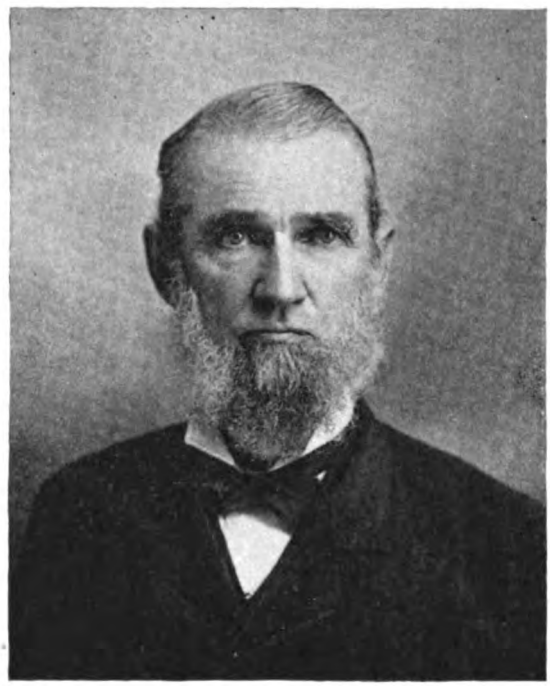
During the years 1865 to 1871 the court began to run behind with its docket, for which it was directly responsible, until, in 1880, it took over three years, in the regular course of business, for a case to reach a decision; and then it might be farther carried along several months by a petition for a rehearing.

As a measure of relief, the legislature of 1881 created a commission, the members of which were to be appointed by the court, to continue two years. Pursuant to the provisions of this act, on April 27, 1881, the court appointed George A. Bicknell, John Morris, William M. Franklin, James I. Best, and Horatio C. Newcomb, — three Democrats and two Republicans. Judge Newcomb died May 23, 1882; and James B. Black was appointed his successor, May 29, 1882. The legislature of 1883 continued the commission two years. Nov. 1, 1883, Judge Morris resigned, and on the 9th Walpole G. Colerick was appointed his succes-

sor. The commission expired April 27, 1885. Upon the whole, it was not satisfactory to the bar of the State. The individual members of the commission prepared opinions in cases assigned to them, and after these opinions had received the approval of the court, — the commission and court sitting jointly, — they were adopted and made the opinions of the court, and judgment rendered accordingly. These opinions thus became the opinions of the court, and found a place in their reported opinions.

At the November election of 1886 Judge Elliott was re-elected, his second term beginning Jan 3, 1887.

From the beginning of 1881 a change is quite perceptible in the decisions of the court, especially in criminal cases. The court gradually brushed aside technicalities, and decided the cases upon their merits. Previous to that time it was difficult to sustain a conviction in a well-defended criminal case. Gradually and imperceptibly technicalities in criminal cases had assumed undue proportions. This state of affairs was largely due to the technical mind of Judge Worden; and the change was due to the new blood placed upon the bench in 1881. Not until then did it seem possible to sustain in that court a conviction for illegally selling intoxicating liquors, obtained upon circumstantial evidence,[1] although death penalties thus obtained were affirmed. Another evidence of the brushing aside of technicalities was a decision that the courts judicially know that beer is a malt liquor prepared by fermentation, and that it was not necessary to prove that it was intoxicating,[1] as had been previously necessary under the rulings of the court.



JAMES S. FRAZER.

Questions of grave importance came before the court in 1886 and 1887, which went to the very foundations of the State. In 1886 the Lieutenant-Governor, Mahlon D. Manson, resigned. He, with the Governor, had been elected in 1884 for a term of four years from the following January. Governor Gray applied to the Attorney-General, Francis T. Hord, for an opinion upon the question whether a successor to Manson could be elected at the November election of 1886, and received an answer in the affirmative. The Democratic Convention, following this opinion, nominated Hon. John C. Nelson for Lieutenant-Governor, and subsequently the Republicans nominated Hon. Robert S. Robertson. The latter received a majority of 3,200. After the election Alonzo G. Smith, the Democratic President of the Senate, who, if there was no Lieutenant-Governor, would hold that office, and be Governor if the chief executive of the State were to die or resign, brought an action to prevent the Secretary of State from delivering to the Speaker of the House the sealed returns of the election of Lieutenant-Governor, which were directed to the Speaker, as required by law, in the care of the Secre-

[1] Dant *v.* The State, 83 Ind. 60.

[1] Myers *v.* The State, 93 Ind. 251.

tary, and were to be delivered to him by the latter. The avowed purpose of the suit was to test the validity of the election of Robertson. The court unanimously decided that it had no jurisdiction of the controversy.[1]

Although at the November election of 1886 the Republicans had secured a majority in the House, the Democrats still held a majority in the Senate. Robertson claimed the right to preside over the Senate; but that body denied his claim, placed Smith in the chair as President *pro tem.*, and forcibly ejected Robertson from its chambers, and by police force kept him out. On the 12th day of January, 1887, Smith filed in the Marion Circuit Court an information, praying for an injunction against Robertson, restraining him "from intruding, or attempting to intrude himself into the office of Lieutenant-Governor," and for a judgment of ouster, "excluding him" from that office. The lower court granted the restraining order; but upon appeal its judgment was reversed. The Supreme Court held that as Robertson resided in Allen, and not in Marion County, the action should have been brought in the former; and a majority of its members also held that a claimant of the office of Lieutenant-Governor cannot maintain an information in the nature of a *quo warranto* to settle the title to that office, for the Constitution vests exclusive jurisdiction of such a controversy in the General Assembly.[2]

These decisions called down on the court the wrath of the entire Democratic press of the State. Its leading organ at the capital was very offensive, going so far as to use on its editorial page, as applied to the members of the court, the unseemly denunciation, "D—n their cowardly souls!" Political strife ran high. The House declared in effect that the body occupying the Senate Chamber was not legally organized, and refused to communicate with it until Robertson was recognized as Lieutenant-Governor and as its duly elected presiding officer. The consequence of the deadlock was that few laws were passed in 1887. The strife was continued in 1889, and Robertson excluded, until the newly elected Lieutenant-Governor, Hon. Ira J. Chase, took his seat.

At the November election of 1888 Silas D. Coffey, Walter Olds, and John G. Berkshire were elected as successors to William E. Niblack, Allan Zollars, and George V. Howk; and they took their seats Jan. 7, 1889. They were Republicans; and for the second time in the history of the State a majority of the bench were members of that political party.

The strife that had arisen between the two leading parties of the State was one not calculated to pour oil on the troubled waters. The Democrats took their defeat of 1888 sorely. The Legislature in both its branches was Democratic, and it soon manifested a disposition to save from the wreck of defeat as many offices as possible. The docket of the Supreme Court was several years behind. There was a universal demand for relief. To increase the number of judges, or to change the organization of the court, a constitutional amendment was required, and it would take two years to adopt it. A commission was proposed; but a Republican Governor would appoint Republican commissioners, and so would a Republican court, it was thought. The result was that the legislature created a Commission of five members, "to aid and assist the court in the performance of its duties," to hold their offices four years. The legislature selected the commissioners. The persons thus selected qualified and demanded recognition; but the court, in an able and elaborate opinion, unanimously held the action of the legislature unauthorized, and the act failed. The striking down of this act was simply an assertion of the independency of the judiciary.[1]

Another thrust at the court, made by the legislature, was an attempt to compel it to prepare the syllabus of each opinion recorded, and to superintend the printing of

[1] Smith *v.* Myers, 109 Ind. 1.

[2] Robertson *v.* Smith, 109 Ind 79.

[1] State *v.* Noble, 118 Ind. 350.

the Supreme Court reports. The effect of this act was to deprive the Reporter of his constitutional privileges, and to impose upon the court duties and labors placed elsewhere by that instrument. The court declined to write the syllabi, and held, in an elaborate opinion[1] and in a subsequent one,[2] the entire act invalid.

The legislature of 1889 provided for a Board of Public Works in all cities of fifty thousand inhabitants or more, to consist of three members, selected from the two leading political parties by the General Assembly. These boards were given control over many affairs of the cities. The legislature was largely inspired to this action by party motives, in order to secure control over cities of political majorities adverse to the majority of that body. Contests quickly arose over the validity of this act; and the court, one member dissenting, held it invalid, on the ground that the legislature could not fill a vacancy in an office, and that it deprived the municipalities to which it applied of that local self-government guaranteed to them by the Constitution.[3] A similar act, creating a Board of Metropolitan Police and Fire Department in cities having a certain population, was also held invalid,[4] leaving an earlier act on the same subject, but not obnoxious to the Constitution, in force.[1]

HORACE P. BIDDLE.

Another case of importance before the court was the act authorizing the State to borrow a large sum of money for governmental purposes. The act was upheld.[2] So was an act authorizing the legislature to elect trustees of the benevolent institutions of the State.[3]

In its greed for office, and to hedge about the constitutional privileges of the Governor, the legislature of 1889 provided that the State Geologist should be elected by the joint ballot of the two houses. The Governor claimed the right, under the Constitution, to appoint, and the court upheld his claim.[4] Two members of the court dissented. The same ruling was made, with a like division of the court, with respect to State Statistician, the majority of the court holding further that such office was elective.[5] The same ruling was made concerning Oil Inspector, except as to the elective feature.[6]

Other acts of 1889 held invalid were the Meat Inspection Act;[7] the section of the Election Law requiring registration of those leaving or absent temporarily

[1] *Ex parte* Griffiths, 118 Ind. 83.
[2] Griffin *v.* State, 119 Ind. 520.
[3] State *v.* Denny, 118 Ind. 382; and City of Evansville *v.* State, 118 Ind. 426.
[4] State *v.* Denny, 118 Ind. 449.

[1] State *v.* Blend, 121 Ind. 514.
[2] Hovey *v.* Foster, 118 Ind. 502.
[3] Hovey *v.* State, 119 Ind. 386 and 395.
[4] State *v.* Hyde, 121 Ind. 20.
[5] State *v.* Peele, 121 Ind. 495.
[6] State *v.* Gorby, 122 Ind. 17.
[7] State *v.* Klein, 126 Ind. 68.

from the State,[1] and the Natural Gas Law.[2]

On the other hand the court upheld, of the acts of this year, the act permitting cities and towns to exact an increased license fee for a permit to retail intoxicating liquors;[3] the School-book Law;[4] and the Street Improvement Law.[5]

The several decisions of the court holding invalid legislation that was largely inspired by party expediency and thirst for place drew down upon the Republican members of the court the denunciation of the State Democratic press, which pursued them with unusual violence of language and with charges of dishonesty and party subserviency. So heated became the language and charges of that press that when the party it represented met in State convention on the 28th day of August, 1890, it, led by its extremest members, denounced Judges Coffey, Olds, and Berkshire in its platform, charging them with rendering partisan opinions and with judicial dishonesty. We are not aware that any party so openly ever went to this extreme. The charges were wholly unfounded, and largely inspired by chagrin occasioned by the decisions of these three judges in striking down unconstitutional laws enacted for party ends.

At the November election of 1890 Judge Mitchell was re-elected; but he died on the 12th of the following month; and on the 17th of the same month Robert W. McBride was appointed to fill the remainder of the few days of his first term, yet unexpired, and to fill the term to which he was elected until the November election in 1892. On the 19th of February, 1891, Judge Berkshire also died, and on the 25th of the same month John D. Miller was appointed to the vacancy thus occasioned.

The legislature of 1891, in order to relieve the Supreme Court and its overloaded docket, created the Appellate Court, giving it appellate and final jurisdiction in all cases of misdemeanor, cases originating before justices of the peace, cases for the recovery of money only where the amount in controversy does not exceed one thousand dollars, cases for the recovery of specific personal property, actions between landlord and tenant for the recovery of possession of leased premises, and all cases of appeals from orders allowing or disallowing claims against decedent's estates. In all such cases their decisions are final. Constitutional questions and the validity of statutes are reserved for the Supreme Court. By the terms of the act all cases of which the Appellate Court were given jurisdiction, and which were then pending before the Supreme Court, were transferred to the former court. In pursuance of a private understanding with several members of the legislature who secured the passage of the law, Governor Hovey appointed three Republicans and two Democrats to the judgeships thus created. Unfortunately the jurisdiction of the court was not made broad enough, and consequently the full relief desired was not obtained.

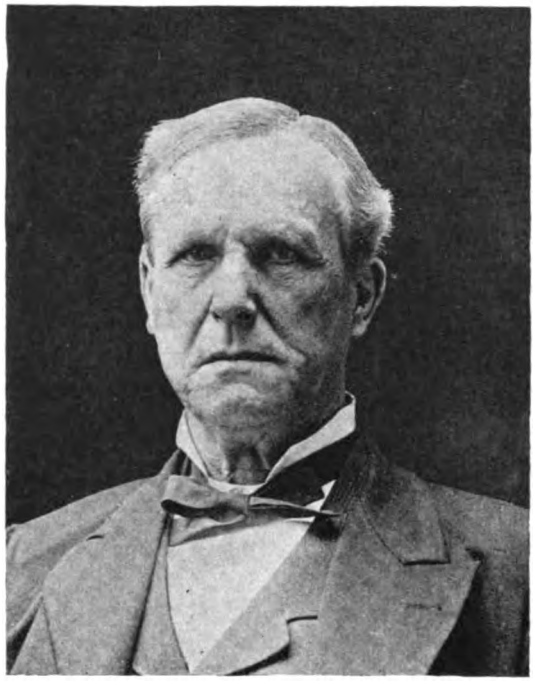
The one hundred and thirty-six Indiana reports contain 20,427 reported cases.

Samuel E. Perkins.

Judge Perkins was on the Supreme Court bench nearly twenty-two years, though not continuously. Blackford was a member of the court for thirty-five years continuously, and Perkins was his closest competitor in length of service. Perkins was the only member of the old court that became a member of the new. He was born at Brattleborough, Vt., Dec. 6, 1811, and died at Indianapolis, Dec. 17, 1879. His father was a lawyer, but died when Samuel was only five years of age. His mother was too poor to rear him, and he was adopted by a neighbor. His education was limited to the common schools of the day, with a short course in Gates County Seminary, New

[1] Morris *v.* Powell, 125 Ind. 281.
[2] State *v.* Indiana, etc. Co., 120 Ind. 575.
[3] Bush *v.* Indianapolis, 120 Ind. 476
[4] State *v.* Haworth, 122 Ind. 462.
[5] Quill *v.* Indianapolis, 124 Ind 292; McEneney *v.* Sullivan, 125 Ind. 407.

York. After reading law awhile in New York, he came on foot to Richmond, Ind., in 1836, where he settled. Reading law in an office during the following winter, he was admitted to practice in the spring of 1837. The same year he became the editor of a local Democratic newspaper, and so continued, with an intermission of a year at least, until 1840. The community was Quaker, and intensely Whig. In 1843 Governor Whitcomb rewarded him for his fealty to party under such discouraging circumstances as environed him, by appointing him prosecuting attorney. The year following he was a Polk elector; and during that and the following year he was twice appointed to a seat on the Supreme Court bench, but the Senate declined to confirm the selection. After the legislature adjourned, Governor Whitcomb appointed him to the vacancy occasioned by the Senate's failure to confirm his former appointments. Thus Perkins found himself, at the age of thirty-four, on the bench of the highest tribunal of the State; and necessarily, owing to his several years of political and newspaper work, with a limited knowledge of the law. In 1858 he accepted the appointment of professor of law in the Northwestern Christian University, at Indianapolis, and during the years 1870–72 filled a similar position in the State University. In 1858 he published the second digest of the Indiana reports; and in the following year published the first work in the State on the civil practice. In 1868 he became editor of the "Herald," afterwards the Indianapolis "Sentinel." In 1872 Governor Baker, his adversary in politics, appointed him Judge of the Marion Superior Court; two years later he was unanimously elected to the same place; and in 1876 he was again placed, by popular vote, upon the bench where he had formerly so long sat. Judge Perkins was an indefatigable and never ceasing worker; but of him it can scarcely be said that he was a learned man. In his opinions he was fond of quoting the Scriptures, and often cited works on political economy when discussing constitutional questions. He was a man of considerable vigor of mind; but he scarcely arose to the opportunities afforded him in being one of the first judges whose duty it was to interpret the Constitution of 1851, to construe the new codes of 1852, and to mould and conform the unwritten law to their principles and rules of action. This was a great opportunity which he did not fully grasp; probably because he did not have that exact training in his career at the bar when a young man which seems essential to the making of a great judge. The last three years of his judicial career did not add any laurels to those he had already won; for he was then, in mind, too old a man for a place on the highest tribunal of the State.



WILLIAM E. NIBLACK.

Andrew Davison.

Davison was one of the four judges who first took their seats as members of the new

court, and he served until 1865, — a career of twelve full years on the bench. He was born Sept. 15, 1800, in Franklin County, Pa.; and was educated at Jefferson College, Cannonsburgh, of the same State. At the age of twenty-four he was licensed to practice, and then came West, settling at Greensburgh, Ind., then a village of half-a-dozen log houses. Here he lived until the day of his death, practicing his profession when not on the bench; and although of delicate frame and in feeble health from early youth, he lived until Feb. 4, 1871. In practice he was a great laborer; and his greatest power was in the mastery of general principles, which he applied with more than usual acumen. His opinions are usually short, but pointed, clear, and concise. In fact, it may be said that the bar has not yet fully appreciated his legal ability as evidenced in his opinions. He was a man of unusually pure moral character.

William Z. Stuart.

Judge Stuart's parents were born in Scotland. He was born at Dedham, Mass., on Christmas Day, 1811. Nine years afterwards his parents returned to Scotland, taking him with them. But five years later he ran away from them, returned to America, and engaged as a drug-store clerk in New Bedford of his native State. Two years later he went to Boston in the same capacity. Urged by his friends to educate himself, he succeeded, after years of endeavor, in working his way and in graduating in 1833 as the salutatorian of his class, from Amherst College. He became principal of the High School at Hadley, and the next year of Mayfield Academy, Westfield, N. Y. During these years he read law, and in 1836 settled at Logansport, Ind. In 1846 he was elected prosecuting attorney, and in 1851 to the legislature which framed the new codes of procedure. It cannot be said that he was a popular man, and he never sought popularity; yet he was esteemed by the people for his integrity and real worth, and most by those who knew him best. His abilities in the legislature were so well displayed, and became so generally known, that he was elected the next year judge of the Supreme Court. The salary was too small to support his growing family, and he resigned in 1857. His opinions are models of clearness, and show his thorough training. They are usually elegantly written; and there are no superfluous words, — little but nouns and verbs, and many of them monosyllables. On his retirement from the bench he became the General Attorney of the Toledo and Wabash Railroad Company. In 1856, although on the bench, he was a candidate for Congress, but was beaten by Schuyler Colfax. Among strangers he was retiring and almost diffident. His mind moved slowly, but was vigorous in action. Although a Democrat in principle, he was moderate in partisanship. He died May 7, 1876. His death was caused largely from overwork in the interest of the great railroad for whom he served as its chief attorney until his death, a period of nearly twenty years.

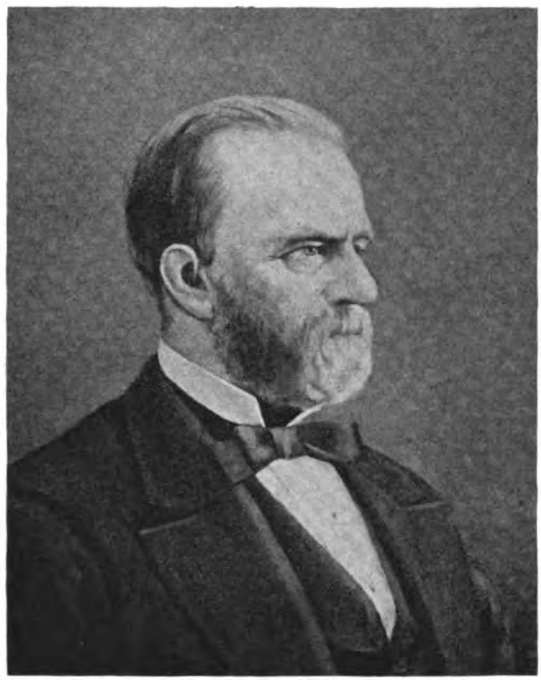
Addison L. Roache.

Judge Roache is the sole survivor of the Supreme Court bench of 1853. He was born in Rutherford County, Tenn., Nov. 3, 1817, and came with his father to Bloomington, Ind., in 1836. He was admitted to practice at Frankfort, but soon returned to Rockville, where he had read law, and where he married in 1841. Eleven years later he was elected Judge of the Supreme Court, and resigned his seat in May, 1854, and formed a partnership the same year with Hon. Jos. E. McDonald, the latter being the junior member. Judge Roache is preeminently a man of affairs, and has taken great interest in the State educational institutions, having been twice elected trustee of the State University. He conceived the plan of a public library for the city of Indianapolis, drafted the original bill for its establishment, and worked before the legis-

lature until it was adopted. All this required unremitting toil and untiring work. Owing to his health, he early retired from the active practice, — retiring upon an ample fortune he had secured.

Alvin P. Hovey.

Of all the public men of Indiana, Governor Hovey held more public offices than any other. He was appointed, May 8, 1854, to the vacancy caused by the resignation of Judge Roache. He was native born. The place of his birth was in a little hamlet of Posey County, and the time Sept. 6, 1821. His father was a native of Vermont, and died before Alvin was three years of age, leaving seven small children in poor circumstances. He received little education in the schools, being almost wholly a self-educated man. His memory was very retentive. At twenty-one he was admitted to the bar. Hovey's greatest case was the one involving the validity of William McClure's will, in which he gave the trustees all his property in Spain, "to be by them applied to the diffusion of useful knowledge, and instruction of the working classes, or manual laborers who gain their bread by the sweat of their brow," in the United States. It proved further that sums not exceeding $500 should be expended in the purchase of libraries wherever there was an accumulation for a public library of fifty volumes. The executor regarded the clause as invalid, and was so advised by eminent counsel. Hovey considered it valid, and brought suit, at the instance of one of the executor's bondsmen, to test its validity. In the lower court he was defeated; in the Supreme Court successful, the decision following the Girard will case.[1] By this will over $150,000 was given to the workingmen's libraries.



GEORGE V. HOWK.

In 1851 he was a member of the constitutional convention; in 1852 Circuit Judge, being called "The Boy Judge." His appointment to the Supreme Court bench did not secure for him an election; and consequently his term there was less than a year in length of time. In 1855, without solicitation and without his knowledge, President Pierce appointed him United States District Attorney for the District of Indiana, from which position Buchanan removed him because he supported Douglas. He was always an intense partisan, intensity being characteristic in every feature of his composition.

During the Mexican War he was elected lieutenant, but his company failed to secure an entry into one of the regiments assigned to Indiana. At the outbreak of the Rebellion Governor Morton commissioned him colonel. Shortly after the capture of Fort Donelson he was commissioned brigadier-general. He was at the battles of Pittsburg Landing, Vicksburg, and Jackson. For meritorious service he was made a major-general, although he did not receive his commission until two years after it was granted, — being one of the four men

[1] Sweeney *v.* Sampson, 5 Ind. 465.

of the State who rose to that rank. General Grant found occasion to speak highly of his service and skill in the command of his troops.

By command of Secretary Stanton he prosecuted, under the rules of the military law, a number of Indiana's leading Southern sympathizers who were aiding and abetting the cause of the Southern Confederacy, and secured the pronouncement of the death sentence upon them. They probably would have suffered that penalty if President Lincoln had not interfered.

After the war President Johnson, upon the recommendation of General Grant, tendered him the mission to Buenos Ayres; but he declined it. He was then tendered the mission to Peru, and accepted it, and resigned in 1870.

The War of the Rebellion changed Hovey from a Democrat to a Republican, and in 1886 he was elected to Congress by a majority of 1,359 over his Democratic competitor. In 1888 he was elected Governor of the State, receiving the nomination without a canvas; and in this office he died the 23d of November, 1891.

Governor Hovey was a good Latin scholar, and spoke German and Spanish fluently. He was a very self-relying man, and determined when he had "made up his mind." He was a frequent contributor to general magazine literature, and a poet of more than ordinary ability. A volume of his poetry will probably be published erelong. He was too short a time upon the Supreme Court bench to make anything more than the ordinary place for himself. His opinions have, however, that directness and force that everywhere stamped him as a man of more than ordinary power.

Samuel B. Gookins.

Judge Gookins was nominated and elected at the fall election of 1854, taking his seat Jan. 3, 1855. He was a descendant from the celebrated Gookins family of New England, and was born at Rupert, Vt., May 30, 1809. When he was five years old his father died. In 1823 his mother brought him to Terre Haute, Ind., and there settled, but died two years later. Gookins, thus thrown on his own resources, entered a printing-office in 1826, and four years later went to Vincennes to assist John B. Dillon in editing the "Gazette" of that place. In 1832 he returned to Terre Haute as editor of a local newspaper. Through the persuasion of his friends he began to read law, and was admitted to practice in 1834. In 1850 he was appointed a judge of the Circuit Court; and in 1851 was elected a member of the first legislature under the new Constitution, and served on the committee for the organization of the courts. It was his endeavor to take the Supreme Court out of politics, but he failed. He however was nominated by the Whigs in 1852 for a position on the bench, and was defeated. In 1854, on the occurring of a vacancy, he was again nominated, and was elected by a majority as large as that by which he had been defeated. These nominations were unsolicited by him. He held the position of judge until Dec. 10, 1857, and then resigned, chiefly because of the inadequacy of the salary to support himself and family, and because the condition of his health demanded a change of climate. He went to Chicago, Ill., and there practised law until 1875, and then returned to Terre Haute, where he died June 14, 1880.

He was an occasional contributor to the press. His judicial opinions, as reported, are fair specimens of legal and judicial literature.

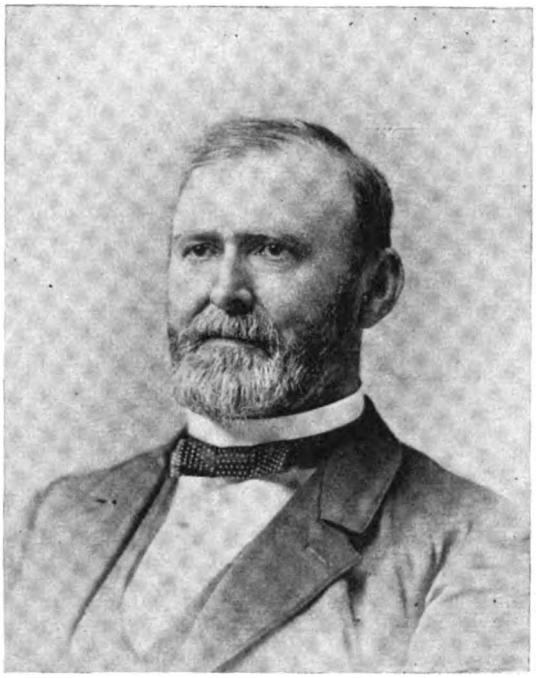
James M. Hanna.[1]

James M. Hanna was born Oct. 25, 1817, on the farm where his father and grandfather settled in 1804, Franklin County, Ind., near where the village of Fairfield has since grown up. His early education was limited to three months' schooling. His boyhood, like

[1] This sketch of Judge Hanna has been kindly furnished by Hon D E. Williamson, formerly Attorney-General of Indiana, and at one time a partner of Judge Hanna.

others of that age, was confined to his father's farm, where he labored, assisting his father, until 1837, his twentieth year. During this time he gave more than ordinary attention to mental culture, being a voracious reader. He soon acquired a breadth of thought and book culture rarely attained by one of his age.

Mr. Hanna then entered the office of John M. Johnson, an able lawyer of Brookville, Ind., and commenced his course of legal study. Two years' close application, with the assistance of his able mentor, qualified him for admission to the bar.



WILLIAM A. WOODS.

He then started West in search of a suitable location to commence practice as a professional lawyer. The old National Road was then the great highway of travel; and he stopped at Williamstown, a small village on that road, in the north part of Clay County, Ind., and while stopping at that place was advised by a gentleman to go to Bowling Greene, the then county-seat of Clay County.

Very simple things sometimes shape the course of a man's life. Mr. Hanna followed the advice of his new acquaintance, and located at Bowling Greene, and commenced his professional career, spending the balance of his life within a radius of forty miles of that place.

As a young lawyer, he soon acquired legal business, and began to reap the rewards of close application and hard study. He soon commanded a wide influence in western Indiana, both as a lawyer and Democratic politician, holding a magic power over his professional and political friends. In 1842 Governor Whitcomb selected and appointed him his private secretary; following this, the State legislature, then having that power, elected him prosecuting attorney for the judicial circuit composed of the counties of Putnam, Clay, Park, Vermillion, Vigo, Sullivan, and Knox.

The office of prosecuting attorney required talent and legal acumen of the highest order. The common law governed the rules of procedure in criminal as well as in civil business. He had to be not only well acquainted with the technics of the law, but skilled in all the forms of criminal pleading and evidence. He met and discharged the duties of that office with credit to himself and honor to the State.

During this time he became a Mason, and stood well in the ranks of that ancient and honorable order. At the expiration of his term of office he resumed his local practice, and continued in that line until 1849. At the August election of that year he was elected to the State Senate, representing in that branch of the legislature the counties of Vigo, Sullivan, and Clay. During his term of service in that body the State passed from the old to the new Constitution. This change required many new and important alterations in the law; the old common-law and equity practice had to give way to the advanced thought of the age.

The long-established rules of practice had to yield to the new and almost untried code or statutory form of pleading, in all of which Senator Hanna, as a member of the Judiciary Committee, took an active part. In 1856 he was elected by the voters of the district Circuit Judge, which he afterwards resigned to accept a seat on the Supreme bench of the State, appointed by the Governor.

He was then elected by the votes of the State to succeed himself; and at the expiration of his term of office he retired, having held the office by appointment and election for the term of eight years.

The decisions of that high court attest its character for industry in legal research, and wisdom in decision of new and intricate questions of law. Judge Hanna and his associates of that court are dead, but they have left surviving them a monument more enduring than marble or brass. These may perish, as others have; but their judicial opinions will stand, with the language in which they are written, forever.

In quitting office, Judge Hanna retired to his farm in Sullivan County. He was again elected to the State Senate; and resigned from that body with his Democratic associates to defeat the Fifteenth Amendment to the Constitution of the United States.

Disgusted with the order of public affairs, he retired from public to private life, giving attention to his large farm in Sullivan County, Ind., and the practice of the law in the surrounding courts, until his death. In the fall of 1871 Judge Hanna was stricken down with paralysis, and died the following January, 1872.

As a neighbor, none could excel him; his house, like a hotel, was open to all who saw proper to partake of his hospitality. Kind, liberal, and charitable, devoted in his attachments, he never deserted a friend. As a lawyer, he was accurate and discriminating in his arrangement and classification of facts, and seldom erred in his application of the law. He was an able lawyer and an upright judge. His early death created a profound sorrow.

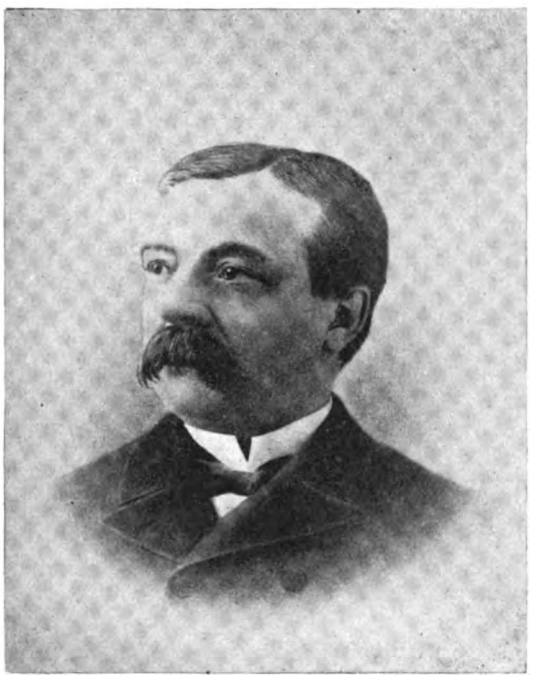
James L. Worden.

Massachusetts furnished another judge in the person of James Lorenzo Worden for the Supreme Court of Indiana. He was born at Sandisfield in that State, May 10, 1819. When only eight years of age, his father died, and a year or so thereafter his mother moved to Ohio. He received only a common-school education; and was admitted to the bar at Lancaster, Ohio, in 1841. In 1844 he moved to Whitley County, Ind., and shortly afterward to Noble County of the same State. He was a Democrat, and in 1856 Governor Wright appointed him to a vacancy on the Circuit Court of the tenth circuit. In 1857 he was an unsuccessful candidate for Congress; and on the 16th of January, 1858, Governor Willard appointed him to the vacancy occasioned by the resignation of Judge Stuart. Thus reached the Supreme Court bench one of the ablest men who ever sat upon it. With one intermission of six years, from 1865 to 1871, he continued on the bench until Dec. 1, 1882. During the six years he was off the bench he was elected Mayor of Fort Wayne, where he had lived many years. In 1876 the indiscreet announcement of the decision in State *v.* Swift, made during the political campaign of that year, was a source of great annoyance to him. It became a byword of the campaign, and for months he was pursued by anonymous letters taunting him with the expressions he then used. Judge Worden was a man of few words. His opinions are seldom long, and often short but terse. Of him it has been said by some of his brother judges that the State could well afford to pay him his salary although he did nothing but meet with the court in consultation. Perhaps his best opinions were given in cases of wills and in their construction. But in criminal cases his mind was too technical; and more than one criminal has cheated the punishment he justly merited because of Worden's technical opinions. In 1882 he declined a renomination, and resigned one

month before his term expired, in order to take his seat on the Superior Court of Allen County, to which place he had just been unanimously elected. He died at Fort Wayne, June 2, 1884. His opinions are often very witty.[1]

Charles A. Ray.

But one man born at the capital of the State of Indiana ever sat on the bench of the highest tribunal of the State, and that was Charles A. Ray, who was born Sept. 3, 1829. He attended the county seminary, having for one of his classmates Lew Wallace, the author of "Ben Hur." Afterwards he attended Brown University, Providence, R. I., but was compelled to leave in his senior year, owing to the sickness of his father. In the course of a few years he studied law and attended the law school at Cambridge, Mass., and entered the practice at his native home in 1853. In 1861 Governor Morton appointed him judge of the Common Pleas Court of his own county, and the following year he was elected. While serving on the bench he was nominated by the Republicans for the Supreme Court and elected, taking his seat Jan. 3, 1865. In 1870 he was renominated, but went down with his ticket. After his defeat he formed a partnership, and entered on the practice of the law at Washington, D. C. While a resident of Washington he was connected for three years with the law department of the General Post-Office, resigning in 1882. He returned temporarily to Indianapolis, and then went to Rochester, N. Y., to assume editorial charge of the "Western Reporter" (law). At present he is practising law in New York City. Judge Ray is the author of "Negligence of Imposed Duties." This book has been well received by the profession. His judicial opinions stand well the test of the times, and are able, showing that they emanated from a sound legal mind. At the time he ascended the Supreme Court bench he was in his thirty-sixth year.



JOSEPH A. S. MITCHELL.

Robert C. Gregory.

Robert C. Gregory was born in Knox County, Ky., Feb. 15, 1811. In 1812 his father moved to this State. After reading law, young Gregory opened an office at Crawfordsville, Ind., and from that place was elected State Senator in 1841. In 1843 he moved to La Fayette, Ind. In 1850 he was nominated as a delegate to the State constitutional convention, but was defeated by a party vote. Subsequently he was a candidate for the legislature and for Congress, but went down with his party, although he led the ticket by several hundred votes. In 1864 he was nominated for the Supreme Court bench and elected; but in 1870, though nominated, he was defeated. He was a Whig so long as the party existed as a political force, and then a Republican.

Judge Gregory was a genial gentleman, well beloved and admired by all who knew him; his mind moved slowly, but when in-

[1] See Waugh *v.* Waugh, 47 Ind. 580.

formed his judgment was excellent and sound. His opinions are usually short, but clear and pointed. After his retirement, Jan. 3, 1871, he resumed the practice at La Fayette, and continued at it until his death, which occurred Jan. 25, 1885.

John T. Elliott.

One of Judge Ray's associates was John Tindall Elliott, who served at the same time, and was of the same politics. He was born in Indiana, near Richmond, Feb. 7, 1813, and suddenly died at his home in New Castle, Feb. 12, 1876, of apoplexy. He lived in and near New Castle fifty-two years, and his education was limited to the common schools. In 1837 he was Secretary of the House of Representatives of the State, and the next year was elected prosecuting attorney. In 1839 he was chosen State Senator, and in 1844 judge of the Circuit Court. Being re-elected in 1851, he resigned the following year, and accepted the presidency of a railroad. In 1855 he was again elected judge of the Circuit Court, which place he held until he took his seat on the Supreme Court bench. His career on the *nisi prius* bench was remarkably successful and satisfactory to his constituents; and his opinions bear evidence of great industry and a clear knowledge of the law. They stand well with the profession.

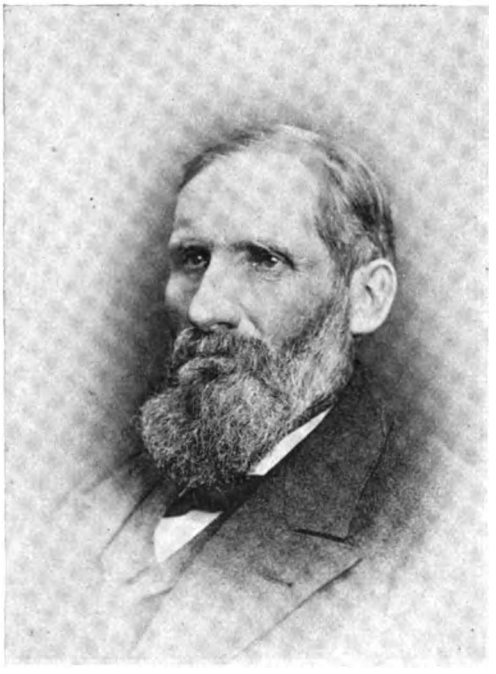
James S. Frazer.

Still another contemporary of Judge Ray was Judge Frazer of Warsaw, who was born in Hollidaysburg, Pa., July 17, 1824. Thirteen years afterward his father moved to Wayne County, Ind.; and at the age of sixteen James began reading law, supporting himself by teaching school. When twenty-one years old he was admitted to the bar, and opened an office at Warsaw, where he yet resides. In 1847, 1848, and 1854 he represented his county in the legislature as a Whig and then as a Republican, and took an especial interest in the common schools of the State. He was author of most of the school law of 1855. In 1852 he was elected prosecuting attorney; and in 1862 was appointed assessor of internal revenue. After retiring from the bench in 1871, President Grant appointed him a commissioner, to adjust claims of English subjects against the Federal government, and against the English government by American subjects, arising from the War of the Rebellion. This commission was composed of three members, — Right Hon. Russell Gurney of England, Count Louis Corti of Italy, and the subject of this sketch. Their decision was final, and both nations interested agreed to abide by it without evasion or delay. It required two years to adjust these claims, amounting to two hundred and twenty million dollars. In 1879 he was appointed one of three to revise the civil and criminal codes and other statutes of the States; and was continued in office until 1882 for the purpose of publishing the revised statutes of 1881. These statutes are the State's last official edition, and are the equal of that of any State. He still practises law. Judge Frazer has great power of condensation, and his opinions are models of brevity and conciseness. The opinion of no man ever on the Supreme Court bench carries with it more respect and weight than that of Judge Frazer.

John Pettit.

The subject of this sketch was born at Sackett's Harbor, N. Y., July 24, 1827, and received an academical education. He was admitted to the bar in 1838, and began practicing at La Fayette, Ind. He served two terms in the State legislature; was a member of the twenty-eighth, twenty-ninth, and thirtieth Congresses, and of the State constitutional convention of 1851. He was a Pierce presidential elector in 1852, and was United States Senator from 1853 to 1855, elected to fill the vacancy caused by James Whitcomb's death. President Buchanan appointed him Chief-Justice of the Territory of Kansas. In 1870 he was elected a judge of the Supreme Court and served six years, at the end of his term being forced to retire

because of political charges brought against the court. He died at La Fayette June 17, 1877. Pettit was a man of pronounced character. His opinions are characterized by the forcible language used in them. "A soldier," said he in one opinion, "was at home on a furlough, and was about to return to the ranks of his country's armies, where death was as likely as life; he had one hundred and seventy-five dollars, and an adult brother, and an infant sister, and with a brother's love for her growing in his breast, he went to his trusty friend and said, 'Here is all I have. I am called to the post of honor, but of danger. If I return, give it again to me; but if I die, give it to my infant sister or her guardian.' The writing was made accordingly. The soldier died, and the money was paid to his infant sister according to the contract, and we cannot and will not disturb its possession. We hold that the written memorandum was an obligation to pay the money to the soldier if he lived to demand it; but if not, to pay it to his sister. The soldier died, and the money has been paid to his infant sister, and no ruthless hand should be allowed to disturb that sacred memorial of a brother's love."[1] His opinions are not noted for their learning or even accuracy of expression, but for the good common-sense often displayed in them.



JOHN G. BERKSHIRE.

Alexander C. Downey.

The birthplace of Judge Downey was Hamilton County, Ohio, and the time Sept. 10, 1817. One year later his father moved to Indiana, settling in Dearborn County, where young Downey received a common-school education. He became a flatboatman on the Ohio River, but was admitted to practice in 1841. In 1844 Ohio County was formed; and Downey moved to Rising Sun, the newly selected county-seat. In 1850 he was appointed Circuit Judge by Governor Wright, and served in that capacity until 1858, when he resigned because of the inadequacy of the salary, and the great expense of travelling over so extensive a territory as his circuit embraced. In 1854 he commenced and continued for many years in the conducting of a law school at Asbury University, Greencastle, Ind. After his resignation he practised law until his elevation to the Supreme Court bench in 1871. He was a Democrat; but in 1862 he was elected State Senator on the Union ticket, and voted for the resolution ratifying the Thirteenth Amendment. In 1867 he was appointed by Governor Baker one of the three commissioners of the House of Refuge for juvenile offenders. During his six years' term on the Supreme Court bench two thousand eight hundred and thirty-seven cases were reported, he writing the opinion of the court in one thousand and sixty-three cases. For the same reason that Judge Pettit failed to receive a renomination Judge Downey also failed; but in 1882 he was again a candidate before his party's convention, and very nearly received the nomination over Judge

[1] Baker *v.* Williams, 34 Ind. 547.

Howk, who was seeking a re-election. In recent years he became Dean of the Law School of De Pauw (formerly Asbury) University, but retired in 1890.

On the bench he was a very industrious man. His opinions are long, but not compact nor forcibly written, nor written with that exactness of expression that should at all times characterize judicial opinions. Recently he was elected judge of the seventh judicial circuit.

Samuel H. Buskirk.

Judge Buskirk was born at New Albany, Ind., Jan. 19, 1820. When he was quite young, his father moved to Bloomington, Ind., where young Buskirk graduated from the State University Law School, and entered the practice of the law, being an unsuccessful candidate for the office of prosecuting attorney in 1843. In 1848, 1849, 1850, 1851, 1852, and 1854 he served in the State legislature. He was an elector on the Democratic ticket of 1856. In 1863 he was Speaker of the State House of Representatives, and in 1865 was again a member of that body, but failed to get a third term, although nominated by his party. In 1871 he took his seat on the Supreme Court bench, but was forced to decline a renomination in 1876, because of the onslaught made on the members of the court in the use of the public funds in furnishing the court chambers. While on the bench he prepared his work on Practice in the Supreme Court, which for many years was a *vade mecum* for Indiana lawyers. Although out of date and inapplicable to many questions of practice under the revision of 1881, it is still a very useful work. His opinions are very long and laborious, and show marvellous research. At times they are mines of information, exhausting the subject, and are, in fact, treatises on the questions discussed. While this is true, they are not always wanting in vigor of thought, but display strong powers of originality. He was a fine public speaker, being regarded as one of the strongest men in that way in his party. He died April 3, 1879. One of his ablest opinions was delivered in Cory *v.* Carter, 48 Ind. 327, upholding the law providing separate public schools for colored children.

Andrew L. Osborn.

When the court was increased to five members, Judge Osborn was appointed by Governor Baker in December, 1872, to fill the vacancy thus occasioned, but was defeated at the polls in 1874 by Horace P. Biddle. He was born May 27, 1815, in New Haven County, Conn., and at the age of twenty moved to Chicago, Ill., and engaged in the printer's trade. He was a Whig, and afterwards a Republican. In 1836 he moved to Michigan City, Ind., and engaged in the practice of the law. In 1844 he moved to Laporte, where he continued to reside until his death early in 1891. In 1844 and 1845 he was elected to the House of Representatives of the State, and in 1846 to the State Senate. In 1857 he was elected judge of the ninth judicial circuit for six years. Upon retiring from the bench in 1875 he re-entered the practice, and was employed by the Michigan Central Railroad Company as their General Attorney, holding the position until the day of his death. His opinions are good examples of a judge of fair ability.

Horace P. Biddle.

The subject of this sketch was born March 24, 1812, twenty miles below Lancaster, Ohio, and is still living at his "Island Home" at Logansport, Ind. He was the ninth and youngest child. His father dying when Horace was seventeen, his education was limited; but he was a voracious reader, which supplied many defects in his education. He did not begin reading law until he was twenty-four years of age, and was not admitted to the bar until three years afterwards. In October, 1839, he went to the place of his present residence, and began the practice of the law, and grew into favor rapidly. In 1844 he was nominated

as elector by the Whig party, and was defeated the following year for the legislature. In 1846 he was elected by the legislature President Judge of the eighth circuit, resigning six years later to make the race for Congress, but was beaten by Dr. Norman Eddy. In 1851 he was a member of the constitutional convention, and was one of the leading members of that body of representative men. His speeches in that convention are as able as any that were made. He was a ready debater and a fluent talker. From 1852 to 1860 he devoted himself assiduously to his practice, which was large and lucrative, then laying the foundation of his present fortune. He served on the circuit bench from 1860 to 1872. Few men in this country have made better *nisi prius* judges than he was. In this respect his career was remarkable, and gave a promise that he did not redeem on the Supreme Court bench. During the years 1873 and 1874 he devoted himself to literary pursuits. He was elected to the highest tribunal of his State on the Democratic ticket, having once before been elected to a position on that bench as a Republican, but failing to get the seat because of an irregularity in the resignation of Judge Stuart. His written opinions lack the preciseness essential to judicial expression, nor do they evince great research or industry; yet when aroused he had a forcible and trenchant pen.

Judge Biddle for fifty years was a contributor to the best magazines in the country. In 1849 he published a small volume entitled "A Few Poems," and it was highly complimented by Charles Mackay, Irving, and Longfellow. In 1858 a larger edition of the same work was issued. In 1860 he published a work on "The Musical Scale." The edition of this work was limited, but several editions have since been issued. The theory of the scale advanced in this work was counter to the theories of Tyndall and Helmholtz, but recent discoveries have proved that he was right and they were wrong. In 1874 he published "Glances at the World," another volume of poems; in 1876, "American Boyhood," and "A Discourse on Art;" in 1878, "Amatories by an Amateur," limited to ten copies; and in 1881, "Elements of Knowledge." He has also printed several pamphlets: "A Definition of Poetry;" "A Review of Professor Tyndall's Work on Sound;" "The Analysis of Rhyme;" "Russian Literature;" and "The Tetrachord, a New Musical Instrument," his own invention. These were followed in 1882 by another volume of poems. Although never having attended college, he is a good scholar in Latin, is well conversant with German and French, and has some knowledge of Italian, Spanish, and Portuguese. His library is one of the largest private libraries in the State, and his residence almost a museum of art.

Judge Biddle drew down upon himself the censure of the Republican press in 1880 for his opinion in The State *v.* Swift, which was so severe that he flinched under the onslaught, especially when attacked by the New York City papers.

William E. Niblack.

May 22, 1822, the subject of this sketch was born in Dubois County, Ind. He was a farmer's boy; and although he attended the State University, he did not graduate. In 1845 he began the practice of law at Mt. Pleasants, then the county-seat of Martin County. In 1849 he was elected State Representative, and the following year State Senator. In January, 1854, he was appointed by Governor Wright, without solicitation, judge of the Circuit Court, and in the following October was elected for six years; but two years later he was elected to Congress, serving until 1861. In 1863 he again served as a Representative in the State legislature. In 1864 he was again sent to Congress, and there remained until March 4, 1875. In 1876 he was elected judge of the Supreme Court of Indiana, and served until Jan. 7, 1889. The greater part of his life he has lived at Vincennes, Ind.;

but he is now residing at the capital, engaged in the practice of the law.

Although descended from a Whig family, he has always been a Democrat. Judge Niblack sat on the bench at a very busy period of the court's history, when it was overloaded with cases, many of which grew out of the financial troubles of 1873 and 1874. His opinions are remarkable for the ease and grace with which they are written, many of them being elegant models of the use of the English language. His opinion in The White Lick Quarterly Meeting of Friends, by Hadley, against The White Lick Quarterly Meeting of Friends, by Mendenhall (89 Ind. 136), is worthy of special mention. His strong sense of justice, aided by a wide experience in the affairs of the world, united with good common-sense, is almost everywhere manifest in his opinions. In 1888, although nominated for a third term, he was defeated. In 1889 he was one of the Supreme Court commissioners chosen by the legislature, but the act creating the commission was declared unconstitutional.

George V. Howk.

Judge Howk's birthplace was Charlestown, Ind., and the date Sept. 21, 1824. His father was a pioneer lawyer of the State, and died when his son was only nine years of age. Through the exertions of his mother he was enabled to graduate from Asbury University, of this State. In 1847 he was admitted to the practice, and settled at New Albany, where he now resides. One year later he married the daughter of Judge Dewey. In 1852 and 1853 he was city judge of New Albany; and in 1857 judge of the the Court of Common Pleas of his county. In 1863, and from 1866 to 1870, he represented his county in the House of Representatives of his native State. In 1876 he was elected judge of the Supreme Court, re-elected in 1882, but defeated in 1888, although nominated by his party. He has always been a Democrat. While a young man, he was employed in the county clerk's office, and there acquired a penmanship seldom equalled. A sheet of writing from his pen was like a copper-plate, and contained as many words to the line as a line of the ordinary printed page. On the bench he was an indefatigable worker, rising even in summer before the sun was up, and in winter long before the break of day, to prepare his opinions, and worked long into the night. But he entailed upon himself much unnecessary work, in making long and tedious statements of the case, or in copying into the opinions long extracts from the record. This he often did, although the case was disposed of upon a question not appearing in these statements, thus greatly and unnecessarily encumbering the official reports of the opinions of the court. This he did, too, with great labor to himself; for in later years he wrote slowly and with much difficulty. For several years he wrote more opinions disposing of cases than any other member of the court. He had an accurate and extended knowledge of the practice in the Supreme Court, exceeding in this respect nearly all of his brother judges. His opinions are usually clear, and are expressed in plain and straightforward language, containing fewer citations of authorities than the usual opinion contains.

During the year 1891 he was appointed judge of the Floyd Circuit Court, having been appointed by his Republican friend, Governor Hovey. He died Jan. 13, 1892.

John T. Scott.

When Judge Perkins died, Governor Williams appointed John T. Scott to the vacancy. Scott was an old political and personal friend of the Governor, and it was chiefly this that brought to him the appointment. Though nominated by the Democrats, he was defeated in 1880. He was born in Glasgow, Ky., May 6, 1831. He resided awhile in Tennessee, there attending college, working at the saddlery trade, assisting in surveying a railroad; and came to Indiana in 1853, settling at Montezuma,

where he began the practice in 1856. In 1860 and 1862 he was elected district attorney, and during the latter year moved to Terre Haute, where he resided until his death, Dec. 29, 1891. In 1868 and 1872 he was elected judge of the Common Pleas Court. He was appointed judge of the Supreme Court Dec. 29, 1879, and retired Jan. 2, 1881. After his retirement from the bench he resumed the practice of the law, but in the last few years was compelled to retire by reason of his extremely poor health. He died in February of the present year.

William A. Woods.

Judge Woods is now judge of the United States Circuit Court of Appeals for the Seventh District. He was born May 16, 1837, in Marshall County, Tenn. When he was a boy, his father moved to Davis County, Iowa. In 1859 young Woods entered Wabash College, Crawfordsville, Ind., and became afterwards one of its tutors. In 1860 he moved to Marion, Ind., where he was admitted to practice, and in the following spring settled at Goshen, Ind., and there resided until his appointment as United States judge, when he moved to Indianapolis. In 1866 he was elected as a State Representative of his county, and in 1873 judge of his circuit. In 1880 he was elected judge of the Supreme Court, — taking his seat Jan. 1, 1881, succeeding Judge Biddle. Here he remained until May 8, 1883, when he resigned to accept the appointment of United States judge for the District of Indiana tendered him by President Arthur. By his experience on the *nisi prius* bench, Judge Woods came to the highest tribunal well fitted for its exacting duties. He was and now is a man of splendid physique. He is a man of originality, depending less than the ordinary judge upon precedents and the opinions of others. He is fearless, and does not hesitate to express his views when duty requires him to do so. Somewhat combative in his nature, but not offensively so, he is ever ready to meet an opponent. His independence of character and thought has occasionally led him into error, though not seriously so, in his judicial opinions. The language of his opinions is forcible, and they are totally destitute of verbiage. He goes directly to the core of the case, decides it in a few paragraphs, reasoning out the controverted question, and citing few authorities. Although he was but little over two years on the Supreme Court bench, he ranks as one of the strongest men who ever sat upon it. On the death of Justice Miller of the Federal Supreme Court, he was a strong candidate for the vacancy thus occasioned. Quite recently President Harrison appointed him one of the judges of the United States Circuit Court of Appeals for the seventh circuit.

William H. Combs.

Judge Combs was appointed Dec. 2, 1882, and served until Jan. 1, 1883, filling the vacancy occasioned by the resignation of Judge Worden. He then, as now, resided at Fort Wayne, and is nearly eighty years of age. He is a Republican. He wrote only three opinions. His birthplace was in Maine.

Allen Zollars.

Judge Zollars's birthplace is in the State of Ohio. He was born in that State in 1839, and graduated at Dennison University, Grenville, Ohio, in 1864, and in due course of time at the Law School of Michigan University. About 1866 he settled at Fort Wayne, Ind., and began the practice of law. In 1868 he was elected a member of the House of Representatives, and for six years was the city attorney of Fort Wayne. A few months before he was elected judge of the Supreme Court, he was appointed judge of the Superior Court of his home county. In 1882 he was elected on the Democratic ticket a judge of the Supreme Court, taking his seat Jan. 1, 1883. His nomination was unanimous, as it was also in 1888. In the latter year he was defeated with his ticket. He now

resides at Fort Wayne, engaged in the practice of the law. Compared with his brother judges, his opinions are few. They are, however, of more than the usual length, and bear undoubted evidence of great research and labor. He was exhaustive in the search for and the examination of authorities; and while his opinions are able, and will rank well in this or any other State, yet Judge Zollars was restive under the restraints his office imposed upon him. He was better fitted for the profession of an advocate than that of the bench, and he desired to return to that field. It was therefore with reluctance that he consented to stand the second time for the office of judge, and his defeat did not bring to him any regret for his personal loss.

Edwin P. Hammond.

When Judge Woods resigned, Governor Porter appointed Judge Hammond, May 14, 1883, his successor; and he continued to serve until Jan. 6, 1885, having been defeated at the polls by his Democratic adversary, Joseph A. S. Mitchell. Judge Hammond is an Indianian, having been born at Brookville, Nov. 26, 1835. When he was fourteen his father moved to Columbus, Ind., and in 1854 the son went to Indianapolis as a clerk in a store. He studied law with his brother, Hon. A. A. Hammond, afterwards Governor of the State, and graduated from the law school of Asbury University, at Greencastle, Ind., in 1858. The same year he located at Rensselaer, Ind., where he still resides. In 1861 he enlisted in the volunteer service, and was commissioned first lieutenant, coming out of the service as colonel. During this time he was elected State Representative; but he stayed at the front, and finally marched with Sherman to the sea. In March, 1873, Governor Hendricks, a Democrat, appointed him judge of the thirtieth judicial circuit; and he was elected to the same position in the following October, and again in 1878, without opposition. His career on the Supreme Court bench was a surprise, for he made a better judge than his friends expected. His opinions are clear and pointed; there is no mistaking what he decides. Judge Hammond is one of the most genial and pleasant gentlemen one can meet with. In all things he is the acme of courteousness, but unostentatious, unaffected, and unassuming. He is modest and retiring, and a steadfast friend. After he retired from the bench in 1885, he resumed the practice, but was re-elected circuit judge in the fall of 1890.

Joseph A. S. Mitchell.

Judge Mitchell was born near Mercersburg, Pa., Dec. 21, 1836, and died at his home in Goshen, Ind., Dec. 12, 1890. Graduating at an academy, he studied law at Chambersburg, Pa., and was admitted to the practice in 1858; and in 1860 moved to Goshen, where he opened an office. In 1861 he enlisted in the volunteer service, and rose to the rank of captain, remaining there until January, 1865. He fought at Shiloh, Stone River, and Chickamauga, where Judge Hammond, afterwards his political adversary, commanded a regiment. After the war he resumed the practice at Goshen, and continued in it until he ascended the Supreme Court bench, Jan. 6, 1885, having unsuccessfully made the same race in 1880. At the time he ascended the bench he was one of the chief counsel of a large and important railway company, having its road in the northern part of the State. In 1879 he was a member of the American Bar Association, having for one of his associates Hon. Benjamin Harrison. In 1890 he was re-elected to the Supreme Court bench, but died shortly before the time his first term expired. "It may be written with strict truth," said the committee in presenting a memorial to the bench, "that he was a just judge; and of no man can greater praise be truthfully spoken. He possessed, in an eminent degree, the qualifications of a judge; he was upright and impartial, courteous and patient, learned and able. His morality was

of the highest type; pure things he loved, impure ones he despised. His conceptions of the principles of justice were clear, his adherence to them courageous and manful. His judgments were formed with care, and expressed with vigor. . . . His keen discrimination, his masterful analytical power, and his logical methods of thought enabled him to grasp with strength and apply with wisdom the principles of jurisprudence. His judicial opinions are of massive strength, and their language is clear and forcible."

On the death of Chief-Justice Waite, his name was urged as a candidate for the vacancy thus caused on the Federal bench.

John G. Berkshire.

John G. Berkshire was born at Millersburgh, Ky., Nov. 12, 1832, and died Feb. 19, 1891. At the early age of ten years he began the trade of blacksmith, in the shop with his father. His early education was wholly confined to the common schools of the State. He graduated from the law school of Asbury University, Greencastle, Ind., in 1857, and opened an office at Versailles, Ind.; Rising Sun, Ind., having formerly been his home. In 1864 he was elected circuit judge, and twice re-elected, in 1870 and in 1876. In 1882 he was nominated for the office of judge of the Supreme Court, but was defeated at the polls with his party; in 1888, by acclamation, he was again nominated for the same high office, and elected, taking his seat Jan. 7, 1889, and succeeding Judge Howk. His death was largely superinduced by overwork, rendering him an easy prey to a severe cold, which brought on a fatal fever.

The lack of an early and thorough education rendered his labors in the composition of opinions more laborious than they otherwise would have been. He was industrious to a fault, and his energies knew no check. He was fearless in the expression of his views, and assiduous in research for authorities. His language was never equivocal, and he went straight to the point at issue. He sought to put his opinions on some well-founded and established principles of law, rather than to follow a case on account of its having some elements of similarity with the one under consideration.

At the time of his death his home was North Vernon, where he had resided several years. Few men had more personal or truer friends. His personal popularity was unusually strong.

Byron K. Elliott.

The exceptional opportunities enjoyed by Judge Elliott before he ascended the bench of the highest tribunal of his State well fitted him for that exalted position. He began the practice in the capital of his State, then a rapidly growing and now a large city, — the largest in the State, — of which he was for many years city attorney. His practice was such as a large city brings to a successful and general practitioner. His experience on both the criminal and *nisi prius* bench was of great advantage to him.

He possesses an unusual command of language, that in early manhood threatened to overwhelm him with its exuberance, and which he happily corrected by the reading of authors of strict and severe expression, such as Aristotle, Locke, and Kant. He has that happy faculty, deemed so valuable in the legal profession, of stating a proposition two or three times in the same connection, yet in language so different each time that he cannot be charged with redundancy. This is a rare gift, and its right use is highly prized by the lawyer who is so happy as to discover a controverted or rare question thus discussed. His memory of cases reported, and the principles enunciated in the opinions, is remarkable, often citing them from memory alone. From this fact he derives great aid, and by his untiring energy and perseverance disposes of an amount of work that is a continual surprise to his oldest friends.

His opinions contain not only many, but a wealth of citations that entail upon him great labor. They are free of long extracts

taken from the record, and in the very opening he often proceeds to the discussion of a controverted proposition without a preliminary statement.

He was born Sept. 4, 1835, in Butler County, Ohio, near Hamilton. He attended the Hamilton Academy, Furman's Seminary, and a school taught by Prof. F. M. Slack, a noted teacher of his day, and had as a classmate W. D. Howells. In December, 1850, his father moved to the capital of Indiana. Judge Elliott attended the "Old Seminary," and began to read law early. In May, 1859, he was elected city attorney. During the War of the Rebellion he enlisted in the 132d Indiana Volunteers, and was made a captain, but served much of the time as an aide to General Milroy. In 1865, 1867, and 1869 he was unanimously elected by the Common Council city attorney of Indianapolis. In October, 1870, without opposition, he was elected judge of the criminal Court of Marion County; but being unanimously requested by the City Council to accept the office of city attorney, he resigned in November, 1872, in order to comply with their request, being unanimously re-elected in May, 1873. In 1876 he was elected a judge of the Superior Court, was renominated in 1880, but after having accepted the nomination declined it in order to accept the nomination as judge of the Supreme Court. He took his seat on the Supreme Court bench Jan. 3, 1881, and was re-elected in 1886 for a second term.

Aside from the duties these offices placed upon him, he was lecturer to the law class of Butler University, of Central Law School (both at Indianapolis), and is now a lecturer in the law department of De Pauw University, located at Greencastle, Ind., and of the Northwestern University, located at Chicago, Ill.

The opinions of Judge Blackford run through thirteen volumes of our reports; of Judge Worden, seventy-four; of Judge Perkins, forty; and of Judge Elliott, sixty; but, unless it be Blackford, Judge Elliott has prepared more opinions disposing of cases than any judge who ever sat upon the Supreme Court bench of this State. He has been upon the bench a little over eleven years. It is beyond possibility to enumerate in this short paper the many opinions of importance that have been prepared by him; and to enumerate any as important is almost inevitably to omit others of greater importance. Perhaps as important a case as has fallen to the lot of a judge to decide was Sanders *v.* The State (85 Ind. 318), involving the power of the courts as to-day constituted to issue a writ of *coram nobis* in a criminal case. There are but few cases on record where this has been done, and but one case at that time in America. Sanders had been sent to the penitentiary for life upon a plea of guilty extorted by mob violence, as he alleged. He, after several years, applied for a new trial, on the ground that his plea of guilty was extorted from him; and the Supreme Court held that he was entitled to it. Goodwin *v.* The State (96 Ind. 550) is a very important criminal case, and shows the manner in which Judge Elliott sought to brush aside the technicalities that had so hedged around the court as to prevent the certain administration of justice in this class of cases. Archer *v.* The State (106 Ind. 426) involves the validity of a statute designating the place of trial when the blow is struck in one county and death results in another.

Little *v.* The State, 90 Ind. 338, is an excellent illustration of the powers of a court to protect itself and punish contempt regardless of any statute authorizing it to do so. This case, taken in connection with Ex parte Griffiths, 118 Ind. 83, and The State *v.* Noble, 118 Ind. 350, are fine examples of judicial reasoning in asserting the independence of the judiciary and its freedom from legislative control. In The State *v.* Berdetta, 73 Ind. 185, was decided that the stand of a peanut-vender standing in the street was an obstruction, and that the court itself would so decide without submitting the question to a jury. The City of North Vernon *v.* Voegler.

103 Ind. 314, involved the right to recover for damages sustained from an unforeseen cause after a right of way had been condemned and paid for. The discussion in this case is peculiarly satisfactory, and the writer does not hesitate to controvert the soundness of some recent English decisions of the Queen's Bench. Another principle enforced in this case, and in that of Sims *v.* The City of Frankfort, 79 Ind. 446, was that a municipality is not liable for mere error in judgment, but is responsible for negligence in devising the plan of a public improvement. The illustration used in this opinion — of the plan of covering a sewer with weeds — has been used by several courts, and at least by two writers of wide reputation. Binford *v.* Johnston, 82 Ind. 426, was another case of negligence of a toy-vender in selling a toy-pistol to a child, with which pistol a second child was accidentally shot by letting it fall when loaded upon the floor. The vendor was held liable.

In Billman *v.* The Indianapolis, etc. Co., 76 Ind. 166, the right to recover for damages sustained by reason of negligence occasioned by an intervening agency is discussed in a very satisfactory manner; and this is followed in the recent case of Louisville, etc. R. R. Co. *v.* Nitsche, 126 Ind. 229. The decisions of the court while he has been on the bench have been very numerous, and a practitioner in that State has very little need of going beyond these decisions for an authority. The Midland Ry. Co. *v.* Wilcox, 122 Ind. 84, and Farmers' Loan and Trust Co. *v.* The Canada etc. Co., 127 Ind. 250, involved difficult questions concerning the enforcement of a mechanic's lien against a railroad, questions of first impression in this State. In Carr *v.* Coetlosquet, 127 Ind. 204, is discussed at great length the obligation of a State, and the power to enforce it to pay its obligations. In The State *v.* The Indiana, etc. Co., 120 Ind. 575, it is decided for the first time that natural gas is an article of commerce, and that its transportation beyond the boundaries of the State cannot be prohibited by statute. The case of The Rushville, etc. Co. *v.* The City of Rushville, 121 Ind. 206, was decided a short time after the majority in the Federal House of Representatives was insisting upon the right to count as present, in order to make a quorum, those present who refused to vote and did not answer the roll call. It announced the principle contended for by the majority, and attracted wide attention at that time. The case of The State *v.* Haworth, 122 Ind. 462, involved the constitutionality of a law authorizing the State to superintend the supply of school-books, to let out the contract of furnishing them to private individuals, and forbidding the use of any other in the public schools of the State. It presented many difficult questions, but was upheld in an able opinion.

Judge Elliott and his only son are the joint authors of "The Work of the Advocate," published in 1888, a practical treatise containing suggestions for preparation and trial. They are also the joint authors of "Roads and Streets," published in 1890. Both these works have had a very wide sale. During the present year Judge Elliott and his son have published a large work on Appellate Procedure, a work of great value to the profession. His address, in August, 1890, before the National Bar Association, on "Local Self-Government," attracted wide attention.

Walter Olds.

The subject of this sketch was born in Morrow County, Ohio, Aug. 11, 1846. While attending the common-schools of his county, he enlisted in the One hundred and seventy-fourth Ohio Volunteers. After his return from the army he attended college until 1867, and then studied law until 1869, when he was admitted to the bar and moved to Columbia City, Ind. He continued there in the practice, and in 1876 was elected State Senator, serving during the sessions of 1877 and 1879. In 1884 he was elected judge of the Circuit Court, overcoming a decided adverse political majority. In 1888, over two years

before his office as circuit judge had expired, he was nominated by the Republican State Convention for the office of judge of the Supreme Court and elected, taking his seat Jan. 7, 1889, succeeding Judge Zollars. He thus came to a seat on the highest court of his State before he was forty-two years of age. In the four years that Judge Olds has been upon the Supreme Court bench he has shown great industry, having prepared the opinions disposing of a large number of cases. It is impossible to give a complete list of anything near the number of cases he has written upon; but the following may be taken as fair examples of many others that could be cited: —

Enyeart *v.* Kepler, 118 Ind. 34, on estates by entireties; The Central Union Telephone Co. *v.* Falley, 118 Ind. 194, holding that telephone companies are common carriers of news; The Louisville & Nashville R. R. Co. *v.* Crunk, 119 Ind. 542, duty of a common carrier to a sick passenger; Moon *v.* Jennings, 119 Ind. 130, right of a tenant in common paying off lien on property held by them as such tenants; Holland *v.* Bartch, 120 Ind. 46, liability of the propeller of a bicycle for negligence in its use; Stoner *v.* Rice, 121 Ind. 51, right of owner of land bordering on a non-navigable lake; Rahm *v.* Deig, 121 Ind. 283, measure of damages as to profits on sale of a merchantable article; State *v.* Peele, 121 Ind. 495, on the power of the legislature to elect to an office; Rogers *v.* The Phenix Insurance Co., 121 Ind. 570, on fraud in procuring insurance; Culver *v.* Marks, 122 Ind. 554, on bank checks; Pennsylvania Co. *v.* Marion, 123 Ind. 415, on negligence of a common carrier of passengers; The Continental Insurance Co. *v.* Dorman, 125 Ind. 189, on waiver of forfeiture of an insurance policy; McClure *v.* Raben, 125 Ind. 139, on an heir's sale of his expectancy; Penso *v.* McCormick, 125 Ind. 116, on negligence in leaving an exposed pit uncovered; The State *v.* Hirsch, 125 Ind. 207, on what is a "primary election" as used in a statute forbidding the sale of liquor on a day when such an election is held; Morris *v.* Powell, 125 Ind. 281, on the validity of a statute requiring the registration of a certain class of electors; Jackson *v.* The City National Bank, 125 Ind. 347, on "options;" Anderson *v.* Anderson, 126 Ind. 62, on delivery of a deed; Watts *v.* Sweeney, 127 Ind. 116, on priority of a mechanics' lien for repairing an article after a chattel mortgage had been placed on it; Adams *v.* Bicknell, 126 Ind. 210, on malicious prosecution; The State *v.* Gramelspacker, 126 Ind. 398, on judicial notice. Chambers *v.* The State, 127 Ind. 365, on what constitutes a lucrative office; Gammon Theological Seminary *v.* Robbins, 128 Ind. 85, on gifts *causa mortis;* The Ohio and Mississippi Ry. Co. *v.* Pearcy, 128 Ind. 197, on liability of master to servant for negligence; Small *v.* The City of Lawrence, 128 Ind. 231, on double taxation of bank stock; The Louisville, New Albany, & Chicago R. R. Co. *v.* Wolfe, 128 Ind. 347, ejectment of passenger for using profane language when the conductor has unnecessarily provoked him; Plank *v.* Jackson, 128 Ind. 424, on "options;" The Terre Haute & Indianapolis R. R. Co. *v.* Brunker, 128 Ind. 542, on liability of railroad for injury to traveller at crossing; Downing *v.* The Indiana State Board of Agriculture, 28 N E. Rep. 123, on unconstitutionality of a law reorganizing a *quasi* public corporation, and State *ex rel.* Holt *v.* Denny, 118 Ind. 447, on the validity of a statute defining a city of local self-government.

Judge Olds possesses a firmness and manliness of character, combined with a genial nature, that makes him friends wherever he goes, no better evidence of which could be given than his rapid elevation to the highest judicial position his State can give him.

Silas D. Coffey.

In Silas D. Coffey the State has a self-made man. He is a native of the State, his birthplace being Owen County, and the date, Feb. 23, 1839. He was a farmer's boy, and after receiving a common-school education he entered the State University in 1860, but

remained only a few months, responding to the first call for volunteers for the War of the Rebellion. He served in the active service until June, 1863, when he was transferred to the Veteran Reserve Corps, serving in it until his term expired in the following year. While in the army a copy of Blackstone was a part of his outfit. On his return he resumed his reading, and soon entered on the practice at Bowling Green, the county-seat of Clay County. In 1866 he was an unsuccessful Republican candidate for prosecuting attorney. In 1882 he was a successful candidate for the office of circuit judge in a Democratic circuit, having been previously appointed, in 1881, by Governor Porter, to a vacancy occurring in that office.

In 1888 he was elected judge of the Supreme Court, taking his seat Jan. 7, 1889, and succeeding Judge Niblack. He came to the bench when the court's docket was crowded, and cheerfully took up the burden his position imposed. The court was soon involved in controverted constitutional questions which imposed great labor upon the judges.

The opinions delivered by Judge Coffey are usually short, and contain the citations of comparatively few authorities ; but nevertheless they are clear and distinct, the propositions involved being stated with perspicuity and decided force. Upon the whole, these opinions are shorter than those of any judge who has sat upon the bench within the last twenty years, excepting those of Judge Biddle. His first most considerable opinion was delivered in a murder case, Grubb *v.* The State (117 Ind. 277). In The State *v.* Denny (118 Ind. 382) he upheld the right of local self-government secured to a municipality by the provisions of the Constitution, and held a statute wherein the legislature had attempted to deprive them of that right, void. The State *v.* Blend (121 Ind. 514) was a similar decision ; while in a case of the same name (121 Ind. 514) the right of the State to take charge of the police force of a city was asserted. In The State *v.* Gorby (122 Ind. 17) the power of the legislature to take away from the chief executive of a State the right to fill a vacancy in an office by appointment was denied. The Barber Asphalt Paving Co. *v.* Edgerton (125 Ind. 455) involved the validity of a statute for the improvement of streets, and the issuing of bonds to run a long period of years, and making them a lien upon the property assessed. This statute was upheld. Renihan *v.* Wright (125 Ind. 536) presented a difficult question as to the right to recover damages from an undertaker for the losing of a body of the plaintiff's child. Welsh *v.* The State (126 Ind. 71), involving the unlawful sale of liquor upon the Ohio River, and presented difficult constitutional questions as to the boundary between this State and Kentucky. Shuman *v.* The City of Fort Wayne (127 Ind. 109) involved the right of a city to exact a license from a pawnbroker ; while The Indianapolis Cable Street Railway Co. *v.* The Citizens' Street Railway Co. (127 Ind. 369) presented the difficult question of the right of a street railway company to occupy a street to the entire exclusion of another company. One of the recent cases in which Judge Coffey wrote the opinion was Hovey *v.* The State (127 Ind. 588), wherein it was claimed that the right of the courts to mandate the Governor of a State existed; but this was denied. Other cases of importance are Gilson *v.* The Board, etc. (128 Ind. 65), on constitutional law ; Mann *v.* The Belt R. R. Co. (128 Ind. 138), on negligence ; The Board of Commissioners of Fountain County *v.* The Board of Commissioners of Warren County (128 Ind. 295), on the power of one county to compel an adjoining county to pay its proportion of the cost of building a bridge over a stream forming the boundary between them ; and The Western, etc. *v.* The Citizens' Street Railway Co. (128 Ind. 525), involving the power of a city to compel a street railway company to pave that part of the street occupied by it with its tracks.

Perhaps Judge Coffey's usefulness in the consultation room is as much felt as any-

where else; very few judges that have ever sat upon the Supreme Court bench have, in this particular, excelled him.

Robert W. McBride.

On the death of Judge Mitchell, Judge McBride was appointed, Dec. 17, 1890, to the vacancy thus created on the Supreme Court bench. He was born Jan. 25, 1842, in Richland County, Ohio. His education was principally obtained in the common schools of Ohia and Iowa, but has been supplemented by constant study through his entire life. In 1863 he enlisted in the volunteer service, in Ohio. His company was composed of picked men, and the design was to make it a body-guard of President Lincoln; but it was for a while assigned to other duty on reaching Washington. Being permanently injured so as to unfit him for active duty, he was, in January, 1865, transferred to the War Department at Washington, where he served until September, 1865. In 1867 he was admitted to the bar at Auburn, Ind. He had excellent success at the bar. He resided at Waterloo from 1866 to June, 1890, when he settled at Elkhart. In 1882 he was elected circuit judge. In 1890 he was nominated by the Republican party for the office of judge of the Supreme Court, but was defeated with his party.

Judge McBride is a hard student. His studies are not confined to the law. He has been but one year on the bench, and necessarily has not written up many important cases. In number, however, he will hold his own with those who have been longer on the bench. Among many important cases in which he has prepared the opinions, The City of Frankfort *v.* State (128 Ind. 438), involving a novel question in street improvement assessments, may be noted. So may be noted The State *v.* Wolever (127 Ind. 306), involving a collateral attack upon the judgment of the court of inferior jurisdiction; and Goodbub *v.* Hormung (127 Ind. 181), concerning mechanics' liens; The City of Crawfordsville *v.* Braden (28 N. E. Rep. 849), concerning the right of a city to supply private consumers with electric lights; The City of Rushville *v.* Rushville Natural Gas Co. (28 N. E. Rep. 853), concerning the right of a city to regulate the price of natural gas supplied its citizens; and The First National Bank *v.* Sarlls (28 N. E. Rep. 434), concerning the right and power of a city to remove a dangerous wooden building.

John D. Miller.

The vacancy occasioned by the death of Judge Berkshire was filled by the appointment, Feb. 25, 1891, of John D. Miller, who was born in Decatur County, Ind., Dec. 2, 1840. He attended Hanover College, near Madison, Ind., but in his junior year, in September, 1861, enlisted in the Seventh Indiana Volunteers, and remained there for over three years. The Seventh was one of the regiments that saw hard service, and was at the front in many a hard-fought battle.

After his return from the war he read law and located at Greensburgh, the county-seat of his native county, and began the practice of the law. In 1872 he was elected State Representative, and since then he has held several local offices.

Judge Miller has been, at this writing, less than a year on the bench, during which time a vacation of nearly three months intervened. Consequently his opinions are not many. As a rule they are short. His style is clear and nervous, and he cites but few authorities. As examples of his writings we cite: Davis *v.* Fasig, 128 Ind. 271, concerning the validity of a city ordinance requiring saloons during certain named hours of the day and night to close their doors and exclude the public; Sumner *v.* Darnell, 128 Ind. 38, on the effect of a donation of land to secure the location of a county-seat; Baltes *v.* The Bass Foundry and Machine Works, 28 N. E. Rep. 319, on the validity of an arbitration of a disputed claim; and The City of Richmond *v.* Dudley (28 N. E. Rep. 312), on the storage of oils within city limits.

CHANCELLOR WILLARD SAULSBURY.

HON. WILLARD SAULSBURY, Chancellor of the State of Delaware, died at his home in Dover on April 6, 1892. His sudden death, the cause of which was apoplexy, was a great shock to the people of that State, in the affairs of which for nearly fifty years he had been prominent.

He was born in Misspillion Hundred, in the southwestern part of Kent County, Delaware, near the Maryland State line, on June 2, 1820. William Saulsbury, his father, was a man of strong character, sterling worth, and commanding influence in the community where he lived. His mother, Margaret Saulsbury, was a daughter of Captain Thomas Smith. She was a most exemplary woman and possessed great mental power, a marked characteristic of her distinguished son, two of whose brothers, the late Dr. Gove Saulsbury, Governor of Delaware, and Hon. Eli Saulsbury, a senator in Congress of the United States from 1871 to 1889, also attained national reputation.

The Saulsbury family is of Welsh descent, having come to this country in the seventeenth century, since which time they have held lands in Dorchester County, Maryland, a part of which, including the farm upon which Willard Saulsbury was born, and which had been held by the family since the settlement of the county, was on the adjustment of lines between the States awarded to Delaware. Though land-owners in Maryland and Delaware for about two centuries, and though some of them held offices of local honor and importance in both States, no member of the family seems to have attained more than local distinction until Willard Saulsbury, the youngest of the three brothers Gove, Eli, and Willard, who have been called the "Saulsbury Triumvirate" of Delaware, by his eloquence, his absolute fearlessness, and his devotion to what he believed to be the right of the causes he espoused, began to win the hearts of the people to him, and to achieve those successes, professional and political, which made him in his State second to none of her gifted sons whom she has delighted to honor, and in the broader forum of the Senate of the United States in the most stupendous crisis of our nation's life the peer of any with whom he came in contact.

Willard Saulsbury was a bright lad, fond of books, and about the age of thirteen was sent to school at an Academy at Denton, Md., near his home. After completing his academic education at Delaware College and Dickinson College, he began the study of the law with Hon. James L. Bartol of Denton, afterward Chief-Justice of Maryland. He completed his legal course under the direction of Hon. Martin W. Bates, afterwards United States Senator and then one of the Democratic leaders in Delaware, at Dover, where he was admitted to the bar in 1845.

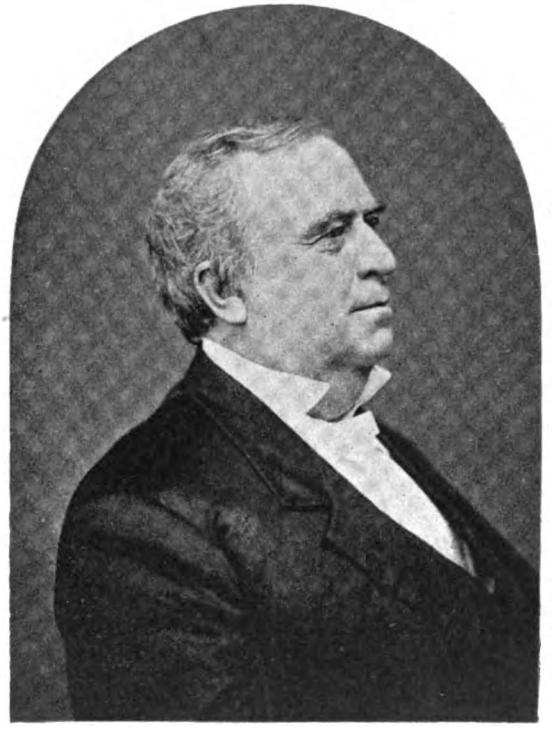
He had seriously considered at one time the advisability of "going West;" but a remark of his mother, whose youngest son he was and who wished to keep him near her, that she "would be ashamed of any son who could not make his living in his native State," drove such thoughts from his mind.

He was a hard student, but intensely fond of mixing with the people, and during his law course, with characteristic industry and energy, he taught school in Dover, thus doubtless gaining, like so many other men of mark, a practical knowledge of the character of others, and a coolness of judgment and capacity for self-control that was of great use to him in after life.

Immediately after his admission to the bar he removed to Georgetown in Sussex County, opened an office, and began the practice of his chosen profession. His genial nature and popular manners soon won him hosts of friends; and his legal knowledge

and persuasive eloquence, coupled with strict integrity and attention to business, soon brought him scores of clients; and with him a client once was a client always. His success was assured from the start, and it was not long before he stood in the very front rank of his profession; thenceforth until his election to the Senate and his necessary absence at Washington, scarcely a case of importance was tried in Sussex County in which he was not of counsel.

When twenty-nine years of age, in 1850, Governor Tharp appointed him Attorney-General. His competitor for this office was the Hon. James A. Bayard, whose friends were greatly disappointed at his failure to secure it, and took no pains to conceal their chagrin, and to predict the failure of the young Attorney-General to measure up to the high standard of excellence required of one filling the position. But the doubters did not know the man. The new Attorney-General was equal to every demand; and not only justified the confidence of his friends, but won the esteem and respect of his former opponents. During this official term some of the most important cases in the legal history of the State were tried, and in all of them he maintained his high character for legal ability, strict integrity, and close attention to his official duties.



WILLARD SAULSBURY.

With juries his success was truly phenomenal. The cases in the two lower counties of Delaware, Kent and Sussex, which always excited the greatest public attention and seemed to be of the greatest public importance were the trials of those charged with capital felonies; and these were not a few. None in Sussex and few in Kent were tried when Willard Saulsbury was in active practice and not acting as Attorney-General, where he did not represent the accused. Never but in a single case was his client convicted as charged in the indictment. Mr. Saulsbury once said that this was his only case when the Chief-Justice who presided, and was an old prosecuting officer, was with him for acquittal.

The same success distinguished his administration of the office of Attorney-General as his private practice. Yet it was all deserved. He was a hard student and an omnivorous reader; added to his learning were those natural gifts which all tend to make a man succeed, and are necessary to the highest success.

His was a splendid personality, — a man six feet in height, perfectly proportioned, hair of raven blackness, eyes tender and impassioned or stern and flashing, laughing with infecting pleasure or veiled in tears as the theme of his eloquence demanded, and within him as kind and true a heart as ever beat, forbidding him to wrong the humblest of God's creatures. His last audible words enjoined his surviving son never to do a wrong to any one, and a few moments thereafter he breathed his last. Can it be wondered he acquired a power over men by whom he was surrounded? A clipping from

a newspaper published in his State, the "Lewes Pilot," refers to this as follows: —

"Delaware has always been proud of her public men, and it would be difficult to name one who has justified and called forth that pride more than the man to whom the last of earth's honors will be paid this afternoon at Dover. Attorney-General, Senator, Chancellor, — how she loved to shower her gifts upon him, and how well did he repay her for all she gave him! At the bar, in the Senate, on the bench, it was the same, — new lustre added to the brightness of the fame of this little State. Delaware was proud of him, but here in Sussex it was something more than pride. To the younger generation the hold that Willard Saulsbury had upon the hearts of the men of Sussex during the time of his active public career is something incomprehensible. It was a personal loyalty that is absolutely non-existent at the present day. There are gray-haired men in Sussex whose voices quiver and whose eyes glisten with the enthusiasm of boyhood as they talk to you of Willard Saulsbury. It was here that he entered upon his profession, and it was here that his earliest triumphs were achieved. And he never forgot old Sussex. To the day of his death his thoughts turned kindly to the honest, faithful hearts that had never failed him. And so at Dover among the throng that gathered there to pay the last sad tribute to the dead Chancellor, there were no sincerer mourners than the old men of Sussex who honored and loved him in his life, and who will tenderly cherish his memory."

For twelve years, from 1859 to 1871, he represented his native State in the National Senate, and there maintained his great reputation for learning, eloquence, and statesmanship which he had acquired at home. Though overborne by the weight of numbers of the opposition; though during those times of the greatest excitement this country has ever witnessed, he was often threatened with personal violence for the absolute fearlessness with which he opposed many of the popular measures of the war, — he never hesitated to combat those radical measures which he believed subversive of the Federal Constitution. His bold and eloquent speech against the suspension of the Habeas Corpus was delivered against the protests of his friends, who believed his life would be imperilled thereby, and against the earnest objections of his colleague. The slightest element of personal fear was unknown to him. Though always a stanch supporter of the Union, his political opinions as to methods were opposed to those in power at the time.

One of his greatest writings was an open letter to the people of his State, published about the time of the beginning of the war, in which he declared that Delaware, the first State to ratify the Constitution, should be the last to do aught to cause the dissolution of the Union; but if, alas! the Union should be destroyed and the federal compact broken, he declared his firm conviction to be that she should never again enter into a compact to which either South Carolina or New England should be parties unless the whole Union should again be indissolubly restored. When files of soldiers were stationed at each polling-place in his native State, he was as courageously outspoken as in time of peace. In the greatest forum of the time he proved himself in statesmanship, learning, eloquence, and courage the peer of any who dared combat him.

Being one of a helpless and almost hopeless minority in the Senate, he directed his efforts chiefly to ameliorating the hard conditions imposed upon the States and people in rebellion; and the following graceful and touching tribute clipped from the Charlotte (N. C.) "Observer" shows that the people of the South still cherish his memory in grateful recollection: —

"The recent death of Hon. Willard Saulsbury, ex-United States Senator for the State of Delaware, has received that notice for an hour or a day which the busy world accords to the passing away of a man conspicuous in life and illustrious in public service. But we of the South think of him as something more than the broad statesman and wise lawgiver whom the people of his State delighted to honor, and to whom they proffered their choicest gifts. There are men among us —

with most of their lives behind them, and waiting for the end which gently came to him the other day — who tell their sons, with full heart and suffused eye, what manner of man Willard Saulsbury was.

"His dust is gathered to his native soil; but may not we, too, lay tributes on his tomb, — we, in whose behalf he raised his voice when we were 'passing under the yoke'? . . .

"We shall remember him; and to his courage, his magnanimity, and his nobility of nature we shall offer the homage always due to honesty and virtue in public life.

"Be noble, and the nobleness in you
That sleepeth, but is never dead,
Will wake to majesty the nobleness in other men."

Idolized, almost, by his friends, who often besought him not to incur the dangers he cared not to consider; maligned by foes who feared his opposition during the stormy times of war and reconstruction, — he held fast to his firm belief in the efficacy and sanctity of our Federal Constitution, and never hesitated to raise his voice in defence of his convictions, in favor of what he thought to be the right, and against all unconstitutional usurpations of overwhelming force and power.

He is said to have been the handsomest man in the Senate during the twelve years he was a member of that body, and in mental calibre he was unsurpassed.

In 1871 he practically retired from political life, and after a brief period of the practice of his profession, during which he showed his old-time fire and energy and won one of the important cases of his life, he was made Chancellor.

Surrounded by his books, his life was thenceforth spent in peace and quiet in greatest contrast to the stormy scenes of his political career.

For more than eighteen years in the highest judicial position of his State he held the scales of justice with an even hand. As Chancellor of Delaware, some of the most important questions ever raised in the State came before him; and in the adjudication and determination of all questions presented to him he took a strong and comprehensive grasp of the facts and the legal principles applicable thereto, and allowed no artificial technicalities, "the husk about the kernel of the cause," to hinder or confuse the right determination of a case; and though infirm in body, his bright intellect remained undimmed until his death.

Willard Saulsbury and Anna Ponder were married May 11, 1850. For forty-two years she was the loving and devoted wife, a true helpmeet in every sense and in the fullest meaning of the word. In sunshine or in rain, in sickness or in health, in joy or in sorrow, she was ever at his side to assist, to counsel, encourage, and cherish her honorable and revered husband. It was said by a friend who knew them well, and who was not given to flattery, "that of the many gifts of a gracious Providence to the late Chancellor, the richest and best was his good wife."

His wife and one son, Willard, a prominent member of the Wilmington Bar, survive him; a daughter, Margaret, having predeceased him at the age of nineteen years, and his eldest son, John Ponder Saulsbury, having died while Secretary of State for Delaware, about three years prior to his father.

MOTHER HUBBARD'S DOG.

By Irving Browne.

[*When a man kills a dog that nightly disturbs his family by howling and fighting with other dogs around his house, the justifiability of the act is a question for the jury.* — Hubbard *v.* Preston (Vermont Sup. Ct.)]

DIANA'S orb was up in majesty,
Shining on divers places of the earth
(One might say sundry, but I let that pass),
Including Bagg Street, city of Detroit,
Sleeping upon the silver stream St. Clair.
It seemed that all the dogs, excepting that
Pertaining to Endymion, steeped in love
Of that high shining huntress, were awake
And full of riot; gathered round the house
Of Ellery D. Preston, Esq.,
Who kept no dog himself, but whose front lawn
They chose for their convention, just as men
Prefer this town or that for purposes
Political, wherein to hold their rows.
Night after night they barked and howled and fought,
And so to speak, they cursed, and made the night
Hideous with tumult, scaring Mrs. P.,
And all the little P.'s tucked in their pods.
In vain had Preston gone to the police
And made complaint, and asked them to abate
The nuisance; they just glared at him and said,
"'T is not within our province to arrest
Disturbers of the night unless they go
Upon two legs; poison or powder 's cheap."
And so much-suffering Preston gat him thence;
And when they next did congregate, he drave
Them twice away, but they returned, and then,
Vexed in his spirit, he discharged at them
A pistol, aimed at no particular dog,
But which did take effect upon a cur
Owned by a woman, Carrie Hubbard named
(But whether she was "Mother" in the tale
Sung in our infant ears by nurses fond,

The record makes no note, but anyhow
Her "dog was dead"), and she sued Preston straight,
And speedily recovered damages
Twenty-five dollars, for the court did hold
He had no privilege the beast to slay.
But on appeal this doctrine was reversed,
And 'twas adjudged a question for the twelve
To pronounce the act or necessary
Or unreasonable; other courts have held
"'T were mockery the party to refer
To remedy by action, impotent
And dilatory far beyond the press
Of such an exigency."[1] I suppose
That Preston was not reasonably bound
To catch the dogs and give them chloroform,
But their quietus might with bullet make,
Or throw them bread spread o'er with arsenic,
Or any other mode adopt to rid
His house effectually of such a pest.
In dealing with such things the courts should not
Stick in the bark.

HUMOR OF THE BENCH.

By Clark Bell, Esq., *of the New York Bar.*

JUDGE GEO. THACHER, of the Supreme Bench of Massachusetts, had a high reputation for humor; and Mr. Willis, author of "Law Courts and Lawyers of Maine," relates this anecdote of him: —

"I recollect being in court when Judge Thacher interrupted a lawyer who was earnestly pressing a point: 'You need not argue that point, sir; for to my mind it has no more weight than the lightest feather upon a bumble-bee's wing.'"

The same author, describing Judge Thacher's peculiar manner of charging the jury on trials, says: "He would dissect and analyze the case, and so mix up the facts that the jury were perplexed to know the views of the court concerning them;" and adds that Mr. Orr thus characterized this judge's peculiarity: "Thacher would take his fish and make it chowder, and then turn the chowder back again into a fish."

A good story is told by the same writer of the venerable Judge Strong, who presided at a trial where Mr. Thacher, then at the bar, was pitted against the Attorney-General.

There was considerable excitement; and

[1] Brill *v.* Flagler, 23 Wend. 354.

the Attorney-General, addressing Mr. Thacher, said, "You are no gentleman."

Thacher arose and said, "Well, now, Mr. Attorney-General, I admit that I am no gentleman, — I am no gentleman."

Judge Strong interposed, with a peculiar arch manner, and said, "Well, gentlemen, I think you need not go to the jury on that question."

Judge Paine, of Maine, was trying a cause where Daniel Davis, one of the ablest lawyers of Maine in Revolutionary times, represented a mother who prosecuted a school-teacher for flogging her son, and Mr. Mellen, afterwards upon the bench, the defendant.

Bradbury, one of the judges, suggested "that there should be more proof of the offence on the part of the boy."

Mellen said: "If a schoolmaster was obliged to hunt up evidence among his pupils to justify his manner of governing a school, he would be placed in a more difficult position than any officer of the government."

Davis answered: "Brother Mellen was probably educated in the school of one Tyrannus."

"Well," says Judge Paine, "he was a good master, was n't he?" (Willis's "Law Courts and Lawyers of Maine.")

Daniel Davis and Judge Thacher were boys together at Barnstable, when the battle of Bunker Hill was fought. They joined the militia company as escort that marched next day towards Boston. The company was ordered back. The boys, foot-weary and tired, mounted an old horse they found in the road without bridle, and rode him several miles on the retreat, and then abandoned him in the highway. Years after, Davis as Solicitor-General was prosecuting a horse-thief before Judge Thacher in Kennebec County. In the course of the trial Thacher leaned over and said to Davis, in an undertone, "Davis, this reminds me of the horse you and I stole together in Barnstable." (Ibid.)

Perhaps one of the most eloquent and distinguished lawyers of Maine at the close of the Revolutionary War was William Symmes of Portland.

He was arguing a motion one day before Judge Thacher, and persisted, though constantly interrupted by the court.

Thacher grew impatient, and said, "Mr. Symmes, you need not persist in arguing the point; for I am not a court of errors, and cannot give a final judgment."

"I know," answered Symmes, "that you can't give a final judgment, but as to your not being *a court of errors* I will not say."

Judge Dana quieted the fears of the servant-girl at the tavern where two lawyers who had a very sharp conflict during the day on a trial, had been lighted by her to the same chamber to pass the night. She expressed her fears that it would not be safe.

The judge said to her, "Lawyers are like two sides of a pair of shears; they do not cut one another, but only what was between."

An eminent judge, who was trying a right-of-way case in England, had before him a witness — an old farmer — who was proceeding to tell the jury that he had "knowed the path for sixty year, and my feyther tould I as he heered my grandfeyther say — "

"Stop!" said the judge; "we can't have any hearsay evidence here."

"Not?" exclaimed Father Giles. "Then how dost knaw who thy feyther was 'cept by hearsay?"

After the laughter the judge said: "In courts of law we can only be guided by what you have seen with your own eyes, nothing more or less."

"Oh, that be blowed for a tale," replied the farmer. "I ha' a bile on the back of my neck, and I never seed un; but I be ready to swear that he 's there, I do."

The author of the biographical sketch of Lord Selborne, in the September "Green Bag" of 1891, gives an anecdote of Lord

Westbury, who formerly occupied the woolsack, and was distinguished as well for his legal erudition as for his caustic tongue, who when told on the occasion of Lord Selborne's promotion that his motto was "Palma Virtuti," replied, —

"I suppose that must mean 'the palm to Palmer' [alluding to his family name, Sir Roundell Palmer]. It is very appropriate. I have always considered that his character was unredeemed by a single vice."

Lord Westbury did not have the reputation of a saint.

Lord Coke has said: "It standeth well with the gravity of our lawyers to cite verses;" so I quote from an old poet: —

"A woman having a settlement
Married a man with none;
The question was, he being dead,
If that *she* had was gone.
Quoth Sir John Pratt, 'The settlement
Suspended doth remain,
Living the husband, but him dead,
It doth revive again.'

Chorus of puisne judges.

Living the husband, but him dead,
It doth revive again."

Mr. Allen, in his sketches of the Lincoln Bar, of Maine, relates the following anecdote of Mr. Nathaniel Perley, one of the great wits of the Bar of Maine in an early day: —

When one of the four judges of the Court of Common Pleas, not remarkable for his profundity, coming late into court, observed as an apology, on taking his seat, "that he believed there was no member of the court less absent than himself," — "True," replied Perley, "and no one less present." (Maine Historical Collections, vol. vi., quoted in Willis's "Courts and Lawyers of Maine.")

Mr. F. J. Parmenter, of the Rensselaer County Bar, who is a first-class humorist, sends me the following: —

The late Judge Rosecranz, of our New York Supreme Court Fourth Judicial District (brother-in-law of the late Wm. A. Beach), was a great wag. His wit was as ready, as bright and keen as that of any man I have ever known; nor did he care much if it "carried a heart-stain away on its blade."

During the latter years of his life he was holding circuit when a cause was brought on for trial where no defence was interposed, except that of the Statute of Limitations. The action was on a promissory note for a large amount. The judge's charge was as follows: —

"Gentlemen of the jury, the only defence to the plaintiff's acknowledged claim in this action is the Statute of Limitations." Then the judge explained the statute to the jury, and added: "This is a good legal payment, gentlemen, though regarded with more satisfaction by the debtor than by the creditor, who as a general thing prefers cash; and among honest business men such payment is never pleaded. But notwithstanding this little difference of opinion between debtor and creditor, and between honest men and rogues, it is my painful duty, gentlemen, to charge you that if you believe the defendant's testimony, such payment is good in law."

Ex-Chief-Justice Noah Davis, now of our New York City Bar, was the presiding judge in the First Judicial District of the Supreme Court of New York for many years. He has a large collection of judicial jokes. He contributes the following: —

Sitting at General Term one day were Judges Davis, Brady, and Daniels. A counsellor arguing said: "Suppose I were to draw upon your honors for twenty thousand dollars."

"Your draft would be dishonored for want of funds," said Davis, P. J.

"Oh, no!" said Brady, J., "not while sitting in *Bank!*"

SHORT STUDIES IN THE EARLY COMMON LAW.

II.

By William G. Hammond.

RENTS-CHARGE.

THE careful and experienced editor of the Rolls edition of Year Books was shocked a year or two ago to find one of the sages of the fourteenth century talking about the feoffment of rents. His frank account of the effect is worth quoting: —

"The idea which naturally presented itself at first was that the reading was wrong, and must be corrected. But the more the readings were attacked, the more stubbornly they held their own; and in the end they assumed the aggressive, and carried the war into the whole field of incorporeal hereditaments." [1]

Of course he soon found that this was by no means an isolated phenomenon; that rents had long been treated as capable of seisin and disseisin and entry, as subjects of all the assizes applicable to land, and that Bracton himself had talked of rents in *demesne*.[2] He found also that rents were not the only form of incorporeal hereditaments so treated; that commons and advowsons also were considered then in the same way, as subject to livery instead of grant, etc. His discoveries were stated and discussed in the very interesting article on "Livery of Incorporeal Things," referred to in a preceding note. In concluding this, he mentions the well-known ambiguity existing in all systems of law, between the terms that express rights and those designating the objects of rights, and appears to explain the difference between this early usage of seisin, etc., and ours by the want of any real distinction between corporeal and incorporeal hereditaments.[1]

Without risking a controversy on a point rather of metaphysics than of law, I venture to suggest that it is hardly needful to destroy a distinction which has rendered such good service alike in Roman and in English law to account for this change of usage. The possession or seisin of land has always been determined more by the fact of lawful control over it than by any mere evidential fact. If our ancestors uniformly spoke of it as vested in the lord or the chargee rather than in the tenant, and consistently allowed the former all the possessory and proprietary remedies, while we have grown to consider him a mere incumbrancer or even an obligee, it is much easier and simpler to accept the change of view as an historical fact, than to make it the basis for overthrowing a well-settled classification.

In this paper, therefore, first prepared to present some dissent from the current view of the mediæval rents-charge, I have assumed that from the earliest time down to the fourteenth century, if not later, when our ancestors used all the terms of land-ownership to describe the rights of the chargee, they really regarded him as in some sense owning the land, or what would now be called the corporeal hereditament. To understand rents properly, we must remember that what we know to-day most commonly under the

[1] Livery of Incorporeal Hereditaments, by L. Owen Pike, Law Quart. Rev., v. 29–43, Jan., 1889; and see Introd. to Y. B. 14 Edw. III. p. xlvii (Rolls ed.).

[2] Fo. 263 *a*, ed. Twiss, iv. 196. Perhaps few of the younger bar now attach a meaning to this word sufficiently definite to see how much more incongruous with the conception of an incorporeal hereditament it was than even the others. But a glance at Blackstone, 2 Comm. 106, will show it.

[1] "No one can really deliver to any one else a corporeal hereditament, any more than he can deliver an incorporeal hereditament. . . . But when the words are carefully weighed, there does not appear to be any sufficient reason why they [livery of seisin] should not be used in relation to one just as much as in relation to another" (p. 43).

term is not a rent of the kind described by Blackstone as an incorporeal hereditament. When a lessee pays the owner of the fee simple or the freehold for his enjoyment of the land, — whether on a month's holding or on ninety-nine years, whether by formal contract or for use and occupation, — this rent is a mere incident to the fee, and not a distinct hereditament at all. To be such, it must be payable to some one who is *not* seized of the freehold, and to his heirs. A life-rent payable to one not owner of the freehold is to be classed, not as a hereditament, but like any other life estate in heritable property as a tenement.[1]

The *rent-service* of Blackstone is now an incorporeal hereditament, because the freehold is in the tenant who pays; but it has an analogy with the above, because both imply that the tenant derives his title from the lord.

The *rent-charge* of Blackstone is one also in the modern view, but there is no tenure between the holder of the land and the rent-owner. Each of them has an interest in the land quite independent of the other. The rent, in its purest and really simplest form of rent-charge, was not a debt due from the owner of the land, as it afterward came to be regarded. It was the ownership of a certain fixed portion of the profits of the land, purchased by the gross sum laid out in it, as an indefinite or aliquot part of those profits might be purchased by a tenant in common. The whole doctrine can hardly be understood unless this fundamental point is clearly seen.

This explains why seisin could be had of a rent (even after it was regarded as an incorporeal hereditament), and why the assizes could be brought for it, precisely as for land. It is in no sense a mere easement or appurtenance or issue or profit *à prendre*. It is a substantial property in itself, held by a title and estate quite distinct from that of the tenant who occupies the land, and is bound to see the rent paid out of it; though this tenant in turn does not depend for his title and estate on the rent-owner, who is *not* his landlord.

This double nature of rents, partaking both of corporeal and incorporeal quality, is not peculiar to English law, but is found also in the primitive Germanic law of the Continent. Albrecht[1] has discussed it fully, and shows that the object of the rent, the thing to which the right of the rent-owner attaches, is in a certain sense the land out of which the rent proceeds, and that he may be said to be seized of the land (has a *gewere* in it); his rights in their most characteristic qualities resembling those of a land-owner who has leased to a tenant for a fixed rent (p. 158). (The resemblance in the two cases is obvious; but the latter case, as already shown, would not be one of a true rent in the modern English sense of the word.) Consequently it is immovable, requires *gerichtliche auflassung* (Eng., livery of seisin) to a complete title, goes to the heir, and is even subject to the *jus retractus*. But it has also a personal element[2] (p. 167).

Before the Norman Conquest the conception of a hereditament, and of course the distinction of corporeal and incorporeal hereditaments, was unknown, though the same deed often conveyed land and rights in other land together, — commons of pasture, in woods, etc. Land as well as easements might be appurtenant to other land; that is, the subsequent technical doctrine of appurtenances was as yet unthought of.

In C. D. 1041, v. 88, Ethelwolf of Kent (A. D. 832) grants both kinds of property and (*inter alia*) a villa in Canterbury, to which pertain five jugera of land and two meadows (*prata*), one in Sheltorye and the other in

[1] "Rents-charge, though not strictly the subject of common-law tenure, are so closely connected with things that are that they are admitted to the privileges of the Statute de Donis." H. W. Challis, in 6 L. Q. R. 69.

[1] Gewere, § 18 (Rentekauf), pp. 157, etc.

[2] On this personal element in rent-service and rent-charge, and the nature of rent as an incorporeal hereditament, see Duncker's essay, "Reallasten durch Vertrag," in "Zeitschrift fur deutsches Recht," xi. 450–491.

Taningtune, and a common of wood. Other examples of the kind are plentiful.

Even in that period we have evidence of transactions much resembling the later grants of rent-charge, except as to the incidents peculiar to the later law. Thus, in Alfred's reign or soon after, Bishop Werfrith compromised a claim of his bishop-stool to land for a perpetual annual payment of fifteen shillings clean money every year to the bishop; and the other party, one Eadnoth, prays her heirs in God's name to be ever faithful and never diminish the payment. This probably was as near to a charge upon the land as could then be created.[1]

Somewhat later, in Edmund's reign, A. D. 946, there is a grant of an annual rent to Glastonbery in grain, honey, etc., which is to be doubled and tripled if left in arrear; and if unpaid for three years, the brethren are to carry the grant to the king and bishops and get possession of the land. Here we have a decided advance toward the later security for such charges, in a kind of re-entry for non-payment by special interposition of the king and bishops.[2]

In France we find rents enumerated as early as the sixth century among the possessions of the famous Queen Brunehaut, or Brunichild,[3] and other princesses, in the same line with lands, etc., leaving little doubt that rents were already regarded as of the same nature, and as what we should now call hereditaments, or real property.

In the French law the term *rente*[4] (*fonciere*) seems to have been applied only (or chiefly) to what we call rents-charge, excluding rent-service or customs payable by reason of tenure and coupled with reversion, which was termed *cens*.[1]

Glanvil's reference to rents as the objects of homage clearly ranks them with what were afterward called *corporeal* hereditaments. The text should probably be thus punctuated and read: —

"Fiunt autem homagia de terris et tenementis liberis tantummodo, de servitiis, de redditibus certis assignatis in denariis et in aliis rebus: pro solo vero dominio fieri non debent homagia alicui, excepto principe."[2]

Here, as elsewhere, the Reg. Maj. shows a better text, even where it follows the English book most closely: —

"Fiunt autem homagia de terris, *de* tenementis liberis tantummodo, de servitiis *et* redditibus assignatis, in denariis et aliis rebus. Pro solo vero dominio *non solet fieri* homagium; excepto Domino Principi."[3]

"De redditibus certis assignatis," etc. can hardly mean anything but rents-charge or seck, while "de servitiis" (as distinct from them) must be rents-service. Homage is to be done for both these, but not for a mere seignory without them (*dominio*). The reading "domino" I take to be the work of some transcriber who did not understand its use in this sense, and perhaps saw that in its correcter Roman sense for property in land homage *was* due for it; and was led by the "domino principi" following to suppose it should mean "to or for a lord."

"For free tenements *only*" doubtless excludes copyholds, etc.; the exceptions from lands (*terris*) follow in the latter part of the chapter, being dower and marriage lands, etc.

If homage was due for rents-service, we may conclude that these as well as rents-charge were then regarded as *corporeal*, objects of seisin and of feoffment. Writs of

[1] See the bishop's account of the entire transaction in Kemble, C. D. no. 327, ii. 131. Thorpe, Diplom. Ævi Sax., p. 166.

[2] Kemble, C. D. no. 406, ii. 260

[3] Cum omnibus rebus earum, cum civitatibus, agris, *redditibus*, vel cunctis titulis et omni corpore facultates, etc. Conventus apud Andelaum, A. D. 587 in Walter, C. J Germ. ii. 6.

[4] As the word came to us from the French, it perhaps illustrates that class of words so wittily described by Sir Walter Scott in "Ivanhoe." The Norman lord would apply his own term to all profits received from his Saxon tenants, without reference to distinctions as to the source from which the laborious tenant drew them.

[1] Schaffner, Gesch. d. Rechtsverfassung Frankreichs, tom. iii. p. 347.

[2] Glanv. ix. 2, pr.

[3] Reg. Maj. ii. 65, §§ 1, 2 (ed. Houard)

right to recover them were in use in Glanvil's time.[1]

Bracton was too learned a civilian to confound rents with servitudes, which cannot consist *in faciendo*, while rents were received "by the hand of" the tenant; and I believe he himself in the practical parts of his work uniformly treats rents as corporeal things; certainly as tenements.

"In this action by writ of right, as in any other action by which a *res corporalis* is demanded, the demandant must point out the thing; as, for instance, if it be a thing immovable, as a tenement, or a movable thing, as an animal, garment, &c. . . . If it is a tenement, he must show whether it is land or rent; and if rent, whether it be annual, proceeding from a tenement, or given *de camera*, as is distinguished above in the tract of *novel disseisin*." [2]

It must be owned that later in the same passage he distinguishes *corpora* and *jura*, and gives an advowson as example of the latter; [3] while in Fet Assavoir, on the other hand, *avowson d'église* is mentioned with various forms of land as objects of a writ of right founded on a claim, "de fee et *de demeyne* et de droit," no other incorporeal object being mentioned with it. The different forms of rents (including what also were distinguished as annuities) are thus described by Bracton incidentally, when pointing out the subjects of the judge's inquiries in an assize of n. d. fo. 184 *a*.

If the disseisin be of a rent, inquiry should be made whether it be (1) one *qui domino feoffatori debeatur* [rent-service due to the tenant's lord and feoffor]; or (2) *qui concedatur de aliquo tenemento annuatim percipiendus et ut tenementi feoffato* [rent-charge,[4] issuing out of a tenement, and as to the feoffee of a tenement; by which, if I understand it, Bracton means that the rent-owner is as it were a feoffee of the tenement itself, or perhaps of the rent *as* a tenement]; or (3) *de camera tantum percipiendus ad vitam vel in feodo de haeredibus sine aliquo tenemento de quo debeat provenire* [an annuity as it now would be], and in that case (4) *si detur pro aliquo tenemento, vel pro aliquo jure habendo, vel libertate in fundo alieno*, in which case it might have the freehold quality of a true rent, as Bracton has shown (c. 16, § 9, fo. 180–181 *a*). To be a freehold a rent must be held personally, and not by virtue of something to which it was attached. If the rent could be claimed only if one held the thing *cui et propter quam debetur*, as when the owner of a hundred received rents from other parties for the privilege of exemption from attendance, no assize could be brought. But there is a remarkable exception. If rent issued from one tenement payable to another in consideration of a servitude exercised by the former over the latter, and the rent-paying tenement refused to avail itself of the servitude, it could not thus get rid of the rent, and an assize lay in that case for the rent, for the want of other remedy.

When an assize n. d. was brought for rent, the jurors were to view the land out of which the rent proceeded as exactly as if the land itself were the subject of the action. They were also to view — that is, ascertain — the amount of rent, whether it consisted in money or in corn, wine, oil, etc. This is on the supposition that the rent is payable by the tenant of the land. No assize could be brought for a rent payable by another than the tenant, even though out of the profits of the land; as when the donor of the rent paid it himself out of profits received from the tenant by way of rent-service or otherwise. Such rents were not tenements, and no assize lay for them; some other action must be brought. So also when the rent was *ex camera*, not charged on land at all. All this shows very clearly the conception of the rent as a kind of estate in the land itself.[1]

This conception of a rent as distinct from a servitude or easement is clearly expressed

[1] Lib. xii. cc. 4, 5.

[2] Lib. v. tr. de Except. c. 27. § 3. Tw. VI. 406.

[3] Ubi supra, fo. 422. Tw. VI. 412.

[4] See also, for another clear distinction of rent-charge from services and customs, fo. 35. Twiss, i. 278

[1] Bracton, lib. iv. tr. 1, c. 16, §§ 5, 6, fo. 180 *a*.

by Bracton in another place. After describing the rents which *are* services or servitudes (*servitia*), reduced to certainty either in money or in things like pounds of pepper or of wax, casks of wine, gloves, etc., he adds: —

"There is, however, a certain kind of rent which is given by any one, to be received out of a certain thing, with or without the power of distraining for it, which is not called a service, but is as it were a freehold by feoffment, — *quasi ex feoffamento liberum tenementum*, — to be treated of hereafter under assize."[1]

This, it will be seen, includes rent-seck as well as rent-charge, by the words "with or *without* the power of distraining."

Indeed, there is ample proof that rent-seck shared fully what may be called the *corporeal* character of the other forms. For rent-seck, as of all other rents, one can have mordancestor, or writs of ayel or cosinage, and all other kinds of real actions (Litt. § 236). Novel disseisin would lie for it after seisin once had by receipt of rent (ib. 233), though Houard strangely enough interpolates a contrary statement in his translation of § 236. So far as the rent itself is concerned, there seems no difference between the three species. It was the reversion, the power to distrain, and the mode of creation that distinguished them.

A rent-service could be changed into a rent-charge. A lord entitled to rent and fealty from his tenant grants the rent to another with clause of distress, and tenant attorns to grantee; thereupon it becomes a rent-charge.[2] Or if he transfers without the reversion or clause of distress, it becomes a rent-seck, even though tenant may attorn.[3]

The transferee could not distrain; and even on a lease for years he could not sue in debt for the rent, not being privy to the contract.[4] Hence remedy was given him in chancery, by requiring the tenant to give seisin of the rent, after which he had the assise.[1] But by Stat. 4 Geo. II. c. 28, sec. 5, rent-seck was put on an equal footing as to distress with the others. The mere failure to pay rent or perform services, without a denial of the right to them, would not warrant an assize. The lord was bound to distrain; and if he lacked the power, then to call upon the sheriff, as representing his superior lord, to assist him.[2] According to Britton, the judges in eyre may order the sheriff to assist him in distraining.[3] If the tenant disavows the lord, the latter may bring the assize; though some say that he ought to claim the land in demesne.

The rent was so identified with the land out of which it issued, that any peculiarity of tenure in the land attached also to it. For example, if the land was partible, devisable, or in ancient demesne, the rent was of the same nature, although recently granted.[4] So of gavelkind and borough-English; though a dictum of M. 30 E. III. is quoted, that where lord mesne and tenant were in that tenure, the mesne's rent and services would be at common law, unless shown to be of the nature of the land. But the reporter adds a *quere*. Rent reserved to two parceners for equality of partition follows the nature of the estate, and there is no survivorship.[5] Upon such rent distress was of common right, although it was not rent-service, but properly rent-charge; yet it was valid without any writing.[6]

It appears to be the charge upon the land, not the person by whom the payment is to be made, in which the substance of the

[1] Lib. ii. c. 16, § 6, fo. 35 *b*.
[2] Y. B. 1 Edw. III. 21, 27, 28.
[3] Litt. §§ 228, 235.
[4] Austin *vs.* Smith, Leon. 315 (1558).

[1] Viner's Ab't Rent, C. 4; and fuller in M. 13, 3 Ch. Cas. 92; Mo. 626, pl. 859.
[2] Bracton, fo. 203. I should hardly think this worth quoting, if Twiss in the Index to vol. iii. of his edition had not stated it thus: "An assize does not lie for a rent-charge, but it is matter of distress" (333).
[3] Britton, lib. ii. c. 18, § 10.
[4] 12 Ass. 78. Brook, Rents, 13.
[5] 15 Hen. VII. 14. Brook, Rents, 8.
[6] Litt. §§ 251–253. Paston doubted that it was properly rent-charge. Brook, Rents, 6. 21 Hen. VI. 11. See Litt. §§ 217, 218, as to the usual requirement of a deed in rents-charge.

charge consists. Thus, on a grant of £20 rent out of an entire manor, of which £10 by the hands of A and £10 by the hands of B, the rent is single, and one assize lies for it.[1] But the distress is not to be confounded with the charge. It was repeatedly held that where a rent is charged on one land, and if it be in arrear, its owner might distrain in another, the latter was but a penalty or for greater surety.[2]

Even a rent-seck may have distress on lands other than that on which it is charged. This will be considered as only a penalty.[3] So an obligation to pay at a certain place other than the land charged does not prevent the rent issuing out of the land charged.[4] Where demand on the land is necessary, it need not be of any person,[5] "because the land is the debtor."[6]

The action of debt was excluded as a remedy for the recovery of rent, not by any technical rule, but by the very nature of the right to be enforced. Rent belonged to the same class of rights with customs and services, and became differentiated from them only as the use of money in the community increased. It was a form of ownership, a right to take a certain specified part of the profits of the land as the tertenant took the rest of them. The fact that this also could be held in demesne or freehold, and that an assize could be brought for it, is clear proof of its original nature, and illustrates more clearly perhaps than any other single point, the extent to which the possession of land was already idealized at an early day; — the fact that the lord who merely took the profits of the land was as directly seized of it as the tenant who ploughed it. Even the discrimination between seisin of the rent and seisin of the land is probably a later refinement.

[1] Brook, Assize, 476. Y. B. 15 Ass. 11. Fitzh. Charge, 6.
[2] 7 Coke R. 23. Butts' case: rent cannot issue from a leasehold, but may be distrained on it. 31 Ass. 27; 41 Ass. 3.
[3] Brook, Charge, 17. 41 Edw. III. 15 *b*. 41 Ass. 3.
[4] Brook, Charge, 22, cites 20 Ass. 1.
[5] 29 Ass. 52. Co. Litt 153.
[6] Co. Litt 201 *b*.

The designations of rent as a right *in rem*, as an incorporeal hereditament, are only later and more scientific expressions of this original view. It merges in the freehold out of which it proceeds, whenever the two are united in one person. A man cannot have rent out of his own land.[1]

A proviso that a rent-charge shall not bind the lands, but only the grantor, is repugnant to the very nature of the rent, and void: *secus* of an annuity, which is a personal charge in its nature.[2]

Debt could be brought for arrears of rent on a tenancy for life after it was terminated by a re-entry, as is shown in Mich. 39 Edw. III. fo. 22, — a case which seems to decide simply a variance between the writ and the deed on which it was founded. Lessee had sublet, and the sublessee was in arrears for three terms, "wherefore the lessor entered, by *force of which entry* action accrued to him to demand the arrears by a writ of debt." Finch for debt or pleads a variance in the name of plaintiff as given in the writ and in the lease, and Kerton for plaintiff argues that the action is not on the lease, to which defendant is a stranger, but "the *duty* commences in his own default of payment." Finch admits the last, but maintains that the action is still on the lease. Skipwith: "when the rent was behind, still before the entry no action was given for it *except to distrain, because it was then freehold*, wherefore the right of action began with the entry, which was your own fault; therefore the deed is not simply the cause of the duty, but the arrears and the entry by force of the condition." To this it was said that the entry was based on the condition, and that could not be proved without the deed. Wherefore Knivet, J., decides against the plaintiff, because his action depends on

[1] Brook, Prescription, 1, citing 26 Hen. VIII. 5, where it was held that an annual payment of £10 made to the lord as a condition of commoning was an annuity, and not a *rent*. So, in strict language, is every payment to an owner for the use of his premises or upon a term for years Possibly some difficult questions in modern law might have been avoided if the terms had not become mixed.
[2] Co. Litt. 146 *b*.

the deed. "If I lease land *pur auter vie*, and *cestui que vie* dies and the rent is in arrear, *he*[1] shall have an action of debt without a deed."

Candish in same case, to which Knivet, J., replies: Yes, in your case the tenant's estate terminates by the death, but in this case the action of debt is claimed by reason of the entry, and that by force of the condition, which cannot be proved without a deed.

Cestuis que usent, when allowed to lease by Richard III., could not distrain for their rent, because they had no reversions. Consequently they had an action of *debt* as upon a contract. But it was a question whether they could have it by way of reservation in the lease, or in any way but by deed of indenture (express covenant). For a reservation must be considered as a grant of the lessee, which could only be by deed. Still Perkins tells us that such leases and reservations were commonly made in his day by *cestuis que usent* by parol (c. 692). Compare the question raised above as to the nature of rents for equality of partition. Both are cases of rent-charge created by parol in the nature of rent-service: a thing not anomalous if the rent lay in livery.

When the conception of incorporeal "things" became converted into that of incorporeal "*hereditaments*," after Bracton's time, we can see that it was applied less with philological accuracy than by the more ready and plain test of things lying in grant, as distinct from those "in livery." Rents-charge of course fell among the former; but their nature, as objects of seisin, was too firmly fixed in lawyers' minds and language to be changed merely to make a definition accurate. Thus they remained through the times of Littleton and Coke, and even down to their gradual disappearance from general use; a solitary survival of a lost conception of land-ownership. The creation of rents-service had come to an end with the statute of *quia emptores*, unless in the case of estates less than fee-simple. Besides, the peculiar nature of the lord's seisin, etc. in rent-service was less obvious because he usually had a demesne in manors, and always a reversion or an escheat. These two conceptions were not clearly distinguished till after the same statute.

Both kinds of rent, then, lead us back to a time when the seisin or possession of land was deemed to be in the landlord, who got the profits, rather than in the tenant, who did the labor.

We know that there was on the Continent an intermediate view between the two, when their ownership, designated by the Roman term *dominium* (however little it may have resembled the classic institution so known), was divided between the two, the lord having *dominium directum*, the tenant *dominium utile*; a distinction attributed to Bulgarus in the twelfth century. These terms never had any practical application in our law, I believe; and their chief interest to us is in showing that there was a period when the question of ownership or seisin as between lord and tenant was an open one, to be determined by scientific law, and not as one of mere fact.

The early charters or "books" show that this ownership of the lord was the uniform rule in the Anglo-Saxon era, as might be expected when the cultivators were for the most part serfs. But the position of the *geneat*, and other facts seem to warrant us in believing that the same was true even as between the lord and a *free* tenant.[1] This might naturally lead to the continuance of the same notion as applied to all tenancy, until the feudal idea of freehold and of the tenancy of nobles and knights, as well as of mere churls or socagers, became so inconsistent with it as to force a change. It would also explain the otherwise puzzling fact of a certain degree of confusion between feudal tenure in its early stages, and the servile tenure that preceded it. This is inconsistent with the fundamental feudal con-

[1] *He*, instead of *I*, is clearly a mistake of the speaker or reporter.

[1] See the Rectitudines Sing. Personarum in Ancient Laws

ception of freehold tenure; but I know of no writer who has ever attempted to explain it except at the expense of the purity of that conception.

It is not certain, however, that *tenure* alone would ever have required a strict definition of the relative rights of lord and vassal in this respect. Very possibly it was not till the doctrine of estates was formed, that men began to feel the need of determining to which party the possession belonged.

This, however, is only a hypothetical explanation, which must wait for proof or disproof until the origin and genealogy of our common law notions of property and possession have been far more carefully studied than they ever yet have been. It is much easier to see the social and economical functions of the rents, and to clear away some of the old misunderstandings that have grown up in later times and been made current in some of our best books. With a few words on this subject, I will close the present study.

All the wealth of the upper classes, including the church and its great monasteries and foundations, consisted in land, and the incomes derived from the services rendered by the cultivators of land to the lords of whom they held. At the same time the sale of land, especially in the large bodies held by the lords, was not easy or common. There was no "market" for it in the modern sense of the word; it was subject to the approbation of superiors, and was opposed by the pride of large possessions. A very natural consequence of the two facts would be that some method should be devised of transferring a definite portion of such rents with the security for their prompt and regular payment, that the landlord himself had, and other advantages of his position as owner; while at the same time the possession of the owner was undisturbed.

As a means of raising money, this would have all the advantages of a modern mortgage, while avoiding the onerous features of the ancient one. Its convenience in making family settlements, providing jointures and portions for younger children, are obvious. In facilitating "owelty of partition," its use is proved by the number of cases of that kind in the books.

The constant use of rents as means of investment, etc., where we now should employ the form of loans upon interest, with or without mortgage security, is one of the most striking facts of the Middle Ages. Formerly it was explained as a mere device to escape the penalties of usury, the canonists' prohibition of taking interest; as if such men as the framers and enforcers of the canon law could have been blinded by such a shallow artifice as repayment by annual instalments instead of a gross sum, when this was the real motive! But the insufficiency of this explanation was pointed out long ago.[1]

The true explanation is that these rents offered the safest form of investment at the time, and that in the yet undeveloped state of mercantile or personal credit (as we may see in the law of contract), they seemed undoubtedly a more natural transaction than those which have gradually been developed out of them by later law.

That they were safer than loans in gross, may easily be seen. By contemporary law, the lender had no claim against landed property, unless the loan was directly charged upon it; and none against the heir or the estate of the debtor after his death, except to the extent of his chattels. Even when in England the heir was expressly bound by the obligation; it was only effectual while he had the inheritance, and there were too many chances of escheat, of forfeiture in many ways, or of dissipation to make such a loan secure for a lifetime, or as a permanent investment. If the lender took a mortgage, he entered as a rule into possession, and had all the care and labor of managing the property. If allowed to repay himself for this by pocketing the profits, he would probably find few solvent borrowers willing to take up money on such terms; if required to account for

[1] Eichhorn, Einleitung, 105. Albrecht, Gewere, p 176 *et seq.*

them as payments on the debt, it was trouble without recompense. Probably the uncertainty that prevailed on this point [1] from an early period shows that mortgages were rarely employed then for purposes of investment.

But the rent-charge had none of these disadvantages. If sufficient security were taken in the first place, it must remain so, for there were no accumulations of interest, costs, etc., to look out for, as in modern mortgages. Unless the rent were perpetual, the security must constantly grow better, as its present value diminished by successive payments. In any case the arrearages could not be large without gross and long-continued neglect of the party entitled; and the sum due at any annual or other instalment was so small in proportion to the value of the property charged, that the rent-payer had every inducement to pay promptly, and none whatever to throw the land upon the hands of a reluctant creditor, as is often the case of a modern mortgagee, who must take that or nothing when the mortgagor is personally insolvent. The risk, in that case, of depreciation in the value of the security, for example, by destruction of improvements, neglect and wasting of the land, is common to both transactions.

Against these advantages, almost the only objections that could be made to-day to the rent as an investment are that the lender cannot call for his entire loan at any time, — though usually the borrower had the right to redeem the rent by a gross sum on proper notice of his intention, — and that the principal sum is gradually diminished by the payments instead of remaining intact until repayment in full. These doubtless account for the disuse of such investments to-day, when the lender may have a chance sometime of investing his money to better profit, or if he lends merely to live on his interest, feels bound in prudence to keep his capital sum intact. But this is to compare the rents with forms of investment that then were practically unknown, or very rare. As compared with investments in land which practically furnished the only alternative, the rent had almost every advantage except the profit which might be made by improved values.

We see now why rents constituted an earlier form of property (in the broadest sense of that word, including investments and securities) than loans of money on personal credit, or even mortgages in their modern form as securities for the payment of a gross sum. These have grown out of the development of credit, which has been the consequence of the increased abundance and use of money in modern times; [1] and at once the consequence and cause of a vast development of the law of contracts or obligations *in personam*. The *rent* was not a contract originally, but a property right, in the narrow sense of rights to external things. It was a method of dividing the issues and profits of land between different owners, so that each might have them in the form that suited him best, — the rent-owner taking a fixed sum irrespective of any increase or diminution in those profits; the tenant having the benefit of his own exertions upon the land when these made the profits larger.

The possession of a seignory or honor was not necessarily connected with that of a demesne, or of land in any form, as that of a manor was. A great lord might have his entire income from freehold tenants who were themselves seized of all the land from which they owed him services; indeed, he was more likely to be in that position than the owner of a single knights' fee or manor who had a strong interest in holding a part of it in demesne. Even if the great lord had a castle or a number of them, he did not need to cultivate any part of them by serfs, — he who had knights, perhaps barons, for his undertenants. Hence there was nothing strange in the conception of rents distinct from the ownership of lands; it would have been strange if men of wealth who loved ease had not preferred this form of investment.

[1] Glanvil, lib. x. c. 8, § 6.

[1] Eichhorn, Einleitung, § 105, quoted by Albrecht, note 431.

HUSTLING IN THE LAW.

By Percy Edwards.

SHADES of Bacon and Blackstone! Do you get the full force of the expression "hustling" in this connection, my brethren? Can you evolve from out the dust and dry rot of the past any protoplasmic origin of this species? I am, my brethren, at a loss as to whether this condition is a natural effect of some first cause in the science of the Law, or an empiricism. We have become but recently familiar with the expression "hustling." I know not just the origin of this word, or rather the origin of the peculiar meaning we give it. One would easily conclude, however, that it must come from the verb intransitive to "hustle," which Webster says is "to move hastily and with confusion, to hurry." Since the introduction of this stranger into our diction we have become familiar with the "hustling grocer," the "hustling clothier," the "hustling politician" who is a "rustler" and hails from "git thar Eli" country. In fact, we make use of the expression *ad libitum*. We give it a somewhat different meaning than our musty old compilations, that do not change fast enough to keep pace with the added innovations of these brisk times.

The only part of the Webster definition which seems to fit is the first part, which refers to moving hastily. That "hustlers" move hastily, must be conceded. But "hustlers" in the accepted sense of this expression do not "confuse" at all. To be sure, he helps to raise the dust which confuses others, but he does not take part in the confusion. He is the sly fellow who turns this to his advantage. He is the lively vulgar fraction in the great problem of life. Very "loud" in advertising himself, "he blows his own horn," and he does it indefatigably. He is a self-styled "hustler," and lets the people know it by hanging out a big sign six by nine.

This condition of things we have come to regard with equanimity in all mercantile pursuits. It is not the purpose, my brethren, to consider this condition of things outside the profession of law. That the term "hustling" is now applied to the practice of law by laymen and lawyers alike, in the same sense as that we have accepted in its application to mercantile pursuits, there is no room to doubt.

This hustling characteristic partakes largely of the tone of character of the individual concerned. One will talk incessantly, loud and long, of the business he is doing, the cases he has, and he will employ others to do the same.

Another will, with even more ardor than manifested by the junior member of the firm of "Quirk, Gammon, and Snap," run down a "scent" of some new case, and then soon afterwards appears the announcement in the local papers that "'Mr. Buzfuz' has been retained in the famous case of 'Bardell *vs.* Pickwick,' which will be hotly contested at the next term of court," while another fills the weekly papers with squibs referring to the number of cases he or his firm has in court, and the number of victories wrested from an unwilling opponent. And still another has been known to insert a notice in a local paper to the effect that "those intending to apply for divorce should do so before the act passed by the last Legislature takes effect, etc.," over his signature.

Your "hustler" in court is a burden to the life of the judge. In theatrical parlance, he "plays to the gallery." It is from them he gets his sympathy. They term him hustler. He insults counsel opposed to him, severely taxes the patience of an indulgent court, and wearies the jury. With him the end seems to justify any means he can employ, and dark suspicion at times hangs its murky folds about him.

One of the worst features about this growing innovation, not to use a stronger term, is the fact that a practitioner of the kind above referred to, in many cases, is allowed the indulgence of the court to such an extent that he soon becomes contemptuous in his manner even to the court itself.

Have we not, my brethren, all of us noticed this growing evil in a more or less degree? And at the same time the unfair advantage which this kind of practitioner gets over his less fortunate brother, and "while timorous knowledge stands considering, audacious ignorance has done the deed." And the effect on laymen. Do we not give honorable acceptance to the draft that "lawyers are made in a day," and that "the law is a sort of hocus-pocus science," etc.? The advice given by one of our old masters to the young practitioner was to "keep your office, and your office will keep you." All that is changed now; and the advice given under the new regime of these hustling times would be to get out of your office and "hustle" for business. Get out among the people and "stir up" something. If you hear of some accident that has happened to some unfortunate, see him or his widow, or some legal representative, and get the case. If there is no case, make one out of it by hook or crook. Have somebody suggest to somebody else that you are a "hustler." If necessary, pay a little "bonus" out of what is realized to "somebody."

Just here it might be interesting to insert parts of a little report of a "hustler" who enjoyed the distinction of being City Attorney in one of our Michigan towns; and this is his report to the Council of what he has done: —

"*To the honorable Mayor and Common Council of the city of* ——

Your attorney would respectfully report in the case of —— a motion was made by your attorney . . . which motion was granted. . . . And a motion has been argued by your attorney and Mr. —— for a new trial, and his honor Judge —— has ordered a new trial of said cause, and your attorney would therefore recommend that the city of —— defend anew with all possible vigor against said action, as Mr. —— has no merits in his case, *and that they proceed and obtain another verdict of no cause of action! . . .*"

Ye gods! what a change from the primitive purity and dignity of the code of ethics in the ante-Blackstonian era, when the members of the profession were placed alongside of the mailed chivalry of western Europe. The dignity of dignities, the *sanctum sanctorum* of all the professions, the pride of the people, the *noblesse de la robe!*

The advocate occupied an exalted position in the social structure in those days. How absurd to speak of "hustling," with its brassy jingle, as applied to the *noblesse de la robe!* The term might easily be one of reproach or contempt, but never of commendation. In the days when the profession was exalted above all others, there was chivalric sentiment which placed it above all sordid greed, and made this profession what it was intended to be, an instrument under Providence, to exalt and guide mankind to a more perfect enjoyment of the gifts which an all-wise Power has placed within our reach.

A reference to the rules of conduct governing members of the profession at the time to which reference has been made, would forcibly impress us with the immeasurable difference in the code of ethics of that time, and the rules governing our conduct in these "hustling" times.

I would not, my brethren, pose as a fault-finder or critic. My lack of progressiveness may account for much that is here expressed. But this is no theory; it is a condition, which without doubt many of us have reason to know. Was it a condition of this kind which brought the profession into such contempt that it bred such sentiment as expressed by Shakspeare's King John, "When the law can do no right, let it be lawful that law bar no wrong," and the more startling sentiment in Henry Sixth, "The first thing we do, let 's kill all the lawyers."

The profession of the law as the most dig-

nified and exalted of all professions is the least liable to innovations. The law itself is an exact science. We have what we call "Reforms in the Law" which are mere changes in its application. The great foundation principles are as unchangeable as time, and go on forever. Dignity and truth, personified justice.

EDUCATION IN PRISONS.

By James A. Anderson.

WITHIN the past twenty years most remarkable changes have been made in the management of our prisons and the treatment of their inmates.

The penologist has caught much of the infection of liberality that has struck in at every story of our social structure. With increased knowledge of those with whom he has to deal, and a better understanding of the nature of crime, has come to him a clearer conception of the treatment which will offer the most chances for the criminal's reformation.

The great pioneers in prison reform — Crofton, McConochie, Obermaier, Montesinos, and the founders of Mattray — in their most sanguine hopes for the prisoner perhaps never dreamed of a time when these hopes would be more than realized.

Oftentimes the best things that happen to men come in the guise of apparent disaster. When jealousy in behalf of free labor led our law-makers to restrict within a narrow channel the production in prison of all goods possessing value in the general market, prison wardens were made to face a crisis. There is no torment so fierce to the criminal in prison as the torment of absolute idleness, when he can only sit in his narrow cell and think, think, think, until he is all but mad.

His natural tendency under such conditions is to curse fate and the law, and to plan future depredations on the society that had cast him off. It was to obviate such tendencies that the wise directors of penitentiaries established in their prisons schools and libraries, offering the possibility of a much needed education to the majority of their charges.

While unexpected results have followed this departure from hitherto accepted theories for prison management, it has not come to be believed by these men that education will prevent crime, but simply that it multiplies the chances of reforming criminals.

It would be impossible in this brief glance at the work of education pursuing in our prisons to estimate justly the excellence of the results being achieved all along the line. The names of Brockway of Elmira, N. Y., Major McLaughry, formerly of Joliet, Ill., and now of Huntington, Penn., the late Gardiner Tufts, of Concord, Mass., and Miss Ellen C. Johnson, of Sherborne, Mass., shine out brightly among those who are engaged in educating the convict, and bringing him into harmonious relations with society, of which they have demonstrated he can be made a useful member.

Elmira, one of the grandest penal institutions in the world, has admirable trade schools, an excellent course of study extending from primary lessons to lectures upon history, literature, and social science, and a library of over three thousand volumes of general literature and special reference. The result of these educationary advantages is manifest in the report of the institution for 1891, which has an appendix exclusively the work of the inmates. The text is written by the editor of the "Summary," the weekly paper published in the reformatory; the illustrations are taken from photographs, sketches, and etchings made by the prison-

ers; and the whole report is printed on the presses, and bound in the bindery of the institution.

Concord Reformatory, only seven years in existence, is fast following in the footsteps of Elmira; and Huntington, of even more recent date, has adopted the same methods.

In these prisons the schools are conducted on essentially the same lines as our public places of learning. The same spirit of competition among the pupils is manifested; and it is but just to say that the prisoner pupil is often a harder working and more conscientious student than his brother beyond the prison walls.

It is interesting to watch the mental development of these convicts after being brought into the companionship of books. In their first stage they browse eagerly among the volumes, changing them often. As they become more thoughtful and receptive, they read fewer books, and keep them longer, and the real students confine themselves to a small number of volumes. And they are a most critical class of readers. He who would select books clever enough for them must have his wits about him. Their sharpness is developed quite out of proportion to the weightier gifts of judgment and discretion. They like Dumas, Lever, Sir Walter Scott, and Dickens. Some of them will relish profoundest essays on the most abstract philosophies, and the products of the pens of sceptics receive their closest attention and arouse their sincerest admiration.

The report of Chaplain J. W. F. Barnes, of the Massachusetts State Prison, for last year furnishes some interesting statistics as to the classes of books most popular among prisoners. The library of this prison contains nearly six thousand volumes. The per cent of fiction taken out during the year was 48.84; magazines (bound volumes), 10.65; history, 9.58; travel and adventure, 7.87; general literature, 6.46; and religious reading, 3.20.

A most important phase of the educationary methods yearly becoming more general in the treatment of prisoners, is that their manhood is recognized. They do not want to be talked to as criminals. They know as well as we that it is wrong to steal and murder, but they may have many motives when perhaps we have not one. They are grateful for judicious kindness, but sentimental indulgence they play upon and despise. They want only just dealing.

Foreign books have told of abnormal creatures, fostered in crime, the brutish children of brutish parents. There may be classes of such criminals in the Old Country, but in six years' experience as a teacher among convicts on this side the Atlantic the writer has failed to find any such here except in a few cases of insane persons. The criminal is unbalanced, selfish, whimsical. His conscience is warped, his will diseased, his mind oftentimes corrupt. He lacks principle. On the other hand he is not always wanting in feeling. He is often emotional. He is keenly impressionable, and is capable of appreciating good reading; but he has a strong sense of the ridiculous, and not much reverence. He respects knowledge of the world, acuteness, humor, sympathy, and frankness; and the less he is treated as a man peculiar from other men the harder he will work to retrieve himself from crime.

A picture might be painted of scenes that still take place in prison, — scenes that would make the just man's blood boil with indignation. It is not long since men were confined in cells unfit even for the habitation of brutes, and subjected to punishments as horrible as the tortures of the Inquisition. To-day in parts of the country can be heard the shriek of prisoners undergoing the torture of the thumb strings, and kindred appliances.

But such tragedies are surely giving way to better things, as old prisons are torn down and new ones built on the ruins, while air and sunshine replace former darkness, and education fills the mind of the prisoner with ambitions for the manliness of his life which is his right.

LONDON LEGAL LETTER.

LONDON, May 4, 1892.

A RECENT instance of organized public folly is the formation of a Witnesses' Protection Society. It is difficult to realize the mental operations of those who engage in the manufacture of idiotic associations. Lately we had a good deal of newspaper correspondence on the subject of cross-examination, many timid citizens being apparently of opinion that it was exercised for no purpose save oppression and insult. With persons of this type it is impossible to argue. I suppose the Witnesses' Protection Society is the outcome of some such range of ideas. Its professed objects are (1) to protect witnesses from insult by counsel; (2) to put the matter of contempt of court into the hands of a jury; and (3) to raise a fund to indemnify contumacious witnesses from pecuniary loss, provided that the questions they refuse to answer reflect upon their honor, and are at the same time irrelevant to the issues of the case. It is not likely that we shall hear much more of this society.

The extent to which young and thoughtless persons have been made the victims of betting agents and such like social parasites has led to a useful enactment, The Betting and Loan (Infants) Act. It provides that any person shall be guilty of a misdemeanor who, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant, any circular, notice, advertisement, telegram, or other document which invites, or may reasonably be implied to invite, the person receiving it to make any bet or wager, or to enter into any betting or wagering transaction. It is to be hoped the Act will not be allowed to remain a dead letter.

A good suggestion was made in the "Law Times" lately to the effect that when money has been borrowed on mortgage and the debt has been paid off, a recognizance should by statute be dispensed with, and that a simple receipt indorsed on the mortgage should be declared to be sufficient to revert the estate in the mortgagor. This might very well form a provision of some amending Conveyancing Act in the near future. The Lord Chief-Justice's great powers of speech and graces of elocution are well known; the other day one of the leading newspapers held him up as a model to all who wished to attain high excellence in the manipulation of the voice. Some one having written to Lord Coleridge on the subject, extracted from him the following interesting reply:

"I am really quite unconscious of the faculty which you say the 'Manchester guardian' ascribes to me; and I am certainly quite unaware of any art or method by which the result you speak of is produced, if indeed produced it be. The only rule I have ever followed is one taught me by Bishop Blomfield of London many years ago. He was a great orator, and had a most beautiful and effective mode of speaking. He told me that he always spoke in his natural conversational voice, never allowed himself to get into a falsetto, and always kept his voice equably up to the end of his sentences. If these are peculiarities, they are really, as far as I know, the only things in which my speaking differs from that of anybody else"

Patent cases have of late been earning an evil notoriety. They last for days and weeks, the ordinary despatch of judicial business being thereby disastrously hindered. Public sentiment on the subject cannot be better expressed than in the following words used recently by the Master of the Rolls, Lord Esher: —

"It used to be said that there was something catching in a horse case, that it made the witnesses perjure themselves as a matter of course. It seems to me that there is something catching in a patent case, which makes everybody argue and ask questions to an interminable extent. A patent case with no more difficult question to try than any other case, instead of lasting six hours, is invariably made to last six days, if not twelve The moment there is a patent case, one can see it before the case is opened or called in the list. How can we see it? We can see it by a pile of books as high as this [holding up the papers invariably], one set for each counsel, one set for each judge; and by the voluminous short-hand notes we know here is a patent case. Now, what is the result of all this? Why, that a man had better have his patent infringed, or have anything happen to him in this world short of losing all his family by influenza, than have a dispute about a patent. His patent is swallowed up and he is ruined. Whose fault is it? It is really not the fault of the law; it is the fault of the way of conducting the law in a patent case."

As usual in the case of legal abuses, the evil is more apparent than the remedy.

* * *

The Green Bag.

PUBLISHED MONTHLY, AT $3.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

THE following reminds one of the old Blue Laws of Connecticut: —

VICKSBURG, MISS.

Editor of the "Green Bag":

DEAR SIR, — I enclose you the following copy of an affidavit, lately filed and drawn by a Justice of the Peace who has been elected to that position by the admiring citizens of Vicksburg for the past twenty-five years. The affiant, accused, and witnesses were all colored.

STATE OF MISSISSIPPI
WARREN COUNTY.

Before me, the undersigned Justice of the Peace of said county and State, Kate Nash makes oath that Sophie Mulholland did commit a misdemeanor in this, that she did in the presence of three more kiss one Marlowe, he being a married man.

her
KATE X NASH.
mark

Sworn to and subscribed before me this 8th day of April, 1892. JUSTICE P.

The fair Sophie went to trial and was found guilty of the heinous charge. She was severely rebuked by the Honorable Justice for her immoral conduct, and was sentenced to pay a fine of fifty cents and costs of the court to the amount of five dollars. It is true that our statute does not make it a crime to kiss a married man either in the presence of witnesses or alone; but what are the absence of statutes to a patriotic Justice of the Peace when the morality of a great State and the costs of the court are at stake? For you must know if the Justice does not convict he receives no costs. * * * *

THE following comes from an Iowa subscriber:

May 14, 1892.

Editor of the "Green Bag":

DEAR SIR, — Iowa is blessed with a District Judge with many sterling qualities, not the least prominent among which is his ability as a jurist, and the consideration with which his opinions have been reviewed and generally affirmed by our Supreme Court. It is however likewise said of the judge that he is very deliberate in his opinions; and many are the anxious attorneys who await his rulings in cases taken under advisement. At a recent term of Court two of these restless individuals had the temerity to indicate their desire to the judge by joining in a motion jokingly requesting a ruling in a case in which they were mutually interested. The case in question is one of long standing, and raises a large number of questions of law and fact; and the record which the judge has been examining is especially cumbersome. After a jury trial, the attorneys have each been filing motions of one kind and another, until the record is decidedly mixed. After scanning the motion, the judge, with a twinkle in his eye, drew a sheet of paper to him, and soon handed the clerk for filing the following: —

IN THE DISTRICT COURT OF IOWA IN AND FOR —— COUNTY.

W—— W——, *Plaintiff*,
vs. SHOWING OF THE JUDGE.
J. J. L——, *Administrator*
et al., *Defendants*.

Now comes the Judge before whom said above entitled cause was tried, and sheweth as reasons why he shall not pass on and determine motions therein pending and render judgment in said cause the following, to wit:

First, The facts in said cause were in the first instance skilfully concealed in order to avoid their discovery, and the attorneys have still more skilfully obscured the law;

Second, The attorneys have adopted new and original practices and methods, and thereby perplexed the Court and filled him with doubt;

Third, The attorneys failed, neglected, and refused to file motions for new trial, but viciously and covetously and precipitously moved each for judgment then and there, well knowing that said Judge would not know what to do with said motions;

Fourth, The Judge herein does not know what to do with said motions, and the attorneys herein have failed, neglected, and refused to tell him;

WHEREFORE, the said Judge prays that a change of forum be had, and said motions be taken by said attorneys with them when they go before the Court of Last Resort, sitting for judgment of men and angels, and that upon the fixing of the final abode of said attorneys they be required to take said motions with them to be consumed with said

attorneys in manner and form required by law at such place; and this Judge further prays to go hence in peace.

——— ———. *Judge.*

Respectfully yours,

O. H. M.

LEGAL ANTIQUITIES.

PHILIP, in passing sentence on two rogues, ordered one of them to leave Macedonia with all speed, and the other to try and catch him.

DEMONAX was once heard to say to a lawyer: "Probably all laws are really useless; for good men do not want laws at all, and bad men are made no better by them."

ALCIBIADES, when about to be tried by his countrymen on a capital charge, absconded, remarking that it was absurd, when a suit lay against a man, to seek to get off, when he might as easily get away.

SOCRATES used to say the best form of government was that in which the people obey the rulers, and the rulers obey the laws.

IN a case in the time of Elizabeth, the plaintiff, for putting in a long replication, was fined ten pounds and imprisoned, and a hole to be made through the replication, and to go from bar to bar with it hung round his neck.

FACETIÆ.

LAWYER. Have you conscientious scruples about serving as a juror where the penalty is death?

BOSTON TALESMAN. I have.

LAWYER. What is your objection?

BOSTON TALESMAN. I do not desire to die.

"I AM as much opposed to drinking as any one," said Lawyer Jenks to his client, "but nevertheless liquor rightly used is a blessing to humanity; when I was ill last winter, I actually believe it saved my life."

"Very likely; but how does that prove that liquor is a blessing to humanity?" was the reply.

A WITNESS in a criminal case while giving his testimony turned to the jury, whereupon the prisoner flew into a passion and shaking his fist at the jurymen, shouted, "Set of boobies! asses! pack of idiots!" Upon which the judge, interrupting him, said, "Do not speak to the jurors; address your observations to the Court."

A "TOMBS" lawyer had been endeavoring all the week to get his client out of durance vile. One morning he walked into the "Tombs," and sent for his client. His face was as smiling as the historic basket of chips. "It 's all right," said the lawyer, grasping his client's hand. "Yes?" ejaculated the client, brightening up. "Yes, everything's fixed." "How?" "I can get you out on a habeas corpus." The client's face lengthened as he replied, "Can't be done, would n't dare to try it; my cell is on the third tier, and the damned thing might break."

A JUSTICE of the peace who was constantly trying criminal cases was called upon to marry a couple. After he had asked the usual question, if they desired to be united in the bonds of matrimony, and they had replied in the affirmative, the justice said solemnly: "Having pleaded guilty to the charge, if there are in your opinion any mitigating circumstances, now is the time to state what they are."

THE LAMENT OF LITTLETON COKE, ESQ.

THERE was a time, there was a day,
Poetic fancy thrilled my mind,
But surly Blackstone came my way,
And rippling lays are left behind.

No more I tune the answering lyre,
I sing of amorous scenes no more:
But use my old poetic fire
To fuse great chunks of legal lore.

The eloquence with which I once
Discoursed of mountain, vale, and stream,
I use to wake some sleepy dunce
Of juror from his noonday dream.

The midnight oil I once did burn,
While pleading in poetic courts,
Now serves a much more useful turn
Illumining dull law reports.

GEORGE HUDDLESTON.

BIRMINGHAM, ALA.

CLIENT. You have an item in your bill, "Advice, Jan. 8, $5." That was the day before I retained you.

LAWYER. I know it. But don't you remember, on the 8th I told you you 'd better let me take the case for you?

CLIENT. Yes.

LAWYER. Well, that 's the advice.

JUDGE (to Officer): "What is this man charged with?"

"Bigotry, yer honor."

"Bigotry? Why, what 's he been doing?"

"Married three women, yer honor."

"Three! That 's not bigotry; that 's trigonometry."

"YOUR honor," said the defendant's attorney in a larceny case in South Dakota, where an Alliance attorney was elected public prosecutor last fall, "I move to dismiss this case on the ground of lack of jurisdiction; the defendant is a citizen of Minnesota, and this court cannot have jurisdiction of it."

"I guess that 's so," admitted the public prosecutor; "the defendant belongs in Minnesota, and will have to be tried there."

The case was duly dismissed.

A SMALL Scotch boy was summoned to give evidence against his father, who was accused of making disturbances in the streets. Said the bailie to him: "Come, my wee mon, speak the truth, and let us know all ye ken about this affair."

"Weel, sir," said the lad, "d' ye ken Inverness Street?"

"I do, laddie," replied his worship.

"Weel, ye gang along it, and turn into the square, and cross the square —"

"Yes, yes," said the bailie, encouragingly.

"An' when ye gang across the square, ye turn to the right, and up into High Street, and keep on up High Street till ye come to a pump."

"Quite right, my lad; proceed," said his worship. "I know the old pump well."

"Well," said the boy, with the most infantile simplicity, "ye may gang and pump it, for ye 'll no pump me."

NOTES.

EVERY example of punishment has in it a tincture of cruelty and injustice; but the sufferings of individuals are supposed to promote the public good. — TACITUS.

THE antiquity of laws may make them respectable, but it cannot alone be deemed a sufficient reason to prevent them from being altered or abrogated.

THE venerable Lyman Trumbull, in an address before the Illinois Bar Association, declared that the tendencies of the Federal judiciary to absorb litigation properly belonging to the State courts, threaten to destroy all local government, and with it the liberties of the people. He believes that State tribunals are the best administrators of domestic and local affairs, and the way to relieve the United States Supreme Court of the surplus of work now crowded upon it is not to create more tribunals, such as the new courts of appeal, but to curtail the broadening and threatening jurisdiction of the Federal courts.

"WHY are there so many turnings, windings, and other delays in the laws? Why is our law a meander of intricacies, where a man must have contrary winds before he can arrive at his desired port? Why are so many men destroyed for a want of a formality and punctilio in law? And who would not blush to behold seemingly grave and learned sages prefer a letter, syllable, or word before the weight and merit of a cause? Why does the issue of most lawsuits depend upon the precedents rather than the rule, especially the rule of reason? Why do some laws exceed the offence; and on the contrary, other offences are of greater demerit than the penalty of the law? Why is the law kept in an unknown tongue, and the nicety of it rather countenanced than corrected? Why are not the courts rejourned into every county, that people may have a right at their own doors, and such tedious journeyings may be prevented? — "*Old Tract*, 1649.

Some of the above questions seem to be equally pertinent at the present time.

AN opinion is commonly entertained that the sovereign signs some instrument by virtue of which capital offences are punished with death; hence these presumed documents are popularly

termed "Death Warrants." Such, however, not only is not the case in England, but, so far as our knowledge goes, never has been. The only authority for the execution of a criminal is the verbal sentence of the judge, pronounced in open court, in a prescribed form of words. This the sheriff or his deputy is bound to hear and to execute. After the offenders are tried, the judge (or, at the Old Bailey, the Recorder) signs a list containing the names, offences, and punishments of the convicts, and the names of the prisoners acquitted; and a copy is given to the sheriff. The list (commonly called a calendar) is, however, a mere memorandum, and of no binding authority whatever. Lord Hale, in the second volume of his "Pleas of the Crown," records the case of a judge *refusing* to sign any calendar, fearing, he said, it might *grow* into a rule; the sheriff, believing that the calendar was really necessary, neglected to execute a criminal who had been capitally convicted, and he was heavily fined in consequence; the law being distinctly laid down by Lord Hale, and the other judges of the time, that the *verbal* sentence was "the only and sufficient authority." So important, indeed, does the law deem this verbal sentence of death to be, that it is very reluctant to use it in cases where probably it will not be carried into effect; and in such cases the judge is empowered by act of Parliament to abstain from *passing* sentence of death, and to order such sentence to be *recorded* only. At the Old Bailey the custom *formerly* was for the Recorder, at the termination of each session, to wait upon the sovereign with a list of all the prisoners lying under sentence of death; and after explaining the several cases, to receive the royal pleasure thereon, and then by a warrant under his (the Recorder's) hand, directed to the sheriffs, to command execution to be done on a day and at a place therein named. This practice continued until the accession of her present Majesty, in the first year of whose reign Mr. Baron Parke (afterwards Lord Wensleydale) tried a man at the Old Bailey for a certain offence still, by the letter of the law, capital. From motives of delicacy it was deemed highly inexpedient to lay the details of the crime before the Queen; and in order to prevent an infringement of the law by neglecting to do so, a bill was hurried through Parliament, the 1st Victoria, cap. 77, by the first section of which it was enacted that for the future it should not "be necessary that any report should be made to her Majesty, her heirs and her successors, in the case of any prisoner convicted before the Central Criminal Court, and now or who may hereafter be under sentence of death." Thus the practice at the Old Bailey is now assimilated to that of all the other courts in the kingdom, and the sovereign is never consulted about any capital offences whatever. ("Things Not Generally Known," by John Timbs.)

PHOCIUS, in his Bibliothèque, dwells with great satisfaction on a decision of the Athenians as to the conduct of one of their judges sitting in the Areopagus. That court sat upon a hill in the open air; and one day a sparrow pursued by a hawk darted into the midst of them for refuge. It took shelter in the bosom of one of the judges, who was of a harsh and passionate temper. Taking hold of the little trembler, he threw it off with such violence as to kill it on the spot. The whole assembly were filled with indignation at this cruelty. The judge was instantly arraigned for it, and by the unanimous vote of his colleagues he was degraded and ejected from his seat on the bench.

UNDER the statutes of the State of Minnesota, any person who shall use, in reference to and in the presence of another, abusive and obscene language intended and naturally tending to provoke an assault or any breach of the peace, is guilty of a misdemeanor.

Under this statute a justice of the peace in one of the interior counties of Minnesota drew a complaint upon which a warrant was issued and the defendant brought into court for trial. The complaint and warrant were substantially as follows:

"The complaint of J. D. of said county, before A. J. S., one of the justices of the peace in and for said county, being duly sworn on his oath, says: That on the first day of January, 1892, at the town of Blank, in said county, one R. F. did commit the crime of criminal conversation, in the presence of said complainant, which naturally tended to provoke an assault or breach of the peace, and prays that said R. F. may be arrested and dealt with according to law."

A WHITE woman called on a Justice of the Peace in a Southern State some time since, and asked him to issue a "Peace Warrant" for some negroes that she alleged had been giving her some

trouble. The Justice, however, for certain reasons decided not to commence proceedings to keep the peace as provided for by the criminal code, but instead gave the woman the following unique and interesting instrument: —

"*To whom it may concern,* — There has been several statements made to me regarding the criminal conduct of Persons, some for using threatening, abusive, and insulting language in the 'presents' of females along the public roads and so forth, carrying concealed weapons and other acts of a criminal nature. The names of those persons are known to me, and the evidence is ready.

"I, now, in the name of the State of ——, forewarn such persons to desist, before they get in the meshes of the *law* and thereby incur heavy expense upon themselves."

REVIEWS.

THE ARENA for May is filled with interesting matter. "Austria of To-day," by Emil Blum, Ph.D., is a valuable contribution to modern history. "Psychical Research," by Rev. Minot J. Savage, contains a number of remarkable cases. Solomon Schindler and Sam'l Leland Powers engage in an interesting discussion on "The Use of Public Ways by Private Corporations." Prof. James T. Bixby contributes a paper on "Zoroaster and Persian Dualism," and Frances E. Willard asserts that "Woman's Cause is Man's." "The Strength and Weakness of the People's Cause" are set forth by Eva McDonald-Valesh. The other contents are "Alcoholism and its Relation to the Bible," by Henry A. Hart, M.D.; "Spoil of Office," by Hamlin Garland; and "The Broadening Horizon of Civilization," by the Editor.

REUBEN GOLD THWAITES writes an interesting account of "Village Life in Old England" in the May NEW ENGLAND MAGAZINE. It is finely illustrated by Louis A. Holman, who spent the summer of 1891 in England, and who furnishes the frontispiece of the number, "A Picturesque Bit of Old England," finely engraved by M. Lamont Brown. "On the Track of Columbus," a valuable and interesting paper by Horatio J. Perry, is one of the features of this number. Herbert M. Sylvester begins a series of articles, "Ye Romance of Casco Bay." The initial article is finely illustrated by the author, Charles H. Woodbury, Sears Gallagher, Jo. H. Hatfield, and others. William Eleroy Curtis, the well-known and brilliant Chief of the Bureau of American Republics, contributes a clever and comprehensive article on the "Progress of the South American Republics." It corrects a number of popular errors about these great countries. A number of shorter articles serve to make up a most readable number.

AN important literary feature of HARPER'S MAGAZINE for May is an article by Anne Thackeray Ritchie on "Robert and Elizabeth Barrett Browning," relating many interesting personal reminiscences of the two eminent poets. Portraits are given of Mr. and Mrs. Browning and of their friend Mr. Milsand, also a view of the tomb of Mrs. Browning in Florence. Lieutenant-Colonel Exner, an officer in the German service, contributes a timely article on "The German Army of To-day," which is effectively illustrated. Julian Ralph, continuing his valuable series of papers on the great Northwest, gives a strikingly interesting description of "The Dakotas," their peculiarities of situation, soil, and climate, their inhabitants and resources, and their outlook for the future. The fourth of the deservedly popular series of Danube papers, "From the Black Forest to the Black Sea," is written by F. D. Millet, and beautifully illustrated by Alfred Parsons and Mr. Millet. The other contents are unusually interesting.

THE complete novel in LIPPINCOTT'S MAGAZINE for May, "The Golden Fleece," is by Julian Hawthorne. It is a curious medley of the modern and the antique, of the weird and the practical, of civilized manners, wild adventures, Aztec hidden treasures, and legends or superstitions of long ago. In the Journalist Series, W. J. C. Meighan recounts the exploits and trials of the Travelling Correspondent. In the Athletic Series, the world-renowned bicycler, Thomas Stevens, glorifies his favorite pursuit. "The Good Gray Poet," Walt Whitman, is celebrated in a timely essay by William S. Walsh, and in sundry random recollections by William H. Garrison. Mr. Floyd B. Wilson has a paper on "Personal Economics in our Colleges," and Mr. Moulton one on J. M. Barrie, the Scottish novelist, who has lately sprung into sudden

fame. There are short stories by Emma B. Kaufman and Frederic M. Bird, the latter liberally illustrated.

THE brilliant correspondence of Ralph Waldo Emerson and Thoreau occupies the first place in the ATLANTIC for the month of May. The letters are edited by Mr. F. B. Sanborn, of Concord; and they give characteristic glimpses of the life, physical, mental, and spiritual, of the two friends during "the 'Dial' period," as the editor calls it, — in other words, 1843. A fit companion-piece to these letters is the Roman Journals of Severn, the friend of Keats, which give quite a thrilling picture of the events preceding the fall of Papal Rome. These papers are edited by William Sharp. Mr. Crawford continues his Italian serial, "Don Orsino." The short story of the number, with the odd title "A Cathedral Courtship," is furnished by Kate Douglas Wiggin. Two unsigned articles will attract attention for their cleverness, the first being "A Plea for Seriousness," the second "The Slaying of the Gerrymander," a keen thrust at this political monster.

SCRIBNER'S MAGAZINE for May opens with the second article in the series on "The Poor in Great Cities." This series of papers cannot fail to be productive of much good by arousing a deep interest in a class which is entitled to the warmest sympathy of its more favored brethren. "Rapid Transit in Cities," by Thomas Curtis Clarke, is a timely article on a most interesting subject, and one with which the author is well qualified to deal. The other contents are "Unter den Linden," by Paul Lindau; "Sea and Land," by N. S. Shaler; "Paris Theatres," by William F. Apthorp; "The Reflections of a Married Man," by Robert Grant, and "The Wrecker" (chapter xxii.), by Robert Louis Stevenson and Lloyd Osbourne.

THE table of contents of the May CENTURY is quite remarkable in its list of prominent names. In the way of short stories there are two very interesting ones; namely, one by Wolcott Balestier, posthumously printed, called "Captain, my Captain!" and the other "A Gray Jacket," by Thomas Nelson Page. Of a particularly timely character is the article on "Coast and Inland Yachting," by Frederic W. Pangborn, with a number of illustrations. The opening paper of the number is one of reminiscence by the painter Healy, who is residing in Paris, on Thomas Couture, one of the striking figures in Modern French art. Mr. Stedman prints his third paper on the subject of poetry, this time dealing with "Creation and Self-Expression." James Lane Allen describes, and a number of artists illustrate, "Homesteads of the Blue-Grass." Examples are given of the work of the American painters, Carl Marr, J. H. Dolph, and the sculptor, Herbert Adams, with a sketch of these men by Mr. Fraser of the CENTURY Art Department. To speak of the serials, Hamlin Garland's Western story, "Ol' Pap's Flaxen," is concluded; and further instalments are given of Dr. Weir Mitchell's "Characteristics," and "The Naulahka," by Kipling and Balestier.

WITH the May number the COSMOPOLITAN enters upon its thirteenth volume, and the number is certainly a most remarkable one in the list of distinguished contributors which it presents. "A Noble Lover," by James Russell Lowell, is given the place of honor, followed by articles by Marion Wilcox, Gertrude Smith, Hjalmar Hjorth Boyesen, John Hay, Luther G. Billings, William W. Campbell, Hamlin Garland, Henry James, Thomas Wentworth Higginson, Edgar Fawcett, S. P. Langley, Lilla Cabot Perry, Sarah Orne Jewett, Theodore Roosevelt, Richard L. Garner, Murat Halstead, Edmund Clarence Stedman, Brander Matthews, Frank R. Stockton, Edward Everett Hale, and William D. Howells. What an array of notabilities! What a feast for lovers of good literature! The illustrations are superb.

BOOK NOTICES.

A TREATISE ON THE LAW RELATING TO THE OFFICE AND DUTIES OF NOTARIES PUBLIC, throughout the United States. With forms of Affidavits, Acknowledgments, Conveyances, Depositions, Protests, and Legal Instruments. By JOHN PROFFATT, LL.B. Second Edition by John F. Tyler and John J. Stephens of the San Francisco Bar. Bancroft-Whitney Company, San Francisco, 1892. Law sheep, $5.00.

This work is too well known to need any introduction to the profession. It is, so far as we are aware, the only treatise fully covering the subject; and while having the field to itself in this respect, it is also a most valuable and reliable book. Since the publication of the first edition in 1877, the changes in the Statutes of the several States and the late judicial decisions respecting Notaries Public have made a new edition desirable. The editors of the work in its present form have evidently performed their duties in a careful and conscientious manner, and enlarged and improved, as it now is, the book will be found to be of material aid to the profession and of practical benefit to Notaries Public and Commissioners of Deeds

CONTRACTUAL LIMITATIONS, including Trade Strikes and Conspiracies, and Corporate Trusts and Combinations. By CHARLES A. RAY, LL.D. of the New York Bar. Lawyers Co-Operative Publishing Co., Rochester, N. Y., 1891. Law sheep, $4.50 net.

In these days of social disturbances caused by the differences arising between employers and employees, this work of Judge Ray's will be found to be both timely and useful. In a thorough and exhaustive manner the learned author covers the law embraced within the scope of his subject, and while devoting particular attention to Contracts in Restraint of Trade, Monopolies, Trade Trusts, Strikes and Conspiracies, he by no means neglects any other limitation upon the power to contract. The treatise as a whole is one of very great value to the profession, and will, we doubt not, meet with the appreciation which its merits justly deserve.

THE ROMAN LAW of Testaments, Codicils, and Gifts, in the Event of Death (Mortis Causa Donationes). By MOSES A. DROPSIE. T. & J. W. Johnson & Co., Philadelphia, 1892. Cloth, $3.00 net.

The author's preface well describes the scope of this interesting work, and we cannot do better than to quote therefrom. "This work is based on the *Corpus juris Civilis* for its chief authority Though the Pandects or Digest have contributed the most of the material, yet the Institutes and Code have furnished a considerable share, and the Novels have in a less degree also contributed to the subject-matter. The author is not aware that there is any work in the English language occupying the same field as this book. The growing importance of the Roman law, and the increased attention that it is receiving from jurists have caused the profession to extract out of its vast treasury of learning new precedents and new illustrations of legal principles adapted to the growing wants of higher civilization, and thus further enrich the common law, especially on the subject-matter of testamentary dispositions, the law of which depends in a great measure on judicial decisions and but little on statutes." The work will prove a valuable addition to legal literature.

SKILL IN TRIALS containing a Variety of Civil and Criminal Cases won by the art of Advocates. By J. W. DONOVAN. Williamson Law Book Co., Rochester, N. Y., 1891. Law sheep, $1.00.

An exceedingly interesting and readable book, in which Mr. Donovan has collected a number of incidents demonstrating the advocate's skill in the conduct of trials. Stories are told of such eminent legal lights as Webster, Choate, Beach, Butler, Curtis, Davis, and others; and the lesson taught is that however desperate a case may appear, the advocate's skill is equal to overcoming seemingly insurmountable difficulties.

A DICTIONARY OF ENGLISH SYNONYMES AND SYNONYMOUS OR PARALLEL EXPRESSIONS DESIGNED AS A PRACTICAL GUIDE TO APTNESS AND VARIETY OF PHRASEOLOGY. By RICHARD SOULE. New Edition, revised and enlarged, by GEORGE H. HOWISON, LL.D. J. B. Lippincott Company, Philadelphia, 1892. Cloth, $2.25.

A new edition of this work which has long been recognized as a standard will be gladly welcomed. While of value to every one who has occasion to write or speak, it is almost indispensable to the legal profession. Even practised and skilful writers and speakers are often embarrassed in the endeavor to make a sentence more clear, simple, terse, and rhythmical, by the substitution of one form of diction for another, and this work will be found eminently useful in providing a ready means of assistance where one is at a loss for a word or expression best suited for a particular turn of thought or mood of the mind.

IT CAME TO PASS. By MARY FARLEY SANBORN, author of "Sweet and Twenty." Lee and Shepard, Publishers, Boston, 1892. Paper, 50 c.; Cloth, $1.00.

The cordial reception given Mrs. Sanborn's first book, "Sweet and Twenty," will be extended to this

new story. While not so distinctively a summer novel as the author's earlier venture, it is yet far removed from the dreary field of novels with a purpose. The thread of the story is simple; but the deepest interest attaches to Alma, with her undisciplined nature, her romantic longings, and her girlish follies. For the last, however, she "pays the price," as Kildare would say.

MONTESQUIEU.

The Green Bag.

VOL. IV. No. 7. BOSTON. JULY, 1892.

MONTESQUIEU.

BY ALFONSO H. DI FARINI.

AMIDST the grand galaxy of splendid geniuses who illustrated the eighteenth century, stands pre-eminent Charles de Secondat, Baron de Montesquieu. Born at the château of La Brède, near Bordeaux, on the 18th of January, 1689, his early talents bespoke for him a great and learned career. His father destined him for the magistracy, and indeed, the earlier years of his life were spent in that capacity. Upon the death of his paternal uncle, who was president *à mortier* of the Parliament of Bordeaux, he left his fortune and his office to M. de Montesquieu. During his brief incumbency in this office he was the author of many acts which merited both the recognition and applause of his countrymen. In 1716 he was admitted a member of the then infant Academy of Bordeaux, and lent his efforts to diverting that society from the study of the polite arts, which can seldom be cultivated to advantage outside the capital, to the more useful study of the natural sciences.

But the functions of the magistracy soon proved too limited and confining to the broad genius of Montesquieu, which longed to deploy itself in the wider realm of letters. Thus in 1721, when he was but thirty-two years of age, he published his first and one of his most celebrated works, entitled "Lettres Persannes," or "Persian Letters." In these he absents himself in mind from his country to return in the character of a Persian noble travelling in the Occident for the purpose of studying the customs, manners, and laws of its peoples. These letters are full of sprightliness and energy, often teeming with lively wit, and still oftener with biting satire, especially when he attacks some of the old social idols of western Europe in general, and of France in particular. His severe strictures upon many practices of the Christian Church caused him at first to refuse to acknowledge himself the author of the "Lettres Persannes," though afterward, when he became a candidate for the seat in the French Academy made vacant by the death of M. de Sacy, and the identity of their authorship was discovered, he confessed to Cardinal Fleury, the then prime minister, that they contained nothing he was ashamed of. He was accordingly received into the Academy on Jan. 24, 1728, — the more deserving of that high honor, since he had lately quitted a lucrative employment that he might follow the bent of his genius and devote himself entirely to letters.

A few months after this event, for the further improvement of his knowledge, he set out on his travels accompanied by his intimate friend Lord Waldegrave, ambassador from England to the Court of Vienna. It was in the latter place that he met and conversed with the celebrated Prince Eugene, who, after having humbled the Gallic and Ottoman pride, lived here in time of peace without pomp, a lover and promoter of letters. After having visited the fertile valleys of Hungary and acquainted himself thoroughly with that brave and generous people, he directed his steps to Italy. At Venice he met, in his decline, the famous Law

author, and promoter of the celebrated "System," which had but a short time previous bouleversed the finances of Europe. It was also here that he met the famous Count Bonneval, who told him the story of his extraordinary life.

From Venice he went to Rome. In this famous capital he viewed the wonders of antiquity with a philosophic eye, and although he had made no particular study of the polite arts, the good taste and expression of his remarks as he stood before the celebrated triumphs of a Raphael, a Titian, and a Michael Angelo, at once evinced the fact that his mind belonged to the aristocracy of Genius. But more interested in the conversation of great men than in the admiration of the wonders of art, he hastened to enter into intimate relations with Cardinal Polignac, ambassador from France to the Holy See, and Cardinal Corsini, afterward Pope Clement XII., two of the most learned men of the age. Leaving Italy, he passed into Switzerland, where he remained some time carefully examining the institutions of that ancient and free Republic. Going down the Rhine, he next landed in Holland, the then commercial mart of Europe, and rival of the "Mistress of the Seas." The studies which he seriously began here of the "laws in their relation to commerce" he perfected when later on he crossed over into England. In England he was the admiration of both philosophers and statesmen, and had often the honor to wait on that generous protectress of the *literati*, Queen Caroline, who cultivated philosophy on the throne, and whose keen instinct for men of genius at once gave her a just relish for the conversation of M. de Montesquieu. By these means he acquired a perfect knowledge of the English system of government. This kingdom, which glories so much in its laws, was to M. de Montesquieu what in other times the isle of Crete had been to Lycurgus, a school where he improved in knowledge without accepting the whole.

Thus, having visited the most civilized and polished peoples of Europe, and having made the personal acquaintance of the greatest and most learned men of the age, he retired to his seat at La Brède, where during two years he gave the finishing touches to his learned disquisition on the Roman people: "Considérations sur les Causes de la Grandeur des Romains et de leur Décadence," which appeared in 1733, — wonderful work which will live and be studied as long as the philosophy of history shall continue to arrest the attention of great minds.

But all these travels and literary labors were but the prelude to the great work which the genius of Montesquieu meditated, and for which he had during a lifetime been gathering materials; namely, his most celebrated work, his monument, in fine, "L'Esprit des Lois," to the arrangement of which he consecrated upward of twenty years. Of this great work, he himself says, that should it meet with success, he would owe it to the majesty of the subject; and when he contemplates what so many great men of France, England, and Germany have said before him, he confesses himself lost in admiration, though not in courage, for we hear him exclaim with Correggio, "Io anche son pittore!"

Of the "Spirit of Laws," it may be truly said that there is no question of public morality, politics, or statecraft with which it does not thoroughly deal. The learned author first treats of the laws in general, after which he proceeds to discourse upon the three principal forms of government, the republican, the monarchical, and the despotic, showing the mainspring by which each one is moved. He next enters into the laws derived from and governing these three principal forms of government. He leaves no subject regarding the laws untouched or problem unresolved. He handles the great questions involving the law in all its branches with the pen of a master. Now he quotes from Tacitus in his "De Moribus Germanorum," or Plutarch in his "Lives," to bear him out; now he calls upon the deep medi-

tations of Plato in his "Republica," or Aristotle in his "Politica," to sustain his philosophical conclusions; again we see him travelling with Du Halde to Tartary or to China to carry a rejected principle or bring back a comparison; again he invokes the civilizations of the Antilles, of Mexico, or of Peru. He argues with Justinian, he reasons with Theodosius, he quotes Cicero and Cæsar, revels in Baumanoir, and refutes Dubos. The great triumphs and stupendous calamities of history are all familiar to him, and they, too, have their spirit as well as their laws. He is the witness of the upheavals of nations, the transmigrations and settlement of peoples; and to these, as well, his mighty genius gives laws and determines becoming bounds. The nice questions of commerce, together with the subtle intricacies of finance, are in the "Spirit of Laws" all happily resolved. Everything of moment which the philosophers have said, he quotes and embellishes with his own deep lucubrations, so that his illustrious work becomes a grand panorama of the law, unique in its style, plenary in the information it conveys, — perennial source at which the student may drink, would he know the spirit which animates peoples and the laws which govern them.

The great philosopher-jurist thus lived to execute the plan and merit the title which his early ambition coveted, — title the highest and noblest that human being can possess, that of legislator of the nations. The publication of the first edition of the "Spirit of Laws" filled the world of letters with the glory of Montesquieu; philosophers did him homage; statesmen courted him; France exalted him; the King of Sardinia, one of the most learned sovereigns of his time, confessed that the "Spirit of Laws" had taught him how to govern; Voltaire said that the human race had lost its titles, but that the genius of Montesquieu had rediscovered and restored them; and the English people, who had wished to claim him as their own, sent their most celebrated artist to strike a medal of him.

Thus, after having lived the life of a philosopher and man of the world, he died, as people were wont to die in the seventeenth century, a good Christian, universally and sincerely regretted. When the priest who administered to him the last sacraments of Holy Church, suggested to him, "Sir, you of course know how great God is," he answered, "Yes; and I am aware, too, how little men are!" — beautiful words, which at once bespeak the greatness of his soul and the simplicity of his faith. His death took place on the 10th of February, 1755. Lord Chesterfield said of him: —

"His virtues did honor to human nature; his writings, justice. A friend to mankind, he asserted their undoubted and inalienable rights and liberties, even in his own country, whose prejudice in matters of religion and government he had long lamented, and endeavored (not without some success) to remove. He well knew, and justly admired, the happy constitution of England, where fixed and known laws restrain monarchy from tyranny, and liberty from licentiousness. His works will illustrate his name, and survive him as long as right reason, moral obligation, and the true spirit of laws shall be understood, respected, and maintained."

THE FALSE PRIEST.

By Irving Browne.

IN looking over a very beautiful recent edition of "The Vicar of Wakefield," I was led to re-read some of the charming old story, and for the first time a suspicion dawned on me that "Goldy" was a little weak in his marriage law. Among "the odd little things" which the Squire employed Jenkinson to do for him, he commissioned him to procure "a false license and a false priest," in order to deceive Olivia by an appearance of a valid marriage; but the crafty Jenkinson procured "a true license and a true priest," and so the marriage was legal in spite of the bad Squire. It strikes me that Jenkinson went to unnecessary trouble and expense to "make an honest woman" of Olivia, for it seems that by the early English law the Squire would have been bound by the sham ceremony. Something however *may* depend on the period in which the author means to lay his scene. If before the enactment of Lord Hardwicke's marriage act, in 1753, I should say that the sham ceremony was *probably* binding. If afterward, it may be doubtful, for that act pronounces void all marriages not celebrated in the presence of a person in holy orders. I use this guarded language because it is not entirely clear that at common law the presence of a person in holy orders was not essential to the validity of a marriage, and in such case the sham marriage must be void unless the courts will refuse to entertain the fraudulent husband's contention on account of his infamy.

It must be observed that the present examination is as to a sham and false priest, without color of clerical authority or standing, and not as to one who claims in good faith to be a priest, but of the regularity of whose office there is question made. There is a distinction recognized in favor of marriages celebrated by persons of the latter class.

Although it is the popular belief, as evidenced in novels and plays, that a marriage ceremony imposed on an innocent woman through the medium of a false priest and a sham license, by the contrivance of the supposed husband, does not bind the latter,[1] yet it is remarkable that there does not appear to be a single case of a judicial investigation of the point in the books of reports on the elementary treatises. It is a reasonable presumption that when such exhaustive and researchful authors as Bishop and Schouler have not a word to say of mock marriages, it is because there is no law on the subject. In addition, my own researches have resulted in nothing very definite. There are cases approaching the point, and cases from which strong inferences may be drawn, but the exact point seems undecided.

It must be conceded that by the ruling English authority of Queen *v.* Millis, 10 Clark & Finnelly, 641, it is technically set-

[1] From the New York "Tribune" of a very recent date, I cut the following:—

"About a year ago," says a Brooklyn clergyman, "a woman who had been deceived by her lover by means of a 'mock marriage,' and who had discovered the fraud, came to me with her tale of woe and asked my advice. She was living with the man she supposed to be her husband, but believed that he was about to desert her. I thought the matter over, and told her to arrange a little party at her house and to invite me as a friend, but not as a minister of the gospel, and at an opportune time propose to the lover that they show their friends how they were married 'in fun.' She was a bright little woman, and carried out my instructions to the letter. The people in the house when I went there knew of the existing conditions, and readily entered into the scheme, prompted by curiosity to see how a 'mock marriage' was performed. I was pressed into service by the woman on the plea that I had a brother in the church. I took a Bible she provided, and married them fast, and made out the certificate in due form. Then I had an interview with the man. He was very angry at first, but came around all right; and he and the little woman are now living together very happily. That isn't the way most 'mock marriages' end, but it would be a good way to do it."

The clergyman and the newspaper seem equally at sea as to what constitutes a valid marriage in the State of New York. As no ceremony is there required, the first marriage was perfectly valid; but if it were not, the second one was equally void and "mock."

tled that before Lord Hardwicke's act the presence of a person in holy orders was necessary to constitute a valid marriage. Millis was indicted in Ireland for bigamy. His defence was that his first marriage was invalid because it had been celebrated by a Presbyterian clergyman. The question was discussed at great length and with vast learning by counsel and by the law lords. The opinion of the common law judges, requested by the lords, was expressed by Chief-Justice Tyndal, and was unanimous against the validity of the marriage; and this was the opinion of Lyndhurst, Lord Chancellor of Abinger, Lord Chief Baron, and of Lord Cottenham; while to the contrary was the opinion of Lords Brougham, Campbell, and Denman. It seems to me that the latter easily had the better of the argument; and it seems a sufficient reason for thinking so, that otherwise every marriage of Jews and Quakers in England before 1753, was utterly void. It is amazing that the three learned lords should have adopted this view, which involved the disgrace of thousands of innocent families, based wholly upon an obscure reference to a statute of Edmund which required the presence of a "mass priest," and an ordinance supposed to have been adopted by the Council of Winchester, in 1076, presided over by Archbishop Lanfranc, a Norman, called into England by William the Conqueror, that the benediction of a priest was essential to the validity of a marriage; supported by some scattering *dicta* and two ancient and obscurely and imperfectly reported cases. The robust sense of Campbell and Brougham, fortified by the learning of Holt, Blackstone, and Sir William Scott, and the opinions of Kenyon, Ellenborough, Sir William Scott, and Gibbs revolted at this narrow and inconvenient notion, Denman made the strong suggestion that "nothing in the Old Testament requires the presence of a priest at a marriage; nothing in the New;" and Brougham cited eleven ancient canonical writers, not one of whom claimed any such power for the church. It is highly probable that the early priests tried to compel parties intending marriage to pay tribute, spiritual and in money, to the church, to be enabled to make a contract of this kind; but the idea that the priesthood could impose that notion as a law upon the people in England is a remarkable exhibition of the narrowness of English judicial vision.

But the most surprising part of this judgment is that it only took its form rather than the reverse on account of the way in which the question was put to the lords. According to the rules of the House, the question was put "that the judgment be reversed," and the rule being *semper præsumitur pro negante*, the judgment was affirmed by the equal division; and thus, as Campbell says (Life of Lyndhurst), "a judgment passed by which hundreds of marriages, the validity of which had not been doubted, were nullified, and thousands of children were bastardized." Campbell entered a formal protest, and the decision led to the enactment of the Dissenters' marriage, which patched up the old marriages. "The measure was strongly opposed," says Campbell (Life of Campbell), "by the Irish primate and several of the ordinary supporters of the government."[1]

It is in this celebrated case that I find the only absolutely direct judicial expression concerning the precise subject in hand, and it did not amount to more than an *obiter dictum*.

Mr. Kindersley, arguing that a religious ceremony was necessary to a valid marriage at common law, said: —

"And did not the customs of the people show that? What but that occasioned the Fleet marriages and the marriages of May Fair? and what made the writers of plays and novels always describe marriages as taking place before a priest, if a mere contract *per verba de præsenti* was sufficient to constitute marriage?"

To which Lord Campbell replied in his opinion: —

[1] For excellent accounts of this case, see also Snyder's "Great Opinions by Great Judges," p. 425.

"Here I must observe how little weight is to be given to what was gravely relied upon at the bar, the prevailing belief among mankind of the necessity of the presence of a priest at a valid marriage, as evinced by novelists and dramatists: for it will be found that these expounders of the law always make a marriage by a sham parson void, contrary to the opinion of Lord Stowell and the canonists; and they give validity to marriages in masquerade, when the parties were entirely mistaken as to the persons with whom they are united; marriages which would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights."

Lord Campbell also observed: —

"What if the person who officiates as a priest, and is believed by the parties to be so, is no priest, and has never received orders of any kind? Mr. Pemberton admitted at the bar, as according to the authorities he was bound to do, that the marriage would be valid. Lord Stowell repeatedly expressed an opinion to this effect; and it turns out that in the instance of a *pseudo* parson, who about twenty years ago officiated as curate of St. Martin's-in-the-Fields, and during that time married many couples, upon the discovery of his being an impostor, which became a matter of great notoriety, no act of parliament passed to give validity to the marriages which he had solemnized; which could only have arisen from the government of the day being convinced, after the best advice, that in themselves they were valid. . . . The proposition must now be changed" (to this) "that there must be one believed by the parties to be a priest in apostolical orders; and a marriage by a layman may be good. There is a good marriage by a layman from the mistake of the parties, who thought that he was a priest with power to marry them."

"Lord Stowell has referred to the marriage between the first parents of mankind; and looking to a more modern case, which would be determined by the common law of England, I presume the learned judges would not doubt that in the recent settlement of Pitcairn's Island the descendants of the mutineers of the 'Bounty' might lawfully have contracted marriage before they had been visited by a clergyman in episcopal orders."

Mr. Pemberton, arguing in the Millis case, asked, why should parties have "got men to assume the habit of priests, who were not priests, if the marriage would have been perfectly valid" without a priest? To which Lord Campbell immediately answered, to avoid the danger of ecclesiastical censure. Mr. Pemberton also admitted "that if the party went to a minister of another sect, and represented himself as belonging to that sect, and his representation was believed by the woman," the marriage would be good, "for the proceeding would otherwise be a fraud."

The decision in Queen *v.* Millis had the effect of reversing the doctrine laid down by that most famous of authorities on marriage law, Sir William Scott, in the very celebrated case of Dalrymple *v.* Dalrymple, 2 Hag. Cons. It is worthy of note at this point, that the Supreme Court of the United States were equally divided in opinion on the same question, in Jewell *v.* Jewell, 1 How. 219; but the subject was passed without any reported opinions, the case being decided on other grounds.

It will now be well to glance at the few English decisions which to any extent approach the precise point in question.

In Weld *v.* Chamberlaine, 2 Shower [300], Pemberton, C. J., was "inclined to think" that a marriage before a parson, ejected in 1663, was valid, though no ring was used, "there being words of contract *de præsenti* repeated after a parson in orders; but upon the importunity of counsel a case was to be made thereof."

In Catterrall *v.* Catterall, 1 Rob. Ec. 580, Dr. Lushington held that a marriage celebrated in New South Wales by a Presbyterian clergyman was valid under English law, although the statute of England required the presence of a priest in orders of the English established church.

In Catherwood *v.* Caslon, 13 M. & W. 261 (1844), it was held that a marriage between English subjects, celebrated according to the rites of the church of England, but not in the presence of a priest in holy orders, is invalid at the common law. This was a marriage celebrated by an American mis-

sionary at the English consulate in Sidon, Syria.

In Beamish *v.* Beamish, 9 H. L. Cas. 274 (1861), the same doctrine was held on the strength of Queen *v.* Millis, Campbell, Lord Chancellor, himself conceding it to have been established by that case "that there could never have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or of a deacon." The point of the decision was that the priest could not marry himself; the priest must be a third party, as a witness, and as having power to forbear to celebrate the marriage if proper objection should be made.

In Hawke *v.* Corri, 2 Hag. Cons. 280, a suit for jactitation of marriage, Sir William Scott said: —

"How the case may be, in a moral point of view, if it should prove that the person who solemnized the marriage was not a clergyman, and the paper not a license, to the knowledge of the party who held them out as such, no reasonable man can doubt. What it may be in legal consideration, it is not necessary for me to answer at present; but I am not quite prepared to say that a marriage contracted under such circumstances would necessarily be pronounced null and void. . . . No case has been cited to me, in which it has been proved or has been laid down that an innocent woman, so imposed upon, would not be entitled to the complete protection of the law. . . . But if the facts were simply these, that being a young unmarried woman, she was imposed upon by a pretended clergyman, and a supposititious license, the matter might perhaps be deemed an arguable point, whether a marriage, had under such an atrocious imposition practised upon her, might not bind the guilty artificer of such fraud. It seems to be a generally accredited opinion that if a marriage is had by the ministration of a person in the church, who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for a sight of the minister's letters of orders, and if they saw them, could not be expected to inquire into their authenticity. . . . And even if this special license were false, it might perhaps be considered by some as an arguable point, whether the same principle, which in favor of innocent parties supports the acts of a pretended clergyman, might not be invoked to uphold the authority of a supposititious instrument of license obtruded upon a party deceived by so cruel a fraud;" etc.

This case went upon the point that the plaintiff had publicly and privately declared himself to be defendant's husband, and this put upon him the burden of proof to the contrary. It did not appear whether the minister was an irregular one or a mere pretender. The case is barely cited by Bishop, and not at all by Schouler nor by any other recent text-writer.

The most extensive and learned treatment of this topic by a text-writer is to be found in Reeve on Domestic Relations (4th ed. p. 253). He says: —

"There can be no doubt that the express words of the statute of Geo. II. has rendered those marriages not celebrated as that statute directs, void. But I apprehend that by the provisions of the common law, marriages, although celebrated by a person not qualified by law, or in a manner forbidden by law, are valid. The conduct of the parties concerned has rendered them obnoxious to the penalties of the law; but such singular conduct is not a ground for impeaching the validity of the marriage. Until the civil wars, during the reign of Car. I., nothing can be found on this subject. For until that period it had not been supposed that any person but one in holy orders could celebrate a marriage. . . . During the commonwealth the power of celebrating marriages was given to justices of the peace. And they were the only officers whom the law recognizes as possessing power to marry. Yet during the existence of this law it was determined that a marriage celebrated by one not in holy orders, though not a justice of the peace, was valid. After the Restoration, the power of celebrating marriages was committed exclusively to the clergy of the Church of England. And yet we find the court of King's Bench issuing a prohibition to the spiritual court, because the validity of a marriage had in the face of a separate congregation was questioned in said

court. So too we find that a marriage celebrated by a preacher in a separate congregation who was a layman was recognized as valid; . . . we find also that a marriage by a popish priest was held valid; and that in the strongest possible case the case was that a man had been married by a popish priest, who by law had no authority to marry. This person, so married, during the life of his wife married again. The matter was brought before the ecclesiastical court, and the second marriage was annulled upon the principle that the first marriage was valid. After the marriage was annulled, he was informed against before a common law court of criminal jurisdiction, for bigamy, and convicted. This seems to me irrefragable proof that the common law did not consider marriage, celebrated irregularly, as void."

So Bishop says (1 Mar. & Div. § 277 *a*):

"There were, in former times, numerous canons and the like, making it an offence against the Church to marry without the presence of the priest; but these were never construed to render the marriage in violation of them void."

But still the question recurs, were they not voidable in proceedings to avoid them?

In this country generally the mock marriage would bind both parties, for here generally the intervention of a clergyman is not necessary. The doctrine of Queen *v.* Millis never obtained here.

Bishop says of Queen *v.* Millis (1 Mar. & Div. § 281):—

"Repudiated, except as bare authority, at home; decided in haste by judges who had no knowledge of the very peculiar branch of jurisprudence to which it belonged; determined in the way it was, instead of the reverse, by an accident,—it never was entitled to any particular respect abroad, and it has received none."

It is well settled in this country, that if the minister were such *de facto*, and the parties acted in good faith, the marriage would be valid, although he were not a minister *de jure*, and, Bishop thinks, even if he were an usurper. A few cases illustrate this.

In Pearson *v.* Hovey, 11 N. J. L. 12, it was held that a justice of the peace might celebrate a marriage out of his county. This is put on the ground that no ceremony at all is necessary; but the courts say:—

"But suppose this act had gone to the whole extent of declaring that *no other* person or persons should solemnize marriages except those mentioned in it, such other persons would commit an offence against the act by solemnizing marriages, for which they might be punished, but still the marriage contract between the parties themselves would remain valid. During the commonwealth of England, Parliament passed a law *requiring* all marriages to be solemnized by justices of the peace; yet a marriage solemnized before a clergyman was holden by all their courts to be valid, although the clergyman was punishable. . . . Our act empowers an *ordained* minister of the gospel to solemnize marriages; but suppose a minister of the gospel to do it before he is ordained, can any person believe that the marriage itself would be invalid?" etc.

In Taylor *v.* State, 52 Miss. 84, it was held that the marriage was not invalid because the minister had not been regularly ordained.

In State *v.* Bray, 13 Ind. 289, it was held that "it was not necessary to the validity of the marriage that the minister should have been a minister in charge of a church, or the rector of a parish, or pastor of a particular flock. But it is necessary that he should have appeared to be a minister capable of entering upon the duties of such a charge, according to the ecclesiastical economy of his church, with the faculty of celebrating the rites of matrimony." This was under a statute requiring the celebrant to have "the cure of souls."

In People *v.* Hayes, 25 N. Y. 390, it was held that on a prosecution for bigamy the defendant is not absolved by the fact that the second marriage was celebrated by one falsely personating a clergyman. But this was put on the ground that the intervention of a clergyman or magistrate is not necessary under the law of New York. The following expressions of Allen, J., however, have some bearing on the question under examination here:—

"Most certainly the prisoner should not be permitted to evade punishment by showing that he deceived his victim, not only as to his capacity to contract, but also as to the character of the individual called in to attest the contract; that he induced the female to believe that their union had the sanction of the Church as well as the binding force of an enduring civil contract."

Still, although the defendant may be punishable for his deceit, the question recurs whether the marriage itself would have been valid at common law; whether, although estopped on the criminal side, he is also estopped on the civil side.

It would seem, however, that there is a practical opening to justice in the matter out of presumptions. It is very well settled that such an irregular marriage is presumptively valid; the celebrant is deemed *prima facie* duly authorized. (Patterson *v.* Gaines, 6 How. 550). The deceived wife may therefore safely rest upon this presumption, for no court will allow the husband to rebut the presumption by bare proof of his fraud. Thus one technicality is offset by another to attain justice, and that is the best use to which technicalities can ever be put.

THE LAW OF THE LAND.

III.

SOMETHING ABOUT THE MAKING OF WILLS.

By Wm. Arch. McClean.

IT has been said of old, "For we brought nothing into this world, and it is certain we can carry nothing out." One would suppose that this had never been said before, except in a secret session, to judge from the records of decedents' estates. The saying is so commonplace true that humanity only half appreciates it, thereby having a peculiar significance to the legal profession. Poor mortal worries a whole life to gather together something, rises early and retires late in the pursuit, adds and multiplies. When the end comes, he realizes faintly that he cannot smuggle any of his hoard into that other bourn, and a lawyer is summoned to advise, perchance, some technicality to evade the inevitable. If the attorney arrives in time, a last will and testament is apt to be the result. If he is too late, poor mortal has died intestate, according to the law of his domicile. In either event the lawyer is generally a necessity. After faithfully making the estate as large as possible, directing the minute details to prepare the estate for distribution, and finally after the net balance under his superintendence has been divided as directed by the will or according to law, he reaps his reward by having the funny man insinuate that the estate has been duly divided between the lawyer and the heirs.

It has been observed that of the number of persons who annually die seized of an estate, one half or more succeed in dictating who shall spend that which they have saved by leaving a last will and testament. As the proportion of testates is so large, certain hints about the making of wills that have stood the scrutiny of courts may be appropriately suggested.

When you have made up your mind to make a will, don't let it be an instrument that shall take effect at once, or your will may be construed to be a gift. Don't postpone, on the other hand, the operation of your will for half a century or more after your death, or your will may be no will on account of laws against perpetuities. When you wish to make a will that will be a will

that will have its way, execute an instrument, or better, have a lawyer prepare one for execution, whereby you make a disposition of your property to take effect after your death. It is absolutely necessary to die to have your last will and way legally.

It may not be facetious to remark that it is wise to put your will in writing, if you have the time. In the written form it is always much easier to ascertain the intention of the testator and to interpret his exact language, and that is what the lawyers and the courts will seek to discover after your death. If you are unlucky enough to leave a verbal will, some court may be compelled to declare that if you could have made a written will, the verbal one is of no avail. If through some eccentricity you deliberately select the verbal method and live a week or two afterwards, you will have had your wilful way to no purpose, for your will is not good. The best plan in making a verbal will is to die just about the time you have finished making, as it were, your verbal seal to it.

Don't make any conditional wills unless you want the heirs to have as much trouble in obtaining your money as you had in making it. Don't fill up all the crevices of your will with "ifs." Should you take a little trip and leave as a memorandum, "if I should not get back, do as I say in this paper," and then come back sick and live a week or two, such paper will not answer the purpose of a will. If you have any regard for the directions made on the paper, never come home alive.

First and foremost, before making your will, do be certain that you are not crazy. Next, that you have the testamentary capacity to make the instrument. Don't ask that fellow that you swapped horses with last spring, or him who decorated your barn with its fringe of lightning-rods, whether you have a sound mind. They already are witnesses for the contestants. To be sure that you have this testamentary capacity consists in having a sound mind and disposing memory, a full and intelligent knowledge of the act you are engaged in, of the property you possess, and the disposition you desire to make of it.

Inter nos, you can be a little crazy, yet it may not hurt your will if you are careful not to publish the fact, for it may be with you as with the old man who said he had been crazy for two years, but no one ever found it out because he had not told any one about it. So you may be the kind patron of a cat hospital, or the would-be inventor of perpetual motion, still these might not count against you provided you have the business capacity, co-existent with your delusion, on such subjects as are requisite to make a will. There is a Charybdis to this Scylla. You may not be crazy even a particle, yet be incompetent to make a will. Imbecility of intellect, though short of insanity, enfeebled in mind, so as to imagine yourself to be possessed of immense wealth and disposing of what you have in consequence in an erratic manner, may be sufficient to upset your will.

If you have some bad habits, they may be brought to light, but will hardly affect your will. You may indulge in various brands of "Oh! be joyful," but if you are sober when you make your will and are careful to have that fact provable, your testamentary capacity may be saved. You may lie about your property when pestered with gratuitous advice what to do with your money, or, like a certain old woman, you may take a mischievous delight in deceiving your nieces and nephews, promising your estate to them all; but when it is found out that you have deceived them all but one, it will not affect your testamentary capacity.

Having with great pains ascertained that you have not been crazy your whole life, but have the necessary testamentary capacity, you must next be careful not to permit yourself to be imposed upon by fraud and undue influence. If you would wish to leave your estate to some warm friend, your lawyer or doctor, and succeed in persuading the recipient to draw the will, don't do it. It will be shown beyond doubt that you were a

miserable weak creature, — a regular bunco victim, — and that this disinterested friend was squeezing you. This may indeed be the result of any preference made. However, don't have the recipients of your preferences write and witness your will, or the fact may be suspicious. If you are a real old man and your second wife — an old man's darling — makes you the recipient of alleged spiritualistic communications from your first wife, your will giving the young darling your entire estate will be set aside, as the spiritualistic sleight of hand will be considered sufficient evidence of undue influence. If you propose to establish some great charity or institution by your will, don't do it. It is tempting the poor human nature of your relatives too far. Give it before you die.

Having avoided all pitfalls to the best of your ability, and having completed your will, be sure to sign your name at the end thereof, and have the attestation as required by the law of the State you live in. Don't write your will on three pages of note paper, the first two pages being preamble, and the third page the disposition of your estate, and then sign the second page instead of the third, unless you are fond of a practical joke. This has been tried, but failed to answer for a will. If you don't know how to write your name, you may make your mark, duly witnessed.

In fact, if you happen to be real sick, *in extremis*, just about to die, but possessed of disposing ability and fully informed of the contents of a writing presented to you for your signature as your will, and you make a scrawl which you mean to represent your name, it will be a valid signature.

Having your will written, some one therein remembered has provoked you, and you are going to exhibit your charitable disposition by a revocation of your will. You can revoke special clauses by codicil attached to will, or by a revocation in writing, or by destroying the will yourself, or by a new will revoking all former wills, or by some such method as any lawyer will advise for the usual fee. Don't direct some friend to burn your will when you are not present to witness the cremation, for that may not be a revocation. If you are fond of making wills and keep three uncancelled wills by you made at different times, until you have made up your mind which you want to keep, that does not place the three wills on an equal footing as unexecuted and unpublished wills. The last will if left unrevoked will be valid. If you happen to be of the feminine gender and having made a will leaving your property to a fondly remembered lover of your youthful days and having afterwards married your last opportunity, don't worry about such will. Law deals romance a crushing blow by declaring that marriage revoked the will made when single.

Apropos of wills and women, there is a rule in the construction of wills that where one clause in a will conflicts with another, the clause nearest the end of the will rules, as being the latest and freshest instruction from the testator. This shows the importance of last words. They rule in wills as with ——.

Speaking of a drinking man, he has the testamentary capacity, though frequently drunk, if he makes his will when sober. The following will illustrates how a certain testator succeeded in avoiding any trouble of testamentary capacity. It is given verbatim, except a fictitious name has kindly been substituted. The italics are the testator's.

"I, Richard Roe, of Adams County, do hereby in my own handwriting declare this to be my last will and testament, hereby revoking every and all other by me at any time made and there are several, each and every one of which I do now most solemnly declare and say was made and executed when I was too *drunk* to know or realize the acts or the effects of the papers I was executing, particularly one in the hands of ——, one in the hands of ——, and one in the hands of ——. If not absolutely *drunk* at the execution of the said wills, my mind, enfeebled and debilitated by the excessive use of liquors, was incapable of judging between *right* and *wrong*, wherefore I do now and hereby give, devise, and bequeath," etc.

A LAWYER ON LAWYERS.

By Albert C. Applegarth.

THE age in which we live may be aptly characterized as an era or an epoch of reform. Everybody is attempting to improve everybody. The press fairly teems with accounts of the appointment of committees to investigate some person or something. Old things are rapidly passing away; everything is becoming new. In all directions we hear of reforms in sociology, in medicine, in juridical systems, in theology,— in short, in all the various departments of human activity. The male fraternity, it is popularly supposed at least by the better half of the race, will not honestly reform themselves; consequently advanced women are endeavoring to bring their unprogressive and recalcitrant brethren to their elevated platform. On the other hand, these aforesaid lords of creation appear to rest satisfied in the comfortable assurance that if some of their ideas were carried into execution, the amelioration of femininity would be very pronounced; would, in truth, be an accomplished fact. Then, again, the physiologist regards the preacher as very far below par. The clergyman sits in austere judgment upon the pestilential professor, whom his opponents charitably describe as just bursting with heterodoxy of every description.

And when we proceed to examine this category more minutely, we ascertain that all classes of society express their earnest desire and indisputable ability to reform the lawyer, the latter individual appearing to occupy much the same relation to the modern community as did the unfortunate scapegoat to the Jewish ecclesiastical polity. On one occasion, when Voltaire was attempting to surpass all previous relations of persons not remarkable for honesty, he observed, with his brilliant audacity, "Once upon a time there was a lawyer." When called upon for elucidation, he declared the statement was self-explanatory. Many, in our own day and generation, appear to coincide in the opinion of this celebrated and satirical Frenchman.

Does any measure miscarry in the halls of legislation? Instantly the attorney is summoned to the bar, as a rule condemned, and we read interminable articles on the lamentable fact that governing bodies are so largely composed of legal gentlemen. Is public opinion neglected, ignored, or defeated? Once more the disciple of Blackstone is pronounced the undeniable culprit. Has the government of some municipality resulted in an abortion? In some quarters it is never attributable to any other cause than the intrigues of astute but unscrupulous attorneys.

If any of these undesirable events come to pass, immediately the scribe class is produced, and invariably slain on expiatory altars. The whole affair strongly reminds one of a Western anecdote. One morning, in this present century of grace, a gigantic son of Erin was soundly thrashing a poor diminutive Hebrew. When the bystanders remonstrated with this modern Hercules, he replied, with unutterable scorn, —

"And is he not a Jew? Yis, gentilmen, he is. And did not the Jews kill our blissed Lord? Yis, gentilmen, they did."

But spoke up one of these heroic observers, —

"My dear man, that was centuries ago."

"Be jabbers," responded the Irishman, "I can't help that. That may be true; but, 'pon my word, I just heard of the crime of the Jews to-day."

Now, seriously, does the attorney need the pruning-knife more than his zealous brethren, apparently so intent on his reclamation? Of course, there are in our profession, as in all others, some few persons of

whom the less said in charity the better. But is it the correct thing to do to estimate an entire class by such samples? What opinion would the ordinary layman entertain of a court of justice that entered up its judgment after one of the contestants had presented his evidence, without even so much as hearing the opposite testimony? Because some colored persons reside on a street, shall we aver that all the residents on that particular thoroughfare are Africans? In churches there are generally some members whose lives are in no sense consonant with their professions, but will any impartial mind declare on that account that all Christians are hypocrites? On the contrary, does not the very presence of counterfeit money prove that there must be such a thing as genuine currency?

Such being the case, the horror that some persons pretend to entertain for this profession *in toto* is absolutely inexplicable. Many individuals base their aversion on the phraseology of Holy Writ, which declares that he who goes to law shall atone for such fatuity by losing his last shilling. Other opponents, of a more facetious turn of mind, affirm that a lawyer always demonstrates his military training by his magnificent charges. In spite of these serious arraignments, however, experience teaches that the fees of the legal practitioner are seldom more exorbitant than those demanded by a reputable physician or a competent surgeon.

Again, the lawyer is usually considered responsible for all the anomalies existing in the present systems of jurisprudence. But such accusation is not just. In the law, as he is compelled to practise it, he observes much that should be modified, but he soon comes also to recognize his own impotency. The rule of precedent is despotic and inexorable. No matter what the client may think of the equity of his case, the lawyer's business is simply to administer the remedies as he finds them. In some aspects the settled rule that an employee is not allowed to recover for accident caused by neglect of his fellow employee, is a harsh doctrine, and will be so adjudged by many.

Any one familiar with legal history knows that the recent improvements in the law have been numerous and important; but, despite this fact, many technicalities still linger. If these are occasionally employed by some shrewd advocate to acquit a criminal, our ears are always saluted with "maladministration of justice," and other expressions equally complimentary. Were these complainants, these individuals, who now declaim on the foolish, abstruse legal points, as they stigmatize them, under arraignment, — were they themselves on trial, it is seriously apprehended their opinions would very suddenly change, and that they would urge their lawyer to employ every device to secure their acquittal.

Recently one of the writer's clients brought a claim to his office for collection. The defendant in the suit was threatened with several similar prosecutions, but my most excellent friend urged me, in quite emphatic language, to realize his claim before I took any steps to recover for his "companions in distress." Had not our critical friends better remove the beam from their own eyes before they attempt to operate on the optics of the legal profession?

But once more. We also hear much about lawyers having no consciences. This pabulum has been placed before us so frequently that we can adopt the language of the boarding-house victim, when he candidly informed the conventional pig's face that he had had the ineffable pleasure of beholding his visage several times in the last few days.

An acquaintance recently went to the extent of affirming that it was a mystery to him how an attorney could be a Christian. How can an individual justify himself in pleading for a man of whose guilt he is confident? continued this Cato, the junior. But such argument proceeds upon nothing better than a *pons asinorum*. Lawyers and clients alike know that seldom, very seldom, is a legal adviser in possession of the facts until

he comes to the trial table. According to one of the most fundamental laws of humanity, a person invariably marshals his facts in a way most advantageous to his own side of the controversy.

It is, indeed, no uncommon occurrence for a man to enter a law office, and from his statement one is verily inclined to believe that he had been led as a lamb to the slaughter. It is nothing less than an enthronement of violated innocence. But, alas! too late the credulous solicitor discovers that in this instance, as in others, he has seen in a glass but dimly. When the opposite party begins to give his version of the testimony, the lawyer is more than likely to change his notions as to his client's innocence, — certainly as to the aforesaid individual's veracity.

But my readers must not imagine this article is an inspired plea. I have not been engaged by the legal profession to elaborate these points. This paper is simply a plain narration of incontestible facts. And since this is true, the question arises, in the language of a New York celebrity, "What will you do about it?" The statement was recorded at the beginning of this dissertation that we live in an age of reforms. Their number is already great, but it is always an irresistible temptation to a mortal being to be a benefactor of mankind. The writer has been infected with this contagion. And as I have several suggestions that lie along the line of improvement, I desire to make some addenda. My proposed improvements would be about as follows: —

First. That no client of a wicked or deceitful heart ever come to a lawyer's office.

Second. That all persons in doubt of the righteousness of their cause examine and cross-examine themselves most rigidly before they invoke legal advice.

Third. That, to guard against accidents, all lawyers add to the inscriptions already on their shingles this legend: "None but conscientious people wanted here."

Fourth. That each attorney keep a squire penned up in one corner of his office to test the candor of a client, when such heroic measures appear necessary.

Fifth. That all clients who deceive or otherwise misinform a lawyer be sent to the penitentiary for twelve months, with no hope of pardon, for what is erroneously called good behavior.

Sixth. That all clients be put on oath to state the entire case, with no reservations.

Seventh. That the community, jointly and severally, solemnly promise through its official representatives, giving suitable bond, to patronize a lawyer who is sufficiently imbued with ideas of rectitude to dismiss a case, in spite of the awful maledictions of his patron, when he discovers in the course of the testimony that his client's case is not permeated with Simon-pure equity.

Eighth. Lastly, but by no means least, that our beneficent government then devote some of that perplexing surplus to the establishment of a retreat for the future maintenance of those unfortunate bipeds who were so unhappy as to study the law and attempt to realize the profits thereof anterior to the inauguration of this great millennium.

LEGAL STRATAGEMS.

PROBABLY it is not too much to say that many a cause apparently hopeless from the first has taken an unexpected turn by an accidental happy hit or the prompt adoption of some smart ruse on the part of counsel.

A celebrated barrister with whom cross-examination was a fine art once confidentially told an adverse witness in the box that he knew he possessed the key of the legal situation, that he held a most important secret.

"And, mind you," added he with measured emphasis, "I am going to get it out of you." And he did, for the witness was demoralized in anticipation by the lawyer's emphatic and cock-sure warning.

Brougham, while practising at the bar, once tried the experiment of magnetizing an adverse witness giving evidence, and succeeded in a remarkable manner without speaking a word. Seating himself immediately before the witness, he fixed him with his eye till the poor man blushed, stammered, and finally collapsed in nervous confusion, probably leaving his most important evidence unsaid.

An eminent barrister still practising on the Midland Circuit, and famous for his power in cross-examination, had once to defend a man charged with poisoning his master. The principal witness for the prosecution was a fellow-servant, who swore that he detected the prisoner in the act of mixing a white powder with the hot water and spirits which it was his duty to supply his master with every night on retiring to bed.

The defending counsel, in his cross-examination, was so deferential and polite to the witness that his manner as much excited the surprise of the court as it flattered the feelings of the witness himself. He was complimented upon his intelligent and straightforward replies, and finally questioned as to the finding of the remains of the powder in the glass, a fact to which he had sworn.

"After what transpired you had no doubt that it was the arsenic which caused the illness of your master?" asked the counsel, directing a look of indignation at his own client, the prisoner in the dock. The witness assented.

"Then you know something of the properties of arsenic?" observed the other with an approving smile. The witness hesitated, and replied in the negative.

"Then," suddenly thundered the barrister, flashing his eyes upon him, "how did you know the powder to be arsenic?"

The transition was so sudden that the man was carried out in a fit.

The defence was that the white powder was nothing more than the usual harmless sugar provided with hot punch, while the real poison had been added by another hand.

At the next assizes the prisoner and the witness had changed places, when the latter was proved the real culprit, — a fact suspected and worked upon by the astute counsel from the first.

A still more clever ruse was that adopted by another counsel who afterwards attained to distinction, who had to examine a witness in a disputed will case. One of the witnesses to the will was the deceased man's valet, who swore that after signing his name at the bidding of his master, he then, also acting under instructions, carefully sealed the document by means of the taper by the bedside. The witness was induced to describe every minute detail of the whole process, the exact time, the position of the taper, the size and quality of the sealing-wax, "which," said the counsel, glancing at the document in his hand, "was of the ordinary red description?"

"Red sealing-wax, certainly," answered the witness.

"My Lord," said the counsel, handing the paper to the judge, "you will please observe that it was fastened with a wafer."

It will be within the recollection of many that a somewhat similar ruse was adopted by one of the leading counsel of the present time in a trial of political importance, the whole case of which hinged upon the question of the genuineness of certain letters. The most important witness was, while under examination, suddenly taken by surprise by being called upon to write down a particular word which occurred in the letters. The slip of paper was handed back with the word misspelt in an identically similar fashion as it appeared in the correspondence, and the clever forger was soon after detected in the witness himself.

While some lawyers have been distinguished for their powers of extraordinary special pleading, others have been equally famous for the adoption of odd and whimsical ruses.

In an action brought by a country newspaper editor against a gentleman whom his paper had attacked, and who had thought that a thong whip was the proper implement for wiping out the indignity, the counsel for the plaintiff delivered a long and eloquent speech, in which he vividly depicted the cruelty and ill-usage to which his client had been subjected.

Counsel for defendant rose, and, addressing the jury in a familiar tone, said that they had heard the eloquent speech from the other side, and, stripped of all its finery, the simple, naked English of the whole matter was that the plaintiff had got a sound horsewhipping. He should only say one thing in reply, and that was that he most richly deserved it. After a little consideration the jury, by their verdict, showed that they thought so too.

Another instance of a laboriously produced effect being effaced by the simplest means was that of a breach of promise case.

The barrister who in this instance held the brief for injured beauty, was famous for studying effect when he pleaded, and to that end arranged that his fair client should be so placed that her charms should be well under the observation of the jury. He began a most pathetic appeal by directing their attention to her beauty, and calling for justice upon the head of him who could wound the heart and betray the confidence of one so fair, concluding with a peroration of such pathos as to melt the court to tears.

The counsel for the defendant then rose, and after paying the lady the compliment of admitting that it was impossible not to assent to the encomiums lavished upon her face, he added that nevertheless he felt bound to ask the jury not to forget that she wore a wooden leg. Then he sat down.

The important fact, of which the fair plaintiff's counsel was unaware, was presently established; and the jury, feeling rather sheepish at their tears, assessed damages at the smallest amount. — *London Tit-bits.*

THE SUPREME COURT OF KANSAS.

By Henry Inman.

BEFORE the cession of the vast territory known as the "Louisiana Purchase" by treaty dated April 30, 1803, there was no permanent settlement in what is now Kansas. On the 26th of March, 1804, Congress divided the immense ceded tracts into two distinct territories on the line of the thirty-third degree of north latitude. All south of it was called the Territory of New Orleans; all north, the District of Louisiana. The executive authority of the Governor of the Territory of Indiana was extended over the northern division, of which Kansas was an integral portion. The establishment of inferior courts, their jurisdiction, and such laws as might seem conducive of good government were authorized; and the Governor and Judges of the Territory of Indiana at once acted upon this authority. This was the first assumption of law over what is now Kansas.

By Act of March 3, 1805, a territorial government was authorized for the District of Louisiana, and its name changed to the Territory of Louisiana. The legislative power was vested in a Governor and three Judges. On the 4th of June, 1812, Congress reorganized the territorial government, vesting it in a Governor, Legislative Council, and a House of Representatives; it also changed the name to Missouri Territory. Under this authority, on the 19th of January, 1816, an act was passed by which the common law of England, and the statutes passed prior to the fourth year of James I., of a general nature, were declared to be in force in the territory, provided they were not inconsistent with the laws of the United States and the statutes of the Territory.

On the 6th of March, 1820, Missouri was admitted into the Union on an equal footing with the original States. Kansas was thus left without any territorial government. By Act of Congress of June 30, 1834, it was enacted that all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, should be taken for the purpose of the act to be Indian country; and certain regulations were prescribed for its government. So much of the laws of the United States as provided for the punishment of crime committed in any place within the exclusive jurisdiction of the United States, was declared to be in force in it, with the proviso that the same should not extend to crime committed by one Indian against the person or the property of another Indian.

For the purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi River that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the State of Missouri, west by the Mexican possessions, south by Red River, and east by the west line of the Territory of Arkansas and the State of Missouri, was annexed to the Territory of Arkansas; and the residue of the Indian country west of the Mississippi River, which included what is now Kansas, was annexed to the judicial district of Missouri.

On the 30th day of May, 1854, an act was passed by Congress popularly known as the Kansas-Nebraska Act, by which Kansas was created a Territory, with a territorial government. The executive power was vested in a Governor, to be appointed by the President. The legislative power was vested in the Governor and legislative assembly, — the legislative assembly to consist of a Council and House of Representatives. The twenty-seventh section of this act enacted that —

"The judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace. The

Supreme Court shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said Territory annually; and they shall hold their offices during the period of four years, and until their successors shall be appointed and qualified. The said Territory shall be divided into three judicial districts, and a District Court shall be held in each of said districts by one of the justices of the Supreme Court, at such times and places as may be prescribed by law; and the said judges shall, after their appointments, respectively reside in the districts which shall be assigned to them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace shall be as limited by law; provided that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction. . . . Writs of error, and appeals from the final decisions of said Supreme Court shall be allowed, and may be taken to the Supreme Court of the United States, in the same manner and under the regulations as from the Circuit Courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witness, shall exceed one thousand dollars; except only, that in all cases involving title to slaves, the said writs of error, or appeals, shall be allowed and decided by said Supreme Court without regard to the value of the matter, property, or title in controversy; and except, also, that a writ of error or appeal shall also be allowed to the Supreme Court of the United States from the decisions of the said Supreme Court created by this act, or any judges thereof, upon any writ of *habeas corpus*, involving the question of personal freedom: provided, that nothing herein contained shall be construed to apply to, or affect the provisions of the act 'Respecting fugitives from justice, and persons escaping from the service of their masters,' approved February 12, 1793, and the act 'To amend and supplementary to the aforesaid act,' approved September 18, 1850."

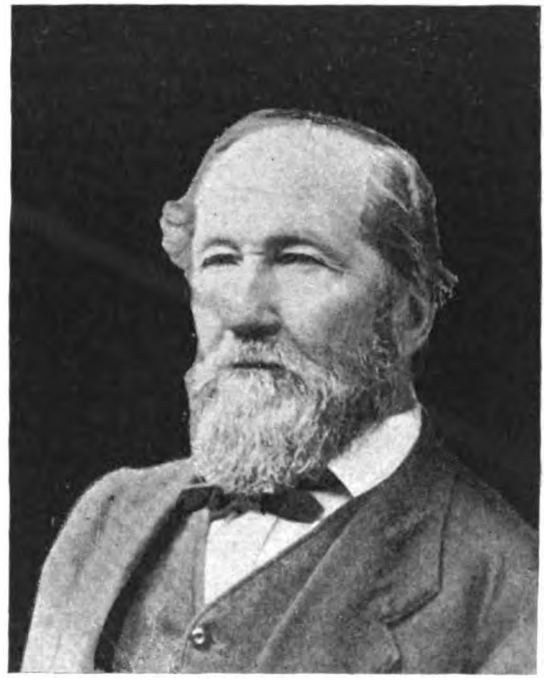
THOMAS EWING.

The first legislative assembly convened at Pawnee, on the 22d day of July, 1855. After organizing, it adjourned to the Shawnee Manual Labor School, where it proceeded to enact a body of laws for the government of the Territory.

Shawnee Mission of the Methodist Church South stood close to the quaint old town of Westport in Missouri, but within the boundary of Kansas. At the newly selected capital the Legislature was very nearly at home. The members were taken in a hack at every daily adjournment to Westport, in which they returned next morning. Bottles and jugs in number were part of the freight in the hack. The code of laws they framed, comprising over a thousand pages, would cause the ordinary man to shrink from reading it; it would have taken the greater portion of the whole session to have read it through once. All their enactments were of a local character, in fact, transcripts of the Missouri code. The legislature were in the habit of passing separate acts in which they defined the meaning of words. Thus,

in taking up some Missouri law, they would pass a separate act in which it set forth that "in said act the word 'State' quoted was to be understood as meaning 'Territory.'" In this way the most of those acts, or laws, were gotten up, and were passed simply by reading the title of the bill.

Here, at the old Mission, the first session of the Supreme Court was convened on the 30th day of July, 1855. The first judges appointed were Samuel Dexter Lecompte, of Maryland, Chief-Justice, whose commission is dated July 11, 1854; Sanders W. Johnston, of Ohio, and Rush Elmore, of Alabama, Associate Justices, whose commissions bear date June 29, 1854. At this inaugural session there were present Chief-Justice Lecompte, and Associates Johnston and Elmore. On the first day of its session the following communication was presented to the court by A. J. Isacks, United States District Attorney: —



NELSON COBB.

"Resolved by the House of Representatives, the Council concurring therein, That the District Attorney be requested to advise the legislative assembly, whether in his opinion the act providing for the temporary session of the legislature at the Shawnee Manual Labor School is valid, and whether the adjournment of the Assembly to this place, in pursuance of such act, was legal, and whether it was competent for the Assembly, if its present session be legal, to confer on the probate courts jurisdiction, civil and criminal, concurrent with the district court.

"Resolved further, That the District Attorney be required to present these questions to the Supreme Court at its first session, and solicit from that court an opinion on said interrogatories."

The journal of the court says: —

"The court having taken the communication under consideration, determine, in view of the importance of the subject, to respond, as judges, but not as a court, to so much as presents the question of the constitutionality of the act, generally, of the legislative assembly, but decline to respond to the particular question embraced in the second clause of the resolution."

To this Mr. Justice Johnston dissented as follows: —

"I do not concur in the action of a majority of the court. This application is, in my opinion, clearly extra-judicial. Any attempt by this court, in a matter not properly before it, or by a member of this court in his official character, to change, direct, or otherwise control the past action or future proceeding of the legislative assembly of the Territory, involves an assumption of power of the most alarming character. My official duties and authority are limited by law, and, with my present view, I cannot consent to participate in any effort to overstep or transcend them."

It does not appear what response the two judges made, but as they subsequently indirectly acknowledged the validity of the laws passed at the Shawnee Manual Labor School, it is presumed that they gave as their opinion that they were valid.

On the 31st day of July, 1855, after adopting a seal, the court adjourned to meet at the seat of government on the first Monday

of December following. The court met at Lecompton on the third day of December 1855; present were Chief-Justice Lecompte, and Justices Elmore and Johnston. On the 4th, Jeremiah M. Burrell, of Pennsylvania, presented a commission from the President of the United States as an associate justice, dated the 13th of September, 1855, on which his oath of office was endorsed. On the next day Sterling G. Cato, of Alabama, presented a commission from the President of the United States, as associate justice of the same date as Mr. Burrell's. The following entries appear upon the Journal: —

"The Hon. Jeremiah M. Burrell and Sterling G. Cato, having presented commissions from the President of the United States, as associate justices of the court, each dated the 13th day of September, 1855, and the Hon. Sanders W. Johnston and Rush Elmore, heretofore associate justices of said court, denying the power of the President to issue such commissions, and claiming to be themselves entitled to occupy the position of associate justices, under and by virtue of their existing commissions, until the expiration of the term of four years, and until the appointment and qualification of their successors, being the period of their appointment; and the matter being thus presented for determination to the Chief-Justice, he, without deciding or professing to decide the question of the power of the President in this respect, stated it as his opinion, that he ought to be governed by the commissions of the President aforesaid, and that being so governed, he could but recognize these gentlemen, Jeremiah M. Burrell and Sterling G. Cato, as associate justices *de facto*, and, as such, entitled to occupy seats upon the bench. To which opinion and judgment of the Chief-Justice, the said Sanders W. Johnston and Rush Elmore except, and enter their most solemn protest, the entry whereof is made at their request. . . . Whereupon the said Jeremiah M. Burrell and Sterling G. Cato took their seats as associate justices."

The court met again on the first day of December, 1856; and, during the term, on the 13th day of January, 1857, Hon. Thomas Cunningham presented a commission from the President, as an associate justice in place of Jeremiah M. Burrell, dated 19th of November, 1856, and took his seat. It does not appear from Justice Cunningham's commission, from what State he was appointed, but it is believed that he was a native of Pennsylvania. The 14th day of January, 1857, appears to be the first date at which any cases were called, but none were then argued. Two were dismissed for want of prosecution, and time was given in another for the assignment of errors. At the June term, 1859, Hon. John Pettit, of Indiana, having been commissioned Chief-Justice in place of Lecompte, by commission dated March 9, 1859, appeared and took his seat. There were no other changes of the territorial government.

The last record on the journal of any proceedings in the Supreme Court of the Territory, is dated Jan. 11, 1861, but is not signed.

Kansas was admitted into the Union as a State, by act of Congress dated Jan. 29, 1861. The territorial legislature was in session at the time the act of admission was passed, and continued to transact business for several days afterward. The acts passed by this body, after the admission, were declared to be valid by the Supreme Court of the State in the case of Hunt *v.* Meadows, 1 Kas. 90.

The publication of the reports of the decisions of the Supreme Court of the Territory, was commenced in 1860, by Hon. Thomas Means. There were forty-eight pages of the work printed at that time, and then it appears to have been abandoned. In 1870 James McCahon, of Leavenworth, Kansas, took up the work, and in one volume reported all the cases of which any record could be found of the territorial Supreme Court decisions; amounting, in number, to twenty-eight.

Among the cases cited, there is none of any importance, or involving questions of political significance, or that have any bearing upon the thrilling events of those troublous times. There is one case in the District Court of the First Judicial District of the

Territory, where, it will be remembered, the Chief-Justice with his associates were assigned to preside over three districts respectively. This case was heard by Chief-Justice Pettit, at Leavenworth; and the syllabus is as follows: —.

"1. The guardian of an infant owner of a slave in Kentucky cannot pursue the slave into another State or Territory, to which he has escaped, and there arrest him under the Act of Congress of 18th September, 1850, he not being the person to whom the labor of the fugitive is due by the laws of Kentucky, nor the agent or attorney of such person, empowered in the manner specified by that act.

"2. The act requires a special mode by which the agent or attorney shall be authorized to act, and any other authority to him is insufficient. The authority must be by the act of the person to whom the service is due.

"3. If the guardian had authority, as such, to arrest the fugitive, it would be necessary, in an indictment for the offence of rescuing the fugitive from his custody, after the arrest, to state the time, place, and by what authority the appointment of guardian was made.

"4. The indictment must distinctly show that the fugitive escaped from the State or Territory where the service or labor was due by the laws thereof.

"5. The indictment must also show that the defendant knew or had notice that the person arrested was a fugitive, owing service or labor, etc."

ROBERT CROZIER.

The indictment charged one Weld with aiding and abetting one Peter Fisher, a slave, to escape from the service of Rain C. Hutchinson. The motion by defendant's counsel was to quash the indictment; and upon that motion the Chief-Justice delivered the following opinion: —

"There are eleven points of objection taken to the sufficiency of this indictment, as follows: —

"1. That it does not show that the owners, or 'their agent or attorney, duly authorized by power of attorney, in writing, acknowledged and certified under the seal of some officer of the court of the State or Territory in which the same may be executed,' made the arrest and had the fugitive in custody; or, in other words, that to aid and assist a fugitive from labor in escaping from the arrest and custody of the guardian of the infant owners, does not subject a person to indictment under the said act of Congress.

"2. That if to assist a fugitive to escape from the custody of such guardian is within the statute, his appointment, together with the time, place, and authority by which he was appointed, should be set out or more fully stated in the indictment.

"3. That the indictment does not show that Rain C. Hutchinson was *then*, that is, at the time of making the arrest and the escape of the fugitive, such guardian.

"4. That it does not show that the fugitive was held to service or labor in Kentucky, before his escape therefrom and arrest in Kansas.

"5. That there is not a sufficient seizure and arrest shown.

"6. That it does not show that the fugitive was taken forthwith before a court, judge, or commissioner, for the purpose of having the case of the claimant heard and determined.

"7. That it does not show in what county, district, or territory the indictment was found.

"8. That it does not show that the fugitive es-

caped from Kentucky, or the *place* it is alleged he owed the service.

"9. That the fugitive is described by an *alias* of his Christian name.

"10. That the indictment does not show that the defendant knew or had notice that Fisher was a fugitive from labor.

"11. That the *escape* after the arrest by Hutchinson, is not sufficiently alleged.

"The importance of the questions, and the deep interest the subject always and justly excites, have induced me to listen patiently to the long and able arguments of learned counsel, both for the government and the defendant, and with an earnest and sincere desire to arrive at a proper and a legal conclusion. Believing, as I do, in the clear constitutionality of this law, the power and duty of Congress, under the then existing circumstances, to pass it, and the duty of every citizen to obey it, and being willing and desirous that all rights under it shall be promptly and amply protected, and all crimes created by it prosecuted, and all penalties and punishments provided for in it certainly and condignly inflicted; yet it is my duty to see that the defendant is not put to the hazard, vexation, and expense of a trial on an imaginary case, or one that is not provided for by the law itself, nor in real cases within the law, unless he is charged according to the strict rules of criminal practice and pleading.

S. A. KINGMAN.

"I feel, in my position, the full force of the charge and instructions given by Queen Elizabeth to her newly appointed judges: 'That you take care and remember to judge as well for the subject as my majesty.' So I am instructed by the constitution, the laws, and my oath of office, to take care and remember that I judge as well for the citizen as for the majesty of the law. If we would have the respect of the citizen for and obedience to the laws, we should be careful that our courts do not extend their criminal provisions beyond the cases provided for; and although it may seem to us that there are other cases that ought to have been provided for, it is not the right of the court to ingraft or interpolate into the law, by construction, such provisions as will cover such other cases not provided for by its terms. I think the books will be searched in vain to find a case, in criminal proceedings, where the courts have warrantably stretched the law to cover such an one as was not within the letter of its reading; but, on the contrary, the courts have often held that cases which were within the letter of the law were not within its spirit, and therefore not punishable by it, as in the oft-cited case where, by statute, it was made highly penal to 'let blood' in the street, and a surgeon was indicted for using his lancet and bleeding a man in the street, to restore circulation, who had been stupefied by an injury. The judges properly held that though the case was within the letter of the law, it was not within its spirit, and the accused was discharged.

"There are two classes of persons authorized by this act to make the arrest: The owner, or his agent or attorney, appointed in a particular way, and to hinder and obstruct whom, in making it, or to aid or assist the fugitive to escape from the custody of whom, is an indictable offence; but to aid or assist the fugitive arrested by, and in the custody of, a guardian of infant owners, to escape from such custody, is not an indictable offence, however it may subject the party to a penalty in the civil action provided for by these acts.

"But it was said in argument, that if this custom should prevail, then infants, in their cradles, would be worse off than adults, — a condition we

are not at liberty to presume Congress intended to leave them in, as they could neither make the arrest themselves, nor execute the proper power of attorney. To this it is a sufficient answer to say, that adults would not have had the sanction and benefit of this law if Congress had not given it to them; and it was discretionary with the law-making power to confer it on, and withhold it from, whomsoever it saw fit. . . . But I can see that Congress may have thought that there was a very good reason for conferring this power upon an adult, or a person of his selection and appointment; and for withholding it from the rashness and indiscretion of youth, and such persons as may have been appointed by courts, and who may have no interest in, or kind feelings for the negro, which is almost the certain and necessary consequence of the long existence of the relation of master and slave. Whatever may have been the motive, it is clear to my mind that Congress had not conferred the power on the guardian, as he is neither the owner nor the agent or attorney appointed in the manner prescribed by the act of 1850.

"In thus disposing of the first objection to the indictment, the whole question is disposed of, and this opinion might end here; but as other points of objection have been raised, I shall lightly notice them, and give my conclusions without much elaboration. . . .

"This opinion has been hastily written in the midst of turmoil, interruption, and confusion, in the absence of a library to consult, and without time to correct or pay much attention to legal diction; but I am confident that in its main features it will stand the test of the most searching and rigid legal and judicial criticism."

The amount of business of appellate courts depends upon the growth of the community. The first litigation in a territory is over matters of small import, or cases that are based upon a few simple facts. No long and complicated litigation had as yet taken place while Kansas was a Territory, because personal property was limited in value, communities averaged but few individuals, and the title to real estate had not been vested in many persons. Settlers on the public lands had not accumulated enough wealth to be pursued by creditors, nor had they become well enough acquainted with each other to have that confidence which inspires lawsuits. For these reasons the early litigation of every Territory is always of a very simple character. Kansas was no exception to the rule, notwithstanding the terrible political troubles which disturbed her peace.

Kansas was admitted into the Union as a State by Act of Congress, Jan. 29, 1861. Its Constitution vests the judicial power of the State in a Supreme Court, District Courts, Probate Courts, Justices of the Peace, and such other courts, inferior to the Supreme Court, as might be provided for by law. It was provided that the Supreme Court should consist of one Chief-Justice and two Associate Justices, to be chosen by the Electors of the State at large.

The Supreme Court of Kansas first met in Topeka, the capital of the State, as the Constitution requires, on the 28th of October, 1861. The term of office for each member of the court is six years. The first three judges were Hon. Thomas Ewing, Chief-Justice; Hon. Samuel A. Kingman and Hon. Lawrence D. Bailey, Associates. Chief-Justice Ewing held the office by election from the organization of the court, until his resignation in October, 1862, when he accepted the Colonelcy of the Eleventh Kansas Regiment of Volunteers, for service in the Civil War. Hon. Nelson Cobb was appointed by Gov. Charles Robinson to fill the vacancy, on the 23d of December, 1862. Chief-Justice Cobb continued in office one year, and was followed by Hon. Robert Crozier, who was elected at the general election in November, 1863. He held the office for about three years, and was succeeded by Hon. Samuel A. Kingman, who was elected Chief-Justice on the 6th of November, 1866. He continued to preside over the deliberations of the Court until December, ten years later, when he was compelled to resign in consequence of failing health. Associate Justice Kingman was succeeded, in January, 1865, by Hon. Jacob Safford; Associate Justice Bailey by Hon. D. M. Valentine, in 1869, and

Associate Justice Safford by Hon. David J. Brewer, in January, 1871. Associate Justice Brewer resigned on the 9th of April, 1884, to accept the position of United States Circuit Judge, and he was succeeded on the supreme Bench of Kansas by Hon. Theodore A. Hurd, who was appointed to the vacancy, on the 12th of April, 1884, by Hon. George W. Glick, Kansas' first Democratic Chief-Magistrate. Associate Justice Hurd was succeeded by Hon. William A. Johnston, who was elected in November of the same year.

The present members of the Supreme Court are Hon. Albert H. Horton, Chief-Justice; Hon. Daniel M. Valentine and Hon. William A. Johnston, Associates.

ALBERT H. HORTON.

In 1887, in consequence of the crowded condition of the docket, the Legislature provided for the appointment of three Commissioners of the Supreme Court. The law, which is contained in Section I. Chapter 148, of the Session Laws for that year, is as follows: —

"SECTION I. The Governor of the State of Kansas, by and with the consent of the Senate, immediately upon the taking effect of this Act shall appoint three persons, citizens of this State, of high character for legal learning and personal worth, as Commissioners of the Supreme Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to aid and assist the Court in the performances of its duties in the disposition of the numerous cases pending in said Court. The said Commissioners shall hold office for the term of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the Constitution of the United States and the Constitution of the State of Kansas, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court, to the best of their ability. All vacancies in said Commission shall be filled in like manner as the original appointment."

On the 5th of March, 1887, Gov. John A. Martin appointed the following named Commissioners: Hon. B. F. Simpson, Hon. J. B. Clogston, and Hon. Joel Holt. When the terms of these Commissioners had expired, Gov. Lyman U. Humphrey appointed the following persons their successors: Hon. George S. Green, to take the place of Hon. J. B. Clogston, and Hon. J. C. Strang to take the place of Hon. Joel Holt; Hon. B. F. Simpson succeeded himself. The present Commissioners are, therefore, Hon. B. F. Simpson, Hon. George S. Green, and Hon. J. C. Strang. Under the provisions of Chapter 246, Session Laws of Kansas for 1889, the terms of these Commissioners continue for three years from the date of their appointment, the Legislature very wisely having re-enacted the law.

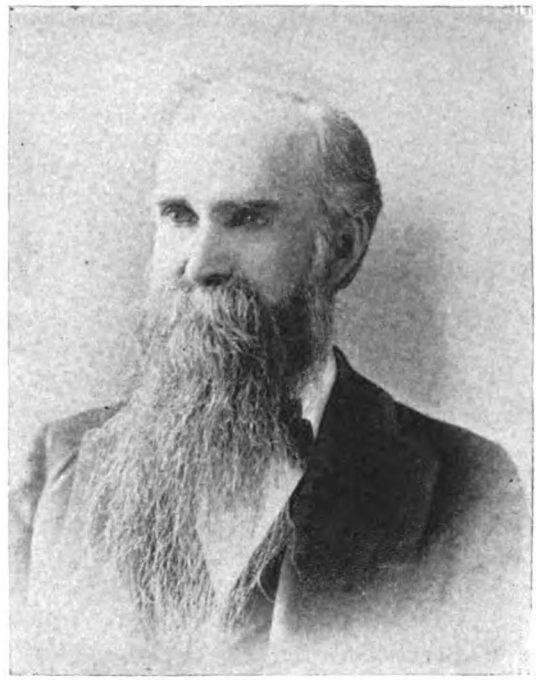
The Reporters of the Supreme Court since its organization have been five: Preston B. Plumb, afterwards United States Senator, now deceased; Louis Carpenter; Elliot

V. Banks; W. C. Webb, and A. M. Randolph. Preston B. Plumb resigned in October, 1862; Louis Carpenter was appointed in January, 1863, and was killed in the massacre at Lawrence August 21 of the same year, by the guerillas under the notorious Quantrell. Elliot V. Banks succeeded him, who in turn was succeeded by W. C. Webb, and he by A. M. Randolph, who is the present Reporter.

The "Opinions" of the Court are reported in forty-seven volumes. The first volume was published in 1864, the last volume early in 1892. The forty-eighth will appeai in a few months, and there are a sufficient number of "Opinions" handed down to complete the forty-ninth.

The number of Clerks has been four: Andrew Stark; E. B. Fowler; A. Hammat; and C. J. Brown, the incumbent.

Under the provisions of law, the Judges of the Supreme Court nominate to the Governor a suitable person to act as Librarian. To this office there have been appointed three: D. Dickinson; Samuel A. Kingman; and H. J. Dennis, who now fills the position. Mr. Dennis is a gentleman of rare literary tastes, a fine writer, a lawyer, and a prince among books. The Library of the State, while it includes all that pertains strictly to the law, comprises a fine miscellaneous collection, to which additions are made by legislative appropriations. Under the careful selections of Mr. Dennis, the Library is valuable, and rapidly taking rank with any of the relatively new States.



D. M. VALENTINE.

Hon. Thomas Ewing, Kansas' first Chief-Justice, was born in Lancaster, Ohio, on the 7th of August, 1829. He is the third son of Hon. Thomas Ewing, of Ohio, whose fame as a great lawyer and statesman is part of the history of our country. His remote ancestry were Scotch-Irish, and in the troublous times of 1688, under William of Orange, distinguished for their loyalty, bravery, and intelligence. George Ewing, the paternal grandfather of Kansas' first Chief-Justice, was an officer in the Revolutionary War, and served with honor until the Independence of the United States was achieved. His maternal great-grandfather was Niel Gillespie, who emigrated from Ireland to Pennsylvania, and became a very prominent and influential citizen of that Commonwealth. This remarkable man was also the great-grandfather of the Hon. James G. Blaine.

General Ewing, as he is more familiarly known, was private Secretary to President Zachary Taylor, before he had attained his majority. Immediately after the sudden death of that Chief Magistrate, he entered Brown University, and was graduated in 1854. He was also graduated by the Cincinnati Law School, and a year later emigrated to the then disturbed Territory of Kansas, settling in the embryo town of Leavenworth, where he opened a law office, and commenced the practice of his profession. The firm of which he was a member, "Ewing, Sherman & McCook," included the afterward immortal Gen. William T. Sher-

man, and Gen. Daniel McCook, who was killed at Kenesaw Mountain.

General Ewing at once took rank as a leader at the bar of the struggling Territory. He was also particularly active in the "Free State" troubles; and when the State was admitted into the Union, elected its first Chief-Justice at the remarkably youthful age of twenty-nine. This exalted position he filled with distinction for two years, when the military spirit he had rightfully inherited from his soldier ancestors impelled him to take up the sword in defence of the Union. During the war he as ably distinguished himself in the profession of arms as he had before, and has since in the profession of law.

At the close of the war General Ewing returned to Ohio, the State of his nativity, where he soon became conspicuous in national and State politics. He was a member of the Ohio Constitutional Convention of 1873–74, in which body he took a leading part. He was a member of the Lower House of Congress in its forty-fifth and forty-sixth sessions, having been elected as a Democrat. Retiring from public life in 1882, he has devoted himself assiduously to the practice of his chosen profession in the city of New York, where he enjoys a lucrative business.

Gentlemanly and dignified in his bearing, a very prince in personal appearance, a forcible speaker, endowed with great social qualities, he has a host of admirers, who are attached to him "with hooks of steel." He has delivered many addresses before literary societies and bar associations, but the one he presented to the legal fraternity of the State of Kansas at the meeting of their association, in Topeka on the 7th of January, 1890, on "Judicial Reforms," is regarded as one of his best efforts. The opening paragraphs, in which he deals in personal reminiscences are here quoted, where he was inspired by the occasion, and an opportunity afforded for the development of his natural eloquence, and is a fair example of his impressiveness: —

"Mr. President and Gentlemen of the Kansas Bar Association; Ladies and Gentlemen: Thirty years ago I had the honor to be chosen by the people of Kansas Chief-Justice of the then proposed State; and when in the year following, after her long struggle and rude rebuffs, Kansas was admitted to be a State in the Union, I presided at the first term of the Supreme Court held near the spot where we are now assembled. How changed the scene! A splendid city rises now, with its temples, electric railways, flashing lights, and elegant mansions, where scarcely a graded street cut the primeval sward, or crushed the tendrils of the wild strawberries and the blue-bells as they rode in the wind and sunlight on the unbroken waves of the prairie. . . .

"Of the first members of the Supreme Court all are living and here present, — Samuel A. Kingman, Lawrence D. Bailey,[1] and myself. Brothers, I greet you! I am rejoiced to see how few are the wrinkles time has written on your brows. If we had not been comparatively youngsters then, we probably would not all be here to-night. But of the bar, nearly half will nevermore answer the call of the docket. Sam Stinson, the brightest and wittiest of all; Billy McDowell, Perry, Holman, Gamble, Helm, Ruggles, Carpenter, Parrott, Purkins, Havens, — a majority of these were younger than either of us three, but they are all gone forever from the scenes of their forensic struggles.

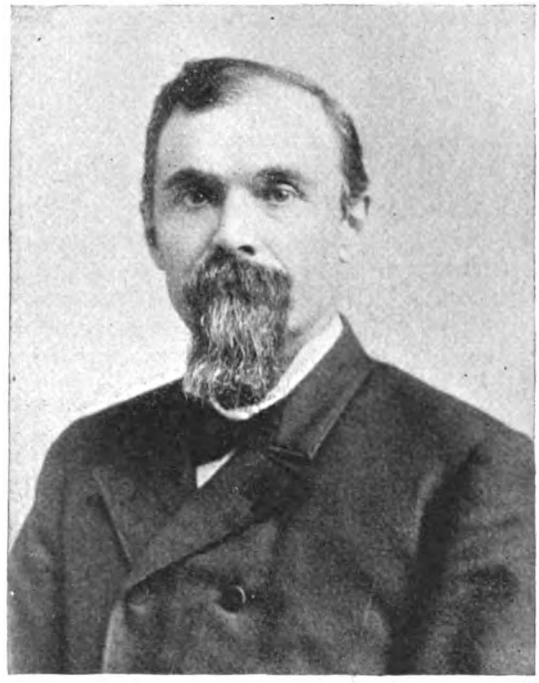
"There was Governor Shannon, too, who in his prime, as a proslavery partisan, lived through the political blizzard in Kansas, and then passed the long evening of his days here in the serene and successful practice of his profession. There, too, was Dan McCook, my partner and friend — God bless his patriotic and daring spirit! — who went to glory in the wild storm at Kenesaw. And there, too, was Ben Monroe, the equally noble and gallant Southron, who fell mortally wounded at Donelson, fighting for what he believed to be the right, — both companions at the bar, — fast friends and bosom cronies until the war broke out, when

[1] Since the history of the Supreme Court of Kansas was sent to the editor of the "Green Bag," ex-Associate Justice Lawrence Dudley Bailey has passed away. He died at his old home, Lawrence, Kan., on the 5th of October, 1891, aged seventy-two. Judge Bailey's death is the second, only, of those who have served on the Supreme Bench of Kansas, since the organization of the Court, — a period of thirty-one years.

they parted as enemies, never to meet again. Peace to their souls! And may the bitterness which armed against each other all the splendid youth of North and South disappear from their survivors in the proud recollections of their virtues and their valor, and in the beneficent results of the war to North and South alike. . . .

"And how the State has changed! The Pilgrim Fathers, though tossed by rough seas and starved on barren shores, were not so rudely tried as were the pioneers of Kansas. When a rest came after the exhausting struggle to make her a free State, the seasons brought famine instead of plenty in their hands. A more feeble State in population and property, or a greater State in the splendid spirit and hardihood of her people never knocked at the door of Congress for admission. With a population of but 107,000, impoverished by the long struggle against force and fraud, she set out on her career with empty barns and an empty treasury. The State officers were paid poor salaries and in scrip. As Chief-Justice, I sold my State scrip at sixty cents on the dollar, so that my whole official income was $1,080 for the first year. We thought then the uttermost limit of cultivable land was about the meridian of Fort Riley, and never dreamed of a day when the sun would look down from west of that line on boundless wheat-fields, harvested by steam, and on millions of cattle fattening to feed the world; nor of a day when Kansas, instead of being least of her sisters, should stand as she does now, with 1,750,000 people, the thirteenth in power of the forty-two States of the Union.

"There is a longing in the human heart, akin to that for immortal life, to have our names live after us associated with illustrious or benignant events. I think that all of us who fought for freedom in Kansas, and who followed up the fight through the war for the Union, may feel this longing fully satisfied. It was the sling of the stripling Kansas which slew the Goliath slavery. Few men have ever had the chance to serve mankind so signally as those of us who wrested this splendid region from the haughty and reckless Southern propaganda, and then formed the right wing of that glorious army which swept both rebellion and slavery from the land forever." . . .



W. A. JOHNSTON.

Ex-Chief-Justice Nelson Cobb, who held the position, by appointment, for only a short time, was born in New York State in 1811. He was educated at the common schools of the region of his nativity, and studied law, in Portage, N. Y. He came to Kansas in 1859. Eventually he removed to Kansas City, Mo., where he now resides in a quiet way, doing but very little practice, and that in consultation only, having virtually retired. He has a rural home, on the outskirts of the city, and is passing the evening of his days highly respected, and surrounded by a select circle of friends.

Ex-Chief-Justice Robert Crozier succeeded Hon. Nelson Cobb, having been elected to the office on the 3d of November, 1873. He came to Kansas from Ohio, on the 22d of February, 1857, and settled in Leavenworth. In the early history of the "Daily Times" of that city, Judge Crozier was editorially and financially connected with that journal, but disposed of his interest in the paper in the fall of 1857. He was elected to the Council of the Territorial

Legislature on the 5th of October of the same year, and admitted to his seat in place of Judge J. A. Halderman on the 5th of October. On the 8th of October, six years later, he was nominated by the Republican State Convention at Leavenworth for Chief-Justice, and elected on the 3d of the following month. Prior to that he was United States District Attorney, but resigned upon his elevation to the Supreme Bench. In November, 1873, Governor Osborne appointed Judge Crozier United States Senator, in place of Hon. Alexander Caldwell, resigned. He served as Senator until the election of his successor, in January, 1874. In the fall election of 1876 he was elected District Judge of the First Judicial District, and has since been continuously re-elected, occupying that office at present.

J. C. STRANG.

Samuel A. Kingman, late Chief-Justice of Kansas, son of Isaiah Kingman and Lucy, his wife, both of whom lived to the patriarchal age of ninety years, was born in Worthington, Mass., on the 26th of June, 1818. He received such educational advantages as the common schools and academies of his home afforded, attaining considerable proficiency in the higher mathematics as was practicable at that day in such institutions. His regular attendance at school ceased when he had arrived at the age of seventeen, but his entire life has been devoted to study and general literature, as far as the precarious state of his health and his public duties would permit. His health has never been firmly established, and at times he has been compelled to lay aside all study, and even such reading as required thought and attention. Since early manhood he has been seeking those climates most congenial to his physical constitution, and at the age of twenty drifted into Kentucky, in which State he remained eighteen years, teaching school, reading law, and practising as an attorney. Here he held office as County Clerk, County Attorney, and in 1849–50 and 1851 was a member of the Kentucky Legislature.

In 1856 he removed to Iowa, where he remained one year. The following spring, 1857, he emigrated to Kansas and settled on a farm in Brown County. He was not fortunate in his agricultural experience, remained upon the farm one year, and then moved to Hiawatha, the county-seat, opened a law-office, and continued in the practice of his profession until 1865.

In 1859 Judge Kingman was a member of the Wyandotte Convention, which framed the present Constitution of the State. The same year he was elected Associate Justice of the Supreme Court of Kansas, and took his seat upon the admission of the State into the Union in 1861, holding the position for four years.

In 1864 Judge Kingman was defeated in his candidacy for re-election as Associate Justice, but two years later was elected Chief-Justice, and at the end of his term of six years, in 1872, was re-elected. In 1877 the

duties of the responsible office proving too laborious for his constitution, he resigned and retired from active public life. Judge Kingman continues to reside in Topeka, the capital of the State; he has carried with him into his retirement the affable and courteous manners that ever marked his official life, and is as dignified as when presiding on the bench.

When he came to Kansas, there were only two parties in the State, — Free-State and Proslavery; he could only act with the former, for notwithstanding his long residence in Kentucky, his convictions of true State policy and right led him to oppose the "peculiar institution." But while serving his constituents in that Southern State, and conscientiously discharging his duties toward them, respecting their opinions on that question, he quietly sustained his own, and has always held sound antislavery ideas regarding the negro and forced conditions of servitude.

On the 29th of October, 1844, Judge Kingman was married to Matilda Willetts, daughter of Samuel and Susan Hartman, at Terre Haute, Ind. Miss Hartman was a native of Catawissa, Penn.; but her parents dying in her infancy, she was removed by her guardian to Terre Haute, where she was reared.

In his official life Judge Kingman has conferred honor upon his adopted State. On the Supreme Bench he was an ornament to his position; his judicial decisions were always marked with careful deliberation, deep research, and profound legal acumen, commanding the unqualified respect of the bar of the State. His style was never highly ornate, but was simple, perspicuous, and direct. The "Temple of Justice" has rarely been presided over by a more honorable representative of high moral manhood than Samuel A. Kingman, both as Associate Justice upon the Supreme Bench and as Chief-Justice of Kansas.

The Horton family, of which Albert H. Horton, the present Chief-Justice of Kansas, is a descendant, may be traced to a remote antiquity. Ever since the conquest of Britain by Cæsar, the name has been known in England, is of Anglo-Saxon origin in its conjunctive form, and derivatively Latin. It is of record that one Robert de Horton manumitted a bondman to his manor of Horton, long before the time of Henry Larey, Earl of Lincoln, who died in 1310. It is also clearly shown that the Hortons possessed a manor-house in Great Horton, at a remote period. The patronymic Horton, in the Anglo-Saxon, means an enclosure, or garden of vegetables, — from *ort*, plant, and *tun*, fenced in, or circumscribed. The Horton coat-of-arms in England is: A stag's head caboched, silver attired, gold; and for distinction the canton ermined. Crest, out of the waves of the sea, proper, a tilting spear erect, gold, a dolphin enfiled with silver fins, gold, and the emblem a shell. The legend: "Quod vult, valde vult" (What he wills, he wills cordially). William Horton, Esq., of Frith House, in Barksland Halifax, descended from the foregoing Robert Horton, who married Elisabeth, daughter of Thomas Hanson, Esq., of Toothill, and died about the year 1640. He had issue as follows: William Horton, of Barksland, or Bark Island Hall, who purchased in the fifteenth century, of the unfortunate Charles I., the estate of Howroyde, was born about 1576; Joseph Horton about 1578. Barnabas Horton, who is the ancestor of all the Horton family in America, was the son of Joseph Horton, and was born in the little hamlet of Mously, Leicestershire, on the 13th of July (old style), 1600. He came over to this country in the ship "Swallow" between 1633 and 1638, and landed at Hampton, Mass. In 1640 he moved to New Haven, Conn., where on the 21st day of October, that year, in conjunction with the venerable Rev. John Davenport and Governor Eaton, he organized a Congregational Church, and immediately departed for the east end of Long Island, now Southold. All of these primitive Christians had

been members of Puritan congregations in England, and were forced to leave because of their religious predilections. Barnabas Horton built the first house on the east end of the island; it was of frame, and in 1876 still occupied and in a fair state of preservation. He died at Southold, on the 13th day of July, 1680, at the advanced age of eighty. This Barnabas Horton is known in the chronology of the family as "Barnabas, the old Puritan." He was a man of the most rigid orthodoxy, but a zealous advocate of civil and religious freedom. His third son was born in the autumn of 1640, and christened Caleb. He settled at Cutchogue, Southold Township, L. I., and died on the 3d of October, 1702. Caleb's first child was born Sept. 23, 1666, and was named Barnabas, after the "Old Puritan." Barnabas *secundus* had a second son who was likewise named Barnabas, also born in Southold, about 1690. In 1732 he emigrated to Goshen, N. Y. The fifth son of this Barnabas was born in Southold too, in 1730, and named Silas. The sixth child of Silas was born in Goshen, on the 30th of June, 1770, and made heir to the ancestral name, and with him Barnabas ceases to appear in the family record. This Barnabas *finis* married Millicent Howell in 1794, and died on the 24th of October, 1823, in Minnisink, Orange County, N. Y. The third child of this Barnabas was married to Mary Bennett, and died on May 10, 1840. His children were: Harvey Addison, born March 13, 1832; Millicent Ellen, born Sept. 3, 1833, and Albert Howell, the subject of this sketch, on the 12th of March, 1837. Dr. Harvey Horton was an educated and skilful physician; he practised his profession with remarkable success in Minnisink and adjoining towns, enjoying the confidence of all with whom he associated. His son, Harvey Addison, was instantly killed, Sept. 3, 1861, by the fall of a bridge with a train of cars upon it, in which he was a passenger, nine miles east of St. Joseph, Missouri, on the Little Platte River. The bridge had been partially burned by Confederate troops, but left standing, ready to tumble into the stream the moment the cars came upon it. Millicent Ellen died on the 24th of March, 1841. Albert Howell Horton, the Chief-Justice of Kansas, is the second son of Dr. Harvey Horton and Mary Bennett. He was born near Brookfield, in the town of Minnisink, Orange County, N. Y., on the 12th of March, 1837. His early education was received in the public schools of West Town, N. Y., and at the youthful age of thirteen he was prepared for college at "Farmer's Hall Academy," in Goshen. In 1855, when eighteen years old, he entered the celebrated University of Michigan, at Ann Arbor, as a Freshman. He remained there for a period of two years, when his eyesight became seriously affected, and he was reluctantly obliged to sever his connection with the Institution. Three years later he entered the office of Hon. J.

GEORGE S. GREEN.

W. Gott, in Goshen, as a law student, where he studied faithfully until the winter of the following year, and was then admitted as counsellor and attorney, at the general term of the Supreme Court of New York, held in Brooklyn. In 1859, with his brother, Dr. Harvey A. Horton, he removed to Kansas, selecting Atchison as his home.

In 1860 Judge Horton was appointed City Attorney by the Mayor, to fill a vacancy caused by the resignation of the duly elected officer. The following spring he was elected to the position upon the Republican ticket. In September of that year he was appointed District Judge for the Second Judicial District of the State by Gov. Charles Robinson. He was twice elected to the honorable position, after which he resigned, to resume the practice of his profession.

B. F. SIMPSON.

In 1868 Judge Horton was one of the Presidential Electors on the Republican State ticket, and was selected by his colleagues as messenger to convey the vote of Kansas for General Grant and Henry Wilson to Washington.

From 1861 to 1864, in addition to his duties as District Judge, he assisted in editing the "Weekly Champion," one of the leading papers of the State, which was published at his home, Atchison.

On the 26th of May, 1864, Judge Horton was married, in Middletown, N. Y., to Miss Anna Amelia Robertson, daughter of William Wells Robertson, Esq., and Adeline Sayer. The children of this union were Carrie Robertson, born in Middletown, N. Y., April 22, 1865; Mary Bennett, born in Atchison, Kan., July 12, 1868; Rosa Sayer, born in Atchison, June 2, 1871; and Albert Howell, Jr., born in Atchison, April 1, 1874.

In May, 1869, Judge Horton was appointed by President Grant United States District Attorney for Kansas, which office he held until his resignation, on July 18, 1873. In November of that year he was elected to the House of Representatives of the Legislature, from Atchison City, and in 1876 was elected to the Senate, representing the county of Atchison. On the 1st of January, 1877, he resigned the office of State Senator, to accept the appointment of Chief-Justice of Kansas, tendered him by Hon. Thomas A. Osborn, who was then Governor. Under this appointment he held the office of Chief-Justice until the regular election in the fall of 1877, when he was elected to fill the vacancy caused by the resignation of his predecessor, Hon. Samuel A. Kingman. In the following fall Chief-Justice Horton was elected for the full term of six years. In 1884, at the expiration of his first full term, he was elected to again serve for the constitutional term of six years, and in November, 1890, was re-elected for another term of six years, and now holds the office of Chief-Justice by virtue of the last election. If Chief-Justice Horton serves out this present term, he will have occupied the exalted position for twenty years.

On the 13th day of November, 1887, Judge Horton re-married. His second wife was Mrs. Mary A. Prescott, the widow of Mr. A. Prescott, in his lifetime a very successful banker of Topeka, Kansas. On account of his official duties in the Supreme Court of the State, Judge Horton has taken up his official residence at Topeka, the capital, and resides in a handsome home facing Capitol Square.

Chief-Justice Horton is now in the prime of manhood; enjoys excellent health, and has before him, in the ordinary course of affairs, many years of activity and usefulness.

In personal appearance he possesses in an eminent degree, without any overstraining, but naturally, the manner and bearing of the court; dignified as becomes his exalted position, popular, and accredited with many warm friends. He is a model judge, conferring honor upon the great State which has honored him with the most eminent place in her gift.

Notwithstanding the almost insuperable demands of the court, over which he presides with, such impartiality, constancy, and unsullied reputation, the Chief-Justice finds some leisure to indulge in reading, of which he is very fond, in the range of his tastes comprising the best literary efforts of the day, and the old authors.

As an example of the style of the judicial writings of Chief-Justice Horton, we make the following extracts from opinions handed down by him.

In 1874 the Legislature of the State of Kansas enacted a statute making railroad companies liable for all damages to any of their employes in consequence of the negligence of a co-employe. One of the principal railroad companies attempted to evade this statute by compelling its employes to waive and release in writing all liabilities imposed by the statute.

Chief-Justice Horton held, in The Kansas Pacific Railway Company *v.* Peavey, 29 Kas. 169, that this could not be done, and that such contracts were invalid. He said:

"Whether this legislation be wise or not, it is not within our province to determine. We must assume that the legislature had satisfactory reasons for changing the rule of the common law, and having adopted the statute, as we may assume, for wise and beneficial purposes, we do not think a railroad company can contract in advance for the release of the statute liability. It is a familiar principle of law that a contract made in violation of the statute is void, and also that agreements contrary to the policy of statutes are equally void. There are exceptions: thus, it is no part of the policy of the law to encourage frauds, by releasing the fraudulent party from the obligation of his contract, and so a party shall not set up his own illegality or wrong to the prejudice of an innocent person. (Bemis *v.* Becker, 1 Kas. 226.) Again, he who prevents a thing being done shall not recover damages resulting from the non-performance he has occasioned. The plaintiff below is not within these or other exceptions, and therefore the ruling of the District Court upon the demurrer must be sustained. While the reasons for the rule of the common law, that the master ought not to be responsible for injuries inflicted upon one servant by the negligence of another servant in the same common employment, seem plausible and correct theoretically, yet we may assume that the legislature did not find the practical operations of the rule affording sufficient security to persons engaged in the hazardous business of operating railroads; that for the protection of the lives and limbs of the employes of such companies, the legislature deemed it necessary to enact the statute. If the statute was enacted for the better protection of the lives and limbs of railroad employes, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer. Take this illustration: In some States, and in our own, the owners of coal-mines, which are worked by means of shafts, are required to make and construct escapement shafts in each mine, for distinct means of ingress and egress for all persons employed or permitted to work therein. Such a statute is for the benefit of employes engaged in working in coal-mines; but the owner of such a mine would not be permitted to contract in advance with his employes in contravention of the provisions of the statute. The State has such an

interest in the lives and limbs of its citizens, that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts."

In the case of The State of Kansas *v.* Yarborough, 39 Kas. 581, Chief-Justice Horton held that the defendant, who committed murder, was not excused from the penalty of the law on account of his voluntary intoxication. He said in the case, among other things, that "the instructions concerning intoxication and insanity sufficiently embrace the law applicable to the case. Lord Bacon said: 'If a madman commit a felony he shall not lose his life for it, because his infirmity came by act of God; but if a drunken man commit a felony, he shall not be excused, because the imperfection came by his own default.' For this reason the courts unanimously hold that if a man kills another while in a fit of voluntary intoxication, it is murder, and he must suffer the penalty. Of course, drunkenness may be considered by the jury in determining whether there was that deliberation, premeditation, and intent to kill necessary to constitute the offence charged. In this case it is not claimed that the drinking had created *delirium tremens*, or that the defendant was insensible. We think he was not so drunk as to have lost his understanding or reason. Counsel assert that when the defendant is slightly drunk, he becomes wild, vicious, and ungovernable. They refer to his unprovoked attack upon Jordon in 1882, and his attempt in 1883 to cut the throat of a friend. It seems when he indulged in drinking intoxicating liquor, even to a slight extent, he became a second Mr. Hyde. Upon this account it is urged he should be dealt with more leniently. Our decisions denominate drunkenness *malum in se*, and not an innocent mistake merely.[1]

"If the story of Dr. Henry Jekyll were true, rather than a fanciful one, Dr. Jekyll, according to the theory of counsel, ought not to have been responsible for the murder of Sir Danvers Carew, although he voluntarily drank the potion that so powerfully controlled and shook the very fortress of his identity. Dr. Jekyll, like Yarborough, when not under the influence of the fatal potion which he accustomed himself to drink, was of a very kind disposition and unusual amiability. After drinking the drug or tincture, he doffed at once the body of the noted professor, and assumed, like a thin cloak, that of Mr. Hyde; his pleasures then turned toward the monstrous, and his whole being, as Mr. Hyde, was inherently malign, brutish, and wicked. At such times the kindness and virtues of Dr. Jekyll slumbered, but the evil of Mr. Hyde was alert and swift to seize the occasion. Should it be said that Dr. Jekyll was not responsible, and that Mr. Hyde, after all, and Mr. Hyde alone, was the guilty one? Yarborough is not to be relieved from responsibility because he did not get drunk with the thought of a difficulty with Collier. Dr. Jekyll did not drink the drug, changing his character to one wholly evil, for the purpose of injuring the child he cruelly trampled upon, nor to take the life of Sir Danvers; but in that case, as in this, a wicked and depraved disposition was developed or produced by the voluntary act of the party. If the indulgence in a slight degree in intoxicating liquor awoke in the defendant the spirit of hell, he should have refrained from touching the intoxicating draught; he should have chosen the better part, and not been found wanting in strength to keep it.

"The law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby relieve him from all criminal responsibility. Whenever a man understands the nature and character of an act, and knows that it is wrong, it would seem that he ought to be held legally responsible for the commission of it, if in fact he does commit it.

"In the tragedy of Othello, Montano, to quiet Cassio, who had taken a few cups, but was unfortunate in the infirmity, said:

[1] The State *v.* Brown, 38 Kas. 390.

'Come, come, you 're drunk.' Cassio, in return, at once thrust him through with his sword. Soon after, in his grief and remorse over the act, he said: 'Oh, thou invisible spirit of wine, if thou hast no name to be known by, let us call thee devil!' What Cassio uttered, Yarborough may well repeat. He voluntarily stripped himself of all those balancing instincts by which even the worst of us continues to walk with some degree of steadiness among temptations; and in his case to be tempted, however slightly, was to fall." [1]

Daniel Mulford Valentine, Associate Justice, was born in Shelby County, Ohio, on the 18th of June, 1830. He is the son of John W. Valentine, who was born in New Jersey, about fifteen miles west of New York City, on the 24th of October, 1804, and removed with his father to Ohio in 1805. Judge Valentine is the great-great-grandson of Richard Valentine, who removed to New Jersey from Long Island in 1703. His ancestor, the seventh generation removed, was also Richard Valentine, who emigrated from England, and settled in Hempstead, L. I., in 1644.

Judge Valentine accompanied his father from Ohio to Tippecanoe County, Ind., in 1836, from there to Iowa in 1854, and to Kansas on the 5th of July, 1859. He resided in Leavenworth one year; in Franklin County, principally at Ottawa, the county-seat, for fifteen years, whence he removed to Topeka, where he now lives. He was married to Miss Martha Root, in Adair County, Iowa, in 1855, in June of that year. He was County Surveyor for three years, studied law, was admitted to the bar in 1858, served as County Attorney for two years, and a portion of that time was *ex officio* Judge of Adair County.

Two years after his removal to Kansas he was elected a Representative to the Legislature from Franklin County, and in 1862 was returned as State Senator. In 1864 he was elected Judge of the Fourth Judicial District, in which capacity he served four years; at the end of the term was elected to the Supreme Bench, on which he has served continuously ever since.

Judge Valentine has been a most indefatigable worker; his opinions written while on the Supreme Bench number over fifteen hundred. He is beloved by all who have the honor to number him among their friends, and his repeated return to the highest court of the State, without opposition in nearly every instance, is an endorsement of his legal abilities and affability which tell of his character as a judge and a man much better than any language. He has a large family, nine children, who are all worthy of the name they bear; and his comfortable but unostentatious home is a home in the strictest interpretation of what the word means, where a genuine welcome greets the many visitors who delight in being classed among the friends of the family.

One of the most important questions ever brought for decision to the Supreme Court of Kansas was the one whether the Legislature has the power to authorize municipal corporations to aid railroad companies in the construction of their railroads. That question was presented in the case of Leavenworth County *v.* Miller, 7 Kas. 479, and decided in the affirmative, Judge Valentine delivering the opinion of the court.

Another important question upon which the courts of the various States have differed is whether the defence of insanity in a criminal action must be established by the defendant by a preponderance of the evidence, or whether the prosecution must show beyond a reasonable doubt that the defendant was of sufficiently sound mind to commit the offence charged. This question was presented to the Supreme Court of Kansas in the case of The State *v.* Crawford, 11 Kas. 32, where it was held that it devolved upon the State to prove soundness of mind, the opinion being delivered by Judge Valentine; and with respect to insanity gen-

[1] The State *v.* Nixon, 32 Kas. 205; The State *v.* Mowry, 37 id. 369.

erally as constituting a defence in a criminal action, see the case of The State *v.* Nixon, 32 Kas. 205, the opinion being delivered by Judge Valentine. With respect to the rights of married women the decisions of the Supreme Court of Kansas have been very liberal, Judge Valentine delivering the opinions in the leading cases: Going *v.* Orns, 8 Kas. 85; Deering *v.* Boyle, 8 Kas. 525; Knaggs *v.* Mastin, 9 Kas. 532. It has also been decided by the Supreme Court of Kansas, Judge Valentine delivering the opinion, that the Legislature has the power to confer upon women the right to vote at school elections. (Wheeler *v.* Brady, 15 Kas. 26.) And in all cases of elections, the Supreme Court of Kansas has rigidly held that the elections must be pure, and that the majority of the legal and honest voters must govern. Among the cases upon this subject in which Judge Valentine has delivered the opinions of the Court, see the cases of The State *ex rel.* Wells *v.* Marston, 6 Kas. 524; Morris *v.* Vanlaningham, 11 Kas. 269. As to the value of the legislative journals and the enrolled bills as evidence of the validity and force of the statutes purporting to have been passed by the Legislature, see the following cases, the opinions having been delivered by Judge Valentine: Division of Howard County, 15 Kas. 194; The State *ex rel. v.* Francis, 26 Kas. 724.

On the question whether the Legislature has the power to authorize municipal corporations to aid railroad companies in the construction of their railroad, Judge Brewer (now an Associate Justice of the Supreme Court of the United States), who was then an Associate Justice of the Supreme Court of Kansas, although dissenting in this case, pays the following tribute to the ability of Judge Valentine, and the exhaustiveness of his opinion: —

"For these reasons I think these acts of the Legislature authorizing municipalities to extend aid to private railroad corporations cannot be sustained upon principle. My brethren think otherwise, and the question is so settled. The conclusion reached is no hasty one, but the result of long, patient, and careful examination; and the believers in the validity of municipal aid to railroads may look in vain through the books for an abler presentation of the arguments in their favor than that given by my brother Valentine."

The eminent Judge Cooley, of Michigan, in a conversation with a prominent Kansas lawyer at the time, said that although he perfectly agreed with Judge Brewer in his dissenting opinion in this case, nevertheless the opinion of Judge Valentine was the most exhaustive and the ablest ever delivered on that side of the question.

William A. Johnston, Junior Associate Justice, was born in Ontario, on the 24th of July, 1849. His father was a farmer, and as is the case with nearly all farmers' sons, he alternated his time as a youth between working on the homestead and attending the country school. When he had arrived at the age of fifteen, he removed to Illinois. He did what many of the best lawyers of the United States were compelled to do, taught school to obtain the means to continue his own studies, during which time he devoted all his spare moments to reading law, and was admitted to the practice at the relatively early age of twenty-three.

Emulating many of the men who from poverty have risen to distinction he sought the West as a more congenial field than the crowded cities of the East; he removed to Minneapolis, Kansas, the county-seat of Ottawa, in 1872, where he immediately entered upon the practice of his profession with remarkable success. He became very popular among the citizens at once, who elected him a Representative to the Legislature, where he served one session, and the next fall was sent as a State Senator, for four organized counties and all the unorganized territory extending to the western boundary of the State. He held this important office for four years, and in 1879 accepted the position of Assistant United States Attorney for the District of Kansas. This he retained until his election, in 1880, as Attorney-General of

the State. In 1882 he was re-elected for another term, at the end of which he was still further honored by the people of the whole State, who placed him upon the Supreme Bench, to fill the vacancy caused by the resignation of Hon. David J. Brewer, who had been appointed by the President United States Circuit Judge. There remained four years of Associate Justice Brewer's term, at the end of which time Judge Johnston was re-elected for another term of six years, which has not yet expired.

Judge Johnston was married to Miss Lucy Brown in 1875. His family consists of two children: the eldest, a boy nine years old, and a daughter seven. They possess a beautiful home in Minneapolis, which place has ever been the Judge's residence since he came to the State.

Judge Johnston is a hard worker, as in fact all who have been and are now on the Supreme Bench of Kansas must be. It is no sinecure; perhaps there is no court that imposes such burdens upon its members as this. His popularity is great; his character made up of all those qualities which endear men to each other; and withal he is an excellent lawyer, having gained his reputation by dint of hard study, energy, and close application. Judge Johnston is in the prime of all his faculties, with the probability of many years of usefulness before him to the Commonwealth of Kansas.

THE SUPREME COURT COMMISSIONERS.

Hon. Benjamin F. Simpson, Senior Supreme Court Commissioner, oldest son of William P. and R. H. Simpson, who were natives of Maryland, was born in Belmont County, Ohio, in 1836. He received an academic education, and was admitted to the bar in 1857. He came to Kansas in the spring of that year, and settled in Paola, Miama County, where he has ever since resided. In March, 1858, he was elected the first attorney of the county, and in June of the following summer was elected a member of the Wyandotte Constitutional Convention, in which body he served as Chairman of the Committee on Finance. In 1860 he was elected a member of the Territorial Legislature, and upon the admission of Kansas to the Union was elected Attorney-General of the State. In a few months, June, 1861, he resigned his State office to enter the army, in which he served as Captain and Major of Cavalry throughout the entire war, and was mustered out with his regiment on the 18th day of October, 1865. In the fall of 1870 he was elected to the House of Representatives, and was made its Speaker. In 1876 he was elected to the State Senate, and served as Chairman of the Judiciary Committee. In June, 1877, was appointed one of the committee to revise the Statutes of the State. In 1878 was appointed United States Marshal for the District of Kansas, and reappointed in 1882. In March was appointed by Gov. John A. Martin, one of the Supreme Court Commissioners, in which capacity he is still serving. He was a delegate to the Republican National Conventions of 1868, 1872, 1876, and 1880.

Major Simpson, as he is familiarly called, has risen rapidly in his profession and in the confidence of his fellow-citizens. He has been almost continuously in the public service of the State since he became one of its residents, and has discharged his duties without a single complaint against the manner of their performance, or a blemish being found on his character, while the honor conferred upon him by being twice appointed Commissioner of the Supreme Court attests his superior legal abilities.

Hon. Jeremiah C. Strang, Supreme Court Commissioner, is the son of Daniel and Eliza Strang. He was born in Tompkins County, N. Y., on the 31st of December, 1847. His early education was gained in the country district schools, to attend which, as was the case with the majority of farmers' boys of his era, he could only be spared from the labor of the fields in the winter. He worked faithfully every sum-

mer, until he was unfortunate enough to lose his hand in the cylinder of a threshing-machine. This in one sense was a misfortune only, for he then turned his attention to a more regular system of schooling, attended the Ithaca Academy for a short time, then, his family having moved to the adjoining county of Schuyler, he was sent to Watkins Academy, from which institution he was graduated. After graduation he took a select course superintended by John A. Gillett, which he continued for one year, and then commenced the study of law.

He became a student in the office of Dana, Beers & Howard, prominent in the profession at Ithaca; but after remaining with them a short time, removed to Tioga County, Penn., and entered the law office of his cousin Butler B. Strang, from which he was admitted to the practice, in partnership with his preceptor.

Judge Strang was elected and served one term as District Attorney for Tioga County, shortly after which he emigrated to Kansas, settling at Larned, Pawnee County, in the spring of 1877. The following spring he was elected County Attorney for two years. In 1880 was elected State Senator, serving during the first session, then resigned to accept the appointment of District Judge of the Sixteenth Judicial District. He was elected to succeed himself in the fall, and re-elected in 1885, in which capacity he served until June, 1889, when he declined a renomination, deciding to re-enter the practice, but at this juncture was tendered the position of Supreme Court Commissioner, to take effect March 1, 1890, which he accepted.

Judge Strang was one of the four delegates at large for Kansas to the Republican National Convention in 1888, and has been prominent in many ways in the politics of the State.

Judge Strang is a young man, and is an excellent lawyer, as the records of his court when district judge will confirm. From the moment of his arrival in Kansas he took a prominent position; his talents for the intricacies of local politics, coupled with his legal abilities and oratorical powers, although he is not an eloquent but an effective speaker, brought him rapidly "to the front."

Hon. George S. Green, Junior Commissioner by date of appointment, was born a short distance east of Kenton, Hardin County, Ohio, on the 16th of December, 1845. He was a farmer's boy until his twelfth year, doing such work on the paternal homestead as his strength permitted. At the age of twelve he was sent to the Bellefontaine High School in Logan County, where he picked up much knowledge, studied hard as long as he attended, and then served an apprenticeship at harness-making in the village of East Liberty in the same county.

At the inauguration of the Civil War, imbued with that spirit of patriotism characteristic of the American youth everywhere, he enlisted in Company C of the Fifteenth Ohio Infantry, commanded by Colonel John M. Connell, of Lancaster, on the 25th of August, 1861; on the 1st of October of the same year, crossed the Ohio River into Kentucky, and participated in the battles of Wild Cat on the 21st, Mill Springs on the 19th of January, 1862, Shiloh in April, and the siege of Corinth. His regiment then marched with General Buel's army to East Tennessee through Northern Alabama, and from thence back by way of Nashville to Louisville. He also was in action at the battle of Perryville on the 8th of October, and Stone River on the 31st of December. He was with Rosecrans in Chickamauga, on the 19th and 20th of September, and under General Thomas at the storming of Missionary Ridge on the 25th of November, 1863.

In January, 1864, Judge Green re-enlisted as a veteran in the same company and regiment. He was with his command with Sherman from Ringold, Georgia, and participated in all the engagements during the memorable Atlanta campaign, culminating at Jonesborough in September. He was on the famous march "To the sea," and in Jan-

uary, 1865, participated in the campaigns through the Carolinas which ended with the occupation of Raleigh. His regiment then marched with General Sherman to Washington, by way of Richmond, and was in line at the Grand Review. From thence his regiment was ordered to Louisville, Ky., where it remained until July, when it was sent to Camp Chase, Ohio, and mustered out by the provisions of a general order.

At the close of his continuous and gallant military service, young Green entered the Ohio State University, at Athens, where he remained until 1867, then emigrated to Kansas, and settled in the embryo town of Manhattan. The following year he was elected Justice of the Peace for his township, and two years later attorney of the county. That year he formed a law partnership with John E. Hessin, Esq., which remained unbroken until the dissolution of the firm, in consequence of Mr. Green having been appointed one of the Supreme Court Commissioners, on the 1st of March, 1890.

Judge Green has served two terms in the lower branch of the Legislature, with distinction, as a member of the Judiciary Committee, of which he was its Chairman, and the Committee on Railroads. In 1884 he was elected to the State Senate, where he served for four years as Chairman of the Committee on Public Lands and on the Judiciary Committee.

Judge Green studied law under Judge James Humphrey, of Junction, Kan., who was for a number of terms President of the Board of Railroad Commissioners, and has practised continuously ever since, to the moment of his appointment to the Supreme Court. In 1883 he was employed by the State of Kansas to assist the Attorney-General, Judge Jerry S. Black of Pennsylvania, Judge A. A. Harris of Fort Scott, and Mr. Rossington of Topeka, in Quo Warranto proceedings against the Union Pacific Railroad, to contest the consolidation of that corporation with the Kansas Pacific Railway, which celebrated case resulted in a stipulation upon the part of the Union Pacific, yielding substantially all that the State of Kansas demanded.

Judge Green is a Mason of high standing, having served as Master of the Grand Lodge of Masons in 1883, and Grand High Priest, in 1884, of the Grand Chapter of Kansas.

Judge Green is a good lawyer, a careful judge, a gentleman with all the inherent qualities which go to make up the honest man, and as a legislator was a power, — a "Hustler," to employ a Western phrase which if not a particularly polite rendition of the meaning intended to be conveyed, is very expressive, and thoroughly understood by the people of the great empire of which Kansas is an integral part.

The story of the Supreme Court of Kansas is not a long one; the period which has elapsed since the State's admission to the Union of great Commonwealths is too short to admit of extended necrological records or a lengthy list of judges. The highest court of the State has an honorable record, and the people have been very wise in the selection of those distinguished lawyers who have been called to preside over its deliberations. Its "Opinions" will compare favorably with those of any court in the older States, and are recognized as authority wherever the law is applied, throughout the country. As a confirmation of the youth of the State's judicial history, it is only necessary to repeat that the court has had but five Chief-Justices, all living to-day, and but one of them has reached the allotted "threescore and ten."

LONDON LEGAL LETTER.

LONDON, June 10, 1892.

THE English judiciary has recently lost two of its most prominent figures in the persons of Lord Bramwell and Sir Charles Butt. George William Wilshere Bramwell was born in 1808, the oldest son of a London banker; as quite a youth he spent a short time in his father's counting-house, where he gained a knowledge of the practice and principles of commerce which stood him in good stead in after years. His career at the bar was a highly prosperous and distinguished one. He was raised to the bench in 1856 as a Baron of the Exchequer, ten years later became a Lord Justice of Appeal, and shortly after his retirement in 1881, on completing a quarter of a century's judicial service, he was created a Law Lord, and since then has taken an active and prominent part in the deliberation of our Supreme Court of Appeal, the House of Lords. Lord Bramwell was one of the last survivors of the great lawyers whose careers united the old and the modern law of England. When at the bar some of the more famous men before whom he practised were Lord Justice Denman and Lord Justice Campbell, Barons Parke and Alderson, and Mr. Justice Patteson; he took a notable part in the labors of the Common Law Procedure Commission of 1852, and in the great Judicature Commission of an after year. The deceased was one of the greatest masters of the Common Law who has sat on the English bench. He was far more than a mere lawyer, however; he was perfectly versed in affairs, and possessed a character of unusual force and originality, which showed itself in the racy humor with which he enlivened legal proceedings. Lord Bramwell passed away in the fulness of years. Not so Sir Charles Parker Butt, President of the Probate, Divorce, and Admiralty Division of the High Court of Justice; he has died at the age, early for a judge, of sixty-two. Sir Charles Butt commenced his forensic career at the consular bar of Constantinople; and when he started practice in England, he naturally came to the front in mercantile and admiralty matters. On the bench as a divorce judge, he tried some of the most celebrated divorce suits within recent years, among others, Langworthy *v.* Langworthy, the first Dilke case, the Colin Campbell case, and the Scott and Sebright nullity suit; he became President of his division when his predecessor, Sir James Hannen, at the termination of the Parnell Commission, was made a law Lord. Sir Charles Butt was an admirable judge, with immense natural quickness, and experience in the class of causes which came before him; he suffered from ill health for a long time before his end, courageously discharging his judicial duties on many occasions with the utmost patience and forbearance while enduring severe physical pain. Sir Francis Jenne, the junior judge of the Probate Divorce and Admiralty Division, has been promoted to the Presidency; and the vacant appointment has been conferred on Mr. Gorell Barnes, a comparatively young man. He is only forty-three, and therefore finds himself a judge at an unusually early age. The appointment has given great satisfaction, as the new judge has practically been the leader of the Admiralty Court, where he exhibited very conspicuous legal qualities, and aptitudes which augur well for the successful discharge of his new duties.

The Westminster Debating Society has just held its Annual Dinner. The Committee were fortunate in securing Mr. Frank Lockwood, Q. C. M. P., an old member, as guest of the evening. Mr. Lockwood is not only the wittiest man at the bar, but he enjoys the reputation of being one of the very first after-dinner speakers in London. Mr. Lockwood's speech on the occasion was well worthy of his reputation, and gave great pleasure to the members of the Society and their guests; it contained an amusing comparison of the position of debating societies nowadays with that which they occupied in the days of Mr. Pitt. The speaker referred to an Act of George III. in 1795, and which actually remained on the statute-book till 1869, when it was repealed by the Newspapers, Printers, and Reading-Rooms Repeal Act. The act in question purported to be for the more effectually preventing seditious meetings and assemblies; it forbade any meeting being held, of any description of persons, exceeding the number of fifty, for the purpose of deliberating upon any grievance in Church or State unless due notice had been given, signed by seven householders and publicly advertised. The seven householders were required to give notice of the meeting to the clerk

of the peace, and a copy to three justices of the peace. If at any meeting assembled without these preliminaries, and ordered by a justice of the peace to disperse, twelve of those present refused to disperse within an hour, their offence was to be adjudged felony without benefit of clergy, and the offenders therein to be adjudged felons and suffer death as in the case of felons, without benefit of clergy. This measure, which to our ears sounds rather barbarous, was aimed at meetings and debates in London and Westminster, and must have made the debater's lot of those days by no means a happy one.

As usual, the profession was well represented at the Derby. Mr. Justice Hawkins, true to his love of the race-course, put in an appearance; among other eminent legal spectators were Sir Charles Russell and Sir Edward Clarke. There is a rumor that the judges are going to recommend a permanent curtailment of the long vacation by a fortnight. The courts at present rise on the 12th of August and resume on the 24th of October, so that there is some room for an abridgment of the legal holiday. The change would not sensibly interfere with any one's convenience, as most practitioners return to their chambers early in October.

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The Green Bag.

PUBLISHED MONTHLY, AT $3.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

THE following good story comes from a Colorado subscriber: —

When R——, New Mexico, was in its infancy, and the writer had just hung out his shingle as "Attorney-at-Law," the following pathetic incident took place.

You know that every small town has its leading citizen and most prominent man, who takes the lead in all matters of progress; and our burgh was no exception to the general rule. The leader of our society was a Kansasite who had emigrated from that State when the mortgage on his homestead had fallen due, and had taken up his abode in our booming town when it was the terminus of the Santa Fé. We will call him Deacon X.

One day an alleged murder occurred in town, and a Mexican, Juan Labata, was accused of the same. About an hour after the accusation, Juan was being gently swayed by the mountain breezes at one end of a rope, which the other was securely attached to the arm of a telegraph-pole. Always first in every enterprise for the good of the community, Deacon X. was the leader in this little soirée, and the neatness with which he sustained his position greatly increased our admiration and respect for him.

But a most unfortunate event happened; the next day it was discovered beyond any reasonable doubt that Juan was n't the man at all, and was innocent of the crime

This was not only embarrassing, but Deacon X. was liable to lose his reputation and prestige. Being chairman of our school board, the deacon of our church, and a conscientious man, he naturally felt very badly. Something had to be done; and the Deacon did it. He called a meeting of the citizens in the school-house, and was elected to the chair. After a pathetic speech, setting forth the particulars of the unfortunate mistake, he submitted the following resolutions: —

"Whereas it has pleased Almighty God to remove from our midst our late beloved brother Juan Labata; and whereas we poor weaklings cannot understand His mysterious movings, but meekly bow to His will; and whereas we regret that the said Providence did not disclose the truth of this affair a little sooner, and thus save unnecessary pain and trouble; and whereas it can't be helped now: Therefore be it resolved, by the citizens of R—— in mass meeting assembled, that our sympathy and condolence be, and hereby is, extended to the stricken widow of the departed Juan, and that we erect a suitable but not costly headstone over the resting-place of our former fellow-citizen, with appropriate inscription thereon; and be it further resolved, that a copy of these resolutions be properly engrossed by our worthy chairman, — for which he is to receive the sum of two dollars, to be paid out of the headstone fund, — and presented to the grief-bowed widow."

The resolutions went through with a whoop, and the Deacon's reputation was saved.

LEGAL ANTIQUITIES.

AMONG the ancient and barbarous nations, whether a man was slain by accident or not, the wisest course that occurred to them was to let the nearest relative of the dead man have his will, and kill or assassinate the slayer, and often the slayer's relatives also, without mercy or compunction, or the formality of a trial, or even an hour's breathing-time. It was at a later period generally deemed but fair that the doomed man should have one chance for his life; and hence, if by superior speed or skill he could outrun the avenger for a certain distance, and reach a city of refuge or sanctuary, then he was not to be murdered, but to be let alone, at least for a time, till he banished himself in due course from the country. The practice of a blood-avenger seems traditionary in every ancient society.

FACETIÆ.

LEO TOLSTOI, the Russian novelist, who has ideas of his own as to the right of the community to punish its offending members, saw the other day a policeman take an individual into custody. He at once walked up to the constable and said, —

"Can you read?"

"Certainly, sir."

"Have you read the Scriptures?"

"Yes, sir."

"Then you forget that they command us to love our neighbors as ourselves."

The minion of the law, quite taken aback, stared at the Count; then, after a moment's reflection, made answer, —

"And pray, can you read?"

"Yes."

"Have you read the police regulations?"

"No."

"Then read them."

IN a law case, in which a question of identity was being discussed, the cross-examining advocate said to the witness, "And you would not be able to tell him from Adam?"

"You have not yet asked the witness, Mr. X.," interrupted the judge, speaking in a studiously deliberate manner, "whether he is acquainted with the personal appearance of the personage whose name you have just mentioned. There must be order in your questions."

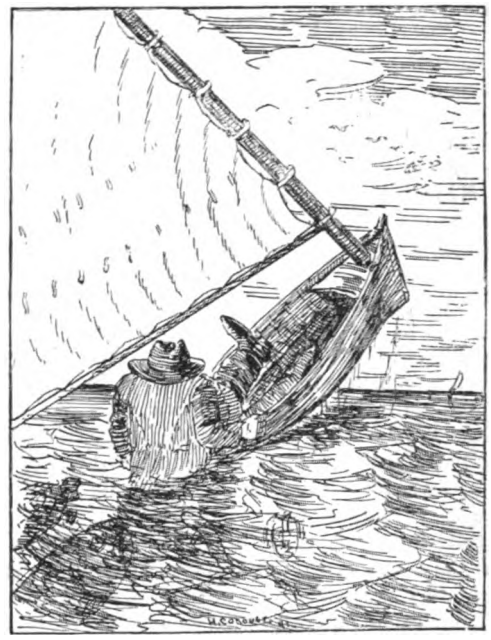
RECENTLY a Northern Recorder who is noted for the length and solemnity of his exhortations was addressing an old Irishwoman who had been convicted, not for the first time, of some trifling offence. His honor had gone on for half an hour or so, when suddenly the prisoner flopped on the floor of the dock. As the warder was trying to get her on her feet again, she made a remark in a very bitter and discontented tone. The Recorder, not catching the drift of it, asked the warder in his most impressive manner, —

"Warder, what does the prisoner say?"

"She says, your honor," replied the warder, with evident sympathy, "that she can stand penal servitude, but she's d——d if she stand this." — *London Truth.*

WHEN one talks of hereditaments, misprisions, and indentures,
Of chattels and of mortgages, of choses and debentures,
Of assumpsit, debt, and covenant, of trespass and attainders,
Of writs of habeas corpus, of reversions and remainders,
Of attaching and conveyancing, of signing and endorsing,
Of femes, both sole and covert, separating and divorcing,
Of words of twenty letters, which you 'd think would break his jaw,
You will then know that the fellow is just begun to study law. — *Life.*

Legal Object Lessons. — I.



A SHERIFF'S SALE.

THERE was for many years a clerk of one of the Minnesota courts, a German of fine education, who was very punctilious in the observation of the details of his office, and who maintained all the dignities which he thought should characterize judicial proceedings. It is said that during the progress of a trial a witness came up to be sworn, and that this clerk started to read the oath to him in slow and solemn voice, as was his custom, when

he noticed that the witness had not removed his hat. Pausing, he lowered his book, and said with much earnestness, "Look here! ven you schwear before me und Gott, take off your hat."

NOTES.

A FEATURE of the recent Detroit Bar Dinner was a quotation, placed at each plate, having some special reference to the legal profession. Among them were the following: —

> Who ever skulked behind the law's delay,
> Unless some shrewd attorney showed the way,
> By his superior skill got the ascendant,
> And led astray the innocent defendant?
>
> *Butler.*

An over-speaking judge is no well-tuned cymbal. — *Lord Bacon.*

The indiscriminate defence of right and wrong contracts the understanding, while it hardens the heart. — *Junius.*

Whoso loves law, dies either mad or poor. — *Middleton.*

> A lawyer art thou? draw not nigh!
> Go, carry to some fitter place
> The keenness of that practised eye,
> The hardness of that sallow face.
>
> *Wordsworth.*

> With books and papers placed for show,
> Like nest-eggs, to make clients lay,
> And for their false opinions pay.
>
> *Butler.*

Let not the counsel at the Bar chop with the judge. — *Lord Bacon.*

Justice delayed is justice denied. — *Gladstone.*

A witch will sail in a sieve, but a devil will not venture aboard a lawyer's conscience. — *Congreve.*

If objection is made to the one-man power of the judge, what shall we say of the one-man power of the twelfth juror? — *Alfred Russell.*

WHEN Numerius, governor of the Narbonnoise Gaul, was impeached for plunder of his province, he defended himself, and denied the charge, and explained it away so skilfully that he baffled his accusers. A famous lawyer thereupon exclaimed, "Cæsar, who will ever be found guilty, if it is sufficient for a man to deny the charge?" To which Julian retorted, "But who will appear innocent, if a bare accusation is sufficient?"

THE Louisiana State election of 1872 resulted in two rival governments, — the Republican, headed by Kellogg, and the Democratic, by McEnery. The parish of Caddo had two sheriffs and two clerks. The Democrats got possession of the offices, records, etc., and the Republicans, holding commissions from Governor Kellogg, brought suits to oust the intruders. The first suit brought to trial was F. *v.* P. for the office of sheriff. The district judge presiding was a Republican, and charged the jury that the commission presented by F. entitled him to the office. P. offered evidence showing that he received a majority of the votes cast at the election, and was commissioned by Governor McEnery. The jury retired to deliberate. The foreman was Jno. J. H., a native of the Emerald Isle. Most of the jury was in favor of bringing in a verdict for the defendant, who had undoubtedly received a majority of the votes cast at the election. "Hold on," said H., "let us consider the matter. The judge charged us to bring in a verdict according to the *law* and the *evidence*. Well, the *law* says that the plaintiff is entitled to the office, and the *evidence* says that the defendant was elected, and I don't see how we can bring in a verdict for either." This was a poser, and the jury agreed to disagree. The jury returned into court, and announced that they could not agree. "Why can't you agree in so plain a case?" said the irate judge. "May it please your honor," said the foreman, "we can't agree because the *law* and the *evidence* conflicts." The jury was discharged.

The foregoing actually occurred.

ONE of the most widely disseminated of popular errors is that Dr. Guillotin invented the grim machine which still bears his name. The real inventor of this sinister contrivance was Dr. Louis, a well-known medical man, and Permanent Secretary of the Parisian School of Medicine, or Académie de Médecine. On April 25, 1792, the guillotine was publicly used for the first time, and beheaded a

bandit named Pelissier. This was in the Place de Grève, where some twenty years previously Damiens had been tormented for days in precisely the same way as Ravaillac had been for the assassination of Henri IV.

During four months after the execution the machine which was eventually to achieve such sinister celebrity was disused. In August it was transferred to the Place du Carrousel, and a few weeks later it was alternately stationed in the Place de Grève, the centre of what is now called the Place de la Concorde, and in the Place du Trône. It was in the Place de la Concorde that Louis XVI., Marie Antoinette, Mademoiselle Elisabeth, and some eight thousand other victims fell beneath the identical blade which, by a curious irony of fate, is now to be seen in the Chamber of Horrors at Mademoiselle Tussaud's. As it is impossible now to ascertain the exact number of the victims of the massacre of St. Bartholomew, so it is impossible to give a correct estimate of the number of persons who were put to death by the guillotine in France between Aug. 10, 1792, and the 9th "Thermidor," 1794; but it was certainly not under forty thousand. Lamartine and Thiers gave the number as under twenty thousand; but they do not seem to have been acquainted with the evidence which has been discovered during the last few years of the facts of the "Comité du Salut Public" in the small towns and villages where roughly constructed guillotines were erected and performed their awful work with appalling regularity.

Under the Empire and Restoration the guillotine was permanently stationed in the Place de Grève, and executed annually between thirty and forty persons. During the reign of Louis Philippe the guillotine was transferred to the Barrière St. Jacques, and under the Second Empire to the Place de la Roquette, where it remains. During the Commune the old guillotine was burned by the people, and the present instrument is quite new. Sanson, who was the public executioner throughout the Reign of Terror, sold the original guillotine to Curtius for £1,000; and he in turn disposed of it for a larger sum to his niece, Mademoiselle Tussaud. Dr. Guillotin, who died in 1814, energetically but vainly protested against the use of his name in connection with this disagreeable subject, — another evidence, if one were wanted, of the great difficulty there is of correcting a popular error. Needless to say that the legend that Dr. Guillotin was among the victims of his friend's ingenious and merciful instrument of destruction is wholly apocryphal. He died at a good old age, and in his bed, surrounded by his children, who, however, obtained permission to change their name. — *The Saturday Review.*

Recent Deaths.

PROF. THEODORE W. DWIGHT died on June 29 at his home at Clinton, N. Y. He was born in Catskill, on the Hudson, N. Y., on July 18, 1822. His grandfather was Timothy Dwight, the seventh President of Yale College. Dr. Dwight himself was cousin to the Timothy Dwight who is now President of Yale. The Dwight family was a distinguished one in colonial times. In Dr. Dwight's early youth his father moved to Clinton, N. Y. Young Dwight entered the Sophomore Class at Hamilton College, and graduated with the highest honors at the age of eighteen. He studied law in the Yale College Law School in 1841 and 1842. From 1842 to 1846 he was a tutor in Hamilton College, and from 1846 to 1858 held there the chair of law, history, civil polity, and political economy. In 1858 he was elected Professor of Municipal Law in Columbia College. On the organization of the Columbia College Law School he became its warden. In June, 1891, he resigned his active connection with the Columbia College Law School, but was made Professor Emeritus of Municipal Law. Professor Dwight was one of the hardest working and most valued members of the New York State Constitutional Convention of 1867. He served on the Judiciary Committee. He was Vice-President of the State Board of Public Charities in 1873, President of the State Prison Association in 1874, and an active member of the Committee of Seventy. He was appointed by Governor Dix a member of the Commission of Appeals in 1873. He was also an associate editor of the "American Law Register." He published many pamphlets and treatises on law, and edited Henry Sumner Maine's "Ancient Law."

(An excellent portrait of Professor Dwight was published in the "Green Bag," April, 1889.)

REVIEWS.

THE NEW ENGLAND MAGAZINE for June is fully up to the high standard of this popular periodical. Its most noteworthy articles are "Art in Chicago," by Lucy B. Monroe; "The Government of Cities," by Moorfield Storey; "Work and Wages," by Charles Edwin Markham; "General Armstrong and the Hampton Institute," by Edwin A. Start; "The Ship Columbia and the Discovery of the Oregon," by Edward G. Porter; "The Christian Endeavor Movement," by Rev. Francis E. Clark, Amos R. Wells, and John Willis Baer; "Three Letters to 'Dorothy Q.,'" by Henry Collins Walsh; "The People in Church and State," by Edward Everett Hale.

THE contents of the ARENA for June embrace science, history, ethics, economics, politics, literary criticism, education, psychic science, and fiction. Among the contributors are Prof. A. E. Dolbear, of Tufts University, Rev. Minot J. Savage, B. O. Flower, W. D. McCrackan, A. M., author of "The Rise of the Swiss Republic," Louise Chandler Moulton, Rabbi Solomon Schindler, Frederick Taylor, F. R. G. S., B. F. Underwood, and Hamlin Garland.

THE June number of HARPER'S MAGAZINE is rich in illustrations, and in the extraordinary variety of its contents. Its most striking literary feature is the beginning of the series of papers on "The Old English Dramatists," by James Russell Lowell, — papers which will attract universal attention as representing the maturest critical thought of their distinguished author upon a subject which was to him a life-long favorite. Another article which will elicit the especial interest of thoughtful readers is Dr. Charles Waldstein's "Funeral Orations in Stone and Word," suggested by the recent discovery of a remarkable bas-relief in the excavations on the Acropolis at Athens. This article is accompanied by several illustrations (including the frontispiece) from photographs. A minute and comprehensive description of "The Austro-Hungarian Army" is contributed by Baron von Kuhn, and appropriately illustrated by T. de Thulstrup. The popular series of Danube papers, "From the Black Forest to the Black Sea," is continued by F. D. Millet, who describes the voyage of himself and fellow-canoeists from Belgrade to the Bulgarian frontier. The fiction of this number is contributed by Mary E. Wilkins, Wm. D. Howells, and Sarah Orne Jewett.

THE principal contents of the June CENTURY are "Budapest: The Rise of a New Metropolis," by Albert Shaw; "The Nature and Elements of Poetry: IV. Melancholia," by Edmund Clarence Stedman; "Mount St. Elias Revisited," by Israel C. Russel; "The Fight of the 'Armstrong' Privateer," by James Jeffrey Roche; "The Chosen Valley: II.," by Mary Hallock Foote; "Early Political Caricature in America," by Joseph B. Bishop; "The Atlantic Steamship," by Titus Munson Coan; "The Chatelaine of La Trinité: I.," by Henry B. Fuller; "Christopher Columbus: II. In Search of a Patron," by Emilio Castelar; "The Naulahka: VIII.," by Rudyard Kipling and Wolcott Balestier; "Characteristics: VII." by S. Weir Mitchell, M. D.

THE complete novel in LIPPINCOTT'S MAGAZINE for June, "John Gray: a Kentucky Tale of the Olden Time," is by James Lane Allen. Murat Halstead furnishes the "Journalist Series" with a paper on his "Early Editorial Experiences" that cannot fail to attract a re-awakening interest in the series. Hon. John James Ingalls contributes an article on the West, entitled "Westward the Course of Empire takes its Way," bearing the impress of the ex-Senator's powerful style. The short stories of the number are by Maurice Thompson and Patience Stapleton.

IN variety of subject and popular treatment the contents of the June COSMOPOLITAN furnish an attractive standard. The magazine is leading a movement for the solution of the problem of Aerial Navigation; and Hiram S. Maxim, the great inventor and foremost authority on the subject, gives the result of some recent experiments under the title, "The Aeroplane." The magazine opens with a charming Philadelphia story, by Janvier, with artistic illustrations from Wilson de Meza. Miss Hewitt, daughter of ex-Mayor Hewitt, gives some very sound advice regarding fashions and counterfeits in bric-a-brac. Other important articles in this number are "The Working of the

Labor Department," by the Commissioner of Labor Carroll D. Wright, and "Fur Seals in Alaska." Another sonnet of James Russell Lowell's is published in this number, and a poem by Inigo Deane, with a full-page illustration from the pen of Will Low.

THE June SCRIBNER presents a most delightful table of contents. There is one article, however, which appeals especially to every reader, and that is a wonderfully sympathetic account of "The Drury Lane Boys' Club," London, by Mrs. Frances Hodgson Burnett, who has not contributed to any magazine for several years. The remarkable thing about this club is that it originated in the mind of a poor boy himself, who felt the need for such an organization, and who called around him a handful of similarly minded poor boys, who met for a time in his mother's cellar, because, as he expressed it, "if two or three of us stopped a bit to talk on the street, the policeman came and told us to move on." By the aid of a young man and woman, this club had grown to be more prosperous, though when it came to Mrs. Burnett's attention it was still in very modest quarters. In memory of her own son Lionel, who died not long ago, she recently presented a reading-room to the club.

THE June ATLANTIC opens with a noteworthy article on "The Education of the Negro," by Dr. William T. Harris, Commissioner of Education, which is enriched with comments by eminent Southern gentlemen. There is another instalment of the "Emerson-Thoreau Correspondence," written at the time Mr. Emerson was in Europe, and abounding in passages delightfully characteristic of both writers. Agrippina, a fortunate and aristocratic cat, is the subject of a charming and very bright essay, by Agnes Repplier. Janet Ross contributes a very interesting paper of reminiscences of her grandfather, John Austin, one of the greatest English writers on jurisprudence, and an associate of Mill, Brougham, etc. The other contents are full of interest, and in every way up to the ATLANTIC standard.

IN the POLITICAL SCIENCE QUARTERLY for June Prof. John Bassett Moore continues his study of "Asylum in Consulates and Vessels," bringing it down to the late affair in Chili. John Hawks Noble presents a concise summary of "The Immigration Question" as it stands at present. Robert Brown, Jr., gives the salient points in the history of "Tithes in England and Wales." Prof. Ugo Rabbeno of Bologna, Italy, expounds and criticises "The Landed System of Social Economy," as contained in the works of his fellow-countryman, Achille Loria. Ernest W. Clement discusses "Local Self-Government in Japan;" and Prof. A. B. Hart, of Harvard, writes on "The Exercise of the Suffrage."

BOOK NOTICES.

A TREATISE ON THE LAW OF DAMAGES BY CORPORATIONS, including Cases *Damnum absque Injuria*. By GEORGE E. HARRIS, of the Washington (D. C.) Bar. The Lawyers' Co-Operative Publishing Co., Rochester, N. Y. 2 vols. Law sheep, $11.00 net.

In this work Mr. Harris gives us much more than the title would seem to demand, — the treatise in fact covering pretty well the whole subject of damages for injuries. This, perhaps, was unavoidable, as the liabilities of corporations and individuals are in the main the same; and it would exercise the ingenuity of a Philadelphia lawyer to draw the line between them in respect to damages. The book, however, will prove a useful and valuable one to the profession. Mr. Harris has evidently done his work thoroughly and conscientiously; and the citations include all the important adjudications on the various topics discussed. The scope of the treatise is shown by the following titles of the chapters: Corporations, Definition, Nature, Municipal Liability, Eminent Domain, Damages by Municipal Corporations, Highways, Nuisance, Injuries by Railroad Corporations, Injuries resulting in Death, Injuries to Children, Master and Servant, Fellow-Servants, Passengers by Land and Water, Baggage, Common Carriers of Freight by Water, Common Carriers of Freight by Land, Common Carriers of Live Animals, Common Carriers over Connecting Lines, Express Companies, Telegraph Companies, Mining Corporations, Banks and Bankers. Gas-Light Companies.

A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE, OR NEGLIGENCE AS A DEFENCE. By CHARLES FISK BEACH, Jr., of the New York Bar.

Second Edition. Baker, Voorhis & Co., New York, 1892. Law sheep, $6.00 net.

The rapid growth of the law, and the vast number of new cases passed upon by our courts, cannot be better illustrated than by this second edition of Mr. Beach's well-known work. Although but seven years have elapsed since the first edition was given to the public, and was then brought well down to the date of publication, the present volume has been increased in matter nearly *fifty per cent*, and nearly three thousand additional cases have been cited. In the preparation of the present edition the author has rewritten much of the text, and has reconstructed and increased the number of the chapters. Mr. Beach's work is always done thoroughly and conscientiously, and the present volume will add to his already well-earned reputation as a legal writer.

A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA. Adapted for all the States, and to the Union of Legal and Equitable Remedies under the Reformed Procedure. By JOHN NORTON POMEROY, LL.D. Second Edition by Carter Pitkin Pomeroy and John Norton Pomeroy, Jr., of the San Francisco Bar. Bancroft-Whitney Company, San Francisco, 1892. 3 vols. Law sheep, $18.00 net.

Upon the publication of the first edition of this work, in 1881, it was at once recognized as a standard treatise upon the subject of Equity Jurisprudence, and it has ever since maintained its position. It is undoubtedly the most complete and the best work which has been offered to the profession. The learned author died shortly after the first edition was published; but by a testamentary request he charged his sons, the present editors, with the task of preparing a second edition. That this work was confided to competent hands is evidenced by the care and discrimination which has been used in the preparation of the present treatise. The original text and arrangement of the first edition have not been disturbed; but the vast number of cases, involving matters within the scope of this work, which have been decided in the English and American courts during the past ten years, have added greatly to the bulk and value of the material of the treatise, and increased its size fully twenty-five per cent. Numerous cross-references have been introduced, adding materially to one's convenience in the use of the book. In its present form Pomeroy's "Equity Jurisprudence" will, for many years to come, continue to be recognized as a standard authority upon this important branch of the law.

THE ANNUAL OF THE LAW OF REAL PROPERTY. Being a complete Compendium of Real Estate Law, embracing all current case law, carefully selected, thoroughly annotated, and accurately epitomized; comparative statutory construction of the laws of the several States, and exhaustive treatises upon the most important branches of the law of Real Property. Edited by TILGHMAN E. BALLARD and EMERSON E. BALLARD. Vol. I. 1892. Ballard & Ballard, Crawfordsville, Ind.

The purpose and plan of this new Annual is to furnish a reliable medium which shall keep the profession familiar with all the growth and change of the law of Real Property, affected by current legislative enactments and judicial opinions. The object is a good one; and if this first volume is to be taken as a fair sample of those that are to follow, the work will prove of much assistance and value to the working lawyer. The cases appear to have been selected with good judgment, and the annotations carefully prepared.

HOW TO GET GOOD JUDGES. A study of the defects of the Judicial Systems of the States, with a plan for a Scientific Judicial System. By JOHN A. WRIGHT. The S. Carson Company, San Francisco, Cal., 1892. Cloth, 75 c.

While we cannot entirely agree with the author of this little monograph in his premises, we have found his work extremely interesting, and many of his ideas are worthy of careful consideration. The profession will heartily approve any effort to elevate the bench and bar; but we think Mr. Wright draws rather too dark a picture of the existing state of affairs. It is inevitable that there should be bad judges and rascally lawyers; still, on the whole, we believe that our American Judiciary and Bar are composed of able, conscientious, honest men.

LAWYERS' REPORTS ANNOTATED. All current cases of general value and importance decided in the United States, State, and Territorial Courts, with full Annotation. By ROBERT DESTY, Editor. Books XIII. and XIV. Lawyers' Co-Operative Publishing Co., Rochester, N. Y. Law sheep, $5.00 a volume.

A well-selected collection of cases, admirably annotated. These few words sum up the merits of this series of Reports, and ought to be sufficient to commend them to those of the profession not already familiar with them.

A TREATISE ON FEDERAL PRACTICE IN CIVIL CAUSES, with special reference to Patent Cases and the Foreclosure of Railway Mortgages. By ROGER FOSTER, of the New York Bar. Second Edition. The Boston Book Company, Boston, 1892. 2 vols. Law sheep, $12.00 net.

The first edition of Mr. Foster's admirable treatise on practice in the United States Courts was published in 1890. Ordinarily, the author and publisher who should venture a second edition of any book in two years after its first publication would meet the execrations of the bar, and find their venture a dead failure. But in this instance Congress interfered to render a new edition essential. The passage of the Evarts Act, and the establishment of the United States Circuit Courts of Appeal, nullified and made obsolete all existing Federal practice books. If Mr. Foster wished to remain an authority upon the subject, he had to revise his treatise; if his publishers were unwilling to see a rival book supersede theirs, they had to face the necessity of throwing away the balance of their first edition, and going to the expense of an entirely new book. They met the necessity as promptly as possible; and the profession must take their share in paying the cost of advanced legislation by casting aside their old editions and investing in the new one.

Nor will they much regret this sacrifice when they examine Mr. Foster's second edition. He has not only revised and rewritten many of the former chapters, to adapt them to the new law, but he has taken occasion to add to and strengthen his treatise in other ways. We notice new chapters on Admiralty Practice, on the Court of Claims, and on Private Land Claims. The Appendix of Forms and Statutes is greatly enlarged.

Use of the first edition has shown that Mr. Foster's book is in many respects the clearest and the most practical treatise on equity practice in existence. Lawyers who own it certainly have no occasion to refer to Daniell or Smith, for the pith of those books, so far as they are now applicable to our American equity practice, has been absorbed by Foster.

We can heartily concur in what Judge Dillon has said of Foster's "Federal Practice," that "it is comprehensive, methodical, and carefully prepared, and will prove an excellent guide to the Federal practitioner."

JOHN ANDREW & SON CO.

John K. Porter

The Green Bag.

VOL. IV. No. 8. BOSTON. AUGUST, 1892.

JOHN K. PORTER.

BY GROSVENOR P. LOWREY.

I.

I HAVE been asked to write a short sketch of John K. Porter, who died in April of this year. The task is difficult, for reasons which apparently should make it easy. Judge Porter and I were friends from the year 1861 to the day of his death, which occurred in April of 1892. During fifteen years of that time we were partners in the practice of law in New York, and in daily and intimate association. It might be expected from this that I should have known him well; and I suppose I did know him as well as any man knew him. But when I seek to gather from my memory material to illustrate, without too much amplification and analysis, his strong and unique individuality, I find that I have no sufficiently clear hold upon him. He was a man with differing phases of character. This statement, which seems to imply vacillations or uncertainty, must be at once qualified by another, seemingly opposed to it, — namely, that he was a man of absolute inflexibility, and therefore with no vacillations; and of a certain formality in all his actions and ideals, and therefore with slight if any variation in the manifestations of himself; with absolutely definite opinions on most subjects, and with absolutely fixed principles and affections. For instance, among all the men I have known, he was most forgiving of an injury or offence. At the same time he was a relentless hater, — his hatred being tempered, however, by a Christian conscience, which forbade him to do injury to an enemy. I think he forgave where he had respect, and could not forgive where he felt contempt. Ordinarily, one would not expect difficulties in appreciating the motives or the intellectual and spiritual movements of so positive a man. Nevertheless, it is true that after all these years of acquaintance, I find myself diffident about making generalizing estimates of Judge Porter. A few things can be stated beyond dispute. His personal and professional integrity stood like a mountain height in comparison with the average man's fidelity. It was not possible to be more honest and faithful. As a friend, his steadfastness had no limit. As a counsellor, he was exceptionally industrious, persistent, and all-believing in his client, — who, it may be mentioned, was always in the right! His case was always one which *should* be won. Only a few times in our association did he say to me, after a case was over, — in a sort of confidential way, as if announcing an astounding and incredible suspicion, — that he was "a little afraid that our client had gone too far," etc., or "had not been quite what he appeared," etc. Still, with all this faith, his critical acumen was ever at work on his case, distrusting everything and everybody, and sparing nothing in the search for exact truth, and the means by which to make it known. To reconcile such believing with such doubting is an instance of the difficulty I find in harmonizing my views of Judge Porter's character. In some things there were "no two ways about" him. Thus, a promise was inviolable with him; and the assurance of his friendship, once obtained, was good forever. In every relation in life

he was exactly what he professed. His cordiality, which was marked, and endeared him to a great many men throughout the Union, — especially to younger members of the bar, — was entirely sincere. A lawyer who knew him well said to me a few days ago that when acting as senior, Porter could make it always appear, if anything went wrong in a case, that he, the senior, was blamable, — that *he* ought to have done this or that; or that it was *his* oversight or *his* overconfidence, etc., that had led to the error. And my friend declared that no amount of protest would make Porter concede the point. Still, I have known him to be unsparing and unforgiving to ignorance or incompetency, when accompanied by vanity or willingness to play a perfunctory part. So, also, when successful in a case, he was quick to inform the client of the efficiency of the junior's preparation, and of the important influence of that preparation on the result, etc. Juniors never lost clients through him, but, on the contrary, generally found their confidence strengthened after an experience with Porter as senior. In short, he was an open-hearted, generous, high-spirited, faithful, inscrutable character. The inscrutableness I shall not try to exhibit by examples; and it is alluded to only because I cannot conscientiously speak — and do not wish so to speak to those who knew us both — of Judge Porter as if believing that the general and superficial aspects of character which I may be able to show, give or can be made to give any really complete view of the man.

The general opinion of him in our profession during his career is justly expressed by a short article in the "Albany Law Journal," from which I quote in part: —

"After several years' retirement and physical heaviness, Judge John K. Porter has died, at the age of seventy-three years; and so has passed away one of the greatest American advocates. . . . He was master of a remarkably beautiful extemporaneous style, — vivid, original, and brilliant. His tact was exquisite and unerring. He had a grim satiric humor. He had abounding resources and readiness, audacity equal to the most surprising occasion, unfailing patience and command of his temper. He elevated and dignified common disputes, while never passing the boundary between pathos and bathos. . . . So has departed the second of the three greatest advocates of our State, who contested the Beecher case. There have always been men in every human occupation who were peculiarly the admiration of their brethren in the same occupation; and it has always seemed to us that Porter was the lawyers' ideal advocate."

John K. Porter was born at Waterford, N. Y., on the 12th of January, 1819. His father was a physician in excellent practice there, and gave his son a superior education, ending with his graduation from Union College, to which institution he was always greatly attached.

It is said that he wished his son to adopt the medical profession, but that a few months' trial led him to say: "John, I do not know what sort of a lawyer you might make, but you will make a very poor doctor." This is a little surprising; for among other peculiarities, Judge Porter evinced the greatest interest in "cures," and had in scrap-books and note-books a large collection of so-called remedies, varying in therapeutical importance from a horse-chestnut worn in the pocket, to the most complex prescriptions, and covering every ailment, from plain obvious toothache to whatever bodily disease is hardest to understand. These he cherished, and with benevolent zeal communicated to his suffering friends. Perhaps the old doctor had witnessed the beginning of this collection, and, on the whole, knew what he was talking about.

The moral character of Judge Porter was cast in an heroic mould, which was doubtless matter of heritage. His grandfather was a Major in the Revolutionary army, who fought at the battle of Bemis Heights, and participated in the capture of Burgoyne; but although his military career had been much to his credit, at the close of the war

he positively refused to be recognized by his military title, and insisted always on being known as "Deacon," — esteeming that office more than the other. Dr. Porter was, I believe, an indulgent parent in most things, an affectionate and self-sacrificing man; but he must have been rather severe in his judgments of his boy. Having already determined that he could not make a good doctor, he appears to have been disinclined to accept the neighborhood reputation which the young man was fast gaining in the law. It is said that the doctor heard John K. but once in court, being led then by public interest in some trial to slip in at the back of the court-room while his son was speaking. The only opinion which could be elicited from him afterward by friends was that John did not do so badly as he had expected. The circumstances of Dr. Porter's death show continuance of this heroic strain by descent from the hard and pious Revolutionary Major. He was in perfect health, visiting his patients as usual, when he died suddenly by the roadside. His horse was found standing near him; he was lying in an angle of the road-fence, his hat placed upon a high stick to attract attention, and his body in such position as he would have selected for a patient threatened with apoplexy; and with lancet in hand, he was trying to relieve himself from the threatening attack by blood-letting. But the remedy had come too late, and he was dead. This calmness in a most critical personal emergency was characteristic of his son. I believe that for a number of years he bore great pain in perfect silence, and in that way concealed from his friends the approach of an insidious and obscure disease of the spinal cord, which, after producing a variety of misleading symptoms, kept him prisoner in his bed for the last three years of his life, enduring much of the time the extremest suffering.

His study of the law was begun in the office of Nicholas B. Doe and Richard B. Kimball at Waterford, N. Y. The young student was admitted to the bar on reaching his majority; and came at once into competition and companionship with the bar of Saratoga County, at that time distinguished throughout the country. He met there Deodatus Wright, Nicholas Hill, William A. Beach, Augustus Bockes, and others whose names were only less eminent. Referring to one of them, whose activity and pertinacity were notable, Porter used to say that "to have one case with X. was to be in full practice." And I fancy that practice at the Saratoga Bar in those days was a man's work.

One of the earliest cases of which I have heard, and which is said to have been contested with utmost vigor, learning, and enthusiasm, was a dispute before a Justice of the Peace about a pike-pole, — a pole used by boatmen in the perilous navigation of the canals, — the value of which was appraised in the action at less than one dollar. The trial lasted two days and two nights, the court being held until twelve o'clock each night. The result of the suit has been lost in the greater interest of the contest, my informant declaring that each lawyer made the case his own, and fought it as if not a pike-pole, but an oil-well had been the prize of controversy.

Another interesting early incident of his career must have been disheartening. It came out when the Bar Association of the City of New York rejected by blackball the candidacy of a certain practitioner here.

On hearing of the circumstance, Judge Porter, with great confidence in the correctness of his judgment, expressed the opinion that the rejected person was unfit for association with gentlemen anywhere, and made it good by telling the story of one of the first, if not the very first, important case which was ever in his hands. When he entered the bar, there was immediately placed in his hands the defence of a suit against Judge Doe, as shareholder in some corporation. There were reasons for asking for an extension of time to answer, which the young

attorney did by a civil request in a letter to the plaintiff's attorney in another part of the State, who was the person above referred to as having been blackballed. That person wrote to Porter a letter so full of expressions of a desire to oblige Judge Doe and avoid putting him to any trouble, etc., etc., that the inexperienced young lawyer understood it to be an assent to the desired extension, and was aroused from his error only on receiving notice of taxation of costs and entry of judgment. The judgment was for several hundred dollars. In his mortification and despair, Porter considered himself ruined, and felt unable to acquaint Judge Doe with what had happened, in order to obtain the needed affidavit for opening the default. After a night's reflection he took a shorter course. Going to his father, he succeeded in raising the money, and paid the judgment. John K. Porter never needed to learn any lesson twice; and it was observable throughout his life, that he was especially careful about the regularity of such important matters as extensions of time to answer, etc.

He began to travel the Circuit early, and at once took rank with the most eminent and experienced of his associates. He was a lawyer and an advocate by his very constitution; and people familiar with his early career say that his first forensic work was equal to his best. To take sides vehemently, and yet to keep wary and cool; to discriminate, and in the midst of controversy to shape or change a course in the face of his adversary, and yet to hide all this from that adversary; to contend strenuously and uncompromisingly, taking every point and every advantage, yet keeping strictly to the standard of uprightness, and to the ethical code of the profession in every situation,—those things were as natural to him as his breath. He was for a short time a partner of Deodatus Wright, an accomplished jurist, association with whom was doubtless very useful. When that connection ended, he went into partnership with Nicholas Hill and Peter Cagger at Albany. Such is the evanescence of a great lawyer's fame, that some of your readers may not have heard of Nicholas Hill. But most lawyers still hear, through the reports at least, the echoings of a fame like that of his contemporary in this State, Charles O'Connor, or like that of men like Pinckney, Wirt, Jeremiah Mason, and Horace Binney, in earlier times, in other States. A young friend informs me that at Columbia Law School it was the practice of Professor Dwight to refer students to briefs of Nicholas Hill, as furnishing the perfect model of professional work. The brief in Silsbury *v.* McCoon, 3 N. Y. Rep. 380, may be named as an example. In Olcott *v.* Tioga R. R. Co., 20 N. Y. 210, will be found another, which is often cited to students as a model in the art of brief-making; and it may be interesting to know the *modus operandi* by which briefs like these were built up.

During the existence of the firm of Hill, Cagger, & Porter, it was the practice of Mr. Hill to argue all cases in the Court of Appeals, and of Porter to try all cases at the Circuit, and argue appeals in the General Term; a practice, by the way, of which Porter did not approve. Lawyers throughout the State had a practice of sending cases to prominent lawyers at Albany for argument, not only of motions, but final hearings. At one time Mr. Hill was said to hold retainers in a large proportion of all the cases on the docket of the Court of Appeals, at each term.

Usually he wrote his own briefs, not relying upon those of attorneys or other counsel. The preparation of those briefs generally resulted from preliminary arguments conducted at night, after the day's work was over, between Porter and Hill, in which they contended and struggled over every point in the case. These consultations often began by Mr. Hill's calling from his room: "Porter, what do you think of the authority of 'Smith *v.* Jones'?" or "What have you to say upon this proposition?" etc. The query, frequently addressed to the younger man when

just on the point of going home at nine or ten o'clock in the evening, was pretty sure to result in an all-night's session, and sometimes in a very excited discussion. For Mr. Hill, having elicited his junior's first impression, opinion, or criticism, would invariably assail it; and usually succeeded, at the outset at least, in demonstrating that there was "nothing in it," that it was "ridiculous, untenable," etc. All the advocate in Porter being aroused, he would proceed to fortify his argument by a thorough examination of the question by aid of the facilities at hand. The firm were then owners of the law library formerly belonging to Judge Cowen, who by its aid had, with Mr. Hill, created that monument of learning, "Cowen & Hill's Notes to Phillipp's Evidence,"—a library which was said to have cost him more than $25,000 (a great sum at that time), and which the firm had more than doubled. Daylight often saw the brief sent in by local counsel riddled and destroyed by the fire of enlightened and astute criticism, and an entirely new line of argument substituted. It did not always happen that one night sufficed, and it came to be the custom of Mr. Hill to fight inch by inch with his partner Porter, in these night sessions, over every case of interest which he was afterward to argue in the Court of Appeals. With such practice in fence against such an adversary, it was not surprising that when he met in court the brilliant men of the day,—O'Connor, Evarts, Noyes, Comstock, Cutting, Ganson, Lord, *et id omne genus*, the perfection of his armor and weapons came to be proverbial. The result of such professional work had its reward. The firm of Hill, Cagger, & Porter stood easily first in the State, if certain firms in the city of New York be excepted, and perhaps first in any case. Certainly the arguments of Nicholas Hill were unsurpassed, and will probably remain forever unsurpassed in this State, for learning, logic, power, and persuasiveness. And for this they were in part indebted to midnight sessions in the midst of the great Cowen library, with that fiery antagonist, John K. Porter, on the other side. It is easy to believe that but seldom anywhere — probably never in the more formal air of court-rooms — have greater intellectual contentions been heard, than some to which those silent walls were the only listeners.

In 1846 Judge Porter was a member of the convention called to revise the Constitution of the State of New York; and although he was an active member of the various committees, he made but one speech. It was in support of a report upon limiting the powers and duties of the executive. A few quotations will give us a view of what sort of a statesman and publicist he was when twenty-seven years old:—

"The gentlemen from Ontario and from Albany deny our right to restrict any but delegated power. Why, sir, the power of the electoral body itself is a delegated power — not in form but in effect — by the necessity of the social compact. We were elected only by qualified voters. But we are the representatives of all. Those electors themselves were but the representatives of the people. Four hundred and fifty thousand electors may constitute a plurality. Shall those two hundred thousand, a minority even of the electoral body, without restriction or barrier, select whomsoever they please to rule over two and a half millions of freemen? Every man that voted for you and me represented in his turn five unqualified citizens. We have a female population of one million two hundred and ninety-three thousand, — three times the number of your whole electoral body. They have as deep an interest in this Government as you; nay, a deeper interest. If your laws prove dangerous to liberty, you can unmake the work of your own hands. You are clothed with the power of the ballot-box. You have the strong arm to resist unto blood. They are voiceless, powerless, defenceless! Are we not their representatives here? There are more citizens under than over the age of twenty-one years. They have more interest than we in the Constitution we are to frame. They are to survive us and the electors who sent us here. If we sow the wind, they are to reap the whirlwind. Nay, more, we are constitutionally legislat-

ing for advancing millions. We are assuming to act for generations to come. We represent, not the mere party which nominated, not the mere voters who elected us, but the whole people of New York, of each sex and of every age and condition, — aye, and the succeeding millions, whose constitutional rights we are now asserting, around whom we are erecting in advance constitutional barriers and entrenchments for the security of their liberties. Was Magna Charta extorted at Runnymede by the iron-handed barons of Normandy for themselves alone? No; but for every freeman and serf within the limits of England — for every child of English lineage that has since been born — yea, and for every colony that has been planted in the wilderness by the descendants, and which has burst in its growth their bonds of colonial vassalage. Even in the Declaration of our own Independence are contained those doctrines of human rights which were first conceded by power to the spirit of liberty in the Magna Charta of England. When, therefore, we convene as the representatives of a free people, to discuss elementary principles of constitutional law, let us discard the spirit of the demagogue and invoke that other spirit of expansive patriotism — of manly independence under a just sense of responsibility — of devotion to the great and permanent interests of the people. It devolves upon us to perpetuate the privileges of our citizens, and to guard our institutions from danger in the distance, whether menaced by legislative corruption, by popular excitement, by partisan frenzy, or by the encroachments of power. I trust this question will be met as one of principle; that gentlemen will prove by their votes that love of the people which they profess in their speeches. Rely upon it, the electors will prefer the substance to the shadow."

. . . . . .

"Mr. WORDEN: It is absurd to suppose that two millions of men will make an absurd compact, and therefore they are to be trusted to select just such a candidate for their suffrages as they please.

"Mr. PORTER: Absurd as it is, two millions of men have made precisely such a compact, and it has stood in your constitution for twenty-five years. Whether the compact is altogether absurd is a question between the gentleman and the convention of '21, between the gentleman and the people of the State of New York. But if the contract was absurd, it was their right to make it. It is their right to renew it. The gentleman from Ontario pronounces it absurd. The people of New York have not discovered its absurdity. We are here to enter into a compact to examine the ancient landmarks, and if needful to erect new monuments to define the boundaries of executive, of legislative, aye, and of electoral power. Such a compact is our bill of rights. If we go behind the social compact and the doctrine of restrictions. it is my natural right to hunt in every forest, to dig in every valley, to reap on every hillside. But by that compact we agree to respect the vested rights of property and to recognize the exclusive dominion of the landholder. The people have the power to elect a king to rule over them and make his eldest son successor to the throne. If gentlemen deny that, they deny the doctrine for which they contend, the unlimited power of the people. By this compact we surrender that power, and declare, for us and our descendants, that we will have a Governor, but no King. He shall wear no crown. Two years shall be the limit of his dynasty. He shall not be elected for life, even by the voice of the people. The gentleman from Ontario and the gentleman from Seneca insist that the question is involved, whether we will not entrust power to the people. Not so, Mr. Chairman, but that other question is involved, whether we, standing in the place of the whole people, will leave unlimited power in the hands of the electoral body. The question is involved, whether a plurality of 200,000 shall exercise absolute dominion over two millions of citizens."

A part of the plan which Mr. Porter opposed was the removal of the restriction which required candidates for the office of Governor to be thirty years of age at the time of election. The result of Judge Porter's speech was to induce Charles O'Connor, who was opposed to the restriction, to say that —

"The gentleman from Saratoga in his own person furnishes the best evidence of the claims of early youth to honorable distinction."

In politics Judge Porter began life as a Whig, and at twenty-five years of age he made a speech before the Baltimore Conven-

tion of 1844, which nominated Henry Clay, which in the newspapers of the time is spoken of as an extraordinary effort for so young a man, and is said to have attracted great attention. Doubtless the political field was open to him at all times. His family and social connections would have made him a desirable candidate, and his education, ardor, and eloquence would doubtless have given him considerable party standing. But except the election to the Constitutional convention, and subsequent appointment and election to the Bench of the Court of Appeals, and one other occasion during the war, when for patriotic reasons he prosecuted and almost won a hopeless Congressional canvass, he never permitted himself to be a candidate for office. Indeed, nothing had much interest for him which lay very far away from the prosecution and administration of the law as a part of the progressive drama of human life. This he loved; other subjects sometimes interested him a little, but not much. In literature, his taste was for the classics. Of fiction, I doubt if he permitted himself to read anything this side of Sir Walter Scott. I often tried to speak with him upon a variety of subjects which interested my mind; but although he listened politely and with apparent respect, I soon discovered that a repetition was more likely to accumulate evidence of my light-mindedness, according to his view, than to produce any other effect. In the daily routine of law practice it was his maxim to win as you go. It was therefore idle as a general thing to talk to him of present tactics arrranged to accomplish a secondary or indirect effect by and by. He considered this as an effort to be wiser than events, which, ordinarily, he did not believe was practicable. In politics also he was for securing now, in an honest and fair way, what was needed. He did not listen with patience to theories of government which postponed present advantage or security to real or supposed theoretical necessities. In closing his argument in the Legal Tender Case in the Court of Appeals, on the 27th of June, 1863, he said: —

"It happens, by a singular coincidence, that the appeal to your Honors to declare the Government impotent for its own defence, is made at a time when the heels of the rebel soldiery are polluting the soil of a free State, between the capitol of New York in which we hold our deliberations, and the capitol of the nation where final judgment is to be pronounced.

"On the theory we maintain, the Constitution was designed as a citadel to secure public liberty and repose. On the theory of our adversaries, it was to serve as a grave, in which sovereignty should be buried alive, to linger only until life should be extinguished by suffocation.

"'*E pluribus unum*' is not a mere rhetorical phrase, but the terse record of the philosophy of our system of government, — a stumbling-block only to those who reject even the mathematical postulate that the whole is greater than either of its parts. The effect of yielding to the views of these tenacious friends of the Constitution would be to relieve them and us from its burdens and its protection. It would be to deliver over the Government to its enemies, '*monstrum ingens cui lumen ademptum*' — nay more, with its inherent force and its constitutional power of self-defence, bound to helplessness with cords spun from its own fibre."

Upon the breaking up of the Whig party Judge Porter became a Republican, and remained ardently attached to that party, but with an independent bias which several times took him away from the support of the regular nominations. I am sure that he voted for Grover Cleveland for Governor of the State of New York, and I am inclined to think that on later occasions also he would have been found, had he chosen to avow his position, among those who call themselves independents.

His contempt for some of the leading members of his party was openly expressed. He heard me regretting the degradation of high office which happened when a person (whose only apparent recommendation was that he was a very rich man) was elected Senator of the United States from this State, and said with some asperity: "Why

do you question his right to this office? Has he not *paid for it?*"

In 1853 he was counsel for the managers on behalf of the Assembly on the trial of John C. Mather, one of the Canal Commissioners of the State of New York in the Court of Impeachments. His argument of this case appears to me the most close, powerful, and logical of any which I have had opportunity of reading; but it would be difficult to make extracts from it which would be intelligible. It being understood that the propositions which I shall quote below were made upon the trial of a public officer impeached for malfeasance in the performance of statutory duties, a single one will indicate the way in which Porter wove together propositions of law which he intended to apply to an assumed or proven state of facts: —

"The learned counsel for the respondent and we agree upon one proposition, that where a discretionary power is confided, a corrupt intent must be proved to render the party either indictable or impeachable.

"There is another proposition upon which we shall not differ, and that is, that where there is an infraction of positive law vesting no discretion in the party violating it, the intent is not to be proved, but presumed. Where there is a positive statute enjoining a duty, or prohibiting a wrong, with the officer, as with the citizen, the first, the simple, the paramount duty, is to obey. A violation of a mandatory law is *per se* corrupt. The pretext of the culprit, that he cannot understand the statute which imposes a command on him, is idle. It is not like the case of a judge, who is to construe laws, affecting doubtful and civil rights between third parties. There he is bound honestly to *seek* the truth, but not to *find* it! But if a judge is commanded by statute to commence no trial on the Sabbath day, he cannot say in excuse of his infraction of the act: 'In my judgment public policy is against this provision. I will therefore assume that the lawgiver had in mind, not the Christian, but the Jewish sabbath; and I will hold my court and commence my trials on Sunday as on Monday.' Sir, in this case the statute enjoined plain duties upon the respondent; he was to go so far, and no farther. As a member of the Letting Board, he had no authority except to contract *under the direction* of the Canal Board. As a member even of the Canal Board, he had no discretion to exercise except upon the three elements prescribed by law, — price, ability, security. He was not at liberty to seek pretexts for evading the statute."

In 1857 I saw him for the first time, while making an argument before a select committee of the Senate of the State of New York, as counsel for the disfranchised corporators of Trinity Church. Judge Porter introduced the subject by saying: —

"In behalf of the great body of the Episcopalians of New York, who for forty-two years have been excluded by an act of legislative suspension from the exercise of their corporate rights, I appear to ask that the barrier to the enjoyment of those rights may now be removed. If we are to rest our case upon a simple comparison of the second section of the Act of 1814, with even those portions of the charter and subsequent grants, read by my learned friends in aid of the exclusive claims of Trinity, in the course of the able arguments which have just been closed, no room would be left for doubt that the claimants would still be in the undisturbed possession of their franchises, but for this act of legislative exclusion; an act procured on the application of Trinity vestry in fraud of the beneficiaries of the trust, and operating as a great wrong, unintended indeed by the Legislature, but none the less unjust to those whose rights were shorn away, none the less disastrous to the interests of the church at large, none the less at war with the provisions of the State and Federal Constitutions."

The argument exhibited a profound comprehension of those fundamental principles of association upon which all clubs, churches, political societies, and even free governments must stand if they are to stand safely. I was a casual spectator, not yet admitted to the bar. I was not an Episcopalian, nor had I any grievance against Trinity Church, not being even an heir of Anneke Jans. But the opening words of Mr. Porter thrill my memory still. They were low and sonorous;

and the impression on me was as if this man had been a champion knight, challenging, in my interest, some abominable wrong-doer to mortal strife.

The best argument of his earlier years is by some thought to have been made at the trial in Albany of William Landon, who was tried and acquitted July 21, 1855, on the charge of violating a prohibitory liquor law.

"He dignified and elevated common disputes, while never passing the boundary between pathos and bathos," says the "Albany Law Journal." The argument in Landon's case is a sample of this. He said, addressing the jury: —

"The opinions just expressed by one of your number in the presence of the court, as well as the intimations of the bench during the progress of the trial, admonish me that I am entering on no ordinary task. Unless preconceived opinions can be removed by argument and authority, the defendant cannot expect the acquittal to which we believe him to be entitled. The fact is undisputed that on the 6th day of July he sold two glasses of brandy to Messrs. Johnson and Hastings. Before he can be convicted, the question must be determined, either by you or by the court, whether this act was a crime. This is an inferior tribunal, in which the jury are the judges both of the law and of the fact. Two questions are involved in the issue: First, whether the sale of imported liquor is prohibited by the Act. Second, Whether the prohibitory enactment is in conflict with the Constitution. Both are legal questions; one involving the construction and the other the validity of the law."

The remarks immediately following indicate that the trial was before a Justice of the Peace; that the jury were well-known temperance men; and that Judge Porter relied upon their intelligence and sense of justice for a candid hearing. I select from a long argument the following: —

"In the general view I am presenting of the scheme of legislation embodied in this law, and the practical effects it was designed to accomplish, it becomes necessary to allude to other considerations of a more public character. They have an important bearing upon the rule of construction to be applied, and a still more direct connection with the constitutional inquiry. It is never to be presumed that it was the design of the Legislature to inflict wanton injury upon large classes of citizens, and the language of statutes invading general rights is always to be restrained within the narrowest limits. And when a law is found to be subversive of the public interests at the same time that it injures the security and value of private property, it weakens the presumption in favor of its constitutionality.

"The prohibitory act took effect on the 4th of July. It then first spoke the language of command. It found fifty millions of property in the form of spirituous liquor, in the hands of private citizens, purchased on the faith of pre-existing laws and constitutional guarantees, — property which had contributed to the taxes of the State and the national revenues, and which was bought, kept, and intended for sale as a beverage. According to the theory of the prosecution, all this the law intended to confiscate at a single blow and without compensation. It found a hundred thousand citizens of the State engaged in various branches of business dependent on this department of commerce. All those who would not acquiesce in the destruction of their property it converted into criminals, and proposed to hunt down into the jails and penitentiaries. The Legislature claimed for itself the omnipotence of parliament, and assumed to impose upon three millions of men an act of arbitrary, bold, and unlimited dominion. It undertook to strike down in one day the business and the property of a hundred thousand citizens, not as a punishment for antecedent crime, but on the pretext of private philanthropy and public necessity. But this was not a tithe of the mischief it contemplated. Like all despotic enactments, it anticipated resistance, and provided for subduing it by a systematic departure from the usual course of public justice, and by lopping away, one by one, the safeguards of the citizen. It invested inferior magistrates with unlimited power over liberty and property. It created a host of constructive crimes, and visited them with unheard-of penalties and confiscations. It reversed the rules of evidence, and made acts in themselves lawful presumptive evidence of crime. It deprived parties accused, in cases involving alike their fortunes and their liberty, of

their right of trial by jury according to the course of common law. It clogged the right of appeal from the decision of an inferior magistrate, with conditions unprecedented even in absolute monarchies. It provided that the accused might again be put in jeopardy after a full acquittal upon the merits. It usurped the province of the judiciary, and by a legislative decree confiscated fifty millions of property. It adjudged the guilt of tens of thousands of citizens, and substantially restricted the courts to the execution of a search-warrant for the culprits. . . .

"But the immediate victims are not the only sufferers under the act. Like every similar blow, it strikes at the framework of society. The sense of wrong arouses the spirit of resistance. Dissension and discord arise, and divide men in their business, their private and their social relations. Animosities are kindled which years will not quench. Rumor is made the basis of criminal accusation, and espionage receives the sanction of law. Secret societies are organized to conduct State prosecutions, and the accused are admonished that they must confederate to resist them. Foul imputations, invective, and calumny are used by heated accusers as weapons of war. The weapons of assault may become, in their turn, the weapons of defence. Men do not willingly consent to be at once robbed and maligned. To ameliorate one evil a hundred are introduced, tending to demoralize society and foster the spirit of private feud and mutual enmity. Old ties are severed, old rights impaired, old guarantees repealed. To reform here and there a straggling inebriate, constitutional rights are to be invaded, and a criminal code introduced which has no parallel even in the history of New England."

And all this was about two glasses of brandy which "Messrs. Johnson *v.* Hastings" would perhaps have been better without.

The Parish Will Case was argued in the Court of Appeals in April, 1862. William M. Evarts and John W. Edmunds were on one side, and Charles O'Connor and John K. Porter upon the other. Porter's argument remains a model of critical analysis of facts, made persuasive and winning by forensic eloquence. The case was a great one in its day. A fortune was involved, besides most interesting questions touching the testamentary capacity of, and the validity of gifts *inter vivos* by, a paralytic, speechless, helpless husband to a wife, who had entirely excluded his own family from him during seven years of this disability, had entirely surrounded him by her own relations, and who appeared at his death, by gifts, and by codicils executed during his alleged disability, to have absorbed a great estate.

In looking at the argument, I find something at the outset which shows Porter's usual plan of work, — one which can, I think, be commended to all who may not employ it. His first step in any case was to jot down every act, event, document, scrap of paper, or whatever came into the case, in the order of their real or supposed dates. He said: —

"I submit to the court a printed statement of the material facts, arranged in chronological order. This statement was prepared with the conviction that in a case where the evidence extends through several octavo volumes, it might aid your Honors, in conducting the investigation, to consider events in the order of their actual sequence, — a mode which rarely fails to bring to light the nature and mutual dependence of a series of acts, and the objects and motives of the various actors and participants."

There is a great temptation to quote freely from this argument, which seems to me unsurpassed as an example of the criticism of facts as to their legal significance. But to do so with freedom would involve the mention of names, and, to a degree, the revival of things now forgotten, which might be painful to living persons, unknown to me. A few phrases, however, may, I think, without much risk of offence, be quoted.

Judge Porter, declaring that certain facts which he recited, demanded explanation, said: —

"We find it close at hand, in the prominent, controlling, undisputed feature of the case.

"On the 19th day of July, 1849, Henry Parish was struck down with apoplexy. From that day he never *spoke* and never *wrote* a single sentence

or clause of a sentence. Mrs. Parish had the sole possession and control of his person. She assumed the sole possession and control of his estate. He saw only those whom she permitted him to see. He saw them only when she permitted him to see them. She introduced two of her brothers into his mansion at Union Square to preside over it with her, at the expense of the estate, as joint heads of the establishment. Fortunately for her purpose and theirs, another of these brothers, now here as claimants, was his attending physician. She cashiered his standing counsel, and filled the vacant place by assigning to him the counsel of the ——— family, a gentleman of great distinction, to whom Mr. Parish had never spoken. She dedicated to his religious uses, her friend, her guest, her beneficiary, the Reverend Pastor of Grace Church. Having favored him with these surroundings, she claimed to be the only *medium* of intelligent communication between him and the rest of the human race. Such are the circumstances under which Mrs. Parish claims to have received from her absolute dependant a succession of gifts intervening between apoplexy and death, to the amount of $100,000 annually, and running through the darkest years of his life, — those in which he most needed wealth, and the alleviations with which it so often mitigates the pressure of age, disease, and calamity."

To sustain these various gifts *inter vivos* as well as testamentary, testimony had been introduced to show that the husband, though an apoplectic, paralytic, epileptic mute, was otherwise in perfect health and of sound and disposing mind and memory; that though the vocal organs were paralyzed and he had lost the power of speech, yet he was able by other sounds or signs intelligible to Mrs. Parish, at times, and occasionally to others with her aid, to communicate intelligent ideas; that possessing these powers, he had exercised them of his own free will; and notwithstanding the presumption arising from her absorption of his estate in improvident and constant gifts, that he had made these codicils without undue influence.

Every legal presumption was against the validity of the gifts and codicils; and to uphold these presumptions against this proof was the duty especially assigned to Mr. Porter. I venture to believe that professional work in the law was never better done. The analysis of evidence was keen, merciless, and exhaustive; the demonstration of a fraudulent design was always clear and convincing and at times overpowering. A lurid sarcasm, and contempt for the actors in the shameful drama, hot from an honest and indignant heart, flash through the argument like summer lightning in a storm. Here are one or two specimens: —

"The breath of God which shipwrecked the mind of Henry Parish fell like a zephyr upon his pious wife. As early as the 14th of August, a little more than a month after he was prostrated, she claims to have been fanned by a Divine *afflatus*. She announces this heavenly visitation in a letter to his sisters of that date, the writing of which she excuses on grounds that recall the pleas of the crier of Bristol, — that 'he might be spared from crying that day because his wife was dead' — for she assumes that their brother, of whom they were 'so proud,' being in the condition Mr. Parish was, and they aware of it, therefore they 'will scarcely expect to hear from her at that grievous time;' on which plea probably it was that she allowed him to die within four hundred yards of those attached sisters, without letting them know he was dying. 'So difficult is it,' she says, 'to comprehend his language, — at first, of course, just as unintelligible to me, but now, thank God, I seem inspired with understanding, and really do understand him.' . . .

"The Reverend Dr. Taylor, rector of Henry Parish as well as of the Parish of Grace Church, evidently a pluralist and entitled to take tithes from both, was often in this manner beguiled into what would seem almost 'judicial blindness.' This good man was enabled to believe that his disabled parishioner 'discerned the Lord's body' in the most solemn and mystical ordinance of the Christian religion, when it is abundantly proved that the bewildered communicant could not even recognize a woodcock in its feathers.[1] Nor was any

[1] It had been proved that before his calamity Mr. Parish, who was a *bon vivant*, had always marketed for his own table, and that his opinions were much esteemed by purveyors of all sorts. Afterwards he had been driven by Mrs. Parish over the accustomed rounds, where to his old acquaintances she interpreted his rolling head and ceaseless "Na, na!" sometimes to approve and some-

doubt of his sanity or his piety excited when this communicant, before his lips were dry of the sacramental wine, 'evinced strong displeasure, both by his looks and contemptuous mode of expression, frowning and saying, "Nah, nah, nah!" shaking his hand towards—' Towards whom? Towards a co-communicant! And the 'devout and humble' Henry Parish crowns this exhibition of Christian temper by throwing backward to his wife a small package of gold! The credulous Doctor saw nothing in this to require the application of any discipline whatever, and dismissed the case, merely decreeing the missile to be a deodand. 'It was $15. I received it, of course, and retired.' It came out, on his being cross-examined, that Mrs. Parish either could not interpret her husband's wishes, or that she would not allow him to dispense even inconsiderable sums of his own money without her concurrence. . . .

"Even this did not cause the scales to fall from the eyes of the single-minded rector. As little did his presence restrain them. Of two, — to whom he had just broken the bread of life, — one communicant is exhausting his last remnant of strength in assaulting the other, his wife; and that other contumaciously resisting her husband's active benevolence, and by a fraudulent pretence of not understanding him, striving to pick the pocket of 'Pious and Charitable Uses' of two hundred dollars, for which the check had already been drawn. And in this the rector sees nothing to rebuke; fines the offended party $15, and retires.

"Dr. Taylor is free from suspicion of having absorbed the $15, — expecting the two hundred still to come. There is nothing either in the testimony or the character of the communicants to warrant it. Nevertheless *it did come.*

"What a commentary upon the artlessness of Dr. Taylor, upon the consciousness of Mr. Parish, upon the good faith of Mrs. Parish!"

I saw Porter try but few jury cases. After we became partners, his services were so constantly sought by other attorneys and solicitors that he was not called into many cases originating in our office. I tried a few with him very early, but later it was only when the litigation was of exceptional importance that it received his personal attention. We were together in the trial of what was called the Quadruplex Telegraph Cases in the Superior Court of this city, which turned out to be a very complicated patent case in a State Court, the form of action being a bill *quia timet* to settle the conflicting claims of the Western Union Telegraph Co. and Mr. Jay Gould to the inventions of Thomas A. Edison for sending two messages in each direction at the same time over one wire. The case turned in part on the identification of certain inventions with the descriptions in certain contracts earlier in date than that with the Western Union Telegraph Co., and under which Mr. Gould and the Atlantic and Pacific Telegraph Co. claimed to take superior title to those particular inventions, as against the Western Union Company. The trial lasted for two months, and the technical testimony instead of being taken before a Master or an Examiner, as in patent cases pending in the United States Courts, was taken in the presence of the court, — which constituted a novel spectacle.

Other matters originating in our office in which Judge Porter took part, were all the various litigations which established the legal rights and status of the elevated railways in the city of New York. My first impression of his manner before a jury was got in a trial in Albany, which I witnessed some time before he went on the bench, and while he was still a member of the firm of Cagger, Porter, & Hand. The "Albany Law Journal" said of him, in an article published in 1875: "If he has the last word, the day is his; but we expect that if he is to be answered by a strong man, his wondrous spell might fail." Of the shrewdness of the doubt expressed in the last phrase, I had a personal illustration in that case. The trial was at Albany, and the case was damage by personal injury. Porter represented the defendant. When he came to sum up, he sympathized so deeply with the sufferings of the plaintiff, — he treated

times to disapprove the things shown. This was regarded as an effort to make evidence; but if so, it was especially unsuccessful on one occasion, when Mrs. Parish undertook to interpret Mr. P.'s views of some particularly fine woodcock which an old dealer was persuaded to submit to his judgment.

him with such gentleness, and regretted so much that in a careless moment he had exposed himself, and by his own negligence had made it impossible for Porter's client to avoid hurting him, — that I was entirely convinced. Lyman Tremain was on the other side; and he was the sort of man referred to in the quotation, — "a strong man," — and he had the last word. When Porter finished, I said to him (being under the spell), "It is impossible that there should be a verdict against you." "Oh, yes," he replied, "Lyman is sure to get a verdict; but I do not think it will be so large as he might wish." And that was the way it turned out, — except that, I think, the amount was more to Mr. Tremain's satisfaction than to Mr. Porter's. I listened to Mr. Tremain's way of destroying Porter's spell. It was effective with the jury, but was not with me; and upon analyzing the spell afterward, I was convinced that it was an honest spell, — that is to say, Porter had set forth irrefragable reason for believing that the injury was the result of contributory negligence, but the jury had not been able to appreciate the full force of that reasoning. Therefore, when the other strong man with another kind of spell had the last word, he got the verdict.

One notable case in which Porter was employed, was that of De Witt C. Littlejohn *v.* Horace Greeley, tried at the Oswego Term of the Supreme Court in September, 1861. The "Tribune" had opposed the re-election of Mr. Littlejohn to the Assembly, upon the ground that he had favored legislation manifestly against the public interest, and which was thought to be corrupt. No charge of personal corruption was made against Mr. Littlejohn. The trial appears by the report to have been somewhat eccentric. The Judge had ruled out all proof of the corrupt character of the legislation, whether offered in mitigation of damages or by way of complete defence; and had also refused proof that there was a corrupt agreement with certain parties closely related to the plaintiff, under which a large amount of money was to be divided as the proceeds of a franchise created by the legislation, together with other facts, from which it was claimed that the jury might be permitted to infer that the plaintiff's action in supporting the bills was such as to justify the "Tribune's" characterization. These rulings were a surprise to the profession; and Judge Porter, addressing the jury, said (in a way which seems not well reported): —

"A few rough notes, made during the recess, of the topics to which I can properly restrict the discussion, will enable me in some degree to abridge the argument. I acknowledge the embarrassment under which we present the case; after the exclusion of the evidence on which we mainly relied. It is difficult for a lawyer to abandon in an hour the rooted convictions of twenty years. We do not readily acquiesce in what we conceive to be a departure from the settled principles of law. To our faith in them we cling tenaciously; and it fails us so rarely that in that faith we soon grow old, and part with cherished opinions as with cherished friends. But we are bound by the rulings of the court, and must discharge our duty as we may, in conformity with the decisions made for our guidance. . . .

"The truth cannot be excluded in a court in which blind Justice holds her balanced scales, — unless the defendant shall go further, and prove in addition the truth of charges he never made. Hitherto, by the common understanding of all American lawyers and jurists, it has been deemed an absolute right to aver and prove the truth of the matter alleged to be libellous. But our friends propose to inaugurate a new era in the law of libel. The jury are no longer to read the paper upon which they are to pass. They are to find damages for an accusation, though they cannot find the accusation. On a question of doubtful intent, the court is to find the fact, and the jury to visit upon the defendant the penalties of a wrong of which they believe him to be innocent. We were challenged by the plaintiff to prove the truth of the publication on which he counts. When we accept the challenge, and offer to prove its truth, he tells us, in substance, that we cannot be permitted to prove it, — that he will elect what evidence we may, and what we may not offer, and that we may

prove the truth of his inferences, but not of our allegations. You will readily perceive that when propositions like these are entertained, discussion becomes embarrassing; as we are bound to abide by such rulings as have been made by the court, and may yet be made in the course of the trial. Within the narrow limits assigned, I shall present the case as well as I can, upon the topics to which the discussion is cut down by the court.

"You will not fail to appreciate the public aspect of the grave questions involved in the issue. The fearless comments of a free press on the public acts of those you entrust with power, are your only protection against profligate legislation and official corruption and venality. Even with such exposures of malfeasance in office and partisan intrigue as you have hitherto had, and with the princely revenues of New York from its magnificent public works, your industry is taxed four millions annually for State purposes alone. Every farm from Lake Ontario to the sea is under mortgage to-day to the tax-gatherer, not for the legitimate support of government, but to supply the ever-recurring deficiencies of a treasury drained by corrupt legislation. You are taxed because the capital of a free State is polluted by jobbers and money-changers. Laws are enacted by the mercenaries of the third estate. Where we most need integrity, roguery thrives, and honest men are in disrepute. Whoever is guilty, whoever innocent, the fact exists and is known to all men. It is matter of public history, and as familiar to every citizen as the fact that the cohorts of rebellion are now advancing in arms to subvert the Republic. Do I mistake the sentiment of this community when I say that deeply as we abhor the brazen front of treason which boldly encounters the perils of crime and war, still more do we detest and abhor the treachery, the thievery, and the peculation of those among ourselves who betray public trusts, who rise and stab the people, and in the house of the people? However it may be with individuals, we know the laxity of public morals prevailing among many of those who have crept into high places. It has been found that there are gold-mines nearer than California, accessible to plastic consciences. Men have learned to buy their offices and sell their votes, — to barter honor for emolument, and conscience for coin. Human souls are bought and sold at the public shambles. In the present case we are not permitted to inquire who these men are. But we may well ask, when we are called on to silence the sentinels who should warn us against corruption, what will be our condition when you have muzzled those whose duty it is to guard us, when you have knifed the watch-dogs who protect us while we sleep? You are to vindicate all rights and enforce all laws; but in doing so, and in arriving at a judgment in each particular case, you will not lose sight of what is due to the community at large, or discard from view the circumstances and surroundings which reflect light on the acts and motives of those who are arraigned before you as wrongdoers. We are to abide by the decisions of the courts; but we especially rejoice when they gladden good men, — as the exclusion of our evidence gladdened the worthy gentlemen whom we brought here to reveal the doings and bargainings of the Albany lobby. How speedily the cloud rolled away which seemed before to darken the court-room! . . .

"Legislative Corruption. Certain local journals persist in misrepresentations of the course of the 'Tribune' respecting State matters so gross that we cannot refrain from noticing them. We take the following from a leader in the last 'Chautauqua Democrat' as a sample: —

> "'There may have been, and doubtless was, the *usual* amount of "legislative corruption" at Albany last winter.'

"The *usual* amount of legislative corruption at Albany? Time-honored usages of our ancestors! What has become of them? There was a period in our history when high offices were filled by upright men. Those whose lives touched the era of the Revolution retained the spirit of patriotism in fires . . . and loathed crime and corruption and venality. But here a prominent public journal enters the lists against the 'Tribune,' and intimates that there is a usage of corruption which Republicans are bound to respect. It is because corruption is acquiring the sanction of usage, gentlemen, that this case, involving the issue of corrupt legislation, transcends in interest and importance any previous libel suit in this country. . . .

"I need scarcely recur to the prominent characteristics of the Gridiron bills, so admirably analyzed in the masterly opening argument of my associate. You remember that they were grants in perpetuity, obviously framed to evade the Constitution, and without the usual reservation of the

power to alter and repeal. You remember they were grants of franchises invaluable for use, invaluable for disuse, made marketable alike to those who would build roads and those who would prohibit their construction for the purpose of excluding rivalry and perpetuating monopolies already overgrown. They were grants, not to corporations subject to general laws, but to men whose names are unknown as benefactors of their country, who are scarred with no wounds unless they be wounds received at the primary meetings of hostile parties, — men who have not augmented your revenues by public works, illustrated your history by their genius, or enhanced your glory among the nations. No, they are grants to lawyers of whom you never heard — to brewers whose names are new to your ear — to hackneyed politicians whose reputations are too familiar to commend them to your regard. To such men, of whom we are at liberty to say nothing except as you happen to know of them or as you yourselves are ignorant of them, were these grants made by Speaker Littlejohn and his associates."

Before he went on the bench, Porter argued in the Court of Appeals Metropolitan Bank *et al. v.* Henry M. Van Dyck, Superintendent of the Bank Department, in 27 N. Y. 400, involving the constitutional power of Congress to make Treasury notes a legal tender for the payment of debts.

It would be impracticable to extract anything from the great argument in this case and do it justice. It will be found in full in "Snyder's Great Speeches," p. 421. And here this meagre and to me unsatisfactory reference to the work of Mr. Porter at the bar before his accession to the bench must suffice.

(To be continued.)

THE LAW OF THE LAND.

IV.

LAWYERS AND DECEDENTS' ESTATES.

By Wm. Arch. McClean.

IT is said, men die that lawyers may live. The saving clause about this saying is the "it is said;" for it is altogether probable some one has said it who does not know anything about the subject. The "it is said" and "they say" are twins of no caste, born of anonymous parents. It should rather be said, men die because they cannot help it, and lawyers cannot labor gratuitously in unravelling the knots and snarls of dead men's estates.

There is a popular prejudice or predilection to connect lawyers with dead men's estates, with an insinuating significance. The dear public, perhaps unconsciously, thus wrongs the legal profession. To give the dear fossil an opportunity to undeceive itself would be charitable.

Observations reveal that one half of those who die possessed of an estate leave wills; the other half die intestate. Of those who die testate, by far the greater number either write their own wills or have some friend or confidant write it, regardless of form, law, authorities, or legal effect of the words used. Many mortals are sensitive about this last right, or rite, and make it a matter of secrecy, — leading to its preparation by the maker or a confidant. In country districts a great host of the wills are prepared by justices of the peace, who follow examples given in the form-books; and where the forms fail, a deep sea enticingly yawns.

An idea may be gained of the sources from which wills spring, by the interesting fact discovered from an examination of the probate records of an agricultural county. The one hundred last wills offered for probate were examined. Nineteen were found drafted by attorneys-at-law. The greater number of the remaining eighty-one were drafted by justices of the peace or ex-justices, a few by the testators themselves, the attending physician, and even the pastor.

When the sources are considered from which wills emanate, it is hardly a matter of wonder that there is scarcely a will but needs the construction of a legal mind, — more frequently that of the bar, yet quite often of the bench. The wonder is increased by the fact that some of the most difficult wills to be interpreted by courts have been those carefully prepared by attorneys.

In addition, no man can write his will, or any woman have hers, so as to please each and every relative. A displeased one may be a willing contestant. An estate is a temptation to heirs who have been slighted by preferences, or by charitable bequests or devises away from them. Many wills being prepared and executed at the eleventh hour, when the makers thereof are sick or aged, the doors are open to questions of susceptibility, importunities, imposition, fraud, and undue influence. All these considerations are matters for litigation by heirs who are ready and anxious to have them tested.

In spite of these facts, it still remains true that the decedent's estate that is involved in expensive litigation is the exceptional estate, — the one or two in the hundred, of the hundreds of thousands annually settled by the legal profession of the country. Observations would indicate that the average percentage of litigated dead men's estates does not exceed two per cent in many sections, barely five in any. What we mean by a litigated decedent estate is one in which the administrative officers, the creditors, and the heirs are

engaged in legal warfare from the beginning to the end thereof. An estate closed up with the assistance of counsel, with heirs represented by counsel to see that the distribution is legally made, cannot in any wise be called a litigated estate.

When an estate becomes heavily involved in litigation, and a small balance is left for the distributees, the lawyers generally receive the blame, as being ready absorbents. This is far from the truth; that is, while lawyers do absorb that which they are entitled to for their services, yet they are not the causes of the small balances. It is not true even in litigated estates that the lawyers take the estate, and the heirs that which is left.

The wealth of men is overestimated. A man dies reputed to be worth $100,000. Rumor says that that is his valuation; heirs believe it; it is to their interests to deceive themselves. An inventory of the estate is made; the $100,000 rated man just touches the $75,000 mark. Now, a man worth $75,000, or $100,000, or a millionaire, has liabilities, if he is actively engaged in business, that frequently bear an ascending ratio in proportion to his wealth. The estate must be first appropriated to these debts. The net balance, clear of all debt, of the $100,000 rated man, the $75,000 appraised estate, may be but $25,000 when the distribution comes. The columns of the daily newspaper will confirm this fact continually. This is not only true of large estates, but equally of even the smallest; estimates are placed that nine times out of ten are far excessive of the balance for distribution. Where has the difference gone to? "Into the pockets of the lawyers," is the answer of the caricaturist, paragrapher, and the disgruntled heirs, when in fact it never existed.

What share of dead men's estates do lawyers receive? There is no occasion for any alarm, — it is not proposed to take the public into the confidence of the profession; only a pretence of doing it will be made. In the settlement of testate and intestate estates, where corporations are not the administrative officers, it is not the rule, but the exception, where first-class business qualifications are united with the duties of the executor or administrator. A widow, husband, child, relative, or friend is named executor by will, as a matter of sentiment or respect, regardless of business qualifications. The preferences in intestate estates are given by law to relatives. The result is something any lawyer of a practice in settlement of decedents' estates will corroborate. It comes to pass that there are executors and administrators who settle up estates, and when signing their names do it by making a mark; that there are those who cannot write a single word beyond their own names; that there are those who do not know the nature of the simplest paper of even a business character, — that of a simple receipt for the payment of money, — and who depend upon counsel to prepare such receipts; that there are those who know nothing of banking, and the attorney is necessitated to give lessons in methods of deposit, check-drawing, and bank-book keeping; that there are those for whom counsel prepare every check drawn by administrator or executor. Even where these offices are filled by intelligent business men, there is the great field of legal procedure in the settlement of decedents' estates, that is an unknown land through which each and every one must be constantly led and guided by counsel.

For these reasons it comes to pass that in by far the greater number of estates the lawyer is the real administrative officer, who directs settlement in every minute detail, who settles the estate in the name of the legal administrator or executor, and who makes the distribution. It is he who prepares all necessary papers, both of a legal and business character, from the probating of a will or issuing of letters of administration to the releases to be taken from parties entitled to the residuum. What does the legal profes-

sion receive for these services? The amount will not equal, in about ninety-five per cent of the estates, the compensation allowed by law to executors and administrators for their work, the greater part of which has been done by counsel, — will not only not equal, but most frequently will not be one half of, such compensation. It is only in the exceptional litigated estate, where counsel, beside all the routine work involved in the settlement of estates, conducts lengthy and tedious litigation, that counsel fees begin to run up in figures; yet the proportion they bear to the whole estate is seldom large. A moderate amount of litigation has been known to be thrown in for a sum equal to the compensation of executors and administrators, which, in the sections in which our observations have been taken, is five per cent on personalty, and two and a half per cent on realty.

Now, after all, is not the attorney the best and most faithful friend of dead men's estates?

Among the many delicate matters the attorney handles in the settlement of estates, is the intention of a testator in making a testamentary paper. It is always the constant endeavor to find out what the intention may be, or, if there is none, to make one or guess at it, — as a Supreme Court Justice aptly remarked on this subject that the court of last resort had the advantage of the lower court, because it had the last guess at what a testator intended. The following literary monstrosity was excluded as a will by the court, because the maker of it reached home and survived about ten days, during which time he was possessed of testamentary capacity. It would have been extremely interesting, if the maker thereof had never seen his home again, to have learned the various guesses that would have been made to arrive at the intention of the maker, and the interpretations that would have been put upon the instrument.

" I am going to town with my drill, and I aint feeling good and in case if i shouldend get back do as i say on this paper tomey and robert is to pay they last payment one this place Samuel nows his payments Joseph you are to have that land and town property and pay Magy $3.00 dollars $1.00 dollar a year without interest tomy Miten is to have his colt fore freedum.

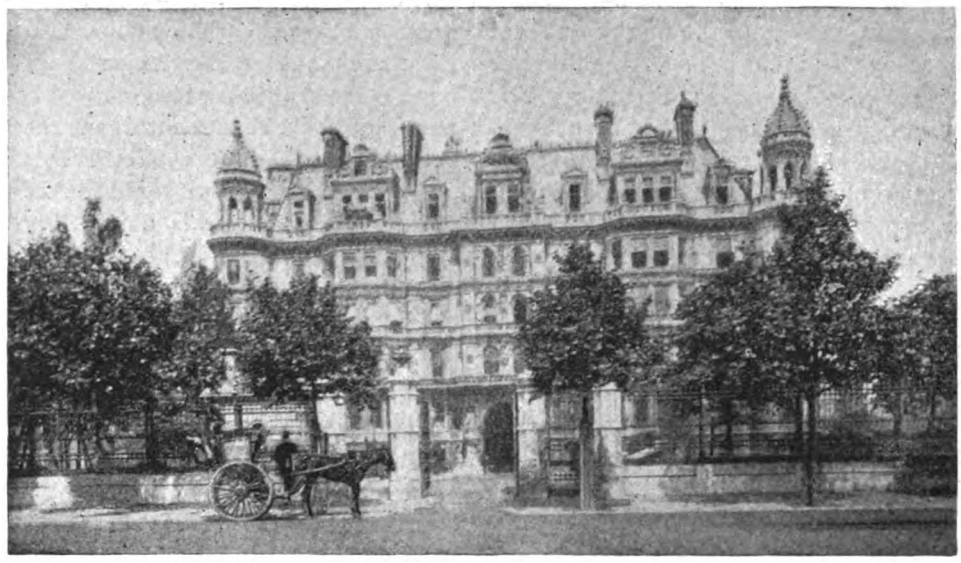
" tomy and robert is to settle up and make sail and devide the money equil amung my five boys this i write down and sign to my will."

The following is the unique attempt to combine the Queen's English and the Fatherland's language, for the purpose of making a Pennsylvania Dutchman's will. It is to be noted that the original will bears the mark of the testator; so that the decedent must have employed a scribe of his own mixed nationality to draw up his will. Further, the section giving his lands to his " Deer weif so lang as shee berrs mey Nam," was crossed over by lines; but upon the oaths of the witnesses to will that these lines were not on the will when executed, the will as it stands *verbatim* below was admitted to probate.

Ocktober de 4 1867

In de Nam of God, amen. I am —— ——— an maeke this mey last will and testement as follows, that is to say, mey deseire is to be bured with as littel expense as decensy will permit, and dat all mey debts and funerel expenses be paid as soon after my decease as conveniently may be I give and bequeath all mey massuags lands tenements and hereditaments wathsoever setuated, lay lying and being in the Conty of ———, Comperland township, which I parchased of Phellep Schneider to mey Deer weif so lang as shee berrs mey Nam. first to my wife her drey hundred Dollers, secount acordin to law de eintraest of one thard of my astadt so lang as she be mey weddowe. I bequeet to my sohn John ——— twanty fivt Dollers, de rest of my chillern schell be exxectly ekell sheer and scherr a lieck. Schell I deye or deceesse den my holl estadt shall be sold so soon as convennet. I nam Samuell ——— my Exsecketer.

Wetnes mey hand an sell.



TEMPLE GARDENS.

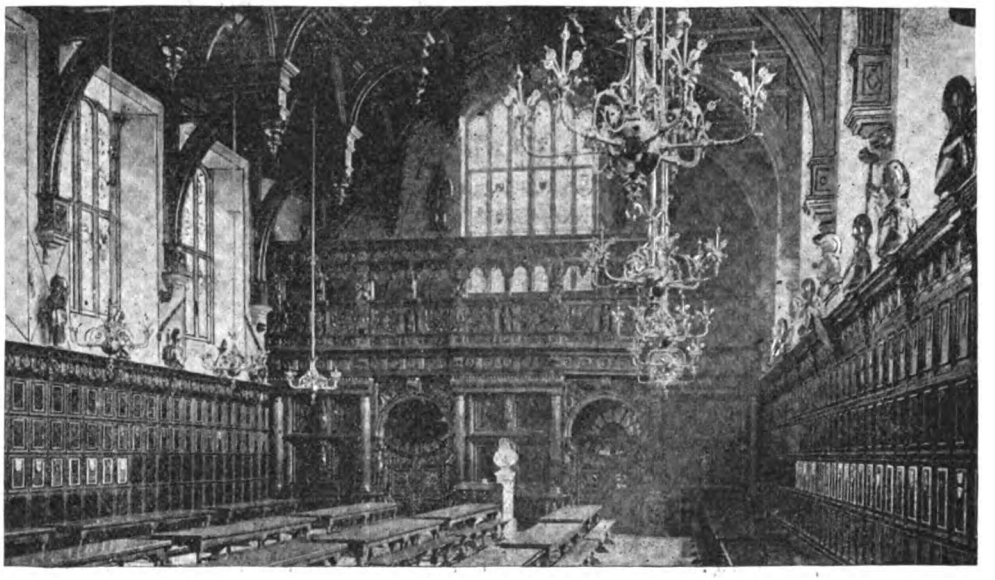
STUDENT LIFE AT THE INNS OF COURT.

THE Inns of Court, each with its pleasant garden and its library, offer an agreeable picture to the eye wearied by the monotony of street after street of dingy buildings. The Inns, or *hostels*, as these schools of law were anciently called, are but a stone's-throw from the busy thoroughfare; and should the stranger, tired of the noise and bustle of the London streets, turn down one of the many narrow little lanes by which they are approached, he will suddenly find himself in a region of stately buildings and silent courts and squares. Here is much to interest a lover of things ancient. He may, if he has strayed within the precincts of the Temple, visit the fine old church, with its effigies of recumbent Crusaders. Here, in a corner of the churchyard, is Goldsmith's grave; and hard by is Brick Court, where stood the building in which he wrote his "Animated Nature," and in which, when times were prosperous with him, which did not occur often, he made merry with his friends.

There is an old-world air about the Inns of Court that might easily beguile the stranger, if he were in a dreamy mood, into the fancy that time had slipped back a century or two. Nor would the illusion be dispelled if he could peep into the hall of the Middle Temple at six o'clock — the dinner-hour — during term-time. He would see the benchers in their black gowns walking slowly up the hall, preceded by the head porter in embroidered robe, carrying a long wand or mace. He would have noticed this official, before entering the hall, strike the floor twice with the end of his mace, and all the occupants, clad in black gowns, rise to their feet at the signal. These are the barristers and students. They remain standing until the benchers have reached their tables and grace has been said. After dinner another grace is said, and the benchers retire in the same order. At the Middle Temple students and barristers dine together in messes of four, and the dishes are passed around in a manner prescribed by immemorial usage. Each mess is supplied with wine, and the old-fashioned custom of drinking with one another is still preserved.

Every afternoon during term-time a blast from the horn signals to the hungry student the approaching dinner-hour. An old writer thus refers to this ancient custom: "The panyer man, by winding of his horn, summons the gentlemen to dinner and supper." This "panyer man" also provided mustard, pepper, and vinegar for the hall; "and hath for his wages yearly £3 6*s.* 8*d.*, and the fragments of certain tables."

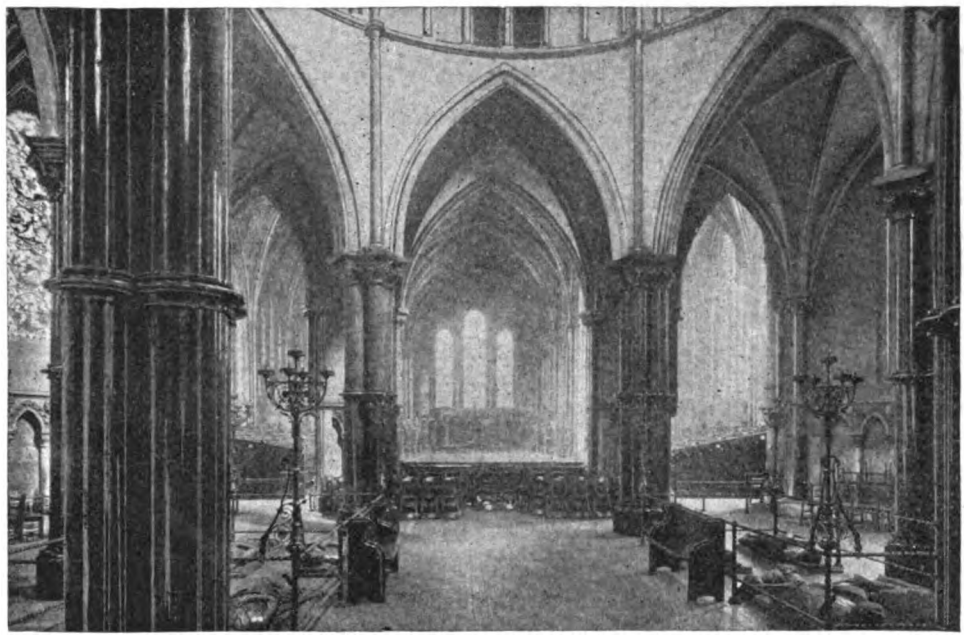
In a quaint old folio, published more than two centuries ago, the writer, describing the Inns of Court as they existed in his day, gives some curious information. The chief cook, he says, "had divers vailes appertaining to his office — namely, dripping and scummings, the rumps and kidneys of loynes of mutton, which is the usual supper meat of this society, there being seldome any other joynt served in the hall." Besides getting these delicacies, "for his further benefit he was wont to prepare every Easter a breakfast of calves' heads, for which every gentleman gave twelvepence or more, according to his discretion." The same authority observes that only the sons of gentlemen studied the law, "the vulgar sort of people not being able to undergo so great a charge." The manners possessed by these sons of gentlemen could hardly have come up to modern notions of refinement, for in an enactment dated the fortieth year of Elizabeth it was ordered that "to avoid disturbance and confusion of service, every gentleman of this house (Gray's Inn) who should henceforth go down to dresser, either to fetch his own meat or to change the same; or not presently to sit down to his meat when the servitors have messed him; or take meat by strong hand from such as should serve them, to be put out of commons."



MIDDLE TEMPLE HALL.

Books in the olden time were scarce and dear; but at the Middle Temple "they had a simple library, in which were not many bookes besides the law, and that the library, by meanes that it stood alwayes open, and that the learners had not each of them a key unto it, it was at last robbed and spoiled of all the bookes in it." But though they had lost their library, these gentlemen had other resources. After dinner and supper, the "students and learners sat down together

by three and three in a company, and one of the three put some doubtful question in the law to the other two, and they reasoned and argued it; and this was observed every day through the year except festival day." At the end of every term "examination and search was made what exercises had been kept the same term and by whom; and likewise in the beginnings of the terms it was the custom to examine who kept their learning in the vacation time." It is not stated what befell those who had failed to "keep their learning."



THE TEMPLE CHURCH (EAST).

In hall and in church students wore gowns and round caps; but boots and spurs, swords and cloaks, and extraordinary long hair, were forbidden. The regulations as to dress varied somewhat at the different Inns. At Gray's Inn a member wearing "any gown, doublet, hose, or other outward garment of any light colour," was to be expelled; and no member was to come into the hall to breakfast, dinner, or supper, or to any "exercise of learning" in boots. At Lincoln's Inn wearing a hat in hall or in chapel, or "going abroad to London or Westminster" without a gown, was prohibited; "and likewise, if any fellow of this house shall wear long hair or great ruffs, he shall be put out of commons." The members of the Middle Temple were more fortunate, for "they have no order for their apparell, but everyone may go as he listeth, so that his apparell pretend no lightness or wantonness in the wearer."

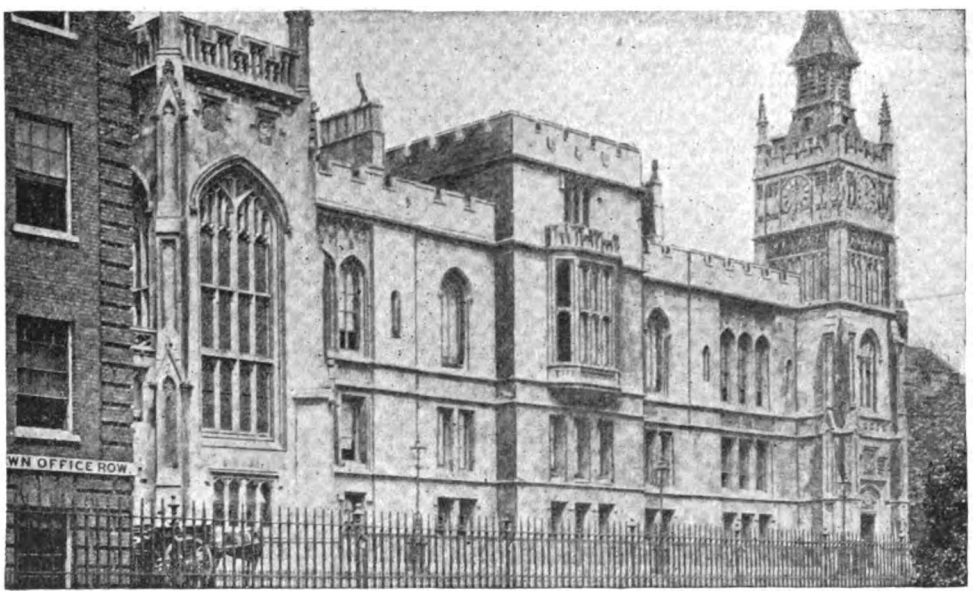
The authorities at the different Inns seem at one time to have strongly objected to their members wearing beards. There are several regulations on the subject. In the thirty-third year of Henry VIII., an order was issued that "none of the fellows being in commons, or at his repast, should wear a beard;" the culprit to pay double commons "during such time as he should have any beard." Apparently this order was insufficient; for in the first year of Mary's reign it was enacted that "such as had beards should pay twelve-pence for every meal they continued in them; and every man to be

shaven upon pain of putting out of commons." Again, in the first year of Elizabeth another order appeared "that no fellow should wear any beard above a fortnight's growth." But the fashion at that time of wearing beards grew so rapidly that the very next year, at a council held in Lincoln's Inn, it was agreed that all orders before that time touching beards should be repealed.

The chief butler had orders to take the names and inform the benchers of those who offended in the matter of hats, boots, long hair, and the like, "for which he is commonly out of the young gentlemen's favor." A delinquent was punished by fine or by "putting him forth of commons; which is," explains the chronicler, "that he shall take no meate nor drynke among the fellowship until the elders list to revoke their judgment."

The masques and revels held in the halls of the Inns were often most magnificent entertainments. Stage plays were sometimes performed; and at other times the barristers danced with each other, and afterwards one of the gentlemen was called on to give the judges a song. But that other kinds of play were not neglected appears from an order issued on the 7th of November in the fourth year of Charles I. Herein it was ordered that "all playing at dice, cards, or otherwise, in the hall, buttery, or butler's chamber should be thenceforth barred, and forbidden at all times of the year, the twenty daies in Christmas only excepted."

At the present day a student, if he be duly qualified in legal knowledge, may obtain his call to the bar after keeping twelve terms. Students who are at the same time members of one of the universities in the United Kingdom "keep term" by dining in hall three times during term; other students must dine six times every term. The ceremony of "call" varies slightly at the different Inns. The student dines in hall that night. At the Inner and Middle Temples he must appear in evening dress; at the latter he must also be fully robed as a barrister, in wig, gown, and bands. The men called sign the roll, and the senior

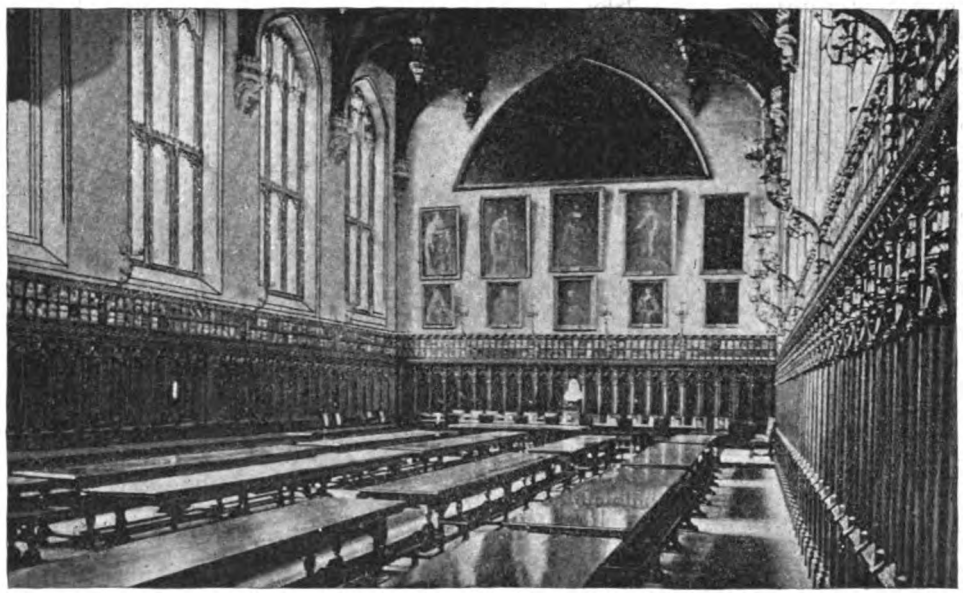


INNER TEMPLE HALL.

bencher makes a short speech wishing them success. At the Middle Temple the new barristers, who dine in their wigs, etc., have the privilege of inviting their friends to a wine party in the hall after dinner.

Between entrance at one of the Inns of Court and the final "call" a period of three years usually elapses. During this time the student, when not engaged in study, may attend the lectures of the professors, or visit the law courts, or exercise his oratory at one of the legal debating-societies. He may, if he needs a little relaxation, play tennis in the gardens, or take martial exercise with his rifle-corps. This voluntary regiment is recruited solely by barristers and students for the bar; hence it is playfully nicknamed the "Devil's Own." Then there are the "common rooms" attached to each Inn, where newspapers may be read and smoking indulged in, and where lunch and other refreshments may be obtained. Lastly, on Sundays, the student can repair to the church belonging to his Inn, and listen to a sermon by an able preacher.

This slight sketch may conclude with a pleasing account of the Inns as they appeared to Sir John Fortescue, writing in the reign of Henry VI. Sir John was Chief-Justice of the King's Bench, and it was in his work written in praise of the laws of England that the following occurs: "The students resorted thither in great numbers to be taught as in common schools. Here they learn to sing and exercise themselves in all kinds of harmony. On the working days they study law, and on the holy days Scripture, and their demeanor is like the behavior of such as are coupled together in perfect amity. There is no place where are found so many students past childhood as here."



INNER TEMPLE HALL (INTERIOR).

THE TONGUE.

By R. Vashon Rogers.

"THE tongue can no man tame." "The tongue is an unruly evil." These words are well known, yet many an attempt has been made to tame and restrain this little member that can wag so fast and so fiercely. Let us consider a few of such efforts. Perhaps Saint James knew of some of them and their abortiveness, and so wrote as he did.

The laws of Menu threatened the direst future punishments to the perjurer: —

"The witness who speaks falsely shall be fast bound under water, in the snaky cords of Varuna, and be wholly deprived of the power to escape torment during an hundred transmigrations. Whatever places of torture have been prepared for the slayer of a guest, for the murderer of a woman or of a child, for the injurer of a friend, or for an ungrateful man, those places are ordained for a witness who gives false evidence. The fruit of every virtuous act, which thou hast done, O Goodman, since thy birth, shall depart from thee to the dogs if thou deviate in speech from the truth. Headlong, in utter darkness, shall the impious wretch tumble into hell, who being interrogated in a judicial enquiry answers one question falsely. Hear, honest man, how many kinsmen in evidence of different sorts, a false witness kills, or incurs the guilt of killing; he kills five by false testimony concerning cattle in general: he kills ten by false testimony concerning kine: he kills an hundred by false testimony concerning horses: and a thousand by false evidence concerning the human race. (Private and Criminal Laws, 82, 89, 90, 94, 97, 98. Sir William Jones, vol. iii.)

These words are as strong as those of Holy Writ: "All liars shall have their part in the lake which burneth with fire and brimstone." Not content with threatening the wrong-doing, the old Hindoo strives to induce right acting by fair promises: "A witness who gives testimony with truth shall attain exalted seats of beatitude above, and the highest here below; such testimony is revered by Brahma himself." (Ibid., 81.)

In the land of the Pharaohs and Ptolemies the false witness had his tongue cut out (Diodorus, i. 77). In Rome a false witness in a civil action was liable both to an indictment for perjury and also to an action for damages. The punishment was generally exile, transportation to an island, or disfranchisement as a citizen. In Germany, a witness who injured a party by false swearing was punished by such damages as were equal to the damages sustained. If he could not pay, he became the slave of the person wronged. He was never again allowed to be a witness. The suborner of perjury was condemned to an hundred lashes, to have his head shaven, and to be branded. Among the Visigoths perjury was visited by confiscation of goods, amputation of the hand, by shaven head, and scourging. In Saxony, formerly, the punishment was whipping, or amputation of the two forefingers, with banishment. In Holland it was, under the old law, branding the face, or cutting off the joints of the forefinger. In Schleswig amputation of the fingers was also once in vogue. In Spain it was the galleys and loss of teeth. In England, anciently, perjury was punished, sometimes by death, at other times by banishment; then was substituted forfeiture of goods; later on, the punishment was fine and imprisonment, and being rendered incapable of ever bearing testimony. By a statute of Elizabeth (5 Eliz. c. 9.) the punishment was made six months' imprisonment, perpetual infamy, a fine of twenty pounds, and a position in the pillory with both ears nailed to that instrument. George the Third added to the common law penalties a power in the judge of transportation for seven years (2 Geo. II. c. 25).

By the managers of the Inquisition of the

Middle Ages a false witness, when detected, was treated with as little mercy as a heretic. As a symbol of his crime, two pieces of red cloth, in the shape of tongues, were affixed to his breast and two to his back, to be worn through life. He was exhibited at the church doors on a scaffolding during divine service on Sundays, and was usually imprisoned for life. As the degree of criminality varied, so there were differences in the severity of chastisement. (Lea's Hist. of Inq., vol. i. p. 442.)

To the old Stuarts of Scotland (we mean those estimable characters, Mary, her son Jamie, and his grandson Charles) swearing seems to have been particularly objectionable — in others, and each had a law passed to endeavor to stop it. Mary's act is peculiarly interesting as giving us samples of the oaths then in vogue among the Scottish clergy, nobles and commonalty, and as making it twice as bad to swear in summer as in spring, thrice worse to swear in autumn, and four times as bad to be profane in winter as when one could go a-maying. (The Scotch have always been philosophical, and doubtless understood why profanity varied in criminality with the procession of the equinox.) This is the title, and the act:

"Anent them that swearis abhominable aithes. Because notwithstanding the oft and frequent preachinges, in detestation of the grievous abhominable aithes, swearing, execrationes and blasphematioun of the name of God swearand in vaine be his precious blud, bodie, passion and wounds, Devil stick, cummer, gore, toist or riefe them, and sik uther ougsum aithes and execrationes against the command of God, zit the samin is cum in sik ane ungodlie use amangst the people of this realme, baith of great and small estaites, that dailie and hourelie may be heard amangst them open blasphemation of Gods name and majestie, to the great contemption thereof, and bringing of the ire and wrath of God upon the people; Herefore and for eschewing of sik inconvenienties in times coming, It is statute and ordained, that quhat-sumever person or persones swearis sik abhominable aithes, and detestable execrationes, as is afore rehearsed, sall incur the paines after following, als oft as they failzie, *respective*, that is to say, ane Prelate of Kirk, Earle, or Lorde, for everie fault to be committed for the space of three monethes next-to-cum; that is to say, unto the first day of Maij, exclusive, twelve pennies; ane Barrone or beneficed man, constitute in dignitie ecclesiatical, foure pennies: ane landed man, Free-halder, Vassal, Fewar, Burges, and small beneficed man, twa pennies; Ane craftesman, zeeman, ane servand man and all uthers, ane pennie. Item, the puir folkes that has no geare, to pay the paine foresaide, to be put in the stockes or prisoned, for the space of foure houres; and women to be weyed and considdered, conforme to their bloude or estaite of their parties, that they ar coupled with; And this paine to be doubled upon everie committat, after the out-running of the saidis three monethes for the space of uther three monthes thereafter; that is to say, fra the first day of Maij unto the first daye of August, exclusive, and from the first day of August unto the first day of November, exclusive, the paine to be tripled, that is to say, for everie pennie, three pennies; And fra the first day of November to the first day of Februar thereafter, quhilk makis the zeir compleit, the paine to be quadruple, that is to saye, for everie pennie, four pennies, effeirand to their Estaite. And from the compleeting of the said zeir the first faulte of ane Prelate, earle or lorde to be foure shillinges, the second fault, aucht shillinges, and the third fault, sexteene shillinges, and for the fourth fault, to be banished, or put in ward for the space of a zeir and daye at the will of the Prince, and sik-like of all uther estaites, after their qualitie foresaide, to be punished effeirandlie. And the foresaide paines to be applied to the puir folkes, be them that sall be depute collectoures thereof." (Fifth Parliament, 1 Feb., 1551, No. 16.)

James, worthy soul! ratified and approved his mother's act, but put up the tariff rates much more than the increased prosperity of the country would seem to have warranted. For the prelates and such like he made the penalty four shillings, for the second class one shilling, for the third sixpence, and for the fourth four pennies; to the poor folks he gave the same punishment as Mary had. He doubled the penalty for a second offence, "and for a third fault the saidis secund paines to be doubled; and for the fourth

and last fault, the offenders to be banisched or put in Waird, for the space of zeir and day, at the Kingis will." Censors were appointed in market places and at public fairs with power to arrest "the swearers of sik abhominable aithes." And woe was to the magistrate who was found remiss or negligent in executing the law. (Seventh Parliament, 24 Oct., 1581, No. 103.)

The king himself used, when occasion seemed to require, mighty and big oaths (Motley's John of Barneveld, ch. xi.). But consistency was not one of the jewels in the crown of this ex-Calvinist, crypto-Arminian, pseudo-Baptist, and avowed Puritan hater, as the author of the "Dutch Republic" dubs him (Ib. ch. i.). James's favorite oath was "By my soul;" other renowned monarchs of England had their pet forms of imprecation: William the Conqueror swore, "By God's resurrection and His brightness;" William Rufus, "By Saint Luke's face;" Henry I., "By our Lord's death;" John, "By the feet of God;" and bluff old Hal, "By the mother of God."

The Scottish House was satisfied with these pains and penalties until the days of the rollicking Charles II. came on. This monarch was anxious, as we can readily imagine, "to curb and suppress all sorts of sin and wickedness, and especially those abominable and much abounding sins of Drunkenness and all manner of Cursing and Swearing," so with his usual recklessness and extravagance he increased the penalties excessively; in fact, the transitory pleasure of mouthing only five oaths would, under this act, have cost a Minister of the Kirk his entire yearly stipend, however large it was. According to its terms each nobleman who should blaspheme, swear, or curse, was to be fined twenty pounds, Scots; each baron twenty merks; each gentleman, heritor, or burgess, ten merks; each yeoman, forty shillings; each servant, twenty shillings, toties quoties, each minister in the fifth part of his year's stipend. (Ch. ii., c. 19.)

In Scotland, it was a most serious matter for any son or daughter, unless "distracted," to curse either father or mother; for such a one was to be put to death without mercy, if above sixteen; if within that age and past the age of pupillarity, the punishment was at the arbitrament of the judge, according to their deservings, that others may hear and fear and not do the like. (Ch. ii., c. 20.)

By the first code of Connecticut, published in 1650 (and a similar law was passed by the New Haven colony about the same time), such profanity by children was punished in the same manner by death, unless it was proved that the parents had been very unchristianly negligent in the education of such child or children, or had so provoked them by extreme and cruel correction or usage, that they had been urged or forced thereunto to preserve themselves from death or maiming.

Of swearing, old Giles Jacob says, in his Law Dictionary, it is an offence against God and religion, and a sin of all others the most extravagant and unaccountable, as having no benefit or advantage attending it. "There are several good laws and statutes," saith he, "in England for punishing this crime. The 21 Jac. I., c. 20, enacts that if any person shall profanely swear or curse in the presence of a Justice of the Peace, he shall forfeit one shilling for every offence to the use of the poor, to be levied by distress; and for want of distress the offender to be set in the stocks." By 19 Geo. II., c. 21, the penalties on conviction are as follows: for every day-laborer, common soldier, sailor, or seaman, one shilling; for every person under the degree of a gentleman, two shillings; for every person of or above that degree, five shillings; a second offence, double; and every other offence, treble. If on conviction the offender does not pay his fine or give security, he is sent to the House of Correction for ten days, or being a common soldier or sailor, is set in the stocks. The poor get the penalties as under the Scotch laws. If

a magistrate fails to do his duty in the premises, he is fined five pounds; and a constable neglecting to inform when the swearing reached the tympanum of his ear forfeits forty shillings, — a great many bobs for a bobby to lose. The parsons, too, had to read this law and tariff of rates in all their churches four times a year, or else put up a forfeit of five pounds.

About a dozen years ago the English newspapers informed the world that the Rev. Rees Pritchard, vicar of Llandyfodwg, was charged at the Bridgend petty sessions by another Welshman named Thomas Davies, of Ystradyfodwg, for that "he the defendant on February the 16th did profanely curse one curse, 'You are a damned liar,' five times repeated; and another curse in these words, 'You are a damned coward,' five times repeated; he then being a gentleman." And the upshot was that the Bench fined the Reverend Vicar five shillings and costs for each curse. (We humbly submit that Justice and Fair-play should allow an occasional curse to any one not to the manor born who has to pronounce the names of places in Wales.)

In Virginia, by the laws of 1610 and 1611, it was enacted that no man use unlawful oaths upon pain of severe punishment for the first offence, and for the second to have a bodkin thrust through his tongue, and for a third time so offending he was to be brought to a martial court and there receive censure of death.

The first code of Connecticut contained a law, copied from the Massachusetts law of 1646, to the effect that any person swearing rashly and vainly, or sinfully and wickedly cursing any, should "forfeit to the common treasure, for every such several offence, ten shillings," and in case of default in payment he was sent to the stocks, there to continue not exceeding three hours, nor less than one hour. In the New Haven colony, the fine for the first conviction was likewise ten shillings, for the second it was double that; but if the person offended the third time, "he shal be whipped (so runs the law), for his incorrigible prophaneness. And if swearing and curseing go both together, or be accompanied with other sinful aggravations, such miscarriages shal be punished with a higher fine, or corporally with due severity, as the court shall judge meet."

We find from the old Colonial Records that these laws were meant to be and were enforced. In September, 1636, the Massachusetts General Court had before them one Robert Shorthouse, who, for swearing by the blood of God, was sentenced to have his tongue put into a cleft stick, and so stand for the space of half an hour. Mrs. Elizabeth Applegate had a similar sentence pronounced against her for swearing, railing, and reviling. Shortly afterwards John Smith, of Meadford, although found guilty, was only set in the bildoes, because he was penitent.

One had to talk quietly and peacefully when in church or churchyard, in the old days; for mere quarrelsome words, which were not an offence anywhere else, were penal there. That goody-goody youth Edward number Six, enacted that if any person should, by words only, quarrel, chide or brawl, in a church or churchyard, the ordinary [the bishop] should suspend him, if a layman, *ab ingressu ecclesiæ*, from going to church; and if a clerk in orders, from the ministrations of his office during pleasure (5 & 6 Edw. VI. c. 4.) How Colonel Ingersoll, and some other doughty men of today, that might be named, would writhe if so punished!

Blasphemy against the Almighty, by denying his being or providence, or by contumelious reproaches of our Saviour; and all profane scoffing at the Holy Scriptures, or exposing them to contempt or ridicule, were punished by the English common law by fine and imprisonment, or other infamous corporal punishment. (1 Hawk. P. C. 7; 3 Barn. & Ald. 161; 2 Strange, 834). The act 1 Edw. VI., ch. 1 (which repealed 1 Mary, ch. 2, and revived 1 Eliz. ch. 1), en-

acts that persons reviling the sacraments of the Lord's Supper by contemptuous words shall suffer imprisonment. The 9 & 10 Will. III., ch. 32, enacts that if any person educated in or having made profession of the Christian religion shall, by writing, preaching, teaching, or advised speaking, deny any one of the persons or the Holy Trinity to be God, or shall assert or maintain that there be more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he shall upon the first offence be rendered incapable of holding any office or place of trust, and for the second, incapable of bringing any action, or being guardian or executor, or of taking a legacy of or deed of gift, and shall suffer three years' imprisonment without bail. The 53 Geo. III., ch. 160, excepts from these enactments "persons denying as therein mentioned respecting the Holy Trinity;" but otherwise the common and statute law on the subject remains in England as stated.

By the law of Scotland, as it originally stood, the punishment for blasphemy was death. By a statute passed in King William the Third's reign, any person reasoning against the being of God, or any person of the Trinity, or the authority of the Holy Scriptures, or the providence of God in the government of the world, was to be imprisoned for the first offence until he should give public satisfaction in sackcloth to the congregation; to be punished more severely for the second offence; and for the third, condemned to death. By the combined influence of 6 Geo. IV., ch. 47, 7 Wm. IV., & 1 Vict., ch. 5, these punishments were reduced to fine or imprisonment or both. Thomas Aikenhead (a very appropriate patronymic for such a one), a young Edinburgh student of twenty, appears to have been the only one executed for this crime in Scotland; his offence consisted in loose talk about Ezra and Mahomet, and in crude anticipations of materialism. He was hanged in 1697, buried beneath the gallows, and all his movables forfeited to the crown. (See Maclaurin's Crim. Cas. 12.) He seems to have been harshly treated, no counsel appeared for him. But if Mr. Buckle quotes correctly, the clergy in Scotland ofttimes punished blasphemers and the profane in a manner which anticipated lynch law. A celebrated divine of the early days of the seventeenth century, named John Welsh, on one occasion was sitting at supper with the Lord Ochiltree, and, as his manner was, he entertained the company with godly and edifying discourse, which was well received by all the company save only one debauched Popish young gentleman, who sometimes laughed, and sometimes mocked and made faces, whereupon Mr. W. brake out into a sad, abrupt charge upon all the company to be silent, and observe the work of the Lord upon that profane mocker, which they should presently behold; upon which immediately the profane wretch sunk down and died beneath the table, but never returned to life again, to the great astonishment of all the company. (Buckle's Hist. of Civil. vol. iii. ch. 4.) A Rev. Thomas Hog, some fifty years later, brought down heaven's vengeance upon another graceless sinner; only in this instance the transgressor was allowed to retire to his bedroom before the fatal bolt fell. A drunken man was one day aping the Rev. Gabriel Semple by putting out his tongue when, *mirabile dictu*, "it turned stiffe and sensless, and he could not drau it in again, but in a feu dayes dyed." (Buckle, supra.)

In Denmark, by the laws of Christian V., passed in 1683, the blasphemer was beheaded, after having the tongue cut out. (Lea's Hist. of Inquisition, vol. 1. p. 235.) About 1650 the Maryland colony enacted that if any person should deny the Holy Trinity he should, for the first offence, be bored through the tongue and fined or imprisoned; for a second offence be branded as a blasphemer, the letter B being stamped on his forehead, with double the fine or imprisonment; and for a third offence he should die, and all his goods be confiscate to

the king. This law was re-enacted as late as 1723. In Connecticut, by the code of 1642, blasphemy against God, the Christian religion, or the Holy Trinity was punishable with death; this statute remained in force until the revision of 1784, when the penalty was changed to whipping on the naked body, not exceeding forty stripes, and sitting in the pillory one hour. In 1821 the present penalty was substituted, — that is, a fine of not more than $100, with imprisonment for not more than a year; the court also having the power to bind the culprit to his good behavior. In Virginia, by the laws of 1610 and 1611, death was the punishment for blaspheming God's holy name.

A common scold is a nuisance, and can be punished. The law is not gallant; it supposes that none but a woman can be guilty as such. All the words used in the old law Latin to denote this miserable sinner are of the feminine gender; there are several aliases, such as "communis rixatrix," "communis pugnatrix," "calumniatrix," "communis pacis pertabatrix." How much one could scold without incurring conviction is not quite clear; if, however, the scold was convicted, she was sentenced to be placed in a certain engine of correction called a trebucket, castigatory, or cucking-stool; which last word is said in the Saxon language to signify the scolding-stool, though in later days it was generally corrupted into ducking-stool, because the residue of the judgment was that, when so placed therein, she be plunged in the water for her punishment. Coke, who is exceedingly interesting on etymologies, says, "cuck," or "guck," in the Saxon tongue "signifieth to scould or brawl (taken from the cuckaw or guckhaw, a bird, qui odiose jurgat et rixatur), and 'inge,' in that language, water, because she was for her punishment soused in the water; and others fetch it from cuckquean, *i. pellex*."

Women seem not to have liked this mode of correction. In 1705, a scold, after conviction, wanted to argue her writ of error in person; and Holt, C. J., gave her time so to do, saying, "that perhaps ducking would rather harden than cure her, and if she was once ducked she would scold on all the days of her life." On the argument she used her tongue to good purpose, and succeeded in setting aside the judgment on the ground that in the indictment she had been called "rixa" (a scolding) instead of "rixatrix" (scolder). Another flaw in the indictment, says the reporter, was the want of an allegation that the scolding was a common nuisance to the neighbors, for "that all scolding was not indictable, but only such as was intolerable to neighbours." Scolding of this kind was indictable, but not actionable like a slander.

The use of this reformatory engine in England in the good old days of yore is referred to in the "Green Bag," vol. ii. p. 198; but this was one of the good things that crossed the Atlantic with the early colonists. Apparently, however, it was confined to Virginia and Massachusetts. Good Parson Hartley, of Hungaro parish, Virginia, thus tells Governor Endicott of Massachusetts all about it: —

"The day before yesterday I saw the punishment of the ducking-stool given to one Betsy, the wife of John Tucker, who by the violence of her tongue had made his house and the neighbourhood uncomfortable. She was taken to a pond near which I was sojourning, by an officer, who was joined by a magistrate, and a minister, Mr. Cotton, who had frequently admonished her, and by a large number of people. They had a machine for the purpose, which belongs to the parish, and which I am told has been used three times before this summer. It is a platform with four small rollers or wheels, and two upright posts, between which works a lever by a rope fastened to its shorter end. At the end of the long arm was fixed a stool, upon which Betsy was fastened by cords, her gown tied fast about her feet. The machine was then moved to the edge of the pond, the rope was slackened by the officer, and the woman was allowed to go under the water for the space of half a minute. Betsy had a stout stomach, and would not yield until she had allowed herself to be so ducked five several times. At length she cried piteously, 'Let

me go; with God's help I 'll sin no more.' Then they drew back the machine, untied the ropes, and let her walk back in her wetted clothes, a hopefully penitent woman." Mr. Hartley adds: "Methought such a reformer of great scolds might be of use in some parts of Massachusetts Bay, for I 've been troubled many times by the clatter of the scolding tongues of women, like the clack of the mill, seldom ceasing from morning to night." (Meade's "Old Churches, Ministers and Families in Virginia;" Hening's Statutes at Large, vol. ii. p. 75, Virginia.)

Perhaps it was upon this suggestion that it was introduced into Massachusetts.

About 1682 the clergy in Scotland had a summary way of dealing with scolds: a famous divine, Mr. Peden, on one occasion after wading "Douglas-water very deep, came to a house there: the good wife of the house insisted (as most part of woman do not keep a bridle-hand) in chiding of him; which made him to fret, and said, 'I wonder that your tongue is not sore with so much idle clatter.' She said, 'I never had a sore mouth or tongue all my days.' He said, 'It will not be long so.' Accordingly, her tongue and gooms swelled so that she could get no meat taken for several days." (Buckle's History, etc., vol. iii. ch. 4.)

Slander by a married woman in Virginia, in the early days (*circa* 1662), was atoned for by the husband paying a fine of five hundred pounds' weight of tobacco; and if he, worthy soul! did not pay this, the woman was ducked in the ducking-stool. According to the law of the Twelve Tables in Rome, insulting songs were punished by death; apparently the guilty singer was disposed of with a club. Pascal charged the Jesuits of his day with sanctioning killing for the slander of a member of a religious order. (Hening's Statutes at Large, vol. ii. pp. 166, 167; Morgan's Law of Literature, vol. i. p. 92; Stephens's Hist. of Criminal Law, ch. 2.)

In England the spreading of false news so as to make discord between the king and his nobles, or such news concerning any great man of the realm, was punishable by fine and imprisonment, at common law; and the statutes of the first Edward and second Richard confirmed this law. (Westmin. I.; 3 Edw. I., ch. 34; 2 Ric. II., ch. 5, and 12 Ric. II., ch. 11.) In the New Haven colony, any one above fourteen who wittingly and willingly made and published any lie tending to damage any particular person, or with the intent to deceive or abuse the people with false news, or which might be pernicious to the public weal, was liable to a fine; and if he offended thrice, to be whipped (Trumbull's True Blue Laws, p. 239). The great Cæsar tells us that among the ancient Gauls no one was allowed to spread public news of any kind, without first communicating it to the magistrates (De Bell. Gall. lib. 6, c. 19). Since the days of newspapers these wise laws have ceased to be enforced.

False prophets terrifying nervous people with imaginary dangers were punished capitally by a statute passed by the boy king Edward (1 Edw. VI., c. 12.) His sister Mary repealed this law, as she did many another of his; but good Queen Bess enacted that the penalty for the first offence should be ten pounds and one year's imprisonment, and for a second, forfeiture of all goods and chattels, and imprisonment during life (5 Eliz. c. 15.) Coke tells us: "Certain it is that to foretell of things to come is a prerogative appropriated to the Holy Ghost; and that the devil cannot *prædicere*, foretell of things to come, which notwithstanding S. Austin did sometime hold that he could. But afterwards justly retracted. . . . Also predictions, either of the time or end of the world, or that it is at hand, are not lawful." And the authorities quoted to prove this latter proposition are Acts i. 7, Matt. xxiv. 36, 2 Thess. ii. 1, 2 (Coke, Third Inst. ch. 53).

A man's grammar may perchance be passed upon by a learned bench of judges; for "courts are not only expounders of the law, of society, of religion, of trade, of domestic relations, and of all contracts, but actually of

grammar, rhetoric, philology, and of the exact significances of dialect, patois, argots, and vernacular speech." (Morgan, Law of Lit., vol. i. p. 109.)

Some judges have objected to that well-nigh universal medium of emphatic expression, slang, for instance, Sir James Hannen, in a divorce suit, complains that "it is to be observed that it is not unusual at the present day for young men and women to apply such terms as "dreadful" and "awful" without any nice consideration of their fitness (Durham *v.* Durham, 10 P. D. p. 82.) (Poor judge! happy would it be for humanity if he had nothing worse to complain of in the cases brought before him.)

In the Vendotian, Gwentian, and Dimetian codes, where the money value of each portion of the body is given, it is said, "the tongue is equal to the worth of all the other members, because it defends them all."

In conclusion, we quote the words of a Jewish Rabbi, long since sleeping with his fathers: —

"What care has not the All-wise Creator bestowed on the chief organ of speech! All the other principal members of the human body are situated externally, and that either upright or pending. The tongue alone is placed internally, and in a horizontal position, that it might remain quiet and steady. Nay, that it might be kept within its natural bounds, he has encompassed it with two walls: one of ivory, the teeth; the other of softer substance, the lips. Further, to allay its intense ardor, he has surrounded it with an overflowing rivulet, the salivary glands. Yet, notwithstanding all this Divine care, what mischief does it not do? How many conflagrations does it raise! What destruction does it cause!"

THE QUESTION.

IT is, perhaps, almost impossible for us in these days, when the suggestion that the lash should be used on wife-beaters and such-like brutes is met with a howl from a large section of the public, to realize the immense part which has been played throughout the world's history by torture in its various forms. We may take it that there were three different objects in the application of torture. The first of these would, perhaps, be the earliest, and was to give pleasure to some tyrant in the spectacle of suffering in others: it is just possible to imagine a mind so brutal as to take pleasure in such a thing. The second object was punishment; and this we can easily understand in a low state of civilization, when men had nothing, or next to nothing, in the way of refining influences around them. Even now, although perhaps we do not mean it, we are apt to say, when a man has committed some particularly brutal murder, that hanging is too good for him. So we will admit that we can understand these first two objects. But what shall we say about the third, — the Question? Can we possibly bring ourselves to understand how answers wrung from a sufferer on the rack could be accepted as true? Yet this was the object which caused torture to flourish mostly, and which brought it to its highest pitch.

Of course, the countries where torture — and more particularly in the form which gives the heading to this article, "The Question" — obtained most were those countries where the Inquisition reigned. The terrible scenes which went on in secret in the dungeons of the Inquisition can never be known; but when the Inquisition fell and its prisons were destroyed, enough came to light to present pictures of almost undreamed-of cruelty.

The fear of the Inquisition was so great, when once a man was arrested no relation or friend dared to come forward to defend him or give evidence on his behalf, lest he

himself might not be considered to be true to the Church; so the unfortunate prisoner was left alone, deserted, without a single friend to help him.

The routine of the Inquisition and the officials who carried it out were as follows:

There were, first, familiars to arrest any suspected person against whom any information had been laid. The tribunal before which the accused appeared consisted of three inquisitors, three secretaries, an alguazil (constable), three receivers and assessors, together with familiars and jailers. To obtain the post of inquisitor a man had to be of a good family, no members of which had ever been before the courts. The accused then was arrested, or if not found, judged in default. If arrested, he was thrown into a dark prison, where, if he confessed, he was released as a penitent, but he himself was dishonored and all his kindred with him. Should he refuse to confess, he was subjected to the three grades of torture, — the cord, the water, and the fire; if under the question he then confessed, he was further tortured to give motives of his confession, and again to betray his accomplices, and after that was regarded as a penitent. Should all the degrees of torture prove ineffective, he was thrown into worse prisons, of which there were again three grades, — public, intermediary, and secret; and following these prisons, came condemnation and death, — death by burning or by some even more horrible manner. Such, in brief, was the routine of the Inquisition, which sought by every means at every step to break down its unfortunate victim, so that when he did come to trial he would be a broken-down creature, incapable of any defence.

In England, we are told, torture was never general, it being reserved as the prerogative of the crown; which gives rise to the discussion whether it was not the worse for that, for it tended to make the application of torture secret, and therefore the more terrible. One punishment, however, was inflicted by common law, but that was originally instituted from a sense of humanity. In very early days if a man accused of crime refused to plead, he was starved to death. By refusing to plead he could not be judged and condemned, and therefore his property could not be escheated. Early in the fifteenth century the English people becoming more humane, the punishment of the "peine forte et dure" was substituted for the starving. This was the sentence: "That the prisoner shall be remanded to the place from whence he came, and put in some low, dark room, that he shall lie without any litter or anything under him, and that one arm shall be drawn to one quarter of the room with a cord, and the other to another, and that his feet shall be used in the same manner, and that as many weights shall be laid on him as he can bear and more. That he shall have three morsels of barley bread a day, and that he shall have the water next the prison, so that it be not current, and that he shall not eat the same day on which he drinks nor drink the same day on which he eats, and he shall so continue till he die." This punishment was law up to a very late period.

There is a small collection of relics in London at the Tower, — relics of that torture-chamber described by Ainsworth in "Guy Fawkes." As Mr. Ainsworth was always at great pains to make his descriptions correct, we may take it that the descriptions are fairly accurate. The first description is of the torture of Viviana when she refused to answer questions as to what she knew of the plot; and the torture-chamber is described as "a square chamber, the roof of which was supported by a heavy stone pillar, while its walls were garnished with implements of torture. At a table on the left sat the lieutenant and three other grave-looking personages. Across the lower end of the chamber a thick black curtain was stretched, hiding a deep recess." To this recess, again refusing to give any information, Viviana is taken. "The recess was about twelve feet high and ten wide. It was crossed near the roof, which was arched and vaulted, by a heavy

beam, with pulleys and ropes at either extremity. But what chiefly attracted the unfortunate captive's attention, was a couple of iron gauntlets attached to it, about a yard apart. Upon the ground under the beam, and immediately underneath that part of it where the gauntlets were fixed, were laid three pieces of wood, of a few inches in thickness, and placed one upon another." The gauntlets being placed upon her hands, which were stretched above her head, and screwed tight, "the tormentor took a mallet and struck one of the pieces of wood from under Viviana's feet. The shock was dreadful, and seemed to dislocate her wrists, while the pressure was increased to a tenfold degree. The poor sufferer, who was resting on the points of her feet, felt that the removal of the next piece of wood would occasion almost intolerable torture. Her constancy, however, did not desert her, and after the question had been repeated by Ipgrieve, the second block was struck away. She was now suspended by her hands, and the pain was so exquisite that nature gave way, and uttering a piercing scream, she fainted."

Further on we have a description of the torture of Guy Fawkes himself. Ipgrieve proposes to start him with the Scavenger's Daughter and the Little Ease; proceed to the gauntlet and the rack; and finally, if these fail, to try the effect of the dungeon among the rats and the hot stone. The Scavenger's Daughter was a huge iron hoop, which opened in the centre with a hinge — there is one still to be seen at the Tower — which was placed over the prisoner's shoulders and under his legs in such a way as to compress his body so tightly that he could hardly breathe. The Little Ease is described as "a narrow cell about four feet high, one and a few inches wide, and two deep. Into this narrow receptacle, which seemed wholly inadequate to contain a tall and strongly built man like himself, the prisoner was with some difficulty thrust, and the door locked upon him." The dungeon among the rats was a "horrible pit adjoining the river," in which there was at high tide about two feet of water, and which was infested by ferocious and daring rats. The final torture of the hot stone is thus described. "On the fourth day he was taken to another and yet gloomier chamber, devoted to the same dreadful objects as the first. It had an arched stone ceiling, and at the further extremity yawned a deep recess. Within this was a small furnace, in which fuel was placed, ready to be kindled; and over the furnace lay a large black flag, on which were stout leathern straps. After being subjected to the customary interrogations of the lieutenant, Fawkes was stripped of his attire, and bound to the flag. The fire was then lighted, and the stone gradually heated. The writhing frame of the miserable man erelong showed the extremity of his sufferings; but as he did not even utter a groan, his tormentors were compelled to release him."

But you may say this is out of a story-book. True, it is; but it is nevertheless from an historical romance, from the pen of a writer who took pains with his facts and historical references, and it may be fairly taken as a specimen of what took place in humane England when torture was not employed in common law, but was reserved as a prerogative of the crown. — *Chamber's Journal.*

SOME REFLECTIONS ON PENOLOGICAL LAW REFORMS.

By Percy Edwards.

WHAT an unconservative people we are becoming! Is this really the progression of civilization towards a more perfect condition of society, or is it, perhaps, a retrogression of civilization towards a chaotic state of society?

Liberality and reform in everything. Theology, politics, law, and medicine, — all are undergoing changes commensurate with the most liberal ideas of the times. The penological element of theology has been reformed in a direction very acceptable to the legal fraternity particularly, it is said. Relieved of the fateful necessity of facing an eternally long sentence to a habitation not along "Life's Plutonian shore," but right in the "swim" of old Pluto's domain, there should not be lacking a grateful feeling on the part of the legal fraternity for such reforms, although we grumble at and criticise other reforms.

Reform in politics is a misnomer. Many changes there are, assuredly. The only subject of dispute here would be as to the direction of these changes, or reforms, if we will have it so. Tammany is doing much to reform politics and political parties, according as its ideas of reform affect its political existence; so it is with other political associations.

The strong aid of the law is seen here and there in this political reform giving a drastic effect to an otherwise congested condition. One instance will serve the purpose here. The local Legislature of Michigan of the session 1891, dubbed by the newspapers of the State "Squawbuck Legislature," passed an act making it obligatory for all candidates for offices at a general election, within so many days after election, to file a statement under oath, showing what each had spent for corruption purposes, when by the same act all expenditures for the sake of influencing voters are prohibited, except expenses of getting infirm and sick voters to the polls, and the distribution of campaign literature.[1]

Along the lines of medical science there have been also long strides in a reforming direction. And now doctors of the different schools have agreed that the best reason for their ever having been licensed to experiment with the human anatomy and life, is to save life, and not to quibble over who is going according to Hoyle, while the patient's spirit leaves in disgust.

While no one has been successful in an attack upon the great foundation principles of the law which were forged and tempered in the furnace of public sentiment in an age of antiquity, and have come down to us practically unchanged, still the law as a science has undergone many changes and reforms in this country, and especially so in the present century

Perhaps there is no reform in the law of this age that has attracted more attention, generally, than reform attempted in penological law.

Charitably disposed people are always interested in penological reforms. This may arise from morbidity of temperament, which is the breeder of weak sentiment, or from some Quixotic notion of raising the standard of humanity.

Be that as it may, the subject of penological reform has been forced upon our attention by a mighty wave of sentiment, much as the other great social reform problem now knocking at the doors of society for recognition as a political and social factor in our country. When "Little Dorrit" found her way into the homes of England, a period was fixed for the existence of the stupid "Debtors' Act." Dickens, with his good

[1] Sec. 44, Election Law, 1891.

sense and keen appreciation of the ridiculous in the law as well as social status of his time, did much to open the eyes of stolid, indifferent Englishmen to a sense of needed reforms in these directions.

But here real, palpable abuses existed. It seemed to Dickens sheer nonsense to allow a law to stand in force which gave power to a creditor to say to his debtor "Go to jail and stay there until you pay me what you owe me." Thus taking from the debtor, in most cases at least, the only power he could use to raise money to pay the debt, the thing most desired by the creditor.

But here, as in other cases, a real abuse existed, an absurdity inconsistent with the logic and dignity of English penal law.

Following the course of events through some years, we find in this country the beginning of reforms in the administrative law far more important and aggressive. Prison Reform Conventions made up of the executive officials of the great penal and reformatory institutions of this country are held from time to time, and as a result we have the Indeterminate Sentence Scheme. A large number of the States now have such a law upon their statute books.

In 1889 the Legislature of Michigan passed an act styled "An act to provide for indeterminate sentences, and disposition, management, and release of criminals under sentence." [1]

The prison "Board of Control" is given full authority to parole and order the re-arrest of prisoners violating their parole, and virtually power to readjust the sentence of the court. In formulating the act, the Indeterminate Sentence Law of New York State was largely consulted. It may be well to give a brief summary of the different sections of this Michigan Act, because of the recent holding of the Supreme Court thereon.

Section 1 provides for the sentence of certain persons guilty of crimes punishable by imprisonment in the penal and reformatory institutions of the State, except for crimes punishable by imprisonment for life, or in case the criminal is a child under fifteen years, and gives direction to judge for a general sentence, and then gives power to the "Board of Control" to terminate this sentence at pleasure, except that the minimum time provided by law in such case must be served.

Section 2 simply provides for furnishing records to warden, and pay for the clerk.

Section 3 provides for the parole of prisoners under such sentence by said "Board of Control," and gives full power to the Board to order the re-arrest and imprisonment of any prisoner thus under parole, making the written order of said Board, by its clerk, sufficient warrant for any officer named to arrest such prisoner.

Section 4 provides for a classification of such prisoners into different grades, with promotion or degradation of such prisoners according to merit.

Section 5 provides for the re-arrest and readjustment of the sentence.

The Supreme Court of Michigan, in the case of People *v.* Cummings, now say that the provisions of this act are in derogation of the constitution of the State, and therefore void. The Legislature has attempted to clothe the "Board of Control" of the State institution with judicial power contrary to the provisions of the Constitution of the State, which vests the judicial powers in certain *courts* therein named.

Mr. Justice Grant, who is the moralist of the court, dissents to the opinion of his brethren upon principles of moral necessity or economy.

The pardoning power is, by the 5th article of section eleven of the State Constitution, vested in the governor. If it be considered that the only power conferred by the act is a conditional release on parole, if the prisoner keeps his parole, or rather if the Board of Control are of the opinion that he does, the release is in fact an absolute one. Mr. Justice Morse, giving the opinion of the court, says: "By what refinement of

[1] Act No. 228, Pub. Acts, 1889.

reasoning it can be made to appear that this is not in effect a pardon of the prisoner is beyond my comprehension." And also, quoting the language of the opinion, "This act also confers upon the Board of Control judicial power."

Mr. Justice Grant says "such laws are humane, and their tendency is to reform criminals and to protect society." He seeks to show a precedent of like power as that granted to the Board of Control in this act in question, by pointing to the "good time" allowed certain prisoners to be set off against the full time of their sentence which is fixed by the prison inspector and warden, and which the Supreme Court of Michigan has sustained.

"When of old I studied grammar,
A verb was said to be
Something to do and suffer,
And also to agree
With different moods and tenses,
Syntactically applied,
I never thought that I might be
A mood personified.

"There 's ' perhaps ' and ' if it 's possible,'
And ' might be it 's too late ;'
And another word subjunctive
Called ' indeterminate.'
I 'm a living conjugation
Of the latter mood and tense, —
A flesh and blood contingent
Environed by suspense.

"There 's a high old court at Lansing
Which plunges mighty deep,
And knocks my mood subjunctive
Into a clear promiscuous heap.
' Perchance ' and ' if it 's possible '
To patience have and wait,
The potential mood will lift us clear
Of ' Indeterminate.' "

This is now the most popular song in our penal institutions, and is said to be substituted for the usual "Gospel Hymn" in the chapel exercises, at least by those most affected by the recent dispensation.

In the mean time there is much cause for rejoicing on the part of a score or more of convicts in the different penal institutions of the State. They have only to await the expiration of the minimum time fixed by law in their cases, and the all-powerful Habeas Corpus will bring them forth once more to commingle with their fellow-men in the world of social reform; but, presumably, they will not be found much better because of these humane efforts in their behalf. What a choice job lot of partially reformed material to turn loose on society! But moving along the line of argument used by the reformers, it is the society of their fellowmen which is to be the means of working out the salvation of this class. Mr. Eugene Smith, Secretary of the Prison Association of New York, in his report says: "Those methods of prison management are the best calculated to reform the prisoner which assimilate his condition to that of the free workmen outside; which cultivate in him the same habits, appeal to the same motives, awaken the same ambitions, develop the same views of life, and subject him to the same temptations that belong to the free community of which he is fitted to become a member."

All this sounds very nice, and no doubt the writer was thoroughly imbued with the spirit of Christian charity when he gave expression to the above, and filled with a desire to do good in this cause. But in dealing with a subject "of the earth, earthy," as this certainly is, such a poise of reform is impracticable ; it is chimerical.

If the mixing with the great body of society whose robes do not smell of the prison under this parole system is to work the transformation claimed for it, a rubbing up against this same untarnished world unrestrained by the now defunct authority of the Board of Control should produce something like the same result, since such subjects are governed more by convenience than sentiment. If this be true, then society will not be the loser.

Placing men hardened and sharpened by vicious living and adversity upon their good behavior solely is like placing food before a hungry man, and putting him on his honor not to touch it.

A law of this kind considered from a moral standpoint shows the growth more of weak sentimentality than of sound reason and knowledge of the needs of social reform in this age, not to speak of the complex system of administering the law, and the increased opportunity for abuse of authority by corruption.

Conservatism of opinion should be felt here. If a person on trial is guilty enough in the unbiassed, unprejudiced minds of twelve of his peers, backed by the conviction of the judge who is to pronounce his sentence, and surrounded by all of the safeguards which are thrown about every man on trial, whether guilty or not, then he should suffer the penalty imposed by an outraged society as found by a judge of sound sense and ability, and no weak sentimentality should be allowed to interfere.

Even the reformers in penological ethics concede that prison discipline should be strict and wholesome, so as to bring home to the prisoner the full force of his position with reference to the society he has outraged. But is not the power to make this same prison discipline wholesome and formable weakened by the knowledge which the prisoner is sure to have that he will meet with leniency more as a refractory schoolboy than as a convict, or that he is subject to the same parole system as the boys and girls in the State Reform Schools?

We do not wish to manifest a spirit of opposition to merited reforms in administrative law. That there may be room for reforms in this direction we concede. But we submit that a reform in this direction should not be guided or controlled in any way by fanaticism or sentimentalism.

GUILDS AND GUILD-LAWS.

A Contribution to the History of the Laws on Trades, Mercantile, and Social Unions.

By Gustave Ravené.

I.

OUR experience, as well as the unanimous testimony of history, tells us that men live and always have lived in a social state. Wherever we turn we see man as the member of a community of fellow-creatures, in whatever manner their unions may be effected, — whether by the ties of blood, or by herding together for the purposes of mutual assistance, or by the formation of great national associations. But at the same time we notice another social phenomenon. Not content with the natural formation of society and the legal guarantees of the State, men carry their social instincts farther, and form themselves into peculiar associations existing within the community and the State. Such associations are the *guilds* of the Middle Ages.

The word *guild* is a purely Germanic word. The Gothic *gild*, old High German *gelt*, *kelt*, Anglo-Saxon *gield*, *gyld*, Norse *gildi*, all had one meaning, — that of *retribution*. It is related to the idea of sacrifice, offering; and we see this in the Anglo-Saxon translation of the book of Genesis. *Gield* means sacrifice, — *brynegield*, burnt offering; *haedengield*, sacrifice to an idol. The heathen sacrifices were accompanied by drinking-bouts, and the Norse word *gildi* expresses this circumstance. This etymological connection of guild with sacrifice is historically justified; it is the only correct one, and should

take the place of the antiquated derivation from the Anglo-Saxon *geldan, gyldan,* to pay, by which are implied contributions by friends, relatives, and associates.[1]

Guided by the hand of etymological and historical evidence, we may conclude that the origin of guilds is to be sought in the ancient custom of drinking at the occasion of sacrifices. The drinking-bout, *convivium,* was the occasion when the members of the association met; it afterward became the method for celebrating their meetings, and its very name, *convivium,* was applied to the guild. In a contribution of this kind to a journal of a professedly entertaining character, it may be pardonable if the writer indulges in a few observations on the leading characteristics of these associations. He must recognize in the guilds the immutable law of cause and effect. Guilds had their origin in drinking-bouts, in conviviality associated with idolatrous worship; and to-day trade and other unions, the legitimate descendants of the guilds of the Middle Ages, make it an object and sign of fellowship to revive the practices of the early times, — in other words and plain English, to get disgracefully drunk. Etymological and other analogies and conclusions like the above must not be carried too far, however; for example, demagogue cannot be construed into any relationship with demijohn, although the observation of certain socialistic phenomena may justify the conclusion of intimate association.

Omitting the consideration of those institutions of ancient Rome to which some of the characteristics of guilds and unions can be ascribed, we will in this paper study the guilds among the Germanic nations, the earliest mention of which occurs in the laws of the Franks.

The earliest laws on guilds apply to unions for convivial purposes; and besides, the laws are directed against the formation of unions by oath and solemn pledge, such unions being considered as of a nature dangerous to the welfare of the State. (See the *Capitularia regum Franconum,* the capitulary of Charlemagne, A. D. 779, and the Edict of Aix la Chapelle, A. D. 789. The latter edict is intended to suppress the growing vice of intemperance.) Ecclesiastics took part in these guilds, and the Church saw itself obliged to keep a sharp lookout on them. In the resolutions of a synod at Nantes (about the beginning of the ninth century, and contained in the laws of Archbishop Hincmar of Reims, A. D. 852), these unions are called associations, fraternities, and guilds. The laws enact that these associations are to exist only for the purposes of charity. They are, above all, to further the services of religion. Banquets and drinking were prohibited. Associations formed with the ceremony of an oath or by solemn pledge were entirely forbidden; participation in them was to be punished by death or scourging. (*Capitularium* of Diedenhofen, A. D. 805.)

After this brief preliminary sketch, we will now direct our attention to the history of guilds in England, Denmark, Sweden, Norway, France, Holland, and Germany, and specially consider their connection with the growth of law. Incidentally, the statutes of the various cities will also be considered.[1]

Guilds in England. In England the system of guilds attained to a greater development than in any other country, and their history is interesting in all respects, social, historical, and legal. The mention of guilds occurs in the oldest laws of the Anglo-Saxons; and while it is impossible to reconstruct accurately the guild-system of that ancient time, we can base on these laws some con-

[1] Hegel, Städte und Gilden, i. pag. 4, 5; Grimm, Deutsche Mythologie, pag. 34, 957; Wilda, Das Gildwesen, pag. 1–25.

[1] Intended merely to present in general outline the most interesting legal features of guilds, and especially those connected with the less-known guilds of the northern nations, it has been thought best to omit the merchant guilds of England after the Conquest. For the history of these guilds the reader is referred to the important and exhaustive work of Professor Gross, of Harvard, "The Guild Merchant," 1890.

clusions as to the existence and nature of unions in the pre-Normanic period.

The laws referred to are Articles 16, 17, 20, and 21 of the "Laws of Ina" (A. D. 688–726); also Articles 27 and 28 of the "Laws of Aelfred" (A. D. 871–901), and the *Judicia civitatis Lundoniae* of the reign of Aethelstan (A. D. 924–940). For details the reader is referred to the literature mentioned in the note, the limits of an article permitting only a *resumé* and conclusions.[1] These laws enact in substance that when a person is killed, the weregild was to be paid by — or to, as the case might be — the relations (*maegas, magen*) and the *gegyldan*. From these laws it appears that a man had connections of some kind; if he did not have any relations, he at least had associates (*gegyldan*).[2] These *gegyldan* were responsible for his acts, and also entitled to compensation for his loss by murder.

From the early guild-statutes appear some noteworthy features of the ancient guilds. They had common meals, and were bound to secure the spiritual welfare of members by the performance of religious acts; and it appears also that guilds existed for the purpose of preserving the peace in the "hundreds."

The nature of these ancient guilds was a mixed one. Thus, a guild of Exeter, known to us through the statutes of the eleventh century, partook very much of the nature of a modern lodge. There were regular contributions to a common fund, from which aid was rendered for funerals and loss by fire.

It appears that these guilds were strong centralized unions, often wielding enormous powers. They were formed with the ceremony of an oath; they protected their members, as well as represented them against all attacks. They were responsible for the payment of the weregild, and also entitled to it when a member was killed by a non-member. In case of refusal they threatened revenge. They demanded the aid of the magistrates, of the sheriff, and punished them in case of failure to render their assistance.

Unions of this kind are possible only in anomalous states of society, — either when the society or the State is in its first formation, or when it is approaching its end. The Anglo-Saxon kingdom was rapidly approaching its dissolution; and we can form a picture of the state of affairs at that time from the necessity men were under to form guilds for their protection. The modern legislator might profit by a comparison of modern unions with the Anglo-Saxon guilds. The experience of mankind has generally run in uniform channels, similar conditions producing similar results; and it is not too much to say that modern unions for purposes of protection, private redress, and individual — and often irresponsible and illegal — initiative in the enforcement of their rights evidence an unhealthy state of society, and a more than unsatisfactory condition of laws. Neither is comparison carried too far if we class vigilance-committees, trades-unions with their incidents of "boycotting," in the same category with the ancient guilds that enforced the law for themselves. A society recently formed in England for the purposes of protecting witnesses from insult is an instance of an organization for the repression of real or fancied wrongs. Whatever may be said on this subject, the symptom is that of an unhealthy legal administration; and it shows that the people intend by organized extra-legal action to influence the existing state of judicial procedure. Without claiming that such organizations and the ancient guilds are identical, the attention of the historian, jurist, and economist ought to be directed more than it is to the historical study of guilds and similar associations; for the influence they have had on the development of the law must not be underrated. Law is a phenomenon of society, and has its

[1] Schmidt, Gesetze der Angelsachsen; Thorpe, Ancient Laws and Institutes of England.

[2] Bosworth, Anglo-Saxon Dictionary, ed. Toller, fol. 363.

origin in the popular legal consciousness; but when we consider it as a part of human moral nature, we must not forget that its development does not proceed only in a slow, natural growth, but also by deep and incisive changes. Often enough the evolution of a legal system has been changed by violent convulsions. In these convulsions the organized effort of the community has taken a prominent part.

We know too little of the Anglo-Saxon guilds to justify conclusions as to their lasting effect on the administration of the law. We recognize in them the unions of families, or persons occupying a similar sphere in life. They were independent of the public government of the community; they served the purposes of affording their members a protection which the impotent administration could not give; they supplemented the administration of the law. In this they usurped the power of the ge, such unions be- possessed of a two-edged ure dangerous to often liable to be wielded in (See the *Capitu-* oppression and lawlessness. capitulary of they did a great deal of good the Edict of lishment of social order, and le latter edict organizations, they upheld a cer wing vice of standard and generally promoted ok part in industry and good fellowship; but saw itself ger to which the general welfare of on them. ple and the safety of the State were Nantes by the independent and irresponsible a entury, of autonomous societies cannot be bishop rated. The Norman invaders of Eng nions recognized this feature of the guilds, ilds. they suppressed the Anglo-Saxon assoc are tions, — without, however, succeeding in e ity. fectually destroying the associative element es in the people. In the Domesday-book we e find mention made of only two guilds, and these had ceased to exist.

The Green Bag.

PUBLISHED MONTHLY, AT $3.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

THE following petition was presented some years since to the Supreme Court of Ohio, and has been kindly forwarded to us by an Ohio correspondent: —

WINDSOR, OHIO, May 12th, 1884.

OHIO STATE COURT,

Gentlemen Sirs, — I have been injured, by being rode on a rail or pole, in this said Township, in the year of 1874: and I have been in pain ever since that time, and not able to earn my own living by survile labor.

I ! Petition for you Ohio State Court to have the rioters or mobers be brought to justice: and I am looking for the said Township: County (Ashtabula,) or State, to pay the injury, damages & etc., their Officers and company did to me; as the Officers got them together. There were over thirty in number; in the riot or mob and the trusteese were ——. Two of them wear on the ground and the other might have been there for any thing I know off.

I believe that the *Officers are holden* for what their *privates* do. And the *Nations* are *holden* for what *their Officers do.*

I want for you, Ohio State Court, to proceede and pay me for the injurys & etc., and *bring them to justice.*

I have been call a *British stag* and my brothers was call mofodites on the 22d day of June, 1882, by one of the mob that injured me.

Do you think, this is not any account, with Great Britton, and others sivilize and inlightened nations? Do you think that the above mention nations are going to sit down and alow their subjects be slandered like this?

As I am a freeborn and consider myself subject to the same said nations; and I look to them for my protection. How much more they will look to the act of crippleing; brutalizeing or mangleing the humon being: besides the rumour out through the County that mask men came to my Fathers house; and operated upon me; *is this a threat* or not "*I think it is.*"

The below are a part of the names of the rioters or mobers that was on the ground; and a part or all of them help to injur me.

[Here follows a long list of names.]

I sent a petition to the County Court about September 18th, 1883, and I sent another petition to the Ohio State Circuit or Destrict Court about April 7th, 1884.

Please answer within *Thirty days so that I might know what to depend upon.*

Yours in truth,

ANOTHER Ohio subscriber favors us with the following amusing production: —

KENTON, OHIO, June 3, 1892.

EDITOR "GREEN BAG": —

Dear Sir, — The following copy of a legal notice that I obtained in an adjoining county may interest some of your readers.

The notice reads as follows: —

NOTIC.

Notic is Hereby given thad the undersinder has taken up 5 hogs. I soug & 4 picks. Sought waigh is about 200 lbs and the picks abought 100 to 125 lbs. Sad Hogs is nearly altogether Black and kebt on expense of the owner. D. B——, Road Sup.

Respt. yours,

* * *

LEGAL ANTIQUITIES.

FROM the Old Act Books of the Archdeacon's Courts, to which offenders were cited for ecclesiastical trial and discipline, the Rev. John Brown (the author of a new life of John Bunyan) has selected some curious instances of clerical fallibility. One clergyman acted at Christmas as the lord of misrule; another neglected his duties to be present at an execution; a third baited a bear in his church; while a fourth encouraged cock-fighting in the chancel.

Among other ecclesiastical offences were such as refusing to follow the cross in procession, hanging down the head at the elevation of the host, throwing the pax bread on the ground, separating the holy oil, washing hands in the baptismal font, singing the Litany derisively, refusing to pay dues and keep feast days, reading heretical and English books during the Mass, not receiving the ashes on Ash Wednesday, and not confessing at Easter. Among offences of a more miscellaneous character, we find one man bringing judgment upon himself for "marieing his wife in their parish church in her mask;" another "for that the day he was married he dyd blowe oute the lightes about the alter and wolde suffer no lightes to be bourne." One unloving spirit was dealt with "for not treating his wife with affection;" another yet more unloving, for "cheening his wife to a post and slandering his neighbours." People offended by "exercising the magic art," by consulting cunning women, by using private conventicles, and "by hiring foreigners to work at their art." It was an offence also not to "make two torches and keep the drynkynge in the parish, according to the laudable use and custom;" and a shoemaker was punished for that "he kepeth his bedd upon the Sundaies and other holy days at time of mattens and mass, as it were a hownde that should kept his kenell." One man came into trouble for "folding some sheep in the church during a snowstorm;" and another for "living in the church porch."

Women fell under the judgment of the court for "coming to be churched without kercher, midwife, or wyves;" or "not as other honest women, but comynge in her hatt, and a quarter about her neck," or for "not coming in a vaille;" and one brisk housewife, striking out a bright idea on a rainy day, found that she had offended by "hanginge her lynnen in the church to dry."

FACETIÆ.

THE witness on the stand had been bullyragged by the lawyer until his patience was exhausted.

"Now," said the attorney, "you say you saw the prisoner draw his pistol?"

"Yes."

"Remember you are on your oath."

"I 'm not forgetting it."

"You are sure you are telling the truth?"

"Sure."

"No mistake about it?"

"None."

"You could n't be persuaded into any other statement?"

Here the judge interposed.

"Oh, let him go on, your honor," pleaded the witness; "he 's a lawyer, and he does n't know the truth when he sees it, and I 'm only too glad to show him how, so far as I can."

MR. JENKS. I see that a new law in Alabama prohibits the selling of liquor within three miles of a church or school-house.

THE COLONEL (from Louisville). That 's a terrible blow to Alabama.

MR. JENKS. Think so?

THE COLONEL. I should say so. In three years there won't be a church or school-house left in the State. — *Life.*

THE following good story is told of Rufus Choate. One morning when he entered his office his clerk rose and said: "Mr. Choate, a gentleman has just left here who wants you to undertake a case for him." "Ah! And did you collect the regular retaining fee?" "I only collected $50, sir." The regular fee was $100, and in a reproving tone Mr. Choate said: "But, sir, that was unprofessional, — yes, very unprofessional." "But, sir," said the clerk, apologetically, and anxious to exonerate himself from the charge, "I got all he had." "Ah," said Mr. Choate, with a different expression, "that was professional, — yes, quite professional."

SOME people are too trusting for this world. At a recent trial the prisoner entered a plea of "not guilty," when one of the jury put on his hat and started for the door. The judge called him back and informed him that he could not leave until the case was tried. "Tried!" cried the juror, — "why, he acknowledges that he is not guilty!"

AT the trial of a breach of promise case, — the parties to which were a man of advanced years

and a young girl, — the judge remarked that this was another instance of the evil effects of "engagements contracted between May and December." Shortly afterwards the learned judge received a letter from a statistical society intimating that that body would be much obliged if he would favor them with an account of the facts from which he had derived the singular rule enunciated by him as to the infelicity of engagements contracted during certain months of the year, and adding that some of the members wished to utilize the information which might be thus afforded them in the shape of a paper to be read before the society with a view to public discussion.

Legal Object Lessons. — II.

A COMMON CARRIER.

"GENTLEMEN of the jury," said a Belfast lawyer, "what kind of swearing has been done in this case? Here we have a physician, a man who, from his high and noble calling, should be regarded as one who would scorn to stain his soul with perjury, or be guilty of giving utterance to an untruth. But what did he testify, gentlemen? I put the question to him plainly, as you all heard, 'Where was this man stabbed?' And what was his reply? Unblushingly, his features as cool and placid as though cut from marble, he replied that he was stabbed an inch and a half to the left of the medical line, and about an inch above the umbilicus. And yet we have proved, by three unimpeachable witnesses, that he was stabbed just below the railway-station."

THE late Lord Eldon had occasion to discharge a coachman whom he suspected of purloining his corn. In a few days after he received a letter from a merchant, inquiring into the man's character, and his lordship's reply was that he was a sober and a good coachman, but he entertained suspicions that he had cheated him. The man came the next morning to thank his lordship for procuring him so excellent a place. "My master," said he, "was contented to find I was sober and a good coachman; but as to cheating your lordship, he thought it would puzzle a Philadelphia lawyer to do it."

NOTES.

WHY do American law journals — for instance, the "Weekly Law Bulletin" — write "syllabi" for the plural of "syllabus," instead of "syllabuses"? It is quite doubtful whether "syllabus" can properly be called a Latin word, or even a Greek word. On the other hand, there can be no doubt whatever about its having somehow become an American word, and entitled as such to have "es" added to it to denote its plural. We may hear yet of "omnibi" for "omnibuses," and "ignorami" for "ignoramuses," and "cauci" for "caucuses." — *The Indian Jurist.*

A RECENT decision of Chief-Justice Paxson of the Supreme Court of Pennsylvania holds that the shooting at live pigeons from traps is not illegal. His honor says, —

"It is doubtless true that much pain and suffering is often caused to different kinds of game by the unskilfulness of sportsmen. A squirrel, badly wounded, may yet crawl to his hole, and suffer for many hours or days and die. So with birds. They are often badly wounded, and yet manage to get away only to suffer. It was not pretended that the act applied to such cases. The sportsman in the woods is not responsible for the accuracy of his aim under the Act of 1869. At the same time it is manifest that much

suffering would be spared wild game if sportsmen were better trained.

"It is conceded that the sportsman in the woods may test his skill by shooting at wild birds. Why, then, may he not do the same with a bird confined in a cage and let out for that purpose? Is the bird in the cage any better, or has it any higher rights, than the bird in the woods? Both were placed there by the Almighty for the use of man. They were not given to him to be needlessly tortured. Was there anything in the finding of the jury to show that the object of this association was to torture pigeons, we would not hesitate to sustain the judgment of the court below. But no such purpose appears, nor is there any finding that the defendant was guilty of needless and wanton cruelty. The bird was immediately killed as soon as its condition was discovered.

"A distinction was pressed upon the argument between the case of a captive bird and one at large in the woods. In the latter case there is a necessity to shoot it in order to capture it for food or any other lawful purpose; and if wounding results, it is an unavoidable incident, — while in the case of a captive bird, no necessity exists for putting it to death in this way. Some force may be conceded to this as an abstract proposition, but we do not see its application to the facts of the case. The right to kill the pigeon was and must be conceded; and there is no finding of the jury that its suffering was greater because of the manner of its death than if it had been killed in some other way. We do not say there might not be a violation of the Act of 1869 at a shooting-match, but in our view the facts found by the jury do not bring this case within it. The judgment is reversed."

Our jury trial, requiring the unanimous verdict of twelve men, is time-honored, inherited from our English ancestors; yet every lawyer and judge knows its uncertainty, and its value has become very questionable. In a recent case in Massachusetts, involving quite an amount, and where to outsiders there seemed to be but little doubt what the verdict should be, there were three disagreements. At the last trial one of the jurors stated that during their deliberations they varied all the way from eleven to one for the plaintiff to eleven to one for the defendant. It was remarked that the one juror who refused to agree against the plaintiff was from the same town. Is or is not the French rule, permitting a verdict by eight out of twelve, the better way? In New Hampshire cases involving less than one hundred dollars can be referred to judges; and the result has been very satisfactory. It has certainly largely diminished litigation and legal expenses.

A LAWYER'S VALENTINE.

This year of 1892, Saint Valentine's the date.
Now this indenture witnesseth: —
That of my whole estate,
To her I love the best I give, to have and hold forever
In full fee simple absolute, the true love of the giver.
But lest the grantee in this deed should ever wish to alienate
To others, from herself, the whole or any part of this estate,
Unless she first shall have obtained from the said grantor his permission,
And do the same with his consent, now, therefore,
This express condition
Is unto this said gift attached, That if she any part of this
Conveyed estate, however small, shall give away, she owes a kiss
To the said grantor in this deed, unless the said grantor relents;
But if he does not, he may claim the penalty for each offence.
And the said grantor herein named, in testimony of his love,
Has set hereto his hand and seal, the day and year first named above.

James G. Burnett, in *Puck*.

From the case of Stewart *v.* Benninger (27 Weekly Notes of Cases, p. 381) the following extract is made: —

"According to the statement of the plaintiff, the defendant kept a very voracious set of hogs. They were suffered to run at large without rings or yokes. They were of the slab-sided, long-snooted breed, against whose daily and nocturnal visits there is no barrier. They were of an exceedingly rapacious nature; and six of them at one sitting devoured fifty pounds of paint, thirty gallons of soft soap, four bushels of apples, and five bushels of potatoes, the property of the plaintiff. They raided the plaintiff's spring-house, upset his milk-crocks, and wallowed in his spring, and for several years foraged upon his farm, having resort to his corn, potatoes, rye and oats crops, to his garden, and to his orchard and meadow. They obtained an entrance by rooting out the fence-chunks and going under, or by throwing down the fences, or by working the combination on the gate.

These hogs were breachy, and the plaintiff notified the defendant several times to shut them up, and the last time told him if he did not shut them up he would; and the defendant replied, 'Shut them up, and be d——d!'"

THE faculty of Northwestern University Law School, Chicago, has been reorganized. Judge Henry W. Blodgett, LL.D., recently appointed by President Harrison counsel for the United States in the Behring Sea Arbitration, continues Dean of the School and Professor of Patent and Admiralty Law. Four new professors have been elected, three of whom give their entire time to the School. These three are: —

Nathan Abbott, A.B., LL.B., a graduate of Yale and former member of the Boston bar. Professor Abbott goes to Northwestern from the Michigan University Law School, where he had established a fine reputation as a teacher.

Ernest Wilson Huffcut, B.S., LL.B., graduate of Cornell University, where he made a brilliant reputation, has resigned his position in the Law School of Indiana State University to accept the position offered him at Northwestern.

Edward Avery Harriman, A.B., LL.B., who graduated at Harvard with high honors, and afterwards from the Boston University Law School, is the third of the new professors.

Mr. John Maynard Harlan, A.B., LL.B., a graduate of Princeton University, and one of the ablest of the younger men at the Chicago Bar, and a son of Mr. Justice Harlan of the Supreme Court of the United States, has been appointed Professor of Real Property Law. Mr. Justice Harlan himself is Professor of Constitutional Law in Northwestern Law School. During his absence from the country, as one of the arbitrators in the Behring Sea controversy, his place is to be filled by Mr. Justice Brewer of the Supreme Court.

Among the special lecturers appointed we notice the names of Melville M. Bigelow of Boston, Chief-Justice Elliot of Indiana, Seymour D. Thompson of St. Louis, Judge Bunn of Madison, Judge Gresham of Chicago; Charles H. Aldrich, Solicitor-General of the United States, Washington; Aldace F. Walker, former member of the Interstate Commerce Commission, and Leroy D. Thoman, former member of the United States Civil Service Commission; as well as John N. Jewett, one of the leaders of the Chicago Bar. Mr. Harvey B. Hurd and Judges Booth and Farwell continue in the School, where they have served for many years.

The outlook for the School is full of promise.

REVIEWS.

THE July ARENA contains a richly illustrated paper on "Women in the Alliance Movement," by Annie L. Diggs. A paper by H. A. Higgins on the "Basis of Currency," in which he ably answers Mr. Carnegie's A B C of money and Mr. Harter's recent attack on silver. Among the political papers in this issue are: "Why the Democrats should elect the Next President," by Hon. W. E. Springer, leader of the present House; "Why Republicans should elect the Next President," by Hon. J. C. Burrows, M.C., from Michigan: "Why the People's Party should elect the Next President," by Hon. Thomas E. Watson, of Georgia.

STARTING off to a summer resort, or for a week's fishing, or upon a tramp with a gun, or to visit your relations in the country, there is one companion that you will not regret taking with you, — a copy of the July COSMOPOLITAN. It contains a wide range of subjects for summer reading, — twenty-two articles, mostly illustrated.

THERE are three interesting literary papers in the July NEW ENGLAND MAGAZINE. One deals with Edward Augustus Freeman, the historian, and is by the well-known English essayist, William Clarke. Another treats of "The Socialism of James Russell Lowell," and is by Edward Grubb, of the University of London; and the third is from the pen of Walter Blackburn Harte, the Boston critic and story-writer, and is devoted to "The Antiquity of the Short Story." Western readers will find much to interest them in the finely illustrated article, "The Heart of Chicago," written by Franklin H. Head.

THE July CENTURY is sufficiently summery in its contents, the opening paper being a readable and authentic account of the Great French landscape-

painter, Daubigny, with illustrations from his own work, portraits of himself, and pictures of his favorite haunts.

There is a good deal of fiction in the number, including the last chapters of Dr. Weir Mitchell's "Characteristics," and also of the striking "Naulahka," by Messrs. Kipling and Balestier. The seeond instalment of "The Chatelaine of La Trinité" is given; and the third instalment of Mrs. Mary Hallock Foote's story of "The Chosen Valley," which is being read with peculiar interest in the West. There are also short stories by Maurice Thompson, Charles Belmont Davis (a brother of Richard Harding Davis), and George Wharton Edwards.

THE contents of LIPPINCOTT'S MAGAZINE for July are as follows: "White Heron," a complete novel, by M. G. McClelland; "The Newspaper Illustrator's Story" (illustrated), by Max de Lipman; "Peary's North Greenland Expedition" (illustrated), by Benjamin Sharp and W. E. Hughes; "Unc' Ananias" (illustrated), by Molly Elliot Seawell; "Canoe Life" (Athletic Series, illustrated), by W. P. Stephens; "Geographical Fiction," by Gertrude Atherton; "Trials of a Publisher," by Agnes Repplier; "Ashes and Incense," by Robert Burns Wilson; "An Old Boston Magazine," by Joel Benton.

HARPER'S MAGAZINE for July contains several articles of national and patriotic interest, the opening paper, "How the Declaration was received in the Old Thirteen," containing a great deal of valuable historical information. The usual complement of illustrated articles and fiction, all up to the high standard of this popular magazine, is provided for the delectation of its readers.

THE July ATLANTIC offers its readers the following interesting articles: "General McClellan," by Eben Greenough Scott; "In a Japanese Garden," by Lafcadio Hearn; "Chicago," by Edward G. Mason; "Don Orsino," XIV., XV., by F. Marion Crawford; "Unguarded Gates," by Thomas Bailey Aldrich; "Arabian Horses," by H. C. Merwin; "Looking toward Salamis," by William Cranston Lawton; "The American Idealist," by Gamaliel Bradford, Jr.; "The Calumniator," by Charlotte Fiske Bates; "A Florentine Episode," in Two Parts, Part First, by Ellen Olney Kirk; "Political Assessments in the Coming Campaign," by Theodore Roosevelt; "The Prometheus Unbound of Shelley," I., by Vida D. Scudder.

SCRIBNER'S MAGAZINE for July contains a striking article about the "Poor in Chicago," by Joseph Kirkland (the author of those very realistic novels of Western life, "Zury" and "The McVeys"). Mr. Kirkland describes graphically the various foreign quarters in Chicago, and the admirably organized special charities, such as Hull House, Liberty Bell, the Waifs' Mission, etc. The number is particularly rich in illustration; the paper on "The Art of Ravenna," by the Blashfields, being one of unusual artistic merit. Prof. N. S. Shaler's article on "The Depths of the Sea" also contains some very curious pictures of the bottom of the ocean.

There is abundant fiction in the issue, including two complete short stories, "The House over the Way" and "The Pianner Mares," with the powerful concluding instalment of Stevenson's romance, "The Wrecker," which has proved the most successful serial in the history of the Magazine.

BOOK NOTICES.

HAND-BOOK OF ALL THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, from its Organization to October Term, 1891. Part I., Index by Subjects. Part II., Index by Cases. By H. D. CLARKE, Librarian of the Court. The Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1892. 1 vol. Law sheep, $7.50 net.

To all practitioners in any of the United States courts, and to all who have occasion to refer to the United States Supreme Court Reports, this Handbook will prove of great value. The duplex Index, giving not only the title of the case but the subjects discussed, date of the decision, and the judge who wrote the opinion, is in many respects quite as satisfactory as a full digest. Mr. Clarke, as librarian of the Supreme Court, has had exceptional training for work of this nature; and the result is perhaps more satisfactory than any other writer would have produced. We commend the work to every lawyer.

A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW, comprising the Rules and Legal Principles applicable to the Vocation of the Lawyer, and those governing the Relation of Attorney and Client. By EDWARD P. WEEKS. Second Edition, revised and enlarged by the adjudications of the last fourteen years, by CHARLES THEODORE BOONE. Bancroft-Whitney Co., San Francisco, 1892. 1 vol. Law sheep, $6.00 net.

The first edition of this work was published in 1878, and has been out of print several years. The subject is one of interest to every lawyer, and one of which, we regret to say, a lamentable ignorance is displayed by some of the profession. The usefulness of such a treatise cannot be doubted; and this new edition should meet with a good demand.

This book treats of the various duties of the Attorney, Charges against; Disbarment of; Summary Jurisdiction of Courts over; What Contracts of, are Void as against Public Policy; Compensation of, and Contingent Fees; Fees as Element of Damages; Right of Women to Practise; Authority of Attorney; Unauthorized Appearance of Attorney; Power to Bind his Client; Negligent Acts of Attorney; and all the various duties and rights of both Attorney, Client, and Public are discussed in the light of the Judicial Decisions of England and America.

THE ROMAN LAW OF SALE, with Modern Illustrations. By JAMES MACKINTOSH, B. A. T. & T. Clark, Law Publishers, Edinburgh, Scotland, 1892. 1 vol. Cloth (10*s.* 6*d.*).

The common law owes so much to the civil law, that the legal profession find a deep interest in the study of the latter; and this work by Mr. Mackintosh, in which he gives an interesting comparison of the Roman and the modern law of Sales, will be found to be not only very readable but of great value.

THE PURITAN IN HOLLAND, ENGLAND, and AMERICA. An Introduction to American History. By DOUGLAS CAMPBELL, of the New York Bar, Member of the American Historical Association. Harper & Bros., New York, 1892. 2 vols. Cloth, $5.00.

This work of Mr. Campbell's is certainly one of the most valuable additions to American History which has been given to the public for a long time. In the limited space at our command, it is impossible to adequately review its contents, and we can only endeavor to briefly give some idea of the scope of the work. By the great mass of readers, who have always been taught to regard our institutions as of English origin, Mr. Campbell will be looked upon as an iconoclast of the first order; for he completely demolishes this time-honored belief, and demonstrates quite conclusively that we have scarcely an institution of English origin. Holland, and not England, was the source of our institutions and ideas. In a most interesting manner the author points out the various channels through which the laws and institutions of the Netherlands worked their way into the New England colonies, New York, New Jersey, Pennsylvania, etc.

From Mr. Campbell's summary of these laws and institutions, unknown in England, and derived directly or indirectly from the Netherland Republic, — "itself the heir of all the ages," — the reader can form some idea of the importance of this book, bearing the fact in mind that the history of each institution is traced out in full. This summary begins with the novel features of our written Constitution, and concludes with our modern legal reforms recently adopted in England, — reviewing, among other things, our free schools, free press, freedom of religion, our land laws, township system, written ballot, penal institutions, and charitable work.

To the English or American lawyer who cares for the history of his science, this work will be of particular interest. The author traces the history of legal reform in England, giving a full account of the changes proposed in the law of England by the famous committee on its reformation, of which Sir Matthew Hale was chairman. These reforms were borrowed almost entirely from the jurisprudence of Holland, which was itself the inheritor of Roman law, as well as of Roman civil institutions. They were at the time rejected by the English Parliament, although they have since been taken up in detail, forming in large part the basis of modern English jurisprudence. Meantime America, under a Netherland influence, adopted them almost in their entirety; and hence it has been the leader, and not the follower in all matters of legal reform for the English-speaking world.

Mr. Campbell is a delightful writer, and we heartily commend this work, as one not only of great historical value, but also as one of most absorbing interest.

A TREATISE ON THE NEGLIGENCE OF MUNICIPAL CORPORATIONS. By DWIGHT ARVEN JONES. Baker, Voorhis, & Co., New York, 1892. One vol. Law sheep. $6.00 net.

If those lawyers whose practice brings them into cases involving a knowledge of corporation law are not proficient therein, it certainly cannot be attributed

to any lack of excellent works upon the subject. This treatise by Mr. Jones has the advantage over other works on the same topic of being the latest publication, and consequently contains many cases of very recent date. The author appears to have treated his subject very fully, and in a thorough, painstaking manner. The work will be found of much value to the profession. An idea of its scope and arrangement may be had from a list of the chapter headings, which are as follows: —

Chapter

I. Introductory Principles of the Law of Negligence.
II. Early Instances of Municipal Liability for Negligence.
III. Dual Character of Municipal Corporations.
IV. No Liability respecting Solely Governmental Duties.
V. Liability for Failing in Solely Municipal Duties.
VI. Liability for Neglecting Municipal Duties relating to Governmental Affairs. — Highways.
VII. American Authorities as to Common Law Liability for Neglect to Repair Highways.
VIII. Extent of Liability for Neglect to Repair Highways.
IX. & X. Duties of Municipal Corporations respecting Streets and Roads.
XI. Duties in respect to Sidewalks.
XII. Snow and Ice on Streets and Sidewalks.
XIII. Bridges — Negligent Construction.
XIV. Bridges — Neglect to Repair.
XV. Statutory Liability for Neglecting Highways.
XVI. Negligence in Public Work.
XVII. Negligence as Owners and Managers of Property.
XVIII. Respondeat Superior.
XIX. Negligence respecting Ultra Vires Acts.
XX. Notice.
XXI. Proximate Cause.
XXII. & XXIII. Contributory Negligence.
XXIV. Evidence.
XXV. Damages.

A Treatise on the Law of Wills. By James Schouler, LL.D. Second edition. The Boston Book Company, Boston, 1892. One vol. Law sheep. $5.50 net.

When the first edition of this work of Mr. Schouler's appeared, in 1887, the profession were quick to recognize its merits, and it was at once regarded as a standard authority upon the subject of which it treats. Written in a clear, terse style, the author has succeeded in presenting the principles of the law of wills fully and thoroughly; and the treatise is not only a most valuable working tool for the practising lawyer, but is also an admirable text-book for students. The present edition has been personally revised by the author, and all the citations are brought down to date, making the work much more complete and satisfactory than ever.

The Elements of Criminal Law Principles, Pleading, and Procedure. For the use of Law Schools and Students. By Irving Browne. The Boston Book Company, Boston, 1892. Leatherette, $2.00 net. Law sheep, $2.50 net.

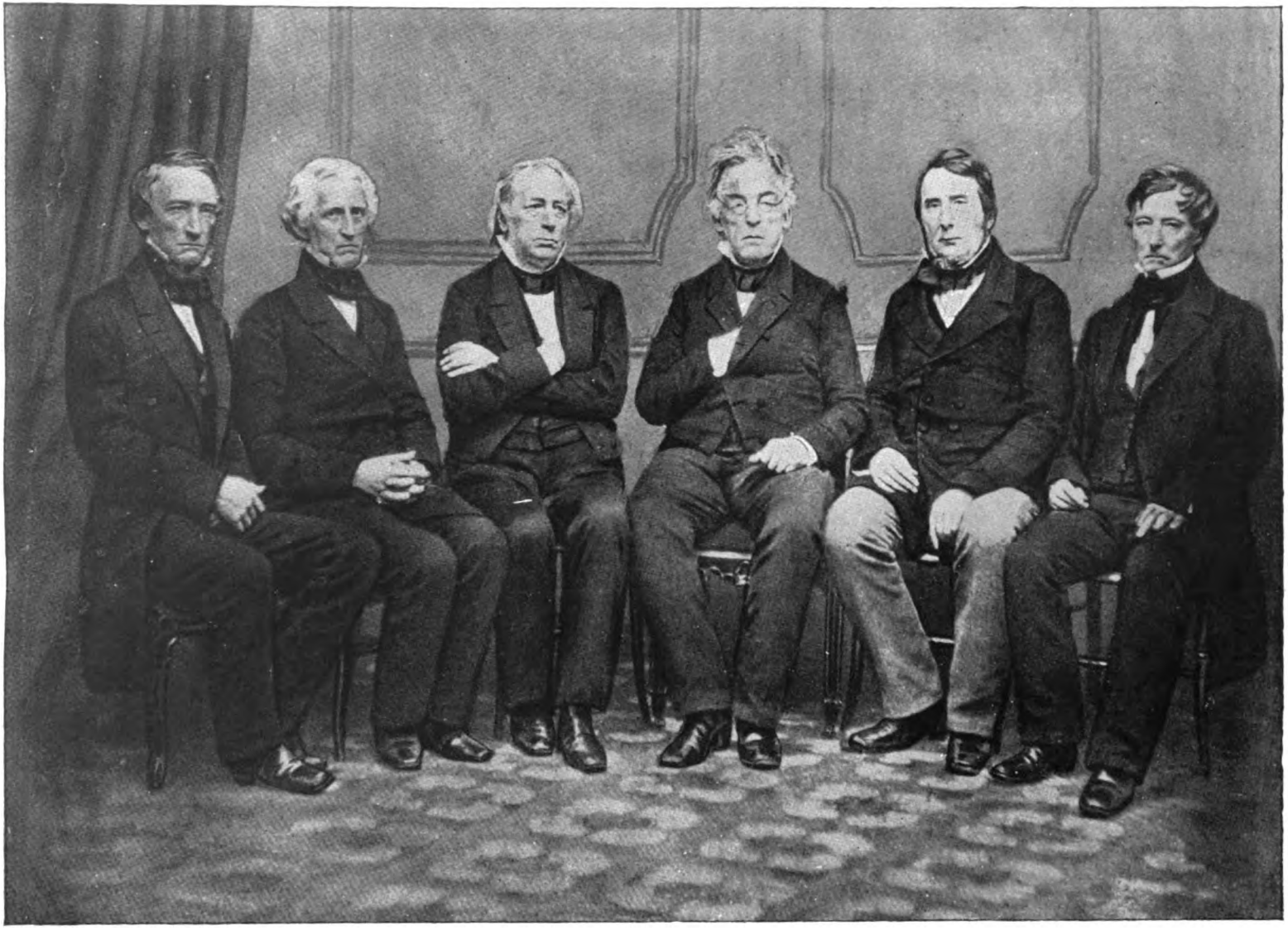
This is one of the best elementary treatises for the student's use which has come to our attention for a long time. It is a plain, straightforward, practical exposition of the subject of criminal law, just what we should expect from such an author as Mr. Browne, whose long experience as a lecturer in the Albany Law School has admirably qualified him to minister to law students' needs. It cannot fail to find favor with law schools.

A Treatise on Mortgage Investments. Applicable to Investments generally in Farm and City Property Mortgages. By Edward N. Darrow, Minneapolis, Minn., 1892. One vol. Paper. $1.00.

This is a timely little book, in view of the great development within the past few years of the desire to invest in what are known as "Western mortgages." The author, who is evidently experienced in such matters, gives sound advice as to how to make intelligent and judicious selection of such securities, and also how to attend to the details of such investments. Those contemplating placing their money in securities of this nature will do well first to read this work.

A Treatise on the Appellate Procedure and Trial Practice incident to Appeals. By Byron K. Elliott and William F. Elliott. The Bowen-Merrill Company, Indianapolis, 1892. One vol. Law sheep. $6.00 net.

The reputation of the distinguished authors of this treatise would of itself be a sufficient guarantee of its excellence; and a careful examination of its contents shows the work to be one which cannot fail to be of the greatest aid and value to the practitioner. The subject is one which has never before been fully and satisfactorily treated by itself, but in this volume the authors have certainly practically exhausted the subject. Written in a clear, terse style, the text is easily understood, and information upon any desired point is gained at the least possible outlay of time and patience. The authorities cited seem to be well selected. the arrangement of topics is admirable, and the table of contents and index all that could be desired. We can honestly commend this treatise to the profession as a most valuable assistant.



SUPERIOR COURT OF THE CITY OF NEW YORK (1855).

John Slosson. John Duer. William W. Campbell.

Joseph S. Bosworth. Thomas J. Oakley, C. J. Murray Hoffman.

The Green Bag.

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THE SUPERIOR COURT OF THE CITY OF NEW YORK (1855).

ALTHOUGH of only local jurisdiction, the Superior Court of the city of New York, established in 1828, is one of the most famous in this country; and its decisions, promulgated in a long series of reports, are of eminent authority in all the States, — especially upon questions of commercial law. A distinguished judge and legal author of the West has recently told the writer that, judged by their opinions, this court, when Oakley and Duer sat in it, was in his opinion the ablest ever known in this country. Benjamin D. Silliman says: "They have by their decisions largely fixed commercial law with almost the force of statutory legislation." Oakley and Duer were certainly legal giants. Of them, as well as of their associates, there is comparatively little in the form of biography or published reminiscences, and their fame is mainly traditional.

Thomas J. Oakley was "a great *nisi prius* lawyer and judge, independent of the books." "His charge to the jury was like the sun, dispelling all clouds," says Mr. Silliman. He argued the historic cause of Gibbons *v.* Ogden with Thomas Addis Emmett, against Webster and Wirt. He was Attorney-General, and served three terms in Congress. In 1818, as member of the Assembly, he introduced the bill for founding the State Library. He seems to have had rugged, unadorned strength. He was very religious, and an insatiate novel-reader. A memorial of him is in 1 Robertson's Reports.

John Duer was born in Albany, served two years in the United States army, and studied law with Alexander Hamilton. He was mainly self-educated, and became a proficient scholar in Latin, French, and Italian. (He wrote the beautiful Latin epitaph on the monument of Thomas Addis Emmett, in St. Paul's churchyard, New York.) He was one of the three revisers who prepared the New York Statutes of 1830. He was the author of a work on Marine Insurance. He was the reporter of his court. He pronounced a discourse on Kent before the bar of New York City. He was an earnest Churchman. Among his pall-bearers were Washington Irving and Gulian C. Verplanck; and James T. Brady pronounced a eulogy on him, which is in the memorial in 6 Duer's Reports. The charming orator said: —

> "It is true that his mind caught from the discussion, which elicited sparks of flashing intelligence from the members of the bar, many a ray of party-colored light. In that respect the gem set within his soul suggested a close comparison to another jewel, highly prized among men. It could give back all the tints cast, but it remained still the diamond, — brilliant in its pure integrity, with its singleness of color and its capacity to diffuse more light than its face received."

Charles O'Conor said that he regarded Duer as the ablest jurist of his time in America. "Lofty, learned, and accomplished," says Mr. Silliman. Some interesting reminiscences of him may be found in William Allen Butler's history of "The Revision and the Revisers."

Murray Hoffman was the author of works on Chancery Practice, Provisional Remedies under the Code, Laws of the Protestant Episcopal Church in the United States; compiled a volume of Laws relating to the

City of New York, and issued a volume of Chancery Reports giving his decisions as Vice-Chancellor. He was a man of elegant scholarship, and a great authority in equity and ecclesiastical law.

Joseph S. Bosworth served as police commissioner after coming from the bench. Some notices of him may be found in 27 Albany Law Journal, 462, and 30 id. 121. He edited ten volumes of the reports of his courts. He was at one time Chief-Justice. At a bar meeting on his death, William Allen Butler said: —

"In Chief-Justice Oakley we admired his massive intellect and native judicial instinct; in Chief-Justice Duer, his ardent, impulsive love of justice, his large and various learning, his discursive but well-trained faculties; while in Chief-Justice Bosworth, what we specially admired, if I mistake not, was his acute, clear, and discriminating mind, aided by the natural vigor of his intellect, which gave him, if not a larger grasp of all the principles of the law, a firmer grasp of those which were required for constant application to the subjects of his special inquiry, than belonged to other men. With him the judicial faculty was like a true, well-tempered blade, remarkable not so much for its polish as for the keenness of its edge and the sharpness of its point, — never wielded for mere display, never turned aside in irrelevant contests, and always fairly and fearlessly used in the interest and service of justice. As a member of the junior bar, when Judge Bosworth came on the bench in 1851, and during his term of twelve years' service, I was often before him; and it was to me always most interesting and instructive to try causes in his court. He possessed qualities which, while perhaps not indispensable for a proper exercise of judicial authority, greatly enhance the pleasure and satisfaction of the practitioner. His imperturbability, his patience, his great sagacity, his quickness and dexterity, if I may so call it, in detecting and defeating technical, insufficient, or unworthy causes of action or defences, the ease with which he disposed of difficult questions of law, the clearness with which he presented questions of fact to the jury, the quiet humor which he was fond of exhibiting without in the least detracting from the dignity of his office, the absolute impartiality with which he held the scales of justice, — all these are traits which many of us can recall with special satisfaction. The calm serenity and even temper which distinguished him then were conspicuous in all his life, the later years of which were full of respect and honor; but it is to his judicial career that I chiefly recur, and to his judicial record, as made up in the volumes of Sandford and Duer, and the ten volumes of his own reports. It is a record of faithful, unwearied, and fruitful labor in the high and responsible office which he filled."

The picture of the court, given as a frontispiece to this number, is taken from a photograph kindly lent us by Messrs. Baker, Voorhis, & Co., the law-book publishers, of 66 Nassau St., New York. The original is the rarest member of their extensive and highly interesting legal portrait-gallery. It is evident that it was no "composition" picture, but that the judges all sat together for it, in their Sunday clothes. Another copy hangs in the State Law Library at Albany, and is the most attractive picture in it. Groups of visitors stop before it every day; and their remarks, as overheard by the writer, are often very amusing. Brides giggle, and big men haw-haw at it. A pretty good judgment was passed on it by a man, evidently from the wild West, who said, "Rum old duffers for looks, but I 'll bet they knew a heap." Judge Bosworth, however, was an eminently handsome man. They are all, we believe, beyond the criticisms of this world; and it is probable that their court will soon follow them, for there is a strong effort making to abolish it.

THE LEGAL SYSTEM OF OLD JAPAN.

By Prof. John H. Wigmore.

I.

IN Puchta's "Outline of the Science of Right" occur the following passages:

"The relationships of Rights are the relations of one man to another, and may be called legal relations. But the various human relationships do not enter, in their full extent, into the sphere of Right, because the legal notion of a person rests upon an abstraction and does not embrace the whole being of man. There must, therefore, occur much modification and subtraction before we reach the special relations which alone are involved in the idea of a Right. Thus, suppose a man has arisen from a protracted illness, and in order to pay the bill of his physician, to provide for the urgent wants of his family, due to his recent incapacity, and to procure the means of beginning business again, he goes to a well-disposed neighbor, whom he has helped in former times, and obtains a loan at the usual rate. How much of all this must we not leave out in order to ascertain the purely jural relation between the parties! Compare with this the case of the rich man who raises capital merely to add to his possessions by a new speculation, and consider the effort of abstraction which is required in order to assimilate the resulting legal relations. And yet the legal relations in these two cases are identical."

For the Anglo-Saxon lawyer, accustomed as no other is to do homage to strict legal principle, as in and for itself the *summum bonum* of law, and to regard legal justice as manifesting itself only in a science of unbending rules, this quotation will indicate better than anything else, the vast gulf that is fixed between his own system and that which was indigenous to Japan. By making generalizations into hard-and-fast rules, by strictly eliminating in individual cases a variety of important moral considerations (much as certain English economists worked out their science with respect only to the wealth-acquiring motive), the Anglo-Saxons have succeeded in creating a special type of justice. This tendency of theirs is so strong that English Equity, the one great effort to counteract it, has become in the end identical in these respects with the whole system. But there are peoples to whom this type of justice is utterly alien. Even on the Continent this impersonalization (if we may so call it) of justice has never reached such an extreme. For example, the French Civil Code has a "*délai de grâce*," which the court may accord to a debtor whose misfortunes render inequitable the immediate enforcement of a claim in its entirety (though even this has been abandoned in the new Italian Code).

But it is in Japan that we may find the extreme antithesis to the Anglo-Saxon conception of justice. Whether there is or not any practical lesson for us in studying this opposite type, is a question which we need not here take up. However this may be, the chief characteristic of Japanese justice, as distinguished from our own, may be said to be this tendency to consider all the circumstances of individual cases, to confide the relaxation of principles to judicial discretion, to balance the benefits and disadvantages of a given course, not for all time in a fixed rule, but anew in each instance, — in short, to make justice personal, not impersonal. It would not be fair to infer from this that the courts of old Japan could have been no better than the tents of an Arab Sheikh, where justice came roughly and speedily, and the good sense of the tribunal was the only measure of equity. On the contrary, there was in Japan a legal system, a body of clear and consistent rules, a collection of statutes and of binding precedents. But whether it be or not a mere mark of primitive legal development, there was always the disposition to take, as Puchta

puts it, "the whole being of man" into consideration, to arrange a given dispute in the most expedient way, to sacrifice legal principle to present expediency. This is the first notable characteristic.

The second is that Japanese justice was essentially feudal in its spirit. At every step this quality shows itself. Chiefly affected by it, of course, was the criminal law. The common people necessarily came in for a meagre amount of respect in the feudal polity, except as wealth-producing instruments, on whose effectiveness the subsistence of the military class depended. They were restricted and punished with a severity characteristic of feudalism everywhere. The features of their status, and the kinds of punishments were not substantially different from those of European nations at similar stages of social development. On the civil side the result of feudalism was that the dispensing of justice between disputants appeared as a boon from the lord to his suppliant subjects. The first duty of the faithful commoner was not to disturb his lord's peace and waste his own time by becoming involved in a dispute. A litigious community was the worst of evils. An obstinate plaintiff, even with a just cause, might fare in the end not much better than the defendant. A good example of this, in high life, was the dispute over the succession to the fief of Echigo. The incumbent *daimyo*, Mitsumaye, was childless, and one of the two seneschals intrigued with the lord's brother, Nogayashi, to have the son of the latter adopted as heir to the title and the fief; while the other seneschal used his efforts against this step, and to gain his purpose brought the matter to the attention of the Shogun. The latter looked upon the inability to come to an agreement as seditious and dangerous in its tendencies, especially in a quarter where only the example of peace and smoothness should be set; and the decision was that the *daimyo* and his brother should be exiled, with the complaining seneschal, while the other intriguer was to be put to death and the fief confiscated. No doubt a jealousy of the power of this large fief was one of the elements in this particular decision.

The spirit of feudalism entered largely also into procedure. There was a great deal of learning as to summons, writs, and appearances; and in these matters the military gentry (and the priesthood shared these privileges in part) were exempted from some of the ordinary requirements. The commoners were to assume the most abject attitudes in the august presence of the judge. I have been told that one of the reasons why the mercantile classes resorted little to the courts in their disputes was the necessity of humiliating themselves so deeply in their quest for justice, — of crawling, for instance, on hands and knees from the door of the court to the judgment-room. This is somewhat overdrawn, however, and was probably true only of the haughtier merchant-princes or money-lenders, who could have bought out a *daimyo*, had their birth permitted them, and could not bring themselves to cringe to men in petty authority. Another consequence of the same spirit was the discouragement of appeals. Appeals there were, to be sure; but the generally indispensable ground was that of corruption, prejudice, or delay on the part of the inferior judge; and it must be confessed that such appeals were dangerous for the poor peasant; for it went hard with him if he did not make out a clear case against the obnoxious judge, and the many difficulties of accomplishing this rendered such appeals infrequent.

These being two of the noticeable features of Japanese justice, it must be remembered that none the less was there a real legal system in existence, similar in form and history to that wrought out by the Anglo-Saxon. I mean by this a body of legal notions, establishing relationships of right under given circumstances, and applied in systematic fashion by political authorities to disputes brought before the tribunals. These notions

were to be found, partly in statutes, partly in local custom, and partly in the precedents and practice of the courts. In the latter realm the development of these ideas by reasoning from analogy played as clear, if not as important a part as in Anglo-Saxon jurisprudence. It was, in Japan, the judges themselves who accomplished this development, not, as in some nations, an order of jurisconsults or of religious advisers. The precedents were not all in the shape of decisions directly rendered in controversies. There were, first, the general precedents established by the Supreme Tribunal (*Hyojo-sho*), in council assembled. The decision, however, usually took the shape of a vote upon a proposition submitted by a single judge, who was in doubt and had no precedent to guide him, or wished to change an existing rule; for the chief members were magistrates already exercising an important original jurisdiction of their own. Secondly, judges of equal rank but separate jurisdiction often consulted one another on knotty cases, and agreed thereafter to follow a certain rule mutually decided on. Thirdly, a *daimyo* from a distant fief (having independent judicial powers) sometimes consulted one of the chief judges of the Central Government, the Shogunate. Fourthly, the Supreme Tribunal often passed resolutions asking the approval of the Council of State (the controlling ministry who exercised the virtual power in the Shogun's name) for certain rules, deemed to be of special importance, this approval usually following as a matter of course. Finally, there were sundry minor ways in which precedents were added, and legal ideas expanded. The Council of State sometimes consulted the Supreme Tribunal on a point of law; and, what is still more interesting, a merchant was frequently asked to advise the tribunal as to the bearing of a commercial custom. I have said that appeals were discouraged. But these consultations of one judge with another, or of the Supreme Tribunal with one of its members, practically took the place which appeals occupy with us; for where any really doubtful question arose, a judge was ready enough to seek advice or put the responsibility of decision upon his superiors.

On the whole, then, while it is sometimes difficult to define the exact line at which the system of justice in a people ceases to deserve the name of jurisprudence, and is to be esteemed as merely customary or arbitrary, there can be no doubt that Japan under the old régime belonged to the higher category. Whether its national system, freed from the bond of feudalism, would have shown a capacity for development equal to some in the West, is an attractive question. But the logic of events has established Western laws here too firmly to allow us to expect ever to see an historical solution of it; and our present lack of knowledge makes it impossible as yet to hazard an opinion upon what might have been.

From this attempt to sketch some chief features of indigenous Japanese justice, I pass to a few details, concerning the judges, courts, and legal methods in general.

The administration of justice was not confided to a separate governmental department (a characteristic of which European States still show strong traces), and an enumeration of the grades of administrative officials would include most of the judicial ones also. It must be noted, too, that we have to deal in reality with a number of petty States, not merely a single judicial system. Feudalism kept the country divided under a number of powerful nobles; and although these were not politically independent of the Shogun, the Viceroy of the Emperor at Yedo, the Shogun was theoretically only *primus inter pares* as regarded every matter on which he did not choose to legislate in the name of the Emperor, and thus the judicial functions of the powerful *daimyo* not friendly to the Shogun (as well indeed as of some others) were exercised for the most part quite independently. In many matters of inheritance and marriage in noble families, political

reasons had induced the Shogun to legislate, and, as we shall see, the Supreme Tribunal of the Shogunate took cognizance of disputes between different federal lords and between vassals owing diverse allegiance. But in ordinary civil and criminal matters there was a practical independence varying in degree according to the influence of the fief. The immediate possessions of the Tokugawa family (in whose line the Shogunate power descended after 1603) embraced a little less than one third of the national territory; but, as Herr Rudorff has suggested, the indirect influence of their legislation and judiciary must have been great, and one may say, speaking roughly, that Tokugawa jurisprudence was valid as a type, for at least one half the country.[1] The first Tokugawa Shogun, Iyeyasu (1603–1616), and his grandson Iyemitsu (1632–1652) occupy, with reference to the political and legal unification of the country, a position similar to that of William I. and Henry II. in England. But they were never able to achieve the results which the English monarchs produced, and this lack of thorough union was the most important influence in keeping the feudal spirit everywhere alive. The materials for the study of legal development in the various fiefs still lie hidden in the storehouses of the noble families; and some slight acquaintance with the Tokugawa system is all that is at present attainable. We may be sure, however, that in this portion of the empire Japanese jurisprudence reached its highest development.

[1] Herr Rudorff, in his essay on "Rechtspflege unter den Tokugawa" (Mittheilungen d. Deutschen Gesells. Ostasiens, 1888), thinks that this influence penetrated with more or less effect to all parts of the country, his chief reasons being the similarity of administrative arrangements in the Shogunate dominions and some Western fiefs, and a supposed incorporation of the general legal ideas of the nation in certain Tokugawa codifications. As to the former, it is more probable that the Western fiefs, being the older, furnished models to the Tokugawas; as to the latter, it is certain, from the evidence of collections of customs and precedents, of which Herr Rudorff was probably not aware, that the codification in question represented only the Tokugawa jurisprudence.

After 1650 the Tokugawa Shoguns were for the most part *fainéants*, and the real power lay with the Council of State (*Goroju*), the Shogun's advisers. Decrees, ordinances, and regulations emanated from this source, and reference was often made to the Council on judicial matters. But practically the highest judicial tribunal was the Chamber of Decisions (*Hyojosho*), finally constituted about 1634. The working members of this Supreme Tribunal were the Town Magistrate of Yedo, the Temple Magistrate, and the Magistrate of Treasury Lawsuits. Each of these in his capacity as a magistrate of original jurisdiction, dealt with special classes of litigation, — the Town Magistrate with suits involving merchants of Yedo (practically all Yedo commoners); the Temple Magistrate, with all questions involving the priesthood, chiefly disputes over temple-lands; and the other magistrate, with all important controversies over taxes, etc., as well as with difficult cases reported for decision from the provincial officials, whose duties were primarily fiscal. But at stated times the sessions of this court were attended by one of the Council of State, and on other occasions by one of the Censors, rather by way of inspection than as a sharer in the proceedings. The Shogun himself twice a year appeared at the session. The regular sessions occurred thrice a month, — on the second, twelfth, and twenty-second days, with continuances, when necessary. Besides the appellate jurisdiction, already mentioned, in case of corrupt decisions or delayed justice, the Supreme Tribune had original jurisdiction in disputes between subjects of different fiefs, between a subject of an ordinary fief and a subject of the Tokugawa dominions, between Tokugawa subjects belonging to different magisterial jurisdictions, between different *daimyo*, and in cases of treason or of crimes by high officials. But the lines were not strictly drawn, and this enumeration is only substantially correct. So far as concerns the development of the

law, the most important organs were this Supreme Chamber, the Three Magistrates (*Sambugyo*, their usual designation), and the Town Magistrates of a few other chief cities, such as Osaka, Kyoto, Nagasaki, Nara, and Sakai. When the treasures of recorded material, now stored away in these places, are brought to view, and the case-books of the various Tokugawa magistracies as well as of the officials in the independent fiefs are properly studied, we shall know something complete and accurate in regard to the growth and conditions of law; but as yet only the outline is distinct.

Out in the country districts all lawsuits came before the reeve, or general administrative officer (*daikwan*, *koribugyo*, etc.; there were various titles). One of these was set over each district, the area being fixed by custom and convenience; it might contain from fifty to one hundred villages. But at this point we begin to lose sight of anything like systematic jurisprudence. Justice becomes an administrative rather than a judicial matter. The part which precedent and rule play in settling controversies becomes less and less; and the part of compromise and conciliation increases. When finally the initial stage of a dispute is reached, we find that the surroundings have quite changed. Justice is attained not so much by the aid of the law as by mutual consent. Customs there are, and definite ones; but they are always applied through arbitration and concession. This feature of the jural life of the nation is not without its parallel among other Oriental peoples; but I fancy that it is here peculiarly pronounced, and it is worth dwelling upon. I have spoken of the marked disposition to make justice personal, to let many external considerations enter into the settlement of a controversy. The exigencies of mercantile life in towns reduced this disposition to a minimum; but it attained its greatest influence in the country. But, joined with this, perhaps even more powerful and deeper-rooted in the character of the people, was the tendency to conciliation, to make everything smooth, — a tendency which is still, I think, the best key to much of the Japanese character. Not to attempt too much refinement of analysis, it may perhaps be laid down that a chief quality of that character is not so much a predominance of the emotional nature as the comparative weakness of the will. A consequent disinclination to act, a desire to avoid obstacles, to make things as easy as possible, explain many traits. The fierce determination to do, which Anglo-Saxons know so well, is wanting. The leisurely way of carrying out an undertaking, the shrinking from physical violence, — these seem to point back to the quality I have named. The perfection to which the art of politeness has been developed, the opprobrium which rests upon loud, violent, rough, uncouth, agitated behavior, is equally suggestive, and flows from a worship of tranquillity and smoothness in social intercourse. The commonest coolie is more courteous to the friend who passes him on the street than is the prosperous American merchant. In numberless ways a Japanese will put up with annoyance and even positive abuse of his rights, without thinking it worth while to do more than politely protest. Imagine the exact contrary of the spirit inculcated by Prof. von Ihering in his "Struggle for Rights," and you will understand the Japanese spirit. Even the disregard of truth is in Japan, if my readers will believe me, nothing but politeness and the dislike to offend carried to an extreme. Many of us can testify to promises made with full knowledge of inability to perform, to fibs told where the truth would have done no real harm, and to other incidents equally annoying and equally contrary to our ideas of good faith. The simple explanation is that rather than say to your face what he knows will be unpleasant, your Japanese friend has stated or promised what he thinks you would like to hear. This thought is perhaps not consciously present; but heredity and tradition have

made such a course instinctive with him. After one has discerned by experience, it is easy to make allowance for this disposition, and between persons to the manner born it causes no more inconvenience than does our conventional "not at home." I do not for a moment say that the incidents I have referred to are of every-day occurrence in Japan. I suggest merely that the spirit of regard for the feelings of another which prompts us to say "not at home" to an acquaintance, rather than announce that we are at home but (impliedly) do not care enough for him to see him, is much more powerful in Japan than with us, and receives a more frequent practical application. It is probable that a Japanese would seldom be deceived in such cases, just as in our own cities the conventional "not at home" deceives no one. Another characteristic, kindred to all these, is the general peaceableness and happiness of society in Japan. One can see in New York in one night such exhibitions of violence, brawling, and abandoned lawlessness as one would not see in an entire year in Tokyo. Poverty and want are nowhere accompanied by such tranquillity and sobriety as in Japan. These are all more or less direct manifestations of a deep-seated opposition to whatever implies clash, clatter, shock, roughness, strain, in any shape, and an inclination to make everything quiet, smooth, easy, harmonious. In short, the Japanese are confirmed quietists. If I have seemed to digress in illustrating this, it is because this quality in one of its manifestations had so great an influence on the administration of justice.

The result, then, was a universal resort to arbitration and compromise as a primary means of settling disputes. It was, and to a great extent still is, an ingrained principle of the Japanese social system that every dispute should, if by any means possible, be smoothed out by resort to private or public arbitration. The machinery of local government, under the old régime, was employed for this purpose, if friendly mediation failed; but no efforts were to be spared to settle the matter in this way, and in practice the vast majority of disputes were so disposed of. It is true that the interests of the feudal aristocracy in preventing turbulence and open quarrels among the common people led them to foster the disposition to arbitrate, and such procedure was enjoined by law. But the legislation was only cumulative in its effect, and was probably intended to stem a tendency perhaps in towns to break away from the old customs. The consequence was that even where a lawsuit ultimately resulted, a long stage of negotiation had invariably preceded, and it was (in the rural regions) only an irreconcilable difference that ever reached the seat of judgment in Yedo.

The principle of arbitration resulted thus. In case of a disagreement between members of a *kumi*,[1] the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as at a dinner-party. This, they thought, tended to promote good feeling and to make a settlement easier; for everybody knows, they said, that a friendly spirit is more likely to exist under such circumstances. Even family difficulties were sometimes settled in this way. Thus, if a man abused his wife, she might fly to one of the neighbors for protection, and, when the husband came to demand her, the heads of families in the *kumi* would meet and consult over the case. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters into their own hands and break off intercourse with him, refusing to recognize

[1] Every town and village was divided into *kumi*, or companies of five neighbors, the members of which, somewhat as in the Saxon frankpledge or frithborg, were mutually responsible for each other's conduct.

him socially. This usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in the larger towns and cities only, where the family unity was somewhat weakened, and not in the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or the *kumi*.

A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. The time spent and the money lost reduced the community to poverty. If even the company-chief could not settle the matter, it was laid before the higher officers, the elder and the headman. In fact, the chief village officers might almost be said to form a board of arbitration for the settlement of appeals; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring headman. If the headman was unable to settle a case, it was laid before the reeve, who however almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity. When a case finally came before the reeve for decision, it passed from the region of arbitration, and became a law-suit. From the reeve it might pass to the higher officials at Yedo. But even when the case finally came to the reeve's court, it was not treated in the strictly legal style familiar to us. The spirit of Japanese justice, as I have said, dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances. A few selections of actual cases will give a better idea of the course of justice than any number of generalizations. The following quotations are from public records, perhaps fifty years old, belonging to a village some eighty miles from Tokyo, and were lent to me from the family-chest of an old farmer. The entries relate to all the events of general local moment, and incidentally record the rise and issue of controversies between the villagers. The first document explains itself.

[1] *Bond offered to Haikichi and Tsubei.*

My son Sutegoro, on the occasion of a festival at the Zoko temple on the 28th of last month, wounded you and your son Tsubei in a quarrel. We are distressed at hearing that you are to take the matter into court, for my son's punishment would doubtless be severe. We asked Wahei, representative of the farmers of this village, and Tomiyemon, of Hatta village, to mediate and to ask your pardon. We are grateful to you for having extended it, and now promise not to suffer the said son Sutegoro to live in this village hereafter. He has already fled the village, dreading the consequences of his conduct; but if he ever is found again within the village, he shall be treated according to your pleasure: we shall offer no objection to whatever you may do. We offer this document of apology, sealed by the chief of the company and by the mediator.

Tempo, 11th yr., 8th mo., 3d day (1841).

FARMER YOBEI, *The parent.*
FARMER SUJIBEI, *His relative.*
FARMER ISOBEI, *Chief of company.*
WAHEI, *Mediator.*
TOMIYEMON, *Mediator, Chief Farmer.*

The next tale is a longer one: —

[2] *Petition to Shinomoto Hikojiro, Reeve of Koma Shire.*

The undersigned respectfully represents as follows: —

Uhei, farmer of this village, has laid the following matter before us. A certain Cho, the daughter of Jirozayemon, farmer in Kiwara village, was a farm-servant in the family of Asayemon, a fellow-villager, during the past year. On the 2d of this month this woman Cho, accompanied by her father, by Yazayemon, farmer of that village, and by Tomoyemon, farmer of this village, came to my house, and made the claim that my son Umakichi should marry her, inasmuch as their previous relations had made it honorable for him to do so. I asked my son if her assertions were true, but he denied it. I told them of my son's denial, and requested these persons to leave the house immediately. But they did not do so; and in my opinion their object was merely to extort money from me by false assertions. On the 4th of this month these persons came again, and threatened me with violence if I did not yield to their demands; but the neighbors intervened, and persuaded them to depart. On the 5th they came again. This time I went with the woman Cho to an inner room, and questioned her sharply, and was convinced that the demand was a trumped-up one. We are watching Cho day and night with four men; for, being a woman, she is more likely to trick us. But all this is very annoying, and I am obliged to beg you to summon these persons and order them to desist. My perturbation of mind incapacitates me from performing my duties as a farmer. I therefore make this respectful request. If you grant it, I shall be forever grateful.

Tempo, 10th yr. 2d mo. (1840).

FARMER UHEI, *Complainant.*
Warrantor, ASAYEMON, Headman of Village.
Countersigned, ICHIKAWA, Under-reeve of Shire.

[3] *Petition for Dismissing a Case.*

In the matter of Cho, already reported, we beg to file the following petition for dismissing the case: —

Cho, daughter of Jirozayemon, farmer of Kiwara village, asserted certain illicit relations with Umakichi, the son of Uhei, in this village; and a demand was made upon Uhei, who reported the matter to your office, and you began to investigate the case. But the affair turns out not to be an important one, and the whole matter has arisen from some foolish statements made by the woman Cho. She has returned to her home, and all the parties are now satisfied with the result. This settlement has been brought about through your influence, and we are very grateful. We beg therefore that you will shut your eyes to the case, and not give it any further consideration.

Tempo, 10th yr., 2d mo. (1840).

ICHIKAWA, *Under-reeve.*
FARMER UHEI, *Complainant.*
HEADMAN ASAYEMON, *Warrantor.*
FARMER JIROZAYEMON, *Defendant.*
FARMER HICHIBEI, *His relative.*
FARMER MASABEI, *His company-chief.*
HEADMAN SHIROZAYEMON, *Warrantor.*

Approved: SHINOMOTO HIKOJIRO, Reeve of Koma Shire.

The next case exemplifies the principle of customary law that where a tenant or occupant had continued in uninterrupted possession of a plot of land for a number of years (varying in different regions), his tenancy became perpetual, so long as his rent was duly paid (nearly the emphyteusis of Roman Law).

[4] *Deed of Settlement as required by the Court.*

A few years ago a dispute arose in regard to the possession of a piece of land in Gokurakuji village, producing fifteen bales of unhulled rice, the complainant being Sakurabayashi Samayemon, patron of the Ubata (Shinto) Temple, in Miyawara village, and the defendants being Gartei, chief priest of Anraku (Buddhist) Temple, and Kinrei of Zoko (Buddhist) Temple, in Gokurakuji village. This complaint was first brought before Sasaki Michitaro, Esquire, the late reeve, and the defendant filed his answer; but the case was afterwards transferred to Morita Okataro, Esquire, the present reeve, and the investigation has been going on. In the mean time the persons mentioned below have mediated between the parties, and have brought about the following settlement, which we hereby communicate to the court: —

The statement of the complainant was that the Shimmei Shinto-temple of Gokurakuji village was from time immemorial an appurtenance of Ubata

Temple, in Kiwara village, and under the patronage of the complainant's family.[1] Now, one of the plots, 120 feet by 192 feet, which belonged to this estate, was inundated in Horeki Period (1751–1764), in the lifetime of the complainant's grandfather, and became waste. When the complainant succeeded to the office of patron, he thought the land ought to be by that time reclaimable, and he inquired about it of the officers of Gokurakuji village, in which it lay. The latter evaded the inquiry, though it was often repeated; and the complainant began to suspect that the land had long ago been reclaimed by the villagers, and was being cultivated by them. He discovered, on searching further, that this was true; and that the plot had been divided into three parts, one going to Anraku Temple, a second to Zoko Temple,[2] and a third to the maintenance of the Jizo shrine. The complainant, therefore, prayed for an investigation by the court.

The defendant's answer was as follows: It is true that there is a plot of land cultivated as above, and not included in the taxable land of Gokurakuji village. But this plot was from Shotoku Period (1097–1099) to Kyoho Period (1716–1736) in the possession of Auraku Temple, having been received from the village to support the temple. The chief priest, Honko, eleven generations ago, on retiring from office, received one portion as a settlement upon him forever; but he removed to join the Zoko Temple, and gave his land to the latter, first apportioning a piece to the Jizo shrine. The latter part was under the charge of the village itself. We were on the point of asking to have this land assessed, when the great inundation came, and it is only very recently that we have been able to cultivate it at all; in fact, it is still mostly meadow.

Such was the controversy. Two of the reeve's agents visited the spot, and examined the deeds offered by both parties, and, after long investigation, concluded that the land in question must have been identical with the plot belonging to the Shimmei Temple. But as it has so long been cultivated by the defendants, it must be regarded as in their permanent tenancy. The product of the plot should be divided as follows: Landlord, 5 bales; tenant, 5 bales; taxes, 5 bales. This arrangement has been agreed to, and we beg to thank the court for its kindness. To prevent future disputes, we have executed this deed of settlement.

Kayei, 5th yr (1853), 9th mo. 12th d

Complainant.

SAKURABAYASHI SAMAYEMON, Chief priest of Ubato Temple, Miyawara village.

Defendants.

GANTEI, Chief priest of Auraku Temple, Gokurakuji village.

KINREI, Purveying priest of Zoko Temple. (By his agent, Gantei.)

YEISUKE, Farmer, representing the parishioners of Auraku Temple.

YOSHISABURA, Farmer, representing Zoko Temple.

ASAYEMON, Headman of Gokurakuji village.

TADAHICHI, TAROBEI, Chief farmers of the same village.

SAJIBEI, ISOBEI, representing the small farmers of the same village.

Mediators.

HOCHIYEMON, Headman of Futsuka village.

KANZAYEMON, Chief farmer of Otoguro village. (By an agent, as he was sick)

Addressed to

MORITA OKATARO, *Reeve.*

[5] *Supplementary Document.*

The above settlement having been reached by negotiation of the parties, while the inquiry was in progress by the court, has been accepted by order of Honda, Lord of the Province, and becomes valid. But censure has been passed upon Ganeti, one of the defendants, because, while the inquiry was pending he violated the law by thrusting petitions into the sedan-chair of one of the Council of State, as he passed, and of other high officers. We acknowledge the unlawfulness of his conduct, and accept the reprimand. (Signed as before.)

The last passage calls to mind some of the informal ways in which disputants sometimes sought justice. The thrusting of a petition into the chair of the lord of the province as he passed, was a favorite plan, — if such an epithet can be used of a procedure which was strictly forbidden, and was only resorted to in desperation. The pathetic tale of Sakura Sogoro, which Mitford has made famous, hangs upon an incident of this sort.

[1] The exact relation of a *kannushi*, or chief priest of a Shinto temple, to the living, is not clear; but the estate of such a person was a sort of advowson in a particular family, with right of presentation to members of that family.

[2] In many instances the parishioners cultivated the land belonging to their temple as a contribution towards its support.

GENESIS OF LEGAL JOKES.

By Irving Browne.

IT was an ancient legal wag,
To whom approached a youth,
Attracted by his bulging bag
And air of modest truth.

Quoth he, "I 'm on the 'Sunday Sun,'
In charge of legal news,
And now and then a little fun
Our readers won't refuse.

"Some good, fresh stories, if you please,
About the legal giants,
Their ways, their wit, their heavy fees,
Their selling out their clients."

That wicked ancient then began,
With epitaphs and jokes
Far back as human memory ran
To stuff newspaper folks.

To chestnuts from the centuries back
Too far for youthful view,
He tacked the names of Jere Black
And Chauncey M. Depew.

Jo Miller and Sir Matthew Hale
Provided epitaph
And jests to make the moderns rail,
And shallow fools to laugh.

To Marshall, Webster, Lincoln, Choate,
He fastens mouldy lies,
And what his memory fails to note
Invention shrewd supplies.

He seems a very monstrous fable
To history to prefer;
On fighting lawyers to be able
To stick some chestnut-Burr.

That youth wore several pencils out,
And filled a bulky book;
He swallowed all without a doubt,
And with a gosling look.

Two columns in the "Sun," or more,
Fruit of this plot to vex, he
Prepared to cause the world to roar,
And fall in apoplexy.

"He 'll lose his place, that greenhorn ——!"
So thought that legal fraud;
"Was ever anything so rank?"
He smiled both long and loud.

On Friday next again they met, —
The ancient and the bore, —
"They liked that lot first-rate; please let
Me have a column more!"

That lawyer straightway tumbled down;
His end was sudden, very,
And sad, because that foolish clown
Wrote his obituary!

SKETCHES FROM THE PARLIAMENT HOUSE.

IV.

LORD YOUNG.

By A. Wood Renton.

WITHOUT possessing either the culture of the late Lord President Inglis or the superb dignity of Baron Moncrieff, Lord Young is perhaps the strongest, and certainly the most individualistic judge — every lawyer will understand the significance of the superlatives — that has sat upon the Scottish Bench within the memory of living men.

Son of the Procurator Fiscal of Dumfriesshire, George Young was born at Nithside in the county of Kirkcudbright, and was educated at Dumfries Academy, and afterwards at the University of Edinburgh. In 1840 he was admitted to the Faculty of Advocates. Nearly thirty years later (1869) he was called to the English Bar, at which, however, he has never practised. Lord Young's forensic career contains many interesting episodes, upon a few of which alone we have space to dwell.

In September, 1862, Mrs. Jessie Maclachlan was tried at the Glasgow Circuit Court before Lord Deas and a jury for the murder of Jessie Macpherson, the housekeeper of a Mr. Fleming, an accountant residing in Sandyford Place, Glasgow. In spite of a most able and eloquent defence by her counsel, Mr. (now Lord) Rutherfurd Clark (of whom more anon), the prisoner was convicted, and the question, usually formal, whether she had anything to say in arrest of the death-sentence was duly put. To the surprise of everybody Mr. Clark arose and asked permission from the judge to read a written statement which the prisoner had prepared. The required permission was given, and Mrs. Maclachlan's statement was read accordingly. The burden of it all was that old Mr. Fleming, the accountant, had committed the murder, and had bribed Mrs. Maclachlan by a gift of silver plate to conceal her discovery of his crime. Lord Deas dismissed this belated story in very curt terms, and sentenced the prisoner to be hanged. But the bar of public opinion (to which she had really appealed) was strongly agitated for and against her; and all the noisy and foolish people who, forgetful of the maxim "Messieurs les assassins qu'ils commencent," cry out against capital punishment, clamored for a reprieve. Sir George Grey was Home Secretary, and it was on his advice that her Majesty would exercise or refuse to exercise her prerogative of mercy. He consulted the judge. But the voice of Deas was still for hanging. He consulted the Lord Justice Clerk (Inglis), who agreed with Deas. Fourteen out of the fifteen jurymen met, considered Mrs. Maclachlan's confession, and unanimously resolved not to petition in her favor. Meanwhile the storm of public excitement went on raging, and grew fiercer. At last the Home Secretary was enabled to make up his mind. He took the extraordinary course of constituting a new tribunal to retry the case. Mr. Young, who had then acquired considerable judicial experience as Sheriff of Inverness, Haddington, and Berwick, and was also one of the foremost advocates at the Scotch Bar, was appointed Commissioner. Mr. Young went to Glasgow, held his investigation with closed doors in the Sheriff Court (Oct. 16–18, 1862), and in due time presented his report. Sir George Grey thereupon commuted the death sentence to penal servitude for life. The Right Honorable gentleman's view was that Mrs. Maclachlan was possibly only an accessory after the fact, and that capital punishment ought not to be inflicted in the face of the strong and clearly

expressed opposition of the public, — a cowardly and flabby doctrine which did little credit to a Minister of the Crown. Mr. Young soon reaped the reward of his extra-judicial services. In November, 1862, he became Solicitor-General for Scotland.

In July, 1865, he prosecuted in the *cause célèbre* of Reg. *v.* Pritchard. The story of this strange case is worth telling at some length.[1]

Edward William Pritchard, a member of the Royal College of Surgeons (1846), after travelling in the Pacific and North Polar Seas, in Egypt, and along the shores of the Mediterranean, settled at Filey, in Yorkshire, where he married a Miss Mary Jane Taylor, daughter of a retired silk-merchant in Edinburgh. In 1859 he commenced practice in Glasgow, and by his contributions to medical literature acquired a considerable reputation among his brethren. In the summer of 1863, however, public attention was drawn to him in a somewhat unpleasant way. On the morning of the 5th May in that year, a fire broke out in his house, No. 11 Berkeley Terrace, Berkeley Street. It was supposed at the time to have been caused by the servant-girl — who, by the way, was found burned to death in her bedroom — having fallen asleep with the gas-jet lit and close to the curtains. But ugly rumors got abroad which put a different complexion upon the matter: (1) the insurance office was said to have seriously demurred about paying for the damage, though the objection was subsequently withdrawn; (2) the servant was reported to have been pregnant; (3) and it was credibly asserted that her bedroom door was found to be *locked outside*. This incident passed, however, without further comment or inquiry. In the spring of 1865 Mrs. Pritchard became poorly; and the prisoner wrote to her mother, Mrs. Taylor, to come through to Glasgow and nurse her. Mrs. Taylor arrived on the 10th of February. On the 25th she died suddenly; the death was attributed to apoplexy, and the deceased lady was taken back to Edinburgh and buried in the Grange Cemetery. Mrs. Pritchard's illness continued, and she died on the 18th of March. The body was taken to Edinburgh for burial, and Dr. Pritchard accompanied it to the house of his father-in-law, whence it was to be conveyed to the Grange. On the evening before the funeral Pritchard returned to Glasgow by the last train. He was arrested at the railway station on a charge of having murdered his wife. The body of Mrs. Taylor was exhumed; the interment of Mrs. Pritchard was postponed; post-mortem examinations were held by Prof. Douglas Maclagan and Dr. Littlejohn, and these eminent gentlemen came to the conclusion that in neither case had death resulted from natural causes. Chemical analysis yielded unmistakable evidence of poisoning by antimony, and in the case of Mrs. Taylor the symptoms pointed to the presence also of aconite. Pritchard was at once fully committed on the charge of having murdered both his wife and his mother-in-law. He was tried before three judges of the Court of Session, — the Lord Justice Clerk Inglis, whose distinguished abilities were no longer available for the defence of prisoners in distress, Lord Ardmillan, and Lord Jerviswoode. Mr. Young, then Solicitor-General, Mr. (afterwards Lord) Gifford, whose intellectual energies were during a long lifetime evenly divided between the study of law and strange religious speculation; and Mr. Crichton, the late universally loved and admired Sheriff Principal of Fifeshire, prosecuted for the Crown. Mr. Rutherfurd Clark was leading counsel for the prisoner. Most of the *forensic* interest in this remarkable trial centres round Mr. Rutherfurd Clark, whose career forms the subject of the following paper. It may suffice for the present to say that Pritchard was convicted and ultimately executed, and to sum up the evidence upon which this eminently proper result was arrived at; the Solicitor-General's speech,

[1] "A Complete Report of the Trial of Dr. E. W. Pritchard for the Poisoning of his Wife and Mother-in-law." Reprinted by special permission from the "Scotsman." Edinburgh: William Kay, 5 Bank St., 1865.

unexceptionable in tone and unanswerable in argument, shall form our text. (1) The evidence of *motive* was not strong. But Pritchard was in pecuniary difficulties. His practice was not large. His bank-account was overdrawn; and he had a pecuniary interest in the deaths of the two ladies. (2) Antimony, with aconite superadded in the case of Mrs. Taylor, was beyond all doubt the cause of death. (3) The prisoner was in possession of both poisons. In itself, of course, this was not more extraordinary than that a lawyer's library should contain a copy of "Russell on Crimes." Taken with other circumstances, however, it was a not unimportant adminicle of proof. (4) There was no suggestion of suicide. There could be no suggestion of accident. The length of Mrs. Pritchard's illness, and the mysterious presence of aconite in Mrs. Taylor's sedative were conclusive on that point. (5) Only two persons could have done the deed, — Dr. Pritchard, and Mary Macleod,[1] a servant-girl whom he had seduced and promised to marry if Mrs. Pritchard died. But the case was essentially one in which, as the Solicitor-General said, you could trace a doctor's finger.

The subsequent facts in Lord Young's career are soon told. He became Lord Advocate. He piloted the Education Act of 1872 through the House of Commons. By a mere accident he missed the Law lordship of Appeal, now worthily held by Lord Watson, and consoled himself with a judgeship of the Court of Session.

[1] Before his death, Pritchard completely exonerated Macleod from any complicity in either murder.

THE SUPREME COURT OF ARKANSAS.

By G. B. Rose.

THE Territory of Arkansas was created out of a part of the Missouri Territory in the year 1819. It was then almost a trackless wilderness. Its population, now nearly a million and a quarter, was estimated at fourteen thousand, composed of frontiersmen who had left the older States to find a congenial abode among its vast forests; of honest settlers seeking homes where they might carry on the pursuits of agriculture or commerce; of border ruffians, who found in the swamps, the woods, and canebrakes a safe asylum in case of pursuit, and of ambitious young men who had come to the new territory in hope of adventures and of the gratification of a restless ambition. It was a wild population, many of whom went armed, and with whom the blow followed quick upon the word. Among the gentlemen duels were frequent, while affrays and bloodshed were common with all classes.

The territorial government was organized by the Secretary of State, Robert Crittenden, then barely twenty-two years of age, and probably the most brilliant man that we have ever had among us. He was one who, had he not buried himself in the wilderness, would have achieved a national renown. Gifted with a remarkably handsome, refined, and intellectual face, that still looks down upon us from the walls of the Secretary's office, with a magnificent and glowing eloquence such as has never since been heard within our borders, he was regarded by all as a man of more ability and higher powers of oratory than his brother, John J. Crittenden of Kentucky. But the obscurity of his field of action, and an early death, have robbed him of fame; and his wonderful orations at the bar and before the people are now only a tradition.

The seat of government was established at the Arkansas Post, a wretched village near the mouth of the river of that name; and there it remained until it was removed to Little Rock in 1821.

The Superior Court of the Territory was composed of three judges appointed by the President. Its written opinions, which are not numerous, were only published in 1856, when Mr. Hempstead gathered them up and included them in his volume of Federal decisions. Remaining in manuscript for so many years, they have had but little influence upon the State's judicial history. However, some of the ten judges who occupied the bench between 1819 and 1836 are sufficiently notable to deserve mention.

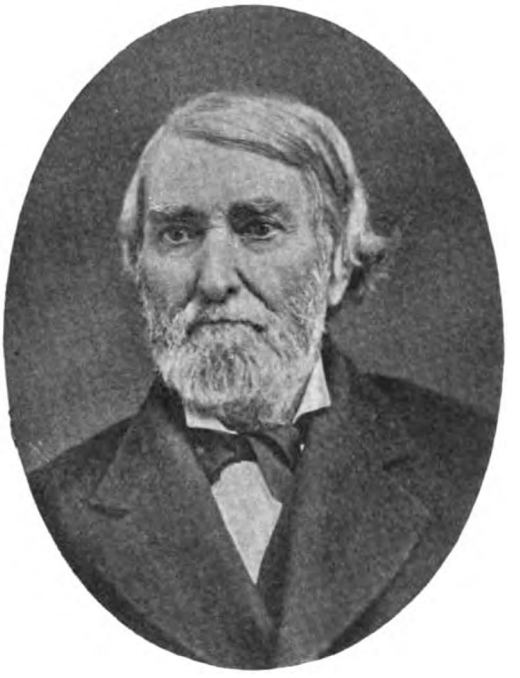
The first presiding judge was Andrew Scott, who was born in Virginia on the 6th of August, 1788, but who in 1808 removed to St. Genevieve, on the Mississippi River, in the Missouri Territory. He was a small man, of blond complexion, gray eyes, and aquiline nose, with long hair falling about his shoulders, such as we still see in the far West. He is said to have been a man of considerable ability, but of a fiery and haughty disposition.

The first session of the court was held in January, 1820, at the Arkansas Post, which then contained less than a hundred inhabitants, dwelling in log-huts. Judge Scott presided. Of his capacity as a judge we can form no just conception from the little that has come down to us. He is remembered chiefly by the tragedies in which he was engaged.

In May, 1824, he and Judge Selden, one of his colleagues upon the bench, were engaged in a social game of cards with two ladies of Little Rock. Judge Selden made a remark, at which Judge Scott took offence and demanded an apology in such terms that it was refused. He thereupon sent a challenge to Judge Selden.

They met on an island in the Mississippi River, near Helena. Judge Bates, who was the following year to be appointed to the bench of the same court, was second to Judge Selden; and Nimrod Menefee, who was afterwards to die in a personal encounter, was second to Judge Scott. It was a strange sight, — two judges of the same court, two sworn conservators of the peace, standing there, as the sun rose across the broad Mississippi, ten paces apart, grasping in their hands the deadly Derringers. The signal was given, — one, two, three, — and they wheeled and fired. Judge Selden fell, and was carried from the field mortally wounded. Judge Scott returned to his duties upon the bench.

Even in that age the occurrence of a duel between two judges of an appellate court was so extraordinary that the fame of it spread throughout the country, and gave to the new Territory an undesirable notoriety.



DANIEL RINGO.

In 1829 Judge Scott, who had left the bench, ran for the State legislature against Gen. Edward Hogan, a retired army officer. They quarrelled, and Hogan knocked the Judge down; but he sprang to his feet, drew a sword from his cane, and plunged it several times into the body of his adversary. Reeling in the agony of death, the General wrested the sword from the Judge's hands and made a terrific lunge at him; but the weapon only passed through his cravat, and the General sank down to die unavenged.

Shortly after this the Judge removed to a point on the Arkansas River, in Pope County, which he called Scotia; and there he lived in retirement, and without further bloodshed, so far as history records, until 1859, when he died.

Judge Benjamin Johnson was born in Scott County, Kentucky, Jan. 22, 1784. He was admitted to the bar of the Lexington Circuit, and in 1821 he was appointed by President Monroe to be one of the judges of the Arkansas Court. This position he held until the Territory became a State in 1836, and then President Jackson appointed him judge of the United States Court for the District of Arkansas, — a place which he filled with honor until his death in 1849. He was a man of good ability, of considerable learning, and sincerely anxious to do right. His opinions fill the greater part of Hempstead's Reports, and will be found to reflect credit upon him. He was a tall, slender man, with a pleasing and intelligent face, and always enjoyed the respect of the bar.

Several anecdotes of him are preserved, — notably a retort which he made to Judge Daniels of the Supreme Court of the United States. After Judge Johnson's appointment to the district bench, Mr. Justice Daniels came out upon the circuit. One day, while a case was being argued, Judge Johnson expressed his opinion; whereupon the Justice said with lofty dignity: "Judge Johnson, the court will first consult, and the Associate Justice of the Supreme Court will

deliver the opinion of the court." The next day, when a case had been argued, the Justice began to express his views, when Judge Johnson, seizing his arm, said in a stage whisper: "Judge Daniels, the court will first *consult*, and *then* the Justice of the Supreme Court can deliver the opinion of the court." The bar were immensely diverted, but Judge Daniels did not seem to enjoy the joke.

There was a greater resemblance between General Jackson and his friend Archibald Yell than is usually to be found among men. Yell was for Arkansas what Jackson was for the nation, and had the same overwhelming popularity with the people. He was born in North Carolina in August, 1797, but emigrated to Tennessee in early youth. He served with General Jackson in the War of 1812 and in the Seminole War, and in 1832 Jackson appointed him one of the judges of our Superior Court. He came to Arkansas and located at Fayetteville. While holding court on the circuit he is said to have performed a feat similar to one performed by Jackson when circuit judge. A notorious desperado was indicted, and though he was in the village the sheriff could not get up a posse to arrest him, for every one knew his desperate character. Yell adjourned court, found the desperado, and seizing him by the throat, exclaimed: "Come into court, G—d d——n you, and answer to the indictment against you!" And to the astonishment of all, the fellow allowed himself to be led to court, and thence to jail.

TOWNSEND DICKINSON.

He was a man of unlimited popularity with the masses, and it was his ambition to be the first Governor of the State; but in the constitutional convention his opponents took advantage of his absence, and inserted into the Constitution a provision that no one should be Governor who had not resided in the State four years, — just a few months too long for him. He was therefore forced to content himself with being the first Congressman and the second Governor.

He was a very handsome man, of great natural ability, of unlimited courage and energy, but of small educational advantages. A natural leader of men, he was invincible before the people as long as he lived. He was killed at the battle of Buena Vista, while leading his regiment in a desperate charge against the Mexican lancers.

His capacity for pleasing the people is well illustrated by the following anecdote that Judge David Walker used to tell. He and Walker were running for Congress, and were making their canvass together. They came to a place where men were shooting for beef. Judge Walker, a religious man, could not engage in what he considered a species of gambling. Yell got off his horse, bought a chance, drew the rifle to his shoulder, and struck the bull's-eye at the first shot. The beef was his; and asking the name of the poorest widow in the neighborhood, he sent it to her with his compliments. Then he sent for a jug of whiskey, drank with the crowd, and rode off a hero in their eyes.

The two went on to where a camp-meeting was being held. "Here," thought the pious Walker, "I shall have him." He went to the inn, attired himself becomingly, and proceeded to the place of worship. What was his astonishment when he saw Yell in the midst of the congregation, leading the hymn, "How happy are they who their Saviour obey," in a rich, strong voice that Walker could never hope to rival! Walker looked, and saw the handwriting on the wall.[1]

Arkansas was admitted into the Union on June 16, 1836. By the terms of its first Constitution, which remained in force until the war, the judiciary was elected by the legislature; and at the first meeting of that body Daniel Ringo, Townsend Dickinson, and Thomas J. Lacy were chosen for Supreme Judges.

The court was organized on the 24th of January, 1837. The population of the State at that time was probably not in excess of sixty thousand, and these were scattered in small settlements mostly along the courses of the rivers. There were scarcely any roads. At irregular intervals steamboats or barges would make their appearance, bringing to the settlers the necessaries of civilization, and carrying away the scant produce of the country. When the traveller left the rivers, he plunged into the wilderness; where game of all kinds — deer, bears, wolves, and panthers — were almost as abundant as before the landing of Columbus. The town of Little Rock, whose striking position at the point where the last foot-hills of the Ozark Mountains meet the river marked it for the capital and largest city of the State, was a straggling village of wooden houses, containing in all probability less than a thousand inhabitants.

The State House was not yet completed; but the court met in the northeast room, where it continued to hold its sittings until the present Chief-Justice took his seat upon the bench. The furniture was of rude pine wood, and saw-dust was strewn upon the bare floor. It was not a place where much was to be expected. A Supreme Court siting in a barren room in an unfinished building, in a poor village buried in the heart of the forest! And yet it was no ordinary body of men that was assembled there. It was a time when the nation was in its lusty youth, — when the spirit of adventure, the love of independence, was strong in the breasts of men. It was the age of our great orators, when men felt strongly, and expressed themselves in words that burned, because their hearers were still capable of being swayed by the fire of their eloquence. It was the age when the romantic movement in literature was in its full development, and when the sad smallness of the realistic school had not come to belittle the souls of men. It was a time of buoyancy, of expansion, — when the love of change, of adventure, the weariness of the conventionalities of civilized life, the attraction of a future of unknown possibilities, were drawing many of the ablest and most ambitious of the nation's youth to the distant West. Their hopes were often chimerical, and now that an iron civilization has forced us all into a common mould, we should perhaps smile at their strongly marked individuality; but of their abilities and their energy there can be no doubt. Indeed, it may well be questioned whether the bar of our court has ever been stronger than on the day when they met in that rude chamber to organize the judiciary of the State. The brilliant Crittenden had found an untimely grave, but others had come to take his place.

There was Chester Ashley of Massachusetts, a man of commanding presence, destined to accumulate a great fortune, to acquire a national reputation, to be one of the most distinguished members of the Senate of the United States, and the only man who was ever honored with the chairmanship of the

[1] It is proper to say that in the preparation of these sketches I have availed myself freely of the information contained in the histories of Arkansas by Mr. Hallum and Mr. Hempstead.

judiciary committee at the first session of that body that he attended.

Beside him was Absalom Fowler of Tennessee, a man of square-built, powerful frame and dark complexion, profoundly learned in the law, caring for nothing save his profession, proud, bitter, fierce, sarcastic, — a man who hated much and loved little, whom many disliked and all feared, — a strong, scathing, though not an elegant speaker, whom men would have avoided had not his great learning and ability forced them to have recourse to his services, and who for many years was to have perhaps the largest practice in the court.

And from Massachusetts also came Albert Pike, one of the most brilliant men that America has produced, and one of her best poets; a man of most varied acquirements, and whose exquisite appreciation of every form of refined culture would have made him a leader in his native Boston, but who had come, by a strange freak, to bury himself in the wilderness. He was then in the first flush of youth, and a handsomer man was perhaps never seen, — with a face worthy of an Apollo, and with curling locks of raven hair that would not have been unworthy of the god.

From Connecticut came Samuel H. Hempstead, a pleasant, affable man, of infinite energy and animal spirits, of robust constitution and florid complexion, — a man of ripe and liberal learning, a formidable lawyer, a tireless worker, and of a genial disposition.

W. K. SEBASTIAN.

Kentucky sent Frederick A. Trapnall, a tall, handsome man, the ideal of a cultivated gentleman, of agreeable manners and fascinating conversation, with a flow of the smoothest and most polished eloquence.

By his side was his partner Cocke, a tall, slim man, with piercing black eyes deep set in his head, with a slightly awkward and timid air, but who when roused spoke as a true orator; a genial and companionable man, a fine lawyer, and a favorite with all the bar, but who was doomed to drink himself to death in consequence of domestic misfortunes.

From Kentucky, too, came William Cummins, an accomplished lawyer and elegant gentleman, of an intellectual and pleasing presence and a strong speaker, and who was soon to be joined by his brother Ebenezer, a man even more eminent at the bar than himself.

Within the year they were to be joined by George C. Watkins and John Taylor, two of the most striking figures in our history.

Of Watkins we shall have occasion to speak hereafter. Taylor was one of the most remarkable men of the South, — a tall, thin, red-haired man, repulsively ugly, hating all his kind, associating with no one, a gloomy, scornful misanthrope; the most hatable of men, but learned in the law, and with an incomparable power of vituperation, a scathing, blasting eloquence, that made him the terror of the bar. An Ishmaelite with his hand against every man, he wandered from North Carolina to Texas without a friend or

even a companion, everywhere despised and everywhere dreaded on account of his terrific eloquence, backed by a cold and contemptuous courage that never sought or shunned a conflict. Yet, strange to say, he was a Puritan, endowed with the strongest religious convictions.

And there were others whom we need not name, composing a bar of unusual power; not the typical bar of the West, of spread-eagle oratory and small learning, but an earnest, studious bar, whose members accumulated large libraries and argued their cases laboriously and exhaustively, as any one may perceive who will turn back and read their briefs in our old reports.

C. C. SCOTT.

Upon a rude stand sat the three judges. Ringo, the Chief-Justice, was born in Kentucky about the year 1800. He removed to Arkadelphia, Ark., in 1820, and became deputy clerk of the District Court, and in 1825 clerk. In 1830 he entered upon the practice of the law at Washington, Ark. In 1833 he removed to Little Rock, and in 1836 was elected to the supreme bench, and drew the long term of eight years. He was Chief-Justice until 1844, when he was defeated for re-election. Then he returned to the practice, and in 1849 was made United States District Judge upon the death of Judge Johnson, — a position which he retained until the war. In his later years he did little; for the adoption of the civil code had deprived him of his principal engine of legal warfare, the common-law pleading. He died at Little Rock on Sept. 3, 1873.

Judge Ringo was a man of incorruptible integrity, dry and uninteresting, though courteous in his manners. He had a great opportunity. A new Commonwealth had been admitted into the Union. It had as yet no legal system of its own. A strong and sagacious man, with the authority which the position of Chief-Justice always gives, would have been able to achieve a most enviable standing, laying the foundation of her jurisprudence broad and deep. But unfortunately, Judge Ringo was not the man for this. Studying law in a clerk's office, his attention had been directed to the forms of pleas and entries, not to the broad principles of justice. For him a lawsuit was rather a means of settling nice points of special pleading than of adjusting the rights of parties. In his eyes the forms of the law were the essential thing, and substantial justice a matter of minor concern. During his whole official career his object was to seek out new refinements of pleading, and he impressed upon our jurisprudence a degree of technicality which it was never able to cast off until the adoption of the Code. With the greatest desire to do right, he was so wedded to technical forms that in considering them he too often lost sight altogether of the merits of the controversy.

Judge Dickinson was a native of New York. He came to the Territory shortly after its admission, and settled at Batesville

in 1821. In 1823 he was elected to the legislature, and was made by that body prosecuting attorney of his district. He was a member of the constitutional convention of 1836, and of the first State legislature, by which he was elected to the supreme bench.

He was a small, slender man, with dark gray eyes and auburn hair, bright and shrewd, quick to comprehend a case, and a fluent speaker. His judicial opinions are very creditable, — brief, clear, and pointed. He was a man of sound judgment and fair legal training, and had in him something of the spirit of the adventurer.

GEORGE C. WATKINS.

After his term of office expired, he returned to the practice at Batesville. Judge Byers of that place told an anecdote which illustrates the versatility of the man. Byers had sued a client of Dickinson's before a justice of the peace. After the jury was impanelled, Dickinson wanted to interpose a set-off. Byers read a decision of the Supreme Court saying that after the impanelling of the jury the defendant could not insist upon putting in a set-off. Dickinson seized upon the word "insist," and said: "Of course, your honor, we cannot *insist* upon filing the set-off. If we *insisted*, your honor would fine us for contempt of court. We only ask you to allow us to do it, and we leave the matter entirely to you." Of course the worthy Justice allowed it to be filed.

About 1851 Dickinson wandered back to New York, but on account of private troubles left that State and went to Pennsylvania. After remaining there a short time, he removed to New Orleans, and from thence to Texas, where he met a tragic death. Travelling in a buggy, he came to a river, — the Brazos, I believe. It was very much swollen, and the ferryman refused to set him over. Judge Dickinson persisted, and offered the man five dollars. Tempted by the unusual fare, the latter consented; and they started over, but were soon swept away by the current and were drowned.

The most esteemed of the three was Lacy. He was born in Rockingham County, North Carolina, and was a graduate of Chapel Hill College in that State. In 1832 he was appointed to a place on the Arkansas territorial court. He served with Dickinson in the constitutional convention of 1836, and was elected one of the first judges.

He was a man of broad intellect and considerable learning. As a speaker he was fluent and eloquent, with an agreeable diction. In person he was tall, slender, with dark hair, complexion, and eyes. His opinions are among the best to be found in our reports, — clear and comprehensive. His popularity was great, and he commanded the confidence of the bar, whom he attached to himself by his kind and pleasant manners and by the purity of his character.

On the expiration of his first official term he was re-elected without opposition, but in

1845 was compelled by failing health to resign. In search of a more congenial climate, he went to New Orleans, where he died of cholera before he had an opportunity to establish for himself the position to which he was entitled by his character and abilities.

In 1842 one of the famous cases in our State came before the court. On April 2 of that year, the Real Estate Bank, a corporation under the patronage of the State, and one of the numerous fiascos of that age of wildcat banking, was compelled to make an assignment. The consternation throughout the State was unbounded. The assignment was attacked, but was sustained by Judge Lacy in an extended and able opinion, concurred in by Judge Dickinson. (Conway, *ex parte*, 4 Ark. 361.) The Chief-Justice dissented. From every quarter there went up a cry of indignation, and a demand for the impeachment of the two judges. When the legislature met, many of the members were bent upon impeachment; but Mr. Pike, who had drawn the assignment, thwarted them in an adroit way. He had sent copies of the assignment to Judge Story and to Chancellor Kent, and both had replied that the instrument was entirely valid. Copies of their opinions were laid upon the desk of each legislator, and nothing more was heard of the impeachment. The opinion in this case is a very able one, and has had great weight in establishing the doctrine that an insolvent corporation may make an assignment with preferences.

The successor to Judge Dickinson was George W. Paschal, who came to the State from Georgia about 1837, and settled at Van Buren. He brought with him his wife, a full-blooded Cherokee, but a lady of beauty, refinement, and cultivation. In 1842 he was elected a judge of the Supreme Court, but resigned on Aug. 1, 1843, and removed to Texas. There he prepared Paschal's Digest of the Texas Reports, — a meritorious work, which he rendered somewhat ridiculous by saying in the preface that it was more exhaustive than *Lord* Bacon's Abridgment. From Texas he went to Washington City, where he died a few years ago in the enjoyment of a large practice. He was a small, dark man, who looked as if he had some Indian blood in his veins, — nervous, energetic, and laborious, of a rather vain disposition, and a good lawyer; but he did not remain upon the bench long enough to make any great impression upon our judicial history.

William K. Sebastian was appointed to fill the vacancy caused by the resignation of Judge Paschal. He was born in Hickman County, Tennessee, and came to Arkansas in 1835 and settled permanently at Helena. He was prosecuting attorney and circuit judge before his elevation to the supreme bench. He was a rather stout man, of florid complexion, sandy hair and beard, quiet but affable in his manners, of stainless honor and kindly disposition. In 1848, upon the death of Chester Ashley, he was sent to the Senate of the United States, where he remained until the war. His end was sad. He was a sincere Union man. He believed that his highest allegiance was due to the National Government, and yet he could not bring himself to take an active part against his erring friends. When the war began he did not resign, as did all the other Southern senators save Andrew Johnson, but remained a melancholy and helpless spectator of events. Incensed at his passive attitude, the Senate expelled him from the Chamber, — an act of injustice which was solemnly rescinded in 1878. He returned to Helena, and mournfully watched the progress of the war. While his friends were in rebellion against the Government which he loved so well, and while that Government was crushing the State which was equally dear to his soul, his wife and daughter died, and the advancing hostilities drove him from his home. With a broken heart he sought refuge in Memphis, and in the dark hours preceding the close of the war he passed away. He was a good lawyer and a sub-

stantial though not a brilliant man, but was on the bench too short a time to accomplish lasting results.

Judge Lacy was succeeded by Judge Edward Cross, who had been upon the territorial bench. He was a sound lawyer, a man of the highest character, who filled many positions with honor, and who died at a patriarchal age, universally lamented; but his influence upon our jurisprudence was not sufficient to justify a sketch of his long and useful life.

Upon the expiration of Judge Ringo's term in 1840, the legislature elected Thomas Johnson to be Chief-Justice. He was a native of Maryland, and came to Batesville, Ark., in 1832. He was a tall, dark-haired, thin, dry man, of great honesty, but of slight distinction as a lawyer. He was Chief-Justice until 1852, and died at Little Rock in 1877, at an advanced age.

Judge Cross was succeeded by William Conway B., a good man, but of small learning and capacity, who held the place until 1849. What the B. was affixed to his name for I do not know. He used to say that the beginning of his opinions — "William Conway B., J." — looked as if it meant "William Conway, Bad Judge;" and there were those who were sufficiently uncharitable to take the jest in earnest. Some say that it meant Bardstown, in memory of the place he came from; others, that he adopted it to distinguish him from another of the same name. Perhaps the inquiry is not important.

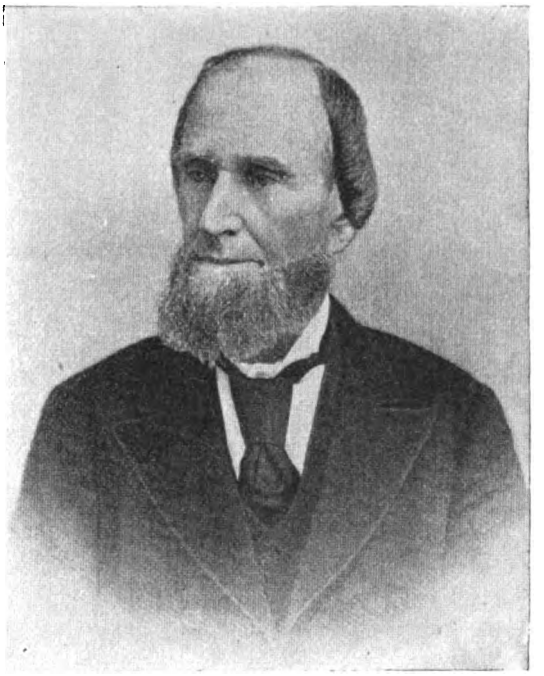
In 1845 William S. Oldham succeeded Judge Lacy. Judge Oldham was born in Franklin County, Tennessee, in 1810, and settled at Fayettville, Ark., in 1835. He was elected to the legislature in 1838 and 1842, and upon Judge Lacy's resignation was elected judge in his stead. In 1848 he resigned to run for Congress, and being defeated, left the State and located at Austin, Texas. There he acquired a high rank at the bar, and was elected to the Confederate Senate. He died at Austin a few years ago.

DAVID WALKER.

Judge Oldham was a man of good ability, an accurate lawyer, and sat upon our bench at a time when his services were much needed. In person he was rather small, dark-haired, well-built, and of affable demeanor.

Upon the resignation of Judge Oldham in 1848, Christopher C. Scott was appointed in his place, and was twice elected, serving until his death in 1859. He was born at Scottsburg, Va., on April 27, 1807. At eleven years of age he was left an orphan, and was brought up by a brother. He graduated at Washington College at the head of his class. Removing to Gainesville, Ala., in 1828, he began the study of the law, but abandoned it for mercantile pursuits. In this venture he soon lost his modest patrimony, and returning to Virginia, studied law in the school at Staunton. Then he went again to Gainesville, and soon became an active practitioner. In 1842 he killed one Smith, a man of some local importance, shooting him with a shotgun

on the streets of Gainesville. Smith had been threatening him, but it was doubtful whether he had proceeded to any overt act. Scott was indicted, and was bitterly prosecuted and warmly defended. He was at last acquitted, and came to Arkansas, locating at Camden. In 1846 he was elected judge of his circuit, — a position which he relinquished to take a seat upon the supreme bench. In November, 1850, he was elected for the term of eight years, and in 1858 re-elected; but in coming from Camden to the capital in January, 1859, he contracted pneumonia, and died on the 20th of that month at the Anthony House, a famous old hotel in Little Rock.



E. H. ENGLISH.

In person Judge Scott was a large man, whose hair had become gray before he died. He possessed a liberal education, and was a cultivated gentleman, pleasant in his manners and popular with the bar. He was upon the bench nearly eleven years, and served with credit to himself and to the State. The besetting sin of our court at that time was the tendency, inherited from Judge Ringo in large measure, to attach more importance to the forms of the law than to its essence. From this tendency Judge Scott was notably free. His judicial style was modelled upon that of Judge Story, to all appearances. He had the same love of sonorous and rounded periods, the same leaning toward broad generalizations; though of course he was not Story's equal. The chief fault of his opinions is their great length, — the natural result of his fluency in writing.

On Nov. 28, 1848, David Walker was elected in the place of Conway B. He was born in what is now Todd County, Kentucky, on the 19th of February, 1806. He was admitted to the bar of that State in 1829, and removed to Arkansas in 1830, settling at Fayetteville. He was a member of the constitutional convention of 1836. He was always an ardent Whig, and in those days the contest between Whigs and Democrats for dominion of the State was extremely close. In 1840 he was elected to the State Senate, where he remained four years. In 1844 he ran for Congress. Recognizing the fact that only one man, Archibald Yell, could defeat him, the Democrats induced Yell to resign the Governorship and enter the race; and Walker soon found that he could not compete with a man who could excel him either as a saint or as a sinner. In 1848, while on a visit to Kentucky, he was without his knowledge elected to the supreme bench by a Democratic legislature. He was naturally astonished at such an honor, and he hesitated to accept the position at the hands of his adversaries, but was persuaded to do so. He remained upon the bench until Dec. 31, 1855, when he resigned.

He was a man of medium height, sturdily built, dark, with strongly marked features. He had enjoyed but slight educational advantages in his youth, but was endowed

with a vigorous and manly intellect, which is apparent in his judicial opinions. He was a dignified, silent, religious man, and of great integrity of purpose.

When the war became imminent, he was earnestly opposed to secession; but after the die was cast, like so many other gallant men, he threw in his fortune with his friends, resolved to sink or swim with them.

In August, 1866, upon the re-organization of the State government, he was elected Chief-Justice, but was removed in 1868 by the reconstructionists.

Again, when in 1874 the yoke of the carpet-baggers had been shaken off, he was elected an associate justice, and served until May 19, 1878, when declining health compelled him to resign. At the time of his third incumbency, age had somewhat impaired the vigor of his faculties; so that to form a proper estimate of his merits, we must turn to his opinions in the earlier reports.

H. F. FAIRCHILD.

In 1852 occurred an important event in the history of our jurisprudence. For the first time a leader of the Little Rock Bar was induced to accept a place upon the bench. The docket had fallen greatly in arrears, and there was a just dissatisfaction with the weakness of many of the opinions. At the earnest solicitation of his professional brethren, George C. Watkins resigned a large and lucrative practice to take the position of Chief-Justice.

He was born at Shelbyville, Ky., on the 25th of November, 1815. When he was six years old his father came to Arkansas, and became one of the first settlers of Little Rock. Judge Watkins received a liberal education, and was a graduate of the law school at Litchfield, Conn., — the first established in the country. Returning to Arkansas in 1837, his abilities were at once recognized; and Chester Ashley, then the head of the bar, invited him to form a partnership with him, — an invitation which was naturally accepted. His rise at the bar was rapid. He was a perfect lawyer, as distinguished from an advocate, — learned in the law, quiet, wary, skilled in forensic fence, never exposing the weak points of his case, and always ready to take advantage of any slip of his adversary, equally a master of technical procedure and of the broad principles of the law. In person he was small, — about five feet five inches in height, thin to the point of extreme emaciation, weighing less than a hundred pounds; but of great though calm energy, and with an extraordinary endurance of the sedentary labor of the profession. He was a man of the most unblemished rectitude, and of stainless professional and private life. Though a shrewd man of the world, who accumulated a large fortune by his practice and by judicious investments, he had in some respects almost the simplicity of a child. Of this a characteristic anecdote is told.

Long after he had been Chief-Justice, he went one Sunday afternoon to visit Mr. Jennings, a brother lawyer. Without his

knowledge Mr. Jennings had moved, and some ladies of the *demi-monde* were living in the house that he had formerly occupied. They told him that Mr. Jennings had left, but invited him to come in. He thanked them, and said that he would sit awhile on the front porch to rest, as he was tired with his long walk. He sat down, and soon they all became interested in his conversation and gathered round him; and there the distinguished jurist sat through the long summer afternoon in pleasant converse, without a suspicion of the character of his new friends, while the citizens who passed looked on in open-mouthed astonishment.

He remained upon the bench only until Dec. 31, 1854, — a little more than two years; but in that time he did a vast deal of labor, made a great impression upon the State's judicial history, and with the help of his two able assistants cleared the docket. At that period our Supreme Court, with Watkins, Scott, and Walker upon the bench, acquired a higher standing than it had ever before possessed. His opinions are admirably written, and have stood the test of time remarkably well, being characterized by a breadth of view that had too often been absent from the decisions of his predecessors in office.

While he was upon the bench, Mr. Curran, his former partner, died, leaving a considerable amount of the old business undisposed of; and he felt compelled to resign in order to discharge the duties which the firm owed to its clients. He resumed the practice of law, which he continued with great success until 1872, when failing health compelled him to seek repose; and he died at St. Louis on the 7th of December, 1872, on his return from Colorado.

As a good example of his judicial style, we may refer to the case of Merrick *v.* Avery, 14 Ark. 370, in which he demonstrated the necessity of the exclusiveness of the admiralty jurisdiction of the Federal courts, more than twelve years before the decision of the United States Supreme Court in The Hine *v.* Trevor, 4 Wall. 554, and with a force of reasoning, a breadth of view, and a wealth of learning that is truly admirable. He was a man who, had he remained longer upon the bench, would have established for himself a great name.

Judge Watkins was succeeded by Elbert H. English, a man destined to have a great influence on the jurisprudence of the State. He was a rather small man, with a long nose and slight claim to personal beauty, who made no pretension to brilliancy, but was one of the best judges that we ever had. In his opinions there will be found an accurate though sometimes too detailed statement of the facts, a careful review of the authorities, and a conclusion coinciding with their weight. He was not especially technical, but he was very conservative, and when technicalities had become imbedded in the law, he enforced them. With him the rule of *stare decisis* was one that was not to be shaken. His aim was to declare the law as it was, not as it should have been. The duty of supplying its imperfections, of mitigating its hardships, he left to the legislature, where it properly belongs. He did not strive to be original. He is often reproached for his conservative disposition; but in a judge of an appellate court the charge implies a compliment. The worst evil of the law is uncertainty. When men who act upon a decision of the highest court are deprived of their fortune by a reversal of that decision, it is a trifling with vested rights that is little short of robbery. Of this fault Judge English was never guilty. With him men were safe in acting upon the former rulings of the court, or upon the general current of the authorities, without the fear of being ruined by some wild vagary or judicial legislation. He enabled men to rest in peace beneath their own vine and fig-tree, — a great merit in a judge. In only one case that I now remember — Clayton *v.* Johnson, 36 Ark. 406, a case in reference to assignments for the benefit of creditors — did he clearly mistake the effect of the authorities.

He was born in Madison County, Alabama, on the 6th of March, 1816. He went through an academy at Athens in that State, and after some hesitation about a calling in life, opened a shop as a silversmith, — an episode in his life of which he was always strangely ashamed, and to which he never referred. Then he studied medicine, but finally settled upon the law, and was admitted to the bar at Athens in 1839, and served two terms in the Alabama legislature. In 1844 he came to Little Rock and opened an office, and in a few months was made reporter of the Supreme Court.

THOMAS B. HANLEY.

Mr. Pike, in reporting the first volumes, had adopted the plan, then barely coming into use, of calling them by the name of the State, — a great and necessary reform. Judge English returned to the old system, and called his eight volumes "English's Reports," — a change which was not approved by the profession, and which was not destined to endure; for the volumes are now always cited by their serial numbers in the Arkansas Reports.

In 1846 he revised the statutes of the State by appointment from the legislature, and in 1848 was a candidate for the position upon the supreme bench to which Judge Walker was elected. In 1854, upon the resignation of Judge Watkins, he was elected Chief-Justice, was re-elected in 1860, and held the place during the war.

After the war he returned to the practice of his profession until, upon the termination of the reconstruction period in 1874, he was elected Chief-Justice by the people. Upon the expiration of his official term in 1882, he was again elected, but died at Asheville, N. C., on the 1st of September, 1884.

Up to the time of his death, age had not in any degree impaired the vigor of his mind or his capacity for labor. He stood remarkably well the confining and monotonous work of an appellate judge. He always read the briefs of lawyers with great care, and examined all the authorities which they cited. He was not only careful to get the law right, but to comprehend accurately the facts of the case; not concurring in the sentiment too often felt by judges, that the hardships of the individual litigant are of small importance so that the integrity of the law is preserved. In his manners he was extremely courteous and affable, and enjoyed a deserved popularity throughout the State. He was somewhat vain, but it was an amiable vanity that never gave offence. He spoke fluently, and in his speeches at the bar was inclined to be flowery and sentimental, — qualities rigidly excluded from his opinions. In speaking, he would plant his feet together, and rock back and forth on his heels and toes in a very characteristic manner.

They used to tell an anecdote about him when at the bar, that annoyed him very much. In the old days the lawyers used to have to ride long distances on horseback, and practise in court-rooms that offered few

comforts. Judge English had ridden down to Rockport to attend court. An Irishman named Bartlett was brought in, charged with some offence. He had no money to employ counsel, and the presiding judge asked if he wanted counsel assigned. "Who will you app'int, Jedge?" asked the fellow. "There are the lawyers, — you can make your own choice," replied the judge. The lawyers were all seated on a wooden bench inside the bar. The fellow began at one end, peering into all their faces, — for he was very short-sighted. At length he came to Judge English, the last in the row. He stuck his face almost against the judge's, who straightened up with offended dignity; but the fellow scrutinized him for a long time, and then, turning to the court, said: "Jedge, I b'lieve I 'll spake to the case meself."

In 1859 and 1860 several changes occurred. Judge Hanley resigned, and Felix J. Batson was elected in his place, but resigned shortly afterwards, and Freeman W. Compton was chosen to fill the vacancy. Judge Scott died, and Henry M. Rector was elected in his stead, but resigned to take the office of Governor, and Hulburt F. Fairchild was chosen to succeed him.

As Judge Compton and Governor Rector are still alive, we forbear to speak of them.

Judge Batson displayed commendable modesty. He was a man of marked ability as a lawyer, though of little cultivation; but after a few weeks' conscientious trial, he reached the conclusion that he was unfit for service upon an appellate bench, and promptly resigned. What a benefactor to his country he would be if his example were to become contagious!

Judge Fairchild was one of the finest characters that we have had upon our bench. He was born at New Lisbon, N. Y., on Oct. 25, 1817, and was educated at Williams College, Massachusetts. In 1838 he went to Louisville, Ky., studied law, and was admitted to the bar in 1841. In December of that year he came to Arkansas and located at Pocahontas. There he practised law for four years, when he removed to Batesville. He rapidly advanced in his profession, and when in 1855 the Pulaski Chancery Court was established for the purpose of dealing with the innumerable controversies arising out of the failure of the Real Estate Bank, the recognition of his capacity was such that the Democratic Governor chose him, though a Whig, for the office of Chancellor. He accepted and discharged the duties of the place with great distinction until 1860, when he was elevated to the supreme bench. The advent of the war cut short a judicial career which promised to be one of great eminence. During the Rebellion he adhered to the Southern cause; but sadly, for his mind was too clear for him to be blind to the error of secession.

In 1864 he removed to St. Louis, but under what was known as the Drake Constitution he was disqualified from practising law, and in 1865 took a voyage to Europe for business and pleasure. Returning, he settled at Memphis, and in January, 1866, started up White River to Batesville; but on his way he fell sick at Jacksonport, and there he died on the 3d of February.

In person he was of medium height, strongly built, with black hair and beard. He was a great student and a tireless worker, burning his lamp every night until long past midnight; and his studies were by no means confined to the law. He was pleasant in his manners, and of a kind and gentle disposition, but reserved rather than expansive. His mind was not oratorical or imaginative, but was clear, calm, analytical, and strong. By the even balance of his intellect he was peculiarly suited to a place upon the bench. The opinions which he has left in our reports are models of strength and accuracy; and had he been permitted to hold the position longer, he would have made for himself a great reputation. As it is, he will not be forgotten by the bar of his State, who feel, when they

find one of his opinions, that they have found the law.

Judge Walker resigned on Dec. 31, 1855, just one year after Judge Watkins; and Thomas B. Hanley was appointed in his place, and served until 1859.

Judge Hanley was born at Nicholasville, Ky., on June 9, 1812, and removed to Arkansas in 1833, settling at Helena, where he resided until his death. Always active in politics, and a strong Democrat, few men in the State have filled more official positions. He was a member of both branches of the legislature, and was a county and probate, a circuit, and a supreme judge. At the outbreak of the war he sided with the South, and was a member of the Confederate Congress. After the war he returned to the practice, and continued it until his death on the 8th of June, 1880.

ALBERT PIKE.

In person he was of medium height, of dark complexion, with black hair and closely cropped beard. His character was vigorous and aggressive, so that he had devoted friends and bitter enemies. He was a good lawyer, and a student not only of law but of general literature. At the bar he was successful, and he was a forcible speaker; but the numerous public positions which he held necessarily interfered with the growth of his practice.

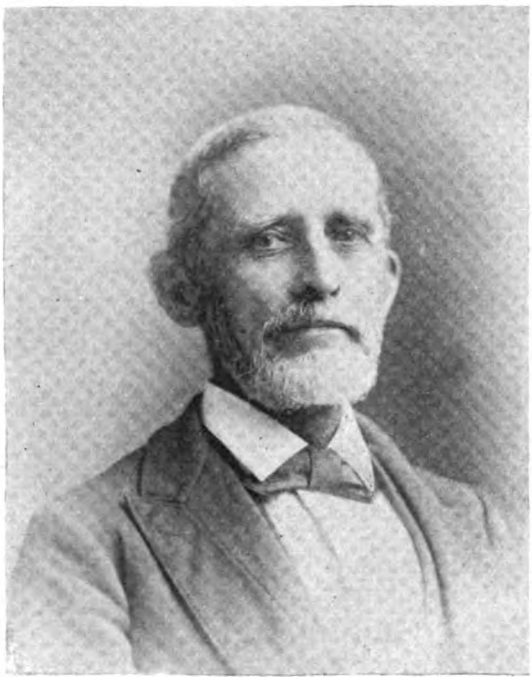
During the war Albert Pike was for a while upon our bench; but as the doings of the court during the Rebellion were not recognized, only such of his opinions as were afterward adopted by the court have been published. And yet he is so important a figure in our State's history, and by his labors at the bar has had so great an influence upon the development of our jurisprudence that it would not be proper to pass him by.

He was born in Boston, Mass., on Dec. 29, 1809. His parents were poor, and although he was examined for admission to Harvard, he was not able to enter because the tuition of two years was demanded in advance. From 1825 to 1831 he taught school at various places in Massachusetts, when he wandered out West, and went with a trading-party from St. Louis to Santa Fé, — at that time a most hazardous journey through a wilderness peopled by Indians. He came back across the Staked Plains and through the Indian Territory to Fort Smith, Ark. In 1833 he opened a school a short way below Van Buren.

At that time party politics in Arkansas were intensely bitter. The Territory was divided between the Conway party, or Democrats, and the Crittenden party, or Whigs; and the excitement was so high that bloodshed was frequent, — particularly after Mr. Crittenden in 1827 had killed Henry W. Conway, a brilliant young man and then the leader of the Conway party, in a duel on an island in the Mississippi, near the mouth of White River. Pike was a Whig, and published in the Whig organ at Little Rock — the "Advocate" — some articles of such

force that the attention of every one was attracted. Finding out who the author was, Mr. Crittenden sought him out in his little country school-room, and he was induced to come to Little Rock and assist in editing the "Advocate." There he began to study law, and was admitted to the bar by Judge Lacy in October, 1834, and soon took a high rank. When the Territory became a State, the first Revised Statutes were passed by the legislature, — a work which for brevity, clearness, and consistency has never since had a rival among us, and has had few superiors anywhere. It is said that Pike had much to do with the preparation of the statutes which it embodies. He prepared the index and notes.

He went to the Mexican War, and was present at the battle of Buena Vista. Upon the subject of the battle he wrote a beautiful poem, which used to be in many of the school readers.



LAFAYETTE GREGG.

After his return Pike criticised the military career of Governor Roane in Mexico, and was challenged by Roane. They met on a sand-bar just inside the Indian Territory, above Fort Smith. Both behaved with courage, Pike with notable coolness and indifference. Two shots were exchanged without effect, and a reconciliation was then effected by the seconds.

In 1853 he removed to New Orleans, having prepared himself for the change by a diligent study of Roman law; but he was compelled to spend so much of his time in Washington City under various professional engagements, that he never acquired much of a foothold at the bar there.

In 1857 he returned to Arkansas, and continued the practice until the war; when, like so many other Northern men who had come South, he espoused the Southern cause with an ardor surpassing that of the natives. He had great influence with the Indians, and in the Indian Territory he raised quite a force of troops. But he could never make them efficient soldiers; the white man's style of fighting was not theirs.

For a while he was upon the bench, and his few opinions were marked by his customary power. They are to be found in 24 Arkansas, having been adopted by the court after the war.

When the war was over he practised law for a time in Memphis, and then removed to Alexandria, Va., in 1868, and to Washington City in 1870, where he resided until his death on the second day of April, 1891.

He was a man of the most varied and extensive culture. Not only was he an accomplished common-lawyer, but he devoted a great deal of time to the Roman law, and wrote a work of great learning, in three large volumes, upon its maxims. This remains in manuscript in the United States Supreme Court library, being too abstruse a subject for profitable publication. He also made a translation of the Zend Avesta and of the Rig Veda, with annotations, in twenty-two large volumes, which are still in manu-

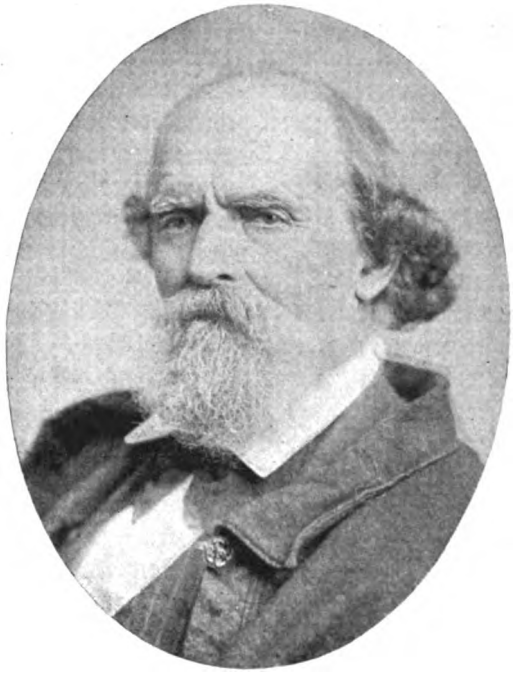
script, but which would be a great boon to scholars if published.

He was also an accomplished poet. Many of his verses are of great merit. He had a number of them printed, but only for private distribution among his friends. He devoted a great deal of attention to Masonry, and at the time of his death he had attained the highest rank possible in that order.

During the war the loyal people of the State adopted the Constitution of 1864; and under it T. D. W. Yonley, Elisha Baxter, and C. A. Harper were the first judges. They were in office but a short time, and produced no great impression.

In August, 1866, David Walker, F. W. Compton, and John J. Clendenin were elected judges, but were soon displaced by the reconstruction Constitution of 1868.

For six years, from 1868 to 1874, the carpet-baggers were in office. Of the disgraces of that time it is needless to speak; they have passed into history. Upon the supreme bench there were many judges, — a few of them conscientious and upright men, the majority political adventurers. And yet even this evil time had its advantage, — it introduced the Code of Civil Procedure. The leaders of the Arkansas Bar were all opposed to its introduction; the common-law system of pleading, which they had mastered by years of study, was a tremendous weapon in their hands. Those who had not attained proficiency in it found themselves involved in a hopeless labyrinth, and were soon caught in the toils of their wily adversaries. They were loath to give up an accomplishment which it had taken years to acquire, and which left them the undisputed masters of the field; and had it not been for the reconstructionists, who in their invasion brought with them the Civil Code, it is probable that we should still be struggling with the intricacies of special pleading, carried to an excess of technicality unknown even to Chitty.



JOHN R. EAKIN.

Of the reconstruction judges, two of the best, W. W. Wilshire and Lafayette Gregg, are now dead; and of them we can speak.

Judge Wilshire was born in Gallatin County, Illinois, on the 8th of September, 1830. In 1852 he went to California with the gold-hunters, but returned in 1855 with more experience than gold. He began studying law in 1859. In 1862 he entered the Union army, and was made a major. After the war he settled at Little Rock, and formed a partnership with Judge English. In July, 1867, he was made Solicitor-General of the State, and in 1868 he was made Chief-Justice. He resigned on Feb. 16, 1871, and returned to the practice. In 1872 he ran for Congress, and was admitted, but unseated in favor of T. M. Gunter, the Democratic candidate, when his official term was about to expire.

In 1874, when the people entered upon the death-struggle with the carpet-bag *régime*, Judge Wilshire, and Judge Caldwell of the Federal court, though ardent Republicans,

threw all their energies into the cause of the people. The position of both gentlemen, and their unquestionable allegiance to the Republican party, gave to their testimony against the carpet-bag iniquities a great weight; and the value of their services to the State at that critical time cannot be overestimated. In gratitude for his efforts, the Democrats indorsed Judge Wilshire for Congress in 1876, and he was elected without substantial opposition. After the expiration of his official term he entered upon the practice of his profession at Washington City, where he died a few years ago.

Judge Wilshire was not a great lawyer, but he was a man of sterling honesty, and he sat upon the bench at a time when that quality was not a superfluity. In person he was rather tall, with blond hair and beard, of agreeable manners and kindly disposition.

Judge Gregg was born near Decatur, in Lawrence County, Alabama, on the 6th day of February, 1825, and moved in 1835 with his father to Washington County, Arkansas, where he grew up on a farm near Fayetteville. He was educated by home study and in the schools of the country, completing his course at the Ozark Institute, then a popular high-school located three miles from where the State University now stands. In 1852 he was admitted to the bar. In 1854 he was elected to the State legislature. He was elected to the office of prosecuting attorney in 1856, and was re-elected in 1858 and in 1860.

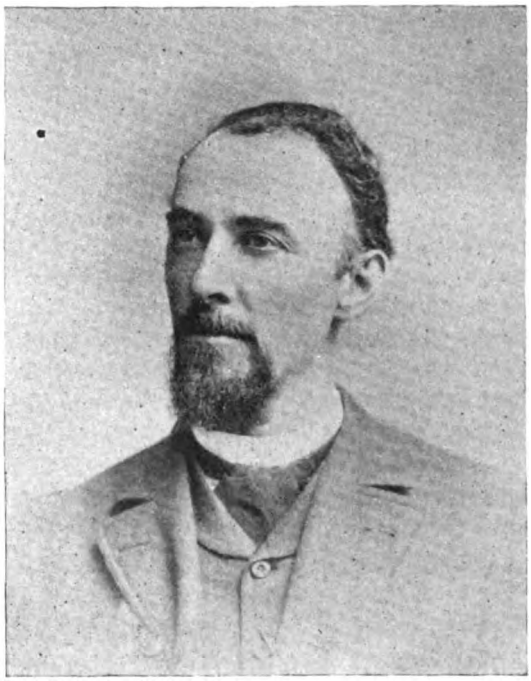
Being in feeble health from protracted dyspepsia, he did not enter the army at the breaking out of the war, but later joined the Union service, and was made Colonel of the Fourth Regiment of Arkansas Federal Cavalry, which he commanded until the restoration of peace. Immediately upon the surrender of the Confederate forces, he applied to have his regiment mustered out. In July, 1865, he opened his law office in a cabin which he placed on the lot where his former office had been burned. In 1867 he was appointed State Chancellor, and held that court at the capital for about one year, when he was elected a judge of the Supreme Court, and occupied that bench until 1874. He then declined to accept another term, though strongly solicited by attorneys without regard to politics. He returned to his former home and resumed the practice of law, which he kept up with success until his death on Nov. 1, 1891.

In person he was rather small and slender, with light hair and mustache. He was of a very kindly and sociable disposition, which was reflected in his manners; and at a time when party feeling was intensely bitter, he preserved the respect and confidence of all by the rectitude of his course. As a judge he was careful and accurate, and did a disproportionate part of the work that was done during his official term.

After the overthrow of the carpet-baggers, the Constitution of 1874 was adopted, and Judge English, Judge Walker, and William M. Harrison were elected judges. Of the first two we have already spoken; the last is still living. On May 19, 1878, Judge Walker resigned, and Judge Jesse Turner was appointed in his stead. As he too is alive, we refrain from speaking of him.

In September, 1878, John R. Eakin was elected to succeed Judge Turner. He was born at Shelbyville, Tenn., on Feb. 14, 1822. He graduated at the Nashville University in 1840; and after studying law for three years, one of which was spent at Yale, he was admitted to the bar. In 1849 his father died, leaving him a large estate. Handsome in person, agreeable in manners, fond of society and qualified to shine in it, he enjoyed life to its utmost, careless of the diminution of his patrimony. In 1857 he removed to Washington, Ark., bringing with him a fortune considerably impaired. Washington, though a small place, was in those days one of great gayety and of no little brilliancy, where the rich planters of the Red River bottoms gathered with their families for business and pleasure; and soon Eakin was one of the most popular in its circle.

He strongly opposed secession, but when it was decreed, accepted it as an accomplished fact. The war destroyed the remainder of his once handsome estate, and after its termination he returned to the practice, editing also the "Washington Telegraph," — a paper which he had conducted throughout the war. In 1874 he was elected State Chancellor, — a place which he retained until his election to the supreme bench in 1878. He died on Sept. 3, 1885, while still in office.



MONTI H. SANDELS.

In person he was of middle height, and of handsome and agreeable features. In youth he was something of a dandy, but in later years became very careless of his dress. During the war and the dark years which succeeded, he fell into the habit of drinking to excess; but upon his election to the bench he entirely reformed. He was of a most kind and genial disposition, fond of the society of his friends and of cultivated ladies, and with an unbounded charity for the weaknesses of others. His kindness of heart was one of his greatest faults as a judge. He could not conceive that any one, especially any one that he had ever known, could be so wicked as to commit an intentional fraud; and under his administration that important branch of equity jurisprudence fell into abeyance.

As a Christian philosopher he has never had a superior. Much came to sadden his old age. From wealth he was reduced to poverty. Many domestic misfortunes came upon him; and at length the wife of his youth, the mother of his children, — a noble woman, who had sustained him in adversity and rejoiced with him in the hours of happiness, — was taken away. He survived her only a few months; but he never murmured, he was never soured. He wrapped his old weather-stained cloak about him with a quiet, gentle resignation that seemed to say, "The Lord gave, and the Lord hath taken away; blessed be the name of the Lord," and went about the discharge of his duties, never saying a harsh word to any man, never entertaining an uncharitable thought.

As a judge he was reactionary. His favorite author was Scott, his favorite period of study the Middle Ages. He thought that in the old common law there were great virtues, and a case in the Year-Books was for him a higher authority than one in Wallace or Otto. His peculiar affection was for equity. A fluent and agreeable writer, he delighted to get hold of huge chancery transcripts, and to discourse at length of the general principles of equity jurisprudence. He rarely cited an authority, saying that they looked like cockleburs in an opinion. The value of his services in chancery cases was much impaired by his amiable incapacity to believe in fraud, which resulted sometimes in the escape of guilty administrators, guardians, and other trustees.

The year 1882 was rendered notable in

the history of the court by the accession to the bench of William W. Smith, who succeeded Judge Harrison. Since the reconstruction era the judges had been men advanced in years, whose thoughts were turned backward to the days of their earlier manhood. But in the mean time great changes had taken place. The war had supervened, destroying old institutions and creating new. Railroads and telegraphs had been built, not only bringing with them new questions, but revolutionizing the methods of business. A new age had come, and required a judge to comprehend it and to expound its needs. Such a one was found in Judge Smith.

STERLING R. COCKRILL.

He was born in Abbeville District, South Carolina, on the 12th of October, 1838, and was a graduate of Columbia College in that State. Leaving the college in 1858, he taught Latin and Greek in a school at Charleston until a short time before the war, when he removed to Monroe County, Arkansas, and started in life as a planter.

A true South Carolinian, he entered the army when the war broke out, and served until he was captured at Port Hudson, attaining the grade of a captain. While a prisoner at Johnson's Island, he devoted his time to studying law. The war destroyed the value of his lands; and upon his return to Monroe County, he taught school, continuing the study of the law in the mean time. In May, 1867, he was admitted to the bar, and became the partner of Simon P. Hughes, — now one of the judges of the court, — practising law at Clarendon, Ark. In 1877 he removed to Helena. He took his seat upon the bench on Nov. 1, 1882, and died of consumption, brought on by too close attention to his official duties, on the 18th of December, 1888.

In person he was tall, slender, and well-favored, with iron-gray hair, mustache, and imperial. His life was distinguished by the most absolute purity of motives and conduct. His demeanor was kind and affable, his conversation agreeable, and enlivened by a sly humor devoid of malice. With great suavity of manner he combined the most unalterable firmness in the discharge of his duty. He was one of the most rapid workers that we have ever had upon the bench, disposing of a vast amount of business. His opinions are models, — clear, brief, and pointed, stating the facts with great conciseness and the law with extreme precision. He was particularly alive to the importance of the new questions which had arisen out of changed conditions, and met them in a progressive and enlightened spirit. He brought to the bench a new vigor, a capacity to comprehend, and a readiness to accept the altered circumstances of the Commonwealth; and in his untimely death the State suffered a loss which it has never ceased to regret.

Upon the death of Judge English, Sterling R. Cockrill was elected Chief-Justice, and still occupies the place. Upon Judge Eakin's

death, B. B. Battle, who is still upon the bench, was chosen in his stead.

After the death of Judge Smith, the legislature increased the number of judges to five; and on April 2, 1889, Monti H. Sandels, Wilson E. Hemingway, and Simon P. Hughes were elected to fill the vacancies. The last two are still in office. Judge Sandels, of whom much was expected, died on the 12th of November, 1890. He was a man of great mental strength. He was born in Maury County, Tennessee, on the 13th day of August, 1851. When he was eight years old, his father removed to Arkansas and settled at Fort Smith. The old gentleman was an Episcopal clergyman, and himself conducted his son's education. In 1872 he was admitted to the bar, and rapidly acquired a large and lucrative practice, which at the age of thirty-eight he resigned to accept a seat upon the bench, — moved thereto in some measure by a bronchial affection which made public speaking difficult. The strength of his intellect, and his rapid and firm grasp of legal questions were very remarkable. He possessed in a high degree what is called a legal mind, — a capacity to understand correctly the reasons of the law, and to perceive clearly the real point upon which the case turns. He has left us few opinions, but those are characterized by a marked force and by a striking originality in his methods of expression.

In person he was tall, rather slender, dark, with black and curling hair growing rather thin about a broad, rounded brow. He was deliberate in speech, and stoical as an Indian, — and indeed was sometimes jestingly called an Indian. He loved his friends with unusual devotion, and was strong in his hate as in his love. His death was a great blow to the hopes of the bar.

On Feb. 16, 1891, W. W. Mansfield was elected to succeed Judge Sandels. Our court is now composed of S. R. Cockrill, Chief-Justice, and of B. B. Battle, Wilson E. Hemingway, Simon P. Hughes, and W. W. Mansfield, Associate Justices. It is widely different in its temper from the court that met on the 24th of January, 1837. Then technicalities were esteemed the life of the law. Days would be consumed over a nice point of special pleading. Whether the action should be trespass or trespass on the case, whether an *absque hoc* was in proper form, whether a plea should be in abatement or in bar, were then the vital issues. All that has passed away. It is probable that no member now upon the bench could draw a declaration in assumpsit without having recourse to Chitty. The old trumpery of the common law, with its meaningless forms and labyrinthine technicalities, has been discarded forever. The code has been accepted; and a more liberal court in matters of pleading, one which pays less attention to the outward forms of the law, or strives harder to reach the principles of right and justice which are its eternal essence, would not easily be found.

In looking back over the history of the Arkansas Supreme Court, its most marked characteristic is its conservative soundness. It has followed with surprisingly few departures the general growth of the country's jurisprudence; so that it can almost always be said that the law on any point is in Arkansas as it is in a majority of the States. The court has never been strikingly original; but adhering to precedent with unusual fidelity, it has been remarkably free from those vagaries, those "wild-cat" decisions, which are so trying to the patience of the bar and so injurious to public interests.

JOHN K. PORTER.

By Grosvenor P. Lowrey.

II.

JUDGE PORTER was appointed by Governor Fenton in 1865 to the Bench of the Court of Appeals, to fill the vacancy caused by the death of Judge William W. Wright. The offer of this place was promptly accepted, since it opened a way to a severance of existing partnership relations, which he had for some time contemplated. The appointment had no political significance or consequence.

I have heard it said of Judge Porter that he was too much of an advocate to be a good judge. That judgment was not well considered. A perusal of his opinions will, I think, show that as a judge he has had no superior on the bench in this State, and few peers. His mental constitution and his moral and mental vigor forbade him to dally with a question when he once saw its solution clearly; and he always did see it clearly before he began to write. In consulting his judicial writings, the reader will not find it necessary to struggle painfully through pages of balanced propositions, now guessing right and now guessing wrong, as to what the eventual judgment is to be. It is always manifest from the outset what is to be the outcome, and space is occupied solely in announcing reasons for the foreseen conclusion. This uncompromising certainty of expression does not hide from the intelligent reader the clear and gentle light of judgment which shines through it all. A certain quality in his opinions does show that on the bench as at the bar, sophistry received his prompt condemnation, and sometimes assurance of his scorn, — and that may to some temperaments seem unjudicial.

Turning by chance to the Reports, I find Herrick *v.* Van Santvoordt, 34 N. Y., a good example of this. The opinion begins by saying: —

> "The defendant Van Santvoordt was not a party to the contract with the proprietors of the Camden, and he did not navigate the steamboat by which that vessel was towed. He neither owned nor chartered the Cayuga, nor did he take any part, as agent or otherwise, in chartering it. He was held liable on the sole ground that he was a stockholder, etc. . . . To connect the defendant with the liability, the court below found it necessary to hold, in substance: (1) That there *was* such a corporation as the Steam Navigation Company; to the end that he might be bound, as a shareholder, by the corporate acts of its officers. (2) That there was *no* such corporation; to the end that he might be held responsible as a partner for debts contracted, and for torts committed by other persons assuming to act in its name."

Perhaps the judge who was overruled in that case may have thought Porter had too much the habit of an advocate.

I have space to refer to only one other opinion, which has always seemed to me to be a model of judicial decision, the opinion in the case of People *v.* Roper, 35 N. Y. 631. Upon this opinion I am willing to rest a claim for Judge Porter's judicial eminence. That judgment seems conceived in the spirit of loftiest statesmanship, applied to a minor situation in political affairs, and is expressed with impressive dignity and a persuasive eloquence, which are alike fitting to great and small occasions when arising under the administration of a scheme of free government.

I was before Judge Porter in his magisterial capacity only once. That was for the argument of the case of Hoffman *v.* Ætna Insurance Company, reported 32 N. Y. 405. George C. Barrett had been counsel upon

the other side, but did not take part in the argument in the Court of Appeals, having in the mean time been elevated to the Bench of the Supreme Court of the State. He is a man, as all who know him will agree, of very clear, positive, and conscientious opinions. After Judge Barrett had read the opinion of Judge Porter overruling the views for which he had as counsel contended, he met me and said that he had never felt more assured of being right in any case, but that for the first time in his life he had been completely convinced of error, by Judge Porter's masterly treatment of the case. The mention of Judge Barrett's name recalls an amusing witticism by him several years later, after Judge Porter had been for some time at the bar in New York, often appearing before Judge Barrett. He declared it to be his opinion that Porter "was capable of trying to draw tears from a Master in Chancery on a partnership accounting."

The practical character of Porter's advice to clients may be seen from that which he once gave to Governor Fenton, who was for many years an object of attentions from the press which he doubtless thought to be undeserved, and knew to be unpleasant. He consulted Porter as to a particularly offensive personal attack. Porter deeply sympathized with him; declared it a public duty to punish such abuses of the freedom of the press; said that a line must be drawn at which forbearance should cease; and, that line being fixed and overpassed, gave it as his opinion that the sufferer had but one course left to pursue, — which was "to pretend as hard as possible *not to have seen the articles.*"

Judge Porter defended a good many libel suits, but I doubt if he ever advised any one to seek redress at law for that kind of injury.

Our partnership went into effect in 1868, Judge Porter having resigned late in 1867; and was composed of John K. Porter, George Wales Soren, Charles Francis Stone, and myself.

Porter was immediately on his arrival in New York in receipt of retainers in the very important Erie litigations and other important suits then pending. From the first week of his life in New York, his professional employment was constant, and sometimes more engrossing than was reasonable either to client or counsel. I remember the dismay with which he came to me one morning, exhibiting his diary for the day, which contained seven or eight peremptory engagements in different courts for the same hour. I was able to comfort him by leaves from my own experience; and as it happened, no one of the cases set down peremptorily for that day came on for many days afterwards. After that, whenever Judge Porter found his services positively promised in more than five cases at one time, it was his habit to consider himself free to go a-fishing all that day.

He was especially sought after in cases of importance or difficulty, whether they were jury cases or at the bar of the court. To enumerate the important litigations in which during the next fifteen years he took an important and often controlling part, much less to outline that part, would be impracticable in any space less than a volume. An epidemic of railway litigation broke out about that time, as the more or less direct result of new ways of stealing railroads which had been found out by ingenious and energetic new operators. These new ways of stealing naturally led to new forms of litigation about the thing stolen and the manner of the theft, — or what might be called the etiquette of the new art. I have said above that Judge Porter always believed his clients to be right. It was a natural emotion which resulted in a natural conviction. This trait was sometimes put to severe tests in those days. He was employed for the parties then in the management of the Erie Railway Company, who found it convenient about that time to migrate to Jersey City, a step which they afterwards realized (when they came to know the capacity of certain members of the bench to

sympathize with roguery, and — just for the fun of the thing! — to thwart and delay all measures for its punishment) was unnecessary. Judge Porter, with several other members of the bar, was called to Taylor's Hotel, in Jersey City, to advise upon critical matters of law and tactics. On one of these visits he undertook to persuade the late Mr. —— —— to adopt a course which he thought the manly and right one. In recounting to me what he said, he repeated, "It is unfit that the reputation and character of —— —— should be threatened by the appearance of," etc. I asked Judge Porter what he had referred to in speaking of the reputation and character of —— ——. He looked at me in a startled way, and there came across his face an expression which indicated that for the first time it had dawned upon him that, as the basis of an appeal for right action, his client was lacking in the elements upon which his counsel relied, and would feel about as much pride in "reputation" — as decent people view it — as a tinker in a leaky kettle which he has no motive for mending. There was something pathetic in the situation. The clear-headed, eagle-eyed, resolute, and perfectly honest lawyer was without a word led to realize that he was advising a knave, to whom any appeal which honor would permit the lawyer to make would be fruitless. Judge Porter did not very long continue the adviser of that set of men. Perhaps he did not altogether suit them. It is certain that they did not at all suit him.

He construed the duty of counsel to accept service very strictly, and would have regarded it a most unworthy and impertinent thing in a lawyer to determine in advance and against him the guilt of an accused person. His view of the part assigned in ours and the English system to counsel who represent others in court required him in almost every case to accept and not to decline professional employment.

These principles were again tried when he was called upon by the representatives of Messrs. Tweed, Ingersoll, and others, indicted in 1870, for various acts of fraud and corruption in municipal affairs, to assume the responsible control of their defence. When he evinced some indisposition he was asked to name his own retaining fee, and at a second interview it was intimated to him that the accused would regard $50,000 as appropriate. If there was anything in this world Porter hated, it was a man like Tweed, who betrayed public trusts. He realized that men who are dishonest in matters of public trust are more dangerous than ordinary criminals; and to him they were a thousand times more obnoxious and hateful. He felt it his duty to communicate the appeal which had been made to him to his partners, after which it was, in strict accordance with his own ideas, promptly and peremptorily rejected.

In the case of Tilton against Beecher, he engaged in the defence of Henry Ward Beecher with the most hearty zeal, upheld by a belief in the innocence as well as the nobility and purity of character of his client, which was as positive and to him as comforting as his belief in his religion. He defended with equal zeal and the same success General Babcock, private secretary of General Grant, who was indicted and tried at St. Louis for complicity in what was called the whiskey frauds. In the course of the trial, political friends of General Grant came to Judge Porter on one or two occasions, and excitedly remonstrated against the line of defence which he had taken, saying that it "implicated the President." Judge Porter was indisposed to render any account of his actions to casual strangers, and contented himself with saying that he had but one client, — General Babcock, — and that his sole aim and expectation was to acquit *him*. The jury was largely composed of ex-Confederate officers and soldiers; and in his address to them Judge Porter told them he had been warned to tread lightly upon certain parts of the case, lest the reputation of General Grant should be drawn within the con-

sequences of their possible verdict. But he said that he knew them for soldiers, who had fought four years against General Grant, and that he was convinced that in no tribunal could the reputation of that great soldier and honest man be more safe than in the case of a jury composed of his late opponents in war. He told me that after the verdict, which was an acquittal, five of the jury came to him and said, "We thank you for understanding us right. We fought against that man and fought hard, but nobody need take the trouble to persuade us that he is a perfectly honest man and a good patriot. We *know* it."

The elevated railways which at present distinguish the city of New York have their foundation built, as I might say, in the sweat and blood of John K. Porter. Our firm were attorneys for the Gilbert Elevated, afterwards the Metropolitan, and afterwards the Manhattan Railway Company. The proceedings which surrounded the beginning of these enterprises were carried on under great difficulties, and at times these difficulties seemed too great to be overcome. It was not only by triumph in the courts, but by advice given in his office and by labors far surpassing the ordinary labors of counsel, that a clean, substantial, unimpeachable legal basis was laid, on which the structures and franchises which they embody and represent can be forever made useful to this community. A volume might with profit and instruction be made upon the inside and outside history of the elevated railroads litigations, and much of it would tend to encourage professional men to persist, even in the face of apparent disaster, where the object is a good and useful one.

Judge Porter was employed in many important will cases, that being a branch of the law in which he had special facility. He was also engaged with me in a number of cases of importance for the Western Union Telegraph Company, for which during fifteen years we were the general counsel. These litigations often had to do with the building up of the colossal success which that company has attained.

The last case in which he appeared was the prosecution of Charles J. Guiteau, indicted in the District of Columbia for the assassination of President Garfield. When he closed his address to the jury in that strange and unprecedented case, he pronounced the last word which he was ever to speak in a court of justice. It was against the wishes of his partners that he engaged in that service. In fact, in the autumn of 1881, we were together in Paris, where I had a very grave conversation with him on the subject of his health, which had shown signs of breaking. I knew that when he should reach home there would immediately follow the customary applications by attorneys to accept briefs; and representing the wishes of his family and his partners, I urged him to decline all professional employment for a year, to take rest, and, if possible, recreation; and this he seemed to promise. He returned first; and when I arrived I found that President Arthur had sent for him, and had made to him a personal appeal, based upon the peculiar circumstances of the case, to assume the responsible direction of the prosecution of the murderer of the late President.

While this paper was being written, I learned from Mr. William Allen Butler a fact which I believe was not known to Judge Porter, and which would in part account for the urgency which was used to induce him to take part in the case. Mr. Butler tells me that he was on a visit to the White House during the trial, when President Arthur told him of his first knowledge of Judge Porter. It seems that young Arthur, while still a student, chanced to be at Ballston Spa while the Circuit Court was in session, and a trial in progress in which Porter was of counsel. He did not know Porter, and, so far as I am aware, was never acquainted with him until they met in respect to the Guiteau case. The result of that Saratoga County trial, however, was

that young Arthur resolved that if he was ever in trouble, or needed the services of a lawyer in a matter of great importance, he would not fail to obtain those of the counsel whom he so much admired, if they were to be had. It was under the influence of this recollection that he called in Judge Porter.

The mephitic air of the court-room, the prolonged and responsible work, and the anxiety of the case completed what years of intense labor and advancing disease had begun. He confided to me some circumstances touching that case which enhanced his anxiety, which I do not think it now proper to mention. It will suffice to say that the jury was considered to be composed of very inferior and ignorant men. They had been separated from their families and had not been permitted to see the newspapers for more than two months; during which time the wild beast who was on trial was permitted to address the court and jury, to interrupt counsel, and to conduct himself generally in the rôle of martyr, and in doing this flagrantly to misrepresent to the jury the state of public opinion prevailing outside the court-room walls. One of Guiteau's expressions addressed to Judge Porter was: "God Almighty will punish you prosecuting men for the mean, dirty way in which you have done your work. That is the unanimous opinion of the press to-day."

On other occasions he read in court letters from different parts of the country, approving his act, of which this is one: —

MR. CHARLES J. GUITEAU, Washington, D. C.

All Boston sympathizes with you. You will yet be President.

(S'd) A HOST OF ADMIRERS.

The presiding Judge appeared powerless to control and prevent these irregularities. The confidence and positiveness of the prisoner, who took issue with counsel on almost every statement they made, and maintained every day a running fire of insulting dialogue, was liable to have the effect of breaking down all sense of respect for the court and the prosecution; and Judge Porter was in fear that there would be found upon that jury one or more men weak enough to be induced by this demonstration to believe that there really was in the United States a strong sentiment which condoned the assassination of the President. In this situation it was his policy to allow the prisoner to exhibit himself day after day before the jury, believing that his true character would be made apparent when all his acts and declarations came to be remembered and considered in the light of the final argument. The daily course of procedure is made apparent from the manner in which Judge Porter resumed his closing argument on the 24th of January. Before he had an opportunity to do this, the prisoner had made various announcements from the dock, and Judge Porter said, —

"Gentlemen of the jury: As usual, the court has been opened by the prisoner; but by his permission I am at liberty to add a few words."

All this is a part of our judicial history, so shameful and fantastic that the future reader will have difficulty to believe that at the capital of the nation a trial of that sort occupied two months, in the midst of uproar, riot, and defiance of all known rules.

When a conviction was obtained, Judge Porter's nervous strength gave way, and he at once retired to his residence in the country for recuperation. Within a few weeks, however, he came again to New York; and for the last time the members of Porter, Lowrey, Soren, & Stone were all together. He then announced his purpose to retire definitely, — a purpose to which none could object who knew the reason for it.

I have refrained from speaking, except in the most general way, of his professional life as a member of our firm. It would be impossible to do this intelligibly in any short space.

During the course of the Beecher trial there was published in the "Albany Law

Journal" an article contrasting the traits and talents of the three very distinguished men who took part in that notable case. Probably many readers of the present day have not seen this, and others have forgotten it. I shall therefore quote that article in full, in the hope that it will not be found too long, and that it will be accepted in the place of any more particular observations by me.

THREE GREAT ADVOCATES.

Sundry of our newspapers, in the course of comments on the Beecher-Tilton case, have announced that forensic eloquence is dying out in this country. It is a significant commentary on this opinion that three of the four leading counsel on this trial should have proceeded to deliver three of the finest addresses ever heard at the bar. It reminds one of Dr. Lardner's prediction that the ocean could never be navigated by steam; almost while the doctor was speaking, the first steamship successfully crossed the Atlantic. Our own opinion of the matter is that forensic ability is much more general than it was a century ago, and that the eloquence business is no longer monopolized by a few shining men. If you fill up the valleys in a hilly country, the hills will disappear; so able and eloquent lawyers are not so noticeable as formerly, because the general level of the bar has been raised. However this may be, it must be conceded that the three advocates who have just summed up the great scandal trial would be remarkable lawyers at any bar. Their conduct of the case makes us proud of our profession; and we more than ever wonder at the capacities of the human mind. The effect of continuous legal training is evidenced here. These three great men have conducted the most important trial of a public nature ever held in this country, the longest of any trial on record, to our knowledge, save one, and at the close of a hundred days of evidence have delivered addresses of five, eight, and ten days respectively, — addresses which will form a part of the permanent forensic literature; and we suppose they will keep right on trying causes, just as if nothing extraordinary had happened. They will not even have to go to Europe on account of their throats! And these addresses are no more wonderful, except in length, than scores of others which the same advocates have delivered, and which the newspaper men and the general public never heard of.

As the writer of this has listened to the trial of many cases by two of the three advocates in question, and has a general acquaintance with the powers of the third, it may be interesting to some of our readers to have a professional estimate of their characteristics and capacities, and some comparison of their powers.

We have for many years believed that as a mere declaimer, Mr. Beach stands not only at the head of the American bar, but at the head of all American orators. His oratorical style is well-nigh perfection. A presence of rare manly beauty and dignity, a voice of great power and sweetness, a vocabulary singularly affluent and sonorous, an unquenchable enthusiasm, and a masculine nobility and vigor of thought make him a great master of oratory. In regard to his elocution, Mr. Beach has but a single defect, — his gestures are constrained, awkward, and violent. As a forensic rhetorician, we think he is too level, and that his level is too high. He would gain in effect by having more conversational and familiar passages. The thunder is grand, but we don't want always to hear it. He commands, rather than persuades; and men sometimes set their faces against such advocacy. As an advocate, Mr. Beach suffers from a lack of two gifts, humor and power of illustration, — very important defects in an advocate. In the former of these qualities he is strikingly inferior to Mr. Evarts, and in the latter to Mr. Porter. In his conduct of a case Mr. Beach is remarkably self-possessed, fertile, and courageous, but lacks tact and knowledge of human nature. We think, too, from a pretty intimate knowledge of him, that his culture is by no means so broad as that of either of his antagonists. He is not a man of many books, except law-books. Still, he is not by any means a genius; he is simply a man of the highest order of legal talents. It may be inferred from the foregoing that we do not give him the very highest place as an advocate at *nisi prius*. But before an appellate court, in the discussion of pure questions of law, we regard him as the head of the American bar. There his grand manner, his elevated style, his noble scorn of petty arguments, and his various and profound legal learning find their proper place. This is a higher sphere than persuading juries, and Mr. Beach should addict himself to it. It is in this walk, and

not in the service of such men as Stokes, Barnard, and Tilton, that he will find his permanent and most satisfactory fame.

Singularly enough, in Mr. Porter we find a life-long professional antagonist of Mr. Beach. It is gratifying to know that like two athletes who have long struggled doubtfully for the mastery, they have the profoundest respect for each other. A more complete contrast to Mr. Beach than Mr. Porter, in every point of view, could not be imagined. In person rather insignificant, and in manner apparently somewhat theatrical, he possesses none or few of the graces of the orator. But he possesses something which is more effective; namely, the indefinable magnetism which enables some rare men to fascinate their auditors. In our opinion, Mr. Porter comes nearer to being a genius than any other man at our bar. If we were called on to point out his most prominent and potent characteristic, we should say it is his dramatic power. His trial of a cause from the start is a consecutive drama. No question and no suggestion but has some connection in his mind with his final argument. We have watched his wondrous power in this respect until we have grown to regard it as something almost magical. It has sometimes seemed to us almost as if he swayed the cause at his own sovereign pleasure. In summing up, his glowing imagination, his exquisite ingenuity, his magnificent generalizations, his manly pathos, his faculty of grouping and contrasting facts, his fertility of illustration, and his vivid and dramatic rhetoric seize upon the listener, and carry him out of himself and make him the property of the orator. Mr. Beach fills us with admiration of the advocate, Mr. Porter makes us in love with his cause; Mr. Beach lifts us up, Mr. Porter carries us away; when we listen to the one we are afraid we shall yield without knowing it. A great actress said that when she played Juliet to Garrick's Romeo, she felt that she could not deny him access to the balcony; when she played Juliet to Barry's Romeo, she felt that she must inevitably descend to him. This expresses the difference between these two orators. The one would raise a mortal to the skies; the other would draw an angel down. Erskine or Choate may have surpassed this advocacy, but we doubt it. Before a jury Mr. Porter is peerless. In the higher plane of professional labor of which we have spoken, he is a shining and original, but not an unrivalled debater. When, however, the question is one of mixed law and fact, as in the Parrish will case, it would be difficult to conceive anything more admirable than his presentations. As we have not hesitated to speak of Mr. Beach's deficiencies as an advocate, so we shall allude to what seems to us Mr. Porter's main defect. He always strikes us, on reflection, as an actor. He is just as effective in a bad case as in a good one. The cause lends him no aid; he makes the cause. At the moment we yield, just as the jury does. If he has the last word, the day is his. But we suspect that if he is to be answered by a strong man, his wondrous spell might fade.

We now come to Mr. Evarts, who has a more extended reputation than either of his brethren. With a world-wide celebrity as a lawyer and a statesman, he stands as the representative man of our profession. But Mr. Evarts is not a shining orator, and consequently cannot be compared with Mr. Beach or Mr. Porter as an advocate. In several essentials, however, we think he surpasses both of them. In humor, in adroitness, in judgment, in patience, in self-mastery, and in a knowledge of law in its highest and broadest sense, he is in our opinion *facile princeps*. As we are not a juryman, we confess that after quaking at the thunders of Beach and growing feverish over the drama of Porter, it is refreshing to listen to the calm, clear logic of a man like Evarts. If one considers a case under Beach's presentation, it is like looking at an object through a superior magnifying-glass; when Porter presents it, you gaze through a variously stained glass window of many panes; when Evarts presents it, you see it through a broad, clear pane of French plate. We had feared, however, that Mr. Evarts would not appear to his best advantage in this trial. We had supposed that his proper and exclusive arena was where grave constitutional questions are discussed, — as, for instance, on the impeachment trial of President Johnson. But his conduct of this case has been a surprise to us, as we dare say it has been to every one else. It seems to us that it has been faultless. In every point of view — as an examiner and cross-examiner, in the discussion of points of evidence and in the summing up — he has exhibited most varied and admirable talents of a lawyer. His cross-examination of Theodore Tilton, in our judgment, was an unequalled masterpiece; and his final argument, while it must yield

to those of his brethren in brilliancy and declamatory force, must have left a deeper mark on the jury than theirs. Mr. Evarts's rhetoric is far from being a model, — somewhat diffuse and involved; but spite of all seeming disadvantages, he has the art to appear less an advocate and more a disinterested judge than either of his compeers.

If we are correct in our analysis of the powers of these three great men, it will be seen that each is *sui generis* and unapproachable in his peculiar sphere. All things are not to all men. These three combined would make the ideal advocate, who would persuade Agrippa himself. If we are ever indicted for anything important, we shall retain Evarts as general manager, Porter to sum up to the jury, and Beach to argue the appeal if we happen to be convicted.

Judge Porter was twice married, — first, in 1837, to the daughter of Hon. Eli M. Todd of Waterford, by whom he had two children, Mary, who died in 1867, and William L., a graduate of Harvard College and Law School, who was closely associated with his father during all the later years of his life; and the second time to Harriet, daughter of the Hon. John Cramer, also of Waterford, and who survives him after a married life of more than thirty years. Together with his son William, Mrs. Porter had the sad satisfaction to watch the slowly fading light of a genius which his contemporaries are not likely to see repeated.

ADVICE TO STUDENTS AT LAW IN THE YEAR 1668.

Compiled from Rolle's Abridgment

By E. Allen Frost.

TOUCHING the Method of the study of the Common-Law, I must in general say thus much to the Student thereof; It is necessary for him to observe a Method in his Reading and Study; for, let him assure himself, though his Memory be never so good, he shall never be able to carry on a distinct serviceable Memory of all, or the greatest part he reads, to the end of seven years, nor a much shorter time, without helps of Use or Method, yea, what he hath read seven Yeares since will, without the help of Method, or reiterated Use, be as new to him as if he had scarce ever read it: A Method therefore is necessary, but various according to every Man's particular Fancy. I shall therefore propound that which by some Experience hath been found to be very usefull in this kinde, which is this; First, it is convenient for a Student to spend about two or three yeares in the diligent reading of "Littleton," "Perkins," "Doctor and Student," Fitzherbert's "Natura Brevium," and especially my Lord Coke's Commentaries and possibly his Reports; this will fit him for Exercise, and enable him to improve himself by Conversation and Discourse with others, and enable him profitably to attend the Courts of Westminster. After two or three Yeares so spent, let him get him a large Common-Place-Book, divide it into Alphabetical-Titles, which he may easily gather up, by observing the Titles of Brook's Abridgment and some Tables of Law-Bookes.

. . . . . .

Afterwards it might be fit to begin to read the Year-Books: and because many of the Elder-Year-Books are filled with Law not so much now in Use, he may single out for his ordinary constant Reading such as are most Usefull: as the last part of Edw. 3, the Book of Assises, the second Part of Hen. 6, Ed. 4, Hen. 7, and so come down in order and succession of time to the latter Law, viz. Plowden, Dyer, Coke's Reports the second Time, and those other Reports lately printed: as he reads, it is fit to compare Case with Case, and to compare the Pleadings of the Cases with the Books of Entryes, especially Rastals, which is the best, especially in relation to the Year Books; what he reads in the Course of his Reading let him enter the Abstract or Substance thereof, especially of Cases or Points resolved, into his Common-Place-Book, under their proper Titles: and if one Case falls aptly under several Titles, and it can be conveniently Broken, let him enter each part under its proper Title; if it cannot be well broken, let him enter the Abstract of the entire Case under the Title most proper for it, and make References from the other Titles unto it.

It is true, a Student will waste much Paper this Way, and possibly in two or three Yeares will see many Errors and Impertinencies in what he hath formerly done, and much irregularity and disorder in the disposing of his Matter under improper Heads: But he will have these infallible Advantages attending this Course.

I. In process of Time he will be more perfect and dexterous in this Business.

II. Those first imperfect and disordered Essayes will, by frequent Returns upon them, be intelligible, at least, to himself, and refresh his Memory.

III. He will by this Means keep together under apt Titles whatsoever he hath read.

IV. By often returning upon every Title as Occassion of Search, or new Insertions require, he will strangely revive and imprint in his Memory what he hath formerly read.

V. He will be able at one View to see the Substance of Whatsoever he hath read

concerning any one Subject, without turning to every Book (only when he hath particular occassion of Advice, or Argument, then it will be necessary to look upon that Booke at large, which he finds Usefull to his Purpose).

VI. He will be able upon any Occassion to find any Thing he hath read, without recoursing to Tables or other Repertories, which are oftentimes short, and give a lame Account of the Subject sought for.

LONDON LEGAL LETTER.

LONDON, Aug. 6, 1892.

THE judgment which the Judicial Committee of the Privy Council delivered this week in Read *v.* The Bishops of Lincoln forms the close of the greatest of the Ritualistic prosecutions which have agitated the Church of England during the past thirty years. The ceremonial acts complained of were committed by the Bishop of Lincoln in the year 1887; and the Church Association — a body which undertakes the guardianship of the Protestantism of England — having succeeded in instituting proceedings, the case was ultimately tried before the Archbishop of Canterbury, sitting with episcopal assessors. In November, 1890, the Archbishop delivered judgment which was in favor of the Bishop on almost every point. This result caused great indignation among the ranks of extreme Low Churchmen, and so it was with much ardor that the promoters of the suit, backed by the Church Association, appealed from the findings of the Archbishop to the Judicial Committee of the Privy Council. The promoters had every reason for confidence that they would succeed in securing a reversal of the judgment at the hands of the Judicial Committee; for all, or almost all, the ceremonial practices upheld by Archbishop Benson in his judgment have been declared illegal and contrary to the rubrics of the Church of England on several occasions by the Privy Council. The idea was therefore not ill-founded that the Judicial Committee would consider itself bound by its previous decisions, and reverse, in consequence, the pronouncement of the archiepiscopal tribunal at Lambeth. Just imagine the consternation which fell on the Church Association and their henchmen last Tuesday, when the long delayed judgment of the Privy Council was delivered by the Lord Chancellor, upholding the Archbishop on all points, and dismissing the appeal! The Lord Chancellor entered elaborately into the question as to how far they were bound by previous decisions, and arrived at the conclusion that they were not so bound under all circumstances. Except among a few ultra Low Churchmen, the result has been greeted with extreme satisfaction, as likely to contribute sensibly to the peace of the Church and to put an end to a most futile type of litigation. It is now decided that the following practices at the celebration of the communion are not contrary to the law of the Church of England: the use of the mixed chalice, if the water and wine are mingled prior to the service, and not ceremonially in the course of it; the eastward position of the celebrant at the consecration; and the singing of the "Agnus Dei" during the communion service. As to the two lights on the altar, when not required for the purpose of giving light, the Archbishop had determined in favor of the practice; that is to say, he found, on elaborately examining all kinds of evidence, that he could not pronounce it illegal if not done ceremonially. The Privy Council, apprehensive, perhaps, that they would have had to take another view of this particular question on its merits, acquitted the Bishop on another ground. The Lord Chancellor pointed out that on the occasion when the Bishop was alleged to have celebrated the sacrament while two lights burned upon the altar, he was conducting the service in a church at which he was in a sense a visitor, and over whose services he had no control, — the responsible person in such cases being of course the minister of the church; consequently he absolved the Bishop of responsibility in this matter altogether.

The divergence between the former and the present attitude of the Privy Council towards ecclesiastical ceremonies is simply a reflex of the public mind. In 1874, when the ill-judged Public Worship Regulation Act was passed, a considerable

section of the English public was simply crazy with fear that Ritualism portended the speedy triumph of Romanism; now that hallucination has practically died out, and towards the whole subject a good deal of indifference reigns.

We are just happily recovering from the excitements of the General Election. Every night, while it lasted, enormous crowds of eager partisans thronged their respective political clubs; and the demand for liquid refreshments was in some cases so enormous that the club managers found it difficult to gratify every individual palate. Members of the bar, whether as candidates, speakers, canvassers, or agents, swarmed in every constituency. Of some of these youthful orators, their cynical brethren who remained at their legal labors affirmed that they would have done their party much more good by sitting silently in chambers. Of course a very large number of barristers, both eminent and obscure, have been returned. Every one regretted the defeat of Sir Horace Davey, the leader of the Chancery Bar. Although our greatest lawyer, and a beautiful exponent of legal problems in court, he cuts a very unimpressive figure, as you might easily fancy, on a public platform, where his mental subtlety appears mere insincerity, and his cynical tone absolute indifference. He has had many political reverses, but it is expected that Mr. Gladstone will find a high place for him.

I should have liked to tell you what the new legal appointments are going to be; but we won't know for some time yet. The movement of the amendment to the Address from the Throne in the House of Commons has been intrusted to Mr. Asquith, Q. C., who has made more mark in Parliament as a politician than any lawyer for several years. Outside a limited circle, he was almost unknown until he entered Parliament as a Liberal some years ago. Then he was one of the junior counsel in the Parnell Commission, where he was considered to have argued some points of evidence and to have done a piece of cross-examination with unusual aptitude. He owes his fame, however, to a few successful speeches in the Commons, which attracted attention from all parties. Mr. Asquith is sure of office, — probably the Solicitor-Generalship, which is most likely; others predict for him the Home Secretaryship, but I think that is improbable.

I don't think anything has taken the profession more by surprise than the retirement of Lord Justice Fry, at the end of his fifteen years' service on the bench. He was one of the ablest of the judges, and enjoyed admirable health; while his intellectual strength was as marked as ever. They say his object was to leave the bench while his reputation was at its zenith, and so preclude its passing into mediocrity. Sir Edward Fry is a Quaker. His father was one of the founders of the great chocolate business with which the name of Fry is so familiarly identified. His busy brain long ago found legal authorship and practice inadequate subject-matter for its energies. Thus he has written on topics religious and scientific. He is the greatest living authority on mosses and lichens; I think he published a book thereon the other day. Sir Edward Frye's place in the Court of Appeal was filled by the promotion from the Queen's Bench Division of Mr. Justice A. L. Smith. He was one of the ablest of the common law judges, and it may be remembered he served as a member of the Parnell Commission.

The Long Vacation commences in a few days, and the majority of chambers will be deserted for the country.

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The Green Bag.

PUBLISHED MONTHLY, AT $3.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

OUR "Disgusted Layman" has waked up again, and gives vent to his feelings in the following epistle: —

Editor "The Green Bag":

SIR, — Your "Disgusted Layman" has recently grown a fresh grievance against the common law, and the lawyers who worship it with such singular blindness. Did it never occur to you that the very lawyer who has such a reverence for the common law constantly takes care to provide that the effect of it shall not apply? Just think a bit and see if you cannot recall a case where a lawyer would be scouted as not knowing his business did he not make the plainest provision against the application of this law in drawing papers.

Well, after thinking it over, do you give it up? Why, even "A Member of the Bar," much less a *lawyer*, would be set down as an ignoramus if, in drawing papers of a private partnership, he did not provide that the majority in interest should rule, not the majority in number! Take any dozen business men you may run across, and see what they will say as to a practice or rule in business that every business man provides against? Here a legislature provided in the plainest terms that the common law should not be set up against a certain statute, and didn't the Supreme Court of that State drive a whole caravan over that act? Is n't it time that voter and legislator be allowed to have a "say" as to the laws governing them? The average layman believes the *law* is a good thing; but if you lawyers don't change your ways, how long will he have any respect for *you?*

Yours truly,

A DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

THE following are methods of capital punishment used in the German Empire of the Middle Ages: —

Hanging between dogs or wolves. An aggravation of the death penalty was the hanging of malefactors between two dogs or wolves. Jews were thus punished as late as the year 1511, as appears from the *Laienspiegel*, Augsburg, 1511, bl. 216. A poet of the thirteenth century recommends this as an appropriate punishment for scolding wives.

Execution with the plough. Terminal marks, such as milestones, stones placed in such a manner as to serve to distinguish property, walls and trees, used for the same purpose, were in ancient times deemed sacred. We meet this in the Roman law; and curiously enough, Bracton has copied the passage from the civil law. The law treatises and enactments of mediæval Germany imposed the most cruel punishments for the desecration of such objects. The offender was buried up to his neck in the ground, and then his head was *ploughed off.*

Exenterare. This was the punishment of disembowelling. The reader may modify materially his notions of German culture on reading this passage: "*He shall be cut open, then he shall be tied to a post, and dragged around it with his entrails until none remain in his body.*" *Emmerich. Frankenb. Recht.* (Schminke), 2755.

Cutting off flesh. A debtor who could not satisfy his creditor could be punished by the creditor, who had the right of cutting *a piece of flesh* out of the delinquent's body. The XII Tables have this celebrated law, that several creditors could divide — actually dismember — the debtor's body between them; and the Norwegian Guledingslaw contains the same provision in the *Leyfingsbalken*, cap. 15.

Burying alive. A customary capital punishment for women. See the song of Hans Sachs, II. 3, 192 a. Among the Ditmarsen it was the punishment of a seduced girl. Neocorus, 2,547. Men

who committed rape were also thus punished. Immuring was also used; thus in Zurich (A. D. 1489) two men were immured.

Cowards were, in older times, buried in dung or in a morass. See Tacitus, Germania, cap. 12. "*Ignavos et imbelles et corpore infames cœno ac palude, infecta insuper crate, mergunt.*" The Romans had the same punishment, as witness Livy, I. 51.

FACETIÆ.

HE WOULD NOT VIOLATE HIS OATH.

QUITE a number of years ago, before Mount Washington had become so much of a summer-resort, a party were taken up over the carriage-road by an old driver, who, being unable to write his name, always found some excuse for not giving his signature.

Arriving at the old Tip-top House, they all went in to register their names, as was the usual custom; and the pen being passed to the driver, with the request that he add his name as a member of the party, he excused himself by saying that several years before, while he and others were at work upon the mountain, a fearful storm arose, which threatened destruction to every living thing upon the mountain top; that in his great terror and fear of losing his life he promised God upon his bended knees that if He would spare him and return him in safety to his family, He would never catch him or hear of his being up there again; and that if he registered God would at once see and recognize his signature, and would thus know that he had broken his promise. He did not register.

NOT long since, in one of the justice courts in Americus, Ga., a case was being tried; and during the progress of the trial a legal question was submitted to the court, upon which it was insisted by a prominent young attorney that the court pass at once. The court deeming it unnecessary to decide the question just then, the young attorney told the judge that if he did n't decide it he would get out a writ of mandamus and compel him to. The judge looked around the court-room and then at the young attorney, and remarked solemnly: "Well, I have been deacon in the church, and a preacher, and I have been justice of the peace a long time, and *this is the first time I've been accused of the crime of mandamus.*"

IN a certain village in a Western State, which rejoiced in the possession of only one lawyer, an action was commenced before Justice S., and "W.," the local attorney, retained by the plaintiff. The defendant employed counsel from the county-seat, but the return day came and no lawyer appeared. Defendant, in distress, was relating his woes to a group of idlers, on the lookout for fun and mischief, when a stranger appeared, wearing a suit of black, with silk hat and gold-headed cane. This was one A., a "tree peddler" from a neighboring town, a fellow of much versatility and acumen, and withal considerable of a wag. Some one of the group, seeing sport ahead, told the defendant that A. was Judge X., a great lawyer from St. Paul, and that if the judge could be prevailed upon to take his case, victory was sure. To carry out the joke, the defendant was introduced to the pseudo judge, and explaining the situation, besought his aid. A. condescendingly replied that although he had long since ceased to practise in these inferior courts, he appreciated the hard situation of his would-be client, and would consent to undertake his defence. When ushered into the presence of the court, he was introduced to his honor as Judge X. of St. Paul. S., highly elated at the honor of having such eminent counsel appear in his court, at once called the case. A. arose, made a motion to dismiss, and argued with great pomposity and at considerable length, quoting pretended decisions of the Supreme Courts of the United States, and the State of Minnesota, referring to Blackstone and every other law-writer of whom he had ever heard, and not omitting the most open and shameless flattery of the magistrate. When he concluded and sat down, W., the local counsel, arose to reply, whereat the justice smote the table a thundering blow, and cried, in a voice pregnant with righteous indignation: "Sit down, sir! That is Judge X., of St. Paul. Don't you suppose he knows the law? What do you mean by attempting to contradict him? This case will be dismissed."

PRISON WARDER (to new convict). We assign men here to occupations with which they are familiar. So, if you have any special line, say so, and we will start you at once.

CONVICT (who can scarcely believe his ears). Thanks; I can't begin too soon. I 'm an aeronaut.

"So you see the Dakota statute is directly in point, and exactly sustains me," said the lawyer in a Dakota case, laying down the book.

"Yes, yes, that would have settled it had not the Supreme Court of Wisconsin held the other way," answered the court. "I 'm sorry, but I shall have to rule against you."

BRIEFS.

CASES of lard should be tried in iron kettles.

A breach of promise comes under the Statute of Frauds.

Second marriages are the best examples of rejoinder.

Never refer to bills in equity as anything but Williams; it adds dignity to the profession.

Actions for divorce should be adjudicated in the court of Hymen.

The will which is probably surest to stand a legal test is that of the mother-in-law.

Only practical mechanics should be allowed to file bills.

The policeman who does duty in the evening is the most frequent example of knight service.

Prevailing sentiment among the fair sex indicates that lawyers make the best suitors.

Crows are said to have the best caws for most actions.

Statistics demonstrate that consumption is the most common complaint against the state — of health.

IT became the solemn duty of Justice —— to pass sentence on an aged man named George Bliss, for stealing a hog: —

"It is a shame that a man of your age should be giving his mind up to stealing. Do you know any reason why sentence should not be pronounced on you according to the law?"

"Now, Judge," was the reply of the aged sinner Bliss, "this is getting to be a trifle monotonous. I would like to know how a fellow can manage to please you judges. When I was only seventeen years old, I got three years, and the judge said I ought to be ashamed of myself for stealing at my age. When I was forty, I got five years, and that judge said it was a shame that a man in his very best years should steal. And now, when I am seventy years of age, here you come and tell me the same old story. Now, I would like to know what year of a man's life is the right one, according to your notion."

A QUAINT specimen of a judge who had been an Irish hedge-schoolmaster in his time, once summed up a case as follows: —

"The learned counsel for the plaintiff has made a very fine argument, — a splendid argument. Indade, I am thinking his argument unanswerable. And the distinguished counsel for the defendant has made an illigant argument, — an argument that seems to be very sound. I think it is unanswerable. Indade, gentlemen, I think both your arguments are unanswerable. So I dismiss the case."

Legal Object Lessons. — III.

A MECHANIC'S LIEN.

COL. CHARLES SPENCER some years ago had to defend one Marshall, charged with larceny, against whom there was very strong evidence. Before the trial, Spencer went to his client, and told him that his only chance was the plea of insanity, and

advised him to play the lunatic, and to answer all questions put to him with the word "Spoons."

The day of the trial came; and Marshall took his place in the dock, pale, haggard, and wild-looking.

"Guilty or not guilty?" asked the clerk.

"Spoons!" drawled the prisoner, with a blank stare.

"Come, plead guilty or not guilty," the clerk responded.

"Spoons!" was the reply.

"Prisoner, will you answer the question put to you?"

"Spoons!" he bawled.

At this point the counsel for the prisoner interfered, and told the court that the prisoner was insane, and not responsible for his actions, etc.

"Do you understand what is said?" asked the judge of the prisoner.

"Spoons!" was the reply.

The judge discharged him, as he was evidently insane.

Spencer congratulated him upon his escape, and suggested it would be a good idea to pay him. His client stared, and moved away with the simple remark, "Spoons!"

NOTES.

THE American Bar Association held its annual meeting at Saratoga Springs, N. Y., on August 24, 25, and 26. The annual address was delivered by John Randolph Tucker, of Virginia, his theme being "Constitutional Law." The subject was admirably treated by the distinguished orator, and made a deep impression upon his audience. Papers were also read on "Limitation of Legislative Power in respect to Personal Rights and Private Property," by John W. Cary of Chicago, and "The Problem of Uniform Legislation in the United States," by W. L. Snyder of New York. The address of the President, John F. Dillon of New York, was unusually interesting and instructive. The Association is in a very prosperous condition, and should be a tower of strength in advancing legal reform, and elevating the standard of the profession.

The following officers were elected for the ensuing year: President, J. Randolph Tucker, of Virginia; Secretary, Edward Otis Hinkley, of Maryland; Treasurer, Francis Rawle, of Pennsylvania.

The next meeting of the Association will be held in Milwaukee, Wis.

THE commissioners appointed by the several States to confer as to the securing of uniformity in State laws, met at Saratoga Springs on August 24. A small proportion of the States only were represented, and no decisive work can probably be accomplished before another year.

AT the annual meeting of the Missouri State Bar Association, at Excelsior Springs, Missouri, August 30, 31, and September 1, the annual address was delivered by Hon. F. M. Estes, St. Louis, Missouri; and a very interesting paper "The Lawyer of the Roman Republic," was read by Mr. F. W. Lehmann, and several other interesting topics were discussed during the session.

The officers for the ensuing year are Judge G. B. Macfarlane, of the State Supreme Court, President; William C. Marshal, Treasurer, St. Louis; Judge William A. Wood, Kingston, Secretary; and an executive committee consisting of R. T. Railey, Chairman, Gen. B. G. Boone, Judge C. G. Burton, W. C. Marshal, and W. A. Wood.

WHEN Grattan was a young student, he was fond of practising oratory in a certain wood, in a part of which was a gallows from which depended the rusty chains in which a criminal had been hung many years before.

When he was once apostrophizing this melancholy object, a stranger came up unperceived behind him and said to him, —

"How the devil did you get down?"

The young orator coolly replied: "Ah, sir, you have an interest in that question!" — *The Bench and Bar of Ireland.*

THE laws of Denmark contain, among various other wise provisions, one which it would probbly be as difficult to find in the criminal code of other nations as in our common law or any statute amending the same. It provides a punishment for that especially revolting form of cruelty which consists in allowing a fellow-creature to perish

without extending to him a helping hand. A mere act of omission in certain cases is indictable. "Whoever has refused," says the Danish law, "to help another person in mortal danger, when he could have done so without peril to his own life, and that person has perished in consequence, is liable to either imprisonment or fine."

AT a large banquet of Irish judges and lawyers two of them sat down before a dish containing only one small fish. One of them drew the fish towards himself, remarking, "This is a fast day with me."

The other speared the fish with his fork, and transferred it to his own plate, saying to his pious neighbor: "Jasus! do you think no one has a sowl to be saved but yourself?" — *Ibid.*

THE plaintiff, wife of an attorney at Cartersville, Ga., by her husband as her agent and attorney-at-law, filed a bill to enjoin the water-works company from cutting off the water from their premises, alleging that their bath-tub, which was put in at great expense, would be useless, and their ducks, of which it seems they were raising quite a number, would be a great trouble to water, etc., and their shrubbery in the yard would dry up and die.

The following is an extract of the answer filed by the defendant's (the water-works company) attorney: —

"Without the revenue from the city defendant could not operate its works except at almost a total loss.

"Defendant did not build its water-works for the mere purpose of supplying plaintiff's duck-pond.

"Defendant is anxious to encourage that cleanliness which ensues from bathing, but it did not build its water-works for the purpose of supplying plaintiff's one bath-tub.

"Plaintiff's shrubbery flourished and was green before defendant began to supply plaintiff with water, and it will continue so, regardless of the water supplied by this defendant, for 'the rain falleth upon the just and the unjust.' Defendant certainly did not erect its water-works at a great expense for the purpose of watering plaintiff's shrubbery, which would hardly make a meal for a hungry cow.

"Defendant avers its willingness and desire to serve plaintiff and other citizens of Cartersville, Ga., on reasonable terms, but it is not willing to be forced into unreasonable and unconscientable contracts, however much it may desire that plaintiff's dirty puddle ducks may bathe, and plaintiff's agent and attorney may himself wash and be clean, in the pure salubrious water which defendant furnishes at $30.00 per year."

Recent Deaths.

ASSOCIATE JUSTICE JOSEPH J. DAVIS, of the Supreme Court of North Carolina, died at Louisburg, N. C., on August 7. Judge Davis was in the sixty-fifth year of his age. His grandfather, William Davis, was a Revolutionary patriot, who lived in Franklin County, where his father, Jonathan Davis, was born and resided, dying there, after a long and useful life, in 1842, and where Judge Davis himself was born on April 13, 1828. He was educated at the Louisburg Male Academy at Wake Forest and at the University of North Carolina, where in 1850 he received the degree of Bachelor of Laws. Coming to the bar in that year, he first located at Oxford, but three years later returned to Louisburg, where his practice was good until interrupted by the war. When peace was declared, he returned to Louisburg and entered again upon the practice of the law. In 1874 he was nominated for Congress in the Fourth District and was elected, and again in 1876 and 1878. Declining to seek a fourth election, he returned to the practice of the law in 1879. In 1887 he was appointed by Governor Scales to the Supreme Court bench, to fill the vacancy caused by the death of Judge Ash, to which position he was elected by the people the following year.

JUDGE LEVIN T. H. IRVING, of the Maryland Court of Appeals, died August 24. Judge Irving was born on April 8, 1828, in Salisbury, then in Somerset County, and at the age of nineteen graduated from Princeton College. He studied law with his uncle, William W. Handy, who was then a practitioner in this town, and in May, 1849, was admitted to the bar. After practising here for a short while, he moved to Cincinnati, Ohio, where he followed his profession successfully. After remain-

ing in Cincinnati for a year, he returned to Maryland and formed a law partnership with Isaac D. Jones, under the name of Jones & Irving, which partnership was dissolved in 1867, when Irving was elected Associate Judge, and Jones was elected Attorney-General. He held the position of Associate Judge until the death of Judge Stewart in 1879, when on April 9 in that year he was appointed Chief-Judge by Gov. John Lee Carroll. In the following November he was elected Chief-Judge for a term of fifteen years, the Republicans declining to nominate an opposing candidate. His term as Chief-Judge would expire in 1894.

HON. EDWARD BERMUDEZ, late Chief-Justice of the Louisiana State Supreme Court, died in New Orleans, August 22. He was born in New Orleans on Jan. 19, 1832. He was related to Don Francisco de Zea Bermudez, at one time Spanish Minister of State and Plenipotentiary of Spain to France. His father, Joachin Bermudez, was for many years Judge of Probate in New Orleans. He studied law in Kentucky and at the Law School of the University of Louisiana, and was admitted to the bar in 1853. He was a member of the Secession Convention in 1860, enlisted for local service in the Confederate army, was an officer in the Orleans Regiment, and Judge Advocate of the brigade. After the evacuation of the Crescent City, he went to Mobile, where he served as Adjutant, Provost-Marshal, and Post Commandant in the Department of the Gulf. He returned to New Orleans after the war, and served as Assistant City Attorney until removed by General Sheridan. Subsequently he acted as attorney for several banks and corporations and for several large mercantile firms, especially those corresponding with firms in France. In 1880, when the Supreme Court was reorganized under Wiltz's administration, he was appointed Chief-Justice. His term expired in April last.

(An excellent portrait of Judge Bermudez was published in the Green Bag, March, 1891.)

REVIEWS.

THE September SCRIBNER contains an unusual number of elaborately illustrated articles, viz.: "The Last of the Buffalo," by George Bird Grinnell; "The Tilden Trust Library: What shall it be?" by John Bigelow; "The Névsky Prospékt," by Isabel F. Hapgood; "French Art," by W. C. Brownell; "The Indian who is not Poor," by C. F. Lummis; "The Education of the Blind," by Mrs. Frederic R. Jones. There is the usual amount of interesting fiction in the number.

HARPER'S MAGAZINE for September excels in the variety and value of its illustrated articles, and in the high quality of its fiction. A timely article on "Fox-hunting in the Genessee Valley," by Edward S. Martin, with several striking pictures by R. F. Zogbaum, is one of its most attractive features. Laurence Hutton begins a short series of interesting papers descriptive of his unique and extensive "Collection of Death-Masks," which is fully illustrated from photographs. Theodore Child concludes his very valuable series of articles on "Literary Paris" with notices and portraits of many of the famous living French writers. The series of essays by James Russell Lowell on the Old English Dramatists is continued in an article on George Chapman. Julian Ralph continues his graphic and comprehensive studies of the great Northwest in a paper on "Washington: the Evergreen State." The fiction of the number is well represented in a novelette by A. Conan Doyle, entitled "Lot No. 249," illustrated by W. T. Smedley; an amusing short story, "Those Souvenir Spoons," by Margaret Sidney; the fifth chapter of Mary E. Wilkins's remarkably interesting New England novel, "Jane Field," illustrated; and the seventh instalment of William Dean Howell's serial, "The World of Chance."

AN article that will interest a wide circle of readers at this time is "On the Shores of Buzzard's Bay," by Edwin Fiske Kimball, in the September NEW ENGLAND MAGAZINE. It is a bright, well-illustrated article, and gives sketches and portraits of Mr. and Mrs. Grover Cleveland, and their summer cottage, "Gray Gables;" Joseph Jefferson, his house and studio; Richard Watson Gilder, the editor of the "Century;" and the studios of several famous artists, including R. Swain Gifford and Walton Ricketson. The other notable contents of this number are "An Improved Highway System," by E. P. Powell; "The North Pole," by Charles M. Skinner; "What is Nationalism?" by Rabbi

Solomon Schindler; "Rhode Island," by E. Benjamin Andrews; "Mrs. Rex's Brahmin," by Kate Gannett Wells; "Bird Traits," by Frank Bolles; "An Old New Hampshire Muster," by Horatio J. Perry; "A Plea for the German Element in America," by W. L. Sheldon; "The Tendencies of Othello Perkins," by Helen Campbell; "Profit Sharing in the United States," by Nicholas Paine Gilman.

THE ARENA for September presents a rich and varied table of contents, as will be seen from the following: "The Future of Islam," by Ibn Ishak; "Old Stock Days," by James A. Herne, with full-page portrait of Mr. Herne; "Psychical Research," by Rev. M. J. Savage; "The Communism of Capital," by Hon. John Davis, M. C.; the third paper in the Bacon-Shakespeare Controversy, by Edwin Reed; "Successful Treatment of Typhoid Fever," by Dr. C. E. Page; "Under the Dome of the Capitol," by Hamlin Garland; "Walt Whitman," by Prof. Willis Boughton, Ph. D.; "Bricks without Straw," a story of the modern West, by John Hudspeth; "A Symposium on Woman's Dress Reform," prepared under the auspices of the National Committee of Women of the United States.

THE September COSMOPOLITAN is an unusually interesting number. "The Advance of Education in the South," by Charles W. Dabney, Jr., is perhaps the most important of its contents, and will open the eyes of many a reader as to the educational status of that portion of our country. The article is beautifully illustrated. "Up the Onachita on a Cotton-Boat," by Stoughton Cooley, and "Alligator Hunting with the Seminoles," by Kirk Munroe, give us further pictures of Southern life. Murat Halstead contributes an amusing paper on "The Chicago Convention." There is the usual supply of fiction, including the first part of a new story by H. H. Boyesen, entitled "Social Struggles."

THE contents of the CENTURY for September are notable for their variety and excellent quality. They include "The Grand Falls of Labrador," by Henry G. Bryant; "The Nature and Elements of Poetry," VII., by Edmund Clarence Stedman; "Pioneer Packhorses in Alaska," by E. J. Glane; "Christopher Columbus," V., by Emilio Castelar; "The Chosen Valley," V., by Mary Hallock Foote; "Architecture at the World's Columbian Exposition," IV., by Henry Van Brunt; "The Pictorial Poster," by Brander Matthews; and "The Chatelaine of La Trinité,', IV., by Henry B. Fuller.

THE September issue of LIPPINCOTT'S is a Pacific number. Every article in it deals with topics of our Western coast, — chiefly, of course, Californian, — or has been prepared by a native or resident of that favored region. The complete novel, "The Doomswoman," is by Mrs. Gertrude Atherton. It is a vigorous tale of "the grass era" of Spanish occupation, and depicts with vivid brilliancy the manners, amusements, passions, and intrigues of those hidalgos and donnas who ruled the land before its cession. The novel is fully illustrated.

THE contents of the September ATLANTIC are as follows: "The Story of a Child," IV., by Margaret Deland; "Cliff-Dwellers in the Cañon," by Olive Thorne Miller; "An American at Home in Europe," III., by William Henry Bishop; "Catherine," by Mary J. Jacques; "A New England Boyhood," III., by Edward Everett Hale; "Romance of Memory," by S. R. Elliott; "The Lost Colors," by Elizabeth Stuart Phelps; "Don Orsino," XIX–XXI., by F. Marion Crawford; "The Primer and Literature," by Horace E. Scudder; "An Afternoon Tea," by Harriet Lewis Bradley; "The Prometheus Unbound of Shelley," III., by Vida D. Scudder; "To Oliver Wendell Holmes," by John Greenleaf Whittier.

BOOK NOTICES.

WHARTON'S LAW LEXICON; forming an Epitome of the Law of England, and containing full Explanations of the techical terms and phrases thereof, both ancient and modern. Including the various Legal Terms used in Commercial business, together with a translation of Latin Law Maxims, and selected titles from the Civil, Scotch, and Indian Law. Ninth Edition by J. M. LELY. Stevens and Sons, Limited; London, England, 1892. Cloth, 38*s*.

Wharton's Law Lexicon has been too long and favorably known by the legal profession to need any introduction or additional words of praise. The

fact that it has passed through nine editions is conclusive evidence of the high estimation with which it is regarded both in America and in England. Many additions and alterations have been made in the present edition, and in its present form it will be found to be a very valuable and complete Lexicon of the Law.

AMERICAN STATE REPORTS, Vol. XXV., containing the cases of general value and authority subsequent to those contained in the American Decisions and American Reports, decided in the Courts of Last Resort of the several States. Selected, reported, and annotated by A. C. FREEMAN. Bancroft-Whitney Company, San Francisco, Cal., 1892. $4.00 net.

The selection of cases in this volume leaves nothing to be desired; and Mr. Freeman's notes are as exhaustive and valuable as ever. How he manages to accomplish so much and such good work is a veritable wonder. The publishers are fortunate in having secured such an able Editor for these Reports.

SELECT CASES ON EVIDENCE at the Common Law, with notes by JAMES BRADLEY THAYER, LL.D. Charles W. Sever: Cambridge, Mass., 1892. Cloth, $7.50.

There is no better authority on the Law of Evidence than Professor Thayer; and anything from his pen upon the subject must carry much weight, and be of exceptional value. While designed primarily for the use of students, this work is of equal importance to the practising lawyer. A large and admirably selected collection of Leading Cases, excellently classified and arranged, accompanied by abundant and exhaustive notes, makes up a volume of over 12,00 pages, and gives to the profession a most masterly exposition of the Law of Evidence. Too much praise cannot be given to Professor Thayer for the evident pains and care taken in the classification of the cases selected; while his notes display a research and knowledge only to be expected from one of his eminent ability. The various subjects are treated in the following order: —

CHAPTER I. Note on the General Character of our Law of Evidence: The Jury: Judicial Notice: Burden of Proof: Presumptions: Admissions: Law and Fact: Court and Jury: Demurrers upon Evidence.

CHAPTER II. Matters likely to mislead a jury, or to complicate a case unnecessarily, etc. Character of the parties to the Litigation: Confessions: Hearsay: Qualifications and Exceptions to the Rule against Hearsay: Opinion.

CHAPTER III. Real Evidence. Things presented to the Senses of the Judge or Jury.

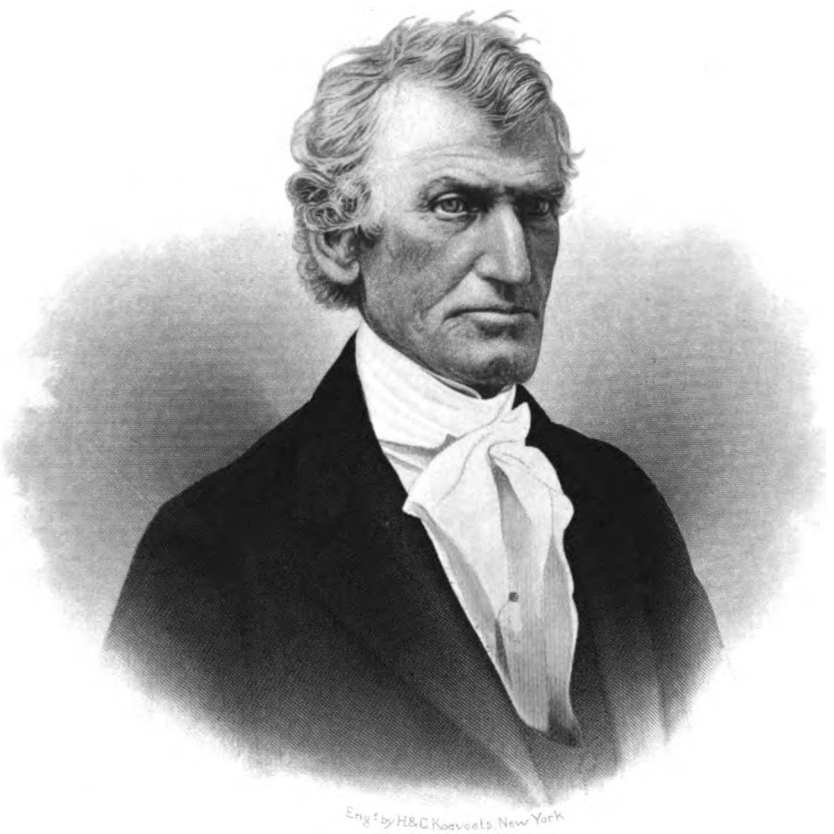
CHAPTER IV. Writings. Proof of the Contents: Proof of Authorship: Alleged Alterations: The so-called "Parole Evidence" Rule.

CHAPTER V. Witnesses. Competency: Privilege: Refreshing and supplementing Recollection: The Examination.

From a careful examination of this work, we are deeply impressed with its great value, and earnestly recommend it to the profession as well as to all law students.

AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW: vols. 1–18. Edward Thompson Co.: Northport, Long Island, N. Y.

No legal work has ever been undertaken which aspired to cover so broad a field as this Encyclopædia of Law. It is, in fact, a complete compendium of law; and as its publishers justly claim, "if all other law books should be destroyed, the world would have lost but little of its legal information." Unlike most subscription publications which put their best foot forward at the start to entice subscribers and then gradually fall off in quality and quantity, this work has steadily maintained the high standard which we were led to expect from the earliest volumes. There has evidently been no expense spared to secure the best possible talent for the preparation of its articles; and the best evidence of their value is the fact that they are not only constantly consulted by the profession, but are frequently cited and quoted by the courts. Many of them are complete text-books on the subject of which they treat, and the point must be a novel one on which the working lawyer cannot find in this Encyclopædia a case directly applicable. The greater portion of the legal profession are comparatively poor men, unable to procure the text-books necessary for a working library. To them a publication of this nature is an inestimable boon, enabling them for a small outlay to obtain all the benefits which would otherwise cost them many times the amount asked for this publication. To all lawyers it is equally valuable in that within the compass of a very few volumes all the law is accessible. In the 18 volumes already published, there are 830 complete legal treatises, containing 603,551 citations. Besides these treatises there are 14,502 unusual titles and adjudged words and phrases, upon which there are given 127,302 citations. As will be seen, the Encyclopædia is a law library in itself. It should be on the shelves of every lawyer: and once there we can confidently assert that it will be in constant use, and the more it is used the better it will be appreciated.



Yours truly,
Thomas Ruggles

The Green Bag.

VOL. IV. No. 10. BOSTON. OCTOBER, 1892.

THE SUPREME COURT OF NORTH CAROLINA.

BY WALTER CLARK.

I.

THE title "Supreme Court of North Carolina" dates from the Act of 1805; but the court thus styled consisted of a conference of the circuit judges, and was in fact a mere continuation, with some modifications, of the previous Court of Conference. In the year 1818 the Supreme Court, consisting of judges having appellate duties only, was first established. From 1818 to 1868 it was composed of three judges. The number was increased by the Constitution of 1868, to consist of a Chief-Justice and four Associate Justices. By constitutional amendment the number of Associate Justices was reduced to two, Jan. 1, 1879; but by another amendment it was again increased to four, Jan. 1, 1889.

Since the establishment of the Supreme Court in 1818 the bench has been occupied by twenty-nine judges, of whom seven were Chief-Justices. In this enumeration are included the present occupants of the bench. This article is intended to be a sketch of the twenty-four incumbents of the Supreme Court of North Carolina from its organization in 1818, exclusive of those now on the bench.

The history of our judiciary prior to the Act of 1818, creating a separate and distinct body of Appellate Judges, will justify a cursory notice.

In 1670, under the cumbersome "Fundamental Constitutions of Carolina," which had been drafted by the celebrated philosopher John Locke, we first hear of a Chief-Justice of North Carolina. He was no less a man than Anthony Ashley Cooper, better known to fame as Lord Shaftesbury. He was one of the eight Lords Proprietors to whom the province of Carolina had been granted by the Crown. Lord Shaftesbury had no intention of exercising the duties of the post in person, and appointed one Captain John Willoughby as his deputy. In 1713 we find that Christopher Gale was Chief-Justice. He was born in Yorkshire, England, where his father was rector of a church. He resided and died in Edenton. He left a name that is never mentioned but with respect. The late Col. George Little of Raleigh was a lineal descendant. Gale, owing to difficulties with the Governor, visited England, and was succeeded by Tobias Knight, who was accused (but acquitted) of complicity with the pirate "Blackbeard." He was succeeded by Frederick Jones, of indifferent fame. Gale, having returned from England, again filled the post. In 1724 Governor Burrington endeavored to eject him, and appointed Thomas Pollock; but the Lords Proprietors refused to confirm him and re-instated Gale. The Proprietors retroceded their sovereignty to the Crown in 1729; and in 1731 Gale was superseded by William Smith, who had been educated at an English University, and had been admitted as a barrister at law in England. Governor Burrington appointed John Palin first to succeed him, and then William Little, son-in-law of Gale, who, soon dying, was succeeded by Daniel Hamner.

He in his turn yielded to Smith, who had returned from England. In 1740 John Montgomery became Chief-Justice, and was succeeded in 1744 by Edward Mosely, a man of real ability. He died in 1749, and was succeeded in turn by Enoch Hall, Eleazar Allen, James Hazell, and Peter Henly respectively.

In 1746 an important change was made in the Court Law. Up to this time the Chief-Justice sat with from two to ten assistants, who were simple justices of the peace. Indeed it is not certain that all the Chief-Justices even were lawyers. By that act all writs were issued from the court at Newbern, and all pleadings were filed there; but trial of the issues could be had at the *nisi prius* terms held by the Chief-Justice and associates at Edenton, Enfield, and Wilmington. Three Associates were appointed under this act, who were required to be lawyers. Charles Berry became Chief-Justice in 1760, and committed suicide in 1766. In 1767 the Province was divided into five judicial districts, — Edenton, Newbern, Wilmington, Halifax, and Hillsboro, — in each of which towns a court was held twice each year by the Chief-Justice and his Associates. The Chief-Justice was Martin Howard, and the Associates were Richard Henderson and Maurice Moore. Judge Henderson was the father of Chief-Justice Leonard Henderson, and Judge Moore was the father of Justice Alfred Moore, of the U. S. Supreme Court. This Act of 1767 expired at the end of five years; and in consequence of disagreement between the Governor and the Legislature, there were no courts in the Province between 1773 and 1777. After August, 1775, till the Judiciary Act adopted Nov. 15, 1777, by the new State government, the judicial functions were perforce discharged by the Committees of Safety.

Under the Provincial government the Chief-Justice was a member of the Council or Upper House of the General Assembly, which also shared largely in the executive functions. The Constitution of 1776, on the contrary, made both the Executive and Judiciary dependent upon the General Assembly, which was elected annually. Though the judges were to hold office during good behavior, their offices could be abolished at the will of the legislature, and there was no inhibition against a decrease of their salaries. The Constitution of 1835 prohibited a decrease of a judge's salary during his continuance in office. The Constitution of 1868 made the Supreme Court a part of the Constitution and beyond repeal by legislative action, and fixed the term of office at eight years, and made it an independent part of the Government, free from control by the legislative or executive departments. The judiciary inferior to the Supreme Court is still, however, left subject to legislative action, except that the term of office of the Superior Court judges is fixed at eight years, and the salary of no judge can be diminished during his continuance in office.

By the Judiciary Act of 1777 the State was divided into six districts, — Wilmington, Newbern, Edenton, Hillsboro, Halifax, and Salisbury. In 1782 Morganton was added, and in 1787 Fayetteville, making eight in all. At each of these a court was held twice each year by three judges. The first judges elected were Samuel Spencer of Anson, Samuel Ashe of New Hanover, and James Iredell of Chowan. After riding one circuit Iredell resigned, and was succeeded by John Williams of Granville. Iredell was a very able man, and was subsequently appointed by Washington a Justice of the Supreme Court of the United States. Judge Ashe held office till he was elected Governor in 1795, Spencer till his death in 1794, and Williams till his death in 1799. The death of Judge Spencer was singular. In old age he was asleep on a warm day in a chair under the shade of a tree. A turkey cock, enraged by a red cap or handkerchief which the Judge wore to keep off the flies, assaulted him. Either by the blow of the gobbler, or by the fall from his chair caused by the assault, the old Judge died.

To this court belongs the distinction of being the first to assert the power and duty of the bench to declare an act of the legislature void for unconstitutionality. This it did in the case of Bayard *v.* Singleton, at May Term, 1786, shortly before similar action by the Supreme Court of Rhode Island. New York followed with a similar decision in 1791, South Carolina in 1792, and Maryland in 1802. This was novel and strong action then. There were no precedents for it. In England, there being no written Constitution, any action of the Parliament had always been conclusive on the courts, at least since arbitrary government by the Crown had ceased.

In 1790 Halifax, Edenton, Newbern, and Wilmington were constituted the Eastern Riding; and Morganton, Salisbury, Fayetteville, and Hillsboro the Western Riding. Two judges were to hold each term of court, the number being increased for that purpose to four by the election of Judge Spruce McKay. In 1799 James Glasgow, Secretary of State, and others having been charged with fraudulent issue of land warrants, the legislature passed an act for the court to meet twice a year in Raleigh for the trial of these causes, and incidentally to hear appeals in causes accumulated in the district courts, the act to expire in 1802. This act, however, so far as hearing appeals was concerned, was in 1801 extended for three years, and the court was styled the "Court of Conference." In 1804 this was made a court of record, and the judges required to file written opinions. In 1805 the title was changed to the "Supreme Court," — surely a tardy recognition of the constitutional provision of 1776, — and the Sheriff of Wake was made marshal of the court. In 1806 the districts were increased to six ridings, two additional judges being elected, and a superior court was for the first time to be held twice a year at the court-house in each county, and by one judge. The judges were to ride each circuit in rotation, as is still the law, and as it has been continuously since 1806, with the exception of the years 1868–1876. The provision requiring this is now in the Constitution. In 1810 the judges hearing appeals in the "Court of Conference" were required to write out their opinions "at full length," and to elect a Chief-Justice. John Louis Taylor was the first and only judge who filled the post. By the same act a seal and motto were directed to be established for the court, and any party to an action in the Superior Court, civil or criminal, was given the right of appeal. Any two of the six judges sitting in conference at Raleigh as a supreme court constituted a quorum.

In the year 1818 the Supreme Court, as contemplated by the Constitution of 1776, and substantially as it has ever since existed (barring an increase in the number of

judges, and the constitutional provisions as to tenure of office, and independence of the other departments of the government, as above noted), was established. The bill was introduced by Hon. William Gaston, who many years after became one of the most illustrious members of the court he had contributed to create.

The salary was fixed at that date at $2,500, — a figure at which it still stands, though owing to the changes in values the present salary is not much more in fact than one third of the sum allowed by our forefathers seventy-four years ago. The salary of the Superior Court judges, previously $1,600, was then fixed at $1,800. This has since been raised to $2,500. The legislature elected John Louis Taylor, Leonard Henderson, and John Hall the first judges. Taylor and Hall were elected from the Superior Court bench, and Henderson had recently resigned from it. Till the Constitution of 1868 the tenure was for life or good behavior, and the judges were elected by the legislature, the Chief-Justice being chosen by his associates. Since 1868 the term of office has been fixed by the Constitution at eight years, as has been stated, and the office of Chief-Justice is a distinct one from that of Associate Justice, though there is no difference in point of emolument or functions, save that the Chief-Justice presides. The mode of election, too, since 1868 is by the people. In event of a vacancy the Governor appoints till after the next general election for members of the General Assembly. The new court began work Jan. 1, 1819, and its first decisions appear in the 7 N. C. Reports (3 Murph.).

Among the decisions prior to the establishment of the new court we note that the court in those days made numerous adjudications upon bets on horse-races, from which they have been relieved by the Act of 1810 making all betting illegal. In Williams *v.* Cabarrus, 1 N. C. 19, decided in 1793, will be found the ethics which should govern in horse-racing laid down with a fulness and accuracy which indicate thought and a thorough knowledge of the race-track; and there are many similar cases: McKensie *v.* Ashe, 2 N. C. 578; Hunter *v.* Parker, 3 N. C. 373, and others. In State *v.* Knight, 1 N. C. (Taylor, 44), Judge Taylor lays down a principle which has just been reaffirmed after the lapse of nearly a century, in State *v.* Cutshall, 110 N. C. 538, that the legislature cannot make an extra-territorial act punishable in this State. In the same volume, in State *v.* Carter, occurs one of those unaccountable decisions which made the old criminal law so often a trespass upon the common-sense of mankind. In that case the defendant had been convicted of a deliberate and malicious homicide, yet the judgment against the murderer was arrested because in the indictment in the word "breast" the vowel *a* (which is unpronounced) was omitted by clerical error. Such fantastic mental phenomena have long since become impossible, as the legislature, by repeated and very plain enactments, have provided that errors and omissions of form, and not of substance, shall be disregarded, and the courts have now very long since abandoned such trifling with justice. In this very case it is refreshing to see that Judge Taylor dissented from the decision of the court. It is also to be noted that in those days an appeal lay for the State in criminal cases from a verdict of not guilty. State *v.* McLelland, 1 N. C. (Conf. 523), and State *v.* Hadcock, 3 N. C. 348. This was not reversed till as late as the year 1809 by the decision in State *v.* Jones, 5 N. C. 257, and then upon the wording of the new statute regulating appeals.

On p. 469 of the 3 N. C., the conscientious reporter saves himself from all possible responsibility by this remark at the end of the report of the case of Clark *v.* Arnold: "The reporter is bound by his duty to the public to question at least one part of this decision." Then, after giving his reasons why the court was in error, he courteously adds: "But let it be remembered, once for all, that I impute

this, as well as every other mistake of Judge Hall, to the hurry of business. I believe the government at this time has no officer who more deserves its confidence. Yet I cannot agree to disseminate wrong legal opinions out of respect to the opinion of any one." State *v.* Smith, 5 N. C. (1 Murph.) 218, is an indictment for fraudulently procuring a certificate of survey to be issued from the public-land office, etc. Its singularity lies in the fact that the defendant then, and for many years after, was State Senator continuously till elected Governor in 1810; the prosecutor was Alfred Moore, then an Associate Justice of the United States Supreme Court. The Surveyor, who was an alleged *particeps criminis*, frequently thereafter served as a member of both branches of the General Assembly. The case is evidently a historical puzzle for some Dryasdust to investigate and elucidate. The new court, as we have said, began its labors Jan. 1, 1819; and its decisions begin with the 7th N. C. Reports (3 Murph.).

JOHN LOUIS TAYLOR.

John Louis Taylor, chosen by his associates the first Chief-Justice, was when elected to the Supreme Court the oldest judge in commission on the Superior Court bench, to which he had been elected in 1798. He was born in London, but of Irish parentage, March 1, 1769. At the age of twelve years he was removed from his widowed mother, and brought to this country by his elder brother, James Taylor. By the assistance of his brother, he obtained, though in an imperfect degree, the benefits of a classical education at William and Mary College in Virginia, an eminent institution in those days, from which went out four Presidents, — Jefferson, Madison, Monroe, and Tyler, — Chief-Justice Marshall, Gen. Winfield Scott, and many other distinguished men. He was compelled to leave college before graduation; and after reading law without preceptor or guide, he was admitted to the bar in 1788, before he was twenty, and located in Fayetteville. In 1792, 1793, 1794, and 1795, he was elected to the legislature from Fayetteville, then a borough town. In 1794 he was a candidate before the General Assembly for the office of Attorney-General, but was defeated by Blake Baker. He removed to Newbern in 1796, and in 1798 he was elected a Judge of the Superior Court. In 1818 he had held that office consecutively twenty years, during ten of which he had been Chief-Justice of the court held by the judges of the Superior Court in Conference. He died Jan. 29, 1829, and is buried in the cemetery at Raleigh. In 1802 he published Taylor's Reports, which now form a part of 1 N. C. Reports. In 1814 he published the first volume of the North Carolina Law Repository, and in 1816 the second volume of the same, and in 1818 Taylor's Term Reports. These three volumes are now united in one, known as the 4 N. C. Reports. As originally printed, the Repository contained much interesting matter (other than decisions of the court) which has now been omitted in the reprint. In 1817 he was

appointed by the General Assembly jointly with Judge Henry Potter of the United States District Court for North Carolina to publish a revision of the statute law of the State. This revisal, known as Potter's Revisal, came out in 1821. In 1825 Judge Taylor published a continuation of this work, including the Acts of 1825. This is known as Taylor's Revisal. He also published a treatise on executors and administrators. He possessed a singular aptitude for literature, and would have excelled in composition if his "jealous mistress," the law, had given him opportunity. His elocution was the admiration of all who heard him. His style of writing is preserved to us in his opinions, and in beauty of diction they are not surpassed, if equalled, by any of his successors. Chief-Justice Taylor came to that post at forty-nine years of age, and during the ten years he presided in the new court his opinions, which are to be found in Murphey's last volume and Hawks's four volumes (now known as 7th to 11th N. C. Reports inclusive) and in part of 16 N. C., form at once his judicial record and his lasting eulogy. His opinions before his elevation are to be found in the prior volumes, 1st to 6th N. C. His charge to the grand jury of Edgecombe in 1817 is a model in style and subject matter. It was published by request of the grand jury. Of his character as a man his associates place their estimate on record in a tribute to be found in the 16 N. C. (1 Dev. Eq.) 309, as follows: "Of the Chief-Justice as a man, we are unwilling to trust ourselves to speak as we feel. We loved him too well and too long to make the public the depository of our cherished affections. If there ever heaved a kinder heart in human bosom, it has not fallen to our lot to meet with it. If ever man was more faithful to friendship, more disinterested, humane, and charitable, we have not been so fortunate as to know him. When we think of these excellences, — when we call to mind the instances in which we have seen them illustrated in practice, and felt their kindly influence, — and when we look around into the wide world to search for those who may supply his place in our affections, the exclamation involuntarily arises, —

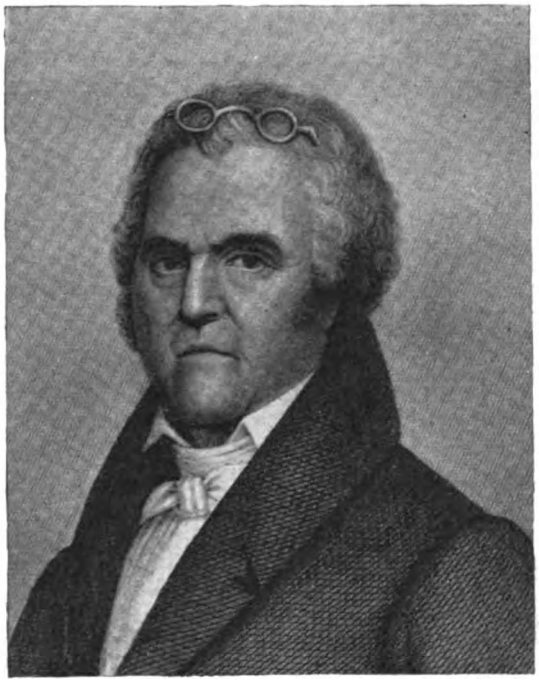
"Vale! Vale!
Heu quanto minus est, cum reliquis versari
Quam tui meminisse."

Judge Taylor was twice married. By his wife Julia Rowan he had one child, a daughter, who married Major Junius Sneed, of Salisbury. A son of theirs, John Louis Taylor Sneed, became Attorney-General of Tennessee. His second wife was Jane Gaston, sister of Judge Gaston, by whom he had a daughter who married David E. Sumner, of Gates County, and left descendants in Tennessee. Judge Taylor also had a son who died without issue. His name, therefore, can be transmitted to posterity only in his good works which "do follow him." Judge Taylor was succeeded as judge by John D. Toomer, and as Chief-Justice by Leonard Henderson.

Chief-Justice Leonard Henderson was the son of Judge Richard Henderson of colonial times, and was born, Oct. 6, 1772, on Nutbush Creek, in that part of Granville County which is now in Vance. As an evidence of the frugality and industry of the times, it is said his mother taught her sons as well as her daughters to card and spin. A county and two prosperous towns preserve this illustrious family name to posterity. His brother Archibald was equally distinguished as a lawyer. Archibald married the sister of Governor Alexander, and represented the Salisbury district two terms in Congress, — the same district for which his grandson, Hon. John S. Henderson, is now the worthy representative in Congress for the sixth term. Two other brothers of Judge Henderson were distinguished lawyers, while another was Comptroller of the State, and long Clerk of the Supreme Court; and his uncle, Major Pleasant Henderson, a Revolutionary soldier of distinction, succeeded Judge Haywood as clerk of the House of Commons in 1786, and retained the office through all the mutations of parties and men for forty years, and by

annual elections. A sister of Judge Henderson was the wife of Judge McKay, already mentioned, and a niece was the wife of Judge Boyden of the Supreme Court in more recent years.

Judge Henderson's early education was limited. He studied law under Judge Williams, and located at Williamsburg. Soon after he came to the bar he married his cousin, Frances Farrar, who was a niece of Judge Williams. The young couple being poor, Judge Williams, who was wealthy, generously gave them a fair settlement in life to begin the world. For several years Leonard Henderson was clerk of the District Court at Hillsboro. In 1808 he was elected to fill the vacancy on the Superior Court bench caused by the death of his brother-in-law, Judge McKay. His election was the higher compliment because a majority of the legislature belonged to the opposite political party. The duties of the office he discharged with ability and fidelity for eight years, resigning in 1816. In 1818, as already stated, he was elected to the Supreme Court bench. The election took place Dec. 12, 1818. The candidates were John Louis Taylor and John Hall, who had been in continuous service on the Superior Court bench twenty and eighteen years respectively; Henderson, who after service of eight years had recently resigned; Henry Seawell, who was still on the bench after five years' service; Archibald D. Murphey, who, with a high reputation as an able lawyer and an elegant scholar, had greatly distinguished himself in a seven years' service in the State Senate, where he had been foremost in advocacy of a system of Internal Improvements and Public Schools; and Bartlett Yancey, a distinguished lawyer, who had served four years as a member of Congress, and who was then and for many years after Speaker of the State Senate.



LEONARD HENDERSON.

There was no scarcity of material. The majority in the legislature was of the opposite political party to Henderson, as had been the case in 1808; yet on the first ballot Henderson and Hall were elected. On the second ballot Taylor was by a narrow majority elected, and was chosen by his associates Chief-Justice, being their senior in judicial service, though junior in years to Judge Hall. Judge Battle, who had studied law with him and was his personal friend, in his excellent sketch of him deplores that Judge Henderson, "in common with too many of our distinguished lawyers and public men of that day, had become imbued with the French infidelity which was rife in their youth," and that in consequence he had not "that purity of manners and morals which the genuine spirit of Christianity alone can produce." He says, however, that his integrity was beyond question, and that he was charitable in act and in speech, temperate, candid, and truthful. His religious views are said to have been much modified in his latter days. He was kind, sociable, and courteous, a fine conversationalist, and very

popular. Among his law students were his successors, Chief-Justice Pearson and Judge Battle. He was elected to the Supreme Bench on the first ballot, together with a personal friend but political opponent, over four other gentlemen of the highest reputation and influence. He was a good lawyer, and stands in the front rank as a judge. He was restive of precedent when he considered it in conflict with principle. He did not have the same degree of regard for the maxim, *Stare decisis*, which was so prominent a feature with Judge Taylor; but he had an honest, strong mind, and his arguments show an earnest grasping after the truth. Later in life he could not endure the fatigue of reading many books, and he relied on his recollection of principles and his powers of argumentation. Hence with his later opinions, as with Pearson's, and for the same cause, there is small citation of authority. A fair specimen of his knowledge and powers can be found in Taylor *v.* Shuford, 11 N. C. (4 Hawks) 126, on the difficult subject of estoppel and warranty, which he discusses with clearness and force, without citation of any decided case or elementary work. On the death of Judge Taylor, in 1829, Judge Henderson was elected by his associates Chief-Justice, and served till his death, which took place at his residence near Williamsboro, August 13, 1833. He had four sons and two daughters, and through them has many descendants, who look back with pride to the record of his honored and useful life. Among his descendants are A. E. Henderson, a prominent lawyer of Caswell County, and the wife of the late Governor Scales. He was succeeded as Judge by William Gaston, and as Chief-Justice by Ruffin.

Judge John Hall, who was elected to the Supreme Court at its organization together with Taylor and Henderson, was the senior of them both, having been born in Augusta County, Va., May 31, 1767, near Waynesboro, a small village now on the railroad from Staunton to Richmond. He was the youngest of the children of Edward Hall and Elizabeth Stuart, his wife. Edward Hall was a native of Ireland, who first settled in Pennsylvania, but afterward removed to Virginia in 1736. Judge Hall received an excellent education, and was a graduate of William and Mary College, where he was a fellow-student of Bishop Ravenscroft, and possibly of Chief-Justice John Louis Taylor. He studied law in Staunton, Va., under his kinsman, Judge Stuart, who was the father of Hon. A. H. H. Stuart, Secretary of the Interior under President Fillmore. In 1792 Judge Hall removed to Warrenton, N. C., where he continued to reside till his death. His manners were diffident and reserved, and his talents, though considerable, were not striking; but such was the favorable impression made by his character and industry that, though he came to Warrenton a total stranger, and possessed no influential connections, eight years thereafter he was elected, at thirty-three years of age, a judge of the Superior Court, then the highest judicial office in the State. On the adoption of the present Superior Court system in 1806, he rode the circuits of the State in rotation. As there were then six circuits, he had held court in succession in every county of the State four times, when, in December, 1818, he was elected to the Supreme Court, being chosen on the first ballot. He discharged the duties of the office with credit and fidelity. On the death of Chief-Justice Taylor, though the senior in years and judicial service, he did not insist upon succeeding to the office, and concurred in the selection of Judge Henderson as Chief-Justice. Owing to a painful and distressing malady, he resigned, December, 1832, and died soon thereafter, at his residence in Warrenton, Jan. 29, 1833. Although not a brilliant or showy man, he possessed a sound judgment and extensive legal attainments. He was eminently a safe judge, thoroughly impartial and unbiassed. Throughout life his character was unblemished. In 1804 he was elected

Grand Master of Masons, and though taking no part in politics, he was in 1829, while still retaining his position on the bench, elected as one of the Presidential Electors on the Jackson ticket. His judicial opinions were brief, plain, and to the point. In person he was considerably above middle size, with handsome features and a florid complexion. He left eight children, one of whom — Hon. Edward Hall — was appointed Judge of the Superior Court in 1840, and served a short term on the bench with much reputation. Judge John Hall was succeeded on the Supreme bench by Judge Daniel.

JOHN HALL.

Archibald DeBow Murphey, though never elected a member of the Supreme Court, is entitled to a place in this list of the occupants of the bench, as by special commission he discharged its duties for part of three terms. Under a clause in the act creating the court, the Governor was authorized to detail a Judge of the Superior Court by special commission to sit instead of a judge of the Supreme Court in causes where one of its members had been counsel or had an interest in the result. Judge Henderson had been elected from the bar, where he had been in full practice, and there were many of these causes. Judge Murphey was specially commissioned by Governor Branch, and sat in several cases at May term 1819, 7 N. C. 428; at November term 1819, 7 N. C. 566; at June term 1820, 8 N. C. 77, 82, 86, 92, 126. Indeed his concurrence with Chief-Justice Taylor (8 N. C. 96) against Judge Hall's dissent sustained the validity of the Moses Griffin will, under which Newbern has ever since possessed the "Griffin" school. Judge Daniel (afterward for many years a judge of the Supreme Court) was also commissioned and sat at May term 1819, in several causes (7 N. C. 54, 503). The act was repealed in 1821, being considered of doubtful constitutionality.

The fame of Judge Murphey is very dear to the State, and he was worthy of any honors she could bestow upon him.

His father, Col Archibald Murphey, was a prominent citizen of Caswell County, and bore a part in the military service of the Revolution, for which the citizens of that patriotic county were specially distinguished. At his father's residence near Red House, and seven miles from Milton, Judge Murphey was born in 1777, a member of a family of seven children. He entered the State University in 1796, and graduated with the highest distinction in 1799. Such was the reputation he had acquired that he was immediately appointed Professor of Ancient Languages in the University, which position he held for three years, maturing that taste for liberal studies which always distinguished him.

He was admitted to the bar in 1802 after a meagre course of legal study, but advanced rapidly to the front rank in the profession. The bar is not a place where a false reputation for talents can be maintained. His practice for years was not exceeded by any

lawyer in the State, and he had most able competitors and contemporaries at the bar, — the two Hendersons, Cameron, Norwood, Nash, Seawell, Yancey, Ruffin, Badger, Hawks, Mangum, Morehead, Graham, and many others. Governor Graham says of him: "He had a Quaker-like plainness of aspect, a scrupulous neatness in an equally plain attire, an habitual politeness, and a subdued simplicity of manner which at once won his way to the hearts of juries, while no Greek dialectician had a more ready and refined ingenuity, or was more fertile in every resource of forensic gladiatorship." Though a charming and successful advocate, he more especially delighted in the equity practice, which he deemed "the application of the rules of Moral Philosophy to the practical affairs of men." He was a skilful pleader; and his chirography, neat and peculiar, was almost as legible as print, — an unusual thing with lawyers.

From 1812 to 1818, he was continuously, by annual election, a Senator from Orange, and on this new theatre shone even more conspicuously than in his profession. He inaugurated a new era in the public policy of the State, and exerted for years probably a greater influence than any other citizen of the State. He was the foremost and ablest advocate, indeed the originator, of a system of internal improvements and of common schools in North Carolina. His papers and addresses on these subjects would do credit to DeWitt Clinton or John C. Calhoun. One of these memoirs was published in 1822, with high commendation in the "North American Review," then edited by Hon. Edward Everett. He was a firm friend to the State University. In 1822, by appointment of North Carolina, he was heard before the Tennessee legislature, and adjusted the disputed claims of the University to lands in that State. He also was the first who aroused an interest in our State history. He proposed, indeed, to write a history of North Carolina (though never able to accomplish it), and procured from the Revolutionary survivors, then rapidly passing away, much valuable material and information, which but for him would have been irretrievably lost. In one of his letters he says: "We know nothing of our State, and care nothing about it. We want some great stimulus to put us all in motion, and to induce us to waive little jealousies and combine in one general march to one great purpose."

In 1818 he came near being elected to the bench of the new Supreme Court, though he had never presided — as the successful candidates all had — on the Superior Court bench. He was elected to fill one of the vacancies on the Superior Court bench, and held the office for two years, during which time he sat, as we have seen, by special commission, part of three terms upon the Supreme Court. He resigned in the fall of 1820. In 1819 he published three volumes of reports, the 5, 6, and 7 N. C. (formerly 1, 2, and 3 Murphey). Of these, the first two covered the decisions of the old Supreme Court (from 1804 to 1818), and the last contained the decisions of the new Supreme Court for 1819, — the first year of its existence. We are so accustomed now to official reporters and a prompt publication of the decisions of the court of last resort, that we cannot understand the full extent of the benefit conferred on the profession then by the editing and publishing of the decisions, the larger part of which had remained in manuscript for so many years.

As a literary character, Judge Murphey should be classed as one of the first men in the nation. His style had all the charm of Goldsmith or Irving. In Latin, Greek, and French his proficiency was such that he read the standard authors with pleasure and for amusement. He was thoroughly familiar with the English classics; and, though in this self-taught, he had no small attainments in the sciences. His oration before the two literary societies of the University in 1827 was the first of a long series of like addresses by distinguished men at the annual Commencements, but has never

been surpassed by any. It is a model of its kind. Its commendation by Chief-Justice Marshall in a letter to its author adds to its interest, and renders it historical.

In the latter years of his life he struggled with disease and financial embarrassment, the latter the result of over-sanguine investments. But to the last his gifted mind, when his chronic rheumatism permitted him to appear in the court-room, shone out in its noonday splendor, and at all times his hours of pain and misfortune were solaced

> "With silent worship of the great of old,
> The dead but sceptred sovereigns,
> Who rule our spirits from their urns."

He died at Hillsboro, his place of residence, Feb. 3, 1832, and is buried in the Presbyterian churchyard, where repose so many of our illustrious dead. He left two sons, Dr. Murphey of Mississippi, and Lieutenant Murphey of the United States Navy. A beautiful and growing town in the western-most county of the State preserves his name, and our State itself the recollection of his fame.

John DeRossett Toomer was born at Wilmington, March 13, 1784. He was educated in part at the University of North Carolina, but did not graduate. He was elected Judge of the Superior Court in 1818, but resigned the next year. On the death of Chief-Justice Taylor in 1829, Judge Toomer was appointed by Governor Owen in June to the Supreme Court till the legislature should meet in December, 1829, when Judge Thomas Ruffin was elected by that body. Thus Judge Toomer's stay upon the Supreme bench was brief, and he did not have opportunity to develop his powers; but the opinions he filed afford proof that if time had been given, he would have achieved a reputation equal to that of almost any judge who has occupied the seat. A judge who has capacity is like a tree in good soil, — he *grows*. Time is necessary to him. It is only an inferior man who does not improve by experience and study. Judge Toomer's opinions are thirteen in law cases to be found in 13 N. C. (2 Dev.), and two in equity cases in 16 N. C. (1 Dev. Eq.). For many years he was president of the branch bank of the Cape Fear at Fayetteville. He represented Cumberland in the State senate in 1831 and 1832, and was a member of the convention to revise the Constitution in 1835. In 1836 he was again elected a judge of the Superior Court, to succeed Judge Strange, who had been elected to the United States Senate. In 1840, on account of ill-health, he resigned, and was succeeded on the Superior bench by W. H. Battle. Judge Toomer was welcomed back to the bar, and located at Pittsboro, in Chatham County, where he lived till his death, Oct. 27, 1856, in the seventy-third year of his age. He was an eloquent speaker, an agreeable writer, of fine literary attainments, and an amiable and urbane gentleman.

> "None knew him but to love him,
> None named him but to praise."

He was succeeded on the Supreme Court bench, as already stated, by Judge Ruffin.

The hunter in the Indian jungle discovers by unmistakable signs when the king of the forest has passed by. So the lawyer who turns over the leaves of the North Carolina Reports, when he comes upon the opinions of Thomas Ruffin, instantly perceives that a lion has been there.

Thomas Ruffin, the eldest child of his parents, was born in King and Queen County, Virginia, Nov. 17, 1787. His father, Sterling Ruffin, was a very zealous and a very pious minister of the Methodist church. His mother was cousin-german to Chief-Justice Spencer Roane of the Supreme Court of Virginia. His father sent his son at a suitable age to a classical academy in Warrenton, N. C., taught by Marcus George, an Irishman, and a teacher of high reputation. Among his schoolmates there were Cadwalader Jones and Weldon N. Edwards. From this academy he was transferred to Nassau Hall, Princeton, N. J. His father, who was a deeply

pious man, was controlled, it is said, in the selection of this college in preference to William and Mary and other colleges then popular, by a desire to secure him as much as possible from the usual temptations of college life by placing him in an institution whose reputation for the maintenance of authority and discipline stood high, as it did at Princeton. Young Ruffin graduated there in 1805, being sixteenth in a class of forty-two members. Gov. James Iredell was his roommate; and among his college friends and contemporaries who afterwards achieved prominence were Samuel L. Southard and Theodore Frelinghuysen, of New Jersey; Joseph R. Ingersoll, of Philadelphia; Stevenson Archer, of Maryland; and many others. On his return home he entered the law office of Daniel Robertson, Esq., in Petersburg, and remained with him during 1806 and 1807. Here he had as fellow-students Gen. Winfield Scott and Judge John F. May. Mr. Robertson was a Scotchman by birth, a learned scholar and advocate, who gained high distinction as a lawyer. He reported the debates in the Virginia Convention which adopted the Federal Constitution and the trial of Aaron Burr for high treason. In his autobiography General Scott refers to subsequent occasions when he had met Judge Ruffin, especially in Washington, in the spring of 1861, when the latter was serving as a member of the Peace Congress; and he expresses the opinion that "if the sentiment of this good man, always highly conservative (the same as Crittenden's) had prevailed, the country would have escaped the sad infliction of the war."

Rev. Sterling Ruffin, his father, having suffered financial reverses, removed to Rockingham County, N. C., in 1807, and his son soon followed. He continued his studies in the law office of Judge Murphey, and was admitted to the bar in 1808. He located in Hillsboro, and on Dec. 7, 1809, married Miss Anne Kirkland of that town, the daughter of William Kirkland, a leading citizen. In 1813, 1815, and 1816, he was a member of the House of Commons from the borough of Hillsboro, and in the last-named year was Speaker of the House. In 1815 and 1816 the town of Hillsboro was represented by Judge Ruffin, and the county by Judge Murphey in the Senate, and Judge Nash in the House. It is said that on first coming to the bar Judge Ruffin's efforts at argument were diffident, and his speech hesitating and embarrassed. His friends candidly advised him to abandon the profession, but he felt that he had the "root of the matter" in him, and held on. He was well grounded by his studies in a knowledge of the law, and experience soon cured his defects of speech. At a strong bar he soon became a leader, and in 1816, while Speaker of the House, he was chosen a judge of the Superior Court to fill the vacancy caused by the resignation of Duncan Cameron. This position he resigned after two years on the circuit, and returned to a lucrative practice at the bar. He was an indefatigable student, and a frame of iron permitted him any amount of application. For forty-three weeks of the year he had engagements in court which he kept regardless of weather and bad roads. He also was for one or two terms reporter of the Supreme Court, but was compelled to relinquish the position by the demands of his practice. His work as reporter will be found in the first part of the 8th N. C. (1 Hawks). In the summer of 1825, upon the resignation of Judge Badger, he again accepted the position of judge of the Superior Court, and during the next three years he administered its duties in such a manner that he was generally designated by public opinion for the succession to the Supreme Court upon the occurrence of the first vacancy.

In the fall of 1828 the stockholders of the State Bank of North Carolina, at Raleigh, at whose head were William Polk, Peter Browne, and Duncan Cameron, in view of its embarrassments and threatened litigation, prevailed on him to take the presidency of the bank with an increased salary and with the privilege of practising his profession. He again resigned his judgeship, and, accepting the offer, by his

diligence and practical business knowledge and the faith imparted by his acceptance of its headship, he effectually reinstated the bank in public confidence, and relieved it of its embarrassments. About this time there being a vacancy in the United States Senatorship by the appointment of Governor Branch to the head of the Navy Department, he was solicited to become a candidate for the vacancy, with strong prospects of success. This he declined, saying, as he often did, that "after the labor and attention he had bestowed upon his profession he desired to go down to posterity as a lawyer." While employed on the affairs of the bank, he still remained in full practice at the bar, and his reputation as a lawyer suffered no eclipse. On the death of Chief-Justice Taylor, in 1829, Governor Owen appointed to the Supreme Court Judge Toomer, a lawyer of deserved eminence in the profession, and of a singularly pure and elevated character; but public opinion and the sentiment of the bar had so decidedly marked out Judge Ruffin for the succession that when the legislature met in the fall of that year he was elected to the position.

ARCHIBALD D. MURPHEY.

Upon the death of Chief-Justice Henderson in 1833, Judge Ruffin was elected Chief-Justice by his associates, and served as such nineteen years. In the autumn of 1852, while at the height of his fame and not yet oppressed by the weight of years, he resigned his office, intending to retire forever from the profession and the studies in which he had won renown. But in 1858, on the death of his friend and successor Chief-Justice Nash, he was called by the almost unanimous voice of the legislature, though in his seventy-second year, to resume his place upon the Supreme Court bench. This he did, but did not insist upon resuming the Chief-Justiceship, which went to Judge Pearson. After something over a year's service, his failing health made his duties irksome, and he resigned a second time, and retired finally from judicial life. It is his singular fortune to have resigned twice from both the Superior Court and Supreme Court bench. It is worthy of note, too, that in 1848 all three of the Supreme Court judges (Ruffin, Nash, and Battle), the Governor (Graham), and one of the United States Senators (Mangum) were from the single county of Orange. Already, from 1845 to 1848, two of the Supreme Court (Ruffin and Nash), the Governor (Graham), and one United States Senator (Mangum) had been from that county; while at the legislature of 1841 both United States Senators (Graham and Mangum) were elected from the same county of Orange, in which the Chief-Justice also then resided. From 1852 to 1858 two of the three Supreme Court judges were again from Orange, as two out of the three (Smith and Merrimon) were from Wake from 1883 to 1889. In the latter year the number of judges was increased to five. Thus, in our State, geographical considerations have

had small weight in the selection for non-political offices in which fitness alone is of importance.[1]

During the six years between Chief-Justice Ruffin's resignation in 1852 and his re-election in 1858, and again after his second resignation in 1859, he accepted the office of justice of the peace in Alamance County, to which he had then removed, and held the county court with the lay justices as their presiding justice. Another most eminent lawyer, Thomas P. Devereux, the author of Devereux's Reports, having retired from the bar upon falling heir to a princely fortune, discharged the same duty for years as presiding justice of the peace in the county court of Halifax; and George E. Badger, ex-U. S. Senator and ex-judge, presided in the same manner as a justice of the peace in Wake County. The law is well said to be a jealous mistress; but Judge Ruffin took an intelligent and practical part in agriculture and horticulture. During the recess of his courts, for thirty-five years, while at the bar and on the bench, as well as after his retirement from both, he found recreation in these pursuits, and in the rearing of live-stock and in the improvement of breeds. It was no mere compliment to a distinguished citizen when the Agriculture Society of North Carolina in 1854 elected him to its Presidency, but a tribute to his eminence in that calling to promote the interests of which the Society had been founded. He was also one of the soundest and ablest financiers in the State. We have already seen the demand for his services as President of the leading bank in the State, and his success in restoring its prestige and credit.

By his industry, frugality, and capacity for the management of property, he accumulated a large estate. He owed little of it to his profession; for soon after he had achieved a lucrative practice he was called to the bench, on which, notwithstanding four successive resignations, he spent the greater part of his active life, receiving the moderate salary attached to the judicial office in North Carolina.

Until superseded by the changes in 1868, he had been for many years the oldest Trustee of the State University, and took an active interest in promoting its welfare.

After the failure of the "Peace Conference" of 1861, as to which President Buchanan adds his testimony to that of General Scott, that the voice of Judge Ruffin was for peace, he accepted a seat in the Convention of 1861. When war began, his influence was for its earnest and zealous prosecution. When defeat at last came, he yielded an honest submission, and in good faith renewed his allegiance to the government of the United States. After the war he sold his farm and returned to Hillsboro, where he died, Jan. 15, 1870, after an illness of but four days, in the eighty-third year of his age. He raised a family of thirteen children. One of his sons, Thomas Ruffin, Jr., became a judge of the Superior and Supreme Courts, and as such will have notice further on in this article.

As an advocate Chief-Justice Ruffin was vehement but logical. He placed small reliance on rhetoric, and appeals to the imagination. His mind was broad, analytic, and grasping. He was physically and mentally capable of vast application, and he did not spare himself any amount of labor. Indeed of him it was true, "Labor ipse est voluptas." He was in the habit of exercising his mental faculties by daily going over the demonstration of some theorem in mathematics. He reached greatness like most great men (especially lawyers), not by the sudden sweep of an eagle's wing, but

> "While others slept
> He toiled upward in the night."

[1] It may also be noted that in 1815 the Governor (Miller), both United States Senators (Macon and Turner), and Judge Hall were from the same county, — Warren. It is a singular coincidence that before serving together in the United States Senate, Macon and Turner had served together in the Revolutionary War as privates in the same company in Colonel Hogun's Seventh North Carolina Regiment. There is probably no parallel case in the history of the Senate.

His capacity as a business man was shown in the executive talent displayed by him on the Superior Court bench, where there is full scope for it, and in which particular the occupants of that bench are more often lacking than in a knowledge of law. In administering the criminal law upon the circuit, the extent of punishment depends very largely on the discretion of the judge. Judge Ruffin's sentences, while not cruel, were such as to be a terror to evil-doers. His practical mind saw that punishment was not vengeance visited upon the criminal, nor was it intended to be reformatory, but rather an example to deter others from the commission of offences, and that the protection to law-abiding men was to prevent violations of law by fear of punishment. He was no sentimentalist. He knew that the investigation and the punishment of crime was expensive to the good men of the community, and by the nature of his sentences he left no doubt of his intention to fulfil the purpose of the court by visiting offences against law with unpleasant consequences to the evil-doer. Consequently, wherever he rode the circuit crime decreased. He sat upon the Supreme Court bench twenty-three years consecutively, from 1829 to 1852, during nineteen years of which he was Chief-Justice, besides one year and a half after his return to the bench. His opinions thus covered nearly a quarter of a century, and will be found in 35 volumes, from 13 N. C. (2 Dev.) to 45 N. C. (Bus.) inclusive, and also in the 51 & 57 N. C. He wrote while on the bench more opinions than any other judge. His opinions embrace almost every topic of the civil and criminal law. They are usually long, full, and show the concentration of a powerful mind upon the subject in hand. His opinions are well beaten out. The print of the hammer is there. His opinions have been cited with approbation by the Federal and State supreme courts, by eminent text-writers, and have been quoted as authority in Westminster Hall. He reached the rare distinction of being equally great both in the common law and as an equity lawyer. Pearson probably equalled him as a common-law lawyer, but fell far short of him in the grasp and application of the great principles of equity.

JOHN D. TOOMER.

While conservative, as judges and lawyers necessarily are, he was not a Chinese copyist "of things long outworn." Where the changed condition of things in this country as compared with England, or improved modes of thought, or "the better reason" called for a modification of precedent, he did not hesitate to declare it. In the criminal law he was above the pettiness of "word-splitting," and obeyed the will of the legislature, — so often expressed in enactments previously slighted by the courts, — that technicalities should be disregarded by the judges when not of the substance of the issues involved. In State *v.* Moses, 13 N. C. (2 Dev.) 452, he construed the statute to mean that all defects and omissions in in-

dictments are cured, except the omission of an averment of matter essential to constitute the crime charged. This certainly was the clear intent of the law-making power. He says: "This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of *form*, *technicality*, and *refinement* which do not concern the substance of the charge and the proof to support it. Many sages of the law had before called nice objections of this sort a disease of the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to accept. In all indictments, especially those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the legislature meant to *disallow the whole of them*, and only require the *substance;* that is, a direct averment of those facts and circumstances which constitute the crime to be set forth." In 1796 the North Carolina legislature amended the common-law rule by prohibiting judges from expressing an opinion on the facts. The example has been followed in only a very few States, and the common-law rule still prevails in the United States and most of the State courts, as well as in all other English-speaking countries. In this same case (State *v.* Moses) Judge Ruffin takes his stand against an extension of the purport of this statute by judicial construction, and intimates that "the administration of the law would be more certain, its tribunals more revered, and the suitors better satisfied, if the judge were required (as formerly) to submit his views on *the whole case*, and after the able and ingenious but interested and partial arguments of counsel, to follow with his own calm, discreet, sensible, and impartial summary of the case, including both law and fact. Such an elucidation from an upright, learned, and discreet magistrate, habituated to the investigation of complicated masses of testimony, often contradictory, and often apparently so, but really reconcilable, would be of infinite utility to a conscientious jury in arriving at a just conclusion, not by force of the Judge's opinion, but of the reasons on which it was founded, and on which the jury would still have to pass. If this duty were imposed on the Judge, it is not to be questioned that success would, oftener than it does, depend on the justice of the cause, rather than the ability or the adroitness of the advocate."

During his service on the bench two notable departures were made from the English precedents in equity, simplifying our system and freeing it from embarrassments: (1) Adhering to the Statute of Frauds, and refusing to decree specific performance of a verbal contract of sale of land upon part performance; (2) Discarding the doctrine of vendor's lien upon land sold on credit. Womble *v.* Battle, 38 N. C. 193. There were also other salutary reforms, since recognized and acted on by many able courts, in support of which Chief-Justice Ruffin delivered strong and convincing arguments. His familiar knowledge of affairs, especially with banking and accounts, and his practical knowledge of our many-sided, every-day life was of great advantage to him on the bench. He was, as Tennyson says of Wellington, "rich in saving common-sense."

In State *v.* Morrison, 14 N. C. 299, he laid down the doctrine, since followed in every State but one (Black Int. Liquors, § 507) that on an indictment for retailing liquors without license, the burden is on the defendant to show the existence of a license. His opinion in "Hoke *v.* Henderson," 15 N. C. (4 Dev.) 1, holding that an officer has an estate in his office, and though the legislature may destroy the office (when not prohibited by the Constitution), yet it cannot continue the office, and transfer the estate in it to another, is a most able argument, which received the notice and high encomium of Kent and other constitutional writers. It was the main authority relied on by

Mr. Reverdy Johnson in the second argument of *Ex parte* Garland before the United States Supreme Court, — a case involving the power of Congress by a test oath to exclude lawyers from practice in that court for participation (on the Southern side) in the late war between the States, and upon which Mr. Johnson won his case. In State *v.* Benton, 19 N. C. 196, he established clearly the practice as to trials for homicide and challenges to jurors. In Railroad *v.* Davis, 19 N. C. 452, he established the doctrine (then a new one) of the right of the legislature to provide for condemnation of a right of way for railroad purposes, and that in such cases the land-owner did not have a constitutional right to a trial by jury to assess the damages, but was remitted to whatever mode of assessment might be provided by the legislature, and that payment of compensation did not necessarily precede the taking possession of the right of way. In Irby *v.* Wilson, 21 N. C. 568, in a very able opinion, he maintains that while the domicile of the husband is that of the wife for some purposes, yet where they have adverse interests, as in a suit between them, her domicile is where she actually resides; and that hence in an action for divorce, where a wife had left the State for many years, a decree of divorce obtained by the husband in the State where he continued to reside, without actual service upon the wife, is a nullity. In Webb *v.* Fulchire, 25 N. C. 485, is laid down the proposition that where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practised the fraud upon him. The game in this case was "three-card monte," and the learned Judge seems as much puzzled as to how the trick was worked as the simple-minded plaintiff himself. State *v.* Rives, 27 N. C. 297, is a very interesting decision, which holds that while the interest of a railroad company in its right of way can be sold under execution, the corporate franchise is not liable to such sale. In Attorney-General *v.* Guilford, Ib. 315, is discussed a subject which is still sometimes a *vexata questio* in this State, and the Chief-Justice holds therein that the county authorities are not bound to grant license to retail spirituous liquors to every one who proves a good moral character, nor have they, on the other hand, the arbitrary power to refuse at their will all applicants for license, if properly qualified; and further, that the county authorities, having a discretion to a certain extent in granting such licenses, a mandamus will not lie to compel them to grant a license to any particular individual, though he may have been improperly refused a license, the only remedy, if the license is perversely and obstinately denied, being by indictment. *Apropos* of this, counsel for the applicant to retail, in one of the recent cases in this State, observed with much *naïveté* that he did not understand the object of this requirement, and that he did not see why a man needed a good moral character to qualify him to sell intoxicating liquors. Fleming *v.* Burgin, 37 N. C. 584, maintains the proposition that actual notice of an unregistered incumbrance does not affect a subsequent incumbrance or purchase for value. In State *v.* Boyce, 32 N. C. 536, is a very interesting discussion of the right of the owner of slaves to permit them to meet and dance on his premises on Christmas eve and other holidays without being responsible for keeping a disorderly house. He says: "We may let them make the most of their idle hours, and may well make allowances for the noisy outpourings of glad hearts, which Providence bestows as a blessing on corporeal vigor united to a vacant mind. . . . There was nothing contrary to morals or law in all that, adding as it did to human enjoyment, without hurt to any one, unless it be that one feels aggrieved that these poor people should for a short space be happy at finding the authority of the master give place to his benignity, and at being freed from care and filled with gladness."

Take him all in all, we have not seen "his like again." By the consensus of the profession he is the greatest judge who has ever sat upon the bench in North Carolina, and those few who may deny him this honor will admit that he has had no superior. In political opinions he was a follower of Jefferson; but this did not prevent his reverence for Chief-Justice Marshall, who was his personal friend, as was also Chancellor Kent. He was succeeded as Judge by Battle (on Battle's second call to the Supreme bench), and as a Chief-Justice by Nash, both from his own county of Orange. When he left the Supreme Court bench in 1859, after having been recalled to it, he was succeeded by Judge Manly.

THE COMMON LOT OF THE LAWYER.

By Frank J. Parmenter.

CRIBBED in his office, where sunshine was rare,
And the spider unscared wove his murderous snare,
Surrounded by furniture needing repair,
As a quick eye would note in a casual stare;
Laden with sorrow, and burdened with care,
And pallid for want of a little fresh air,
And weary from waiting, almost in despair,
While the lamp cast a shadow upon his dark hair,
Musing he sat in his uncushioned chair,
Persuading himself he was Misfortune's heir
To the entire estate instead of a share,
Upholding a cross that Christ only could bear,
And pensively twisting his mustache there.

His eye, large and restless, was black as the night;
His brow, broad and high, as the marble was white;
His lips, thin and bloodless, were cold and shut tight;
And the lines of the sad face betokened a might
Could make itself feared in the wrong or the right,
On which side soever engaged in the fight.
Of years he had numbered but one lustrum more
In his studious course than the frolic first score
Of existence that Time had swept rapidly o'er,
In haste to waft life to Eternity's shore,
Where one lays down forever the burden he bore,
For God to exalt or depress it still lower,
According as life had developed before
On earth, and been lessoned to sink or to soar;
But our hero had learned to take Time by the fore,
And thus had he garnered of Law a vast store.

He loved its stern science, but literature took,
Through a love not less ardent, the bait from his hook;
And, halting between them with alternate look,
Like the ass 'mid the haystacks, of neither partook;
Or, standing in pause like the Dane in the book,

Neglected them both. But now he could brook
Law's service alone, and all other forsook.

And such was his eloquence, Cicero's might
Have risen at times to as dazzling a height;
His fancy was vivid, his wit keen and bright,
And his logic had staggered the Stagyrite,
And cast sublime Phædo far into the night
By its power to eliminate wrong from the right,
And draw from the deepest well into the light
Truth might concentrate the wavering sight
Of the nonplussed agnostic, and put him to flight.

But these availed little: men rarely engage
A lawyer just starting on life's pilgrimage
To pursue a profession; 't is fair to presage
He must cope with starvation till youth pass to age,
And then, perhaps, gain but a small clientage;
Hence they wait for experience to make him so sage,
He can teach doubtful battles where fittest to rage,
Like Churchill on Addison's well-purchased page,
Years after fond Cleveland had paid him his wage.

Too proud to court patrons, he saw with disgust
Servile lawyers, — but only a few, let us trust, —
Who shamed their high calling by licking the dust
And begging employment from just and unjust,
Wax fat through such meanness, while he ate his crust.

Thus they left the young advocate plodding away,
Heart-sore and despairing from day unto day,
Determined sometimes, in his passions' mad play,
On getting transported to Botany Bay,
Or running amuck, like the frenzied Malay,
Among his three clients that never would pay,
As the best means of keeping the gaunt wolf at bay;
Longing for sunshine, nor feeling a ray
Smile on the hot forehead its pain to allay,
Or banish the gloom that enveloped its prey,
And twisting his mustache until it was gray!

Then, forsooth, they discovered his merits, and flocked
Round the cushionless chair, till approaches were blocked,
And the spider, his roused victim fleeing, was shocked;
While the unrepaired furniture, — not overstocked, —
Through the weight, or surprise at an occupant, rocked,
And the rusty-hinged door had to be double-locked,
So numerous and eager the clients that knocked!

Yes; now repaired thither the good and the bad,
The brilliant, the stupid, the merry, the sad,
The sneaking camp-follower, the sane, and the mad,
The simpering dude, and the dusty foot-pad,
Apparelled like Lazarus, or as Dives clad;
While worthless and worthy his day in court had,
And justice — sometimes. It is needless to add,
The long smileless face of the lawyer looked glad.

The fool and the knave and the righteous now bore
Witness how vast were the genius and lore
Enabled our lawyer all depths to explore,
And in calm or tempest to pull the best oar
(For those who had sneered were as quick to adore
After Fame's blaring trumpet had opened its roar);
And though it wrung anguish from every pore,
Since his service brought plenty to their greedy door,
Where the famine for many lean years had been sore,
They paid him large fees — many thousands or more —
With ungrumbling promptness unheard of before!

Yet in heart they were ingrates: most litigants see
Little worth in their counsel, and rarely bend knee
To their temporal savior, whate'er his degree,
Or however earnest or listless may be
Their love for the One who walked down to the sea,
And met his first followers by deep Galilee;
And though in all other things generous and free,
They pay with reluctance his hardest-earned fee;
For they think success due to their *own* worth, and the
Absence of it in their crushed enemy.

His practice now grew so extensive and great
That wealth flowed upon him through every gate;
And never was lawyer so favored by Fate,
As the envious world said, forgetting how late
On Time's rapid calendar was the sad date
When his bread had no butter, and no meat his plate,
And the long, weary years she condemned him to wait
Before condescending to better his state,
With Poverty holding a grim *tête-à-tête*,
His passions all roused by the angry debate,
And twisting his mustache, despairing, irate,
As herein your poet, without love or hate
For him, or intending to extenuate
His faults or malign him, has tried to narrate.

Was he happy at last, with his fame and his wealth,
His Atlas-like burden, his fast failing health,
That most of life's pleasures had laid on the shelf?
You shall judge. I once heard him sigh to himself,

"Too late have these fools sought my services here!"
(He brushed from his pale, shrunken cheek the hot tear.)
"I've purchased their favor with life's blood, I fear;
But 't will lighten the burden of those I hold dear,
And that thought will solace when Death hovers near,
That still is far distant by many a year,
Despite this depression, or I am no seer;
Though nigh to the cradle wait coffin and bier,
For me 't will be long ere their herald appear!

While Townsend and Ingalls, Law's white-haired, gay thralls,
Whose years sit so burdenless no task appalls,
Perform giant labors where active life calls,
I 'll not lag superfluous, whatever befalls,
But force to the finish a good fight, like Paul's;
For sloth, more than serfdom, the earnest soul galls!"

So he bent to his yoke, and with resolute might
And wondrous dexterity fought for the right
Whene'er he could choose under which flag to fight ;
And when he could not, as persistently quite
On the side where the black is veneered with the white,
To keep the true inwardness out of the light,
As duty enjoins on professional wight,
Who must stand by his colors, though Heaven should smite
The staff with its lightning, to wither and blight,
As it smote Jeroboam's rash hand. I invite
The most stubborn casuist to question this right,
But meanwhile should state (turning back to the plight
Of our hero), his candle, while still burning bright,
Though nearing the socket, went not out by night.

So after a little, worn Nature betrayed
Grave signs of exhaustion, and beckoned for aid
To her handmaiden, REST, who so long had delayed
Her coming, reluctant, obnoxious, afraid ;
For the restless night-toiler was sure to upbraid,
Whenever she proffered assistance, the maid,
And repulse her with scorn. Lest on him be laid
The hand that withdraws not, a motion was made
That his incessant toil for a season be stayed ;
The order was granted, — and straight disobeyed,

When, stealthy but urgent, a litigant came,
That won his case ever, no matter what claim,
And mockingly whispering Death was his name,
Despoiled th' amazed lawyer of life and of fame !

And like *his* lot, his brothers' : the same broken health,
The early-life struggle, death brought by one's self,
Fame transient, and all else the same, — but the wealth.

THE LEGAL SYSTEM OF OLD JAPAN.

By Prof. John H. Wigmore.

II.

WHEN we turn from the rural districts to the towns, we find, as has been said, that justice becomes somewhat more impersonal and inelastic. Formal litigation was in the mercantile communities, of course, more frequent. It has been said that the development of commerce undermined the feudal system in Europe. We may also believe that it contributed to the more comprehensive development of law. Tracing the same influence in Japan, we see that while it never became strong enough to affect the overthrow of feudalism (this came from quite other causes), it contributed to the development of precise jurisprudence, as distinguished from mere custom, in the courts of the town magistrates. One example must suffice from the precedents of the Yedo courts.

[6] *Memorandum of Consultation.*

Sent to Supreme Tribunal, Bunsei Period, 10th yr. (1828) 11th mo. 2d d., by Sakakibara, Town Magistrate of Yedo. Answered informally by Ishikawa, Temple Magistrate, 18th day.

(1) *Question.* Ought not the successor of one who has suffered a sentence of banishment from his town to be liable for his predecessor's debts, provided a confiscation of effects has not accompanied the sentence?

(2) *Answer.* We have received your question. We have examined the precedents in regard to a defendant who has suffered local banishment, but there are none on that point. But we find, in Gembun, 4th yr. (1740) 10th mo., a consultation on the question whether a claim for money lent by a person sentenced to local banishment was to be regarded as extinguished, to which the Tribunal answered that it was not (provided no order of confiscation of patrimony was included in the sentence), and that as one's sentence to local banishment does not affect his wife or his son, either the successor, if any, should possess all the claims of the exile, or the exile himself, if no successor existed, should be authorized to cause his effects to be sold and the proceeds forwarded. Now, as the rights of a banished creditor are thus not lost, much less should a banished debtor's obligations be extinguished. In such a case we think that the successor ought to renew the instrument of debt in his own name; if none exists, the court should renew the instrument for the exile, and as soon as he has fixed his residence, require him to pay. It is true that in Kansei, 6th yr. (1794), where the defendant in an action before your predecessor, Ikeda, had absconded pending trial, and in the absence of a precedent the successor was ordered to renew the instrument, the Tribunal decided that thereafter such renewal in case of an absconding debtor should not occur, but the claim should be extinguished. If we followed this analogy, we should here order the claim extinguished; but that course does not seem just, at least where there is a successor; and as the practice has usually been to have the plaintiff name the successor of the debtor in his declaration [where the original debtor has died before suit brought], so here we think it best, in case of an absconding pending trial, to order the successor to renew the instrument in his own name and pay the debt. If you agree with our result, we hope that you will lay the matter before the full Tribunal, so that we may agree on a uniform practice for the future."

(3) *Letter from Ishikawa, Temple Magistrate, to Sakakibara, Town Magistrate.*

Bunsei, 11th yr. (1829) 1st mo., 28th d.

You consulted us in the 11th month in regard to a debtor who has suffered local banishment. We answered according to the principle which we should like to see adopted for that case as well as for the case of absconding during a trial, and we understood that you were to consult the full Tribunal. We shall be glad to learn your conclusion.

(4) *Answer.* I did, as you say, consult you in regard to the question of an exile's debt, and your answer advised ordering its payment by the

successor; and being myself of the same opinion, I did so order. You also referred to the case before my predecessor of a debtor absconding pending trial, where the judge imposed liability on the successor and the Tribunal afterwards negatived this rule, and you suggested that as this rule did not seem just, I should bring the question before the full Tribunal. But I beg to remind you that what I consulted you about was not the case of an absconding pending a trial in my own court, but a case in which the defendant was in exile, and out of the jurisdiction of the Yedo Court, and we both had the same opinion about it. But as the matter of a debtor absconding during trial is somewhat different, and I have not yet made up my own mind about it, I think it better not to refer it to the full Tribunal until the case actually arises." [1]

This whole record shows a method of developing the law not different in spirit from that of our own; and the last answer especially reveals the cautious and practical shrinking from the decision of more than is necessary which has always characterized the English judiciary. In a case which occurred a few months after the preceding, in the full Tribunal, the very question just mentioned — the lapse of a claim against a debtor absconding during trial — did come up and was discussed at great length, and a number of precedents of all sorts were brought forward. The two cases, as the Magistrate said, might be very different, because the exile was civilly dead and a successor was usually at hand, while the absconding debtor might return to the jurisdiction at any time and no legal successor yet existed. It must be remembered that in a society such as Japan knew in feudal times, local opinion, as well as the lack of free change of livelihood, made bankruptcy in most cases the end of a man's career. He might continue to subsist as a despised dependant on the charity of his friends and relatives; but he often preferred to cut loose from respectable society and join one of the outcast classes. Thus it was that the courts were frequently called on to deal with the property of debtors who had absconded.

[1] The manuscript collection of precedents from which this case is taken is a large one, covering the whole field of private law, and is now in process of translation, to appear, it is hoped, in a year or so.

The real development of Japanese jurisprudence went on at Yedo, as has been said. But the proportion of cases in which a legal principle came into doubt was small in comparison with the mass of litigation, and the Yedo magistrate was above all a trial judge. The greatest fame was achieved by those magistrates who showed penetration in discovering the truth and good sense in apportioning practical justice. The traditions of the famous deeds of some of these great popular judges still linger in the nation, and especially among the townspeople of Yedo. The greatest judge upon the long list was Oka Tadasuke, whose name has been fairly canonized in judicial annals. He held the office of Town Magistrate from 1742 to 1751, and he is the hero of many tales, — not entirely, it must be said, founded on fact.

Some of his famous trials may be worth reproducing among the "Causes Célèbres" of this magazine. There is room here for only one brief incident in which he figures, — a story which is beyond doubt original to Japan in its present form, notwithstanding its remarkable resemblance to another celebrated judgment given more than two thousand years previous on the other side of the world.

About a century and a half ago, a woman who was acting as a servant in the house of a certain Baron had a little girl born to her. Finding it difficult to attend to the child properly while in service, she put it out to nurse in a neighboring village, and paid a fixed sum per month for its maintenance.

When the child reached the age of ten, the mother, having finished the term of her service, left the Baron's mansion. Being now her own mistress, and naturally wishing to have the child with her, she informed the woman who had it that she wanted the child. But the woman was reluctant to part with her. The child was very intelligent, and the foster-mother thought that she might get some money by hiring her out. So she refused

to give her up to the mother. This of course led to a quarrel. The disputants went to law about it; and the case came up before Oka Tadasuke, then Magistrate of Yedo.

The woman to whom the child had been intrusted asserted that it was her own offspring, and that the other woman was a pretender. Oka saw that the dispute was a difficult one to decide by ordinary methods. So he commanded the women to place the child between them, one to take hold of its right hand and the other of its left, and each to pull with all her might. "The one who is victorious," said the Magistrate, "shall be declared the true mother." The real mother did not relish this mode of settling the dispute; and though she did as she was bidden and took hold of the child's hand, she did what she could to prevent the child from being hurt, and slackened her hold as soon as the foster-mother began to pull, thus giving her an easy victory. "There!" said the foster-mother, "the child, you see, is mine."

But Oka interposed: "You are a deceiver. The real mother, I perceive, is the one who relaxed her grasp on the child, fearing to hurt her. But you thought only of winning in the struggle, and cared nothing for the feelings of the child. You are not the true mother;" and he ordered her to be bound. She immediately confessed her attempt to deceive, and begged for pardon. And the people who looked on said, "The judgment is indeed founded on a knowledge of human nature."

It remains to give an instance or two of the criminal cases which from time to time came before the Chamber of Judges for decision. Usually the question was as to the degree of punishment. The penalties often seem very severe; but they do not exceed in this respect the English penalties of the last century.

1752. Province of Oshu, Hotoke Shire, Hama village. Defendant: Jimbei, adopted son of the farmer, Chozaku, and Risaburo, farmer.

Report. A certain Riyemon often came to the house of the said Chozaku, and enticed him into gambling games. Jimbei warned him of the unlawfulness of such conduct, and forbade him the house. A quarrel thus arose. Riyemon finally made an effort at reconciliation, and proposed to have a little wine bout to seal the peace, and, as a certain Risaburo of the same village happened to be present, all three betook themselves to a wine-shop in the neighborhood and began to drink. They ended by becoming intoxicated, and, as they were walking home along the beach, Riyemon started once more the original matter of controversy. A scuffle took place, and Jimbei and Risaburo wounded Riyemon so severely with stones that he died. It was dark at the time, and it is impossible to say whose blow it was that killed him. The question is whether Jimbei should be punished by decapitation, without confiscation of property, and Risaburo with banishment.

Judgment. Banishment for both.

1745. Joshu Province, Nakanishi village. Defendants: Sezayemon, farmer, and Shinkai, priest of Jingu Temple, Shinano village.

Report. These two men had with others been sued by the authorities on account of unpaid taxes, and believed that their apprehension was due to the instigation of the headman, Senyemon. They formed the plan of revenging themselves when opportunity offered. A lawsuit arose, and Sezayemon had occasion to go to Yedo in company with the headman. As the latter was called back by his affairs, he left his seal with Sezayemon, to represent him in the matter of the lawsuit. This opportunity for revenge was seized by Sezayemon, and he drew up several documents in blank with the headman's seal appended. Sezayemon was afterwards examined as a witness in regard to the tax-suit, and so he gave to the defendant priest one of the documents, with the instruction to make out a receipt for the payment of the taxes and another of the same sort to one Chubei, of the village. This was a most culpable offence. As the priest, moreover, planned the crime with Sezayemon, and forged the tax-receipt, his conduct is disgraceful to one in his position, and deserves severe punishment. The question is whether the punishment shall be, for Sezayemon, decapitation, with exposure of head on the scaffold; and for the priest, decapitation, without privilege of public burial.[1]

Judgment. The above is approved.

[1] There were four classes in the death punishment, decapitation being the least heinous; and the additional circumstances here mentioned indicate the fourth and second degrees, respectively, in this class, there being four degrees in all.

The last case mentions a journey of the accused to Yedo with the headman. This was one of the common incidents of Tokugawa justice, — the departure of all the parties to Yedo, in cases of importance, to attend on the court there until the suit could be brought to a conclusion. It was an expensive matter, to be sure; but it doubtless had its pleasures for the rustics, and it played a great part in familiarizing the rural inhabitants with the ways of the busy metropolis. The headman or some other officer must always accompany the litigants, as has been said, and probably served as an adviser both of the court and the party. But each man was supposed in theory to advocate his own cause. To obtain payment of a claim on behalf of another, taking a share as a fee, was a penal offence. Nevertheless, many made a business of thus acting for others. They would claim a relationship with their client, and represent that he was sick and unable to attend. It was a business in which much money was made. But the receiving of a fee was clandestine, and ostensibly the service was rendered as a favor.

There were no court fees, before either the headman of the village, the reeve, or the magistrates. There was a large staff of clerks and assistants at every town magistrate's and reeve's office, and also in the Chamber of Judges; and to these skilled permanent officials rather than to the magistrates themselves was owed the systematic and consistent treatment of litigation. The legal training they received was found in the ordinary political and moral precepts which, together with a stock of historical information relating to their own country and China, they obtained from the Confucian books studied at the schools for *samurai*, and in the experience which they gained in subordinate grades of their calling. These, as well as the rural administrators (or reeves, as it seems best to call them), in fact formed a special class trained for this life. The reeve was usually a knight or one of the lesser barons, and had usually received a fair education for his office, and was thoroughly acquainted with the customs of his district and its special requirements. The directions given in one of the official manuals were that these officers should be men trained to the keeping of accounts, should have a general knowledge of civil and criminal law, and should be familiar not only with the customs of the locality over which they presided, but also with those of adjacent regions.

In the towns there was always a well-organized police system. Ordinary watch duty was performed by the townsmen themselves, under regulations arranged at the ward-meetings; while the regular police were attached to the magistrate's office, and their duties were rather those of bailiffs and detectives. In the country this portion of the work, by old custom, was in the hands of one of the outcast classes, called *bantaro*, or watchmen.

These formed a sort of volunteer police, who could be hired by villages and towns, or by private persons, for the protection of their property. The large cities had their own police systems, but the reeve and lesser feudal lords usually employed *bantaro*. In a village the *bantaro* went every morning to the headman to inquire if there was anything to be done. They had no power to arrest without an order, unless *flagrante delicto*. When an order was desired, it had to be obtained from the reeve, the headman having no authority in criminal matters. A small prison stood near the *bantaro* house, and was used as a temporary place of confinement until the proper official arrived. Arrested persons were bound with cords, differing according to the kind of offence, — in case of murder with a blue-black one, in case of theft with a light-colored one. *Samurai* were always bound with iron clamps or wristlets, never with cord. The *bantaro* were very skilful in capturing criminals. When a criminal escaped from Yedo, a letter was sent on to the first *bantaro* in the direction taken by the fugitive. Search was begun, and the letter sent on rapidly to the

second, to the third, and so on. Sometimes a distance of one hundred and twenty miles was thus covered in twenty-four hours. The *bantaro* themselves were never known to commit a theft or other crime of any kind, and, remarkably enough, they did not even "squeeze" or levy blackmail. They went about every morning with a small covered pail, and received from each house the cold victuals left over; this they often sold to beggars. Instead of food, they were sometimes given a small coin or two.

As to the content of the legislation and the jurisprudence of the Tokugawa Shogunate, it would be useless to enter into details. In the rural districts the subject-matter of ordinary legal relations hardly extended beyond land-holding, with the various methods of tenancy, land sales, marriage, inheritance, adoption, mortgages, and a few easements. The development of definite customs was limited to these general subjects. In the commercial communities legal relations were naturally more varied and more complicated. The loaning of money gave rise to a variety of distinctions and refinements, and furnished a great portion of the litigation. Sale, in all its forms, and with its attendant machinery of brokerage and credit, played an equally important part. Agency, Set-off, Carriers, Bills of Exchange, Auctions, Damages, Penalties, Pledges, — these are some of the special topics in the recorded cases. Of course analogies to our own system and to others are plentiful. The form, however, even where the legal result is the same, is often different, the result having been reached by a different road. Thus there existed the ordinary transaction of deposit for safe-keeping; but as money was often so deposited, and the privilege of loaning it was frequently given at the same time, the rule grew up that the depositary was not liable for loss by act of God (their phrase, "calamity of Heaven," ran in curious correspondence with our own), where a *res* was bailed merely for safe-keeping, while if it was money and was lent out by the bailee, under the above privilege, the bailee was responsible for it absolutely. We should have placed this obligation in the category of debts arising from loans; but circumstances caused the Japanese to work out a similar liability through the machinery of deposit,— just as the Romans also, in the *depositum irregulare*, a similar transaction, worked out the absolute liability of an ordinary borrower of money. In security rights we find usually the two chief sorts — the pledge (where possession is given to the creditor), and the hypothec (where it is retained by the debtor) — side by side in the same regions. In the former case the earlier English rule of "dead pledge" obtained, that the creditor worked the land and took the profits by way of interest, without accounting for them to the owner or applying them to the payment of the debt. In the rules for redemption we find special favor shown to the debtor; for in most localities redemption might take place at any time that the debtor or his successors obtained the money. The pledge (in the above sense) of land involved, as in the later form of our mortgage, the transfer of the legal ownership to the creditor; in the hypothec no title passed, but a registration at some local office was required, as at Rome. Just as the hypothec, or mortgage without transfer of possession, has, in its modern Anglo-American shape, grown from the mortgage with transfer of proprietorship entitling the creditor to possession, until in most States the real-estate mortgage has now become, even in theory, a mere hypothec, with registration; so, too, we find in Japan that the registered hypothec came after the pledge, although the influences causing this are not clear; and in some districts we find the transition stage of a transaction known as a pledge, but really a hypothec.

One might continue to cite a volume full of the interesting coincidences and divergences which present themselves as one studies the Japanese civil law. The purely criminal law does not have the same attrac-

tion, for one reason, because it early came under the influence of Chinese law, and never regained its independence; for another and connected reason, because it came almost entirely from above downwards, and was not an outgrowth of the popular character; and, finally, because its vitality was almost wholly lost when feudalism fell, and such attraction as it has is connected more with the study of social life under the Tokugawas than with that of legal development. If one were to analyze the reasons for the interest which the civil branch of the law has for the Western student, he would probably find three chief elements. First, the polar oppositeness, as compared with the West, of the style in which Japan has contrived to work out so many traits of language and manners, leads one to wonder whether in legal relations the same spirit of contradiction has shown itself. Second, the idea of justice, as has been said, is in Japan a more flexible one than we are accustomed in Anglo-Saxon law to aim at; and there must always be an interest in examining and comparing the results reached under these two extreme types of strictness and flexibility. Third, the legal system of Japan (on its civil side) is one of the few which have been permitted by their environment to maintain their individuality and reach a certain stage of development in comparative isolation from other systems. The Roman was one; the Germanic was another, of which the English branch has attained to the first place. The Hindu, the Slavic, the Mohammedan, and the Chinese may also be named; and to this list it seems clear that the Japanese must be added.

What rank it shall take among these systems cannot yet be told. It must be placed higher than the Hindu law, for its development never fell into the hands of a religious order, and was not retarded by an inextricable complication of tribes and races. But it was greatly hampered by the framework of feudalism in which it was cast, — not only by the preservation of certain class-distinctions and other features in the law itself, but indirectly by the hindrance which feudalism interposed to the unification of the country, preventing the separate treatment of judicial affairs by trained judges, and obstructing that growth of commercial and social intercourse which necessarily underlay the growth of the national jurisprudence.

But the practical question for to-day, which is forced upon the student of indigenous Japanese law is as to the wisdom of the adoption by the Japanese Government of a foreign system in the place of their native one. Shall we say that the policy was a correct one or not? If we consider merely the feasibility of perpetuating the native system, we may say that it might have been done. There is no doubt that the customs and precedents could have been collected, arranged, and codified in a form easy to administer and suitable to the national character. Much more must we disagree with the commonly received notion that the importation of a foreign system was required because Japan had no jurisprudence of her own. But the feasibility of a codification is only a small part of the problem. The solution depends on a dozen other important considerations of policy. If we regard merely the standpoint of the statesmen who, at the beginning of the Restoration epoch, determined to reorganize the legal system and invited a number of competent continental jurists to undertake this task, we can but say that, viewing all the circumstances with their eyes, their action was reasonable and natural. Given all the elements of the situation the same, and any other body of intelligent men would hardly have pursued a different course. If, however, we take our stand at the present, and survey the problem in the clearer light which two decades of history have thrown upon it, the solution becomes more difficult. There are on both sides serious considerations, so complicated and so difficult to measure with accuracy, that one hesitates to

make a decision. It is one of those situations in which the inclination is to stand aside, and let history decide for itself in the result.

But on the whole, the result promises to be a fortunate one. No amount of legislation can dispel legal rights inherent in the character of a people. It is probable that the prime notions of importance still current will be assimilated into the new system. Thus the borrowed law will furnish the system, and the indigenous will supply the material, so far as seems expedient. The history of the Roman law in France and Germany will repeat itself. Said Bernhöft, a noted student of comparative jurisprudence, some ten years ago: [1] —

> "It is only when we examine the process of development by interpretation through which the Roman law passed in mediæval times that we can understand how it came to be accepted in Germany. . . . The wider the region it embraced, the greater was the remodelling to which it was subjected, and that involuntarily, at the hands of jurists and administrators."

It is in the administration of the new law in Japan that we may expect to see a just accommodation of its principles to the ideas of the people. It is a fact that no foreign law-book is ever cited by counsel or referred to in judicial decisions in the courts of Japan. The spirit which inspires this rule will doubtless secure the best results in the process of welding the codes to the national civilization.

[1] Zeitschrift d. vergleich. Rechtswiss., I. 443.

JUDICIAL DIVERSIONS.

NOT long ago an Irish police-court was disturbed in a peculiar way. A celebrated Irish Member of Parliament was about to be placed upon his trial, when the magistrates were observed to clutch their noses with a suicidal tenacity. The assembled spectators of the trial looked inquiringly at one another, and then at the magistrates whose faces were strangely distorted. Presently the crowd began to gasp and sniff, and in a moment a hundred or more noses were held in a tight embrace. The usually impassive faces of the policemen were curiously contorted, and even the prisoner betrayed the effect of the mysterious influence. Magistrates and men made a wild rush for the door, and their noses were not released until the fresh air was blowing in their faces. The proceedings were summarily adjourned to another day. Some merriment was caused when it became known that a quantity of sulphuretted hydrogen had been intentionally sprinkled on the floor of the court-house, the fumes of which cleared the building quicker than an earthquake.

Perhaps the same fine sense of humor caused some Dublin magistrate to send Mary Smith to prison for eating dynamite. Mary found a brownish-looking compound in a heap of rubbish, and thinking it was chocolate, consumed half of it with considerable relish. She had not finished the remaining half, when a kind friend informed her that she was eating part of a dynamite cartridge. The police sought her out; and Mary Smith was sent to prison for two months, for having dynamite illegally in her possession.

Few people can claim to have outwitted Sir James Hannen, the well-known judge. His lordship, however, was curiously "done" by a sombrely dressed juryman in his own court. In a most melancholy tone the juryman claimed to be exempt from serving on the jury which had been empanelled to try an important case. Sir James very sympathetically asked on what grounds he

claimed exemption. "My lord," said the applicant, "I am deeply interested in a funeral which takes place to-day, and am most anxious to follow." "Certainly, sir, your plea is a just one," remarked his lordship. The man departed; and the next day the judge learned that he was the undertaker.

One of the mildest of the High Court judges, Mr. Justice Wills, was extremely ruffled at Birmingham one day, when he found that some local magistrates had sent a man for trial at the assizes on a charge which had not been, in his opinion, sufficiently investigated. He strongly condemned the perfunctory way in which he considered the magistrates had done their duty. He was somewhat disconcerted to find at a later stage that one of the defaulting magistrates was his own brother.

A singular circumstance led to the release of a Scandinavian sailor who was recently charged at Swansea with the wilful wounding of a comrade. The jury found what was considered a verdict of not guilty. The judge thereupon acquitted the prisoner, and retired from the court. The jury then awoke to the fact that the Court had somehow given a wrong verdict. Messengers were sent for the judge, but that functionary had left the building. The clerk of arraigns then informed the jury that as the wrong verdict had been recorded, it could not be recalled.

The officials of a country police-court were startled one day to see a man walk into the court with an enormous axe over his shoulder. He glared fiercely around him, as if he expected to be attacked. Ultimately the clerk of the court ventured to ask him why he was armed with so formidable a weapon. The man replied that his summons told him to be provided with the means of defence, and he considered that an axe would do for that purpose.

The manufacture of judicial bulls is apparently not confined to Ireland. In Mr. Sergeant Robinson's book, entitled "Bench and Bar," there are some whimsical stories of days gone by. Amongst these is the following sentence, once pronounced on a prisoner by an occupant of the Bench at the Old Bailey: "It is in my power to subject you to transportation for a period very considerably beyond the term of your natural life; but the Court, in its mercy, will not go so far as it lawfully might go." On another occasion the same judge addressed the culprit: "Prisoner at the bar, if ever there was a clearer case than this of a man robbing his master, this case is that case." To another prisoner he considerately offered "a chance of redeeming a character that he had irretrievably lost." — *Tit Bits.*

A LEGAL EPISODE IN THE CHEROKEE NATION.

By George E. Foster.

"HOWDY!"

The speaker was an Indian, whom I one day met as I was travelling upon the half-road and half-trail that marked one of the lonesome prairies of the Cherokee nation.

The Indian wore a semi-civilized dress, the barbaric epoch being represented by buckskin trousers, with fringed stripes of fine-cut hide to ornament each leg. In marked contrast with the buckskin breeches was his white vest, — or the one which might have been white when he started upon his journey over the dusty prairie trail.

His coat was before him on the saddle; beneath his white vest he wore a red shirt; a black tie coiled beneath the overlapping shirt-collar, and was fastened in a sailor-knot in front.

Simultaneously with his exclamation of "Howdy!" he emphatically drew his bridle, and his little Cherokee pony stopped short; and bringing mine to a standstill, we began to size each other up as strangers do when they meet alone on the prairie.

"You are a friend of the Cherokees," he said; "you wrote the life of our greatest man."

His remark was at the same time an affirmation and interrogation. He noticed my look of admission and surprise, and said, "I heard that you were over there," — pointing toward Tahlequah, the Cherokee capital. "But few people come to this nation unless we know who they are, and what they are here for. It is well that it is so, if they are white men."

Glancing at his well-filled haversack, which hung at his pony's side, I noticed several leather-covered books protruding from its open top. Desiring to show penetrative faculties equal to the Indian's, I said, both interrogatively and affirmatively, "Colporteur?"

Whether he knew what I meant or not, I do not know; but he appeared pleased that I had noticed his books. He laughed, and in a good-natured way, tapping his haversack with his finger, he said, —

"Heap law there!"

"Then you are a lawyer," I said.

I had been previously informed concerning these travelling Indian lawyers, and was not surprised to receive his profound bow of assent.

Rev. A. N. Chamberlain, a lifelong resident, teacher, missionary, also interpreter in the Cherokee country, had said to me, "I presume that there is no people anywhere better informed than the non-English speaking Cherokees are in regard to their laws, and their treaties with the United States."

I had here an English-speaking Cherokee armed and equipped with his law library, and I resolved to interview him.

The mid-day sun was scorching the prairie, and there was no convenient shade-tree; but it was only the work of an instant for the Indian lawyer to unroll his blanket, in which were four sticks, some over three feet long. Having dismounted, he stuck these sticks in the ground, and threw the blanket over them; and into the shade of this hastily improvised sun-umbrella, or wickeyup, he invited me, and at my request, while the incense of pure "havanas," which I furnished, was wafted upward, he displayed his law library, — the code of the Cherokee nation.

An ancient-looking book, printed in English, was a compilation of the laws which were adopted by the Cherokee Council at various periods previous to 1852. It surprised me, and may be surprising to others to know, that the compilation occupied nearly two hundred and fifty pages; and many of the laws were passed by their Council before the Cherokees took their long, sad jour-

ney from Georgia to the land which they now occupy. The first of the compiled laws was one dated 1808, concerning horse-stealing, — the convicted thief to be punished with one hundred lashes on the bare back.

"The Cherokee tradition concerning the reception of their first law is not unlike that of your own people," said the lawyer.

"Some time after the red man entered the wilderness, they came to a very high mountain, and their God came down upon the mountain, and their leader went up and conversed with God, — or, rather, as their fathers said, with the son of God. They supposed, therefore, that God had a son, as it was said to be the son of God that came down on the mountain; and the top of the mountain was bright like the sun. There God gave the leader a law, written on a smooth stone. The reason of this being written on stone was as follows: —

"God gave our first parents a law to be handed down verbally to posterity; but when the language was destroyed, and men began to quarrel and kill each other, they forgot this law; and therefore God wrote his law on stone, that it might not be lost. Their leader also received other instructions from God, which he wrote in a book made of skins."

And so it happened that a long time before the Cherokees reached the country which they now occupy, they had a full code of laws.

They had striven to imitate the whites in the management of their affairs, and their Councils were well conducted. In 1810 the Council abolished clans, and unanimously passed an act of oblivion for all lives for which they had been indebted one to another. In 1820 the nation was reorganized, and, by a resolve of its National Council, divided into eight districts, each of which had the privilege of sending four members to their legislature. Some of their principal laws and regulations were: A prohibition of spirituous liquor to be brought into the nation by white men. If a white man took a Cherokee wife, he must marry her according to their laws; but her property was not affected by such union. No man was allowed but one wife. A judge, sheriff, and two deputies were allowed each district. Embezzlement, intercepting and opening sealed letters, were punished by a fine of a hundred dollars, and one hundred lashes on the bare back. They had a statute of limitations, which, however, did not affect notes. A will was valid if found, on the decease of its maker, to have been written by him, and witnessed by two creditable persons. A man leaving no will, all his children shared equal, and his wife as one of them; if he left no children, then the widow had a fourth part of all the property, the other three fourths going to his nearest relatives. Even before the division of the nation into districts, and the appointment of a judge, marshal, sheriffs, and deputies, there was an organized company of light horse, which executed the orders of the chief, searched out offenders, and brought them to justice. It was a fundamental law of the Cherokees that no land should be sold to the white people without the authority of a majority of the nation. Transgressors of this law were punished with death.

The Cherokee lawyer now replaced the old law-book — which, by the way, was printed wholly in English — carefully in his haversack, and took out two more volumes. They were handsomely printed, bound in leather, and one was printed in English, the other in the Cherokee language, and in the alphabet that Se-quo-yah, one of the learned members of their tribe, had given them over half a century ago.

"These are our latest compilations," said the Indian lawyer, with a proud manner, opening the covers of the book and turning over the pages.

"In spite of what the whites say about us, you can see that we are far from being a lawless people, and possibly we can give the white men a point or two on the enforcement of law ourselves." By Cherokee law,

every killing of a human being, without the authority of law, by stabbing, shooting, poisoning, or other means, is either murder or manslaughter, in the first, second, or third degree, according to the intention of the person perpetrating the act, and the facts and circumstances connected with each act. If the killing is done intentionally or with premeditated design, the convicted person must suffer death by hanging; if done without design to effect death, or by culpable negligence, the term of imprisonment is not less than two years. Abortionists are imprisoned for not less than two or more than ten years; seconds and medical advisers in prize-fights, where death occurs, are deemed guilty of manslaughter. Rape is punished by imprisonment from ten to twenty-five years, and the ravishment of female children is punished by hanging. From five to fifteen years is the imprisonment for arson; and if death results from the fire, death is the prospective fate of the one convicted.

"Marriage and divorce are now subject to law with as much strictness as in the States. No marriage can be contracted while either of the parties has a husband or wife living, or between persons of a kin nearer than first cousins; and a heavy penalty is inflicted on any who join minors in marriage without the consent of their parents. Divorces are regulated by law, and are adjudged for adultery, imprisonment for three years, for wilful desertion or neglect for one year, for extreme cruelty or habitual drunkenness. The Cherokees as a people have always favored temperance, and have an effective prohibitory law on the statutes. The United States law lays a penalty on any white man or Indian who brings liquor across the line of the Territory, for any purpose whatever. The Cherokee laws lay a penalty upon the sale of any liquor after it is brought into the country.

"So," said the lawyer, "you see that the Cherokees are a law-abiding people; and their laws must certainly be looked upon with interest and respect by all civilized nations of the world."

"How about the enforcement of law?" I queried.

"The judiciary system is divided into Supreme, Circuit, and District Courts. The Supreme Court consists of three judges, one of whom is selected by a joint vote of the National Council as Chief-Justice.

"The power of the Supreme Court is about the same as the power of a similar body in the States, — the decision made has the force of law. The judges have and exercise exclusive criminal jurisdiction in all cases of manslaughter, and in all cases involving punishment of death; this court also has exclusive jurisdiction of all cases instituted to contest an election held by the people, and brought before it as provided by law; they have power to award judgments, order decrees, and to issue such writs and processes as they may find necessary to carry into full effect the power vested in them by law. There are three judicial circuits, — the Northern, Middle, and Southern; and one judge is elected for each circuit. The circuit courts have jurisdiction in all criminal cases, except those of manslaughter, and cases involving directly or indirectly a sum exceeding one hundred dollars, and all civil suits in which the title to real estate or the right to the occupancy of any portion of the common domain shall be at issue, exceeding one hundred dollars. There is also a district court for each district, for trying of all criminal cases, whether felonies or misdemeanors, involving the sum of one hundred dollars or less."

"Then you have a jury system?" I said.

"Yes; but no man is allowed as a juror who is under twenty-one years of age, nor any person who may be under punishment for misdemeanor; and no member of the legislative or executive departments, or any commisioned officer of the nation, officiating clergyman, physician, lawyer, public ferryman, school-teacher, or one older than sixty-five years, is compelled to serve as juror or

as guard. Five persons constitute a jury in the trial of all civil suits, any three of whom may render a verdict. In case of murder, twelve jurymen are required; but in all other cases the jury consists of nine persons; and no verdict is rendered in any criminal case without the consent of the whole jury. The grand jurors are selected with especial care from the best and most intellectual men in the nation. The term of service is for one year, unless discharged. Five men are summoned from each district for this purpose.

"I am on my way to court now," said the lawyer; "will you go with me?" And consenting, I rode back with him to the court-house.

The case on trial was something like this: —

A white man had married a Cherokee woman, and therefore was the possessor of a farm; and for a period of three days had employed, without permit of the court, a white boy. The warrant set forth that "thereby the peace and dignity of the Cherokee nation had been damaged to the extent of seventy-five dollars."

No citizen of the United States is permitted to labor in the Cherokee nation without a permit, which is issued by the district clerk, and which shows the name of the employer and employee, the length of time to be employed, and the occupation to be followed. For such permit the employer pays in advance one dollar per month to the clerk; but no permit is given for a longer time than a year. The person "permitted" is obliged to subscribe to the following oath, to wit: —

"I do solemnly swear [or affirm] that I am a citizen of the United States [or a foreigner]; that it is not on account of any criminal offence against the laws of the same that I have come to seek employment in this nation; that within ten (10) days after the expiration of my permit, unless the same shall be renewed, I will remove without the limits of this nation."

It was for the violation of the permit law that the employer was under arrest. At an early hour Cherokees of all grades had assembled in the vicinity of the court-house. The sheriff soon came to the door, and summoned his jury. Looking over the crowd, with stentorian voice he shouted, —

"Ho-ho-o-o-o-o, Hog Catcher! Ho-ho-o-o-o-o, Six Killer! Ho-ho-o-o-o-o you, Coming Deer! Ho-ho-o-o-o-o you, Walking Stick! Ho-ho-o-o-o-o you, Kingfisher! Ho-ho-o-o-o-o you, Muskrat!" and his jury was complete.

I am not absolutely sure that I have recorded the names of this particular jury correctly; some of these names were summoned, and the other names are frequently met with, and their owners find their way from time to time into the jury seats.

This assemblage was by far the most novel of any that I saw in the nation. Men, women, and children sat around the stove, or gathered in little groups about the oak-grove that surrounded the court-house. Most all were smoking, and all were in their every-day dress. The jurymen, six in number, had gathered behind the rail that separated the jury seats, counsel seats, and judge's table from the gaping crowd outside.

The gate leading behind the rail was closed as the jurymen took their seats; but while the court was in session, any one wishing to speak to the lawyers and judge usually straddled over the rail in preference to opening the gate. The jurymen could all speak English save one; an interpreter was sworn in for his benefit, and all the evidence was given twice, — first in English, and then in Cherokee. As the case proceeded, and the evidence grew more complicated, the jury dropped into apparently deep meditation. Finally one drew out a long pipe, filled it with tobacco, and commenced to smoke. Another and another of the jurymen followed with a pipe. The interested audience outside the bars also lit their pipes, and at length the judge, five of

the jurymen, and nearly the whole audience were smoking.

To show the inconsistency of their etiquette, I mention that while all were thus smoking, in order to protect myself from a draught of air, as I sat by a window, I put on my travelling-cap. Had I been in a more dignified court in the States, I should not have done so; but in this assemblage, blue with the smoke of tobacco, I forgot myself, and in a few minutes was brought to grief by being touched lightly on the shoulder by one in authority, who also had a pipe in his mouth, who said, —

"Your pardon, sir; but it is not customary in our nation to wear one's hat in the presence of the judge."

Notwithstanding this reproof, I listened to the arguments of the lawyers with pleasure. They were well posted in regard to their laws, and handled their respective sides with shrewdness. The Cherokee lawyers displayed a marked logical penetration into the meaning and intent of the laws, and a weak place in a witness's testimony was quickly detected; and he was most unmercifully handled when the lawyer summed up the case.

THE LAW OF THE LAND.

V.

A MATHEMATICAL PROBLEM.

By Wm. Arch. McClean.

IT might be supposed that at all times and in all places the law would be mathematically correct, and mathematics legally correct; that law would have endless needs for the science of figures. It is so. Figures do not lie, is an old saying that is only falling into disrepute in these later days, when they are manipulated by large corporations as to their financial condition to mean almost anything but the truth. In far the greater number of cases the decision of the law means an expression in figures with the dollar mark prefixed. Notwithstanding this close affinity, there is a point of difference between mathematics and the law about a certain set of figures that cannot be compromised in any way; and it is about the simplest of figures and sums.

Mathematics says that twice one are two, adding one and one makes two, subtracting one from one leaves nothing (a zero), and that the half of one is one half. The law, in considering the problem in hand, says that twice one are one, adding one to one makes one, subtracting one from one leaves one, and that the half of one is one. There can be no reconciliation between law and mathematics about it, though it must be confessed that the mathematical horn of the dilemma seems uncontrovertible, and the logic of the law unassailable.

As may be surmised, it is as to the marriage relation between man and woman. Joining the two makes them one in the eyes of the law in many things. The twice one are only one. From this legal one subtract one by death, and one remains. The half of the one in law is not a half, but a whole.

For many years the twice one are one made that one in the eyes of the law a male one. The woman's legal status was submerged into that of the man, her property became his. During the present century the rights of the wife have grown, and been enlarged from time to time, until in many States the rights of the married woman are one in law and in fact, and the married man's rights are one; yet the twice

one are not two, as to a set of cases we propose to consider.

At common law joint tenancy was that possession of property with another that upon the death of either the survivor took all the rights in the property. Joint tenancy has been abolished in many of the American States except in one particular, as between husband and wife.

Let us suppose a case. John Smith has $500, and his wife Jane has another $500. John acquired his by his labor or inheritance or shrewdness, and his wife has probably acquired hers in some similar way. They join their capital, and with the $1000 buy a fifty-acre tract of land. The deed, the title, is made to John Smith and Jane Smith his wife. As more frequently happens in the reported cases, some relative of John Smith by will bequeaths and devises to John Smith and Jane his wife the tract of land. Or the Joneses by a will devise to Jane — for Jane was a Jones, intermarried with John Smith — and John Smith, her husband, the tract of land. In any event, whether mentioned as a joint tenancy or not, it will be considered in law as such or equivalent to such.

The law declares that they take the title not by moieties, but by entirety, or as the Frenchman would say, hold it *per tout et non per my*. John Smith takes the whole title of the place, and Jane Smith takes the whole title of the place. These two whole titles are not two but one title. The language sounds quite mixed to read of the court holding that the husband has the entire use and the wife has the entire use. It sounds as though something was full; and one hardly knows whether it is the title, or John Smith, or Jane Smith, his wife, or the court.

The fun begins when they have this title. John Smith has a title of entirety on the entire place, but he can do next to nothing with it unless his wife consents. In the reported cases Jane never consented. He cannot sell it or borrow money on the credit of it, or confess judgment against it. Of course he can do the two latter things if he can find a lender that will give him the chance, but the lender will probably understand the legal nature of John Smith's title, for it is to be presumed that the lender has had counsel who has enlightened him.

Why this utter helplessness of John Smith as to his entirety of title? Take one from one, and one legally remains. Remove John Smith, not by poison or murder, but by good old-fashioned methods of a natural death, and there is left one, Jane Smith, his wife, who has an entirety of title equal to that the deceased husband had when living. As the survivor she takes the whole title, because her entirety has survived that of her joint tenant, her husband. The wife surviving does not take through the husband, but by the paramount grant in the original conveyance.

Suppose some lender did not have counsel and loaned John Smith $300, and took a judgment note for the same, which was entered of record as a lien against John Smith's entirety title in the real estate. An interesting experience awaits the lender. John Smith dies before his wife. Jane Smith takes the entirety of the title to the whole place, and the husband's creditor takes nothing, for the lien of his judgment was a lien upon a contingency that did not materialize.

These cases have developed most interesting points. John Smith may have been a man of reckless habits, enjoyed life at the expense of his creditors. They patiently await, then grow anxious, and finally sue him. John Smith is indifferent. The creditors take judgment by default. They propose to give him no quarter, and show him no mercy. They propose to sell him out; so the fifty acres are levied upon by the sheriff under execution process upon their judgments. John Smith at this point may try to stay their execution process, for the reasons that the creditors can only sell his title or interest in the land, and that the entirety of title can

only be determined by the death of himself or wife, and succeed in staying them.

It may be the creditors have not been stayed but have gone ahead, sold, and purchased at sheriff's sale the interest of John Smith in the land. They receive a title for the same from the sheriff, and propose now to bring ejectment or partition proceedings against Jane Smith. They will utterly fail in their purposes. The courts will not permit them to disturb Jane Smith. The entirety of the title will have to be first determined by the death of husband or wife. If the former dies before his wife, the creditors will take nothing and lose all they put in John Smith, while the wife comes into absolute possession of her entirety of title by surviving the joint tenancy with her husband. If the slip between the cup and the lip comes in the death of the wife, the husband's creditors will take the entire property, having purchased and obtained the title from the sheriff for the entire interest of John Smith in the property.

Here is a problem for the philosopher. Suppose all titles of real estate of married persons should come to be taken in this way, would it increase or diminish suicide among married people? Or in case of financial trouble of either, would it place a premium on suicide? Or in cases where titles are so held now, is suicide ever resorted to, to help matters with the survivor?

Of course John Smith and Jane his wife could have borrowed money on mortgage at any time by putting in pledge or pawn their entire title, so that no matter which died first the lien of the mortgage would remain, to be paid by the survivor. A further complication about these entireties might be brought about by a contest between creditors of the husband and wife. The following is a case to the point.

The husband in 1877 gave a judgment which was entered of record as a lien against his interest in the estate. In May, 1882, the wife gave a mortgage upon her interest, in which her husband joined. In June, 1882, the wife died. The property was sold on execution process upon the judgment against the husband. It was contended by the holder of the mortgage that the wife with the husband was seized of the whole of the tract described in the mortgage, when they executed the mortgage, and that there were no other mortgages or judgment liens against their joint estate, and they wanted their money.

The court reasons out the situation most beautifully, in consequence of which the mortgage debt fails to be paid. It says:—

"The estate of the wife in the premises was not different from the estate of her husband in the same premises. They were husband and wife; the devise was to them jointly, and they held the land devised by entireties and not by moieties. The estate of each is exceptional and peculiar. It dies with the owner, and only the survivor has the absolute and unqualified fee simple title in the whole. The estate of the other, though extending to the whole during life, absolutely ceases at death. It was that kind of estate which was bound by the lien of the mortgage given by the wife, and it was the same kind of estate which was bound by the lien of the judgment against the husband. As against the wife, the mortgage was undoubtedly the first and indeed only lien. As against the husband the judgment was the first lien and the mortgage the second simply because the judgment was obtained before the mortgage was given. Had the wife survived, the mortgage would certainly have had precedence to the exclusion of the judgment, because the estate bound by the lien of the judgment was defeasible by the death of the husband before the wife. For the same reason if the husband survived the wife the estate of the latter was divested, and the mortgage only became operative against the husband because he had joined in its execution. But as to him it was not the first lien, he having become subject to a judgment at a time anterior to the giving of the mortgage."

CHAPTERS FROM THE ANCIENT JEWISH LAW.

By David Werner Amram, *of the Philadelphia Bar.*

II. CAUSES FOR DIVORCE.

JEWISH law can hardly be distinguished from modern law in the number and nature of the causes which it recognizes as sufficient for divorce.

The difference between the ancient Jewish and our own systems of divorce law lies in their fundamental principles: our law is founded on the principle that divorce will be granted only for cause, whereas at Jewish law the ancient principle on which the law rests is that the husband may divorce his wife at his pleasure. Rabbinical legislation, as was pointed out in the previous article, and as will be shown more fully hereafter, restricted this right and subjected it to judicial investigation, yet the principle as such was always recognized as fundamental. There is no doubt that the same principle obtained at the English law in the remotest antiquity, but it has long since become obsolete. The conservatism of the Orient, and especially the tenacity with which the Jews held to their past would not permit them to declare positively that the principle had become obsolete, and the Rabbis sought rather by a system of restrictive legislation to evade the logical effect of the application of this principle, than to subvert it by repeal.

All systems of legislation justify divorce for the same general reason; viz., because the purpose of the marriage relation has been defeated; but the specific causes deemed sufficient for divorce differ according to the ethical view of this relation current in different countries, or according to temporary considerations of public policy.

The causes for divorce at Jewish law embrace nearly all those recognized under the laws of the United States. There was one general class of cases peculiar to the Jewish law in which the Court of its own motion decreed a divorce, even against the wish of the parties, on grounds of public policy. This power was exercised in four instances:

1. When the parties had contracted a marriage prohibited by law, such as the union of a member of the priestly tribe with a divorced woman, or of an Hebrew with a heathen woman. In one case a man having gone abroad and having been reported dead, his wife remarried; shortly thereafter he returned, and the Court compelled the second husband to divorce the woman; nor was she permitted to remarry the first, for a man could not remarry his wife after she had been married to another and had been divorced from him.

2. The law permitted no condonation of the crime of adultery committed by the woman, and her husband was compelled to divorce her.

3. To prevent the spread of contagion, if one of the parties became afflicted with leprosy, they were obliged to separate.

4. Finally, in the case where a marriage had proved fruitless after a cohabitation of ten years, divorce was anciently decreed; though the later law abolished the right of the Courts to decree a divorce in such case of its own motion, and left the parties to sue for divorce on this ground if they so desired.

It is impossible within the limits of this article to touch upon all the causes for divorce at Jewish law; suffice it to say that with the single exception of the case where both parties agreed to the divorce, the law demanded a sound reason in every case in which the respondent defended the suit, before granting the divorce; if the parties agreed, the divorce was granted without any cause being shown.

The wife's antenuptial incontinence was

under the old Mosaic law (*Tora*) punished by death. "If this thing be true and virginity be not found for the damsel, then they shall bring her to the door of her father's house, and the men of the city shall stone her with stones that she die." With the introduction of the Roman rule in Palestine, before the beginning of the present era, the right to inflict capital punishment, which had always been sparingly exercised, was entirely taken away from the Jewish courts, and thereafter the husband's remedy for this offence was by divorce. When the husband became jealous of his wife and suspected her of marital infidelity, she was, under the law of the *Tora*, obliged to submit to the ordeal of the "bitter waters." Moved by the spirit of jealousy, the husband led her to the temple; the officiating priest uncovered her head, and placing her before the altar, handed her a cup of water in which some of the dust from the floor of the sanctuary had been dissolved; then, having first assured her that if innocent, she need not fear and would be unharmed by the ordeal, he charged her with a most solemn oath, by which if guilty she would be accursed bodily and spiritually; whereupon she drank the water. The purpose of the ordeal was to exact a confession from the guilty woman, while the innocent one had the assurance that the ordeal would leave her unharmed. If the husband had at any time been guilty of sexual immorality, it was thought that the bitter waters would have no effect, even though the wife were guilty, showing that the ethics of the Rabbis demanded the purity of the man as well as of the woman to be undefiled. About the time of the destruction of the temple (70 A.C.) adultery increased, in consequence of the general demoralization brought about by the military invasion of the Romans and the devastating campaign against Jewish independence; therefore the Sanhedrin, under the presidency of Rabbi Jochanan ben Sakkai, abolished the ordeal entirely, since the temple had been destroyed and no priest could superintend the rite elsewhere; and thereafter the woman who had committed adultery, or who had by her conduct raised a strong suspicion against her chastity, was divorced.

A breach of a positive enactment of the Mosaic code, or an offence against Jewish customary law by the woman was deemed a sufficient ground for divorce. The *Mishna* explains this law as follows: "What is meant by a violation of the law of Moses? If, for example, she causes her husband to eat of forbidden food, if she does not set apart the heave offering (*Hala*), or if she breaks her vows, for a man cannot dwell with a serpent. And what constitutes a breach of customary law? If the wife goes out unveiled, if she exposes her person on the public highway, if she flirts with men. Rabbi Tarphon says "if she is a noisy woman;" that is, if she speaks in so loud a tone in her own house that the neighbors can hear her, or if she uses indecent language.

Adultery could technically be committed only by the wife; and the immorality of the husband was deemed an offence of an entirely different character, and one which did not so essentially violate the nature and purpose of marriage. The penalty for a single act of adultery by the husband was the infliction of corporal punishment by the lash, and the presumption of law was that the first offence would also be the last; but if the offence was continued, the wife could sue for divorce on this ground. If the husband refused to support the wife, the Court would, on her petition, compel him to do so; and if he persistently refused to obey the order, the Court would grant a divorce to the wife. And the difference between this law and the law of our States lies in the different conditions of the times. A woman anciently could not engage in any of the pursuits of life now open to the sex, in order to earn a livelihood, and the lack of the husband's support obliged her to return to her father's house; inasmuch as this was practically a separation from the husband, a

divorce was granted her, the Jewish law knowing nothing of a separation from bed and board. And on the same principle she could obtain a divorce when her husband subjected her to continuous ill treatment, driving her from him, or beating her. In the words of Rabbi Isserles, "If a man beat his wife, it is considered an offence as if he had beaten his neighbor; and if he repeats such cruelty, it lies in the power of the *Beth Din* (Court), to reprove him, to excommunicate him, to punish him with the lash, and to place him under oath not to offend again; and if he disobeys the order of the Court and breaks his oath, his wife is entitled to a divorce, since it is not the custom of men of Israel to beat their wives, nor is it to be permitted; if however she is also at fault, as when she curses him or insults his parents and neglects her duties, I am of the opinion that he is entitled to chastise her, although many Rabbis have ruled that it is forbidden to beat even a wicked woman. If there is any dispute as to the facts, the burden of proving her fault lies on the husband, for the presumption of innocence is *always* in favor of the woman." To this opinion a distinguished commentator adds: "The fault is even greater than an attack upon a neighbor, for a man is not obliged to uphold the honor of his neighbor, whereas the honor of his wife must be as sacred to him as his own, and he is in duty bound to maintain it. The wife's honor rises with that of her husband, but does not fall with his disgrace. A woman is given to a man as a companion through life, and not as an innocent victim for his malice; she lives under the same roof, reposing the utmost confidence in him: how then shall the law allow this confidence to be abused?"

If the husband was engaged in a malodorous business which rendered cohabitation with him intolerable, the wife was entitled to a divorce. In one case the husband who was a tanner died, and the widow was claimed in marriage by the deceased husband's brother under the law of the Levirate marriage (Deut. xxv. 5–10). She however refused to marry him, saying, "I did manage to survive your brother, but I could not live through it again." He appealed to the Court for relief, but the Court sustained her objection.

The ancients thought polygamy permissible, provided the ladies agreed. And an old law provided that if a man married a second woman without having obtained the consent of his first wife, the latter was entitled to a divorce. Polygamy had ceased to exist among the Jews as early as the fifth century, and it was officially interdicted in the eleventh century by the decree of Rabbi Gershom of Mayence.

Divorce for desertion was unknown among the Jews, for no decree could be made unless the husband was present and personally gave the bill of divorcement. How the difficulties of this law were overcome has been described in the article on "Divorces on Condition" in the August (1891) number of this magazine.

This review of the leading causes for divorce at Jewish law will impress the reader with one fact; namely that divorces were allowed only upon cause shown and *coram judice.* The causes are such as most of our States recognize as sufficient, on account of their inherent destructiveness of family life. The spirit of the Jewish law was opposed to divorce for the same reason that the spirit of our laws antagonizes it, and the spirit of Jewish law did not oppose divorce in theory alone, for it was the *duty of the judges* to effect a reconciliation of the parties whenever it was possible. The faults of the system of divorce at Jewish law are marked, viewed from a subjective standpoint; yet an historical study of the condition of the people among whom it was developed and of the circumstances which prompted the adoption of the different laws, points to a distinct ethical advance of the Jewish law over all the contemporary legal systems, and to a flattering equality in legal reasoning and able legislation with Rome, the most distinguished law-making people of the world.

LONDON LEGAL LETTER.

LONDON, Sept. 10, 1892.

THE Council of Judges has at last made its Report. The Judges have been conferring from time to time during the present year, for the purpose of inquiring into any defects in the system of procedure, and in the administration of the law in the High Court of Justice. The result of these deliberations was issued just before the commencement of the Long Vacation. The proposals made are to a large extent in accordance with professional expectations, and should receive, I think, general approval. I shall confine myself to a sketch of the Report's more salient features, mere detail being of course devoid of interest. As I have mentioned in more than one letter, a prominent difficulty has been how to arrange for the constant presence of a sufficient number of judges in London to provide for the continuous administration of justice, and at the same time for a sufficient attendance of judges in the country to satisfy local requirements. The Council now proposes a scheme of judicial labor which would secure the presence in London of never fewer than eight, and for the greater number of working days in the legal year, more than eight judges of the Queen's Bench Division. If this plan can be effectually carried out, the wheels of our old Circuit system should move sufficiently smoothly. Perhaps the most interesting section of the Report is that which recommends the institution of a Court of Appeal in criminal cases. "There is a great diversity," say the Judges, "in the sentences passed by different courts in respect of offences of the same kind, where the circumstances are very similar. It is much to be desired that this diversity should if possible be avoided. It often happens, when a person is convicted of a serious crime, and is sentenced to a severe punishment, and most frequently when a person is convicted of murder, that a petition is presented, after having been circulated for signatures, and the Home Secretary is pressed to review the finding of the jury, and the sentence of the judge. This review is not asked for on the ground of the exercise of the prerogative of mercy, but by way of appeal, upon the assertion that the verdict or sentence was wrong. The request is really an appeal, and not merely a petition. That appeal throws at times more responsibility on the Home Secretary than any one man ought to have imposed upon him." It is suggested that this Court should consist of seven Common Law judges, with a quorum of five. It would, however, in the opinion of the Judges, be contrary to the fundamental rules of English Criminal Law to interfere with a verdict of acquittal, so that no man who has once been acquitted should be put in danger again in respect of the same accusation.

In thus recommending the creation of a Court of Criminal Appeal, the Judges are only giving effect to an opinion which has gradually gained ground with the public; it is no doubt a distinct innovation, but the circumstances alluded to in the Report, as quoted above, have rendered it inevitable.

The New Government is now complete, and all important appointments have been made. Contrary to expectation, but in accordance with a frequent rumor, Mr. Asquith, Q. C., of whom I spoke in my last letter, has been made Home Secretary. Sir Charles Russell again becomes Liberal Attorney-General, with Mr. Bigley, Q. C., one of the leaders of the Chancery Bar, as Solicitor-General. As in Mr. Gladstone's last administration, the Woolsack is occupied by Lord Herschell. The principal public diversion of the recess has been the Labouchere episode. Mr. Labouchere, M. P., the well-known editor of "Truth," reflecting that he had consistently dowered the Liberal party with his support in the columns of his journal, arrived at the conclusion that he should find a place in Mr. Gladstone's cabinet. This distinction not having been conferred, Mr. Labouchere then began to assert, through the medium of "Truth," that he owed his rejection to royal disfavor. It now, however, abundantly appears that his exclusion from office was exclusively due to Mr. Gladstone's own opinion that the editor of "Truth" was, from the nature of his occupation, incapacitated from serving in the inner sanctum of political life. The humor of the incident consists in Mr. Labouchere's feverish asseverations that it was a matter of indifference to him whether he received office or not, and the conspicuous keenness of his disappointment.

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The Green Bag.

PUBLISHED MONTHLY, AT $3.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession, also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

THE following, received from an Oregon subscriber, certainly ought to "entertain" our readers: —

PORTLAND, OREGON, Aug. 30, 1892.

Editor the "Green Bag":

DEAR SIR, — I enclose herewith the originals of a letter and document, *sui generis*, which recently came into my possession. The unique petition to the Ohio Supreme Court, given in the August number of the "Green Bag," represents Eastern eccentricity; and it suggests itself to me that perhaps a specimen of an Oregon J. P's. work would not be wholly without interest to the readers of the "Green Bag." In case you see fit to publish the enclosed "specimens," give the letter first and then the document.

Yours respectfully,

—— ——.

SANDY OREGON August 17 1892.

MR. —— ——. Portland

SIR I recived your Letter from the 13 ist in regard To that Cow you bought of me, in the first part of June 1892. I am sory to Say that you have Lost said Cow. But as you Treden me, To Eather have a nother Cow, Or the money refonded, sutch you Can not Expect from me, you had your Choise amongst my Cows, it would benn Inmatriel to me witch one you took, and i Considder said Cow was not sick when you Came thare whit Mr. F and bought her, to my best Ability. Conseequntoley you Can not recover said money, after hayen said Cow 9 weeks in your posesion whitout notelifying me of the Case.

Respectfuley yours

—— ——.

JUSTICE COURT COUNTY
OF CLACKAMAS
STATE OF OREGON

PERSONABLE apperd before me the undersighned a Justice of the Peace, in and for said County above mention, —— —— Of District No. 13 well Known To me as a reputal and Honest man. Certifying under Oath That he sold a Cow, To —— —— of Portland Oregon in the first part Of June 1892, and that said Cow was not sick at the time when said Cow was Taken away from his premmisis To his best Ability

(Signed) —— ——

Subcribed and sworn To This seventeen day of August 1892.

—— ——,
Justice of the Peace,
Districe No. 13

LEGAL ANTIQUITIES.

THE following is a copy of the indictment upon which Bothwell was tried for the murder of Lord Darnley: —

"You, James earl Bothwell, lord of Hallis, Creygchton, &c., are indicted on account of the cruel and horrid murder of the most excellent, most high and most mighty prince the king, the late most dear spouse of the queen's majesty, our sovereign lady, committed in the dead of night, at his house near the church of the Fields in this City, as he was taking his rest, by treasonably setting fire to a great quantity of gunpowder in the said house, by the violence whereof the whole house was blown up into the air, and the king himself by you killed traitorously and cruelly, wilfully and by premeditated felony. And this you did on the 9th day of Feb. last past, in the dead of the night as aforesaid, as is notorious and you can not deny.

WHEN Phryne was prosecuted on a capital charge at Athens, her advocate, Hyperides, knowing she was the most beautiful of women, and the original of the Venus of Praxiteles, took care to

place her in full view of her judges, and even arranged the details of her dress to the best advantage. He then used his highest oratorical arts to excite the pity of the court, and so subdued their feelings that they could not find it in their hearts to condemn, and she was acquitted. The result was that the public prosecutor, Euthias, swore he would never prosecute another. The court also were so conscious of the disturbing cause of their judgment that they made a rule that in future no accused person, man or woman, should be present in court at the time of the decision.

AN old law tract assumes to give in this simple language the origin of the tenancy by the law or courtesy of England: "It was called the law of England because it was invented in England on behalf of poor gentlemen who married gentlewomen, and had nothing to support themselves after their wives' death."

FACETIÆ.

"MY Lord, I assure you there is no understanding between us," exclaimed an eminent English lawyer who had been suspected of collusion with the counsel who represented the other side. Lord Eldon thereupon observed: "I once heard a squire in the House of Commons say of himself and another squire: 'We never through life had one idea between us; but I tremble for the suitors when I am told that two distinguished practitioners have no understanding between them!"

"WHAT side is the gentleman on?" asked the stranger who had been listening for two hours to a lawyer arguing a case in the Supreme Court. "I don't know," replied the gentlemanly doorkeeper; "he has n't committed himself yet."

A CERTAIN lawyer of New York City, who is distinguished not only in his profession, but as a man of affairs, owns a delightful summer home in Vermont. His neighbors there tell this story about his youngest child, a girl not more than ten years of age. After much coaxing this little girl had prevailed upon her father to buy her a donkey and a cart. The first day of the donkey's arrival he was permitted to browse on the lawn. The child followed the little animal about, and thinking that his countenance wore an uncommonly sad expression, she cautiously approached him, and, stroking his nose gently with her soft little hands, cooed in his ear: "Poor donkey! you feel lonesome, don't you? But never mind, papa will be here to-morrow, and then you will have company."

"AND now, gentlemen of the jury," wound up the lawyer, "and now can you, with easy consciences, refuse to bring in a verdict for this young woman? Think of her, with her husband killed by this railway corporation, and contemplate her situation, left alone, a widow, at the tender age of twenty-seven! Think—"

But he was interrupted by the poor young widow, who raised her eyes, and in a voice choking with tears, sobbed: "Not twenty-seven, please, —twenty-five!"

A LAWYER retained in a case of assault and battery was cross-examining a witness in relation to the force of a blow struck: "What kind of a blow was given?" "A blow of the common kind." "Describe the blow." "I am not good at description." "Show me what kind of a blow it was." "I cannot." "You must." "I won't." The lawyer appealed to the court. The court told the witness that if the counsel insisted upon his showing what kind of a blow it was, he must do so. "Do you insist upon it?" asked the witness. "I do." "Well, then, since you compel me to show you, it was this kind of a blow;" at the same time suiting the action to the word, and knocking over the astonished disciple of Coke upon Littleton. When the lawyer arose to his feet, he said he did not wish to ask the witness any more questions.

A NEGRO came before a justice of the peace and signed a pledge, promising to give up the use of all intoxicating liquors. Ten days afterwards the Judge met him, and, greatly to his astonishment, found him a good deal under the influence of liquor.

"Why, Erasmus," cried the Judge, "God bless me! how is this, and after your solemn affidavit too? You have broken your oath, Erasmus."

"Not at all, Jedge, — not at all, sir!" cried Erasmus, with alacrity. "De affidavy stands as when fust sworn and subscribed to; but bein' as you know, Jedge, a man of Websterian education, I have added a few trifling codicils to de original dockerment."

"Codicils, Erasmus, — what do you mean by codicils?"

"Well, Jedge, I 'll explain; I 'll give them codicils to you in the regular order. I've got the dockerment right here, and I've never let it go out ob my hands since I got it;" and Erasmus drew from over his heart the precious paper. With a grand flourish he read: "'Codicil de fust — Dis codicil is to certify dat the meanin' and intent of the above insterment is hereby so moderfied an' set aside as to allow the affiant de triflin' indulgence of one cocktail befo' he go to breakfas'.'

"Well, Jedge," said Erasmus, lifting his eyes from the paper, "that codicil appear ekal to the requirement of de subscriber for about fo' days; den we had," casting his eyes upon the paper, 'Codicil de Sec'un — De above affidavy an' codicil is hereby affirm an' am to remain in full fo'ce an' effec', 'ceptin' sich sections, claws, an' parts of clawses as would conflic' wid de allowance to de affiant of a appetizer before each meal, bein' tree drinks per diem, be de same more or less.'"

Here Erasmus again lifted his eyes from the document, and explained as follows: —

"On dis las' codicil de subscriber existed in tol'able comfort about fo' mo' days, when it not bein' found to rise to de hight of all demands, I felt obleged, Jedge, to add: 'Codicil de Third — All de above orginal dockerment an' codicils are hereby proclaimed to be of full fo'ce an' effec', pervided dat no part of dare contents be so construed as to interfere wid de inherin' right of de undersigned affiant and codicilist to partake of some sich suitable stimerlent as shall, in his judgment, be deemed necessary to de decent an' proper arousin' of de dorman' energies of his phisical an' mental constitution.'"

"And is this the last of the codicils, Erasmus?"

"It 's de finis, Jedge. It appears to fill all de 'quirements, an' is ekal to all de 'mergencies dat has yet arose."

"You say the officer arrested you while you were quietly minding your own business?"

"Yes, your honor. He caught me suddenly by the coat-collar, and threatened to strike me with his club unless I accompanied him to the station-house."

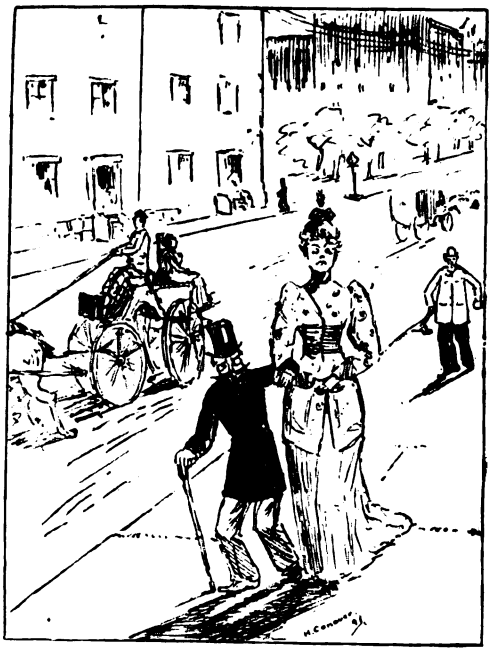
"You were quietly attending to your own business; making no noise or disturbance of any kind?"

"None whatever."

"That is very strange. What is your business?"

"I 'm a burglar."

Legal Object Lessons. — IV.



A FOREIGN ATTACHMENT.

NOTES.

We note that the "Union Law School" of Chicago, of which Marshall D. Ewell is Dean, has changed its name, and will henceforth be known as "The Kent Law School" of Chicago.

The late Mr. Justice Swayne was not without vanity in respect to his classical acquirements. On one occasion, when he was holding the Circuit at Detroit, in a case where Hon. Alfred Russell represented one party, his (Russell's) client was

about to suffer a nonsuit on account of the failure of a witness (one Bela Chapman, from the island of Mackinaw) to respond to the subpœna. Suddenly Mr. Chapman entered the court-room. "*Here the witness is,*" said Mr. Russell, "*Deus ex Machinâ*" (*Mackinaw*). The Judge promptly rejoined, "*Nec deus intersit nisi dignus vindice nodus.*"

LAWYERS must be superior to other men, for they are generally seen at their best when going through the greatest trials of their lives.

A GENTLEMAN, long a resident of this capital, says a Washington correspondent of the Louisville "Courier-Journal," used to relate that his father, a practitioner at the bar of the Supreme Court, once sent him, when a small boy, to the house of the Chief-Justice for some legal papers. He appeared before Marshall with something like that feeling of reverence with which the Ibo prostrates himself before his fetich, — with something of that awe with which the barbarian Gaul approached the Roman Senate, sitting among the ruins of the Forum.

He presented the note, and the Chief-Justice was not slow to detect the bashfulness of the lad. He read the note, selected the papers, tied them up in a bundle, and then said, "Billy, I believe I can beat you playing marbles; come into the yard and we will have a game." The boy assented, and soon he was engaged in that childish play with the foremost intellect of the Western hemisphere. All his embarrassment was gone; and the game proved to be exciting and closely contested, both being skilful players.

When Chief-Justice of the United States, Marshall used to spend much of his time at his home in Richmond. The court had comparatively a small docket then, and the vacations were more frequent and longer in duration. He would bundle up submitted cases, go to Richmond for the vacation, and write his decisions there. He had a spacious mansion in the outskirts of the city, and in his grounds was a noted spring of pure water, surrounded by splendid elms and giant oaks; and in pleasant weather the great jurist would retire to the spring to read and ponder the legal records upon which he was to adjudicate. Near by was a school-house, the pupils attending which got water at his spring.

No boy or girl ever went there for water that the old man did not have a kindly greeting for, and words of advice or encouragement. He often engaged in their games at playtime, and it was a common sight to see the boys chasing him, after he had hurled at them that greatest of all affronts to the schoolboy of fifty or eighty years ago, — "school butter," — something the old fellow was almost certain to do every day, when it was about time for the boys to return to their studies. And yet boyish as the man was, full of animal spirits as he was, it is said of him by William Wirt that had a flower of fancy sprung up in the train of his thought, he would have crushed it as he would an adder. On the bench, he was human reason incarnate; in private station, he was the kindliest and most playful of men. As Chief-Justice, he was a Hamiltonian federalist; as John Marshall, he was more than a Jeffersonian democrat.

THE Bombay High Court recently sent back a record to the district whence it came, with an order that a fair transcript be made of the illegible handwriting of the magistrate. We wonder that some such steps are not more frequently taken. A lesson is sorely needed by many officers, who appear to think that their lofty position relieves them from the obligation of writing a legible hand. This is so utterly selfish! Perhaps five minutes' time is saved by scribbling in haste the deposition of a witness, but hours are wasted by clerks and copyists, and by the appellate court, in the endeavor to decipher the scrawl. It may cause a failure of justice. We remember a deposition which contained the following remarkable passage: "My cow has now upper garments which my calf has spilt. My uncle smoked each day for all his life." The deposition was sent back to the magistrate who had written it, and he explained that the passage was, "The plaintiff was not at all present when the cart was upset. The plaintiff walked that day and did not drive." Suppose that application were made for sanction to prosecute for perjury, and the only record of the evidence were a hieroglyph such as that was! — *Indian Jurist.*

IN regard to the appointment of counsel by the court for undefended prisoners in murder cases, the "Indian Jurist" says: "Some session judges regard this as a good thing, that must go round

the local bar and nominate for the defence learning-boys and pleaders who seldom hold any brief in court. This is utterly wrong. The object of this concession is that the prisoner shall have professional assistance, and he ought to have the best professional assistance that can be obtained for the money. A man's life is not a subject for experimental assays of the skill of untried pleaders. The judge ought to nominate for the defence the best pleaders that can be induced to accept the work for the fee that is given."

Recent Deaths.

Sir William Johnston Ritchie, Chief-Justice of the Supreme Court of Canada, died at Ottawa, September 27, aged seventy-nine years.

Sir William came of an illustrious legal family, his father having been Chief-Justice of Nova Scotia, a position now held by a younger brother. He was called to the bar of New Brunswick in 1838, and became Queen's Counsel in 1854. In the latter year he was named a member of the Executive Council of New Brunswick, and in 1855 he became a Puisne Judge of the Provincial Supreme Court. Ten years later he was appointed Chief-Justice of the same court. In 1875 he was called to the Federal Supreme Court at Ottawa, and in 1879 he succeeded Sir Buell Richards as Chief-Justice.

Her Majesty conferred upon him the honor of Knighthood in 1881.

(A portrait of Sir William J. Ritchie was published in the "Green Bag," June, 1890.)

Nathaniel Cleveland Moak, one of the best-known lawyers in the State of New York, died at his home in Albany, N. Y., on September 17. He was born in Sharon, Otsego County, Oct. 3, 1833, and worked his way up from a farm hand to a creditable position in the legal profession. He studied law with James E. Dewey of Cherry Valley, and was admitted to the bar in 1856. In 1867 he went to Albany as partner in the firm of Smith, Bancroft & Moak. In 1871 Mr. Moak was elected District Attorney of Albany County, and during his term of office prosecuted the celebrated Lowenstein murder case, and that of Phelps, the defaulting clerk in the State Treasurer's office. He retired from political life at the end of his term. He was famed for his thorough preparation of his cases, and won a notable reputation during the Jesse Billings murder trial. Mr. Moak's contributions to legal literature have been very extensive.

(An excellent portrait of Mr. Moak was published in the "Green Bag," April, 1890.)

Hon. Francis Kernan, an eminent lawyer of New York State, died in Utica, N. Y., on September 7.

He was born in Steuben County, N. Y., Jan. 14, 1816. He received his education at the Georgetown College in the District of Columbia, and chose the law for his profession, settling at Utica, N. Y. He held for a time the office of Reporter of the Court of Appeals in New York State, and was elected to the Legislature. In 1862 he was nominated by his party for Congress in the Oneida District, Roscoe Conkling opposing him. The contest was a very bitter one, but Kernan was successful. In 1872 he was nominated for Governor, but was defeated by John A. Dix. When his party gained control of the Legislature by the election of 1874, the senatorship was conceded to Francis Kernan, and he was elected in January of the following year. After his term in the Senate expired, Mr. Kernan resumed the practice of his profession in Utica, in which he continued until he retired from all active work some five or six years ago.

REVIEWS.

An article of immediate and almost sensational interest is Professor Jenks's paper on "Money in Practical Politics," in the October Century, describing the methods, shamefully common, in what are called "practical politics" in this country. The opening paper of the number is a very striking piece of autobiography by Archibald Forbes, the famous war correspondent, who describes in the first of a series of two papers what he saw of the Paris Commune. Harry Fenn very curiously illustrates a paper by Charles Howard Shinn on "Picturesque Plant Life of California."

In the short stories of this number a new writer is introduced, Hayden Carruth, a New York journalist, who tells the story of "Doggett's Last Migration." The poet Aldrich has a short story called "For Bravery on the Field of Battle," and Miss Viola Roseboro' tells of "The Village Alien." The final instalments of several serials are given in this number, including the last of Mr. Stedman's notable papers on Poetry, the present paper being entitled "The Faculty Divine." Also the concluding chapters of Mrs. Foote's "Chosen Valley," Mr. Fuller's "Chatelaine of La Trinité," and Mr. Fox's "Mountain Europa." Mr. Glave, the well-known traveller, in his paper on Alaska, describes his return to the coast.

THE paper to which most readers will turn first upon opening the pages of the October NEW ENGLAND MAGAZINE is Miss Lucy Larcom's "In the Ossipee Glens." Arthur Wentworth Eaton, who is well known as an authority upon Nova Scotian history and affairs, describes "The Acadian Province-by-the-Sea," and its legends and traditions, with a great deal of charm and freshness. The article is finely illustrated. "Columbus and his Friends" is the subject of a valuable historical essay, by Isaac Bassett Choate. Hon. L. G. Power writes on "The Whereabouts of Vinland." The revolution in Venezuela gives timeliness to the article on "The Republic of Venezuela," by Don Nicanor Bolet-Paraza, the Envoy Extraordinary and Minister Plenipotentiary to the United States. Walter Blackburn Harte contributes the first paper of a series on "The Philosophical Basis of Fiction." Richard Marsh has the opening instalment of an amusing story, "A Prophet," which shows literary powers of a high order.

IN the POLITICAL SCIENCE QUARTERLY for September, Prof. B. Moore completes his series of articles on "Asylum in Legations and in Vessels;" Albert Clark Stevens of Bradstreet's deals with the proposed Anti-Option legislation in discussing the "Utility of Speculation;" George K. Holmes of the United States Census Bureau contributes a very complete review of "Usury in Law, in Practice, and in Psychology;" N. H. Thompson of the United States Treasury Department offers suggestions as to reform in the "Control in National Expenditures;" Prof. Jesse Macy writes of "The English Crown as an Aid to the Democracy;" Prof. Wm. A. Dunning completes his review of "Irish Land Legislation since 1845;" and Prof. A. D. Morse treats of "The Republican Party, — its Origin and Tasks."

IN SCRIBNER'S MAGAZINE for October is begun a series of articles on "The World's Fair at Chicago, Mr. H. C. Bunner giving a picturesque description of "The Making of the White City." The article is finely illustrated. W. C. Brownell continues his interesting papers on "French Art" with reproductions of pictures by leading French artists. Two articles in the number have a very practical educational value: "A School for Street Arabs," by Edmund R. Shearman, and "The Education of the Deaf and Dumb," by Walter B. Peet. The fiction of the number includes another "Story of a Western Town," by Octave Thanet, entitled "Tommy and Thomas," which describes the rise of a Western politician (illustrated by A. B. Frost); Bliss Perry, the author of "The Broughton House," begins an amusing story of life at Mount Desert, entitled "Salem Kittredge, Theologue."

THE contributions to the October ARENA are varied, interesting, and able. In this issue Hon. Thomas E. Watson appears in a thoughtful paper on the "Negro Question in the South." Congressman Brosius discusses in a thoughtful manner the plan of limiting the number of the House of Representatives. Rev. Thomas P. Hughes, D. D., answers Ibn Ishak in a masterly contribution entitled "Has Islam a Future?" Under the title, "The True Character of Christopher Columbus," Mr. A. P. Dunlop gives a severe arraignment of Columbus, quoting numerous authorities. One of the most notable features of this issue is the closing of the Symposium on Woman's Dress, prepared under the auspices of the National Council of Women of America. The editor also supplements this symposium with a striking editorial entitled "The Next Step Forward for Women." This paper is illustrated. Among other leading features of this issue should be mentioned the superbly illustrated sketch of Edward Hugh Sothern, the brilliant young American actor, the continuation of the Bacon-Shakspeare discussion, a striking paper on Astrology, by Edgar Lee, of London, and a paper by Sylvester

Baxter on "The Social and Economic Influences of the Bicycle."

THE October number of HARPER'S MAGAZINE is of unusual interest. Its illustrated articles include "The Baptismal Font of America," by Frank H. Mason; "Tiger Hunting in Mysore," by R. Caton Woodville; "Paris along the Seine," by Theodore Child, and the second paper on "A Collection of Death Masks," by Laurence Hutton. President Charles F. Thwing contributes an interesting article on "Education in the West;" James Russell Lowell's papers on English Dramatists are continued, the subject in this number being "Beaumont and Fletcher." The fiction includes further chapters of "The World of Chance," by William Dean Howells, and "Jane Field," by Mary E. Wilkins.

THE complete novel in LIPPINCOTT'S MAGAZINE for October is entitled "The Kiss of Gold," and is written by Miss Kate Jordan. Other interesting contents of this number are "The Carnival at St. Louis," by James Cox; "Old Paris," by Sigmund J. Cauffman; "James Russell Lowell," by Richard Henry Stoddard; and "Men of the Day," by M. Crofton. One or two short stories and the usual amount of poetry serve to fill out an unusually interesting issue.

The October ATLANTIC opens with an able paper by James C. Carter, entitled "Mr. Tilden." He gives an interesting résumé of Samuel J. Tilden's place in public life. Mrs. Deland, in "The Story of a Child," gives some delightful passages in the life of her heroine. Alexander Brown, author of the "Genesis of the United States," has a paper on "The English Occupancy of North America," and incidentally endeavors to put Captain John Smith back into his rightful obscurity. Mr. Hale's amusing papers on "A New England Boyhood" are continued; and Boston Common, and his associations with it, forms the subject of this new instalment. Professor Shaler writes on a subject of the day, namely, "The Betterment of our Highways;" and Mary A. Jordan has an article on "The College for Women."

IF it were possible to shut all the strong interest of the month between the light covers of a monthly magazine, the October COSMOPOLITAN would do it. As usual, the illustrations are more numerous and varied in character than those of the other leading magazines; the articles are as short and as much to the point as is consistent with literary finish; and one has the sense of a vigorous and newly appreciative grasp even of subjects which in themselves are familiar. Perhaps this quality of vigor and freshness is most conspicuously displayed in the three articles contributed by Henry Cabot Lodge, John A. Cockerill, and Murat Halstead, of which the themes are, respectively, "As to Certain Accepted Heroes," "Phases of Contemporary Journalism," and "Liberal Tendencies in Europe." In these, we venture to say, the reader will find new thought, in phrase that cuts its way and insists on being quoted. But, after all, this strong individuality is noticed throughout the current number, in about the degree which the public has learned to expect.

BOOK NOTICES.

THE AMERICAN PROBATE REPORTS, containing recent cases of general value decided in the courts of the several States on points of probate law, with notes and references by CHARLES FISKE BEACH, JR., of the New York Bar. Vol. VII. Baker, Voorhis & Co., New York, 1892. Law sheep. $5.50 net.

This last volume of this excellent series of Reports contains over one hundred reported cases covering almost every subject of Probate Law. Mr. Beach's notes and references give additional value to the work.

THE LAW OF BANK CHECKS IN THE UNITED STATES, as determined by the leading courts of this country and of England, with references to American and English decisions. By HENRY C. VAN SCHAACK of the Denver Bar. The Chain & Hardy Co., Denver, Colorado, 1892. One vol. Law sheep. $3.50.

In a small volume of 290 pages, Mr. Van Schaack has very clearly and concisely stated the law relating to the important subject of bank checks. His work seems to have been done thoroughly and conscientiously, and this treatise should find favor not only with the legal profession, but also with bank officers, to whom it will prove a valuable assistant. The typographical part of the book is excellent.

PRINCIPLES OF THE LAW OF REAL PROPERTY, intended as a first book for the use of students in Conveyancing. By the late JOSHUA WILLIAMS of Lincoln's Inn. The Seventeenth Edition re-arranged and partly rewritten by his son, T. CYPRIAN WILLIAMS. The Boston Book Company, Boston, Mass., 1892. One vol. Law sheep. $5.00 net.

Although put forward as the seventeenth edition of the late Mr. Joshua Williams's "Principles of the Law of Real Property," this volume is to a large extent a new book. The present editor, in view of the great changes in the English law and practice, has practically remodelled the book after a design of his own, and has largely changed and added to the text. But with all the changes made the work is still essentially an English one, no endeavor having apparently been made to make it embrace American law and practice.

This edition is of peculiar interest to the profession, it being the first law book published under the International Copyright Law. One good result of this law should, and we trust will, be the re-editing of many of the standard English text-books, so as to make them applicable to the laws of the British colonies and the United States as well as to those of England. *Verb. sap.*

BENJAMIN'S TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY, with reference to the American decisions and to the French Code and Civil Law. Sixth American Edition from the latest English Edition. With American Notes by Edmund H. and Samuel C. Bennett. Houghton, Mifflin & Co., Boston and New York, 1892. One vol. Law sheep. $6.00.

This is one of the few works which have easily maintained their position as standard text-books, and it is likely to do so for a long time to come. This last edition comes from the hands of able editors, and their notes add greatly to its value. In its present form the work is admirable in every respect, and as a working tool for the practising lawyer and guide for law students leaves nothing to be desired.

LAWYER'S REPORTS ANNOTATED. Book XV. All current cases of general value and importance decided in the United States, State, and Territorial Courts, with full annotations by ROBERT DESTY, Editor. The Lawyer's Co-operative Publishing Company, Rochester, N. Y., 1892. $5.00 net.

This series of reports continues to maintain the high degree of excellence which has been a distinguishing feature from the first volume Mr. Desty's annotations are as valuable as ever, and his selection of cases reported shows much care and discrimination.

PENNSYLVANIA COLONIAL CASES. The administration of law in Pennsylvania prior to A. D. 1700, as shown in the cases decided and in the court proceedings. By Hon. SAMUEL W. PENNYPACKER, LL.D. Rees, Welsh & Co., Philadelphia, 1892. Law sheep. $3.50.

To the legal profession and to the antiquarian as well, this volume will prove of exceptional interest. The earliest case reported is that of Noble *v.* Man, which dates back to the 20th day of the 4th month, 1683, or about seventy years before the earliest case reported in Dallas's Reports. While these cases may not be of great practical value to the practising lawyer of the present generation, they certainly show that the law, even at that early day, was administered in Pennsylvania with a considerable degree of technical skill, and was distinguished by a spirit of justice and fairness, in both the findings of the juries and the decisions of the judges.

JOHN ANDREW & SON CO.

THE RT. HON. SIR JAMES HENNEN.

The Green Bag.

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THE ENGLISH BENCH AND BAR OF TO-DAY.

VI.

SIR JAMES HANNEN.

THE Right Hon. Sir James Hannen President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, and sometime President of the Parnell Commission, was born in 1821, was educated at St. Paul's School and afterwards at the University of Heidelberg, became a student of the Middle Temple, and was called to the bar in 1848. In 1853 the hour of opportunity that cometh to every man overtook him. The interminable Canadian Fisheries' Disputes between England and America had reached a crisis. The proximate cause of quarrel was the alleged encroachment upon British fishing-grounds by vessels belonging to the United States; and the English Colonial Secretary, Sir John Pakington, in a circular addressed to the colonial governors concerned, had used foolish language, to which Mr. Webster, the American Secretary of State, had unfortunately and unwisely replied. Less trivial circumstances have ere now plunged nations into the horrors of war. But the relations between Great Britain and America, though strained, were happily not ruptured. A Mixed Commission to adjudicate upon the matter generally, and upon the outstanding claims in particular, was appointed; and the Gazette for Nov. 16, 1853, announced the nomination of James Hannen, Esquire, as agent for Great Britain before the Commissioners. The Mixed Commission sat in London from 1853 to 1854 or 1855; it settled the immediate difficulties between England and the United States; and it brought at the same time to Sir James Hennen both reputation and practice. Cases of a sensational character Hannen never received, and could not have conducted with success. But heavy arbitrations, solid mercantile questions, difficult points of law sought out his chambers instinctively, and departed thence settled and solved. In the course of time he became Treasury "devil." In modern legal nomenclature, the word "devil" has no Satanic significance. In its generic character, it is a term applied to a junior barrister who digests cases, and occasionally holds briefs, for an overburdened senior. These services are not always paid for,— at least directly. But the devil gains experience,—at the cost of his leader's clients, — establishes a claim to his employer's good offices in the future, and eventually forms a connection of his own. The Treasury devil is the highest species of this important order of beings. He is the junior counsel to the Government, is briefed in all heavy Crown cases, enjoys, besides, a lucrative private practice, and has a reversionary right to a puisne judgeship, without being expected either to take part in politics or to become a Queen's Counsel. Lord Justice Bowen, Mr. Justice Mathew, and Mr. Justice A. L. Smith are types of the class. During his tenure of the office of Treasury devil, Sir James Hannen was called upon to take part in several important cases,— the trial of Franz Müller for the murder of Mr. Briggs, the

strange action raised by the *soi-disant* Princess Olive, and the prosecution of the Manchester "martyrs." He was also engaged in the great Matlock Will case, when Lord Chief-Justice Cockburn was almost persuaded to believe in expert testimony by the remarkable evidence of the lithographer, Charles Chabot (1816–1882.) In 1865 Sir James Hannen made an unsuccessful attempt in the Liberal interest to oust Mr. Stephen Cave, the Tory M. P. for New Shoreham. But his politics were impotent to destroy his privilege as Treasury devil; and in 1868, on the death of Sir William Shee,— less known as a judge than as the advocate that offended Palmer,— Hannen received simultaneously the vacant Justiceship and the honor of Knighthood. He was made Judge-ordinary of the Court of Probate, in succession to Lord Penzance in 1872, and three years later was raised to his present position,— the Presidentship of the newly constituted "Probate Divorce and Admiralty Division."

Sir James Hennen's leading judgments are well known; most lawyers have heard of Niboyet *v.* Niboyet, the Frederick Legitimacy Trial, Durham *v.* Durham, Sugden *v.* St. Leonards (where the will of the great ex-Chancellor was established by secondary evidence), Gladstone *v.* Gladstone, and Crawford *v.* Dilke. We propose, however, to allude particularly to the services that this distinguished Judge has rendered to the law of lunacy. Mr. Justice Holmes, whose treatise on "The Common Law" is as popular in England as in America, has familiarized us with the conception of an "external standard," whereto "the average man" must at his proper peril conform. "The law," says this profound and accomplished writer, "takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. The law considers what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that." Now, an "external standard" is all very well when one has an "average man" to deal with; but there arose a generation of judges in England that sought to determine by rigid "external" formulæ the capacity and the responsibility of the insane. About the year 1840 the French theory of *manie sans délire* was naturalized in England, under the now historic name of "moral insanity." The English-speaking exponents of this theory exaggerated, if indeed they did not misconceive it; and the plea of "moral insanity" or "irresistible impulse" was regularly set up in criminal cases, whenever any other defence was obviously untenable. No sooner was the arm of Justice raised to strike, than the medical expert plucked her sleeve, and sought to paralyze the blow. The English judges rallied bravely against this apotheosis of wickedness, and insisted that if moral insanity, thus interpreted, were a disease, the proper hospital for its treatment was the treadmill of the scaffold. The Rules in Macnaghten's case (1843), which made a knowledge of right and wrong the test of responsibility in mental alienation, gave formal expression to the judicial dislike of "moral insanity." The external standard thus erected for juridical use was speedily trampled upon and broken by the triumphant feet of hostile critics. It was pointed out that to suppose a lunatic capable of reasoning sanely upon his delusions was absurd, and a formidable array of cases was drawn up to show that a knowledge of right and wrong might coexist with a diseased inability to apply that knowledge to a particular set of circumstances. But the worst enemy of the old judicial theory was himself a lawyer, and a very eminent one. Mr. (now Sir) James Fitz James Stephen wrote a paper on the Rules in Macnaghten's case for the Juridical Society, and argued that they were quite wide enough to protect those who were in fact "morally insane." So Dr. Newman "tested the elasticity" of the Articles beneath the very nose of Oxford orthodoxy! Little more was

left for subsequent critics to do. The Rules were "explained," "distinguished," "qualified" — a work in which American lawyers have borne an honorable part — and are at length tacitly abandoned. Now, one of the main arguments that medical criticism had urged against the legal test of responsibility in mental disease was this, — that the mind is one and indivisible, and that no court can determine the extent of the derangement caused by even a slight attack of insanity. This argument had a ring of metaphysics as well as of medicine about it, and it appealed powerfully to the versatile mind of Lord Brougham. In the leading case of Waring *v.* Waring, his lordship promulgated it *ex cathedra* with reference to the testamentary capacity of the insane. Lord Penzance followed suit in Smith *v.* Tebbitt, and in 1867, in Hancock *v.* Peaty, he established the same principle with regard to the power of a mad person to marry or be given in marriage. This external standard for determining the civil capacity of the insane was disapproved of by Sir A. E. Cockburn, in Banks *v.* Goodfellow. In Boughton *v.* Knight and Durham *v.* Durham, Sir James Hannen destroyed it altogether; and "capacity," like responsibility, is once more a question of fact.

Sir James Hannen's conduct of the Parnell Commission is probably the episode in his public career that posterity will remember most vividly. In the stormy debates that preceded the appointment of the Commissioners, when the qualifications and impartiality of his colleagues were bitterly questioned or denied, no shadow of doubt was cast on the perfect competency and integrity of the President. His demeanor at the great inquest amply justified this forbearance. Determined that his court should not become a cockpit for party railleries, or a parade-ground for the exhibition of sensational but irrelevant evidence before the galleries, Sir James Hannen kept the work of the Commission strictly within the lines prescribed by statute, and made Sir Richard Webster and Sir Charles Russell alike feel the pressure of his guiding hand. The Report is before the world, and speaks for itself; but the few sentences with which Sir James Hannen closed the public labors of the Commission are not so well known, and are yet eminently worthy to be recorded. When Sir Henry James concluded his elaborate address, the President said, in tones that are indelibly impressed upon the memories of his audience: "And now I have to congratulate the counsel who are still before us on the completion of their arduous task, and to thank them, and those others to whom such thanks are due, for the untiring industry and conspicuous ability which they have placed at our service, and for the great assistance we have derived from their labors. Our labors, however, are not concluded. We must bear our burden yet a little longer. But one hope supports us. Conscious that throughout this great inquest we have sought only the truth, we trust that we shall be guided to find it, and set it forth plainly in the sight of all men."

As a judge, Sir James Hannen possesses in union and harmony the three indispensable judicial qualities of patience, dignity, and knowledge. He can listen to an argument without interrupting it. He permits no liberties to be taken with the decorum of his court, and no withholding of the respect that is his due. Any effort to mislead him is foredoomed to failure.

All that remains to be said of this great judge and lawyer can be stated in a few words, — he is practically a vegetarian in diet, and no amusing or doubtful anecdotes are linked to his name.

PAGAN JURISPRUDENCE.

By Albert C. Applegarth.

DESPITE the title selected for this dissertation, it requires some extension of the imagination even to speak of jurisprudence among most heathen nations. The word itself must be adjudged almost a misnomer. Even what vestiges there are of this very desirable commodity exist exclusively for the benefit of the upper strata of society. The poorer classes are simply and generally ignored.

Until quite recently, there were no native lawyers in Japan. Now, however, several are practising before the courts in the metropolitan centres, — Tokio and Yokohama. It can hardly be said, however, that they have as yet established a footing, or that the profession as such has a well-defined existence. As no civil code has been adopted, and as the criminal law still remains in its incipient stages of development, it may be a considerable time before these promising adjuncts of civilization attain a position of much importance.

In China any one who wishes to institute legal proceedings before a magistrate, must first purchase a sheet of paper, bearing the official stamp of the incumbent. The litigant then goes to a scribe, presumed to be competent, and employs this individual to write out the complaint in terse, classical language. He next carries his petition to a certain bureau, where it is perused by a somnambulent clerk. If the statement be clear, if the case be not too complicated, this haughty potentate stamps it for the insignificant fee of forty cents or more, — the amount depending upon the intrinsic importance of the matter. When this operation is completed, the official in question is supposed to convey the papers to the magistrate's secretary. Without the stamp, the complaint cannot be filed. If filed, no further attention is paid to it unless the plaintiff possesses a very substantial bank account or considerable social influence. If he be powerful, and his charge be against a friend or any person connected with the magistrate, the interested party receives immediate notification of the complaint, and the case is usually compromised.

The time required for all this elaborate and embarrassing machinery depends principally or entirely upon the amount of money invested in bribes. Nothing on earth, it is claimed, could persuade a Chinese judge to render a decision which was not sustained by sound reason; but all Celestials are only too well aware that dollars, secretly transferred, constitute *par excellence* such a *raison d'être.*

In one of the native courts of the Flowery Kingdom, a litigant, to secure judgment in his favor, sent the magistrate five dollars just before the trial. When, at the conclusion of the suit, he was condemned to receive forty lashes, he imagined the judge could not be aware that he was the man who had sent the pecuniary reminder. In order to recall this interesting fact to the magisterial mind, he raised his hand, with the fingers widely distended, and lustily shouted, "I have right on my side, I have right on my side." Perceiving that these rather embarrassing vociferations would not be discontinued until the defendant ascertained he was understood, the magistrate arose in all his conscious majesty, and leaning over his desk, extended both his hands, with the fingers all apart, and in evident protest at such invincible stupidity, exclaimed, "The other man has twice as much right on his side as you have on yours."

The prisoner was at once convinced of his guilt. He now knew that there was nothing for him to do but to take the flogging to which he had been sentenced. Some of the Chinese proverbs, while not exactly compli-

mentary to the legal profession, clearly indicate the popular sentiment concerning courts and their *attachés.* "To win a lawsuit," declares an ancient maxim, "reduces a person to penury." "Better live on dung," so goes another, "than have recourse to law;" while a third affirms that "he who has to do with magistrates becomes a pauper."

Among some heathen tribes the legal forms are exceedingly primitive. They are more: they are excessively curious. Among some of these benighted people any injury may be condoned by the payment of a compensation for the tears shed as well as for the blood spilt; and the ramifications of this peculiar system extend to cases not ordinarily embraced within the limits of juridical procedure.

If, for example, an Indian among the Goajiras (United States of Colombia) accidentally wound himself, break a limb, or meet with any similar misfortune, his mother's family immediately demand of him "the payment of blood," as it is termed. This novel claim proceeds upon the theory that as his blood is also their blood, the supposed culprit has no right to shed it, without making just compensation therefor. The father's relatives must also receive payment for their tears. But these latter, for some reason surpassing ordinary comprehension, are generally esteemed of less value than the maternal lachrymation. Even the friends of the unfortunate person come in for their share. Indeed, all who may have witnessed the catastrophe are entitled to indemnity of some sort for the grief into which they were plunged at beholding their companion suffer.

The amount of this payment depends upon the character of the injury sustained. A trifling cut on the finger calls for a little corn, a kid, or some commodity of equal value. If the matter be more serious, nothing less than a goat or a sheep — perhaps, even a cow — can assuage the sorrow of these sympathetic mourners. If an Indian borrow a horse from a friend, and is thrown or in any way injured, the relatives of the wounded man instantly demand compensation from the owner of the animal, alleging with logic as undeniable as it is irresistible, that the accident could not have happened but for the supposed act of kindness on the part of the friend. In case a person is injured by his own horse, he himself must compensate his friends, in accordance with the pleasant program to which reference has already been made. Pronouncing the name of a decedent in the presence of his surviving relations, also, constitutes an offence of considerable enormity. Such a misdemeanor can only be condoned by large payments of money.

Among the natives of Alaska, the Mosaic law of "an eye for an eye, and a tooth for a tooth" is preserved inviolate. Here, when any person is injured, the wrongdoer must suffer identically the same. If this be physically impossible, he must make suitable compensation in blankets, — the currency of the country; and it is alleged that almost every offence, ranging all the way from the slightest misdemeanor to the most revolting homicide, has its value determined in this highly respectable mean of exchange.

PRACTICAL TESTS IN EVIDENCE.

By Irving Browne.

I.

IN the early and rude ages there was a strong leaning toward the adoption of demonstrative and practical tests upon disputed questions. Doubting Thomases demanded the satisfaction of their senses. The accused was confronted with the body of the victim. The judgment of Solomon was the typical example of this demand, and a striking instance of the satisfactory character of the result of the compliance with it. The shrewd and homely sense of Governor Sancho Panza devised several practical tests which proved eminently decisive, the most striking of which was that adopted by him in the rape case, which must have occurred to the mind of any modern lawyer witnessing a trial on such an accusation, accompanied by the mental query whether it might not still preserve its efficacy. As society grew civilized and refined, it seemed disposed to despise these demonstrative methods, and incline more to the preference of a narration, at second-hand, by eye and ear witnesses. But in this busy century there seems to have been a relapse toward the earlier experimental spirit, and a disposition to make assurance doubly sure by any practicable method addressed to the senses. And so in recent days the instances have been numerous, and are constantly growing more numerous, of a resort to exhibitions, experiments, and tests made out of court and proved by testimony, or in court before the eyes and ears of the jury called on to pronounce upon the issue of fact. This species of evidence was called "real" by Bentham. Others have named it "demonstrative," and the latest term for it is "immediate." A review of recorded instances of the introduction of such evidence must prove useful, and will not be devoid of interest and amusement.

Exhibition of the Human Body.

1. *In civil cases.* There is no doubt that one suing for damages for physical injury may submit his body to surgical examination before trial, and have the result testified to by experts, or in a case not involving indecent exposure, may exhibit the marks of injury to the jury on the trial. Mulhado *v.* Railroad Co., 30 N. Y. 370; Schroeder *v.* Railroad Co., 47 Iowa, 375; Brown *v.* Swineford, 44 Wis. 282; Indiana Car Co. *v.* Parker, 100 Ind. 181. In the celebrated Tichborne case the claimant was allowed to exhibit his thumb to a witness who had testified to a peculiarity in Sir Roger's thumb.

But whether this is not purely optional with the plaintiff, and whether the defendant may compel such preliminary examination or such exposure at the trial, is a point on which there is much conflict of opinion. It is probably the general rule that such examination or exposure is compulsory, some cases asserting the absolute right, others bounding it by judicial discretion. The latest judicial expression, however, is to the contrary. In Railroad Co. *v.* Botsford, in the United States Supreme Court, 141 U. S. 250, s. c. 44 Albany Law Journal, 325, it was held that the courts of the United States have no power, in an action for personal injuries, to order before the trial an examination of the body of the injured person. Mr. Justice Gray gives a comprehensive and concise statement of the various rulings, as follows: —

"So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history. The inviolability of the

person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order of process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country.

"In the case at bar it was argued that the plaintiff in an action for personal injury may be permitted by the court, as in Mulhado *v.* Railroad, 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature and extent, and to enable a surgeon to testify on that subject, and therefore may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is that any one may expose his body if he chooses, with a due regard to decency, and with the permission of the court, but that he cannot be compelled to do so in a civil action without his consent. If he unreasonably refuses to show his injuries when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. Clifton *v.* U. S., 4 How. 242; Bryant *v.* Stilwell, 24 Penn. St. 314; Turquand *v.* Strand Union, 8 Dowl. 201. In this country the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal injury appears to have been in 1868, by a judge of the Superior Court of the city of New York in Walsh *v.* Sayre, 52 How. Pr. 334, since overruled by decisions in General Term in the same State. Roberts *v.* Railroad, 29 Hun, 154; Neuman *v.* Railroad, 50 N. Y. Super. Ct. 412; McSwyny *v.* Railroad Co., 7 N. Y. Supp. 456. And the power to make such an order was peremptorily denied in 1873 by the Supreme Court of Missouri, and in 1882 by the Supreme Court of Illinois. Loyd *v.* Railroad Co., 53 Mo. 509; Parker *v.* Enslow, 102 Ill. 272; s. c. 40 Am. Rep. 588. Within the last fifteen years, indeed, as appears by the cases cited in the brief of the plaintiff in error (Schroeder *v.* Railway Co., 47 Iowa, 375; Turnpike Co. *v.* Baily, 37 Ohio St. 104; Railroad Co. *v.* Thul, 29 Kans. 466; s. c. 44 Am. Rep. 659; White *v.* Railway Co., 61 Wis. 536; s. c. 50 Am. Rep. 154; Hatfield *v.* Railroad Co., 33 Minn. 130; s. c. 53 Am. Rep. 14; Stuart *v.* Havens, 17 Neb. 211; Owens *v.* Railroad Co., 95 Mo. 169; Sibley *v.* Smith, 46 Ark. 275; s. c. 55 Am. Rep. 584; Railroad Co. *v.* Johnson, 72 Tex. 95; Railroad Co. *v.* Childress, 82 Ga. 719; Railroad Co. *v.* Hill, 90 Ala. 71), a practice to grant such orders has prevailed in the courts of several of the Western and Southern States, following the lead of the Supreme Court of Iowa in a case decided in 1877, and some of them citing the Walsh New York case, afterwards overruled. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law. In the State of Indiana the question appears not to be settled. The opinions of its highest court are conflicting and indecisive. Kern *v.* Bridwell, 119 Ind. 226, 229; Hess *v.* Lowrey, 122 Ind. 225, 233; Railroad *v.* Brunker (Ind.), 26 N. E. Rep. 178."

This conclusion was dissented from by Brewer and Brown, JJ., Mr. Justice Brewer observing: —

"The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court-room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest

the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?"

Mr. Justice Gray observes, in the same opinion:—

"3 Bl. Comm. 331–333. The authority of courts of divorce in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. Briggs *v.* Morgan, 2 Hagg. Const. 324; 3 Phillim. Ecc. 325; Devanbagh *v.* Devanbagh, 5 Paige, 554; Le Barron *v.* Le Barron, 35 Vt. 365. The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Abr. 'Bastard, A.' In cases of that class the writ has been issued in England in quite recent times. *In re Blakemore*, 14 J. L. Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people."

I may add that the writ was denied by the Supreme Court of New York, in 1874, in the Rollwagen case, in which a testator's widow alleged herself to be pregnant by him. (10 Albany Law Journal, 3.)

Judge Thompson (Trials, § 859) favors the requirement of the examination in the discretion of the court, before trial and under proper safeguard. He says:—

"Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection."

In Page *v.* Page, 51 Mich. 88, a divorce case, the court said:—

"There was also a most extraordinary compulsory examination of defendant by physicians, who stripped him and subjected him to oral inquisition, to compel him to give evidence which they could repeat before the commissioner for use against him. What means they could be supposed to have for compelling him to answer their questions, in case he declined, as he ought to have done, we do not know; but we are certain they could not be means known to the law. We strike from the record all the evidence obtained by this inquisition also. It should be understood that there are some rights which belong to man as man and to woman as woman which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and that there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."

It is difficult to accept the argument that a party may be compelled to produce particular evidence against his will, simply because he had the right to produce it if he wishes. It seems to me that the true reason of the case has not been sufficiently emphasized in either of the opinions, nor any-

where else, so far as I have read, excepting one case. The court has no power to compel the suitor to produce any particular piece of evidence. He is suing for his own benefit, and may put in such evidence as he chooses, taking upon himself the burden of satisfying the jury. The jury may lean against him because of his omission to produce certain available evidence, but the court has no more power to compel his exposure of his person to a surgical examination, than to compel his production of a particular witness to the transaction in question, whom he omits or refuses to produce. This last class of omission is frequently commented on by opposing counsel as suspicious, but no one ever claimed that the party could be obliged to produce such evidence. And yet the reasoning of Mr. Justice Brewer, followed to its legitimate conclusion, would imply such a compulsory power. The judges frequently lay stress on the fact that such an examination tends to certainty, which is the aim of the law. The answer is, the plaintiff is not bound to render his case certain, although it may be within his power to do so. He simply takes the risk of his omission to do so. The most cogent expression of this idea is by Learned, P. J., in Roberts *v.* Railroad Co., 29 Hun, 155, as follows: —

"But again . . . we know of no right which this court has to compel a party to submit to any bodily examination. In a common-law action like this the jury are to pass on the issues of fact. And they are entitled to see and hear for themselves the evidence. It is of the very essence of the common-law system that the evidence shall be produced before the jury. Exceptions to this rule (and not desirable exceptions) are those cases in which evidence is previously reduced to writing, and then read to the jury. Now, if a party is entitled to the compulsory exhibition of the body of his opponent, it would seem to follow that he might have such exhibition made before the jury. And the court might require the plaintiff, on the trial and before the jury, to submit to the same examination as is required by this order. Neuman *v.* Third Ave. R. Co., 50 Supr. Ct. 412. It is undoubtedly true that not unfrequently plaintiffs, suing for bodily injuries, do exhibit in court the injured part. Nor do we know of any reason why they should not do this, notwithstanding the exhibition may excite sympathy. And on the other hand, all unreasonable concealment of an injured part (not justified by any dictate of modesty or otherwise) may excite a doubt in the mind of the jury as to the genuineness or extent of the alleged injury. But we cannot admit the principle that either in the presence of the jury or in the presence of a referee a party can compel his opponent to exhibit his body, in order to enable physicians to examine and question and testify. . . . There may be danger that in actions of this nature plaintiffs will exaggerate the injuries they have received; and that defendants may be at a disadvantage in ascertaining the exact truth. But this evil is far less than the adoption of a system of bodily and perhaps immodest examinations, which might deter many, especially women, from ever commencing actions, however great the injuries they had sustained."

Since the foregoing was written, the lead of the United States Supreme Court has been followed by the courts of last resort in New York and Indiana. In McQuignan *v.* Delaware, etc. Railroad Co., 129 N. Y. 50, the Court of Appeals denied the compulsory right, citing the Botsford case, and observing: —

"It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. . . . The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this State. Its existence is not indispensable to the due administration of justice. Its exercise depending on the discretion of the judge would be subject to great abuses. We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has been dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence."

The court was unanimous. The Indiana case is Pennsylvania Co. *v.* Newmeyer, 129 Ind. 404. The conclusion is as follows: —

"So far as we know, the courts of this State have never attempted to exercise such a power, and we are of opinion that no such power is inherent in the courts. We think the better reason is against the existence of such a right, and in the absence of some statute upon the subject we do think the courts should attempt to compel litigants, against their will, to submit their persons to the examination of strangers for the purpose of furnishing evidence to be used on the trial of a cause. Should a litigant willingly submit, there could be no legal objection to such an examination; and should he refuse to submit to a reasonable examination, his conduct might possibly be proper matter for comment; but this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers."

The court was unanimous. Reliance was placed on the Botsford case; but the decision was earlier than that in the McQuignan case.

But although it is permitted to the claimant of damages for corporeal injuries to exhibit his hurt to the jury, if he chooses, he will not be allowed to make an indecent exposure. Thus, in Brown *v.* Swineford, 44 Wis. 282, the appellate court lectured the trial court very severely for suffering the plaintiff to "uncover and exhibit to the jury his organ of generation," although the opposing counsel did not object to it. But he may expose a wound to show that pus still flows. McMaier *v.* Ry. Co., 51 Hun, 644.

In Schneider *v.* Ætna Life Ins. Co., 32 La. Ann. 1049; s. c. 36 Am. Rep. 276, it was held that in an action on a policy of life insurance, where the issue was on the death of the insured, the insurer is not bound to bring him bodily before the court. The court said: —

"There was nothing whatever in these objections, and they were rightly overruled. If the person whose identity was in issue had been himself a party to the action as claimant of some right based on such identity, as in the famous Tichborne case, the opposite party might have demanded a view of his person and the opportunity of personal examination in presence of the court. Such was not the case here. The person whose identity was in question was not a party to this suit, and was not within reach of its process, and was in no manner subject to its orders. If he had been within the reach of process of the court, plaintiff would have had the same right to invoke it to compel his attendance that the defendant had. As he was not within reach of its process, neither party had power to enforce his attendance; and the law imposes impossible duties on no one. A free man is not subject to the possession and control of another, his body cannot be offered or filed in evidence, and he is not to be treated like a document of which *profert* or *oyer* may be claimed."

Other living human bodies. In a recent action in the Superior Court, in Boston, for dislocation of the collar-bone, the plaintiff's experts having testified that such an injury in most cases is permanent, the defence offered to produce three persons who had suffered exactly similar injuries, and who would visibly demonstrate to the jury that their recovery was complete. This was excluded.

A NEW YORK WITCHCRAFT CASE.

By John Douglas Lindsay.

IN October, 1665, Ralph Hall and Mary, his wife, were put upon trial in the Court of Assize held in New York, for witchcraft. The indictment against the husband was as follows: —

"The Constable and Overseers of the Town of Seatallcott, in the East Riding of Yorkshire, upon Long Island, Do Present for our Sovereign Lord the King, That Ralph Hall, of Seatallcott aforesaid, upon y^e^ 25^th^ day of December, being Christmas

day last, was Twelve Monthes, in the 15th yeare of the Raigne of our Soveraigne Lord, Charles ye Second, by the Grace of God, King of England, Scotland, ffrance and Ireland, Defender of the ffaith, &c., and several dayes and times since that day, by some detestable and wicked Arts, commonly called witchcraft and Sorcery, did (as is suspected) maliciously and feloniously, practice and Exercise at the said towne of Seatallcott in the East Riding of Yorkshire on Long Island aforesaid, on the Person of George Wood, late of the same place, by wch wicked and detestable Arts, the said George Wood (as is suspected) most dangerously and mortally sickned and languished, And not long after by the aforesaid wicked and detestable Arts, the said George Wood (as is likewise suspected) dyed."

A second court accused him of practising his arts "on the Person of an Infant Child of Ann Rogers, widow of ye aforesaid George Wood deceased," and concluded: —

"And so ye said Constable and Overseers do Present, That the said George Wood, and the sd Infant sd Child, by the wayes and meanes aforesaid, most wickedly, maliciously, and feloniously were (as is Suspected) murdered by the said Ralph Hall, at the times and places aforesaid, agst ye Peace of our Soveraigne Lord ye King and against the Laws of this Government in such cases Provided."[1]

The indictment against Mary Hall was in a similar form.

The evidence consisted entirely of depositions, of which several were read to the jury, and (according to the record) no witnesses gave testimony *viva voce*.

What facts were proven against the prisoners in this clearly illegal manner is not to be ascertained from the records of the case, for no mention is made of the contents of the depositions; but that little importance was attached to the acts so established is shown by the verdict of the jury, which was recorded in the following language: —

"Wee having seriously considered the case committed to our charge, against ye Prisonrs at the Barr, and having well weighed ye Evidence, we finde that there are some Suspitions by the Evidence, of what the woman is charged with, but nothing considerable of value to take away her life. But in reference to the man wee finde nothing considerable to charge him with."

This finding of the jury was in law nothing more nor less than a verdict of acquittal. The court was bound by the rules and practice of the English common law, and could not legally recognize any verdict except of "guilty" or "not guilty." The Scotch verdict of "not proven" never found its way into our colonial criminal jurisprudence. Nevertheless the New York Courts of Assize undertook so to construe the jury's report, and accepted it in the form in which it was rendered; and evidently deeming the jury's comments well founded, and the absolute discharge of the woman while she rested under the direful "Suspitions" a proceeding dangerous to the common welfare, the court assumed without any legal justification to require a recognizance for her future good behavior, pending the giving of which the prisoners were detained in prison. The following entry in the court minutes states the proceedings subsequent to the verdict:

"The Court thereupon gave this sentence, That the man should be bound Body and Goods for his wives appearance, at the next Sessions, and so on from Sessions to Sessions as long as they stay wth in this Government, In the meane while, to bee of ye good Behaviour So they were returned into the Sheriff's custody, and upon entering into a Recognizance according to the Sentence of the court, they were released."

In August, 1668, Governor Nicolls released them from the recognizance.

[1] Doc. Hist. N. Y., vol. iv. p. 85.

DETECTION OF CRIME BY PHOTOGRAPHY.

THE detection of crime is a matter of fascinating interest to all but those who, unhappily for themselves, have to pay the penalty of wrong-doing. The novelist, as well as the dramatist, knows well that a crime round which a mystery hangs, or which involves the detection or pursuit of a suspected individual, is a theme which will at once secure the attention of those for whom he caters. In one respect it is a misfortune that this should be so; for there has arisen a copious supply of gutter literature, which, by its stories of wonderful escapes and lawless doings of notorious thieves and other vagabonds, arouses the emulation of youthful readers, and often, as the records of our police courts too frequently prove, tempts them to go and do likewise. On the other hand, we cannot look without admiration at such a wonderful word-picture as that given us in "Oliver Twist," where the wretched Sikes wanders with the brand of Cain upon him, haunted by the visionary form of his victim.

Both novelists and playwrights have many clever ways of tracking their puppets and hounding them to death. Some of these are hackneyed enough, — such as the foot-mark in the soil, the dirty thumb-mark on the paper, etc.; and he who can conceive a new way of bringing about the inevitable detection is surely half-way toward success.

Once again has romance been beaten by reality. In this matter of the detection of criminals, the photographic camera has lately performed such novel feats that quite a fresh set of ideas is placed at the disposal of fiction-mongers. The subject recently came before the Photographic Society of Great Britain, in the form of a paper by Dr. Paul Jeserich of Berlin, a chemist, who has devoted his attention for many years to the detection of crime by scientific means, and more especially by the means of photography. This paper was illustrated by a remarkable collection of photographs, which were projected by means of an optical lantern. Some of the wonderful results obtained by this indefatigable worker we will now briefly place before our readers.

Most persons are aware that for many years it has been the practice in this and many countries to take the portraits of criminals when they become the unwilling tenants of the State, and such portraits have proved most useful in subsequent identification. There is little doubt, thinks Dr. Jeserich, that this system might with advantage be extended to the photographing of the scene of the crime; for the camera will faithfully record little details, at the time considered to be unimportant, but which may supply a valuable link in the chain of evidence later on. Thus, he refers to a case of murder, when, in the course of a terrible struggle, the contents of a room were upturned, — a clock, among other things, being hurled from its place and stopped. A photograph would have shown the hour at which the deed was done, — a fact of first importance, as every prisoner who has endeavored to establish an *alibi* knows well enough. But it is in microscopical examination, and in the subsequent photographing of the object examined in much magnified form, that Dr. Jeserich has done his most noteworthy work. Such a photograph will often afford evidence of the most positive kind, which can be readily comprehended and duly appraised by judge and jury alike. Let us now see, by a few examples, how the method works out.

The first criminal case brought forward by Dr. Jeserich was one in which the liberty of a suspected man literally "hung upon a hair;" for by a single hair was he tracked. The case was one of assault, and two men were suspected of the deed. A single hair was found upon the clothing of the victim, and this hair was duly pictured

in the form of a photo-micrograph. (It may be as well, perhaps, to point out here that by this term is meant the enlarged image of a microscopic object, the term "micro-photograph" being applied to those tiny specks of pictures which can only be seen when magnified in a microscope.) A., one of the suspected men, had a gray beard; and a hair from his chin was photographed and compared with the first picture taken. The difference in structure, tint, and general appearance was so marked that the man was at once liberated. The hair of the other man, B., was also examined, and bore little resemblance to that found on the victim. The latter was now more carefully scrutinized, and compared with other specimens. The photograph clearly showed, for one thing, that the hair was pointed, — it had never been cut. Gradually the conclusion was arrived at that it belonged to a *dog*, — "an old yellow, smooth-haired, and comparatively short-haired dog." Further inquiry revealed the fact that B. owned such a dog, a fresh hair from which agreed in every detail with the original photograph, and the man was convicted. He subsequently confessed that he alone committed the crime.

In the identification of blood-stains, several difficulties crop up. As every one knows, blood when magnified is found to contain myriads of little globules, or corpuscles, as they are commonly called. Some of these are colorless; but the others are red, and give to blood its well-known color. The microscopist can tell whether the blood he submits to examination is that of a mammal, of a bird, or of a fish; for the corpuscles of each have distinct characteristics. But when we ask him to differentiate between the blood-corpuscles of different kinds of mammals, he is somewhat at a loss, because his only guide is that of size. Thus, the blood-corpuscles of the elephant are, as might be expected, larger than those of any of the other mammalia; but they are in other respects like those of his brother mammal, man, — round in outline, and looking like so many coins carelessly thrown together. A dog or a pig possesses corpuscles of smaller size, while those of a goat are very much smaller still. Here is a case in which these differences witnessed with terrible effect against a man suspected of a serious crime. A murder had been committed, and D. was the man suspected; suspicion being strengthened by the circumstance that an axe belonging to him was found smeared with blood, which had been partly wiped off. The man denied his guilt, and accounted for the blood-stained weapon, which he declared he had not taken the trouble to wipe, by saying that he had that day killed a goat with it. The blood was examined microscopically, and the size of the corpuscles proved his statement to be false. A photo-micrograph of it, as well as one of goat's blood, was prepared for comparison by the judge and jury. Another photo-micrograph was also made from part of the blade of the axe, which showed very clearly, by unmistakable streaks, that the murderer had done his best to remove the traces of his crime. It is certain that these photographs must be far more useful for purposes of detection than the original microscopic preparations from which they are taken; for it requires a certain education of the eye to see through a microscope properly, and still more to estimate the value of the evidence it offers. It is certain, too, that counsel on either side would see through the microscope with very different eyes.

We now come to a very important section of Dr. Jeserich's work, — the detection of falsification of handwriting and figures by means of photography. Crimes of this nature are far more common than deeds of violence; and, judging by the heavy punishment meted out to the offenders, in comparison to the mild sentences often passed upon men whom to call brutes would be base flattery, the law would seem to consider such sins worse than those committed

against the person. However this may be, it is a most important thing that this very dangerous class of crime should be subject to ready detection. The microscope alone will not aid us much, although we can detect by its aid places in paper where erasures have been made. If any one will take the trouble to examine microscopically the paper on which these words are printed, using quite a low-power object-glass, he will note that its smooth surface altogether disappears, and that it seems to be as coarse as a blanket. This being the case, it will be readily understood that an erasure with a knife, which would be imperceptible to the unaided eye, becomes so exaggerated when viewed with the microscope that there can be no mistake about it. In examining writing by this searching aid to vision, the finest lines appear thick and coarse. It is also possible to ascertain whether an alteration has been made in a word before the ink first applied has become dry, or whether the amendment has been an afterthought. In the former case, the previously applied ink will more or less amalgamate with and run into the other, as will be clearly seen under the microscope; while in the latter case, each ink-mark will preserve its own unbroken outline. The use of this observation in cases of suspected wrong-doing is obvious. Dr. Jeserich shows two photographs which illustrate these differences. In the first, a document dated early in January is marked 1884, — the 4 having been altered into a 5 as soon as written, so as to correct a mistake which most of us make a dozen times or more at the beginning of each new year. In the other picture, the date had been altered fraudulently, and long after the original words had been traced, in order to gain some unworthy advantage.

The photographic plates by which these records have been accomplished are the ordinary gelatine plates which are being used in the present day by thousands of amateur workers. By special preparation, these plates can be made to afford evidence of a far more wonderful kind, and can in certain cases be made to yield a clear image of writing which has been completely covered with fresh characters by the hand of the forger. In this way the true and the false are distinctly revealed, together with the peculiarities belonging to each, clearly defined.

The word "ordinary" has a special significance to photographers, and is used by them in contradistinction to a color-sensitive (orthochromatic) plate. This second kind of sensitive surface is of comparatively recent date, and the great advantage in its use is, that it renders colors more according to their relative brightness, — just, in fact, as an engraver would express them by different depths of "tint." These plates are especially useful in photographing colored objects, such as paintings in oil or water color. Dr. Jeserich has, however, pointed out an entirely new use for them, and has shown that they will differentiate between black inks of different composition.

The oft-quoted line, "Things are not always as they seem," is very true of what we call black ink. It is generally not black, although it assumes that appearance on paper. Taking, for experiment, the black inks made by three different manufacturers, and dropping a little of each into a test-tube half-full of water, the writer found that one was distinctly blue, another red, and the third brown. Each was an excellent writing-fluid, and looked as black as night when applied to paper. Now, Dr. Jeserich prepares his color-sensitive plates in such a way that they will reveal a difference in tone between inks of this description, while an ordinary plate is powerless to do anything of the kind. Among other examples, he shows the photograph of a certain bill of exchange, whereon the date of payment is written April. The drawer of this bill had declared that it was not payable until May; whereupon Dr. Jeserich photographed it a second time, with a color-sensitive plate. The new photograph gives a revelation of the true

state of affairs. The word "Mai" had been altered to "April" by a little clever manipulation of the pen, and the fraud was not evident to the eye, to the microscope, or to the ordinary photographic process. But the color-sensitive film tells us that the ink with which the original word "Mai" was written was of a different black hue from that employed by the forger when he wrote over it and partly formed out of it the word "April." The consequence is that one word is much fainter than the other, each stroke of alteration being plainly discernible, and detecting the forgery. Another case is presented where a bill already paid, let us say, in favor of one Schmidt, is again presented with the signature Fabian. Here, again, the photographic evidence shows in the most conclusive manner that the first word is still readable under the altered conditions. In this case, when the accused was told that by scientific treatment the first name had been thus revealed, he confessed to the fraud, and was duly punished.

Alterations in figures have naturally come under Jeserich's observation; figures being, as a rule, far more easy to tamper with than words,—especially where careless writers of checks leave blank spaces in front of numerals, to tempt the skill of those whose ways are crooked. Dr. Jeserich shows a document which is drawn apparently for a sum of money represented by the figures 20,200. The amount was disputed by the payer, and hence the document was submitted to the photographic test. As a result, it was found that the original figures had been 1,200, and that the payee had altered the first figure to 0, and had placed a 2 in front of it. The result to him was four years' penal servitude; and it is satisfactory to note that after sentence had been passed upon him, he confessed that the photograph had revealed the truth.

Two cases in which fabrication of documents was rendered evident by the camera are of a somewhat amusing nature, although one might think it difficult to find matter for mirth out of these mendacious doings. Two citizens of Berlin had been summoned for nonpayment of taxes, and had quite forgotten the day upon which the summonses were returnable,—thus rendering themselves liable to increased expenses. It was a comparatively easy matter, and one which did not lie very heavily on their consciences, to alter the 24 which denoted the day of the month into 26. But that terrible photographic plate found them out; and the small fine which they hoped to evade was superseded in favor of imprisonment for the grave offence of falsifying an official document. In another case, a receipt for debts contracted up to 1881 was altered to 1884, by the simple addition of two strokes in an ink which was of a different photographic value from the ink which had been used by the author of the document.

Many cases like these, relating to falsifications of wills, postal orders, permits, and other documents, have come under the official notice of Dr. Jeserich. One of these is especially noteworthy, because the accused was made to give evidence against himself in a novel manner. He was a cattle-dealer, and had altered a permit for passing animals across the Austrian frontier at a time when the prevalence of disease necessitated a certain period for quarantine. The photographic evidence showed that a 3 had been added to the original figures, and it was necessary to ascertain whether the prisoner had inserted this numeral. To do this, he was made to write several 3's, and these were photographed on a film of gelatine. This transparent film was now placed over the impounded document, and it was found that any of the images of the newly written figures would very nicely fit over the disputed 3 on the paper. Such a test as this, it is obvious, is far more conclusive and satisfactory in every way than the somewhat doubtful testimony of experts in handwriting,—the actual value of whose evidence was so clearly set forth during the celebrated Parnell inquiry.

It is refreshing to turn to an instance in which the photographic evidence had the effect, not of convicting a person, but of clearing him from suspicion. The dead body of a man was found near the outskirts of a wood, and appearances indicated that he had been the victim of foul play. An acquaintance of his had been arrested on suspicion, and a vulcanite match-box believed to belong to the accused — an assertion which, however, he denied — seemed to strengthen the case against him. The box was then subjected to careful examination. It was certainly the worse for wear, for its lid was covered with innumerable scratches. Amid these markings it was thought that there were traces of a name; but what the name was it was quite impossible to guess. Dr. Jeserich now took the matter in hand, and rubbed the box with a fine, impalpable powder, which insinuated itself into every crevice. He next photographed the box, while a strong side-light was thrown upon its surface, so as to show up every depression, — when the name of the owner stood plainly revealed. This was not that of the prisoner, but belonged to a man who had dropped the box near the spot where it was found many weeks before the suspected crime had been committed. The accused was at once released.

In conclusion, we may quote one more case of identification, which, although it does not depend upon the camera, is full of interest, and is associated with that other wonderful instrument known as the spectroscope. Solutions of logwood, carmine, and blood have to the eye exactly the same appearance; but when the liquids are examined by the spectroscope, absorption bands are shown, which have for each liquid a characteristic form. In the case of blood, the character of the absorption bands alters if the liquid be associated with certain gases, such as those which are given off during the combustion of carbonaceous material. Now, let us see how this knowledge was applied in a case which came under Dr. Jeserich's official scrutiny. A cottage was burned down, and the body of its owner was found in the ruins in such a charred condition that he was hardly recognizable. A relative was, in consequence of certain incriminating circumstances, suspected of having murdered the man, and then set fire to the building in order to hide every trace of his crime, — thinking, no doubt, that the conflagration would be ascribed to accident. The dead body was removed, and a drop or two of blood was taken from the lungs and examined spectroscopically, with a view to finding out whether death had been caused by suffocation or had taken place, as was believed, before the house was set on fire. The absorption spectrum was found to be that of normal blood, and the suspicion against the accused was thus strengthened. He ultimately confessed to having first committed the murder, and then set fire to the building, according to the theory adopted by the prosecution. The proverb tells us that "the way of transgressors is hard." The thanks of the law-abiding are due to Dr. Jeserich for making it harder still. — T. C. HEPWORTH, in *Chambers' Journal.*

THE SUPREME COURT OF NORTH CAROLINA.

By Walter Clark.

II.

JOSEPH JOHN DANIEL was a resident of Halifax County, in which he was born Nov. 13, 1784. He entered the University in 1804, but left after a brief stay, and studied law under Gen. William R. Davie at Halifax. He represented that borough town in the legislature in the years 1807 and 1815, and the county in the same body 1811 and 1812. He was elected a judge of the Superior Court in 1816, to fill the vacancy caused by the resignation of Judge Leonard Henderson. This position he filled with fidelity sixteen years, and at June Term, 1820, of the Supreme Court, sat in a few cases in that court by special commission, as already mentioned in the sketch of Judge Murphey. In 1832, upon the resignation of Judge Hall, he was elected to succeed him upon the Supreme Court bench. He discharged the duties of that post till his death, which took place at Raleigh, Feb. 10, 1848. While in service on the bench he was a member from Halifax of the Constitutional Convention of 1835, in which his colleague, Judge Gaston, was also a member.

Judge Daniel's opinions have always been great favorites with the profession. They are the shortest to be found in our reports, yet they are clear, to the point, and dispose of the whole subject in hand. Wheeler in his History says of him: "He was remarkable for his patience, profound legal knowledge, and general learning, especially in history. His character was one of innocent eccentricity, and if he possessed the 'wisdom of the serpent,' truly, it might well be said, the 'harmlessness of the dove' also belonged to him. The elevation of office and the dignity of position never changed the native simplicity of his character and the unadulterated purity of his republican principles." Upon Judge Daniel's death in 1848, Chief-Justice Ruffin, who had been so intimately associated with him for sixteen years, said of him, "He had a love of learning, an inquiring mind, and a memory uncommonly tenacious; and he had acquired and retained a stock of varied and extensive knowledge, and especially became well versed in the History and Principles of the Law. He was without arrogance or ostentation, even of his learning; he had the most unaffected and charming simplicity and mildness of manners, and no other purpose in office than to 'execute justice and maintain truth.'" But he needs no tongue or pen to praise him. His eulogy was written by his own hand in the judicial opinions which still remain to instruct us. It is not uncommon to be fulsome in speaking of the dead, seeking the favor of the living rather than the cool impartial award of history, and presenting a fancy sketch for which the delineator is "indebted to his imagination for his facts, and to his memory for his wit." Nothing was more foreign to the character of Judge Daniel. He knew himself how to speak truly and to the point, and to stop when he had made himself understood. Like Cromwell, he would have said, "Paint me as I am." He made no pretensions to greatness. He was a strong man and a just judge. He was a good lawyer, and deservedly ranks high up in the legal pantheon.

Unlike Ruffin, he had no spheres of activity off the bench; though possessed of a great memory and an accurate knowledge of history, unlike Murphey, he has left us nothing from his pen except his decisions, and, unlike Gaston, he did not achieve eminence

either in politics or literature. He was a lawyer, pure and simple, and among lawyers his fame "must live or bear no life." He is said to have possessed no eloquence as an advocate, but to have made his way at the bar by learning and diligence.

An anecdote often told of him may be pardoned here. At church on one occasion with the Chief-Justice, when the collection plate was approaching, he could find nothing but a five-dollar gold piece in his pocket. "Ruffin," said he, "lend me a quarter." The Chief-Justice did not have it. "Lend me a half or a dollar." A shake of the head was the reply. He slammed the gold piece in the plate, saying in desperation "D—n you, go!"

Judge Daniel's opinions will be found in twenty-one volumes of the Reports, to wit, 14 and 15 N. C., 17 to 30 N. C. inclusive, and 36 to 40 N. C. inclusive, embracing the Law and Equity reports for sixteen years, beginning December Term, 1832. His opinions are of Spartan brevity, usually half a page or less, and very rarely indeed exceeding one page. The following may be turned to as fair specimens of his style of thought and expression: State *v.* Stalcup, 23 N. C. 30 and State *v.* Wilson, Ib. 32, as to the requisite averments and proof in indictments for riot, and Hardin *v.* Borders, as to the same in actions for malicious prosecution. In Mitchell *v.* Mitchell, Ib. 257, he construes a will in a fourth of a page; and in Gaither *v.* Teague, 26 N. C. 65, he decides a question as to the admissibility of evidence in less than five lines. Fleming *v.* Straley, 23 N. C. 305, discusses evidence on a question of domicile. State *v.* Fore, Ib. 378, holds that as to indictments, if the sense be clear and the charge sufficiently explicit, nice objections should be disregarded. Ballew *v.* Clark, 24 N. C. 23, is a ruling that a party signing an instrument can plead that he was insane when he did it, and that the old doctrine that a man cannot stultify himself had long been exploded. Rowland *v.* Rowland, Ib. 61, decides that in a civil action against several who have a joint interest, the declaration of one as to a fact within his own knowledge is evidence against all the other defendants also. Copeland *v.* Copeland, 25 N. C. 513, is a decision in half a page that an overseer from whom a slave is retreating had no right to shoot at him to stop him, and that the owner of a slave which is unjustifiably injured while hired out, can recover damages for the injury. Locke *v.* Gibbs, 26 N. C. 42, is a ruling that one may recover damages for a malicious prosecution of his slave. Smith *v.* Low, 27 N. C. 197, holds that the return of a ministerial officer of his acts out of court, unlike the records of the court, is only *prima facie* correct, and not conclusive. Needham *v.* Branson, Ib. 426, decides that where a conveyance of land is made to husband and wife, they do not take as joint tenants or as tenants in common, but by entireties, and on the death of one the entire estate devolves upon the other. Wright *v.* Mooney, 28 N. C. 22, holds that a judgment in one court is a set-off in an action in assumpsit in another court. State *v.* Gherkin, 29 N. C. 206, rules that falsely putting a witness's name to a bond which does not require a subscribing witness does not vitiate the bond, and is not forgery. Coon *v.* Rice, Ib. 217, construes a case coming under the rule in Shelley's Case. State *v.* Thomas, Ib. 381, holds it to be error in the judge to tell the jury that they must find for one of the parties unless they believe his witness had committed perjury.

Judge Daniel's will is in eight lines. In it "he disposed of a large estate, gave his blessing to his children and his soul to his God." He was ten years at the bar, and thirty-two years consecutively a judge,—sixteen years on the Superior Court and sixteen in the Supreme Court. For eleven years (1833–1844) Ruffin, Daniel, and Gaston sat together on the Supreme Court bench of North Carolina. No State has surpassed that bench in ability and learning. To our own judicial annals that time is what—

"The golden prime of good Haroun al Raschid" is to Eastern story.

On Jan. 1, 1822, Judge Daniel married Miss Maria B. Stith. He left surviving him one son, William A. Daniel, Esq., of Weldon, and two daughters, through whom he has many descendants; among them Jacob Battle, Esq., of Rocky Mount, one of the ablest young lawyers of eastern North Carolina; the wife of Dr. R. H. Lewis, of Raleigh; and Armistead C. Gordon, of Staunton, Va., author of the beautiful idyl "My boy Kree."

Judge Daniel was succeeded on the bench by Hon. W. H. Battle.

The name of Gaston is one upon which North Carolinians love to linger. A county and two towns, Gastonia and Gaston, bear his name. Chief-Justice Henderson is the only other judge whose popularity has received a like testimony. William Gaston was born in Newbern, N. C., Sept. 19, 1778. His father, Dr. Alexander Gaston, was a native of the North of Ireland, but of Huguenot descent, and a graduate of Edinburgh Medical College. He had been a surgeon in the English army, but resigned and settled in Newbern. During the Revolution he was an ardent patriot, serving both as captain of volunteers, and as surgeon in the army. In August, 1781, when Major Craig advanced towards Newbern, the emboldened tories captured the town. Dr. Gaston, in attempting to escape, pushed hurriedly off in a boat with a companion, the river being close by his house. The tories fired over the heads of his wife and children, who were on the wharf; and he fell mortally wounded. He left a young widow almost without means, and two children, — a son then three years old, the subject of this sketch, and a daughter who in after years became the wife of Chief-Justice John Louis Taylor.

JOSEPH J. DANIEL.

An early anecdote will illustrate the training he received at the hands of his mother. "William," said one of his playmates, "what is the reason *you* are always head, and *I* am always foot of my class?" "If I tell you the reason," replied the seven-year-old boy, "you must keep it a secret, and promise to do as I do. When I take my book to study, I always say a prayer my mother has taught me, that I may be able to learn my lessons." His companion could not remember the words of the prayer; and that evening William was found by his mother behind the door, writing out the prayer for his friend to commit to memory. His mother was a devoted Catholic, and such her distinguished son remained through life.

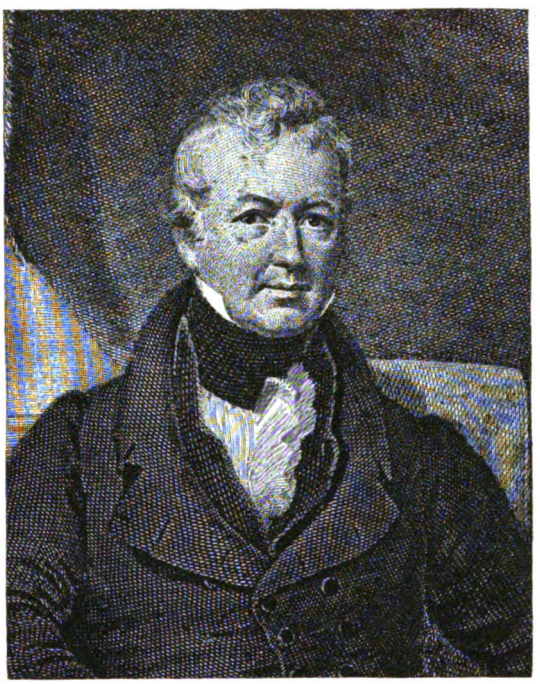
At thirteen years of age he was sent to Georgetown Catholic College, D. C., whence the Rev. Mr. Plunkett wrote his mother that he was "the best scholar and the most exemplary youth we have in the college." His health suffering from too close application, he was wisely called home for some months of rest. After some months' study under the Rev. Mr. Irving, he was sent to Princeton, where he entered the junior class, and graduated there in 1796 with the highest

honor. He said the proudest moment of his life was when he announced this fact to his mother.

On his return to Newbern he studied law with Francis Xavier Martin, a native of France, a leading lawyer, author of Martin's N. C. Reports, and of a history of North Carolina, afterwards appointed by Mr. Jefferson judge in Mississippi Territory, and who was a judge of the Supreme Court of Louisiana thirty-one years, 1815–1846, out-living his distinguished pupil. In 1798 Judge Gaston was admitted to the bar, being then twenty years of age. In 1800 he was elected to the State Senate, and in 1808 Presidential Elector for that district, the electors being then chosen by districts in this State. In 1808, 1809, 1824, 1827, 1828, and 1831 he represented the town of Newbern in the House of Commons, being chosen Speaker of that body in 1808, and afterwards; and in 1800 (as already stated), 1812, 1818, and 1819 he was in the State Senate. He was defeated for Congress in 1810 by William Blackledge, but was elected in 1812, taking his seat in 1813 and again in 1815. He at once took a leading part. Mr. Webster, in reply to an inquiry from a member of Congress from Ohio, "who was the greatest of the great men in the War Congress," said, "The *greatest* man was William Gaston;" adding, with a smile, "I myself came in along after him." With equal magnanimity, Henry Clay, in conversation at Raleigh, said: "I once differed with Gaston, but afterwards found that Gaston was right." Soveral of his speeches, especially those on the "Loan Bill" and the "Previous Question," are models of parliamentary debate. He was the leader of the Federal party, and opposed to the Administration. After two terms in Congress he voluntarily returned to his practice. In the State Senate, in 1818, he drafted and introduced the bill which established the Supreme Court of this State. The statute book of North Carolina is full of proofs of his wisdom. His speech on the State Currency in 1828, and in defence of the Constitution in 1831, and in 1827, in opposition to a bill introduced by Frederick Nash (himself afterwards Chief-Justice) to reorganize the Supreme Court, are among his most notable efforts. His most brilliant legislative action was in the State Convention of 1835 (while still on the Supreme Court bench), when he secured the repeal of the constitutional restrictions upon Catholics. He was a superb orator and a most persuasive advocate. His address before the Literary Societies at the University of North Carolina in 1832, and at Princeton in 1834, are models of their kind.

Upon the death of Chief-Justice Henderson, in 1833, Gaston was elected without solicitation or suggestion from himself to the Supreme Court bench, as Associate Justice, Judge Ruffin becoming Chief-Justice. He was then fifty-five years of age, and the senior in years of both his associates, — Ruffin and Daniel. His election was indeed a marked compliment to his personal eminence; for in the fifty years which elapsed between the creation of the Supreme Court in 1818, and its *bouleversement* in the cataclysm of 1868, this was the only instance of the election to that bench of any one who had not previously served upon the Superior Court bench. Indeed, all others were taken directly from that bench except Judge Henderson, and he, after having served many years as a Superior Court judge, had only recently resigned when elected to the Supreme Court on its organization. Gaston had been thirty-five years in full practice at the bar before he was called to the bench; but his opinions are singularly free from that disposition to choose sides which is so often observed in judges who come late to the bench, and who generally are swayed by strong preconceived views on some subjects. In 1835, as already stated, he was a leading member of the Convention of 1835 to amend the Constitution. When called to the bench in 1833, the Constitution contained a provision, the famous thirty-second article, rendering ineligible to office any one who "denied the truth of the Protestant

religion." Judge Gaston was a devout and consistent member of the Roman Catholic church. He accepted his election to the bench, and maintained, in a very strong and remarkable letter, that there was no organization, form of faith, or creed which could be called *the* Protestant religion, that no Catholic as such denied any truth held by Protestants, and that, considering the general tenor of the Constitution, it was clear that this provision was not *intended* to disqualify Catholics from office. All possible question on the subject was laid to rest by the amendments to the Constitution made by the Convention of 1835.



WILLIAM GASTON.

In 1840 Judge Gaston was solicited by the then dominant party to accept the post of United States Senator. This was no mere compliment. He could have been elected without a contest. But like Chief-Justice Ruffin, under similar circumstances, he declined the proffered honor. In a letter to Gen. John G. Bynum, October, 1840, he expressed his refusal, and that upon the ground that the duties of the post he then filled were "as important to the public welfare as any services which I could render in the political station to which you invite me."

Judge Gaston's opinions are well rounded, and betray scholarship as well as legal learning. Among those most deserving of notice are State *v.* Will, 18 N. C. 121, which holds that if a slave in self-defence, under circumstances strongly calculated to excite his passions of terror and resentment, kills his overseer or his master, the homicide under such circumstances is not murder, but manslaughter. The opinion is a clear, intelligent discussion of the rights of the slave in such circumstances. The case is further remarkable for the very full and able briefs of counsel (printed in the report of the case) by B. F. Moore, George W. Mordecai, and Attorney-General J. R. J. Daniel. Indeed the brief of Mr. Moore, in this case, first gave him that established reputation which ripened in a few years into the admitted leadership of the North Carolina bar.

In State *v.* Haney, 19 N. C. 390, Judge Gaston lays down the rule, since settled law, that the unsupported testimony of an accomplice, if it produces entire belief in the prisoner's guilt, is sufficient to warrant a conviction, and that the propriety of cautioning the jury against placing too much confidence in testimony of that nature must be left to the discretion of the trial judge. In Thomas *v.* Alexander, 19 N. C. 385, he lays down, what is now also settled law, that on appeal the presumption is in favor of the correctness of the proceedings and judgment below, and that such judgment will be affirmed unless the appellant shows that there was error. In State *v.* Manuel, 20 N. C. 122, he affirms the constitutionality of the act requiring defendants convicted of crime to work out the fine and court costs, and that this is not prohibited by the clause forbidding imprisonment for debt, that while the fine and costs may be collected as a debt by

execution, they are also a punishment, and therefore the defendant can be imprisoned if he fails to pay. He also discussed citizenship, naturalization, and alienage. The opinion is a very able and thoughtful one, and presents a fair specimen of his literary style and method of reasoning. Parrott *v.* Hartsfield, 20 N. C. 203, is a short opinion in which he discusses the right of the owner of sheep to kill a sheep-killing dog, though not taken in the act.

In McRae *v.* Lilly, 23 N. C. 118, he settled the practice already once before laid down, and ever since followed in this State, that setting aside a verdict for excessive damages is a matter of discretion in the presiding judge, and not a question of law, and hence the granting or refusal of such motion is not reviewable by the Supreme Court. Clary *v.* Clary, 24 N. C. 78, is a very interesting opinion, holding that a witness who has had opportunities of knowing and observing a person whose sanity is impeached, may not only depose to the facts he knows, but may also give his opinion or belief as to his sanity or insanity.

Judge Gaston died in harness, and like a soldier in the discharge of his duty. Death is impartial. It is Horace who says, —

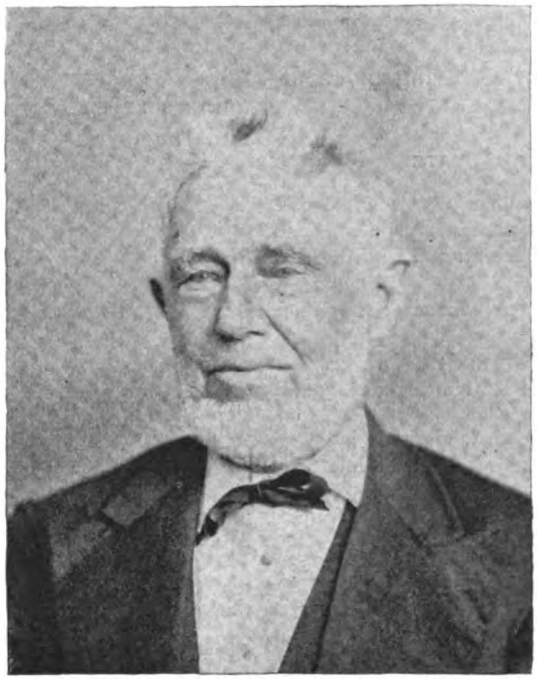
> "Pallida mors equo pulsat pede
> Pauperum tabernas, regumque turres."

On Jan. 23, 1844, while in attendance upon the court and in his usual health, he was suddenly stricken with apoplexy. By use of suitable remedies he revived, and entered into cheerful conversation with his friends, for he was an engaging conversationalist. He was relating the particulars of a social party at Washington some years before, and was speaking of one who on that occasion avowed himself a free-thinker in religion; "from that day," said Judge Gaston, "I always looked on that man with distrust. I do not say that a free-thinker *may* not scorn to do a mean action, but I dare not trust him. A belief in an all-ruling Providence, who shapes our ends and will reward us according to our deeds, is necessary. We must believe and feel that there is a God *all wise and almighty*." As he pronounced this last word, he raised himself up to give it emphasis, there was a rush of blood to the brain, his body fell back lifeless, and his spirit stood in the presence of the Master. He thus passed away in the sixty-sixth year of his age.

FREDERICK NASH.

In the beautiful cemetery at Newbern, a plain, massive monument of white marble stands, with no inscription save the single word "Gaston." There is need of no other. The rest is already known when the living stand in the presence of the ashes of so illustrious a man. Yet his contemporaries in their own behalf, not his, might not inappropriately have handed down to posterity their estimate of his life-work by adding at the base those grand but simple words in which, on the presentation of the resolutions of the bar upon the occasion of his

death, Chief-Justice Ruffin in his reply summed up the opinion of the court, of the bar, and of the public: "*We* knew that he was a good man and a great judge." Both houses of the General Assembly passed unanimously resolutions expressing a deep sense of the public loss, — an unusual circumstance. His death was incidentally the occasion of a singular proceeding. The Supreme Court continued in session, though the vacancy was not immediately filled. Upon the receipt below of the certificate of opinion from the Supreme Court, affirming the judgment in a capital case, Judge Pearson, then upon the Superior Court, took judicial cognizance that there were but two judges upon the upper bench when the decision was rendered, and ruled that the action of that court was extra-judicial and invalid except when composed of three judges, and refused to execute the mandate. This action, coming up for review (State *v.* Lane, 26 N. C. 434), it was reversed, the opinion by Chief-Justice Ruffin holding that upon the death of one of the judges of the Supreme Court the two surviving judges have full power and authority to hold the court and exercise all its functions. An exactly similar case happened in South Carolina last year, after the death of Chief-Justice Simpson; and that court came to the same conclusion as ours.



WILLIAM H. BATTLE.

Judge Gaston was in his day one of the most popular men the State has ever known. His popularity, too, was of that solid character eloquently described by Lord Mansfield as that "which follows a man, not that which is run after, but which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means."

One great element of his abiding popularity, in addition to his high integrity and great talents, was his unswerving devotion to his native State. When solicited to accept emolument and fame elsewhere, he always replied: "Providence has placed me here, and 't is my duty, as well as pleasure, to do what I can for my native State." We have seen why he declined a seat in the United States Senate. In a letter to one of his daughters he said: "The resources of our State lie buried and unknown; when developed, as they must be erelong, she will be raised to a consequence not generally anticipated."

His talents, his character, and his attainments were such that Chief-Justice Marshall was heard more than once to say that he would cheerfully resign if, by so doing, he could secure the appointment of Judge Gaston in his stead. He was so well-rounded a man, so uniformly great, that he did not show his full stature; just as a tall but well-proportioned man does not seem as high as a less symmetrical one of the same height. The sharp contrast of his excellence with that in which he is deficient is needed.

Gaston's goodness, benevolence, and mildness of manner were so attractive that his mental superiority was less noted than it would have been in a man with less to rec-

ommend him. Of him it might truly be said, —

> "His life was gentle, and the elements
> So mixed in him, that Nature
> Might stand up and say to all the world,
> 'This was a man.'"

His love of his State found expression in the following poem, which has been adopted by universal consent as our State hymn. It is too well known in North Carolina to be repeated; but as your magazine has a national circulation, a poem from so eminent a Judge may be worthy of being given at length.

THE OLD NORTH STATE.

Carolina, Carolina, Heaven's blessings attend her;
While we live we will cherish, protect, and defend her.
Though the scorner may sneer at, and witlings defame her,
Our hearts swell with gladness whenever we name her.
Hurrah! hurrah! the old North State forever.
Hurrah! hurrah! the good old North State.

Though she envies not others their merited glory,
Say, whose name stands the foremost in liberty's story?
Though too true to herself e'er to crouch to oppression,
Who can yield to just rule a more loyal submission?
Hurrah, etc.

Plain and artless her sons, but whose doors open faster
At the knock of the stranger, or the tale of disaster?
How like to the rudeness of their dear native mountains
With rich ore in their bosoms, and life in their fountains!
Hurrah, etc.

And her daughters, the queen of the forest resembling;
So graceful, so constant, yet to gentlest breath trembling,
And true lightwood at heart: let the match be applied them,
How they kindle and flame! Oh, none know but who've tried them.
Hurrah, etc.

Then let all those who love us love the land we live in,
(As happy a region as on this side of Heaven,)
Where Plenty and Freedom, Love and Peace smile before us,
Raise aloud, raise together the heart-thrilling chorus,
Hurrah! hurrah! the old North State forever.
Hurrah! hurrah! the good old North State.

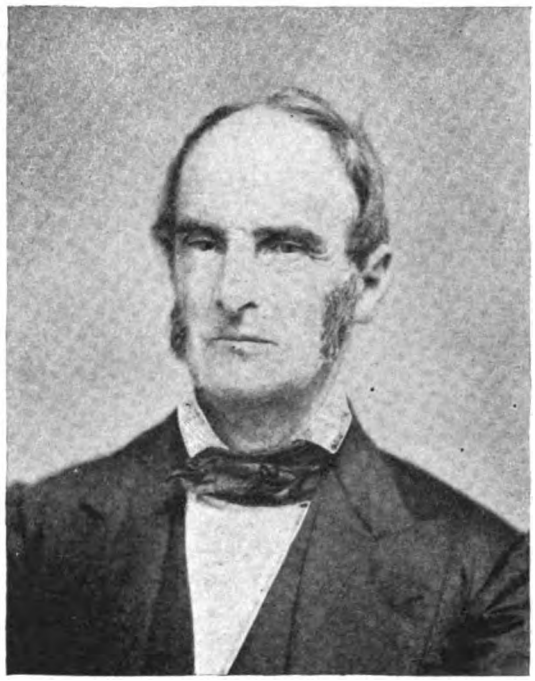
The tune, it need hardly be added, is that of Heber's well-known hymn, beginning, —

> "When through the torn sail the wild tempest is streaming,
> And o'er the dark wave the red lightning is gleaming."

Some one has said, "The style is the man." The following extract from Gaston's address at the University presents the style and the man: —

"Honestly seek to serve your country, for it is glorious to advance the good of your fellow-men, and thus, as far as feeble mortals may, act up to the great example of Him in whose image and likeness you are made. Seek, also, by all honest arts, to win their confidence, but beware how you ever prefer their favor to their service. The high-road of service is indeed laborious, exposed to the rain and sun, the heat and dust; while the by-path of favor has apparently at first much the same direction, and is bordered with flowers and sheltered by trees, 'cooled with fountains and murmuring with waterfalls.' No wonder then that, like the son of Abensina, in Johnson's beautiful Apologue, the young adventurer is tempted to try the happy experiment of uniting pleasure with business, and gaining the rewards of diligence without suffering its fatigues. But once entered upon, the path of favor, though found to decline more and more from its first direction, is pursued through all its deviations, till at length even the thought of return to the road of service is utterly abandoned. To court the fondness of the people is found, or supposed to be, easier than to merit their approbation. Meanly ambitious of public trust without the virtues to deserve it; intent on personal distinction, and having forgotten the ends for which alone it is worth possessing, the miserable being, concentrated all in self, learns to pander to every vulgar prejudice, to advocate every popular error, to chime in with every dominant party, to fawn, flatter, and deceive, and becomes a demagogue. How wretched is that poor being who hangs on the people's favor! All manliness of principle has

been lost in this long course of meanness; he dare not use his temporary popularity for any purposes of public good in which there may be a hazard of forfeiting it; and the very eminence to which he is exalted renders but more conspicuous his servility and degradation. However clear the convictions of his judgment, however strong the admonitions of his as yet not thoroughly stifled conscience, not these, not the law of God, nor the rule of right, nor the public good, but the caprice of his constituents, must be his only guide. Having risen by artifice, and conscious of no worth to support him, he is in hourly dread of being supplanted in the favor of the multitude by some more cunning deceiver. And such, sooner or later, is sure to be his fate. At some unlucky moment, when he bears his blushing honors thick upon him (and well may such honors blush), he is jerked from his elevation by some more dexterous demagogue, and falls unpitied, never to rise again."



RICHARD M. PEARSON.

Surely these are noble words.

Judge Gaston was thrice married: (1) in 1803 to Miss Susan Hay, daughter of John Hay, the eminent lawyer, of Fayetteville; (2) in 1805 to Hannah, daughter of General McClure, — she died in 1813; (3) in 1816 to Miss Worthington, of Georgetown. Through his last two wives he has numerous descendants. A daughter by his second wife was the first wife of Judge Matthias E. Manly, of the Supreme Court of North Carolina. The only child of that union married a son of Rev. Dr. Francis L. Hawks, of New York, and died a few years since, leaving several children. Judge Gaston was thus the brother-in-law of Chief-Justice Taylor, and the father-in-law of Judge Manly. He was succeeded on the bench by Frederick Nash of Orange.

Frederick Nash was born, Feb. 9, 1781, in the old Colonial Palace at Newbern, his father, Abner Nash, being then Governor of the State. He had been elected in December, 1779, to succeed Richard Caswell, who was the first Governor under the republican form of government. Governor Nash was a member of the Continental Congress from 1782 to 1786, and died in the latter year at Philadelphia, while attending Congress. His wife was the widow of the Royal Governor, Arthur Dobbs. His brother, Francis Nash, was mortally wounded at Germantown, Oct. 4, 1777, and is buried at Kulpsville, not far from Philadelphia. The Nash family was prominent among the early colonists of North Carolina.

When Washington visited Newbern on his Southern tour in 1791, Frederick Nash was presented to him as the nephew of General Nash. He took the boy on his knee, and placing his hand on his head, reminded him of his brave and patriotic uncle as a bright exemplar to follow. This the boy never forgot.

Frederick Nash was sent, when quite young, to Williamsboro, to the school of the Rev. Mr. Patillo, a Presbyterian clergyman, under whom Chief-Justice Henderson had also studied. He was prepared for college by Rev. Mr. Irving, of Newbern, who had likewise prepared Judge Gaston; and like

him he entered Princeton College, whence he graduated with the second distinction in 1799. In this class were John Forsythe, afterwards Governor of Georgia, Secretary of State under Jackson, etc.; and James C. Johnston of Edenton. Nash studied law, and was admitted to the bar. In 1804, and again in 1805, he represented the town of Newbern in the House of Commons. In 1808 he removed to Hillsboro, and represented the county of Orange in the House 1814 and 1815, and the town of Hillsboro in the same body 1827 and 1828. Down to the Convention of 1835 the elections to the legislature were annual, and six towns were each entitled to a member in the Commons: Halifax, Newbern, Wilmington, Fayetteville, Hillsboro, and Salisbury. In 1807 he was elected a Trustee of the University, then a life position, and was always its warm friend.

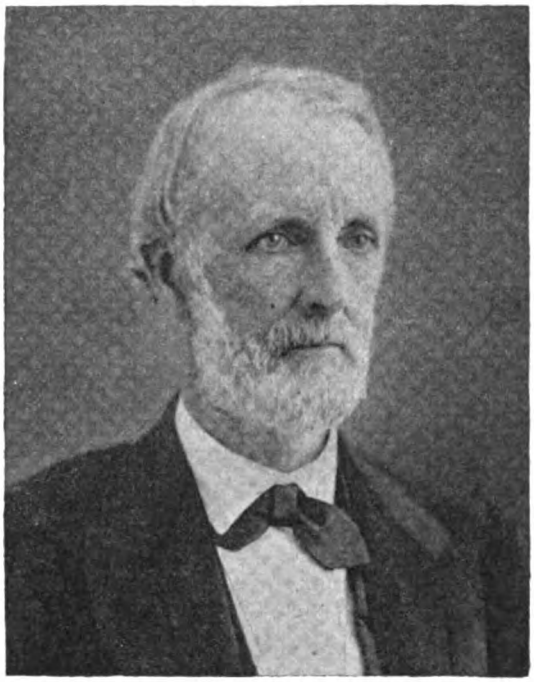
MATTHIAS E. MANLY.

In 1815 he introduced a bill in the legislature for the suppression of duelling, and supported it in an able and eloquent speech. On his removal to Hillsboro he purchased the dwelling of his friend and kinsman, Judge Cameron, and resided there till his death.

In 1818 he was elected judge of the Superior Court, and filled the duties of that responsible position till his resignation in 1826. He possessed those qualities which Lord Campbell (himself an eminent judge) has designated as essential to a good judge: "Patience in hearing, evenness of temper, and kindness of heart." He was again elected to the Superior Court bench in 1836, upon the resignation of Judge Norwood. Upon the death of Judge Gaston of the Supreme Court bench, in 1844, he was elected to succeed him, being then in his sixty-fourth year. Upon the resignation of Chief-Justice Ruffin in 1852 he was elected by his associates Chief-Justice. He died at his home in Hillsboro, Dec. 5, 1858, in the 78th year of his age. His opinions show a familiarity with the precedents and a singular chasteness and felicity of expression.

Among his opinions the following may be noted as giving a fair specimen of his style and reasoning: (State *v.* Perry, 44 N. C. 330), as to challenges to jurors, special venire, conduct of the jury, and conduct of a trial in a capital case. In Rives *v.* Guthrie, 46 N. C. 84, it is held in a learned opinion that the word "months" in the Statute of Limitations means *lunar*, not *calendar* months. This, however, has since been changed by statute. In State *v.* Moore, 46 N. C. 276, it is ruled that where, by special Act, the county authorities were forbidden to issue license to retail liquor in the limits of an incorporated town, without the written consent of the town authorities, a license issued without such written consent is void, and will not protect the retailer from an indictment. The same point came up again this year (1892), and was ruled the same way (Hillsboro *v.* Smith, 110 N. C. 417). Clements *v.* Hunt, 46 N. C. 400, holds that declarations of deceased members of a family are compe-

tent to prove the date of birth of a member of the family, though it may also be recorded in the family record, the one kind of evidence being of no higher dignity than the other. Miller *v.* Black, 47 N. C. 341, since thrice affirmed, decides that an action may be maintained in the courts of this State, though both plaintiff and defendant are citizens of other States. State *v.* Samuel, 48 N. C. 76, holds that where a husband slays, on the spot, one taken in the act of adultery with his wife, it is manslaughter, not murder. The Georgia Statute makes homicide under such circumstances excusable. It would add to the respect for the law if this were the statute everywhere; for juries will invariably acquit on the ground of emotional insanity or some other pretext. In a recent case in this State where *jury* law and *book* law came in conflict, the jury returned without a verdict, and told the court there was a conflict between the *law* and the *evidence*, and that a verdict was impossible.



EDWIN G. READE.

In 1856 the legislature laid a general tax on *all salaries*. The question arose whether this tax could apply to judicial salaries in purview of the provision of the Constitution forbidding that they be diminished during the term of office. Chief-Justice Nash at the instance of the court addressed a letter to Hon. Joseph B. Batchelor, the then Attorney-General, stating that the court felt a delicacy in expressing an opinion upon a subject in which the members of the court were interested, and asked his opinion as the highest law officer of the State. The very able reply of the learned Attorney-General is published in the appendix to the 48 N. C. (3 Jon.), and is to the effect that the power to tax salaries is the power to diminish them, and is therefore prohibited by the Constitution. This has ever since been deemed the law in this State.

Judge Nash married in 1803 Miss Mary Kollock at Elizabethtown, N. J. He and his wife were devoted members of the Presbyterian Church. They left several children; among them Henry K. Nash, long a prominent lawyer in Hillsboro, and Misses Sarah and Maria Nash, principals of the famous female school in Hillsboro, to whose excellent training and care so many men are indebted for most excellent wives, whom their husbands deem the best in the State.

Judge Nash spent a long life of honor and usefulness, and dying "left no blot on his name." Truly,

> "The remembrance of the just
> Smells sweet, and blossoms in the dust."

He was succeeded on the bench by Hon. Matthias E. Manly of Craven.

William Horn Battle was born in Edgecombe County, Oct. 1, 1802. Elisha Battle, the founder of the family and a prominent member of the Baptist Church, removed to Edgecombe County, in this State, from Virginia in 1743. He served for many years in the legislature for that county,

and was a member of the provincial congress at Halifax in 1776, which framed the State Constitution. Joel Battle, the father of Judge Battle, was an influential and enterprising citizen of the same county, and established the Rocky Mount Mills, which remained till recently in the Battle family. Judge Battle graduated at the State University in 1820, delivering the valedictory, then deemed the prize of the second-best scholar. Among his classmates were the distinguished lawyer B. F. Moore and Bishop Otey; and among his college mates his future associate, Chief-Justice Pearson. He was the eldest of six brothers, all of whom were educated at the University. He read law with Judge Henderson, and was licensed to practice in 1824. In January, 1827, he removed to Louisburg. He had not the qualities to push him early to the front in his profession. He won his way by industry and fidelity. The voters of the county in which he resided were almost unanimous in support of Jackson's administration, while Judge Battle belonged to the opposition. He was little calculated for political life, but he had the courage of his opinions. He was twice defeated for the legislature, but on a third venture he was elected, in 1833, to the House of Commons, and in 1834 he was again elected by an increased majority. After his election three fourths of the voters of the county signed a petition to him to vote for Hon. Bedford Brown for U. S. Senator, who was of the opposite political party, and in deference to the will of the people, upon whose consent our form of government is based, he so voted. He was not misled by these successes, so complimentary to him, and which were due to public confidence in his character, from his true vocation, and after this never again attempted the thorny path of politics.

As early as 1832 Judge Battle published a second edition of 1 Haywood's Reports (now 2 N. C.), annotated with references to subsequent decisions and statutes. This work, manfesting his learning, ability, and patience, gave him at once an established reputation. It was followed by similar annotated reprints of several other volumes of the earlier reports. From 1834 to 1839, in conjunction with T. P. Devereux, he was Reporter to the Supreme Court, and published 4 volumes of Law and 2 of Equity Reports, which are now known as 18 to 22 N. C. Reports. These were the halcyon days of the court; Ruffin, Daniel, and Gaston being then the judges constituting the court. In 1835 he was appointed, in conjunction with Governor Iredell and Judge Nash (afterward Chief-Justice), to revise the statute law of the State. In 1836–1837 the legislature adopted their work, the "Revised Statutes," with small alteration. This work owes much of its excellence to Judge Battle's indefatigable labor and thorough knowledge of the statute law and the decisions.

In 1839, Mr. Devereux having resigned, Judge Battle became sole Reporter; but before he had issued a volume, Judge Toomer having resigned, he was appointed by Governor Dudley to succeed him on the Superior Court bench, and was elected by the legislature when it met later in the same year. His work as sole Reporter is in the first part of 23 and 36 N. C. Reports (1 Ire. and 1 Ire. Eq.) To add to his modest salary as judge, like many of our judges, he found it best to open a law school. For that purpose and to educate his sons he removed in 1843 to Chapel Hill. In 1845 he was elected by the trustees of the university professor of law, but without salary, and opened the law school, which lasted till 1866. A large percentage of the lawyers of the State owe much of their professional attainments to his faithful and careful instruction. All his students remember him with respect and affection. Among his students were three of his successors on the Supreme Court bench, — Davis, Shepherd, and Clark.

Learned, firm, patient, courteous, incorruptible, and impartial, his administration of justice on the Superior Court bench met with an approval which marked him out

for promotion. In May, 1848, upon the death of Judge Daniel, he was appointed by Gov. Wm. A. Graham to fill the vacancy upon the Supreme Court bench until the meeting of the ensuing legislature. That body failed to confirm the appointment, and Judge Pearson was elected. The reason given was that there was already a governor, a U. S. Senator, and three judges in the county of Orange where Judge Battle resided. There being, however, a vacancy upon the Superior Court bench, he was immediately elected thereto without opposition, being the choice of both political parties. Members of the legislature without distinction of party united in a letter requesting him to accept the office. Urged thus and by many friends outside of the legislature, he accepted the position, and again entered upon the discharge of the duties of Superior Court Judge. In 1852, upon the resignation of Chief-Justice Ruffin, Judge Nash became Chief-Justice, and Judge Battle was elected to the Supreme Court bench by an almost unanimous vote and without distinction of party. He filled the position till 1865, when all the State offices were declared vacant. He was then again elected to the Supreme Court bench, and occupied the post until the new Constitution was adopted in 1868, under which the judges were elected by the people. The State being in the control of the opposite political party, he then returned to the practice at the bar in connection with his sons Kemp P. and Richard H. Battle.

W. B. RODMAN.

In 1876 he was chosen President of the Raleigh National Bank. In 1877 his son, Hon. Kemp P. Battle, having been elected President of the university, Judge Battle returned to Chapel Hill, and was again elected professor of law.

In 1866 Judge Battle published a Digest of the North Carolina Reports, in three volumes. In the preface to the third volume he says that he "has read over every case ever reported in North Carolina from the beginning to the end." To these he afterwards added a fourth, bringing the work down to the year 1874, and including the seventieth volume of Reports. In 1872 he was again appointed by the legislature to revise our statutes. Though alone on the commission, and not even given the aid of a clerk, he produced at the end of a year's time the volume known as "Battle's Revisal."

Judge Battle was probably more thoroughly familiar with the case law of North Carolina than any other judge who ever sat on the bench. His opinions were expressed in clear, simple language, without effort at show or effect. He knew the precedents. He eschewed judicial legislation. He had no pet system or ideas to promote. He was eminently a safe judge. In the consultation-room he was invaluable. In more than one instance his dissenting opinions have since been held to be the correct declaration of the law, as notably in his dissenting opinion in State *v.* Barfield, 30 N. C. 344 (at his first term), in which he held, against Ruffin, C. J., and

Nash, J., that in a trial for murder, evidence of the character of the deceased as a violent and dangerous man is admissible if there is evidence tending to show that the killing was in self-defence, or where the evidence is wholly circumstantial, and the character of the transaction is in doubt. The view of Judge Battle is now held to be the law in this State (State *v.* Turpin, 77 N. C. 473, and subsequent cases).

His opinions at his first term will be found in 30 N. C., and after his return to the bench in 44 N. C. to 63 N. C., inclusive. Among those that it may be interesting to note are Melvin *v.* Easley, 46 N. C. 387, holding that medical and other scientific books are not admissible in evidence, though *experts* may be asked their opinion and the grounds for it, which may be founded in part on such books. In Commissioners of Raleigh *v.* Kane, 47 N. C. 288, it is held that the granting or refusing license to sell liquor, being to a certain extent discretionary with the county authorities (when within their power), their action cannot be reviewed, either by appeal or certiorari. State *v.* Peter Johnson, 48 N. C. 266, enunciates the well-established doctrine, that in trials for murder, if the killing by a deadly weapon is proved, the burden shifts, and is upon the prisoner to show all matters of excuse or mitigation. This was affirmed again by Judge Battle in State *v.* Willis, 63 N. C. 26. In Lane *v.* Railroad, 50 N. C. 25, it is held that where a corporation has been brought into court under a wrong name, the court has power to amend the process by striking out that name and inserting the right one, the defendant being already in court by service upon its officer. State *v.* Glen, 52 N. C. 321, is a leading case, discussing the rights of the public and of riparian owners over unnavigable streams. In State *v.* Williams, 52 N. C. 446, it is held that in trials for murder, where the identity of the body is destroyed by fire or other means, the *corpus delicti* may be proved by presumptive or circumstantial evidence.

In person, Judge Battle was rather below medium size. He was simple in his manners, cordial, and without affectation. Though gentle and quiet in his demeanor, he was firm and fearless in the discharge of duty.

In June, 1825, he married Miss Lucy Martin Plummer, the daughter of Kemp Plummer, a prominent lawyer of Warrenton. He was exceedingly fortunate in his choice of a wife. With her he enjoyed near half a century of a domestic happiness rarely granted to man. They lived to rear eight children to years of maturity. There were two noble sons, whose souls went up to God amid the smoke of battle, fighting for the Confederacy. Among the others are, (1) Hon. Kemp P. Battle, Treasurer of the State, 1866–1868; and from 1877 until his recent resignation President of the University, and now Professor of the newly established Chair of History in that institution. (2) Richard H. Battle, of Raleigh, one of the leading lawyers of North Carolina and President of the State Agricultural Society. He was State Auditor 1864–1865. (3) Dr. W. H. Battle, a prominent physician of Anson County.

For forty years Judge Battle was a communicant of the Protestant Episcopal Church, and for a quarter of a century a member of its diocesan and general conventions. His walk in life and conversation were without reproach.

> "The good gray head which all men knew"

was indeed, as it should always be, a mark for honor. His old age was accompanied by

> "Honor, love, obedience, troops of friends."

He died at Chapel Hill, March 14, 1879, in the seventy-seventh year of his age. When the inevitable hour came, he had no preparation to make; but

> "Soothed and sustained
> By an unfaltering trust, approached his grave
> Like one who wraps the drapery of his couch
> Around him, and lies down to pleasant slumbers."

When the new Supreme Court was established under the Constitution of 1868, the number of judges was increased to five. Chief-Justice Pearson and Judge Reade of the old Court were retained, and Judge Battle, owing to the change in the political complexion of the State, was succeeded by Judge W. B. Rodman, the two additional judgeships going to Judge Dick and Judge Settle.

The name of Richmond Mumford Pearson, fifth Chief-Justice of North Carolina, is written in legible characters,

"High on the dusty roll
the ages keep."

Ascending the bench at thirty-one years of age, his judicial career covered nearly forty-two years of unbroken service,—twelve years on the Superior Court bench, and nearly thirty on the Supreme Court, of his native State, and of these last over nineteen years as Chief-Justice. He had ability, industry, and time. The net result was a great judge, of which his State and his profession have cause to be proud. He was the equal of Ruffin, if not his superior, as a common law lawyer. He had probably more originality, and, as far as he went, was as accurate. He only fell behind Ruffin in his thorough grasp of the great principles which are applied in the administration of Equity. To the casual reader Ruffin seemed a very remarkable thinker. Those who will read the cases cited in his opinions will increase their admiration for his learning at the expense of his originality. In this he was the greater judge. Ruffin was made by his labor, and labored to the last, as the sunflower

"Turns on her god when he sets
The same look she turned when he rose."

But with Pearson, towards the last, as with Chief-Justice Henderson, reading became irksome. So long accustomed to pronounce the law, his later opinions are often rather his conclusions than a statement of the reasons by which they were reached. Few will deny Ruffin's rank as our greatest judge. None will deny Pearson's claim to the second place, except those who claim for him the first.

R. P. DICK.

Judge Pearson was born June 28, 1805, in Rowan County, N. C. His grandfather, Richmond Pearson, was a native of Dinwiddie County, Va., who removed to this State, and settled in the forks of the Yadkin. He was an officer of the Revolutionary War, and was captain of a company at Cowan's Ford when Gen. Wm. Lee Davidson was killed. Among his children by his first wife were Gen. Jesse A. Pearson, who commanded a regiment in Gen. Joseph Graham's N. C. Brigade sent against the Creeks in 1814; Hon. Joseph Pearson, Member of Congress 1809–15; and a daughter who married Judge John Stokes, United States District Judge for North Carolina; and among his children by his second wife was the subject of this sketch. His mother, Miss Mumford, was the daughter of an ex-officer of the Br[illegible]

navy. She was married twice before she was nineteen years of age. Colonel Pearson was her second husband.

Judge Pearson's early education was under John Mushat at Statesville and at Washington City, where the expenses of his education were defrayed by his half-brother, Hon. Joseph Pearson; his father, an enterprising merchant and planter, having failed in business in 1812. He graduated at the University of North Carolina in 1823, at the age of eighteen, with the highest honors in his class. Among his classmates were Daniel W. Courts, and Judge Robert B. Gilliam; and among his college mates, Gov. Wm. A. Graham, Judge John Bragg of Alabama, Thomas Dews, Judge Augustus Moore, John W. Norwood, David Outlaw, Wm. J. Bingham, Ralph Gorrell, Gov. Henry T. Clark, Dan'l M. Barringer, Abraham Rencher, Judge Anderson Mitchell, Attorney-General J. R. J. Daniel, A. O. P. Nicholson and Bishop Otey of Tennessee, B. F. Moore, and his own future associates on the Supreme Court, Judges W. H. Battle and M. E. Manly. He studied law under Chief-Justice Henderson, and received his license in 1826. He began practice at Salisbury, and his rise was at once rapid and marked. For four years (1829–32) he represented Rowan in the House of Commons, the Senator from the county at that time being Judge David F. Caldwell. In 1835 he was a candidate for Congress against Hon. Abraham Rencher and Hon. Burton Craige, but was defeated by Mr. Rencher. In 1836 he was elected Judge of the Superior Courts, T. P. Devereux being his competitor, and rode the circuits of the State till December, 1848, when he was elected to the Supreme Court, as heretofore stated, over Judge Battle, who had been appointed by the Governor to fill the vacancy caused by the death of Judge Daniel. On the death of Chief-Justice Nash, in 1858, he was elected by his associates, Judges Battle and Ruffin (who were both on the bench for a second time), Chief-Justice. During the war he took a very bold stand in maintaining the writ of Habeas Corpus. He was a candidate for the Constitutional Convention of 1865, but was beaten by Mr. Haynes. When all civil offices were declared vacant that year, he was re-elected to the Supreme Court by the legislature, and served till the Constitution of 1868, when, all offices being again vacated, he was elected Chief-Justice by the people. He was nominated by both political parties, and of course elected without opposition.

In 1870, Governor Holden having declared martial law in certain counties, many leading men were imprisoned by military authority,—the State militia under Kirk. Application for a writ of Habeas Corpus was made to Judge Pearson. Obedience to the writ issued by him was refused by the military. Owing to his attitude as to this matter during the war, high hopes were entertained that he would enforce the efficacy of the great writ of right. After hearing argument (Ex parte Moore, 64 N. C. 802), however, he decided that he could not direct its execution in opposition to the will of the Governor, without danger of civil war, and declared the "judiciary exhausted." This is not the place to discuss a question on which so much had been said, and which is as yet still viewed as much from the political standpoint as the legal one. It is enough to say that upon his decision being announced, a wave of disappointment swept over the State, like that which a nation feels, when one who

> "Might have lighted up and led his age
> Falls back in night."

The prisoners were afterwards released upon a Habeas Corpus issued by Judge Brooks of the United States Court, whose process the officer did not dare to disregard. Judge Pearson has placed his defence, and the concurrence in and approval of his course by his brethren of the bench, on record (65 N. C. 349). Governor Holden was afterwards impeached and removed from office. Chief-Justice Pearson under the Constitution pre-

sided at the Impeachment trial. Whatever feeling there was against the Chief-Justice at the time was largely kept under by the influence of those who had studied law under him. They were numerous and influential, and to a man devoted to him. And the public at large, however much they differed as to the propriety of his course at this juncture, are disposed, as a magnanimous people, to forget it, and remember only his excellence. With them

> "Fresh stands the glory of his prime;
> The later trace is dim."

These sketches are not intended as eulogies, but as history. Though not assuming to sit in judgment upon a matter which is yet debated, still it is proper to notice the event, and to say that on this occasion of his life, whether his action was right or wrong, he did not receive the popular approval which so signally and generally marked his judicial career. In January, 1878, on his way to Raleigh to open the spring term of the court, while crossing the Yadkin River in a buggy, he was stricken with paralysis, and died at Winston, Jan. 5, 1878, in the seventy-third year of his age.

His career on the Supreme Court is the longest in our annals, nearly thirty years; and his opinions are so numerous we can only refer briefly to a few of them. They are usually as clear as a bell, and evince a strong personality in the writer. Wiswall *v.* Brinson, 32 N. C. 554, is an interesting opinion which holds (Ruffin, C. J., dissenting) that where one is injured by the negligence of a contractor who undertakes to remove a building across the street, the owner of the building is answerable in damages. Mills *v.* Williams, 33 N. C. 558, decides that the legislature has the same power to repeal an act establishing a county as it has to create or divide a county. Leggett *v.* Bullock, 44 N. C. 283, rules that as between the parties a mortgage is valid without registration. Capehart *v.* Mhoon, 45 N. C. 30, discusses the difference between common and special injunctions. State *v.* McIntire, 46 N. C. 1, holds that if it appears from the record and the face of the pardon that the Governor was misinformed, the courts will hold the pardon void. The ruling in Thompson *v.* Thompson, 46 N. C. 430, is that the widow is entitled to dower in land covenanted to be conveyed to her husband. State *v.* Haywood, 48 N. C. 399, is authority that the omission to discharge any duty imposed by law, which concerns the public, is indictable. In Shaw *v.* Moore, 49 N. C. 25, it is held that one who believes in a Supreme Being who will punish sin in this world, though not in a world to come, is a competent witness. Ashe *v.* DeRossett, 50 N. C. 299, is upon the difference between remote and proximate cause in an action for damages. State *v.* Smith, 53 N. C. 132, explodes the old maxim, "Falsum in uno, falsum in omnibus." Morse *v.* Nixon, 51 N. C. 293, learnedly discusses the right to kill a "chicken-eating hog." Melvin *v.* Easley, 52 N. C. 356, is an interesting discussion, each of the judges filing opinions, as to the validity of sales made on Sunday. Cotten *v.* Ellis, 52 N. C. 545, holds that a *mandamus* will issue to the Governor to require him to do an act merely ministerial. After war became flagrant there were many cases of parties seeking to be discharged from alleged illegal detention in the army by Habeas Corpus. In all these cases Judge Pearson was a strenuous supporter of the right of the courts to examine into the legality of such detention. He held that the writ was not suspended by the emergency of the times. The cases can be examined by those who will turn to them. In re Graham, 53 N. C. 416; In re Bryan, 60 N. C. 1; Gatlin *v.* Walton, Ib. 325; In re Roseman, Ib. 368. Davidson College *v.* Chambers, 56 N. C. 253, is the counterpart of the recent great suit in which Cornell University was a party; and the court here also decided that the college could only take so much of a legacy as added to the property it already held would not be in excess of the limit specified in its charter.

In re Martin, 60 N. C. 153, is an opinion given at the request of the Governor as to his right to declare an office vacant and fill it by appointment. In re Hughes, 61 N. C. 57, and Cooke *v.* Cooke, Ib. 582, are discussions of the legal status of the State as it was left by the results of the war.

State *v.* Farrow, 61 N. C. 161, is short, but entirely in Pearson's peculiar style. It says enough and in very few words. State *v.* Haywood, 61 N. C. 376, establishes the test upon the trial of an issue of insanity. After the Convention and legislature of 1868, there were large issues of State bonds which were assailed as fraudulent and illegal. The matter was often before the courts. It is discussed by Pearson in Galloway *v.* R. R., 63 N. C. 147, and other cases. Numerous cases also arose as to the validity of the acts of State and county authorities during the war, especially as to the validity of bonds issued by a county to provide its citizens with salt, etc. These were held void on the ground that they were issued to provide means to avoid the result of the federal blockade, and therefore in aid of the Confederacy. Leak *v.* Comm'rs, 64 N. C. 132.

In R. R. *v.* Reid, 64 N. C. 155 and 226, the court held invalid an alleged exemption of certain R. R. corporations from taxes. On appeal to the United States Supreme Court this was overruled; but the present year a similar question has been raised, and the exemption, so far as drawn in question, again ruled invalid, but upon a different ground entirely (Alsbrook *v.* R. R., 110 N. C. 137), and an appeal to the United States Supreme Court has again been taken.

On page 785, et seq., of the 64 N. C. are the opinions of C. J. Pearson and the other judges as to the legislative term of office, which opinion was rendered in consequence of a resolution of the General Assembly requesting it. Kane *v.* Haywood, 66 N. C. 1, is a discussion of the power of the court to disbar an attorney who has embezzled the money of his client.

The Constitution of 1868 introduced the Homestead provision in this State and the reformed Code of Civil Procedure. Both have given rise to numerous decisions; but they cannot be noticed here, except the ruling that the homestead was valid against action for *torts* in Dellinger *v.* Tweed, 66 N. C. 206 (Pearson and Rodman dissenting). The consequence has been the passage of many statutes making indictable acts which were previously punishable only on the civil side of the docket by actions for damages. State *v.* Jefferson, 66 N. C. 309, holds that the judge cannot discharge a jury by telegraphing the clerk to do so; and in State *v.* Branch, 68 N. C. 186, it is held that the judge cannot bring the Grand Jury into open court and examine witnesses before it there. Crummen *v.* Bennet, 68 N. C. 494, holds that the fraudulent conveyance of a homestead does not forfeit the owner's right to claim it against creditors. In Green *v.* Green, 69 N. C. 294, Pearson, C. J., says: "We take this notice of the brief of Mr. B——, out of respect for the learned counsel, and with the hope that it will be an admonition to counsel not to overlook the facts of the case in order to present 'a nice point of law.'" Cloud *v.* Wilson, 72 N. C. 155, is a construction of the Constitution as to the judicial tenure of office. State *v.* Neely, 74 N. C. 425, is an indictment for an assault with intent to commit rape, and is known as the "chicken-cock" case, from the learned discussion between the Chief-Justice and Judge Rodman as to that fowl. The dissenting opinion, however, has since been held correct in State *v.* Massey, 86 N. C. 658.

The opinions of Chief-Justice Pearson will be found in forty-seven volumes, from 31 N. C. to 77 N. C. inclusive. They represent a vast amount of labor and thought, much of which is of permanent value.

Many characteristic anecdotes are related of him. One only is here given. Some one when he was a young man asked him why he allowed the Bishop to confirm him, intimating that he thought the future Chief-Justice was not exactly prepared. "Well," said Pearson,

"when I was baptized, my sponsors stood surety for me. I thought I ought to surrender myself in discharge of my bail." He was not an idolator of other men's thought, and did not hesitate to overrule a precedent if he thought it wrong or in the progress of events had become an anachronism. He would say, "You can't make an omelet without smashing an egg, nor clear a road through a forest without cutting down a tree." He was idolized by his students and reverenced by the bar. He had his foibles, but "not one that came near his heart." Before the war he was a Whig in politics, and after 1868 a Republican. He used many original expressions. Among them, for instance, in a burglary case, speaking of a chimney which was low and easy of entrance, he said "a travelling dog or an enterprising old sow" might have easily entered the house, and therefore no one ought to be held guilty of burglary for entering (State *v.* Willis, 52 N. C. 192). He spoke of the repartee and rejoinder of counsel between themselves as "crossfiring with small shot." His familiar and often quoted expression that a case was "on all fours" with another means that it is *in consimili casu.* Then there is his ruling (since overruled), that a fraudulent debt embraced in a deed of assignment to secure creditors renders the whole void, "as one rotten egg spoils an omelet" (Palmer *v.* Giles, 58 N. C. 75.) Numerous others of his homely and vigorous expressions might be collected, and would be entertaining reading if there was space for them. He was not eloquent in words or imagery, but the clearness and precision with which he expressed himself, backed frequently by homely but forcible turns of expression, gave his opinions a vigor and a charm which are often lacking in more carefully prepared productions. He discharged his duty conscientiously, and every term he went through the entire docket and gave every litigant a hearing. He was a patient, attentive, and *understanding* listener. He saw through a case quickly on the argument, and as it were by intuition.

In 1868 a number of leading members of the bar signed a "Protest" which resulted in several of the signers being attached for contempt. The proceedings will be found in Ex parte Moore, 63 N. C. 397. It is only referred to here as a part of the history of the times, and as the sole occasion in the history of the State when there has been antagonism between the bench and the bar. Happily the feeling then aroused was of very short duration. Five of the "protestants" have since sat on the Supreme Court bench themselves: two were ex-Governors, three have since been Governors of the State, and two United States Senators.

In 1831 he located in Mocksville, and in 1832 married the daughter of United States Senator John Williams of Tennessee, and niece of Hugh L. White, also a Senator from that State, and Whig candidate for the Presidency in 1836. By her he had ten children, three of whom survived him.

One of them is Richmond Pearson, Esq., of Asheville, one of the most prominent and wealthiest men of western North Carolina; and one of his daughters was the first wife of the late Governor Fowle. In 1847 he removed to Richmond Hill in Surry County, where he lived till his death, and maintained the famous law school at which so many of the lawyers of North Carolina were educated; among them three of his future associates, Settle, Bynum, and Faircloth, besides Avery and Ruffin, who afterwards came on the court. He stated that he had taught over a thousand law students in his life. His first wife having been several years dead, in 1859 he married Mrs. Mary Bynum, the widow of Gen. Jno. Gray Bynum, and daughter of Charles McDowell of Morganton. There was no issue of this marriage; but Mrs. Pearson's son by her first marriage, Hon. Jno. Gray Bynum, is one of the present Judges of the Superior Court.

Chief-Justice Pearson was succeeded by Hon. W. N. H. Smith, who was appointed Chief-Justice by Governor Vance.

Matthias E. Manly is the last of the judges who ascended the bench in *ante bellum* days. He was born in Chatham County, N. C., 13 April, 1800, and was a younger brother of Gov. Charles Manly and of the Rev. Dr. Basil Manly. He graduated at the University in 1824, in the same class with Gov. Wm. A. Graham, Judge Augustus Moore, David Outlaw, and Thomas Dews. He was for a while tutor of mathematics in the University. He studied law under Governor Manly, and located in Newbern. He was elected in 1834 and 1835 to the House of Commons from that town, being its last member, as borough representation was abolished by the Convention of 1835. He was elected in 1840 Judge of the Superior Court, in the place of Judge Edward Hall, who had been appointed by the Governor to fill the vacancy caused by the resignation of Judge R. M. Saunders. The duties of this post he discharged with fidelity for nineteen years, until December, 1859, when he was elected to the Supreme Court to fill the vacancy caused by the second retirement of Judge Ruffin. He served upon that bench till the offices of the State were declared vacant in 1865, when Judge E. G. Reade was elected to succeed him. Judge Manly was Speaker of the State Senate in 1866, and was elected by that legislature to the United States Senate jointly with Governor Graham, but they were not allowed to take their seats. He then resumed practice at Newbern, where he remained till his death.

For a quarter of a century — nineteen years on the Superior Court bench and six years on the Supreme Court — he rendered his State faithful judicial service. His stay on the Supreme Court was mostly during the war, when there was not much litigation. His opinions will be found in five volumes; i. e. 52, 53, 58, 59, & 60 N. C. Among them may be noted State *v.* Brandon, 53 N. C. 463, in which he discusses insanity as a defence for crime. He also filed an opinion in Melvin *v.* Easley, 52 N. C. 356, in which the judges differed among themselves as to the validity of a sale upon Sunday. The Habeas Corpus cases during the war have already been cited in the sketch of Chief-Justice Pearson. As a proof of Judge Manly's impartiality, it may be noted that his first four opinions were in appeals in cases tried by himself while on the Superior Court bench. In these he reversed himself in two cases and affirmed two. (52 N. C. 12, 14, 16, 19.)

After his retirement from the bench, like Ruffin, Badger, and Devereux, he presided as one of the magistrates over the county court until that court was abolished in 1868.

He died at Newbern, 9 July, 1881, in the eighty-second year of his age. His first wife was the daughter of Judge Gaston. After her death he married Miss Simpson. He left one child by his first wife, and several children by his second. Among the latter are Capt. Matt Manly, for years Mayor and Postmaster of Newbern, and Clement Manly, the popular and rising lawyer of Winston, who bids fair to add to the hereditary honors of a family which has already given Gaston and the two Manlys to the State.

Judge Manly was a sound and well-read lawyer. He possessed the sincere regard and the entire confidence of the people of North Carolina, and

> "Bore without abuse the grand old name of gentleman."

Like Judge Gaston, he was a member of the Roman Catholic Church. He was succeeded, as has been stated, by Judge Edwin G. Reade.

SCOTT'S LEGAL LORE.

By Nathan Newmark.

THAT the law should loom through the pages of Scott is not to be wondered at. Was he not the son of a Writer to the Signet? Was he not himself an advocate and a sheriff? Did not his fondness for feudal antiquities attract him to musty parchment as well as rusty mail, and lead him to decipher ancient contracts and wills as well as provincial charters and parish registers? These points we may glean even from the cursory sketch of his life given by his French depreciator, the graphic Taine, who holds that Scott gave us the days of chivalry, not as they really were, but with all the modern improvements and appurtenances, and that he found the structure of barbarous souls too difficult to discover, and too little pleasing to show, for him to dare to make the exhibition without these nineteenth-century accessories. But then we are bound to discount Taine's verdict when we note how he denies greatness to Dickens, and is full of protest against Shakspeare's riotous imagination. As for Carlyle's objection that Scott did not go out into rocky solitudes to wrestle with the mystery of existence, it is characteristic of the great English appreciator of German literature, who diminished our debt of gratitude by adopting the twisted style of some of his Teutonic models, and who doubtless expected a philosopher when he found a novelist. Nor is even Howell's claim that Scott is too simple and too romantic for these times, likely to outweigh the views of the host of critics who find no end of charms in most of the Waverley Novels. But what shall be said of Scott's legal career and leanings? These are quite generally lost sight of in the much larger measure of attention awakened by his varied works, and by the picturesque features of his manly life. Yet even a little investigation shows that they possess many elements of interest, not only to the members of his original profession, but also to the world at large.

It is true that all the biographical accounts agree that when placed in his father's office to learn legal routine, so that in the end he might become a barrister, he by no means gave his undivided attention to "Erskine's Institutes," which he mentions in one of his earlier novels as a fountain-head of Scotch law. It is also true that he himself compared his feelings toward the law to those avowed by Slender to Miss Anne Page, as consisting of no great love at the beginning, which it had pleased Heaven to decrease on further acquaintance. So in his recently published Journals we find a passage in which he deprecates the way in which young men are spoiled for the army and for other pursuits, by being thrust into the paths that lead to the bar. Still, he also declared that he had "a thread of the attorney" in him; and it cannot be said that there is any trace of want of cordiality toward the law as a study, or toward its exponents, shown in such of his novels as touch on legal topics. In "Guy Mannering" he makes one of his characters say, "Law 's like laudanum; it 's much more easy to use it as a quack does, than to learn to apply it like a physician." Then almost nothing but law occupies our attention in "Redgauntlet," perhaps one of the least read of his novels, yet by no means the least interesting to a thoughtful reader. There much is told of salmon-fishing, and of Jacobite plots, and of quaint Quakers, and of a plan of whistling familiar melodies to signal to those in prison. But most of the story deals with Scotch lawyers and law courts, and we are supposed to obtain a portrait of Scott's father and of Scott himself. Certainly we hear enough of Scotch law, with its strange terms and its peculiar features, indicating French influence and largely borrowed

from the civil law. It must be admitted, of course, that Scott cut no special figure as an advocate, and that in an early case he made but a poor showing. But it has been very properly suggested that experience would have taught him greater tact in the management of causes, and that not being a heaven-born orator he could hardly be expected to make much of an impression at first. As against all this unfavorable matter, we have the depth of his interest in researches dry as the law, his habits of application to that which commanded his taste, his understanding of legal questions and situations as evidenced by his writings. So we must feel with the commentator, who calls attention to these points, that his relative failure at the bar was due to his dislike to solicitor's patronage and merely mechanical routine, to the ill effect upon his reputation of his well-known dabblings in poetry, and his exaggerated fondness for wild adventure, and to the fact that he was so full of literary power that he revolted at the fetters which prudence imposed on his extra-professional proceedings. Hutton's final suggestions on the subject are such as must meet general indorsement. He points out that the life of literature and the life of the bar, always incompatible, suited the less in Scott's case, because "he felt himself likely to be a dictator in the one field, and only a postulant in the other," and that literature "was a far greater gainer by his choice than law could have been a loser," since "his capacity for the law he shared with thousands of men, his capacity for literature with few or none."

Scott's earnings during the fourteen years which made up the period of his practice at the bar, largely nominal for at least one third of the time, were not such as would arouse the envy of any of our great modern fee-takers. It appears that the most he ever earned in a year was less than £230, and a legal income of about ninety dollars a month presents a rather violent contrast to his enormous earnings from his pen, which yielded him during his lifetime almost a million dollars. However, it may be true of him, as has been suggested by one of his reviewers, and as he himself said of his father and represents the conduct of one of his characters, the roystering counsellor Pleydell, that he lost no small part of a very flourishing business by insisting that his clients should do their duty to their own people better than they were themselves at all inclined to do it.

As for the disposition of the money he earned at the law, it is interesting to find that he bought a silver taper-stand for his mother with his first five-guinea fee, and that during his apprenticeship in his father's office he tried to earn a little extra money by copying, to be devoted to his favorite mediæval studies, and so undertook fourteen or fifteen hours of hard work in that line. It is noted, as told by himself, that he remembered writing "120 folio pages with no interval either for food or rest." This gives us an idea of the indomitable and unremitting industry that enabled him to pay off, by his own labors, so much of an overwhelming debt in his later years. Altogether we cannot help wondering that so little is told of the legal life of this writer, even by such a world-renowned biographer as Lockhart. Nor can we help wishing that some explorer of elusive documents might light upon a few further details of the relations to the law maintained by such a master of old-time and other facts, so well woven into the tapestry of fiction.

SKETCHES FROM THE PARLIAMENT HOUSE.

V.

LORD RUTHERFURD CLARK.

By A. Wood Renton.

LIKE Baron Moncrieff, Lord Rutherfurd Clark is connected by descent with the profession both of theology and of law. His father was an eminent divine, the Rev. Thomas Clark, D.D.; and his uncle, the Right Hon. Andrew Rutherfurd, was a senator of the College of Justice. Mr. Clark was admitted to the Faculty of Advocates in 1849; was sheriff of Inverness, Haddington, and Berwick successively, Solicitor-General for Scotland, and Dean of the Faculty of Advocates. After a distinguished forensic career, he was made a Lord Ordinary of the Court of Session, and in time by progress of seniority reached the bench in the Second Division of the Inner House. Lord Rutherfurd Clark was as advocate, and is as judge, the Huddleston of Scotland. He was reputed to be the best speaker, and is credibly asserted to have made the largest income among his contemporaries at the bar. His forensic skill was unquestioned and unquestionable. His gift of exposition and his independence of judgment make his decisions well worth reading; and the only judicial weaknesses that he displays are a tendency to argue, and a certain constitutional indolence which prompts him to deliver judgment in the simple formula, "I concur."

Reg. *v.* Jessie Maclachlan (1862) and Reg. *v.* Pritchard (1865), the leading *causes célèbres* in which Lord Rutherfurd Clark was engaged as counsel, have already been noticed in the preceding paper. It may be possible, however, to refer to them again without traversing the old ground to any great extent.

On the night of 7th July, 1862, Jessie Macpherson, the housekeeper of a Mr. Fleming, an accountant residing in Sandyford Place, Glasgow, was murdered in her bedroom. Her body was found next morning lying on the floor, and so mangled that it was evident both that the murder had been committed with a hatchet and that the deceased had offered a desperate resistance. The accountant and his family were at the seaside on the night in question; and the only inmates of the house were Mr. Fleming, his father, an old man of eighty-seven years of age, and a Mrs. Jessie Maclachlan, who before her marriage had been a servant to the Flemings, and who was on most friendly terms with the deceased woman, Macpherson. Suspicion not unnaturally fell upon old Mr. Fleming. He was arrested and imprisoned. But it was soon discovered that some plate, which had been missing since the night of the 7th July, had been pawned by Mrs. Maclachlan under the *alias* of "Mary Macdonald," and she was at once fixed upon by the Crown as the proper object of a criminal prosecution. Old Fleming was released, and examined as a witness on behalf of the Crown. The case came on for trial at the Glasgow Autumn Assizes, 1862. Mr. (afterwards Lord) Gifford, then advocate depute, prosecuted; Mr. Clark defended; the late Lord Deas presided. We cannot refrain from pausing to make a few comments upon this great judge. The son of humble parents, Judge Deas raised himself at the bar and ultimately to the bench, by virtue of sheer hard work. He had great intellectual gifts, — a faculty of homely yet persuasive speech, a power of grasping and welding into intelligible shape masses of complicated facts, insight into men and things, and an accurate knowledge — laboriously acquired — of legal principles and practice. His want of refinement was often mistaken for mere

vulgarity, and one of the wits of the Parliament House is said to have observed on the occasion of his promotion to the honor of knighthood, "The Queen may make George Deas a knight, but no one will ever make him a gentleman." Deas was quite able, however, to hold his own, and he punished the wits when they came to make their maiden speeches before him. "Prisoner at the bar," he once said to an unfortunate wretch on whose behalf an infant advocate had been feebly urging "extenuating circumstances," "everything that your counsel has said in mitigation, I consider to be an aggravation of your offence." Mr. Clark conducted the defence in the Sandyford murder case with great skill. He cross-examined old Mr. Fleming most ably and severely, and pressed upon the jury that his behavior was incompatible with innocence. Under the direction of Lord Deas, the jury returned a verdict of guilty. Then followed the curious scene which we described in the preceding paper, and which bears a strange resemblance to the denouement in the Maybrick case, except that while Mrs. Maybrick's statement destroyed, that of Mrs. Maclachlan supported and gave color to the defence.

One or two episodes in the trial of Dr. Pritchard deserve notice here.

(1) Dr. James Paterson, a well-known medical practitioner in Glasgow, had been called in by Dr. Pritchard to see his mother-in-law, Mrs. Taylor. While attending to Mrs. Taylor, he was much struck with the appearance of Mrs. Pritchard, and became convinced that she was suffering from antimonial poisoning. He never communicated this conviction to any one, however, and never went back to see the patient. Dr. Paterson's position was very delicate, and it is much easier to blame him than to be quite certain that under similar circumstances one would have acted more wisely. Mr. Clark of course turned the incident to the best account. The following extract from the cross-examination of this witness may interest our readers: —

"'Did you mean to convey to us that Mrs. Pritchard had been taking antimony medicinally or that she was being poisoned?' 'My impression was that she was being poisoned by antimony.' 'And you formed that conviction by looking at her?' 'Yes.' 'Simply from looking at her?' 'Yes, judging from symptomatology.' 'Now, did you ever go back to see her again?' 'I did not.' 'Why did you not go back?' 'Because she was not my patient; I had nothing to do with her.' 'Then, though you saw a person suffering from what you believed to be poison by antimony, you did not think it worth your while to go near her again?' 'It was not my duty; I had no right.' 'No right?' 'I had no power to do it.' 'No right?' 'I was under no obligation.' 'You were under no obligation to go back to see a person whom you believed was being poisoned with antimony?' 'I took what steps I could to prevent any further administration of antimony.' 'By never going back to see her?' κ. τ. λ."

The use which Mr. Clark made of these admissions in his address to the jury was to ridicule the idea that Dr. Paterson had any such conviction as he subsequently alleged.

(2) Mr. Clark displayed even greater ingenuity in the way in which he dealt with Mary Macleod.

"It will not do," he said, "for the Solicitor-General to say, 'I have established that one of two persons must have committed these crimes; and you can trace the finger of a medical man in connection with them.' Probability will never support a conviction. It will not do for my learned friend to say, as regards the death of Mrs. Pritchard, it was the act either of the prisoner or of Mary Macleod, and it was not likely that a girl of fifteen would have the skill to do it. Only by showing that it was *not* Mary Macleod can he bring this charge home to the prisoner."

The Lord Justice Clerk, however, disposed of this point very neatly.

"The prisoner's counsel," observed his lordship, "did not seem sufficiently alive . . . to the possibility that *both* (Pritchard and Macleod) might be implicated; and if that was so, I suppose we should have little doubt which was the master and which the servant."

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

AN unfortunate typographical error crept into the poem, "The Common Lot of the Lawyer," by Mr. Frank J. Parmenter, published in our October number. In the third stanza the line

"Where one lays down forever the burden he bore"

should read

"Where *he* lays down forever," etc.

The poem has been published in pamphlet form, with some additional lines, and with the correction above referred to.

TO OUR SUBSCRIBERS.

We shall continue to send "The Green Bag" to all subscribers who do not notify us before Jan. 1, 1893, of their desire to discontinue. Non-notification to this effect we shall consider, as we have in the past, an implied desire and intention to renew subscription for another year.

We must ask of our subscribers a prompt remittance of the amount of their subscription. Three dollars is a small sum in itself; but when we have hundreds of these accounts outstanding, the aggregate becomes large, and we are temporarily deprived of funds which we need for the successful carrying on of the magazine.

Our subscribers will, we are sure, appreciate this, and comply with this reasonable request.

Bills for subscription for 1893 will be mailed to subscribers in December.

Remit by Postal Note, or add 20 cents for local checks.

LEGAL ANTIQUITIES.

THE Gothic nations were famous of old in Europe for the quantities of food and drink which they consumed. The ancient Germans, and their Saxon descendants in England, were remarkable for their hearty meals. Gluttony and drunkenness were so very common that those vices were not thought disgraceful; and Tacitus represents the former as capable of being as easily overcome by strong drink as by arms. Intemperance was so general and habitual that no one was thought to be fit for serious business after dinner; and under this persuasion it was enacted in the laws, that judges should hear and determine causes fasting, and not after dinner. An Italian author, in his "Antiquities," plainly affirms that this regulation was framed for the purpose of avoiding the unsound decrees consequent upon intoxication; and Dr. Gilbert Stuart, very patiently and ingeniously observes in his "Historical Dissertation concerning the Antiquity of the British Constitution," p. 238, that from this propensity of the older Britons to indulge excessively in eating and drinking has proceeded the restriction upon jurors and jurymen to refrain from meat and drink, and to be even held in custody until they had agreed upon their verdict.

FACETIÆ.

"THEY 've raked in a pretty tough-looking lot this morning, have n't they?" observed the stranger who had dropped in at the police court.

"You are looking at the wrong gang," said the reporter to whom he had spoken. "Those are not the prisoners; those are the lawyers."

"WHAT is the first step toward securing a divorce?" asked a client of a Philadelphia lawyer. "Get married," was the prompt reply.

A YOUNG barrister in his first case was called upon to defend a couple of deep-dyed villains, for whom there was no chance of escape. He wound up his address to the jury as follows: "Gentlemen, there is in the South of France a small village of two hundred inhabitants. In that village there stands a house; in that house there live an aged couple with their only daughter. The old man is perusing a paper with feverish anxiety, the old lady is shedding tears over her knitting, the young woman sits at the window gazing wistfully at the sky. They are waiting to hear the result of this trial, which will cause them immense delight or profound despair, according as my case is won or lost; for that old man is my father, that aged woman is my mother, and the young person is my sister!"

A BARRISTER tormented a poor German witness with so many questions that the old man declared he was so exhausted that he must have a drink of water before he could say another word. Upon this the judge remarked, "I think, sir, you had better let the witness go now, for you have pumped him dry."

A HUMOROUS thing occurred a short time since at the trial of a case in a justice court in Minnesota. The assistant prosecuting attorney of the county was called upon to prosecute parties arrested for stealing from a peddler. The case was being tried in a small country town, the justice occupying all the positions of honor and trust in the community, together with that of postmaster. Considerable interest was manifested, and a large number were present during the trial. The justice was put to his wit's end by the numerous objections interposed by the defendant's attorney, and ruled uniformly for the State. The case, however, enlisted much more interest than he anticipated, and the second day of the trial the justice thought he was becoming altogether one-sided, and upon objection being interposed on the part of the State, he ruled in favor of the defendants. Whereupon the prosecuting attorney arose to his feet, and exclaimed excitedly, "What! you do not propose to rule against me on that question?" to which the justice honestly replied, that inasmuch as he had ruled in his favor on all questions the preceding day, he thought it not more than right to give the defendants some show, and he therefore, in the interest of peace and harmony between the attorneys, would rule in favor of the defendants that day, which he thought would even it up and be about fair.

SAID Justice Brown to Mr. Morse,
"I 'm sure, sir, that you stole this horse,
For, though you have denied the charge,
I 'll never let you go at large,
Because I have the docket here,
And seems to me your case reads queer,
And proves you guilty — or, of course,
You 'd never docket it 'in re Morse.'"

JEAN LA RUE BURNETT.

THE following acknowledgment appears upon a deed recorded in the Register's Office, Davidson County, Tenn.: —

Personally appeared before me, F. F., a Notary Public, in and for Davidson County, Tenn., the within named Kate Conley, wife of Jas. Conley, deceased, the bargainor, with whom I am personally acquainted, and who acknowledged that she executed the within instrument for the purposes therein contained. And Kate Conley, widow of the said Jas. Conley, deceased, having appeared before me privately and apart from her husband; the said Jas. Conley, deceased, acknowledged the execution of said deed to have been done by her freely, voluntarily, and understandingly, without compulsion or constraint from her said husband.

Witness my hand and official seal, at Nashville, Tennessee, this 10th day of February, 1891.

F. F., *Notary Public.*

NOTES.

IN the leading Iowa case of Bowne & Sleeper *v.* Bilsland, wherein a railroad company's title under congressional grant is declared inferior to the rights of a settler on the land claiming title under homestead laws, "the squatter" defendant after denying plaintiff's title sets up a denial of the claim for damages for trespass in the following eloquent language: "That the defendants have not trespassed upon the land described in the petition; that they have enhanced the value of said land by tilling the same; for but a short time ago the rank thistle nodded in the wind, and the gopher dug his

hole unscared, and the Indian warrior wooed his dusky maid; but now, by the labors of these defendants the Indian has moved away to the barren plains of Dakota, and the gopher scalp hangs upon the cabin walls of these defendants; and where the thistle nodded, the roses bloom."

While the "squatter's" attorneys won the case, we are sorry that we can't say that it was won solely on the poetic defence set up.

IN classic antiquity law-givers were honored not less than conquerors, and all the most celebrated laws of Rome bore the names of their authors. In later times oblivion seems to await most of those who devote themselves to legal reform. We do not know with any certainty who framed the statutes of Westminster in the time of Edward I., the Statute of Fines, the Statute of Uses, the Statute of Wills, or the Statute of Frauds.

A "COMMISSIONER of colonization" appointed by a canal or ditch company in Colorado, recently brought a suit against other stockholders of the company, charging conspiracy to wreck the company by discharging him from his position just as he had got started in his efforts "to populate" the uninhabited valley to which the canal was to carry the water. The court clearly comprehended the situation, and said in its opinion: "The water and the people were both needed. The water without the people was useless, and could not, as required by the Constitution, have been regarded as applied to a beneficial use. A certain amount of water or fluid of some kind is supposed to be necessary to support animal life. Ghosts and disembodied spirits are supposed capable of existence without it, and yet in its absence they are not cheerful. 'Dives' was anxious to obtain the smallest quantity for 'domestic purposes.' Given plenty of water, a dense, thrifty population accustomed to its use for drinking, lavatory, and irrigating purposes was indispensable. It is evident that plaintiff had correct views; both factors, united, were needed. His removal just at the time he had fully prepared himself to enter upon the proper discharge of the duties of his office was an indignity and an outrage, but may have been inspired by the purest dictates of humanity. The water-supply was needed at a date as early or earlier than the great influx of population. The company finding that by the exercise of his ability, energy, and zeal the population was to precede the water, was compelled to remove him, or subject a large number of people to the horrors of a severe and long protracted drought." — *The Lawyers' General Digest.*

ORIENTAL justice sometimes finds a parallel in Russia, where judges and lawyers see no difficulty in making eccentric decisions and taking the meat of the nut themselves, leaving the shell for plaintiff and defendant. One day, at a village market, a shoemaker bought a calfskin of a farmer for two and a half roubles, and having no money with him, went home to procure it.

The farmer, meanwhile, sold the skin to a second buyer for three roubles. Then the original buyer returned, and when he discovered the trick that had been played, was so indignant that a quarrel ensued, and the matter was brought before a justice.

"You bought the skin first?" said the latter to the shoemaker, after listening to the evidence.

"Yes."

"For how much?"

"Two and a half roubles."

"Have you the money?"

"Yes."

"Put it on the table."

Then, turning to the second buyer, the justice asked: "You bought the skin afterward and paid for it?"

"Yes."

"How much did you pay?"

"Three roubles."

"You have the skin?"

"Yes."

"Put it under the table."

The man obeyed, and the farmer was next addressed.

"You agreed to sell for two and a half roubles, and as the buyer did not return promptly with the money, you sold to another for three roubles?"

"Yes."

"Have you the three roubles?"

"Yes."

"Put them on the table."

When this had been done, the judge delivered his decision. "The shoemaker is to blame for bargaining without money, and thereby endanger-

ing the peace of the town. The second buyer is to blame for outbidding another, and the seller for dealing with people without money. Now, all three of you go! March!"

And they went, perforce, leaving skin and money behind them.

THE opinion of the Supreme Court of the State of California in Touchard *v.* Crow (20 Cal. 163), delivered by Mr. Justice Field, now of the United States Supreme Court, contains the following: —

"This action was tried by the court without the intervention of a jury. Of course, in such cases the court not only performs its peculiar and appropriate duty of deciding the law, but also discharges the functions of a Jury, and passes upon the facts. The counsels of the appellants, impressed, as it would seem, with this dual character, requested the court to charge itself as a jury, and handed in certain instructions for that purpose. The court thereupon charged that part of itself which was thus supposed to be separated and converted into a jury commencing the charge with the usual address, 'Gentlemen of the jury," and instructing that imaginary body that if they found certain facts they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the court, but were at liberty to judge of the facts for themselves. The record does not inform us whether the jury thus addressed differed in their conclusions from those of the court. These proceedings have about them so ludicrous an air that we could not believe they were seriously taken, but for the gravity with which counsel on the argument referred to them. If counsel, when a case is tried by the court without a jury, desire to present for consideration certain points of law as applicable to the facts established or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows. The mode adopted in the present case, though highly original, is not of sufficient merit to be exalted into a precedent to be followed."

THE law is said to be founded on common cents; some members of the profession, and many juries, believe this to be true.

Solomon was the first magistrate who proposed to split the difference.

The judge's charge in a criminal case is usually inferior to that of the successful attorney.

Recent Deaths.

HON. GEORGE F. COMSTOCK, formerly Chief-Justice of the New York Court of Appeals, died in Syracuse, September 27. He was a native of Williamstown, Oswego County, N. Y., born in 1811. His father, a soldier of the American Revolution, died when the future judge was a mere lad. Nevertheless, the latter, by teaching school, managed to earn money enough to carry him through Union College, from which he was graduated with high honors in 1834. In the following year he began the study of law, and in 1839 he was admitted to the bar. Governor Young, in 1847, appointed him reporter for the Court of Appeals. In 1852 President Fillmore appointed him Solicitor for the Treasury Department. In 1855 he was elected a Judge of the Court of Appeals by the "Silver Gray" Whigs and the Native American party. He became a Democrat on the readjustment of party lines in 1856. In 1861 he was defeated for re-election. On returning to active practice, his clientage became of the first rank, and during this period he edited an edition of "Kent's Commentaries." Judge Comstock was elected a delegate at large to the Constitutional Convention of 1868, and he and the late Judge Folger were the principal framers of the new judiciary article in the present Constitution. Judge Comstock was largely instrumental in founding Syracuse University, giving $50,000 towards its establishment. He may also be considered the founder of St. John's School for Boys at Manlius, Onondaga County, N. Y., having given $60,000 towards it. He was a trustee of the State Institute for Feeble-minded Children in Syracuse. Notwithstanding his advanced age, Judge Comstock maintained his intellectual vigor to a surprising degree, and his counsel was sought in many important cases up to within a short time of his death.

(A portrait of Judge Comstock was published in the "Green Bag," July, 1890.)

JUDGE EDWARD WOODRUFF SEYMOUR, of the Supreme Court of Connecticut, died on October 17. He was born at Litchfield, Conn., Aug. 30, 1832. He came of a family which has been prominent in Connecticut public affairs for two hundred years. His father was Chief-Justice of the Supreme Court, and one of his relatives was United States Senator

from Connecticut in 1821–33. He was graduated from Yale College with the famous class of 1853. He afterward studied law, was admitted to the bar in 1856, and practised law in Litchfield until 1875, when he removed to Bridgeport.

Judge Seymour served in the House of Representatives in 1859, 1860, 1870, and 1871, and in the State Senate in 1876. In 1882 he was elected to Congress as a Democrat from the Fourth District, and served two terms. In 1889 he was appointed to the Supreme Bench. He was regarded as eminently just in his judicial decisions, and commanded the respect and confidence of all who knew him.

A portrait of Judge Seymour was published in "The Green Bag," October, 1890.

Ex.-Gov. Thomas H. Watts, Alabama's greatest lawyer, died at his home in the city of Montgomery on September 16.

The passing away of this distinguished citizen, Christian gentleman, profound statesman, able jurist, and skilful lawyer has caused a shock of deepest sorrow throughout the length and breadth of Alabama and the entire South, but not of surprise, for when a man has passed his seventieth milestone his death can never be wholly unexpected.

The people have grown so accustomed to Governor Watts's dignified presence, however, that it really seemed as if he might have gone on living forever; and if the affectionate regard of a great people could have kept him in the midst of us, the day of his death would never have come. For nearly half a century his manly form has been a familiar figure in Montgomery and adjacent cities and towns, and his name is a household word in every community in the State.

Thomas Hill Watts was born in Conecuh, now Butler County, Ala., Jan. 3, 1819. After graduating at the University of Virginia with high honors, he opened a law-office in Greenville, Butler County, in 1841. The next year he represented Butler in the Legislature of Alabama, and was re-elected for one or two terms. In 1846 he removed to Montgomery, and opened an office there; in 1849 he represented Montgomery in the House of Representatives, and in 1853 he was elected to the State Senate. Two years later Colonel Watts was the nominee of the Whig Party for Congress, and after a very exciting race was defeated by his Democratic opponent, Colonel Dowdell, by a small majority.

In the memorable days of 1860 Governor Watts canvassed the State as elector-at-large for Bell and Everett on a platform declaring for the "Constitution, the Union, and the enforcement of the laws." He was passionately devoted to the Union, but belonged to the States Rights wing of the Whig Party; and when Mr. Lincoln was elected, he declared for secession.

In 1861 he was elected Colonel of the Seventeenth Alabama Regiment, and entered the Confederate army. In the same year he received a very complimentary vote for governor. Had he been a candidate, he doubtless would have been elected. In March, 1862, while with his command at Corinth, Miss., he received notice of his appointment by Jefferson Davis to be Attorney-General of the Confederate States Government. Colonel Watts entered the Confederate Cabinet at Richmond, and was the legal adviser of the *de facto* government till the latter part of 1863, when he was recalled to Alabama to be inaugurated Governor, having carried every county in the State over Gov. John Gill Shorter but one, — Winston. He was inaugurated in December, and was the chief executive of the State till the close of the war.

Governor Watts resumed the practice of his chosen profession at Montgomery, and continued to the day of his death, with the exception of a term in the House of Representatives during the session of the State Legislature in 1880–81.

Governor Watts was President in 1889–90 of the Alabama State Bar Association, and did much while in that office to advance the science of jurisprudence and remedy the defects in our statute law.

It was only a few years after his admission to the bar before he was at the front ranks of the profession. He was very eloquent when addressing a jury, and was in the habit of quoting applicable selections of poetry. His favorite was the couplet found in the opinion in Kelsoe's Case (see 47 Ala. p. 573). The Governor never forgot to use this in every important murder case in which he was interested, — on the side of the defence, of course; he never but once in his life represented the State in a murder trial. He seemed to sway a petit jury at his will. When addressing a court he

was analytical and logical, and painstaking and careful when considering cases as counsel. He was, to the fullest extent of the term, a great lawyer. It is seldom that a lawyer is great in the various branches of the law, but this was pre-eminently the case with Governor Watts. Some are strong in one and some in another, but he was at home and ever ready in all. The Governor, though, had his hobby; and that pet was constitutional law.

He loved the profession of the law, and for the past quarter of a century has spent a large portion of his time in the Supreme Court library preparing briefs and arguments in the larger number of cases in which he was interested before that tribunal.

Governor Watts was of a sunshiny and cheerful disposition, kind to all, and loved by every one who has any taste for a great and good man. The young men of the profession all loved him as a father, and no young limb of the law ever called on him for aid and assistance in vain when a knotty problem was to be solved; and he was very frank and free to render assistance when called upon, and always took a deep and abiding interest in the struggling stripling who had cast his lot with the "disciples of Blackstone," and who was about to fall by the wayside on account of obstructions and intricacies that in every instance are met with by beginners.

Alas! he is gone. We shall see him no more. The clarion voice is stilled. The manly form will grace by his presence our courts below never again. While we mourn his death here below, he has gone to answer a summons in the court in the Great Beyond.

Requiescat in pacem.

W. C. Davis.

REVIEWS.

The November Century is the first number of the forty-fifth volume and of the twenty-third year of this magazine, which, while preserving the general characteristics which have given it vogue, is striking out freshly into new paths. Articles which strike into the midst of current discussions are "Plain Words to Workingmen," by one of them, Fred Woodrow; "Does the Bible contain Scientific Errors?" by Prof. Charles W. Shields of Princeton; and "Some Exposition Uses of Sunday," by Bishop Potter, in further discussion of the question of opening the World's Fair for the entire week. The last topic is also discussed editorially, and by Dr. Washington Gladden in an open letter. Four or five finely illustrated articles and a good supply of interesting fiction go to make up a most readable number.

The November number of the New England Magazine is a Whittier number. The frontispiece is from a rare photograph of the poet taken about 1855, and the opening article takes the reader in and about the New England country which inspired so much of Whittier's poetry and is so associated with him as a man. It is by William Sloane Kennedy, whose monograph of Whittier was so well received. Another article deals with Whittier as poet and man, and is by Frances C. Sparhawk. Allen Eastman Cross contributes a fine poem, "The Passing of Whittier." Mr. Edwin D. Mead, the chief editor of the magazine, deals with Whittier's life, work, and influence in his Editor's Table. The articles are finely illustrated throughout. The fiction of the number includes "Catnip for Two," by Ethel Davis; "The Black Deuce," by W. Grant; and "A Prophet," by Richard Marsh.

With the November number the Arena closes its sixth volume. The success of this magazine has been remarkable, and it has fought its way to a foremost position in the ranks of our monthly periodicals. It is conspicuously fair, and unquestionably the boldest review of our time. The contents of this number are strong, varied, and of general interest. The most important articles are "Lord Salisbury's Afghan Policy," by Rev. Thomas P. Hughes, D.D., and the "Practical Application of the New Education," by Prof. J. B. Buchanan. A feast of good things is promised for 1893.

The Atlantic Monthly for November offers its readers the following interesting contents: "The Story of a Child," XI.–XV., by Margaret Deland; "Mr. Jolley Allen," by W. Henry Winslow; "A New England Boyhood," V., by Edward Everett Hale; "The Marriage of Ibraim Pasha," an Episode at the Court of Sultan Murad III., 1586, by Horatio F. Brown; "The Withrow Water Right," in Two Parts, Part First by Margaret

Collier Graham; "An English Missal," by Lizette Woodworth Reese; "John Greenleaf Whittier," by George Edward Woodberry; "In Memory of John Greenleaf Whittier, Dec. 17, 1807, to Sept. 7, 1892," by Oliver Wendell Holmes; "Whittier" (dying), by Elizabeth Stuart Phelps; "Don Orsino," XXV., XXVI., by F. Marion Crawford; "Sociology in the Higher Education of Women," by Samuel W. Dike.

THE contents of SCRIBNER'S MAGAZINE for November are sufficiently varied and interesting to please all tastes. The most important article is "Conversations and Opinions of Victor Hugo" by Octave Uzanne, which is elaborately illustrated. Lovers of horses will find "Racing in Australia," by Sidney Dickinson, something after their own hearts. Henry James contributes a paper on "The Grand Canal," and W. C. Brownell continues his sketches of "French Art." Kirk Munroe writes of "Sponge and Spongers of the Florida Reef." For fiction the number gives us "Miss Dangerlie's Roses," by Thomas Nelson Page; "Stories of a Western Town," IV., by Octave Thanet; and the conclusion of "Salem Kittredge, Theologue," by Bliss Perry.

HARPER'S MAGAZINE closes its eighty-fifth volume with the November number. The issue is fully up to the standard of this excellent magazine. Charles Dudley Warner writes of "The Holy Places of Islam;" Theodore Child takes us "Along the Parisian Boulevards;" and F. D. Millet has a timely article on "The Designers of the Fair." These articles are all finely illustrated, as are also "The New Growth of St. Louis," by Julian Ralph, and "A Collection of Death-Masks" (third paper), by Laurence Hutton. There is plenty of fiction of a most readable character in the number.

THE complete novel in LIPPINCOTT'S MAGAZINE for November, "More than Kin," is from the well-known pen of Marion Harland. J. B. McCormick, otherwise known as "Macon," carries on the *Journalist Series* in a sketchy and readable article headed "The Sporting Editor." George Stuart Patterson, in the *Athletic Series*, gives an account of "Cricket in the United States," and C. Davis English lays down the law concerning "Form in Driving." Both these papers are illustrated, as is Mrs. Ellen Olney Kirk's Venetian sketch, "In a Gondola." Under the chapter, "Men of the Day," M. Crofton gossips about Dr. Pasteur, General Wolseley, and Secretary Foster.

THE legal profession as well as the general public will be deeply interested in the article in the November REVIEW OF REVIEWS entitled "Ought Mrs. Maybrick to be Tortured to Death?" The controversy over her case has risen almost to the dignity of an official international question; and Mr. Stead, the English editor of the REVIEW OF REVIEWS, has now undertaken to investigate the matter, and comes out with a strong article, taking the American side of the case. He shows that Mrs. Maybrick was condemned on insufficient evidence, and that her treatment is a scandal upon the name of English justice. Mrs. Maybrick is a young American woman, highly connected in this country; and her cause has been stoutly championed by Mr. Blaine and all the leading people at Washington. The other contents of this number of this most admirable magazine are of unusual interest.

BOOK NOTICES.

A MANUAL OF MEDICAL JURISPRUDENCE AND TOXICOLOGY. By HENRY C. CHAPMAN, M.D. W. B. Saunders, Philadelphia, 1892. Cloth, $1.25 net.

In this little work Dr. Chapman offers to both medical and legal students a valuable assistant in the study of a most important subject. Too little attention is paid in our law schools, and in the medical schools as well, to the consideration of "Medical Jurisprudence," and yet there is no more interesting or important topic connected with the two professions. We have derived much pleasure and profit from the perusal of this book, and heartily commend it to all students and to the practising lawyer.

PRINCIPLES OF THE LAW OF WILLS, with Selected Cases. By STEWART CHAPLIN. Baker, Voorhis & Co., New York, 1892. Law sheep, $4.50 net.

This is another treatise designed for the use of students, and is prepared upon the plan, now so much in vogue, of combining text explaining the

principles and important features of the law, with selected cases which illustrate the application of such principles. We like the method, and we like this book of Mr. Chaplin's. The cases appear to have been selected with care and discrimination, and the text is clear and accurate. The work should find favor with our law schools, as it is admirably adapted for teaching the law of wills.

A DIGEST OF THE DECISIONS OF THE COURTS OF LAST RESORT OF THE SEVERAL STATES, FROM THE YEAR 1887 TO THE YEAR 1892, CONTAINED IN THE AMERICAN STATE REPORTS, volumes 1 to 24 inclusive, and of the notes therein contained, to which is added an alphabetical index to the notes. By WILLIAM MACK of the San Francisco Bar. Bancroft-Whitney Company, San Francisco, 1892. Law sheep, $4.00 net.

Some idea of the vast amount of matter contained in "The American State Reports" may be derived from an inspection of this digest, which contains over 1,350 pages. To the possessor of this series, and to all practitioners as well, this digest will prove invaluable. Mr. Mack has done his work thoroughly. Cross-references have been carefully prepared, referring from all the titles to kindred or analogous matters found under other titles, as well as numerous reference titles containing merely references to such subjects as might possibly be searched for thereunder. All the extended and monographic notes of the series, as well as many minor notes of greater or less importance, have been arranged with reference to the classification used in the digest, and will be found appended to the various subdivisions under which they properly fall. In addition to this logical arrangement a special alphabetical index to the notes has been prepared.

JOHN ANDREW & SON CO.

George Shiras Jr.

The Green Bag.

VOL. IV. No. 12. BOSTON. DECEMBER, 1892.

MR. JUSTICE SHIRAS.

IN his latest appointment to the Supreme Bench of the United States, President Harrison displayed excellent judgment, and exalted to that high position a man eminently fitted for the place, and one who commands the respect and esteem of the profession throughout the country.

GEORGE SHIRAS, Jr., was born on the 26th day of January, 1832, in the city of Pittsburg, within a short distance of the site of old Fort Pitt. He is a descendant from English Puritan stock. His paternal great-grandfather, George Shiras, came from England about the year 1725, and settled in the State of New Jersey, from whence the family removed to the city of Pittsburg, prior to 1790. George Shiras, Sr., the father of George Shiras, Jr., was born in the year 1805, in the same house in which George Shiras, Jr., was afterward born; he is still living, at the age of eighty-seven years, and is sound, vigorous, and active in body, and in full possession of his mental faculties. The mother of Justice Shiras was Elizabeth Herron, daughter of Rev. Francis Herron, D.D., the founder of the First Presbyterian Church of Pittsburg, and for fifty years its pastor. Dr. Herron came of the Scotch-Irish Presbyterian stock, his wife being Elizabeth Blaine, an aunt of the Hon. James G. Blaine.

George Shiras, Jr., received a common-school education in the city of Pittsburg, and prepared for college at the Ohio University, from whence he went to Yale, and graduated there in the famous class of '53 with class honors.

After graduation Mr. Shiras entered the Yale Law School, and was admitted to the Bar of Pennsylvania in 1856. After a year's practice of the law at Dubuque, Iowa, whither his brother Oliver, now United States District Judge for the Seventh Circuit, had preceded him, he returned to Pittsburg to pursue his profession. There he formed a law partnership with Hon. Hopewell Hepburn. This partnership continued until 1860, when it was dissolved by the death of Mr. Hepburn.

Mr. Shiras rapidly acquired a large practice; becoming in a very few years one of the leaders of the Allegheny Bar, — a bar that has been distinguished for the statesmen and jurists which it has given to the country. For a period of twenty-five years, from 1867 to 1892, he was concerned in almost every leading case in the courts of his county, and in the United States Courts for the Western District of Pennsylvania. His position was also prominent as a practitioner in the Supreme Court of Pennsylvania and in that of the United States.

While an assiduous student of law and thoroughly familiar with all its branches, he found time to give attention to literary and scientific reading; and his acquirements in these directions caused his classmates at their thirtieth reunion in 1883 to select his name for presentation to the faculty of Yale College for the degree of LL.D., which was conferred upon him at that time; among the members of the class thus honoring him may be mentioned Theodore Bacon, one of the most distinguished members of the New York Bar; Hon. Andrew D. White, LL.D., ex-President of Cornell University and ex-Minister to Germany; United States Senator Randall Lee Gibson, of Louisiana; Bishop Davies, of Michigan; Stoddard Johnston, of Kentucky;

Benjamin Knevals, law partner of President Arthur; Hon. Wayne MacVeigh, ex-Attorney-General of the United States; Judge Billings, of the United States District Court of Louisiana; Henry Robinson, ex-Governor of Connecticut; Charlton T. Lewis; E. C. Stedman, the poet; Benjamin K. Phelps, of New York; George W. Smalley, the English correspondent; and Isaac Bromley, of the New York Tribune.

In 1857 Mr. Shiras was married to Lillie E. Kennedy, daughter of Robert T. Kennedy, an old and influential citizen of Pittsburg. His wife is still living, together with two sons, George Shiras, 3d, and W. K. Shiras, prominent young members of the Allegheny County Bar.

On July 19, 1892, President Harrison nominated him for the position of Associate Justice of the Supreme Court of the United States, and on July 26 following the nomination was confirmed by the Senate. He took the oath of office on Oct. 10, 1892, and at once assumed the duties of Associate Justice.

In personal appearance and general address Mr. Shiras is a man calculated to attract attention. He is tall and slender, standing nearly six feet high, with an agreeable open countenance, dark hair, and dark side whiskers.

He is at once dignified and amiable; and many of the younger members of the bar will bear testimony to his uniform kindness and courtesy.

A STROLLER'S CONFESSION.

By Wendell P. Stafford.

"No larceny of things affixed to the soil." — *Law Dictionaries.*

THE farmer, leaning beside his fence,
Believed my book a rogue's pretence,
For I did not read its briefest word, —
Yet all its rhymes in his brook I heard.

I lay an hour by the southern wall
And watched the sun-bright apples fall
I rifled his meadows, green and gold,
Of more than his bulky barns would hold.

And I met him again by the gate, at night,
But my hands were empty, my pockets light;
And he could not see, in the dusk of day,
That I bore the best of his farm away.

PRACTICAL TESTS IN EVIDENCE.

By Irving Browne.

II.

Exhibition of the Human Body.

2. *In Criminal Cases.* It seems that the defendant in a criminal case may exhibit his body to the jury. Thus in Campbell *v.* State, 55 Ala. 80, it being a material question whether certain footprints were made by the prisoner, he was permitted by the court to exhibit his naked feet to the jury, that they might see whether he could have made the tracks, and also to walk over the sawdust on the floor of the court-room in front of the jury-box; and his counsel, having measured the tracks, commented on the difference between them and those described by the witnesses for the prosecution. The court, commenting on this practical test, cited 1 Hale P. C., 136, where a prisoner charged with rape successfully defended himself "by being permitted to show privately to the jury that he had a frightful rupture, which made it impossible he could be guilty."

In a recent case in Texas, the defendant being indicted for aggravated assault by biting off a piece of the complainant's ear, the complainant was permitted to exhibit the maimed ear to the jury. In his brief in People *v.* Kelly, 94 N. Y. 526, Mr. John H. McKinley, complaining that the complainant was permitted to show his maimed hand to the jury, said: "No gaping wound of Cæsar can be used in this age to convict the inflictor." But the court held otherwise.

The most singular instance of such an exhibition was that made at a court in Mercer County, Pennsylvania. A young woman named Scott, who was soon to become a mother, appeared before a Mercer County justice of the peace, and swore out a warrant for the arrest of a young man named Bloodgood on a charge of assault and battery. Bloodgood was arrested. The young woman swore that two weeks previously the prisoner had come to her house, and as she objected to his remaining, he had choked her until she was almost unconscious, and had twisted her left wrist, almost dislocating it. She said the marks of his fingers and thumb were visible on her throat for several days, and her wrist had remained crooked for some time. She had no witnesses of the assault. Bloodgood admitted having been at the young woman's house, but denied the assault. The justice held him, however, for trial. The case came on for trial. The complainant appeared, carrying her three weeks' old baby. She swore to having been assaulted by the prisoner, as she had sworn before the justice of the peace, and that she was the mother of the child in her arms. Her lawyer then offered to show the baby to the jury; after examining it the judge allowed this, and the prosecuting lawyer took the infant to the jury, and uncovering its throat, revealed to them the distinct marks of four fingers on one side of it, and the plain and unmistakable impression of a thumb on the other. After the remarkable birth-marks had been examined by the jury, the lawyer uncovered the baby's left wrist. It was twisted out of shape and swollen, as if it had been suddenly wrenched. These marks on the throat and the twisted wrist corresponded exactly with the injuries the baby's mother swore, more than a month before it was born, to having received at the hands of the prisoner Bloodgood. After this startling and most extraordinary evidence was presented, the prosecution rested its case. The prisoner was convicted.

It has been held however that the prisoner

may not thus voluntarily exhibit his voice. In Com. *v.* Scott, 123 Mass. 222; s. c. 25 Am. Rep. 81, where a cashier undertook to identify a masked burglar by his voice, it was held not competent for the defendant "to prove what was his usual and natural voice, by using his voice in the court-room 'to repeat something,' when not under oath," as "there was no way of determining whether he would use his voice in the court-room in a natural or in a constrained or simulated manner." He might have mitigated his voice, like Bottom, — put a mask on it, so to speak. But if he had sworn to his voice, the court seemed to imply that the ruling would have been different. And he may on request of the prosecution exhibit his voice by his own consent.

In Johnson *v.* Com., 115 Penn. St. 369, at the request of the district attorney, the prisoner stood up and repeated certain words, in order to afford a witness, then "on the stand, an opportunity of seeing the prisoner and hearing the sound of his voice, so that she might the more intelligently testify whether he was or was not the man by whom she was confronted on the night in question." It did not appear that any objection or exception was taken, and the court held that the prisoner for this reason could not complain. But *obiter* the court said it could not be construed as a case of compelling the prisoner "to give evidence against himself," and liken it to the right of search of premises for stolen property. (It is noteworthy that at the same time, the district-attorney asking the prisoner to put on a slouched hat, and his counsel objecting, the request was not pressed.)

But whether the defendant in a criminal case can be *compelled* to expose his person is a very serious question, on which the authorities are conflicting.

In Blackwell *v.* State, 67 Ga. 76, it was held error for the court to require the prisoner to stand up and show his leg in order to disclose where it had been amputated; and in Day *v.* State, 63 Ga. 669, it was held: "Nor can one by force compel another against his consent to put his foot in a shoe-track, for the purpose of using it as evidence against him on the criminal side of the court."

In People *v.* Mead, 50 Mich. 228, it was held that a prisoner on trial for crime cannot be required, against objection, to try on a shoe to determine whether tracks found at the scene of the offence were his own; nor if he objects, can he properly be required to measure the shoe after trying it on. But if he tries it on without objection, the ruling that he must measure it is not prejudicial error, as any witness could do it as well as he.

In Stokes *v.* State, 5 Baxt. 619, it was held that the prisoner was not compellable to put his foot into a pan of mud brought into court.

In McGuff *v.* State, 88 Ala. 147, on a charge of rape, the prosecutrix being a child of seven and one half years of age, the court held that it was not error to refuse to compel an examination of the child by physicians, in order to determine if she had been injured.

On the other hand, it has been held that the prisoner may be compelled to furnish personal evidence of his identity by putting his foot in a track. State *v.* Graham, 74 N. C. 646; s. c. 21 Am. Rep. 493; Walker *v.* State, 7 Tex. Ct. App. 245; s. c. 32 Am. Rep. 595. And in State *v.* Ah Chuey, 14 Nev. 79; s. c. 33 Am. Rep. 530, the defendant was held compellable to expose his arm to determine whether there were tattoo marks on it as described by witnesses. This case was decided by a majority of one, and there was a powerful written opinion in dissent. In State *v.* Garrett, 71 N. C. 85; s. c. 17 Am. Rep. 1, the prisoner was held properly compelled to exhibit her hand, which she pretended to have been burned. In Spencer *v.* State, 69 Ala. 159, it was held that the submission by a female defendant of her person to a private examination by physicians, is not a confession, although the result of the

examination was a disclosure of facts of a criminative character; and such facts are competent evidence against her, although she was induced to submit to the examination through the assurance that "it would be the best thing for her that she could do." In State *v.* Prudhomme, 25 La. Ann. 523, the court said: "The tracks of the murderer were found near the scene of the murder; and to enable the witness who saw the tracks to state how they corresponded in size with the feet of the prisoner, he was forced to take his feet from under a chair where he had put them. This the prisoner's counsel calls forcing him to give evidence against himself. A mere statement of the facts shows how utterly untenable the objection is. The witness was required to look at the feet of the prisoner in order to testify to facts which might enable the jury to connect the prisoner with the perpetrator of the crime, and we are unable to perceive how any constitutional right of the prisoner was infringed by compelling him to place his feet where they could be seen by the witness."

It seems to me that the better reason is with the cases holding that the prisoner is not compellable to expose his person, and thus furnish evidence against himself; at all events, that the prisoner is not compellable to expose those parts of his body ordinarily concealed; and certainly that he is not bound to try an experiment which may conduce to his own conviction. The cases holding the contrary liken the exposure to compelling a prisoner to remove a veil or mask. The distinction however is, that there the prisoner tries to conceal evidence which is ordinarily visible, and from which the jury have a right to draw a conclusion, and the removal simply restores that evidence. The prisoner has no more right to hide his face, his foot, or his hand than to secrete his whole person. Therefore the Garrett and Prudhomme cases were rightly ruled. The court also liken the ruling to the searching a prisoner and finding false keys or stolen property upon him. The sufficient answer to that is, that such things are not part of his person, but are circumstances by which he has surrounded himself. When these circumstances are disclosed, it is not the man who is compelled to give evidence against himself, but the circumstances by which he has environed himself. In Walker *v.* State, 7 Tex. Ct. App. 245, counsel acutely argued that "if this prisoner can be compelled to make an impression with his foot in order to see if it is similar to the impression made by the foot of the person who committed the crime, then if he were charged with forgery he could be compelled to take a pen, and write in order to see if his handwriting was similar to that of the party who had committed the forgery." (This he may now by statute be compelled to do in England.) The decision in State *v.* Ah Chuey, founded on State *v.* Graham and Stokes *v.* State, is distinguished on the ground that there "the prisoner was asked in the presence of the jury to make evidence against himself,"— a perfectly futile distinction. The worst of this decision is that it permits secondary evidence of incompetent evidence, — evidence of an experiment out of court, which, if tried in court, might not have been conclusive against the prisoner. The concealment of the hand in the Garrett case, and of the foot in the Prudhomme case must be classed with the mask and veil as an instance of an attempt to conceal evidence ordinarily visible. The jury of course have a right to scrutinize patent facts, such as stature, shape, complexion, hair, features, scars, loss or peculiarity of members, etc. These are public matters, which the public cannot be prevented from viewing, and which the prisoner knows are liable to comment and comparison. Of these, witnesses who observed them may speak, or the jury may look at them in court. So if witnesses have observed the patent characteristics of gait and voice, they may testify to them, or the jury may observe the prisoner's gait as he naturally and voluntarily walks, or his voice as he voluntarily speaks. But will it be contended that on a question of resemblance of

gait the court can compel the prisoner to get up and walk, or that on a question of voice they can compel him to speak? It is impossible to distinguish the Stokes case. If the court had considered the evidence competent, it would have compelled the prisoner to "make tracks," or instructed the jury that his refusal might be considered against him. The court said: "In the presence of the jury the prisoner is asked to make evidence against himself." That is exactly what he was asked in the tattoo case, and what he was compelled to do in the Graham case. It is immaterial whether he is compelled to do it out of court or in court. The distinction drawn by the court in the Walker case against the Stokes case would apply just as well to the Graham case. Neither Wharton nor Bishop expresses any opinion on this question; but it seems to me that on principle a prisoner cannot be compelled to say anything, nor do anything, nor submit to any act addressed to his actual person, which may tend to criminate him. I agree with the dissenters in the Ah Chuey case when they say: "My conclusion is that under both the Constitution and the common law, it was error to compel the defendant, at the trial, to make a disclosure, which with the testimony of witnesses, tended to prove him to be Ah Chuey, and indirectly to establish his guilt. I think the error is as great as it would have been had the court compelled the defendant to admit that he was Ah Chuey. It accomplished the same result. In criminal cases the State must prove guilt without the aid of the accused at the trial, unless the guaranteed rights are waived, when a waiver is permissible."

But having voluntarily exhibited a scar on his head to the jury, he may afterwards be compelled to show it to a physician to enable him to testify whether it is old or recent. Gordon *v.* State, 68 Ga. 814.

In Bastardy Cases. Whether the child may be exhibited in bastardy proceedings to enable the jury to determine its paternity from its resemblance to the putative father, is a mooted question. The exhibition of a child two years old was allowed in State *v.* Smith, 54 Iowa, 104; but in State *v.* Danforth, 48 Iowa, 43; s. c. 30 Am. Rep. 387, it was held error for one three months old to be exhibited. The court in the latter case said that all extremely young babies look substantially alike. (In a "note by the printer," in 1 Thompson on Trials, § 856, it is said: "The judge who made this ruling must have been an old bachelor.") The resemblance was deemed competent in Gaunt *v.* State, 50 N. J. 490. The court said: —

"In cases involving handwriting, for instance, it has always been deemed pertinent to have a comparison of hands. Likewise in sales by sample in patent cases, in trade-mark and infringement suits, resemblance is of the essence of the proof. Nor can it be said that the tendency of recent applications of this rule has been toward restriction, — rather the reverse. In the courts of a sister State, New York, operas have been performed in court, and comic songs sung, plagiarized papers have been read, and the so-called materialization of spirits exhibited, — all within the scope of the doctrine of the relevancy of resemblance; while in a case now pending in the courts of Pennsylvania a board of experts have been ordered to inspect a certain contrivance called the 'Keeley Motor,' with a view to the determination of its resemblance or mechanical equivalency to a motor described in plaintiff's partnership bill. Examples of the application of the same rule to family likeness are not wanting. In the notorious Douglas case, House of Lords, 1769, Lord Mansfield allowed the resemblance of the appellant and his brother to Sir John Stewart and Lady Jane Douglas to be shown, as well as their dissimilarity to those persons whose children they were supposed to be; while as late as 1871 Lord Chief-Justice Cockburn, in the Tichborne case, held that the resemblance of the claimant to a family daguerreotype of Roger Tichborne was relevant, and intimated that comparison of features between the claimant and the sisters of Arthur Orton would be permitted. The extension of this rule to cases of family likeness in bastardy and other suits of alleged parentage cannot be questioned seriously on principle; the illusory

nature of such resemblances rather imposing a duty on the court in conjunction with the admission of the proof than militating against the relevancy of the inquiry. Such has been the view taken by the courts in this country.... There seems to be no good reason why a jury, if the question of resemblance is to be considered by them, should be compelled to base their decision upon a second-hand view. The effect of the substitution of testimony for inspection is to put the subject-matter of investigation one further remove from its responsible judges, and thus to add to the infirmities inherent in proof of this class the additional danger of bias and imposition. Inspection is like admission, in that while not testimony it is an instrument for dispensing with testimony, and in a doubtful case the class of testimony it dispenses with might be a controlling circumstance. Thus regarded, and in view of the almost utter worthlessness of the testimony of witnesses adduced on the question of the resemblance of a bastard to an alleged parent, it is obvious that inspection is on this account also to be preferred."

In Finnegan *v.* Dugan, 14 Allen, 197, the child was in court, and the judge, against defendant's objection, charged the jury that they might consider whether there was any resemblance between the child and the defendant. In affirming the judgment the Supreme Court says: —

"It is a well-known physiological fact that peculiarities of feature and personal traits are often transmitted from parent to child. Taken by itself, proof of such resemblance would be insufficient to establish paternity, but it would be clearly a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass."

On the same side are State *v.* Woodruff, 67 N. C. 89; Gilmanton *v.* Ham, 38 N. H. 108; State *v.* Arnold, 13 Ired. 184.

In Pettie *v.* Howe, 4 Thomp. & Cook (N. Y. Supr. Court), the question did not precisely arise; but the court said: "If this species of physiological evidence is admissible in a court of justice, it should not be covertly given." This was an action of *crim. con.*; and a child, alleged to be the offspring of the adulterous intercourse, was in court, and the plaintiff was permitted to testify that the hair of four other children previously born of himself and his wife was black. This was held error.

But the question fairly arose in respect to a child less than one year old, and the contrary view was taken, in Hanawalt *v.* State, 64 Wis. 84; s. c. 54 Am. Rep. 588. The court said: —

"In the Douglas case Lord Mansfield is reported as saying: 'I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and various other things, whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude, and action.' This language attributed to Lord Mansfield is taken from Wills on Circumstantial Evidence, p. 123. This author, on the next page, says that in a Scotch case, when the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant as being too much a matter of fancy and of opinion to form a material article of evidence. In the case of Jones *v.* Jones, *supra*, the learned judge who wrote the opinion refers to the language used by Lord Mansfield in the Douglas case, and disapproves of it as authority, and thinks it has not been followed as a precedent in the English courts; and he quotes with approval the language of Justice Heath in the case of Day *v.* Day, decided in 1797, in which the learned judge stated to the jury 'that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence.' In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal oppor-

tunities of observation, will arrive at different conclusions, even in the case of mature persons, where a family likeness will be fully developed if there be any. And when applied to the immature child its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury. . . . We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them."

The same doctrine was laid down in Clark *v.* Bradstreet, 80 Me. 454, in respect to a child six weeks old. The court said: —

"In a case like this, where the child was a mere infant, such evidence is too vague, uncertain, and fanciful, and if allowed would establish not only an unwise but dangerous and uncertain rule of evidence. While it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, yet it is equally true, as a matter of common knowledge, that during the first few weeks or even months of a child's existence it has that peculiar immaturity of features which characterizes it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance then can be readily imagined. This is oftentimes the case. Frequently such resemblances are purely notional or imaginary. What may be considered a resemblance by one may not be perceived by another having equal knowledge of the parties between whom the resemblance is supposed to exist. If there should be a likeness of features, there might be a difference in the color of the hair or eyes. As was said by the court in People *v.* Carney, 29 Hun, 47: 'Common observation reminds us that in families of children different colors of hair and eyes are common, and that it would be a dangerous doctrine to permit a child's paternity to be questioned or proved by the comparison of the color of its hair or eyes with that of the alleged parent.' Mr. Justice Heath, in the case of Day *v.* Day, at the Huntington Assizes in 1797, upon the trial of ejectment, where the question was one of *partus suppositio*, admitted that resemblance is frequently exceedingly fanciful, and therefore cautioned the jury in reference to such evidence. And in a trial in bastardy proceedings the mere fact that a resemblance is claimed would be too likely to lead captive the imagination of the jury, and they would fancy they could see points of resemblance between the child and the putative father. As in the case at bar, where the infant was but a few weeks old, such evidence if allowed in determining the paternity of the child would be exceedingly fanciful, visionary, and dangerous."

The same was held in Risk *v.* State, 19 Ind. 152, and Reitz *v.* State, 33 Ind. 187.

In Eddy *v.* Gray, 4 Allen, 435; Jones *v.* Jones, 45 Md. 144; Keniston *v.* Rowe, 16 Me. 38, the court hold that testimony of witnesses that the child looks like or resembles in appearance the person charged to be the father is not admissible; and in People *v.* Carney, 29 Hun, 47, it was held error to allow the district attorney to ask the mother, as a witness, to look at the child, then in court, and state what the color of its eyes was. In the words of the pastoral poet, *nimium ne crede colori.*

It seems that at any age such evidence is extremely unsafe and untrustworthy. The books are full of well-authenticated cases of mistaken identity. Almost the first thing which two adult strangers do on being presented to one another is to trace resemblances in each other to others of their acquaintance. Another point in which such evidence must be regarded as unsafe consists in the fact that no two people will agree on an alleged resemblance, even in the same family. The moment a baby appears in a household the monthly nurse declares him to be the living image of his papa or her mamma, as the case may be, while on the other hand the most intimate friends of the family see no resemblance to either parent, but think the new-comer "favors" his great-uncle, or discover no likeness to anybody in particular but the vacuity and stolidity of

countenance general in the infant class. It is my belief that most infant resemblances are due to the imagination of the observers or the desire to compliment the parents. I once saw a babe which was the living image of the first Napoleon ; and if it had been born about sixty years earlier, and had been put in a basket and left at his door over night, nothing would have convinced the jealous Josephine that her husband, instead of mounting barbed steeds to fright the souls of fearful adversaries, had not been capering nimbly in a lady's chamber to the lascivious pleasings of a lute, say in the apartment of Madame de Rémusat, or the Duchesse d'Abrantes, or some other of the fool-women of the Empire. There can be no doubt that "heaven lies about us in our infancy." There would be as much sense in tracing a resemblance between the voice of the child and that of the putative father as between their faces, or rather more, in fact, — for the voice of infants is frequently more mature than the face. Such evidence is not good even *prima facie*.

THE LYNCH-LAW TREE.

ON the lawn of one of the most charming and hospitable homes in southern Virginia stands the old walnut-tree on which lynch law was first administered. It bears the marks of extreme age, and is a picturesque object in the landscape.

A part of it is dead ; but the rest is vigorous still, and bears its annual crop of nuts. It is not often the case in America that the home and lands of our ancestors are found to-day in possession of their descendants. So it is, however, with this interesting manor situated in a beautiful valley in Campbell County, Virginia, twenty miles south of Lynchburg. The valley is enclosed on three sides by fertile hills, and bounded on the south by tall and picturesque cliffs, at the foot of which flows the Staunton River, hurrying on to deliver its tribute waters to the Dan. Avoca is the poetic name by which the old Lynch place is now known, and was suggested by Moore's melody, "The Meeting of the Waters." It is singularly appropriate, since this rich and smiling valley where the Otter and Staunton Rivers meet, after winding downward by crags and peaks from their source in the Blue Ridge, is truly another Vale of Avoca. The name was bestowed by a granddaughter of the Col. Charles Lynch of the Revolution.

It is not generally known that the original lynch law never sentenced an offender to death, but only to be whipped. The term has been ascribed to more than one source. Modern dictionaries and some of the encyclopædias have treated it as worthy of notice. Webster, Worcester, and other lexicographers ascribe the origin of lynch law to a Virginia farmer named Lynch ; and the traditions and records of the Lynch family agree with the more formal references found in historical works. There is no room for doubt that the term "now become a part of the English language and accepted of all men" was derived from that fearless and honored soldier of the Revolution, Col. Charles Lynch, whose sword hangs on the wall of the lofty hall at Avoca. But that Colonel Lynch should be reputed the father of lynch law, in the modern acceptation of the term, is quite another matter, and would be utterly unjust to him. In the year 1780, when the fortunes of the patriots were at low ebb, the Scotch settlers and Tories of Piedmont,

Va., conspired to crush the "rebellion." Their efforts were thwarted by the courage, vigilance, and energy of Col. Charles Lynch, Capt. Robert Adams, and Capt. Thomas Calloway, aided by Col. William Preston, all Virginians of wealth and influence. Colonel Lynch, being Chief-Magistrate, had the powers of a judge. He was

THE LYNCH-LAW TREE.
From a Sketch from Nature.

a man of striking individuality, and "vividly impressed the popular imagination, — so eminently a leader that he naturally and easily took his place at the head of the Whig party in his section of the country."

These gentlemen, ardent patriots, kept a sharp watch upon the loyalists; and when one was discovered playing into the hands of the enemies of Washington, he was seized, taken to the residence of Colonel Lynch, examined by a court composed of the gentlemen above named and others, and if found guilty, tied to the walnut-trees, given thirty-nine lashes, and made to shout, "Liberty forever!" After this he was set free, with words of counsel and admonition that left him a wiser if not a better man. One of the Tories arrested was found to have papers of importance to the royalists concealed in the hollow of a square bedpost. He received the usual castigation, was given a house to reside in on the premises, and forbidden to leave them on pain of severer punishment. These orders he strictly obeyed. The refrain of a popular song of that section was, —

"Hurrah for Colonel Lynch,
Captain Bob, and Calloway!
They never let a Tory off
Until he shouts for Liberty."

The manner of procedure cannot be said to be lawless and unauthorized, and was considered by most amply justified by the disturbed condition of the country resulting from the repudiation of allegiance to the English Government. The prisoner was brought face to face with his accusers, heard the testimony against him, and was permitted to call witnesses and be heard in his own defence. If acquitted, he was let go, often with apologies and reparation. If found guilty, he was punished as before stated, and made to recant his disloyalty. After the Revolution the Legislature of Virginia found it necessary to protect these gentlemen by special enactment from the civil suits brought against them for taking the law into their own hands. (See Hanning's Statutes at Large, vol. xi. pp. 134, 135.) In later times the mild sentence of thirty-nine stripes gave place to the sentence of death, and many lives have thus closed without ceremony; but no one ever came to his death at the hands of the gallant Colonel Lynch, except on the battlefield. No ghastly body ever dangled from the bare old tree that has battled with the storms of one hundred and fifty years. — *Philadelphia Times.*

JAPANESE CAUSES CÉLÈBRES.

I.

IN the first half of the last century, in the great city of Yedo, lived Oka, Lord of Echizen, a judge whose name is acknowledged to be the most famous on the long roll of Tokugawa judges, and whose memory is still perpetuated in tales and traditions dear to the heart of the romance-loving populace. Oka was fortunate enough to live under a Shogun who was himself a brilliant administrator and knew the value of able servants; and for thirty-five years Oka continued to dispense justice, first in the City Court of Yedo, and then as one of the two Ecclesiastical Magistrates, whose jurisdiction was national. It is as a trial judge that his fame is greatest. A wonderful knowledge of human nature, the keenest insight into motives, tact to attain his purpose by indirection when necessary, and, above all, a sympathy for the people unusual in a feudal official, and a rough-and-ready justice appealing to common-sense,— these made him the idol of the people of Yedo, and the personification of judicial wisdom; and there was, to their minds, no case too difficult for Oka's genius to unravel. The records which have come down to us are encumbered with popular tradition. We could not separate the tradition, if we would; but perhaps it is as well, for if the celebrated cases which are still so eagerly read are not in every respect records of actual events, they at least represent what the Japanese populace regarded as the ideal qualities of a last-century judge.

The first tale to be told is that of

THE FLAYED HEAD ON THE GIBBET.

I.

There was living in the city of Osaka, about the year 1740, a worthy burgher, by name Hikobei, who followed the occupation of a dealer in art objects. Lacquer boxes, ivories, bronzes,— these products of the cunning artisans of Kyoto and Osaka were the subjects of his commerce. In the year above-mentioned the times had gone hard with Hikobei. None of his ventures (for his sales were few and he made his profits by investments in promising objects of special rarity and value) seemed to prosper. Towards the close of the year his sanguine heart was excited by the prospect, held out to him by a friend, of retrieving his fortunes in the great city of Yedo, where the feudal luxury of the *daimyo* who congregated there offered a never-failing market for the wares in which Hikobei dealt. His wife and the two boys, of course, must be left behind, in the care of friends, until it should be seen whether the new enterprise was to be successful; and these arrangements made, Hikobei started for the feudal capital, trudging all the way along the dusty thoroughfare known as the Tokaido,— for even if his means had permitted him to ride, the law of his country would not have allowed a merchant-commoner the luxury of a sedan and bearers.

As luck would have it, Hikobei's opening proved a good one, and customers began to appear in the most unexpected quarters. He was beginning to think of sending for his wife and children, who had felt the separation keenly, when one day an interruption came to all his affectionate plans. Not very far from the Ryogoku Bridge, the great bond which unites the two heart-valves of Yedo's throbbing life, was the house of an old lady with whom he had become very intimate since his arrival in Yedo. He had first made her acquaintance during a shower of rain, when a pleasant voice had called him in to take shelter awhile as he stood under the dripping eaves trying in vain to escape the drenching drops. The motherly old lady soon won the heart of the lonesome Hikobei, and mutual services cemented the friendship

thus begun. His new friend was the aunt of a certain Ichiyemon, of the Yone House,[1] but lived alone, with only a maid-servant. She belonged, like Hikobei, to the class of tradespeople; but she had managed to save a small sum which, with what her husband had left, gave her a comfortable subsistence. But her years were failing, and she had already laid aside the contribution to her family temple which should secure a mass for her soul after her death. On the day abovementioned Hikobei needed money. He had in sight an excellent investment. In fact, he had agreed to buy the object (on which he hoped to double the sum laid out), and had paid 10 *ryo* as bargain money. He needed 90 *ryo* more, and it was due that night, but as yet he had not been able to raise so large a sum.[2] Determining finally to avail himself of the friendship of the old lady, he asked her for the loan. She shook her head regretfully, and told him that she had no ready money of such an amount. But as Hikobei sadly turned to leave, his visions of profit now melting into air, the generous woman's heart was moved. She called him back, and, going to her cupboard, she took out her mass-money, carefully wrapped in a cloth, and laid it before him. "I was keeping this," she said, "to buy masses for my soul; but you have been my good friend, and since you need it, you shall have it, and shall pay me when you can." That Hikobei overflowed with thanks is to describe his feelings inadequately. The money was taken to the place of his purchase, and the transaction speedily consummated.

II.

That night the old lady's maid-servant spent with a friend in the nephew's house. When she returned next morning, she found that the door was open, and going in hastily there met her sight the body of her mistress, covered with blood and lying motionless on the bed. The neighbors were soon alarmed by her cries, the nephew Ichiyemon arrived, and they found that life was indeed extinct. The murder was apparently the work of a robber; for when the nephew looked eagerly for the mass-money, it was not to be found. "Who knew of this money, outside of the family?" asked Ichiyemon of the maid. "No one, I think," she answered; "unless it be Hikobei, who came last night, by the way, to borrow some money from your aunt." Jealousy, perhaps, aided Ichiyemon in coming without further hesitation to the conviction that Hikobei was the murderer; and he took himself forthwith to Oka, Lord of Echizen, then judge of the City Court, and laid the whole story before him. Nor did he fail to name Hikobei as the undoubted criminal.

Thus it happened that as Hikobei was returning that morning, full of pleasure at his investment, and of speculations upon its profit, his dreams were rudely interrupted by two policemen who had been sent by Oka to arrest him; and in spite of protestations he was speedily taken, without any word of explanation, before the famous judge whom all knaves feared and all honest men trusted. Hikobei found in the court-room the nephew Ichiyemon, the maid-servant, and some of the neighbors. Ichiyemon first told his story again, and ended with accusing Hikobei as the guilty one. "But," said Oka, "Hikobei and your aunt were, it seems, the best of friends. It is a most unlikely thing that he should repay such trust and such benefactions with murder. Is there no one else on whom your suspicions fall?" Ichiyemon answered in the negative, and again demanded, with some vehemence, the death of Hikobei. Oka turned to Hikobei and said, "How could you do such a brutal act as to kill your benefactress?" Hikobei declared, by all that was sacred, that he was innocent. "Is it true that you visited her yesterday?" asked Oka. Then Hikobei told him the

[1] Every commercial business of any consequence had a firm or house name, such as Ise House, Echigo House.

[2] A *ryo* could then buy what 5 *yen* (or dollars) will buy now; and if we make the allowance for the difference in prices between Japan and America, we may say roughly that 90 *ryo* represented what $2000 would to us.

whole story, beginning with his misfortunes in Osaka, and ending with his arrest on that morning. Through the whole of the recital Oka, as was his custom, had watched him keenly with half-shut eyes, apparently almost asleep; and by the time the unfortunate man had ended, the master of human nature had made up his mind that Hikobei was innocent. To save him, however, seemed quite impossible. The circumstances were completely against Hikobei; not one jot of evidence, except his character, appeared in his favor; and the relatives of the dead woman were clamoring for his death. The custom of the times, however, required that no one should be put to death before confessing, and Oka ordered Hikobei to be put to the torture. Innocence was no proof against torture, and it ended by a full confession of guilt by Hikobei. Sentence of execution was passed; he was beheaded in the prison, and his head was exposed on a pole at the usual place, Suzukamori. Singularly enough, the face of the dead man had been disfigured by the removal of the skin.

III.

Meantime there was great grief in Osaka. The last letter of Hikobei had told of his hopes for their reunion, and news of the arrangements was daily expected. But for many weeks no news came, and at last, worse than no news, came the rumor of the father's trial and execution. But the faithful wife never believed it; and the elder boy, Hikosaburo, a brave lad, at last resolved to go to Yedo and seek out his father. Entreaties and tears of the mother availed nothing, and the middle of January found him in Yedo. He first went to the execution place to see if his father's head was there, but the flaying of the face made recognition impossible. Lingering there till dusk, he heard footsteps approaching, and fearing to be questioned by some chance policeman as to his errand there, he crouched behind a tree and saw two figures pass him. They were laborers, judging from their dress; and one was saying, "What a pity that was about Hikobei! He never deserved death." "No, you are right; he was innocent," said the other. Hikosaburo started. Surely these men could enlighten him as to his father's fate. He followed them to their house, and told them his name and his story, and begged them to disclose all they knew. The honest fellows, Sukeju and Gonzo by name, were much touched by the young lad's tale, and their information was soon put at his service. It seemed that on the night of November 17, the night of the old lady's death, as they were returning home very late, they saw in the moonlight a young man of the neighborhood named Kantaro washing a sword in a fire-bucket near the gate. The air was chill, and they passed by rapidly; but it seemed a strange business for Kantaro to be about at midnight, and, as they went out in the morning, they looked into the fire-bucket, and saw that the water was of a blood-red tinge. They thought that it was some quarrel which Kantaro had perhaps been engaged in; until at the bath-house, shortly afterwards, they heard the news of the old lady's murder and of Hikobei's arrest. They never spoke to outsiders of what they saw, but the private conviction had always remained with them that Hikobei was innocent, and Kantaro the murderer.

The laborers proved good friends to the Osaka youth, and in a short time the matter was again laid before Oka. The police were sent to arrest Kantaro; but when the fellow was brought into court and questioned, he denied all knowledge of the crime. His wife, however, finally disclosed such damaging evidence of his guilt, that he broke down completely, and confessed to the killing. When passing along the street he had seen the old lady showing the money to Hikobei, and he had then entered during the night and killed her, for money which he never got.

The real culprit discovered, it only remained to announce the news to the other parties interested. Two days later the judge

summoned to court the filial youth Hikosaburo, the nephew Ichiyemon, and the two laborers. When all had appeared, he called them up and said to Ichiyemon: "When your aunt was killed you demanded the execution of Hikobei as the murderer. But his son has now come up from Osaka, and has brought to me complete proof of his father's innocence! The real murderer was not Hikobei, but a man named Kantaro. I now proclaim that Hikobei was entirely innocent of the crime of which he was accused." At these words Hikosaburo could not restrain his emotion. The clearing of his father's name had at last been accomplished, and he poured out his thanks to the judge. "One thing only I ask," he continued, "that I may have the body of my dear father given back to me, to be taken to his home in Osaka, and buried where our ancestors lie." But the others did not take it so easily. The thought of the innocent man, now gone beyond the possibility of pardon or recall, excited the laborers and their friends who were present, and they began to murmur remarks not at all favorable to the abilities of Oka. "It is a pity," said one, "that the judge should have been so hasty in condemning to death a man who now proves to have been quite innocent." "Kantaro is punished," said another, more loudly; "but is there no punishment for the official who kills an innocent man?" Oka in vain ordered silence. The popular feeling had been aroused by the miscarriage of justice, and the friends of the innocent victim did not restrain their utterances. Finally Oka made a sign, and before long there appeared at the door a pale figure who advanced between two attendants to the group before the judge. "Hikosaburo," said Oka, "this is the reward which I offer for your noble conduct in coming to rescue your father." Hikosaburo turned. It was his father. The two rushed into each other's arms and shed tears of joy, while the others were dumb with amazement. Oka then told the secret. "When the old lady was killed," he said, "her nephew insisted that the guilty person was Hikobei. Of his arrest, torture, and confession, you all know. But I never once believed that Hikobei was the criminal. His confession, I knew, was made to obtain release from torture. So I determined to save him. A convict had just died in prison; I ordered his head cut off and flayed, and exposed it at Suzukamori, instead of Hikobei's. Meanwhile he lived quietly in the prison, until some proofs of his innocence should turn up. You all thought that he was executed; but here he is, thanks to the noble conduct of his son, and the friendly help of Sukeju and Gonzo, and my conviction of his innocence has been justified. Some of you just now angrily reproached me for my seeming injustice. But I shall take no notice of your disrespectful words, for I know that you were much excited, and on the whole I am glad to have in my town citizens who are not afraid to speak up when they see an innocent man suffer." With these words he ordered a reward to be paid to the two laborers, while they, now ashamed of their mistrust of the omniscient judge, bowed low and expressed the humblest apologies. When Hikobei and his son left the court and the news of his vindication spread through the city, the people were full of the praises of Oka and his wonderful penetration and wisdom; and the case has ever since been known as "The Flayed Head on the Gibbet."

SKETCHES FROM THE PARLIAMENT HOUSE.

VI.

THE LORD JUSTICE CLERK.

By A. Wood Renton.

THE Right Honorable John Hay Athole Macdonald, Lord Kingsburgh, who succeeded Baron Moncrieff as Lord Justice Clerk of Scotland in 1889, is and has long been a notable figure in Scottish public life. His father was a Writer to the Signet in Edinburgh. The future Lord Justice Clerk was born in 1836, was educated at Bâle, and afterwards at Edinburgh University, and was admitted to the Scotch Bar in 1859. He soon became a popular advocate; juries were seldom able to resist his good-humored eloquence, and he handled witnesses with considerable skill.

The hard and fast distinction — that prevails in Great Britain and Ireland — between the two branches of the legal profession is frequently, and not improperly, justified on the ground that it renders possible the cultivation of what may be called the judicial faculty. An English barrister or a Scottish advocate does not, at least in the first instance, come into contact with his client; the latter is to him a purely impersonal being, — an A. B. who alleges that he is entitled to some legal or equitable relief against a C. D. He is able therefore to advise without being misled by feeling, and to be first his client's judge and then his advocate. Obviously this kind of professional work constitutes a valuable training for the bench. In England it is practically the only preliminary judicial training that a barrister receives. A recordership may give him experience in the trial of criminal, but it is useless as an education in the trial of civil, causes; a deputy county court judgeship confers no opportunities for learning criminal procedure; a revising barrister has only to do with election law; the experience of a legal arbitrator is chiefly commercial; and the stern competition at the English Bar usually prevents any one man from equipping himself for judicial life by holding these appointments simultaneously or in succession. Now the Scottish advocate is, in the important matter under consideration, more highly favored than his learned brother south of the Tweed. Scotland is divided into "shires" or counties, each of which is presided over by two judicial officers, — the sheriff-substitute and the sheriff. The sheriff-substitute is a *puisne* judge: he resides in the county over which he has jurisdiction, and is not permitted to combine practice at the bar with the exercise of his judicial functions. The work of the sheriff, on the other hand, is principally appellate; his headquarters are in Edinburgh, and he retains his private practice in spite of his official position. Now the jurisdiction of the sheriff courts of Scotland is both civil and criminal, and — as the most superficial study of the public statutes will satisfy any one — it is far-reaching in extent and important in character. The tenure of a sheriffship, therefore, gives the Scottish advocate wide judicial experience without withdrawing him from any of the activities of forensic life. Lord Kingsburgh had quite enough practice at the bar to keep his mental armory bright; and he had at the same time the good fortune to hold two important sheriffships, — that of Ross Cromarty and Sutherland from 1874 to 1876, and that of Perth from 1880 to 1885. It has been said that "the sheriff of Perthshire never dies." Macdonald proved to be no exception to the general rule. In 1885 he was made Lord Advocate by the Conservative Government (he had already held

for a short time — 1876–1880 — the office of Solicitor-General for Scotland), and in the same year he entered the House of Commons as M. P. for Edinburgh and St. Andrews Universities. He had previously made a hopeless attempt to win the heart of Mid-Lothian itself. The settled Liberalism of the Scottish capital rendered Mr. Macdonald's suit worse than desperate, but the constituency, though it rejected the proffered political "marriage," was delighted with the candidate's "manner of wooing," and his success in carrying the representation of the universities against Mr. Erichsen, the eminent surgeon, gave pleasure even to those whose principles had compelled them to vote against him, or at all events to abstain from voting in his favor.

From 1885 till his promotion to the Lord-Justice Clerkship in 1889, Macdonald held the office of Lord Advocate without interruption, the brief interregnum of the Home Rule Ministry being scarcely worthy of notice. The House of Commons has had many an abler, but no more popular, law officer in recent years. Inglis and Moncrieff were great lawyers and great politicians. Mr. Balfour, Baron Moncrieff's son-in-law, who was Lord Advocate in two of Mr. Gladstone's governments, was at least a great lawyer. Macdonald was great neither in politics nor in law. But his imperturbable good-humor, his excellent common-sense, his tact, his business qualities, his kindly feelings, and his sterling character won for him and enabled him to retain the esteem of the most critical assembly in the world.

During his tenure of office he had the honor to "pilot" through the Lower House one of the most salutary measures ever enacted by Parliament. The adjective criminal law of Scotland had long been cursed by technicality. No criminal indictment was ever presented to a jury without giving rise to a crop of "objections to the relevancy," and technical escapes from justice were by no means uncommon. The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), rendered such miscarriages difficult for the future. Our readers will get some idea of the defects which this statute aimed at removing from the following provisions: (1) "A person accused may be named and designed in an indictment according to the existing practice, or he may be named by the name given by him and designed as of the place given by him as his residence when he is examined on declaration, and it shall not be necessary to set forth any other name or names by which he may be known, or any other address or designation" (sec. 4). (2) "It shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime" (sec. 5). (3) "When in any indictment two or more persons are charged together with committing a crime, it shall not be necessary to allege that 'both and each or one or other' or that 'all and each or one or more' of them committed the crime; but such alternatives shall be implied in all such indictments" (sec. 7). (4) Then follow a variety of sections providing that the words "guilty actor or act and part" (sec. 7), and "wilfully, maliciously, wickedly," etc. (sec. 8), shall, where necessary, be implied in all indictments, and giving the prosecutor latitude as to time and place (sec. 10), quantities, persons, things, or modes (sec. 11), and as to the description of persons, goods, buildings, money, and other property (secs. 12–14).

Macdonald, who went to the bench with the title of Lord Kingsburgh, is making an excellent Lord Justice Clerk. He is dignified, painstaking, and courteous. His knowledge is wide if not profound. But his chief characteristic is clearness. "After myself," said an eminent Scotch advocate, now a judge, "no man can put a case better than John Macdonald."

THE SUPREME COURT OF NORTH CAROLINA.

By Walter Clark.

III.

EDWIN GODWIN READE was born at Mt. Tirzah, Person Co., N. C., Nov. 13, 1812. His father, Robert R. Reade, died when the subject of this sketch was very young, leaving a widow and three young sons with small means. In early life he aïded to support the family by work on the farm, in the carriage and blacksmith shop, and in the tanyard. At eighteen years of age he started out to procure an education. As soon as he had made sufficient progress he entered the Academy of Rev. Alex. Wilson, and paid for his own preparation for college by teaching the younger boys the rudiments he had himself so recently learned; but instead of entering college he read law in 1833 under himself at home by studying the law books which a retired lawyer kindly loaned him. He received license to practise in 1835. Previous to that, at the June term of the court, when, according to the custom of the times, the candidates announced themselves, he astonished every one by declaring himself a Whig candidate for the legislature, and in a well-prepared speech arraigned the administration of President Jackson. This was certainly bold, as at the last election there had been but eleven anti-Jackson votes cast in the county. He made such an effective canvass that he was beaten by only one hundred votes. He at once attained prominence, and his rise at the bar was rapid. In 1855 he was nominated without solicitation Whig candidate for Congress against Hon. John Kerr, one of the finest orators in the State, and after a brilliant canvass was elected. He declined to be a candidate for re-election. In 1863 he was appointed by Governor Vance Confederate States Senator, and at the expiration of the appointment he was in the same year (1863) elected Judge of the Superior Court. When all offices were declared vacant in 1865, he was re-appointed by the Governor provisionally, and served as such till elected by the legislature Judge of the Supreme Court, to succeed Judge Manly. In 1866 and again in 1867 he was elected Grand Master of Masons. In 1868, when, by the terms of the new Constitution, the judges were to be chosen by the people, Judge Reade, like Chief-Justice Pearson, was nominated by both the Democratic and Republican parties, and was elected without opposition. He filled the duties of that office till the expiration of his term, Jan. 1, 1879. He was then elected President of the Raleigh National Bank, which was somewhat embarrassed. Like Chief-Justice Ruffin under similar circumstances, he speedily redeemed the credit of the bank. He remains to-day its efficient head. He was chosen almost unanimously a delegate to the State Convention of 1865, and was elected its President by acclamation. This was the Convention called to readjust our relations with the Federal Government. On taking the chair Judge Reade made a memorable address beginning: "We are going home," which attracted wide attention. With the exception of one term in Congress, Judge Reade has never taken an active part in politics. On Mr. Lincoln's election Hon. Jno. A. Gilmer, then in Congress from North Carolina, wrote to Judge Reade at the instance of Mr. Seward, to know whether he would accept a seat in the Cabinet. This he declined, but strongly urged Mr. Gilmer to accept.

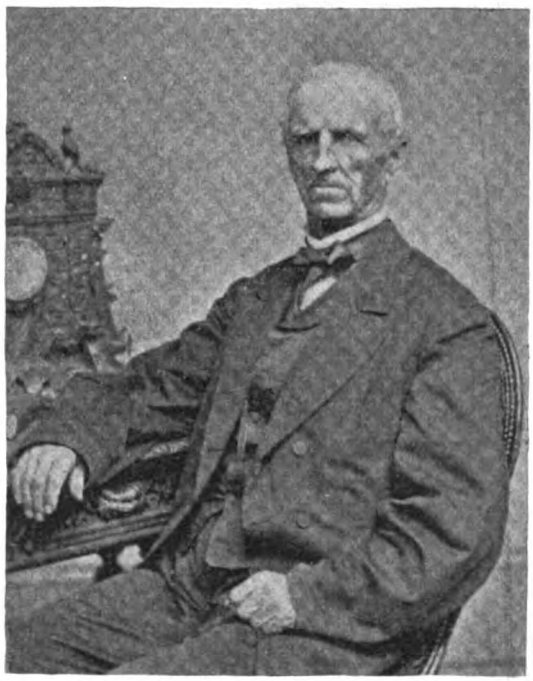
It is said of him when in his prime that in the history of the State he never had his superior as an advocate before a jury. He speaks with such logic and simplicity as to give eloquence and fervor to his speeches,

which persuade and convince. His methods at the bar are fitly described in the following extract from his address before the State Bar Association since his retirement from the bench, in which, after speaking of his frequently sitting up all night to prepare a case for trial, and his contempt for counsel who pleaded lack of preparation, and his indulgence to the opposite side before trial whenever not to the prejudice of his own client, he says: "My practice was to allow a brother to supply defects, correct errors, and do almost anything he desired to do *in fixing up his case before trial;* but when the trial commenced and swords were drawn, I threw away the scabbard and *fought for a funeral.*" He was a caustic and trenchant writer. Many of his articles and addresses have been published in pamphlet form, and merit preservation by being collected and published as a volume.

THOMAS SETTLE.

He sat on the Supreme bench thirteen years. His opinions are usually short, always terse and clear. They are to be found in the nineteen volumes from 61 N. C. to 79 N. C. inclusive. Among his opinions may be noted: Wood *v.* Sawyer, 61 N. C. 251, the famous Johnston Will case in which the ablest counsel summoned from all parts of the State appeared, and in which was involved the validity of the will of James C. Johnston, disposing of the largest estate in North Carolina. The case was tried below by Chief-Justice Merrimon, then upon the Superior Court bench, and the opinion affirming the judgment on appeal is by Judge Reade. The issue was the sanity of the testator. Graham, Bragg, Vance, and Eaton appeared for the caveators; and Moore, Smith, Heath, Gilliam, Conigland, Phillips, and Battle *contra.* Such an array of legal talents was never before or since, in the history of this State, assembled in one case. In the well-known cases of Jacobs *v.* Smallwood, 63 N. C. 112, Hill *v.* Kesler, 63 N. C. 437, and others, he held that the Homestead exemption was valid against debts created prior to the adoption of the Homestead law. In one of these cases (Jacobs *v.* Smallwood), he says that the homestead is secure to the owner against all comers, "from turret to foundation stone." This ruling was afterwards reversed, however, by the United States Supreme Court in Edwards *v.* Kearsey, 96 U. S. 595. In Sutton *v.* Askew, 66 N. C. 172, it is held that the act restoring the common law right of dower does not apply to land acquired prior to the passage of the act. People *v.* McKee, 68 N. C. 429, decides that the Governor, and not the legislature, has the power of appointment to office. State *v.* Jones, 69 N. C. 16, rules that the court has no power to grant a rehearing in a criminal case. Green *v.* Castlebury, 70 N. C. 20, settled the practice as to trials by referees. State *v.* Parrott, 71 N. C. 311, held that any one has a right to tear down an obstruction (here a railroad bridge) to the free navigation of a river. State *v.* Elwood, 73 N. C. 189, holds that in trials for murder when

the killing is proven or admitted, malice being implied, if the defendant fails to show any matter of excuse or mitigation, it is not error to tell the jury that if they believe the evidence it is their duty to find the defendant guilty of murder. People *v.* Staton, 73 N. C. 546, decides that the clerk of a court appointed by a *de facto* judge, who is himself afterwards ousted by the courts, has a superior title to one appointed by the *de jure* judge after judgment in his favor and entrance into office under it. In Lee *v.* Dunn, 73 N. C. 595, it is held that a requirement that a sheriff shall produce a receipt for taxes before induction into office for a second term is constitutional, and imposes no additional qualification for office. Grady *v.* Comm'rs, 74 N. C. 101, held that the creation and alteration of townships was left with the legislature. State *v.* Miller, 75 N. C. 70, discusses the statute of this State forbidding the judges of the trial courts from limiting counsel as to the length of their speeches.[1]



N. A. BOYDEN.

In State *v.* Overton, 77 N. C. 485, it is held that a defendant in a criminal action has no constitutional right to be present in the Supreme Court on the argument of his appeal. State *v.* Hoskins, 77 N. C. 530, decides that a revenue officer indicted for an offence committed under color of his office has a right to remove the action into the Federal court. Perry *v.* Shepherd, 78 N. C. 83, discusses the writ of Prohibition. State *v.* Driver, 78 N. C. 423, discusses "excessive punishment," and is a case that once attracted considerable attention. Holiday *v.* McMillan, 79 N. C. 315, considers the separate estates of married women. In a "Note to the Profession," 68 N. C. 133, Judge Reade recommends sending up on appeal only so much of the record as is really necessary, and Pearson, C. J., does the same in a note on page 166 of the same volume.

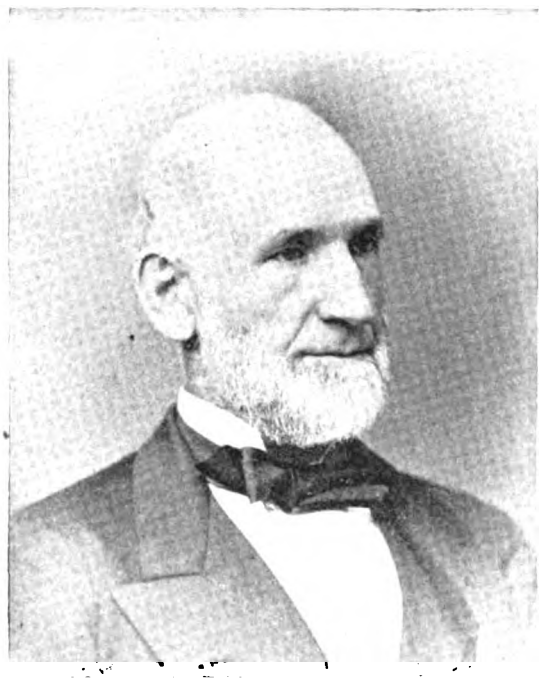
Judge Reade's first wife was Miss Emily Moore, of the family of General Moore (of Revolutionary fame) and of Bishop Moore. She died in 1871, and he subsequently married Mrs. Mary E. Parmelee, widow of Benjamin J. Parmelee, of Washington, N. C. Judge Reade has no children by either marriage. He is a consistent member of the Presbyterian church, which he joined early in life, and of which he has been a ruling

[1] From the remotest time and in all countries one of the recognized duties of the judge has been to economize the time of the courts in all proper respects including a due supervision of the length of argument by counsel. Iowa and North Carolina are the only States which have departed from this rule by statutes which forbid the trial judge from limiting either the number or length of speeches. In Iowa a legal journal says (possibly jocularly) that when counsel begin the argument, the judge goes off to a game of billiards. It may be doubted if the innovation has been of any good effect in North Carolina; for judges have never been prone to restrict argument unduly, while the existence of the power and duty, in proper cases, to do so prevented abuse. The statute has been thought by some to lengthen materially the terms and expense of our courts without corresponding benefit. It is certain that there is now greater opportunity for abuse, as the lawyer is not responsible to the public for the conduct of the court as the judge was. The statute, however, does not extend to the Supreme Court, which is protected by the Constitution from legislative interference.

elder more than thirty-five years. He is charitable and unostentatious. He has risen by his own exertions, and by dint of talent and a determination to succeed.

The bench elected to go into office at the end of Judge Reade's term was Democratic, and reduced by constitutional amendment to three in number. He was succeeded by Judge Thomas S. Ashe.

William Blount Rodman was born at Washington, N. C., June 29, 1817. The founder of the Rodman family was John Rodman, a Quaker, who went from Ireland to Barbadoes in 1686. His sons emigrated to Rhode Island. Judge Rodman's father was a native of New York. He removed about 1800 to this State, and married a daughter of John Gray Blount, to whose care Judge Rodman was left by the early death of both his parents. He graduated at the University with the first honors in 1836. He read law with Judge Gaston, and was licensed to practise in 1838. He soon acquired a large practice. Among numerous important cases in which he was of counsel, he appeared for the defendant in the famous trial of Geo. W. Carrowan for murder. He entered the war as captain of a company, and was in the battle of Newbern, 14 March, 1862, and went with Branch's Brigade to Virginia as quartermaster. He was soon appointed, by President Davis, presiding officer of a military court, with the rank of colonel. He served in this capacity till the close of the war. His considerable estate was almost entirely destroyed by the results of the great civil conflict, and he began life anew.



W. P. BYNUM.

He was elected to the Convention of 1868. Many of the most important provisions of the Constitution adopted by it are due to his pen or his active support. To him is especially due the credit of the provision that the tax on $300 of property shall never exceed the tax on the poll. The object of this clause, known as the "equation of taxation" clause, is apparent, and originated with him. It was not in any other State Constitution. Messrs. Rodman, Tourgee, and Victor Barringer were the Commissioners who prepared and reported to the legislature our present Code of Civil Procedure. Judge Rodman also prepared a Code of Criminal Law and Procedure. Unfortunately this latter was not adopted. He also drafted the Landlord and Tenant Act, the Act concerning Marriages, and the Drainage of Swamplands Act, and many others. In 1868 he was elected by the people a Justice of the new Supreme Court. His opinions will be found in seventeen volumes, 63 N. C. to 79 N. C. inclusive. The judicial term of office is eight years, but it was held (Loftin *v.* Sowers, 65 N. C. 251, and opinion 64 N. C. 785) that the term of the judges first elected ran for eight years after the next general election, which was two years after the adoption of the Constitution. The effect was to make the term of the judges first elected ten years. Judge Rodman served the full term of ten years, which expired Jan. 1, 1879. He and

Judge Reade were the only two of the five judges elected in 1868 who served till the end of their terms.

Judge Rodman was one of the best read men who have sat upon our Supreme Court. He wrote a large number of most important opinions while on the bench. These are too numerous to be all referred to. As specimens of his style and modes of thought, the following may be noted: Robbins ex parte, 63 N. C. 309, as to the law of contempt. It is there held that the court can tax the costs of a case against counsel who has been guilty of gross negligence. Hyman *v.* Devereux, 63 N. C. 624, decides that if a bond secured by mortgage be renewed, the new bond retains the same security. Norfleet *v.* Cromwell, 64 N. C. 1, is an instructive opinion upon covenants running with the land. McConnell *v.* McConnell, 64 N. C. 342, gives the history of the doctrine of color of title in North Carolina. Simmons *v.* Wilson, 66 N. C. 336, denies the right of county commissioners to levy a tax exceeding double the State tax, except for a special purpose and when authorized by the legislature. Pullen *v.* Comm'rs, 66 N. C. 361, holds the right of taxation is unlimited, except as prescribed by the Constitution. In Turner *v.* R. R., 70 N. C. 1, the decision is that when a free pass for life is given to one by vote of the stockholders, the pass is a mere license which the company may revoke at their pleasure. Pippen *v.* Wesson, 74 N. C. 437, holds that a married woman has no power to contract a debt, or enter into an executory contract, even with the written consent of her husband, unless her separate estate is charged with it, either expressly or impliedly, by its being for her benefit. London *v.* Headen, 76 N. C. 72, is an unusual case, not likely to occur often, since it enforces the collection of a penalty against a party for refusing an office. Warlick *v.* White, 76 N. C. 172, is as to the legitimacy of children born in wedlock, and the right to exhibit the child to the jury. Branch *v.* R. R., 77 N. C. 347, is an instructive opinion upon the exercise of the police power of the State over common carriers, and the mode of computing time in penal statutes. In Miller *v.* Miller, 78 N. C. 102, an action for divorce, his opinion received at the time some adverse criticism, caused probably even more by the tone of the opinion than by the conclusion he reached. In London *v.* Wilmington, 78 N. C. 109, and Gatlin *v.* Tarboro, Ib. 119, is discussed the matter of town taxation. In Oldham *v.* Kerchner, 79 N. C. 106, and Lewis *v.* Rountree, Ib. 122, very full consideration is given the rules as to the measure of damages. State *v.* Swepson, 79 N. C. 632, holds that a verdict of not guilty procured by the fraud or trick of the defendant is a nullity, and the defendant can again be put on trial for the same offence.

W. T. FAIRCLOTH.

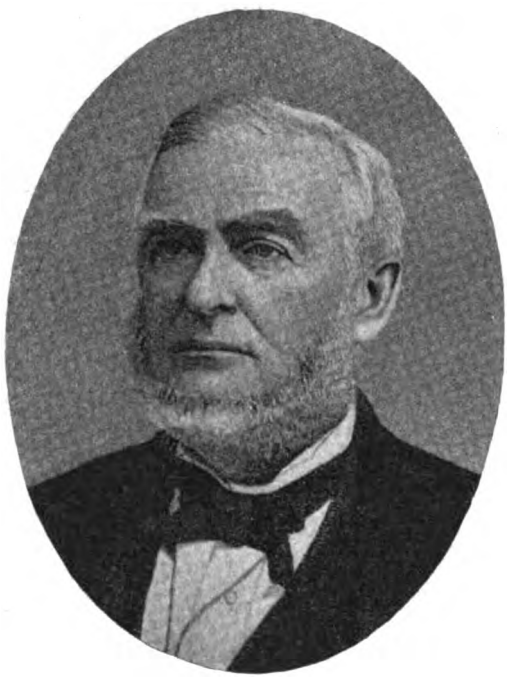
Judge Rodman has always been a student. His opinions are valuable and instructive. He spent the greater part of a long life —

"Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances."

The profession and the public are indebted to him for his valuable aid in introducing the reformed system of practice and for many useful statutes. He still lives at Washington, N. C., and practises law in partnership with his son.

In 1858 he married Camilla, daughter of Wiley Croom of Alabama. She died in 1887, leaving six children, one of whom, Capt. W. B. Rodman, Jr., is a prominent lawyer of Washington, N. C.

The Democratic party in 1878 having elected its nominees for the bench, Judge Rodman retired at the end of his term, Jan. 1, 1879, and was succeeded by John H. Dillard.



W. N. H. SMITH.

Robert Paine Dick was born at Greensboro, N. C., Oct. 5, 1823. His father, Hon. John M. Dick, was Judge of the Superior Court nearly thirty years, from 1832 till his death, in October, 1861.

Judge Robert P. Dick graduated at the University of North Carolina in 1843 with distinction. He read law with his father, and was admitted to the bar in 1845. He was United States District Attorney for North Carolina from 1853 till the acceptance of his resignation in April, 1861. He was a candidate for elector on the Douglas ticket in 1860. He was a member of the State Convention of 1861, and signed the Ordinance of Secession. He was State Senator from Guilford, 1864-65. In May, 1865, he was appointed by President Johnson United States District Judge for North Carolina, but resigned in two months and before qualifying, being unable to take the "iron-clad" oath. In March, 1867, he was a member of the Convention that organized the Republican party in this State, and in April, 1868, he was elected Justice of the Supreme Court. In June, 1872, he resigned, after a service of four years, upon his appointment by President Grant as United States District Judge for the newly created Western District of North Carolina, which position he still fills.

His opinions will be found in four volumes, from 63 N. C. to 67 N. C. inclusive. They are well written, as have also been his opinions upon the United States District Court. He is fond of literature, and is probably the best biblical scholar in the State. He has delivered several admirable addresses on literary occasions which have been published in pamphlet form. He married, in 1848, Miss Mary Adams of Virginia. A daughter of his married the eldest son of Hon. Stephen A. Douglas.

Judge Dick is a pleasing speaker and writer. He has for years been a ruling elder in the Presbyterian church and a Sunday-school superintendent. He is very courteous and agreeable in his manners. He has a large circle of friends and no enemies.

Upon his resignation from the Supreme Court, his colleague, Judge Settle, who was elected with him in 1868 but who had re-

signed in 1871, was appointed to succeed him.

Thomas Settle was born in Rockingham County, Jan. 23, 1831. His father, Thomas Settle, was Member of Congress 1817–21, Speaker of the House of Commons in the State Legislature 1827–28, and Judge of the Superior Court for nearly a quarter of a century, from 1832 till his resignation in 1854.

JOHN H. DILLARD.

The subject of this sketch graduated at the State University in 1850 in the same class with John Manning and Prof. W. C. Kerr. Among his college mates were United States Senators Ransom and Pool, Governor Scales, Generals Pettigrew and Bryan Grimes, Dr. E. Burke Haywood, President Battle of the University, Rev. Dr. Thomas E. Skinner, Major Rufus S. Tucker, Oliver H. Dockery, Seaton Gales, Peter M. Hale, David M. Carter, Francis E. Shober, and many others who have since achieved prominence. He read law with Judge Pearson, with whom he afterwards sat on the Supreme Court, and was licensed to practise in 1854. He was a member of the legislature from 1854 to 1859, and was elected Speaker of the House in 1858. He was chosen elector in 1856 on the Buchanan ticket. In 1860 he was a supporter of Stephen A. Douglas, who had married his kinswoman. He entered the war in 1861 as captain of a company in the Third N. C. Regiment. At the end of twelve months' service he resigned, was elected Solicitor of his district, and served almost continuously till 1868. He was a member of the Convention of 1865; also a member of the State Senate of 1865–66, and was elected its President. In April, 1868, he was elected a Justice of the Supreme Court. He resigned after his appointment as minister to Peru, Feb. 18, 1871, and was succeeded by Hon. Nathaniel Boyden.

Judge Settle returned from Peru in 1872, was President of the National Convention of that year, which nominated Grant for a second term, and a candidate for Congress against Gen. J. M. Leach, by whom he was defeated by a narrow majority. Judge Dick having resigned, Judge Settle was, Dec. 5, 1872, reappointed to the Supreme Court by Governor Caldwell, and served till 1876. Upon his nomination that year as Republican candidate for Governor against Vance, he resigned and entered the canvass, which was one of the most notable ever known in the State. It was conceded that each party had named its strongest man. Vance was elected by 13,000 majority. Jan. 30, 1877, Judge Settle was appointed United States District Judge for the District of Florida. He held that office till his death, which occurred Dec. 1, 1888, in the fifty-eighth year of his age.

He married the daughter of Tyre Glenn. His son, Thomas Settle, has been for six years the very efficient Solicitor of the Ninth Judicial District, and was the Republican candidate for Congress in his district at the recent election. One sister of Judge Settle married the Democratic Governor and United

States Senator, David S. Reid; and another was the wife of Hon. O. H. Dockery, the Republican candidate for Governor in 1888. His brother, Col. David Settle, is a leading Democrat.

Judge Settle's opinions, when first upon the bench, will be found in 63, 64, and 65 N. C., and, during his second occupancy of the bench, in 68 N. C. to 75 N. C. inclusive. His opinions are generally short. His bias was for political, not judicial life. He merely "bivouacked in the Supreme Court in his march from one political position to another;" but he was a man of unquestioned ability, and had he turned his attention to law exclusively, he would have ranked higher as a judge. Among his opinions may be noted State *v.* House, N. C. 315, upon the larceny of animals *feræ naturæ*. State *v.* Linkhaw, 69 N. C. 214, is a singular case. The defendant had a peculiar manner of singing which convulsed the congregation with laughter; but as it was found as a fact that he sang *bona fide*, and the best he could, the court held that he was not indictable under the act for disturbing a religious congregation. The opinion is serious and short. It is a distinct loss to the world that it could not have been written by Irving Browne or Seymour D. Thompson. State *v.* Oliver, 70 N. C. 60, overrules the old doctrine that a man had a right to whip his wife (if he could) provided he used a switch no larger than his thumb, and gallantly holds that he has no right to chastise her at all.

State *v.* Collins, 70 N. C. 241, holds that the judge, being responsible for the conduct of the court over which he presides, has had, from immemorial time, the power (though rarely exercised) to guard against a waste of time by speeches of counsel of inordinate length. This decision, however, gave rise to the act of assembly depriving judges of control over the time of the courts in that respect. In Wilmington *v.* Yopp, 71 N. C., it is held that the commissioners of a town have the right to assess the cost of paving the sidewalks of a street upon the owners of the abutting property. State *v.* R. D. R. R., holds that the legislature had no power to prohibit a change of gauge by a railroad corporation. Since the subsequent decisions of the United States Supreme Court in the "Granger" and other cases, that the legislature has supervisory and police powers over all corporations, this decision would now hardly be considered authority. But the subject at that time was *terra incognita*. As it was, Judge Rodman did not sit, Judge Bynum dissented, and it was always understood that Chief-Justice Pearson was *dubitante*. Skinner *v* Hettrick, 73 N. C. 53, is an interesting discussion of the right of fishery in navigable waters. Upon his second resignation Judge Settle was succeeded by William T. Faircloth.

Nathaniel Boyden was born in Conway, Mass., Aug. 16, 1796. He was a soldier in the War of 1812. He entered Williams College in 1817. He went thence to Union College, New York, where he graduated in July, 1821. His father was a Revolutionary soldier, who died in 1857, aged ninety-four. Judge Boyden came to Guilford County, N. C., in 1822. He was admitted to the bar in December, 1823, and settled in Stokes County, near Germantown. In 1832 he removed to Surry, which county he represented in the House of Commons in 1838 and again in 1840. In 1842 he removed to Salisbury, where he resided till his death. He represented Rowan County in the State Senate in 1844, and in 1847 he was elected a member of the Thirtieth Congress. He declined a re-election, and continued in practice at the bar till raised to the bench. He attended forty-eight courts each year, and practised regularly in twelve counties. He was a member of the State Convention of 1865, and in 1868 was elected as a Republican to the Fortieth Congress. Upon Judge Settle's first resignation, he was appointed by Governor Caldwell, in May, 1871, to the Supreme Court. He was then in his seventy-fifth year. He died at Salisbury, Nov. 5, 1873, having served on the bench two years and a half. His opinions

will be found in five volumes, 65 to 69 N. C. inclusive. He was a very successful practitioner. While on the bench he was said to have been especially useful on questions of practice. He was a good lawyer, possessed a strong and cultivated mind, and was endowed with an extraordinary memory. Many of his opinions might be cited with profit. A fair specimen of his style, and his practical turn of mind will be found in Horton *v.* Green, 66 N. C. 596, which was an action for deceit and false warranty in the sale of a mule.

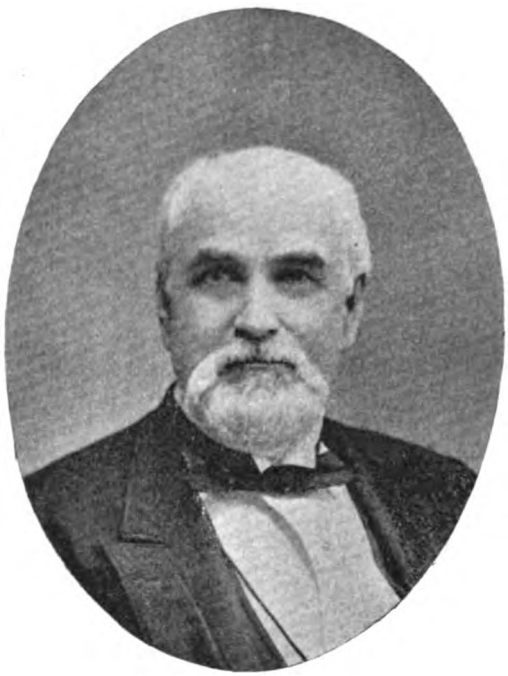
THOMAS S. ASHE.

He married in 1825, in Stokes County, Miss Ruth Martin, by whom he had several children, but left surviving him only two, N. A. Boyden of Yadkin and Jno. A. Boyden of Salisbury. After her death he married in December, 1845, Mrs. Jane Mitchell, widow of Dr. Louico Mitchell, daughter of Hon. Archibald Henderson and niece of Chief-Justice Leonard Henderson. By her he left one son, A. H. Boyden, one of the most prominent and popular citizens of Salisbury. In 1873 Judge Boyden attended the Commencement at Union College, being the fifty-second anniversary of his graduation, and found only one person who had been at college with him.

Judge Boyden was succeeded by William P. Bynum.

William Preston Bynum was born June 20, 1820, in Stokes County, N. C. He graduated at Davidson College, with the highest honors, in 1843. He read law with Judge Pearson, with whom he afterwards sat on the Supreme Court, and was admitted to the bar in 1844. His license was the last one signed by the lamented Gaston, who died so suddenly. He located in Rutherfordton, but after his marriage removed to Lincolnton. In 1861 he was appointed by Governor Ellis Lieutenant-Colonel of the second N. C. Regiment. His future associate on the Supreme Court, Judge Faircloth, was Quartermaster of this regiment; and the Major was the future General and Judge W. R. Cox. Judge Bynum was in the battles around Richmond and at the first battle of Fredericksburg. After the death of Colonel Tew, he became Colonel. Early in 1863 he was elected Solicitor and returned home. He continued in this position for eleven years, and until promoted to the Supreme Court. He was a member of the State Convention of 1865, and State Senator 1865–66, by which body he was elected Solicitor. He was appointed by Governor Caldwell, Nov. 20, 1873, to the Supreme Court bench to fill the vacancy caused by the death of Judge Boyden, and occupied the post till the expiration of his term, Jan. 6, 1879. He then settled in Charlotte to practise law; but being a man of means, has paid no great attention to business. His opinions are to be found in 70 N. C. to 79 N. C. inclusive, — nine volumes. They are clear, strong, and able. He has a vigorous mind, was a capital judge, and thoroughly impartial. He wrote many excellent opinions. The following may be quoted as specimens: Armfield *v.* Brown, 70

N. C. 27, which holds that if a reference is compulsory the objecting party is entitled notwithstanding to a jury trial of the issues arising on the pleadings, — *aliter* if the reference is by consent. In re Schenck, 74 N. C. 607, holds that the writ of Habeas Corpus does not lie for one imprisoned by the final judgment of a court of competent jurisdiction, even where the judgment is erroneous. The remedy is by *certiorari*. If such plain provisions of law were not overlooked, we should not have the scandal of subordinate Federal judges using the writ of Habeas Corpus to bring before themselves cases which should regularly go up to the United States Supreme Court by writ of error to the highest State court. Huffman *v.* Click, 77 N. C. 55, holds that medical books are not admissible in evidence, and that counsel cannot read extracts from them as part of his speech, — *aliter* as to books upon the "exact sciences." State *v.* Turpin holds that in a trial for murder the character of the deceased for violence is competent if there is evidence tending to prove self-defence, or if the evidence is circumstantial and the nature of the transaction is in doubt. This sustained the dissenting opinion of Battle, J., in State *v.* Barfield, and is now held settled law. State *v.* Morris, 77 N. C. 512, discusses the right of the legislature to repeal or modify charters and to revoke licenses. Citizen's National Bank *v.* Green, 78 N. C. 247, holds that the income from the homestead and personal property exemption and the natural increase of the latter are not exempt from execution. Doggett *v* R. R., 78 N. C. 305, is an interesting discussion of negligence and damages therefor, when proximate and when remote. Mizell *v.* Simmons, 79 N. C. 182, is an instructive case upon boundary, course, distances, and description of land. Manning *v.* Manning, 79 N. C. 293 and 300, is an action of ejectment brought by the wife against her husband. The questions involved are novel, and the opinion shows careful consideration of the subject.

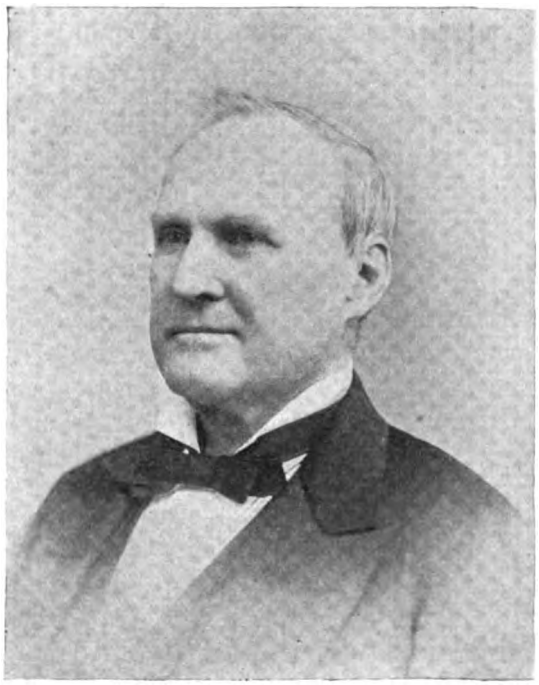


J. J. DAVIS.

Judge Bynum married the sister of Judge W. M. Shipp, and is uncle to Judge Jno. Gray Bynum, both of the Superior Court bench. He is a near relative of Senator Wade Hampton. His elder brother was John Gray Bynum, whose widow married Chief-Justice Pearson. He has one son, Rev. W. S. Bynum, of the Episcopal church. Judge Bynum had no successor to the seat he filled, as at the expiration of his term the constitutional amendment went into effect reducing the Supreme Court judges to three in number.

William Turner Faircloth was born in Edgecombe County, N. C., Jan. 8, 1829. He graduated at Wake Forest College, 1854, with distinction. His means being limited, he taught school in vacation, and thus earned a large part of the means to pay his expenses at college. He studied law with Judge Pearson, and was admitted to practice Jan. 1, 1856, and was almost immediately elected County Solicitor. In May, 1856, he

removed to Goldsboro, where he has ever since resided. During the war he was Quartermaster of the Second North Carolina Regiment; Louis Hilliard, afterwards a judge of the Superior Court, being Commissary. His future associate on the Supreme Court, Judge Bynum, and Judge W. R. Cox of the Superior Court, were field officers in the same regiment. He served the whole war, and was at the surrender at Appomattox. He was a member of the Convention of 1865, and also of the legislature of 1865–66. By this legislature he was elected Solicitor, and filled the position till all offices were declared vacant in 1868. He was a member of the State Convention of 1875, together with Justices Avery and Shepherd, who are now on the court. He was appointed by Governor Brogden, Nov. 18, 1876, to fill the vacancy on the Supreme Court, caused by the second resignation of Judge Settle. He served till the expiration of his term, Jan. 1, 1879. He then returned to the practice of his profession at Goldsboro, where he still resides. He canvassed the State in 1884, as candidate for Lieutenant-Governor on the Republican ticket, and in 1888 was the candidate of the same party for Justice of the Supreme Court, but was defeated with his party on both occasions. He is a member of the Baptist church, and a man of pure character and upright walk in life. Beginning with himself, as his principal stock in trade, he has accumulated a handsome estate. He has been a successful lawyer.



A. S. MERRIMON.

His opinions will be found in five volumes, from 76 N. C. to 79 N. C. inclusive. There may be noted State *v.* Brooks, 76 N. C. 1, which holds that carnal knowledge of a married woman obtained by fraud in personating her husband does not amount to rape. State *v.* Smith, 77 N. C. 488, decides that the burden being on the defendant, on a trial for murder, to show mitigating circumstances, if the jury are left in doubt as to the matters alleged in extenuation, the verdict should find him guilty of murder. Hymans *v.* Dancy, 79 N. C. 511, discusses excusable neglect upon a motion to set aside a judgment upon that ground. State *v.* Barham, 79 N. C. 646, is upon the requirements in an indictment for profane swearing.

Judge Faircloth has been a director in the Wil. & Weldon and A. & N. C. R. Roads. He is also a trustee of Wake Forest College and of several other institutions.

He married, in 1867, the daughter of the late Council Wooten, of Lenoir County, but has no children.

At the end of his term of office the number of Supreme Court Judges was reduced to three; hence, like Judge Bynum, he had no successor. The two senior Associate Justices were Reade and Rodman, who were succeeded by Justices Ashe and Dillard, and Chief-Justice Smith was elected his own successor.

William Nathan Harrell Smith, sixth Chief-Justice, was born in Murfreesboro, N. C., Sept. 24, 1812. His father was a native of

Connecticut, a graduate of Yale, and a physician. He removed to this State in 1802, and died in 1813.

Judge Smith graduated at Yale in 1834, and studied law at its law school. Among his college mates were Morrison R. Waite, the future Chief-Justice of the United States, Wm. M. Ewarts, since Secretary of State, Samuel J. Tilden, and Edwards Pierrepont, minister to England. He obtained license to practise law in North Carolina, but soon removed to Texas. After a stay of six months he returned to this State. In 1840 he was elected to the lower house of the legislature from Hertford, and in 1848 to the State Senate. By the legislature of that year he was elected Solicitor for his district, and was re-elected four years later, serving two full terms. In 1857 he was the Whig candidate for Congress against Henry M. Shaw, but was beaten by a few votes. In 1858 he was a candidate against the same competitor and was elected. Though this was his first term in Congress, he came within one vote of being elected Speaker, and would have been chosen, it is said, had he agreed to appoint E. Joy Morris, Chairman of the Committee on Ways and Means, in the interest of Protection. His competitors for the Speakership were Hon. John Sherman, Republican, and Thomas S. Bocock, of Virginia, Democrat. Mr. Sherman having withdrawn, Mr. Pennington, of New Jersey, was elected Speaker. Mr. Smith served out his term in Congress, and was present at the inauguration of President Lincoln. He was elected to the Confederate States Congress, and served in it the entire period of the war (1861–65). In 1865–66 he was again a member of the State legislature; and the passage of the act to permit colored people to testify was due to him, as was also the enactment of Lord Denman's act permitting parties in civil cases to be witnesses. In 1870 he removed to Norfolk, Va., to practise law. Though all his life a political opponent of Governor Holden, when the latter was by that legislature impeached and tried, Judge Smith was retained as one of his counsel. In 1872 he removed to Raleigh, and entered into partnership with Hon. George V. Strong. The law firm of Smith & Strong continued for several years. Upon the death of Chief-Justice Pearson, Mr. Smith was appointed, Jan. 14, 1878, by Governor Vance as Chief-Justice. This is the only instance in this State of a Chief-Justice being appointed who was not already one of the justices of the court. When Judge Smith was promoted directly from the bar to the chief place on the court, the four associate justices, though gentlemen of experience and learning, were all of the opposite political party to the appointing power. He was elected by the people that fall for a term of eight years. In 1886 the bench, then consisting of Smith, Ashe, and Merrimon, were re-nominated and re-elected. Chief-Justice Smith and Judge Ashe were each at the time of their re-election in their seventy-fifth year. There is probably no other case of two out of three judges of the highest court of a State being re-elected at such age. No higher compliment could have been paid their efficiency, or been more expressive of the unwillingness of the people to make changes on that court. The term of office on the Supreme Court, which was previously for life, was changed by the Constitution of 1868 to a term of eight years. But since the change there has been no instance of a judge of that court being defeated for a renomination, and none has been defeated for re-election, except in 1878, when the bench passed from the Republican to the Democratic party.

Judge Smith was an excellent advocate, a fluent speaker, a strong judge. Labor was a pleasure to him. Though for ten years of his service there were but three judges on the bench, the business of the court, representing the ultimate litigation of a million and three quarters of people, never got for a day in arrears. The work, however, was too heavy; and by constitutional amendment the number of judges was again increased to five, Jan. 1, 1889.

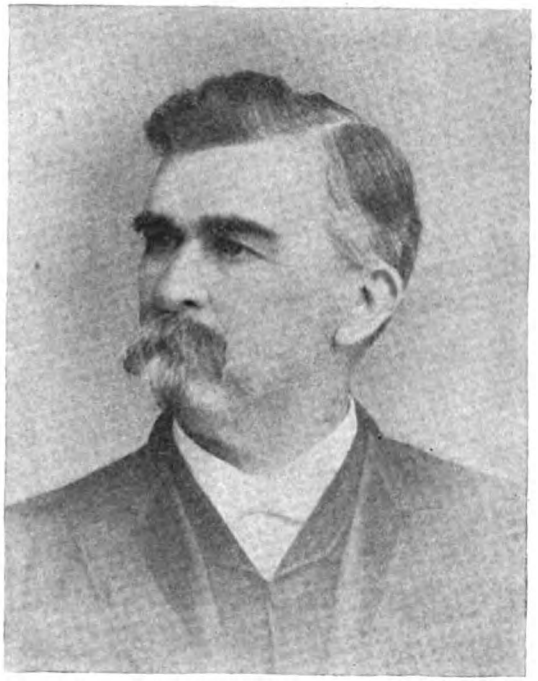
He did not long enjoy the relief afforded by this addition, but died Nov. 14, 1889. Owing to the vast increase of business with the growth of the State in population and wealth, the work done by Chief-Justice Smith and his two associates in these ten years of his service equals that done by the court during its first thirty years. The pages of the reports during these ten years exceed in number of pages, and contain far more cases in number, than the reports for the first thirty years from the organization of the court in 1818 down to 1848. His opinions are to be found in 78 N. C. to 104 N. C. inclusive, twenty-seven volumes.

JAMES E. SHEPHERD.

Among them may be noted the following: Overby *v.* Build. and Loan Asso., 80 N. C. 56, which settled the law governing building and loan associations. Ruffin *v.* Harrison, Ib. 208, which holds that when one is both administrator and guardian, upon closing one trust the law transfers the liability to the other; but that until the first trust is closed the sureties on the bond for the discharge of that trust are still liable. Scarborough *v.* Robinson, Ib. 409, decides that an act of the legislature is invalid until signed by the speakers; and though the journals may show that the bill passed each house the requisite number of times, the courts cannot by mandamus compel the speakers to sign it. In Washington Toll Bridge *v.* Commissioners of Beaufort, Ib. 491, it is held (page 498) that though a contract made by a State with a corporation is protected by the United States Constitution, when the attempted contract is for an alienation of any of the "essential powers of government" it is inoperative and void. This same doctrine has been recently reaffirmed by the court in Alsbrook *v.* Railroad, 110 N. C. 137. Mowery *v.* Salisbury, 82 N. C. 175, holds that a town tax on dogs is valid. Lord *v.* Hardin, Ib. 241, rules that church property cannot be subjected to payment of a pastor's salary. N. C. Railroad Co. *v.* Alamance, Ib. 259, decides that a statute to collect taxes for past years is constitutional. Cain *v.* Commissioners, 86 N. C. 8, upholds the validity of the "no fence law" and of local assessments as distinct from taxation. This is affirmed in many cases since, notably Commissioners *v.* Commissioners, 92 N. C. 180. Hannon *v.* Grizzard, 89 N. C. 115, discusses "residence" and "domicile" in connection with eligibility to office, and the same is considered in Lee *v.* Mosely, 101 N. C. 311, in reference to the right of homestead.

Ellison *v.* Raleigh, Ib. 125, and Doyle *v.* Raleigh, Ib. 132, discuss the right of a city council to deprive one of its members of his seat upon the ground of ineligibility, and the proper remedy. Stanly *v.* Railroad, Ib. 331, decides that in a suit against a corporation it need not be averred that it has been incorporated, and if that is disputed it should be done by answer. This is affirmed in Ramsay *v.* Railroad, 91 N. C. 418. University *v.* Harrison, 90 N. C. 385, discusses

escheats, and the presumption of death from long absence. State *v.* McNinch, Ib. 695, rules that an officer making an arrest is not liable for excessive force if used in good faith and without malice. Churchill *v.* Ins. Co., 92 N. C. 485, holds that where a lawyer is to discharge a duty, not purely professional, he is merely an agent, and his neglect is the neglect of his client. This is followed in many cases, especially in Abrams *v.* Ins. Co., 93 N. C. 60, and Finlayson *v.* Accident Association, 109 N. C. 196, and is involved in a more recent case which has been much discussed by the profession, — Williams *v.* Railroad, 110 N. C. 466. Asheville *v.* Aston, 92 N. C. 578, holds that the second story of a house, when held separately, may be recovered in an action of ejectment. Williams *v.* Railroad, 93 N. C. 42, decides that a common carrier is not bound by a bill of lading issued by its agent, unless the goods are actually received for shipment, even though the bill has been transferred to a *bona fide* holder for value. Halstead *v.* Mullen, Ib. 252, draws the distinction between a defective statement of a cause of action and a statement of a defective cause of action. Barksdale *v.* Commissioners, Ib. 472, holds that though the Constitution requires the common schools to be kept open for four months, this will not authorize the exceeding of the limit imposed in another section of the Constitution upon the rate of taxation. Puitt *v.* Commissioners, 94 N. C. 709, decided an act unconstitutional which applied the poll tax collected on white people to the white schools and the poll tax from the colored race to the education of colored children. State *v.* Miller, 94 N. C., held that a fine of $2,000 and thirty days in jail was not excessive punishment for keeping a gambling-house under the circumstances of that case. After sundry attempts to evade this decision, the fine was eventually paid in full. Duke *v.* Brown, 96 N. C. 127, is one of many cases holding that a majority of the qualified voters and not merely of those voting, is necessary to enable a municipal corporation to loan its credit. In Hannon *v.* Grizzard, 96 N. C. 293, and s. c. 99 N. C. 161, it is held that when the Commissioners refuse to induct into office a person elected thereto upon the bona fide belief that he is ineligible, an action against them for damages will not lie, although on a *quo warranto* it is adjudged that such person was entitled to the office. In re Griffin, 98 N. C. 225, holds that where an act punishable as a contempt is also a violation of the criminal law, an indictment will lie, notwithstanding the punishment imposed for the contempt. State *v.* Thomas, Ib. 599, rules that where a defendant in a criminal action voluntarily becomes a witness in his own behalf, he waives his privilege of refusing to answer questions which may tend to criminate him. Threadgill *v.* Commissioners, 99 N. C. 352, is a decision that counties are not liable for torts unless liability is imposed by statute. Hammond



A. C. AVERY.

v. Schiff, 100 N. C., is a discussion of the right of lateral support to a party wall. State *v.* Lyle, Ib. 497, discusses the rights of a town or city in condemning land for streets. State *v.* Cross and White, 101 N. C. 770, is the well-known case against the Cashier and President of the State National Bank for forgery. DeBerry *v.* Nicholson, 102 N. C. 465, discusses the rights of the parties and the powers of the canvassing board in a contested election case. Edwards *v.* Dickson, Ib. 519, considers the status of an unregistered deed.

Judge Smith married, Jan. 14, 1839, Miss Mary Olivia Wise, of Murfreesboro. He left two sons, William W., a general insurance agent, and E. Chambers Smith, a prominent lawyer and late Chairman of the Democratic State Executive Committee, both of Raleigh. Judge Smith was a consistent member of the Presbyterian church. His character was spotless, his patriotism beyond question. Having exceeded the bounds of man's appointed years, —

WALTER CLARK.

"Life's labors done,
Serenely to his final rest he passed,
While the soft memories of his virtues yet
Linger like twilight hues, when the bright sun is set."

With the exception of Chief-Justices Ruffin and Pearson, he is deemed second to no judge who has sat upon the bench in North Carolina. Had he come to the post as early in life as they, and spent his career in developing his judicial qualifications, it may be doubted if he had not fully equalled them. No ability however great, no judicial qualification however striking, can make up for the lack of time and opportunity. He was in his sixty-sixth year when he first went upon the bench.

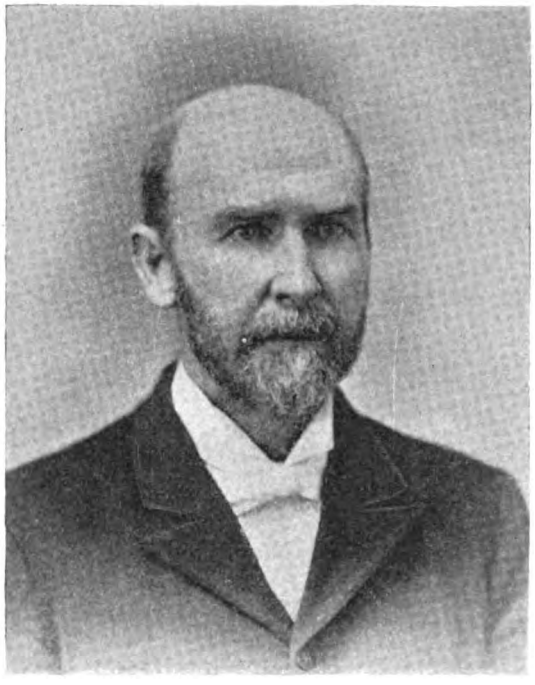
For long years in varying positions he labored for the public weal. Never for an hour of that time did public confidence waver in his integrity or his entire capacity for the work assigned. And now "his memory like a slow fading twilight long shall dwell in the minds and hearts of a people he served so faithfully and well."

He was succeeded as Chief-Justice by Hon. A. S. Merrimon.

Thomas Samuel Ashe was born, July 21, 1812, in that part of Orange County, N. C., which is now Alamance. He was a great-grandson of Judge Samuel Ashe, who has already been mentioned in these sketches as one of the three judges who constituted the entire judiciary of North Carolina from 1777 till 1795, when he became Governor of this State.

The subject of this sketch graduated at the State University in 1832, in the same class with James C. Dobbin, Secretary of the Navy under Pierce, and United States Senator Thomas L. Clingman. He studied law under Chief-Justice Ruffin, and located at Wadesboro in 1836. In 1842 he was elected as a Whig to the lower house of the legislature, and in 1854 to the State Senate. He was Solicitor of his judicial district from

1848 to 1852, and left an abiding recollection of his faithfulness and ability among the people of that section. He was nominated for Congress in 1858, but declined the nomination. During the war he was a member of the Confederate Congress from his district, and was then elected to the Confederate States Senate. In 1868, in "Reconstruction days," he was Democratic candidate for Governor, but was defeated by Governor Holden. In 1872 and 1874 he was elected to the United States Congress, and served upon the Judiciary Committee. He was one of the committee of three which was examining James G. Blaine as to the Credit Mobilier when further examination was stopped by Mr. Blaine's illness. In 1876 he was elected a justice of the Supreme Court of North Carolina, to succeed Judge Reade, and in 1886 was nominated by acclamation and re-elected, being then in his seventy-fifth year.



JAMES C. MACRAE.

He was second to few men on the bench. He possessed excellent qualifications for a judge. But both ability and experience are necessary in creating a great judge. He was in his sixty-seventh year when he first went upon the bench. Judge Ashe's opinions are good specimens of strong nervous English. His opinions are to be found in sixteen volumes, 80 N. C. to 95 inclusive. Among these may especially be read State *v.* Bowman, 80 N. C. 432, as to the construction of the constitutional provision in regard to the ridings of the judges; Whitaker *v.* Smith, 81 N. C. 340, which holds that an overseer is not entitled to file a laborer's lien for his services; Taylor *v.* Harris, 82 N. C. 25, which construed the computation of time as to the services of a summons ten days before court. Tabor *v.* Ward, 83 N. C. 291, rules that retroactive laws involving no criminal element are not unconstitutional. Hester *v.* Roach, 84 N. C. 251, is a construction of the Mill-dam Act. Wharton *v.* Moore, 84 N. C. 479, is a discussion of the doctrine of betterments. Katzenstein *v.* R. R., Ib. 688, sustains the validity of the statute imposing a penalty upon railroads for failure to forward freight. State *v.* Knight, Ib. 789, holds that indictments for the higher offences should not ordinarily be quashed, and has been recently cited with approval in State *v.* Skidmore, 109 N. C. 795, and State *v.* Flowers, Ib. 841. Wilmington *v.* Macks, 86 N. C. 88, sustains the validity of a town tax upon lawyers. Keeter *v.* R. R., 86 N. C. 346, rules that it is the duty of a railroad company to provide a sufficient number of cars for the prompt forwarding of all freight. The same doctrine has since been applied by the court to the furnishing of cars for passengers in Purcell *v.* R. R., 108 N. C. 414. The right to an order of restitution when a judgment is reversed is laid down in Boyett *v.* Vaughan, 86 N. C. 725. Cumming *v.* Bloodworth, 87 N. C. 83, holds that there can be no lien upon the homestead for materials furnished. Muller *v.* Commissioners, 89 N. C. 171, defines the duties and powers

of county commissioners in granting license to retail liquor. Knight *v.* Houghtalling, 94 N. C. 408, is a case in which the unusual "Writ of Assistance" was granted. Hodges *v.* Williams, 95 N. C. 331, is an interesting case as to the rights of riparian owners.

Judge Ashe was a fine specimen of manhood. His days were, in the general opinion of the public, shortened by the excessive labor exacted of the Supreme Court, which during his entire occupancy of the office consisted of only three judges.

He died at his home in Wadesboro, Feb. 4, 1887, in the seventy-fifth year of his age. He married early in life Miss Burgwyn. He left one son, Samuel T. Ashe, a popular member of the bar, who lives at Durham; and several daughters, one of whom married James A. Lockhart, a lawyer of Wadesboro, who is one of the most prominent men in that section of the State; and another married Hon. Richard H. Battle, of Raleigh, who has been already mentioned.

Judge Ashe was a model judge and a model man. In many particulars he very nearly resembles Gaston, his illustrious predecessor. Like him, he went late to the bench; like him, he developed great judicial capacity; and like him, he left a character above reproach, and obtained a great and lasting popularity. The examples of both will live for good.

"Were a star quenched on high,
For ages would its light
Still travelling downward from the sky
Shine on our mortal sight;

"So when a good man dies,
For years beyond our ken
The light he leaves behind him lies
Upon the paths of men."

Judge Ashe was succeeded by Joseph J. Davis.

John H. Dillard was born in Rockingham County, N. C., Nov. 29, 1819. He entered the University of North Carolina, but after a year and a half left on account of ill health. He afterwards entered William and Mary College, and graduated at its law school in 1840. He began the practice of law at Richmond, Va., then removed to Patrick Court House, Va., and became commonwealth's attorney. In 1846 he returned to Rockingham County, N. C., and from 1848 to 1861 he was a law partner of Judge Ruffin, who succeeded him, on the Supreme Court bench. In 1862 he entered the army, and served one year as captain of a company in the Forty-fifth North Carolina Regiment. In 1868 he removed to Greensboro, where he has ever since resided. For many years he was county attorney and clerk and master for Rockingham County. In 1878 he was elected to the Supreme Court, and began his labors Jan. 1, 1879, succeeding Judge Rodman. There being, as stated, only three judges then upon the bench, his health gave way under a conscientious effort to keep up with the mass of work devolved upon the court, and to the regret of every one he resigned, Feb. 11, 1881, after a service of a little more than two years.

His opinions sustain his standing as one of the foremost lawyers in the State. They are to be found in four volumes, 80 N. C. to 83 N. C. inclusive. Among them should be noted Riggan *v.* Green, 80 N. C. 236, that a deed of a lunatic is voidable, not void; since affirmed in Odom *v.* Riddick, 104 N. C. 515. Wright *v.* Hemphill, 81 N. C. 33, as to the right to reassemble the jury to complete their verdict. Cobb *v.* O'Hagan, Ib. 293, lays down the duty of a client to give proper attention to his case, and not to leave the matter absolutely to his counsel, without further attention on his part. Jones *v.* Mial, 82 N. C. 252, that where the plaintiff sues on a special contract, if he fails on that he may recover upon a quantum meruit without amendment of his complaint. This has since been followed in several cases, especially in Stokes *v.* Taylor, 104 N. C. 394.

Judge Dillard married, in 1846, Miss Ann I. Martin, of Henry County, Va. He has several children.

Judge Dillard is very much loved. A large fine-looking man, with a large brain and kindly heart, he looks more like a bishop than a layman. He is unostentatious,

> "And as the greatest only are,
> In his simplicity sublime."

He is the only lawyer in North Carolina who does not appreciate how great a lawyer Judge Dillard is. For many years he and Judge Dick (of the United States District Court, and formerly of the North Carolina Supreme Court) have maintained an excellent law school at Greensboro. He was succeeded by Thomas Ruffin.

Thomas Ruffin, the fourth son of Chief-Justice Thomas Ruffin, was born Sept. 21, 1824, at Hillsboro. He was prepared for college by Samuel Smith, and one of his schoolmates was Judge Jno. H. Dillard, his lifelong friend. He graduated at the University of North Carolina, in 1844, with honors. Among his classmates were L. C. Edwards and Walter L. Steele, and among his college mates Gen. Rufus Barringer, Judges R. P. Dick, and Samuel J. Person. He read law under his father, and began practice at Yanceyville in 1846. In 1848 he removed to Wentworth, and formed a law partnership with Judge John H. Dillard. In 1850 he represented Rockingham County in the House of Commons. In 1856 he was elected Solicitor, and served till his resignation in March, 1860. He was an unusually strong prosecuting officer. He entered the army in 1861 as a captain in the Thirteenth North Carolina Regiment. In October, 1861, he was appointed by Governor Clark a Judge of the Superior Court, to fill the vacancy caused by the death of Judge John M. Dick. He rode the fall circuit. He then resigned, and returning to the army was, in March, 1862, promoted to be Lieutenant-Colonel of his regiment. He was wounded at the desperate battle of South Mountain, Md., Sept. 14, 1862, and resigned March 13, 1863. He displayed great courage, coolness, and capacity on the battle-field. In the latter part of the war he served as member of an Army Court in the Western Army. After the war he resumed practice at Graham, but in 1868 removed to Greensboro, and formed a law partnership with Judge Dillard and Jno. A. Gilmer, who afterwards became a Superior Court Judge. In December 1870, his health becoming seriously impaired, he abandoned the practice, and removed to Hillsboro, where he ever after resided. For a while he was an insurance agent. His health being somewhat restored in 1875, he returned to the bar and formed a partnership with John W. Graham. Upon the resignation of Judge Dillard, Feb. 11, 1881, he was appointed by Governor Jarvis to succeed him upon the Supreme Court. In 1882 he was nominated by the Democratic party to the same post, and elected. The labor of the court was too heavy for three judges, and, like Judge Dillard, he soon found that he could not remain on the bench and *live*. He resigned, Sept. 23, 1883, after a service of two years and a half, and resumed the practice of law with Hon. John W. Graham at Hillsboro. His opinions will be found in five volumes, 84 N. C. to 89 N. C. inclusive. They are a lasting monument to his industry and ability. Attention may well be called to the following: Muse *v.* Muse, 84 N. C. 35, which holds that a husband in a divorce suit may be ordered to pay alimony out of the proceeds of his labor when he owns no property. Wilson *v.* Seagle, Ib. 110, discusses the duty of an appellant in perfecting his appeal. Wallace *v.* Trustees, Ib. 164, hold that the corporate powers of a municipal corporation may be revoked, leaving the creditors to seek relief by an appeal to the legislature. Murrill *v.* Murrill, Ib. 182, is one of many decisions holding that a new action will not lie when the same end can be attained by a motion in the original cause. Long *v.* McLean, 88 N. C. 3, decides that the constitutional provision abolishing imprisonment for debt has no application to actions in tort. Bevers *v.* Park, Ib. 456, holds that the heir may plead the statute of limitation to a debt of his ancestor in a proceeding by the administrator to sell

land for assets to pay the debts. Syme *v.* Riddle, Ib. 463, rules that the husband is still entitled *jure mariti* to the services and earnings of the wife, and that this has not been altered by the constitution nor the "marriage act." Dougherty *v.* Sprinkle, Ib. 300, holds that a married woman cannot be sued before a justice of the peace upon any liability incurred during coverture. He was strong in his convictions, and clear and forcible in his expression of his views.

He had no superior as an advocate at the bar of North Carolina. In the legal traditions of the State, he and Judge Reade — heretofore mentioned — stand as advocates *facile principes*. He was exceedingly courteous and winning in his manner; but when his duty or his interest required it, he could be a very thunderbolt. For some reason he never once sat for his portrait or photograph. Hence he is the only one of the judges an engraving of whom is not presented in these sketches. He married, early in life, Miss Mary Cain, of Hillsboro, and left her surviving him with three sons and a daughter.

He died at Hillsboro, May 23, 1889.

"He gave his honors to the world again,
His blessed part to Heaven, and slept in peace."

He was succeeded by A. S. Merrimon.

Joseph John Davis was born, April 13, 1828, in that part of Franklin County which is now in Vance. His grandfather, William Davis, was a soldier of the Revolution. He attended Wake Forest College one year, and subsequently went to the University of North Carolina, but did not graduate. He read law under Judge Battle, and was admitted to the bar in 1850, and located at Oxford, but three years later removed to Louisburg. In 1862 he entered the army as Captain in the Forty-Seventh North Carolina Regiment. He was not one of those who, moved by ambition, went to "seek for glory in the smoky purlieus of the cannon's mouth." With him then, as always, the controlling motive was a high sense of duty to the people among whom Providence had cast his lot. He was captured in Pettigrew's charge at Gettysburg, July 3, 1863, and was a prisoner at Fort Delaware and Johnson's Island till paroled just before the close of the war. After the war he began the practice of his profession at Louisburg, where he resided henceforth till his death. He was elected to the legislature of 1866 from Franklin County. In 1874 he was elected a member of Congress from the Raleigh district, and served for six years. He then resumed the practice of his profession till 1887, when upon the death of Judge Ashe, he was appointed by Governor Scales, February, 1887, to the vacancy upon the Supreme Court bench. In 1888 he was nominated by the Democratic party and elected to the same post. The promotions to the Supreme bench in North Carolina, as elsewhere, have usually been from those who have seen service on the Superior Court bench. In the fifty years from the organization of the court till 1868 Judge Gaston was the only exception. In 1868, when the State passed into the control of a new political party, Judges Pearson and Reade only, out of the five elected to the Supreme Court, had served on the lower bench. When the State again passed back to the Democratic party in 1878, two of the three Supreme Court judges were taken from the bar. But since then all the judges of the Supreme Court have seen service on the Superior Court bench, excepting only Judges Davis and Burwell.

His opinions will be found in fifteen volumes, 96 N. C. to 110 N. C. inclusive. During the last three years of his life his health was impaired, but he strove with fidelity to discharge the important trust confided to him. Among his opinions should be noted Hodge *v.* Powell, 96 N. C. 64, which holds that while a married woman cannot be estopped by a contract she will not be allowed to repudiate her acts, when to do so would permit her to perpetrate a fraud. Efland *v.* Efland, Ib. 488, which recognizes that when an equitable element is involved the Superior Court at term has jurisdiction

of a proceeding to assign dower. Cagle *v.* Parker, 97 N. C. 271, discusses the question of easements and how they may be created. Hussey *v.* R. R., 98 N. C. 34, maintains that an action will lie against a corporation for torts such as slander, libel, and malicious prosecution. McCanless *v.* Flinchum, Ib. 358, is a very full discussion of the homestead. State *v.* Emery, Ib. 668, is one of many cases sustaining the widely recognized doctrine that on the trial of an indictment for retailing liquor without license, the burden is on the defendant to show a license. Smith *v.* R. R., 99 N. C. 241, is one of many cases in this State holding that if the facts be admitted or proved, what is negligence or contributory negligence is a question of law. Troy *v.* R. R., Ib. 298, lays down what is now the settled rule as to contributory negligence Foundry Co. *v.* Killian, Ib. 501, decides that unpaid balances on subscription to the capital stock of a company may be subjected to the payment of its debts. Michael *v.* Foil, 100 N. C. 178, considers the doctrine of privileged communication as applicable to lawyer and client. Goodman *v.* Sapp, 102 N. C. 477, holds that in civil cases the failure of a party to go upon the stand as a witness is the proper subject of comment whenever the circumstances are such as would make the non-introduction of any other witness the subject of comment. This has since been considered and reaffirmed in Hudson *v.* Jordan, 108 N. C. 10, and S. C. 110 N. C. 250.

Judge Davis married, in October, 1852, Miss Catherine Shaw, of Louisburg, by whom he left several children. She died in 1881; and in 1883 he married Miss Louisa Kittrell, who survives him.

Judge Davis died at his home in Louisburg, Aug. 7, 1892. No man ever more completely had the entire confidence of the people. His name was the synonym of candor, honesty, and singleness of purpose.

For the last few months his life was perceptibly ebbing away, and when the end came,

> "Night dews fall not more gently to the ground,
> Nor weary worn-out winds expire more soft."

His funeral was one of the most largely attended ever seen in his section, and everything betokened the love, esteem, and profound respect of the people among whom he had so long lived. He was succeeded by Judge James C. MacRae.

The Present Court.

These sketches were not intended to embrace the present occupants of the bench. A sense of propriety forbids.

The following bare data are taken from publications heretofore made.

Augustus Summerfield Merrimon, the seventh Chief-Justice, was born in Transylvania County N. C., Sept. 15, 1830. In 1860 he was elected to the House of Commons, and in 1861 he entered the army as Quartermaster, with the rank of Captain, but was soon elected Solicitor of his district, and served till the close of the war. He was elected a Judge of the Superior Court in 1866, but resigned in August, 1867, rather than obey orders issued by military authority. He was nominated by the Democratic party for Supreme Court judge in 1868, but was defeated with his ticket. He was the Democratic candidate for Governor in 1872, and was again defeated; but the legislature that winter elected him to the United States Senate, and he served 1873–79. Upon the resignation of Judge Ruffin he was appointed by Governor Jarvis, Sept. 29, 1883, to succeed him as Associate Justice of the Supreme Court, and at the next general election he was elected by the people. Upon the death of Chief-Justice Smith he was appointed by Governor Fowle, Nov. 16, 1889, to succeed him, and was elected by the people in 1890. His opinions begin in the 89 N. C.[1]

James Edward Shepherd was born in Nansemond County, Va., July 26, 1846.

[1] Chief-Justice Merrimon died since the above was put in type, at his home in Raleigh, N. C., Nov. 14, 1892. He was succeeded by Hon. J. E. Shepherd. — Ed.

During the war he was a telegraph operator in Western Virginia. He studied law under Judge Battle; admitted to the bar in 1869. He was a member of the Constitutional Convention of 1875. He was appointed by Governor Jarvis Judge of the Superior Court, August, 1882, and elected by the people the same year. Upon the increase of the Supreme Court to five members, he was elected one of the additional judges, and took his seat Jan. 1, 1879. He resides in Washington, N. C. His opinions begin in the 102 N. C. Upon the death of Judge Merrimon he was appointed by Governor Holt, Nov. 16, 1892, Chief-Justice. He was succeeded as Associate-Justice by Armistead Burwell.

Alphonso Calhoun Avery was born, Sept. 11, 1835, in Burke County; graduated at the University in 1857; studied law under Chief-Justice Pearson; admitted to the bar in 1860; saw service in the army in 1861–64; elected State Senator in 1866 and again in 1868, but the last time not allowed by military authority to take his seat. He was a member of the Constitutional Convention in 1875. He was elected Judge of the Superior Court in 1878, and re-elected in 1886. Upon the adoption of the amendment to the Constitution increasing the Supreme Court to five in number, he and Judge Shepherd were elected the two additional judges; and he took his seat, Jan. 1, 1889, for a term of eight years. His opinions begin in the 102 N. C. He resides in Morganton.

Walter Clark was born in Halifax County, Aug. 19, 1846; graduated at the University in 1864; saw service in the war (1861–65) except one year while at the University. When the number of Superior Court judges was increased from nine to twelve in 1885, he was appointed by Governor Scales, April 15, 1885, one of the additional Superior Court judges, and was elected in 1886 by the people. Upon the appointment of Judge Merrimon as Chief-Justice, he was appointed by Governor Fowle to succeed him as Associate Justice Nov. 16, 1889, and was elected by the people in 1890. His opinions begin in the 104 N. C. He resides in Raleigh.

James Cameron MacRae was born in Fayetteville, Oct. 6, 1838. He obtained license to practise law in 1859. He saw service in the war (1861–65). He was a member of the legislature of 1874–75. He was appointed by Governor Jarvis, in July, 1882, Judge of the Superior Court, to succeed Judge Bennett, and was elected by the people the same year. His term expiring in 1890, he returned to the bar. Upon the death of Judge Davis he was appointed by Governor Holt, Aug. 24, 1892, to succeed him, and was elected by the people at the general election this fall. He resides in Fayetteville, N. C. His opinions will begin in the 111 N. C.

Armistead Burwell was born in Hillsboro, Orange County, N. C., Oct. 22, 1839, and is a son of Rev. Robert Burwell, then pastor of the Presbyterian Church at that place. He graduated at Davidson College, 1859, with the first honors. He then engaged in teaching, and was in Arkansas when the war broke out. He served through the war with troops from that State, and was severely wounded in 1864 before Atlanta. He resumed teaching in Charlotte after the war; studied law, and was licensed to practise in 1869. He located in Charlotte, where he has resided ever since. Since 1877 he has been continuously a State Director in the North Carolina Railroad, being reappointed by each successive Governor. He was State Senator in 1880. Upon the death of Chief-Justice Merrimon, Justice Shepherd being promoted, Judge Burwell was appointed by Governor Holt to be Associate-Justice, Nov. 16, 1892.

The work of all courts is in a large measure temporary; but there is a still larger part which abides and shapes the future. Our civilization is like the coral islands, built by individual and forgotten workers, on whose labors each successive generation climbs to higher things. The work of the courts is a potent factor in our civilization.

SUMMARY.

Judges in Order of Appointment.	County or Place of Birth.	Residence when Elected.	Years on Supreme Court.	When term began.	Age when elected to Supreme Court.	Years on Superior Court.	Age at Death.	Remarks.
1. Taylor, C. J. .	England	Craven	10	1818	49	20	59	10 years C. J.
2. Henderson, C. J.	Vance	Granville	15	1818	46	8	61	4½ years C. J.
3. Hall	Virginia	Warren	14	1818	51	18	65	
4. Murphey . .	Caswell	Orange	—	1820	43	2	54	Special service three terms.
5. Toomer . . .	New Hanover	Cumberland	½	1829	45	5	72	Twice on Superior Court.
6. Ruffin, C. J. .	Virginia	Orange	24	1829	42	5	82	Twice on each b. 19 years C. J.
7. Daniel . . .	Halifax	Halifax	15	1832	47	16	63	
8. Gaston . . .	Craven	Craven	11	1833	55	—	66	
9. Nash, C. J. .	Craven	Orange	14	1844	63	16	77	6 years C. J.
10. Battle . . .	Edgecombe	Orange	16	1848	45	12	76	Twice on each bench.
11. Pearson, C. J.	Rowan	Rowan	29	1848	43	12	72	19 yrs. C. J. 2d and 3d elections fr. Yadkin.
12. Manly . . .	Chatham	Craven	6	1859	59	19	91	
13. Reade . . .	Person	Person	13	1865	53	2	Living.	
14. Rodman . .	Beaufort	Beaufort	10	1868	51	—	Living.	
15. Dick	Guilford	Guilford	4	1868	44	—	Living.	U. S. Dist. Judge.
16. Settle . . .	Rockingham	Rockingham	7	1868	37	—	57	Twice on bench.
17. Boyden . . .	Massachusetts	Rowan	2½	1871	74	—	77	
18. Bynum . . .	Stokes	Lincoln	5	1873	53	—	Living.	
19. Faircloth . .	Edgecombe	Wayne	2	1876	47	—	Living.	
20. Smith, C. J. .	Hertford	Wake	12	1878	65	—	77	12 years C. J.
21. Ashe . . .	Alamance	Anson	8	1879	66	—	74	
22. Dillard . . .	Rockingham	Guilford	2	1879	59	—	Living.	
23. Ruffin . . .	Orange	Orange	2½	1881	57	½	65	
24. Merrimon, C. J.	Transylvania	Wake	9	1883	53	1½	62	3 years C. J.
25. Davis . . .	Vance	Franklin	5½	1887	58	—	64	
26. Avery . . .	Burke	Burke	Since Jan., '89	1889	53	10	Now on bench.	
27. Shepherd, C. J.	Virginia	Beaufort	Since Jan., '89	1889	42	6½	" "	C. J Nov., '92
28. Clark . . .	Halifax	Wake	Since Nov., '89	1889	43	4½	" "	
29. MacRae . .	Cumberland	Cumberland	Since Aug., '92	1892	54	8½	" "	
30. Burwell . . .	Orange	Mecklenburg	Since Nov., '92	1892	53	—	" "	

It bears the impress of the present, but remains to instruct the future, as imprints of a passing shower of ages ago are preserved in strata of sandstone. In like manner, much of the work shaped out by the conjoined labor of bench and bar will have its effect long ages after the men of this generation and all memory of them

> "Like thin streaks of morning cloud shall have melted into the infinite azure of the past."

To fix for a few fleeting moments longer the memory of a few of the laborers ere their names shall already sound strange in the courts and the land where they labored, is the object of sketches such as these.

Chief-Justice Taylor was born in England; Chief-Justice Ruffin, Judges Hall and Shepherd were born in Virginia; Judge Boyden in Massachusetts. The other twenty-five were native North Carolinians.

Judge Settle was the youngest judge, having ascended the bench at thirty-seven. Next came the elder Ruffin, Pearson, Murphey, Shepherd, and Clark, who all went on at forty-two or forty-three. Judge Nash went on at sixty-three, and was in his seventy-second year when made Chief-Justice. Judge Smith went on the bench at sixty-five, Ashe at sixty-six, Boyden at seventy-four, and yet served two and a half years. Smith and Ashe were each in their seventy-fifth year when elected the second time. The longest service was by Pearson, twenty-nine years on the court, and the elder Ruffin, near twenty-five years. Each of these was nineteen years Chief-Justice.

As to religious persuasion, six were Presbyterians, — Nash, Reade, Dick, Smith, Avery, and Burwell; two Roman Catholics, — Gaston and Manly; two Methodists, — Merrimon and Clark; one Baptist, — Faircloth; one or possibly two were members of no church; and the remaining eighteen, being nearly two thirds of the whole number, have been Episcopalians.[1]

[1] The death of Chief-Justice Merrimon occurring after this article was in type, a more lengthy sketch of him which was sent us could not be inserted. A notice of him, however, will be found in our obituary columns. In the first column of Part I. (October number) of this article the total number of judges there given as twenty-nine should be changed to thirty. — Ed.

A JUDICIAL ANTHOLOGY.

I. BRITISH SPECIMENS.

By Henry A. Chaney.

"AMONG notable poets who have had legal training, one recalls only Goethe,"[1] — so Dr. Weir Mitchell makes one of his characters say. Well, why not Sir Walter Scott also, or Macaulay, or Barry Cornwall, or that other accomplished proctor, the author of "Nothing to Wear"? And what about Bryant, and Lowell, and Sir William Jones? Did not "Blackwood's Magazine" print poems, more than fifty years ago, by Albert Pike? Did not Sergeant Talfourd write "Ion," and Ellen Tree act in it? Did not even Dr. Kenealy compose elegant sonnets? Is there not extant a whole volume of poems by John Quincy Adams? And have we not Irving Browne? Is it not indeed the fact that almost every person of cultivation has at some time or other felt impelled to versify? In the cases of those who, like great judges, have become the subjects of biography, we behold the results preserved by the ruthless care of their biographers; and we can understand, perhaps, why Brougham feared lest Lord Campbell should outlive and commemorate him. Let it be admitted that such effusions, especially when unaccustomed, are not always worth preserving as poetry, and for some inscrutable reason are often regarded, even by the authors, as something to be concealed, they at least refute the preposterous hypothesis that the legal mind is destitute of fancy.

Here follows the first instalment of a collection of poetic fragments, in which the benches of Britain and of the United States are equally represented. The names attached to the selections are all eminent, — some of them are very eminent. The most celebrated names, to be sure, are not always signed to the most meritorious verse. But the reader may judge if, in the main, the collection does not reach a high standard of excellence: as the poetry of poets, the most of it would be more than respectable; as the poetry of judges, it is remarkable.

[1] "Characteristics," Century Magazine, vol. xxi. p. 425.

ON HIS WIFE AND CHILDREN.

In the noise of the bar and the crowds of the Hall
Tho' destined still longer to move,
Let my thoughts wander home, and my memory recall
The dear pleasures of beauty and love, —

The soft looks of my girl, the sweet voice of my boy,
Their antics, their hobbies, their sports;
How the houses he builds her quick fingers destroy,
And with kisses his pardon she courts.

With eyes full of tenderness, pleasure, and pride,
The fond mother sits watching their play;
Or turns, if I look not, my dulness to chide,
And invites me, like them, to be gay.

She invites to be gay, and I yield to her voice,
And my toils and my sorrows forget;
In her beauty, her sweetness, her kindness rejoice,
And hallow the day that we met.

Full bright were her charms in the bloom of her life,
When I walked down the church by her side;
And five years passed over, I now find the wife
More lovely and fair than the bride.

Charles Abbott.

THE NINETIETH PSALM.

O LORD, thou art our home, to whom we fly,
And so hast always been, from age to age:
Before the hills did intercept the eye,
Or that the frame was up of earthly stage,
One God thou wert, and art, and still shall be;
The line of Time, it doth not measure Thee.

. . . . . .

Thou carriest man away as with a tide:
Then down swim all his thoughts that mounted high:
Much like a mocking dream that will not bide,
But flies before the sight of waking eye;
Or as the grass, that cannot term obtain
To see the summer come about again.

. . . . . .

The life of man is threescore years and ten,
Or, that if he be strong, perhaps fourscore;
Yet all things are but labor to him then,
New sorrows still come on, pleasures no more.
Why should there be such turmoil and such strife
To spin in length this feeble line of life?

But who considers duly of thine ire,
Or doth the thoughts thereof wisely embrace?
For thou, O God, art a consuming fire:
Frail man, how can he stand before thy face?
If thy displeasure thou dost not refrain,
A moment brings all back to dust again.

. . . . . .

Francis Bacon.

A LAWYER'S FAREWELL TO HIS MUSE.

As, by some tyrant's stern command,
A wretch forsakes his native land,
In foreign climes condemned to roam
An endless exile from his home;
Pensive he treads the destined way,
And dreads to go, nor dares to stay,
Till on some neighboring mountain's brow
He stops, and turns his eyes below;
There, melting at the well-known view,
Drops a last tear, and bids adieu:
So I, thus doomed from thee to part,
Gay queen of Fancy and of Art,
Reluctant move, with doubtful mind,
Oft stop, and often look behind.

. . . . . .

William Blackstone.

VIRGIL'S "DESCENT INTO HADES."

(BK. VI. 268–281.)

So, unseen in the darkness, they went by night on the road
Down the unpeopled Kingdom of Death and his ghostly abode,
As men journey in woods when a doubtful moon has bestowed
Little of light, when Jove has concealed in shadow the heaven,
When from the world, by sombre Night, Day's colours are driven.

Facing the porch itself, in the jaws of the gate of the dead
Grief, and Remorse, the Avenger, have built their terrible bed.
There dwells pale-cheeked Sickness, and Old Age, sorrowful-eyed,
Fear, and the temptress Famine, and hideous Want at her side, —
Grim and tremendous shapes. There Death with Labor is joined;
Sleep, half-brother of Death, and the Joys unclean of the mind.
Murderous Battle is camped on the threshold. Fronting the door
The iron cells of the Furies; and frenzied Strife, evermore
Wreathing her serpent tresses with garlands dabbled in gore.

Charles Synge Christopher Bowen.

A PRAYER.

BENDING before thee, let our hymn go upwards,
Bright as the sunshine breaking from the darkness,
Thee we implore to guard us on our journey,
Lord God Almighty.

Guard us in toil when fainting in the noonday,
Guard us reposing under evening shadows,
Guard us when midnight walks abroad in heaven,
Lord God Almighty.

If the dread foe assail us with temptation,
Hear us, O Lord, and save us from his danger;
Oh, keep us pure, oh, lead us to thy presence,
Lord God Almighty.

Glory to thee, O Father Everlasting,
Glory to thee, O Son and Holy Spirit,
One in Three Persons, Infinite, Unchanging,
Lord God Almighty.

John Duke Coleridge.

FROM CATULLUS.

[This liberal version of the six lines beginning "Si quicquam mutis gratum acceptumve sepulchris" was written by Lord Justice Coleridge upon Lord Denman's request for a translation of them.]

IF aught of solace to the silent dead
Spring haply from the pious tears we shed,
Tender regrets which ancient loves renew,
And tears unchecked which long-lost friends pursue;
Sure in thy love there 's joy that overpays
The pang she felt for intercepted days.
Blest Faith, that takes the sting from sharpest grief,
And soothes the widowed heart with sure relief;
Faith that immortal makes the earthly tie,
Reveals communion sweet beyond the sky,
And tells us that our consecrated tears
May gem the glorious crown an angel wears.

John Taylor Coleridge.

HORACE, BOOK III. ODE 29.

SPRUNG from Etruria's royal line,
Mæcenas! at thy friend's abode
There is a cask of virgin wine,
Roses, and perfume that has flowed
Erst o'er thy locks,— no more delay! —
Let Œsula's soft-sloping brow,
And Tibur bathed in constant spray,
For other scenes release thee now;
Thy glut of grandeur leave awhile,
The massive wall and cloud-capped dome,
Nor flatter, with unceasing smile,
The smoke and wealth and noise of Rome.

Change,— not unpleasing to the great,—
A poor man's scant but cleanly fare,
With no proud pomp of purple state,
May smooth the anxious brow of care.
The sun glares forth with scorching eye,
The dog-star burns the sultry plain,
The lion rages in the sky,
The summer days are come again;
The weary swain to welcome shades
Drives his faint flock to streams and groves, —
While not one wandering breath invades
The silence of the bank he loves.

. . . . .

Thomas Denman.

SIMEON'S SONG.

BLESSED Creator, who before the Birth
Of Time, or ere the Pillars of the Earth
Were fixt or form'd, didst lay that great Design
Of Man's Redemption, and didst define
In thine Eternall Councels all the Scene
Of that stupendious Business, and when
It should appear; and though the very day
Of its Epiphany concealed lay
Within thy mind, yet thou wert pleas'd to show
Some glimpses of it unto Men below
In Visions, Types and Prophesies, as we
Things at a distance in Perspective see:

But thou wert pleas'd to let thy servant know
That that Blest hour that seem'd to move so slow
Through former Ages, should at last attain
Its time, ere my few Sands, that yet remain
Are spent; and that these Aged Eyes
Should see the day when Jacob's Star should rise.
And now thou hast fulfill'd it, blessed Lord,
Dismiss me now according to thy word;
And let my Aged Body now return
To Rest, and Dust, and drop into an Urn;
For I have liv'd enough, mine eyes have seen
Thy much desired Salvation, that hath been
So long, so dearly wish'd, the Joy, the Hope
Of all the Ancient Patriarks, the Scope
Of all the Prophesies and Mysteries
Of all the Types unvail'd, the Histories
Of Jewish Church unridl'd, and the bright
And Orient Sun, arisen to give light
To Gentiles, and the Joy of Israel
The World's Redeemer, blest Emanuel.
Let this Sight close mine Eyes; 't is loss to see
After this Vision, any Sight but Thee.

Matthew Hale.

ERSKINE'S PROTEST.

[To the Master of the Rolls, as President of an association of the bar, which, in 1801, the year of the scarcity, had resolved to limit their consumption of bread at all meals.]

My early meal thy prudent care controls,
Lord of the Breakfast! Master of the Rolls!
But as to dinner! What is that to thee?
There Coke alone shall give the law to me!

Thomas Erskine.

TO HIS WIFE.

Can it, my lovely Bessy, be
That when near forty years are past,
I still my lovely Bessy see
Dearer and dearer at the last?
Nor time, nor years, nor age, nor care,
Believe me, lovely Bessy, will —
Much as his frame they daily wear —
Affect the heart that 's Bessy's still.

In Scotland's climes I gave it thee, —
In Scotland's climes I thine obtain'd, —
Oh, to each other let them be
True, till an Heaven we have gained.

John Scott.

THE HARVEST HOME.

The crimson moon, uprising from the sea,
With large delight foretells the harvest near;
Ye shepherds, now prepare your melody
To greet the soft appearance of her sphere;
And like a page enamoured of her train,
The star of evening glimmers in the west:
Then raise, ye shepherds, your observant strain,
That so of the Great Shepherd here are blest.
Our fields are full with the time-ripened grain,
Our vineyards with the purple clusters swell;
Her golden splendor glimmers on the main,
And vales and mountains her bright glory tell:
Then sing, ye shepherds, for the time is come
When we must bring the enriched harvest home.

Edward Thurlow.

SIR LYTTLETON POWIS' CHARGE.

I your most humble servant rest
You gentry of the Grand Inquest, —
Or inquests rather, for you be
The plural number, at least three.

. . . . . .

But hearken what you must present:
First, riot, a most horrid thing
Et contra pacem of the king,
Which don't suppose there is no harm in,
For 't is rebellion's cousin-german.

. . . . . .

Next, libells, gentlemen, present,
Which all mistakes for to prevent
I thus define: it is, to wit,
Not what is spoke, but what is writ
Or printed upon paper sheets
And cry'd by wenches about the streets.
A libell easily is writt
No matter whether it has wit
Or truth, for that is not the point
So they can say but something quaint.

. . . . .

Next nuisances, but chiefly naming
Such as is all unlawful gaming
And cheats, which hydra-like arise,
Sharpers with cards and loaded dice
On silly callys still are sharking
Only to keep themselves from working.

Philip Yorke.

RECREATIONS OF LAWYERS.

ANGLING (salmon-fishing, perhaps, excepted) is not a favorite sport with lawyers. It is, as old Isaac Walton calls it, "the contemplative man's recreation;" and the lawyer is the reverse of contemplative. Lord Bacon was, indeed, a notable exception; but his "contemplative planet" went near to marring his fortunes. Hence the average lawyer is inclined to indorse Dr. Johnson's uncomplimentary definition of a fishing-rod. What anglers there are are mostly Chancery barristers; yet Lord Westbury delighted in a day's trout-fishing; indeed, it was almost the only relaxation he allowed himself while Chancellor. Cricket, on the other hand, like Catholic truth, is received, *semper, ubique, ab omnibus*. To play it scientifically, to play in county matches, requires more time than the practising lawyer can afford; but to play it in an amateurish way is open to all. The present writer, then a very small boy, used to play at this invigorating pastime with the late Sergeant Parry, and he has a lively recollection of the portly sergeant tripping on one occasion in his fielding, and measuring his length on the greensward. "Many a rood he lay." Only quite recently Mr. Justice Grantham broke his leg in the most honorable manner in assisting at a village cricket-match. Sir Alexander Cockburn's ruling passion was yachting. Mr. Justice Wills has achieved distinction as an Alpine climber. It was while bathing that the lamented Lord Justice Thesiger was struck by a wave which caused his untimely death. Sir Frederick Pollock is an expert swordsman. That "Admiral Crichton," Mr. Justice Chitty, is as much at home with the racquet and the oar as he is with the technicalities of equity, to quote only a few instances of the physical vigor and versatility of the English bar and bench.

Riding, says the poet, Mathew Green (and rightly),

> "I reckon very good
> To brace the nerves and stir the blood."

Lord Campbell rode every morning to Westminster Hall and back in the evening. So did Lord Abinger, though very corpulent; so did Malins, V. C., to Lincoln's Inn, till he broke his arm. Many a hard-worked barrister, Sir Horace Davey included, takes his morning gallop in the Row. In the old days, when judges rode the circuits, riding was a very necessary judicial accomplishment; but in Lord Tenterden's time this had yielded to the post-chaise; and when Lord Tenterden was recommended horse exercise, he distinctly declined, saying he should certainly fall off, like an ill-balanced sack of corn, as he had never crossed a horse any more than a rhinoceros, — which reminds one of Lord Macaulay's remark when he was offered a horse to take him as minister to Windsor: "If her Majesty wishes to see me ride, she must order out an elephant."

The accident which Lord Tenterden apprehended did befall Mr. Justice Twisden on the last occasion on which the judges went in procession to Westminster Hall on horseback. The procession, once settled for the march, proceeded statelily along. But when it came to straits and interruptions, "for want of gravity in the beasts and too much in the riders," as Roger North expresses it, "there happened some curvetting which made no little disorder; and Judge Twisden, to his great affright and the consternation of his grave brethren, was laid along in the dirt." Need it be added that the learned judge arose *valde iratus?*

Cicero could be a lawyer, and a man of letters also. Lord Coleridge is so, too, happy in a double inheritance of genius; but the combination is a rare one, though many a lawyer quits the thorny roads of jurisprudence for the "primrose path" of literature. Sir Wm. Blackstone seems to have felt their incompatibility when he wrote "The Lawyer's Farewell to his Muse," and said a fond adieu to the "Delilahs of the Imagination" before embarking on the stern task of "The Commentaries;" feeling himself, however, as he did so, like "an exile" going from home.

In the same devoted spirit Mr. Fearne, when he devoted himself to contingent remainders, burned all his profane library and wept over its flames, mourning more especially in this great act of renunciation for the Homilies of Saint John Chrysostom to the people of Antioch, and for the *comedies of Aristophanes!* It is not recorded that Fearne ever returned to his scholarship, but Blackstone still found time to make critical remarks on Shakspeare, as another great judge of our own day has found time in his translation of the Æneid to reproduce for us "the stateliest measure ever moulded by the lips of man." Such "wantonings with the muse," as Kirke White would call them, are not in vain. They have left their impress on the luminous and eloquent diction of the commentaries; they are discernible in the finish of Lord Justice Bowen's judgments. Lord Selborne's reputation as a lawyer is none the worse because among the vulgar hustle of affairs his life, as has been well remarked, "has been elevated and ennobled by an element of ethereal texture that love of poetry which has given us 'The Book of Praise.'" — *Law Gazette.*

THE LEGAL COUGH.

IT is probably owing to the whirl and bustle of the age that no observer has yet found time to give the world a glimmer of light on the nature and possibilities of that artistic malady which may be termed the legal cough. It is an artistic malady in that it is not natural, but is the sweet perfection of a cough affected for professional purposes, and nursed and practised through patient stages of development, until rounded off to a rosy loveliness that virtually makes the lawyer a virtuoso.

A lawyer without a cough is like a mince-pie without brandy. No matter how profound his knowledge may be, he is only fit for searching titles and doing the routine work of the office. His partner, with a very limited stock of legal information, will easily eclipse him before a jury, providing, of course, his cough is in good working order. When he pauses to clear his throat, he is really taking time to look ahead for new arguments and similes with which to clear his client. And when he says, "If your honor please, bow, wow, wow!" he is regarded by the jury as a scholar of sublime dignity, especially if he has bushy white hair, a clean shaven face, and a monumental jowl whose purplish festoons of chin rest in tremulous agitation between the white wings of a New England dicky.

Against such a creature what chance would a pale thin man, with a red goatee and no magnetism, have? Even with a good case and the choicest flowers of oratory, he would be laughed, or rather coughed, out of court. He would only have the ghost of a chance during the winter, when, by wearing summer underclothing and broken boots, he might practise in the enjoyment of a cough that would last during the entire season.

It is not known to be a fact, but it is fair to assume, that our finest coughing lawyers spend an hour or two before going to court in coughing exercises and *études*, going gracefully from the wild impassioned cough of scorn to the rippling dimpled cough of fun, and so on to the sentimental choking cough of pathos, so effective when he points to the innocent assassin, and then to the latter's deeply veiled anxious wife, who sits beside him, clasping the smiling babe, borrowed for the occasion.

In spite of the fact that it may be impertinent, we feel it our duty to point out to the various law schools the importance of introducing this feature into the regular course of study. The old professors would be astonished beyond measure at the effect the cough attachment would give to Roman law. They should look to it that as much time and attention be given to coughing as to lecturing. Let them in the first year teach only the gentle rippling cough that means time for reflection, and then the pleasant cough, followed by a sunny smile, intended as an endorsement of the argument, and so on up to the wild, frantic cough that goes with the red face, the pounding of the table with the fist, and the swathing of the top of the head with the glowing bandanna handkerchief.

This course would also prove a beautiful sanitary measure, inasmuch as the constant coughing would doubtless render the lawyer proof against colds, and preserve his throat, that he might ever be ready to accomplish the "forensic effort" in "stentorian tones." It would also make it easier for the young man starting out, and enable him to have an office with a fire and a desk in it, and not compel him to spend his life as a five-dollar chief clerk of a firm with a name longer than the moral law.

No self-respecting legal luminary regards the cough as an unfair medium through which to attain his ends. If it were unfair, would the honest, upright judge, who could n't be purchased with Golcondas of shining gold, and whose only interest is in the cause of justice, cough during his charge?

'T is true the cough may be but sympathetic with that of the lawyers; but it makes his charge more effective than it would be if accompanied by the dreamy discoursing "of lutes and soft recorders."

Let it be proclaimed, then, that coughing is a part and parcel of the law; that it is law, and good sound law at that, though not made and provided by the Legislature. But it is the capital of many a lawyer, and the thing that causes a fiendish smile to light his features when he picks up a paper and reads an advertisement setting forth with lyric sweetness the virtues of the prevailing nostrum, under the general head of "Stop that cough!" — *R. K. M. in Harper's Magazine.*

LONDON LEGAL LETTER.

LONDON, Nov. 5, 1892.

OUR new Home Secretary, Mr. Asquith, has signalized his accession to office by granting permission to hold public meetings in Trafalgar Square at certain times and under certain conditions. Many of your countrymen know Trafalgar Square well; it has been described as the finest site in Europe, and the magnificent hotels in its immediate vicinity owe much of their prosperity to the patronage of American visitors. Meetings used to be allowed in the Square. As a rule they were of no great magnitude, and did not seriously interfere with vehicular or passenger traffic; but towards the end of the year 1887 these gatherings began to assume a very different aspect and proportion. The winter was exceptionally severe, and employment was scarce. Day after day noisy demonstrations were held by a motley congregation of genuine workmen, reinforced by at least an equally large body of professional loafers and blackguards. As a result, public security was seriously menaced; and no alternative was left to the Government of the day but to close the Square for the purposes of public meeting. Then befell that day now known in the melodramatic parlance of visionary politicians as "Bloody Sunday," when an obstinate and organized effort was made by the malcontents to recapture the Square, as they phrased it. They were led by one or two foolish members of Parliament and other misguided persons. In anticipation of grave disturbances to the peace of the metropolis, nearly one hundred thousand special constables were enrolled during the preceding week to strengthen the hands of the regular police force, for the proposed enterprise had been well advertised. In the event, an enormous multitude began to gather from every quarter on that November Sunday; and before the day was over a serious riot took place in the Square, the troops were called out, heads were broken, and a great deal of bad feeling aroused. Thereafter it was felt that the right of public meeting had been overdone, and the controversy closed for the time, after the courts had decided, the question having been formally brought before them, that the property in the Square was vested in the Crown. It was known, however, that when the new Ministry came into office an attempt would be made to secure the Home Secretary's permission for the holding of meetings. This has been granted, subject to certain conditions. Meetings are only to be allowed on Saturday afternoons, Sundays, and public holidays. The first is to take place on Sunday, the 13th, and lively curiosity is felt as to what may then occur. It is more than likely that the gatherings will again have to be prohibited. The numerous parks throughout the metropolis are all open for any kind of assemblage, and it is this circumstance which renders the employment of an important thoroughfare for the purpose so unnecessary.

The Government has appointed a Royal Commission to inquire into the condition and circumstances of the Irish evicted tenants. Many of these men voluntarily incurred eviction from their holdings at the bidding of associations like the Land and National Leagues. A great number of the holdings are now in the occupation of persons who acquired a statutory title under one or other of the Irish Land Acts, and it is not easy to see how in such cases any measure of reinstatement is possible; and yet in some quarters, at any

rate, hopes are entertained that the Commission will recommend wholesale reinstatements. One of the acutest of our English judges, Mr. Justice Matthew, is president of the Commission. He is an Irishman, a Radical, and a Roman Catholic.

The senior common law judge, the Hon. George Denman, retired from the bench at the commencement of the present term. As his name would lead you to infer, he is a son of the Lord Denman who was Chief-Justice of England. His elder brother, the present Lord Denman, is a very old man, and generally known as the bore of the House of Lords.

The devotees of arbitration are at present in a condition of feverish expectation. It is proposed shortly to open in the City of London a central Chamber of Arbitration, by way of focussing in one central tribunal the numerous arbitration bodies which have for many years existed for various trades. An elaborate constitution has been drawn up, based to some extent on that of Continental tribunals of commerce; but, as our friends in the city would tell you, embodying more than their merits and none of their faults. It is just possible that the plan will be very successful. One condition of success assuredly is, that appeals to a court of law should not be too strictly vetoed.

* * *

The Green Bag.

PUBLISHED MONTHLY, AT $3.00 PER ANNUM. SINGLE NUMBERS, 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, HORACE W. FULLER, 15½ Beacon Street, Boston, Mass.

The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

ANOTHER PORTRAIT!

IT is our intention to present annually to our subscribers a portrait of some eminent English or American lawyer, printed upon good paper, and of a size suitable for framing.

To all subscribers for 1893 we offer an excellent picture of

DANIEL WEBSTER.

This is a reproduction of a rare engraving, and is printed on heavy paper, 20 in. × 24 in.

This portrait will be forwarded immediately upon receipt of amount of subscription.

A MERRY Christmas and a Happy New Year to all our readers!

WITH this number, Volume IV. of the "Green Bag" is completed, and the task now lies before us to "entertain" our readers for another year. We feel equal to the undertaking, and with the kindly assistance of many friends, we have already laid in a store of good things wherewith to regale our small army of subscribers. We promise them that the "Green Bag" for 1893 will be better than ever before, and well worthy the consideration of every member of the legal profession. Among the noteworthy features for the coming year will be finely illustrated articles on "Gray's Inn," "The Hall of Four Courts" (Dublin), "Legal Education in Modern Japan," "The Golden Days of the Virginia Bar," etc., and a continuation of the "Supreme Court Series."

Contributions of short articles of general interest to the profession have been promised by well-known members of the bar.

The biographical sketches (with portraits) will include such well-known names as Baron Huddlestone, Sir George Jessel, Sir Henry Hawkins, Sir Horace Davey, Nicholas Hill, Charles O'Conor, Ogden Hoffman, and others.

A series of celebrated "Old-World Trials," written by an eminent English barrister, will prove of much interest to the profession.

Arrangements are being made for a series of articles on "Criminal and Civil Procedure" in Italy, France, Spain, Germany, Austria, Russia, Belgium, Denmark, Norway, Sweden, etc. This series will be of great value, and will acquaint the profession with the legal methods of foreign countries, of which but little is known among the great body of our practitioners. We hope to commence the publication of this series during the coming year.

There will be the usual supply of "Anecdotes," "Legal Facetiæ," and "Legal Antiquities."

The four volumes of the "Green Bag" already published contain over five hundred portraits of eminent lawyers, forming an unequalled legal portrait gallery. These volumes contain illustrated articles on the following Law Schools: Harvard, Yale, Boston University, Columbia, University of Michigan, St. Louis, Union College of Law (Chicago), State University of Iowa, Buffalo, Cornell, Hastings College of Law, Cumberland University, Tulane, Albany, and the University of Minnesota. Also illustrated articles on the Courts of Final Appeal of Canada, New York, Michigan, Connecticut, New Hampshire, Rhode Island, Pennsylvania, Louisiana, Missouri, Illinois, New Jersey, Georgia, Minnesota, Indiana, Kansas, Arkansas, North Carolina. This series will be continued until it includes every State in the Union.

WE will bind parts of Vol. IV. for our subscribers, in half morocco, for $1.50. Parts to be delivered to us at sender's expense. We deliver the bound volumes *express paid*.

THE following letter from Eugene F. Ware, Esq., of Fort Scott, Kansas, will be read with interest: —

LONDON, Sept. 5, 1892.

Editor the "Green Bag":

Having passed a little time in examining the Assyrian and Babylonian tablets in the British Museum in this city, it occurred to me to send you a memorandum list of several that to me as a lawyer appeared to be interesting. I take the tablets as translated by the scholars, and as I find the tablets and translations in the Museum. I assume the translations to be correct. There are a very great number, and I only give the substance of a few. To me they were of great interest, as showing the then condition of society, business, and general civilization. The list is of such matters as seem to have special interest to lawyers, and as such I send it to you for publication if you see fit.

The tablets so selected are respectively as follows: —

A letter from a prisoner to the King of Assyria declaring the innocence of the former of the crime charged.

A petition to the King of five inhabitants of the city of Darata.

An interpretation of a part of the Assyrian code.

A deed of a field by Titi to Addunaid, giving price (half a mana and four shekels in silver). On the edge is the seizin, "the giving up of the field."

A despatch where the writer sends 237 horses to Salimu.

The will of Sennacherib, the King.

A contract for seventy-five oxen.

Sale of three slaves for one mana each.

Many sales of land, houses, plantation, and grain.

Sale of house in Hama for one mana.

Sale of house in Nineveh for one mana, 692 B.C.

A six year's lease of a plantation.

A contract for loan of eight manas and three shekels of silver at half a shekel interest for six months.

A loan of nine mana and fifteen shekels at twenty-five per cent per annum.

Many other loans running from 1½ per cent to twenty-five per cent per annum.

A joint deed for a house by two brothers.

A conveyance of seven slaves for three manas; one of the slaves had two wives, who were also slaves.

A mortgage of four slaves for 210 mana of copper.

An arbitration and award that Salmu-aki shall pay Assur-sallim 1½ manas of silver.

A recorded gift by four inhabitants of Calah to the temple of Ninip.

A judicial decision as to the ownership of a female slave, named Salmanu-naid.

An explanation of legal terms.

A record of the judgment of a court in favor of Nabu-shar-usur.

A loan of money "at the customary rate of interest."

A proclamation concerning the royal estates.

A lot of various boundary stones, engraved with the deed and title of the owner.

A royal grant by Nebuchadnezzar.

A written statement regarding the abstraction of various articles from the royal treasury.

A list of things supplied to the crew of a boat.

The record of the payment of a fee.

Record of payment of tithes, first year of Cambyses.

A chattel mortgage on a *door* to secure the loan of one mana of silver.

Concerning the dowry of (Miss) Kibitum Kisat.

A sale of land by one brother to another, 2120 B. C.

A money judgment for a debt by a Babylon court in 677 B. C.

Satisfaction of a mortgage by a swap of land.

An account of the litigation in which (Mrs.) Bunanitu won her husband's estate from his brother after long contention.

A tablet showing the purchase and conveyance to a man and his wife, jointly, of seven canes, five cubits and eighteen fingers of land situated in Borsippa, for 11½ manas of silver, including the house.

A declaration of a right of way in favor of another.

An acknowledgment of the payment of the first instalment of interest on a mortgage.

A summons in an action of debt for the nonpayment of price of slave.

An award of one mana of silver for killing the servant of another.

Deed of partnership between Sininana and Iribamsin, 2400 B. C.

Record of borrowing a quantity of grain.

A woman's record of her borrowing four measures of grain.

A bequest by a son to his father.

A renunciation by a father of his minor son, accompanied by the adoption of the son by another man.

A declaration of trust by Sini concerning certain property bought and held by him, 2120 B. C.

Record of a loan made for the purpose of paying the interest on another outstanding loan.

An apprenticing by Nubta of Attan to Beledir for five years.

A deed, in sixth year of Cyrus, of real estate in the ward of Suanna in the city of Babylon, giving dimension and abutting owners, signed by seller and witnesses.

An order for straw for workmen on canal.

A tablet concerning the rations of workingmen.

An order on another for five manas of iron; for work done.

A power of attorney from one brother to another to sell a quantity of grain.

A lease of a house by the agent of a woman, she being the owner.

Slave having been sold when title was in dispute, the tablet shows the matter now all settled, the title perfect, and the money paid.

A loan of field produce in the third year of Xerxes.
A list of tenants who had paid their rent.
A loan of a copper kettle.
A written cancellation and withdrawal of a right of way theretofore granted.
An income mortgage of revenues of a temple.
Instructions from Bullut to an agent to loan some produce to another.
A quitclaim deed by a woman and her husband of certain portions of their revenue.
A receipt by a joint owner for his part of the produce.
The defeat of a lady in a litigation in which she sought to acquire her brother's property.
A renting of slaves for work.
An agreement to deliver a certain quantity of silver, "stamped for giving and receiving" [coined].

Perhaps it would not be amiss to add a few others of the very many: —

An inscription showing that Entenna was King of Babylon 4200 years B. C.
A letter to a King of Babylon asking for a doctor to see a lady.
A table of synonyms of Assyrian words.
Treatment of diseases of the eye.
Assyrian-Elam dictionary.
A list of clothing on hand.
Observations of the planet Venus.
A record of the recovery of an image of the goddess Nana that had been captured and carried off from Babylonia 1635 years before.
A label to be worn by Khipa, a female slave of Sinishish.
The history of the recovery by Sennacherib of a signet seal that had been captured and carried away six hundred years before.
A record of the conquests of Tilgath Pilesar, 1120 B. C.
A list of furniture in the royal household.
A report on the building of a palace.
A list of kings who had paid tribute.
A tablet containing a list of the standard works of the royal library of Nineveh.
Record of the eclipses of the moon.
The exact date of the vernal equinox.
Records of the Creation and of the Deluge.
Concerning the building of the Tower of Babel.
An address "to primitive man."
Lists of Babylonian kings from the Flood down.
A letter from Sennacherib to his father, reporting the condition of the empire.
A report of progress being made in copying out works for the royal library.

The above legal documents are all dated with the regnal years of the then reigning monarchs, are signed by witnesses, and seem to be gotten up with an accurate formality.

LEGAL ANTIQUITIES.

NESTOR tells us how the weregeld and private redress was abolished in the Russian law, in the following words: —

"And Vladimir lived in the fear of the Lord, and deeds of murder were on the increase; and the bishops said to Vladimir: 'Murderers are increasing in numbers; why do you not punish them?' Vladimir answered: 'I fear to do injustice.' But they said: 'You are appointed by God to punish evildoers and reward the good. Therefore punish the murders, but only after trial.' Thereupon Vladimir abolished the weregeld, and punished murder."

AT a Quarter Sessions held at Guildford in 1769, a motion was made for an application to one of the Secretaries of State, recommending a certain prisoner as a fit object for his Majesty's pardon.

Twelve months previously the man in question had been sentenced to two years' imprisonment, and to find sureties for his good behavior for seven years afterwards, for "chalking 45" on the back of a justice of the peace.

In the same year a Methodist preacher, who had "disturbed the peace of the city of Gloucester with his enthusiastic cant," was flogged through the streets by order of the mayor.

A few years later, a suit instituted by a Yorkshire rector against two of his parishioners, for a tithe of milk and calf, was decided in favor of the rector. A payment of a certain sum had been made for many years for these tithes; but the rector thought this insufficient, and therefore insisted upon taking them in kind, — a proceeding upheld by the decision of the court.

Several comedians were committed to prison at Bordeaux in 1770, for advertising the representation of a piece entitled "The Honest Criminal."

FACETIÆ.

JUDGE (to female witness). What is your age, madam?

WITNESS (hesitatingly). I have seen sixteen summers.

JUDGE. How many years were you blind?

THE following act was passed some years ago by the Pennsylvania Assembly: "The State House yard shall be surrounded by a brick wall, and remain an open enclosure forever."

THE solicitor of the mountain district of North Carolina, a few years back, was J. M. Gudger, a man of quick and sparkling wit, of which many incidents are current, among them this: On one occasion five colored men of unusual blackness of tint were on trial for a riot or some similar offence. When the case was called, the judge, noticing the group, inquired, "What have you now, Mr. Solicitor?" Instantly came the reply, "A flush of spades, your honor." It may be mentioned that there, as elsewhere, it was not unusual for judge, solicitor, and counsel to beguile the tedium of the circuit with a harmless game of cards. The inquiry, not unusual over the social table, received an answer more witty than expected in the court-room.

A GOOD story is being told about a judge of the Massachusetts Superior Court. The judge has a habit, when making a charge to the jury, or during the course of any lengthy remarks in court, of allowing his voice to drop so that his words can with difficulty be caught. While sentencing a prisoner at a term over which he presided at Lawrence, he fell into the habit, and a man in the court-room shouted, "Speak louder, your honor! speak up!" "Send that man out, Mr. Officer!" said the judge; and a friend of the individual, knowing the penalty which might be inflicted upon him for such a contemptuous proceeding, advised him to get out of town at once, lest the judge's rightful wrath should induce him to punish him more severely. So the man hurried out, and the court went on. "Call the next case," said the judge, when he had finished with the prisoner in whose case the interruption occurred. "Terence O'Flynn" (or whatever the next man's name was), called the clerk; but no O'Flynn arose. The crier called him; but there was no answer, and the officers of the court began to look about. It was discovered that O'Flynn had been in court that morning, and his absence could not be accounted for, until some one spoke up and said, "May it please the court, but Terence O'Flynn was the man you just sent out!"

NOTES.

AT the June Term, 1863, of Bennington, Vt., County Court, Michael Costello and Michael Purcell were jointly indicted for the murder of Thomas Barrie. The facts shown upon trial were that these three persons, on their way home at night from the Dorset quarries, became engaged in a drunken row, in which Barrie was stabbed and killed. The evidence was quite uncertain as to how or by which one of the three the quarrel was begun, or which one of the two did the stabbing; and there was no evidence of concert between Costello and Purcell. At this term Costello procured a continuance of the trial, as to himself, until the next term; but Purcell, being in readiness, demanded a present trial, which was granted him; and he was tried and acquitted. At the next December term Costello was tried, and he was also acquitted. They were defended by different counsel, each urging the danger of convicting an innocent man, and that his client was truly or probably the innocent man. Each verdict was clearly right, and yet the result of the two trials was the acquittal of a murderer; but which was he? The case seems to have been a proper one for separate trials, since the parties were placed in a position of hostility, — each forced to maintain his own innocence by casting the crime upon his fellow. If they had been tried jointly, the result must have been substantially the same, — either an acquittal of both or an irreconcilable disagreement. Thus, though in one view the result of these trials was a failure of justice, in another it was a vindication of the considerate justice of the law.

AMONG the many curious customs still existent in England is that of the crown supplying venison twice a year to London's lord mayor, sheriffs, recorder, chamberlain, town clerk, common sergeant, and remembrancer, each of whom receives his proper quota of deer. The early charters granted to the citizens secured to them their supply of game; and the present custom is the relic of the bygone age. — *Ex.*

AN artist employed in decorating the properties of an old Romanist church in Belgium, being refused payment of a bill which he had sent in unitemized, thereupon furnished the following bill of particulars: —

"Corrected the Ten Commandments, 20 fr.

"Embellished Pontius Pilate, and put a ribbon on his bonnet, 15 fr.

"Put a new tail on a rooster of Saint Peter, and mended his comb, 15 fr.

"Replumed and gilded the left wing of the Guardian Angel, 20 fr.

"Washed the servant of the high-priest, and put carmine on his cheek, 15 fr.

"Renewed heaven, adjusted two stars, and cleaned the moon, 50 fr.

"Reanimated the flames of purgatory, and restored souls, 25 fr.

"Revived the flames of hell, put a new tail on the devil, mended his hoof, and did several jobs for the damned, 45 fr.

"Rebordered the robe of Herod, and readjusted his wig, 20 fr.

"Put a new spotted sash on Tobias, and dressing in his sack, 10 fr.

"Cleaned the ears of Balaam's ass, and shod him, 20 fr.

"Put earrings into the ears of Sarah, 12 fr.

"Put a stone in David's bag, enlarged the head of Goliath, and extended his legs, 20 fr.

"Decorated Noah's ark, 20 fr.

"Mended the shirt of prodigal son, and cleaned his ears, 25 fr.

"Total, 332 fr."

Recent Deaths.

AUGUSTUS SUMMERFIELD MERRIMON, Chief-Justice of the Supreme Court of North Carolina, died at his residence in Raleigh, Nov. 14, 1892. He was born at Cherryfields, in Transylvania County, Sept. 15, 1830. His father, like the father of Chief Ruffin, was a minister in the Methodist Church, and removed to this State from Virginia in the course of his duties. Judge Merrimon's mother was Miss Paxton, niece of Judge Paxton of our Superior Courts, and through her he is related to the McDowell family of Revolutionary fame, who have left a wide and influential connection of descendants in western North Carolina.

As a boy Judge Merrimon's opportunities for an education were limited. He kept till his death a copy of "Townes' Analysis," in which he had acquired the rudiments of an education by snatches while following the plough, or as he watched the saw cutting its way through the logs of the saw-mill where he labored.

Later his father sent him to school in Asheville, where he was able to remain only eight months: but such had been his diligence and progress that he was retained six months longer as assistant teacher, and used the opportunity to prosecute his studies. He had no further school advantages. He studied law, and was admitted to the bar about 1852, and located in Asheville. He was soon made county attorney for Buncombe and other counties. In 1860 he was elected to the House of Commons, defeating David Coleman, an able and popular opponent. The war was coming on, and the drift in favor of secession was strong; but with the courage of his convictions young Merrimon took the Union side, and in debate held his own with the best men in the house.

When war broke out, he promptly enlisted as a private in the company commanded by Capt. Z. B. Vance, since Governor and United States Senator; but soon after his arrival in Raleigh with his company he was appointed quartermaster with the rank of captain, and served as such for a year in eastern North Carolina, when he was made solicitor of his district, which post he filled till the end of the war. In 1866 he was elected by the legislature judge of the Superior Court, and he filled the office for eighteen months, holding the terms in the Asheville, Raleigh, and Chowan districts. The military having under the reconstruction acts taken charge of the State, he resigned rather than obey orders issued to him by General Canby.

While holding the Chowan circuit he presided at the trial of the famous "Johnston" will case, in which was involved the largest amount ever tried in a court of this State. Most eminent counsel — Governors Graham, Bragg, and Vance, Judges Smith, Heath, Gilliam, Messrs. S. F. Phillips, B. F. Moore, P. H. Winston, Conigland, and Eaton, presented an array of talent never before or since gathered in a single cause in North Carolina. The trial lasted four weeks, and on appeal every ruling was affirmed by the Supreme Court, the opinion being written by Judge Reade. Upon his resignation he settled in Raleigh as a partner with Hon. S. F. Phillips, since Solicitor-General of the United States. Later he entered the well-known firm of Merrimon, Fuller & Ashe, with Judge Fuller and Capt. S. A. Ashe. In 1868 the executive committee nominated him for governor; but he declined, and the late Judge Ashe was selected. He was then put upon the ticket as associate justice; but the Democratic party at that juncture of affairs was of course defeated. He was one of the first to apply for writs of *habeas corpus* for the prisoners in the "Kirk" war in 1870, and was one of the foremost advocates who at that day maintained the supremacy of the civil law. He appeared for the men who had been illegally arrested without fee, and by his earnest fight in their behalf earned the cordial thanks of the people.

The next winter Governor Holden was impeached; and Judge Merrimon, with Governors Bragg and

Graham, was employed to conduct the impeachment. In this employment he won his greatest title to fame. To him was given the duty of examining the witnesses, and his examination was perfect. It was as fine an exhibition as has ever been seen in tne conduct of a legal cause.

In 1871 he was candidate from Wake County for the convention, together with D. M. Barringer, Governor Bragg, and Green H. Alford, but was defeated, and the convention was not called. In 1872 he was nominated for governor, and made a thorough and strong canvass of the entire State. He was believed to have been fairly elected; but on the face of the returns his opponent, Governor Caldwell, was seated by a small majority.

In the legislature ensuing the election, 1872–73, the United States Senatorship was warmly contested between him and Governor Vance. After a long contest Judge Merrimon succeeded, and served his full term of six years (1873–79). In the Senate he added to his well-earned reputation, and the State never had a more faithful or watchful representative. He was an indefatigable student, and thoroughly familiarized himself with all questions coming before the Senate. After the expiration of his term he resumed the practice of his profession in Raleigh till Sept. 29, 1883, when upon the resignation of Judge Ruffin he was appointed by Governor Jarvis Associate-Justice of the Supreme Court. This appointment was ratified by an election by the people, and he continued to fill the post till the death of Chief-Justice Smith, Nov. 14, 1889, when he was appointed Chief-Justice by Governor Fowle. He was unanimously nominated by the Democratic Convention in 1890, and elected by a majority of over forty thousand votes.

His opinions will be found in twenty-two volumes, from 89 to the 110 N. C. Reports, inclusive. Among them may be noted: Burns *v.* McGregor, 90 N. C. 222, which holds that while a married woman is not bound by a contract of purchase to pay the purchase-money, she cannot avoid the contract and keep the purchased property. Bunch *v.* Edenton, 90 N. C. 431, and White *v.* Comm'rs, Id. 437, hold that a town is, and a county is not, liable for injuries sustained from defective highways. Branch *v.* Walker, 92 N. C. 87, and Foley *v.* Blank, Id. 476, hold that the term expires whenever the judge quits the bench, and does not extend to the end of the week or weeks allotted for such term. Rencher *v.* Anderson, 93 N. C. 105, affirms the independence of the Supreme Court from legislative control, and has since been followed by Horton *v.* Green, 104 N. C. 400. 94 N. C. Reports contains 1,220 pages, and was the work of the three judges then composing the bench at *one term* of four months. It contains very many valuable opinions. Dare *v.* Curribuck, 95 N. C. 189, reaffirms that the legislature can abolish, alter, or create counties at will. In Wood *v.* Oxford, 97 N. C. 227, it is decided that the legislature may authorize municipal corporations to subscribe to railroad and other public companies, but not to aid a purely private enterprise. State *v.* Giersch, 98 N. C. 720, holds that the words "spirituous liquors" in the Local Option Act embrace wine, lager beer, and all other liquors, whether produced by fermentation or distillation, which by their free use produce intoxication. State *v.* Pearson, 100 N. C. 414, decides that after sentence passed a prisoner is not entitled to "prison bonds." Jones *v.* Lee, 102 N. C. 166, holds that an injunction will lie in favor of a creditor against cutting timber upon the "homestead." Brown *v.* Brown, 103 N. C. 221, is a review of the subject of legislative control over Indian lands in this State, and the effect of the treaty of Holston. State *v.* Boyle, 104 N. C. 800, is the well-known case of the conviction of a Roman Catholic priest of rape. Board of Education *v.* Comm'rs, 107 N. C. 110, discusses the constitutional limitation of taxation. Van Amringe *v.* Taylor, 108 N. C. 196, passes upon the validity of an election, and what constitutes an officer *de facto*. In the 108 N. C. 805, the court adopted a rule providing for the citation of the Reports, prior to the Sixty-third, by number instead of as previously by the name of the reporter. Van Story *v.* Thornton, 110 N. C. 10, is an interesting opinion as to the instances in which the "homestead" may be reallotted.

At the age of twenty-two he married a beautiful and lovely woman, Miss Margaret Baird, daughter of Israel Baird, of Buncombe County. She survives him, together with four sons and three daughters. His eldest daughter is the wife of Hon. Lee S. Overman, a popular and talented gentleman, who has often represented Rowan County in the legislature, and who has recently been again chosen to that body. Judge Merrimon left several brothers, among them Hon. James H. Merrimon, for many years a judge of the Superior Court, from which he lately resigned.

Judge Merrimon's work is before the world. North Carolina has long since made up her estimate of his character. That with his disadvantages in early life he should have risen to be one of the leading lawyers in the State, Chief-Justice, and United States Senator, and accumulated a handsome estate besides, argues the possession of no ordinary talents. Neither in public nor private life has the slightest spot or blemish attached itself to his name. Faithful to his work, faithful to every duty, he has left behind him an example to encourage young men who set before themselves a high ideal. He was a man of great singleness of purpose, and "an Israelite indeed in whom there was no guile." Long an earnest seeker after truth, in his last illness he connected himself with the

church in which he had been reared, and in which his father was for sixty years a devoted minister. He was succeeded by Hon. James E. Shepherd.

WALTER CLARK.

BOOK NOTICES.

THE LAW OF PUBLIC HEALTH AND SAFETY, AND THE POWERS AND DUTIES OF BOARDS OF HEALTH. By LE ROY PARKER, Vice-Dean of the Buffalo Law School, and ROBERT H. WORTHINGTON of the New York Bar. Matthew Bender, Albany, N. Y., 1892. Law sheep. $5.25 delivered.

This is a timely book upon a most important subject. There is a real want for a work upon the law of public health and safety, to which the lawyer may refer for the law as it has been decided by the courts; in which the medical man may find his rights and duties set forth; in which municipal officers may find their authority, and the limitations on their authority for the enactment of public health ordinances and regulations; and where the health officers and members of boards of health may find such plain directions as will enable them to properly perform the delicate and responsible duties of their offices, and may ascertain the limitations upon their powers. The present treatise admirably supplies this want, and develops the subject from its foundation in the authority of the State, under its police power, to enact laws for the preservation of the health and safety of the people, and for the prevention of disease: treating of the various methods by which that power may be exercised, directly by the State, or by delegation to inferior municipalities, by establishing boards of health and prescribing their powers and duties; and detailing those powers and duties; the mode in which they may lawfully be exercised, and the limitations upon them, together with the subjects upon which municipalities may legislate in the interest of public health and safety, such as trades occupations, buildings, foods and drinks, traffic and transportation, the practice of medicine, vital statistics, the disposal of the dead, quarantine, etc. Mr. Parker, having been president of the Michigan State Board of Health, is eminently well fitted to write upon this subject, and has evidently bestowed great care and discrimination in the preparation of the work.

A MANUAL OF MEDICAL JURISPRUDENCE. By ALFRED SWAYNE TAYLOR, M. D., F. R. S. Revised and edited by Thomas Stevenson, M. D., London. Eleventh American, edited with citations and additions from the twelfth English edition, by Clark Bell, Esq. Lea Brothers & Co., Philadelphia, 1892. Law sheep. $5.50 net. Cloth. $4.50 net.

This admirable work of Mr. Taylor's has long been recognized as a standard both in England and America. The present edition is an entire revision of all prior editions, and includes the excellent work with which Dr. Stevenson has enriched the twelfth English edition. Much new matter has been added by Mr. Bell, and many portions of the work have been amended, and some parts have been rewritten. In its present form the treatise is an improvement on previous editions.

THE LAW OF BY-LAWS OF PRIVATE CORPORATIONS. By LOUIS BOISOT, JR., of the Chicago Bar. The United States Corporation Bureau, Chicago, 1892. Cloth. $1.50.

This is a very useful little work upon a subject of much importance, and one which has not been treated of by our law-writers, so far as we are aware. The legal construction and effect of the By-Laws of Private Corporations have been passed upon in many cases, and these adjudications have been carefully collected and considered by Mr. Boisot in this volume. For corporation officers and counsel the book will prove of real value and assistance.

UNITED STATES CIRCUIT COURTS OF APPEALS REPORTS, containing the cases determined in all the circuits from the organization of the courts. Fully reported, with numerous annotations by members of the editorial staff of the "National Reporter System." Vol. I., with the Acts of Congress establishing the courts, and the Rules in all the courts, elaborately annotated. West Publishing Company, St. Paul, Minn., 1892. Law sheep. $3.00 net.

Another series of reports was rendered inevitable by the formation of the Circuit Court of Appeals; and the West Publishing C mpany with commendable zeal are first in the fi ld with Vol. I., containing the decisions of these tri'unals rendered since their organization. The decisions in this series are all submitted to the judges in proof for revision, and this series is therefore authoritative. The act establishing these courts is published in this volume, with elaborate annotations, and the court rules adopted in the different circuits are also given. The position of the West Publishing Company as publishers of the "National Reporter System" gives them exceptional

facilities for work of this nature, and the series will undoubtedly prove eminently satisfactory to the profession.

COMMENTARIES ON MODERN EQUITY JURISPRUDENCE as determined by the courts and statutes of England and the United States. By CHARLES FISK BEACH, JR., of the New York Bar. Baker, Voorhis & Co., New York, 1892. Two vols. Law sheep. $12.00 net.

This treatise is intended by Mr. Beach to be a working-book for lawyers, and from the limited examination we have been able to make of it it seems admirably adapted to the purpose. Eschewing in a great measure the less important of the older cases upon the subject, Mr. Beach cites and discusses all the recent cases found in our State and Federal Reports and in the English Law Reports, so that the work is essentially, as its title states, a treatise on *Modern* Equity. As Sir George Jessel aptly remarks: "If we want to know what the rules of equity are, we must look, of course, rather to the *more modern* than the more ancient cases." This is the idea which Mr. Beach has attempted to develop. The book is a complete and practical treatise along modern lines, giving the principles and practice of equity as they are to-day. Over fifteen thousand cases are cited, as well as articles from American and English periodicals touching upon the subject. The work is not only exceedingly useful for the practising lawyer, but is well adapted to the law student's need. It will add to Mr. Beach's well-earned reputation as a legal writer.

THE AMERICAN STATE REPORTS, containing the cases of general value and authority decided in the Courts of Last Resort of the several States. Selected, reported, and annotated by A. C. FREEMAN. Vol. XXVI. Bancroft-Whitney Company, San Francisco, 1892. Law sheep. $4.00 net.

This last volume of this series of reports is in every way up to the standard of its predecessors. Well-selected cases, admirably annotated, give fresh evidence of Mr. Freeman's faithful and conscientious work. The cases reported include decisions in the following States: Arkansas, Florida, Kansas, Louisiana, Massachusetts, Michigan, Nebraska, New Jersey, New York, North Carolina, North Dakota, South Carolina, Texas, Washington, and West Virginia.

THE AMERICAN DIGEST (ANNUAL 1892), being Vol. VI. of the United States Digest, Third Series Annuals, also the complete Digest for 1892. A Digest of all the decisions of the United States Supreme Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri, and Colorado, Supreme Court of the District of Columbia, etc., as reported in the "National Reporter System" and elsewhere from Sept. 1, 1891, to Aug. 31, 1892. With notes of English and Canadian cases, memoranda of statutes, annotations in legal periodicals, etc. A table of the cases digested, and a table of cases overruled, criticised, followed, distinguished, etc., during the year. West Publishing Company, St. Paul, Minn., 1892. Law sheep. $8.00.

If anything is lacking in this vast tome of over 3,000 pages which is essential to the making of a "complete digest," we have failed to discover it. The editorial work is in every way admirable, the arrangement all that could be desired, and the typographical work truly refreshing for a volume of this nature. We must congratulate the publishers on the great advance made in this digest since its first publication, and are confident that their efforts in behalf of the profession will meet with a hearty response.

THE INSOLVENT LAWS OF MASSACHUSETTS, with notes of decisions. By JOSEPH CUTLER. Edited with additional notes by Gorham D. Williams of the Suffolk Bar. Fifth edition, including the Legislation of 1892 and cases in Vol. CLIV. of the Massachusetts Reports. George B. Reed, Boston, 1892. $3.50.

The changes in the Insolvent Laws of Massachusetts since the last edition of this work was published in 1878 have been numerous, and the number of cases adjudicated has been large, so that there was an actual need for a new edition. Into the present volume have been incorporated thirty-seven new statutes, and all the decisions upon the subject contained in the Massachusetts Reports subsequent to Vol. CXXII. Mr. Williams has made no attempt to change the original form of the work, except to arrange the points decided under the several sections in smaller groups, and to provide a much fuller index. His efforts in this direction show an admirable result, and add greatly to the value of the book. Subjects are not only indexed by reference to page, but also by reference to the particular note wherein the point sought for is contained, each note being numbered. Massachusetts lawyers will find this work almost indispensable.