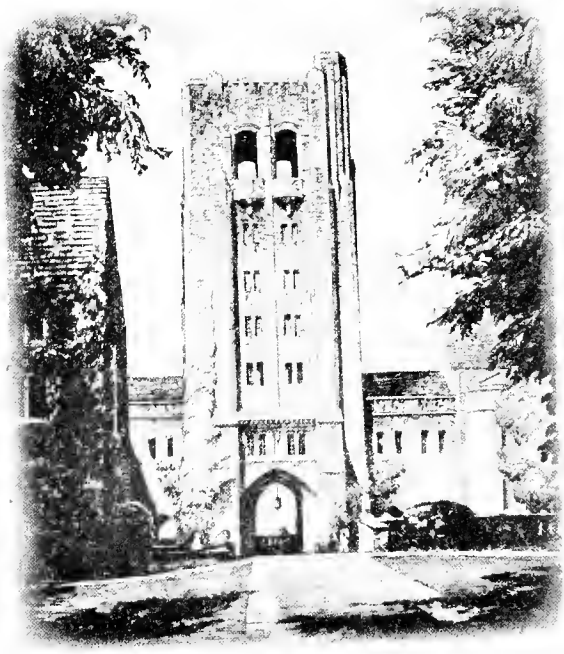
# LANDMARKS OF A LAWYER'S LIFETIME

THERON G. STRONG



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BY
THERON G. STRONG

NEW YORK
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TO

MARTHA PRENTICE STRONG

MY BELOVED PARTNER
FOR THIRTY-SIX YEARS

## *MAY IT PLEASE THE COURT:*

*In submitting to this, the highest of all tribunals —the court of public opinion—the record now presented, a word of explanation may perhaps be permitted.*

*It consists of testimony relating to personages and events at the bar of the City of New York, during the past forty years, from the view-point of a casual observer. It does not profess to have the merit of biography, nor the accuracy of history, but is rather in the nature of freehand sketches of notable lawyers and interesting incidents, amid the passing show of the courts. In its recital, the testimony, at times, wanders off into comments and opinions which are, of course, subject to correction by those better qualified to speak, but, whatever its value may be, it is hoped that the court will not find it immaterial or irrelevant, although some of it may not be perfectly competent. A large amount of valuable testimony is available, relating to eminent judges and distinguished lawyers now living, which, for obvious reasons, it would not be proper at this time to present.*

*January, 1914.*

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THE LAW IS GOOD IF A MAN USE IT LAWFULLY.

1 Tim. 1:8.

AND DO AS ADVERSARIES DO IN LAW, STRIVE MIGHTILY, BUT EAT AND DRINK AS FRIENDS.

As You Like It.

# CHAPTER I

## SOME OLD-TIME LAWYERS

THE tendency, by reason of heredity or environment, of successive generations in a family to engage in the same pursuit is probably true of the law, as of other occupations. This is doubtless the reason that many of my ancestors, relatives and family connections have been lawyers. I allude to it because it enables me to furnish from my own experience and recollection a better illustration of old-time lawyers and their practice and associations than would otherwise be possible.

The Connecticut Strongs have produced a long and numerous line of lawyers, headed by my great-grand-father, Col. Adonijah Strong, followed by his son, Judge Martin Strong, and by Adonijah's grand-son, Mr. Justice William Strong, of the Supreme Court of the United States, and Martin's son, my father Judge Theron R. Strong, of the New York Supreme Court and another of Adonijah's grand-sons, Judge William Strong, United States District Judge in Oregon and by a great-grand-son of Adonijah's, Judge Robert N. Willson of Pennsylvania, a nephew of Mr. Justice Strong, and many others of us plain practitioners who have borne the cross, but did not wear the crown of judicial distinction. Then there are the Long Island Strongs, headed by Judge Selah B. Strong of the New York

Supreme Court, an associate on the bench with my father, followed by the Strongs who founded the practice of that distinguished firm—Strong & Cadwalader of New York City, in which for many years there was no Strong, but the name was regarded of sufficient value to be retained. The progeny of these two branches of Strongs ramified far and wide in the field of law, and quite likely a few more judges among them might be unearthed by more or less diligent search, and if the fates had been kinder upon my two nominations for a judgeship by the Republicans of New York City, I might have added another to the list of Supreme Court Judges. It is a matter of satisfaction in looking over the roll of these worthies of the bench and bar, that in about a century and a half neither the sentence of *sus per coll* nor of disbarment has been pronounced against any of them.

Adonijah, the son of Noah, the son of Preserved, the son of Jedediah, the son of John the Puritan, one of the first settlers of Northampton, Massachusetts, was surely of good Puritan stock. I do not know how or where he was educated, but there is good testimony to his efficiency as a lawyer. The course of study which he pursued was doubtless like that of other colonial lawyers, a prominent illustration being John Adams of Massachusetts, who, however, had access to resources which were not available to the country practitioner. He tells us in his diary in 1760, when he was about 25 years of age, that he had read a multitude of law books, Coke on Littleton, Wood's "Institutes of

Civil Law," Lillies' "Abridgement," Salkeld's Reports, Swinburne, Fortescue, Fitzgibbon, Justinian's "Institutes," Cowell's "Institute of the Laws of England," Imitations of Justinian, Doctor & Student, Finch's "Discourse of Law," Hale's History, Cases in Chancery, and the General Treatise of Naval Trade and Commerce. The office of the country lawyer, even toward the end of the eighteenth century, contained little more than Coke on Littleton, Comyn's Digest, Bacon's Abridgement, Hale's or Hawkins' Pleas of the Crown, Blackstone, Lillies' Entries, Saunders Reports and some brief book upon pleading and on practice. Lacking books, and with the undeveloped law of commercial relations and personal rights, most of the students devoted themselves to real property and pleadings, as found in the difficult pages of Coke on Littleton and the still more difficult ones of Brackton, Britton, Fleta and Glanville.

While Adonijah was rough-hewn, like most of the men of those days, he was evidently a leader of men, and a patriot as well, for as colonel of the militia and later as commissary-general, he turned his plowshare into a sword, and his pruning hook into a spear and gave his services to his country in the days of the Revolution. At its close he turned them back again, and being enrolled as one of the original members of Washington's society of the Cincinnati he resumed his farming and his law. His early advantages were, of course, few, but his mind was strong, his wit keen, he abounded in common sense, he had studied hard and was therefore well equipped.

His was a powerful personality, and while his wit was rough edged, and he had peculiarities and eccentricities, his influence with juries was great, his practice for those days was large, and he attained eminence in his locality.

There is a shelf in my library which holds a little line of venerable volumes testifying to the patient study of Adonijah and of Martin and of my father, and I may add, of myself. There is among them a complete set of Durnford and Easts' reports, known as the Term Reports, which contain the immortal decisions of Lord Mansfield and Lord Kenyon, also a huge tome entitled "Jacob's Law Dictionary," a copy of Powell on Contracts, two volumes of Lespinasse's reports, all bearing the book-plate of Adonijah, a couple of volumes of Connecticut reports, bearing Martin Strong's autograph, and some early works of my father's. I must not omit, however, to mention other books of theirs of a more personal character, which reveal the years of preparation and the days of slender practice. There is an ordinary blank-book, one of three volumes, containing the clear handwriting of my grandfather, Martin Strong, recording his notes of lectures delivered by Judge Gould in the famous law school of Litchfield, Connecticut, from which he graduated in 1802. This was the year of my father's birth, which shows that Martin, while a diligent student of law, was at the same time a *pater familias*. Then there are two large blank-books containing the handwriting of my father when he, too, was an attendant of Judge Gould's law school in 1822, and there is another con-

taining his account of fees and expenditures from the time he began practice in Palmyra, New York, in 1826, to which I shall allude as an illustration of the modest fees of those early days.

It is generally true, I think, of the rural lawyer of former times, and it is, at least, true of my ancestors of the law, that they combined with their professional practice, to a greater or less extent, the occupation of farming. Land which yielded rich harvests was abundant. Their practice was not sufficient to engage all their time; the court sessions were infrequent; their homes could be conveniently located within easy reach of the village centre so as to admit of cultivation of a generous acreage, and it was, therefore, quite natural, and entirely practicable, to manage a farm without neglecting the practice of law. Col. Adonijah Strong's home was thus located on the crest of Town Hill in the Village of Salisbury, Connecticut, now known as Lakeville, on the border of its beautiful lake, and commanding an extended and attractive view of the surrounding country. The offices of these old-time rural lawyers when not in their residences were frequently in small buildings erected for that purpose on their own grounds. This was true of my father after he became judge and of my mother's father to whom, later on, I shall refer. It is on a part of Adonijah's farm that in later years the celebrated Hotchkiss School was located.

Judge Donald J. Warner, some years ago in his reminiscences of the Litchfield County Bar, referring to Adonijah Strong, said: "He was one of the

roughest pieces of granite that ever existed; with a powerful mind, full of wit and humour, of great commonsense, and much force and ability, which produced a marked effect upon the court and jury. He belonged to the Congregational Church and was a great supporter of it. There was another colonel there, Col. Joshua Porter, who was the ancestor of distinguished sons, one of them a member of the cabinet under the presidency of John Quincy Adams. At one time the Methodist people organised a society in Salisbury to which there was a great deal of opposition. They held a meeting in the old school house on Ore Hill, and Col. Strong and Col. Porter made up their minds to attend, but not for any religious purposes. Each had a distinctive reputation—Col. Strong of imbibing considerably and eating heartily, and Col. Porter—well—of another kind, and it can easily be guessed what that was; it is spoken of in the Scriptures. Well, the clergyman who was to officiate on that occasion had been advised of their coming and Col. Strong's character was portrayed, and so was Col. Porter's. They went in and took seats and after a while the clergyman was portraying characteristics of different individuals and shouted inquiringly, "where is that wine-bibber and glutton?" Col. Strong arose and said: "Here I am, sir," and sat down. He then took up other wrongdoings and when he reached the sinner of Col. Porter's type, he inquired, "and where is he?" Col. Porter sat still, whereupon Adonijah said: "Col. Porter, get up and answer to your name, as I did."

The incident he refers to must have occurred, I think, in his earlier days, soon after his return from service in the War of the Revolution, for his later years were characterised, I am sure, by dignity and self-respect, which won for him the confidence and esteem of his fellow-citizens; and surely his influence must have been excellent upon his sons, who were men of the highest character, one in the law and two in the ministry. And we are not wanting in excellent testimony as to this. In the records of the bar of Litchfield County there appears the following minute: "At a Bar meeting, December Term, 1804, the following resolution was passed unanimously, namely: that Adonijah Strong, Esq., on account of his great eminence as a lawyer and eloquence as an advocate be considered as a member of this Bar for the purpose of instructing students, although he shall not continue to practice." Possibly this may have been not only an excellent way of providing a suitable instructor for the embryo lawyers, but of getting rid of a very formidable opponent. However this may be, this testimonial, coming from the men of his own time, is one of which he may have well been proud, as certifying to his personal worth as a man in making him the guide of the young men of the day, and to his qualifications from the standpoint of individual eminence, as learned in the law and accomplished as an advocate in the courts.

The contribution, however, which Adonijah made to the ranks of the Bar through his lawyer son, Martin Strong, and of his two clergymen sons, William and Henry, each of whom became the father of

an excellent judge, was one in which he would have taken an honest pride. At the time of the resolution referred to, Martin had recently finished his course in Judge Gould's law school and entered upon practice as a lawyer. He combined the occupation of farmer with the practice of his profession. He was evidently held in high esteem by his fellow citizens, serving them as a member of the Legislature, later as State Senator, and was finally honoured by his selection as senior Associate Justice of the County Court of Litchfield County. He was of immense physical proportions, weighing, it is said, 300 pounds.

In attending the sessions of the County Court he was usually accompanied by his wife, who was as diminutive as he was large, and the wagon in which he drove from Salisbury to Litchfield was not only furnished on his side with a stronger spring to equalise the weight, but the wagon seat, which I once saw, was divided by a partition which left two-thirds of it for his own use and one-third for his wife, the partition serving the purpose of preventing his huge bulk from crowding her out of the wagon.

I have in my office the chair which he used in the court sittings, which is itself testimony to his ample proportions.

It is said that he never devoted himself very assiduously to the practice of his profession, but being characterized by sound common-sense and furnished with a reasonably fair knowledge of legal principles and maxims, he was able to discharge his duties to the satisfaction of the county for nine years. He was evidently a good listener, for when his three

hundred pounds were once seated on the bench, it is related that he sat perfectly quiet until the loud proclamation of the sheriff announced the adjournment of the court. Like his father, Adonijah, he had a large family of children, of whom his second son, Theron R. Strong, was my father.

A history of Wayne County, edited by Hon. George W. Cowles of Clyde, late County Judge of Wayne County, contains the following:

"One of the most conspicuous figures at the Bar of Wayne County was Theron R. Strong. He was born at Salisbury, Connecticut, November 7, 1802; his father was Martin Strong, for many years a State senator and County Judge of Litchfield County, Connecticut; his grandfather, Judge Adonijah Strong, also a Colonel in the Revolutionary War.

Theron R. Strong was intended for other than professional pursuits, but his inherited love for the law led him to its study and finally, after much opposition, he was permitted to pursue his studies for one year in the justly celebrated law school of Judge Gould in Litchfield. He then sought the West, as it was then called, and for a time located in Washington County, where, in the office of Cornelius L. Allen, later a Justice of the Supreme Court, he continued his studies. After admission to the bar he sought a permanent location, and with means insufficient to support himself in one of the cities of the State, he finally selected Palmyra as his field of practice.

His early years were those of struggle and hardship and his slender means were often at so low an ebb as to deprive him of the necessaries of life, but

his sterling worth, although hidden by a natural diffidence and modesty, was soon discovered, and, equipped with a thorough mastery of legal principles, he won the confidence of and attracted as clients the most desirable citizens of Wayne County. He was associated in business with Hon. O. H. Palmer, and the firm of Strong & Palmer was for many years among the leaders of Wayne County.

He was chosen in 1831 District Attorney; in 1839 he was elected member of Congress; in 1842 he became Member of Assembly and in 1851 he was elected Justice of the Supreme Court. He filled this position eight years, during one of which he sat as Judge of the Court of Appeals.

Judge Strong after retiring from the bench practiced several years with conspicuous success in Rochester, New York, and subsequently with even greater success in New York City. His grasp of legal principles, his remarkably sound judgment, his power of application, his patient industry, his unassuming and courteous demeanor, won for him as a practitioner unlimited confidence, and commanded for him as a judge the respect and regard of the bar; and among all classes in Wayne County, the name of Theron R. Strong was synonymous with the highest qualities of christian citizenship. He died in New York City on May 14, 1873, honored by the bench and bar of that City."

The *Wayne Sentinel,* a weekly paper published in Palmyra, shows in its earlier years his identification with the various schemes of intellectual and local improvement, and for two or three years he assumed

its editorship, and in it will be found many editorials from his pen.

His growth and advancement as a lawyer were steady, until his position in Wayne and the adjacent counties was easily first, and his influence was such that it used to be said of him that his summing up to a jury was equal in point of weight and importance to that of a considerable number of excellent witnesses, owing to their reliance on his truthfulness, and his freedom from arts often employed to mislead.

The account books of my father bear abundant evidence of his early struggle to build up a practice, and its steady growth during the succeeding years. I suppose his fees were about the same as other village lawyers of that time. Most of the charges are of insignificant amounts, such as 50¢ for writing a letter for some illiterate farmer, 75¢ for drawing a deed, $2.50 for drawing a deed, bond, mortgage and agreement, $1.00 for advice, $3.00 for assisting some client in the trial of a case before a Justice of the Peace, and from $3.00 to $5.00 for going to some neighbouring township to attend the trial of a case in a Justice's court, with an occasional larger fee, not more than $20.00 generally, the taxable costs in a litigation in one of the higher courts. His aggregate fees, according to his account, amounted during his first year—from January 14, 1826, to January 18, 1827—to $217.00, which had to be supplemented by a loan of $63.00 from his father to enable him to live. In his third year of practice he was evidently making good headway, for his receipts in 1829 amounted to

$670.00, within which he prudently kept his living expenses, amounting to $443.00, enabling him to save a balance of over $200.00, and he probably regarded himself as in flourishing practice. During his first eight years, and until his marriage, he occupied as his sleeping apartment a room adjoining his office, sharing it with some student who enjoyed the facilities of his office and assisted him in his practice. Among these were William W. Campbell, who subsequently removed to New York City, where he became a judge of the Superior Court of the City of New York, in association with those eminent men, Judges Duer and Bosworth, and later on, removing to Cherry Valley, near Cooperstown, New York, he was elected a Justice of the Supreme Court. Another of his students, subsequently of great distinction, was that eminent lawyer and judge, Thomas M. Cooley, author of "Cooley on Constitutional Limitations" and "Cooley on Torts," head of the law school in connection with the University of Michigan at Ann Arbor, Chief Justice of the Supreme Court of Michigan and chief of the Interstate Commerce Commission. Judge Cooley, shortly before his death, sent me, at my request, his engraved portrait accompanied with the following letter:

"Ann Arbor, December 4, 1896.

Theron G. Strong, Esq., New York.

*Dear Sir:*—

I have pleasure in placing an engraved likeness of myself in the hands of a son of Theron R. Strong whom, when I was with him, I regarded as a model of a lawyer and

gentleman. The engraving was from a photograph taken four or five years ago and is regarded as a very excellent likeness.

Very respy yours,
T. M. Cooley."

Twenty-one years' faithful and conscientious discharge of duty and manifestation of keen moral sense, for which he was noted, although not at the time a religious man, resulted in his nomination for the Supreme Court bench at the reorganisation of the judiciary on the adoption of the Constitution of 1846, but he was not successful in the ensuing election. Again in 1849 he received a second nomination with the same result. In 1851 the third nomination was conferred upon him, his opponent being Samuel Blatchford of Auburn, a nephew of William H. Seward, who subsequently became United States District Judge for the Southern District of New York, and later still United States Circuit Judge, and finally was appointed and served for a number of years as Justice of the Supreme Court of the United States. The election was close, my father's majority being only 993 votes.

As I was a very young child at the time I have no recollection of him as a lawyer, but I recall his quiet announcement to my mother of the fact of his election. I remember more distinctly that in his leisure hours he was quite a sportsman. The streams in his locality abounded with trout, and he would return from an afternoon's fishing with a well-filled basket. Squirrels and partridges were plentiful in

the woods, and with his little rifle of small bore he would pierce the heads of black and gray squirrels, or if he carried his double barrelled shotgun, then a recent development in firearms, he would be sure to bring home a full game-bag. This fondness for the woods and waters and the pleasures of the rod and gun has characterised most of the Strongs, and its descent to me has been a most delightful and healthful inheritance.

For many years, a small, neat office building erected by him stood on his grounds, furnishing a very excellent and convenient playhouse for his children during his absences holding court. Here he would at times hold court for the trial of equity cases and the hearing of motions, and my memory goes back to one summer afternoon when, being promised some excursion at the conclusion of the trial, I established myself in one of his chairs so as to be on hand when the time arrived. I remember listening to the droning of the lawyers and the recitals of the witnesses, in almost hopeless despair lest the case would never end, until finally the warm summer afternoon and the general drowsiness of the place resulted in my falling asleep, from which I was awakened with glad surprise by the moving of the chairs and shuffling of the lawyers in taking their departure. Both of us were happy to be free, and probably we started on a trip to the farm he owned not far away.

Once I remember being taken by him to attend the Circuit Court for Cayuga County, which was held at Auburn. It is almost the only recollection I have

of him on the bench during trials of criminal cases. I recall distinctly the trial of an indictment which involved a grievous wrong done to a little girl. When she took her place on the witness stand and the District Attorney began to interrogate her she burst into tears. I felt very sorry for her, but I saw my father lean over and speak to her, and he evidently asked her to come to him, as she immediately left the witness' seat and took her place alongside him on the bench. He gently put his arm around her and asked her to tell him all about it, which she did in her childish way, while with the other hand he made notes of her testimony as she proceeded. At the conclusion of her story, but without changing their respective positions, he inquired in a tone of quiet dignity whether the prisoner's counsel had any questions that he desired to ask on cross-examination, and his manner and the whole surroundings of the incident were such that I doubt whether anyone would have been willing to undertake the task of cross-examining this innocent child standing under the fatherly protection of the Court. It was on the last day of the term that I saw him sentence some prisoners, one of whom, I remember, was an old man who had been convicted of the crime of arson, and the other, the prisoner in the case of the little girl.

I was told by Mr. F. C. Reed, a most reputable lawyer of this city, formerly a resident of Clyde, of a trial at which my father presided at Lyons, the county seat of Wayne County. Mr. Reed stated that at the time of the trial he was a student, not

having been admitted to practice. The trial which was of an indictment for rape had excited uncommon interest in the community, and led large numbers from the immediate locality, and others from a long distance to attend the trial, whose ears would be tickled by the recital of the facts necessarily involved, and there was a general expectation of racy details to furnish ample amusement, so that the case was generally regarded as an opportunity to have a grand good laugh and as a kind of theatrical performance. The court was crowded to its utmost capacity, distinguished counsel were to participate, and everyone was on the tiptoe of expectation. Mr. Reed said that at the opening of the court, my father ascended the bench with a very serious and dignified demeanour, so much so that a hush fell upon the assembly, and from that time on, said Mr. Reed, it was the most remarkable exhibition he ever saw of the influence of personal character and personal dignity. There were undoubtedly racy incidents, which might easily have caused laughter; there were amusing situations, which might well have provoked merriment, but, from the beginning of the trial until the judge's charge there was not a single manifestation of laughter or merriment, and the case was conducted on such a high moral plane that there was no disposition to make light of the matter; on the contrary, the spectators seemed to become impressed with the seriousness of the case and of the consequences involved. At the conclusion of the trial, said he, the judge's charge covered all the details of the case, some of them most amusing, but with an

impressive dignity calculated to convey to a country jury the full weight of their responsibility, with a lucidity of statement that would prevent all possibility of misunderstanding or misapprehension of the facts and the issues involved.

My father must, I think, have had a very decided objection to capital punishment. I never heard him state his objection to it, but his course on the bench was such that I think he must have regarded it unnecessary except in extreme cases. During his service it became his duty to preside at a number of murder trials, some of them of considerable public interest and, so far as the conduct of the trial and the sentence to be imposed were concerned, I do not think that any feeling which he had against capital punishment influenced him in the slightest degree and, where the verdict required, he of course pronounced, as obliged by law, sentence of death. These sentences were, however, rarely executed, for he was not satisfied to let the cases proceed to that extent without careful examination of all the extenuating facts and circumstances which should, as a matter of justice, be taken into account, although they might not be sufficient in the eye of the law to mitigate the crime. This led him to confer with the District Attorney and the other public authorities, and if he found that the facts and circumstances justified an application to the governor for clemency, he would secure the co-operation of the District Attorney and personally present the application. The result of his applications invariably was a commutation of the sentence to imprisonment for life.

I have alluded to the high moral sense which influenced his conduct, but this was not the outgrowth of religious sentiment, as that did not develope until after he ascended the bench, when he was led to consider the subject of his personal relation to God. While in this state of mind he was called upon to preside in one of the murder trials to which I have referred. The issue, involving life or death, his responsibility to see that justice was administered, and his reflections upon his own attitude to God as the Judge of mankind, created such an impression upon him that he could not but compare his own helplessness before the Bar of Divine Justice with that of the prisoner at the bar. This thought was to him of such significance that when the time arrived for him to begin his charge to the jury, he would have given, as he subsequently related it, "all that he possessed to have had the favour of God for a single hour." This experience led him to a more earnest consideration of his religious duty, and although I was then not more than seven years of age I remember the impressive scene when in the village church, he who was the important figure in that community, took his place with a few other villagers to make a public confession of his faith, which he maintained steadfastly and loyally until his death.

It is not my purpose here to enter upon a detailed account of his public service or of his practice as a lawyer or of his career as a judge. While he did his duty in every department of life faithfully, which secured for him universal respect and esteem, these matters I cannot regard as of sufficient general in-

terest or importance to enter upon. His opinions in Volumes II to XXXI of Barbour's Supreme Court Reports and in Volumes XVI, XVII and XVIII of the Court of Appeals Reports will speak for themselves. I may add, however, that the importance of his opinions in the Court of Appeals is testified to by the fact that more of his opinions were reported than of those of any other of the eight judges who sat upon the bench at that time, excepting one; and when we consider that among his associates were Alexander S. Johnson, George F. Comstock, Samuel L. Selden, Hiram Denio and Ira Harris, it will be readily understood what this fact signifies. One of his opinions has been regarded as a landmark in the law ever since it was delivered, that in "Cancemi against The People," (18 N. Y., 128); where it was decided that notwithstanding the consent of a prisoner on trial for murder to be tried by a jury of eleven, resulting in his conviction by the eleven jurors, the trial was a nullity and the conviction was illegal. His opinion was reasoned almost entirely on principle, there being an entire absence of authority as a guide, excepting two brief reports of cases of noblemen in the reigns of Henry VIII. and Charles I., who waived their trial before their peers and were tried by the country, that is, the common jury, and these two authorities, based upon a provision of *Magna Charta,* held that the trials were illegal. Mr. Justice Harlan of the Supreme Court of the United States in one of his opinions referred to the case as follows: "Its doctrines have been widely accepted as based upon a sound interpretation of

constitutional provisions relating to criminal prosecutions."

Upon his retirement from the bench, he resumed practice in Rochester, New York, where for the next seven years he was largely employed as counsel by other lawyers, and as referee, until he removed to the city of New York to begin practice in the larger field. I allude to this because it seems to me to have been remarkable that at the age of sixty-five years he should possess the vigour and energy to enable him to cut loose from life-long associations, and begin work over again in a field well-supplied with the highest order of legal talent; but this he did with such success that his services in arguments before the courts and as referee to hear and determine cases were in constant demand, making the last five and one-half years of his life the most successful and remunerative of his whole career. He was so exceedingly painstaking and conscientious in the consideration and investigation of cases, that I know of but a single case in which a decision of his was reversed. But they were sometimes subjected to serious vicissitudes, the case of "Knowlton against the Congress & Empire Spring Co." (57 N. Y., 518, and 103 U. S., 49) being an interesting instance. This case involved the question whether a party to a contract prohibited by law but not *malum in se,* might, while performance of the contract remains incomplete, rescind and recover moneys advanced to the other party, who had done nothing by way of performance. He decided that such recovery could be had notwithstanding the fact

that the contract under which the money was paid was illegal. An appeal from his decision resulted in an affirmance by the General Term of the Supreme Court of the State of New York, but upon further appeal the Commission of Appeals reversed his decision, that learned jurist Theodore W. Dwight dissenting from his associates and in favour of sustaining it. Subsequently, however, the case was brought on appeal to the Supreme Court of the United States and there the decision made by my father was sustained.

He had been but a year in New York when I began the study of law in his office. As this was before the days of general employment of stenographers, I had the privilege of acting as his amanuensis in the taking of testimony in cases tried before him as referee by distinguished counsel, and of witnessing his admirable demeanour, fairness and learning as a judge.

At the close of the sixty-fifth volume of Barbour's Supreme Court Reports may be found a record of the proceedings of the bar in Rochester, New York, in which tributes were paid to his memory. They are the estimates of his eminent associates, the most eminent of whom was Judge Henry R. Selden. The conclusion of Judge Selden's tribute is: "He was elected by the people of the Seventh Judicial District to the bench of the Supreme Court and in the performance of the duties of that position he proved a worthy compeer of the able and excellent men with whom he was associated. In his extensive and accurate knowledge of the common law,

and in nice discrimination of its principles, he had few equals, and in independence and integrity in the performance of duty he had no superiors."

It is a matter of regret to me that I am not able to give any personal recollections of Mr. Justice William Strong, a grandson of Adonijah until after he had ascended the bench of the Supreme Court of the United States. A short time before his appointment as Justice of the Supreme Court, I remember his retaining my father in a case of considerable importance which was afterward brought before the Supreme Court of the United States, but in the decision of which he did not participate. Justice Strong was then about sixty years of age, tall and of unusually fine appearance, with head of silvery hair and exceedingly courteous and winning demeanour. His countenance was expressive of great dignity and benevolence, and he was very modest, unassuming and gracious. He was a deeply religious man, and perhaps somewhat excessive in the strictness with which he regarded his religious duties, and the careful observance of the Lord's Day. He was indeed a pillar in the church, and for many years was president of the American Tract Society. His early life was spent in Reading, Pennsylvania, and his clients were among the Pennsylvania Dutch which necessitated his acquiring their native language and conforming to their habit of using tobacco. The prevalence of the use of tobacco among litigants, filled with clouds of tobacco smoke not only the offices but the court rooms, compelling him as a matter of self-defense to form the habit of using it.

Although I cannot vouch for it, I have no reason to doubt the accuracy of a statement concerning him in a biographical sketch contained in the "Dictionary of National Biography" that upon the death of Chief Justice Taney, President Lincoln selected Judge Strong for appointment to the position of Chief Justice, but events so shaped themselves that President Lincoln was finally constrained, probably for political reasons chiefly, to nominate Salmon P. Chase.

From what I have heard, I think President Grant must have fallen in love with him on the occasion of the presentation to President Grant of a copy of the Bible, when Judge Strong made the presentation address, for it was not long after, two vacancies having occurred in the United States Supreme Court, that President Grant appointed William Strong and Joseph P. Bradley to fill these vacancies. In his letter of acknowledgment to President Grant he said: "A seat on the Supreme Bench would satisfy all my ambition, except to discharge its duties well." At the time of these appointments the legal tender cases were before the court, exciting widespread interest, opinion being divided, largely upon party lines, as to the constitutionality of the acts, and President Grant's appointments were criticised as having been made for the purpose of sustaining their constitutionality. However, it soon became apparent that these criticisms were groundless.

The first of the legal tender cases—Hepburn vs. Griswold, (8 Wall, 603)—came before the court at the December term, 1869, but the decision was not announced until February 1, 1870. At the time the

case was heard there was one vacancy, and one of the justices having resigned in the interval between the hearing of the case and the announcement of the decision, there were but seven justices on the bench. Three justices dissented from the decision as announced, resulting in a decision by a minority of the entire court, had the bench been completely filled. It was, of course, very unsatisfactory that a decision in a case of such importance should be rendered by a minority of the entire court. Long before the decision was announced the appointment of Justices Strong and Bradley to fill the two vacancies had been under consideration and, in fact, their nominations were sent to the Senate several hours before the decision was announced. Of course, no one knew what the decision was to be, and if Chief Justice Chase, who had a large share in framing the legal tender legislation had supported it, as was naturally expected, there would have been a majority in favor of its constitutionality. It is preposterous in view of the characters of Justices Strong and Bradley as revealed in the years they occupied seats on the bench, where they earned the highest encomiums, to suppose that they could have been induced to promise their support to the constitutionality of the legislation by the prospect of an appointment to the Supreme Court without having carefully heard and considered as judges a discussion of the questions involved. Therefore, when the case of Knox v. Lee (12 Wall, 457) came before the Supreme Court, involving practically the same subject as Hepburn v. Griswold, the questions were reconsidered and the

constitutionality of the legal tender acts sustained. The opinion of the court was delivered by Mr. Justice Strong, and it not only did much to strengthen and uphold the powers of the government and give stability to its monetary system, but the soundness and correctness of the principles of constitutional construction which it contained have been vindicated by the judgment of posterity.

It so happened that on several occasions my attendance on the Supreme Court brought me into closer acquaintance with Justice Strong, and I was honoured with his intimate friendship during the remainder of his life. Among his confidences is one of considerable public interest, growing out of the Electoral Commission formed to pass judgment upon the rival claims of Rutherford B. Hayes and Samuel J. Tilden to the presidency. Both Justices Strong and Bradley, as well as Justices Clifford, Field and Miller, were selected as members of that Commission, and its proceedings were at times heated and rancorous, especially in the private deliberations. Mr. Justice Bradley was subjected to most unjust criticism by reason, it was asserted, of a change in his previously announced opinion in these deliberations. In his opinion, as finally given, he used the expression in considering the question of the right of the Commission to go behind the returns, "*aliunde* the Record," and his first name being Joseph this earned for him the unworthy sobriquet "Aliunde Joe," by which he was referred to often in the columns of the hostile press. But there was no foundation whatever for criticising him as having

changed his opinion, as Mr. Justice Strong related the circumstances to me. Justice Bradley, he said, called upon him before his opinion was expressed to the Commission and stated that he had prepared his opinion and would like to read it to him and get his views. Assent to this was given and the opinion read. With the exception of a few verbal changes suggested by Mr. Justice Strong, the latter assured me most emphatically that Mr. Justice Bradley's opinion remained unchanged.

But there was another incident in connection with the Commission which occasioned a personal estrangement for a long time between Mr. Justice Strong and Mr. Justice Field. Referring to this the former stated that when the opinions of Mr. Justice Bradley and himself were delivered at a private session of the Commission, Justice Field lost control of himself and, with most violent and abusive expressions, arraigned these two justices with unfriendly, severe and unjust criticism. Up to that time Justice Strong's relations with Mr. Justice Field and all the other justices had been of a peculiarly intimate character, and his own gentle and pacifying nature made such an attack almost, if not quite, impossible. He offered no retaliation at the time, but he felt that his own sense of self-respect would put further personal intercourse between Justice Field and himself out of the question, until a suitable apology was offered. The sessions of the Electoral Commission soon after came to a conclusion with the announcement of the decision in favour of Mr. Hayes and the justices resumed their places in the Supreme Court. Justice

Field had evidently repented his violent outburst, but was not prepared to offer an apology. No reference was made to the matter by anyone, but Mr. Justice Strong pursued the course of practically ignoring Mr. Justice Field's existence, and although they met upon the bench and in consultation with the other members of the court, there was no resumption of personal intercourse, though Mr. Justice Field used all arts and expediments short of an apology. "He would," said Justice Strong, "when in consultation address his observations directly to me, and inquire as to my views wherever possible, and would manifest great deference to my judgment in the cases under discussion." The kindly and gracious character of Justice Strong, as I think of it, makes me wonder that it should have been possible for him to assume this attitude toward any human being, but I have no doubt that, while anxious to forgive and forget, he felt that he owed it to his self-respect as a man to pursue this course. To the honour of Mr. Justice Field, be it said, that after a long interval he called one evening at the residence of Mr. Justice Strong and there in appropriate terms conveyed an apology which was accepted before it was completed, and their former relations were resumed and thereafter continued uninterruptedly.

I happened to be hanging by a strap in one of the cars of the elevated road one afternoon on my way uptown when who should enter the car but Mr. Chief Justice Waite. I do not know that any one recognised him beside myself, and he was not offered a seat. We fell into conversation, and I naturally in-

quired after my relative on the bench and, turning toward me, he added to his response to my question: "They don't make any better men than William Strong."

Mr. Justice Strong gave me the following story of his retirement when he had served something more than ten years on the Supreme Court bench. Having reached the age of seventy-three years, and although remarkably well preserved physically and mentally and quite as capable of efficient service as any of the other justices, he became convinced that it would be for the interest of the court if one or two of the justices who had become enfeebled by age were to retire and their places be filled by more vigorous men. He enjoyed the position and its duties, and would not have retired at that time if the retirement of other justices could have been effected without his setting an example. This conviction led him to say to Mr. Justice Swayne, who had been on the bench a long time and was quite enfeebled, that he had had in mind the strengthening of the bench by resigning, and as they had both reached the period of life when they could retire with the continuance of their salaries during life, he would offer his resignation if Mr. Justice Swayne would follow him in so doing. Justice Swayne assented to this and shortly afterward Mr. Justice Strong resigned, followed after a brief interval by Mr. Justice Swayne, and their places were filled by Mr. Justice Shiras of Pennsylvania and Mr. Justice Matthews of Ohio.

I have no doubt that the early experiences of

Judge William Strong of the United States Court of Oregon and Washington Territories, a cousin of Mr. Justice Strong and of my father, would fill a volume of interesting reminiscences, but, as I never met him or corresponded with him, I am unable to say more than that in point of honourable career, high moral sense, love of justice and a faithful discharge of duty, he was the equal of any of the Strongs. In 1849, at the early age of 32, while engaged in a large and lucrative practice in Cleveland, Ohio, he was appointed by President Taylor, Associate Justice of the Supreme Court of Oregon Territory. He was a pioneer in that new and undeveloped region, and shared the fortunes of its early settlers, residing at Cathlamet, on the north side of the Columbia river, until 1862, when he removed to Portland, Oregon. His position was a difficult and stormy one, so caused by the rugged character of the country, and the strong prejudices and individualism of the pioneer community. He had a large part in shaping the jurisprudence of that portion of the country, and brought to it rare ability and intelligence—so much so, that in a biographical sketch it is said: "There is no name more thoroughly associated with Oregon and Washington judicature than that of William Strong, and his marked characteristics are indelibly impressed upon the system of law of both States." Another writer in commenting upon the value of his judicial labours said: "He made practice, moulded procedure, and established precedents for his Bar to follow, and his orders of court, his decrees in chancery, and his

opinions, are models of expression. Thoroughly equipped for every-day practice he was learned in the science of his profession. His memory will linger long amongst the old settlers, because he was a man naturally adapted to influence and mould a new and unorganised community."

I should not fail to mention William Strong's three brothers, all of them lawyers,—George P. Strong of St. Louis, John C. Strong of Buffalo and James C. Strong of Oakland, California, whose early career in the law was interrupted by his service for the cause of the Union, and who has since laboured under severe disability from wounds honourably incurred in the defense of his country, and is still living All of these brothers attained honourable positions in their profession and were generally recognised as men of the highest character.

The Long Island Strongs have also made a valuable contribution to the judiciary of this State. From Colonial times they have been the owners of St. George's Manor at Setauket. Here Selah Strong married the daughter of the Chief Justice of the Supreme Court of the Colony of New York and himself became first judge of the Court of Common Pleas. His son, Thomas Strong, adopted the profession of law and became a worthy successor of his father in his judgeship. His son, Selah B. Strong, also became a lawyer and rose to the higher position of Justice of the Supreme Court, which office he filled with distinction, and the successors of these men have occupied honourable positions at the bar for several generations.

My mother's father, Wheeler Barnes, was also a lawyer. He graduated at the University of Vermont in 1802, and removed from his ancestral home in Burlington to Rome, New York, of which he was one of the early settlers, long identified with its development and occupied a prominent position as its leading lawyer. He was an excellent scholar and a man of fine culture. His residence was situated on the site of Fort Stanwix. His office was a separate building in his own grounds. He was not an advocate in the courts, being inclined to office practice as an adviser and counsellor to this growing community. His legal knowledge was sound and accurate, and his office was largely sought by young men desiring education in the law. My mother has related to me occasional instances connected with these young students, among whom was William Curtis Noyes who subsequently became a partner of my grandfather under the firm name of Barnes & Noyes. Soon Rome became too limited for Noyes' capacity and he removed to Utica, where he became a partner of that brilliant lawyer, Henry R. Storrs. During the time he was in my grandfather's office, he became engaged to his first wife, Miss Tracy, whose family resided near Rome. Later he removed to New York where he became one of the most distinguished lawyers of the day. One of his associates, Charles Tracy, for many years a prominent member of the bar, was a relative of his wife, and Elbridge T. Gerry, founder of the Society for Prevention of Cruelty to Children, was one of his students and junior partners. In the report of

Beekman vs. Bonsor, (23 N. Y., 298), will be found at page 575 an exhaustive and interesting argument of Mr. Noyes, which displays his power as a profound lawyer. Another of these students was Hiram Denio who afterwards practiced law in Utica and became Chief Judge of the Court of Appeals and one of the most distinguished judges who ever sat upon this bench. He was very near-sighted and my mother used to relate how she, as a girl, would go out to her father's office to watch Mr. Denio copy legal documents, his nose so close to the paper owing to near-sightedness, that she was in momentary expectation of seeing him rub his nose against the ink.

Oliver L. Barbour, author of Barbour's "Chancery Practice," and reporter of the Supreme Court decisions for nearly thirty years, was another student and my mother used to describe him as one of the most homely and crabbed individuals she ever saw, with little personal attractiveness to make him a successful lawyer, but whose industry was unlimited, and whose personal qualities of heart and of mind were such as to endear him to all who became associated with him.

Norman B. Judd of Illinois, who finally attained high distinction as a member of Congress and in our diplomatic corps, being one of President Lincoln's appointees to a foreign court, was another of these young men. The intimate relations which existed between my grandfather and these students of the law brought them into close association with his family and I cannot but feel that their high characters and distinguished attainments were the re-

sult of my grandfather's lofty conception of his duties as a citizen, his wide culture, and his Christian character as the outgrowth of deep religious conviction and principle.

## CHAPTER II

### THE COURT OF APPEALS

The reorganisation of the Court of Appeals in 1870 marked an important change from the preceding system in the court of last resort. Previous to that time, the court, under the constitution of 1846, had consisted of eight judges, four of whom were elected as judges of the Court of Appeals, the remaining four being justices of the Supreme Court selected from the justices having the shortest time to serve in alternate districts of the eight districts of the State—being designated one year from the first, third, fifth and seventh districts, and the next year from the second, fourth, sixth and eighth. There were decided disadvantages in this system; there was a constantly shifting and ever-changing court which lacked permanence and stability, sometimes composed, in part, of justices who were probably unsuited to such an important tribunal. At times, by reason of the death of a Supreme Court justice who was serving or about to serve his year in the Court of Appeals, a perfectly inexperienced and untried member of the bar would be appointed to the Supreme Court, who, by virtue of his appointment, would immediately assume a place in the Court of Appeals. The equal number of judges was also an objection because, under the provisions of law, in

case of an equal division of opinion, the judgment would be affirmed by a divided court. In such cases, an appeal to the Court of Appeals, involving large expense to the parties, with a decision by an equally divided court amounted to nothing and left the disputed questions unsettled. A further objection was that a Supreme Court justice would sit in the Court of Appeals in review of his own decision in the Supreme Court, and having pre-judged the case he was quite unprepared to consider it from an entirely unprejudiced standpoint.

The plan of having a permanent court with justices elected for a term of fourteen years, whose duties should be confined to the hearing and determination of appeals from inferior courts, was the result of the combined wisdom and experience of almost all the judges and practitioners. But the working out of the plan and the scheme of legislation involved was probably, more than to any other single individual, due to George F. Comstock of Syracuse, who had recently served as associate justice and chief justice of the Court of Appeals under the old system. At the time the present court was formed it was the general expectation, and probably Judge Comstock expected himself, that he would be nominated as chief judge of the court, and this would probably have occurred if Sanford E. Church had not at the time just recovered from a severe illness, and was practically without an occupation, in consequence of which the interest of Samuel J. Tilden was enlisted in his behalf, and his influence in the Democratic party was such that Judge

Comstock was set aside and Judge Church nominated.

Under the provisions of the constitution it was wisely provided that the system of voting for the judges should be such as to insure minority representation. The result of this prevented the election of more than five nominees of the prevailing party, and insured the election of the two nominees of the unsuccessful party having the largest number of votes, though the election of the chief judge of the court stood by itself. The Democrats nominated Sanford E. Church for chief judge, and as associate judges Rufus W. Peckham, William F. Allen, Martin Grover, and Charles A. Rapallo. The Republicans nominated for chief judge Henry R. Selden and for associate judges Charles Mason, Robert S. Hale, Charles J. Folger and Charles Andrews. The result was the election of the five Democratic judges and Messrs. Folger and Andrews. These men at once became a remarkable court, and the change brought about by its formation has proved to be one of the most important advantages of modern times. Its decisions at once inspired confidence and respect because they were marked by painstaking care and unquestionable ability. Throughout the country generally the decisions of the Court of Appeals of this State have been largely followed, and the range of subjects which has passed under its consideration, due to its close connection with the most important commercial and financial centres of our country, left few questions of any moment which have not been submitted to its consideration.

One of its distinguishing features, noticeable by every practitioner who has appeared before it, is its patient listening to the arguments of counsel, however ineffective they may be, without unnecessary interruption, or by conversing with each other on the bench, or by turning a deaf ear to the argument and burrowing in the record. Every lawyer who appears there feels satisfied, I believe, that he has secured a patient and intelligent hearing. I have wondered sometimes when sitting in the court, waiting for my case to be called, at the patient attention the court would give to some inconclusive and unhelpful argument, and I may add that I have also wondered sometimes at the patience with which they listened to my own.

The court in its earlier days seemed like one large family. There was but one hotel in Albany, except at a distance from the Capitol, which furnished satisfactory accommodation—this was Congress Hall—situated on a part of the ground where the new capitol now stands. Here all the judges lived, except Judge Peckham, and perhaps Judge Allen. They all sat at the same table and they mingled freely among the members of the bar who were in attendance on the court. The clerk of the court was E. O. Perrin, whose flowing beard and rather impressive bearing was such that he was frequently mistaken for one of the judges. I was at times doubtful in my own mind whether he regarded himself as serving the court, or the court as serving him, although it is due to him to say that he was considerate and accommodating in his relations to

the bar. I remember one occasion when he actually got up a dance which was honoured by the attendance of some of the judges, though probably it was planned for the entertainment of their wives and daughters. I was privileged to be a spectator, and it seemed to me that the suppression of youthful vivacity by judicial dignity made the occasion somewhat formal, and what was intended to be entertaining and exhilarating proved to be gloomy and oppressive.

The court at the time of which I speak held its sessions in one of the legislative halls of the old capitol. The furnishings and surroundings were of severe republican simplicity and in strange contrast to such highly ornate court rooms as that of the Appellate Division in the City of New York. The construction of the new capitol, and the destruction of the old, transferred the Court of Appeals to its present rooms in the new capitol, which, however, are not worthy of our Court of Appeals, and we have reason to hope that in the near future this honourable court will be provided with surroundings ample for its purposes and suited to its dignity.

In its earlier years the court assembled at ten o'clock in the forenoon and held a continuous session of four hours until two o'clock. This made it necessary for lawyers to reach Albany the preceding evening, or to take a night train, and scant time was left after the adjournment of the court to take a returning afternoon train. Subsequently the hour of convening was changed to two o'clock in the afternoon, with a continuous session until six o'clock.

This permits the taking of a morning train from New York to Albany and returning by an evening train. The convenience of this arrangement applies as well to other parts of the State.

The adoption of gowns in February, 1884, a reaction from the simplicity of our forefathers, was a step in the right direction, and gave to the judges a distinguishing mark, so far as dress is concerned, which was very much needed. There is no question that it added tone and dignity to the court. It was no untried experiment, for the example of the Supreme Court of the United States from earliest times had proved that it was a valuable adjunct to the judicial office, notwithstanding that the justices of the Supreme Court in early days did not robe themselves in private, but at the opening of the court took their gowns from the pegs on which they hung, and donned them with all the dignity possible. The scene, at the present day, when the Supreme Court of the United States or the Court of Appeals of New York assembles upon the bench and the crier announces the opening of court, is one which the gowns render most impressive. The example of the Court of Appeals in this respect has been almost universally followed and the Federal courts and all of the State courts, down to the most inferior, have their judges gowned. An irreverent wit remarked soon after the assumption of the gowns that the difference between the judges and the bar was, that the judges wore their shirts outside their trousers while the bar wore their shirts tucked inside.

My own attendances on the Court of Appeals be-

gan soon after the death of my father in 1873, and have continued with frequency ever since, and I think I may say that it has given me good acquaintance with every judge of that court, and with some this acquaintance has been quite familiar. In the early days when I used to meet them frequently at Congress Hall, an excellent opportunity was afforded for agreeable intercourse, but with the disappearance of Congress Hall, although there were frequent meetings at the Kenmore, where the judges subsequently stayed, the disposition to break up this association between the judges and the members of the bar began to be more marked. With the passing of Congress Hall and the Kenmore, and the advent of the Ten Eyck, all of these agreeable associations have been lost and the judges are rarely seen, except in the court room, the close association and intimacy of earlier days having been broken up by the frequency with which the judges have established private homes of their own.

A marked and decided change has also taken place in the conduct of the business of the court, not, however, so far as the administration of the court itself is concerned, but in the character of counsel who appear before it. The day has passed when the distinguished lawyer personally argued his own cases; when famous counsel like Nicholas Hill, John H. Reynolds, Amasa J. Parker, John K. Porter and Samuel Hand argued cases for other lawyers from all parts of the State. An examination of the names of counsel appearing in connection with the cases reported in the New York reports will

show how rare it is that the names of distinguished lawyers are to be found representing one party or the other. The increase of facilities for reaching Albany from distant points, the comfort with which the journey may be made in a few hours and the natural desire of the younger lawyers to appear before the court to argue their own cases, has practically destroyed the counsel business, formerly an important feature of the Albany practitioner. It is also becoming more and more evident that lawyers of distinction find their time more remuneratively employed in their own offices, and they are gradually yielding this important business to their junior partners and subordinates. This has become so noticeable that one of the judges of the court recently remarked: "The most prominent lawyers rarely argue their own cases, but send up some one who is able to say a few words and hand in a brief." Nevertheless the court does its full duty just the same, and it becomes a question of importance as to how far the lawyers are discharging their duty to the court.

The constantly increasing volume of business before the Court of Appeals resulted in such an accumulation, and consequent delay, that it became necessary to devise some means by which it could be disposed of. This led first to the formation of what was known as the Commission of Appeals, composed of the judges of the old Court of Appeals,—Ward Hunt who afterward became an associate Justice of the Supreme Court of the United States, John A. Lott, Robert Earl who was subsequently

elected to the Court of Appeals, William H. Leonard, and Hiram Gray. Three of these retired, and Alexander S. Johnson, John H. Reynolds and Theodore W. Dwight were appointed. This Commission continued its work for about five years, and sat concurrently, but not at the same time, with the Court of Appeals.

After the abolition of the Commission of Appeals the business again accumulated so rapidly that in about the year 1899 a Second Division of the Court of Appeals was organised under an act of the Legislature. This was composed of seven justices of the Supreme Court—David L. Follett, Chief Judge, and George B. Bradley, Joseph Potter, Irving G. Vann, Albert Haight, Alton B. Parker and Charles F. Brown associate judges. Of these Alton B. Parker subsequently became Chief Judge of the Court of Appeals and served with pronounced ability and admirable fairness in that position until nominated for the presidency of the United States, and Judges Irving G. Vann and Albert Haight became by election associate judges. The Second Division proved not altogether satisfactory; it involved a divided Court of Appeals which lacked coherence in its composition and uniformity in its decisions. Upon the expiration of the period for which it was constituted, it was dissolved. Since that time, a different remedy for the disposition of the business of the court has been adopted, by assignment, under legislative sanction, of four justices of the Supreme Court to act as associate judges of the Court of Appeals. This permits continuous sessions with seven sitting

judges, the judges rotating in their service, those not sitting devoting themselves to the consideration of their cases and the writing of opinions. The dispatch of business was in this way greatly facilitated, and its accumulations largely removed. The present arrangement is one which is consistent with cohesion in the court and uniformity in its decisions, and the selection of able justices of long experience in jury and equity trials in the Supreme Court adds considerably to the practical efficiency of the court as an appellate tribunal.

I suppose there never has been a better presiding officer in any court than Chief Judge Sanford E. Church. He had wide experience as a public man; and, as Lieutenant Governor, presided over the State Senate; his services were in large demand at political conventions, and he possessed an unusually gracious, considerate and kindly manner which endeared him to every practitioner in the court. I do not think that Chief Judge Church, before he went upon the bench, was regarded as an eminent lawyer. He was more of a politician in its best sense than a lawyer; public life attracted him, although he had been a successful practitioner in partnership with Judge Noah Davis in Albion.

Judge Davis once mentioned to me that during their partnership Judge Church served for a long time with great ability and discretion as district attorney of Orleans County. His conception of his duty to persons accused of crime was very high. He approached every case, not in the spirit of an advocate, but as an impartial representative of the

people, involving not only the duty to see that the crime, where it was proved to have been committed, was punished, but that the individual charged with the crime should find in him a perfectly unprejudiced public official. He, therefore, entered upon each investigation in a spirit of love of the truth, and in cases where the facts left the slightest doubt in his own mind as to the guilt of the accused, he would make this doubt known to the jury, in order that the prisoner might have the benefit of every possible circumstance in his favour. His attitude was that of one not striving to secure convictions and make a record for himself of successful prosecutions, but rather that of a mediator. The result was that in cases where he felt that a conviction should be had he almost never failed to secure it, and his spirit of fairness and of impartiality inspired unbounded confidence that the ends of justice had been served in each case.

Later he began practice in Rochester, where my father resided at the time. He was the senior member of the firm of Church, Munger & Cooke, but I do not think he was especially successful; at least he did not seem to have any particular prominence, and his name appears very seldom in connection with reported cases.

His predilections were toward a legislative rather than a judicial career, but a serious illness overtook him, to which I have already referred, changing the current of his life and resulting in placing him in the position of Chief Judge of the Court of Appeals.

He had an impressive personality, a benignant

countenance, a graceful and courteous demeanour, great dignity of bearing, combined with a rare faculty of making the humblest practitioner feel at home, and creating an impression of friendly interest, which he doubtless felt. There was in him, however, probably unsuspected by himself, as in the case of Judge Folger, the making of a most distinguished judge. His opinions gave great satisfaction by reason of their pains-taking quality, their strong common-sense, their broad view of legal rights and remedies, and their conservatism. His influence in the court and out of it, and the confidence, respect and even affection which he inspired, furnished a lofty example of a chief judge, and imparted at the outset that tone and influence to the court which his successors have been careful to preserve.

William F. Allen would have been an acquisition to any court, as he certainly was to the reorganised Court of Appeals. He was well-equipped through long experience in various public offices, as well as by sixteen years of distinguished service as a justice of the Supreme Court. After the expiration of his term as justice of the Supreme Court, he removed to New York City and engaged in the practice of his profession. In 1867, he was elected State Comptroller, re-elected in 1869, and in 1870, was elected a judge of the Court of Appeals. The interval between his service as justice of the Supreme Court and his election to the Court of Appeals gave him an unusually broad experience as a State official, and as an active practitioner of large employment

in important cases in New York City. In the positions which he held and in his private practice he won the unbounded confidence and respect of the public and of the profession. He was characterised by simplicity, kindliness, absence of pretence and unaffected courtesy. With these qualities was united an unusually practical and resourceful mind, a thorough and extensive knowledge of the law and ability to use it accurately and effectively in dealing with difficult and complicated legal controversies. He was referred to by one of his associates as "the ready Allen," and I can well imagine that in the consultations of the judges, he, with this quality of readiness, would be more likely than any of his brothers to point out the true path to a satisfactory solution of legal difficulties.

With all of Judge Allen's solid and substantial qualities, he possessed, nevertheless, a vein of humour, much suppressed in his later days, but which in earlier life found its expression even on the bench. An illustration of this is to be found in his opinion in the case of Wiley v. Slater, (22 Barb., 506). The action was of a kind which was often found in the country justices' courts, and the evidence adduced undoubtedly furnished amusing reading, and excited judicial wit. The case was that of a fight between two dogs, one of which belonged to the plaintiff and the other to the defendant, in consequence of which the plaintiff's dog died. The country justice awarded a verdict in favour of the plaintiff and the County Court sustained his judgment, but on appeal to the Supreme Court a different result was reached.

Judge Allen delivered the opinion, and in the course of it he said:

"This is the first time I have been called upon to administer the law in the case of a pure dog fight, or a fight in which the dogs, instead of the owners, were the principal actors. I have had occasion to preside upon the trial of actions for assaults and batteries originating in affrays in which the masters of dogs have borne a conspicuous part, and acquitted themselves in a manner which might well have aroused the envy of their canine dependents. The branch of the law, therefore, applicable to direct conflicts and collisions between dog and dog is entirely new to me, and this case opens up to me an entirely new field of investigation. I am constrained to admit total ignorance of the *code duello* among dogs, or what constitutes a just cause of offense and justifies a resort to the *ultima ratio regem*, a resort to arms, or rather to teeth, for redress. Whether jealousy is a just cause of war, or what different degrees and kinds of insult or slight, or what violation of the rules of etiquette entitles the injured or offended beast to insist upon prompt and appropriate satisfaction, I know not, and am glad to know that no nice question upon the conduct of the conflict on the part of the principal actors, arises in this case. It is not claimed upon either side that the struggle was not in all respects dog-like and fair. Indeed I was not before aware that it was claimed that any law, human or divine, moral or ceremonial, common or statute, undertook to regulate and control these matters, but supposed that this was one of the few privileges which this class of animals still retained in the domesticated state; that it was one of their reserved rights, not surrendered when they entered into and became a part of the domestic institution, to settle and avenge, in their own way, all individual wrongs and insults, without regard to what Blackstone or any other

jurist might write, speak or think of the 'rights of persons' or 'rights of things.' I have been a firm believer with the poet in the instructive if not semi-divine right of dogs to fight; and with him would say,

> 'Let dogs delight to bark and bite,
> For God hath made them so;
> Let bears and lions growl and fight,
> For 'tis their nature to.'

It is possible, that had the owners of both dogs been present the belligerents would have been changed, and the familiar questions growing out of *son assault desmene and molliter manus imposuit* would have been presented, but no such questions are made here. . . .

Whatever may have been the character and habits of the dog, there is no evidence that he was the aggressor, or in the wrong, in this particular fight. The plaintiff's dog may have provoked the quarrel and have caused the fight; and if so, the owner of the victor dog, whoever he may be, cannot be made responsible for the consequences. . . . It is one thing for a dog to be dangerous to human life, and quite another to be unwilling to have strange dogs upon the master's premises. To attack and drive off dogs thus suffered to go at large to the annoyance if not to the detriment and danger of the public, would be a virtue, and that is all that can be claimed upon the evidence, was done in this case. Owners of valuable dogs should take care of them, proportioned to their value, and keep them within their own precincts or under their own eye. It is very proper to invest dogs with some discretion while upon their master's premises, in regard to other dogs, while it is palpably wrong to allow a man to keep a dog, who may or will, under any circumstances, of his own volition, attack a human being. If owners of dogs, whether valuable or not, suffer them to visit others of their species, particularly

if they go uninvited, they must be content to have them put up with dog fare, and that their reception and treatment shall be hospitable or inhospitable, according to the nature, or the particular mood and temper at the time, of the dog visited. The courtesies and hospitalities of dog life cannot well be regulated by the judicial tribunals of the land.

The evidence is slight that the dog died in consequence of this fight. I should infer, from the evidence, that he continued his annoying visitations until some one who did not own a white dog with black spots on his head, made use of a shot gun or 'Sharpe's rifle,' or some other substitute, to abate the nuisance. But as this question is left in doubt by the evidence, the judgment of the justice is conclusive as to the cause of death. I can, however, see no just grounds for the judgment. It can only be supported upon the broad ground that when two dogs fight and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog; and I know of no such rule. The owner of the dead dog, would, I think, be very clearly entitled to the skin, although, some less liberal would be disposed to award it as a trophy to the victor, and this rule would ordinarily be a full equivalent for the loss; and with that, unless the evidence differs materially from that in this case, he should be content.''

Judge Allen was one of those independent fearless, straightforward men of high principle and unswerving integrity which neither public clamour nor the prospect of public favour could possibly move. This is well illustrated in the case of The People ex rel. Tweed v. Liscombe, 60 N. Y., 559. That was the great case in which the Court of Appeals released from state's prison William M. Tweed, at the time the arch-scoundrel of New York, after the

payment of a fine of two hundred and fifty dollars, and one year's imprisonment. The principal opinion in the case was written by Judge Allen and as a specimen of judicial ability in the discussion of a difficult legal question, it is entitled to a high place in the annals of jurisprudence. The question was one of pure law, and related to the office and effect of the writ of habeas corpus under our system of jurisprudence and the statutes of the State relating to proceedings under it, and in that particular case, with respect to review by a writ of habeas corpus of the power of the Court to impose the sentence which had been pronounced. Undoubtedly, the result arrived at by him and adopted by the court was extremely unpopular. Public sentiment ran high in favour of inflicting upon Tweed the extreme penalty of the law. A decision by the Court of Appeals sustaining the sentence pronounced upon Tweed would have been met with public acclaim and popular approval, but Judge Allen could say with the apostle: "None of these things move me." He was too independent, straightforward, and fearless and too impervious to the dictates of popular favour to yield a jot or tittle to its influence. Of course, as might be expected, when the announcement came that the writ was sustained and the prisoner discharged, there was a tremendous shout of disapproval, and among the loudest voices in open criticism of the Court, was that of Charles O'Conor. It was certainly an unpopular decision, and Judge Allen had to bear the brunt of it but, after popular clamour subsided, and the public and

the profession were able to take a calm and dispassionate view of the case, it became apparent that, by the action of the Court of Appeals, the ends of justice had been subserved and popular rights protected.

I recall an incident in an experience of my own that created in me a very friendly feeling for Judge Allen. I was once arguing a cause of some importance to my clients, the outcome of which was doubtful, a decision adverse to them having been made in the courts below. The main propositions of my argument did not seem to create much of an impression upon the Court, and, after presenting them, I proceeded to call attention to an item of evidence which I claimed had been erroneously admitted and to the ruling admitting it, I had taken exception. While I was stating my point and enforcing my views as well as I could, Judge Allen was examining the record to ascertain how the matter arose. My point having been presented, he laid aside the record and turning to Judge Folger, who sat next to him, remarked *sotto voce* but with sufficient distinctness to enable me to hear it: "That is a good exception," and I then knew that I had one judge with me upon one point at least. The result announced some months subsequent was a victory for my clients upon that very point and upon that point alone.

It is a beautiful and well-deserved tribute that Chief Judge Church paid to Judge Allen at the opening of the court on the day after his decease, and to my mind, its highest expression as an estimate of

Judge Allen's character is in the words: "He was truly a man of distinction among his contemporaries; a distinction of the sort to be coveted, for it was reached by the qualities which exalt the character and it took no advantage by false pretensions. Through an extended life, he was an honour to his race, to his profession of the law, and to his judicial office."

Judge Martin Grover wrote the opinion in the first case which I argued before the Court of Appeals. It was one which my father had argued in the court below, and his argument was so conclusive that I suppose the attorney for whom he argued it considered that there was no danger in employing me to argue it in the Court of Appeals, and in so doing he was justified by the result. Of course, a budding young lawyer of twenty-seven years would naturally be expected to shake in his shoes as this august tribunal filed through the open door from their consultation room on to the bench, and in fact, I did so, and I have no doubt my argument was characterised by considerable diffidence and embarrassment, coming as it did from a mere stripling to those to whom the law had been the study of a lifetime. They may have noticed my difficulty, and in the course of my feeble argument, I remarked in reply to my opponent, that he had stated that there was no evidence upon a certain point, but that I could point it out. Proceeding to do so and beginning to read I was startled by a high-pitched voice exclaiming: "We'll find it—we'll find it," and looking up I saw that it had proceeded from Judge

Grover,—and they did find it. This is my first recollection of Judge Grover.

His massive, big-boned frame was suited to that of a lumberman; he was not carefully dressed, and in my subsequent intercourse with him he always appeared in a rather ill-fitting suit of black broadcloth, which gave him somewhat the appearance of a backwoodsman who had dressed up for a special occasion, and when he appeared out of court, his head was surmounted by a stove-pipe hat of liberal dimensions not carefully brushed. His necktie was always a little awry. He had a most remarkable countenance; his brow was broad, his face square, his jaw short and firm, his voice nasal, his eyes were like shining beads, his nose was small, and his mouth a long straight line across his face. His portrait in the court room at Albany is not his likeness when I knew him. If there were ever marks upon any one as a man of the people, of rugged simplicity, of difficulties and obstacles surmounted, of honesty of purpose, of keenness of intellect, of lively wit—these marks were on Martin Grover.

His home was in Angelica, a small hamlet of Allegheny County, in the northwest corner of the State. There, amid the rough life of the early settlers, during the first half of the last century, he had with his powerful mind cultivated by hard study, his knowledge of men, his uprightness of purpose, and kindliness of character, acquired such commanding influence that the verdicts of juries in all that locality were moulded by him, and although he rarely appeared before Appellate tribunals he had the con-

fidence and respect of every judge before whom he stood. He was a true son of the soil: he had no systematic habits of work, his office was a gathering place of all classes, he delighted them with his anecdotes; he was "Lincoln-like" in his capacity to enforce his views with an apt story. It is said that a large part of his time would be occupied sitting upon his table in his outer office regaling his friends and clients with his anecdotes, until his business would accumulate to such an extent that it demanded immediate attention, when he would secrete himself in his inner office, deaf to all calls for several weeks until the arrears of business had been cleared away.

His tact before a jury of strangers, in a locality where he was himself a stranger, was illustrated in a case in which he was employed for the plaintiff in Livingston County. He had the disadvantage of being surrounded by unfamiliar associations, and of being opposed by eminent advocates who were on their "native heath," before a Livingston County jury, with whom they were well acquainted. Mr. Grover's client was an Allegheny County lumberman, typical of the residents of that county, and he himself was a fair type of the Allegheny County lawyer,—both of them rough-hewn specimens of manhood, with little culture or refinement. The difference between the polished advocates of Livingston County and their rough and ready Allegheny County brethren, was nowhere more noticeable than between him and his opponents. At the time the trial began, the case, under these circumstances, seemed

half won by Mr. Grover's adversaries. The Livingston County advocates were not slow to create the impression that the Allegheny County plaintiff, and the lawyer he had brought with him, were deserving of little attention and of less credit by an intelligent jury of Livingston County against a resident of Livingston County of high standing, most unjustly attacked.

The case proceeded with a good many slurs to increase this impression, but Mr. Grover's ready wit and keen intellect, had such a potent influence with the jury that notwithstanding his rough and ready demeanour, he proved a formidable adversary. The impression which the Livingston County advocates had endeavoured to create, they lost no opportunity of deepening in their final address to the jury. It was here that Mr. Grover dealt his master stroke, acknowledging freely the superior intelligence, culture and breeding of the men of Livingston County illustrated only too well, as he observed, in comparing the polished and educated lawyers of Livingston County with one so lacking in early advantages as himself; and as he proceeded to compare the men of Livingston County with the rough and uncouth men of Allegheny County due to this lack of early advantages, he reminded them that the men of both localities were the same in one respect at least, their love of justice, and that if in their love of it, and their search for the truth they would look beneath the exterior, they would discover that "as in water, face answereth to face, so heart answereth to heart in man." Having by this apt quotation from Holy

Writ reached the seat of sympathy, he dealt with the facts of the case with that common-sense but effective method which he knew only too well how to employ, and departed from the scene of conflict leaving his adversaries unhorsed.

It was natural, therefore, that whatever his qualifications might be, this popular idol should be elected to the bench, which occurred in 1857. From that time on he was continuously on the bench until his death.

While he was a justice of the Supreme Court, he was assigned to hold court on a certain occasion in the City of New York. He probably looked and acted like an Allegheny farmer. He did not know at what hour the court opened, and thinking it would be well to be in time he arrived at the court house about nine o'clock in the morning. He found the door of the court room locked and so he walked about in the hall to await its opening. About ten o'clock the clerk of the court appeared, and finding this countryman waiting he asked him what he was doing there. Judge Grover, without disclosing his identity, remarked that he had some business with the court and would like to know when the court opened. The clerk replied that it depended somewhat upon the judge, but that generally it opened about half-past ten. Judge Grover asked him if he might take a seat inside and the clerk said, "Yes, those benches back there are reserved for witnesses and spectators, and you can sit there." Judge Grover took a seat and waited patiently. Presently a young man appeared with a bundle of papers and

took a seat near him. Judge Grover inquired whether he was a lawyer; he replied that he was studying law, but had not been admitted. Engaging him in conversation, Judge Grover asked him what the practice of the court was with regard to adjourning cases. The young man replied that it depended very much on the judge—that some of the judges were easy and good-natured, and some of them were very strict. He went on to explain that there were a few legal excuses, such as sickness of a party or his counsel, or the absence of a material witness, and that some judges required that kind of excuse, while others were more liberal, and that sometimes almost any kind of excuse would be accepted. "Well," said Judge Grover, "I suppose you are attending here for some one else and will answer some case." "Yes," said the young man, "I have come here because I am going to try to get an adjournment, but I am afraid the judge won't grant it as my excuse isn't very good." "Well," said Judge Grover, "do your best, and perhaps the judge will grant it after all."

As it was then half-past ten and the court room was well filled, Judge Grover arose from his place and going over to the clerk's desk, quietly remarked, "I guess it is about time to open court, isn't it?" "Yes," said the clerk, "but the judge is late this morning." "Oh, no, I am Judge Grover," he replied, "and I am going to hold court." Imagine the clerk's feelings after assigning him to one of the rear benches, and the young man's consternation to think he had been revealing his confidences to the

judge upon the bench. Soon the young man's case was called and with twinkling eyes, the judge looked upon him, with whom he had conversed. He listened to his excuse, which was certainly very lame, and under hardly any circumstances would be accepted. Moreover, the adversary seemed insistent, and ridiculed the adjournment of the case for any such reason. Finally both counsel had had their say, and it was for the judge to decide. Looking at the young man, Judge Grover remarked, "The excuse you have given is one that perhaps I ought not to accept, but you have given the Court a great deal of valuable information this morning, and so I am going to adjourn your case."

Those who have enjoyed the opportunity of an informal chat with Judge Grover, when he was in a story-telling mood, will appreciate what is said of him in the tribute paid to him by his associates that "his humour was so lively and overmastering that he sometimes jostled dignity and even decorum."

One evening when I was at Congress Hall in Albany in attendance upon the court, I was seated alone in the public office-room of the hotel when Judge Grover entered, having just come from his room to seek a little of that companionship which he used to find around the hotel stove in the tavern at the county seat where he happened, in former days, to be holding court. I had never been introduced to him, and although this was one of my first attendances on the court, he probably remembered having seen me, and took a chair next to mine. We sat together probably for an hour or more, and his

humorous recitals of early experiences in Allegheny County told with his peculiar manner, his high pitched voice and quaint expressions, were sufficient to "jostle dignity and even decorum" to the fullest extent, and I think I can truthfully say that I never spent a more entertaining evening. It would be in vain to attempt to reproduce his anecdotes with all their original humour, even if I recalled them perfectly after the lapse of so many years. It was he that used to say that "up in Allegheny County, a party who is beaten in a lawsuit always has two remedies; one is to take an appeal, and the other to go down to the tavern and swear at the Court."

One of his associates used to tell of an experience in consultation, when one of the judges had read an opinion which he had written in a case awaiting decision. After listening patiently to its reading, he startled the judges present by remarking, "I guess when you wrote that you had your head in a bag; if I were you I would save up that opinion until you find some case to which it applies, because it certainly don't apply to this case." I suppose it is something like this to which his associates allude in their tribute when they say "he was very real and practical, and hence not pleased with forms nor observant of conventionalities or at times of courtesies." He was indeed one of those hard-headed, keen-witted, practical men; a rough diamond, in whom you would not look for great learning and wide culture, but if you desired to find an accurate knowledge of legal principles and clear insight into the facts of a case, and strong common sense in

dealing with them, you would only need to seek for it in his opinions.

A remarkable feature of Judge Peckham was his personal appearance. It was not in any sense judicial but rather that of a soldier. It used to be said that it was worth a journey to Albany to see Judge Peckham walk up State Street. He was tall, thin, and very erect, with a countenance stern, and as though war-worn, emphasised by a rather fierce looking white moustache, and his double breasted black coat always closely buttoned up gave him a bearing particularly military; but the character of a soldier, except in the firmness and the courage of his convictions was not typical of the man. He had a remarkably kind and generous heart, and had rendered conspicuous service as a justice of the Supreme Court, and subsequently in the Court of Appeals. His home being in Albany, he was not closely identified with the other judges in their associations out of court, and there was little opportunity for intercourse with the members of the bar.

It was indeed a mysterious Providence that after a short service in the court, when seeking rest and recreation from his arduous labors, he should have met his tragic fate on the ill-fated steamer *Ville de Havre.*

Judge Peckham was the father of two distinguished sons—Rufus W. Peckham, who followed in his father's steps as a justice of the Supreme Court of the State, and subsequently of the Court of Appeals, and later still added new honours to the family name by receiving an appointment from Presi-

dent Cleveland, as associate justice of the Supreme Court of the United States. Those who were acquainted with him will perhaps recognise in his appearance somewhat of the soldier-like quality possessed by his father. The other son was our beloved and respected associate at the bar—Wheeler H. Peckham, whose distinguished services while a young man in the legal proceedings against the Tweed régime, and his identification with every movement to redress public wrongs and to promote public welfare, coupled with his attainments as a lawyer, made him one of New York's most valuable citizens. Before his brother Rufus was appointed to a seat in the United States Supreme Court, the same appointment was conferred upon him by President Cleveland, but adverse political interests were sufficiently powerful to bring about his rejection by the Senate.

The memory of the three distinguished Peckhams is perpetuated in the history of the State.

In his earlier days and until he ascended the bench of the Court of Appeals, Chief Judge Charles J. Folger practiced law in Geneva, which was not a great distance from my father's residence—Palmyra. They were brought frequently into professional relations with each other and my father being twenty years older than Judge Folger, was naturally sought by him at the time as counsel, especially after my father retired from the bench. An instance of this is the case of Teall v. Barton (40 Barb. 137).

Although Judge Folger was a wise counsellor, I do not think that at the time he entered upon his

judicial career he was regarded as an eminent lawyer. His name appears but rarely in the reports of cases argued in the Appellate tribunals; his tendencies were rather in the direction of office practice, and of public life in legislative bodies. Shortly before he was nominated for judge, he served with ability as a member of the State Senate, and later was appointed assistant treasurer of the United States in New York City. He was a man of imposing appearance and dignified demeanour, and evidently possessed a latent judicial faculty which, on his accession to the Court of Appeals, rapidly developed, until he became recognised as one of the most forcible and useful members of the court; his opinions commanded the highest respect as accurate expositions of the law, and upon the death of Chief Judge Church he was appointed to occupy that high position, which he filled with marked ability. A noticeable feature of his opinions is his quaint and unusual form of expression, which at times seemed to be almost an affectation, but was evidently entirely natural. This is well illustrated in the beautiful tribute which he read as senior associate judge at the proceedings in the court in reference to the death of Chief Judge Church, and, as well, in his letter to his associates on his retirement from the position of Chief Judge, to accept a place in President Arthur's cabinet. This is it:

"WASHINGTON, D. C., November 14, 1881.

My Bretheren: for so I will call you, yet awhile. Your note of the 10th instant touches me deeply. Its words of praise I will ever prize; for I know you so well, as to know

that you are not apt to take the names of things in vain. Besides that, I may say to each of you the verse long ago spoken:

'*Laetor nam, laudari me abs te, pater, laudato viro.*'

'The forty volumes of New York Reports'; they do indeed testify (I may say it now) to an unremitting judicial labor that has seldom been outstripped; and the sad memorials that appear in four of them, tell too, how often vigor of body yielded under strain of mind. The many opinions of all the seven are there, as finished, they left their hands. But as no one may know, by looking on a work of art, the manifold deft touches that brought it to completeness, so no one can tell the thought, the care, the toilsome passage through perplexities, the laborious search for precedents, the doubt, the deliberation, the conference with fellows, the nice poising of reasons, that lead up to the laconic, yet weighty conclusions 'judgment should be affirmed' or 'judgment should be reversed.'

But the dearest of my recollections of the Court of Appeals will be of the harmony of intercourse, the uniform courtesy, the mutual confidence, the unvarying respect for one another, the cordial appreciation, the brotherly love, that held us in happy personal and official relations. When I reflect on all these things, I wonder almost to sobbing that I could have been led to give up the place of formal Head of such a Court, the nominal Chief of such a body of Judges.

My Bretheren, I thank you for your words of praise and affection, and subscribe myself,

Sincerely your friend,
CHAS. J. FOLGER."

A short time after his appointment, I chanced to meet him at lunch in the City of New York, and ven-

tured to remark that I did not see how he could have brought himself to give up the position of Chief Judge for the position of Secretary of the Treasury. His face clouded somewhat, and he replied with deep seriousness, "I do not see how I could either." Undoubtedly, he made a great mistake which probably embittered the rest of his life. During his occupancy of that office he was led to accept the nomination for governor of the State of New York, which was conferred under circumstances which were objectionable to the voters, although no personal reflection in any way could possibly be made upon Judge Folger as a high-minded and honorable man. His opponent was Grover Cleveland, who was elected by an enormous majority. On retiring from the Treasury he disappeared from public life under a weight of great disappointment and sorrow. His death occurred not long afterwards.

His fine character, and his eminent public service as a judge are displayed in forty volumes of the New York reports, and constitute a record of which anyone might be proud.

At forty-six years of age having reached the full tide of professional practice, in which he could have easily earned twice the amount of his salary, Charles A. Rapallo ascended the bench of the Court of Appeals without any previous judicial experience,—but he was a born judge. His thought was straight in its logical processes, his mind clear in its perceptions, his use of language accurate and forcible in expression, his literary style concise and dignified and the learning he displayed so remarkable that his

opinions seem to possess that value of permanency which characterises the opinions of the great Chief Justice Marshall. In fact, the quality of his mind, his habit of thought and dignity of utterance were much the same as Chief Justice Marshall's, while he resembles him in dealing with his cases on principle, and in the infrequency with which he cites authorities in support of his views. I do not believe that we have ever had a judge in the Court of Appeals who contributed more to its high character, efficiency and renown than Judge Rapallo. He looked the judge. He had a fine, thoughtful countenance, with an expression of great seriousness and dignity, and looking at one through the spectacles which he habitually wore, it was impossible to feel otherwise than as in the presence of a master mind. In moments of excitement or merriment, when the other members of the court were visibly affected, I do not remember ever to have seen him relax to any noticeable extent the habitual seriousness and dignity which characterised his judicial bearing. Nor do I see how it could ever have been possible to trifle with Judge Rapallo or to treat him with an easy familiarity. He possessed to a marked degree the respect and confidence of the bar, and in his death the bench sustained a loss which no other Judge has completely supplied. He entered upon his term of service at the organisation of the court. He was induced to accept the position from a high sense of public duty, performed less reluctantly, perhaps, because of his scholarly taste, and his judicial temperament and inclinations. He had for twenty years or more

been constantly engaged in the conflicts of litigation. He was counsel for Commodore Vanderbilt and the various railroads which he controlled, and he prepared his will. He was thoroughly equipped in every particular and made a large pecuniary sacrifice when he entered upon his judicial career.

My personal relations with Judge Rapallo were more formal than with some of the other members of the court. In my attendances on the court professionally in a considerable number of cases I had an excellent opportunity of observing his characteristics and bearing, and casual meetings upon the train or in some festive gathering afforded an opportunity of personal intercourse. He was exceedingly courteous and gracious, manifesting kindliness and consideration, and while he listened with interest his words were comparatively few.

Sixty-four volumes of the Court of Appeals Reports contain his record as judge. At the close of the last of these volumes will be found the tributes of appreciation of Judge Rapallo following his death.

One of his opinions has always impressed me as being a notable example of judicial ability from every standpoint. It is the case of Manice v. Manice (43 N. Y., 303), which involves some of the most intricate questions of testamentary disposition concerning trust limitations and the suspension of the power of alienation, and is a landmark in the law. In the report of this case it is interesting to remark, in passing, that it contains *in extenso* a very interesting specimen of a brief of Charles O'Conor. Al-

though the questions involved have, perhaps, in the light of modern legislation, been removed from the domain of judicial discussion, Judge Rapallo's opinion will repay perusal as a specimen of profound learning and powerful reasoning.

I shall not attempt to follow down what is getting to be the long line of judges who have sat in the court since the first members of it began to disappear. There was the dignified presence of Chief Judge Ruger; the keen and clear intellect of Judge Earl; the strong and forceful mind of Judge Danforth; the refined and polished opinions of Judge Finch; the powerful and dominating personality of Judge Peckham, the junior; the gentle and kindly nature, but sound judicial sense of Judge Miller; and the other worthies, who in that important tribunal have borne their part; but it is at least due to them to say, and it is also a matter of public congratulation, that by their service, the people of the State of New York have abundant reason to be proud of their Court of Appeals.

Fortunately we have still with us the only survivor of the original court—the venerable and honoured Chief Judge Andrews, who has the unanimous and unbounded respect and affection of the entire bar, but of whom, in view of my purpose to make no extended reference to those now living, I am unable to say more.

## CHAPTER III

### NOTABLE APPELLATE JUSTICES

At the time of my admission to the bar and until 1896, the three courts, the Supreme, the Superior and the Court of Common Pleas, exercised their separate jurisdictions, which, so far as the City of New York was concerned, were practically co-ordinate. Each had its separate organisation, its own series of reports, its own clerk's office, its staff of employees, each its Appellate tribunal which made its own law respecting, of course, the decisions of the others, but at times, unavoidably conflicting. Their records were kept entirely separate, and although they administered the same system of jurisprudence, they had no system by which its exercise by each of them could be brought into harmony with that of the others.

The Court of Common Pleas in one respect had exclusive jurisdiction relating to assignments for the benefit of creditors. The only practical difference, however, between these courts was that the process of the Superior Court and of the Common Pleas was confined to the City and County of New York.

An attempt was at one time made through an act of the Legislature to permit a summons issued from the Superior Court or the Court of Common Pleas to be served on a defendant outside of the City of

New York within the State, but it was declared unconstitutional. It was a sorry day for a non-resident of the City of New York when he chanced to be found in the City and was served with a summons issued by the Superior Court or the Common Pleas, as there was no method by which the case could be removed to the Supreme Court, or the place of trial changed; the consequence being that he was then obliged to litigate the case in the City of New York, involving frequently the burden of heavy expense for procuring the attendance of witnesses, as well as of conducting a litigation at a considerable distance from his residence. The lawyers found these separate courts a very convenient method of choosing their forum, and of avoiding a judge in one of the other courts to whom there was some objection. In large litigations, involving a diversity of interests, it happened, not rarely, that by skillful legal tactics, resort would be had by different interests to the different courts upon practically the same subject matter, creating a conflict of jurisdiction and a web of legal entanglements that became, at times, almost impossible to unravel.

At this time, these three courts had been recently housed in the court house then known as the Tweed court house, erected at a cost of about eight million dollars, a monument to the extravagance and fraud of the Tweed régime. A story went the rounds, at the time the impeachment proceedings against Judges Barnard and Cardozo were pending, of an observation by Judge Barnard to an individual in the court room where he was presiding who ac-

cidentally upset one of the ordinary cane seated chairs which, in falling, made considerable noise.

"You must exercise more care" said the Judge, "how you treat those chairs, for you should remember that each one of them cost $300."

The Supreme Court occupied the second floor of the court house, which was quite sufficient for its needs at that time, and one-half of the third floor was occupied by the Superior Court and the other half by the Court of Common Pleas.

Under the revision of the State constitution which took effect in 1871, important changes were made in the system of hearing appeals which previous to that time had been heard by a general term in each of the eight judicial districts, composed of three judges in each of these districts. The result often was that a judge would sit at general term in review of a decision of his own from which an appeal had been taken. This was manifestly unjust in view of his preconceived opinion upon the question involved. One of the most beneficial results accomplished by the revision was the adoption of a system by which this injustice was removed. The multiplicity too of the general terms was objectionable, and under the revision the State was divided into four departments and a general term constituted by the selection and designation by the governor at his own pleasure of three justices in each, selected from any of the judicial districts in the State. This system continued until a further revision of the State constitution which took effect in 1896, under which an Appellate Division was created for each of the

four departments, to consist of five justices selected and designated by the governor.

The general term of the Supreme Court, the predecessor of the Appellate Division, was composed, when I first saw it, of Judges Ingraham, Barnard and Cardozo. It was a trying position for Judge Ingraham. Judges Barnard and Cardozo fell under grave suspicion as adherents of the Tweed régime and it was not long before impeachment proceedings were brought against them which terminated in Judge Barnard's impeachment and Judge Cardozo's resignation while under impeachment charges. No one ever had the least suspicion of Judge Ingraham's absolute integrity. He was a high-minded, upright and efficient judge; his judicial experience extended over many years, first as a judge of the Court of Common Pleas and later of the Supreme Court. A very excellent portrait of Judge Ingraham may be found in the court room of the Appellate Division, where his son, the second Judge Ingraham, has long served with the greatest efficiency, and now serves as presiding justice. I used often to see Judge Ingraham, after his retirement from the bench, accompanied by his son, then in the early years of his practice, and the manifest congeniality and sympathy between them and the devotion of the son to the father have often been in my mind when, while waiting to argue one of my cases, I glanced from the judge on the bench to the judge in the picture.

I had but few opportunities of seeing Judge Barnard on the bench, but these few were interesting.

One of them was at the trial of one of the cases in the Erie litigation. Judge Barnard's appearance was anything but judicial and rather that of an alert and prosperous Wall Street broker. His black hair, drooping black moustache, piercing black eyes, sallow complexion and animated countenance gave an impression of energy and intellectual acumen; his dress was also anything but judicial, as he frequently appeared on the bench in a dark brown or black velvet sackcoat. He had a peculiar habit of whittling, probably due to his restlessness, and for this purpose he was furnished with a liberal supply of soft pine sticks which he industriously whittled to no purpose, as the case proceeded, except to create a pile of shavings. I happened to enter the court room as a spectator at a time when James Fisk, with whom Judge Barnard was said to be on intimate terms out of court, was upon the witness stand; Mr. David Dudley Field was counsel for Mr. Fisk, who was one of the parties and Commodore Vanderbilt, the other party, was represented by William A. Beach, one of the most forcible and distinguished members of the bar. Mr. Fisk was evidently bent upon telling his story in his own way, and Mr. Beach was equally determined that he should give perfectly responsive answers. Mr. Beach asked him a question which called for a direct answer and Mr. Fisk replying launched forth in a loud tone. "Stop," shouted Mr. Beach, but Mr. Fisk continued; "stop, stop," shouted Mr. Beach—Mr. Fisk proceeding and Mr. Beach continuing his shout of "stop," until finally

Mr. Fisk ceased with the remark: "I give up, you can talk loudest." "Yes," replied Mr. Beach in his most ponderous and dignified tones, "in a contest of lungs I have better lungs than you have." Of course those present, including Judge Barnard, were convulsed with laughter.

A story told of Judge Barnard, is that a lawyer who had argued before him in support of a motion for an injunction and, the motion not being decided, sought an interview after a few days with Judge Barnard to inquire when he was likely to decide it. He explained that the interests of his client made it important that he should obtain his injunction as soon as possible (and asked when a decision was likely to be rendered). Judge Barnard looking at him quizzically replied: "Well, I understand that you wish a speedy decision; if that is what you want I will decide it now, your motion is denied." The lawyer attempted earnestly to remonstrate with him, hoping he would not decide it until after careful consideration and wished him to take all the time he desired. "Oh, well," said Judge Barnard, "you are anxious for a speedy decision and I have given it, and you know Judge Barnard never reverses himself."

There was a lawyer by the name of Hirsch who had a remarkably deep voice of great power and resonance. He had a motion which he desired to argue in person at a time when Judge Barnard was presiding at chambers, but as he was engaged with some important business in his office, he sent over a subordinate to apply for a postponement. As the

application met with considerable opposition, Judge Barnard stated that Mr. Hirsch could submit the matter without argument. "But," was the reply, "Mr. Hirsch wants to be *heard* on the motion, he does not want to submit the case without argument, he wants to be *heard.*" If that is all," replied Judge Barnard, "you just go to Mr. Hirsch and tell him to go right on with his argument in his office and that I will be able to hear him."

I was in court one day when Judge Barnard was presiding, just at the time the impeachment charges had been presented to the legislature, but before they were acted on. The late Judge William H. Arnoux appeared before him on an application for an allowance in a will case, I think that of Rollwagen v. Rollwagen, in which he had been successful. The estate being a large one he applied for an allowance of $30,000. This seemed to stagger Judge Barnard for the moment, but Judge Arnoux explained to him the importance of the litigation, and the great amount of labour involved, and when he concluded Judge Barnard looked up remarking, "Oh, well, take your allowance, and let them put it in the charges."

I have no intention of resurrecting the long-buried impeachment charges. It was a sad day for the bench and the bar when the solemn verdict of impeachment was rendered. Judge Barnard was, I think, the victim of his friendships and associations. He was naturally convivial, very confiding, loved his friends, and was led to exercise his judicial functions in their interest, but I believe with-

out any gain, pecuniary or otherwise, to himself. He was a courageous man. He bore the consequences of his act with fortitude; he went through the ordeal without showing the white feather; he never acknowledged guilt of any kind, and he submitted to and bore the disgrace manfully. Judge Cardozo, his associate on the bench, was also the subject of charges, but his course was incomparably inferior to that of Judge Barnard, for in the face of the charges which had been preferred he took refuge in resigning, which, in the opinion of every member of the bar, amounted to an acknowledgment of his guilt.

Judge Barnard's brother, Joseph F. Barnard, during all this time and for many years after, was a justice of the Supreme Court in the Second Judicial District, and his residence was in Poughkeepsie. In appearance he resembled his brother somewhat, as he likewise did in an absence of the judicial manner, although in a different way. There was a disregard of everything that we associate with the judicial make-up, and in dress and demeanor he looked more like a prosperous farmer or, more accurately speaking, a country justice of the peace. His career was in every way honourable, and he was held in high esteem by the citizens of his locality. He had an off-hand way of dispensing a kind of rude justice with an absolute disregard of precedents. On Saturdays he held a special term in Poughkeepsie for the hearing of motions, and would be found sitting in the midst of the lawyers and litigants, not in one of the court rooms, but in a kind of general

room where there was a large round table, with little attempt at orderliness, and with an entire absence of judicial surroundings. Usually, there were several cases in which lawyers from New York were engaged, and as they arrived at the same time by a morning train and proceeded in a body to the court house, he would await their coming with a bit of suspicion and the chances were, that as against local counsel he would deal with them in a summary way, and send them back to New York, sadder and wiser men. I do not think New York lawyers ever gained much by making motions in cases to be heard before Judge Barnard on Saturday mornings in Poughkeepsie. For a number of years he was presiding justice of the General Term in the Second Department, and he was certainly prompt and expeditious in disposing of the business which came before that tribunal. He was not patient with long arguments, and being unusually keen and alert, he would bring counsel to what he conceived to be the point of the case with a good deal of abruptness. His opinions were very brief and he rarely cited authorities, but there was this merit in them, there was no mistaking the point he had decided, and if he was wrong he was manifestly so.

It must have been a great relief to Judge Ingraham, as it certainly was to the bar and to suitors, when the places of Judges Barnard and Cardozo at the General Term were filled by Judges John R. Brady and Noah Davis. Judge Brady was a brother of that eminent jury lawyer, James T. Brady, one of the most interesting figures at the bar. He

commenced his career in the Common Pleas Court and later was elevated to the Supreme Court bench. Judge Brady acquitted himself creditably upon the bench, but it was in social intercourse that he was most successful. He had a very agreeable personality; he was full of good stories; he was a *bon vivant;* he was a man-about-town in the best sense of the word; he loved the drama and the society of the stage, and all the good things of life; he was generous, kindhearted, considerate, and yet, as a judge, he was firm, decided, industrious, painstaking, capable, and performed his part, if not with distinguished ability, yet with fairness, good judgment and sound common sense.

Judge Brady was full of rollicking good humour which sometimes manifested itself on the bench at the expense of his judicial dignity. He never seemed to be able to control his risibility when a ludicrous situation presented itself and, sitting as he did on the right of Judge Davis, who had a quiet and dignified appreciation of the humorous aspects of life, occasions would frequently present themselves when something laughable would strike Judge Brady and he would lean towards Judge Davis making some humorous observation, at the conclusion of which his face would be wreathed in smiles and he would shake in his chair much to the annoyance, as I know from experience, of the counsel who happened to be arguing.

Judge Davis, referring to this characteristic of Judge Brady, once told me an anecdote of the late W. W. McFarland, who had a very deep theat-

rical voice, suited rather to a heavy tragedian than to a court advocate, and who generally wore quite liberal shirt-cuffs which fell about his hand, and often made a gesture with a thrust of his closed hand toward the Court, opening it as the thrust terminated. This would bring his cuff forward on his hand. One day he was arguing very earnestly, indulging in this favourite gesture, his cuff protruding rapidly, when Judge Brady leaned over to Judge Davis and remarked in a stage whisper, "You need to be careful, Davis, or he will hit you with that cuff," following it with one of his characteristic manifestations of ill concealed merriment.

It was a fortunate thing for the City of New York that Judge Noah Davis was elected a justice of the Supreme Court in the fall of 1872. Like many of the most able members of our bar, he came to New York with a high reputation acquired in a country practice, and with about ten years' service upon the Supreme Court bench in the Eighth Judicial District. He brought to the bench wide experience, a broad and comprehensive knowledge of the law, and a dignified and forceful personality, which made him the strongest and most eminent of our judges during his entire term of service. Reference has already been made to his partnership association with Judge Sanford E. Church in Albion, during the existence of which he was elected to the Supreme Court of the Eighth District. While he was serving as such he was elected a member of Congress from the district in which he resided, and, shortly before the expiration of his term, he was induced

by Mr. Evarts to remove to the City of New York and accept an appointment by the President as United States Attorney for the Southern District of New York.

I am quite sure from my acquaintance with him that he had no expectation of re-entering judicial life, but the Committee of Seventy, which had done such good work in the fall of 1871, was still in existence, prepared to continue the efforts which had been so successful. Among the gentlemen actively interested in that movement was Mr. Dorman B. Eaton. There was a vacancy to occur in the Supreme Court and three candidates were nominated, two Democrats—one of them Mr. Henry H. Anderson, a prominent member of the bar—and Judge Davis was nominated by the Republicans and endorsed by the Committee of Seventy. He told me that he had not been approached upon the subject of a nomination and had no idea that his nomination was contemplated, and that the first intimation of it was a note from Mr. Eaton, received immediately after the nomination was made, in which he said: "We have nominated you for justice of the Supreme Court. All that we ask from you is that you will not decline." As the reform movement appeared to have somewhat spent its force he was by no means confident of election, and he told me that he felt so uncertain of the result that, happening to meet Mr. Anderson shortly before the election, he proposed to him that they should toss up a coin to see which of them should withdraw in favour of the other. Mr. Anderson responded, however, that he

felt that his own chances were better than those of Judge Davis, and that they were not so nearly equal as to induce him to do so. Judge Davis was triumphantly elected. From the time that he assumed his judgeship, he was the dominating personality on the bench.

He was a man of great intellectual power, fine legal attainments, of impressive dignity, somewhat austere and severe in manner, and of strong prejudices and predilections; yet withal he was perfectly fair and reasonable; he was patient, attentive and careful; he never acted hastily or through impulse, and upon the bench he seemed to free himself from all the prejudices and predilections which would interfere with a sound and impartial judgment. He was a rather remarkable combination of conflicting qualities. With all his apparent severity and austerity, he had a warm heart, a sympathetic nature, a keen sense of humour, and a poetic gift in which he frequently indulged to the delight of his friends. Very rarely he would make some humorous comment on the bench. An instance of this was when there was before him the divorce case of Price against Price. The question under consideration arose on an application of the wife for alimony. She had been unsuccessful in obtaining alimony in the court below and the case having been argued, Judge Davis proceeded to deliver an oral judgment, beginning with a recapitulation of the facts, adding with a slight twinkle of his eye, "and the result was that she was turned out of court without money and without *Price.*"

Probably one of the most important and dramatic trials that has ever taken place in the city of New York was that of William M. Tweed. He was twice tried. The first trial came on before Judge Davis in January, 1873. A number of indictments had been found against Tweed more than a year previous, but the trial had been postponed on various pretexts until, to the public at large, it seemed that it was altogether probable that they would not be pressed.

After Judge Davis's election it soon became evident that the delays had been because the wise prosecutors of Tweed had been waiting until the People had had an opportunity to elect a new Judge and a new District Attorney, free from any suspicion of influence on the part of Tweed. He was known to be wealthy, and had retained for his defense some of the most eminent members of the bar, including David Dudley Field, John Graham, John E. Burrill, William Fullerton, William O. Bartlett, Elihu Root and Willard Bartlett. The people were represented by the new District Attorney, Benjamin K. Phelps, and one of his assistants, Daniel G. Rollins, with counsel specially retained, Lyman Tremain and Wheeler H. Peckham. Now, at last, this notable case was to be tried, but the trial had a lame and impotent conclusion after occupying three weeks, for the jury reported that they were unable to agree and were discharged. The prosecution, however, immediately moved for a re-trial, but Judge Davis doubted his legal right to extend the term of the court, and the case having been post-

poned, it was not until November, 1873, that the retrial was moved.

Judge Davis was again presiding over the branch of the court where the trial was to take place. Probably nothing more distasteful to Tweed, and his counsel, could have occurred than to find Judge Davis presiding. Tweed was represented by the same counsel. Elihu Root and Willard Bartlett were at this time young men in the first years of their practice, but they had already begun to give promise of the distinction which they subsequently achieved. So distasteful was Judge Davis to Tweed's counsel that they conceived the idea of presenting to him the following paper, setting forth reasons why he should not preside at the trial of the case.

"The counsel for Wm. M. Tweed respectfully present to the Court the following reasons why the trial of this defendant should not be had before the Justice now holding the court:

"First. The said Justice has formed, and upon a previous trial expressed, a most unqualified and decided opinion, unfavourable to the defendant, upon the facts of the case; and he declined to charge the jury that they were not to be influenced by such an expression of his opinion. A trial by jury, influenced as it necessarily would be by the opinion of the Justice, formed before such time, would be had under bias and prejudice, and not by an impartial jury, such as the constitution secured to the defendant.

"Second. Before the recent Act of the Legislature of this State, providing that challenge to the favor shall be tried by the Court, any person who had assumed a position in reference to this case and this defendant, such as said

Justice had assumed, would have been disqualified to act as trier. The defendant is no less entitled to a fair trial of his challenge now than he was formerly. What would have disqualified a trier, must disqualify a judge now.

"Third. Most of the important questions of law, which will be involved in the trial, have already been decided by the said Justice adversely to the defendant, and, upon some important points, his rulings were, as we respectfully insist, in opposition to previous decisions of other judges.

"Although there may be no positive prohibition of a trial under these circumstances, it would be clearly a violation of the spirit of our present constitution, which prohibits any judge from sitting in review of his own decision.

"The objection to a judge, who has already formed and expressed an opinion upon the law, sitting in this case, is more apparent from the fact that in many States, where jurors are judges of law as well as facts, he would be absolutely disqualified as a juror.

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| David Dudley Field. | J. E. Burrill. |
| John Graham. | Elihu Root. |
| William Fullerton. | Willard Bartlett. |
| William O. Bartlett. | William Eggleston." |

Upon its presentation, there was indeed a stirring scene. Judge Davis was the last man to be trifled with, or to be lectured upon what his duty was in the business before him. He gave indications of great surprise and indignation that any counsel, however eminent, should have dared to present such a document to him, but his feelings were well suppressed and his judicial dignity maintained, and, while informing the counsel that the presentation of the paper was a manifest impropriety, he, at the same time, informed them that before taking any

action in regard to it he would consult his associates as to the proper course to pursue. That he conducted himself with admirable self-possession there can be no doubt. He was certainly not a man who could be intimidated.

He took no further action until the close of the trial, when he informed Tweed's counsel that he would proceed in the matter the following Monday morning, and directed all the counsel who signed the paper to attend. Accordingly, at the time designated, not only the counsel were in attendance but the court room was packed with an audience which included leading men of the bar and citizens of prominence, to await the action of the Court upon a matter which so deeply concerned the independence of the judiciary and the dignity of the court. Judge Davis proceeded to state his views of the paper in the following words:

"At the beginning of this trial, I notified the counsel for the defense that I should take some action upon a certain paper which was handed me before the case opened. I intended then, and I intend now, that that document shall receive the notice that it deserves.

"I now fix the hour of ten o'clock on Monday morning next when counsel for the defense must be present; at which time I shall proceed to do what I deem proper in the matter, and take such action as your proceeding demands. You (and all of you who signed the paper) are directed to attend on Monday morning."

Upon the adjourned day an explanation was attempted, in reply to which Judge Davis stated that if the paper had been submitted to him privately

he would not have considered it necessary to take action concerning it, but that having been submitted to him as presiding Justice of the Court of Oyer and Terminer, it was incumbent upon him to do so. He then proceeded to announce his decision which was as follows:

"In expecting the case to be tried, counsel thought it part of good tactics to prevent the judge, then sitting, from presiding. It was an attempt, judging by signatures of distinguished counsel, to intimidate the judge. The counsel sought vainly for a precedent, and will fail in seeking, here or in England, for a case of a tribunal or justice not taking notice of a paper of such a character. If such a paper were presented to an English judge by counsel, clothed as the English judges are with powers which the constitution withholds from our judges, not one of them would be sitting here now, and not one of them would find his name, one hour after, on the roll of counsel." (Applause in Court, which was promptly checked by the judge.)

"As God is my judge, what I feel it my duty to do, I do, not from personal motives, but from a solemn sense of duty to the court, the bar, and above all, to the administration of Justice. No lawyer is justified in any act, for the sake of his client, which renders him amenable to the bar of his own conscience, or tends to degrade the tribunal before which he appears, or lessen respect for that official authority on which so much depends for the preservation of our institutions. I must make the mark so deep and broad that all members of the bar will know, hereafter, that all such efforts are open to censure and punishment by fine, as the law permits. I fine William Fullerton, John Graham, William O. Bartlett, $250 each, and order that they stand

committed until the fine is paid. Mr. Burrill's position has already been explained, and Mr. Field is three thousand miles away from the jurisdiction of the court. In respect to the younger members of the bar, who have signed the paper—Elihu Root, Willard Bartlett, and William Eggleston—I have this to say: I know how young lawyers are apt to follow their seniors. Mr. Eggleston did not take active part in the trial, and I do not speak of him. The other two younger lawyers displayed great ability during the trial. I shall impose no penalty, except what they may find in these few words of advice: I ask you, young gentlemen, to remember that good faith to a client never can justify or require bad faith to your own consciences, and that however good a thing it may be to be known as successful and great lawyers, it is even a better thing, to be known as honest men. Proper orders will be prepared by the clerk and submitted to me."

This was what might have been expected from Judge Davis, and by it he maintained the dignity of the court and his own self respect.

The Tweed trials are matters of history and resulted in Tweed's conviction. The conviction of Tweed was upon an indictment containing several counts charging separate and distinct misdemeanors, identical in character, and Judge Davis, in determining what sentence to pronounce, undoubtedly felt that the imposition of a sentence of one year's imprisonment, and a fine of $250 as upon a single misdemeanor, was entirely inadequate to punish so great a rascal as Tweed, and in this I believe he was undoubtedly right. Tweed was found guilty upon twelve separate counts of the indictment and Judge Davis, therefore, pronounced a

cumulative sentence of one year's imprisonment with a fine under each count of the indictment on which he was convicted. Unfortunately, the Court of Appeals took an adverse view of the legality of this cumulative sentence, and decided that the extent of punishment which could be imposed was one year's imprisonment, and a single fine of $250. The conviction of Tweed was involved in great uncertainty and, when accomplished, was regarded as a tremendous triumph of justice. Its accomplishment was considered at the time as due largely to the manner in which the trial was conducted by Judge Davis, and his impressive charge to the jury.

Judge Davis was an admirable public speaker: his personality and fine full voice lending great dignity and charm to his thoughtful utterances, which were always characterised by intellectual power. His ability in this direction gave great force to his charges to juries. Without being patronising, he seemed to assume an air of fatherly interest, apparently taking the jury into his confidence, giving them, as a father would a son, the benefit of his wisdom and experience. The consequence was that they rarely, if ever, disappointed him in the verdict rendered. He was unusually quick to scent a fraud, and when it was made apparent he dealt with it with an iron hand.

He was particularly severe in cases of professional misconduct. The first case of importance which I argued was before him and his associates at the general term of the Supreme Court. It involved in certain of its aspects the relation of attorney and

client, and there was certainly sufficient evidence of misconduct on the part of the attorney to justify some action. The form of the action was not such as to seek redress against the attorney, and no action on the part of the court in that direction was looked for. After the case had been argued and decided, I happened, one day, to be in the court room at the time of adjournment, and Judge Davis on descending from the bench beckoned to me, and requested me to put the facts which appeared in the record respecting the attorney in the form of an affidavit for presentation to the court. I explained to Judge Davis that the attorney involved chanced to be a boyhood acquaintance, and that personally I would be reluctant to act as complainant against him. "Oh," said Judge Davis, "that will not be necessary; the Court will proceed on its own motion." I therefore complied with his request, and the Court itself instituted proceedings, with the result that the attorney was subjected to severe rebuke from the Court, and was only saved from disbarment by his youth and inexperience.

In another case which came before him, an attorney had been indicted for a criminal act in connection, I think, with the satisfaction of a mortgage. The case had, at the time, considerable publicity and was strenuously defended by the attorney, who claimed, to the last, absolute innocence. The case against the attorney did not seem, from the reports of it I read at the time, to be convincing, but with Judge Davis' horror of professional misconduct, he was led to submit the case to the jury under one of

his impressive charges, and a conviction ensued. An appeal by the convicted lawyer was, of course, contemplated, but the matter of procuring bail to avoid imprisonment pending the appeal, was a matter of much difficulty. I noticed in one of the newspapers an account of the case stating that when the time for furnishing bail arrived, a most estimable gentleman with whom I had considerable acquaintance, Mr. William H. H. Moore, formerly a member of the bar, but then a vice-president of the Atlantic Mutual Insurance Company, appeared with the prisoner and furnished the requisite bail. I supposed the convicted lawyer was an acquaintance of his whom he wished to befriend. Meeting Mr. Moore a long time after, I referred to this incident, when he informed me that the convicted lawyer was so far from being a friend as not to be even an acquaintance, but that from the accounts of the case which he had read, he became satisfied in his own mind that the lawyer had been unjustly convicted, and that as there was difficulty in procuring bail, he determined to go to his rescue. Consequently, unknown to the prisoner and to his counsel, Mr. Moore appeared before Judge Davis when bail was to be furnished, and offered security which was accepted. The lawyer was therefore freed from imprisonment until his appeal could be heard, and when it was heard and decided, the conviction was reversed and the prisoner discharged. Of course, Judge Davis acted upon his best judgment, and, in fact, it was his duty to submit the case to the jury, no matter how weak the evidence of guilt might be, if there

was sufficient evidence in law to justify a conviction. But I mention the incident because of the noble-hearted action on the part of Mr. Moore, a christian lawyer, of whom it might well be said, "I was in prison and ye visited me."

Soon after Judge Davis' term as justice of the Supreme Court began, the term of Presiding Justice Daniel P. Ingraham expired and Judge Davis was appointed presiding justice in his stead. This position he filled during the remainder of his term of service. He was exceedingly useful, especially in connection with much of the litigation which grew out of the peculations of the Tweed ring. Enormous claims were made against the city, and the city was also seeking redress against individuals who had participated in these peculations. He and his associates, Justices John R. Brady and Charles Daniels, rendered distinguished and valuable service to the city government. This general term, as so constituted, continued for many years, and was a bulwark of justice which inspired the confidence of the entire bar. At the expiration of his term, Judge Davis retired from the bench, but his presence as presiding justice will be long remembered, not only by reason of his written opinions, but because of a finely executed and life-like portrait, which has a place in the court room of the Appellate Division of the Supreme Court, presented by the members of the bar.

At the time Judge Davis was appointed presiding justice, Judge Charles Daniels of Buffalo was appointed associate justice. The General Term as

constituted with Judges Davis, Brady and Daniels continued for many years until, I think, the expiration of the term of Judge Davis which occurred December 31, 1885.

Judge Daniels' career was most honourable in every respect; he was one of the most painstaking, conscientious and intelligent judges that I have ever met. He was an intimate friend of Judge Davis, one of his associates on the bench of the Supreme Court in the Eighth Judicial District, and it was through the latter's instrumentality, that he was designated by the governor to sit at the General Term in the First Department. He was dignified, patient, courteous and attentive as a judge and simple, unpretentious, genial and warm-hearted in social intercourse. He was deprived of early advantages and of a liberal education, and in early life was apprenticed, I am informed, to the trade of shoemaking, and worked at his trade while endeavouring to prepare by self-education for the higher calling of the law. He went through many hardships and much discouragement, but in due time was admitted to the bar, where his unquestionable merit was recognised, and he was elected a justice of the Supreme Court. His opinions bear evidence of great care in their preparation, and a critical and exhaustive examination of the law and facts of each case. Although they are somewhat diffuse, this, I think, was because of lack of early training in composition and the cultivation of a concise form of expression.

He was a great walker, and had evidently inured

himself in early days to the rigor of the severe winter weather prevalent on Lake Erie, and to this was probably due his disregard of heavy clothing and high shoes. I would often see him pursuing his way uptown on bitterly cold days without an overcoat, and he habitually wore a low cut Oxford shoe which exposed his ankles to the bitter winds and often inclement weather, but his constitution was most vigorous and his frame seemed to be of iron.

He earned the respect and confidence of the members of the bar who, through the action of the Association of the Bar, on his retirement from the General Term paid him a graceful and well deserved tribute in the following words:

"Resolved that the Association takes pleasure in conveying to Judge Charles Daniels the assurance of the general sentiment of the bar of the city of New York of its grateful acknowledgment of the important services he has rendered as a member of the General Term during the period that he has been one of the associate judges; their appreciation of the strict integrity, the conscientious fidelity, and the marked ability with which he has discharged the arduous duties of his position, and their cordial wishes for his welfare and happiness in the future."

Upon the retirement of Judge Davis as presiding justice at the expiration of his term of office, Justice Charles H. Van Brunt was designated by the governor to fill the vacancy. Justice Van Brunt had a long and distinguished career upon the bench. He was first appointed by Governor Hoffman, in 1869, to fill a vacancy in the Court of Common

Pleas, and was elected a judge of that court at the ensuing election. His appointment by Governor Hoffman was probably due to the fact that he was connected with Governor Hoffman's law office in New York. At the time of his appointment he was comparatively unknown, and of very slender experience as a practitioner, but he had in him the making of a most able and efficient judge. After serving a term in the Court of Common Pleas he was elected a justice of the Supreme Court.

He served continuously upon the bench for about thirty-six years with great distinction, and achieved a high position in the judiciary. After serving in the Court of Common Pleas for a few years he was designated, under an act of the Legislature, to sit temporarily in the Supreme Court in the hearing of jury cases. No one who observed him could help admiring his patient plodding industry, as year after year he gave himself up entirely to his duties in this direction. There was nothing in this employment to render him conspicuous, or bring him much into public notice, and in devoting himself to this service he gave up the opportunity of exhibiting his capacity, and bringing himself into prominence by written opinions; but he was laying the foundation, deep and sure, for future service in appellate tribunals, and his subsequent value as presiding justice of the Supreme Court was, I believe, largely enhanced by his long experience as a trial justice. As such he had few equals and no superior. He was quick to apprehend the facts and the law, forcible and clear in his charge to the jury, and

he adopted the practice of ruling promptly and without discussion upon questions of evidence, using only a single word, either "sustained" or "overruled," which meant a great saving of time in the despatch of business. While this method involved the risk of serious error, perhaps it was no more serious than is usually the case after discussions of questions, and when he erred, his error had the merit of being unmistakable. But with the experience which he acquired, in a short time, his rulings were almost invariably correct. Besides this, he had such a dominating personality that no one would ever dream of taking any liberties with him, or engage in controversies with the opposing counsel which, too often, before weak judges, mark the progress of a trial.

His personal appearance indicated a very strong and rugged character. His face was one of those impressive and strongly marked countenances which needed but a glance to indicate a powerful personality. His large head, short and thick neck, and his ponderous frame presented a very impressive appearance, notwithstanding his moderate stature. He had a deep loud voice, and his manner was brusque, and, at times, it seemed almost rude and unfeeling toward counsel. He was one of the most forceful and strong willed men that I have ever known. In his demeanour there was apparent disregard of conventionality, and his whole attitude was that of fearlessness and independence, with an absence of the amenities of life which, at times, have made association with him somewhat difficult. But

these things, after all, were on the surface, and beneath there was much in Judge Van Brunt that was genial, kindly and attractive. Those who suffered under his rougher manifestations had, in most instances, themselves to blame. They were those who wasted his time, tried his patience, or gave him little credit for intelligence, and to these he was undoubtedly severe and at times harsh. But during the many years, and on the many occasions, when I have tried cases and argued appeals before Judge Van Brunt, I think I may say that I could not have asked for a more patient, intelligent or considerate judge.

At the time he assumed his duties as presiding justice of the Supreme Court, he had not only become unusually well equipped as a lawyer, but he possessed administrative ability of a high order. As a presiding justice he was remarkably efficient. He permitted no time to be wasted; he extended the sessions of the court; he made rules for the orderly administration of justice, and to prevent the altogether too numerous applications for postponements and, as a result, the calendars which had fallen into arrears were brought up to date, and the delays formerly attendant upon appeals from judgments were entirely removed. He presided with perfect dignity, and he conducted the business of the court not only with entire fairness, but in his written opinions he displayed all the characteristics of a well stored, clear, and vigorous intellect. He was an excellent listener; he rarely interrupted counsel, and then only to prevent a waste of time,

by some well-directed query which touched the marrow of the case. Instead of manifesting impatience, I have often wondered, as I sat in the court room awaiting the call of a case, at the patient attention he gave for a long time after the Court was evidently in full possession of the questions involved in the case under argument.

Under the revision of the constitution which took effect in 1896, a very great change was effected by the consolidation of the Superior Court of the City of New York and the Court of Common Pleas with the Supreme Court. The Superior Court and the Court of Common Pleas were thereby abolished, together with their independent systems and machinery for the exercise of their separate jurisdictions, and the judges of those courts were created justices of the Supreme Court during the remainder of their terms, and the jurisdiction of those courts was vested in the Supreme Court. This was a most useful reform in the administration of justice. It remedied abuses which had grown out of the exercise by separate courts in the city of New York of practically concurrent jurisdiction, which had often resulted in a conflict of jurisdiction, and subjected litigants and lawyers to embarrassment. While, at the time, this consolidation met with great opposition from some of the judges and a portion of the bar, the benefits to be derived from it soon became manifest and few, if any, could be found of those who practiced under the old system of separate courts who would be willing to return to it.

This revision of the constitution accomplished

another important change under which, in place of the General Term of the Supreme Court, there were created the Appellate Divisions as they now exist with five judges sitting. Judge Van Brunt, having been designated as presiding justice on the retirement of Judge Davis, was quite naturally designated as the presiding justice of the Appellate Division in the First Department. The assumption of gowns by the justices brought them an added dignity and under Judge Van Brunt's leadership, the court took, and has ever since maintained, a high position among the courts of the State. He regulated its procedure, and established rules for its guidance, which dispatched the business with the least possible delay, and the work of the court in its written opinions has won the respect and admiration of the bar. The supervision of the special and trial terms, which was conferred upon the Appellate Division by the constitution, enabled Judge Van Brunt and his associates to regulate and control the inferior branches of the court in such a manner as to render the disposition of trials more expeditious and orderly, and his remarkable capacity as an administrator was manifest in every branch of the court.

He also introduced a reform which obviated the great delays in hearing appeals, as well as the accumulation of business in court, by devising a plan, and promulgating a rule of the Court, requiring the briefs of counsel to be filed and copies to be served in advance of the hearing of the case, under the penalty of a dismissal of the appeal, or an affirmance

of the judgment appealed from. This step at once did away with a fruitful source of applications for postponements of hearings founded upon excuses, good or bad, for failures to have the briefs in readiness for presentation to the Court when the case was called. This reform has been so effective that the applications referred to which were so numerous, have now disappeared almost entirely, and under the rule adopted, counsel for each party has an effective remedy against the other for a failure to serve his brief, of which advantage is sure to be taken. One of the great merits of this reform is that each counsel now knows in advance what argument his adversary will urge, and the Court is in possession of all that either counsel can suggest, and surprises to the counsel and the Court are thus avoided. The plan has worked so successfully that it was subsequently put in operation in the Court of Appeals, and several of its features have been adopted by the Supreme Court of the United States.

It is not too much to say that he left a powerful impress upon the administration of justice by the Supreme Court in this district which will be felt for years to come. I was told by the late Judge Edward Patterson that one could not form a correct estimate of the value of Judge Van Brunt from merely seeing him in court and reading his written opinions, without an opportunity to observe his characteristics in the more important work of the court in the consultation room. Here, he said, Judge Van Brunt was at his best. His mind was so strong and so fertile in suggestions, and his exper-

ience was so great, that to him it was due, more than to any other, that the correct solution of difficult and complicated situations was due, and he added that in the consultations of the justices following Judge Van Brunt's death, his absence was felt so keenly that they were "like the council without Agamemnon." For nearly twenty years Judge Van Brunt occupied the distinguished position of presiding justice of the Supreme Court in the First Department, and in all fine qualities that go to make up a great judge, he was, I believe, without a peer.

Among the associate judges designated with Presiding Justice Van Brunt, to constitute the Appellate Division, there were two before whom as trial justices, I often appeared, and with whom my relations were most cordial. One of these was Justice George C. Barrett, and he was among the few very attractive judges who have come under my observation. I first saw him on the bench of the Court of Common Pleas when I was a law student. He was then about thirty-one years of age. He had been elected judge of the Sixth District Court at the early age of twenty-five years, and a judge of the Court of Common Pleas in 1867, when scarcely thirty, and was elected a justice of the Supreme Court in the Fall of 1871. In this position he continued until 1906, which covered a judicial experience of over forty years.

In the short interval between Judge Barrett's retirement from the Court of Common Pleas by resignation, and his election to the Supreme Court,

he was actively engaged in practice. At this time revelations of the corruption of the Tweed ring, through the columns of the *New York Times*, aroused the citizens of New York generally to the financial dangers which threatened the city from the tremendous extravagances of the ring, and the misappropriations of which it had been guilty. This led to the beginning of a prosecution, in which Judge Barrett was retained, having for its object the obtaining of an injunction to restrain public officials in the expenditure of public money. Judge Barrett, with a boldness and courage which cannot be too highly commended, appeared in court on an *ex parte* application for an injunction, before Judge George G. Barnard, from whom, as an adherent of the Tweed régime, little could be expected. Judge Barrett stated the facts with an aggressiveness and boldness that was significant, undoubtedly supposing that Judge Barnard would not regard his application favourably unless the terrors of the law persuaded him and, therefore, Judge Barrett was the more aggressive in his disclosure of the facts and in his attitude before the judge, knowing that the matter could not fail to have great publicity and that if the injunction were refused it would leave Judge Barnard in a very embarrassing situation. The result of the application was that Judge Barnard, without hesitation, granted the injunction, and he never modified it, except in some minor particulars so as to allow payments to employés of the city government and other proper expenditures.

At this time was beginning a genuine popular up-

rising to redeem the city from the control of Tweed and his adherents, and one of the most powerful agencies in that direction was an organisation of prominent citizens known as the "Committee of Seventy." In coöperation with this committee the young men of the city organised what was known as the Young Men's Municipal Reform Association, and of this Judge Barrett was elected chairman. His prominence in the movement, and the political management of his uncle, William C. Barrett, led to his nomination for justice of the Supreme Court by what was known as the Apollo Hall Democracy, that name being adopted from the name of the hall in which that particular wing of the Democrats assembled, in contra-distinction to the Tammany Hall Democracy. This was followed, quite naturally, by his endorsement by the Committee of Seventy, inasmuch as he not only represented that type of the Democracy opposed to Tammany, but was chairman of The Young Men's Association. Tammany Hall nominated as his opponent Thomas A. Ledwith, a justice of one of the district courts, and entirely unfit to become a justice of the Supreme Court. This great movement for municipal reform resulted, as is well known, in the complete overthrow of the Tweed ring, and Judge Barrett's election by a majority of about one hundred thousand votes.

He proved to be, in my estimation, one of the best judges that have occupied seats on the Supreme Court bench. I appeared before him constantly during the twenty-four years before he became a member of the Appellate Division, and used to meet him

quite often in social intercourse. He was a man of innate refinement and courtesy, and I never knew him to appear otherwise, either on the bench or off. His whole appearance was indicative of a sensitive, well-bred and cultured gentleman. His physique was slight; he was small of stature; he had a remarkably refined and expressive countenance, and a graceful and dignified bearing. He was distinguished, I think, for the polish of his manner, and the evidence he gave of intellectual culture. He was indeed intellectually cultured. He had read much, and his mind was stored with literature of a high class. He indulged at times in literary effort, occasionally as a poet, and in one instance at least, he was the author of a play. He was not much given to general social intercourse, but among those he admitted to his intimacy he was charming as a brilliant and witty conversationalist, and a devoted and loyal friend.

I have never met with a more perfect model of a judge in his manner of presiding over a court than Judge Barrett. He was always a gentleman. He possessed dignity, courtesy and the capacity to subdue unruly and turbulent elements and, as a consequence, proceedings in his court room were entirely orderly, and conducted in a manner befitting a court of justice. He never raised his voice in rebuke or expostulation, and his utterances were always in well modulated and courteous tones that produced an immediate subduing effect. The fact is that one could not do otherwise with Judge Barrett than endeavour to be well-behaved. He had a remarkably keen, sub-

tle and penetrating intellect. He grasped the point of an argument at once. He needed less argument to convince him than almost any judge I have known. He was either convinced at once by the statement of a case or legal proposition, or else he could rarely be convinced at all. There was no mental hesitation or questioning; there was no indecision and veering one way and the other; he saw the point and his mind seemed to be made up at once.

His conduct of jury trials were manifestations of a high order of judicial ability to control the progress of things, and to mould the verdict of jurors. It is said to have been the boast of a great English judge that he never lost but one verdict. This was due to his strong prepossessions as to what the verdict should be, and his power to induce the jury to adopt the same view. Judge Barrett, I think, possessed somewhat those characteristics. He was what would be described as a verdict-getting judge. At the conclusion of a trial he seemed to have well-defined views as to what the verdict should be, and he exerted his influence, justly and impartially, to see that there was no miscarriage of justice. Unlike most judges, who seem to drift along with a trial instead of controlling it, and deliver charges that are so colourless that they are of little aid to a jury in solving at times complicated questions of fact, he pointed out unmistakably, and with great clearness and force the rules of law to guide the jury, and then explained their application to the facts, which he marshalled with very great skill. There were probably very few cases in which the verdict did not

express his own conviction, and in cases where it did not, he was bold and fearless in setting the verdict aside.

He was perfectly patient; he paid strict attention; he acquired complete possession of the facts and the law, and his charges to jurors were lucid and convincing. This was due, I think, to his remarkable ability to put facts and arguments in such a way as to enable them to be grasped readily by the average intellect. In his charges, he exhibited mannerisms, and indulged in gestures, and vocal inflections, which although incapable of reproduction in a printed record, would produce a very decided effect on juries. These were the despair of counsel with a doubtful case, but the delight of those whose causes commended themselves to him.

I recall an incident related by John M. Scribner, most experienced and able in the defence of cases of personal injuries through negligence, who happened to be defending a railroad company whose car had run over a child of tender years playing in the street. Mr. Scribner had tried the case with great skill and argued it effectively to the jury, upon the theory that the child should not have been permitted to play alone and unattended in a public thoroughfare, and that consequently there was contributory negligence. He had evidently made an impression on the jury and felt that they were inclined to adopt his view of the case. But he had reckoned without Judge Barrett's charge. His way of shrugging his shoulders slightly, or of using some taking gesture, or of giving expression and emphasis, while unex-

ceptionable in itself, would produce an effect which would not be in any way apparent from the language of the charge when it subsequently appeared in the printed record of the case. In this particular instance, when, in the course of his charge he reached a discussion of the facts, he called attention to Mr. Scribner's argument that a child of tender years should not be left alone and unattended in public streets. He remarked that as a general legal proposition this was undoubtedly true, but that it was to be applied in view of all the facts and circumstances; that the streets were public thoroughfares; that children had a right to use them; that reasonable care required that the parents should only do their best, and that it was not to be expected of people in humble circumstances that their children should at all times be accompanied by a *French* nurse. This little word "French," introduced with just a little emphasis, just a deprecatory smile, a wave of the hand, and slight shrug of the shoulder, was sufficient, as Mr. Scribner said, to demolish the force of his argument and, from the moment of its utterance, there could be no doubt what the verdict would be.

He had such great perception and penetration that it was useless to attempt to mislead or impose upon him by specious or unsound argument, or by the citation of authorities which were not directly in point. He would enter into no discussion. He would not waste time by attempting to expose fallacies, but in a single, well-directed phrase, he would demolish the argument, and brush the matter aside, leaving nothing more to be said.

Judge Barrett, in the twenty-five years of his experience in the Supreme Court, before his appointment to the Appellate Division, presided at a large number of very notable trials. He was recognised as peculiarly well fitted to deal with important criminal cases. He presided at the second trial of Richard Croker for murder. At the first trial the jury disagreed, and at the second he was acquitted. In connection with this a prominent justice of the Supreme Court related to me an incident connected with the occasion of Judge Barrett's re-nomination for justice of the Supreme Court in 1885. At that time Richard Croker was "boss" in Tammany Hall. It was necessary to obtain his *imprimatur,* and, accordingly, Judge Barrett being a Democrat, it was expedient for him to secure Mr. Croker's support. One of Judge Barrett's associates on the bench arranged an interview between them and with Judge Barrett called on Mr. Croker. The first remark made by Judge Barrett was: "Mr. Croker, I am glad to see you, I have not met you since you were tried before me." His brother Justice was overwhelmed by the bluntness of his utterance, and wondered how Judge Barrett could have said it, but he soon realised that this was his extraordinary way to remind Mr. Croker of the great personal service rendered him in presenting the case to the jury in such a manner as to justify an acquittal, and he added that within the next five minutes they were enfolding each other in loving embrace. It is undoubtedly true that for a number of years after Judge Barrett's re-nomination and re-election there

were few who had greater influence than he with Mr. Croker.

It was Judge Barrett who presided at the trial of Alderman Jaehne for receiving a bribe. The particulars of the incident are related elsewhere. He also presided at the trial of Jacob Sharp who was tried for bribery in connection with obtaining the privilege of constructing the Broadway surface road. He it was who presided at the trial of Ferdinand Ward in connection with the operations of the firm of Grant & Ward, which involved General Grant to some extent. It is perfectly true that no other judge, during Judge Barrett's term of office, presided over so many trials of public interest.

After his appointment to the Appellate Division his work was confined to delivering written opinions, and they afford abundant evidence of great legal attainments, and a capacity for logical processes and power of reasoning unexcelled, if equalled, by any of his associates.

Justice Edward Patterson was the other justice of the Appellate Division with whom my relations were particularly informal and delightful. He was a friend of many years' standing, and there was no one in my range of acquaintance with whom intercourse was more agreeable. We met in the early days of my practice as antagonists in an insurance case, and from that time forward we became excellent friends. He belonged to one of the fine old Philadelphia families of Irish descent, and he had inherited those genuinely characteristic qualities of the Irish, heartiness, generous impulses, a sincere

sympathy, good humour, conversational gifts, and loyalty to friends. He was always lovable; he aroused no antagonism; he was considerate, amiable and courteous, and he was one of the most popular judges whom I have known. It was like a ray of sunshine to have Edward Patterson cross one's path. He was simple, unostentatious, democratic and friendly, and unlike a great many lawyers who before ascending the bench are genial and warmhearted companions, but after ascending it surround themselves with the chill atmosphere of judicial dignity, Judge Patterson was the same unaffected, genuine, informal, and whole-souled personality that he had always been. While on the bench he had the judicial manner in perfection; off it he was the rollicking, good-humoured, and kindly boon-companion.

Judge Patterson's bearing was quite aristocratic and his fine expressive countenance was indicative of his high birth and good breeding. There was a peculiar charm in his demeanour, which was of a true courtesy, and his greetings and partings were always accompanied by a graceful bow, and a warm and hearty salutation. He was one of the best read men I have ever known. He had more out-of-the-way knowledge than anyone of my acquaintance. He had read exhaustively in the literature of the law, and from such works as Howell's State Trials he would furnish a large amount of most interesting incidents in elucidation of legal discussions, while in general literature he was so well-informed, and had so perfect a command, that he was delightful and instructive, particularly in conversations at informal gather-

ings of ladies and gentlemen. For the ladies he undeniably possessed a very great attraction by reason of his literary culture.

Judge Patterson was essentially a city man. I am under the impression that he did not care very much for country life, and athletic sports had for him no attraction. He liked the life of the city; he enjoyed the amusements, theatrical and literary, which it afforded, and club life at the Century, where for many years he used to spend a portion of his evenings around the billiard table, with his friend, Mr. Frederick R. Coudert, until his death, and afterward with others of the same type. Here he was in his element with men of high attainments, wide culture and genial disposition. He was very temperate, and although cheering beverages were wont not only to circulate but, if too freely employed, might inebriate, I never knew him to indulge in them, and I think his invariable rule with respect to them was strict abstinence. He in no sense depended on artificial stimulants for exuberance and geniality, for these characteristics were his natural possessions.

In 1884 it so happpened that Judge Patterson and I were rival candidates for judge of the Court of Common Pleas, he with two others on the County Democracy ticket; I, with two others, on the republican ticket and three other candidates on the Tammany Hall ticket. This was at the time of Mr. Cleveland's first election to the presidency, and while the republican ticket was supposed to have not much of a chance, as proved to be the case, the two rival Democratic organisations were thought to be nearly

equally divided, which proved to be correct. It turned out that two of the Tammany candidates—Judge Joseph F. Daly and Judge Larremore—were elected by a substantial majority; the race was very close between Henry Wilder Allen, who had been serving by appointment, and was seeking election, and Mr. Patterson as he then was, both of them on the County Democracy ticket. It was generally supposed that Mr. Patterson was elected, and the result was for a long time in doubt. I have always believed that Mr. Patterson was elected and that the count was manipulated so as to elect Judge Allen. The final count, however, elected Judge Allen by a majority of only 93 votes. This was a great disappointment to Judge Patterson and to all of his friends.

In 1885 there was another triangular contest in which Judge Patterson was again nominated by the County Democracy, Judge Henry W. Bookstaver was nominated by Tammany Hall and I was nominated by the Republicans. Again poor Judge Patterson went down with me to defeat and came out at the foot of the poll, Judge Bookstaver being elected by a majority of 1,800 votes. In 1886, however, he was successful, receiving the combined nominations of Tammany and the County Democracy, who had buried their differences, and he was elected Justice of the Supreme Court. Unlike most of our judges, he was thoroughly equipped for the position by long experience in active practice at the bar. All of his friends predicted for him a successful career as a judge, and in this they were not mistaken. He possessed an accurate knowledge of legal principles and

adjudged cases, was entirely familiar with the rules of practice, and with all that pertained to legal controversies. He was fair, patient, courteous and considerate. He was intelligent, practical and ready in the disposition of business. His mind was alert, keen and appreciative, and in his charges to juries his diction was simple, clear and forcible, and he had the gift of arraying the facts and stating the rules of law so simply as to give a jury of average intelligence a correct appreciation of the questions involved. In his disposition of equity cases and of motions he was painstaking and accurate, and his written opinions were brief and to the point. When the Appellate Division was organised in 1896 he was designated as one of the associate justices and the first 135 volumes of the Appellate Division Reports furnish abundant evidence of his industry and ability as an Appellate judge. There was probably no member of that court who was his equal in facility of expression and choice diction, and his opinions read better, I think, than those of any other of the judges.

Upon the death of Judge Van Brunt and after a short service by Judge Morgan J. O'Brien as Presiding Judge, Judge Patterson was appointed to that position, holding it until his death. In the latter part of his life he had a terrible affliction, necessitating severe operations which seriously affected the muscles of his face and his vocal chords, and which was not only a source of pain but peculiarly distressing to such a buoyant, sociable and companionable person as himself. This affliction brought out other qualities compelling the admiration of his friends.

His patience, fortitude, courage and hopefulness were marked characteristics of his later years, and instead of being borne down by his affliction, he rose superior to it and, notwithstanding his manifest infirmities, he was cheerful and companionable as of old, industriously bearing his part with efficiency in the high office which he filled so acceptably and with such great distinction.

## CHAPTER IV

### SOME JUDICIAL PERSONAGES AND CHARACTERISTICS

The evanescence of the lawyer's fame has been commented on so frequently that it has become a truism. Of course, there are a few exceptions where great names loom up whenever bygone years of the law are mentioned, but, generally speaking, lawyers' names are, as Keats said of his own, "writ in water." And yet not quite so bad as that, for whether judges or practitioners, as they pass on into the beyond, their careers may be fairly well traced by the appearance of their names in the volumes of reports, either as authors of opinions, or as counsel for one of the parties. It is, at least, some satisfaction to the useful judge and the successful advocate to know that although he may have disappeared, the path he has pursued over the field of the law bears the imprint of his footsteps.

The title "Judge" has come to be quite as common as the title "Colonel," of which it is related that when a wag-of-a-passenger on a departing steamer shouted out to the crowd on the pier: "Good-bye, Colonel," half a hundred manly voices shouted back: "Good-bye, Judge."

Very many lawyers dearly love to be called "Judge," when their sole claim to the title is that at one time or another they have been nominated by

way of compliment by some political party in a hopeless minority, or, with more show of reason, have occupied some petty judicial position in an obscure locality in some far-distant State, and appear at our bar as "ex-judge so and so." This weakness was illustrated by an illiterate individual who desired to be elected a justice of the peace so that he might be called "Judge." On being elected he sought in the seclusion of his barn an empty barrel, and placing his head within shouted in a loud voice, "Judge," that he might hear how it would sound. This enables us to understand more readily, perhaps, the pardonable pride of a fond Jewish father of Essex Street, who remarked of his son that had been elected to a petty Judgeship: "Ikey has shust been elected shudge, and now he is going to vear the shudicial vermin." This weakness, if it is such, appears in a letter of no less an individual than Chief Justice Fuller to a friend, upon his confirmation as Chief Justice of the United States, in which he remarked in substance. "Hereafter my friends will be at liberty to call me 'Judge.'" But the insuperable disadvantage, to my mind, in being hailed by this title is that, unless the claim to it is perfectly well founded, any encouragement, or even tacit permission of its use savours of false pretences, and how great must be the mortification of its recipient when asked: "What judicial position did you fill?" to be compelled to respond: "I was never really a judge, but I was nominated once upon a time, and defeated."

A great throng of judges of varying degrees of excellence has wielded the gavel during the past forty

years; some of them born to the ermine, and others cast upon the bench by the fickle waves of political favour, only to be submerged again in a well-merited obscurity.

Sometimes judicial dignity is accompanied by an impressive friendliness, which may be illustrated by the remark of one of the judges of the old Court of Appeals concerning an associate on the bench who possessed this characteristic, that "Judge Blank's friendliness was so overwhelming you could hear him shake hands across the street." A story was told of this same judge, who was a devout attendant on the Episcopal Church and joined in the service in rather a loud and impressive voice. During the recital of the Apostles' Creed he would "lag superfluous," a little after the rest of the congregation. One of his former associates on the bench accosted him at the close of the morning service and remarked *sotto voce,* but in a way that everyone could hear: "Judge Blank, when you recite the Apostles' Creed, I wish you would 'descend into hell' with the rest of the congregation."

Upon the retirement of Judge Blank from the bench he did not seem to receive that appreciation of his attainments and ability which is evidenced by frequent retainers in important matters. He cultivated the friendship of practitioners in a manner likely to repel rather than attract, and whenever he did secure a retainer he exhibited gratitude effusively. In one case when a member of the bar came to him with a check for the amount of his retainer, he exhibited so much satisfaction and pleasure that

he gave it expression by grasping both hands of the attorney and came dangerously near osculation, exclaiming: "Mr. Blank, you are a perfect gentleman."

One of the most noteworthy features of elevation to a judgeship is the change which takes place in its recipient in his relations with his associates at the bar. He may have been a very ordinary lawyer, but being in the possession of the high sounding titles, "Judge" and "Your Honor," and the "judicial dignity" which accompanies them, they seem to remove him, in his conception, from free and unrestrained intercourse with his former associates and place him in a sphere apart from his fellows of the pre-judicial days.

Perhaps this is due in part to the fact that in a large city like New York, the judge is hedged about by necessary forms and ceremonies and is not ordinarily accessible, and that he rarely comes in contact with his professional brethren, except at more or less formal functions.

In the country districts free and unrestrained intercourse and easy familiarity still exist to some extent, but the relation between the bench and bar in the past, as illustrated in the case of Judge David Davis and President Lincoln, has disappeared. They were constantly thrown together out of court, sometimes occupying the same room, and Judge Davis never tired of hearing Mr. Lincoln's stories as they sat about the common stove of the country tavern. This seclusion, and the "judicial dignity" which judges seem to think it necessary to display off

as well as on the bench, and to assume an attitude of mental superiority as well as a kind of mastery, as though lawyers were troublesome inferiors that required the exercise of control, works a transformation in the judge, and begets a tendency to forget that, after all, the judges, the lawyers, the jurors and the court officers are but parts of common machinery to administer justice.

Undoubtedly there is a certain amount of respect due to the position, which the bar should never forget, but it is difficult to understand the marked change of attitude alluded to, except that it is the outgrowth of a certain degree of consciousness that many of the practitioners were the judges' superiors at the bar and that, therefore, judicial dignity must assert itself.

I have seen many instances of practitioners of high repute, who were subjected to unpleasant experiences growing out of the demeanour of the judge presiding. I cannot believe that the overbearing conduct as well as the rudeness and brusqueness of the judge could be intentional, though it was certainly conduct which would not have been tolerated for an instant between members of the bar, yet in the presence of the Court the practitioner was powerless.

There was a very conscientious judge, whose manner in ordinary intercourse was in the highest degree gentlemanly and courteous, but the moment that he ascended the bench, his demeanour entirely changed. His voice in calling the calendar was raised to a high pitch; his attitude towards members of the bar who

had various excuses to present as the grounds of adjournment, and his treatment of counsel during the trial was so loud and overbearing, that if it had not been for the confidence the lawyers had in his innate sense of justice, they could have never tolerated it. I remember that someone remarked concerning him, when his loud voice was so noticeable calling the calendar of contested motions at Special Term. "The people in selecting a poor judge, spoiled a good auctioneer."

At the time of my admission to the bar there were but five judges of the Supreme Court, Judges Sutherland, Ingraham, Barnard, Cardozo and Brady. Judge Sutherland's term, in a short time, expired. It was my privilege to become well acquainted with him. He had a rugged and stern countenance, surrounded by a bushy beard, and his exterior indicated severity and sternness, but he had one of the kindest hearts and most genial dispositions which it has ever been my good fortune to meet. He was full of kindly sympathy and good nature. He was a man of the people, plain, unassuming, genuine. His manner and dress and his shambling gait betokened more of the prosperous farmer than the learned judge. During his early practice he was a resident of Madison County, and as counsel for the Van Rensselaers he witnessed many stirring scenes in the anti-rent war which prevailed in that locality, where the Van Rensselaers were the great land owners. Unfortunately Judge Sutherland's term of office expired with the year when the election was held which resulted in the overthrow of the Tweed régime. He deserved re-

nomination and re-election, and probably expected it. One of the judges, now on the bench, who was related to him and associated with him in practice after his retirement from the bench, and familiar with the events of that time, told me that Judge Sutherland was somewhat uneasy with respect to his nomination until he had a conversation with William C. Barrett, a member of the bar, influential in politics and an uncle of the late Judge George C. Barrett. Judge Sutherland was assured by William C. Barrett of his own support, and that any anxiety was unnecessary. He therefore departed on his customary vacation and left it to my informant to let him know the situation as it transpired. It soon became apparent that Mr. William C. Barrett instead of supporting Judge Sutherland was laying his plans for the nomination of his nephew, George C. Barrett. A most influential body of citizens had been recently formed, under the name of the Committee of Seventy, and when they selected a candidate it was George C. Barrett, who also received the support of the Republicans, and Judge Sutherland was sent into retirement. As told me, this act of William C. Barrett was one of gross treachery, of which his subsequent career showed him to be capable, because, not many years later, it was discovered that he was guilty of serious defalcations in professional matters, and he fled to Ireland, where he spent his remaining days in poverty, receiving an allowance of one pound ($5.00) a week from his nephew, Judge George C. Barrett, who was elevated to the bench.

After Judge Sutherland's return to practice, he

was appointed referee to hear and determine a litigation in my father's office in which I acted as trial counsel. Like most young lawyers, I was full of objections to the testimony offered by my opponent and greatly chagrined that quite invariably my objections were overruled. I could not understand why Judge Sutherland should decide so constantly against me and, after one of the hearings, in a fit of depression, I told my father that Judge Sutherland was against me. He asked me what the judge had done, and I informed him of the adverse decisions. "Well," said he, "perhaps Judge Sutherland is ruling against you now so that he may decide for you later and deprive your opponent of the opportunity of securing any exceptions." I then saw a great light and ceased making objections, and when the decision was rendered it was as my father had prognosticated.

In a year or two, Judge Sutherland was nominated and elected City Judge, and presided in the trial of criminal cases, occupying that position until his death. He was a man of religious instinct, and of a remarkably pure and blameless life. No better testimony to this could be furnished than the action of a number of the most eminent members of the bar in presenting to the Association of the Bar, on Judge Sutherland's retirement from the bench, a well executed and admirable portrait of the Judge which now hangs over the entrance to the library of the Association, accompanied by a letter, which says:

"The undersigned beg leave to present to the Association of the Bar of the City of New York a portrait of the Hon. Josiah Sutherland, late a Justice of the Supreme Court of

this State, as a memorial of a man who administered his high office with purity in corrupt times."

Another judge possessing many of the characteristics of Judge Sutherland was David McAdam. In the early years of my practice he was one of the busiest lawyers in the City of New York, in the inferior courts. I doubt whether any man ever had so large a practice as he among the poorer classes and in unimportant litigations, so far as concerned the amount of money involved. He was constantly in the District courts and in the Marine Court of the City of New York. His energy was superabundant, his activity was unlimited, and his industry was indefatigable. He sprang from the people and he was a man of the people. He had little polish or refinement of manner, but untiring perseverance had made him an excellent lawyer, and this, coupled with an exceedingly plain, direct and homely way of presenting a legal question, gave him great influence in the courts in which he practiced. His large experience in landlord and tenant cases resulted in the accumulation by him of a breadth of legal knowledge on that subject which made him an authority, and he prepared that most valuable and useful book "McAdam on Landlord and Tenant," which is recognised everywhere as a leading work on that subject. Judge McAdam's judicial career was one of steady growth and advancement. It was natural that he should be elected a judge of the court in which he practiced most, and about 1880 he became a judge of the Marine Court. He served in that capacity about ten years, during several of which he was Chief Judge of the court.

He was then elected to the Superior Court of the City of New York for a term of fourteen years, and upon the consolidation of the courts he became a Justice of the Supreme Court. He was remarkable for an absence of all formality, lack of assumption of judicial dignity, readiness with which he reached the pith of a legal controversy and his despatch in disposing of it. When the judges of the Supreme Court assumed gowns, this step met, in him, decided opposition. He at first declined to wear one, but finally, out of deference to his associates, he consented to do so, refusing, however, to robe himself in his private chambers and thence proceed with stately step to the court room, but, instead, had his gown brought to the clerk's room adjoining the court room, and there robed himself and proceeded to the bench. From all indications, probably no one was ever so uncomfortable in a gown as Judge McAdam.

Beneath all his plainness and lack of polish there was, however a well trained and cultured intellect which found expression, not only in that monument of industry, "McAdam on Landlord and Tenant," but in an interesting and, indeed, valuable book, of which he was one of the editors, "The Bench and Bar of New York," containing sketches of judges and lawyers.

I do not know of any one who apparently enjoyed his judicial office more than Judge George Shea, who was proud to be known as the Chief Judge of the Marine Court of the City of New York. He was a typical Irishman, as his name indicates. He was particularly urbane and courteous and had an im-

pressive manner. His judicial dignity was indeed pronounced and it may be truly said that in his fairness, courtesy and demeanour, as well as his dignity, he magnified his office. It was related of him that soon after he was made Chief Judge he paid a visit to "the old country," and the home of his youth. Here he was received with unbounded distinction, it being assumed, he being careful not to dispel the assumption, that, as Chief Judge of the Marine Court of the City of New York, he was presiding over one of the highest courts of Admiralty jurisdiction in our land, when, if the truth must be known, the Marine Court was one of the inferior city courts, with a jurisdiction limited to actions involving not more than one thousand dollars and possessing no admiralty jurisdiction whatever. Of course it mattered not to him and it made no difference to them that there was a mistaken supposition respecting the importance of his judicial position, and, quite likely, he would have been, as he deserved to be, honoured just the same.

Besides being a judge, he was a student of history and a writer of no mean pretensions. He was a student, among other things, of the times of Alexander Hamilton and he produced a "Life of Hamilton" which was received with high and well deserved encomiums.

As a genuine Irishman, Judge George Shea possessed the Irish characteristic of hot-headedness, which led him on one occasion, at least, to transgress the bounds of propriety. It happened that I was appointed referee to hear and decide a case in which

Judge Shea, after his retirement from the bench, represented the defendant, and Honourable L. E. Chittenden, former U. S. Treasurer under President Lincoln, represented the plaintiff. The issue was somewhat warmly contested, but with no exhibition of bad feeling on the part of either until the case had progressed a considerable time. Judge Shea was getting a little the worst of the argument, Mr. Chittenden pressing him rather closely. I was more than surprised, in fact, decidedly startled, by Judge Shea exclaiming to Mr. Chittenden: "You're an ass." Up to that time Mr. Chittenden was in good humour and it is to his credit that he did not lose it entirely, although the characterisation evoked an emphatic protest. The spectacle of Chief Judge Shea, so well known for his remarkable dignity and urbanity as a judge, descending to the use of appellations respecting his adversary which he would have been the first to reprove, combined with the explosiveness of the utterance and a countenance suffused with a glow of rage, was in itself so ridiculous that I could scarcely restrain my laughter. Fortunately I was able to command sufficient self-possession toward the learned judge to indulge, as he had often done toward other choleric members of the bar, in some well meaning platitudes respecting the observance of professional propriety in the intercourse of professional brethren with each other.

Judge Shea undoubtedly felt genuine satisfaction, and justly so, in the part he took in the proceedings for a writ of *habeas corpus* to obtain the release from imprisonment, on bail, of Jefferson Davis. Al-

though a Democrat, Judge Shea had more or less intimate relations with Horace Greeley, and it was probably the outgrowth of these that led to the suggestion of a possibility to bring about the release of Mr. Davis by means of a writ of *habeas corpus*. This course was in line with Mr. Greeley's well-known and highly creditable policy of allaying, so far as possible, sectional feeling, by manifesting a spirit of magnanimity toward our defeated Southern brethren and welcoming them repentant and submissive, to the privileges of fellow-citizenship. While the fundamental idea was probably Mr. Greeley's, the plan of proceeding was quite likely Judge Shea's. At all events it is true that Judge Shea enlisted the services of Charles O'Conor, and together they instituted proceedings in the United States Court in Virginia to obtain the writ. In the existing state of excited public feeling, it was thought altogether probable that the writ could not be obtained, or if obtained, that Mr. Davis would not be released, because no judge could be found courageous enough to order it. Nevertheless the proceedings for the writ were prosecuted, the writ was granted, returnable in Richmond, and Messrs. O'Conor and Shea proceeded to Richmond to make their arguments at the hearing on the writ. It was unquestionably an unpopular proceeding and, in fact, in defiance of public sentiment, but Messrs. O'Conor and Shea did their full duty. Fortunately they found themselves in the presence of a judge who could not be influenced by public clamour, and, after full argument, they had the satisfaction of hearing the judge announce

his decision sustaining the writ and ordering the release of Mr. Davis, on bail, which was immediately furnished, Mr. Greeley, one of the foremost abolitionists, and strongest opponents of the Southern Confederacy, being one of the bondsmen for its late President.

I should not forget Judge Donohue, whom all of the members of the bar between 1876 and 1890 have good reason to remember. Charles Donohue was, in fact, a lawyer of first rate ability and pronounced success in his specialty. Why he should ever have been elected a Justice of the Supreme Court of the State of New York is inexplicable, except upon the theory of political expediency. Before he was elected judge he was an expert admiralty lawyer, and had an admiralty practice probably larger and more important than any other member of the bar, and he should never have abandoned it; but suddenly, without any previous training, and, in fact, without necessary qualifications for the position, he was elected to the bench of the Supreme Court, and in this position, served during a term of fourteen years. There was nothing judicial in his appearance or demeanour. Short, rotund, with a head like a bullet, cross-eyed, rather negligent and careless in his dress and with a mincing gait, he looked anything but the judge. I was often before him, and knew him well. He was one of the most accommodating judges that could be found. In fact he would sign almost any order that was presented to him, his idea being that if the order was not right he could easily vacate it on the applica-

tion of the other side. Anybody toward whom he was favourably disposed could get almost anything from Judge Donohue, and it then became a question whether the person could keep what he had got. A trial before him was a unique and unusual proceeding. He regarded no precedents; followed no established rules; did not consult authorities. It mattered not to him what other courts had decided, and in his charges to juries, almost always fair and impartial, he would present the issue of fact without taking the trouble to state the law applicable to it, leaving the jury to dispose of the case in favour of one party or the other without any rules to guide them, just as they might determine the issue of fact to be. His mind was unusually keen and clear and it is to his credit that it could never be said of him that he failed to comprehend the point of a legal controversy. But he dispensed justice according to his own ideas and upon his own theories, with an almost utter disregard of what appellate tribunals might say of his action. He had at least the merit of being perfectly right, or absolutely wrong. The justice he administered was rude and untutored, but it was never dishonest. He had his favourites and for them he would do almost anything. He had strong prejudices and animosities which undoubtedly influenced him, but in discharging the duties of his office there was a limit which his friends would not be permitted to exceed, as there was also a limit beyond which he would not permit his prejudices or animosities to go.

Judge Donohue was so accessible and friendly

that a considerable number of the individuals whom he permitted to enjoy his association and friendship were of a sort whose influence was productive of harm rather than of good. This, with his recklessness in granting all sorts of applications, and orders, relying upon the good faith of the applicants, and his "happy-go-lucky" way of discharging the duties of his position, finally brought down upon him the vials of wrath of the Association of the Bar, in the form of a memorial adopted by the Association for presentation to the legislature, with the purpose of having some action taken respecting the judge. But it amounted to nothing. Judge Donohue required no vindication on any charge of dishonesty and he served his entire term, at the expiration of which he resumed practice. But his career on the bench rather detracted from instead of adding to his reputation as a lawyer and he met with small success as a practitioner.

Indecision is a mental ailment which afflicts some of the worthiest judges. In some this is the result of ignorance of the law and consequent failure to appreciate the legal questions involved and the arguments relating to them, and to apply accurately the law to the facts of the case. In others no such fundamental defect exists, and a judge may be a master of jurisprudence and well-equipped to deal with complicated legal controversies, but yet may have an intellectual uncertainty which is swayed to and fro by contending arguments, until an opportunity arrives to calmly consider the questions involved, free from the influence of contending forces.

Whether this indecision arises from the one cause or from the other, it occasions, nevertheless, great difficulty and embarrassment. In the former case it involves a process of education, where there is a necessity of enforcing the most elementary propositions of law, while in the latter it becomes sufficient, after long discussion, to mark out a pathway which the judge will, on reflection, recognise as leading to the proper destination.

One of the best judges who has occupied a seat on the bench in this city, really a master of equity jurisprudence and of the law relating to testamentary dispositions, was thus afflicted. He was learned and able and his decisions, when announced, commanded the greatest respect. He was one of the most gentle, courteous and altogether lovable judges whom I have known, but he laboured under the indecision to which I have referred. His conscientious uncertainty and desire to reach the right result would lead him to sway first toward one side and then towards the other, until the argument was prolonged beyond all reason. At times it would be difficult to understand how there could be any uncertainty in his mind as to the correct result, but when he had had time to consider and deliberate, his decision would be almost uniformly correct.

At the time that my father was on the bench, there was a worthy and estimable judge who was also afflicted with indecision. The legal shuttle-cock would be batted to and fro between the opposing counsel with the judge in a bewilderment. On one occasion Judge Henry R. Selden of Rochester, one of the

most accomplished lawyers and judges of his time, was arguing a case before this particular judge. It seemed impossible for either Judge Selden or the opposing counsel to make any definite impression, and after the argument was unduly prolonged, Judge Selden, in despair, laid down his papers on the table and resumed his seat with the remark, "Oh, for one hour of Judge Strong."

A type of judge difficult for practitioners to deal with is what may be called the "settling" judges.

These are bent upon bringing about settlements in cases brought before them for trial, by shaping the course of the proceedings in such a manner as to effect a compromise. Their disposition is to assume a Solomon-like judicial quality in adjusting controversies, but without exhibiting his wisdom. In almost every case efforts to settle or compromise have been exhausted by counsel before the case is brought to trial, although occasionally they will, during the trial, get together and reach a satisfactory settlement. Undoubtedly, the motive of the "settling" judge is praiseworthy, but as it is not the function of a judge to act as mediator, efforts in the direction of a settlement, unless by kindly and tactful suggestions, are out of place. This is particularly true in jury trials, for if a jury receives the impression that one of the parties is willing to settle and the other is not, a prejudice is at once created which may be altogether unwarranted; and moreover the judge in any case, whether with or without a jury, is likely to share the same prejudice, which may unconsciously influence his

judgment. One of the most difficult situations in which an advocate and the party whom he represents can be placed, is to be compelled by the intimations of the judge to take the responsibility of rejecting a settlement which the judge recommends. Besides, the result frequently is to protract the litigation rather than dispose of it.

An instance of this in my own experience was when an unfortunate lady had been compelled to bring an action against a corporation into whose toils she had fallen, having been induced to entrust to it a considerable sum of money, upon the income of which she was dependent for her support. It was difficult to understand the action of the judge in taking a technical and narrow view of the circumstances, the hardship of which he fully recognised. This view, however, ultimately led him to suggest to the company's counsel that they should consent to his directing a verdict for about one-fifth of the poor lady's claim. Of course this was gladly consented to by the counsel for the company, and the lady retired from the court with a verdict in her favour, but for an entirely inadequate amount. The result of the effort of this well-meaning judge was that the lady was put to the expense of an appeal to a higher court, where the action of the judge was disapproved and the case remanded for a new trial, necessitating, of course, doing over again the work of preparing the case for trial, procuring the attendance of witnesses and trying the case. The second trial resulted in a verdict in the lady's favour for the full amount, but the company was

spurred on by its previous success to a further appeal, which, however, it prosecuted unsuccessfully. There being still the Court of Appeals to which resort might be had, an appeal was taken to that court, where the estimable lady was completely victorious.

If, in the first instance, the judge had confined himself to his proper function of hearing the evidence and submitting the questions of fact to the jury, under what were perfectly plain principles of law applicable to the case, all the trouble and expense to both parties, and the time of the various courts as well, would have been saved, and justice would have been accomplished.

The humorous judge is one of the most unpleasant, for of all things difficult to contend with, judicial wit or buffoonery is the worst. Nothing is more fatal to a lawyer in his management of a case, especially before a jury, than to have the laugh turned on him by the judge. It is not difficult to deal with the wit of one's adversary, because the jury regard that as a part of the byplay of the case, and, as counsel stand upon an equal footing, such weapons as are permissible can be used by either, and each can deal out from his arsenal such shafts as are appropriate. But when it comes to the judge, it is different; the lawyer is at a disadvantage; he may not retort upon the judge. It would never do to get the laugh on the Court because, in the first place, it is disrespectful and contemptuous, and in the second place, it might have a deleterious effect upon the fortunes of one's case.

I knew a judge once who was an instance of being afflicted with a desire to be humorous, although he possessed neither wit nor humour. In everything that took place he saw something to laugh at, and from the time the trial began until its close there was a succession of coarse ridicule and loud guffaws that rendered the proceedings almost farcical. He was not without ability, nor did he lack a sense of justice, and as his ridicule and laughter were pretty evenly distributed, neither party was put to a great disadvantage; but the course of proceedings in trials before him was certainly inconsiderate and indecorous. To my mind, the justice who attempts to be funny on the bench appears to poor advantage. Everybody, of course, is bound to laugh with him out of respect to the Court but, at the same time, many who appear to be laughing *with* him are really laughing *at* him.

Another type of judge that gives a good deal of trouble is the talkative judge. The famous lawyer of olden times—Selden—made a very sententious and keen-witted observation when he remarked: "A much-speaking judge is no well-tuned cymbal." Judges would do well to bear this in mind, as well as that characterisation of the wise man by King Solomon, as "one who answereth not before he heareth."

Chief Judge Charles P. Daly, of the Court of Common Pleas, although a most learned, able, conscientious and upright man, was an instance of the talkative judge. He presided over the Court of Common Pleas at the hearing of appeals by the

General Term of that court. It was impossible to make a continuous and connected argument before him. In some way he had become impressed with the idea that the colloquial style of argument was the most effective, adopting, somewhat, the practice of the English courts in this respect, where the judges, at times, carry on a colloquy with counsel. But Judge Daly carried it beyond all bounds; it was difficult to proceed at any length without interruption from him, and this was so characteristic of him that an argument amounted to little or nothing as a connected presentation of a case. His interruptions were ofttimes disconcerting and annoying, and counsel would depart from the court with a feeling that their case had not been really heard. I remember an occasion when my father was arguing a case for the New York Central Railroad, growing out of the loss of baggage. He made a statement of the facts of the case and entered upon his argument, only to be interrupted by Chief Judge Daly, and this was followed by a series of interruptions that entirely prevented the presentation of his carefully prepared views. The only time I ever knew my father to lose control of his temper in court was on this occasion when, after a series of most disconcerting interruptions, and facing the Court with a copy of his case in one hand and a copy of his brief in the other, he laid down first his case and then his brief, and looking at Judge Daly, remarked in a dignified tone: "I shall no longer continue to struggle with the Court," and sat down. Judge Daly looked at him in surprise, and then called upon the oppos-

ing counsel to respond. He, evidently thinking that he had plain sailing as the Court was apparently against my father's views of the case, made a very brief statement, and the argument was closed. But he reckoned without his host, for when the decision was announced it was in my father's favour.

Whatever defects Judge Daly may have had as a presiding judge in an appellate tribunal, there can be no question whatever as to his distinguished career as a learned and conscientious judge, and as a public-spirited, high-minded and courteous gentleman. He was elected to the Court of Common Pleas in 1844, and retired from its bench by age limitation on December 31st, 1885. He served continuously in that court forty-one years, affording one of the few instances of such an extended service. He must have been elected when only twenty-nine years of age, and in this respect also is noteworthy as one of the youngest men ever elected to the bench of one of our higher courts. Strange to say, it was only when presiding in the appellate branch of his court that he displayed the talkativeness to which allusion has been made. When presiding at trials of cases, or in the hearing of motions, he was a most patient and attentive listener and said but little. Why in the more important position of hearing appeals he should have been so fond of interrupting counsel it is difficult to understand, unless it may be explained, as already stated, that he desired to follow what he supposed to be the custom of the English courts. His opinions were always marked by painstaking consideration of the case; and, in all

other respects, he proved himself to be a most efficient and useful judge. He was also a man of wide culture and extensive reading, and the science of geography seemed to possess for him a strong fascination. For many years he was president of the Geographical Society, encouraging scientific investigation, and securing for its public meetings lectures from some of the most eminent geographers and travellers of the time. His countenance was indicative of a strong character, and at the same time bore an expression of great benignity, presenting with his long flowing whiskers a venerable and impressive appearance.

Chief Judge Daly and Joseph F. Daly, with one of their associates, who was regarded as a weak judge, were assigned to hold the General Term, and on assembling the first day of the term to call the calendar, a punster put the following conundrum: "Why is the General Term, as it is now composed, like certain issues of the public press?" No one being able to solve it at the moment, he said: "Because there are two Dalys and a weakly."

One of the most valuable attributes of the judicial faculty is that of patient listening, and though it is getting to be rare, except in the highest tribunals, it is a characteristic of the best judges. In the lower courts the proceedings instead of being marked by patient listening, are more frequently characterised by exceedingly impatient interruptions. As one proceeds to the higher courts the patient listening becomes more common; when one has reached the Appellate Division or the Court of Ap-

peals of our own State, or the Circuit Court of Appeals, or the Supreme Court of the United States, it will be found that the proceedings manifest this particular quality; even at times when the spectator must wonder that the judges can pay attention to what appears to be useless argument.

This is illustrated by the story of a young lawyer who had a carefully prepared argument to present to a bench of learned judges. His adversary made the opening argument, to which the court listened attentively, and, at its close, he began his own. He had proceeded but a short time when the Court made an intimation which was distinctly favourable to him but he did not appreciate its bearing, and continued. Again the Chief Justice made a suggestion which was plainly intended to show him that much argument was not necessary, as the Court was in his favour. This had no effect, and after a third attempt in the same direction, the Court resigned itself to hearing his argument to its close, when the Chief Justice looked down at him and in his blandest tones remarked: "Mr. Blank, notwithstanding all that you have said, the Court is still with you." A similar incident arose during an argument in the Appellate Division in New York when a zealous lawyer was so convincing that Presiding Justice Van Brunt intimated that the Court would like to hear the other side upon the point presented. Instead of resuming his seat, satisfied that the Court was favourably impressed, he stated that he had several important points to present and that he would like to be heard to the conclusion of his argu-

ment. "Well," replied the Presiding Justice, "go on, and quite likely you will be able to convince the Court that you are wrong."

I have never seen more patient and courteous listening than in our Court of Appeals, and every lawyer who has appeared there since its organization must have come away impressed with the feeling that whatever the merits of the case may have been, he has at least been patiently heard.

The impatience of a judge was never better met than by the Scotch Erskine who was arguing a case before Lord Braxfield, when the latter remarked in a most impatient and inconsiderate way: "Brother Erskine, what ye're saying gaes in ane ear and out of tither." "Naturally," replied Mr. Erskine, "what is *there* to prevent it."

The same sort of wit, but not so delicate, was displayed by one of our Jewish brethren in the trial of a criminal case. In the course of the trial the Assistant District Attorney, with more zeal than discretion, signified his approval of favourable testimony as it fell from the lips of the witnesses by nodding his head, and when the testimony was unfavourable, by shaking his head. The testimony having been presented, and the time for summing up having arrived, our Jewish brother proceeded to address the jury on behalf of his client. In the course of his address, he referred to the nods and wags of the District Attorney in somewhat such vein as this: "You have seen, gentlemen of the jury, how the District Attorney, when he approves of evidence, nods his head in approval, and when the evidence is unfa-

vourable he wags his head in disapproval. He has no right to do this. His duty is of a semi-judicial character. He has no right to express his approval or disapproval. His duty is to submit the evidence and leave its approval or disapproval to you, and when he nods his head in approval, or wags his head in disapproval, there is nothing in it.'' The Assistant District Attorney was incensed, and immediately arose and asked if he was to be compelled to listen to such malignity and tolerate such abuse. His adversary replied: ''There is nothing on the record to object to.'' The Judge, probably amused at the occurrence and thinking the comment deserved said: ''Yes, Mr. District Attorney, there is nothing on the record and counsel may proceed.'' Whereupon our Jewish brother concluded: ''Yes, gentlemen of the jury, I repeat, he nods his head and he wags his head, but there is nothing in it. It is all emptiness.''

One of the greatest evils with which lawyers have had to contend has been the delays of judges in rendering their decisions. I know of no form of injustice that is greater than this. Undoubtedly there are complicated cases with voluminous testimony, involving intricate questions of law, which justify considerable delay, but delays of from six to eight months, or even a year, or more, in deciding a case seem to be inexcusable. Death or insolvency sometimes steps in to defeat a meritorious claim which, if decided by the judge, could have been promptly collected. I have had, as every lawyer of any practice has also had, experience of this sort where de-

cisions have been held up to the detriment of the rights of the prevailing party.

I recall one of my cases, which was not difficult in any sense of the term, in which the judge held up a decision for a year. It was difficult to approach the judge and ask for a speedy decision, but I was fortunately enabled to remind him of the fact that the case was not decided, by sending him an authority which I accidentally found, and shortly afterward his decision was rendered.

Another instance of delayed decision was in a simple action based upon fraud and deceit, in which a demurrer was interposed to the complaint on the ground, among other things, that damage to the plaintiff had not been sufficiently alleged, and this was the point upon which the demurrer was finally disposed of. Any ordinarily competent judge could have arrived at a determination of the matter at the hearing, but the decision of that simple question was delayed a year, to the great injustice of the parties. I have known judges to be importuned by counsel to decide either way in order that a result might somehow be reached.

Time is always an important element in favour of the defendant and when a party has a good case, it ought not to be the judge's fault that it is not promptly disposed of.

Since the advent, in later years, of stenographers, and the use of them by the judges, there has been a noticeable increase in the length of judicial opinions, presenting a marked contrast to the brief and concise opinions found in the earlier volumes of our

State Reports and down to as late as the first thirty volumes of our Court of Appeals. Since then the tendency has been toward lengthy opinions prepared, as one of our judges once expressed it, by reading through the case on appeal and the printed arguments of counsel, following it by calling in a stenographer and making a stump speech about the controversy. Undoubtedly this tendency to expand opinions has been productive of some undesirable features in the way of *obiter dicta,* which might well have been omitted, and which have occasioned embarrassment in subsequent litigations, but it is due to the judges to say that the responsibility may not be wholly theirs, as in recent years there has been a growing tendency on the part of counsel to expand their briefs to inordinate length, calling, perhaps, for judicial utterances of greater length than would otherwise be necessary to cover the questions discussed. Occasionally a bit of judicial humour escapes in the form of an opinion. In a case which I argued, the complaint, which had been prepared by a distinguished member of the bar, Mr. Dorman B. Eaton, was unusually and unnecessarily prolix. A demurrer to the complaint was interposed and an argument upon it was heard before the General Term of the Supreme Court at which Judge Noah Davis presided. He delivered an opinion which began: "Verbosity is not a ground of demurrer. If it were, the Court might feel bound upon that ground to uphold the demurrer in this case." After which display of wit, he proceeded to the more serious features of the case.

The following opinion is an instance of eccentricity of thought and language in dealing with the loss of a cat at a poultry, pigeon and pet-cat show, through negligence.

"Herein is an instance of bailment, or, to borrow learned language from Massachusetts (10 Gray, 366), *locatum* of a Manx feline described as a male specimen, longer as to its hind leg than as to its fore, prize winning from agricultural societies, of great value, and without a tail. Zenda, for so the Manx was dight, was brought to the show of pigeons, of poultry and of pets of the defendant, and placed in a coop thereof by mistress and maid, assisted by an offering man of fair complexion, and dressed in blue checked overalls with a coloured blouse, in which livery many were about to open the coop door, and showing both how to open and how to close it. A little later the powerful and peculiar exhibit had moved the iron cage unforsightedly, not fastened at the bottom, along and partly beyond the platform whereon it stood, making an aperture sufficient for his escape. Then he was off. There was quick and bootless pursuit by the attendant in pack with many others, with hue and cry. Though often espied in the secrecies between the roof rafters and the cellar of the garden, Zenda was never recovered. Whether his manucapture was impracticable because he was strenuously moved to solitude by jealousy or any other of the impulses so delicately suggested by Allen, J., in his learned and sympathetic opinion (21 Barb. 506) anent the contentions of and over the dogs of Oneida County, or because *ferœ naturæ,* as was held (47 Hun, 366) to be a bivalve, though destitute of locomotivity, in an oyster-bed litigation in an adjoining judicial department, is not stated. . . . The learned justice of the Municipal Court before whom the parties

appeared and introduced their evidence found for the plaintiff, and cast the defendant in damages of $50.00. He was right."

Judicial opinions are not always characterised by a finished literary quality, but rather by a direct and rugged form of expression. Legal phrases and colloquialisms, and the influence of the language of legal literature, have, it seems to me, a paralysing effect upon the elegancies of literary composition.

An instance of peculiarity in the use of English in judicial utterances was Mr. Justice Clifford of the United States Supreme Court, who rarely began a sentence with the articles "a" "an" or "the," or with a personal pronoun.

Then there was Judge Folger, whose quaint and unusual expressions made his opinions read as if they belonged to the time of Lord Coke.

There are two prominent instances of elegant literary style which render an ordinary opinion a pleasure to read. I do not know of more beautiful use of English than that of Mr. Justice Field of the Supreme Court of the United States. His combination of literary finish, and accuracy of expression, it seems to me would be difficult to surpass.

There was also Judge Finch, of the Court of Appeals whose earlier opinions read like specimens of refined literary composition, although in later years they did not seem to possess this characteristic. But Judge Finch was a poet. He had cultivated a fine literary style. He was cultured in literature, and when he ascended the bench it was but natural

that his opinions should manifest a superior literary quality, though in time this was buried beneath the dust of legal discussion, and almost disappeared from view. In his college days he composed that beautiful smoking-song with which every collegian is familiar, beginning:

"Floating away, like the fountain's spray
Or plume of a royal maiden,
The smoke wreaths rise to the blue of the skies
With blissful fragrance laden."

During the days of the war his patriotism found expression in poetry, and among his contributions to the literature of that time was his famous poem "The Blue and the Grey." Both of these are embodied in a little volume of his poems published after his death.

# CHAPTER V

## POLITICAL INFLUENCES AND UPHEAVALS IN THE JUDICIARY

The bane of our judicial system, so far at least as the city of New York is concerned, is that judges are too often the creatures of political parties. The office is bestowed not as the culmination of a career of professional excellence as in England, but as the reward of party service or political influence. The question is, not what the claims as a lawyer are, but what service has been rendered for the party, and what the backing is as a party man. These questions are to be answered by the party leader, and, as very nearly all the judges in New York for many years have been Tammany Democrats, they have owed their position to John Kelly, Richard Croker or Charles F. Murphy, the Tammany leaders. Any one who desires to become acquainted with the influence of a party leader in the selection of candidates for office, has only to read Senator Platt's interesting reminiscences. The very first step for the candidate to take is to make his bow, hat in hand, to the party leader, and, if possible, enlist his support. If he secures it, his path to a nomination is clear; but if not, his case is hopeless, even though he may have the support of the rank and file of the party organisation. An instance of this was when Judge E. T. Bartlett was first nominated for the Court of

Appeals. He was, of course, an entirely reputable candidate, and served for many years efficiently as a judge. He had received the assurance of Senator Platt's support, but John Sabine Smith, a competent lawyer, was also a candidate, and as he was Chairman of the New York County Committee, and as the candidate was to be a New York City lawyer, he was naturally the choice of the party in New York, and had the support of the party organisation. But that choice amounted to nothing because it was not Senator Platt's choice, and notwithstanding Mr. Smith was, and Mr. Bartlett was not the choice of the New York organisation, Mr. Bartlett was nominated and elected. This is perfectly true of the Democratic organisation in which the "slate" is made up by the party "boss," and so far as the delegates to the nominating convention are concerned, they possess no function whatever except to say "ditto to Burke." As party success depends largely on a liberal supply of money, so the selection of a candidate for a judgeship depends in a large measure upon his willingness and ability to pay a liberal pecuniary consideration for the nomination, and, if commonly accepted reports are correct, the amount "contributed" by Tammany candidates has reached figures as high as $30,000, or even more. Even in the case of Republican candidates whose chance of success is, at best, very doubtful, a contribution is expected which, although never over a tenth of this amount, and generally much less, will, with other incidental expenses, sometimes involve an expenditure of five thousand dollars.

But even though the expense of "running" is large, the compliment of a nomination, with the interesting and indeed useful experiences of a "canvass" and the helpful advertising the candidate obtains if his nomination is well received and favourably commented on in the newspapers, is worth more than it costs.

Of course, if a nomination is equivalent to an election, as was ordinarily the case of Tammany nominees, an agreement to pay anything more than what would be a reasonable contribution to the ordinary and legitimate expenses of a party organisation, amounts to nothing more nor less than a barter and sale of the nomination. There are many Democratic lawyers of the highest standing who probably would have been willing to accept judgeships had not their self-respect prevented them from yielding to the demands of a party "boss" for the payment of an amount, under whatever guise, that they could not but regard as the purchase price of the position. The consequence is that while there have been, during the past forty years, a few notable and highly efficient judges in our New York Courts, the bench has been occupied mostly by lawyers of mediocre ability and limited experience, to whom the salary was a rich windfall, far exceeding their previous professional earnings.

The judiciary outside of the City of New York has not, I think, been afflicted to so great a degree with the harmful political influences to which I have referred. There seems to be a commendable pride, especially among the lawyers, to secure the nomina-

tion of able and successful lawyers for these important positions, and while in a very few instances unworthy individuals are nominated and elected, these instances are exceptions, and the great body of judges throughout that part of the State is well selected. Some of them are assigned, from time to time, to hold court in New York City, and appear to advantage, giving great satisfaction to the members of the bar who come before them.

A notable and praiseworthy sentiment has gradually developed respecting the Court of Appeals and the Judges of the Appellate Divisions to retain the services of efficient judges, irrespective of party. For some years the sentiment among all lawyers has been adverse to interference with the composition of the Court of Appeals on party grounds, and this is a growing sentiment, the effect of which will probably be to remove the selection of Judges of the Court of Appeals from party influence. When a vacancy in the court is occasioned by resignation, age limitation or death, it is, of course, natural that the political parties should nominate rival candidates and there will be, in most cases, little to choose between the nominees, so far as qualifications for the position are concerned, but when a judge is once selected for that bench, the probabilities are that he will be retained until his death, resignation or disqualification by age.

The justices of the Appellate Division are designated by the Governor from the entire body of Supreme Court justices, and the same sentiment is manifest, calling for their retention on the bench.

This has probably led to renominations in some instances, which otherwise would not have been conferred. I recall that at the time of the renomination of Judges Van Brunt, Barrett and Patterson. there was serious question whether the leaders of Tammany Hall would consent, and in each of these instances, as I am credibly informed, an interview was necessary with Richard Croker to secure his approval. I can imagine how distasteful it must have been to these able jurists to present themselves before the Tammany magnate and seek his *imprimatur* on their candidacy. It is to be hoped that the sentiment alluded to will continue to grow and that, as a result, capable judges will hold their places until they are retired by resignation, age or death.

The evils in connection with our judiciary are the outgrowth of our elective system, in which it is, of course, hopeless to expect a change again to the appointive system, from which most lawyers will agree, I believe, that no departure should have been made. In England, under the system of an appointed judiciary, the bench is occupied by successful lawyers of long experience and tried capacity. The same is true of the judiciary in Massachusetts, in New Jersey, in Connecticut and some other States. It is likewise true of our Federal Courts, in which the quality of the judges is distinctly higher than in the Supreme Court in New York City, although the salaries of the judges are less than half of those in the State Court. Indifference and lethargy of the people, and their failure to discriminate with intelligence between candidates are responsible for the

character and quality of our judges, and probably nothing different could be expected from the large body of voters. But there is a class of voters of sufficient intelligence and power of discrimination, if they could be induced to take the trouble to exercise it, to control almost any election of judges, and the truth of this has become perfectly apparent in some of the judicial upheavals in the past. Popular sentiment and conscience respecting the judge is, when aroused, exceedingly sensitive, and when brought into action carries everything before it. An appeal, especially to the moral sentiment with respect to judges, when brought home to the voter will find a ready, intelligent and conscientious response. In every election, of course, this moral sentiment is involved more or less, but, in ordinary circumstances, its importance is not appreciated, and the citizen therefore votes his party ticket without giving much attention to the question of the fitness of the candidates for judgeships. When, however, a crisis occurs, resulting in a widespread arousal of moral sentiment, party spirit disappears, and the welfare of the bench is alone considered.

There have been some notable instances of these judicial upheavals, due to an aroused moral sentiment, when the election of suitable judges was the single important issue. Some instances of this are the following:

Isaac H. Maynard had been appointed a judge of the Court of Appeals by Governor David B. Hill. He was a pronounced Democrat, an excellent lawyer and, I believe, an estimable man. He was ap-

pointed just after the election of 1892, and under this appointment he would serve until January 1894, and was nominated for a full term, the election for which was held in November 1893. An election in 1891 occasioned an investigation, in the course of which Judge Maynard's conduct in connection with that election was made the subject of adverse criticism, but his election in 1893, seemed to be a foregone conclusion, as the Democratic party was in the ascendency, and it was generally supposed that a special effort would be made to elect Judge Maynard, whatever the fate of the other candidates might be. His election seemed to be so sure that the Republican nomination went a-begging, being offered to, and declined, by a considerable number of individuals, but finally a candidate was found in Mr. Edwin T. Bartlett, willing to accept what was supposed to be the empty honour of a nomination, to be followed by inevitable defeat. The issue depended solely upon the question of Judge Maynard's conduct in the preceding election, and it was not easy for the average voter to apprehend the issue understandingly, and, even if understood, it was susceptible of different interpretations, and of plausible argument against any misconduct on Judge Maynard's part. In fact, the issue was so obscure that it seemed to have little effect upon Judge Maynard's chances. But it was wonderful to contemplate the arousal of public sentiment upon the general proposition that a candidate for judicial honours must be above suspicion, and that no man should be elected to a judgeship who was not en-

tirely free from reproach of any kind. Mr. Bartlett did not at first seem to have even a fighting chance, but, as the canvass proceeded, and Judge Maynard's conduct was discussed, his chances faded, and Mr. Bartlett's increased until election day arrived, when Mr. Bartlett was elected by one hundred thousand majority.

Another instance of this kind occurred about twenty years ago in the Seventh Judicial District, when the late John H. Camp, of Lyons, was nominated for Justice of the Supreme Court under circumstances which seemed to justify the imputation that it was accomplished by party methods and machinery designed to thwart the free and unrestrained action of the nominating convention. This led to an independent movement resulting in the nomination, as Mr. Camp's opponent, of Judge James L. Angle, an accomplished lawyer of Rochester and a Democrat. The Seventh District being largely Republican, a nomination was ordinarily equivalent to an election, and it was generally supposed that the Republican majority could not be overcome. But the popular mind finally became educated, and its conscience aroused, and Judge Angle was elected by a very large majority.

The same thing happened on the last election of Judge John Clinton Gray to the Court of Appeals. He had served in that court, with a great deal of ability, for a term of fourteen years. On the same bench, a Supreme Court Justice was serving under an assignment by the Governor. Judge Gray was a Democrat and received the nomination; the former

was a Republican, and was nominated by the Republicans. It was generally expected that the Republican ticket would prevail; the result would be the displacement of Judge Gray. This would mean the deprivation of New York, with its large interests, from being represented on the bench, except by a single justice, while the election of his opponent to that court, and the consequent creation of a vacancy in the Supreme Court in the Seventh District, would afford a very excellent opportunity for the politicians of the Seventh district to secure the appointment and election of a new Supreme Court Judge. The injustice to Judge Gray and to the City of New York, if this were accomplished, was manifest. It seemed to be a political scheme to oust a faithful judge for no good purpose. The nominations having been made, the matter remained in abeyance, no one, apparently, taking sufficient interest in Judge Gray's candidacy to bring the matter to the attention of the public. Having frequently appeared in the Court of Appeals before Judge Gray, it occurred to me that something should be done in his interest. Although a Republican, I felt it my duty, as well as pleasure, to assume the responsibility of presenting at a meeting of the Association of the Bar a resolution calling attention to this subject in as forcible terms as I could command. The resolution was presented and adopted, and, of course, the following morning the New York City papers gave a very prominent place to an account of the action of the Bar Association. This was exactly what I intended, and it spread like wild-fire into all parts of

the State and was taken up by the press, by which the action of the Bar Association was favourably commented on, and Judge Gray's election persistently advocated, with the result that, notwithstanding a large majority for the other Republican candidates, Judge Gray was triumphantly re-elected.

At the same time there was a contest in the Fifth Judicial District between Watson M. Rogers, an independent Democrat, and John C. Davies, who had been nominated for Justice of the Supreme Court by a convention dominated by machine methods, resulting in a protest. Mr. Rogers was nominated as an independent, and his nomination was endorsed by the Democracy. The Fifth District was so heavily Republican that there seemed to be little likelihood of success, but popular sentiment in favour of Mr. Rogers became so strong that he was elected over Mr. Davies by almost, if not quite, as large a majority as the Republican candidate usually received over a Democrat. In this election there was probably a change of over ten thousand votes.

Another very recent instance is that of Judge Garretson, in the Second Judicial District, who had served a term of fourteen years and was refused a unanimous nomination, although his associates on the bench, who were also candidates for re-election, had received it, the Democrats refusing it to Judge Garretson, to make way for an "organisation" candidate. The advantage seemed to be entirely in favour of the latter, as he was not only nominated by the Democrats, but supported by an independent

organisation; yet, notwithstanding this, the clear-headed and right-thinking citizens of the Second District rallied to Judge Garretson's support and he was re-elected by a moderate majority. It was indeed a great tribute to Judge Garretson who, in his career on the bench, had proved himself a faithful and competent judge.

## CHAPTER VI

### THE ASSOCIATION OF THE BAR

The Association of the Bar has been a potent influence in the life of the New York lawyer. Although the first of its kind, associations of the bar have existed since early times. The Benchers of the Inns of Court in England, an ancient association of the barristers of the English courts, is an instance of this character, exerting a beneficial influence upon the English bar, and has proved to be a wholesome and commanding force in maintaining the rights, upholding the dignity and elevating the tone of courts, as well as lawyers generally. Its social influence is not the least among its advantages. It is composed of the flower of the English bar. Election to it is in itself a distinction. It brings its members into friendly intercourse at its meetings in its ancient hall, in the Temple, frequented by the greatest lights of the bench and bar of England. It was in these meetings that Mr. Choate, our recent Ambassador to St. James, the sole recipient from the American bar of election as a Bencher, passed, as he has told us, in the company of such distinguished men as the Lord Chancellor, (Lord Halsbury) the Lord Chief Justice, (Lord Alverstone) and other lights of the English bench and bar, the most delightful evenings of his sojourn in England.

But it is not by its social attractions that it is chiefly known, for at critical periods it has proved to be a bulwark of protection in the administration of justice, and in preserving the rights and privileges of the English bar.

In more recent times the Incorporated Law Society, embracing the solicitors of the English courts, has exerted an equally beneficial influence in furthering useful reforms in law procedure, and in preserving by its discipline the moral tone of that large body of lawyers whose function it is to deal with the business community.

Associations of lawyers have, since the earliest times, existed in our own country for the maintenance of a high standard of legal knowledge on the part of applicants for admission to the bar, and for the protection of their rights, especially in Colonial times, when lawyers were regarded as the enemies of society, and organised efforts were made through legislation and otherwise, to drive them from the practice of their profession. Such an association existed in New York from 1744 to 1770. Lofty and patriotic impulses led to its formation. The ever increasing encroachments of the British crown in the exercise of the King's prerogative was, perhaps, the moving cause of its formation, and the resistance of the bar to these encroachments culminated in the success of its endeavours. In 1763, the then Governor, Cadwalader Colden, undertook to enforce the rule that the Governor and King's Council could review upon appeal the facts found by a jury, and nullify the verdict. The Associated Lawyers rose in

opposition, and when the question was to be finally tested, he could find no lawyer to undertake to argue it in his behalf. He assailed the Association as a dangerous influence, tending to enlarge the powers of popular government by depreciating the powers of the crown, and suggested measures intended to end the domination of lawyers. Surely all honour is due to the sturdy patriots of the bar who not only jeopardised the pursuit of their profession but also their lives, in resisting the tyranny of the king, and his officers.

In these early times, however, associations of lawyers were by no means generous in their attitude toward those seeking admission to the bar. By the adoption of rules to prevent competition, they excluded from service in their offices those who contemplated the practice of their profession, with the result that considerable numbers of American students were driven to England to obtain legal training in the Inns of Court. It is related of John Jay, our first Chief Justice of the Supreme Court that, due to this rule, he was on the point of departure for England to pursue his studies in the Inns of Court when the ban was removed, enabling him to study law in his native land. However, this illiberal spirit was by no means a prominent characteristic, but probably an exceptional manifestation, which had a substantial foundation of justice to their profession, and protection for the bar. Societies also flourished in these early times for the discussion of legal subjects, some of which acquired great prominence, such as "The Sodality" in Massachusetts,

and "The Moot" in the State of New York, the latter being of such consequence that, at times, the judges submitted to it questions for discussion which were under consideration by the courts.

"Union is Strength" found remarkable exemplification in the organisation of the Association of the Bar. It was the product of troublous times. It proved to be not only a shield, but a sword. Corrupt influences had been at work in the administration of justice, and pervaded the Bench, manifested, however, by only a few of its occupants. Notwithstanding a large number of as pure minded and able lawyers as have appeared at our bar at any time, the bar as a whole had degenerated. The influence of the Tweed régime was felt in the selection of the judges and the administration of justice. Judicial patronage was bestowed upon political favourites. Counsel were retained because of their influence with particular judges. The courts were used for political purposes, and to further the interests of political parties. It was an era of receiverships, in which the receiver was a prominent politician, and of extravagant receivers' fees. Litigations such as the famous Erie litigation in 1870, consisting of a bombardment of *ex parte* injunction orders, orders appointing receivers, orders by one justice vacating *ex parte* orders made by another justice, midnight applications for orders of various descriptions, and of the most far-reaching character, all of them involving the sharpest kind of practice, had brought the courts and profession into disrepute. The testimony of the impeachment trials of 1871 furnishes

abundant evidence that this picture is not overdrawn. As a necessary consequence, the courts and the judges fell under suspicion, which was also true of certain practitioners before certain judges, when the decision was a foregone conclusion. I recall one case in my father's office, in which owing to the gross favouritism of a particular judge, and his disregard of ordinary rules of law and elementary principles of justice, it became necessary to take advantage of an Act of Congress passed as a war measure, applicable more particularly to the reconstruction period, to apply for and procure a removal of the case from our State Court to the United States Court on the ground of "local prejudice and corruption."

Facility in obtaining admission to the bar was also a scandal of those times. Instances were not wanting of admissions to the bar without any examination whatever; one of the judges in particular taking to himself the right to admit anyone he pleased without examination as to qualifications, and the examinations when had were little more than formalities. There was almost no attempt to ascertain the qualifications of an applicant, and more often than not a whole class of applicants was admitted.

These influences resulted quite naturally in the degeneracy of the bar. The evils which had brought this about did not appear to have been of slow growth, but sprang up quite suddenly with the advent of the Tweed régime. The attack was acute and severe, but the lawyers proved equal to the occasion. It could not be otherwise. It was impossible that the high-minded and public-spirited law-

yers of the time should lie down supinely under such corrupt influences.

It was amid such circumstances, and exactly at the right time, that the Association of the Bar of New York, the progenitor of all succeeding associations of the bar in this country, came into being. In December, 1869, a call, signed by eighty-five members of the bar, was issued, which stated that "the undersigned members of the bar of the City of New York, believing that the organised action and influence of the legal profession properly exerted, would lead to the creation of more intimate relations between its members than now exist, and would, at the same time, sustain the profession in its proper position in the community, and thereby enable it in many ways to promote the interests of the public." A committee was appointed to call a meeting for the organisation of the proposed association.

It must not be supposed, however, that this proposal for the organisation of an Association of the bar had in contemplation an aggressive movement against the Tweed régime. While it is true that corrupt influences upon the bench and bar were well recognised, the time had not arrived, apparently, for concerted action of an aggressive character. The need of organisation of the bar was manifest, but the direction in which the organisation should act to remedy existing evils was at the time not clear. Undoubtedly, there was a deep-seated conviction among the better element of the bar that sooner or later it would be necessary to take radical measures for the reform of existing abuses, although the or-

ganizers of the movement were careful to disavow any intention at that time to take aggressive action in any direction. The original objects of the Association did not include schemes of important reform, although many of its originators foresaw what was coming, and the course the Association would have to take, which if taken at that particular time would have seemed precipitate. The object of the Association, as expressed at its formation and embodied in its articles of incorporation, was "for the purpose of maintaining the honour and dignity of the profession of the law, of cultivating social relations among its members and in increasing its usefulness in promoting the due administration of justice."

But the Association was soon impelled toward a course of action of the most radical and aggressive description, which it pursued fearlessly and relentlessly until its efforts were crowned with complete success. On February 13th, 1870, an incident occurred which made all hesitation as to radical and aggressive measures impossible. The Erie litigation between Fisk and Gould on one side and the Erie Railroad Company on the other, was at its height, and feeling between the respective participants and their adherents ran high. Dorman B. Eaton, a prominent member of the bar and one of the counsel in that litigation, had aroused the animosity and resentment of opposing interests. The entire profession and the community at large were startled and aroused by an unprovoked assault upon him, in which he was beaten down by assassins and his life almost destroyed. Mr. Eaton was one

of the most upright and high-minded lawyers at the bar. He was a public-spirited citizen, for years deeply interested in promoting the cause of civil service reform, and the author of a work which was a valuable contribution to the literature on that subject. He was cultivated and refined, always animated by a high sense of honour in the performance of professional and public duty, and the assault upon him profoundly stirred his professional brethren. The first meeting of the Association of the Bar of which there is a record was held in the Studio Building, on February 15th, 1870. At this time the call bore two hundred and thirty-one signatures, which was soon augmented by the admission of two hundred and twenty-four members at one of its earliest meetings, and its numbers have continued to increase until its present membership has risen to upwards of two thousand. Almost the first action taken at the initial meeting was to offer a reward of $5,000 for the arrest and conviction of Mr. Eaton's assailants. Unfortunately, they were never apprehended.

Events moved rapidly with the new association. Almost immediately a house at No. 20 West Twenty-Seventh Street, was purchased as the home of the Association, and in it, on June 28th, 1870, the first meeting was held.

William M. Evarts had been elected President, and such he continued to be for the succeeding ten years. The work of organisation was perfected, and on October 4th, 1870, three committees were appointed on motion of Wheeler H. Peckham, always

in the lead in promoting the honour and usefulness of his profession and in the work of civic reform. These committees have remained until the present time, and are known as the committees on the Amendment of the Law, the Judiciary and Grievances. Within the next two months the Association directed its attention to admissions to the bar, and a committee was appointed to deal with this important subject. Its efforts resulted later in legislation in accordance with its recommendation, conferring upon the Court of Appeals authority to make rules for the admission of attorneys, and creating a State Board of Examiners, to which should be committed the duty of ascertaining by examination the qualifications of applicants for admission. The action of the Bar Association has resulted in a well devised and completely organised system of bar examination, the beneficial effects of which upon the bar at large cannot be overestimated.

The disclosures in the *New York Times* during the year 1871 not only aroused public sentiment to the dangers which menaced the city from the extravagance and corruption of its public officials, but the arrogant attitude of the Tweed régime toward the courts and the judiciary drew attention, as never before, to the perils which confronted the administration of justice. The Association was at this time unincorporated, with no power or influence other than such as inhered in a voluntary organisation of lawyers. But those composing it were fearless in the face of public danger. A committee of citizens, known as the Committee of Seventy, had been ap-

pointed to use their efforts in an attempt to wrest the control of the city from the band of plunderers and thieves who occupied positions of power in the city government. It was indeed fortunate that the bar had organised, unconscious of the tremendous conflict in which it was soon to engage. The Committee of Seventy had thus a co-operating force, the value of which could not be over-estimated. The Association recognised its duty and its opportunity, and exerted all its powers to the accomplishment of the objects for which the Committee of Seventy was formed. In this conflict, the menace to the administration of justice was a matter of pith and moment, and the Bar Association at its meeting on October 10th, 1871, called attention in stirring terms to the necessity for the election of suitable judges, and a week later appointed a committee of fourteen to confer with the various political organisations for the purpose of securing proper nominations. Tammany Hall, confident in its assumption of power, nominated for Justice of the Supreme Court a totally unworthy candidate. The Association of the Bar on November 1st, adopted resolutions condemning the nomination in the strongest terms, and declaring in unmistakable language the unfitness of the nominee. This combination of right-thinking citizens, under the lead of the Committee of Seventy, and of the lawyers under the leadership of the Association of the Bar resulted in an overwhelming victory; the complete overthrow of the Tweed régime and the emancipation of the judiciary, which has become a matter of history, too familiar to require repetition.

But the greatest and most important part of the work of the Association was still before it. The election had no sooner terminated than, at a meeting of the Association on November 14th, 1871, a resolution was adopted, calling upon the Judiciary Committee to inquire into the integrity of the administration of justice in our courts This committee was not slow in acting, for on January 4th, 1872, resolutions and a memorial were adopted for presentation to the legislature, signed by a committee whose names deserve to be perpetuated as lawyers without fear in the interests of their profession. They were Wheeler H. Peckham, Noah Davis, John Slosson, Gilbert M. Spier, William M. Prichard, James C. Carter and Joshua M. Van Cott. The following extract shows the spirit and sentiment of the memorial:

"Your memorialists further represent that for several years last past the administration of justice in the city, both civil and criminal, has failed to command that measure of public confidence which is essential that it may accomplish its beneficial ends; that the integrity of several high judicial officers occupying places upon the bench in said city has fallen into distrust; that the profession and the public have become, and are becoming, more and more alarmed at the course and tendency of judicial actions, and the general suspicion has ripened into conviction that the courts of justice have been in many instances instruments of promoting the frauds and injustice they were created to repress and punish."

This was, indeed, aggressive action requiring unquestionable courage. The course of this commit-

tee, as well as of the Association that sanctioned it, loses much of its significance, to our minds, as we contemplate it in the light of the victory which followed. The implicated judges were upon the bench. The members of this committee and their professional brethren in the Association were active practitioners, and were appearing constantly before the courts and before these very judges. They could expect nothing but unfriendliness, and their professional appearances met with no favour. They were risking their professional practice and jeopardizing, to some extent, the interests of their clients in undertaking the herculean task that was before them. Dealing as was necessary with a legislative body, it was by no means certain but, rather, very uncertain whether the memorial would meet with a favourable reception. But they were not the men to flinch from the duty which devolved upon them, and the memorial was favourably received. It was followed by a letter from the Speaker of the Assembly informing the Association of the appointment of Judge George F. Comstock and Joshua M. Van Cott, as counsel selected by the legislature, and requesting the assistance of the Bar Association. Then came the appointment of Messrs. Joshua M. Van Cott, John E. Parsons and Albert Stickney as counsel to represent the Association. Then was set on foot the historic impeachment trials which resulted in the impeachment of one judge, the removal of another by concurrent resolution, and the resignation of a third while under impeachment charges, and before trial.

Through it and its friends it contributed a fund of over $30,000 to meet the expenses of the trial, and at the close of the proceedings the lawyers named received well deserved recognition in a resolution of thanks to "the counsel who at their bidding, have recently conducted to a successful issue the most important trial that has ever taken place in the history of our jurisprudence, and for the faithful, fearless and able performance of the duty devolved upon them." The Bar Association proved, indeed, "a mighty power for the pulling down of strongholds" of corruption in the courts. If the Association of the Bar had never in its career performed any other service of a public character, its existence would have been amply justified by the tremendous service which it rendered to the administration of justice during these stirring times.

There has been no occasion since then, and it is hoped that none will ever arise to call forth its mighty power in correcting abuses in the courts which it exercised during this period. The unfavourable results of an elective judiciary led it, in 1873, to exert its influence for a return to an appointive judiciary, and a constitutional amendment for this purpose was submitted to the people, but it was defeated by popular vote. Its policy with respect to judicial nominations has not been one of active interference. Its position in this respect was defined by the Association in 1881, in a resolution which stated that "any active participation in the canvass for judicial offices would be distasteful to us, but it has been necessary in the past as it may be necessary in

the future. If so, we shall not shrink from it. We have felt justified in taking a part in the impeachment and removal of two judges. We cannot doubt that this Association will think it within its province to take all steps necessary to insure the choice of suitable successors."

There have, however, been notable occasions when action affecting the judiciary became necessary. Such was the case of Judge Maynard, whose nomination resulted in an investigation by the Association, and condemnation of his conduct, which was followed by his defeat; and also in the case of Judge Gray, who was refused a nomination by the Republican party, which being in the majority, sought to supplant him, but he was triumphantly elected. The results in both of these cases were due, almost entirely, to the firm stand taken by the Association of the Bar. Ever since, through its committees on the judiciary and on judicial nominations, it has exercised supervision over nominations, and while pursuing its policy of non-participation, it has exerted its influence to some extent, at least, to promote the efficiency of the judiciary. It has also taken a liberal position as to compensation of the judges, especially those in the United States Courts, whose salaries have long been regarded as inadequate, by urging their increase upon Congress, and its efforts have been actively employed in retaining on the bench judges who have given satisfaction, especially in the Court of Appeals and in the Appellate Divisions, and protecting security of tenure in judicial office of all judges who have proved themselves com-

petent and useful. This it has always recognised as a most important feature in the administration of justice, and its efforts have borne fruit in the unanimous nomination by the political parties on several occasions, without regard to political affiliations, of judges who have served long and faithfully. It has aroused popular sentiment in this direction, the influence of which will, in the future, be regarded with greater frequency by the political parties. It is noteworthy that its influence with respect to temporary appointments to fill vacancies occasioned by death or resignation has been recognised by recent governors, who, in making such appointments have deferred largely to the opinion of the Association, by submitting to it for its approval or disapproval the names of candidates under consideration.

In all matters affecting the judiciary and the administration of justice in the courts, it has been prompt to express its sentiments, and to advocate the adoption of reforms and measures calculated to remove the judges from corrupting influences, and to increase the efficiency and elevate the dignity of the courts. The subject of assessments by political parties on candidates for judicial office received under a resolution introduced by Mr. Wheeler H. Peckham, in December, 1880, careful consideration resulting in strong condemnation of the prevailing practice requiring from candidates for judgeships the payment of large contributions to political parties, virtually the price of the nomination. The agitation of this subject and the stand taken by the Bar Association was undoubtedly instrumental in bring-

ing to the attention of the public the corrupting influence of political assessments upon candidates for public office generally. It was followed by legislation, now existing, to prevent excessive contributions, and requiring a disclosure of the amounts contributed, and imposing severe penalties for its violation. Unfortunately, however, notwithstanding the best devised schemes of legislation, it is undoubtedly true that, by indirect methods, large contributions by candidates for judgeships continue to be made, and it is doubtful if by any scheme of legislation the evil of political assessments can be entirely removed.

In minor matters as well, involving courtesy on the part of the bar toward the judges, and in customs calculated to increase the dignity of the courts, it has borne a useful part. Informality in opening the sessions of the courts, and in the conduct of the bar toward the judges, was indeed marked and noticeable. Only in one court, the Supreme Court of the United States, were any formalities observed. There the crier of the court opened its sessions with a dignified proclamation, and the bar stood while the judges, robed in their silken gowns, assumed their places on the bench. But even in such dignified tribunals as our own Court of Appeals, there was nothing of the kind. The bar did not even stand, and the judges wore no distinguishing badge of office. In 1876, however, action was taken by the Bar on motion of Judge Comstock, in the Court of Appeals, to pay the courtesy of standing as the court convened. This met with a hearty response in its favour by the association, and this courteous act was

not only advocated with respect to the Court of Appeals, but also with respect to the General Term of the Supreme Court, and the General Terms of the Superior Court of the City of New York and of the Court of Common Pleas. This courteous recognition of the judges has extended until in every court room, on the entrance of the judge, the members of the bar stand until the judge is seated, who, before taking his seat, often acknowledges the courtesy of the bar by a gracious bow. The assumption of the black silk gowns by the judges of the Court of Appeals met with approval from the Bar Association, and when the Appellate Divisions were organised they, too, followed the example of the Court of Appeals, and at the present time every judge, even down to the police magistrate, appears in a black gown as the badge of his judicial office.

Great as the influence of the Association has been upon the judiciary and the practical administration of justice in the courts, it has been, perhaps, even greater in its less conspicuous influence and action upon legislation affecting the body of the law, and upon the bar itself. The two most important committees, I would say, are the Committee on the Amendment of the law and the Committee on Grievances. The first of these deals with all the various schemes of legislation affecting the body of the law. Its work has been of inestimable value in connection with the revisions of the constitution, and in the several constitutional conventions its members formed a powerful element. They were the voice through which the Association of the Bar spoke,

advocating and procuring the adoption of constitutional provisions affecting beneficially the jurisdiction of the courts and the administration of justice. This is also true of its work of statutory revision designed to bring into harmony and orderly arrangement the whole body of legislation, by the enactment of general laws, and the repeal of the scattered and oft-times conflicting legislation of many years, the result of which is to be found in the Consolidated Laws recently enacted.

An important part of its labours was at a time when an attempt was made to adopt a civil code, which had for its purpose the codification of the whole body of the civil law. The advocates of the civil code were energetic and untiring, and at one time were so near success that the code was enacted by both houses of the Legislature, and it only awaited the signature of the governor, to become a law. Upon the civil code the Association waged unrelenting warfare, with defeat apparently staring it in the face. Nothing could have prevented the code from becoming a law except the powerful influence of the Association, which, by a masterly presentation through its committee of the objectionable features, and the far reaching and unfavourable consequences of its adoption, induced the Governor to interpose his veto. This was the culmination of the efforts of the code advocates, and in recent years nothing has been heard of it. The annual crop of amendments to the Code of Civil Procedure has also added to the laborious work of the committee, while such subjects as the Bankruptcy Law, the laws re-

lating to land transfers, to divorce, and to corporations have resulted not only in the enactment of important beneficial legislation but, more frequently, in preventing legislative measures which would have had the effect of sowing a crop of thorns.

The Grievance Committee has been an instrument of the greatest usefulness to the profession. Until the formation of the Bar Association there was no method by which unfaithful lawyers could be brought to the bar of justice except through indictment, or the expensive method of procuring counsel to prepare charges for presentation to the court. Many a client, grievously wronged by a faithless lawyer, has suffered in silence through inability, owing to expense, to obtain redress. The Grievance Committee meets this condition. It is open, without expense, to every client who has a grievance against his lawyer. Frequent applications are made to it, some of which are seemingly trivial, and proceed no further. But, in numerous instances, the result of its action is the presentation of charges, in the name of the Association, to the Appellate Division of the Supreme Court, the expense of which is not only borne by the Association, but the members of the Association hold themselves ready at all times, upon the request of the Committee on Grievances, to act as counsel for the Association in these proceedings and they cheerfully undertake, without any compensation whatever, and at considerable sacrifice of time and inclination, the painful and disagreeable duty of attending as counsel before the referee to whom such proceedings are usually referred by the Appel-

late Division, and act as trial counsel in the presentation of the evidence, in the investigation and discussion of, at times, difficult questions of law, and in the preparation of the brief for submission to the referee and making an oral argument, and when the referee makes his report, presenting it with such argument as may be necessary to the Appellate Division. Such services, if paid for at the usual rate, would command large compensation. But these lawyers render such services as debtors to their profession. Until within about ten years the committee was able, unaided, to perform its duty of investigating and dealing with the various grievances. But the increasing number has since then required the employment of salaried attorneys by whom the work of investigation is performed. Its service in purging the bar of corrupt lawyers has been of the utmost importance, and its influence is far reaching in maintaining correct standards of professional conduct.

The Association of the Bar has had a tremendous following. In almost every county of our State, and in many of the counties of the various States of the Union, will be found associations of the bar upon substantially the same basis as our own. In its hall was promulgated the idea of forming the New York State Bar Association, which has had a flourishing existence, and this in turn was followed by the American Bar Association, which embraces all the States of the Union. There has been no more remarkable development among lawyers, during the past forty years, than that which has taken place in the forma-

tion of associations of the bar, to create friendly relations among the lawyers and to maintain a high standard of legal attainment and of honour in the profession.

The growth of the Association has been truly wonderful. I have alluded to the fact that in June, 1870, the first meeting of the Association was held in its home 20 West Twenty-seventh Street. This was an ordinary house, 25 feet wide, whose second story was sufficient to house its library. But it was only two years later that the growth of the Association demonstrated that it had outgrown its first home. In April, 1875, it acquired more spacious accommodation in a fine old mansion at No. 7 West Twenty-ninth Street, which stood upon a plot of ground nearly 75 feet wide. In October, 1875, the first meeting of the Association was held there, but its steady growth required, a few years later, the erection of a hall for meetings, with increased library accommodations, and the vacant portion of its premises was utilized for this purpose. But it was not long before its constantly increasing membership, and additions to its valuable and important library, made it evident that even its new surroundings would be insufficient for its accommodation. Consequently, a new site was sought, and at last found, at No. 42 West Forty-fourth Street, on premises which extended through the entire block to Forty-third Street. It is necessary to do no more than to point to its magnificent building, with its library of over one hundred thousand volumes, and its membership of over two thousand. Here is to be

found a veritable workshop of the law. In its spacious library, where a large collection of text books and digests, and a complete set of reports of every State in the Union and of Great Britain and her colonies, are to be found, may be seen, especially in the evenings, a large gathering of lawyers ransacking reports in search of precedents in support of their carefully conceived arguments, or, maybe, indulging in a quest for some legal principle upon which to build up a cause of action or defense in some doubtful case.

Among these seekers after truth will be seen here and there an author of a forthcoming work, surrounded with a mass of manuscript, and his desk and the adjoining chairs piled up with an array of law books. The library occupies the upper floor, and on the floor below is to be found the stack room, its shelves groaning with an accumulation of older and less frequently consulted books, and a number of private rooms, in one of which, it may be, some judge is endeavouring to unravel a complicated case, or in another a consultation is being held. The business of the Association in its earlier days was transacted largely in the ordinary meetings of the Association; but experience showed that these meetings savoured too much of the town meeting quality, and gradually, and almost imperceptibly, the Executive Committee drew to itself most of the details of management of the Association, until now its principal business is performed by that committee, and its regular meetings have become of less consequence, and have declined in interest. Opportunities for social inter-

course are found at its meetings, and occasional receptions to some distinguished court or judge, when antagonists in the forum greet each other in the friendly intercourse of brothers-in-law, and here are also to be found the facilities of club life, excepting the cuisine and sleeping rooms. Here again in its business meetings an opportunity is presented to the aspiring young lawyer to indulge in his first flights of eloquence. But it is well that these meetings are not public, and that reporters are carefully excluded. It is a clearing house of the law, and ambitious lawyers offer all sorts of impossible resolutions and advocate the adoption of visionary measures, but the combined intelligence and common sense of the body at large results in little but talk, and no harm is done.

One cannot fail to recall those early days when the Association attacked the stronghold of the judiciary and, its efforts in that direction accomplished, it pursued its inquiry into the conduct of lawyers implicated by the testimony in the impeachment trial; the memorable discussion respecting the conduct of David Dudley Field, when he escaped expulsion from the Association by a narrow margin; the interesting meeting when the venerable Charles O'Conor stood before the Association to meet the attack upon his professional integrity in connection with the Forest divorce case, followed by his request for a committee of investigation which was appointed, by whom he received a complete vindication; and those memorable meetings on other occasions when the conduct of judges, after investiga-

tion, followed by appropriate resolutions, was under discussion.

Something might, perhaps, be said about the Association "bore" who appeared in the earliest days of the Association, and whose mantle has not wanted a successor up to the present time. But even the "bore" has not been without redeeming qualities, for his ridiculousness has, at least, contributed to the gaiety of the Association. There are others, although not wearing the mantle, who are very near being entitled to it, and this is, perhaps, the reason why the assembled lawyers often seem to be unfeeling;—that is to say, unfeeling toward the ambitious brother who has some pet scheme to advance, or who ventures to indulge his oratorical powers. His slightest slip is so sure to provoke an outburst of laughter, that for even a seasoned veteran of the courts it is a considerable risk to stand upon his feet in that critical assemblage. But, after all, these apparently unfeeling manifestations are in fact, good-natured, and he who by tact and good sense is able to survive the period of friendly ridicule receives, ultimately, a courteous and respectful hearing from his critical brethren.

## CHAPTER VII

### MR. JUSTICE FIELD

It was, indeed, an adventurous spirit that led Stephen J. Field to forsake the refining influences of the East and the valuable association with his brother, David Dudley Field, and embark for California as one of the pioneers of '49. He fell upon stirring and strenuous scenes, calling for iron nerve and unflinching courage. Beholding him on the bench of the Supreme Court of the United States in the calm of judicial dignity, one would scarcely believe it was in the disorderly school of the early days of California that was developed those great qualities, personal and intellectual, which made him one of the leading justices of his time. I doubt if any of his associates on the bench could point to anything similar to, or even approaching, the turbulent incidents of his early years. Out of this, however, was evolved a remarkable personality, physical and intellectual. As he appeared upon the bench, his massive figure, his dignity of bearing, his refined countenance, and the impression he gave of intellectual power, were indeed striking. The cast of his countenance, the spectacles he habitually wore, his flowing beard and his figure draped with his silken gown, gave him somewhat the appearance of a learned Jewish Rabbi—one who might well have been

selected to pose for a portrait of one of the prophets of old.

In his pioneer life there could not have been educational or refining influences to develop that elegant literary style to which I have alluded elsewhere, with its pure and beautiful diction, unequalled, it seems to me, by any of his associates; it must rather have been an inheritance from an educated ancestry which found expression not only in himself, but also in his brother, Henry M. Field, the editor and author, and in David Dudley Field.

There was in Mr. Justice Field a combination of intrepidity and determination of purpose which led him to face personal danger with unquestionable bravery, united with a refined and sensitive nature, intellectual power, and a broad and comprehensive knowledge of the law, which made him an unusual and unique personality. His intrepidity was illustrated by an incident in his early days at Marysville. As a result of a personal controversy he had sent a challenge to a duel, and the time and place were fixed. Mr. Field appeared on the scene, and his adversary had also been there, but his courage having given out, he had disappeared. A few days later Mr. Field happened to be gathering some wood for his fire, when he was startled by a voice from behind calling upon him to draw and defend himself. He turned only to behold the adversary whom he had challenged, pointing a revolver at him as if about to shoot. Mr. Field never flinched, and looking at him with steady gaze said: "You infernal scoundrel! You cowardly assassin! You come behind

my back and put your revolver to my head and tell me to draw. You haven't the courage to shoot. Shoot and be damned." His coolness and intrepidity, and his commanding personality, won the day—his assailant lowered his pistol and walked away.

An incident to which I have already referred, in connection with Mr. Justice Strong, revealed another quality—that of a hot and impetuous temper; with which was combined, however, a spirit of magnanimity which led to reparation for any act which heat and impetuosity might have occasioned.

It was not strange that upon his advent among the early settlers in Marysville, California, where there were no laws or organisations, judicial or civil, for the enforcement of law and order, he should have met with experiences calculated to try men's souls. Almost immediately upon taking up his residence in Marysville he was elected *alcalde,* the functionary under the Mexican régime who settled disputes, so far as possible, but with little power of enforcing any of his decisions. But it was not long before courts were organised as a part of the United States government and his powers as *alcalde* terminated. I am quite sure that no other Justice of the Supreme Court of the United States could ever assert that he had been disbarred, but this was true of Mr. Justice Field. Upon the organisation of the court which sat at Marysville, a certain Judge Turner was appointed, whose knowledge of the law was so inadequate, and whose personal habits were so open to criticism, and whose personal qualities were so objectionable that the practitioners before him, of

whom Mr. Field was one, received scant justice, and were, besides, exposed to violent and arbitrary conduct. Mr. Field, in one of his cases, incurred the displeasure of the Judge, which first found expression in a small fine, and, upon remonstrance, was followed by an increased fine and imprisonment, and finally by a further increased fine and imprisonment, and a sentence of disbarment. This was indeed a serious situation for Mr. Field, but he followed it with legal proceedings to compel a removal of the disbarment, and the restoration of his rights as an attorney of the court. These proceedings are reported in the first volume of California Reports, at page 152, under the title of The People ex rel. Field v. Turner, and terminated successfully for Mr. Field.

But Mr. Field was not through with Judge Turner. The following year Mr. Field was elected to the legislature of California, and in this position he not only framed laws respecting mining claims and the administration of justice, which have ever since stood as monuments of beneficent legislation, but he followed up Judge Turner by presenting to the legislature a resolution for his impeachment. This, as might have been expected, provoked hostilities on the part of the adherents of Judge Turner. During the pendency of the resolution, one of these, a legislator by the name of Moore, undertook the defense of Judge Turner.

In those days the pistol and bowie knife were generally carried, and in the legislature itself it was very common to see the members as they assumed their seats take out their pistols and knives and deposit

them in their desks. Moore, upon the occasion of his defense of Turner, proceeded to his desk, took out his pistols, cocked them, and laid them upon the desk in front of him. He then proceeded to make a violent personal attack on Mr. Field, covering him with abuse. Mr. Field did not immediately respond, but determined to call Moore to account in a duel. He therefore approached two of his friends to represent him in the controversy, but they declined to be the bearers of a communication to his adversary. However, it so happened that Daniel C. Broderick, another son of New York, and also another forty-niner, who subsequently became a Senator of the United States, was a member of the legislature. Mr. Field's disconsolate and woe-begone expression led Broderick to inquire what the trouble was and Mr. Field explained to him the need of some one to act for him in his controversy with Moore. Broderick gladdened Field's heart by undertaking the task, and together they composed an appropriate epistle, which Broderick conveyed to Moore.

Upon the receipt of the communication Moore evaded the difficulty by asserting that he was about to be nominated for Congress, and that under such circumstances he could not engage in a duel with Mr. Field, but would be willing to meet him anywhere on the street, and settle the difficulty. Broderick responded that Mr. Field would never consent to this, and that if he refused Mr. Field's challenge the latter would, in the legislature the next day, denounce Moore as a coward. Moore responded that if Mr. Field did this he would be shot in his place at his

desk. Broderick responded that then others would be shot too, and they separated, only to meet in the legislative assembly the following day, when Field and Moore were in their places, both of them armed. Broderick, with others of Field's friends, surrounded his desk, prepared for the encounter which seemed inevitable. At the opening of the proceedings both Moore and Field rose to their feet and addressed the speaker. The latter recognised Moore first, who then proceeded to make a full and ample apology for his remarks on the previous day, and expressed regret at the occurrence, and the incident was closed.

But the Turner matter was still pending and Broderick, having proved a much-needed friend in one instance, was to render a service of even greater value a few days later. Field and Broderick happening to be in a saloon to take a friendly drink, were standing together at the bar when Broderick suddenly stepped in front of Field, pushed him violently back through an open door and closed it. Field was at a loss to understand Broderick's action and resented it, but Broderick explained to him that as they were standing at the bar he had noticed Turner's brother, a desperate character, enter the saloon, and seeing Field, he had drawn his revolver and was in the act of leveling it, when Broderick, realising that Field would be shot, stepped between them and pushed his friend out of the place. This undoubtedly saved Field's life, and for this act Field's gratitude to Broderick never ceased.

In 1857 Mr. Field was elected a judge of the Su-

preme Court of California. One of his associates on the bench was David S. Terry, a man of gigantic proportions, of a hot and violent disposition, always ready for a quarrel and constantly armed. They served upon the bench together until Terry's retirement. In 1863 Judge Field was appointed one of the Justices of the Supreme Court of the United States by President Lincoln. In the meantime Terry had espoused the cause of Sarah Althea Hill, who claimed to have been the wife of Senator Sharon and, as such, entitled to a considerable part of his large estate. The controversy, which was pending in the United States Court, came before Mr. Justice Field, and the time having arrived when he was to deliver his opinion, Judge Terry and Sarah Hill, who had meanwhile married Terry, were present in the court room, the one armed with a knife and the other with a pistol. Perceiving from the drift of Mr. Justice Field's opinion that it was unfavourable to her, Mrs. Terry became violent, and in the endeavours of the officers of the court to remove her from the court room, Judge Terry undertook to defend her, drew a knife and would have committed murder had he not been restrained. Being imprisoned by order of Mr. Justice Field for this flagrant offence, and confined in jail, he not only applied for a writ of *habeas corpus* to obtain his discharge from imprisonment—which, however, was refused by the United States Supreme Court in an opinion by Mr Justice Miller, in 128 U. S., 289—but also commenced a systematic series of threats against the person and life of Mr. Justice Field.

Those threats were so open that reports of them reached the Executive Department at Washington and, at the same time, the newspapers of California contained articles on the subject evincing a general expectation of an assault upon the Justice. Terry was a desperate ruffian in the early days of California and had been ordered out of the State by the Vigilance Committee. He resigned his place as Chief Justice of the Supreme Court to fight a duel, in which he slew Senator Broderick. An account of this duel, as well as of those early days in California, is in a volume of thrilling interest, containing an account of the life of Senator Broderick.

Judge Terry always went armed with a knife. He was habitually violent, implacable and dangerous where he thought he had any cause, and had the reputation of making no idle threats—of carrying out whatever violence he threatened. I have alluded to his stature as being gigantic. He was six feet and three or four inches tall, and weighed two hundred and fifty pounds. On Judge Field's return to California in 1889, Terry expressed bitter and malignant feeling toward him, and was not averse to having anybody know it—in fact, he desired that it should be known. These threats were so numerous and so constant, that a deputy marshal named Neagle was appointed by the Marshal, with instructions to accompany Mr. Justice Field, to stay with him constantly, to watch Judge Terry and Mrs. Terry on all occasions and especially when passing Fresno, where the Terrys resided, and to protect Mr. Justice Field from any injuries that Judge

Terry and his wife might attempt to inflict upon him. The appointment of a guard to attend and protect him met with a vigorous protest from Mr. Justice Field, and called forth the remark which became current everywhere, evoking admiration and respect, that: "When the judges shall be obliged to go armed it is time for the courts to be closed."

As Mr. Justice Field and Neagle were travelling on a train to San Francisco, Terry and his wife boarded it at Fresno, and Neagle was immediately informed of it. There was a state constable stationed at Lathrop, where the train was to stop for breakfast, and Neagle telegraphed him to be on hand on the arrival of the train. When the train stopped Neagle proposed to Mr. Justice Field to take his breakfast in the car, fearing a meeting with the Terrys. But Mr. Justice Field decided to go into the station as usual. After Mr. Justice Field and Neagle had taken their places at the table, Terry and his wife entered the room. As soon as they saw Mr. Justice Field, Mrs. Terry started back to her car to get her pistol. Terry continued to a seat at a table, but, after a little, while Mr. Justice Field was eating his breakfast, Terry stole upon him unobserved, and dealt him a violent blow on the right side of the head, and another on the left. Neagle, who had been carefully watching him, stood up, exclaiming: "Stop sir, stop sir, I am an officer." But Terry, instead of desisting, made a quick motion as if to draw his knife, with all the rage of his nature concentrated in his countenance, whereupon Neagle, believing there was no other way to save

Mr. Justice Field, discharged his pistol at Terry and killed him.

Of course, Neagle was placed under arrest, but being brought before the court upon a writ of *habeas corpus* to determine whether Neagle in protecting Mr. Justice Field from threatened assassination, which protection necessitated the shooting of Terry, was acting under the authority of the United States, the question was ably presented to the Circuit Court in the first instance, and subsequently to the Supreme Court of the United States, where the writ was sustained and the prisoner discharged. The matter is reported in 135 U. S., 1.

During his long term of service as Justice of the Supreme Court Mr. Justice Field participated in and delivered opinions in cases involving not only those great questions which arose out of the Civil War, but upon other questions, civil, financial and corporate, which the marvellous development of our public and commercial interests have occasioned. Mr. Justice Field has the distinction of having served in the court a longer period than any other Justice—thirty-four years and seven months. The great Chief Justice Marshall came next, with thirty-four years and five months; Justice Story with thirty-three years and ten months; Justice Wayne with thirty-two years and six months; Justice McLean, with thirty-two years and one month; Justice Washington, with thirty years and eleven months, and Justice Johnson with thirty years and five months. Mr. Justice Field's career was indeed noteworthy, as evolved from the conflicts of pioneer life, apparently the

last place from which to expect those characteristics and qualities which have made him a conspicuous and powerful personality in the roll of Justices of our highest national tribunal.

## CHAPTER VIII

### WILLIAM M. EVARTS

At the organisation of the Association of the Bar in 1870, Mr. Evarts was elected its first president and was re-elected annually for ten years. He was then about fifty-two years of age and easily the most prominent member of the bar, with the exception of Charles O'Conor.

After becoming a member of the Bar Association in 1872, I had many opportunities of observing Mr. Evarts when he was presiding at the meetings, and it is needless to say that he discharged his duties with peculiar grace and ability, sometimes in situations of extreme difficulty. The Association, during his early presidency, was kept in a ferment of interest and excitement, in consequence of investigations connected with the impeachment proceedings against two Supreme Court justices, and into the conduct of Mr. David Dudley Field in connection with the Erie litigations, which had furnished the basis of some of the impeachment charges.

I do not remember any meeting of the Association attended with more intense feeling, well suppressed, however, by the members, than that in which the report of the Committee on Grievances, of which my father, Theron R. Strong, was chairman, was brought up for consideration. The report, as I recall it,

was of such a character that the consequences to Mr. Field, if the recommendations had been adopted, would have been of the most serious character. The sentiment of the members and the general trend of the discussion seemed to make it a foregone conclusion that action unfavourable to Mr. Field would be taken. At the conclusion of the discussion and just before the final vote was taken, Mr. Evarts arose and, in a long and powerful address, characterised by moderation, good sense, impartiality and justice, sought to avert consequences which, in the progress of time, would quite likely have been disapproved. Undoubtedly he took a lenient view of Mr. Field's conduct, and, at the time, there was, I think, a feeling prevalent that he had exerted his great influence to shield Mr. Field from the censure which many members of the bar thought was deserved. The result of his address was to avert a direct vote upon the resolution, a motion being made, as I recall it, to lay it on the table, which was carried by a majority vote and the proceedings against Mr. Field terminated.

Mr. Evart's fame, then international by reason of his masterly and successful defense of President Johnson in the impeachment proceedings, was largely increased during the next few years by the ability he displayed and the great triumph he achieved at Geneva, in the arbitration of the Alabama claims. At this time he was probably the most conspicuous American lawyer. Happening to be in Geneva in the summer of 1872 I saw him out driving with his college class-mate and colleague

as counsel, Morrison R. Waite, who shortly became Chief Justice of the United States. The weight of responsibility resting upon them in maintaining our national honour before a tribunal charged with the consideration of matters of supreme importance, arising out of the unfriendly action of England in one of the greatest crises in American history, was indeed impressive, and the expression of their faces indicated that they fully realised it. Evidently, however, even then, there were brighter and lighter moments when Mr. Evarts' wit would bubble over, as in an instance given in Mr. Hackett's interesting book on the Geneva Arbitration. Mr. Evarts had prepared a document, expressed in language peculiarly his own, and at times somewhat difficult to construe. It had been for some time in the hands of translators to transpose into polished French, but finally was brought to him with the statement that the translators had found considerable difficulty, owing to the phraseology, in expressing in suitable words his precise meaning. After considering it for a time Mr. Evarts commented: "I am indeed surprised at the poverty of the French language." Those who are familiar with his long and involved sentences will appreciate, I think, the translator's difficulty.

These long sentences occasioned a display of wit between Mr. Evarts and Judge Noah Davis at a dinner where both were guests. A short time previous, the General Term of the Supreme Court, of which Judge Davis was the presiding Justice, had made a rule on appeals from orders, often involving matters of practice not decisive of the case, that

the arguments of counsel for the respective parties should be limited to fifteen minutes each, and the Court was strict in enforcing it. Among the speakers who preceded Judge Davis was Mr. Evarts, and during his speech he had indulged in one of his long and involved sentences. Judge Davis, when called upon referred to Mr. Evarts' habit of uttering long sentences, and remarked that he understood Mr. Evarts had recently complained bitterly of the enforcement of the rule in one of his own cases, because the court had by expiration of the fifteen minutes been compelled to stop Mr. Evarts in the midst of his first sentence. This of course occasioned much merriment, but Mr. Evarts was equal to the occasion, for, retorting courteously, he said that the incident to which Judge Davis referred was as true as anything else of a similar character, and he could readily understand why he was stopped, because only criminals objected to long sentences.

Happening recently to relate this story to one of his former partners, it was followed with one more ludicrous in the same direction. There was once a sportsman, he said, who was out bird shooting and when the game rose he fired, but most singularly, the usual report was followed by a rapid succession of pop—pop—pop—until after the bird had disappeared. He was at a loss to understand the strange occurrence and an examination of his gun revealed nothing unusual. As the paper used as wadding lay at a short distance, he looked at it to discover whether there was anything in it which would account for the successive pops, and found that it con-

sisted of a newspaper fragment, containing one of the characteristically long sentences from a speech of Mr. Evarts, and that quite naturally the successive pops continued until the sentence terminated.

It was my good fortune in my earlier days at the bar to be junior counsel in an important case in which Mr. Evarts was opposed as senior counsel, and my opportunities for becoming acquainted with his characteristics and legal capacity were exceptionally good. There was a wonderful grace and charm in Mr. Evarts' personality. On inquiring not long since of one of his old associates what Mr. Evarts was like when he first knew him on coming to New York; "Well," he said, "he was as thin as a lath," and in illustration remarked that an intimate friendship existed between Rufus Choate and Mr. Evarts and that when Mr. Evarts happened to be in Boston, or Mr. Choate in New York, they usually called upon each other. When Mr. Evarts was returning from his Windsor home to New York, he stopped in Boston to make his customary call. Mr. Evarts, he said, was anxious to accumulate a little more adipose tissue and thinking that he had gained somewhat during the summer, he asked Mr. Choate whether he did not think he was getting a little stouter. "Well," was the reply, "I must say I cannot see any collops of fat about you."

Mr. Evarts was thirty-seven years of age when Mr. Joseph H. Choate entered his employment. Mr. Choate told me that at this time Mr. Evarts had a very engaging personality, and was most agreeable as an associate but, he added, although a hard

worker, Mr. Evarts did not resent it at all if other people did as much of his work as possible. At this comparatively early age, he remarked, Mr. Evarts was already very prominent and the life of every social function he attended. Referring to the interchange that was customary between Mr. Evarts and himself with respect to the Yale-Harvard dinners,—Mr. Evarts attending the Harvard dinner if Mr. Choate attended the Yale,—a Harvard dinner occurred at which Mr. Choate presided and Mr. Evarts was present. "I am sure that I had nothing new to say," said Mr. Choate, "and I am equally sure that this was true of Mr. Evarts. I therefore hit upon the plan of taking Harvard examination papers and putting questions from them for the speakers to answer whom I wished to call upon to respond. When the time came for Mr. Evarts to speak, as representing Yale, I put to him a question from one of Dr. Oliver Wendell Holmes' examination papers, the substance of which was—'Why is it that in the course of digestion the coat of the stomach is not itself digested?' To which Mr. Evarts replied that he was not a medical man, and was, therefore, in no position to give a scientific answer to the question, but applying to it his own experience the answer was easy, because, before he attended a dinner, especially a Harvard dinner, he always took off the coat of his stomach and left it at home."

This recalls the witty reply of Rufus Choate to a gentleman who expressed the fear that the many public dinners which he attended would impair his

constitution, and inquired what he would do if his constitution was destroyed. "Well," was the reply, "when my constitution is gone, I shall live on my by-laws."

In personal intercourse, Mr. Evarts was undoubtedly most engaging. His fine face would light up with an attractive smile, and his unaffected cordiality and geniality, combined with his wit and brilliance, furnished a combination of fascinating personal qualities that is rarely met. His face was typically Roman and bore in every line the mark of intellectuality, but his nose was quite pronounced even for a Roman. He never succeeded in his ambition to get stouter, and his figure was slight, but although he was not tall, there was an impression of height about him as one observed his movements, especially on the platform, which was not dispelled until coming into direct contact with him. During all our intercourse, which was sometimes rather close, and when he was at the pinnacle of his greatness, there was a kindliness, courtesy, absence of affectation, and a play of wit and good nature that was altogether charming, because quite unusual.

Combined with his remarkable gifts and attractive qualities, exceptional opportunities were undoubtedly afforded him early in his career for the display of his ability. He was trained in the office of Daniel Lord, and in later years, when the Parish will case was begun, in which the will of Mr. Parish, prepared by Mr. Lord, and his son, Daniel D. Lord, was attacked by Mr. Parish's relatives, represented by Mr. O'Conor, for want of testamentary

capacity, and undue influence by Mrs. Parish, he was retained by Mr. Lord as chief counsel in support of the will, although then not more than thirty-eight years of age. No more satisfactory testimonial could be furnished to Mr. Evarts' learning, capacity, and skill as a lawyer at this early age than this retainer by his former preceptor, one of the most distinguished counsel at the New York bar. He had, however, given abundant evidence of his ability, in his conduct as Assistant United States Attorney of the case of Lemmon against The People, (20 N. Y., 562), in which, pitted against such a formidable adversary as Charles O'Conor, he successfully sustained the legal proposition, now appearing to be clear, but then a matter of doubt, as well of debate in the Senate and House of Representatives, and in the courts, that a slave from one of the slave States brought into the State of New York by sea, and there landed with the intention of embarking upon a new voyage to another slave State, was thereby made free.

Although Mr Evarts was favoured by circumstances and opportunities in his early career at the bar, it is due to him to say that he could scarcely have failed with his natural gifts, extensive acquirements and industrious habit to attain at an early age the eminence which he secured and deserved.

Soon after leaving the office of Assistant United States District Attorney his career began in the office of J. Prescott Hall, with whom he was associated during the remainder of his life. The firm, if I am not mistaken, was Hall, Butler & Evarts, the second

member Mr. Charles E. Butler, being occupied generally in office practice and rarely seen in the courts. On the death of Mr. Hall, this firm was followed by Butler, Evarts & Southmayd, and later by Evarts, Southmayd & Choate, for a long period the most distinguished and able firm of lawyers in this city if not in the country. Unquestionably this combination of men of the highest attainments was a prime factor in their great achievements, and the eminence of each of them.

In the early days of my practice, I was brought occasionally into personal intercourse with Mr. Southmayd in the progress of litigations conducted by my father on behalf of a former client of Evarts, Southmayd & Choate which, for some reason unknown to me, they were unable to undertake. Mr. Southmayd was exceedingly able, of wide learning in the law, of unerring judgment in the conduct of a legal controversy or negotiation, but was the antipodes of Messrs. Evarts and Choate in being almost a recluse. As an adviser of clients in complicated matters of importance, he probably occupied the first place in the front rank of the bar of New York, while as an adviser of his partners in their conduct of cases in court he was the acme of usefulness. Undoubtedly Mr. Southmayd contributed largely to the success and achievements of his partners. I remember a remark of Mr. Choate that his success at the bar was probably due in a large measure to the ten years during which he followed Mr. Evarts about in the courts as a junior, but one may well reflect upon the advantage of Mr. Evarts pos-

sessed in being followed about by, and consulting with, a junior like Mr. Choate.

Mr. Southmayd's appearance was most refined and his manner simple and modest. He had a slight lisp and a practice of innocent swearing which, instead of shocking, lent a piquancy and flavour to his general conversation. I was told of an instance of this in his latest days, when, his memory being obscure, a former employé of his office, who had been accustomed during his later years to attend to his personal affairs, called at his residence on some matter of business. Mr. Southmayd's sister informed him that Mr. Rowe desired to see him. "Mr. Rowe, Mr. Rowe," said Mr. Southmayd, "who is Mr. Rowe?" "Why," replied his sister, "you surely know Mr. Rowe who was in your office so long and who has attended to your business affairs." "Oh yes," replied Mr. Southmayd, "hell and damnation show him up."

During the heyday of this great firm, Mr. Southmayd was the trusted adviser of the largest banking interests and relied upon to such an extent by Dutch bankers in Amsterdam and elsewhere that it was impossible to place with them an issue of American bonds without the approving opinion of Mr. Southmayd, and all of this class of business was practically in his hands. This reliance on him was due to his extreme caution in the investigation of legal questions, and his conservative opinions. But as time went on this caution and conservatism grew upon him, and became so marked that it interfered with the placing of securities of unimpeachable

value, so that, finally, when he delivered an opinion of considerable length upon a bond issue involving questions of great importance, and concluded it by stating that these were his views, but that God alone knew how the courts would decide, and that his opinion was given upon the understanding that he was to incur no pecuniary liability, their confidence was impaired, and their business was withdrawn.

A reputable member of the bar, formerly managing clerk in the office of Evarts, Southmayd & Choate, characterised Mr Southmayd as an example of a thoroughly conscientious lawyer, with the highest standard of professional morality, observing the most scrupulous integrity in every professional matter, as well as discriminating carefully in the business which he undertook. In the days of Fisk and Gould, he not only declined to undertake business for them, but refused even to shake hands with them, or speak to them. He also referred to Mr. Southmayd's caution in his personal affairs, against exposing himself to any kind of criticism, as being carried to an absurd extent, leaving him to sell most of his real estate holdings after the law was passed making the owner of real estate responsible when it was occupied for immoral purposes, under the fear that unknown to himself it might be so occupied; and that he was reluctant to send parcels by express lest there should be an over-charge, subjecting not only the company, but the sender, to penalties imposed by legislation in such cases.

In March, 1898, a statute was enacted requiring attorneys and counselors in the courts of New York

to make and file an affidavit that they had been duly and regularly admitted to practice as attorneys and counsellors-at-law, and had taken the constitutional oath of office, and making it thereafter a misdemeanour to practice as an attorney and counsellor without having submitted the affidavit. Mr. Southmayd was in a dilemma because he could not distinctly recollect having taken the oath, there being no jurat affixed to the roll which he had signed.

Few lawyers would, I think, after the lapse of the fifty-two years which had intervened since his admission, have been able to make an affidavit, based on present recollection that they had taken the oath, but they would have been able to do so knowing that they had been admitted on complying with all the rules and regulations, as they would not have been otherwise, that they had been recognised and had practiced as such and that their right to do so had never been questioned. But Mr. Southmayd's conscience and bump of caution were too sensitive to permit him to make oath to the performance of each detail of procedure, unless he could do so from present recollection. He therefore presented a long affidavit, consisting of an argument based largely on inferences, to prove that he had taken the oath, and thus, without being willing to state that he had done so, ask the court to conclude that he had. An interesting and appreciative memorial of Mr. Southmayd, prepared by Mr. Choate for the Association of the Bar, gives an account of this affidavit, and I am indebted to it, and to the affidavit on file, in attempting to give the substance of it.

In this curious affidavit he dealt with the pros and cons respecting his taking the oath. He remembered attending in court with other persons examined for admission and that the chief justice addressed to them some courteous words wishing them success in the profession, and felt quite confident that the candidates attended for the purpose of taking the oath in open court, and that he, as did others, must have taken the oath on the roll in open court. That he recollects signing the roll of attorneys, and has strong reason to believe, and does confidently believe, that he did subscribe and take the constitutional oath of office, because he recollects that when he was about to sign the roll, or after he signed, noticing the signatures of certain persons who had subsequently become prominent members of the bar.

He proceeds to explain why no subscribed oath is attached to the roll, and believes it to be accounted for because the oath was required to be taken in open court, and he therefore says that he has no practical, reasonable, and substantial doubt that he must have subscribed and taken, and did subscribe and take, the constitutional oath, although he does not, after the lapse of more than fifty years, recollect either his subscribing or taking such oath, and could not now state the facts even to the extent already stated, were it not for his reliance upon information obtained from the Clerk, and the Clerk's office, and the other circumstances above referred to, and the further circumstance that he does not think that his license would have been given out to him with-

out his having subscribed and taken the oath required.

A further reason why he is unable to make oath as to his admission as an attorney and counsellor-at-law in the courts of record of this State, is that his admission aforesaid was merely as an *attorney* of the Supreme Court, and that as the law stood at the time of his admission, practitioners in the Court of Chancery, called solicitors, were appointed and licensed in the Court of Chancery, and that solicitors and counsellors licensed in the Court of Chancery were authorised to practice as such in all the courts of equity.

He then tells of his admission as a solicitor, and sets forth a certified copy of the order in chancery admitting him, but takes care to correct it by stating that, although the caption of the order reads as having been made at Albany, his real appearance before the Chancellor for the purpose of being admitted was at Saratoga Springs, to which place he recollects going from Albany for that purpose, and that it must have been at Saratoga Springs that the Chancellor admitted him, and signed the license, and administered the oath as in open court, and he supposes that the Register drew up and entered the order under some sufficient indication or direction from the Chancellor; but still, it may be that he is mistaken in relation to his recollections or impressions in relation to rules of practice in the Court of Chancery, which was abolished more than fifty years before the making of this affidavit, but he feels justified in saying that he subscribed and took the

constitutional oath of office as solicitor in Chancery, although at this time, so long subsequent, he cannot recollect as mere facts, and could not state on oath as an occurrence or occurrences within his memory, either his subscribing or taking the said oath, and thinks that the Register, as Clerk of the Court, would not have given, and is quite confident that he would not have received, such a certificate as is indorsed upon the license, if it had been untrue; that he went from Albany to Saratoga Springs for the purpose of attending before the Chancellor there, and doing what was necessary to obtain his admission as solicitor, and entitle him to practice thereunder, and he does not doubt that he knew what was necessary, and acted accordingly; and upon the premises aforesaid he deposes and says that he was to the best of his knowledge and belief, duly and regularly admitted as a solicitor of the Court of Chancery; but that although he has spent very much time in searching for, and endeavouring to find his license as attorney of the Supreme Court, he has not been able to find it, although very desirous to do so. He completes his argumentative affidavit by stating that the Act of May 12, 1847, commonly called the Judiciary Act, provided that every person who shall be a solicitor in Chancery or attorney in the Supreme Court of this State, on the first Monday of July then next, should be entitled to practice as attorney, solicitor, and counsellor in all the courts of this State; wherefore he assumes that he acquired the right so to practice.

This affidavit is a striking illustration of Mr.

Southmayd's extreme conscientiousness and unwillingness to state, especially under oath, any fact which was not to his own knowledge exactly so, and this characteristic conscientiousness in fact marked his whole conduct in life, and sometimes put him to great inconvenience.

Returning to Mr. Evarts from this digression, one of his most noteworthy features was his oratorical power. He was an accomplished and convincing orator. He was in constant demand, and displayed his remarkable gifts, not only in court, but on occasions of large public interest, in political assemblies, and in public functions of every description. The appearance on the platform of his expressive and intellectual face, his graceful and dignified figure, and his refined and courtly bearing, commanded at once attention and respect. His demeanour, pose and gesticulation were full of grace and charm, and although his voice had none of the *ore rotundo* it was of sufficient resonance and power to be distinctly heard in the largest auditoriums. His ideas and arguments were of great value and significance, as was to be expected from one of his wonderful gifts, and although his utterances were marred somewhat by the rhetorical defect of long and involved sentences, his oratorical efforts were accompanied with such personal magnetism as to enable him to carry his hearers along in concurrence, although the precise meaning of his sentences might not be clearly apprehended. An instance of his fascination as an orator at social functions is that of the reception to Lord Chief Justice Coleridge at the Academy of

Music in 14th Street upon his visit to this country in 1883, and upon a public question of great importance at a meeting at Cooper Union relating to the seizure by the United States Government of the Spanish vessel *Virginius*.

Probably no better manifestation of Mr. Evarts' capacity as a jury lawyer, when in the fullness of his years could be presented, than his address to the jury in favour of Henry Ward Beecher in the case of Tilton against Beecher. Its delivery occupied eight days and was enlivened by wit and brilliancy to a degree in marshalling facts and circumstances, and discussing motives, with what has always seemed to me unanswerable force. One of his witticisms was an inquiry by a lady of a Frenchman as to his definition of a *faux pas,* to which he replied, "I do not know its exact definition, but I do know that it is not a *pas seul.*" During the progress of that case it was necessary to have a consultation between Mr. Beecher and his counsel and, after endeavouring to arrange for a week day, it was found impossible to do so, and the only time when all the counsel could attend was on Sunday. To this Mr. Beecher objected on account of his church services, as between the services it was necessary for him to make preparation. They urged upon him the importance of the consultation, and that, under the circumstances, it could not possibly offend one's moral sense. Mr. Beecher long resisted their arguments, but, finally, Mr. Evarts suggested that our Lord had given his approval to lifting an ass out of a pit on the Sabbath Day, to which Mr. Beecher instantly replied,

"Quite true, quite true, and if there has ever been a bigger ass than I am, I do not know it; of course I will attend."

But it was before appellate tribunals that Mr. Evarts was at his best, and I think he must have felt that his greatest power as a lawyer was in this direction. He did not seem to rely so much on his printed briefs as on his oral arguments. It was then that he expected to bring conviction to the mind of the Court. He was evidently not one of that considerable class of lawyers who suppose an extended and exhaustive printed brief is the best means of convincing a Court. He seemed to regard his briefs as serving to refresh the mind of the Court concerning his oral argument, instead of treating his oral argument as a mere introduction to his brief. I suppose it must have been a recognition of his power in an oral argument which led him, alone among all the counsel at the Geneva Arbitration, to apply for and obtain an opportunity to present his views orally, which he did with marked success, Sir Roundell Palmer of Great Britain and Caleb Cushing and Morrison R. Waite of the United States submitting written arguments.

One instance of a display of his remarkable talents in a case of great public importance came under my personal observation. In June, 1882, I happened to be attending the Court of Appeals to argue a case at its session held at Saratoga Springs. The presence there of Mr. Evarts and Mr. David Dudley Field at once attracted my attention. I found that they were to argue the case of Story against The

New York Elevated Railroad Co., (90 N. Y., 122). The case grew out of the construction of the elevated roads on the public streets in the City of New York, and involved the question whether the public thoroughfares could be subjected to use for an elevated road by permission of the city authorities, without making compensation to abutting owners, on the theory that each abutting owner had an easement of light, air and access in the street, and that this easement could not be interfered with or impaired without compensation. The case had been argued at a previous term before six judges, there being at that time one vacancy in the court. The court was evenly divided in opinion, and the vacancy having been filled later by the appointment of Judge Benjamin F. Tracy, the case was assigned for reargument at the time above mentioned. There were but few lawyers in attendance, and none of the general public. Realising that the argument was likely to be interesting, I secured a place where I could obtain as much as possible a front view of Messrs. Evarts and Field. Mr. Evarts first addressed the court and made an argument which consumed probably two hours in its delivery. From the moment that he began until its close, he held the undivided attention of the court, and it is needless to say that this was true of my own. Whether the subject was one which particularly appealed to Mr. Evarts I do not know, but it was well fitted for a display of the learning, logic, fancy, subtlety, and wit of his fertile mind. It was by far the best argument that I have ever heard addressed to a court. This in-

tangible easement as a property right, its value capable of being estimated in dollars and cents, furnished a theme which brought forth from his abundant stores a remarkable combination of argument, illustration, and wit such as I have never heard on a similar occasion.

Of course, it would be impossible to reproduce it, or convey any adequate idea of its effect, but one of his incidental illustrations has ever since clung to my memory. In dealing with the question of the intangible character of the easement, he told how in the early days of travel by steamboat on the Mississippi River, a party of clergymen who had been attending a religious conference were returning to their homes. Some of them were from outlying wilderness districts, and of very little general culture. During the journey, they fell into conversation upon the different phases of religious belief then manifesting themselves, and among them that of transcendentalism. At the conclusion of the discussion, an uncultured brother who had been listening attentively, if not understandingly, approached one of his learned brethren with the remark, "Brother, I wish that you would tell me what transcendentalism is?" "Well," was the reply, "it is difficult to explain it so accurately as to have it thoroughly understood, but I can best show you what it is by illustration." Just at that time they were passing one of the high bluffs having numerous small holes, in and out of which birds were constantly passing. He pointed to the bluff and said: "Now, brother, do you see that bluff?" "Yes." "Do you

see the holes in that bluff?" "Yes." "Do you see the birds passing in and out of those holes?" "Yes." "Well, you take away those birds, and then take away that bluff, and leave those holes, and you have transcendentalism."

I happened to meet Judge Tracy recently, when our conversation turned on the argument of this case. In view of the even division of the court, Judge Tracy really had the casting vote and practically decided the case. He said it fell to him to write the opinion in this case in the regular course of things, and that it was not a special assignment. I related to him this incident which he remembered very well. "I walked," said he, "from the court house at the conclusion of the argument with Judge Earl, who had written an opinion in favour of the elevated road, and in speaking of the arguments of Mr. Evarts and Mr. David Dudley Field, he expressed his dissatisfaction with Mr. Field's argument, saying that if he ever had a case to be argued he would not have it argued by a man over seventy years of age." Judge Tracy said that there was no consultation over the case, and no discussion of it whatever among the judges, beyond what had taken place at the conclusion of the first argument, and that the other members of the court left it to him to write the opinion, and that they did not see his opinion until the case was decided.

Some time afterward, he remarked, when he was Secretary of the Navy residing at Washington, having become well acquainted with Mr. Justice Field, of the Supreme Court of the United States, brother

of David Dudley Field, he was informed by Justice Field that he had taken considerable interest in the case, having read Judge Tracy's opinion, and that on meeting David Dudley Field subsequently, when attending a session of the Supreme Court, he said to him, "Dudley, I have read General Tracy's opinion in that Story case and I think he is right," to which David Dudley replied, "I think he is right too." The result of this decision was a rich harvest for the lawyers who subsequently began suits for the individual property owners, as well as for the property owners themselves.

From conversation with Mr. Evarts, I think he must have been disappointed at not receiving a nomination for Chief Justice of the Supreme Court of the United States from General Grant on the death of Chief Justice Chase. He delivered a eulogy at Dartmouth College, some time subsequently, on the late Chief Justice. He sent a copy of it to Mr. Bancroft with a half barrel of pig-pork, accompanied by a note saying in substance, "I am sending you the usual half-barrel of pig-pork and my eulogy on Chief Justice Chase, both products of my *pen.*"

Mr. Evarts had become so prominent and his services to the government were of such an exceedingly valuable character, that quite naturally the public eye was directed to him as the probable recipient of the Chief Justiceship, but it was not to be. Roscoe Conkling, then United States Senator, was unfriendly to Mr. Evarts, and evidently determined to prevent his nomination. George H. Williams, Attorney General, and formerly a Senator from Ore-

gon, was the first nominee, but his nomination was received with such an outburst of opposition from all quarters that, notwithstanding senatorial courtesy to a former member of its own body, it could not be confirmed. The public eye was then directed to the several counsel at Geneva, and General Grant selected as his second nominee, Caleb Cushing, whose name has gone down to history as one of the most conspicuous and able lawyers of his time, but his record upon the question of slavery was such that it soon became apparent that he would not be acceptable, and his nomination was withdrawn. Mr. Evarts during all this time was undoubtedly the choice of the bar and the public for the Chief Justiceship, and it seemed impossible, with any sense of justice, and with due regard to public sentiment, to deprive him of the appointment. Probably President Grant would have been glad to make it, but Senator Conkling, who had a dominating influence over General Grant, was implacable. Consequently the President nominated Morrison R. Waite, who, although untried in judicial office, and comparatively obscure before his appointment as counsel at Geneva, was confirmed by the Senate, and left an enviable record during his long service as Chief Justice.

One afternoon, in 1886, I was agreeably surprised by a call from Mr. Evarts at my office. I would have gladly waited upon him if he had signified a desire to see me, but his kindliness and consideration were manifested in calling upon me, a humble practitioner, a generation his junior, to discuss the

settlement of the case to which I have referred. I do not know how long he remained, but I do know that it was light when he came, and that when he left we were sitting practically in the dark. I remember that our case required very little discussion, and that he then entered upon a flow of delightfully interesting talk. I have greatly regretted that no memorandum was made of it, but it extended from the Johnson impeachment down through his Attorney Generalship, and then to Geneva, and finally to the Chief Justiceship, in which he referred to an incident in connection with Chief Justice Taney's appointment, growing out of the inadequacy of the salary of the Chief Justice. He said that when Chief Justice Taney's daughters were informed that their father was likely to be nominated and confirmed for that important position, they replied: "Then we shall be obliged to take in washing." And he followed it by an incident in connection with the appointment of Chief Justice Chase on the death of Chief Justice Taney. When the appointment was under consideration and discussion, and it was undecided whether Chief Justice Chase would be named, a considerable number of other names were presented to Mr. Lincoln, and urged with so much persistence as to be a positive annoyance. On one occasion a representative in Congress from Connecticut called upon Mr. Lincoln to urge a particular nomination. They were standing in a room where there was a fine specimen of one of the chairs prevalent in those days, constructed entirely of the horns of Texas steers, and entwined so as to form a

chair. At the very first mention of the subject, Mr. Lincoln exclaimed: "Mr. Blank, do you see that chair made out of those horns?" "Why yes, Mr. President, very beautiful, is it not." "Well," said the President, "do you know that when the subject of the Chief Justiceship is mentioned, I feel as if I had all of those horns in the pit of my stomach."

Upon President Hayes' election, Mr. Evarts, who was the leading counsel before the Electoral Commission, was appointed Secretary of State. The well-known principles of Mrs. Hayes prevented the serving of wine at the social functions. At the first of these someone remarked to Mr. Evarts upon the absence of wine, when Mr. Evarts replied that it was a very successful reception, and that "the water flowed like champagne." He was greatly besieged at this time by applications for appointment to foreign countries as ministers, consuls, etc., and one day, accompanied by a distinguished friend, he entered the elevator of the State Department on his way to his office, and found that it was crowded with individuals who were intent upon securing these appointments. Mr. Evarts turned to his friend and remarked in a whisper loud enough for all to hear, "This is the largest collection for *foreign missions* that we have taken up for some time." Later he accompanied his friend to Mt. Vernon and as they stood gazing off on the Potomac, his friend remarked that it was said of George Washington that, standing on the terrace at Mt. Vernon, he could throw a silver dollar across the Potomac, but that it seemed incredible. "Well, you know," said Mr.

Evarts, "that a dollar used to go further in those days than it does now."

At his home in Windsor he dispensed a generous hospitality to which he once introduced some visitors of distinction, as they sat down to table: "Gentlemen, you can have either milk or champagne; their cost on my farm is exactly the same."

Alas, that his last days should have been accompanied by the gloom of absolute blindness. In this melancholy condition, his closing years were passed in his home on 14th Street until his death at a very advanced age, but he has left a record of remarkable achievements which are preserved in the pages of our national history.

## CHAPTER IX

### CHARLES O'CONOR

Mr. O'Conor's long career and eminence as a lawyer, combined with his personal characteristics and general appearance, made him one of the most interesting figures at the bar.

At the time of which I speak—about 1870—he was as a lawyer pure and simple, pre-eminently the head of the bar of the State of New York, and probably of the United States, with the possible exception of Benjamin R. Curtis of Boston, formerly a Justice of the Supreme Court of the United States. A mere law student like myself could not hope to have any considerable opportunity of close observation of Mr. O'Conor, and, as was natural, the occasions when I saw him were either in court, or as I chanced upon him in his walks on his way up-town. Of course, this great luminary of the law was a sort of demigod to the embryo lawyer. Although his appearance was plain and unpretentious to a degree, there was yet something striking and impressive about him which would arrest the attention of even a casual observer. His finely chiseled and characteristic Irish face, on which was stamped the pale cast of thought, marked in every line by intellectuality; his piercing grey eyes, his firm and determined mouth, the square set chin and jaws, fringed about with short white whiskers, needed but a glance to

mark them as the outward indications of a powerful and dominating personality. His tall, spare figure was generally clad in a not very well-fitting and somewhat ill-cared for suit of black broadcloth, with a rather rusty stove-pipe hat tilted backward on his head. His gait was a little shambling, but his step was firm and vigorous, although not rapid, as he pursued his way up Broadway. His appearance and demeanour were marked by a certain carelessness of his surroundings and of the impression he would make on those he met. I used to like to follow him and mark the make-up of this great leader of the bar, and wonder at the store of learning and mighty thoughts which his brain contained. It was a kind of hero-worship, such as one bestows on a great victor in the arena. As a pedestrian, Mr. O'Conor was renowned. It was by no means uncommon for him to walk the entire distance from his office in Wall Street to his residence at Washington Heights. In fact, on almost any day he might be seen pursuing his way up-town at an easy gait and with measured tread, that made one feel as though he could walk forever.

An eminent lawyer related to me recently how on the return from Albany of the counsel engaged in the famous case of the New York & New Haven Railroad Co. against Schuyler, when the train stopped late at night at the Harlem River, Mr. O'Conor, against the remonstrances of his associates, insisted on leaving the train and walking at some risk of personal danger several miles across the fields to his home. This remonstrance was because of the num-

erous deeds of violence which had occurred in that locality, infested at the time with desperadoes. In fact several burglaries had occurred in houses of his neighbours; but he put all remonstrances aside, remarking that it was true that there were desperadoes and that there had been burglaries, but he was certain that neither desperadoes nor burglars would harm him, as his servants would be sure to warn them against attacking him "because," said he, "my servants actually think I am the devil."

His progress at the bar was slow, and his distinction was a triumph of intellect. He was not by nature, temperament or art a jury lawyer, having none of the personal magnetism to attract juries, or the methods used with them by skillful advocates, and yet it is by no means true that he was not a successful jury lawyer. On the contrary, some of his great triumphs were before juries, but his greatest were appeals to reason before Appellate tribunals.

He had little outward personal charm, although often described as kindly and genial in informal and intimate social intercourse. No one could look upon his fine intellectual face and domelike forehead and fail to be impressed with the stamp of intellectuality. He had, moreover, no graces of oratory; his manner was angular and scholastic, with little gesticulation, generally unsympathetic and unemotional, and his voice was hard and rasping. He was often sarcastic and bitter, but there were vigour and energy, united with a choice diction and compelling reason, which would carry one along irresistibly un-

til no other conclusion than that which he reached seemed possible. His foundations of power were his wonderful logical faculty, and his vast knowledge of the law, from which he illuminated every subject with clearness and accuracy of statement until it seemed as though nothing could be said to gainsay him.

I remember hearing him on two occasions—in the Jumel will case in the Federal Court, and in a commercial case before the General Term of the Supreme Court. In the former he was associated with Mr. James C. Carter. I do not recall the particular question under discussion but that strange figure George, the Count Joannes, a unique and eccentric member of the profession, with a spurious title of nobility and little practice, represented an opposing interest, and my memory has often turned distinctly and clearly to the terrible arraignment of the Count by Mr. Carter for professional misconduct in the pending controversy, lashing him with the tongue of the furies, while Mr. O'Conor sat with grim visage, stern and impassive, but evidently well satisfied with the performance of his junior.

It may have been that it was in the discussion which followed that Mr. O'Conor made a fine presentation of a branch of the law of marital relations which concerned the disposition by married women of property by will. As he recounted the struggles with the barons in England for a change in the law, his countenance, dignified bearing, and clear and expressive language, culminating in the energetic expression, "and rising in a body they

struck their shields with their swords exclaiming with loud voices, '*Nolumus leges Angliæ mutare,*' " presented a scene which made an indelible impression on my mind. The other case was one in which he was opposed by David Dudley Field, and during Mr. Field's argument, he paced up and down the rear of the court, with a sort of restless energy in every movement, as though impatient that his time and that of the court should be wasted in listening to such a baseless argument. At its conclusion he literally rushed into the fray with a combination of ridicule and destructive logic that seemed altogether overpowering.

At the meeting of the Bar in memory of James T. Brady, which I attended, he made a powerful and impressive address, and in the room where he delivered it there has always stood, until removed to the Court House of the Appellate Division, an excellent bust of Mr. O'Conor which was presented to the Court at a memorial meeting held in the same room in his honour.

If the stories of Mr. O'Conor's temper are true, he was undoubtedly gifted with hot blood, manifesting itself in ill-restrained irascibility. His faithful clerk, a factotum of many years' service, could probably have given valuable testimony in this respect, for a member of the bar now living, who was a student in an adjoining office to Mr. O'Conor's, told me how greatly shocked he was to hear Mr. O'Conor's rasping voice heaping malediction on his probably aggravating clerk, which aggravation was due, quite likely, to the irrepressible conflict between the

keen and dull intellect. These ebullitions of temper showed the infirmity of a great mind, whose tireless energy and Irish impetuosity made him, quite naturally, impatient, and sometimes intolerant of the slower and more plodding processes of those who were working with him or for him.

One of his greatest triumphs at the bar, and it was a jury case too, was the Forest divorce case, in which he obtained for the beautiful Mrs. Forest (Catherine Sinclair) after a trial of long duration, a verdict divorcing her. This was long before my time, but the interest and excitement which the trial occasioned, with such opponents as Charles O'Conor on the one side, and on the other John Van Buren, and Ogden Hoffman, are matters of legal history, resulting, when the verdict was rendered, in the escort of the plaintiff and her counsel by an enthusiastic multitude to her hotel. His conduct of this case was masterly and called forth from Mr. Justice Curtis of the Supreme Court of the United States the high encomium that it was the "most remarkable exhibition of professional skill ever witnessed in this country." (Life of B. R. Curtis, Vol. 1, p. 167.) And when it is remembered that this was uttered in full view of the great performances of Webster and Rufus Choate, it was indeed high praise.

As showing the popular interest, Mr. O'Conor's advocacy was so highly applauded that he was not only made the recipient of a banquet, but was presented by sixty members of the bar with a silver pitcher, and by thirty ladies with a silver vase. But

after all, there was a fly in the ointment, because, twenty-five years afterward, Mr. O'Conor was subjected to severe criticism for exacting what was declared to be excessive compensation, his fair client and her friends claiming, most unjustly, that his services were gratuitous. This criticism led Mr. O'Conor to bring the matter to the attention of the Association of the Bar, to the end that his conduct in that connection might be investigated. It was an impressive occasion in the Spring of 1876, when at a meeting of that Association, with Mr. William M. Evarts presiding, this Nestor of the bar presented in a long address, which will be found in the Association Library, his statement of the circumstances connected with his compensation. At his request an investigation was made by a committee of prominent lawyers with the result, as might have been expected, that he was completely exonerated.

It is not often, at the present time, that any one, even the lawyer, has occasion to seek out the briefs of Mr. O'Conor, and few of his oral arguments have been preserved, but his bound volumes of opinions and briefs may be found in the library of the Law Institute, where they were placed under the terms of his will, and excellent examples of his briefs can be seen in the report of the People v. Lemmon, (20 N. Y., 564), and of Manice v. Manice, (43 N. Y., 303).

In the Parish will case, another of his great triumphs, his oral argument before Surrogate Bradford has been preserved in the six volumes containing the record of that trial, copies of which are in

the law libraries, and a copy of which is also in my own. In an important will case in which I was engaged, I found in his cross-examination and his argument on the questions of testamentary capacity and undue influence, a perfect mine of information and suggestion, and they are worthy of careful study.

There will also be found in a volume entitled "Great Speeches by Great Lawyers," a report of his able and exhaustive argument in the case of the brig *General Armstrong,* before the Court of Claims in Washington, which grew out of the seizure of vessels in the early days of the war.

It was a great service which Mr. O'Conor rendered in those troublous times of public corruption when the Tweed ring flourished. At this important juncture Mr. O'Conor placed at the disposal of the public, without compensation, his eminent services in exposing and punishing the rascality of Tweed and his followers, as well as in bringing charges against certain judges resulting in articles of impeachment. In this he co-operated heartily and valuably with Samuel J. Tilden, and those two Democrats waged unrelenting war upon the Tweed ring and drove it from power, and all of its followers into disgrace, some of them into imprisonment and the unworthy judges from their positions.

Mr. William C. Brownell, the eminent literary critic, related to me an experience he had with Mr. O'Conor, when in his early days as a reporter on the *World,* he called on Mr. O'Conor for an interview on matters connected with the Tweed cases. He

was ushered into Mr. O'Conor's presence and modestly stated the object of his visit. Mr. O'Conor made no reply, but, rising from his chair, advanced toward Mr. Brownell slowly, but with such impressive dignity that the latter backed away toward the open door as Mr. O'Conor advanced, until he had passed the threshold, when Mr. O'Conor closed the door without having uttered a word.

He had a kind of grim humour when something occurred to call it forth; but this was rare. An instance of it is related when happening to meet Mr. Ogden Hoffman, he inquired where he was going and the reply was, "to Brother ——'s funeral; are you going?" Mr. O'Conor had not been on friendly terms with the deceased and he responded, "No, I think not. But, on second thought," said he, "I think I will go, for I feel sure that Brother —— would have taken great pleasure in being present at mine."

When attending the Court of Appeals, he responded to an inquiry by a brother lawyer as to the name of the counsel then addressing the Court. "Oh," said he, "that is Daniel Lord, Jr.—he adds Jr. to his name to distinguish him from the Lord Almighty."

An instance is related of his sarcasm in dealing with a witness who, in justification of his conduct, repeated with great frequency during his testimony as to certain of his actions, that "they were under the advice of counsel." In response to a question the witness stated a fact and added, "I did it under the advice of counsel, but after doing it I actually

cried." "Pray," said Mr. O'Conor, "did you also *cry* under the advice of counsel?"

In one of Mr. Tilden's letters, set forth in Mr. Bigelow's biography of Mr. Tilden, an estimate of Mr. O'Conor is given which is entitled to respect by reason of their long and intimate association in public and professional affairs. Mr. Tilden wrote:

"Mr. O'Conor is a man of extensive and accurate learning, and of an acuteness of reason, somewhat excessive even for the higher uses of his profession; of great mental activity; indefatigable, vehement and sarcastic in controversy; remarked at the bar as able rather than wise, and remarkable for a want of tact."

If Mr. Tilden is accurate these characteristics were probably responsible for Mr. O'Conor's failure to attain office in national affairs, for which, however, he was at times seriously considered. They also probably led him in such matters as the organisation of the Association of the Bar, at a time when some such force was of the utmost importance in reforming the judiciary and rebuking unprofessional practices, to withhold, at the time, his support from this union of lawyers; and the call for its formation, signed by almost every lawyer of repute, is conspicuous by the absence of his honoured name.

At the Memorial meeting of the Bar Association, held shortly after Mr. O'Conor's death, in 1884, an admirable address was delivered by Mr. James C. Carter, in which he gives an estimate of Mr. O'Conor, which I prefer to think truer and more trustworthy than that of Mr. Tilden. After allud-

ing to some of Mr. O'Conor's characteristics, which I have mentioned, he said:

"But, nevertheless, I believe it would be the deliberate judgment of those who have enjoyed a close acquaintance with Mr. O'Conor, and who have frequently witnessed his varied powers in their full activity, and have observed the prodigious extent of his acquirements, that he was, all things considered, the profoundest and best equipped lawyer that has ever appeared at this bar, and that he would not suffer in comparison with the greatest lawyers of any nation at any time."

## CHAPTER X

### GEORGE F. COMSTOCK

I FIRST saw Judge Comstock in my student days in the old brownstone court house, which the Supreme Court was occupying at the corner of Chambers and Centre Streets. This was before the completion of the present court house, whose demolition is now so earnestly desired. It was in connection with what was known as the Express Company litigation, in which Judge Comstock and my father were opponents. He had served in the Court of Appeals with great distinction, being its Chief Judge, and occupied a very prominent position at the bar. The matter in hand was a motion before Judge Daniel P. Ingraham for an injunction and a receiver, to prevent a proposed consolidation of certain express companies. I could not, of course, be expected to understand, and much less to appreciate his argument, but I recall his manner and utterance, which conveyed the impression that his views admitted of no difference of opinion, and while delivering an argument he seemed to be expressing the final judgment of the court. The single expression of his which has remained in my mind ever since was his exclamation, "they can't have a receiver," and from the dominating way in which he uttered it, it seemed to me that his assertion could not be disputed. Nevertheless he was not successful in defeating the

motion. I mention the incident to illustrate the impression which Judge Comstock's personality would be likely to create upon a casual observer. A number of years later, a client of mine had two cases pending in the Supreme Court of the United States, in which he desired the services of counsel of the highest ability, and I suggested Judge Comstock. His selection was fully justified, for he prepared for submission to that court two of the ablest and most exhaustive arguments which I have ever read. I remember listening to an account by Mr. Justice Strong of some of the prominent practitioners before the Supreme Court, when he said to me, "but in your own State you have a man who is certainly the equal if not the superior of any of these," and on inquiring as to whom he referred, he replied that his name was Comstock. If I were to be asked to whom of all the lawyers I have met I would give the first place, I think I should say George F. Comstock. He had more well-proportioned and evenly balanced qualities of a great lawyer than anyone I have known.

His retainer in the cases referred to began a close and familiar association with him, which lasted for about ten years. He was not what one would call a companionable man, lacking, to a certain extent, the sympathetic and magnetic quality, and while there was nothing lofty or unapproachable about him, but, on the contrary, great simplicity and graciousness, there was just sufficient reserve and personal dignity to forbid free and familiar fellowship. The impression that he created was one of intellec-

tual power. He used no arts to attract, and I never knew him to repel by an inconsiderate or an ungenerous act. He was kind, courteous and responsive, but not what one would call affable, nor an engaging conversationalist. He was calm, deliberate, well-poised and gave the impression that he lived in a world of his own, removed from the domain of the material to that which was purely intellectual. Upon him more than upon any other lawyer whom I had ever known, with the exception, perhaps, of Mr. O'Conor, was the stamp of intellectuality.

His home was in Syracuse, where he had pursued his legal career until he was elected to the bench. In his earlier days he became associated with B. Davis Noxon, the leading lawyer of Syracuse, whose daughter he subsequently married. Mr. Noxon used to say that if George F. Comstock were asked who was the best lawyer in Syracuse, he would reply, "that it was B. Davis Noxon, unless it was his son-in-law." General Elias W. Leavenworth was their partner, and the firm of Noxon, Leavenworth & Comstock was beyond all comparison the most prominent law firm in that part of the state. One of Judge Comstock's greatest accomplishments in the law was as an equity lawyer, and he once told me that if he possessed any knowledge of equity jurisprudence, it was due to the fact that when he first became a member of the firm of Noxon & Leavenworth he found a large number of equity cases which had received no attention because of the unwillingness of either partner to give them the careful study they required. This forced him to become

a student of equity, and his experience in these cases resulted in giving him his first impulse in obtaining the knowledge he possessed, and I may add that whatever knowledge he did not possess was not worth possessing. I cannot imagine Judge Comstock as being a great jury lawyer, and yet I can readily understand that his impressive personality and the weightiness of his utterances would be well calculated to sway a jury, not because their intellects had grasped, or had yielded assent to his arguments, but because coming from him, what he said must be true. He did not like jury trials. He, in fact said, "I did not take to jury trials very much; as a general thing I had no faith in juries." A certain majestic quality attached to him as one who ruled, and there was an absence of the quality calculated to persuade.

Perhaps this was responsible for his unsuccessful attempt to convince a jury in an interesting and somewhat celebrated case in which his opponent was my father. The action was founded upon fraud and deceit, and Judge Comstock represented the defendant. The case is chiefly remarkable as an instance of prolonged litigation. It was commenced in 1843 before the Supreme Court as it now exists was constituted. My father was retained in it before he went upon the bench in 1851. After serving a term of eight years the case was still undetermined, and he was again retained. The case was tried for the seventh time in April, 1863. It had been heard twice on appeal in the Court of Appeals and on the seventh trial Judge Comstock and my father met for the

fray at the county seat of Wayne County, Lyons. Judge Comstock was certainly at a disadvantage as he was not on his native heath before a Wayne County jury, while my father was at the scene of the greatest number of his forensic contests in jury trials since he began practice in 1826. My father had such a commanding influence over Wayne County juries, that a verdict in his favour was almost a foregone conclusion when there was anything like an even chance, or with the odds slightly against him.

The vicissitudes of the case clearly indicate that the questions of law involved were by no means free from difficulty, and that upon the facts it presented a close question. Being at the time a mere lad, I knew, of course, nothing of the case, but it was in connection with it, as I have since learned, that my father, having returned from Lyons to his residence in Rochester, before the jury had rendered their verdict, sent me to ascertain the result from a member of the bar who had returned upon a later train. He was evidently most anxious, and in giving me his instructions it was with the utmost particularity he impressed upon my youthful mind that I must on no account fail to get clearly whether the verdict was for the plaintiff or for the defendant, and to be certain, he told me, on receiving the information, to ask a second time whether the verdict was certainly for the party named. I carried out his instructions to the letter, and found him waiting for me anxiously, and I recall his dignified manifestation of pleasure as I announced the result. This trial ended the litigation, for although it was again appealed to the

Court of Appeals, where the case was argued by Judge Comstock and my father, that court sustained the verdict of the jury. This was the case of Hubbard against Briggs, (31 N. Y., 518).

He was at his best upon great questions of law which required an intellectual grapple. This is illustrated by some of his great opinions, such as in the cases of Savage v. Burnham, (17 N. Y., 561) and Downing v. Marshall (23 N. Y., 366), both of which involved questions of trusts under testamentary dispositions, and in Wynehamer v. The People (13 N. Y., 378), which involved a question of constitutional law, and in Curtiss v. Leavitt, (15 N. Y., 9), which related to corporate powers under the banking law, and in New York, New Haven & Hartford Railroad Co. v. Schuyler (17 N. Y., 592), involving the power of a court of equity to remove as a cloud upon the title of general stockholders, spurious certificates of stock issued by the officer having apparent authority to do so, and in Bissell v. Michigan Southern & Northern Indiana Railroad Co. (22 N. Y., 258), in which he discussed the doctrine of *ultra vires*. While he was at times forced to dissent from his associates, it is noteworthy that in the only instance of a dissent on his part which was brought before the Supreme Court of the United States for review, that court sustained the views expressed by him in his dissenting opinion and reversed the judgment of the Court of Appeals.

He was never vivacious, never oratorically ornate, never imaginative or fanciful. His product was nothing less than nuggets of pure wisdom; his ap-

peal was to the intellect, and upon the intellectual he created a profound impression. He used to say that the foundation of his legal knowledge was laid during his early practice in the courts of justices of the peace with only one law book at his command from which to draw his legal inspiration—Cowen's Treatise—and that the other source of it was in the performance of his duties as reporter of the Court of Appeals, the results of his labour being embodied in the head notes of the cases reported in the four volumes of Comstock's Reports which are recognised as of the highest order of excellence, and of which the Court of Appeals said: "His work as a reporter has furnished a model which his successors have aimed to imitate, but have never been able to surpass."

He was tall and spare, his movements were somewhat awkward, he rarely used gestures except when he wished to strike a hard blow. His voice was deep and resonant; his articulation distinct and clear; his utterance was somewhat slow and hesitant. His countenance was long and just a trifle drooping, as though over-weighted with intellectual power, and was crowned by a growth of beautiful silvery hair. He only spoke to utter wisdom, and wisdom seemed in him to beget seriousness. His face did not light up and glow with expression, but most of the time it was over-cast with a kind of dreaminess and solemnity, as though he were living in a world of thoughtfulness, but there was nothing gloomy about him; on the contrary, in social life, while never exuberant, effusive, or talkative, his simplicity, sin-

cerity and consideration for others, was singularly attractive.

In the long line of judges who have come and gone since the formation of the Court of Appeals under the constitution of 1846, I do not know of any other judge, who, in so short a time, achieved such distinction, and left such an impress upon the body of the law in this State as Judge Comstock. He was on the bench only about six years, but in that brief time he won an enduring reputation as possessing the mind of a master, with a breadth of knowledge of legal principles equalled by few, and excelled by none. He once said to me jocosely: "You know, Strong, I am an expert on trusts," but in saying it he was merely expressing what was the common opinion in the profession, and any one who has sufficient interest to read the cases of Savage v. Burnham (17 N. Y., 561) and Downing v. Marshall (23 N. Y., 366), both of them imperishable landmarks in the law, will have no doubt whatever that on these subjects he was learned and profound. My father sat with him in the Court of Appeals and I heard him pay the highest tributes to his natural powers and his legal attainments.

In one of the great cases in the Court of Appeals, that of the New York & New Haven & Hartford Railroad Co. v. Schuyler (34 N. Y., 30), in which as a judge of that court he had rendered an able opinion, reported in 17 N. Y., Reports, 561, he was retained as counsel after his retirement from the bench, and in the opinion of the court, his argument was referred to by Judge Selden, in these words:

"But these views do not dispose of the question that has been argued in this case with an elaboration and power seldom equalled in a court of justice."

This is not the place to enter upon an examination of his record as a judge, nor is it necessary to do so, for there may be found in a publication entitled "Great American Lawyers" a just and appreciative account of his opinions in celebrated cases, by Professor Thaddeus D. Kenneson.

In the Constitutional Convention of 1867, Judge Comstock bore a prominent part in formulating changes in our judicial system, which resulted in constituting the Court of Appeals as it now exists, and he is generally regarded as the father of the present system. I think he expected to be nominated by the Democrats as Chief Judge of the Court of Appeals, and this I believe was the general expectation of the bar, but, by reason of circumstances to which I have alluded in connection with Chief Judge Church, he was not nominated and the jurisprudence of this State lost the services of one who would undoubtedly have been a distinguished ornament.

Upon his death the Court of Appeals did honour to his memory in a tribute from which the following is an extract:

"During the period of his service he was associated with such able judges as Denio, Selden, Gardiner, Johnson and Wright, and it is no exaggeration to say that he was the peer of any of them. His opinions are among the ablest to be found in the reports of this State, and for vigour of thought, terse and accurate expression, forcible

reasoning, close logic and beautiful diction they have rarely, if ever, been surpassed among the judicial writers of this country. Many of his opinions have become leading authorities in various branches of the law, and have largely influenced the course of decisions in this and other States. After leaving the bench he again entered upon a large and lucrative professional practice. His services were sought for in many of the most important cases that came before the court during the most of the past thirty years. In his arguments in this court his briefs were elaborated with great learning and care, and the most abstruse and difficult subjects were illuminated by breadth of learning, and a force of persuasive logic, which added to the labour of opposing counsel, but lessened that of the Court. He was fearless and ardent in the advocacy of his cause, and yet always courteous and deferential to the Court. He has gone from the habitations of men, but his work remains behind him, and it is believed that his opinions will influence the jurisprudence of this country and instruct the students of law for generations to come."

I have never heard of any other lawyer in this State, and I do not believe there has ever been any, who, although residing in another part of the State and having no office in New York City, and using no means to identify himself with practice in the city of New York, ever secured such extensive employment in cases of the utmost importance as did Judge Comstock. He continued to reside in Syracuse until his death. When in New York he used the Windsor Hotel, which stood on Fifth Avenue between 46th and 47th Streets, and his consultations were either in the offices of those who retained him or at his hotel. It was his unvarying habit to have a good long sleep

after dinner, and whenever an appointment was sought with him for a consultation in the evening, he would never appoint it before nine o'clock, and I have sometimes knocked at his door at the time named only to arouse him from his sleep, when he would excuse himself to indulge in ablutions from which he would appear absolutely refreshed, with mind clear and strong, and ready for almost any amount of labour. His practice in New York must have been very large, and the extent of his employment was indeed remarkable when it is considered that he had no office and that it was ncessary to seek him at Syracuse, if his services were to be secured. He was counsel in the large will contests, notably in that of Commodore Vanderbilt's will, in which he was retained because of the expressed wish of Commodore Vanderbilt that in case of a contest his services should be secured. He also acted in cases for the city.

He was successful in overturning the cumulative sentence against William M. Tweed. The decision in this case aroused the indignation of Mr. O'Conor, who was connected with it, and led him to indulge publicly in severe and caustic criticism of the Court of Appeals, which, unfortunately for him, met the general disapproval of the bar. Judge Comstock, quite naturally, defended the court from these aspersions, and in a letter published in the newspapers he used the following language:

"I have long known Mr. O'Conor, and have long been accustomed to think of him with all the respect which is due to eminent talents and unsullied purity of character.

His best friends, among whom I wish to be numbered, must deeply regret the step he has taken; most profoundly do I regret it. But I remember that the greatest and best of men sometimes have faults. If Mr. O'Conor has such, they are only spots on the shining orb of the sun. If I might venture a word further, I should say: Alas, with all his admirable qualities, he is despotic and intolerant. Woe to the luckless wight who stands in his way. Woe to the judges who decide against him in a case which he has nursed, and on which he has bestowed his affectionate regard."

He was called upon largely for opinions upon questions of trusts, and if he had removed to New York, he would probably have occupied the foremost place at the bar. I remember feeling greatly complimented on being retained by him in a matter of his own, involving compensation which he had earned in a case in which he represented the city. The fee was considerable, but the matter itself was not difficult, and I was delighted to think that he should have sufficient confidence in me to avail himself of my services. I was certainly diligent in looking after his interests and he was equally diligent in looking after me, for no client of mine, not even a woman client, ever kept me moving with greater activity than did Judge Comstock. It was not because he was grasping or miserly, for there was not an atom of this in his composition, but he wanted his rights, just as any other client, only he was unusually persistent in seeing that his lawyer did not neglect them. It was with the greatest pleasure that in an unusually short time, through

the kindness of the then District Attorney, Mr. Delancey Nicoll, I was able to send Judge Comstock the entire amount he demanded without any deduction for a fee on my own account. No grateful client ever expressed himself more enthusiastically than did this great client of mine.

Judge Comstock was very liberal, and, perhaps, extravagant in his expenditures. He lived in elegant surroundings in Syracuse, and was a generous contributor to worthy objects. Among his contributions was one of $60,000 for the foundation of a school at Manlius, New York, and another $50,000 to Syracuse University. But notwithstanding his remarkable abilities and his large earnings he became, in later years, involved in a series of unsuccessful ventures connected with the salt industries of Syracuse, and these, with family bereavements and decaying power, brought misfortune and sadness to his declining years. *Finis coronat opus* was not true in his case, for his end was a crown of sorrow, but in the long line of jurists who have adorned the jurisprudence of this State, he will always wear a crown of glory.

## CHAPTER XI

### JOHN K. PORTER

My profound respect and deep affection for John K. Porter and my reverence for his memory make it difficult for me to speak of him, except in terms which might be regarded as undue praise by those who did not know him well. Nevertheless there were, I believe, many of his contemporaries who would yield a willing assent to every word. In his case I could not claim to be impartial because I admired him so much that my sentiment would quite likely influence my judgment. At the time my acquaintance with him began he was one of the three great leaders of the bar of New York City. I did not, however, gaze upon him from afar, as in the case of Mr. O'Conor, nor was my acquaintance with him somewhat formal, as in the case of Mr. Evarts, but it developed almost immediately into an intimacy which created a relation akin to that of father and son.

Judge Porter and my father were old acquaintances and cordial friends. When a law student I used to meet him frequently, and the remarkable cordiality and friendliness of this great man in these casual meetings toward such an insignificant beginner as myself aroused my respect and regard. Upon the death of my father it became necessary for me to retain the services of an able and experi-

enced counsellor in a rather important case, and I naturally turned to Judge Porter. I have referred to this incident in the chapter entitled "The Modern Lawyer."

At this time Judge Porter had been in New York City about five years. We were very congenial, and our intercourse was informal and intimate. I think he liked young men, and his encouragement of my visits led me to think that he craved the friendly intercourse of a young man, not a business associate, to whom he could unburden himself, and pour into sympathetic ears reminiscences of his early days. He was never distant or formal, nor was he familiar or patronising; he was never coarse, profane or vulgar; he was just simple, courteous, genial and warm-hearted. There was in his nature what I have always thought of as an oriental richness, manifested in his affectionate disposition, his graciousness, and what I may perhaps characterise as fervor, in his manner as well as in his glowing language and the impressiveness of his utterances. It was a delight to be with him and to listen to him as he poured forth a generous flow of earnest and highly wrought expressions while he dwelt upon days that were past, or commented upon current events. He was broad and catholic in his views; he had powerful likes and dislikes, but upon the latter he rarely dwelt, one of his characteristics being to cover his dislikes with the veil of charity. He was one of the most magnanimous men I ever met; he was never self-seeking; he never sought to lift himself at the expense of another; he never endeavoured to snatch

the wreath from the brow of a rival. He was always ready to sacrifice personal glory that he might afford one of his juniors an opportunity. He rejoiced in the achievement of another, although it might have been at the expense of his own. He was learned, strong and forceful; he recognised the vulnerable point of attack and no one knew better than he how to use the weapons of defense. His oratory was rich and glowing, and it was pervaded by a supreme earnestness, which gave to his utterances the deep impress of personal conviction as to the justice of his cause, and at the conclusion of one of his arguments the impression left on the mind was not so much admiration for his oratory, as such, but that the natural garb in which he had fittingly clothed it was the expression of his deep and sincere convictions. He was so warm-hearted that he lent the best qualities of his mind to the troubles and perplexities of others, and extended a generous sympathy when he expressed his opinion and advice. He endeared himself to every one. I do not see how he could have had an enemy. He was so patient, so considerate, so free from acerbity of temper, so tolerant of the foibles and frailties of others, and exacted so little, when he expended so much. This is indeed high praise, but among the comparatively few remaining who knew him during the ten years between 1873 and 1883, I venture to say that there would not be a dissenting voice.

His birthplace was in Waterford, N. Y., where his father practiced medicine. His father's desire being that his son should follow in his steps, he, in

fact, made a beginning in this direction, but his heart was never in the study of medicine—the whole bent of his mind being toward the law, and, accordingly, much to his father's disappointment, he entered upon its study and found in it a congenial task.

He had the usual experience of a young country practitioner and, although, as he expressed it, his knees trembled beneath him and his tongue clove to the roof of his mouth when he first attempted to address the Court, he very soon became an accomplished speaker and at the early age of twenty-eight was sent to the Constitutional Convention in 1846. He was so effective in his address to the Convention, advocating the proposition that thirty years should be fixed as the age limit under which no one should be elected governor, that it called forth from Charles O'Conor, also a member of the Convention, the tremendously complimentary observation that: "The young gentleman had furnished to the Convention in his own person and capacity the best argument that could be presented in refutation of his views."

During these early days he came into intimate contact with one of the greatest lawyers that this State has ever produced—Nicholas Hill—who, although he died prematurely at the age of 54 years, was the commanding figure among all the lawyers who practiced before the Court of Appeals, so much so that he was popularly known as "the King of the Court of Appeals." Mr. Hill in his early days resided in Saratoga, near which Waterford is situated. He was associated with Judge Esek Cowen, one of

the justices of the Supreme Court, and in collaboration with Judge Cowen he prepared that famous work, that monument of erudition and legal learning: "Cowen & Hill's Notes to Phillips on Evidence." Undoubtedly it was in the preparation of this work that Mr. Hill laid the foundation, broad and deep, of the remarkable learning and powerful analysis which he possessed.

Judge Porter once told me the story of the formation of the famous firm of Hill & Cagger. Mr. Hill was then developing the remarkable powers which gave him such a commanding position at the bar, and was about to remove or had recently removed to Albany to enter upon practice there. Peter Cagger was a little red-haired Irishman of common extraction, known as a very wily and expert politician and as an industrious lawyer of no great attainments, but of excellent common-sense and business sagacity, who had gathered about him a large body of valuable clients. He was very anxious to have Mr. Hill as his partner, but the latter not contemplating with any satisfaction a partnership with such an ordinary personage as little red-headed Peter Cagger declined the proposition with scorn. It so happened, however, that Judge Cowen had a very interesting law library, which had always been at Mr. Hill's command, and had been gathered with great pains by Judge Cowen, containing not only many books, then rare and expensive, but was particularly complete in the legal literature of the time. On Judge Cowen's death, Mr. Hill was very anxious to procure this library, but he lacked the

means of so doing. There was great danger of its sale or dispersion and he endeavored in vain to make some arrangement to obtain it, short of paying cash for it. He was in despair of being unable to do so. In some inexplicable way the knowledge of Mr. Hill's desire was made known to Peter Cagger. He recognised his opportunity. Accordingly he went to Mr. Hill and explained to him, as he had done before, the pecuniary benefits he would derive from a partnership, and followed it up by saying to Mr. Hill that he had heard that he was anxious to procure Judge Cowen's library, and asked him if it were true. Mr. Hill said that it was, and that he regretted his inability to secure it. Mr. Cagger then said, "Now, Mr. Hill, if you will become my partner, I will buy for you as yours Judge Cowen's library." This was too much for Mr. Hill, and the firm of Hill & Cagger was formed. Judge Porter then added that the firm of Hill & Cagger entered upon a career of almost unexampled prosperity. The business became so great that Mr. Hill felt obliged to confine himself to practice in the Appellate tribunals, chiefly the Court of Appeals, and as was quite natural, Mr. Hill, in seeking a junior partner, found no one more to his liking than John K. Porter, and the firm became Hill, Cagger & Porter. For perhaps six or seven years Judge Porter was the jury lawyer of that firm. Before juries he was particularly attractive and successful. The sincerity, the earnestness, the glowing language and fervor of his oratory, to which I have already alluded, was such that before a jury he was almost irresistible. He would clothe

the most commonplace case in a dress that was in such good taste, and so beguiling, that it would seem to be almost an angel of light, and his warnings to the jury against the efforts of his adversary in the same direction were exceedingly impressive. They reminded one of Disraeli's famous expression "that the Whigs had caught the Tories bathing and had walked away with their clothes." I remember hearing him utter one of these warnings, in which he quoted with great force, the lines of Milton: "Whoever knew truth put to the worst in a free and open encounter. For who knows not that Truth is strong next to the Almighty. She needs no policies, no stratagems to make her victorious. These are the shifts that error uses against her power."

Upon Mr. Hill's death, in 1859, Judge Porter naturally succeeded to his place. That he worthily filled it is beyond all question. Two cases alone of the many which he argued would establish beyond dispute his fame as a lawyer. One of these was Delafield v. Parish, (25 N. Y., 9), which was a contest of Mr. Parish's will in which his descendants were represented by Charles O'Conor and the proponents by William M. Evarts. Nothing could more clearly indicate Judge Porter's great attainments and eminence as a lawyer than the fact that he was retained by that master of the law, Charles O'Conor, to act with him as counsel in the Parish will case. Nor was Mr. O'Conor's estimate of the value of his services unwarranted, for of all the masterly productions of that important case the argument of Judge Porter before the Court of Appeals was the chief,

and as a specimen of clear and skillful reasoning, of masterly marshalling of the facts, and impressive presentation of the whole, this argument at the close of the case has been rarely equalled.

Another case in which he displayed great power was that of the Metropolitan Bank v. Van Dyke, (27 N. Y., 400), involving the question of the constitutionality of the Legal Tender Acts. This was a further instance of a great tribute to his efficiency. William Curtis Noyes, then one of the leaders of the bar, was counsel for Mr. Van Dyke, in support of their constitutionality. When the case came to the Court of Appeals Judge Porter was retained to assist Mr. Noyes. It was a pure question of constitutional law; it involved the single proposition whether the government notes, ever since in common use, were a legal tender to discharge a debt. Fortunately, Judge Porter's argument was preserved and if one desires to read a magnificent specimen of close reasoning, clothed in the choicest language, which makes a dry and uninteresting subject glow with life and interest, he should read Judge Porter's argument as given in a volume entitled "Great Speeches by Great Lawyers," edited by William L. Snyder.

His manner before Appellate tribunals was very different from that before juries. There was the same earnestness and sincerity, there was the same rich and glowing language and there was his fervour of spirit, but over the whole was a subdued, deferential manner, persuasive rather than compelling, characterised by absence of address to feeling or sentiment and was an appeal to the intellect alone.

Quite as was to be expected, Judge Porter was soon offered a seat upon the Court of Appeals bench by appointment, to which he was subsequently elected for a full term. His was not the nature of a judge; he could not be trammeled and tied down to a position which another judge of the Court of Appeals described to me as being "like a bear chained to a stake," and his great abilities were sought by a prominent firm with a large business in New York City, which subsequently became known as Porter, Lowrey, Soren & Stone.

It was from 1873 to 1880 that I knew him intimately. After that time the exactions of my practice necessarily left less opportunity to seek his society and, besides this, the lamented death of President Garfield at the hand of Guiteau resulted in Judge Porter being retained on behalf of the government to prosecute the assassin, and he was not much in New York, but the old affection and respect remained. This was in fact the termination of Judge Porter's career. He entered with all the earnestness, energy and industry of his nature into the preparation of this case, and his presentation of it to the jury is a matter of history. The record of the trial discloses the tremendous ordeal through which Judge Porter passed, subjected to all manner of interruptions and insults by the prisoner, and to like interruption by the prisoner's counsel, rendering the trial one of the most disorderly scenes that was ever enacted in a court of justice. For two and one-half months the trial dragged its slow length along and, on January 23, 1882, Judge Porter commenced

his summing up to the jury which occupied three days. I have a copy of his summing up which he presented to me, as he expressed it, "with the cordial regard of his friend—John K. Porter."

I have been looking it over recently, after the lapse of many years, and all through it will be found the interruptions of the prisoner and his counsel, which were well calculated to disconcert counsel, destroy the continuity of his argument and render his address ineffective. But the assassin was convicted. President Garfield's was not the only career cut short nor the only life destroyed by the hand of Guiteau, for Judge Porter retired from the discharge of his duty a broken man, his career ended, consigned to what was in reality a lingering death. No soldier ever more truly sacrificed his life on the altar of his country than did John K. Porter.

I have always preserved in my personal archives a note which Judge Porter sent to me when I was nominated for a judgeship in 1885, and I hope it will not be presumptuous or self-laudatory if I offer it as not only evidence of his friendship, but as a testimonial to the two Judge Strongs, my father and his cousin, to whom I have elsewhere referred:

"Fifth Avenue Hotel
Madison Square, New York,
Oct. 30, 1885.

*My dear Judge Strong:—*

I need not say how delighted I was with your nomination and I much regret that my residence at my Waterford birthplace will deprive me of the pleasure of voting for you 'early and often' as John Van Buren would have

tempted me to say. Your father and kinsman have inscribed upon the roll of eminent jurists names to which I am glad to know you will add new honour

With hearty congratulations,

Your friend,

JOHN K. PORTER."

## CHAPTER XII

### A GREAT FATHER-IN-LAW

The most illuminating instructor I have ever known was Theodore W. Dwight. I believe he is generally recognised as one of the most efficient professors of law that this country has ever seen; I doubt if he has ever been equalled, unless by Mr. Justice Story. He was a father-in-law to more than ten thousand law students, who freely acknowledge his wonderful capacity as an instructor, and a debt of gratitude which they can never repay for the benefit he conferred in educating them in an accurate knowledge and correct appreciation of legal principles, and in a genuine love for their profession. He was allied to the Strong family through his mother, Sophia Woodbridge Strong, and has shed lustre upon it.

I had been reading law for one year in my father's office when I entered the Columbia Law School under Professor Dwight. He was the creator of that law school; his success as an instructor was phenomenal. From the very beginning students flocked to it in large numbers and at the time I entered there were probably 300 students in attendance. It soon came to be recognised as the leading law school of the country. I have always thought that it was an exceedingly unwise and ungracious act on the part of the management of Columbia College under Presi-

dent Seth Low to attempt, during Professor Dwight's lifetime, to revolutionise his system of instruction, which necessarily involved his retirement, and brought disappointment and grief to his declining years. The law school when I entered it was at the height of its renown and usefulness, and Professor Dwight was the whole law school. He gave instruction in every subject in its regular course. At the present time, in the different law schools, the various subjects are treated by separate instructors, but in his time jurisprudence down through common law, chancery, real estate tenures, trusts, testamentary dispositions, and the Code, was expounded by him. He was a master instructor in the whole field of the law. Some of the ablest lawyers of the time were taught by him, and the fruits of his instruction as exemplified by his pupils, will, I believe, compare favourably with those of any later time. The sessions of the school were held in what was formerly a large dwelling house in Lafayette Place. The course covered two years and the students were divided into two classes, junior and senior, and these classes were divided into two sections, involving two daily sessions of two hours each for each class, one in the morning and the other in the afternoon. No other attendance at the law school was required, the students being connected with various law offices in which they rendered service, and in their unoccupied time, or in the evening, prepared their lessons for the succeeding day.

One day in each week we were required to take his lectures from dictation, in which the general prin-

ciples which he had discussed were embodied, with references to some cases. These were carefully treasured by his students, and, to many of them, they served as a useful guide in the early days of their practice. The moot courts were also of interest, but how he managed to preserve a straight face while listening to some of the arguments presented, it was difficult to understand, especially as they were calculated to and did provoke great merriment among the students.

At the conclusion of the two-years' course, an examination was held, which, if successfully sustained, entitled the student to admission to the bar without the usual bar examination, on presentation of his diploma, under the authority of an Act of the legislature of the State to that effect. Soon after the passage of that Act, a student presented himself with the necessary credentials required for admission to the bar, but he was denied admission on the ground of its unconstitutionality. This was followed by an appeal to the Court of Appeals in which Professor Dwight acted as counsel for the applicant. The report of the case (Matter of Cooper 22 N. Y., 67) contains an admirably exhaustive history of the order of attorneys, and the mode of their admission to the bar in England and in the Colony and State of New York and, as a result of Professor Dwight's argument, the Court of Appeals sustained the constitutionality of the act, and from that time forward the students were admitted without examination.

Professor Dwight's personality was sufficient of

itself to attract young men. He was large and dignified, his manner was exceedingly courteous and affable, and he had a particularly frank and open countenance, with a beautiful play of expression indicative of benevolence, sympathy, kindliness and warm-heart, and these were true *indicia* of his real character. There is a portrait of Professor Dwight which was presented to the Association of the Bar and hangs in its library, and while there is lacking somewhat of the beautiful lighting up of his countenance, it at least indicates the traits which I have already mentioned. I doubt, however, whether among the younger members of that Association, the portrait itself is associated with Professor Dwight unless they have had occasion to inquire whom it represents; so transitory is the fame of a truly great man.

His relations with his students were always singularly pleasant. His manner was winning and sympathetic; he was always so accessible; always so ready to enter into their plans and lend them a helping hand that he made every one of them his ardent admirer and friend. Neither in the class room nor anywhere else, even with the most stupid and blundering, was he ever impatient or petulant. He never held them up to ridicule or contempt; he never censured them, and he never did anything which would tend in the slightest degree to mortify them. He had a wonderful faculty of identifying each by name. I was greatly impressed with this within two or three days after our class entered, when I witnessed the perfect command which he seemed to have of the name as connected with the

personality of each student, enabling him in recitation to single out by name the particular student whom he wished to call upon to respond to his question. His whole attitude toward his classes seemed to be that of stimulation and forbearance. Unconsciously each student would be put upon his mettle to acquit himself creditably, and yet Professor Dwight was exceedingly forbearing if his expectations were not realised. Of course, ludicrous incidents would occur when absolutely irrelevant replies were given to his interrogations, and absurd inquiries and comments made upon matters under consideration, creating outbursts of laughter in which, however, he did not join, except that a somewhat amused but rather discouraged expression would steal over his countenance.

I have never met any instructor whose personal character seemed to be impressed on the students more indelibly than was his. There was a very high moral tone to all his instructions; he was a Christian in the highest sense of the term and he was a lover of mankind, as his broad philanthropic interests and associations in various directions would indicate, if I were to specify them. One of his favourite remarks in the course of his lectures on equity jurisprudence was: "No one can be a good equity lawyer unless he himself is a good man." The moral sense was so interwoven in his own mind with a sense of equity, as applied to human affairs, that he could not understand how anyone could administer equity without possessing genuine morality. The result of the profound impression which his

personal character made was one of unbounded respect, and notwithstanding his students were made up of all sorts and conditions of young men, with all the vivacity, exuberance and untamed spirit of youth, I do not recall a single instance in his presence in his class room of anything which was inconsistent with courtesy and decorum. He never had to admonish or call to order even the most listless and thoughtless. If there was anything bordering on frivolity, a kindly expression of pained surprise would be manifest in his countenance, and the whole scene would be transformed. As Phillips Brooks put it once, there seemed to be the "harmonious blending of the knowing and loving powers."

His instruction was based upon legal principles contained in text books, such as Blackstone's Commentaries, Parsons on Contracts, Story's Equity Jurisprudence, Washburn on Real Property, and other works of a similar character. He dealt with principles not with cases. He mapped out the law as an orderly and reasonable system; his endeavour was to inculcate the principles and teach how to apply them.

His instruction was of the most luminous description. In considering some of the subjects we might well have asked, "can these dry bones live?" And the answer would have to be "yes" emphatically. He would take the dry subjects of Siezin, Limitations of Estates, and Trespass, and clothe them with diction and accompany them with illustration which would make them living and real with interest, and capable of mental grasp by the dullest mind.

At the end of it all, when the time for final examination came, and the days of applying his instruction to everyday practice began, one's knowledge would have been classified and arranged in such a way under his instruction, that it seemed to be like separate packages of law papers, each in its proper pigeon-hole, ready for use whenever wanted. Under him the law was not a confusion of things, but a finely systematised and well-arranged body of legal principles. In fact one seemed to have his legal principles in a well arranged tool-chest, enabling one to bring out the right tool, just as a carpenter would go to his tool-box and bring out the right chisel or plane as the occasion required. Shall we ever see his like again?

He rarely referred to cases except by way of illustration. He was in no sense a case lawyer and it was upon this subject, I think, that he differed so radically with the authorities of Columbia College with respect to the introduction of the system of studying law by considering principles as deduced from adjudged cases, otherwise known as the "case system," that led to his retirement. The "case system" was the system of the Harvard Law School. What its effect is upon students under that system, it is impossible for me to say, but he believed, and in this I think he was correct, that it tended to make "case lawyers" instead of lawyers educated in the principles of the law apart from particular cases in which those principles are applied. Certain it is that the greatest lawyers of ancient and modern times are those which have been educated upon sub-

stantially the same system as that adopted by Professor Dwight. There never have been greater lawyers than those of the first half of the last century, and no lawyer who has observed the tendencies of the times with respect to the consideration of legal questions under the "case system," has failed to notice that the bar is made up of a large body of "case lawyers" who never consider a subject on principle but seek to find some parallel case.

He used to describe his method as "Socratic, illustrative and expository"; his instruction was largely by questions to the student followed by an exposition of the particular phase of the matter which was the subject of the question, and then he would quite likely follow it up by some apt illustration taken from legal history or some interesting case. I recall an instance of this when we were studying the subject of equitable conversion which, to the student mind, requires some thought to appreciate its full meaning and importance. For the uninitiated, I may remark that this is a doctrine of equity jurisprudence which, in certain cases where equity requires it, especially in connection with wills, treats personal property as real estate or real estate as personal property to effectuate the intention of the testator. He explained the subject to us in his luminous way and followed it with an illustration which impressed the doctrine indelibly upon our minds. He said that John Scott was the son of a coal dealer of New Castle upon Tyne in England who, after studying law, entered upon the career of a barrister, and that his first step was to get

married without anything to support him except his unaided efforts. He found progress very slow, and picked up a precarious living by appearing in court, principally in cases where there was no opposition, and for which he would receive the customary fee of one guinea. He was, however, studying with zeal to qualify himself for better days to come. It so happened that a brief in the case of Ackroyd v. Smithson was handed to him to give the usual consent to a decree. As the decree was adverse to the parties for whom he was to appear, he examined it somewhat carefully, but the decree seemed to be so well supported by authority that he hesitated to question it. He made up his mind, however, that the doctrine of equitable conversion which, until that time, had not been established, could be applied to the case, with the effect that the decree, adverse to his clients, would be transformed into one in his clients' favour. He therefore suggested to the solicitor who employed him that he should raise the question before Lord Chancellor Thurlow, who was to sign the decree. The solicitor discouraged this but finally, after some persuasion, consented to permit him to raise the point upon the understanding that he should receive no further fee. Accordingly he appeared before Lord Chancellor Thurlow, opposed by an array of prominent counsel, and intimated his desire to argue the question. Lord Thurlow was scarcely willing to listen to a reargument upon the subject as the matter seemed to have been so well settled, but finally consented to hear it. It has been said that no one was ever half

so wise as Thurlow looked, but he looked even wiser still as the young barrister proceeded, and the indifference of the opposing counsel began to undergo a decided change. At the conclusion of the argument Lord Thurlow expressed himself as greatly surprised and impressed by the argument, and that, evidently, the subject was one which required reconsideration, and adjourned the case to a later day. John Scott gathered up his brief and as he was passing out, a solicitor of large practice advanced and placing his hand upon his shoulder, remarked: "Young man, your bread and butter is cut for life." And so it was, for not long afterward Lord Thurlow upheld Mr. Scott's argument, and established the doctrine of equitable conversion on a foundation from which it has never been shaken. Of course, a flood of business followed Mr. Scott and it was not many years before he became Solicitor General and "Sir John Scott," followed by his appointment as Attorney-General, and later still his appointment as Lord Chancellor, under the title of Lord Eldon, in which high office he administrated equity for over thirty years, laying its foundation broad and deep, and immortalising his name as the greatest equity judge of all time.

I also recall an illustration in connection with the subject of the statute of limitations on the point whether the statute was to be regarded as one of limitations or one of repose, and during his interesting recital of the history of the case of Olcott v. The Tioga R. R. Co. (20 N. Y., 210), he pointed out to us, as a model of profound skill, the brief of Nicholas

Hill published as a part of the report of the case, which every lawyer will do well to peruse.

In his lecture on wills, he illustrated the subject of the probate of lost wills by giving, with gusto, the story of the lost will of Lord St. Leonards, Lord Chancellor of Great Britain who, as Sir Edward Sugden, before his elevation to the woolsack, and as the author of Sugden on Vendors was probably the most celebrated lawyer of his time. Professor Dwight referred to the well known carelessness of lawyers respecting their own affairs, and while carefully preparing the wills of others they neglect their own. He would tell us how Lord St. Leonards, in his declining years, after having his will carefully prepared, carried it about with him, and would often read it to his daughter and discuss its provisions with her. It was seen in his possession shortly before he died, but upon his death no trace of it could be found. The daughter had become so familiar with it that she was able to repeat its provisions, and the court finally allowed the lost will to be proved by her oral testimony.

The strange part of it is that Professor Dwight was even more careless than Lord St. Leonards, because it was only shortly before he died that he gave instructions for the preparation of his will and it was brought to him for execution at a time when he was confined to his bed, having evidently only a short time to live. The witnesses to the will were in attendance and Professor Dwight attempted to execute it and had written "Theodore W. Dwi" and a part of the letter "g" when he fell back and expired.

Of course his partly executed will amounted to nothing, and this great lawyer, who realised the importance of making a testamentary disposition of his property and evidently desired to do so, died intestate.

And yet with all his knowledge of the law, I do not think that Professor Dwight could have ever been a successful practitioner. I do not think that he was largely retained in cases by other lawyers, even among those of his own students. There was a theoretical cast to his mind, and an absence of the practical. He knew the law, he could impart the law to others, but I do not think that he was one who could apply it successfully to everyday affairs, although he was often consulted. Doubtless his duties to the law school prevented frequent appearances in court, but though there were many intervals in which he might have appeared his name appears but rarely in connection with reported cases. All of his students, were, I think, greatly gratified when he was given a seat upon the Commission of Appeals, which was constituted to assist the Court of Appeals in its accumulation of cases. He acquitted himself with great credit and his learning was of decided value to that tribunal. I have referred in another place, in considering the reports of cases, to one of his opinions, at least, in which he differed from his four associates, but was sustained by the Supreme Court of the United States.

# CHAPTER XIII

## LEADERS OF THE BAR

One of the most valuable educational advantages of the young aspirant for forensic honors is the privilege of witnessing the progress of arguments and trials in court. In the earlier days of no law schools and few law books, when men like Lord Mansfield were building up the common law, it was the usually accepted mode of acquiring a legal education to attend diligently the sessions of the courts, and listen to the expositions of the law as they fell from the lips of great judges and lawyers. It is related of Lord Mansfield that, in pronouncing judgment, he often remarked that he would enter into an explanation of the principles which governed the decision for the benefit of the students who were in attendance. I heard a prominent leader of the bar say that one of the greatest advantages he ever possessed was attending as junior upon his senior, one of the most eminent lawyers that has appeared at our bar, in the trial of cases of all sorts and descriptions, and during his arguments before appellate tribunals. This is undoubtedly the most effective method of gaining experience as to how trials should be conducted, and it has the additional advantage that the junior is probably largely responsible for the preparation of the case to be tried. Barristers in the English courts go through this experience, serving a long

apprenticeship as juniors, and by a process of slow growth attain prominence as seniors in the conduct of trials. Few, comparatively, will enjoy the privilege of following a distinguished senior, but this should not prevent the beginner from availing himself of the opportunity of watching, as a spectator in the court room, the progress of trials and arguments. Indeed, it is very important that experience should be acquired by so doing. Knowledge of the methods of conducting trials and of making arguments is, of course, essential. There is no better way of employing the spare time, of which young lawyers, not employed in busy offices, generally have an abundance, than using some of it in frequenting the courts.

The young lawyer may have a mind well stored with legal principles and adjudged cases, and familiarity with the code, and be able to prepare pleadings with skill, but unless he has come in touch with the courts, and is familiar with the various steps in the progress of a trial, and has acquired by observation, at least, some experience as to how to handle a jury and open a case and examine and cross-examine the witnesses and protect the rights of his client by seasonable exceptions, his book-learning will amount to little, and the result will probably be disastrous. By watching the conduct of a case by experienced and able counsel, he will not fail to learn much of very great value. He will observe his method of dealing with a judge in order to create a relation of friendliness, predisposing him to a favourable view of the case; he will notice his demeanour toward

the jurors, which will be courteous without being obsequious, and, while avoiding all familiarity, will lead them to feel complimented by a kind of friendly deference; he will learn much of the proper attitude toward opposing counsel; of methods of calling out favourable testimony from his own witnesess; of the construction of questions; of adroitness and skill in breaking the force of the testimony of an adverse witness by well directed cross examination, and, finally, the skillful grouping of facts, and the inferences to be drawn from them, in the address to the jury. All this will be a veritable object lesson, and when the process has been watched on numerous occasions, the beginner will find himself very much at home in applying to some case of his own the experience which he has thus acquired.

Nor is it necessary, or even desirable, to observe the course of eminent counsel alone, as it is undoubtedly true that the most useful lessons of life are learned from the errors of ourselves and of others. This is equally true of what occurs in the court room. He will see how a want of tact can antagonise the judge from the start, so that instead of predisposing him to give what the counsel would like to have, he will be inclined not to give it unless the law requires it. He will also see how some ill-advised remark, or foolish question, will expose the counsel to the Parthian shaft of ridicule, getting the laugh on him, and putting him in an unfavourable light before the jury, and he will note the clumsy way of putting questions to witnesses so as to discourage the giving of favourable testimony, and the pointless

and prolix cross-examinations which weary the court and jury, and, instead of weakening, probably strengthen the testimony of the witness under cross-examination. In this way he will learn from the skillful trial lawyer what to do, and from the unskillful, what not to do, and as he departs from the court room he will have a vivid impression of truths from experience, which it is not possible to acquire from books. One may doubtless derive a great deal of useful information from books upon the conduct of trials and the art of cross examination, but no one can set forth so pointedly and forcibly useful knowledge in this direction as can be acquired from actual observation in less time than it takes to read it.

The art of arguing a cause before an appellate tribunal is well worth careful study. The fine skill with which an experienced lawyer deals with a jaded appellate tribunal before whom printed records and briefs have been piled to such an extent as to discourage the most industrious judge, and into whose ears have been poured a flood of argument, is an instructive object lesson. The tact with which he will state his case in the briefest compass to put the Court in possession of the facts, the pithy presentation of his legal propositions, recognising the fact that the Court knows something, and that from his brief it can learn a great deal more, his deference and courtesy, and his ability to maintain his position in the face of misapprehension and misunderstanding, and indeed put the Court right from his standpoint and depart the master of the situation, will be something which will call forth admiration.

The observer will have, likewise, an abundant opportunity to witness inefficiency, ridiculous errors of judgment, and ability to try the patience of the most long-suffering court, and mingled with it all will be a feeling of sympathy for the crest-fallen counsel who has given an unfavourable impression of what may have been a perfectly good case, leaving the burden of discovering its merits to an industrious and painstaking court.

In these early days, when spare time afforded me an opportunity of attending the courts as a spectator, there was a large number of unusually able court lawyers, sketches of some of whom I have already given, as well as others of less prominence at the time, a number of whom later reached commanding heights of professional eminence, requiring their inclusion among the great leaders of the bar. Some, alas, disappeared from the scene all too soon, and before their remarkable powers had reached their full fruition. One of these was Francis N. Bangs. He was a product of New York life—the son of a Methodist bishop, but he was not much of a church goer. His devoted mother was very solicitous that he should walk in the ways of a good Methodist. He once told me with considerable glee of the solicitude expressed by his venerable mother: "Dear Francis, I hope you always go to the Methodist church." To which he responded, "Why, my dear mother, you may be very sure that I never go to any other." His reply was somewhat equivocal, but her interpretation of it gave her great comfort. He was an exceedingly interesting personality. His

countenance in repose was not one to attract, and a casual meeting with him did not create an impression of friendliness, which was entirely contrary to his real nature, nor was his manner altogether pleasing. He was apt to be a little careless as to how he treated people, and at times he might have been regarded as inconsiderate and undoubtedly there were occasions when his impatience and quick temper were somewhat trying, but these outward manifestations were mere surface conditions, and in no sense indicated his real nature. He was one of the most warm-hearted and agreeable companions I have ever known. His generosity was unbounded; he had a keen and incisive wit that was constantly scintillating and when anything humorous appealed to him his face would be wreathed in smiles and his enjoyment seemed to transform his personality. This sense of humour has, I think, found its manifestation in its descent to his son, John Kendrick Bangs, who for many years has delighted the public with his humorous productions.

No one who attended it would ever forget a reception given by the Association of the Bar to the Supreme Court of the United States during Mr. Bangs' presidency of the Association. In the course of the evening when the attendance was at its height, Mr. Bangs made a rather informal address, largely, I think, on the spur of the moment, but which for wit and brilliancy I have never heard equalled.

He was rather careless in his dress and deportment, and the brusqueness and abruptness of his manner created an impression that he was rough

and lacking in polish, but it only needed personal intercourse with him to remove this impression entirely, and to reveal the qualities of a gentleman, making intercourse with him a genuine delight.

To me nothing has ever been more interesting than certain occasions when both of us happened to be in the city on a summer day, and at his suggestion we would find ourselves in his light road-wagon behind a team of fleet steppers, speeding along in the late afternoon through Central Park, and thence up the road leading to Highbridge and beyond, having left the cares of professional life behind us, and given ourselves up to the intimacies of friendship. He used to reveal to me much of his early life, of his struggles at the bar, of his successes and failures, and, at times, of his afflictions, of which he had a full share, but generally the humorous element predominated and he was full of witty observations on passing events, and recitals of ludicrous occurrences, which only find their counterpart in the productions of his gifted son. He was one of the worst drivers I have ever known; he was absolutely careless in handling the reins, which generally lay loosely on the horses' backs and, as they had been trained to speed it, I could not help at times remonstrating with him that his driving was at the risk of our necks. He would quietly respond: "Oh, these horses know their way, and know just what to do," and we would go on as before, and then after dinner at one of the road houses we would return in the early evening as we had come and, notwithstanding the risks to which his driving exposed us, the delight of intimate

intercourse with this brilliant man induced me to willingly assume them.

It must be acknowledged that in the court room, he frequently manifested a certain impatience, and sometimes in his relations with his juniors he was apparently lacking in consideration. But these ebullitions were merely passing clouds, and beneath them was the sunshine of a kind heart and a generous disposition. I do not think that he was always conscious at these times of the effect of his manner. I have in mind an occasion when having retained him as counsel in a case of importance, he treated me with a good deal of unnecessary severity and indignity. I was very much provoked, and on leaving the court house and coming into City Hall Square, I resented his treatment, and informed him that I could not endure it and that as I had employed him and not he me, I must request that there be no repetition of it. He at once stopped and putting his arm around me said, "Why, Strong, what have I done, I am sure I must have been out of my mind." I replied, "Why, I don't think that it was you that did anything, it must have been somebody else," and so we laughed it off, and pursued our way to our offices. It was like this always; he was perfectly willing to make amends at any time for anything into which the infirmities of his disposition might lead him. I never knew him to possess but one deep-seated animosity. This he felt toward a member of the bar who was opposed to him in important litigations and whom he believed was guilty of professional misconduct. He did not care how hard an

opponent fought, if he fought honestly; he fought hard himself; he was a formidable antagonist. Senator John C. Spooner once told me that in the course of his experience he had met a good many of the New York lawyers in legal proceedings, but that Francis N. Bangs "tied more grass across his path" to trip him up than any other lawyer he ever met.

When I first knew Francis N. Bangs he was the senior member of the firm of Bangs, Sedgwick & North, but had not reached a position of eminence. His partner, Mr. Sedgwick, afterward became Chief Judge of the Superior Court of the City of New York, and his other partner Mr. Thomas M. North an excellent lawyer, is still living.[1] Mr. Bangs attained eminence by slow process of development, and for ten years before his death, between 1876 and 1886, was one of the two or three most largely employed counsel at our bar, not so much from the business of his own office as because of retainers from a large and extensive clientage among other lawyers. He was very effective in court either before a jury or before an Appellate tribunal; his rough and ready appearance before a jury, his broad sense of humour, his pithy and pointed way of putting things, made the jurors feel at home with him—he seemed like one of them; and, I think, they liked to give him a verdict if they could. Probably many an almost impossible verdict which he obtained was due to the predisposition of the jury to favour him.

[1] Since this was written Mr. North has died, mourned by a large circle of friends.

The judges liked him; they liked his brevity and his conciseness; they got his point without difficulty, and, whether he was arguing a question of evidence during the trial of a jury case, or a question of law in the appellate tribunals, he was simplicity and brevity itself. I never knew him to make a long argument. In his arguments he did not often refer to adjudged cases; he appealed to common sense and the ordinary principles of justice. A remark he once made to me revealed the quality of his mind. "Strong," said he, "no man is fit to practice law that is not able to practice it without law books." In the conduct of a trial he was one of the keenest and most quick-witted men I have ever known; he seemed to see through everything. Nothing could obscure his vision. In the examination and cross-examination of witnesses, I have never seen his superior, and his ability to take a witness whose testimony had been damaged and tattered by cross-examination and straighten him out on redirect examination, stand him up again on his feet and restore his credibility and trustworthiness, was something remarkable, and it called forth the involuntary admiration of even his opponents.

I often saw his methods of work outside of court. Like other successful lawyers he was most industrious and painstaking. He spared neither time nor effort. His fault was, I think, his irregularity in his hours of labour; he would turn night into day, and he knew no fatigue when he was engaged upon an important case. His work being done, he would relax entirely and then go at it as before. He was

not careful in his ways of living. He liked the good things of life; he was generous in his diet, and this, with his irregular habits of work, brought his life to an end at the comparatively early age of fifty-six, just at a time when he stood upon the heights of professional success.

In his office he was one of the quickest men in working that I have ever observed; his facility in expressing himself; his keenness and clearness of perception; his logical faculty; his orderly arrangement of the subject; his rapid processes of thought, were really marvellous. He had a very rapid and accurate stenographer, George C. Appel, who later graduated from stenography and took his seat upon the bench as judge of the Municipal court in Mt. Vernon. He would ring for Appel, who on appearing with his book in one hand and his pencil in the other, was not given an opportunity even to take a seat, but Mr. Bangs would begin rushing off a document, with Appel standing there and writing for dear life. When the document appeared, it was difficult to see how it could be improved.

Although Mr. Bangs was in receipt of a large income, I am sure he was very moderate in his charges. What he would have done in these later days of monster fees, I do not know, but a former partner of his told me that he had occasion to go over some work of Mr. Bangs in a case of reorganisation and that the fee which Mr. Bangs had received was not a flea bite to the fees received at the present time in similar cases.

Mr. Bangs gave me the following account of a fee

which he once received from Selah Chamberlain, a prominent and wealthy citizen of Cleveland. Mr. Chamberlain had about $100,000 on deposit with a firm of bankers and brokers that had failed, and if their estate had been administered through ordinary channels, he would have been a very large loser, as their debts were great. He retained Mr. Bangs, who by his adroitness succeeded in restoring to Mr. Chamberlain his entire $100,000. The work having been completed, Mr. Bangs sent in a bill to Mr. Chamberlain for $7,500.

"One day," Mr. Bangs said, "I was seated in my office when Selah Chamberlain was announced. I supposed he had come to find fault with my bill. He was plain in appearance and plain-spoken as well. Almost the first words he uttered were: 'Bangs, what do you mean by charging me this amount?' 'Why,' said I, 'isn't it right; what have you got to find fault with?' 'Oh, there is nothing right about it, I find fault with the whole thing. You did the work well but you have charged me improperly,' said Mr. Chamberlain. I replied, 'there is my bill; I have done the work; you admit I have done it well and you will have to pay every cent of it.' 'I will never pay that bill,' replied Mr. Chamberlain, 'it is not right and you must change it, and I want you to take your pen and write an amount which I am willing to pay.' 'Well,' I replied, 'if it will satisfy you to have me write an amount that you are willing to pay, I will write it, but I tell you now that I shall not accept less than I have charged.' 'All right' said Chamberlain, 'you take the pen and

see what I have in mind looks like.' As I took up the pen, Mr. Chamberlain said to me, 'I want you to cross out that $7,500 and write $15,000.' "

Mr. Chamberlain did not have a reputation for great generosity and willingness to part with his dollars, and Mr. Bangs almost fell out of his chair, unable to write the $15,000, and so Mr. Chamberlain took the pen, corrected the bill, and drew a check for the amount. Mr. Bangs had then recovered sufficiently to be able to receipt it. I may well say of him:

"Alas! Poor Yorick, I knew him, Horatio; a fellow of infinite jest, of most excellent fancy."

It would have been impossible between 1885 and 1900 to go much into the courts for the trial of equity cases or into the appellate tribunals without being afforded an opportunity of listening to Mr. James C. Carter. I first saw him in the seventies in the Jumel case when he was associated with Charles O'Conor. He was then about forty years of age. Mr. O'Conor had, I think, unbounded confidence in his strong common-sense, his untiring industry and his mastery of the law. While engaged in this case, Mr. Carter broke down entirely under the severe nervous strain, and for several years subsequently he was entirely out of the profession, seeking to restore the physical energy which he had sacrificed in the discharge of his duty to his clients. It seems to me that none but an extraordinary man would have been able to withdraw himself entirely for several years from the profession and, later not

only regain the place which he had abandoned, but achieve far greater distinction on the pinnacle of professional eminence. I did not become acquainted with Mr. Carter until after his illness and never enjoyed association with him in professional matters, nor encountered his formidable opposition.

He had a place of retreat from professional cares and the madding crowd at Good Ground, Long Island, where it was his habit, on those stormy days when the ducks are flying, to locate himself with his gun behind a "blind" and enjoy duck shooting. It so happened that my summers were spent a little further along the South shore, and I had in this way, agreeable personal meetings with Mr. Carter. It was my good fortune, however, to have frequent opportunities of witnessing the display of his powers as an advocate in court, and to observe and listen to him at the meetings of the Association of the Bar which he was accustomed to attend with great regularity.

The impression that Mr. Carter made upon me was of one who, without intellectual brilliancy, gifts of genius or especially attractive social qualities, had, by remarkable force of character, diligent study, unremitting industry and an assiduous cultivation of his natural powers, won his way to eminence in his profession and to the respect of all who knew him. His frame was ponderous, his movements were slow, but not wanting in energy; his countenance was strong and somewhat heavy; his eyes deep-set and overshadowed by beetling brows, and his mouth concealed by a large mustache, but withal, his ex-

pression was pleasing and gracious, he was always approachable and unassuming, and his general demeanour was characterised by great dignity and courtesy.

His manner before the courts was always serious but never aggressive, and everything that he did was characterised by intense earnestness. There was never the slightest humour; there were few light touches; his blows were like those of a sledge hammer. He was always perfectly courteous and considerate and, indeed, deferential in addressing the Court, but his arguments did not seem to be calculated to persuade but rather to compel. I believe it to be true of him that his style was calculated not to lead, but to drive. He was essentially a philosopher. His convictions were the result of long reflection and careful reasoning, and he was generally unwilling to yield them, even in the light of a long line of adjudged cases having the controlling force of precedent. In examining the reported cases in which Mr. Carter was engaged I have sometimes thought that he was almost indifferent to results. He seemed to treat the legal propositions in a case very much as a mathematician would treat a problem in mathematics. He presented his demonstration, and left it with the Court, and he was so unyielding in his convictions that, whether his demonstration, and the result of it, were accepted or rejected was a matter which did not concern him. It has been related, as an instance of this, that after Mr. Carter had argued unsuccessfully the case of Langdon against the Mayor (93 N. Y., 129), a contest between

the city and the owners of riparian rights along West Street on the North River, notwithstanding the adverse decision by the Court of Appeals, he still maintained the correctness of his views and recommended the city to continue the contest as against other owners, although, in view of the decision of the Court of Appeals, the contest was hopeless. He was so firmly convinced of the correctness of the position which he had taken, that he was unwilling to bow to a decision of the court of last resort as a controlling authority.

He was absolutely independent and fearless, and no amount of judge-made law would disturb his confidence in what he believed to be the eternal decrees of justice. His views were expressed with an earnestness and power which were very impressive. His voice was rich and full, and although he was rarely animated, his gestures were free and abundant. He had all the marks of the school of Webster. Mr. Carter was not only a great philosopher but an accomplished orator, and I have often heard the judges speak of the intellectual treat which his arguments afforded, even though they might not command assent.

A few years before his death, Mr. Carter had retired almost entirely from practice but, up to that time, for ten or fifteen years, he was extensively employed as counsel in cases of the greatest magnitude, such as the Income Tax cases and the Behring Sea controversy, and his opinion was constantly sought by the largest financial interests. I doubt whether any lawyer at our bar has ever been em-

ployed more largely in cases of national importance than was Mr. Carter.

I am under the impression that Mr. Carter did not like jury cases, and I do not believe that he could ever have had much success before juries. He lacked the arts of a jury advocate. A jury would admire him and respect him, and listen as he attempted to compel them to adopt his views, but opponents of very moderate ability, entirely unequal to him would, by good humour and adroit presentation of the facts, walk away with a verdict which really ought not to have been rendered.

Mr. Carter was a tremendous influence for good in his profession. He never disregarded the call of public duty in this direction. He had the loftiest standards of professional character and did all he could to impress those standards on his profession. I have no doubt that this led him to sacrifice much of his time, and a great deal of his convenience, to attend the ordinary meetings of the Bar Association, which are so rarely attended by most of the leading members of the bar, but he would be in his place. He was five times honoured with its presidency, which has only occurred in one other instance, that of Mr. Evarts. His first terms were in 1884 and 1885 and the later ones were in 1897 to 1899. He was there to guide and counsel, and he was listened to with universal respect and confidence, and his views always prevailed. He was to be found at the front in every useful movement to elevate the standards of professional conduct and to lead the way to condemn and to reform what was unworthy in the

judiciary. In these matters he took a prominent and influential part.

His characteristics as a philosopher were well displayed in his lectures at Harvard University on the philosophy of the law, as well as in his argument on behalf of the United States before the Behring Sea Commission.

It is well known that President Cleveland seriously entertained the idea of appointing Mr. Carter Chief Justice of the United States. The one serious obstacle to his selection was the doubt whether his physical condition was such as to permit him to discharge the duties of the position. Uncertainty as to this finally led President Cleveland to select Chief Justice Fuller, although subsequent events abundantly proved that Mr. Carter would have been entirely equal to the duties of the office. His intellectual qualities and training were such as to equip him admirably for the Chief Justiceship and he would, I believe, have had a distinguished career in that exalted position.

There are fortunately two very excellent portraits of Mr. Carter, one of which hangs in the reading room of the Association of the Bar, and the other by Sargent in the Harvard Club.

Singularly enough, the poetic and prosaic frequently find a union in men of the law. There surely is nothing in the law itself to call out poetic feeling, and possibly the prosaic quality of the law leads its practitioners to seek relief from its prosiness in the far distant realms of poesy. However

this may be, it is quite true that instances are not wanting of eminent lawyers cultivating the acquaintance of the muses. One distinguished example, at least, may be mentioned, that of Mr. Justice Story of the Supreme Court of the United States, who frequently gave utterance to poetic fancy, and in his early days, if I mistake not, offered a volume of poems to the public.

Poetry and the law also found a most attractive combination in William Allen Butler. His famous poem "Nothing to Wear" has long since become a classic, and his poem "Two Millions," read before the Phi Beta Kappa Society at Yale, which dealt with the subject of social immoralities attendant on the acquisition of wealth, is another note-worthy example of his poetic gift. Most of his poetry however, was of a more private and personal character, produced mainly for the entertainment of his children and friends. He had a beautiful literary gift and his prose productions, to my mind, far out-weigh in merit and in importance the best of his poetry. They struck at various evils in public and social life through satire. The over-reaching spirit of buyer and seller was portrayed in his story of South Street, entitled "General Average." The spirit of gambling, with its illegality and evil consequences, was illustrated in a most entertaining fashion in his little book "Mrs. Limber's Raffle," and the perplexities and embarrassments growing out of the servant question were delightfully displayed in his "Domesticus," while his essay on "Lawyer and Client" brought to the attention of the legal pro-

fession their duties and obligations growing out of professional employment.

Mr. Butler was undoubtedly a very busy lawyer, and my curiosity to know how he could have found time amid the demands of his practice for indulging his literary gift, led me to enquire of him in one of our meetings how he managed to write so much when he was practicing law so diligently. He replied that almost everything was composed when he was attending in court, waiting for his cases to be heard. Almost all his writing was before the days of communication by telephone between the court house and the lawyers' offices, and he was therefore obliged, like all other lawyers at that time, to spend many hours in the court room awaiting his turn to be heard. This time, ordinarily wasted, he employed to advantage in producing the poetry and prose which have proved so attractive to the public at large, and have given him a worthy place among the literary men of his day.

Mr. Butler represented to my mind, more than any other man who has appeared at our bar, a combination of wit, sound sense, and high attainment as a lawyer, with a remarkable development of literary gifts and a broad culture from extensive reading. This, with his innate refinement, his polished manner and his lofty character, made him a notable example of the finest type of the best product of New York life. He was a born and bred New Yorker, the son of a distinguished father, Benjamin F. Butler, a lawyer of great eminence who was Attorney-General in Andrew Jackson's cabinet. His associations

were with the best families of New York and he had every advantage that wealth and position could bestow. Those who desire to have an admirable picture of New York days up to the time of the Civil War, should read Mr. Butler's interesting production published after his death, entitled "Retrospect of the Memories of Forty Years."

At the time that he began practice, his father had retired from public life and was one of the most celebrated practitioners at our bar. Too often these accessories of wealth, high social position and an influential father, instead of being advantages, have proved the contrary, but it was not so in his case. If the possession of these things removed a certain stimulus to exertion, there was that inherent in his own character which furnished an incentive to earnest endeavour. While he had an easy pathway marked out in his father's office, he found in it only an opportunity to develop his powers and for the pursuit of an honourable career.

In the early years of his practice he became associated with Hiram Barney, Collector of the Port of New York under President Lincoln and one of the most proficient lawyers of his time in attracting an important clientage. In my early days at the bar, there were few busier offices than that of Barney, Butler & Parsons, and Mr. Butler was constantly in court trying cases or arguing appeals. The business in which he was engaged was largely commercial. His cases generally were not of public importance, and his practice was not of that conspicuous character in which other distinguished law-

yers were engaged, but he was, nevertheless, prominently known as a man of high character founded on religious principle, and of marked legal attainments entitling him to recognition as one of the distinguished and successful members of the bar. It was undoubtedly due to this that he was elected president of the Association of the Bar.

For several years I came in contact with Mr. Butler frequently, in connection with an important litigation. Feeling undoubtedly ran high between our respective clients and, at times, between certain of the counsel engaged, but it was never so with Mr. Butler. He was always the gentleman. He provoked no controversies, he made allowances for the failings of others, he sought to allay bitterness of feeling and he was remarkably courteous, considerate and magnanimous. Taking him altogether with his fine literary and legal attainments, his symmetrical and well developed character and his beneficial example and influence, I do not think that William Allen Butler had a superior at the bar.

One of the most interesting personalities, justly entitled to rank among the distinguished advocates, was William A. Beach, who, in his later years, relinquished a valuable practice in Troy, New York, to enter the arena of the New York City bar. His position was somewhat peculiar and quite different from that of the men already mentioned. He was engaged in all kinds of spectacular cases, many of them of a character which would not attract the best type of lawyers. They were sensational, and involved

issues which appeal to a not altogether exalted public taste. One of these was the Beecher case in which he appeared for Theodore Tilton in his action against Henry Ward Beecher. Associated with him was Judge William Fullerton, of considerable prominence at the bar and noted as a brilliant cross-examiner, but whose arts as such were entirely lost upon Mr. Beecher. When seemingly involved inextricably and asked by Judge Fullerton: "Now, Mr. Beecher, in view of the facts which you have admitted, what explanation can you make?"—Mr. Beecher, in his inimitably frank and altogether prepossessing way, replied: "Why, of course, I cannot explain these facts otherwise than that I was one of the most foolish men that ever lived, but entirely innocent of any wrong-doing." Of course the cross-examination was fruitless.

Mr. Beach bore the brunt of the long-winded trial, which occupied public attention for about six months, and his conduct of the case, and especially his summing-up to the jury, aroused great admiration for his tact, skill, and commanding ability in conducting, against an array of famous lawyers, the unpopular side of that remarkable litigation.

He seemed to be largely employed in cases of that character, such as the Brinkley divorce case and the case of Gonzales vs. Del Valle, in which his able and witty adversary, in warning the jury against being misled by his arts and eloquence, paid him the doubtful compliment of being "in the whole realm of sexual litigation, without a peer and without a rival." He was certainly at home in this class of

cases. When the impeachment proceedings against Judge Barnard were brought to trial, Mr. Beach acted as his defender. He also defended Edward S. Stokes for slaying James Fisk. Commodore Vanderbilt had a high opinion of Mr. Beach and employed him largely, one celebrated instance being in the litigation between Commodore Vanderbilt and Fisk and Gould, and he was also one of the counsel in sustaining Commodore Vanderbilt's will.

Mr. Beach had an impressive personality. He had one of the coldest, most impassive and sphinx-like countenances that I ever beheld. I never saw his face lighten up with animation. With his cold gray eye, he looked upon one with a grave expression that rarely changed. He was solemnity and dignity personified. He was a fine orator. His periods were slow and measured, his diction was choice and expressive, creating the impression of a strong and forceful character. His gesticulation was deliberate and graceful, and his manner was such that, notwithstanding his dignity and solemnity, there was a magnetic quality which met with a sympathetic response from his audience. His bearing and dress were impressive. There was a gravity about him, a kind of *noli me tangere* characteristic that forbade anything like familiarity. His movements and walk were deliberate and slow, but his step was characterised by firmness and energy. He invariably wore a double-breasted coat tightly buttoned, and there was a sort of military erectness and precision about him which attracted attention and rendered him conspicuous.

I would not be disposed to class Mr. Beach among the profound lawyers, nor among those of the highest type. He was learned and able and was a formidable antagonist, but, in my opinion, he was not entitled to rank among deep students of the law, or profound reasoners on legal subjects.

Probably the most notable achievement of Mr. Beach was before a military commission in Washington when he defended Col. North and several others against the charge of tampering with soldiers' votes. This was essentially a military tribunal. As a civilian appealing to a body of military men on grounds of civil rights, seeking to convince a body of soldiers in a time of war and public excitement that, as a military tribunal, they had no jurisdiction to try a charge ordinarily cognisable by the common law courts, he undertook a task which it would seem to have been impossible to carry out successfully. But this he accomplished. With his comprehensive grasp of the subject, and his powerful presentation of it; his courageous and fearless maintenance of civil rights against usurpations of military power, he succeeded in inducing this commission of soldiers to yield their military power to the arm of the common law. That argument will, I believe, stand forth always as a mighty bulwark against military pretensions in times of war respecting charges cognisable by the common law. This argument may be found in Mr. Snyder's compilation entitled, "Great Speeches by Great Lawyers."

Probably one of the busiest lawyers in New York

was Aaron J. Vanderpoel. He was not a giant of the bar, but he was one of those plain practical, well-read practitioners, of sound mental processes and keen discrimination, with unusual ability to seize upon the vital point of a controversy. His cases were not celebrated and conspicuous, but of the more important of the general run of everyday litigation on almost every conceivable subject. He seemed at home in all. It is said, and I believe correctly, that for thirty years he was engaged in more cases before the courts than any member of the bar. He received an excellent training as a law student under William Curtis Noyes, who had been a student and a partner of my grandfather, Wheeler Barnes. The early years of his practice were passed in Kinderhook, until he became a member of the firm of Brown, Hall & Vanderpoel, which had a large business as counsel to the sheriff and the various municipal officials and boards. One of his partners was A. Oakey Hall, for a considerable time District Attorney, and later the Tweed Mayor of New York, who finally was indicted and brought to trial, but succeeded in escaping conviction. Throughout the trying experiences to which Mr. Hall was subjected, Mr. Vanderpoel was a true and loyal friend.

In one of my early cases I had Mr. Vanderpoel as an opponent. It was a simple action for a real estate broker's commissions, and the jury very kindly gave me a verdict. The case was appealed to the General Term where the judgment was affirmed, and then to the Court of Appeals. I mention the circumstance as an illustration of how an experienced

lawyer may, in the press of his professional employment, lose sight of the vital point of a controversy. An inexperienced practitioner like myself might possibly be excused for failing to notice a nice but not very obvious point which, to a lawyer of long experience, would be apparent, as it was to me when brought to my attention. I was at a loss to understand how it had escaped me, to say nothing of Mr. Vanderpoel with his superior knowledge and experience. At all events, it did escape us both until it was too late. Mr. Vanderpoel and I met in Albany to argue the case before the Court of Appeals. Our case was not called the first day and we were obliged to remain over night. Evidently Mr. Vanderpoel had occupied his time in giving the case more careful study than it had ever received from him, and what was my surprise the following day to have him present to me printed copies of his brief developing this vital point, which, if it had been raised upon the trial, would have been fatal, unless I could have met it by proving facts disposing of it. He was very gleeful over his new found point—admitting he had not thought of it until the preceding afternoon, and in the interval had prepared and had printed a new brief. I saw at once that if the Court should entertain the point upon the record as presented, it was all up with me. But notwithstanding an able and persuasive argument from Mr. Vanderpoel, well calculated to induce the Court to consider the point, I took refuge in the position that the record failed to show that the point had been raised at the trial or at the General Term, and that there was no objection or

exception in the case intended to raise it, and that it could not be raised for the first time in the Court of Appeals. The Court, fortunately for me, agreed with me, and thus the strongest point which could have been presented against us, having passed unnoticed until it was too late, was of no avail. This was the case of Duryee against Lester (75 N. Y., 442).

In the catalogue of lawyers it is difficult to draw the line where the distinguished members of the bar end, for memory sums up many well remembered figures who occupied a large place and left their impress upon the bar.

There was Mr. Stephen P. Nash, substantial and solid, learned in the law, plain and unostentatious, typical of all that was high toned and honourable, and who for many years was one of the most largely retained counsellors. He was not at his best before a jury, but in an equity case or an argument before an appellate tribunal he displayed unusual ability and earned well-deserved success.

There was the brilliant and witty Frederick R. Coudert, with all the vivacity, courtesy and alertness of the genuine Frenchman, combined, however, with the strong and forceful qualities of the Anglo-Saxon. There was no more attractive personality at the bar than he. His arguments, as well as his informal addresses, were saturated with wit and expressive phrases, and to listen to him was to be charmed. The distinction which he achieved was not among the ranks of the counsel largely employed by other law-

yers, but in a vast volume of business of an international character, which grew out of his foreign and particularly his French connections, and which enabled him to render conspicuous service before the Behring Sea Commission. The eminence he secured was of slow growth, earned by diligent and painstaking effort and by the cultivation of those qualities which characterise what is the highest and best at the bar. My first opportunity of observing Mr. Coudert was in a case in which my father had been appointed referee to hear and determine, and in which Mr. Coudert was engaged as counsel. The prominent feature of Mr. Coudert, which has remained in my mind ever since, confirmed in my later intercourse with him, was his unfailing courtesy, in which he made no discrimination between individuals, and was as punctilious in politeness toward the humble amanuensis as to the learned referee. He was indeed the able lawyer and polished gentleman.

One of the strongest and most rugged men of eminence at the bar was Wheeler H. Peckham. He was a son of Judge Rufus W. Peckham of the Court of Appeals and a brother of Mr. Justice Rufus W. Peckham also of the Court of Appeals and subsequently of the Supreme Court of the United States. He rendered conspicuous service early in his career in connection with the litigations instituted on behalf of the city against William M. Tweed, and he could always be found at the forefront of every movement to reform public abuses and to elevate professional life. His courage was undaunted and his energy

was tireless. He was one of the most loyal and true-hearted men whom I have ever known. He came very near occupying a seat on the bench of the Supreme Court of the United States, having been nominated for that high office by President Cleveland to fill the vacancy occasioned by the death of Mr. Justice Blatchford. But this well-deserved recognition by Mr. Cleveland was not to be consummated by confirmation by the United States Senate. He had fought many battles in public life. He had aroused many antagonisms among the baser element of the Democratic party. His nomination met with opposition from David B. Hill, then a Senator from New York, and it could not be confirmed. That which he should have received was bestowed upon his brother, Rufus W. Peckham, to whom Senator Hill had no objection.

There are doubtless other lawyers of distinction without whom any list of distinguished members of the bar would be incomplete. Some of them could be found among the patent and admiralty lawyers, but to these I do not refer, there being wanting that element of personal intercourse, more or less intimate, which alone entitles me to speak.

## CHAPTER XIV

### WILLIAM F. HOWE

Recollections of the bar of New York City within the past forty years would be entirely incomplete without remembering William F. Howe. No one travelling down Centre Street toward the City Hall could fail to observe at the southwest corner of Centre and Leonard Streets, just across the street from the Tombs, the conspicuous sign bearing in bold letters the name of Howe & Hummel. It was like a big mercantile sign, and there was not only that, but the name was repeated on windows, and the individual name "William F. Howe" also stood forth prominently. It was one of the features of the locality, and one of the curiosities of the bar. The offices of the firm were in marked contrast with other law offices, being on the ground floor, and entered directly from the street. If one desires an excellent description of these offices in the heyday of the flourishing practice of that firm, it will be found in the interesting novel of Mr. Arthur C. Train, entitled "Confessions of Artemas Quibble." Situated in that locality with the attention that the signs attracted, it was evident that the firm of Howe & Hummel catered to the criminal classes and offered to them the ægis of its protection. It was, undoubtedly, the most conspicuous and, I may add, the most noted, firm of lawyers at the criminal bar. Howe & Hum-

mel were individually the antipodes of each other. Howe was of immense proportions, although of moderate height, while Hummel was correspondingly diminutive, and very short in stature. They presented a striking contrast, and when they appeared in each other's company their disparity in appearance was so marked as to attract universal attention. Hummel had entered Mr. Howe's service as a clerk. Alert and acute, he made himself invaluable to Mr. Howe, and became his partner. In addition to Mr. Howe's large criminal practice they had a very extensive civil practice, which, however, partook in many of its features of the criminal element, being cases of divorce, assault and battery, slander and torts. The name of the firm was constantly before the public in sensational cases, and consequently attained great prominence, and yet I think it may be fairly said that the firm would not have been classed among those of the highest character and standing. So far as Mr. Howe was concerned, there was never attached to him any disrepute, although undoubtedly, dealing as he did with his special line of cases, he was accustomed to take advantage of every technicality, and may, at times, have been thought to run close to the border line, beyond which a not very high standard of professional ethics would permit him to go.

Judge Van Brunt once related of him an incident which illustrated this phase of Mr. Howe's character. "Mr. Howe," he said, "was the soul of honour, if you put him upon his honour; but the moment you lost sight of this element and treated him upon the

basis of a keen-witted lawyer, at liberty to take advantage of every technicality which the law afforded, he was quite a different individual. He appeared before me frequently and I always put him upon his honour, and I never knew him to deceive me. On one occasion Mr. Howe made a statement, the veracity of which was questioned by his adversary. Mr. Howe asserted that his statement was perfectly true and added that if I doubted it he would put the statement in the form of an affidavit. I replied, 'Oh, no, Mr. Howe, you need not do that. I would rather have your word of honour than your affidavit,' and knowing him as I did, my reason for making this reply was that in his affidavit he would feel at liberty to take every sort of advantage, and therefore it would not be so reliable as his statement on honour." Upon the basis of a practitioner, he would feel at liberty to take advantages which as a man of honour he would not use. His reputation for never deceiving the court, whatever he might do with his adversary in ordinary legal procedure, was well deserved.

Mr. Howe's birthplace was near Boston, and he was the son of a minister, the Rev. Samuel Howe. But he evidently inherited to a small extent the religious proclivities of his father. His early life was spent, and his education secured in England, and his first choice was the medical profession. For some reason, which I am unable to explain, it was impossible to induce him to dwell on the experiences of his early years. It is probable, however, that he never engaged in practice as a physician, but his medical training served him in good stead in subse-

quent years in cases which involved medical knowledge, and the cross-examination of medical experts, in which he was most successful. Upon his return to the land of his birth he studied law, and when about thirty years of age, was admitted to practice. He always claimed that he should have been a tragedian. He had dramatic fire and intensity. He was a great lover of Shakespeare, and was wont to say that he had read him certainly a thousand times, and he could repeat from memory page after page of his plays. He was also a student of the Bible and cultivated it not only for the stores of wisdom which it furnished, but on account of its pure and beautiful diction. He was a man of culture, and had artistic tastes which found expression in surrounding himself with works of art. While he was a *bon vivant,* and frequented the race track considerably, yet he was a man of strong domestic ties. His habits were not open to criticism, and his home life was unexceptionable.

His appearance was most striking, and in the court room he was the observed of all observers. He was about five feet seven inches in height, and weighed between 250 and 300 pounds. He had a round, florid countenance, indicative of high living, with big blue eyes, a broad, strong jaw, and a firm and determined expression of countenance which marked him as a dominant and forceful personality. His abundant hair, streaked with grey, was always carefully brushed, and his general appearance was that of a man well-groomed. He was not intellectual in his appearance, but rather earthy and sensual, although

he could not have pursued his practice as he did, industriously and successfully, if he had to any considerable extent been such in fact.

His dress was of the most unprofessional and gaudy character. His large, rotund form was clad in garments of the loudest description. His aim in dress, apparently, was to be novel and conspicuous. In the course of a trial his change of garments was a marked feature. Every day witnessed a new and striking effect. His personality was always largely in evidence, and the change of garments was for the purpose, as it seemed, of attracting notice and arousing interest. On the street he wore a cap very much resembling the yachting caps of the present day, and in cold weather he was clad in a heavy seal-skin lined overcoat, which in the court room was loosely thrown back displaying an immense front. He was especially fond of wearing big checked trousers, a figured vest of velvet, or similar material, a highly coloured and variegated tie, an enormous watch, to which there was attached a heavy gold chain of large links, and in his shirt front was a diamond pin of considerable size, while his hands were covered with diamond rings. He was literally a show to behold. It is related of him that while travelling up town in a street car after a hard day's work he fell into a doze, and two light-fingered gentry being aboard, one of them took advantage of the favourable opportunity to relieve Mr. Howe of the diamond ornament in his shirt bosom. The second pickpocket, seeing what had been done but, of course, unable to remonstrate at the time without detection, said to his com-

panion when he could safely do so: "You *fool,* why did you do that, don't you know that that is William F. Howe and that to-morrow morning you will be calling on him to defend you?" Taking the ornament from him he waited until Mr. Howe alighted, and approaching him said: "There was an ignorant young man aboard that car who took this from you while you were sleeping, and he has requested me to hand it back to you." No one has ever been seen at the bar like Mr. Howe. In his accoutrements he looked like a prosperous saloon-keeper or a successful gambler, but he was neither of these, and was, in fact, the able, devoted, and successful advocate.

His devotion to his clients was intense. He was completely absorbed in the cases in which he was engaged. He spared no pains. He could not have displayed greater earnestness or zeal if his own life had depended on the result. His cases were with him an obsession. They seemed to be never absent from his mind, and during the night hours with his sub-conscious mind at work, he would awake with some valuable thought which no amount of fatigue ever induced him to neglect. He would rise from his bed and make a note of it. This experience would sometimes be repeated frequently during the night, and the following day he would take from his pocket these notes, and with his assistant arrange them for use.

Before the day of allowances of $500 to counsel for defending homicide cases, and a copy of the stenographer's notes of the testimony for use on appeal, there were a number of instances in which Mr. Howe

not only contributed his services in defense of a person whom he believed to be innocent, but, where an appeal was necessary, he also paid from his own pocket the bill of the stenographer for furnishing a transcript of the testimony. He had a powerful and resonant voice, a remarkably vivid imagination, and was picturesque and powerful in a narration of facts. His imagination enabled him to introduce probable facts and circumstances, clothing the case in a garb so attractive that it exerted a tremendous influence upon the average juror. In addition to this, he was an adept in all the by-play of a trial, and his concluding address to the jury was characterised by dramatic power and tragic interest, which, with his natural aptitude for acting a part, was calculated to create a powerful impression. In one case, in particular, in which he was defending an individual charged with a serious crime against a girl, he was so overwrought by his own feelings that he fell upon his knees before the jury, and addressed them in terms of surpassing power, resulting in the acquittal of the prisoner. His influence with a jury was very great, and many a juror who, as a spectator, had witnessed the progress of a trial wondering how the jury could be so influenced, found himself later on in the jury box, completely under his sway. While he was naturally hot-tempered and impetuous, yet in the trial of a case he was always polite and affable, which also characterised him in his relations with his office-associates and employees, as well as in his intercourse with members of the bar, and, added to this, he was shrewd and cunning, and on the alert to

take advantage of everything that transpired to his advantage.

In his early days, soon after the beginning of the Civil War, he was largely employed in cases of *habeas corpus* for the discharge from the army of individuals who had enlisted while under the influence of liquor, and this large number of cases earned for him the title "Habeas Corpus Howe." His ability, earnestness and zeal resulted in his employment in criminal matters of large interest, until at the conclusion of his career he was able to say that he had defended over a thousand murder cases, and his chief assistant for over twenty-five years informed me that he had been engaged with him in over six hundred of them. Judge Noah Davis characterised him as the Nestor of the bar, taking rank with the greatest criminal lawyers of our time, and as employed in more cases than all of them together.

It is also related that Recorder Smythe, who presided so long in one of our criminal courts, spoke of him as the foremost and most successful defender of criminals in his generation. It was said of him at the time of his death that he found flaws in a score of carefully drawn laws, battering down enactments which seemed impregnable, and stood side by side with James T. Brady, Daniel Dougherty and John Graham at the head of the criminal bar. That he was learned and accomplished in the criminal law is evident from the fact that in 1882 with Daniel G. Rollins, assistant district attorney, and later, district attorney, deeply versed in the criminal law, they compiled a codification of the laws relating to crimes,

which was adopted by the legislature and embodied in the Penal Code.

If the reminiscences of William F. Howe had been written, a thrilling record would have been made of his successful defences in murder cases alone. We have an illustration of varied practice and remarkable cases in the interesting volumes produced by Montagu Williams, Henry Hawkins (Lord Brampton) and Sergeant Ballantyne, leaders of the criminal bar in England, but none of them probably embrace such an extensive experience in homicide cases as that of William F. Howe. There was published, when he was at the height of his career, a pamphlet containing a list of the prominent cases in which he had been engaged, in number far exceeding that of which any other member of the criminal bar could boast. His retainer in this vast number of cases, I am assured by his assistant of over twenty-five years, was in no way due to any other influence except that which his commanding ability exerted. He had no occasion to seek business, for it sought him. His office was thronged, and it was not rare that a dozen carriages of the wealthier class were gathered in the street in front of his office, whose owners, involved in the meshes of the criminal law or in matrimonial complications, were seeking his valuable assistance. I am assured by his associate that in the various cases in which he was engaged, he could never be induced to defend unless the defence was founded upon circumstances which the common-sense of an average jury would be likely to approve. If no such defence could be found, he would do what he could to induce

the District Attorney to accept a plea of guilt in as small a degree as possible, and with that his client had to rest content. This, I am confident, was the secret of his remarkable success. There were, in fact, cases of indictments for murder in the first degree where there was a doubtful defence, in which to save the prisoner's life he advised entering a plea of murder in the second degree, but when rejected by the District Attorney, and being forced into a defence he obtained an absolute acquittal.

Such was his famous defence in the case of Ella Nelson, who was indicted for having shot the man who played her false. It seemed to be a clear case. She had fired the fatal shot and her motive was revenge. The District Attorney thought that conviction was certain and he refused to permit her to plead guilty to murder in the second degree. Mr. Howe had little on which to base his defence except the dreadful wrong which she had suffered; the overpowering impulse which led her to the act, and the overwrought feeling of a broken heart. During his address to the jury the prisoner was seated next to him, heavily veiled, her head bowed in her hands in uncontrollable grief. In the midst of his impassioned appeal, he wheeled around, seized her hands, drew them apart, and held her arms so extended that her features were exposed to the jury, exclaiming: "Look on those features proclaiming a broken heart." His sudden action frightened her, and her face of ashy hue, deluged with tears, produced the desired effect, and a sympathetic jury, overcome with emotion, acquitted her.

This was also true in the case of Considine, who was indicted for murder in the first degree, for shooting an individual with whom he had accidentally come into collision on Broadway during a snow-storm. It appeared from the facts of the case that Considine, in the heavy snow-storm of a winter's day, while passing along Broadway in front of the New York Hospital, collided with a stranger who was carrying a cane. A quarrel ensued. Considine asserted that the stranger became enraged, attempted to strike him with his cane, and that in self-defence he had drawn his pistol and shot him. Mr. Howe's assistant in the preparation of the defence called Considine's attention to the fact that it was a heavy snow-storm; that it would be difficult to get a jury to believe that the stranger was carrying a cane, and that he was quite likely mistaken in supposing that it was a cane in a snow-storm, instead of an umbrella; but Considine was not to be moved by this suggestion, and confidently and earnestly asserted that it was a cane. Mr. Howe's assistant had exhausted every means in his power to obtain the cane, or ascertain whether the deceased owned one. He had his effects searched and followed up every possible clue, but without success. An offer was made to the District Attorney to enter a plea of murder in the second degree, but the offer was rejected. A conviction seemed certain, until at almost the close of the testimony Mr. Howe, addressing the Court stated that the prisoner's fate seemed to hang upon the production of the cane, and appealed to the Court in the interest of justice, and of the protection of

human life, that if the deceased had a cane it should be produced, or its non-production accounted for by the District Attorney, and called upon him to produce it. Of course, Mr. Howe had no suspicion that the District Attorney had any knowledge respecting the cane, and his appeal to the Court was an "arrow shot at a venture," but how great was his astonishment when the District Attorney arose and replied: "We will have the cane in court to-morrow morning." On the following morning the cane was produced. It had a curved handle at the end of which was a heavy piece of metal. The cane was handed to Mr. Howe, and the District Attorney had seated himself. Seizing it, Mr. Howe raised it, and with tremendous force, brought it down with a crash upon the table, making a deep dent. The startled District Attorney rose to his feet in fright, when Mr. Howe bowing most politely said: "I beg your pardon, Mr. District Attorney, I am not surprised at your fright on hearing that blow, and you are now in a position to realise what Considine's fright must have been when he saw that cane raised to strike such a blow as I have struck; and would not you, Mr. District Attorney, if you had been in Considine's place, with a revolver at hand, shoot your assailant, just as Considine did?" This exciting scene, in the presence of the jury, was such a dramatic presentation of the prisoner's defence that even though they might not have felt that the prisoner had proved his innocence, yet they doubtless felt that his guilt was not established beyond a reasonable doubt, and he was, therefore, acquitted.

He defended Unger, whose guilt seemed unquestionable, he having slain his room-mate and followed it by cutting up his body and throwing it into the river. Unger had a little daughter who was present during the entire trial, and sat upon his knee, and fondled him in childish innocence, with little realisation of her surroundings and of the tragic fate which awaited her father. It was nothing but Howe's intensity and power as an actor, playing upon the sympathies of the jury through the medium of the little girl, that saved Unger's life. The fabric of his defence, dissociated from the surroundings of a murder trial, as well as from the impression created by the actor himself, may seem rather flimsy, and his impassioned appeal to the jury almost frivolous in its sentimentality. His defence was that Unger had killed his companion in the heat of a quarrel, and without premeditation, but the District Attorney met this by proof of his subsequent disposal of the body, as indicating a murderous intent. Upon this feature of the case, Mr. Howe apparently swept every vestige of hope for the prisoner aside by boldly admitting that the body had been cut up and thrown into the river, at the same time proclaiming in his most impassioned and dramatic tone that it was not Unger who cut up the body and threw it into the river, but that the thought of his daughter had moved him to it, in the hope of concealing what he had done, and avert from her the stigma of having a murderer for a father. "Look at that little girl," he exclaimed, "It was she who cut off that head; it was she who mutilated the body,

yes, 'twas she, 'twas she. For Unger could not bear the thought of having it said that it was her father who did the awful deed, and therefore, when it occurred to him to hide it by mutilating the body, it was his little girl that moved him to do it, and I therefore say it was *she* who did it."

When we consider his plea under the influence of a sober and impartial judgment, it almost partakes of the absurd, but lawyers, at least, are not strangers to the influence which absurd pleas exert upon the untutored intellects of that boasted bulwark of our liberties, the average jury. Consequently, Unger was only convicted of manslaughter.

Sometimes one of his successful defences would even surprise the prisoner, very much as the Irishman on being tried, was surprised with a verdict of "not guilty"; and being asked how it happened replied, "Sure, how can I tell you? I thought I was guilty until I was tried." This was true in the case of Policeman Hahn, who was tried for the murder of Jack Hussy, known as the "life-saver of Castle Garden," and when he was unexpectedly acquitted, his surprise and astonishment knew no bounds.

It is not easy to explain the source of Howe's power over juries. There was surely nothing in his personality or general appearance to attract, while there was much to repel. He resembled in no respect the typical lawyer, but he possessed that indefinable quality which made him a master of men, one whom, notwithstanding eccentricity of dress, and absence of outward indications of refinement and intellectual power, men in the jury box instinctively

followed. He was a man of the people; he thought on a level with the average jury, he knew what would be likely to appeal to them, and therefore his appeals were not in vain.

Howe has no counterpart at the bar to-day, and I have never heard or read of any lawyer who was such a remarkable combination of eccentricity of dress and adornment, of dramatic power as an actor, of tremendous force, remarkable shrewdness and cunning, and commanding ability in defending criminals. Although at the present day his methods might prove to be out of place, there can be no question that for thirty years he was one of the most interesting and successful figures at the bar.

## CHAPTER XV

### SOME LEGAL LIGHTS OF NEW JERSEY

A PROTRACTED litigation in the United States Circuit Court for the District of New Jersey, which covered a period of about ten years, involving three trials before juries, one motion for a new trial which was hotly contested but finally granted, and two appeals to the Supreme Court of the United States, brought me in contact with distinguished judges and lawyers in the State of New Jersey, and will serve as a thread upon which to hang some recollections of men well worth remembering. The case was one of no especial interest in itself, only involving an issue as to the breach of what is known as the "intemperance" clause in a policy of life insurance, which provided that if the insured, after the issuance of the policy, became "so far intemperate as to impair his health, or induce delirium tremens" the policy should be void. The proceedings in the case were mostly in Trenton.

The first trial was the only instance in my experience where two judges presided in a civil action during a jury trial. One of these was Judge William McKennan of Pennsylvania, United States Circuit Court Judge, whose circuit included the State of New Jersey; the other was Judge John T. Nixon, United States District Judge for the district of New Jersey. Both were venerable men of long judicial

experience. Judge McKennan had been appointed Circuit Judge in preference to Joseph P. Bradley, then the most eminent lawyer in the State of New Jersey and afterwards appointed by President Grant to a seat in the Supreme Court of the United States. Judge McKennan was tall and very portly. Owing to advancing years and a bulky physique, he moved slowly and ponderously, and after he had taken his seat appeared to be sluggish and inert, but his intellect was very bright and keen. His countenance lacked expression, but was characterised by thoughtfulness and force, and his general bearing was that of great dignity. While his intellectual processes were not rapid, his conclusions, when reached, displayed common-sense and fairness, as well as decision of character. He bore, of course, the chief part in the conduct of the trial, while Judge Nixon, except when he was called upon to advise, appeared to be little more than a spectator.

Judge McKennan was in striking contrast to Judge Nixon in almost every particular, in none more so than in Judge Nixon's well-groomed appearance and neat and well cared for apparel, which in Judge McKennan's case was rather the reverse. Judge Nixon's smooth, intellectual face was set off by a very fine head of silvery white hair, and he gave every indication of a polished well-bred gentleman. There was lacking, however, in his countenance, an expression indicating force of character, as well as intellectual power, and I do not think that as a forceful personality, or as a well-equipped lawyer, he was the equal of Judge McKennan. The latter mani-

fested great patience, forbearance and self-control, while the former was disposed, I think, to be somewhat petulant, critical and impulsive, but they were both good men and true, and they manifested every disposition to hold the scales of justice perfectly even. When objections to evidence were taken, Judge McKennan's composure was entirely unruffled, and he would give them patient and intelligent consideration. Judge Nixon would shift his position impatiently, and knit his eyebrows into a frown, as if time were being wasted but, of course, he could do nothing but restrain further ebullition of feeling until Judge McKennan had made his rulings. Judge McKennan was exceedingly cautious, painstaking and deliberate, and these very characteristics led him, I think, in one instance at least, to make a fatal mistake.

An instance of this, illustrating the difference between the two judges, occurred at the close of the trial, which occupied three days. In order to bring to the attention of the Court what my client contended was the proper construction of the "intemperance" clause in the policy, certain "prayers for instructions" to the jury, as they are called in New Jersey, were prepared and delivered to Judge McKennan. At the conclusion of the addresses of counsel to the jury, Judge McKennan adjourned the court until the following day, although there was ample time for him to have made his charge. On the succeeding morning, after ascending the bench, he stated that he had given the prayers for instructions very great consideration, being pleased to character-

ise them as having been prepared with great skill, which I appropriated, quite naturally, as a high compliment. He added that in order to avoid the possibility of any mistake he had gone over them carefully, and had written out what he proposed to say in relation to them. He then proceeded to charge the jury upon the general aspects of the case in a lucid and forcible manner, and when he had concluded he took up these prayers, one by one, and read to the jury his replies. Undoubtedly, the construction that he placed upon the clause in the policy was plausible, and at first blush would strike one as entirely reasonable, in fact, so much so, that my senior associate advised me not to question it; but, as the construction for which I contended was the result of careful investigation of the law, and a great deal of consideration of the language used in the policy, and as I was responsible for the management of the case, I could not concur in his judgment. When Judge McKennan had finished I arose and asked that the usual exceptions be noted. Judge Nixon almost jumped out of his chair, and exclaimed with great impatience and petulance: "What do you want to take any exceptions for?" This was indeed disconcerting to a comparatively young practitioner, and might well have been so to an older one, but fortunately, I had the presence of mind to keep standing, and responded as courteously as I could: "The reason that I wish to take exceptions is, not because I have the slightest want of respect for the Court, but because the interests of my client seem to require it." Imagine my relief, and my feeling of profound gratitude when

Judge McKennan waved his hand to Judge Nixon to keep quiet, and then leaning forward and looking at me said, in the most courteous manner, "You are perfectly right, young man; go right ahead." I glanced at Judge Nixon, with, I fear, a triumphant look, as he sank back into his chair with somewhat of a shamefaced expression. The result of it all was that under Judge McKennan's instructions a verdict went against us, although the jury deliberated over twenty-four hours. When the jury was deliberating I chanced to meet Judge McKennan in one of the corridors; he looked upon me most benevolently, and placing his hand on my shoulder remarked: "Young man, evidently your jury is not *synonymous.*" We appealed the case to the Supreme Court of the United States; the ground of appeal was the exceptions just referred to, and that court unanimously adopted our construction of the clause of the policy, reversed the judgment, and remanded the case for a new trial (123 U. S., 739).

At the second trial our adversaries were reinforced by that eminent lawyer and distinguished man, Cortland Parker. He was an unusually well-equipped lawyer and able advocate. Although well advanced in years, his tall, spare frame was as erect and his movements were as lithe, and his step as quick and firm as ever. I do not think that there was a great deal of personal magnetism about Mr. Parker. I would describe him as rather cold and repellent in manner, although in personal appearance he was highly attractive, and evidently well-bred and cultured. His position at the bar of New

Jersey had long been very high. He was, I think, an intimate friend and college classmate of Mr. Justice Bradley, of the Supreme Court of the United States. His character was of the highest, and his distinction was such that I cannot account for his failure to be selected for important public office on any other ground than his lack of personal magnetism, an incapacity to create friendships generally, a somewhat lofty demeanour, and an apparent inaccessibility. He has, however, contributed to the service of his native State two public men of fine character and large attainments in the persons of his two sons—Mr. Justice Parker, of the Supreme Court of New Jersey, and the Hon. R. Wayne Parker, a representative in Congress.

Mr. Parker manifested great perturbation over the method which I thought it wise to adopt to elicit the testimony of certain witnesses, whose attitude in the interval between the first and second trials had, through some occult influence, changed from that of friendliness to hostility. Their testimony for use on the second trial was taken out of court and, owing to this change in their attitude, I felt obliged to resort to a somewhat drastic method of examination. I laid a very substantial foundation proving amply their manifest hostility, and after doing so I took the record of their previous testimony and reading from it each question and answer, inquired whether they so testified on the previous trial, to which they were obliged to answer "Yes," and I followed it by inquiring whether that testimony was then true, to which also

they necessarily responded "Yes." As their testimony was of very great importance in establishing our case, I fell under Mr. Parker's displeasure for adopting that method. He characterised it by almost every epithet he could find, and argued against its admission with all the strenuousness of which he was capable, but the judge ruled that the method adopted, in view of the manifest hostility of the witnesses, was perfectly proper, and received the testimony. I remember that Mr. Parker before the jury, directed his shafts of ridicule against it, and likened it to the action of a fond parent who desired to train up his obdurate son in the nurture and admonition of the Lord, and therefore proceeded to confront him and put him through his catechism. First putting the question and endeavoring to elicit his answer from memory, and failing to do so, he followed it by reading him the answer to the question and compelling him to repeat it. This amused us all very much, and quite likely had an effect with the jury, but "he laughs best who laughs last" and whatever his impression may have been upon the jury, his attempt in the presence of Mr. Justice Bradley fell perfectly flat, for Mr. Justice Bradley attached sufficient importance to this testimony to induce him to set the verdict aside.

Mr. Parker was a pastmaster in the art of trying a case before a New Jersey jury. His very appearance was a guarantee of the character of his side of the case, and he marshalled the facts and presented the witnesses in their most attractive phase.

Upon this trial I brought to my client's assistance

Ex-Governor and Judge Joseph D. Bedle. He was the antipodes of Mr. Parker. He was short and rotund, he had a remarkably shaped head, and a bright and expressive countenance. He had served for a long time with distinction as a justice of the Supreme Court of New Jersey, and while in that position, was nominated and elected governor of the State. He was an accomplished lawyer, dignified, serene and good-natured. He was exceedingly bland and suave; he made everybody his friend, from the hall-boy in the hotel to the judge on the bench. Lord Westbury once spoke in his sarcastic way of Bishop Wilberforce as "this saponaceous and oleaginous prelate"—and there was just a touch of this saponaceous and oleaginous quality about Governor Bedle, but it was in no sense unattractive, or inconsistent with his fine bearing, and had a very helpful influence in attracting friends.

My acquaintance with Governor Bedle became quite intimate through our long association in the case, more particularly by conversations, some of them of a confidential character, during our repeated journeys between New York and Trenton. His was a lovable nature, full of the milk of human kindness, genuine and hearty with his friends, and charitable toward those whom he disliked. He was animated, buoyant and lighthearted, and his prominent career and wide experience gave to his conversation an unusual charm.

We struggled in the pursuit of what we supposed was "Jersey justice" and we probably got it, but it was not the kind we were looking for. The ver-

dict of the jury against us was not one which satisfied Judge Wales of Delaware, who presided at the second trial. He expected a verdict in our favor, and stated as much to me, expressing the opinion that the verdict should be set aside as against the evidence, but that he was not inclined to take the responsibility of doing so, and suggested that we should apply to Mr. Justice Bradley who, under his assignment as Justice of the Supreme Court of the United States for that Circuit was the presiding justice, to hear the argument on a motion for a new trial, and that he would sit with Mr. Justice Bradley and inform him of his views. Mr. Justice Bradley fortunately consented to hear the motion, and it was argued by Governor Bedle and myself on the one side, and by Mr. Parker and Mr. John Linn on the other.

Mr. Justice Bradley was an exceedingly interesting individual. He was short in stature, and rather slight in physique. He had one of the strongest faces that I ever looked upon, and a dome-like forehead. His hair of steel grey hung down very straight; his face had almost no colour, his eyes were a bluish grey, and his *tout ensemble* was of a very steel grey hue. His face had so much character and strength, and his forehead was so full and high, that he seemed to me to be *princeps inter principies* on the bench of the Supreme Court. His expression was one of dignified severity and tremendous force, with every evidence of highly developed intellectuality. He always appeared to me to be almost the strongest, if not the strongest, in-

tellectual force upon the Supreme Court bench, and he certainly gave it most valuable service, and added to its great distinction. No one can read his opinions without being impressed with his profound learning, his sound reasoning, and the mathematical accuracy of his logical processes, which oftentimes made his opinions appear to be more like a demonstration of a difficult problem in mathematics than a mere expression of a judicial conclusion. This, I think, was due in great measure to the mathematical cast of his powerful intellect. He was not only a student of mathematics, but an expert mathematician who resorted to the demonstration of difficult mathematical problems as a recreation, indulging in calculations of the eclipses of the sun and moon, investigations of the transits of Venus, and the preparation of calendars which calculated the date of the week days for centuries to come. He was also a great Bible scholar, studying it from all points and angles, investigating its hidden mysteries, and probing the depths of its profoundest truths. This study of the Bible, and its beautifully simple style is responsible, I believe, to a considerable degree, for the purity of diction which characterised his opinions. He was one of the great masters in the law before he went on the bench, and it is said that he practically dominated the courts of New Jersey.

In this connection an incident was related to me of his appearance on one occasion in the Court of Errors and Appeals of the State of New Jersey, when he desired an adjournment for some reason

which, although not unreasonable in itself, was not such as to which the Court felt it their duty to accede. He argued the matter with considerable pertinacity, but the Chief Justice refused his application. Mr. Bradley, without further ado, jammed his hat upon his head in high dudgeon in the presence of the Court, picked up his papers and strode wrathfully out of the court room. His adversary was left in possession of the field, but evidently did not dare to proceed, and the Court, after its amazement at Mr. Bradley's conduct had subsided, announced that the case was of such importance that it seemed to be unwise to hear it in Mr. Bradley's absence, and without the presentation of his argument, and that, therefore, the case would be adjourned.

I suppose he felt very much as Thaddeus Stevens of Pennsylvania did on one occasion when his feelings were so outraged by the action of the Court in one of his cases, that regardless of decorum and of the dignity of the Court, he displayed considerable temper, and manifested it in a marked degree in his departure from the court room. Just as he had reached the door, the voice of the judge was heard exclaiming: "Mr. Stevens, Mr. Stevens, stop sir," and stopping, the judge asked, "Mr. Stevens, do you intend to express your contempt for the Court?" "No," Mr. Stevens replied, "I am trying mighty hard to conceal it."

At one time Justice Bradley desired very much the appointment of Chancellor of the State of New Jersey, but the fact that he was counsel for the

Camden and Amboy Railroad and represented other large corporate interests prevented his appointment. Later on he was a candidate for appointment as judge of the United States Circuit court, but in this also he failed, Judge McKennan being preferred before him. This was indeed fortunate for the country, for, after he had arrived at a period in life when the expectation of judicial preferment was remote, President Grant elevated him to the exalted position which he filled with the greatest distinction for many years.

One of his characteristic expressions was that of seeming introspection, and soon after taking his seat to hear our case he seemed to be completely withdrawn into himself, oblivious of all his surroundings, and inattentive to the proceedings, but there was nothing at the time more alive and acute than he. As it became my duty to make the opening argument I could not help feeling, as I proceeded, that I was not making much of an impression, as I probably was not, and that this apparent inattention was due to the fact that he did not care to listen, but as I went on I soon observed from the questions he put from time to time that he was following all that was said, without losing a word. This attitude characterised him during the entire argument on both sides, and, at its conclusion, the printed volume of testimony and the briefs were presented for his examination and consideration, but he was even then in complete possession of the entire case, and the next day but one I was surprised to receive a message from the clerk of the Court that our mo-

tion had been granted, and that the verdict had been set aside.

There is no occasion to give the remaining history of this somewhat unimportant litigation, which has served my purpose to furnish some recollections of the four eminent men to whom I have referred. But yet, I think I should in justice add that notwithstanding Mr. Justice Bradley's decision that the verdict of the jury was against the evidence and, as he expressed it, that if intemperance constituting a breach of the condition of the policy had not been established in this case, it was difficult to understand how it ever could be proved, we could hardly, even then, expect with the traditional love of Jersey men for New Jersey "applejack" and their tender consideration for those "overtaken in a fault" occasioned by its excessive use, and with an attractive widow on the one side, and a soulless insurance company on the other, that there could be any other result than a verdict for the plaintiff, which was ultimately secured, but with which the Supreme Court of the United States differed, declining, however, to set it aside because after three verdicts of a jury there should be an end to the litigation.

The outcome was unsatisfactory so far as the verdict was concerned, especially in view of the opinion of Mr. Justice Bradley and of the Supreme Court of the United States differing with the findings of the jury, but, notwithstanding the result and the expense of the litigation, which was considerable, and out of all proportion to the amount involved, the construction put upon the intemperance clause of

the policy by the Supreme Court was worth in subsequent transactions far more than the expense involved, while the vigorous defense interposed, which became a matter of common knowledge in insurance circles, operated as a deterrent influence upon intemperate men procuring insurance in succeeding years.

## CHAPTER XVI

### A UNIQUE TRIO

#### GEORGE, THE COUNT JOANNES.

A STRANGE character that flitted about the courts in the 70's was a threadbare, but rather carefully dressed individual, known as the Count Joannes. His cadaverous face, steel grey eyes and compressed lips, partly concealed by a slight mustache, produced a set expression of antagonism to all men and all things. I used to see him repeatedly, but I never saw him smile. He was generally dressed in dark garments, black originally, but grown rusty by use, and there was usually a velvet collar to his coat. He wore a wig of long brown curly hair, one curl adjusted to fall over his forehead. Suspended from a ribbon encircling his neck outside his shirt collar was what he called an "order," or decoration of nobility, conferred upon him by some unheard-of potentate, entitling him to substitute for his real name, George Jones, the more high sounding title of Count Joannes. He was a kind of busybody; he rarely tried a case, but he seemed to be on the outskirts of certain sensational cases, or occupied with unimportant matters which I have sometimes thought were not genuine, but devised by him to afford an opportunity to address the court. His enunciation was crisp and distinct, but I never knew him to utter a proposition of any kind that would

appeal to justice, or even to common-sense. He would inject himself into important litigations occasionally, representing some obscure interest entitling him to speak, which seemed to be all that he desired to do, apparently never expecting a favourable result. In this way he succeeded in getting into the Jumel will case, in which he also succeeded in getting excoriated by Mr. Carter, an account of which has been given elsewhere, but the "Count" had an opportunity to retaliate, as we shall presently see.

The Count had been at one time an actor of considerable note, and had left the "boards" for the legal arena. The older members of the bar will probably remember an occasion when the Count, for one night at least, returned to the "boards" in a representation of Hamlet. He was not, I fear, appreciated. The galleries with their mock applause and cat-calls, and the newspaper comments on the performance were his undoing, and the great occasion of his return to histrionic scenes left him vanquished and disappointed. One of the stories told of the Count is this: He happened once to be in the court room where Judge John R. Brady was presiding at the hearing of an election case, where a count of ballots was disputed, when one of the lawyers exclaimed in argument: "All that we want is an honest count," and Count Joannes, rising in his place, responded dramatically: "Behold the man."

I imagine the Count was always impecunious and an instance of this which occurred during the early

years of his practise was related by one of our eminent judges. The embryo judge happened to meet the Count in the court house just as the latter was emerging from one of the court rooms and, noticing the former, approached him and earnestly besought him for a loan of two dollars to pay a fee to the County Clerk, as he explained, in connection with some legal matter, giving of course good and sufficient reasons for his application. The young lawyer had unfortunately left his purse at his office and explained, on that ground, his inability to accommodate the Count, adding that if he had had his purse with him, he would have been glad to do so. Then they separated, and after the business at court was transacted, the young lawyer returned to his office. What was his surprise to find awaiting him our friend, the Count, who then and there renewed his application not only for the two dollars but for eight dollars additional. I suppose the eight dollars was for the time and trouble it took him to go from the court house to the office. Unsophisticated youthfulness induced the embryo judge to accommodate the Count with the ten dollars, a loan which, it is probably unnecessary to say, was never repaid. Personally, I think he got off rather cheap.

The Count was sometimes an active litigant in his own behalf, and it is in the course of one of these litigations, which attracted public notice at the time, that there is revealed his peculiar methods, marked eccentricities, and extraordinary vanity and egotism. The very mysterious murder of Benjamin

Nathan, a prominent citizen, the mystery of which was never solved, led the Count Joannes to interest himself in it, in an endeavour to detect the murderer. In the course of this attempt, he became involved in complications of such a character, that the *New York Times* indulged in severe comments and strictures upon the Count's conduct. This led him to institute the well known action of "George, the Count Joannes against Louis Jennings and George Jones, proprietors and editors of the *New York Times.*" The complaint, in its statement of what are known as the "inducements" to the action, is decidedly characteristic. Introducing himself as, "I, the undersigned George, the Count Joannes, formerly and prior to the month of March A. D. 1847, publicly known as George Jones, author &c. and since that date often written of by my former name and that of my present name and addition, and which surname is often spelled 'Johannes';" he proceeds to tell us of himself, and advises the court as to what it will do, saying: "And I aver that I am and have been for nearly four years an attorney and counsellor at law of the Supreme Court of New York, and of which official and public fact this honourable court will take judicial notice." His statement of the location of his office and residence is interesting, although as a part of the complaint it was quite unnecessary: "And I aver that I practise my said profession and have my law office in the City of New York, to wit: 106 Broadway, and reside in said metropolis, to wit: at Leggett's Hotel near the City Hall." Vanity and egotism get the

better of him in the next allegation: "And I aver that I am also a public lecturer, and oratorical illustrator of the Holy Scriptures, and of works of Shakespeare and other poets." "Oratorical illustrator" is good, but I imagine that he means by it that he had been an actor of Hamlet. He tells us about his literary efforts and his means of livelihood: "And I also aver that I am a public author and writer for the public journals, and in each and in all of the foregoing intellectual employments, apart from the high aspirations of honourable fame, they are my means of income, emolument and profit, all of which would be ruined and destroyed were the hereinafter recited grievances and malicious libels true and not false."

It is not necessary to pursue his complaint further, although it furnishes abundant evidence of his vain-glorious and extravagant expressions. When the action was tried, the Count's past career was opened up, and it then appeared that he had been for some years before his advent in New York a resident of Boston, Massachusetts. There, too, he had discovered in the public press obnoxious comments upon his doings, which his elevated sense of honour and impetuous nature could not for an instant brook, the consequence being that he instituted thirteen actions against various newspapers for libel. The newspapers, I imagine, thought to get ahead of him, and there was therefore presented in the Massachusetts Superior Court in February, 1861, an indictment against him charging that he, on the first day of January, 1861, and on divers other

days and times, "divers quarrels, strifes, suits and controversies among the honest and peaceful citizens of said Commonwealth, then and there on the days and times aforesaid did move, procure and stir up and excite, and so the jurors aforesaid upon their oaths aforesaid do say that the said George Jones otherwise called 'George, the Count Joannes of Boston' aforesaid, on said days and times was and still is a common barrator, and common nuisance of the citizens of the Commonwealth, and against the peace and dignity of the Commonwealth." Serious, indeed, if true; and I regret to say that upon the trial of this indictment by a common jury the Count was found guilty. But he was never sentenced. On the contrary he demanded sentence, but, extraordinary as it may seem, the Court refused to sentence him, for, as the Count observed, he could not be sentenced as a barrator because he was not a member of the bar, and there could therefore be no barratry. The Count turned the tables on the newspapers, however, because a trial of one of the actions resulted in a verdict in his favour for $2,000, which the Supreme Court of the State, after three trials had been had, sustained.

He was not satisfied with bringing an action against Messrs. Jennings and Jones, but he also appealed for justice through the columns of the *New York Sun,* which published a letter from him, certain portions of which give us an excellent idea of the noble Count's mental processes, and the estimate he formed of his individual excellence.

"To the Editor the *Sun*,

"Sir: I consider it to be my solemn duty as a citizen, and by my oath as counsellor of the Supreme Court, and hence a conservator of the public peace, to render a narrative to the people of my endeavors to discover the murderer of the lamented Benjamin Nathan, or the accomplices in the homicidal felony, and I claim upon sworn testimony to have discovered both.

"As in the case of the Malden murderer who through my diplomatic skill finally confessed, and thence was convicted and executed, I have had to meet opposition where it should not have existed, and as in the former case, threats of assassination if I continued investigations.

"At the impolitic inquest I demanded that a Jew shall not be sworn on the Christian Cross or the new testament, and finally he held his hand up and was 'affirmed,' thus changing a Jew into a Quaker!—out-rivalling Ovid and Jupiter. . . . I have publicly said and I repeat it here that if my brother murdered my father, I would give that brother up to public justice and 'though he had twinned with me both at a birth, he should lose me.' Nor should I require the classical fortitude of Junius Brutus who for treason gave the signal for his son's death. . . . I received, (to write in alliteration) numerous letters from Jews and jesters, Gentiles and gentlemen, matrons and maidens, ladies and larceners, slanderers and sumners, clergymen and cheats, priests and prisoners, bombastics, bullies, bankers, brokers, brilliant and bungling burglars, dated in this City, and from Canada, and from the East, West, North and South, a collection of compositions as would make a museum of mockery of sense to throw me off my guard, and some demanded death against me and, in other instances, wise suggestive conclusions."

In the course of the trial he tells us with great gusto about his career in Boston. To quote a little:

"One of these persecutions against me in the City of Boston which I entirely conquered, and so far from being requested to leave the city, the greatest compliment to me immediately following a prosecution took place by a public demonstration in my favour, being a public benefit, when I realised over twelve hundred dollars upon my representation of Hamlet."

Among the witnesses at the trial, it is singular enough to note, was that distinguished lawyer James C. Carter. I have already alluded to the incident in the Jumel will case, when the Count Joannes was subjected to a flaying process by Mr. Carter, and perhaps just enough of the indignation which Mr. Carter felt remained to lead him to consent to give under oath his estimate of the Count's character. That was the upshot of Mr. Carter's testimony, and when he was asked with regard to it, his reply was, "I should say it was rather questionable." Then the Count took him in hand. The first question which he put was as follows: "You have used the Shakesperian word against me as Hamlet did against the ghost in a questionable shape, what do you mean by 'questionable'? " Naturally Mr. Carter's reply was, that by questionable he meant that it was not good. Whereupon the Count resumed the attack by inquiries regarding Mr. Carter's conduct toward him in the Jumel will case and put the following question to him: Q. "Did you not raise your hand at me within six or eight inches right at my face and I appealed to the

Court against that wrong and insult?" A. "I remember using considerable gesticulation but how near I came to your face precisely, I cannot say." And thereupon the Count retorted: "I have proved your malice against me, you may retire." The Count was, after all, victorious, and although he had laid his damages at $75,000, an unappreciative jury, unable to estimate highly in dollars and cents the deep wounds inflicted on the Count's sensitive feelings and the damage to his "honourable aspirations," salved over his wounds with a verdict of $750. I have no doubt that this, with the taxable costs of the litigation, which would have swelled the amount probably to $1,000, would have been a great windfall to the impecunious count but, unfortunately, cold and calm scrutiny of the printed record by an unfeeling Appellate tribunal snatched the fruits of victory from his grasp. But he, at least, availed himself of the opportunity of telling in his brief that august court more of himself. He informed the court: "I not only remained in the City of Boston but, subsequently, I was invited by letter, headed by the Honourable Mayor of Boston, to receive the greatest mental honour in the power of New England to bestow upon the citizen namely: To pronounce in Faneuil Hall, a public oration upon the life and character of Washington on the anniversary of the patriot's birthday. I accepted the honour as before me did Daniel Webster my parental friend, Edward Everett and Robert C. Winthrop, which was the fifth oration I pronounced in that historical hall."

Beholding him then, in our mind's eye, on the platform of Faneuil Hall, in dramatic pose, delivering one of his "oratorical illustrations," it may well serve as the point at which we may appropriately ring the curtain down upon this unique and altogether unusual and strange personality.

### "BARRISTER" NOLAN

I doubt if there was ever a more genuine son of Erin than Thomas Nolan, or as he was frequently called, "Barrister" Nolan. His parents were thoroughly respectable, his father having occupied, it is said, the position of sheriff of one of the counties in Ireland. At an early age the barrister came to this country and found a residence in Cleveland, Ohio. Whether he ever practised law in Cleveland, I do not know; but upon his advent in New York, having obtained admission to the bar, he was asked by one of the judges before whom he was appearing to give his name. Drawing himself up in his loftiest manner he replied: "Me neem is Nolan, from Claveland, O-hee-o." He was a giant in stature, being about six feet six in height. His large, well-rounded form, his characteristically Irish countenance, his dignified bearing, which gave the impression of being assumed, although probably quite natural, his erect carriage, so erect that he seemed to be leaning backward, his slow and ponderous step, his black broadcloth garments, generally a little threadbare, his white tie and stove-pipe hat, presented a conspicuous figure amid the throng of lawyers in a court room, or in the procession on Broad-

way. Like many of his Irish brethren, he had political aspirations, and loved to feed at the public crib, but however seriously he might take himself it was impossible that any one should take him seriously, and notwithstanding his assiduity in cultivating political affiliations and attending political conventions, where his absurd phraseology and his natural humour had full play, he was never so fortunate as to secure that recognition which he probably thought that his talents deserved.

In his later days he was much in need of professional employment and pulled the political wires as well as he was able, to secure an appointment in the corporation counsel's office. After the wires were all in order, he applied to that functionary, who informed him that there was a place vacant, but he feared that it was not such as would be of sufficient importance to attract the barrister, as it paid only fifteen hundred dollars. "To think," said the barrister, "that a man of my professional eminence and skill should be offered a paltry position paying fifteen hundred dollars." "But," replied the corporation counsel, "there is an applicant now awaiting an appointment who would be only too glad to accept this position if it were offered, and if you do not want it, I will give it to him." "Let me have time to think it over," replied the barrister, "and I will consult my friends." The corporation counsel gave him until the following day, when the barrister again appeared, and stated he had thought it over and consulted his friends, and that his friends had advised him not to accept such an unimportant

position with such a meagre salary. "Well," replied the corporation counsel, "that is the best that I can do and I will therefore offer it to the other applicant." "I told you," responded the barrister, "that I had thought it over, and that *my friends* had advised me not to accept it, but I have concluded not to take the advice of my friends, and I shall accept the position."

His demeanour in court was irresistibly funny; everything that he said and did was marked by solemnity and dignity, but his aggregation of words and arrangement of phrases was so unusual that they alone would disturb the decorum of the most decorous and, in addition, there was an apparently unconscious bubbling over of wit that was irresistible because it was unpremeditated. He had an unusually rich and expressive Irish brogue, incapable of reproduction, which added a most interesting and amusing feature to his utterances, and without which any anecdotes concerning him, however amusing, must necessarily be deprived of much of their humour. His voice was deep and strong, and, in addressing the Court or jury, it would be with such profound respect and seriousness that it gave the impression of a kind of mock dignity. It is a pity that some of his summings up to juries were not stenographically reported as a contribution to the wit and humour of the bar, but there are stories told of him which illustrate his character.

In addressing the Court, especially when desiring a favour such as the adjournment of a case, he would use his blandest tones, and indulge in expres-

sions which he intended to be exceedingly persuasive, but which led him to overstep the bounds of respect for the court. For instance, the late Surrogate Rollins was generally clothed on the bench in a very neat and well-fitting double-breasted coat. Nolan appeared before him on one occasion to move the adjournment of some proceeding then pending, but his application did not seem to meet the approval of the Surrogate, whereupon Nolan proceeded in his most persuasive manner to appeal to the generosity and warm heart of the Surrogate by addressing him as "Now, your honour is a fine double-breasted Judge, and I am sure you will grant me the favour I ask."

He was arguing a motion in a case before the late Judge Hamilton W. Robinson, who was one of the most accommodating and considerate judges on the bench. Nolan came into court with a number of volumes of old reports, from which he quoted quite liberally, but not much to the point. After arguing very seriously, but as was usual with him, irrelevantly, he wound up his argument in substantially these words: "Now, your honour, I have referred your honour to these old and familiar cases, and I am sure they will be supported by the decisions of other courts, particularly by the courts of that beautiful green island across the sea where your honour's learned opinions are so often cited with the great respect which they command everywhere, as authorities." Certainly, Nolan must have kissed the blarney stone to good effect.

Nolan used to appear considerably in criminal

cases of minor importance and, after one of his unsuccessful defences, commented on Recorder Smythe's severity in dealing with persons accused of crime, evidently considering every accused person guilty, although he gave him the credit of holding the scales of justice even, and expressed the opinion that Recorder Smythe was "a foine man and a very foine judge, but that he liked to convict because he believed that ivery living man should be in state's prison at least 'wance.' "

A boy in whom a Catholic priest, one of Nolan's friends, was interested, had committed petit larceny, and Nolan was employed at the suggestion of the good priest to defend him. Calling upon Nolan, the priest informed him of the previous career of the boy and his respectable connections, and gave his version of the facts, and then inquired: "Now, Counsellor Nolan, don't you think that you will be able to get the boy acquitted?" "Well, Father Blank," replied Nolan, "ye know that these cases whin they come before Recarder Smythe are always hard to win, but I think that with your influoence and a little perjury, we will be able to get him off."

Nolan was convivial, and had a fondness for old Irish "mountain dew," and was always in demand among his associates at the festive board. On returning from one of these occasions, he entered a street car and found some difficulty in extracting the necessary nickel from his capacious pocket; succeeding finally, he handed it to the conductor with the observation in his most impressive tones:

"Now, young man, here is your foive cints and the relation of passenger and common carrier for hire is established betune us." After he had taken a vacant seat which was the only one unoccupied, a very stout woman entered the car and it was necessary for her to stand unless some passenger were courteous enough to offer her a seat. This Nolan proceeded to do. Rising from his seat unsteadily and looking up and down the car he addressed the passengers: "Now, I will be wan of three persons to give this stout woman a sate." On another similar occasion he was sitting calmly reflecting, probably on the virtues of total abstinence, when a middle-aged and quite homely woman entered the car in which there was no seat unoccupied. Seeing a young man seated nearly opposite, Nolan gazed at him intently for a few moments, and then broke out, "Now, young man, jist get up and give this woman a sate; if she had been young and handsome you would have given it to her long ago."

One of his court experiences was in connection with a case of personal injuries occasioned by negligence of a railroad company, resulting in the death of the husband of a good woman named Moriarity. The case had been on the calendar for a long time, and, notwithstanding that the barrister had on several occasions procured the attendance of his client and witnesses, prepared to try the case, he had been met with applications by the company for adjournment until the widow Moriarity had become exceedingly restive, and had probably poured the vials of her wrath upon the devoted head of the bar-

rister. As the case was again to be called, Nolan made all his preparations, and secured the attendance of the widow Moriarity and the witnesses at his office, where he preferred to leave them until the case was surely to be tried. But he was again met with an application for postponement, and, as the reason for the adjournment appeared to be sound, the judge, notwithstanding Nolan's most eloquent, earnest and persuasive appeal—reminding the judge of the previous adjournments, of his preparations for trial, and the inconvenience to the witnesses and disappointment to the widow Moriarity—decided that the application must be granted; whereupon Nolan, rising in all his solemn dignity and looking earnestly at the judge asked: "Now, yer honour, having granted the adjoornment, will yer honour grant me wan last requist?" "Certainly, Mr. Nolan," replied the judge, "if it is in my power to do so." "Well," inquired Nolan, "the last requist I would make of yer honour is this. Will yer honour be good enough to go over to me office and tell the widow Moriarity that you have adjoorned the case."

During his career at the bar there were in circulation among the lawyers numerous ludicrous incidents connected with his appearance before courts and juries, and entertaining stories of his ebullitions of wit, and he was certainly not only a generous contributor to the gaiety of the bar, but easily surpassed all others in furnishing rollicking amusement, and good-natured humour to enliven the seriousness of professional life, all of which have served

to preserve his name and memory among the pleasant traditions of the bar.

### EDWIN JAMES, Q. C.

One of the first cases with which I had anything to do was one in which Edwin James, Q. C., formerly an English barrister and Queen's Counsel of conspicuous prominence, was engaged. It was a case against the New York Central Railroad Company, which my father's firm represented, and it became my duty to call upon Mr. James with reference to it. His position at the English bar had been such that I have no doubt that if he had pursued a consistent career, high honours awaited him.

He was member of Parliament for Marylebone, and it is said that the Solicitor-Generalship was within his grasp, although some doubt was expressed at the time as to whether, in view of opposition which he was sure to encounter, it would have been secured. He was a brilliant advocate but not a profound lawyer. His professional income amounted to about £7,000—($35,000).

His practice, I am informed, was to a considerable extent of a somewhat sensational character, frequently in connection with political events of the day, relating more particularly to the Italian Revolution. In fact, I think the English government enlisted his services in connection with inquiries at times officially, by commission, and sometimes unofficially, into the state of affairs in Italy as bearing upon the course to be pursued by it. This will be confirmed by referring to Trevelyan's interesting

book, "The Making of Italy," in which the name of Edwin James, Q. C., is included among other distinguished Englishmen connected with such inquiries on behalf of England. The readers of Italian and French history will not have forgotten the conspiracies of Count Orsini and Dr. Bernard to take the life of Napoleon, and the story of the Orsini bomb. It was Mr. James who was counsel for Orsini in the extradition proceedings in England for his delivery to the French authorities. He was powerless to save him, and notwithstanding the efforts of the Empress of France and, indeed, of Napoleon as well, to prevent it, the Count Orsini met his fate on the scaffold. He was more successful with Dr. Bernard, who was apprehended for conspiracy in England. On the trial he had the valuable assistance of Henry Hawkins (Lord Brampton) and notwithstanding that the facts were apparently conclusive against the accused, he was acquitted. Lord Brampton gives in his reminiscences an interesting account of the proceeding.

The story of Mr. James' departure from England and his entrance at our bar is a sad chapter of a lawyer's downfall. I am credibly informed that it was occasioned by complications which arose in pecuniary transactions connected with Lord Yarborough's estate which, possibly, would have been made the subject of charges of a criminal nature if Mr. James had not taken his departure from England. At all events he was obliged to leave England. He was, however, not without friends in New York. Before the facts incident to his departure

had become known, he applied to be admitted to the New York bar without the formalities usually required, because of his eminent position. His cause was espoused by a lawyer of prominence, Mr. Edwin W. Stoughton. Mr. Stoughton, I may remark in passing, was a very picturesque and impressive personage. He had a refined countenance, which, without being in any way florid, was suffused by a pinkish hue. His head was crowned with an abundance of silvery hair, which he never brushed smooth, leaving it to stand out from his head in wild profusion. He was exceedingly careful and of excellent taste in his dress, and his manners were of the most courtly and elegant description. He occupied a prominent position at the bar, and I am under the impression that his prominence was chiefly gained in patent cases. Shortly after my admission to the bar, he was appointed Minister to Russia by President Hayes. On his return he did not seem to regain his foothold in his profession.

Mr. Stoughton applied to the court on Mr. James' behalf, but his application met with considerable opposition, particularly from Daniel Lord, then one of the leaders of the bar, but the court took, possibly, a too favourable view of Mr. Stoughton's application and Mr. James was enrolled. Subsequent events show that he should not have been admitted, as the English court revoked his patent as Queen's Counsel, and he was disbarred. But he was mistaken in supposing that at our bar he could continue to practice with success when he could not at his own. When I called upon him concerning the case re-

ferred to, I found him sitting in his office alone and unemployed, doing absolutely nothing, and although I was not then acquainted with the circumstances of his advent in New York, the reason became apparent subsequently for what impressed me at the time as the spectacle of a distinguished lawyer who had lost heart and hope. His career at our bar was precarious at the best, and I have been told that he eked out his slender resources by delivering addresses on Napoleon and the Italian revolution, more particularly in some of the rural communities in the neighbourhood of New York.

In the reminiscences of Lord Brampton, the 'Enery 'Orkins of the criminal bar in England, an instance is given, in which Mr. James is an important figure, of the danger of attempting to bolster up an already good case by calling an additional witness. Although he was responsible for the disaster which overtook his client, owing to the course he pursued, yet, in justice, it is due to him to say that in all probability the brief furnished him by the solicitor by whom he was retained, led him to feel that it was incumbent upon him to call the witness that destroyed him.

The case involved the probate of a will involving an estate of £100,000, Mr. James appearing for the proponents, and Messrs. Hawkins and Hannen (subsequently Lord Hannen) for the contestants. The latter were without any substantial evidence, and if Mr. James, after proving the *factum* of the will by the subscribing witnesses, had rested his case, Mr. Hawkins had so little evidence that, as he states,

he would probably have consented to a decree in favour of the will. Notwithstanding the intimation of the Court that further proof did not seem to be required, Mr. James called an additional witness, present at the time the will was made, and his testimony on the direct examination seemed to leave nothing to be desired. Mr. Hawkins had no fact whatever upon which to base a cross-examination, but he sparred for an opening, and to his own surprise, and, quite likely, to the complete surprise of Mr. James, it was made to appear by Mr. Hawkins' skilful cross-examination that the will propounded was prepared when the testatrix was seriously ill—not from her own instructions, but from instructions given by her husband and by the witness, to carry out what they supposed her intentions were—and that a former will, made by her understandingly, had been destroyed by the witness, although he had preserved a copy of it, the reason for the destruction of the original will and the preservation of the copy not being satisfactorily accounted for. Inasmuch as the will offered was evidently the will of the husband and of the witness rather than that of the testatrix, the five hundred thousand dollar estate which was at stake passed from Mr. James' clients to those of Mr. Hawkins and, as Mr. Hawkins tells us, Mr. Hannen, his associate, remarked to him: "Brother Hawkins, your cross-examination I consider worth, at the least, eighty thousand pounds."

While he was in London it is said that, notwithstanding his large income, Mr. James was very dilatory in meeting his obligations, and it is related

of him that his landlord who had waited long and patiently for the payment of the rent which had accrued, finally resorted to the expedient of writing to Mr. James for his advice as to the course which should be pursued, upon a state of facts precisely similar to those existing between them, as though it applied to some other tenant. But Mr. James was not to be taken in by anything so transparent, and he therefore replied somewhat as follows: "Dear Mr. Blank: In the case which you put to me, my advice is that you exercise patience."

Lord Chief Justice Campbell, who was presiding at a trial in which Mr. James was one of the leading counsel, had borne rather hard on Mr. James, almost to the point of actual censure, but Lord Campbell was an adroit politician, and recognizing the fact that Mr. James was powerful in the council of the party to which Lord Campbell belonged, he sought in his summing up to the jury, to take away the sting of his remark and placate Mr. James by saying to the jury that in the course of the trial he had felt obliged to make some observations which had possibly offended his brother James, but that he wanted to assure them that in making the remarks, he had no intention of indulging in anything personal, and that he had not only the greatest respect for Mr. James personally, but also for his well known ability as one of the most distinguished members of the bar. Whereat Mr. James rose excitedly and exclaimed: "My Lud, I have been obliged to bear with your censure, and I beg of you to spare me your praise."

His career at our bar ended by his return to England, where he obtained employment as a clerk to one of the Old Bailey solicitors, and he also made an attempt to use his professional abilities by establishing an office in New Bond Street, displaying the sign "Edwin James, Jurisconsult," but his services were not much used, and his last years were spent in poverty.

## CHAPTER XVII

### THE MODERN LAWYER

Two important factors have, I think, been influential in the production of the lawyer of to-day as distinguished from the lawyer of forty years ago. Up to that time, for over two centuries, the type of lawyer, his office, education, training, professional experience, and character of employment remained very much the same. He was distinctly and purely professional as distinguished from commercial. There were practically two classes of lawyers—the office lawyer engaged in real estate, conveyancing, settlement of estates, drawing wills and contracts; and the litigating lawyer, whose business was in common law and commercial cases and equity suits, with a sprinkling of actions for personal injuries. I might add as a third class—the admiralty and patent lawyers. The bar of the City of New York was essentially American, with a slight admixture of foreign elements, which, however, were a very small percentage of the whole.

Following the year 1870 a transition began by the influx of foreigners. While there had been previously a goodly number of Irish lawyers they became more numerous, but their number increased by no means in the same proportion as that of other races. The Jewish lawyers seemed then to be few in proportion to the whole, but their increase has been

extraordinary, and almost overwhelming—so much so as to make it appear that their numbers were likely to predominate, while the introduction of their characteristics and methods has made a deep impression upon the bar as it is to-day. Germans also, but in fewer numbers, and Italians, in larger numbers than the Germans, have had their influence in the transition which has taken place. The Jewish lawyer has almost completely absorbed the large volume of commercial and bankruptcy practice; the Jews, Irish and Germans are employed in large numbers in the prosecution of negligence cases, while Italians are closely identified with the professional work which the tremendously increasing numbers of Italians has produced. These various elements, and their varied characteristics, have to be taken into account, not only as including acute and skilful, as well as at times highly accomplished lawyers, adapted for practice accordingly, while their influence has been such as to give them an extensive representation upon the bench.

There are few more remarkable instances of change in the practice of the law than that which has occurred within the past thirty years by the incursion of the money-making power into the domain of the lawyer. It was hardly to be expected that the possibilities of generous money returns from an effective organization in which business activity, in one form or another, involved professional service by the trained lawyer, should escape the avaricious eyes of purely financial interests. The result is that in several directions professional work, formerly

distributed among lawyers, has been almost completely absorbed by corporations combining the transaction of ordinary business with the performance of legal services incident to the same. No code of ethics interferes with their active solicitation of business, nor from advertising extensively for the purpose of attracting patronage. They are at liberty to employ agents to solicit business and to hold out inducements, pecuniary and otherwise, and in short to employ all sorts of commercial methods to induce the placing of business in their charge.

The most striking instance of change in the practice of the law is that which relates to real estate. Until thirty years ago, all of the business connected with titles to real estate was transacted by lawyers, and in every firm of considerable importance one member of it, at least, devoted himself to the department of real estate, and some offices were almost exclusively occupied with it. About this time the Title Guarantee Company appeared on the scene. It aimed at the complete absorption, not only of the business of the lawyer in examining the title, but of the public offices such as the registers, county clerks, and tax offices, in furnishing official searches for matters of record in those offices affecting the title to the property under examination. As a pioneer in this invasion of the lawyer's field of labour, as well as that of the numerous searchers attached to the public officers referred to, it had undoubtedly a very rough pathway to pursue, not only to overcome the opposition, but to surmount the obstacles necessarily encountered.

But I have no intention of writing the history of the title companies in their conflict with public officials, and with the members of the bar engaged in the practice of real estate law to secure a foot-hold. Public officials did not fare badly, because their "plants" were in most cases purchased at remunerative figures, but lawyers engaged in the practice of real estate law found that as the title companies increased in efficiency and in number, the business of examining titles was gradually absorbed to such an extent that the offices which were formerly great centers of activity in this direction were left practically unemployed. Probably four-fifths of the work of this description is now performed by the title insurance companies, who have attracted the confidence of the public by a so-called insurance of the title; but how far this insurance insures is another matter, owing to the practice of these companies to except from the policy all doubtful points on which the title might be attacked. The client turns over his contract for purchase to the title company, whose staff of meagerly-paid lawyers—whom the client never sees—examine the title, and the liberal fees go not to the lawyers but to the company and thence in dividends to the stockholders. In the case of a loan on bond and mortgage, the borrower goes direct to the company, which lends him its own funds, receiving a large fee for examining the title, and then sells the bond and mortgage to an investor, insuring its collection for ten per cent of the income, and whether insured or not, if it is not paid when due, conducts the foreclosure proceedings, receiving in

costs and allowances a further liberal compensation. It is said that as much as $10,000,000 is paid in a single year to the title companies for what are really legal services rendered often by inexperienced or unsuccessful lawyers working on modest salaries.

These companies have also found lucrative employment in what is known as "condemnation proceedings," where a client's property is to be taken by the city authorities for street or park purposes, or for some other public improvement. In the annual reports of these companies will be found, included among the assets, the estimated value of condemnation proceeding contracts amounting to hundreds of thousands of dollars.

These companies have from time to time, enlarged the scope of their business operations, until they now combine with their real estate business that of the ordinary trust company, having power to act as guardian, executor, trustee, receiver, etc., and it is said that they offer to prepare wills without charge, if appointed executor.

Another direction in which ordinary law business has been absorbed is that of organizing corporations for business purposes. It is within the past quarter century that the laws of the State permitted the organization of corporations for ordinary business purposes. Before then corporations were comparatively few, the purposes for which they could be organized, unless under a special charter, very limited, and most corporations were organized under a special act of the legislature. Within the time named this phase of business enterprise

has undergone a complete and radical change. Special charters are rarely applied for, and seldom obtained, because of the enactment of general corporation laws under which by filing a certificate of incorporation complying with the law, a corporation for the purpose specified in the certificate, comes into existence. The purposes for which corporations may now be organized by not less than three individuals has been so enlarged that it is possible to organize a business corporation for almost any form of legitimate business which the mind of man can devise. It will be readily understood, therefore, that the organization of these corporations has formed an important part of the lawyer's practice, but, as in the case of real estate, corporations are now organized for the purpose of not only organizing corporations under the general laws of our own State, but under the laws of other States, and attend to various details of corporate management necessary to be observed in complying with the laws under which they are organized. These corporations undoubtedly provide a cheap and easy way of organizing a corporation, but it is not seldom the case that the cheap and easy method has proved the most expensive in the long run.

Another instance of the absorption of the lawyer's practice by corporations is that of the defence of negligence cases. The multitude of cases to be defended, growing out of personal injuries, furnished a vast field of professional employment, but within the last twenty years there has been an entirely new development growing, on the one hand, out of the

enactment of statues in the various States regulating the liability of employers, and imposing liability under various labour laws, and, on the other hand, out of the organization of a large number of companies for the purpose of insuring employers against liability to their employees and others under the statutes referred to. These so-called employers liability laws and labour laws cover almost the entire field of ordinary industry in connection with the operation of railways, and factories, the construction of buildings, and works of either public or private enterprise, as well as in the operation of all sorts of vehicles on the public thoroughfares.

The organization of employers' liability insurance companies to insure against liability for accidents of every description, undertaking under their policies to defend the policy-holder in case of a claim for damages, has resulted in the absorption by these companies of the defense of negligence cases, and has practically removed this class of business from the sphere of ordinary law practice. It is necessary of course, that these companies should appear by an attorney, usually employed on a salary, but the policy-holder who commits the defence of the action brought against him after an injury has occurred, to the company, as provided in the policy, has little more to do with the matter, and has no control whatever over the lawyer who will represent him on the trial, and is completely at the mercy of the company in which he is insured. Inasmuch as the company only undertakes to indemnify in the amount specified in the policy, it not infrequently

turns out that the defense is so ineffective that a verdict is obtained for much more than the amount of the policy, and the insured is bound to pay the excess. But, undoubtedly, employers of labour of all sorts, and individuals engaged in hazardous occupations find an insurance policy in one of these companies a convenient, if not altogether satisfactory method of self-protection. As the defense of actions for negligence must, under the terms of the policy, be entrusted to the company, no matter how competent the personal counsel of the individual insured may be, the result is that the defense in four-fifths of the negligence cases is under the control of a half-a-dozen of the large accident and employers' liability insurance companies.

Then again corporate interests of every description which have been the outgrowth of the development of our natural resources have produced an ever increasing number of lawyers whose business is rarely in the courts and, frequently, scarcely in line with regular professional employment. Their business resembles that of promoters, lending themselves to schemes of every description likely to extract financial support from the too confiding public, and proceeds through the process of corporate organization, followed more often than not by receivership or bankruptcy proceedings, only to be built up again by skilfully devised plans of re-organization ending—no one knows where. This is a class of lawyers frequently found at the head, or among the chief executive officers, of railroads, trust companies, banks, insurance companies and indus-

trial corporations, or as partners in large private banking houses. It may be stated that attached to every one of these forms of business activity there is a lawyer, under the title of vice-president, general counsel or solicitor under a generous salary, or a partner, who forms as much a part of the regular staff of employees as any cashier or office boy. In addition to these staff lawyers it is common practice among important business interests to secure the services of a lawyer, or firm of lawyers, upon an annual retainer, which more often than not calls for a maximum amount of service at a minimum rate of compensation and under which the recipient becomes little more than a paid employee, bound hand and foot to the service of his employer. In the instances referred to there is such a proprietary right in the lawyer that he is almost completely deprived of free moral agency and is open to at least the inference that he is virtually owned and controlled by the client he serves.

In fact many of the best-equipped lawyers of the present day are to all intents and purposes owned by the great corporate and individual interests they represent, and while enormous fees result they are dearly earned by the surrender of individual independence. These influences have had a tendency to diminish respect for the lawyer as such.

Racial and commercial influences have in the process of evolution brought about marked and important changes in professional characteristics, methods and standards, which combined with the larger professional emolument to be derived from what may

be termed "commercial activity," have resulted in such a transformation that the lawyer of forty years ago would scarcely recognize his professional brother of to-day.

The beginning of the modern lawyer, so far as his introduction to practice is concerned, is much the same as it always has been. Like every other employment of lasting value there are the long years of preparation and patient waiting, the long hours of hard work, small compensation, and little pay, until a foothold is secured to climb to professional eminence, with the pecuniary reward which accompanies it.

It has been well said that the young lawyer needs "a brain of iron, a seat of lead, and a purse of gold to buy books with," if he would attain success. In this respect at least there has been no change.

In these days of strenuous competition, it is more than ever important that the modern lawyer should have a keen eye to recognize an opportunity when he sees it. It has been wittily observed that a man's success or failure depends on whether he seizes the steed "opportunity" by the forelock or the fetlock. No more instructive words upon this subject are, I think, to be found than the expressive lines of the late Senator Ingalls in his little poem entitled "Opportunity."

> Master of human destinies am I:
> Fame, love and fortune on my footsteps wait,
> Cities and fields I walk! I penetrate
> Deserts and seas remote, and passing by
> Hovel and mart and palace—soon or late
> I knock unbidden once at every gate.

If sleeping, wake—if feasting, rise before
I turn away, it is the hour of fate,
And they who follow me reach every state
Mortals desire, and conquer every foe
Save death! but those who doubt or hesitate,
Condemned to failure, penury and woe,
Seek me in vain and uselessly implore;
I answer not, and I return no more.

But all the preparation and opportunity in the world will amount to but little unless the young modern lawyer is ready for anything and afraid of nothing, with no hesitation as to assuming responsibility, and ability to carry it after assuming it. Then, although he cannot expect to be always successful, he will have shown at least that he has acted well his part.

In illustration of this, there was a case of considerable importance among the few descending to me on the death of my father, in which his clients, in their generosity, were willing to give me a trial by accepting my inadequate service as a substitute for my father's ability, experience and skill. This particular case was entrusted to me upon the understanding that I would engage able and experienced counsel, and I was led to retain that wonderfully warm-hearted, magnanimous and capable lawyer, Judge John K. Porter, a former judge of the Court of Appeals, to whom I gladly and reverently acknowledge a debt of gratitude for early encouragement and assistance, which I can never repay, and whose friendship, ripening during a series of years into intimacy, has been one of the greatest

treasures of my memory. After I had retained him in the early summer he left town upon his vacation. I employed the interval until his return in preparing a brief in the case, which was then on appeal from a judgment against my clients, and submitted it to him as embodying suggestions rather than as a complete argument. After he had examined it carefully I was not only greatly pleased at his expression of commendation, but more than surprised at his suggestion that I, instead of he, should argue the case. I could not accede to this, as I told him, because my client expected *his* services and that it was only because of his retainer that I was entrusted with the case at all. He insisted, nevertheless, that I must argue it personally, and volunteered to communicate with my clients, advising them that I should be permitted to do so. I urged my inexperience and lack of ability as compared with himself, and, in fact, hesitated to assume the responsibility involved, especially as there was very able opposing counsel.

The case was argued before the Court of Appeals in Albany and among the judges, Chief Judge Church, and Judges Allen, Peckham and Folger were old friends of my father, and Judges Allen and Peckham were his associates on the Supreme Court bench. The arguments began on one day and were continued on the day following. An incident took place at the close of the first day which always has been a treasured recollection of graciousness and kindliness in distinguished men. The four judges above named, on descending from the bench, came to the table where I was standing and taking my

hand gave me words of welcome and friendly greeting. The Court took the case under consideration and on re-assembling in the fall they announced their decision in favour of my clients, reversing the judgment appealed from, and the result of assuming this responsibility under the kindly encouragement of Judge Porter was that I continued to represent my clients—a large corporation—during the remainder of my professional life.

The most valuable asset of a lawyer is, of course, his experience, and in the course of preparation various avenues of exceptional value present themselves. If it is as a court lawyer, it is not necessary now as in former days to acquire the requisite court experience through a long period of scattered and perhaps infrequent cases, for the great public offices, such as the Corporation Counsel, the United States and State District Attorneys, the legal departments of the various railroads, employers' liability insurance, or financial corporations, or the litigation department of some large office, will furnish abundant means of acquiring valuable experience.

The modern lawyer generally favours practice in a partnership and, I think, it may be generally accepted as true, that the volume of business which can be transacted by a well-constituted partnership will be at least one-third more than the combined volume of business of each individual member of that firm practicing separately, but the young modern lawyer cannot consider too carefully the partnership into which he enters. Personal characteristics, habits, social position, and moral tendencies

are of the utmost importance as affecting intercourse between partners quite as much so as professional attainments and the ability to practice law successfully, for the latter without the former cannot make a partnership truly successful.

In fact, partners are at each other's mercy, not only with respect to the kind of business undertaken and the method of conducting it and in dealing with clients, but in their relations with each other. What shall be said of the dishonest and treacherous partner who pockets large fees for services rendered, attempting to justify it on the ground that the services were not in a law matter, carefully concealing, however, their receipt from his co-partner and when after the lapse of years the transaction is brought to light, meets his co-partner's claim to share in them with the plea of the statute of limitations. I knew of such a case.

No greater mistake, then, can be made at the outset of one's career, than to enter hastily and without deliberation and careful consideration into a law partnership. Some men are created to be good partners, and to some a partnership relation is an impossibility. This was, I think, the case of Mr. Charles O'Conor, who, although so wonderful in himself as a lawyer, was not suited to the practice of law in partnership. On the other hand, Mr. Evarts through nearly all his legal career was at the head of a leading partnership, into which he entered at the beginning of his practice and in which he continued until its close. The same is true of Mr. James C. Carter, who in the earliest years of

his practice entered into partnership with Henry J. Scudder, and under the firm name of Scudder & Carter continued until Mr. Scudder's death, and subsequently became the head of the firm of Carter & Ledyard. There are numerous instances in New York of these life-long partnerships, but after all, they are exceptional and the partnership changes which occur in the course of years are almost as great as the changes of the figures in the constantly turning kaleidoscope.

Whatever direction he may pursue the modern lawyer will find separate departments in the great offices, each identified with some special line of practice: corporations, real estate, litigations, surrogate proceedings, including wills and trusts, as well as others, sometimes making the modern law office resemble one of the large department stores, where many distinct lines of business are conducted under the same management. Then, for the real estate lawyer, there are the title companies which employ almost an army of lawyers; and for the corporation lawyer, corporations whose business it is to organize and attend to the legal details of corporate organization.

The ability to conduct a business negotiation successfully has always been a highly esteemed qualification of lawyers, but it was never more important than at present. Any lawyer who has this gift can make it the most important and remunerative part of his practice. It is a wise old saying that "a good settlement is better than a poor lawsuit." Business men at the present day want skilful adjust-

ment of their business controversies and complications. Litigation is so slow and expensive that it does not pay, even with the most favourable result, and this has led to arbitration committees in connection with all the mercantile exchanges. Again there are the large combinations and consolidations of business interests and the re-organisations, with conflicting sets of security holders which require skilful handling by able negotiators. This has given rise to a large array of able lawyers of this particular class, some the most flourishing practitioners in the profession.

The spirit of litigation as distinguished from the spirit of settling is illustrated by an anecdote which Judge Noah Davis related to me of Chief Judge Church. "When," said he, "we were partners in Albion, under the name of Church & Davis, Judge Church was the litigator, while I was the settler, and when Judge Church was leaving Albion to assume the office of lieutenant-governor, to which he had been elected, he was afraid that I, during his absence, would settle all the cases we had in the office, and he took my hand and looking at me earnestly, said, 'Now, Noah, I am going to leave you in charge of the business, quench not the spirit.' "

One of the greatest defects in the young modern lawyer is the absence of accomplishment in oratory. Why are the days of cultivation in oratory departed? Why have no efforts been made to perpetuate the oratorical gifts of Pinkney, Webster, Rufus Choate, Emmet, Henry, Wirt, O'Conor and Evarts? The absence of training in oratory in our

universities and colleges has brought about a pitiable state of affairs, so far as the modern young lawyer is concerned, who instead of having been educated to some degree of facility in public utterance while in the formative period of youth when elocution is best inculcated, is graduated from his university and enters upon the practice of the law hampered by the want of this training, and forced to educate himself in it through a long course of unpleasant experiences. It is undoubtedly true that the day of long oratorical utterances before the courts and juries has passed, but there can be no doubt that the cultivation of an easy and forcible style of public utterance furnishes a great asset to the modern young lawyer in the opening of his career.

Time is so valuable in disposing of the large volume of litigated business, the courts are so crowded and the judges so overwhelmed by its amount, and have consequently become so impatient with long-winded utterances, that opportunities are rarely afforded for the oratorical displays of former days and it is consequently necessary to cultivate a plain, direct and earnest style, and conciseness and brevity in the presentation of even the most important cases. The man who can say the most good sense and sound law in the shortest time has a decided advantage. Juries are not much influenced by outbursts of eloquence, and appellate tribunals will not tolerate them. A tired and yawning jury will not be likely to take the most favourable view of an advocate's case, and when the attention of an

appellate tribunal is lost and the judges begin to converse in whispers or bury themselves in the record, the oral argument is little more than a waste of time. When you have lost attention you have probably lost your case. Juries and judges have become so accustomed to business-like methods that they appreciate a simple and clear presentation of the essential facts, each argument in its support clearly stated in a few well conceived sentences, with no haltings and no revertings to things inadvertently omitted, no fumbling of documents and no reading from authorities. Such presentations have characterised the foremost modern lawyers and, at least one of the old time lawyers, Judge Benjamin R. Curtis of Boston, was distinguished for the brevity of his arguments. Mr. Justice Miller of the Supreme Court of the United States, in his estimate of Judge Curtis as the greatest lawyer of his time, mentioned that in his most important cases before the Supreme Court of the United States his arguments rarely occupied more than forty minutes in their delivery. Judge Story and Chief Judge Parsons seldom occupied over an hour, and rarely over half an hour. The cultivation of such a style as this will be likely to contribute as much as anything else to the success of the modern lawyer in the courts.

One of the most important arts of the court lawyer is to know when to keep still, and be able to exercise the self-command to do so. Many a case has been won by paying due regard to the attitude of the judge when he essays to combat the views of

opposing counsel. The lawyer is indeed wanting in tact and discretion who then assumes any other rôle than that of a spectator of the proceedings. By all means let the judge do your arguing for you if he is so inclined, and if in this way he indicates that he is favourably disposed it is folly to attempt to reinforce his views; even though they could probably be reinforced to advantage, they do not need reinforcement so long as he adheres to them. The moment the Court appears favourably inclined to your side of the case is the time to preserve discreet silence. This is equally true with juries, and if in the course of the trial there is the slightest leaning in your favour then is the time to do as little as possible by objections or long cross-examinations, which can only have a tendency to lead the court and jury to think that you consider it necessary to strengthen your case when it needs no strengthening, the only effect being to counteract the favourable impression that has been made. Many a case has been spoiled by an inability to recognise the appropriate time to say nothing.

In a case which occurred sometime since, there was an important issue as to whether service of a certain process had been made on one of the parties. If it had not been served the case was lost. The burden of proving that it had not been served was on the party making that claim. Here was where the art of opposing counsel was exhibited. He recognised that the claim was technical; that the Court would look upon it with suspicion, and that it is always exceedingly difficult to prove a negative

in matters of that kind. He therefore participated but three times in the course of the investigation. The first was when, at the conclusion of the direct examination of the process server the judge asked him if he desired to cross-examine. He answered, "No." Then the party making the claim of non-service was called and gave his testimony denying the service. At its conclusion the judge again asked whether he desired to cross-examine, and he again answered, "No." The judge then asked him whether he wished to introduce any evidence to support the fact of service and he, concluding from the attitude of the judge that he was not impressed with the claim, he again answered, "No." These three "noes" constituted the extent of his participation in this somewhat lengthy proceeding and the result justified his action, the judge deciding immediately that the service had been made.

When the time comes for the modern young lawyer to launch out upon the sea of professional practice, his natural inclinations will determine at once whether he will pursue his career in the courts or as an office lawyer. And it may be that his predilections in a particular direction will lead him to pursue some specialty. To him, however, whose inclination is toward a court practice, his limit will be as boundless as that of human experience, and his opportunities for the display of intellectual acumen in the preparation of cases for trial, of briefs for use in the appellate tribunals, and the exercise of his gifts in impressing his arguments upon strong minds, will be confined only within the bounds of his usefulness

to his clients and his natural ability. While it is doubtless true that the memory of the lawyer is at best fleeting, yet it will be preserved by the appearance of his name in the public reports of cases decided by the courts by which his career may be followed from his first appearance before these tribunals, until he disappears to make his appearance before his final Judge.

The tendency to specialise has been noticeable since early times; for example, court lawyers and office lawyers have always formed two classes, the function of each resulting in a clear separation of the one from the other which only in rare instances would find a union in one individual. As a result court lawyers and office lawyers have always been recognised as two great instances of specialisation. The country practitioner and the lawyer of moderate practice, would naturally combine both functions, but only under compulsion; the tendency is always to separate the two whenever possible, and law partnerships everywhere are made up with this in view.

In England this separation has always existed in the distinction between barrister and solicitor, and even in the case of the barrister the line is sharply drawn—more sharply formerly than now—between barristers occupied in court in the trial and argument of causes and those who were special pleaders or engaged in giving opinions, preparing wills, and revising agreements and other important documents. Then, too, there has always been in England, as well as in this country, a distinct class of specialists known as conveyancers, who confine themselves to

business pertaining to the transfer of titles to real estate and, as allied to this, the preparation of wills and the settlement of the estates of decedents. Two offices of especial prominence, engaged almost exclusively in this class of business, were Wetmore & Bowne and C. J. & E. DeWitt, and the volume of titles to real estate which they examined and the transfers which they superintended was very large. The late Albon P. Man and Charles E. Strong were also prominent examples of specialists in real estate law, and every important firm had at least one member who devoted himself exclusively to this branch of practice.

Notwithstanding the great changes which have occurred in the practice of real estate law by the appearance of the title companies, there still continues to be a considerable class of real estate lawyers, who may be so fortunate as to represent estates or large financial institutions, or who are recognised as specialists in real estate law in that comparatively new line of business, known as building loans.

Patents, trademarks and copyrights have always been a special branch occupying the exclusive attention of such able practitioners as the late George Gifford, George Harding, Edward N. Dickerson and Frederick H. Betts.

The same is true of admiralty, around which congregated lawyers of great distinction and a considerable number of lesser lights, who were recognised as the admiralty bar. Among these were the late Edward H. Owen, Robert D. Benedict, Welcome R. Beebe, Charles Donohue and Wilhelmus Mynderse.

Commercial law embraced so many and widely varied subjects that it was less of a specialty than the others. There were certain law firms known as specialists in that branch of the law, such as the very prominent firms of Martin & Smith and Barney, Butler & Parsons, but commercial law engaged the attention of almost every office to some extent. These large commercial firms have almost entirely disappeared and in their place has arisen a great body of lawyers, who are occupied with commercial affairs in connection with bankruptcy practice.

There is also growing up a large body of lawyers whose specialty is the prosecution of cases of personal injury through negligence. A vast volume of litigation of this class crowds the calendars of the courts, occupying the exclusive attention of many offices, while a large number of counsel of especial experience in the trial of such cases do little else.

Special circumstances have also created specialties, such as in the cases growing out of the construction of the elevated railroads, in which damage to the owners of property abutting on the streets were claimed for injury to their easement of light, air and access. A considerable number of lawyers specialised in the prosecution of them and thereby amassed fortunes. From the Battery to Harlem, along the line of the elevated roads, property owners instituted actions in numbers almost incredible, requiring, while they lasted, the exclusive attention of at least one branch of the court. But these have well nigh disappeared.

Proceedings relating to taxes, assessments, and

street openings, involving technical knowledge of statutory requirements, have also created a specialty to which a considerable number of lawyers devote themselves, usually under an agreement for a large percentage of the tax or assessment vacated or reduced and of the award obtained in street opening cases. This class of business, conducted on this basis, has never been regarded with favour by the better class of lawyers.

The criminal lawyer has occupied for many years a sphere peculiarly his own. A great gulf seemed to separate him from civil practice. Very few practitioners who commanded a civil practice ever appear in the criminal courts, while those who engage in the practice of criminal law are rarely sought for in civil practice unless perhaps in negligence or divorce cases. While the general run of criminal lawyers has not been men of very high repute, there have been, naturally, exceptions, some of them of great ability and high reputation. Among the latter were men like James T. Brady and John Graham, who were truly great criminal lawyers; and William A. Beach and William Fullerton, both men of distinction in civil practice, frequently appeared in important criminal cases. Probably the most notable, and perhaps notorious, among the firms of criminal lawyers was that of Howe & Hummel who commanded, in all probability, the most extensive practice ever obtained by any one firm in the criminal courts. Charles S. Spencer, Charles W. Brooke, Samuel B. Garvin and John R. Fellows were also eminent at the criminal bar.

A numerous class of lawyers at the present day may be described as "patronage lawyers." These are they who subsist on the patronage dispensed by the judges. They have little or no individual practice; they are rarely seen in the argument of cases or in connection with important office business; they are sometimes known as "judges' pets," and years ago there was a reputable lawyer, who was so frefrequently appointed referee by a particular judge, who finally resigned under severe adverse criticism, that the first name of the appointee—Gratz—became a symbolic term which was applied to judicial favourites by the expression—"He is the judge's Gratz." This class of lawyers live upon references, receiverships, commissionerships, and other bits of judicial *pabulum* which fall from the judges' tables. Many of these appointments are directly due to political influence, and in most cases the appointees are of sufficient consequence to their political party, or to some judge, to require that they should be "taken care of." Of course dependence on this form of professional employment is destructive of an individual clientage, and whatever the fees, which are sometimes large may be, they are dearly earned by a surrender of independence of judicial favour and by the obsequiousness which such dependence involves. How can any lawyer who relies upon the patronage of a judge for professional employment maintain a sturdy independence before him and risk a charge of expressing the contempt which on some occasions he may quite likely feel?

One of the most melancholy features of the mod-

ern lawyer is the frequency of disbarment proceedings, resulting often in actual disbarment and, perhaps oftener, in discipline involving suspension from practice. This is not the place to furnish statistics on this subject, but if any one will scan the lists of decisions of the Appellate Division, in the First Department, he will almost always find proceedings affecting the conduct of attorneys. In addition to this there are the Grievance committees of the Association of the Bar and of the New York County Lawyers' Association which are constantly engaged, under the assistance of salaried attorneys employed to do nothing else, in investigating charges of misconduct preferred against lawyers—the function of these committees being to make a preliminary investigation and if the result of the investigation calls for it, to prefer charges in the name of the Association against the attorney complained of. The great number of matters of this description presented to the Grievance committee and to the courts is almost incredible. This is one of the most lamentable features of the present day practice of the law, notwithstanding that the qualifications for admission to the bar with respect to moral character are more stringent than ever before.

These proceedings show that nothing is more important to lawyers of every class than to keep in mind—particularly to those who are entrusted by estates or individuals with moneys for investment, and who collect the income for transmission to their clients, and likewise to those receiving collections in commercial matters—than the distinction be-

tween *meum et tuum*—the difference between what belongs to oneself and that which belongs to another. The constant handling of other people's money has a tendency to dull that keenness of perception which should always exist respecting the fiduciary or trust relation. The failure to observe this closely has led to the undoing of many a lawyer, and I could cite offhand a considerable number of instances of defalcation, followed by lasting disgrace, of men who occupied high positions in the profession, and unfortunately the annals of the Appellate Division are full of disbarment proceedings which have resulted from the failure to observe the *meum et tuum* distinction. The mere possession of funds belonging to clients offers a strong temptation in times of financial stress to "borrow" for a few days, which is in itself nothing more or less than a misappropriation of trust funds and a clear breach of trust; it matters not that the money is restored and that no harm resulted. The undeniable fact that the "borrowing" was in itself a breach of trust can never be obliterated. It is well to distrust oneself, and many a lawyer would have served himself if he had kept constantly in mind the consequences of such misappropriation, accompanied with the wish that if he ever should be guilty of such a breach of trust he should be sent to states' prison.

The value of pursuing this course was illustrated in my own experience by an occurrence in the distribution of a small estate of which I was executor. Among the legacies was one to a church in the north of Ireland. I paid this legacy in due course and the

estate was wound up. What was my surprise, some months later, to receive a very harsh letter from an official of that church calling my attention to the legacy and expressing surprise that it had not been paid, and containing some rather severe animadversions upon my conduct as executor, and concluding by saying that they had placed the matter in the hands of the Right Honourable Mr. S., a member of the Privy Council, who was about to sail for America, and that he would call upon me and receive my explanation, and demand payment of the amount. I was greatly disturbed, and wondered what oversight could have occurred to bring such a situation to pass. I lost no time in unearthing the papers in the case, and examined my check book and my cancelled checks, and, to my great satisfaction and comfort, I found among the returned checks the check for the amount of the legacy with the endorsement of the treasurer of the church, showing its deposit and payment, and a letter acknowledging its receipt.

These documents I directed our bookkeeper to place where at a moment's notice they could be produced. Thus fortified I calmly awaited the appearance of the Right Honourable gentleman. In the course of time he was announced and entered my room. I gave him a very reserved and altogether serious greeting, making no offer of the customary hand-shaking and salutation, which I think rather over-awed him instead of his Right Honourable presence over-awing me. I called for the papers and in silence handed the check to him with the letter. As he perused the check and letter, his face was a study

in physiognomy; he scanned the signatures with the utmost care, and finally acknowledged that a grievous blunder had been made. I made no reply and he asked me for a copy of the check and of the letter, which I directed to be made, and when they were ready he repeated his regret at the occurrence, and the only remark which I made was "that before such a letter as had been sent to me had been written, I should have supposed there would have been an investigation of the facts, but the letter having been written it was my opinion that the time had come for an ample apology." He was humble and conciliatory and promised that one should be made, which promise was performed. I learned afterward, through his brother residing here and whom I knew, that he felt very keenly the embarrassing position in which he had been placed.

Fortunate indeed is the young lawyer, who during the period of preparation has learned to distinguish with absolute clearness between right and wrong, which many seem unable to do. Not only that right and wrong which keeps him within the bounds of legality, and protects him from disbarment or indictment, but that right and wrong which is founded upon the immutable principles of justice and fair dealing which a sensitive conscience will approve.

Women are, as a general rule, undesirable clients, although there are noteworthy exceptions. Like the elder Weller, my advice is, "bevare of the vidders," and I might add as well, the would-be divorcees. The importance in dealing with them of having everything in black and white was illustrated by a

divorce case in my early days, the only one I ever consented to take, in which I came very near getting into considerable trouble.

A few years after I had begun practice, a poor woman connected with one of our philanthropic institutions, applied to me to assist her in obtaining a divorce from her husband, who had deserted her, and a reasonable support for herself and her child. He was a prosperous machinist, having an independent business, and although the evidence of misconduct was satisfactory, the wife was without any evidence of his resources as a basis for awarding alimony. A decree of divorce the husband would welcome, but not a provision for alimony, and this was where the real contest arose. As she was helpless and in poverty, I undertook her case, and by exercising all the ingenuity of which I was capable, I was finally enabled, with the co-operation of one of the mercantile agency investigators, to get at the extent of the husband's resources, something the wife would never have been able to do. Armed with this evidence, I applied for alimony and secured for her a suitable allowance, together with a moderate allowance for counsel fees. She was delighted with the result, and it only remained to obtain a final decree of divorce with an award of permanent alimony. The divorce part was practically non-contested, and it remained for me to again produce my evidence. This was likely to be a matter of considerable difficulty and I was greatly relieved, as well as gratified, to receive a proposition not to contest the decree if no increase of alimony was applied for. As I had

no evidence upon which I could hope to secure an increase, I communicated the proposition to my client and she expressed satisfaction with it, and authorized me to give the necessary consent. Here is where I made a mistake. I should have had her authorization in writing, but I suspected no aftermath, and proceeded to the entry of the decree. The alimony was promptly paid and I congratulated myself upon having done a kindly act and won the gratitude of a deserving woman.

Sometime after, I received a request from her for the papers which I held, and in my inexperience, unsuspectingly, I sent them to her. What was my surprise to learn from my opponent in the case, a lawyer of very excellent standing, that a motion had been made, on behalf of my former client, to open the decree for alimony on the ground that the amount was insufficient, and that my consent to the temporary alimony being made permanent was without any authority on her behalf, and I was confronted with the affidavits of two individuals besides herself in support of her contention. I had no evidence except my own unsupported statement and upon this, in the form of an affidavit by me, the motion was opposed. I felt greatly worried and anxious because of the stigma which naturally attaches to a lawyer who had acted in such a matter without the consent of his client, and as there were three affidavits against one, I awaited the result with a great deal of foreboding. The late Justice George C. Barrett heard the motion, and if there ever was a judge of keen penetration and remarkable ability to dissect facts and ana-

lyze the motives of conflicting statements, he was certainly a pastmaster in this respect. Imagine my intense gratification and relief when, after holding the motion under consideration for a time, he denied it in an opinion of some length, in which he exposed in a luminous way, the falsity of the three affidavits and supported my own in every particular. Since then the idea of undertaking a divorce case has always given me a shudder, and I have consistently rejected retainers in cases of this description.

The relation of the modern lawyer to his clients presents a marked contrast to that of the lawyer of older times. The old-time lawyer occupied a very important and dignified position. With the clergyman, he was a man of intellectual culture and was treated by everybody with deference and respect. He was the leading personage in the community, and was called upon on all occasions where intellectual cultivation was necessary in producing an appropriate oration or a written address or petition. Frequently his gifts were employed in an editorial capacity. My father in his early days edited the *Wayne Sentinel,* some bound volumes of which are in my possession. Any one familiar with the old-time prints will recognize the almost reverential deference in which the lawyer was held, being often represented as occupying a dais, an obsequious and apparently awestruck client approaching him, the lawyer's manner dignified and patronizing, and his general demeanour indicating the conferring of a favour.

This relation between the lawyer and his client ex-

isted to a great degree until the early days of my professional life, but since then it has undergone a complete and marvelous change. The advent of the captains of industry, the multi-millionaires, the mighty corporations and the tremendous business enterprises, with all the pride of wealth and luxury which have followed in their train, have reversed their relative positions, and the lawyer, with a more cultivated intellect than ever and as worthy of deference and respect as formerly, is not treated with the deference and respect of early days. This is accounted for to some extent by the keen competition which exists in the profession, placing the lawyer in the attitude of reaching out for retainers, instead of being regarded as conferring a favour by accepting them. The lawyer no longer receives the obsequious client hat in hand, but is subject to the beck and nod of the great financial magnate, who, whenever he desires to see his lawyer, "sends for him." It would never do for the lawyer who values his practice to insist that his client should call upon him, instead of he calling upon his client.

There is also noticeable, I think, a decline in manners, especially in the courts, presenting a striking contrast with those of earlier days. There have always been, undoubtedly, bullying and brow-beating lawyers, rude to their opponents and often brutal to witnesses; but they were exceptions, and their careers were not successful. The amenities of the profession, ordinarily, were carefully observed, and in England when the lawyers met at circuit, and at our own county seats where the court

sessions were held, there was generally an abundance of good-fellowship and friendly intercourse, which, in the heat of litigation was not disturbed by wrangling. In a numerous bar like that of New York, where the mill of litigation is constantly grinding, with a variety of native and foreign elements engaged, and little of the personal and friendly intercourse outside the court room the tendency to indulge in personalities, to engage in rancorous controversy, to criticise conduct, to attribute unworthy motives, and to forget the amenities and courtesies of professional life, seem to be more noticeable, in consequence of which the tone of the bar in litigation has been considerably lowered from the high standard which formerly prevailed.

This might be illustrated by an incident which occurred on the argument of a motion where one of the lawyers was noted for his enjoyment of the pleasures of the table, which had given him the appearance of a rather overfed individual. His opponent was arguing earnestly, when the former interrupted with the remark: "You should have raised that point by demurrer." His opponent turned upon him with a savage scowl, and inquired: "What do you know about a demurrer? It is nothing that you can eat."

But after all, it is proverbial that the lawyers fight like demons in the court room, but leave the court house arm in arm, in the intimacy of friendship. Probably, this is as true to-day as it ever was, and it is often the case that lawyers who have had the hardest fight become the warmest friends,

subject to the limitation, however, that it was honourable warfare, with legitimate weapons, and not angry strife where personalities took the place of fair argument. Whatever feeling may have been aroused, it is a good time at the end of a litigation, if not before, to seek an opportunity to remove it by friendly advances, and when the moving cause has disappeared this will not be difficult.

Sometimes, however, there is an ungenerous spirit which repels even such advances. I knew of one such instance among lawyers of excellent standing, who, instead of being alienated from each other should have been good friends. One of them had been a subscribing witness to a will, which became the subject of a contest. The will was executed at a time when the testator was in an enfeebled condition, and under circumstances which gave rise to a strong suspicion, at least, of undue influence. When the lawyer became a subscribing witness he must, of course, have appreciated that by doing so, he would, quite likely, expose himself to a searching cross-examination, and that the contestant's lawyer would be at liberty to make such legitimate comments upon his conduct as the facts developed might call for, and which his duty to his client undoubtedly required him to make. The contest proceeded. The lawyer who acted as subscribing witness was called, and undoubtedly subjected to a severe examination. The facts developed justified criticism of his conduct by counsel for the contestant, which, however, did not proceed beyond the bounds of a legitimate cross-examination, and of fair and hon-

ourable criticism. After this the subscribing witness refused to give the contestant's lawyer the slightest recognition. Now comes the sequel. At the end of the litigation the contestants' counsel, confirmed by his conscience that he had simply performed a professional duty, sought out the lawyer referred to, and assured him that there was nothing personal in what he had done; that he had acted according to his conscientious conviction as to his professional duty; that he intended no personal reflection, and that he hoped that their acquaintance which had been disturbed, might be resumed upon its old-time basis. What was his astonishment and surprise to be repulsed with the remark: "I prefer to leave our personal relations undisturbed," and from that time on these two respectable lawyers, who desired to do what was right, never recognised each other. This is undoubtedly an extreme instance of an unforgiving spirit, and it is due to the profession generally to say that they do not often carry their differences outside the court room.

The modern lawyer enjoys advantages over the lawyer who practiced before 1880, which should not only be mentioned, but can scarcely be overestimated. If the lawyers admitted since that date could appreciate the difficulties in earlier days in traveling to and from their offices they would bless the day of elevated roads and subways. For about twelve years after my admission to the bar in 1870, Wall Street could only be reached by the lumbering omnibus which used to run down Broadway and Wall Street to the ferry, or by the surface cars which ran

through Church Street and stopped at Barclay Street or the Sixth Avenue line, which terminated at Vesey Street, or the Third and Fourth Avenue lines which terminated at the City Hall. If the cars were employed it was necessary at their terminals to either take a stage or walk to Wall Street. It would be difficult to portray, and more difficult to realize, the inconvenience and discomforts of these modes of conveyance. The fagged-out horses of mid-summer and of stormy winter days, the slow plodding, the dirty straw covering the floors of the 'buses and cars to keep one's feet warm, the entire absence of ventilation and the almost, as it seemed, interminable journey, had to be endured, of course, and was endured because no better means of transit were known. With the construction of the Broadway surface road the omnibus disappeared and the convenience of travel was largely increased. But what a blessing the elevated roads were! With their advent travel to and fro was at once transformed, and the journey twice a day became a comfortable experience instead of a painful ordeal. In later years the increased facilities furnished by the subway, the brief moments of transit between 42nd Street and Wall Street, and the protection from exposure to storm and torrid heat, furnish a delightful contrast to the days of the omnibus and surface cars. Sometimes I hear one of my juniors complain of the vitiated air of the subway, or some other objectionable feature more or less imaginary, and I cannot but have a silent contempt for his ingratitude, which he would surely ac-

knowledge if he could be translated for a time to the days of the omnibus and street cars, and be compelled to endure their horrors of a winter night in the midst of a raging blizzard.

# CHAPTER XVIII

## THE MODERN LAW OFFICE

Notable and important changes have taken place during the past thirty years in the situation, office-force and ordinary appliances of lawyers' offices. The location and general characteristics of the modern office present a striking contrast to those of former years, brought about by improved methods of building and the introduction of the elevator. Musty offices in old-fashioned buildings, with few conveniences, for the most part poorly lighted, with little attention to cleanliness or internal arrangement, have disappeared. The greater number of lawyers' offices, up to 1880, were located on the third floor of buildings, involving two flights of stairs, and it was not rare to find one on the fourth floor. The modern lawyer seeks light and sunny offices in the highest stories of the so-called sky-scrapers, where the atmosphere is pure and the light abundant, contributing generously to comfort and good cheer, as well as to longevity.

Until about 1880, there was a quaint arrangement of buildings at 41 and 43 Wall Street known as Jauncey Court. In these buildings were to be found some of the typical old-time offices. The published prints of Wall Street as it was before the advent of the modern sky-scraper show Jauncey Court in all its quaintness.

The only remaining instance, so far as I know, of the typical law office of earlier days, although modernized somewhat in its office equipment, and rendered attractive by cleanliness and an air of refinement, is the office of that highly reputable firm, which began in the days of Peter DeWitt, the continuity of which has remained unbroken down to the existing firm of DeWitt, Lockman & DeWitt, whose offices during a period of nearly eighty years have been at No. 88 Nassau Street.

One of the great disadvantages of the offices of earlier times was absence of cleanliness. Unless there was a janitor who would attend to this important matter, little attention was paid to it. The consequence was that except for semi-occasional housecleanings, there was an entire neglect of that daily attention to the offices, which is now deemed so essential. With the advent of the modern buildings, each with its superintendent and corps of employés to care for it, the careless and oft-times filthy condition of the earlier law offices has entirely disappeared, and it is now a matter of course that after the work of the day by the office force is suspended, the corps of cleaning-women and the window cleaners take possession and put the offices in a reasonably cleanly condition.

The large modern law office resembles, in fact, important commercial or banking offices, and in some cases occupies as much as 10,000 square feet, so subdivided and arranged that there is none of the freedom of the office of former days, while access to the partners, and the more important employés,

is rendered difficult unless the object of one's visit is fully explained to some lynx-eyed guardian. It is by no means a place for informal and friendly visits, being enveloped in an atmosphere of business activity, creating an impression unmistakably, although often unintentionally, that anything but business requires an apology for the time consumed, and that it is an intrusion.

The rental of the modern law office would arouse in the old-time lawyer open-eyed wonder. In earlier days, $2,500 for a suite of offices was considered a large rent, while at the present date, five times that amount is not unusual and in some cases it is nearly if not quite $20,000.

The systematic methods and recently devised appliances of modern offices are of such a character that the practitioner before 1870—or even before 1880—would find himself in entirely new and unaccustomed surroundings unable to keep pace with the modern practitioner, surrounded by his numerous conveniences facilitating to a remarkable degree the despatch of business. The slow and laborious methods of former days consumed a vast amount of time and imposed mechanical labour which modern methods have entirely eliminated. Documents of all kinds were in those days invariably written out by the practitioner in long hand, involving not only the time necessary to compose and write them, but where duplicates were necessary, the labour of copyists.

The ordinary work of this character, such as copying pleadings, affidavits and records on appeal, was

performed by the law students or minor clerks. It was quill-driving, pure and simple, and when a voluminous case on appeal had to be copied, there was often a competition as to who would produce the largest number of sheets of legal cap paper, legibly written, in a single day. Those of us who engaged in this duty will probably look back to the appalling tasks of this kind with which we were presented, and to the reams of copies turned out, oftimes with aching fingers and under great depression of spirits.

There was, however, a class of professional copyists who performed the more important and skilled work of copying legal documents. These constituted a regular and well-defined class of office servants, legible handwriting and the ability to decipher illegible handwriting being the only qualifications required. Many of them were strange characters, often venerable in appearance and interesting to behold, but with no ability beyond that required to produce a legible copy of a document. Most of the professional copyists were also skilled engrossers, and whenever a will or agreement was to be copied, a very beautiful specimen of their work would be produced, with writing like copper-plate, the initial word of each paragraph handsomely executed in old English or German text. A considerable number, and in fact, I think, a large majority, were English or Irish who had acquired their skill and experience in the old country, and their work was so automatic that the substance and purport of the document would make no mental impression.

With the advent of modern appliances this class of employés has almost entirely disappeared, although one may occasionally be found. In England, however, where engrossed documents are much more common at the present date, the copyist still retains his place.

The pen has always been an important accessory of the lawyer, and the goose-quill is the lawyer's emblem. The goose-quill pen, the penknife and the sand-box were once inseparable associates on the lawyer's table. As late as my own early days at the bar quill pens had not disappeared from the New York courts, but were supplied by the city authorities at the lawyers' tables in the court room. Even now, the practitioner in the Supreme Court of the United States will find on the tables in the court room provided for the use of counsel, the old-time quill pen, a forcible reminder of the days of Marshall and Story. The abandonment of the quill pen and the universal adoption of the steel pen mark a very important improvement in the facilities of the modern law office. The present generation scarcely stops to think, probably, that it is within the memory of men now living that the goose-quill was replaced by the steel pen and the sand-box by blotting paper. It was not until 1860 that the manufacture of steel pens in America began on any large scale. Ten years later the variety of steel pens was very small. But the evolution of the pen, keeping pace with other improvements, has shown a development of great importance. What was regarded as a somewhat expensive luxury in the ear-

lier days, has become almost a miracle of cheapness, and pens of endless variety, suited to almost every possible requirement, are now to be had. Beside the ordinary pen, modern requirements have evolved the fountain pen and the stylographic pen, which frequently find employment in the lawyer's affairs.

With the passing of the quill pen, and the sand-box, there also passed from use the red tape so familiar to old time lawyers, from which originated the familiar expression "there was too much red tape about it." It continued to be used for some years after my admission to the bar in 1870, but it gradually gave way to its more convenient substitute, the rubber band, which was soon universally adopted. I am quite confident that the rubber band was not a part of the lawyer's outfit in 1870, and I think it may safely be said that this addition to it is a product of the last forty years. Like all other good things, the rubber band, at first crude and imperfect, was, by an evolutionary process, perfected in its material, and in the great variety of its shapes and sizes, adapting it to every kind of use, and making it one of the greatest conveniences of the modern lawyer.

The first notable change in the production of lawyers' documents was the process of manifolding, which came into use about 1870. At first the copies were produced in much the same method as that of copying letters in a letter-book, by using copying ink in making the first draft, then applying moistened tissue paper which received the impression of the original. In this simple and convenient way

several copies could be made, and where documents were voluminous it was universally adopted. But, like many other convenient and labour-saving devices, the careless practitioner often produced copies so blurred as to be scarcely legible, and this led to the adoption of rules by the court which prohibited the submission of such copies to the court, or to public officers for the purpose of filing or certifying.

Another process of manifolding was that of lithography, by which was produced any number of copies in a very attractive and perfect form, but the expense of it was large, especially where only a few copies were required, and being slower than other means of manifolding, it did not come into common and every-day use.

Other methods of manifolding were introduced which, however, were speedily abandoned, owing to the introduction of one of the most useful and valuable inventions of modern times—the typewriting machine. The enormous number purchased, and the vast industry connected with their production and operation, and their presence in every office of any consequence in the country, is the strongest testimony to their practicability, and no office is complete without one. In the early days, their work was indeed crude and unsatisfactory and the freaks of the machines, as well as of their operators, were often annoying, but their convenience and practical value was such that they marked an important step in the production of accurate and legible documents, while in the improvement of the machines and of

their operators, the quality of the work, and the number of copies produced at a single stroke by the operator, is found one of the greatest changes and conveniences which the modern law office presents. The skill with which these machines are operated is often remarkable, a few of the most expert operators being able to take dictation direct on the machine almost as rapidly as if taken by a fairly competent stenographer.

From this evolved another important adjunct of the modern law office in the now indispensable stenographer and typewriter. This individual occupies very much the same relation to a large law office that the skilful machine operator does in a factory. The work is to a large extent purely mechanical. Utilization of time and economy in service form two of the most important considerations. Consequently, comparatively recently, the phonograph and the dictagraph have been introduced and are gradually finding their way into law offices, and into large mercantile establishments. They are a kind of intermediate convenience between the employer and the employé. Their use enables the employer to dictate into the machine that which is to be put into form upon the typewriter, and, the typewriter is enabled by a transmission of the contents of the record to embody the matter dictated in typewritten form.

It is particularly valuable to the court stenographer in the course of cases on trial, where the counsel desire from day to day a transcript of the testimony. By using it the stenographer is able after

the court adjourns to read from his notes into the phonograph his record of the day's proceedings, and the typewriter in the course of the evening will be able to furnish it in typewritten form ready to be supplied to counsel, before the opening of the Court on the following morning.

The stenographer, as such, in former days was a rare and unfamiliar person. When it is considered that official stenographers for the courts were not authorized by statute until 1865, their employment before that time in the ordinary work of the law office was unusual and exceptional. Until then the judges universally took the notes of the testimony in longhand, and no such thing as the stenographer's minutes of the testimony was known. I have in my library the volumes of court notes taken by my father when he was on the bench and which constituted the record in the cases. In my own early days, when a clerk in the office of my father, who frequently served as referee to hear and determine cases, I acted as amanuensis and took down in longhand the testimony of the witnesses as it fell from their lips. In the course of time I became quite an expert, able to record the testimony with considerable rapidity, and the experience thus acquired was of great value subsequently, during trials of cases in court, in enabling me to make notes of the testimony as it proceeded. Among all the cases in which he sat as referee, I know of few in which the testimony was taken by a stenographer. These now antiquated methods have all been revolutionized. The stenographer is a necessary adjunct of every well

regulated office, and stenography has become a great industry. Schools of stenography turn out each year an army for use, not only in law offices, but in every department of business activity where correspondence to any extent is conducted. Stenography and typewriting being almost invariably combined in the same individual, it may safely be said that with the use of a competent stenographer and typewriter the busy lawyer is capable of producing in one day as much work as he could have formerly produced in three; his work will be of equally high quality, and his documents much more legible and accurate. But, with the advent of stenography and typewriting, tendency to greater diffuseness in correspondence and in legal documents generally has manifested itself, and the concise and pithy style of former days is fast disappearing. Except in the writing of wills, where impossibility of making changes by any process not easily discoverable must be secured, long-hand documents are regarded as almost a curiosity.

In the case of male stenographers, I would not say that the tendency is to rise from stenography to admission to practice as a lawyer, but it is nevertheless true that the ranks of lawyers have been recruited in many instances from the stenographers, and in some instances they have attained great distinction at the bar. I have in mind one now living, who is a striking instance of humble beginning as a stenographer, and subsequently of distinguished success as a lawyer. When I first knew him as a stenographer employed by one of our most reput-

able firms, he was identified with a member of that firm who had charge of the litigation of the office. Naturally this young and ambitious stenographer was impressed with the higher calling of the lawyer, and not only qualified himself for admission to the bar, but, by successive steps, gaining admission as a partner in the firm by whom he had been employed, and rising from the position of junior to that of senior, he has for many years been borne on the full tide of professional success.

Many years ago one of the regular court stenographers, James B. Sheridan, secured a nomination to a judgeship in the Marine Court (now the City Court) and, it being a time of political upheaval, the court stenographer became the judge of the court and served acceptably during the six years of his term and then resumed his place at the court stenographer's desk.

It is not, however, always to the advantage of the stenographer that he should forsake the pecuniary rewards of stenography for the more uncertain rewards of a lawyer, for accomplished stenographers who have official positions in the courts, or those closely identified with some busy referee, earn an income better than that of most lawyers in fair practice. The court stenographers have, in addition to their salaries, their stenographic fees at a uniform rate for writing out the record of the trial in every case in which an appeal is taken, and the referee's stenographer receives at the rate of thirty-five cents a folio of one hundred words for three copies of the testimony, and frequently the fees of the stenog-

rapher amount to nearly as much as the fees of the referee. Under these circumstances, successful stenographers may well be content with the pecuniary result. But, it must be added, that thereby the cost of litigation in the courts or before referees has been largely increased, and has become exceedingly burdensome.

Stenography and typewriting have also introduced an important change in the personnel of the modern law office. It would, I think, be safe to say that before 1870 no office could be found in the city of New York in which a woman was employed as a part of the working force. The advent of typewriting and stenography, the attractive employment it affords, the comparatively short business hours, the liberal salaries paid—from $8 to $10 weekly to a beginner, to as high as $20 and sometimes, but rarely, $30 a week to the more experienced—have led large numbers of young women to qualify themselves for these positions. Like the typewriting machine, the woman stenographer is found in almost every office, and it must be said that where a good fundamental knowledge of English grammar and punctuation exists, the work produced by an intelligent woman is of the highest quality. Where, however, this fundamental knowledge is lacking, woman, as in other instances, proves to be a delusion and a snare.

While it is undoubtedly true that an office takes its tone largely from the character of the employer, my experience is that the presence of a right-thinking and dignified young woman in an office tends to elevate its tone by the restraining influence of her

presence upon the clerks and students, preventing the use of language which might otherwise escape, and actions which might be open to criticism. Undoubtedly there is a vast difference in the influence they exert, but in offices where self-respect and character count for something, care being exercised in their selection, the result is an influence of very great value.

My experience with the telephone began in 1884, and since then methods of transacting law business have been completely revolutionized by its general use. Its introduction in law offices was slow, and its service at first very imperfect, but its value as a labour-saving device, dispensing with long-hand correspondence and calls in person, admitting of interviews at a moment's notice, each party sitting in his own office, at times in different cities, has been inestimable, and when communications with clients are taken into consideration, and the ease with which information from the courts as to the state of the calendars is procured, dispensing with messengers to notify parties and secure the attendance of witnesses and watching court calendars are considered, its importance and usefulness cannot be over-estimated. The number of messages for which some of the larger offices contract run up to almost, if not quite, 100,000 per annum.

The amount of time consumed in the earliest days in attendance upon courts while waiting for cases to be called was very great. When a case appeared upon the calendar the only thing to be done by counsel, was to be present at the call of the calendar

and patiently wait until the case was reached. This involved at times waiting for half a day or longer in almost momentary expectation of the case being called, not only involving absence from the office but preventing the utilization of time in other directions. Lawyers of the present day cannot appreciate the inconvenience and annoyance this caused. The introduction of modern appliances has transformed all this, and counsel can now, without risk, direct a subordinate to attend the call of the calendar and watch the court proceedings, and half an hour or so before his presence becomes necessary he can be called by telephone; meanwhile his time has been profitably employed in other directions. This marks one of the greatest changes which has taken place in modern times in the work of the court lawyers.

This important improvement is a boon not only to the lawyers, but also applies to business men who in earlier days were subjected to great losses, in addition to annoyance and inconvenience, by being compelled to spend time as parties or witnesses in awaiting the trial of cases. A party whose presence was necessary in the early stages of the case, or a witness in attendance under subpœna, was compelled to attend day after day and waste hour after hour. This was a great hardship, particularly in the case of a witness who had no interest whatever in the controversy.

But, with all its convenience the telephone has, I think, worked to the detriment of the profession in one respect—their personal relations. Before the

days of the telephone there was personal intercourse between the members of the profession, which tended to promote good feeling and good fellowship. There were the calls upon each other in matters of business, and when the business was finished a pleasant chat upon outside affairs would oftentimes follow; there was the cordiality of greetings; the face to face intercourse; the more familiar acquaintance, which promoted a feeling of brotherhood. All this has practically disappeared. Personal calls are comparatively infrequent; a hurried conversation by telephone transacts the immediate business in hand, and the personal quality is entirely eliminated. The result is that in some instances an opponent is absolutely unknown except over the telephone. You know the sound of his voice, but if you were to meet him on the street you would be unable to recognize him, and while in the earlier days a comparatively intimate acquaintance might have been formed with an opponent, it may now happen that you will have no personal acquaintance with him until an actual meeting in court to try the case.

This absence of personal intercourse is also observable in the case of clients, with whom a meeting in one's office was not only agreeable, but had a tendency to cement the relationship of lawyer and client and bind more closely the ties of personal friendship. It now frequently happens that while actively employed for a client, personal intercourse will rarely occur, and there has come to be with clients as well as with one's professional opponents,

a destruction of the personal and intimate relation, leaving only that which is purely professional.

Most important contributions to the comfort of the modern lawyer are the electrical appliances, which have transformed dimly lighted offices, and systems of electrical desk attachments, such as bells and telephones, permitting communication with the working force with ease and rapidity, and enabling partners to communicate with each other without the necessity of leaving their respective rooms.

The improved office furniture, such as roll-top desks, the newly devised flat-top desks with their spacious drawers, the disappearance of the old-time pigeon holes, the advent of modern cases for filing papers, the improved systems for keeping papers and records, reducing to a minimum the inconveniences arising from mislaying documents or filing them carelessly, have also greatly contributed to the comfort and ease with which business is transacted.

The printing press has also had a remarkable influence on the work of the modern office and of the courts. There are few directions in which improvements in a known art, and its practical application to every day affairs have been greater than in the art of printing, as applied to the law. Even in such a dignified tribunal as the Supreme Court of the United States, and during the halcyon days of Chief Justice Marshall and Mr. Justice Story and of Pinkney, Webster, Wirt and Ogden, when the great constitutional questions were argued, the method adopted was to pass the written record around from

justice to justice; there was not even a duplication of copies. The advent of the printed record put an end to this cumbersome method, one of the earliest instances of its appearance being in the case of Dandridge against the United States (12 Wheat 64) in 1826, concerning which Daniel Webster wrote as a matter of news to Nicholas Biddle, that in that case they were to have a printed record. While it is true that in February, 1821, a rule was adopted providing for the printing of the briefs of counsel, it was not until January, 1831, that the court adopted the rule that "in all cases the clerk shall have fifteen copies of the records printed for the court, provided the government will admit the item in the expenses of the court." Evidently, the art of printing was very slow in making its way into the practical working of the courts.

As late as 1834 there was no rule requiring the use of printed records in the courts of New York State, but, upon the reorganization of the courts and the adoption of the Code in 1846, the Supreme Court rules provided that printed copies of the record should be furnished. Anyone who takes the trouble to examine these printed records during the succeeding twenty years, will notice frequently the crude and imperfect execution of the printed page, and the wretched paper used, being, in most instances, the work of the village printer in the "backwoods" counties of the State. The expense of printing was, for many years, considerable, about $1.25 a page for twenty-five copies and, when the record was voluminous, this expense was a serious

burden upon the litigants; but with the advent of other improvements in the law, the art of printing kept pace, and the sharp, clear type, the excellent paper and the broad margined page of later years have been luxuries of the law, lightening the burden of the lawyer and the judge, while the expense of furnishing thirty copies has fallen as low as fifty cents a page.

But it is not only in the printing records for the use of the courts that the employment of the printing press has become an important adjunct of the modern office, for in the numerous instances where considerable numbers of copies of voluminous documents are required, it is constantly employed. Nothing can present a sharper contrast between the methods of the old time, and those of the modern lawyer, than in the abolition of the slow and laborious work of longhand written documents, by the adaptation of the art of printing to the lawyers' offices and the courts.

There must also be included as among the greatest office facilities in disposing of cases requiring careful investigation the various compilations in the form of digests, encyclopedias, tables of cases, indices of citations, books of practice and forms of pleadings and other legal documents. One of the most important aids in this direction, which for many years was indispensable to every lawyer, was Abbott's Digest, which is continued to the present day. This was the first complete and satisfactory digest issued since the time of Bacon's Abridgement and Cruises' and Clinton's Digests.

In the preface of Abbott's Digest allusion is made to the number of existing reports in this State, which, at the time it was first issued in 1860, had reached the number of 200. Up to that time many lawyers made their own digest, using an ordinary blank book in which they noted decisions of importance contained in the reports. Undoubtedly Abbott's Digest supplied a long felt want, but how much more are such works needed at the present day, when the volumes of State reports in New York have reached the number of 1600, and the reports of the Supreme Court of the United States and of the various Circuit and District Courts contained in the Federal Reporter number about 400. When investigation is made of reported decisions of other States, it would be an impossible task to examine them carefully without the most complete assistance of this description. But even Abbott's Digest has lost much of its earlier importance by reason of the issuance of the two encyclopedias known as "The American and English Encyclopedia of Law," and "the Cyclopedia of Law" which treat each subject separately, and generally with considerable exhaustiveness, and collate the decisions of the various states applicable thereto.

The reports also contain an index to every case cited in the opinions, and further assistance is given in this direction by volumes containing tables of cases affirmed, reversed, modified or distinguished, enabling the practitioner to ascertain on the instant the value of any particular case contained in the reports.

A further indispensable aid is a series of volumes issued quarterly containing a reference to every reported case, informing the practitioner at a glance where any particular case has been cited as an authority in any other case.

These are genuine tools of the trade without which the modern law office would be incomplete, and the modern lawyer helpless. As such, I suppose they could be regarded in the same light that a Right Reverend Bishop, returning from Europe, regarded certain expensive vestments which he had purchased for use in church worship, when he claimed for them exemption from the payment of duties for the reason that they were "tools of his trade."

The elevator is, of course, an important modern accessory to the lawyer's office, and a very convenient one as well, but while it dispenses with the necessity of climbing at least two and sometimes three flights of stairs, as was formerly necessary, it has abolished that enforced physical exercise which lawyers were obliged to take, and which was, I am sure, conducive to health. It has also involved risks and dangers which were formerly unknown, and has introduced a class of individuals within the last thirty years—the elevator-boy, on whom depend the safety as well as much of the comfort of a lawyer and his clients. When my offices were in the same building with those of the late Francis N. Bangs, I used to take elevator trips to and fro frequently in his company. Like all warm-hearted and unassuming men of eminence he was simple and unostentatious, and inclined to un-

bend with his inferiors. There were two elevators in the building, in charge of two excellent young men, who pursued their monotonous employment, one of them during almost my entire tenancy of sixteen years, and the other during the whole of it. Mr. Bangs dubbed one of them the "Duke of Hoist-'em-up" and the other the "Count of Let-'em-down." Sometimes a hurried lawyer, during his trips on the elevator, will take a hasty glance at a law document. On one of these occasions, a bystander remarked: "You are evidently practising law in the elevator. How do you find it?" "Oh," was the prompt reply, "it has its ups and its downs."

One of the most valuable and useful facilities in the routine of practice in the modern law office is that afforded within the past twenty-five years by corporations organised for the purpose of becoming sureties on undertakings on appeal, attachment, injunction, replevin, and arrest, as well as on bonds for receivers, trustees, executors, administrators, guardians and others in the course of legal proceedings. It was about 1884 that this line of business began to be pursued by corporations, on the basis of a fixed annual premium on each undertaking or bond. Until that time it was essential, whenever security of this description was required, to provide in most cases two sureties, owners of real estate, able to qualify as owners of property double in value the amount of the bond required. This was in most cases a very serious and difficult matter, involving on the part of the client an application to friends or business associates to act as sureties. Those

willing to act as such, if free to do so, were often precluded by express provisions in partnership articles from entering into obligations of this kind, while others were naturally reluctant to jeopardise their property as a mere act of friendship or business accommodation, especially in view of the fact that the sureties were required to submit themselves in many cases to a rigid examination as to their property holdings, by the attorney for the adverse party, in order to satisfy the Court as to their sufficiency. The search for sureties was often a long one, attended with much embarrassment and perplexity to the client and his lawyer, and frequently resulted in the greatest hardship. It was a wonderful advance, therefore, in legal procedure, and in furtherance of justice, when surety corporations were organised, but even after their organisation, it was by no means an easy process to induce the profession and the courts to recognise and adopt this new method of providing bonds with sureties. It was necessary not only to procure legislation permitting this form of security, but dispensing with the examination of the surety company as to its property qualifications by the attorney for the adverse party. Without proceeding through the various steps involved in consummating this object, it is sufficient to say that all obstacles were in time surmounted by appropriate legislation, providing for a single examination of the surety company as to assets by the State authorities as a condition of being permitted to transact this business, and a system of annual reports to the proper State department, fol-

lowed by action by the courts approving the sufficiency of each company to act as surety, and there was thus introduced a simple and effective way of furnishing security without inconvenience, embarrassment or delay. The large volume of business transacted by these corporations, sanctioned by legislation and the courts in every State of the Union, and the almost absolute disappearance of individual sureties, is a complete demonstration of the practical utility of one of the most important innovations of modern time in the domain of legal procedure.

The forty years since 1870 exhibit an era of wonderful development in practical and everyday appliances of the modern law office. The modern office building, the elevator, the electric light, the telephone, the typewriting machine, the typewritten documents, the systems of filing papers, the stenographers and typewriters, the art of printing, the surety companies, have revolutionised law practice. The introduction of these improvements, most of them within the last twenty-five years, has resulted in dispensing with a large office force of clerks and copyists, and economising labour and time to such an extent that a day's work of a large modern office would require several days, in former years, in an office of the same relative rank and importance, and not only demonstrates the progressiveness of the modern lawyer, but furnishes a remarkable illustration of the rapid changes in the practice of a profession which is supposed to be exceedingly conservative, and to cling with tenacity to the methods of the past.

## CHAPTER XIX

### OUR SISTERS-IN-LAW

The advent of women as lawyers presents an interesting phase in the development of the modern lawyer. "Woman's Sphere," it was almost universally thought, did not include the learned professions, and especially the law. The turmoil of the courts, their bitterly fought contests, the personalities indulged in, the heated arguments, the free and familiar intercourse between lawyers, witnesses, and parties, were manifestly unsuited to the preservation of the relation which should exist between men and women, to say nothing of ladies and gentlemen. Consequently, the idea of admitting women to practice in the courts met with general disfavour from the public, determined opposition from the bar and actual hostility from the bench. That learned jurist, Mr. Justice Bradley, expressed himself thus upon that subject in Mrs. Bradwell's case (16 Wall, 130, at page 139).

"The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of

things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor."

The agitation of this subject began, if not before, at least about the time of my admission to the bar in 1870, and continued without cessation until, in 1879, women's status as entitled to admission to the bar was recognized by an act of Congress. The credit for this crusade against the stronghold of prejudice and opposition to women as lawyers, is due to the indefatigable persistence of an able and determined woman, Mrs. Belva A. Lockwood. The scene of her labours and conflicts was the Supreme Court of the District of Columbia, the U. S. Court of Claims and the Supreme Court of the United

States. To these she was a veritable "thorn in the flesh," until she finally won the day. Her contests became of national interest, and the public press spread far and wide unsympathetic and often ludicrous accounts of her generally unsuccessful applications to hard-hearted judges for recognition of her right to appear as an attorney and counsellor at law. She became the laughing-stock of the courts and of lawyers, but she illustrated in her own career the truth of the saying "he laughs best who laughs last."

Mrs. Lockwood was a dominant and forceful personality, of strong mental powers, possessing sound common-sense and practical wisdom. Had she been a man, she would have taken high rank among men for ability and force, and she did so as a woman. She was highly educated, and a teacher of experience, but she became imbued with the idea of becoming a lawyer and, contrary to all tradition, she entered upon the thorny pathway leading to the sacred precincts of the bar, where man alone was regarded as possessing exclusive privileges. Her first step, of course, was to obtain the legal education necessary to qualify herself for admission as an attorney and counsellor. She therefore began attendance at the law lectures of the Columbian Law School in Washington, but the privilege of even drinking at all at this Pierian spring of the law was denied her, the authorities refusing her offer of the matriculation fee, giving the absurd reason that her presence "would be likely to distract the attention of the young men"—a high com-

pliment, indeed, to the power of her personal attractions in diverting serious minded young men from the earnest pursuit of their studies preparatory to their chosen profession. The doors of Columbian University being closed to her, she waited until the following year, and then entered the National University Law School. Evidently the spirit of the law had aroused in woman a desire for legal attainment, and fifteen women, including herself, attended the lectures, but only two, she one of them, completed the course. Nevertheless she was refused a diploma. She then applied to the Supreme Court of the District of Columbia and was subjected to long delays. The first committee appointed to consider her application refused to report. In the meantime she had induced the court to amend its rule respecting the admission of attorneys, by striking out the word "male," and a new committee was appointed, who, after examining her, withheld its report for a long time, but finally rejected her application on the ground that the court was opposed to the innovation of admitting women to practice.

She then sought admission to Georgetown College in order to obtain a diploma, but her offer to pay the entrance dues was declined, and she could not become a member of its class in law. In the meantime her right to practice had been recognised by some of the minor courts, such as police courts, courts of justices of the peace, and on one occasion, at least, the probate court. But her right to appear in the higher courts was denied.

The name of Gen. Grant, president of the United States, appeared as president of the National University Law School. In her desperation she addressed to him the following caustic letter respecting the refusal of her diploma.

"*To His Excellency,*
*U. S. Grant, President of the United States.*
*Sir:*

Are you or are you not the President of the National University Law School? If you are its President, I desire to say to you that I have passed through a course of study in the school, and am entitled to, and demand, my diploma. If you are not its President, then I ask that you take your name from its papers, and not hold out to the world to be what you are not.

Very sincerely yours,
BELVA A. LOCKWOOD."

No answer was received from President Grant, but it is evident that he was stirred to activity in her behalf, for, in the following week, she was presented with her diploma. She then applied for admission to the Supreme Court of the District of Columbia, and was admitted, but her application to the United States Court of Claims was not so successful. "You are a woman," the Chief Judge replied to her application, and Mrs. Lockwood was obliged to plead guilty to the charge. The Court in its perplexity adjourned her application for a week. On re-appearance she was met by the further charge "you are a married woman." She was obliged to plead guilty also to this, but pleaded in extenuation that she was presenting her applica-

tion with the knowledge and consent of her husband. The court again took refuge in an adjournment of a week, but at the expiration of that time, notwithstanding a learned argument in her behalf, that honourable Court in an elaborate opinion announced its conclusion that the court was without power to admit women to practice, and that women were without legal capacity to take the office of attorney.

Nor was an application which she made to the United States Supreme Court in October, 1876, received with any greater consideration, for that high tribunal thus expressed itself: "As this Court knows of no English precedent for the admission of women to the bar it declines to admit unless there shall be a more extended public opinion or special legislation." The rebuffs to which she was subjected would have daunted an ordinary individual, and it was only an extraordinary woman who could have risen superior to the discouragements produced by her repeated defeats, but, with unabated energy and zeal, she began a bombardment of Congress, and for nearly three years employed every art known to man or to woman to procure legislation and, finally, in February, 1879, a law was enacted that any woman duly qualified, who shall have been a member of the highest court of any state or territory, or the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character shall, on motion, and on the production of such record, be admitted to practice before the

Supreme Court of the United States. At last she was triumphant, and on March 3rd, 1879, she was admitted to the bar of the Supreme Court of the United States, and on March 6th, 1879, she was admitted to practice before the Court of Claims. But even this legislation did not open the courts of all the states to women as lawyers, for another energetic woman, Mrs. Myra Bradwell, residing in the State of Illinois, made application to the judges of the Supreme Court of that State for a license to practice law, presenting her petition with the usual certificate from a Superior Court of her good character, and that on due examination she had been found to possess the requisite qualifications, but the judges of Illinois, wanting the deferential and gallant spirit due to woman, denied her application, and the Supreme Court of the United States sustained the action of the Illinois Courts upon the ground that it was within the power of a State to prescribe the qualifications for admission to the bar of its own courts, and that with the exercise of this power it could not interfere.

An application of Mrs. Lockwood, of the same nature as that of Mrs. Bradwell, for admission to the bar of Virginia, met with the same fate notwithstanding the statute of that State provided that "*any person* duly authorized to practice as counsellor or attorney at law in any State or Territory of the United States or in the District of Columbia may practice as such in the courts of this State." But the Supreme Court of Virginia was so unfeeling that in construing the statute it decided that a

woman was not a "person" within the meaning of the statute, and that the word "person" as therein used was confined to males. (In re Lockwood 154 U. S., 116.)

Mrs. Lockwood and Mrs. Bradwell were pioneers, and militant pioneers as well, and notwithstanding prejudice, opposition, and hostility from the bench and bar, they won the contest, and woman has gradually established her right to practice in almost every State of the Union and likewise in the Federal Courts. During my recent service as one of a committee on the character of applicants for admission to the bar, there almost invariably appeared among the applicants a number of young women, no longer unfamiliar figures among those seeking admission to practice. But, having gained this right, little use is made of it. "Uncertain, coy, and hard to please" woman thought she wanted to be admitted to practice as a lawyer in the courts, and now having obtained what she thought she wanted, she finds that she did not want it. It is now more than thirty years since Mrs. Lockwood was admitted and the right of woman to practice was established, but I have never yet seen a woman plead a case of any kind in court, and I have never yet met with a woman lawyer, except in a single instance, when a young woman lawyer, the daughter of a reputable member of the bar, called upon me concerning the settlement of some unimportant litigation, and I think it may be safely asserted that there is no prospect that woman will be seen except as a *rara avis* in the ranks of the legal fraternity.

During a recent attendance (October, 1913) on the Supreme Court of the United States, I noticed seated at the counsel table an elderly woman with a strong, intellectual countenance, and wearing a silken robe, bearing upon its sleeves the three velvet bars indicating a Doctor of Laws. At one side of her gown she wore a rosette of yellow ribbon, and upon the table near her was her "mortar-board" —the academic student's hat. She did not participate in the proceedings of the court, having apparently no business to bring before it. An inquiry as to who she was revealed the militant Belva A. Lockwood. When the court adjourned, I introduced myself to her, and met with an urbane and courteous reception. The more than thirty-five years passed since her militancy began have touched her with a gentle hand; and she is to all appearances as full of vigour and force as ever. I referred, of course, to her struggle for recognition as a lawyer, and she replied with honest pride that she, herself, drew the bill for the admission of women, and added, "but more than that, I lobbied it through." I also spoke of her gown and her rosette. "Yes," said she, "this is the gown of a Doctor of Laws," directing my attention to the velvet bands, "and my rosette is the color of my University, Syracuse —who gave me my degree in 1898." I congratulated her on this distinction as a well deserved reward of her achievements in the law, and she received my congratulations with a dignified and feminine manifestation of pleasure.

## CHAPTER XX

### CODES, REPORTS AND TEXT BOOKS

The modern practitioner at the outset of his career is confronted by two things of a most formidable character—the Code of Civil Procedure and the enormous number of Law Reports.

Under the constitution of 1846, the law in New York State emerged from its separate system of common law and chancery practice inherited from England, and entered upon a new system of legal procedure. The code, as then enacted, was designed to abolish the distinction between legal and equitable actions, the former of which were cognisable only by courts of common-law, and the latter by courts of chancery, resulting often in great injustice by reason of a suitor having mistaken his remedy in instituting an action in the common-law courts when his remedy was in chancery, or by applying to chancery when he should have resorted to the common-law. Dickens illustrated this effectively in the pages of "Bleak House" in the proceedings in Jarndyce against Jarndyce. It was also designed to simplify pleadings by abolishing the system of pleading which had grown up under these separate jurisdictions, with its declarations, bills, cross bills, pleas, replications, rejoinders, rebutters, sur-rebutters and demurrers, general and special. Without, however, attempting to point out the var-

ious features of the code designed to facilitate the hearing and disposition of controversies, and to promote justice, it must be said that this effort to codify and simplify the rules of practice and procedure created an amount of litigation over questions of practice which involved for the time being, at least, greater complication, uncertainty and delay than it had remedied, and it was, therefore met by a storm of opposition and ridicule.

A large body of the reported decisions contained in Howard's Practice Reports, Abbott's Practice Reports and the Code of Civil Procedure Reports, as well as many contained in Barbour's Supreme Court Reports, relate wholly to questions of practice which arose under the code. To illustrate this a single but extreme instance of the great number of adjudged cases contained in the reports which were the outgrowth of one section will be sufficient. Under the provision of the code, the disability under which parties to actions had existed, by reason of interest, as to being witnesses in legal controversies, was removed (section 828). But this general provision was followed by a provision forbidding a party, or a person interested in the event, or a person from, through or under whom such interested person or party derived his title, from testifying as to personal transactions with a deceased person or a lunatic, where the executor of the deceased or a committee of the lunatic was the opposing party. (Section 829.) From the time of its enactment this section of the code has been a constant and prolific source of litigation, and the extent of it is apparent

from the fact that a digest of the decisions which have been reported under it occupies over fifty-nine small-type, double-columned octavo pages of Bliss' edition of the Code of Civil Procedure, and since then nearly two hundred additional decisions construing it have been made in the Court of Appeals and the Appellate Divisions. The table of cases cited in another edition which have construed the various sections of the code occupies one hundred and twelve double-column pages, containing nothing more than references to the cases cited, and when we consider the vast number of additional cases which have been decided by the courts, but not reported, we can appreciate the tremendous volume of litigation which the code occasioned.

The code, as originally enacted, embraced 472 sections and at this number it remained at the time of my admission to the bar in 1870. Between 1870 and 1880 it was revised and a large number of new sections added and it then contained 3,356 sections, and with new sections added since that time its sections now number 3,441. Think what a formidable monster this is for a student of the law to attack! He can never hope to master it in all its complexity, for the human mind is incapable of doing it. He may, very likely, become familiar with the ordinary and every-day details of practice, but there is scarcely a lawyer who at one time or another does not lose sight of some of its familiar provisions regulating procedure in actions, and only discovers his over-sight when he is tripped up by his watchful adversary. The most that the prac-

titioner can hope to do is to familiarise himself sufficiently well with its general provisions to know that there is somewhere in the code a provision which applies to the matter in hand, and knowing this, dig it out by diligent research.

Supplementary to the code and to effectuate its provisions and the procedure under it, the courts have also adopted a large number of rules which require careful attention. So far as the rules are concerned, they have added no burden which did not exist under the rules in chancery, which were the guides of the old-time practitioner.

Like the Civil Code, there is now a Code of Criminal Procedure and the Penal Code, which cover all classes of crimes and the procedure in criminal courts.

At the time of my admission to the bar, and for about ten years afterwards, the author of the code, David Dudley Field, was still living and, most of the time, active in practice, with all the old-time persistence and pertinacity which carried through to success his herculean task to abolish the legal procedure of centuries, and procure the enactment of his code as a statute, involving changes in the constitution of the State, the retirement of the chancellor, vice-chancellors and judges, as well as the array of masters and examiners in chancery, and the creation of new courts, with new judges, and a new system of administration of the law. He was one of a remarkable quartet of brothers, one of them, Stephen J. Field, a justice of the Supreme Court of the United States; another Cyrus W. Field, the pro-

jector and successful constructor of the first Atlantic cable; and the third a distinguished editor and literary man, and their sister, Emilia, became the wife of David Brewer, a missionary, and the mother of Mr. Justice Brewer of the Supreme Court of the United States. I often used to see Mr. Field in the courts or pursuing his walks between his office and his residence in Gramercy Park. Tall, erect, dignified in bearing, of extensive learning and unquestioned ability, there was also something cold and repellent in his demeanour, and although his manner was polished and elegant, he lacked every element of sympathy and magnetism, and his distinguished professional achievements and success were not because of an outwardly attractive presence and manners but in spite of them.

Few men, I suppose, have been subjected to greater ridicule and abuse than David Dudley Field, but the Code of Civil Procedure, his mightiest achievement, not only endures in this State, but within five years after its enactment as a statute had been adopted in seven other States, and at the present time has been adopted in almost all the States of the Union, and in particular in those States admitted since its adoption in New York. It is a monument to his legal capacity, untiring zeal and constructive force that will immortalise his name as the "Father of the Code."

If one wishes to read a diatribe against codes, let him turn to the case of McFaul against Ramsay, (20 Howard, U. S. Supreme Court Reports, 523).

Speaking of common law pleadings, Mr. Justice Grier said:

"This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts.

The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice."

Surely one will say that the code with its many sections interpreted by numerous decisions might well call forth the forcible strictures of the learned justice. Adding to it the large body of reports with their accompanying digests, tables of citations, encyclopedias and books of practice the lawyer of the present day faces a formidable array to attack.

My father once said to me that any one who thoroughly mastered Chitty on Pleadings would, if he knew no other book, be a good lawyer, and one of the clearest-headed and quickest-minded, as well as

ablest lawyers of my earlier days, Mr. Francis N. Bangs, once remarked to me that no man was fit to be a lawyer who could not practice law without law-books. Neither of them had a very extensive range of law books to consult in their early studies of the law; such questions were generally considered on principle rather than on authority. There were not many cases to cite and a thorough training in the principles of the law, and the ability to reason from principle was essential, as the fundamental requirement of the successful lawyer. The opinions of judges in these earlier days reveal this characteristic, and nowhere more so than in the judgments of Chief Justice Marshall. An examination of his opinions will show that he rarely cited authorities, but treated the subjects discussed by him almost entirely on principle. In six of his great cases, Martin v. Madison, Cohen v. Virginia, McCulloch v. Maryland, Dartmouth College v. Woodward, Sturges v. Crownsfield, and Gibbons v. Ogden, not a single authority is cited.

It is related of him that when he delivered his opinions on some of the most important constitutional questions (Mr. Justice Story then being one of his associates) he remarked in conclusion: "These are the views of the Court upon the questions involved and our brother Story will furnish the authorities."

The multiplication of the reports of adjudged cases has brought about a serious change in the profession generally. The days of briefly stated and clearly expressed opinions, resting on fundamental

principles, have largely departed. At present there is such an enormous body of reported decisions, that instead of resort to legal principles there is a hunt among the law books for some case which will furnish a parallel. It is not strange that it should be possible to find somewhere in some volume of reports in one of the States of the Union, in England, Canada, Australia or New Zealand some case supporting almost any view which can be taken of any other case like it. This resort to cases instead of to principles has produced a different kind of lawyer from those who, in former days, without precedents to guide them, made law on principles evolved from their own inner consciousness. The lawyer of the present day, I think, may be aptly described by the well-known expression "case-lawyer." Upon a given state of facts his first idea is to find some reported case embodying similar facts, and if he can find a case which is, in common parlance, on "all fours" with his case he is well satisfied, and the more "all four" cases he can accumulate the more convincing is his argument likely to be.

This was what distinguished the late James C. Carter from many of his contemporaries at the bar. He argued on principle. He had somewhat of a contempt for authorities. If in arguing on principle he found that his views were supported by well considered authorities, so much the better. If, however, the result of his consideration of the case on principle was an array of authorities opposed to his view, then it was so much the worse for the authorities. In the capacity to distinguish his case from

a reported case adverse to his views he was very proficient, and perhaps he derived this proficiency to a considerable extent from Mr. O'Conor, who was an adept in that respect. This facility in pointing out distinctions between cases is particularly valuable where so many authorities are available.

"All four" cases upon a critical examination are not very common. There is almost always some minute point of difference which will upset a whole line of cases apparently very similar to that under consideration. As Oliver Wendell Holmes says:

> "A knot will choke a felon into clay,
> A *not* will save him spelt without the k."

Some one remarked "A single fact is worth a ton of law." If a line of cases is adverse, the search will be among the facts of the case in hand to find some distinguishing fact which will take it out of that line of cases, or, *vice versa,* to bring the case within it. If no distinguishing fact can be supplied it is quite likely that the carefully guarded language of the opinion with the qualifications, will furnish the necessary distinguishing feature. Then again there is the balancing of authorities. As already observed, authorities can by diligent search be found sustaining almost any view of any case, and then it becomes a question of balancing one against the other, and when two authorities are found diametrically opposed to each other, the question will then be, which is the better supported on principle.

The well-known difference between the binding force of reported cases as between courts of differ-

ent States, and also as between the courts of a State and the Federal Courts, has become more marked of late years than ever before. While a decision of one of the courts of our own State in a case pending in one of our own courts is a precedent which under the rule of *stare decisis* is ordinarily followed and its binding force recognised, decisions in courts of other States never possess any greater value than as strong arguments, except in cases of interpretation of the constitution or statutes of the United States by the Federal Courts or by the court of a sister State of its own constitution or statutes. This difference has become more marked as the volume of decisions of our own State has increased. Formerly great respect, and almost binding force, was given in cases in our own courts to authorities from the English courts, and to very much the same extent to cases in the State of Massachusetts, especially during the time of Chief Justices Shaw and Parsons. The value of the decisions of other States and of England has been constantly diminishing, and although at the time I began practice, cases from other States and from England were frequently cited, it has become rarer and rarer until the present time, when, unless there is an entire absence of authority in our own State, no reference is made to them, and even when it is made little attention is paid to them unless perfectly apposite to the question involved. The same is true of the different reports in our own State. The constantly changing body of the law, as it evolves, renders the early decisions of less and less value, so that, at the present

time, the force of authorities from the earlier reports is much diminished, and the large body of law contained in the Court of Appeals reports and in Hun's Supreme Court reports and the reports of the Appellate Divisions generally furnish authorities which will counterbalance and outweigh the earlier cases, and naturally so, because the later the authority the greater its controlling force.

The difference in the value of authorities has become more marked in these later days because of the difference in value between the opinions of different judges. While each opinion in our Appellate tribunals, unless dissenting, is in law the utterance of the Court as a body, the opinion itself has weight and force in proportion to the reputation for learning and ability of the judge who delivered it, and no matter what the court may be by which the case was decided, if the opinion happened to be delivered by a weak judge, it possesses no more importance than the reputation of the judge for learning and ability impresses upon it. Then again, the contrariety of decisions is wonderful; the almost kaleidoscopic changes in human affairs produces changes in the body of the law, and to change the metaphor, the pendulum of the law swings backward and forward to such an extent that the decision of ten years ago is nullified by the decision of to-day, and therefore the earlier decisions by a process of modification and questioning become of little value, so little in fact, that there are comparatively few, as applied to the development which human affairs has reached to-day, that have stood the test of its varying changes.

On the whole, the effect of the large number of adjudged cases contained in the reports has virtually transformed the profession from a class of lawyers able to practice without law books to a class almost entirely dependent on the adjudged cases.

The relative value of different series of reports depends to a considerable extent, as already remarked, upon the work of the reporter, and also upon whether the report is official or only that of some individual who has undertaken an enterprise in that direction. Many of the cases embraced in the latter may have been regarded as not of sufficient importance to justify their inclusion in the official series, and in this way a large number of cases are published which should never see the light. One of this class of cases is where there has been a wide difference of opinion between the judges, resulting in strong dissenting opinions, by which the value of the case as authority is greatly impaired, if not wholly destroyed.

An illustration of this relative value presented itself during earlier times when the Court of Appeals Reports and Barbour's Supreme Court Reports were considered the officially authorised series, and there were appearing at the same time Howard's Practice Reports, and Abbott's Practice Reports, which cover much of the same ground, and it is seen even now in the Court of Appeals Reports and Appellate Division Reports which are official, and the issue of the two unofficial series of Reports —the New York Supplement and the New York State Reporter.

In earlier times the publication of reports was almost always a matter of private enterprise, and in many instances the judges of the courts over which they presided acted as their own reporters. When Benjamin R. Curtis was appointed to the Supreme Court of the United States he undertook the editing and publishing of the reports of that court, and gave to the profession a valuable condensation of them. Blatchford's Reports of the Federal Courts was prepared and published by Samuel Blatchford when he was judge of the United States District and Circuit Courts; Judges Duer, Bosworth, Sanford and Robertson were also judges of the Superior Court of the City of New York, when they reported the decisions of that court, and Judge Charles P. Daly was Chief Judge of the Court of Common Pleas of the City of New York when he published the reports of that court.

At a single period there were simultaneously published the United States Reports, United States District and Circuit Courts Reports, the Court of Appeals Reports, Barbour's Supreme Court Reports, Howard's and Abbott's Practice Reports, the Superior Court Reports, the Court of Common Plea Reports and the Surrogate Court Reports, besides other less important issues. It will be readily seen how great a burden this was upon the practitioner who desired to be well-equipped. The inconvenience and embarrassment growing out of these various issues became so great that legislation was enacted which produced a radical change. The merging of the Superior Court and the Court of

Common Pleas into the Supreme Court at once dispensed with the reports of those two courts, and this was followed by legislation respecting the publication of reports, which has been of incalculable benefit. This legislation provided for the issuance of reports by official reporters, with the result that the Court of Appeals reports, the reports of the Appellate Division and of the inferior branches of the Supreme Court, as well as inferior courts such as the Surrogate's Court and the City Court of the City of New York and of other cities and counties are published in three official series—The Court of Appeals Reports, the Appellate Division Reports and the Miscellaneous Courts Reports.

Formerly the practitioner was obliged to wait for his latest information as to the law until a volume was prepared and published. This often involved a delay of several months between the announcement of the decision and its publication in the reports. The change has been effected within the last fifteen years, by which there are weekly issues in pamphlet form, known as "advance sheets" of the cases most recently decided, and these are embodied in the volumes of reports when published. The advance sheets are exact duplicates of the volumes, and have the same authority as the published reports. The advantage and convenience of these to the courts and practitioners is obvious, and presents a striking contrast to earlier days.

The relative value of the reports depends to a great extent upon the head-note or *syllabus* of each case stating with conciseness and accuracy the var-

ious points decided. This, if well done, enables the practitioner to form a reasonably accurate idea of what the opinion contains. There is a wide difference in the reports in this respect, and no matter what the case may be, nor how excellent the opinion, the value of the case as reported is greatly impaired if the work of the reporter in preparing the head note or syllabus is not accurate. The system pursued by the Supreme Court of the United States is for each of the Justices to prepare the syllabus of his own opinion, and we are therefore enabled to know with accuracy what was meant to be decided. The head notes or syllabi of the older reports, such as Johnson, Cowen, Wendell, Hill, Denio and Comstock are remarkably accurate. And this is true of most of Barbour's reports and of Hun, while the work of the official reporters of the Court of Appeals and the Appellate Division under the present system of reporting, seems to be well executed. This is not the place, however, to point out invidious distinctions, nor to call attention to the deficiencies of various reporters. One of the embarrassing features of the different series of reports, part official and part individual, is in the repetition of the one by the other of different cases, involving the preparation often times of different head notes, the only effect of which is to create confusion in the profession and in the courts.

The first thing that a lawyer does when a case likely to be the subject of litigation comes into his office, after ascertaining the facts, is to hand the statements of facts to some subordinate to ransack

the reports. This subordinate begins with the encyclopedia of law or the digest, consulting both, although it matters not which first, gathering together every authority bearing any similarity to the question involved. After he has made this preliminary search he can take each case which he has found, and by referring to the citations of authorities which have been carefully tabulated and published, may learn where the cases which he has found have been cited in other cases contained in the reports. If they are cases of importance, they will have been cited frequently. He will then examine each case in which the cases found by him have been cited. In this mode he will gather an additional array of authorities upon the case which he is considering. His object will then be to ascertain to what extent the reported cases which he has gathered together sustain the view which the client expects his counsel to take. This often requires a critical examination of a great number of authorities, involving careful readings of opinions, the drawing of subtle distinctions, and a correct estimate of each authority where it is balanced by some opposing authority. All this being done and a careful digest of cases made, it is ready for the consideration of the seniors.

This is far different from earlier times, when the reported cases were few, and it was necessary to apply the facts to those eternal principles of law set forth in "Coke on Littleton" or in "Blackstone." During this examination he will be surprised doubtless by the numerous instances in which diametrically opposite views are taken by different courts of

the same question. This is naturally the case when we consider the body of law promulgated by the Federal courts and by each of the courts of the forty-eight different States of the Union. While it exists as between them in a marked degree, it occurs in a less degree, but marked, nevertheless, in our own courts in New York City, which embraced the Supreme Court, the Superior Court of the City of New York, the Court of Common Pleas of the City of New York, the Surrogate's Court and the City Court, between which there were frequent instances of conflicting opinion.

Three illustrations of this conflict in the higher courts are found in diametrically opposing decisions of the Supreme Court of the United States and of our Court of Appeals. The first is in the case of Kelly against Crapo, (45 N. Y., 86) which involved the question of the priority of liens upon a vessel at the port of New York as between an attaching creditor and assignees of the debtors appointed under the insolvency laws of Massachusetts prior to the issue of the warrant of attachment. The Court of Appeals, consisting of seven judges, unanimously decided in favour of the attaching creditor. The case was taken to the Supreme Court of the United States and the judgment of the Court of Appeals was reversed (83 U. S., 610), by a majority of seven of the nine judges of that court, two of the nine dissenting, and one of the seven declining to concur in the prevailing opinion but concurring in the judgment on entirely different grounds. The question then arises which is the better authority, seven

judges of the United States Supreme Court, one of them disagreeing with his associates as to the ground of the decision, or the unanimous opinion of the seven judges of the New York Court of Appeals.

Another instance is a case in which my father was counsel, The Railroad against Lockwood (84 U. S., 357). It involved the question of the right of a railroad company to exempt itself from liability for negligence resulting in an injury to a passenger travelling on its road, on a free pass. At the time of the argument of the case, that question had been decided by the Court of Appeals in favour of the railroad company in several cases: Wells vs. New York Central, (24 N. Y., 181), Perkins vs. New York Central, (24 N. Y., 196), Smith vs. New York Central, (24 N. Y., 222), Bissell vs. New York Central (25 N. Y., 442), Poucher vs. New York Central, (49 N. Y., 263). When, however, the case came before the Supreme Court of the United States, the decisions of the Court of Appeals were not regarded as controlling, and a different view was taken resulting in a decision against the company.

I have elsewhere referred to another instance of this supplied by the case of Knowlton against the Congress & Empire Spring Company, in which a decision of the commission of Appeals, a court coordinate with the Court of Appeals, decided in favour of the defendant; the Supreme Court of the United States took a precisely opposite view and decided in favour of the plaintiff. These are but a few of the many instances of differences in opinion.

In recent years the United States Supreme Court

has sought to remove this conflict of decisions by applying the doctrine of comity, and even in questions in which the Federal courts exercise their own judgment they should for the sake of comity and to avoid confusion lean to agreement with the State court if the question is balanced with doubt.

Thanks, however, to those very excellent publications, the tables of cases affirmed, reversed or modified, the practitioner is enabled to ascertain without difficulty whether an authority on which he places reliance has been impaired by subsequent decisions.

Each lawyer in the days of 1870 was supposed to possess his own private library, in his home or office; he could easily accommodate all the New York Reports, the Federal reports, the English reports, and, perhaps, the reports of the important sister States. Some of these libraries by constant accretion became large and valuable, but the number of reports issued annually increased so rapidly that the libraries themselves became so large and cumbersome that it was almost, if not quite, impossible to keep up a private library to such an extent as to furnish complete sets of the various issues of reports.

One of the most valuable libraries of the time was that of Nicholas Hill of Albany, the foundation of which was laid by Judge Esek Cowen, of the old Supreme Court, in connection with which there is an interesting incident related elsewhere. Aaron J. Vanderpoel, a prominent lawyer of New York, and Clarence A. Seward, also a lawyer of distinction, a nephew of William H. Seward, were the possessors

of valuable libraries. The Law Institute of the City of New York was the first Law Library in New York to meet the needs of lawyers in the rapid increase of the reports. Mr. Charles O'Conor was one of its founders and greatly interested in its growth and development, and to it, as stated elsewhere, he bequeathed his volumes of cases argued, and opinions delivered, and there they may be found. It possesses a large valuable and complete library and still flourishes, furnishing excellent facilities to its members.

Then the Association of the Bar formed in 1869, furnishes facilities of the most adequate description, and there it is possible to find complete sets of every series of reports issued anywhere. According to the last report of the Bar Association its library numbers over one hundred thousand volumes.

Other valuable libraries have also been gathered, one of which was that of the Equitable Life Assurance Society, destroyed in a recent fire; another, the library of the New York County Lawyers' Association. The large office buildings also hold out inducements in the way of well-equipped libraries to induce lawyers to become tenants. The establishment of these libraries, and the multiplication of the reports, have resulted in an abandonment by lawyers of maintaining more extensive libraries than their immediate needs demand. This demand is generally met by a working library, consisting of the reports of cases adjudged in the courts of New York State, and by such digests, encyclopedias and books of practice as may be convenient, which at the

present time would probably number 1,500 volumes.

The increase in the volumes of reports in the United States Courts and the courts of New York may well be illustrated by a comparison of their number at four different periods. In 1826, when my father commenced practice, the published reports of the Supreme Court of the United States and of the State of New York numbered fifty, consisting of twenty-four volumes of United States Reports and twenty-six of the State Reports. In 1850, when he was elected Judge, this number had been increased by eighty-two, twenty-seven of which were United States Reports and fifty-five were State Reports. In 1870, when I was admitted to the bar, there were 315 volumes, of which seventy-seven were United States Reports and the remainder brought the Court of Appeals Reports down to Volume 42, and Barbour's Supreme Court Reports down to Volume 67.

In addition to these, however, there were Howard's Practice Reports, Abbott's Practice Reports, the Reports of the Superior Court of the City of New York and of the Court of Common Pleas. At the present time we have over 1,300 volumes of the New York State Reports alone, and 229 of the United States Supreme Court Reports and 204 of the Federal Reporter, which contain the reports of cases decided in the United States Circuit and District Courts. To this number must be added the different series of reports of cases in the United States Circuit Court of Appeals in the nine differ-

ent circuits, and the different series of reports such as the New York Supplement, the New York State Reporter, the North Eastern, North Western, South Western, and Atlantic Reports, which of themselves form a large library.

The vast number of text books embraces almost every conceivable legal subject. Before 1830 there were less than ten of any importance, but it was in 1830 that Chancellor Kent's "Commentaries on the Law" were completed, and between 1832 and 1843, Mr. Justice Story produced that series of great works which were recognized everywhere as landmarks in the law and furnished the basis of legal education for the generation following, and between 1830 and 1860 other additions deserved and received a place in the front rank of legal discussion. Among the most notable being Cowen and Hill's notes to Phillips on Evidence, Greenleaf on Evidence, Washburn on Real Property and Parsons on Contracts.

The years since my admission to the bar in 1870 have been productive of almost innumerable contributions to the discussion of legal subjects, many of which are worthy of a place among the very best of their kind. It was about 1870 that one of the most notable text books, its author an American, was published in England. This was "Benjamin on Sales," prepared by Judah P. Benjamin, a native of Louisiana, a Senator of the United States, who cast in his fortunes with the South during the Civil War, was Attorney General, and subsequently Secretary of State in the cabinet of Jefferson

Davis, and, at the close of the war, made his escape in a small vessel which, after a perilous voyage, reached England, where he devoted his energies to the building up of his fallen fortunes by the practice of his profession. It was during the first years of his residence in England, when retainers were few, that this work was composed. It was sufficient of itself to establish for him a high reputation, and it bore fruit in the succeeding years, for at his death, he occupied one of the most commanding positions at the English bar.

In 1869, Shearman and Redfield published their work on Negligence as a special subject, and when we consider that the first cases reported in New York State on the law of negligence were those of Townsend against Susquehanna (6 Johnson, 90); Schieffelin v. Harvey (6 Johnson, 169); Elliot v. Rossell (10 Johnson, 1); and Foot v. Wiswell (14 Johnson, 303), in the last of which it was claimed by such eminent counsel as Samuel Jones and David B. Ogden that the fault and all its consequences rest on the defendant for navigating a steamboat in a night so dark that vessels could not be distinguished, it is apparent that since these cases a tremendous number of negligence cases must have occupied the attention of the courts to require the publication of a work on that subject.

In 1872 Judge John F. Dillon published his splendid work on Municipal Corporations, upon which he had spent nine years. This was the year of Perry on Trusts and Trustees, of Wharton's "Conflict of Laws," of Bigelow on Estoppel. In 1873

Schouler on Personal Property and Freeman on Judgments, and, in 1874, High on Injunctions were published. In 1876, Daniel on Negotiable Instruments, Cooley on Taxation, Jones' Law of Railroad and other Corporate Securities, and Bigelow on Fraud appeared.

The subject of private corporations had for some years occupied attention and, in 1882, Mr. Victor Morawetz gave to the public his work on private corporations, which has been repeatedly cited with the highest approval by the courts of the United States. In 1880 Chief Justice Cooley's great work on Constitutional Law was published, and Pomeroy's Equity Jurisprudence appeared a year later. The comprehensive work of William W. Cook on "Stock and Stockholders," which has developed through succeeding editions into large proportions, was published in 1887. In 1890 Roger Foster's "Federal Practice" furnished to the profession a treatise of the highest usefulness on practice in the Federal courts. Electricity also received attention, for Seymour D. Thompson in 1891 gave to us his work on the Law of Electricity, and Edward R. Keasbey, in 1892, contributed his work on the Law of Electric Wires used on Streets and highways.

The Inter-State Commerce Act, passed in 1887, and questions of commerce which have been mooted in the courts, resulted in a number of books of importance on this subject, such as Lewis' "Federal Power of Commerce," Van Fleet's "Law of Commerce," and the valuable work of E. Parmlee Prentice and John G. Egan on the Commerce Clause of

the Federal Constitution were published; and Judge Noyes' "American Railway Rates," and his "Law of Inter-Corporate Relations," as well as that of Beale and Weyman on the Law of Railway Rate Regulation, were important contributions. The law relating to labour and trust questions was illustrated by Ray's "Contractual Limitations, including Trade Strikes and Conspiracies and Corporate Trusts and Combinations," and by Copley's "Strikes and Boycotts," and by Beach's "Monopolies and Industrial Trusts." The law of Employers' Liability has also received attention in the works of Dresser and of Alger and Slater. The vast number of text books is supplemented by a great variety of books of pleading and practice, of tables of cases affirmed, reversed, cited or distinguished; of books of forms; of general digests and digests on special subjects, such as the Digests of the Law of Negligence and of Insurance, and last, but not least, by those monumental encyclopedias—the American and English Encyclopedia, and the Encyclopedia of Law, works of the utmost importance and value, and of the greatest service to the profession. If the bar is overwhelmed by the vast number of reports and text books, the facilities provided to enable the modern lawyer to pursue his way through the mazes of the law are by no means inadequate.

## CHAPTER XXI

### SOURCES OF BUSINESS

In launching out, the vital question after acquiring experience, is how to obtain employment. For the young lawyer who decides to identify himself with a large office and gradually work his way up, this question is practically disposed of. He will have no clientage which he may call his own, unless he happens to develop that important natural gift of attracting it by his own magnetism and personality, in which case his value to the office will gain speedy recognition. Such instances are rare, however, in actual experience, for most young lawyers who are natural business-getters prefer to build up a business and create a practice of their own. Apart from this invaluable gift, fidelity and usefulness bring about the desired result, for the death and retirement of the seniors will leave him in full possession; but this means a series of long years—years as a junior—occupied with details, and, as a subordinate, subject to direction and dictation, having no individuality, being a part of a large machine, where one's name signifies little or nothing in point of reputation in the public mind—the office is everything, and he is nothing. But in the course of time, when his seniors are dead, and his hair has turned grey or departed, he will have his reward in being at the head of a flourishing business, but

without the tremendous satisfaction which a lawyer is entitled to feel, who, either by his unaided efforts or with some congenial partner, has built up a business, and in doing so has acquired standing and reputation and made a name for himself.

There is a class of lawyers who are naturally business-getters. No one can tell, not even themselves, how they do it—*nascitur non fit*. There is that magnetic quality, that type of personality, that mysterious ability to create a favourable impression with or without very much fundamental capacity which attract, in the most surprising way, shrewd and hardheaded men of affairs. The fortunate possessor of this gift, if he spends an hour at lunch will very likely come back with a client; if he goes to church he will make clients there; if he takes a Saturday for golf his opponent in the play will probably retain him to draw his will, and if he flits about in society he will quite likely become the professional adviser of some wealthy widow or fashionable divorcee. The business-getting lawyer, as such, has no progenitor and will probably have no posterity. The gift was born with him and will die with him, and he is powerless to educate any human being in its mysteries. The possessor of this gift should be thankful for it and exercise it.

Two professional acquaintances of my earlier days illustrate this remarkable faculty. One was Isaac P. Martin, the senior member of the firm of Martin & Smith, which occupied a very important and well-earned position among the firms of those days. His partner was Mr. Augustus F. Smith, an

accomplished and able lawyer. Mr. Martin almost never appeared in the courts, but he had the unique faculty of attracting a very large and important clientage, especially in the mercantile community. Added to this natural gift was business sagacity, sound common-sense and a fair knowledge of the law, which, supplemented by Mr. Smith's accurate, legal knowledge and advocacy in the courts, resulted in making the firm highly distinguished and remarkably successful. Mr. Martin was diminutive in stature, and not very prepossessing in appearance. He would hardly be selected as one whose dignified and imposing appearance would be likely to attract important clients, but such was his magnetic quality and the charm of his personal bearing and conversation, that he was the center of a host of admiring clients. Mr. Smith, on the other hand, was a man of highly distinguished personal appearance and of very solid and substantial attainments, but of somewhat austere and imposing dignity, and it is quite likely that after Mr. Martin had attracted the clients Mr. Smith was very much more important in holding them. It is said of Mr. Martin that in a financial upheaval, where securities pledged as collateral were likely to be sacrificed at a time of great financial depression by forced sale, he was the first to invoke the equity powers of the court in a bankruptcy proceeding to issue an injunction restraining the lender from selling them, thus compelling the lender to protect the borrower by carrying the securities until danger was passed.

Another instance of this gift was Samuel L. M.

Barlow, who, when I first heard of him, was a member of the firm of Bowdoin, Larocques & Barlow, another of the most important firms of that day. He was the antipodes of Mr. Martin, being tall, portly and distinguished in appearance. He was a mighty force among the financial magnates. He, too, never appeared in court—this branch of the firm's practice being under the direction of the two brothers Jeremiah and Joseph Larocque. Mr. Barlow was a great business lawyer, of remarkable keenness of perception, of commanding influence over financial magnates, and his office was filled with a highly important class of business, most of which was connected with railroad and banking interests. He acquired great celebrity in the days of the Erie litigation of 1869, and, subsequently, when Jay Gould and James Fisk, on the one side and Commodore Vanderbilt on the other, were pitted against each other. Since that time there has grown up a class of lawyers of which they were the forerunners until at the present day this type of lawyer has acquired a position at the bar which if not more distinguished, without doubt receives larger fees than the most eminent and successful practitioners in the courts.

Fortunately this gift of transforming acquaintances into clients is not indispensable. Fair capacity and steady, persistent effort will, of themselves, in time attract a clientage. There is an old adage, "keep your office if you expect your office to keep you," and it is nowhere truer than in the law. A business-getter may make the golf field, the tennis

court and society functions productive of clients, but according to my experience and observation they are more often absolutely fatal to success, and many a young lawyer who might have been, by conscientious and faithful attention to business during business hours, a successful practitioner, is—if he has not married a rich wife—now occupying some subordinate position at a moderate salary as assistant in the legal department of some large corporation, or occupied with petty business, earning a precarious living. The time when others are away is a good time to be on hand, for some one will be almost sure to need you. Some of the best business and clients that I ever had in my earlier days came on Saturdays, or in midsummer, and in one particular instance, when I was about thirty-four years old, I was called upon by a gentleman in an emergency, whose regular counsel was absent from the city for the day, which resulted in my employment in a professional matter which lasted for about four years, and in which I received $26,000.

In my earlier days I used to wonder how some of the men who were starting out in the law could ever hope to succeed. They apparently had few friends, small personal attractiveness, very little *bonhomie,* and almost no resources. Others seemed to possess advantages which would be likely to insure success; but now as I look about among the acquaintances of my earlier days, where are the favoured ones? "Gone," as Oliver Wendell Holmes said, "like the tenants that quit without warning down the back entry of time." And the plodders? Well, I could

point out numbers who, although achieving no great success and whose names will never be emblazoned in the hall of fame, are in possession of the well-earned rewards of fidelity, perseverance and industry, with the respect and confidence of every one who knows them, and living in comfort on "Easy Street."

One of the most common, and at the same time most mistaken, sources of dependence of the lawyer is his family connections. He is apt to suppose, very naturally, that those to whom he is related by kinship will feel an interest in promoting his professional success. While there are undoubtedly cases in which large professional employment is the result of family ties, I think it is the general experience of lawyers that relations furnish one of the most unreliable sources of business. I do not suppose that it is any lack of interest, or want of confidence that prevents combining family relationship and professional employment, but it is due in part to a hesitation to have any relative acquainted intimately with the ins and outs of business transactions that may reveal peculiarities, tendencies and business methods of which a comparative stranger may be regarded as a discreet repository, but which, if entrusted to a relative, might prove to be a source of embarrassment. Then again, when professional employment is on a purely business basis, there is greater freedom to criticise and direct, or even to sever the relationship if circumstances require it.

I believe that the general run of lawyers will agree that relatives are not a desirable class of

clients. In the first place, if the result is not entirely favourable, the adverse criticism which follows runs the entire length and breadth of the lawyer's family connections, and not only interferes with agreeable family intercourse, but injures him in the estimation in which he would like, and probably deserves, to be held by his relatives. If he is successful, there is no one equal to him in their estimation; if he is unsuccessful, there is none so quick to criticise as the relative-client. Then again the compensation to which in ordinary cases he would be justly entitled is often affected. A relative often entertains the idea that he is conferring a favour by "giving him business," and that, being a relative, he ought not to be charged as much as others; indeed, it is often thought that the services should be gratuitous, and whatever amount is charged will very likely be considered excessive. In family and social intercourse, relatives may be attractive and lovable, and in times of trouble sympathetic and helpful, but my advice to the young lawyer is not to place too much dependence for business upon your family connections but seek clients among those who desire your service solely because of your capacity as a lawyer.

I recall an instance in my earlier days when a gentleman called upon me to prepare his will. I was familiar with the fact that among his immediate relatives there were one or two very competent lawyers, and a feeling of delicacy as to possibly interfering with their professional employment led me to suggest as much to him. I well remember the

somewhat startled and perhaps indignant manner with which he received my suggestion, and the tart response that he was quite aware of their capacity and of their claims upon him; that if he desired their service he would apply for it, and that if I had any hesitation on that account in accepting the business, he would secure someone who had no such scruples. I at once apologised for the suggestion and assured him that business was not so abundant that I did not desire to serve him to the best of my ability. In many instances of a similiar character which subsequently arose I never again offered such an indiscreet suggestion as my inexperience had led me to make on that occasion.

An admiring and enthusiastic father-in-law, whose interest in the welfare of his daughter perhaps prompts him to sound the praises of his son-in-law is a most desirable adjunct to a young lawyer. While it may be true that in his own business he will seek his tried and trusted adviser of former years, yet if he is a man of influence, his recommendation will be productive of favourable results, and I know of at least one distinguished lawyer whose early success at the bar was promoted by the loud praises of an enthusiastic father-in-law, though his undoubted capacity, of itself, would have brought him distinguished achievement, even if by a slower process.

A shrewd and able business man, many years my senior, remarked in my earlier days: "Just remember always that if you do not blow your own horn then the same is not blowing." He appre-

ciated to the fullest extent the value of advertising and bringing one's wares to the attention of the public in every legitimate way. But this is one of the things that the lawyer has the least liberty to do. It is the unwritten law that he should not advertise. It is true that in the newspapers of small communities one frequently notices the business cards of country lawyers, and by common consent such practice is not considered reprehensible, for the reason, perhaps, that the struggling country newspaper is more in need of the advertisement than the struggling country lawyer is of being advertised. Elsewhere such advertising is rarely found and in the large cities it would be regarded as unprofessional. All forms of soliciting business were in earlier days considered unprofessional, but this feeling has been greatly modified during the evolution of the lawyer in later years. In the case of young lawyers just beginning allowance should be made. They may let their friends know they are ready for business by distribution of cards, and avail themselves of opportunities to serve their acquaintances professionally; they may gain public recognition by furnishing to the press interesting items of legal news, especially in litigations with which they have been connected professionally and with which it is in every way proper that their name should be connected, and the publication of such items is often a service to the public. In social intercourse interesting cases may, quite naturally and with due regard to modesty and want of assumption, afford an opportunity of calling attention to profes-

sional success and create a favourable impression. These opportunities should not be lost.

There is, however, a class of lawyers who carry solicitation of business beyond all proper limits, and in a most unprofessional way. They are known as "ambulance-chasers," and are chiefly employed in personal injury cases. They have agents and runners everywhere—in hospitals and in the police department particularly—and as soon as an accident happens, even before the injured party has recovered from the effect of the first shock or while the relatives of a deceased person are plunged in the earliest stages of their deep grief, the ambulance chaser will appear on the scene, and with mock sympathy and a well-feigned offer of disinterested assistance, seek to procure a contract of employment to bring an action on the basis of receiving half of the amount recovered. No reputable lawyer will lend himself to such practices, and if any feasible means of preventing it by legislation could be devised it should be adopted. In other directions, too, business is frequently solicited in reprehensible ways, some of which will be referred to in the chapter on "Fees, Regular and Contingent." But the genuine and reputable way of building up a practice is by serving one client so efficiently that he will be interested in introducing another.

All lawyers will agree, I think, that how or why professional employment comes is often a mystery. It appears from the most unexpected sources and, like the wind—"no one can tell whence it cometh or whither it goeth." While legitimate efforts

to obtain business in particular directions are quite likely to prove unavailing, yet, in making the effort, something may quite unexpectedly arise which will lead to other business which was wholly unexpected. A trivial circumstance will lead to most important results. An insignificant item of service for a client or some kindly attention to an acquaintance may open leads of business, yielding large pecuniary results.

Years ago a young lawyer sent me, from a distant city, a pamphlet containing an address which he had delivered on some legal topic. The large quantity of such literature which one receives would naturally have led me to give it a glance and cast it aside, but his address was so well done, and presented his legal position so attractively that I wrote him a letter of commendation. Sometime subsequently he sent me a small item of business—the fee in which was, I think, $10. From that time a large volume of business followed, resulting in my employment as local counsel to a large corporation, and later on, by reason of that connection, I was retained in other important business, and from this small beginning the aggregate result was many thousands of dollars.

Another instance occurred soon after my admission to the bar, when, in 1872, I had earned money enough to pay for a trip to Europe, and setting out alone I found myself in a stateroom accommodating three other young men beside myself on board the ill-fated steamer *Atlantic,* subsequently wrecked on the coast of Newfoundland. One of the number

was a young insurance agent who had recently secured the agency of a large English company and was on his way to give an account of his stewardship. I did not hide my candle under a bushel, but let it shed modest light on the subject of the law to all who were in the room. The result was a very happy one for me, for shortly after my return the young insurance agent employed me professionally, following it with business which paid my European trip over and over again.

About 1880, I was employed in a little case which only involved $800, but it was so earnestly litigated by an Israelitish opponent that I had fairly earned all that the case involved before it was brought to trial. However, I concluded that the only way to dispose of the case was by trying it, which I did, before Judge Freedman and a jury. The case involved two points, one of which the judge decided he would instruct the jury to find in my favour, and the other he would leave to their consideration. The result was a verdict in favour of my client, but it was followed by an appeal, finally to the Court of Appeals, where the judgment was reversed and the case sent back for a new trial. All hope of any adequate compensation had disappeared, but it was necessary that the case should be tried again, and on the next trial before Judge Truax, he concluded to pursue directly the opposite course to that of Judge Freedman, leaving to the jury the question which Judge Freedman had directed them to find in my favour and directing the jury to find a verdict in my favour on the question which Judge Freedman

had submitted to them. The result was again a verdict in my favour. Again there was an appeal to the Court of Appeals, but alas! the judgment was again reversed because the Court decided that *both* questions should have been submitted to the jury. The case was finally tried, resulting in my client's victory. Now the reward, which was inadequate so far as the fee was concerned, followed in this: that on an occasion when it was necessary for my client to give a bond as security for some purpose, I came in contact with a little Jew, whose mother-in-law had a bakery uptown. They were favourably impressed by my zeal, and from that little individual there came a line of business during the succeeding years which amply and abundantly rewarded me for any sacrifice which I had made in the case referred to. Business not only comes unexpectedly and from most unpromising beginnings, but the experience of most lawyers is that until the full tide of professional employment is reached there will be alternate periods of absolute stagnation, and of active employment, which literally make the first fifteen years of a lawyer's practice one of either feast or famine.

## CHAPTER XXII

### FEES REGULAR AND CONTINGENT

The subject of fees is a sensitive point with lawyers. Judging from experience it is also a sensitive point with clients. Where there happens to be a difference of opinion between the lawyer and his client as to what the fee should be, reputable lawyers, I think, prefer to make almost any concession to the client than to engage in a controversy. There is probably no more perplexing subject with which the lawyer has to deal than the fixing of his fee. This is due to the fact that there is no standard to guide him. Then, too, the difference between lawyers in the fees charged for the same service is very great, depending, of course, upon difference in experience, ability and professional standing, and even among lawyers of the same relative standing, the difference in the amount charged for the same service is at times very considerable. Some time since it became necessary for one of our most prominent lawyers to arrange with his associate, a well-known and adroit Jewish lawyer, for a suitable fee in a matter of considerable importance, and they met for that purpose. The former inquired what his associate thought would be proper and the latter named an amount which in his opinion would be exceedingly liberal. What was his surprise to

have our prominent brother protest vigorously that it was not enough, that double the amount would be no more than right, and suggested that the matter be left to him, and he would arrange it. The Jewish lawyer could scarce contain himself, and raising both hands exclaimed "How can you ever charge such an amount? Almost thou persuadest me to be a Christian!" The matter resolves itself into a question of ability to command a fee that the business will justify. The measure of the fee depends entirely upon ability, experience and professional eminence. The lawyer who needs business will quite likely take it for any fee, however small. It is not necessary that the busy lawyer should enter into competition, as the size of the fee he will expect will be quite irrespective of what may be charged by others. Clients are sometimes heard to remark that they can get the work done for very much less elsewhere, and the successful lawyer immediately retorts, that if they can get it done *as well* for a less amount elsewhere, it is, of course, for their interest to do so. The good judgment of every lawyer comes into play in accurately gauging what his own interest requires, from the standpoint of the desirability of the individual as a client, the character of the business involved, and his own right from the standpoint of ability, experience and professional standing to require the fee he expects. The difficulty and importance of the matter involved and the circumstances of the client are generally taken into account and opinions respecting them vary widely. There is no greater opportunity for

the display of tact than in fixing a fee which will leave a client grateful and appreciative.

There is a class of clients that seem to feel that in bringing business they are doing a favour and offering an opportunity, and that the favour shown and the opportunity offered are an equivalent for the service rendered. Then another class is disposed to think that any fee, however moderate it may be in fact, is high; and another thinks that your services are not worth much unless your charge is large. Then there is the client who always wishes to have the fee fixed in advance, one of the most difficult things to do, especially in the conduct of litigation. In such cases the client does not always get the better of the bargain, but, knowing the limit of the charge is better satisfied. There is also a class of clients that prefer to regard litigation as a kind of gamble. They are willing to take some of the chances and they want their lawyer to take some; therefore they generally propose that the fee be fixed upon a basis of paying a certain amount if they lose and a very much larger amount if they win, the result being that if the litigation is a failure, the lawyer will receive some compensation, though it be inadequate, and if it is a success, his fee will be considerably in excess of the reasonable value of the service performed.

The grateful client is not frequent, but when, as happens sometimes, he voluntarily increases the amount of the fee, he does honour to human nature. But what shall be said of the high-minded Philadelphia practitioner, of whom it is said that on being

paid a fee of fifty thousand dollars by a grateful client, he returned one-half of the amount because he felt that one-half was all that had been earned. It is related of Mr. Evarts that on being retained in a prominent will case, he wrote requesting a retainer of two thousand five hundred dollars, ($2,500); but his client misreading the note sent him a check for twenty-five thousand dollars ($25,000). Mr. Evarts instead of accepting it, with thanks, very honorably returned the check, calling attention to the mistake. A distinguished lawyer used to remark that no matter what the money fee was, he never felt paid unless he felt sure of the gratitude of his client. It might also be added that no client should feel that he had really paid his lawyer until he had expressed his gratitude.

The difficulty of fixing a fee which will meet the approval of the client and at the same time compensate the lawyer, was illustrated by a story related to me by Senator Spooner as having actually occurred. A good many years ago a well-to-do-cotton merchant brought an action in one of the Southern States to recover certain cotton, or its value, amounting to about $75,000. The action was in the hands of counsel to whom he had been recommended, but, in the course of the preparation of the case for trial, he became dissatisfied as to their ability to conduct the case successfully, and was at a loss what to do. It so happened that as he was returning from their offices to his hotel, he saw at a distance an old acquaintance who at one time had been a most prosperous and capable lawyer in Chicago,

but, through unfortunate circumstances, had been obliged to abandon his practice and was reduced almost to penury. The merchant inquired as to what he was doing, and the other explained his hopeless condition owing to inability to find anything to do. "How would you like to try a lawsuit?" said the merchant. "How would I like to try a lawsuit? Why, I would like to try a lawsuit better than do anything else on earth." "Well," said the merchant, "come with me to my hotel and I will explain my case to you and then I will take you to my lawyers and arrange for you to try it." This was like the sound of martial music to the old war-horse, and the introduction and explanation took place. The case came on in a few days and the threadbare lawyer won it triumphantly. Then there came to his mind the question of his fee. He did not know what to charge; he wondered if five hundred dollars would be too large; then he thought perhaps it had better be only two hundred and fifty dollars; but that seemed small; and perhaps he had better charge three hundred dollars, and he laid awake almost all night undecided whether the fee should be five hundred or three hundred dollars. The following morning he started for the office of the attorneys in the case, and whom should he see approaching him, all smiles, but his opportune client. Greeting him with the greatest effusion, the client took out one of those long pocket-books which held bills lengthwise, and, opening it, extracted a package of $500 bills. He handed one of them to the lawyer in silence; he followed it with another, and

that with a third, then followed a fourth, and finally a fifth, and, looking up, he inquired: "Will that be satisfactory for the work you did yesterday?" "Well," replied the impecunious one, "add another and that will be enough."

Few, probably, appreciate how much of a lawyer's work is uncompensated. There are always a considerable number of individuals in every lawyer's circle of acquaintance whom it is a matter of charity to serve, with the result that the gratitude of which he is the recipient, and the consciousness of a service well performed for a worthy individual, is better than any pecuniary reward. After all, the law could not yield genuine satisfaction unless sometimes used to befriend the unfortunate, and to protect the fatherless and the widow.

The highest type of lawyer, although he is in practice to earn fees, is not one who practices simply for fees, but one whose chief end is to be serviceable, and to transact the business in hand so as to produce the best possible result for his client, with a fee as a secondary consideration. In other words, his conception of his duty is to serve his client efficiently, irrespective of the time and labour involved, having in mind only an adequate recognition by the client in dollars and cents for faithful and valuable service.

There are some litigations, however, in which the subject of fees sinks into insignificance. This happens when the litigation is so prolonged that the whole amount involved will not justify an adequate charge and, in fact, might not be even reasonable

compensation, and then it becomes a point of honour with the lawyer to carry it, if possible, to a successful conclusion without hope of anything like a reasonable fee.

Almost all lawyers, I believe, prefer fees which are based upon the reasonable value of their services, irrespective of the result secured. This is undoubtedly the ethical basis of practicing law, which receives the approval of the Bar Associations and of the best element of the profession. In England practitioners of the law, whether solicitors or barristers, regulate their fees almost entirely on this basis. The importance of the business involved necessarily affects the amount of the fees charged, but generally speaking, solicitors have a definite and well regulated scale of charges for the various items of service, to which the approval of their law societies and long established custom oblige them to conform. To us a solicitor's fee bill is a curiosity, as it is made up of separate items, such as "writing a letter," "having a consultation," etc., very much the same as a grocer's bill would be made up, the total of the items constituting the customary fee. The barrister, on the other hand, proceeds upon a different basis. His fee is regarded as an *honorarium*. When a solicitor sends a brief in a case to be tried, it is accompanied by a retainer, and there is marked upon the brief the *per diem* fee. Of course the nature of the business and the standing of the barrister have everything to do with the fixing of the fee. The amount of the *per diem* fee differs widely between those who are juniors and

the seniors—the latter being those who have graduated from the ranks of the juniors and have "taken silk" with preferment often as King's Counsel. The *per diem* fee varies from one guinea to the junior to appear in court as a matter of form, and the two hundred guinea King's Counsel, who is constantly employed in matters of the greatest importance.

The barrister sometimes also receives another fee, called a "refresher" which, in the course of a protracted litigation is supposed to refresh his drooping energies and stimulate his activity. It is undoubtedly true that barristers in large practice receive, and I hope earn, very large incomes, averaging during a series of years $100,000 or more, not differing, generally speaking, from lawyers of equal prominence at our own bar. Such great lawyers as Sir Roundell Palmer (Lord Selborne), Lord Chief Justice Colridge, Lord Cairns, Sir Henry Hawkins (Lord Brampton) and undoubtedly the Anglo-American Judah P. Benjamin, received very large incomes. Of these, Sir Henry Hawkins, the 'Enery 'Orkins of the criminal bar, is said to have received the largest income ever received at the English bar, but he was wise enough to refuse the most urgent requests to divulge the amount. Besides his criminal and common-law practice which was very large, the great income which he received came probably from numerous retainers in land valuation proceedings in connection with the construction of the Thames embankment and other London improvements about thirty years ago. In passing, I can recommend to those who take pleasure

in legal reminiscences, the delightful recitals contained in the two volumes of Lord Brampton's reminiscences.

I venture to say that at no time, and in no country, have the fees received by lawyers been as large as those received by New York City lawyers during the last thirty years. A fair and authenic illustration of the income received by an American lawyer of the highest type before that time will be found in that of Benjamin R. Curtis of Boston, who during the sixteen years following his retirement from the bench of the Supreme Court of the United States, received, as nearly as can be ascertained, $650,000, averaging $40,000 a year.

Occasionally, however, in earlier days, a large fee arrived. Take as an instance, the fee of $400,000 said to have been charged by Henry L. Clinton in the Commodore Vanderbilt will case. William H. Vanderbilt complained that the fee was extravagant, and if Mr. Clinton insisted on it, he would never again retain him, to which Mr. Clinton retorted: "Your future retainers are matters of indifference to me, because when you pay me my fee I expect to retire." Probably the largest single income from litigated business was received in 1911 by a prominent lawyer imported from one of the smaller cities of the interior of the State, which, after deducting expenses, amounted to a little over $1,000,000, $800,000 of which was a single fee received by him for the defense of a Western magnate in a criminal prosecution growing out of his administration of one of our banks. I have not been in-

formed as to the sources of the remaining $200,000, but the accuracy of the fact above stated is vouched for credibly.

We have some reliable information in the records of the courts as to hundreds of thousands of dollars allowed for receiverships and executorships, as well as in railway organizations and cases of industrial consolidations, enabling a considerable number of successful American lawyers to maintain lordly establishments on a scale of extravagant expenditure.

An account is given in the book "Anglo-American Memories," by Mr. G. W. E. Russel, of Mr. Carnegie's sale of his steel properties to Mr. Morgan, at a price, it is related, that yielded him an income of £3,250,000 or $16,250,000. But the interesting part of it to the lawyers is the fee which he tells us Mr. Francis Lynde Stetson and Mr. Victor Morawetz received for services during a period of eleven days, in preparing the necessary documents and supervising the transfer,—no less than $500,000. The legal complications and difficulties in connection with this sale were probably no greater than are involved in hundreds of smaller transactions which are effectuated constantly, and for which a hundredth part of this amount would be regarded as adequate compensation, but these accomplished lawyers are, of course, to be congratulated upon this munificent compensation, the justification, of course, being in the magnitude of the amount involved and the responsibility assumed. All this is very different from the former days of moderate fees when the

country lawyer used to receive his pay in "orders on the store," or in a parcel of land, or in a quantity of provisions, and the criminal lawyer, as indeed is often the case now, found his recompense by way of a fee for his successful defense, in a purloined watch or an article of jewelry and sometimes a diamond ring.

The fees received in the early days of practice sometimes have a ludicrous aspect, as in an experience of my own—my first case—which was in a justice's court. I was employed by a small tailor to defend him against a claim of fifteen dollars by a music teacher for giving lessons to his son. Diligent study resulted in discovering a defense based on the principle of "entire contracts." The study of the law of contracts in that case stood me in good stead in later controversies and in this particular case my defense was successful. Then came up the question of a fee. Fifteen dollars being the amount involved, it was difficult to name an adequate fee without charging at least the whole amount. Happening to call on my client, intending to broach the subject of a fee, my eye fell upon a linen duster of which I was then in need. I do not think its price was over $2.50 but a happy thought led me to suggest that I should take the linen duster as a fee for my successful defense, to which my impecunious client gladly assented and I bore it away as tangible evidence of my professional skill.

The incomes of lawyers have always been a subject of interest, not only to lawyers but to laymen. There are few subjects, probably, that are more

matters of guess-work than this, especially as lawyers are very loath to disclose the amount of their receipts. Many are credited, from outward indications, with receiving far more than they actually receive, while others, credited with receiving little because of their quiet and inconspicuous practice, are in receipt of incomes that would occasion surprise if the amount were known. Outward indications amount to little. Large and expensive offices and a "bold front" impress the credulous, but they are generally deceptive. Of the entire body of about eight thousand lawyers in the city of New York, probably ten per cent are in receipt of very respectable incomes. One-tenth of the eight hundred may be in receipt of incomes of fifty thousand dollars or more; another hundred may be receiving between twenty-five and fifty thousand; another one hundred and fifty between fifteen and twenty-five thousand; and the remainder will receive from ten thousand to nearly fifteen thousand. If the incomes of lawyers were revealed, it would probably occasion surprise to find how few lawyers receive more than twenty-five hundred dollars a year. In contrast with the large fees received in these later days, it is interesting to recall the statement of Mr. Choate in his entertaining address on Mr. Southmayd, that when Mr. Evarts invited Mr. Choate to join the firm of Butler, Evarts & Southmayd in 1859, he wrote him that he might fairly expect that the net income of the firm, exclusive of his own outside counsel fees, would amount to $20,000.

Fees, based upon the contingency of success or

failure in litigation have since early times been generally condemned, resulting in statutes against champerty and maintenance. The former is described by Blackstone as "a bargain with a plaintiff or defendant *campum partire* to divide the land or other matters sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense;" and the latter as "officious meddling in a suit that no way belongs to one by assisting either party with money or otherwise, to prosecute or defend." These were offenses at common law as against good morals and tending to encourage and foster litigation. It is undoubtedly true that contingent fees in a litigation are, generally speaking, objectionable as offering a means to unscrupulous lawyers for exacting unconscionable fees. Reputable members of the profession of the law at all times have generally disapproved them.

Recently a code of ethics promulgated by the State Bar Association, has criticised contingent fees severely, but notwithstanding the statutes, under which, as was said nearly thirty years ago, no prosecution had been had within the memory of men living, and the general disapproval of them by reputable practitioners, I think it may safely be said that a considerable proportion of the litigation pending in the courts in negligence cases or actions for personal injuries founded upon neglect of duty, as well as many mercantile cases and the suits formerly so numerous against the elevated roads for compensation to abutting owners, have been, and

now are conducted on this basis. This is almost invariably the case in proceedings to set aside taxes and assessments, as well as in the numerous claims against the government of the State, and of the United States. I believe it to be also true that in almost every litigation conducted by the most reputable lawyers, the element of contingency enters into the question of compensation.

There are few, if any, lawyers who have a fixed and uniform standard of compensation applying in all cases, irrespective of the result, while in almost every case, I believe, lawyers expect to and do receive more liberal compensation in case of success than they are willing to accept in case of failure. It is naturally the case that all reputable lawyers are willing to share with the client, to some extent, the risk of the litigation, and in case of failure sympathy naturally leads them to moderate their fee. There are sometimes cases in the experience of every reputable lawyer in which it would be a practical denial of justice to the unfortunate, oppressed, and impecunious client if he were unwilling to undertake their cause and let the size of his fee depend upon the result of the litigation, even though there were no definite agreement to that effect.

Undoubtedly in certain kinds of cases, such as those involving personal injuries, unscrupulous lawyers exact agreements for contingent fees which are harsh and oppressive. They make no distinction between cases which are plain and those which are doubtful, and they generally require an agreement for one-half of the amount recovered, besides

the taxable costs, which are frequently considerable. Such agreements, in my opinion, are unfair, and should be condemned, and when questioned should be under the supervision of the courts, and the burden of proving that they are just, fair and reasonable should be upon the lawyer who procures them. In view of the fact that the statutes alluded to, and the general disapproval by reputable members of the profession, have failed entirely to prevent the making of agreements for contingent compensation between lawyer and client, and that undoubtedly, there are cases in which reputable lawyers in the interest of justice are willing to undertake litigations in which they assume the risk of obtaining no compensation unless they are successful, it is probably true that the practice of arranging for contingent fees cannot be suppressed.

Even a practitioner of such a lofty sense of professional honour as Mr. O'Conor, undertook the Forest divorce case with his compensation depending largely upon the result. It led him also to furnish loans of money to his client for her subsistence during the progress of the litigation, and it was not until its successful termination that he secured a reasonable compensation out of the alimony and costs awarded.

Leaving out of view, however, the question of professional ethics, and considering contingent fees from the standpoint of legality, the question has been set at rest by the Court of Appeals in favour of their legality, in the case of Fowler v. Callan, (102 N. Y., 395).

Some instances have occurred in my own experience in which a sense of justice led me to undertake business of this character. In the early days of my practice an improvident young man, wholly without means and in poor health, was referred to me to obtain redress for what seemed to me to be a great wrong. At an early age, before his majority, he had, as an heir of his deceased grandfather, inherited an interest in an estate under his grandfather's will by which a son, then a Methodist minister, was appointed executor and trustee. My client's interest consisted largely of an undivided share in real estate which, for a considerable period of time, remained unsold. During this period, being in want of money, his uncle, the executor and trustee, entered into negotiations with him for the purchase of his interest in the estate, which he finally sold to his uncle for $10,000. Subsequently, the real estate was partitioned, and at the partition sale the interest of my client realized $20,000, by which the uncle secured a profit of $10,000. He naturally felt that his uncle had taken undue advantage of his immaturity and inexperience, and that while relying upon his uncle's judgment and superior information as executor and trustee, he had been led by his uncle's representations to convey his interest for much less than its actual value, which was undoubtedly the case. He had no friends upon whom he could rely and during a somewhat wild and wayward life had wasted in riotous living what he had already received, and was in no position to institute what was likely to be an expensive litiga-

tion. He had already consulted counsel, who had advised him that as there appeared to be no basis in the uncle's representations upon which a charge of actual fraud could be founded, he had no cause of action against him.

I was not aware of the fact that other counsel had been consulted when the case was presented to me, but on examination there seemed to be a reasonable prospect of success upon the ground that as the uncle was executor and trustee and the nephew one of the beneficiaries, a relation existed which raised a presumption of what is called constructive, as distinguished from actual fraud in the purchase by the uncle from the nephew of his interest in the estate; that the burden was upon the uncle to prove that the transaction was just, fair and free from suspicion, and unless that proof was made the transfer would be set aside and he would have to account to the nephew for the profit received. I therefore made an arrangement with the young man on the basis of a reasonable contingent fee.

In due time the trial occurred before Mr. Justice Abraham R. Lawrence, who, after long deliberation, decided in favour of my client. The uncle relied upon proving that there was no actual fraud, but his counsel seemed to have omitted to give due importance to the question of constructive fraud, and I well remember the consternation with which they received the learned justice's decision, refusing to dismiss the case. An appeal was taken by the uncle, but the decision rendered was sustained. The course

of the litigation occupied probably a year and a half. The failing health of my client warned him that he had not long to live, and it gave me the greatest pleasure to pay over to him about $8,000 which enabled him to provide himself with comforts and medical attendance during the next two or three years, when he died. It has always been a gratification to me to think that I was able to befriend him. The case is reported under the title of Lambert v. Browning, (25 Hun., 450).

Another instance that arose out of pitiable circumstances was the case of a brakeman on the New York, New Haven and Hartford Railroad, who, by the negligent manner in which a car was loaded with manure, was precipitated underneath the moving train by the slipping of the manure, while he was stepping from one car to the other in the discharge of his duties, both of his legs being so crushed as to require amputation. The case was exceedingly doubtful, inasmuch as being an employee he assumed all the incidental risks of his employment, and it was incumbent upon him to show that the railroad had failed to exercise reasonable care to provide reasonably safe appliances for the discharge of the duties of his employment. There was the further question as to his right to sue the railroad in our courts, because it was claimed by the company that he was a resident of the State of Connecticut, and as the injury occurred in Connecticut and the railroad was a foreign corporation the injury was not, therefore, the subject of investigation in our courts.

I was requested to undertake the case by a highly

reputable Connecticut lawyer, who explained to me satisfactorily that, owing to the practice prevailing in Connecticut, there was no hope of securing adequate redress in its courts. He also explained to me that the injured brakeman was entirely without means, and in his weakened and helpless condition was unable to earn anything, and that the humble circumstances of his friends made it reasonably sure that unless he could secure from the railroad some compensation for this frightful injury his life would be spent in abject poverty. He was very anxious that I should undertake the case, and stated that any arrangement that could be made with me would be satisfactory. I suggested a percentage of the amount recovered, which was eagerly agreed to, and an action was begun. The case was well and ably defended and was tried before that excellent judge, Joseph F. Daly, and a jury, with the result that the jury gave my client a verdict of $12,000. The company was not satisfied with the result and appealed the case, but the verdict of the jury was sustained, and it was with great satisfaction to myself, and to the unbounded and overwhelming gratitude of my unfortunate client, that I was able to pay him an amount, which, prudently invested, would render him entirely independent during the remainder of his life. The case will be found reported under the title of Phelps v. New York, New Haven and Hartford Railroad Co. (17 App. Div. 392).

Another and final instance of a similar character was the case of a prosperous and well-to-do indi-

vidual of a somewhat bumptious and exuberant disposition, whom I had casually met, but never served professionally. He appeared in my office one day, and in a vociferous way remarked: "Strong, I have a case in which I want you to go halves with me. I won't spend any money on it, but I will give you half of what I get." I told him that that was not my usual way of conducting business, and that I thought it would be better for him, and more satisfactory to me, if he had a reasonable case, to pay a reasonable sum for my service as he was able to do and get the benefit of the litigation if successful. He scorned the idea, and said that he would do nothing else than what he had proposed. He told me that it was a case against an insurance company in which he held a policy of fire insurance, that his house had burned down and that the company had declined to pay because of various changes in the occupation of the premises, and the procurement of other insurance, and the omission to obtain, in due and legal form, transfers of the insurance, so as to render it enforcible by my client, and unless enforced by him it could not be enforced by any one else. I told him I would examine the case and advise him as best I could. Subsequently he appeared with his papers, and an examination of them revealed an extremely complicated case, and one full of legal difficulties. It seemed to me, however, that he had a fair prospect of success, and as he was unwilling to make any other arrangement I concluded to accept his terms.

The case was tried before Judge Noah Davis, one

of the best judges ever upon the bench in this State as referee, after his retirement from the bench. He also found the case one of doubt and difficulty and he expressed to me subsequently that it was with much reluctance that he gave a decision in our favour. My client then revealed to me, for the first time, why he was unwilling to incur any expense, and was so liberal in going halves. It seems that he had already presented his case to a firm of lawyers, his regular counsel, who had given it careful examination and decided that he could not succeed. The case was defended by one of the best insurance lawyers whom I have ever met, Judge A. H. Sawyer, of Watertown, New York. He was, of course, greatly surprised at Judge Davis' decision and immediately appealed the case to the General Term of the Supreme Court, by whom the judgment was affirmed. Our troubles, however, were not over because a further appeal was taken to the Court of Appeals, and before that tribunal it was sure to receive a most careful and critical examination. At that time Alton B. Parker was Chief Judge of the Court of Appeals, and as sometimes happens in every lawyer's experience, my argument seemed to go entirely wrong, and to be absolutely unconvincing. It was with great discouragement that I returned from Albany, but the Court, after holding the case under advisement for a long time, affirmed the judgment of the courts below, and my client and I halved the proceeds. Later on, at a reception which was given by the Bar Association, I happened, glancing up, to meet the eye of Chief Judge Parker, who was smil-

ing at me, evidently desirous of telling me something. Approaching him, he grasped my hand in his usual hearty way and whispered in my ear: "Strong, you don't know how narrowly you escaped being beaten in that insurance case," and as Judge Parker had written the opinion I felt sure that he knew what he was saying. This case will be found reported under the title of DeWitt v. Agricultural Insurance Company (157 N. Y., 353).

This whisper after the event, suggests one before the event in a litigation in England, involving the title to a considerable estate. A gentleman, having been in possession of an estate for a long time, his title was attacked by a collateral relative claiming inheritance and right to the possession of the property, by reason of the provisions of a will forming a link in the chain of title. The result was a litigagation, the landlord in possession refusing to consider compromise. The first decision was against the claimant, but an appeal having been taken, the case was elaborately argued by distinguished lawyers before a bench of five judges. It then became apparent that the point involved was one not free from doubt, but notwithstanding this the occupant declined to consider the subject of compromise until one day he attended a social function at one of the great houses, when one of the Appellate Justices, with whom he was acquainted, happened to be present. Each of them recognised the impropriety of personal intercourse before the case was decided, but they were brought together by chance, and greeting each other pleasantly the learned justice leaned for-

ward and whispered in the ear of the other: "Agree with thine adversary quickly while thou art in the way with him," and then passed along. The occupant being keen enough to appreciate the significance of the remark, proceeded at once to his solicitor, and entered upon negotiations for a settlement which was finally brought about at some sacrifice, and his title secured. The Court, not being advised of the settlement, rendered its judgment favouring the adverse claimant, and but for the significant whisper the occupant would have lost his estate.

The cases to which I have referred were exceptional, growing out of circumstances not dissimilar to those which induce lawyers generally to let their fee depend on the result. Making it a business to undertake cases upon a contingent basis should be discouraged. Undertaking business of this character, except under special circumstances, will have an unfavourable effect upon a lawyer's practise, especially the young practitioner, who will soon find that his practise is being built up on cases of contingent fees with a consequent decline in professional standing. Proper regard for legitimate professional methods is the expectation of a reasonable compensation for services rendered, in which the result secured should have due consideration.

## CHAPTER XXIII

### THE LAWYER'S RECREATIONS

I BELIEVE it will be acknowledged that there has been no more noticeable or, in fact, beneficial evolution in the life of the lawyer admitted forty years ago, than in the recreations afforded. Especially is this true of those practicing in the large cities where the need of open air exercise is so apparent. In small cities, and in rural communities, the lawyer could find his out-door recreation in his garden, on his farm, behind his roadster, in his tramps through the neighbouring woods or along the streams furnishing sport with rod and gun. The treadmill existence of the New York lawyer, and the want of the open-air opportunities of his rural brothers, confined him almost entirely to peregrinations down Broadway to his office, and up Broadway again to his home, unless he sought muscular exercise in the various gymnasiums. But the period of development of out-of-door sports, available to the city lawyer, was near at hand. Perhaps an explanation of this may be found in the fact that, during the period of the war, the young men of the country were with its armies on the battle field, and it was not until their return to the pursuits of peace, and the growth to young manhood of those who were children at the beginning of the conflict, that athletic contests and out-of-door games received much attention.

There had been a few aquatic contests between Yale and Harvard in rowing, crude and unscientific, but they opened the door to those great events which in later years have extended to almost every college where a sheet of water is to be found, and command the attention and interest of the entire country. In England the varsity crews of Oxford and Cambridge had included some of the greatest men of the bar, and this was to be true, also, of our own oarsmen in the crews of Yale and Harvard. Among them during the last forty years will be found many names recognised at once as those of learned jurists, and successful men of other professions. I recall now a presiding justice of one of our appellate tribunals who, in his college days, in the same boat with another class mate, a successful member of our bar, pulled an oar for two successive years in two of the best crews that Yale ever had. Venerable lawyers, now nearing seventy, with those who have followed in their train look fondly back to those days of their youth, when on the Charles at Cambridge, or the Harbor at New Haven, or on the Hudson or Harlem, they were learning as lawyers in embryo those lessons of co-operation with others, and of endurance and grit which are the essentials of every well-trained lawyer. They were in training for the strenuous contests of the forum, to be able, as Kipling says, in his fine poem "If," to

> ". . . force your heart and brain and sinew
> To serve your turn long after they are gone,
> And still hold on when there is nothing in you
> Except your will to say to them, hold on."

Whenever the great race occurs in New London, or on the Hudson, there will be found among the throng shouting the loudest the lawyer-oarsmen of earlier days, while the love of aquatic sports engendered in the student days will play an important part in the strenuous activities of after life.

Then again baseball, as we know it, had its advent about 1860. How the present game developed is a mystery, difficult to explain. There was nothing like it before, except in that primitive game where a soft ball was used, which, when fielded, was thrown to hit the runner and put him out. Every baseball player will, I am sure, offer homage to the brain that conceived the remarkable game as it is now played. It was born just before the war, and it was born full-grown. With the evolution of the game its requirements have been made stricter and it now calls for more scientific skill, but in its essential features the game remains the same as when that remarkable team known as "The Excelsiors," with its famous pitcher Creighton, made a tour of the cities and introduced the novices to a scientific exhibition of what is now our National Game. Of course, this wonderful game appealed at once to the collegians, and it became the craze everywhere. Lawyers took it up, except those whose muscles were stiffened by age. At its introduction, and for years afterward, it was a gentlemen's game, and played for the pure love of it. From that time on the sons of these veterans of the "diamond" have "walked in the ways of their fathers."

As in the case of the oarsmen, so on the baseball

teams of the various colleges, during the last forty years, may be found the names of judges and lawyers of distinction. I am told an old baseball player occupies a seat on the bench of the Supreme Court of the United States, and I know a presiding justice of the Appellate Division who in his time was one of the most accomplished "twirlers," that is, pitchers. Another prominent lawyer whom I know used to pitch on the Yale team, another was a Yale catcher during the four years of his college life and no baseball enthusiast of twenty years ago can have forgotten that successful lawyer, John M. Ward, whose fine pitching and daring base running on the Providence League team, the champions of the United States, made him almost a national character. As often as I meet two of our prominent lawyers, one of whom has borne a conspicuous part in the philanthropic life of our city, I am carried back in mind to the days, more than forty years ago, when each of us "held down" places on one of the vacation "nines" in a prominent locality on Long Island.

For all veterans of the bat and ball there is no game that will be able to supplant it in their affectionate interest. The nine innings are just long enough to make one want more. Each minute is one of action. The swift-pitched ball, the handling of it by the catcher, the accuracy of his throws to the bases, the clean hits, the neat "pick up" by the fielders, the beautiful "throw in," the graceful running catch of the long fly-ball—it is no wonder that the game should attract the thousands and tens of thousands who throughout the country are its de-

votees. Of this large number many are unable to appreciate the difficulty in playing the game. Everybody who understands the game, whether they have played it or not, likes to watch it, just as they would enjoy a theatrical performance, but unless they have played it they cannot really appreciate it. It takes the one who has faced the pitcher, bat in hand, or has attempted to catch or pick up the swift ball, or filled a position on one of the bases, or gathered in the high "fly," and who bears on his finger joints the marks of the ball, to know what it really means to play baseball, and to have a just appreciation of the scientific skill which makes a game of ball interesting to watch.

This appreciation of the game and of the science required to play it leads hundreds of lawyers in the city and thousands throughout the country to indulge in the recreation of watching the game. From the opening of the season in April, until its close in October, the lawyer spends an occasional afternoon watching the play of his old pastime, and at some thrilling play he will shout with the loudest. It takes his thoughts out of the rut, and it not only diverts him for the time being, but he lives over again the contests of his college days, when he was one of the principal actors on the diamond. Almost any day at the Polo Grounds during the baseball season, will be found some of the judges, and a large number of the bar, of whom it might be said that if you scratch the surface of a lawyer you will find an old baseball player. Baseball is recognised, of course, as our national game, and though from a practical

standpoint it has long been relegated to the professionals, except by the embryo lawyers during their days in the university or in the law school, yet those who have once played it always love it. They view the game now from the standpoint of an exhibition of professional skill.

Then again, about 1875, tennis made its advent on this side of the water to further divert the disciple of the law from his briefs. The beauty and the skill of the game, its attractive surroundings, including in its votaries the feminine element, the luxurious club house, the absence of professionalism, and the convenient way in which it lends itself to two players or four, in singles or doubles, soon made it a prominent and successful rival of baseball. In tennis, lawyers young and old have for years found recreation wherever a little plot of ground could be had large enough to lay out a tennis court. The ranks of the law are filled with tennis players. I recall a day about twenty years ago, during the annual tennis tournament at Newport, when one of our well-known lawyers, then in embryo, met as an opponent one of the two principal tennis players of the day. It was a gruelling struggle, and no one present could but admire the perseverance and grit which carried our brother of the bar through the long contest and brought him out a winner, as in later contests the same qualities have made him a winner in his chosen profession.

But when the muscles become a little stiff, the breath a trifle short and the agility of youth has in a measure departed, the lawyer finds refuge in that

ancient and honourable game of golf which, by a fascination not altogether strange, attracts to its ranks lawyers innumerable, from the president of the United States, and the dignified justices of the Supreme Court of the United States, to judges of lesser degree and distinguished lawyers in throngs, whose delight it is on Saturdays and holidays, and whenever they can snatch an afternoon and all through their vacations, to be found upon the golf course assiduously pursuing the elusive "pill," all dignity laid aside, coatless and with sleeves rolled up, and a broad brimmed hat, hoping for a low score at the next hole. Judicial temper, bad enough in the court room but worse on the golf links, often loses itself, and gives voice to expressions not permissible in the presence of the Court, nor such as could be used in the company of ladies. Hope gives way to despair, all sorts of conflicting emotions arise, and the game is one of vicissitudes, but with all its ups and downs, its alternations of hope and despondency, its encouragement and despair, it fills a large place in the legal mind, and is a boon to the brain-weary lawyer.

The close-confined and busy city lawyers have, during the past thirty years, taken advantage of the splendid facilities afforded by the bridle paths of Central Park to indulge in equestrian recreation, which fine pleasure was, before that time, cultivated apparently by few lawyers. The increase in numbers has been marked, and in the early morning hours before going to business, when the park is free from vehicles, there may be found lawyers in

considerable numbers astride well-groomed steeds, and, in communion with nature, breathing in the invigorating morning air, preparing themselves physically for the intellectual labours before them. The growth of the city and the consequent removals of lawyers from their residences down town to the upper part of the city in the vicinity of the park, have doubtless been important factors in inducing the cultivation of this form of recreation.

There also has been a growing tendency among the lawyers to seize every opportunity to get "back to nature" and "hold communion with her visible forms" and listen to her "as she speaks a various language." For this purpose there is nothing like camp-life deep in the heart of the primeval forest, "where the murmuring pines and the hemlocks, indistinct in the twilight, stand like Druids of eld"; the tent pitched on the margin of some picturesque lake or river, with a guide that is a genuine son of the forest, acquainted with all its mysteries and manifold life. Out of reach of ordinary communication, and the demands of insistent clients, he finds in the journeyings in his canoe, or in penetrating the forests, or in sport with rod and rifle, nature's best restorative, and returns to his tasks with a superabundance of buoyant energy and hope. The increased facilities of travel to distant and unfrequented localities, unspoiled by the "onward march of civilisation"; the opening up of new haunts of game, and of rivers and lakes abounding in the finny tribe, have proved an irresistible attraction to an ever-increasing number of lawyers

whose annual vacations have been spent in the pursuit of large game in the West, or in calling the moose in the forests of Maine and New Brunswick, or in the hunt of the caribou in Canada and Newfoundland, or may be in casting for trout or salmon. The remarkable evolution which has taken place in the rifle and shot-gun, and in trout and salmon rods and fishing tackle generally, contributing enormously to the pleasures of the forest and streams, have, with the beauties of nature, and the pursuit of game life, proved an unceasing attraction to the legal fraternity, furnishing physical and mental restoration, and a delightful recreation.

A large number of lawyers, whose early lives have been spent in rural communities, but have sought the city as a field of practice, and many of their city-bred brethren as well, develop towards middle-life a great longing for rural surroundings—the generous acreage, the house of liberal dimensions, the live stock, the poultry, the vegetable garden, and the flower garden planned and superintended by the wife. The desire to "buy and build" quite likely proves irresistible, and those who gratify it learn, as Mark Twain did, how to build a $30,000 house on a $20,000 piece of land at a cost of $100,000, and how it would have cost more if the plumber had only known that there was $300 left in the bank. The "country place," while its novelty lasts, undoubtedly furnishes to many a weary and heavy-laden lawyer, rich opportunities for rest and recreation among the attractions of country life, in the delightful week-ends and restful vacation days, and to

true sons of the soil, this will be permanent. Upon these the cares and vexations of the country place do not weigh heavily but, to others, after the novelty has departed, the constant drain of dollars, the morning departure, with an over-burdened mind charged with commissions from the gardener or the household, to execute which must be devoted golden moments of the day, and upon return at evening be met with news of an ailing chicken or a break in the plumbing, present cares in themselves trivial but in the aggregate considerable, which were not reckoned with as a part of the rural experiences. To these cares must be added the more formidable responsibilities of securing capable employés, the spring planting, the pruning of trees and shrubbery, the care of the grounds, the preparations in the autumn for winter, and the necessary repairs and improvements. It then becomes a question whether the pleasures of the "country place" so far outweigh its cares and responsibilities as to make it a source of recreation, or merely a *modus vivendi.*

Since the time of my admission to the bar another great avenue of vacation recreation has been developed—the holiday trip to Europe. Before that time comparatively few lawyers had been on the other side of the water. Of course, during the period of the war, it was hardly thought of, but soon after its close, the lines of steamers multiplied, and soon, with the advent of increased facilities and quick passages to-and-fro, the month's vacation admitted of a trip abroad, with two weeks on the other side, and the recreation thus afforded has become

with many lawyers an annual occurrence. Surely no more important and pleasurable development in recreation facilities has manifested itself within the past forty years than that of the delightful days on the ocean steamer in its quick passage to Europe, opening up multitudinous ways of gratifying individual tastes of every description during a brief sojourn.

For a few years the bicycle furnished recreation to many lawyers, but it was short lived. So long as the automobile was unknown, or in its experimental stages, the bicycle filled a large place in the lawyer's outdoor life, but with the introduction of the automobile it soon lost favour and was practically abandoned. Now it is the afternoon run, or the tour of a week or two in a well-equipped car that is a frequent source of recreation, and such it will probably remain until some newer and more exciting form of transit on earth, sea or air, quite likely the aeroplane, shall attract attention and furnish a more novel form of diversion.

Thus, thanks to the athletic spirit of the age, the modern facilities of travel, and the remarkable development of motor vehicles, adapted as well to the pursuit of pleasure as to the ordinary uses of every day life, the lawyer is given generous facilities for diversion in forms of open air recreation, affording not only genuine pleasure but physical and mental health and vigour.

Few of the busy lawyers have much opportunity for recreation between October and July. With some their work is their play, as illustrated by the

reply of one of our leaders of the bar to a friend, who had inquired why, having reached his time of life, he did not retire. The reply was that he did not know how he could get more fun than by practicing law. With most lawyers it is different. I think they get satisfaction out of it, but not much real fun. Their days, and more often than not their evenings, are devoted to hard work. Their social life at dinners and other society functions is generally under protest. An occasional evening at the theatre, opera or concert, may afford some diversion, but unless there is something outside of these the lawyer's life during the busy season is mostly one of all work and no play.

To the lawyer whose early education has not been neglected, a game of billiards at his club in the late afternoon on his way up-town, or for an hour in the evening, is not only a most agreeable diversion, but a very pleasant form of exercise. It is rare, however, that sufficient skill is acquired late in life to make the game, as it is now played, interesting. Those of the older members of the bar who have acquired any degree of facility will probably be thankful that all of their youthful hours were not devoted to study, but some of them to the cultivation of this interesting game. This is rank heresy, of course, but, if the hours which they gave to it were not at the expense of college duties faithfully performed, they will indeed be thankful that their education in the game was not neglected. Professional eminence is by no means inconsistent with this gentle and pleasing diversion, for do we not know that even

such a great philosopher as Herbert Spencer indulged in it, and of whom it is related, that, happening to be in a billiard room of a hotel where he found himself with some unoccupied time, and feeling disposed to a game, approached an agreeable young gentleman and engaged him as an opponent. They made the usual "bank" to decide which would have the first stroke, and his opponent won. The play then proceeded, with the result that his opponent, in his first inning, ran out the entire game. Mr. Spencer, putting up his cue without having had a single opportunity to play, remarked in a sedate way, "my young friend, your remarkable proficiency in the game of billiards betokens a youth of wasted hours." A prominent lawyer remarked while playing, "they used to chide me in my earlier years for devoting so much of my time to billiards, but if they now saw how much pleasure and diversion I am getting out of my early education in it, I am sure they would change their opinion."

There are few games which have been more remarkable within the past thirty years in developing scientific play. The six-pocket table of my college days has been abandoned in playing the game as it is now played, and is relegated to either fifteen ball pool, or to that simple and rollicking game known as cowboy pool. The development of scientific skill called for something more difficult, first producing the four pocket table, and then the no-pocket table, then the fourteen inch balk line and finally the eighteen inch balk line. In almost all the clubs, in the late afternoon, will be found a billiard playing

coterie, and included in it a generous sprinkling of lawyers. This is equally true of the Century Association whose billiardists include men of brilliant minds and eminent achievement.

One of the differences between the Century and all other clubs is that in other clubs you may wear your hat with impunity, but in the Century you may never do so. Just as you may never wear your hat, so you may never "talk shop." There is no stock market there, no law, or theology, or medicine, or engineering, or business, although each of these elements will be well represented. There is just that friendly badinage, that cheerful gossip, that play of wit, that easy and familiar intercourse, which pass quite naturally "from grave to gay, from lively to severe." It removes the cobwebs from the brain, care from the heart, gloom from the soul, and lifts one out of the world of materiality and perplexity, and brightens and illumines those who enjoy its intercourse. Its membership is composed of three classes which may be characterised as follows: The first and the largest includes those who rarely visit the club, but are proud to be known as members, and who, as described by one of its *habitués,* bear the same relation to the club that the "dunnage" does to a ship, giving it the support necessary to pursue its onward course. The second is made up of those who attend the monthly meetings, and an occasional Saturday night, and get the benefit of its more formal social intercourse. The third is composed of those who enter into intimate relations with it, to such an extent that its tradi-

tions, customs, and associations become interwoven with their everyday life. To these it is a haven of rest, a refuge from the weariness and distractions of everyday pursuits, as also on those rare occasions when "a man's foes are those of his own household." The different sets of the Century possess their special attractions, and are never exclusive, but always welcome the newcomer. Others of these sets may be as agreeable, but I am sure none more so than that which assembles each afternoon in the billiard room to manipulate the ivories.

Here with cue in hand or forming part of the gallery might be seen an array of prominent artists, lawyers, doctors, theologians, educators, editors, architects, engineers, publishers and distinguished business men, who lay aside their dignity, and forget their burdens and their cares, and take on the vivacity and exuberance of youth. I hope it will not be considered a breach of confidence to say that among them I have found Presidents Hadley of Yale and Butler of Columbia, U. S. Senator Spooner, Chief Judge Parker and his former associate Judge Gray of the Court of Appeals, Judges Patterson and O'Brien of the Supreme Court and Judge Holt of the United States District Court, Charles R. Miller of the *Times* and his beloved associate, Edward Cary; Rollo Ogden of the *Evening Post;* the author and critic, William C. Brownell; the educator and historian Prof. William M. Sloane; the renowned naturalist and father of the Museum of Natural History, Dr. Daniel G. Elliott; Great Britain's consul in New York, Sir Percy Sander-

son; the eminent alienist Austin Flint; such architects as William R. Mead, Walter Cooke, Robert H. Robertson and Cass Gilbert; the philosopher-architect, Henry Rutgers Marshall, and I have also seen one of the most noted of the railroad presidents of our time, whose figure did not admit of conveniently reaching with his cue a distant ball, repose his ample front upon the table and with heels extended from the floor, contrary to all the rules of the game, execute, or probably fail to execute, his intended play; and almost nightly one of our most distinguished physicians, whose name is well known as indicative of learning, may be seen, at his advanced age, stretching his figure on the table, with one foot on the floor, and the leg of the other projected along the rail in the most approved style of the professional, to enable him to execute with scientific accuracy some difficult play. Just read that tender poem of Oliver Wendell Holmes entitled "The Boys," beginning:

> "Has any *old* fellow got in with the boys,
> If there has put him out without making a noise."

and you will faintly appreciate the attractions and associations of the billiard room set.

It was to these surroundings that Thomas B. Reed was eagerly welcomed soon after he forsook the councils of the nation, and made his appearance in New York. His eminence as a public man, his prominence as a legislator in Congress, his distinguished service as Speaker of the House of Representatives, where he won the title of "Czar," and

his position before the people as a candidate for the Presidency, aside from his merits as a lawyer, made him a most interesting figure. It was delightful to see him, his great form surmounted by his perfectly bald head, his smooth and somewhat boyish face, his almost elephantine tread, and a roll like that of a Maine skipper, as he pursued his way around the table. How unlike a "czar" he was, how gentle, kindly and gracious, how simple-hearted and unassuming, and what boyish interest he felt in his play, and with it all, there was his Maine drawl, and his occasional scintillations of wit, akin to the instance when Mr. Springer of Illinois in the House of Representatives exclaimed "Mr. Speaker, I would rather be right than president," and the "czar" replied in his long drawl: "Well, there is no danger of the gentleman being either." He had an amusing expression of countenance when he had made a satisfactory shot, looking about the room with a most benignant expression of countenance, and a sly twinkle in his eye, and, seemingly soliloquising, drawl "th-a-t was ve-ry cha-a-aste." I can see him now as he stood one evening amid the festivities of New Year's Eve, an interested and delighted spectator, but a spectator only because his ponderous form lacked the requisite agility to tread the mazes of the Virginia reel. But as the clock struck twelve, and the assembled members joined hands in forming the great circle extending from one room to another, moving along and swinging hands as they sung the strains of "Auld Lang Syne," he, joining with them, found himself perfectly at home. His association with us

was all too brief, for the reaper intervened and removed him from our sight, but the recollection of his imposing personality, his kindly intercourse, his enlivening wit, his racy descriptions of men and things in public life, have become a part of the traditions of the billiard room, and form a part of its most treasured memories.

While the modern lawyer owes much of his recreation to the development of out-door sports, and especially to those three products of the last thirty years among us, baseball, golf and tennis, there is another phase of his recreation which is not to be forgotten. For if the lawyer is, as he has the reputation of being, a lover of books, he will, like Chief Justice Marshall, find in novels, or better still by combining them with books of biography and reminiscences, abundant recreation; and if, like Mr. Justice Story and Mr. William Allen Butler, he has the gift of poesy, or like our beloved associate, Mr. Adrian H. Joline, can produce such charming books as his "Rambles in Autograph Land," and "At my Library Table," or, like Mr. Frederick Trevor Hill and Mr. Arthur C. Train, write so entertainingly about the law, or if he has cultivated, if he fortunately possesses it, the gentle gift of music with which to dispel his weariness and care, his life as a lawyer will be full of that recreation which is best worth while.

## CHAPTER XXIV

### MEMORIES OF THE COURTS

JUDGES, jurors, witnesses and clients are by no means the only individuals with whom the court lawyer must reckon in his court room experiences. It makes a great difference whether the court officers—the clerks, the officers in charge of the jury, the door-keepers and attendants—are for or against. Just as he reckons with them will his life in the court room be agreeable or not, and I may add, indeed, that upon it may depend in part his success or failure. They are important in creating a favourable or unfavourable impression. Whether they look askance, or with the eye of friendliness, is not lost upon the jury whose sympathy one desires to win, and the attitude of the court *attachés* helps the jury form an estimate of the learned counsel. It therefore behooves him to be on good terms with them.

These functionaries are a constantly shifting and changing element, but among them is to be found a small percentage of courteous, kindly and trustworthy men, whose lives have been spent in the service. Between some of these and the bar strong and enduring friendships are formed, and among them I count several of my best friends. The old policeman, who for over thirty years has served on the third floor of the court house, and whenever he

espies me always arrests me with the grasp of his powerful hand, but never yet except in the warmest friendship; the dear old clerk of Chambers, who for nearly forty years, with unfailing tact, and courteous firmness, has dealt with the rudeness and impatience of older lawyers, and excess of zeal and energy of the younger when submitting their orders to the judges for signature; and that gentle and kindly James J. Nealis who had the look of a "wild Irishman," and at his first appearance, raw and untrained, to discharge the functions of court officer, seemed entirely out of place, but after a time won the friendship, respect and confidence of the bar, and by hard study and persistence became an accomplished stenographer in one of the parts of the courts, and died respected and lamented by all who knew him; these and such as these lighten the burden of the busy lawyer, and make the strenuous life of the court house less oppressive.

The lawyer of thirty years ago observes, I am sure, a marked change in the orderliness of the judicial proceedings of the present day as compared with the past. Especially is this true of the business of contested motions and *ex parte* applications for orders. In the days when a single branch of the court known as chambers was occupied with this business, and particularly on the first and third Mondays of each month when the calendars were called, chambers was packed with a throng of lawyers, some waiting for the call of the calendar, others to make *ex parte* applications, and then there were parties and witnesses in attendance to be

sworn by the judge in proceedings supplementary to execution or on examination before trial. There was hardly a semblance of order; almost every one standing, a struggling, elbowing mass of humanity endeavouring to submit orders, or have witnesses sworn, or making for a place at the front to argue a contested motion. While, of course, there was a great difference between the different judges in their ability to maintain order, very often the judge would vainly pound with his gavel, vainly would the court officers endeavour to preserve order, and in the midst of it all it was sometimes difficult to understand how the patient official whose duty it was to present papers to the judge for his signature, and superintend the swearing of witnesses, and indeed how the justice on the bench, with dignity unruffled, could manage to dispose of the business in hand.

This condition of things was equally true of the different trial terms, especially on the first Monday of each month, when a new term of the court began. Lawyers, jurors and witnesses filled the court rooms; jurors with excuses; lawyers with applications for adjournments; clerks running to and fro; counsel, parties and witnesses keeping up the busy hum of conversation, presented a scene very different from that air of quiet dignity supposed to characterize a court room. Gradually, through a new system, order has come out of chaos, and now with separate branches of the court for contested motions and *ex parte* business, and with an improved method of calling cases for trial, and less latitude in adjournments, with chairs for all and the

rule that all must be seated, "bear garden" scenes of former days have passed away. If one desired an excellent illustration of the vast variety of excuses that could be furnished for adjourning cases, it would only be necessary to attend upon the call of one of these calendars to obtain it. Fertility of resource in this direction was a most enviable accomplishment among a certain class of lawyers, apparently never "ready," whose principal effort seemed to be to "adjourn the case." Ability to offer a lame excuse with a perfectly serious countenance, and so plausibly as to have it meet with judicial favour, was the result of long experience. Connected with the large offices there was always the calendar clerk whose duty it was to watch the progress of the cases and answer them when called, and who, by long practice in answering cases, and applying for adjournments, could gauge to a nicety the disposition of the judge and the validity of an excuse. I recall one of this class connected with the firm of Beebe, Donohue & Cooke, who by long training and adroitness became renowned at the bar as an expert in obtaining or opposing adjournments. He had few equals and no superiors, and his expert knowledge on this subject became so valuable and extensive that he embodied it in a volume published many years ago, but now forgotten, entitled "Voorhees on Adjournments."

It would be strange indeed if the court lawyer, in his frequent attendances in the court house, did not meet with some unusual characters. There is always a number of individuals whose faces soon

become familiar, who are unbalanced mentally, and ever on the alert to air a legal grievance or, may-be, wandering about the courts with a package of papers soiled by the handling of years, under the impression that they have a case which is soon to be tried. This is a melancholy phase of court experiences. One of the ill-favoured, although quite likely mentally sound, was John Percy. He was a small grim-visaged lawyer who had been so unfortunate as to be disbarred. (In re Percy, 36 N. Y., 651.) He was pitiful to behold. He had been ably defended by Wheeler H. Peckham before the Court of Appeals in the disbarment proceedings, but without success. Of course he was precluded from practicing for others, but he was constantly in the courts making applications for reinstatement almost always addressed to the discretion of the Court, but which could not be favourably entertained. Reinstatement appeared to be his sole idea and purpose in life. His entire time seemed to be devoted to obtaining it, and he therefore became a familiar figure in the courts until, in process of years, this unfortunate man passed out of sight.

A very reputable lawyer whom I meet occasionally is an illustration of the strength of the attachments of city life. He had rendered gallant service in the war as a Union soldier, serving from the beginning until its close. I can imagine how, in his soldier days, he longed to return to his metropolitan home, registering a vow, quite likely, that if he were ever so fortunate as to see it again, he would never get far from the Bowery. Probably it was this

spirit which led him at the close of the war back again to his beloved New York. Nothing could induce him to leave it, even for a day. His haunts were its streets, his recreation in Central Park, and he would spend his vacations amid the diversion and relaxation of these surroundings. For twenty-eight years after his return from the war he never left the confines of New York, and although on a few occasions since then he has been compelled to journey outside New York, the occasions have been rare, and he has never willingly departed from it for rest or recreation.

Then there are the queer firm names of law partnerships. A combination of three individual names was common, but it was a considerable time after my admission, that a partnership name embracing four individuals existed. This was, I think, Shipman, Barlow, Larocque & Macfarland. This name was so long that it called forth a witticism from the late Francis N. Bangs, who, having in mind the necessity of folioing the papers to be presented to the court, remarked on hearing the name that it was so long it ought to be folioed. Then there were the odd firm names, such as Yard & Furlong, which at once suggested that Mr. Yard could hardly equal Mr. Furlong, as according to mathematical tables it takes forty yards to make one furlong. There was also the firm of Gallup & Hurry, which, if the name indicated anything, must have been speedy in its methods, and suggested a fair question as to which was the more conservative of the two, Mr. Gallup or Mr. Hurry, both of them being

evidently bent on arriving at a result in the quickest possible time. There were also certain names which had a kind of *colore officii,* such as Brown & Green and White & Black, the latter illustrating the efforts of lawyers "to make black appear to be white." Then another highly reputable and successful firm, Sewell & Pierce, in its early career adopted a motto printed on a circular band enclosing the firm name—*vigilantibus non dormientibus.*

Unquestionably a noble sentiment is expressed in the maxim *"interest reipublicae ut sit finis litium"* —it is for the interest of the country that there should be an end of litigation—but instead of nearing the end we appear to be farther away from it than ever. The litigious spirit seems to be innate, and the consequence is that instead of diminution there is an increase which the growth in population does not entirely account for. Compare the number of judges forty years ago with that of the present day—in the Supreme, Superior and Common Pleas Courts, in all seventeen judges; since then the number has been doubled. Litigation has increased still more, but it has undergone a great change in character. In earlier days there was a large amount of mercantile or commercial litigation, but the formation of mercantile exchanges whose arbitration committees settle disputes between the members, the bankruptcy laws and bankruptcy courts which step in to prevent one creditor gaining advantage over another and the general disposition to make settlements, have caused almost its disappearance. The same is true

of litigation with respect to stock transactions and fire and life insurance controversies. The standard form of fire insurance policy, and adjudication by the courts of almost all questions which can arise under fire and life insurance policies, make litigation of this character at the present time a rarity. Besides that, litigation between insurers and policy holders was contrary to sound business judgment, and insurance men of foresight soon saw that much more was accomplished by advertising prompt payment of claims, and introducing in life insurance an incontestable policy, which soon had the effect to prevent litigation of this character.

There were also those numerous questions relating to common carriers of passengers and their baggage, as well as in the transportation of merchandise. Rights of passengers, and the duties owing to them by common carriers, the efforts of express companies to limit their liability by carefully prepared receipts, and to exempt themselves from the consequences of their negligence, were fruitful sources of litigation.

Then there were the questions connected with negotiable paper, and actions of ejectment and trespass relating to real estate, but the settlement of these questions not only by the courts, but by statutory enactment, dispenses almost entirely with litigations on these subjects.

The contest of prominent wills was much more frequent down to about twenty-five years ago than subsequently. The contest of such wills as A. T. Stewart's, Commodore Vanderbilt's, Jesse Hoyt's,

Mr. Hammersley's, Governor Tilden's and others, more or less prominent, was of frequent occurrence. It may be that the cause of the present infrequency is due to the greater care used by testators in making testamentary dispositions, and by lawyers in safe-guarding against contests. Of course, so long as individuals attempt to draw their own wills, or trust the drawing of them to incompetent lawyers, or make fanciful and absurd dispositions, or permit a spirit of vindictiveness or resentment to control their testamentary dispositions, will contests must occur, and it is therefore true that the Surrogate's Court is inundated by a flood of litigation of this description, chiefly relating to unimportant wills of obscure testators.

While there has been a great decline in litigation in certain directions there has been a corresponding increase in others, and if one takes the trouble to examine the court calendars, it will be found that probably two-thirds are actions of tort, most of which involve negligence of the defendant. Probably the total number of equity cases and of mercantile or commercial cases together would amount to not more than one-third of the whole number of the cases on the calendars of the Supreme Court. It is not strange that cases of negligence should have multiplied enormously, for the growth of the city, the development of means of transit, the increase of factories and the use of machinery would quite naturally give rise to cases of this description.

The tremendous increase in the number of actions for divorce is note-worthy, and the crowded calen-

dar of cases of this class occupies the attention of one branch of the court at least one day in the week, and while the litigants are engaged in a "speed-contest" for a dissolution of the marriage tie, there has also been a "speed-contest" between the judges for a "record" of the largest number of divorce cases disposed of at a single session of the court. I do not profess to speak with accuracy, but the best information I have been able to obtain is that on a single day Mr. Justice A. R. Lawrence made fifty-two couples happy, not by uniting them, but by freeing them from the bonds of matrimony. Assuming a court session of the ordinary length, each case was disposed of in less than six minutes.

For a long time the large number of litigations instituted by owners of property against the elevated railroad company for damages to their easement of light, air and access imposed a heavy burden on the courts, but these cases have well nigh disappeared.

Litigated business undoubtedly does not now command the attention which it formerly did of lawyers of the greatest eminence. I do not wish to be understood that litigated business does not call for the exhibition of as great ability as formerly, nor do I mean to assert that there is not a considerable number of men distinguished for their ability, and of high standing, who devote themselves to the trial of these cases, and the incomes some of these derive are large. To the lawyer whose inclination tends toward court practice there is unquestionably as much room as there ever was; but it is equally true

that the great leaders of the bar, such as engaged in that class of business thirty years ago, turn over the litigation of their offices to their juniors, and at the present day are more often, if not altogether, occupied with those great financial interests which are transacted in the privacy of their own offices, and rarely call for their presence in court, and when they occasionally appear it is in connection with great cases of exceptional importance.

The prime factor in courts of justice for the trial of two-thirds of its litigations is the jury. The quality of the jury is everything. Our jury system, as it prevails in the City of New York, is, I think, defective in this particular. When a jury of real intelligence is desired, recourse is had to a "struck" jury or a special panel. In my opinion the complaint among lawyers of the quality of the average juror is justified, and yet with it all jurors are evidently disposed to be honest and fair, and try to arrive at a verdict which accords with the merits of the case, and when they do not it is more frequently from want of an adequate and lucid presentation of the issues of fact, and proper instructions upon the questions of law involved by the judge. The class from which the average jury in our civil courts is taken is the small tradesmen, employés of various descriptions, and humble toilers in various lines of business. Men of wealth, position, influence and intellect are rarely seen, though occasionally prompted by a lofty sense of duty as a citizen some such will be found. But this is less true, I think, of the Federal than the State courts.

I believe that any lawyer who has had considerable experience in the trial of jury cases cannot fail to have observed how rarely it is that one of his acquaintances appears on the jury. It is, indeed, calculated to give a lawyer a very humble idea of his importance and position in the community, when in case after case, and year in and year out, he hears the jury asked, are you acquainted with the counsel for the plaintiff or the defendant, as the case may be, and learns that the jurors have never even heard of him.

With all the defects of jury trial, I am of the opinion that on a question of fact involving conflicting inferences, and often moral issues, and the credibility of witnesses, it is safer to submit such questions to the decision of a fairly good jury than to that of the average judge. We often hear of the eleven obstinate jurors. I had such a case once, when the eleven obstinate jurors wanted to find a verdict in my favour, but the twelfth juror would not hear of it. When the jury returned into court with a disagreement, the judge was evidently very much annoyed that this juror should hold out, and he proceeded to lecture him and discharge him from further service. The case was tried again, and my client won the day, but an appeal was taken to the Court of Appeals, and that learned court, after examining the evidence, took sides with that poor juror who in the first trial stood out against me and received the rebuke of the Court, and decided that the evidence did not justify a verdict in favour of my client. I have often wished that I could find that

juror and reverently bow to his superior intelligence.

A judge got himself into trouble once when he undertook to lecture the single dissenting juror. He had charged the jury in a very clear and simple way, presenting the issue and applying the law to the facts of the case with such lucidity that they could not be misled. The jury were out for a long time, and did not agree. They were brought into court and announced their disagreement, and the impossibility of ever agreeing. The judge in some way ascertained that there was a single outstanding juror, and he proceeded to lecture the jury upon their duty, reminding them of the rules laid down in his charge and, in fact, put the matter before them in such a way that it was not difficult to see that in his opinion the verdict should be for the plaintiff. The jury again retired, and again deliberated for a long time, and still were at odds. Having reached the conclusion that they could not agree, they returned to the court room and announced the fact. The judge characterised the action of any single juror standing out against his associates in such a case as being reprehensible, and in discharging them he felt obliged to say to the outstanding juror that he regretted that he should have been permitted to serve, that in so plain a case it was inexplicable how he could be so obstinately and persistently opposed to his fellow jurors, and that he would see to it that he should not be permitted to serve in the future. The wretched juror almost collapsed under this rebuke, but he had just

enough vitality left to ask the judge if he might be permitted to say a word. The judge frowned upon him and said "proceed." The juror meekly stated that from the language of the judge's charge he had drawn the conclusion that the verdict should be for the plaintiff, and asked if that was not correct. The judge replied that undoubtedly his personal opinion was that a verdict for the plaintiff would be in accordance with the facts. "Well," said the juror, "I was the only one out of the twelve that agreed with your Honour."

The value of making an earnest attempt to get a good jury in a doubtful case was illustrated by one of my own cases where a railroad company I represented, was sued by a gentleman for $40,000 damages for being run over by one of its cars, resulting in the amputation of his leg. The case was to be tried in Brooklyn, and Brooklyn jurors were certainly below par. On this particular occasion the juries were empaneled before one of the judges, and then sent into other parts of the court where different judges were to preside at the trials. In a case just before mine a lawyer in examining the jurors as to their qualifications asked one very low class individual whether he could read and write, an indispensable qualification of a juror. He replied that he could not and was excused. I took my cue from this, and when the jurors were called in my case, and were ready to be examined, I asked the foreman of the jury, a very intelligent man, in a somewhat jocular and frivolous way, whether he could read and write. There was a titter in the court room, and he laugh-

ingly replied that he certainly could. Turning to the next juror I said to him with somewhat more seriousness, that having asked the foreman that question I must follow it up and put the question to him. He responded that he could read but not write. He was then excused. By that time the jurors and the judge saw what I was aiming at, and although it may seem scarcely credible, five of that jury lacked the necessary qualifications, although it is due to them to say that they were mostly foreigners who had not acquired ability to write although they could read the language. The result of that simple test was to put into the jury box twelve as intelligent men as I could have wished to find, and their own sense of self-respect was evidently increased by the realization that, in comparison with the average juror, they were of a superior order of intelligence. I was careful about this jury because I felt that we had good evidence from reliable and trustworthy witnesses, which ought to satisfy the minds of intelligent jurors that my client was not responsible for the awful injury. Well, we tried the case, and the attitude of the jury throughout was marked by a degree of attention, intelligence and desire to do justice that I have rarely found, and while perhaps the resulting verdict for my client may have had some influence upon my estimate of them, I unquestionably felt when they were empaneled, the greatest confidence in submitting to them my client's rights.

It has always been the custom, since I was admitted, for counsel for the respective parties to test

the impartiality of jurors by interrogating them upon such points as their acquaintance with the parties and their attorneys, and as to having had controversies of a similar character to that about to be presented, but this practice, which to a limited extent, is not unreasonable, has so far developed that the examination of jurors in civil cases to discover any possible ground of objection to their serving is now carried beyond all reason. In the country districts it would probably be impossible to find twelve men who did not know one or the other of the counsel, or one or the other of the parties, and it would not be regarded a ground of objection. The real test is whether the juror, on knowing who the parties are and the issue involved, knows of anything that would prevent him from doing justice in the case and, under the instructions of the Court, render an impartial verdict in accordance with the evidence.

As these examinations are now conducted the inquiry ranges along the line whether he knows either of the parties; either of the counsel; what his occupation is; whether he is an employer or an employé; whether he has ever had or been interested in a claim of a similar character either on behalf of himself or any other member of his family; whether he has ever served in a similar case; whether he would be influenced by sympathy or prejudice; whether he is prejudiced against claims such as the one to be presented; whether he would be governed by the evidence under the instructions of the Court, and whether he would disregard all outside considera-

tions likely to influence his judgment and decide on the evidence alone, and so on, until the juror hardly knows whether he will be allowed to exercise an independent judgment and decide the case on its merits.

This practice applies particularly to those numerous actions founded on negligence defended by street railway companies and the employers' liability insurance companies. It is interesting to listen to an examination by some acute lawyer in a negligence case probing the mental and moral recesses of the jury. Probably the rigidity of these examinations, and the toleration of them by the Court, is due to the fact that in recent years jurors have been tampered with, and in some cases individuals known to be favourable to certain corporations, if not actually in the employ of them, have been smuggled into the jury box. Complaints in this direction have occasioned investigations resulting in a practical substantiation of the charge, and in some cases individuals charged with such offenses have been dealt with severely. I do not remember to have heard until within the last fifteen years of any well authenticated case of tampering with jurors, but the remarkable development of corporations for purposes of city transit, and for insurance of employers against liability for injuries to their employés, each under the management of its own law department, having at its command an army of investigators to work up defenses, procure the attendance of witnesses, keep watch of juries and possessing the most approved facilities for using every

possible means of influence capable of being exerted, and resorting to almost every expedient which can be devised by human intelligence to defeat claims, is responsible for it. It is, of course, a dreadful thought that any member of the bar should ever lend himself to exert such influence or participate in such practices, but unfortunately the records of the Appellate Division of the Supreme Court of the First Department bear the saddest kind of testimony in this direction, and disbarment has been the consequence.

Witnesses have been divided into three classes: "liars, damned liars and experts." I do not think that witnesses are often intentionally untruthful, but they differ so much in ability to recollect accurately; their viewpoint differs so widely; the relative importance which they attach to facts, the impression facts make on different minds, the power to state exactly what they saw, and to distinguish what they saw from what they did not see, is indeed remarkable, and where there is a difference in the recital of facts based upon observation, this difference does not generally grow out of any intentional misrepresentation. Undoubtedly there is a considerable amount of perjured testimony offered in the courts. In many of the cases founded on negligence, to which I have referred, witnesses unquestionably do appear dressed up and carefully coached for the occasion, to state a single fact, whom it is impossible to shake by a cross-examination, but these cases are rare.

The tendency upon the part of lawyers to prolong cross-examination, and resort to all the tricks of the

trade in cross-examining, has been marked of late years, although acute trial lawyers of the highest type content themselves with brief cross-examinations. Of course, a cross-examination, such as that in the case of Laidlaw v. Sage where Mr. Sage was cross-examined by one of the most eminent men of our bar, is very amusing, and no one could help admire the art and skill with which it was conducted. Mr. Francis L. Wellman, himself an able cross-examiner, gives an excellent account of it in his book on the "Art of Cross-examination." It was undoubtedly a lively proceeding. Mr. Sage must have writhed while being presented in a very unattractive light to the jury, and the jury, undoubtedly greatly influenced by it, willingly gave the plaintiff a verdict. But the cross-examination, although brilliant, was self-destructive, and defeated its own ends, for when the Court of Appeals came to review the trial in cold type, and in a judicial atmosphere entirely removed from extraneous surroundings, they decided that the cross-examiner was permitted to exceed the legitimate bounds of cross-examination. It is a strong temptation, of course, to put a vulnerable witness in an unfortunate plight, but a jury more often than not has a fellow feeling that makes them wondrous kind, and although in yielding to the temptation the cross-examiner may have amused the "gallery" and think he has scored a triumph, he will find that he has scored a defeat.

Lack of consideration for a witness was well illustrated by the story of Lord Braxfield, probably one of the rudest judges that ever sat upon the

bench. A timid and fearful young woman appeared as a witness and desiring to shun the gaze of those in the court room, wore a veil. Being called to testify she proceeded timidly to the witness stand, and, still veiled, took her place. Lord Braxfield eyed her sternly for a moment and then exclaimed, "noo, young woman, tak doon your veil, put awa all modesty and look me squarely in the face."

Every lawyer realizes what an awful thing it is to have his case called with no witnesses in attendance, and be compelled to proceed without them under the penalty of suffering default. Witnesses are, of course, the important feature of every lawsuit, and while they often make up in quality what they lack in numbers, the value of the presence of a number of witnesses for its moral effect, at least, upon the other side, is not to be despised. Every lawyer can readily appreciate the predicament of the lawyer who, without any witnesses, was forced to try his case, and in the interval afforded by the calling of the jury, happening to notice a friend of his just leaving the court room, trailed by a number of excellent witnesses, approached him with the question, "Brother, is your case off?" "Yes, is yours?" "No, mine is on, and I wish you would lend me your witnesses."

A witness who deserves to be embalmed in the recollection of any one who has had experience with him is the professional expert. The facility with which expert evidence can be obtained in almost any direction has undoubtedly brought it into such disrepute that in many jurisdictions it is viewed with

disfavour, and is little regarded. It is wonderful what a variety of medical testimony of a diametrically opposite nature can be obtained. Any lawyer who has had experience in testamentary cases, and personal injury cases, can easily recall the conflict of opposing medical experts. Experts in patent cases stand by themselves as a professional class, whose superior technical knowledge gives them the right to speak upon the subjects on which they are called, but experts to which I refer comprise those who testify in will contests, land appraisals, cases of personal injury, in which the fee is often contingent, and in criminal cases involving a defense of insanity. They are sometimes referred to as hired partisans, whom the judges distrust, and the admission of their evidence as the weak spot in the administration of justice. Instead of a scientifically trained thinker, who puts his knowledge at the services of the court in an effort to reach the truth, he more often than not bears the same relation to the legal controversy that the lawyer does, as regularly retained because of the opinion he has given in favour of the party who retained him.

An English judge in a recent case said he distrusted this class of evidence because he knew how it was obtained, and illustrated the matter by the case of an owner of property who desired to obtain expert evidence of its value. He said that it was a common practice for the owner to apply to half a dozen experts, from three of whom he would receive an unfavourable, and from the other three a favourable valuation, the consequence being

that he would pay all of them, but only call as witnesses the three whose opinions were favourable. This looks somewhat like suppressing testimony, and is certainly not fair to the court, but what shall we say of the instance which the learned judge gives of a property owner who applied to sixty-eight experts before he could find one whose opinion favoured his own estimate.

After all, everything depends upon honesty, integrity and absolute disregard of every other consideration than love of the truth, and when such an expert presents himself, his opinion is everywhere received with the respect and confidence to which it it entitled.

Occasionally counsel, too impetuous and hot-headed, or neglectful of proper respect for the court, are brought before the judge to answer a charge of contempt. An adroit child of Israel, forgetful of his duty to appear before the court at a certain time, created an impression on the mind of the Judge that he did so contemptuously, and the Judge issued an order for his appearance the following morning. The order was duly obeyed and the Judge called upon him to explain his conduct and purge himself of contempt. The court room was filled and he arose in a very deferential and humble way and addressed the Court in substance as follows:

"Your Honour has called me before this Bar to explain my conduct and purge myself of contempt. I shall proceed to do so. I recall an occasion not long since when Recorder Goff, now on the bench, was summoned before the court to purge himself of

contempt, and immediately thereafter he was elected Recorder. I also recall the fact that District Attorney Jerome, on a certain occasion, was called before the court to purge himself of contempt, and immediately afterwards he was elected District Attorney; and now I am called before this court to purge myself of contempt, and the only question that troubles me is—what job am I to get?"

This remarkable address, delivered with the peculiar accent and intonation characteristic of some of our Jewish brethren, convulsed the Judge and the entire audience, and when supplemented with a few words expressing no intentional disrespect, the incident closed.

If in the domain of phrenology there is a bump of litigiousness there is a wonderful difference between clients in the extent of its development. Litigation to some is meat and drink; they are never happy without a lawsuit; they love the atmosphere of courts and law offices and association with lawyers. Others view it with abhorrence and are ready to make any sacrifice to avoid it. Their motto is: "agree with thine adversary quickly," and "if any man will sue thee at the law and take away thy coat, let him take thy cloak also," and, strange to say, there seems to be no middle class between the two. It is a case of "he loves me, or he loves me not." It does not seem, in the one case, to be due to the absence of religious principle, or in the other to the presence of it. Religious principle may not be much developed in either; the controlling motive most likely, is self-interest. It remains for the conscien-

tious lawyer to exercise a wise control over both. I recall an individual of high religious profession whose business career has been involved in numerous litigations, growing out of his business transactions, that have engaged the attention of a small army of successive lawyers to whom the vast amount of his aggregate fees must have been a great boon, while the volume of his litigations have made his name a by-word in the courts. I also recall with gratitude a litigant in my early days for whom my father acted, and who after my father's death generously permitted me to take his place. He was diminutive, lame and frail; he laboured under physical disease which often made his life a burden, but he had an unconquerable spirit of litigation, and in spite of disability and pain, would trudge up and down the flights of stairs, sometimes assisted by an attendant, and was always ready and eager to institute legal proceedings to enforce his rights. I have often thought that litigation kept him alive. It gave him something to live for.

Those who are familiar with real estate transactions have probably met with the name John Townshend. I knew him intimately and he occasionally retained me. He was, I think, born in England, and he had all the punctiliousness and regard for the amenities of the profession possessed by the highest type of English lawyers. He was courteous, refined and cultured, and in his bearing always a gentleman. He was for years counsel for the *New York Herald* and its proprietor, James Gordon Bennett, and his long experience in connection with actions

for libel gave him such extensive knowledge in that direction that he produced an admirable work on libel and slander which was long a prominent authority. He was also one of the earliest annotators of our Code of Civil Procedure, and for years Voorhies Code annotated by John Townshend was the hand-book of every lawyer. He was himself an accomplished lawyer and an estimable man. But he was led, how or why I know not, to acquire outstanding interests in real estate in New York City. In earlier days conflicting claims to property of this description growing out of unconveyed interests under wills, or under the laws of descent, or tax sales or defective foreclosures were frequent, and Mr. Townshend had just the amount of litigious spirit to induce him to acquire these outstanding interests, and by litigation enforce them. It would be interesting to know the extent of these litigations, most of which were actions of ejectment, but they were numerous, and Mr. Townshend was ever in the courts. I imagine he was a thorn in the flesh of real estate lawyers, but his course of procedure was entirely within the law, and he was very successful. Two of his cases in which I was engaged, Sanders v. Townshend (89 N. Y., 623) and Masterson v. Townshend (123 N. Y., 458), will fairly illustrate the character of his litigations. In a later case, Townshend v. Frommer (125 N. Y., 446), he made an attack by an action of ejectment on an immensely valuable parcel of real estate in the block bounded by Fourth and Fifth avenues and 76th and 77th Streets, which, if successful, would have enriched him, and the learned

and able argument of Judge George F. Danforth in his behalf required all the legal skill and acumen of Judge John F. Dillon to meet it, and the question was so close that it was thought by many that the Court of Appeals had to stretch the law to the utmost to get rid of this adroit and troublesome suitor. In a still later case in which his wife was plaintiff, Townshend v. Thomson (139 N. Y., 152), the Court remarked: "The plaintiff's title does not appear to be very meritorious, and the Court ought not to be very astute to uphold it."

Another lawyer having somewhat of this litigious spirit, but in a different way, was Henry H. Morange. He was a very respectable-looking and well-dressed personage, and his appearances in court in his own behalf, as one of the parties to a pending litigation, were remarkably frequent. He never should have been a lawyer, but a client with a "fat roll," and he would then have been a positive benefit to the profession. Being a litigious lawyer, he occupied a good deal of time in the courts airing his own grievances, and if the old adage be true that "he who is his own lawyer has a fool for a client," it would probably have applied with all its force to Mr. Morange. The judges soon became acquainted with his litigious propensities, and as he seemed to be fond of technical objections, making intermediate motions founded mostly on technicalities, instead of proceeding direct to the trial of the issue involved, he soon grew into disfavour with the courts. I often used to see him presenting to the court some technical or trivial argument with the result that the

judges grew impatient and petulant and treated Mr. Morange with scant courtesy. The cases of Morange v. Meigs; Morange v. Morange, his own divorce case; Morange v. Morris; Morange v. Mudge; and Morange v. Waldron, being included in the published reports, are permanent monuments to his litigious spirit; but adding to them the considerable number, doubtless, of other litigations hidden away among the records of unreported cases, he was afforded abundant opportunity to pursue the practice of his profession, inasmuch as he invariably appeared as his own attorney and counsel.

On an occasion when he was presenting one of his numerous motions, arguing it at considerable length, and being met by a brief, lucid and convincing statement of his opponent, the justice presiding disposed of it adversely at once, and turning to Mr. Morange, added: "It would be a pity if you should die, Mr. Morange." "Why, your Honour?" "Because if you should die, you would lose your best client."

A litigation of no special interest in itself possessed considerable interest for me on account of the personality of one of the litigants and the events following his death. On entering my father's office as a student in the fall of 1868, I learned that he had been appointed referee to hear and determine an action against the then merchant prince, Alexander T. Stewart, involving a controversy between him and his partners. He had been sued by the executors of one of the deceased partners for an accounting of their business transactions, claiming a not

very considerable amount. This was followed by a counter-claim by Mr. Stewart which would have overwhelmed the estate of the deceased partner if he had established it. The case dragged along several years and terminated later in a mutual adjustment. This was the first case, I think, in which, as referee, my father had the assistance of a stenographer.

Mr. Stewart's appearance, as I first saw him, bore every indication of refinement and culture, and it is true that he was liberally educated in the University at Belfast, and Trinity College, Dublin. His placid countenance, sandy hair and blue eyes were by no means impressive, and his reserved manner, few words, unassuming and diffident bearing, gentle courtesy and exceedingly neat and inconspicuous garments were by no means indicative of a dominant and forceful personality. It was not until there was an opportunity to look beneath the surface that one would discover the reserved force, intellectual power, keenness of perception, self-possession and self-control that easily accounted for his remarkable achievements as the leading merchant of that day. To his large store at Chambers Street and Broadway he added what was then considered a monument of mercantile enterprise, the iron building which now stands on Broadway and Fourth Avenue between Ninth and Tenth Streets. This was, indeed, a somewhat spectacular enterprise, but while under his control was a tremendous success. It was scarcely more spectacular, although on a larger scale, than his purchase of the

"Sarsaparilla" Townsend house at the northwest corner of Fifth Avenue and Thirty-fourth Street, directly opposite his residence at the northeast corner of Fifth Avenue and Thirty-fourth Street which he was then occupying, demolishing the Townsend house, and erecting on its site a showy marble mansion which he occupied until his death, and which his wife subsequently occupied until her death, when it was leased to the Manhattan Club, being subsequently demolished for the construction of the Knickerbocker Trust Company building. His patriotism in the days of the war and his ability as a financier were recognized by General Grant on his election as President, by Mr. Stewart's appointment as Secretary of the Treasury in his first Cabinet; but the selection, although from a personal and political standpoint entirely unexceptionable, contravened a statute forbidding the appointment of any individual engaged in trade or commerce as Secretary of the Treasury, and upon objection by Senator Sumner of Massachusetts it had to be withdrawn.

In the litigation referred to, I often saw Mr. Stewart on the witness-stand undergoing cross-examination. The cross-examiner was a lawyer of high standing, but of excessive irritability. Mr. Stewart's placidity and reserve, and the fewness of his words, had the effect of aggravating and exciting his cross-examiner beyond all reason; so much so indeed that Mr. Stewart was subjected to slurs and insinuations which might well have called out remonstrance, if not rage; but through it all he was perfectly self-possessed, and met his adversary with

a self-control that seemed to me truly remarkable.

At this time and until his death, Mr. Stewart's chief confidential adviser was Henry Hilton, who had served as a judge of the Court of Common Pleas. Judge Hilton was tall and full bodied, with an abundant flow of good nature, geniality, and excellent common sense, but without a profound knowledge of the law, although sufficiently well-equipped in that direction to make his advice extremely useful. He was one of the best dressed men I ever knew, and his personality and bearing were as commanding and impressive as Mr. Stewart's were modest and unassuming. Undoubtedly Mr. Stewart leaned entirely on Judge Hilton as an adviser. Each day Judge Hilton was accustomed to meet him at his Chambers Street store, and together they would ride in Mr. Stewart's brougham up-town. I often used to see Mr. Stewart's brougham on its way, and I do not remember ever to have seen Mr. Stewart in the brougham without the Judge. This fidelity and assiduity on the part of Judge Hilton received recognition in Mr. Stewart's will by a legacy of one million dollars, which was afterwards accepted as the purchase price of Mr. Stewart's large and flourishing mercantile establishments. This will is one of the traditions of the court. Its admission to probate was a perfunctory matter, but subsequent events showed that almost all Ireland, apparently, claimed kinship with the great merchant. It is a fact that over 2,000 persons asserted claims to relationship with him, and Mrs. Stewart was deluged

with applications of all sorts and from all quarters for pecuniary recognition on account of this relationship. A considerable number of the letters were published in the newspapers at the time. I am not aware how these various claims were disposed of, but I recall that a family by the name of Turney were claimants, and instituted a proceeding through one of their number to have the probate of the will set aside, and their attorney in this proceeding was a young lawyer by the name of Elihu Root, who in his subsequent career has won so much distinction, but the Turneys were unsuccessful, and their petition for a revocation of probate of the will was denied. Nor was this all the litigation which grew out of Mr. Stewart's estate, for after Mrs. Stewart's death (about ten years after the death of Mr. Stewart) her relatives instituted actions against Judge Hilton which became subjects of fierce litigation. One of the relatives was the wife of the late Prescott Hall Butler and quite naturally the firm of Evarts, Southmayd & Choate, in which Mr. Butler was a partner, acted on their behalf, and after some well-fought forensic contests a settlement was effected, greatly to the advantage of the relatives.

Although the death of Mr. Stewart attracted wide-spread attention it was nothing to that which was aroused by the news, within a few weeks after his death, that his vault, connected with "St. Marks in the Bouwerie," had been opened and his body stolen. The details of this horrid deed were, of course, widely spread in the newspapers and it was a theme of universal comment. That the body of

this rich merchant, interred with obsequies of a most impressive character in his own private burial place, in a thickly populated part of the city, could be stolen and spirited away and held for a reward was beyond ordinary comprehension, and how ghouls could be found to perpetrate the deed was more than extraordinary. But notwithstanding the most diligent and persistent efforts to discover the actors in this scene, or the whereabouts of the body, they proved fruitless, and to this day this skilfully planned and well executed theft of the mortal remains of Mr. Stewart has been shrouded in mystery. It should be said that the Cathedral at Garden City is reputed to be the last resting place of Mr. Stewart's remains, but whether they are actually there has never been, so far as I am able to discover, satisfactorily established.

When I was a student and clerk in my father's office, I became acquainted with Honourable Jeremiah S. Black, familiarly known to the public as "Jere Black." He had been conspicuous in public life, was Attorney-General and Secretary of State in President Buchanan's cabinet, Chief Justice of Pennsylvania, recognised as an extremely able lawyer, and was largely employed in the Supreme Court of the United States. As a resident of Pennsylvania, he had participated extensively in public affairs which formed an important part of the history of that State during the first half of the last century. He was a very interesting product of those early times.

When I first met him, his career was nearing its

close. His personal appearance was most striking. He was bulky and ponderous, without much regard for dress or personal appearance, and wore a brown wig which by no means added to his attractiveness. His face was of a sallow hue, his eyes small and bright, his whole countenance very expressive of his feelings, and what impressed me particularly was his marvelous capacity in the use of chewing tobacco and snuff. There was a certain ease and graciousness which characterised him, indicative of thorough acquaintance with the usages of polite society, but there was mingled with it a rather rough and ready style of intercourse, which was evidently due to early influences and associations. His make-up on the whole was that of a highly interesting personality, possessing a certain magnetism which at once created friendliness and interest. Whatever his outward demeanour and characteristics may have been, his intellect showed itself to be of a superior order and of wide culture. His published arguments in important cases before the Supreme Court, and his public addresses, furnish abundant evidence of this, and his argument before the Supreme Court on "Trial by Jury" is a forensic master-piece.

My opportunity to become acquainted with him was due to the fact that he retained my father to assist him in collecting a fee of fifty thousand dollars, which he was to receive for his services before the Supreme Court of the United States in a case involving the property of the Quick Silver Mining Company of Pennsylvania. Unfortunately, before

the fee was paid the company became financially embarrassed; sequestration proceedings ensued, and in the course of time a corporation of the same name was organized under the laws of the State of New York, to which all the assets of the Pennsylvania company were transferred. This left Judge Black's fee uncollectable in Pennsylvania from the company for which he had performed the service, and its collectability from any source was considered doubtful. At this juncture he retained my father, and I therefore met him frequently in the office. He was not one of those who, having transacted his business, proceeds on his way but rather, being of a sociable nature, he liked to chat a little, and his conversation was decidedly interesting. His mind well stored with literature, his familiarity with Shakespeare, and his apt use of Shakesperian quotations, lent an unusual charm. He seemed to be particularly broad minded and comprehensive in intellectual grasp and displayed knowledge on a wide range of subjects. He could not have failed to be most agreeable and entertaining in higher circles, both social and political.

By what has always seemed to me to be a very skilful application of legal remedies my father was successful in securing the payment of his fee, but just at this point Judge Black failed in that appreciative and generous spirit which ordinarily prompts adequate recognition of most efficient service, and he disputed the amount of my father's compensation. All friendly means of securing payment failed and Judge Black, being a resident of Penn-

sylvania, it would have been folly to attempt to secure its payment through the medium of a Pennsylvania jury, and unless Judge Black were found in New York, he could not be brought before a New York jury. It was an unpleasant dilemma, and the matter was left in abeyance. Some time afterward, happening to glance at the list of arrivals in the morning paper, whose name should I see as being at the St. Nicholas Hotel but that of Judge Black. I called my father's attention to it and suggested that I proceed at once to the office and make out a summons and serve it upon him at his hotel. He acquiesced rather half-heartedly, being reluctant as he always was to engage in a controversy, and thinking, I suppose, that I would not be able to find him. With the summons in my pocket, I visited the hotel, and as he was not on the office floor, I proceeded to the parlours and there discovered him by a window reading the morning paper. I approached him with deference and respect and bade him a friendly good-morning, and informed him that I had some business with him which consisted in the service of a summons upon him. He was evidently very much disgusted, but he accepted it and I went my way.

Thus was precipitated a very lively litigation in which Judge Black was represented by David Dudley Field's office, his son, Dudley Field, conducting the proceedings. The case was eventually sent to a referee, Hon. Robert B. Roosevelt. The trial was begun and proceeded for a time, and Judge Black was met with an array of eminent lawyers who were more than willing to estimate the value of my

father's services higher than the amount charged and Judge Black was doubtless convinced that his defense was hopeless. He therefore resorted to what we might call "Field" tactics, and actually attempted to remove the case to the United States Circuit Court under an act of Congress which provided for removals on the ground of "local prejudice and corruption." This was unpleasant for Mr. Roosevelt, and was indeed a reflection upon our administration of justice, but under the provisions of the act of Congress it was necessary that the removal proceedings should be taken "before the final trial or hearing" of the case. Mr. Field contended that if the proceedings were taken during the trial, but before it was completed, that then it was before the final trial or hearing, but my father successfully contended that a final trial or hearing was an entire thing, and that when the act of Congress provided that it should be before the final trial or hearing the meaning plainly was that it must be before it was entered upon, and that therefore his attempts to remove the case were not in time. The consequence was that Judge Black was remitted to his defence before the referee. Whether it was mortification at his unsuccessful, as well as ungracious, resistance of a just claim that prevented him from appearing again before the referee, I do not know, but I do know that very soon after my father's fee was paid.

I have never thought that Judge Black would consciously do anything that was not consistent with a high sense of honour, and it is quite likely he con-

sidered that according to the scale of fees which prevailed in that part of Pennsylvania where he resided, the compensation charged was large, but neglected to take into account that the scale of fees was very different in the City of New York.

In the fall of 1884, a sneak thief adroitly entered my house one morning and carried away a considerable quantity of silver, and about the same time the residence of Mrs. Schuyler Hamilton was also burglarized in the day time, resulting in an episode of considerable public interest. She fortunately returned to her residence just as the thief was descending the steps, and, supposing that he was some messenger or workman, spoke to him, and receiving a satisfactory response he was permitted to depart. She was able to remember and identify him. She was energetic in following up this theft, and enlisted the co-operation of Inspector Byrnes and his detective force. Spurred on by her activity, arrests were made indiscriminately, and with the aid of the rogues' gallery she finally succeeded in pointing out the culprit. She consulted me upon the subject as a fellow sufferer, and I gave her what assistance I could. She was unable to recover her lost silver, but she was insistent that the thief should be induced to confess where he had disposed of it. I was not at the time acquainted with Inspector Byrnes, but Recorder Smyth, before whom the thief was to be tried, was an old friend of mine, and to him I applied, believing that he could induce Inspector Byrnes to procure the desired information. He promised to do this and a few days afterward I

was requested by him to meet Inspector Byrnes and lay the matter before him. This I did, stating that I believed he could locate through a confession of the culprit the individual who had received Mrs. Hamilton's silver, and all I desired to ask was whether he was willing to do it. He asked me what reason I had to suppose that he could do this, and I replied that I had no reason except that Recorder Smyth had told me to confer with him and, with the thief in custody, I thought he was skilful enough to accomplish it. He replied: "Well, see Peter Mitchell," a well known member of the criminal bar. I happened to have business in one of the civil courts in the county court house and while there chanced to meet Mr. Mitchell. I was perfectly frank with him, and bluntly stated that Inspector Byrnes had suggested that I should see him, and that through him I could obtain for Mrs. Hamilton the value of her stolen silver. He replied: "Did Byrnes tell you that?" I said yes, that I had just come from him, and that I believed that he would not have said it unless he meant it. Mr. Mitchell, without further parleying, asked how much Mrs. Hamilton claimed. I replied, that it was $1,200. He responded: "Well, send up a receipt for the amount and it will be paid by Henry W. Jaehne," who at the time was one of our city aldermen, and the leader of the County Democratic Organization in his assembly district. I said: "Mr. Mitchell, are you sure that you want a receipt?" "Yes," he replied, "I must have it." "Very well, I answered, "I was not quite sure whether you would wish to

have it." Accordingly I prepared a receipt, which expressed that the money was paid in no other way than as a voluntary restitution, and nowise in forbearance of criminal prosecution, or as compounding a felony. The receipt was delivered to Mr. Mitchell, and restitution of the value of the silver was made. I rendered this service as a friendly act to Mrs. Hamilton, without compensation, and my connection with the matter then terminated, as I supposed.

Some months later a legislative investigation occurred, designed to expose the conduct of certain aldermen in connection with charges of bribery and corruption connected, as I recollect it, with the construction of the Broadway surface road. Among the aldermen so investigated was Henry W. Jaehne. In the course of the investigation information of the transaction referred to reached, I know not how, the counsel conducting it. The receipt which had been delivered to Mr. Mitchell was, of course, important as evidence. The original could not be procured, and I was applied to by Clarence A Seward, a distinguished member of the bar participating in the investigation, to know whether I had a copy of it. This, fortunately, I was able to furnish, and with this evidence there could be no longer any doubt that Alderman Jaehne was nothing more or less than a "fence" for receiving stolen property. He was therefore indicted: the trial resulted in his conviction, and consequently one of our city fathers was sentenced to a term in the state prison. Why Inspector Byrnes, with the information in his pos-

session, did not move at once to procure the indictment without waiting for the investigation, I was never able to explain satisfactorily. If Mr. Mitchell had not taken the receipt, and had simply paid the money over to Mrs. Hamilton, it is evident that Mr. Jaehne's conviction would not, in all probability, have been secured.

The trial of Al Adams, known as the king of policy gambling, was an event of great significance, not only as reaching one of the men "higher up," but in fact the man "highest up." It was also significant because it was aimed as a death blow to a form of gambling which for years had been a constant and unceasing drain upon the slender resources of the poor, and enabled a set of gamblers to live in wealth and luxury. Adams was known as the chief of all. The difficulty of detecting the crime and bringing it home to the principal offender made his conviction well-nigh impossible. But it was accomplished, and its accomplishment was due to the late F. Norton Goddard, one of the most useful citizens which this city has produced in matters of a semi-public character, where the object to be attained was the amelioration of social conditions. His life, which terminated at an early age, was signalized by intense devotion to the betterment of the conditions of the poor in that portion of the city where he resided. He was a pioneer in settlement work and at one time took up his residence among the poorer class of the community. He was a man of wealth, devoting it most generously to the welfare of the people, and his aim was to stimulate and encourage

them to higher ideals and to better lives. He worked among the young men, entering into their political and social undertakings, and became a power among them. The Civic Club on 34th Street was organized by him, and its fine, tasteful and spacious building was erected by him at his own cost. I have always considered it a privilege to have been permitted to be associated with him in his endeavours. My first acquaintance with him grew out of a retainer, which he gave me in connection with charges against Captain Martens before the Police Commissioners for neglect of duty in failing to suppress the playing of "policy." This form of gambling prevailed to an enormous extent among the poorer classes, but little or no effort was made by the police authorities to suppress it, and it was exceedingly difficult to procure any evidence upon which to base an indictment.

Captain Martens was tried, the charges against him were sustained, and he was disciplined by the police commissioners. During this time, Mr. Goddard was pursuing the "policy" dealers assiduously, but he could only reach the subordinates, it being impossible to detect the big culprits. Nothing radical and of permanent value could be accomplished unless, by some means or other, the principals could be discovered and punished. To accomplish this, it was essential that there should be an important change in the Penal Code in connection with its provision relating to gambling.

After the investigation of Captain Martens, it was my privilege to co-operate with Mr. Goddard,

not as a lawyer, but as a friend who gladly placed his legal services at his disposal. We set to work to procure an act of the legislature which would accomplish his object, and make the conviction of wrongdoers easier and more certain.

Of course, all of the baser elements were arrayed in opposition to the proposed act, and at the first session of the legislature at which it was introduced, it slumbered for a long time in committee, and much to our disappointment, failed of passage. But Mr. Goddard was one who seemed never to slumber nor sleep. His energy and resources were inexhaustible. The public press took up his cause and a vigorous campaign was prosecuted until the assembling of the legislature in the following year.

We had been carefully considering what form of legislation to propose, not only from a practical stand-point, but also with respect to its constitutionality. He was urged on by a tremendous enthusiasm, and perhaps this led him to desire provisions which might not have withstood the scrutiny of the courts. Finally, instead of an independent act of the legislature, we proposed legislation in the form of amendments to the sections of the Penal Code relating to gambling. Every effort was made to defeat them, but the bombardment by the press, the hearings had before the legislative committees, and the forcing of a vote in the Senate, at last resulted in the passage of the amendments, and their approval by the Governor. They are now embodied, as prepared by me, in sections 974, 975 and 976 of the Penal Code.

At last Mr. Goddard was armed and equipped to attack the king of "policy." Of course, it was no easy matter to obtain evidence against him, but Mr. Goddard's perseverance won the day and he was able to present to the district attorney sufficient evidence to justify an indictment by the grand jury, which was duly found. The trial of Adams was an important day for Mr. Goddard. George W. Schurmann, then assistant district attorney, conducted the prosecution, and a jury of twelve good and true men pronounced Adams guilty.

Just here is where the principal legal test began, for the amendements under which Adams was convicted were of such a character as to afford ground for attacking their constitutionality. The case was carried on appeal to the Appellate Division of the Supreme Court where, in an excellent opinion, that court pronounced in favour of their constitutionality. The case was then taken to the Court of Appeals by which the constitutionality of the amendments was again affirmed.

Still Adams was not contented, and the case went to the Supreme Court of the United States, and that distinguished tribunal concurred in and affirmed the action of the Courts below, and Adams served his term in the state prison and died a broken man.

Prosecutions under those amendments drove "policy" players out of business and suppressed the game. No single service of mine has given me greater satisfaction than the preparation of those amendments, in co-operation with Mr. Goddard, in his unselfish efforts on behalf of his fellowmen.

## *CONCLUSION*

*Looking back over more than forty years at the bar it is an unceasing pleasure to recall the uniformly agreeable intercourse and sometimes intimate friendships I have enjoyed with the judges, and it is with the deepest satisfaction that I can remember but few instances in my relations with my professional brethren which, at the termination of a litigation, did not find us better friends than at the beginning; and now, having had my "day in court," the time for adjournment having arrived, I submit the best case I have been able to make, on the facts available, hoping for a favourable judgment.*

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