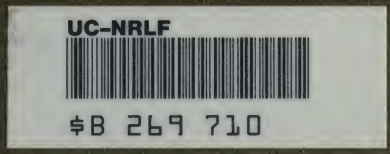

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U. S. Supreme Court

GARLAND.

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WITH SOME

REFLECTIONS AND SUGGESTIONS

AS TO THAT TRIBUNAL.

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REVERDY JOHNSON.

EXPERIENCE

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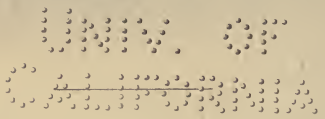
REFLECTIONS AND SUGGESTIONS AS TO THAT TRIBUNAL

BY

A. H. GARLAND

Formerly Governor of Arkansas, United States Senator, and Attorney-General of the United States



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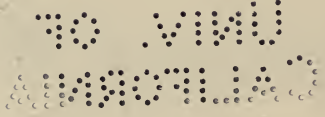

FREDERICK, MD.:
PRESS OF BAUGHMAN BROS.

IF there are such things as political axioms, the propriety of the judicial power of the government being coextensive with the legislative may be ranked among the number.—*Alexander Hamilton No. LXXX Federalist.*

EXPERIENCE

IN THE

Supreme Court of the United States,

WITH SOME REFLECTIONS AND SUGGESTIONS AS TO THAT TRIBUNAL.

Before entering properly upon the subject named, it is well probably to go back and consider of the time when I first came to that court and what brought me.

In December, 1860, when I was about half-way between twenty-eight and twenty-nine years of age, I left Little Rock, Arkansas, to come to the court for the purpose of attending to the case of *McGee* v. *Mathis* (4 Wall. Rep. 143), and several others similar to it—this case to be again referred to herein. At that time it required nearly an entire week to make the trip from Little Rock to Washington.

Getting on fairly well till I reached Bristol, Tennessee, where we failed to make connection in trains, I took a severe chill. During my contest with that

vile and vicious creature, the landlord of the hotel I stopped at consoled me with the kind observation, that the chill was the outgrowth of the poisonous, atmosphere of the low lands of Arkansas :—he did not say *malaria*, because possibly that word, so much overworked now, had scarcely got into general circulation at that time. I was again attacked by that unconscionable enemy by the time we reached Lynchburg, Virginia, and suffered no little, in a berth next to one occupied by Bishop Early, who was much concerned about me, and labored hard to comfort and relieve me, the first and the last time I ever saw that great good christian.

As we reached Lynchburg, cannons, other big guns and anvils were thundering over the high hills on the James and shaking the earth, in honor of South Carolina's seceding from the Union, and it seems to me I can hear them now :—those were portentous noises.

We failed to make connection also at Lynchburg, and spent twelve hours in that city before leaving for Washington. While at Lynchburg I was domiciled at a hotel right on a part or branch of the James, and I fared quite well as I found there an elegant article of apple brandy which I partook of largely, merely as a medicine, antidote, coming

under the general head in medical science, or art, as the case may be, of *Diff. Stim.*, I believe.

Reaching Washington on the 24th of December I went to the Kirkwood House, a nice and well-kept hotel, run by two brothers by the name of Kirkwood. This hotel has since then rejoiced in several other high and suggestive names, and like all else within that time has undergone serious and emphatic changes—the Palais Royal, a most elegant and attractive place of traffic in fashionable articles for men and women, for belles and beaux; then the Raleigh, as it is now, a hotel and place of as superb entertainment as is in all the land.

I was well enough to go to the court on the 26th of December as I did, with Reverdy Johnson, who had me enrolled as an attorney-at-law and solicitor in chancery, and if need be, proctor in admiralty, at the bar of that court, and I felt grand, truly. But as I stood up before the court and took the attorney's oath, my vision became disturbed, and the judges all appeared to be, at least, twice the size they were, and more than double in number, and the surroundings generally appeared magnified in like proportion. This, I believe, is the experience of all young men on being admitted to practice in that court. Soon my vision was restored

to its normal condition, and my nerves were composed, and after motions were called, I arose to visit the Senate where Mr. Johnson was to go with me, but at that moment one of the many noted California land cases was called, when Mr. Benjamin arose to address the court, and just then Mr. Johnson said to me, stop, you must hear that man, that is Mr. Benjamin, and I heard him with deep interest. He was the most fluent speaker I ever heard to this day—never hesitating a second for a word, and learned and polished besides. I heard him often after that in other tribunals down South, and with undiminished interest each time. His career is well-known to the country. After the war between the States, he went to England and there, at once, took rank in his profession with the first. He wrote, after going to England, a work on sales, which is standard authority in England and in this country, and it alone would make his reputation high and lasting.

After Mr. Benjamin spoke in the California land case already referred to, came Jere Black to respond, and then I was again requested by Mr. Johnson to wait and hear him, especially as he was then the Attorney-General of the United States, and I heard him, and as always in after years in listening to him, I was more than compensated.

Before I could start from the chamber another case was called, and as Mr. Badger was to speak, I was again asked to stay and hear him, as he had been a very distinguished Senator from North Carolina, and had once been named by the President for a place on the Supreme Bench, and I heard him with great satisfaction, as he fully sustained the great reputation he had borne for so many years as a close, learned and erudite legist. He was followed by Mr. Conway Robinson, whom Mr. Johnson, as he insisted on my hearing him, called a walking law library, and I did hear him, and he spoke the law as clearly and plainly as if he read it fresh from the books. I was highly gratified to hear Mr. Robinson too, as I was somewhat familiar with the three first volumes of his work on practice—the other volumes I procured after the war between the States, and I have to this day used it regularly, and have found it one of the very best works of the kind in our libraries.

For the first day in this Court I thought I had done well, more than well, in hearing forensic displays by four such men, and I went away quite delighted with this initial experience, and one to be remembered. It was a feast not often spread before a young man struggling at the dim threshold of his profession.

Referring to admissions to the bar to practice, licenses, &c., brings to mind an occurrence I once witnessed, and that may interest some persons, and especially law students. When at school in Kentucky, during a vacation, a criminal case of deep interest to the community was to be tried at Elizabethtown, some twenty odd miles from Bardstown. Some half dozen students of the college, myself included, got permission to go over and hear the trial. Among many attorneys in the case was the celebrated and unique Ben Hardin, the most adroit lawyer in the court-house I ever saw — *Old Ben Hardin*, as he was called from the time he was twenty-one, as he used to say. He was the observed of all observers, and we boys followed him around over the little town like boys do a cake wagon on an election day, and he looked like he had just driven in a wagon from the country loaded with watermelons, tomatoes and roasting ears for sale. As he was about walking into the court-house, a well-grown and bright-looking young man came out smiling and spoke to Mr. Hardin, by the affectionate title of *Uncle Ben*, and *Uncle Ben* hailed him as *Jimmy*, and asked him about his *pa* and *ma*, and told him how long he had known them, and when and where, and what color their eyes and

hair were, and how tall they were. All of which pleased *Jimmy* greatly, and he remarked, with much good feeling, "*Uncle Ben*, I have just got my license to practice from the judge, after a hard examination, and I feel happy." "Very good," said Uncle Ben, "now Jimmy get license from the people and you will be all right." Jimmy's countenance at once assumed a thoughtful aspect, but I never heard whether Jimmy did this or not.

Going over to the Senate Mr. Johnson procured for me a good seat to hear and to see. Just as I sat down Mr. Seward was presenting a petition from citizens of New York against anything like disunion, which petition, with the names of the signers attached, if spread out at full length, would have reached from Washington to Bladensburg. Then a spirited tilt followed between Senators Doolittle and Wigfall, in which, as I remember, emphatic references were made to Lord Angus, &c., &c., and the collision was indeed fierce and fiery, and soon the Senate proceeded to the consideration of executive business, and I retired to the Kirkwood, where I had another chill.

The chills were becoming tedious and monotonous, and I asked for a doctor to be sent for, and Dr. Boyle was called in, a skilled physician and a

feeling gentleman. He filled me up with the usual remedies in such cases made and provided, calomel jalap and quinine, and after some days rallied me and turned me loose as well. Dr. Boyle lived for many years after that, and died here not very long since respected and beloved by all people who knew him.

I was in the court only once after the day of my enrolment, and nothing occurred then of any particular note or importance. I mingled freely on that day with the clerk and his officials and visitors.

The judges then were Roger B. Taney, C. J., and John McLean, James M. Wayne, John Catron, Samuel Nelson, Robert C. Grier, John A. Campbell, Nathan Clifford, Justices.

Only a few weeks before this Jere Black had pronounced a glowing eulogy, in the new court room, on Justice Daniel, who had died in the recess of the court. This tribute, after speaking of the long service of Justice Daniel on the bench, among other things said: "The laws of this country were never administered by any judge who had a higher moral tone, or who was influenced by purer motives." This was uttered in presenting to the court resolutions of the bar meeting presided over by Jefferson Davis. The venerable Chief Justice Taney, on

behalf of the court, most tenderly approved the resolutions and the remarks of Mr. Black, and made beautiful references to the character and services of Judge Daniel. It is good for me to refer to this, as I knew Judge Daniel in the Circuit Court of the United States for Arkansas and practiced before him there.

At the time of my visit to the court Jere Black was Attorney-General, and those elegant and refined gentlemen, William Thomas Carroll and William Selden, were clerk and marshal. The kind and generous Mr. Middleton was deputy clerk. None of these names are now on the records of living men; they have all laid down their work to rest. The present clerk, James Hall McKenney, I think, had just a year or two before this come into the office as assistant.

Everything hereabout was then at fever heat. Secession, war and things of that sort were the sole subjects of conversation and discussion, and it was even so on the last day I was in the clerk's office where Mr. Stanton, then Assistant Attorney-General (and soon thereafter Attorney-General) was unmeasured in his expressions of favor to the South. But afterwards he underwent a decided change and was as unmeasured in his opposition to the South—quite

so. And then in the clerk's office Mr. Reverdy Johnson berated some man who had recently published one of his former letters in which it appeared he, Mr. Johnson, had not been entirely consistent. Whereupon Mr. Badger warmly urged Mr. Johnson to make the man produce the original letter, and Mr. Johnson wanted to know what good that would do! "Why," said Mr. Badger, "no one on earth can read it but yourself and you can read it to suit you," and the laugh went loudly around on Mr. Johnson and he did not participate.

It is well to note, that it is quite important for lawyers practicing in that court, to see much of the clerk's office and to know its workings. If any motion is to be had or proceedings asked in court not specifically provided for by law or rule, it is wise to seek advice there beforehand. There is much in the practice and usages of the court not provided for by any rule, and in some instances cannot well be covered by rule;—a sort of common law of procedure that lies outside of rules and cannot be put down in written charts. This is necessarily so in all courts. Many useless and sometimes unpleasant collisions between court and counsel are avoided by this precaution. Even the oldest and most experienced attorneys are not ashamed to consult the

clerk's office first and they do not hesitate to do so.

In the Supreme Court of Arkansas, for years practically we had no rules save and outside of the clerk himself. And over and often when a question of practice arose between counsel, would the judges stop until the Chief Justice could enquire of Mr. Barber, the clerk (and a fine lawyer besides), what the practice was, and his word settled it.

At the same time of my enrolment Samuel F. Miller was admitted to the bar, and not long afterwards he was appointed one of the justices of the court where he became

> "A tower of strength
> Which stood four square to all the winds that blew."

He served nearly thirty years on the Bench, and died at his home in Washington, on the thirteenth of October, 1890. My esteem for him, born under many relations of life in which I had seen him tried, made his loss great indeed to me. At the bar meeting held in this city on the sixth of December, 1890, to speak of and commemorate his life and services, I offered a small tribute to his memory, and I reproduce it here, as embodying briefly my views of the man and the judge.

Mr. Chairman: Upon occasions like this, of

course, we cannot express all that we desire in reference to so grand a character as that of Mr. Justice Miller, and those who address the bar meeting must, of necessity, be brief ; but I would feel that I was derelict and unfaithful if I did not give some of the impressions that I have in reference to him at this time, or, indeed, if I permitted any proper oppportunity to pass without saying something in commendation of him.

My acquaintance with Justice Miller began more than twenty years ago, when he came to Little Rock to hold his first court there. The country, some short time previous to that, had been in a state of war ; in fact, in a state of chaos, when not only the laws were silent, but "even almost the voice of God was silent." Up to that time for several years past the business in the United States Court there had not been large or onerous. The lawyers were somewhat rusty in the Federal practice, and many things had transpired in reference to that practice with which we were not familiar. Justice Miller came there with a docket of considerable size and importance awaiting him, and held his term for some three weeks, in which, with a blunt directness somewhat bordering, as has just been stated, on ruggedness, he did many new things and brought

to our attention matters of practice that we had not yet dreamed of. The means sometimes that he used to discipline us in these new ways were not entirely agreeable to us at the time, and to some extent we flinched under his affectionate chastisement, but when he left Little Rock, at the close of that term, there was not a member of that bar who did not esteem and admire him, and he has had their unbroken affection ever since. And when the sad news of his death first went out to the country, that bar met to testify their estimate of him, and in strong and elegant and eloquent language it spoke in just praise of him in all relations of life, and the resolutions of that meeting are, with other memorials, in possession of the Clerk of the Supreme Court, to help make up in the future a lasting memento of his good name.

He was my friend, as I have reasons to know, at all times, and he was a friend to the people whose trust I bore in this city for years, and he served them at times and in ways they know not of. I never hesitated to seek his advice and counsel, which he gave always freely and not grudgingly, and often, too, when I needed a friend. Never was there an uncertain sound in his responses.

Upon one occasion, when I approached him with

feelings of delicacy with reference to the subject-matter, he laid down the large transcript before him and answered: "You can always speak to me on anything under God's heaven." And this was the style of this unpretending man. He had no airs about him. He was just as he was whether on or off the Bench. The wonderful simplicity of the man's character was its greatest and best feature. He did not believe in perfect men ; he did not himself pretend to be perfect ; he knew the frailties and weaknesses of mankind, and he made every allowance for them. In those perfect people, those "faultless monsters which the world ne'er saw," he took no stock.

Though at times he appeared to be rough and rugged upon the Bench, yet no warmer and better heart than his ever beat in the side of man. His familiar bearing and pleasant demeanor through these halls, towards the clerks, officials, messengers, and attendants of the court, were more like that of a guardian or father, and they will miss him, as his colleagues on the Bench, and as we who appear before that Bench will sadly miss him, and it will be many days, I fear, before the vacuum that his death has created will be filled. He owed as little to the schools and to the influence of wealth and of society

for his advancement, almost, as any of the great men of our country who have gone before him. He was essentially self-made. His name and his record have gone to history ; they cannot be impeached ; they cannot be worn away by time or anything else. His work was well-rounded up, and from the whole country, in all the papers, in all the courts, and by all sorts of people, his praises have been spoken, and I can add nothing to them. Here amidst his friends, upon the scene of his greatest triumphs and glory, with his family and other kind ones around his body at his bed of suffering and with every attention bestowed, this plain man of level head, of great common sense, enlightened by well-matured law knowledge, as honest as the sunlight, of "iron nerve to true occasion true," departed this life, just before the coming term of the Supreme Court, at which he was to perform new and exacting duties. His mission is full and complete, and it is done ; and I may, Mr. Chairman, in conclusion, use the same words that he so appropriately uttered in reference to the death of Chief Justice Waite :

"Who does not wish that when his own end shall come it may be like this?" Mr. Chairman, I second the motion to adopt the resolutions.

The list of enrolment of attorneys at the time of my admission was unusually large, marking close to one hunred (24 How. Rep.), and among the names we noticed many who honored their profession and filled high places of trust in their States and in the nation.

Leaving Washington about the 15th of January, 1861, I returned to my home, and did not visit Washington again for over four years, as I had pressing business all this time at Montgomery, Alabama, and at Richmond, Virginia, so urgent and pressing I could not even visit the capital of the United States during that period.

In July, 1865, after the row between the States had subsided, I called on President Johnson with much amiability, and requested pardon for my deeds of commission and omission, in that row, and seconded by the efforts of my constant and steadfast friend, Mr. Reverdy Johnson, I procured the pardon—it was large and capacious, and I hugged it closely and went off rejoicing, with exceeding great joy, as a *novus homo* would naturally do.

Before going home, however, I went to the clerk's office of the Supreme Court and renewed my very pleasant acquaintance with those there whom I knew, and formed the acquaintance of

MATT. CARPENTER.

others quite agreeable. Many of those now are not, and

"The mower mows on though the adder may writhe,
And the copperhead coils round the blade of the scythe."

Looking over the papers and records of that office, I found the cases I had lodged there more than four years before were still there undisturbed.

During that visit I formed the idea of making application to the court for leave to practice, notwithstanding the test-oath then required by a previous act of Congress, and I spoke to Mr. Johnson to retain him to aid me in it, to which he replied: "With the greatest of pleasure will I do so, but not for one moment will I think of receiving a fee," big hearted, large brained and generous man and friend.

Early that fall I drew the petition and forwarded it to Mr. Johnson, which he filed in court and late that year I came on to see after it. By this time the move had attracted much attention and had excited no little interest, and the day after I came, at that term, Mr. Middleton, then clerk of the court, said to me, "he desired very much to see the Southern lawyers back in the court, and he recommended me to get, if I could, Mr. Matt. Carpenter to appear in the case." Carpenter was then the very

personification of health and striking manhood, and his star was rising and going rapidly to its zenith, and great and brilliant intellectuality was stamped in unmistakable characters upon his face.

I spoke to him of the case, and at once, he made, in substance, the reply that Mr. Johnson did. The case was argued at that term. Mr. Johnson, Mr. Carpenter and myself appearing for the petition, and Mr. Speed, Attorney-General, and that courtly and polished gentleman and lawyer, Mr. Stansberry, special counsel against the petition. Mr. R. H. Marr, of Louisiana, had filed a similar petition and he appeared also for the application. The court held the case for some little while under advisement, and then ordered a reargument, which was had, and in due time a decision by one majority was rendered in favor of the application. Mr. Justice Field delivered the opinion of the court, and it was a clear, clean and cogent presentation of the case; Mr. Justice Miller delivered a dissenting opinion of great force and power, and three other judges, Chase, Davis and Swayne concurred in this dissent.

By the way, Mr. Blaine, in his *Twenty Years in Congress*, states that at the New York Convention (1868) when Mr. Seymour was nominated for President, there was a strong feeling among Southern

Democrats to nominate Judge Chase, as he had favored the application to admit their lawyers, but this is a mistake, for Judge Chase did not favor it, but opposed it. I called Mr. Blaine's attention to this error soon after his book came out, and he said he would correct it in subsequent editions. I do not know that he ever made the correction. Strange enough, about one month after this decision, Judge Wayne, after a long and very honorable service on the bench, died, and if this event had occurred one month earlier the case would have been lost by an equally divided court But it stands as *Ex parte Garland*, 4th Wall. 333, vindicating the right of lawyers against legislative encroachments, and often I am called *Garland Ex parte*, or *Ex parte Garland*, or *In re Garland*, as the case may be.

It is not without interest to note, how in the space of a little over four years the personnel of the court had changed. In the beginning of the term of 1865 the judges were Salmon P. Chase, C. J., James M. Wayne, Samuel Nelson, Robert C. Grier, Nathan Clifford, Noah H. Swayne, Samuel F. Miller, David Davis and Stephen J. Field, justices, showing a broad chasm in this respect, since my first appearance in the court in 1860.

McGee v. *Mathis* and the several kindred cases

that first brought me to the court were decided about that time, and they are reported in *4th Wall.* as above stated, and the decision was in favor of my clients. These cases involved the question of impairing the obligation of contracts by State law, and the Circuit and Supreme Courts of Arkansas had decided against my position. The amount financially involved in these cases was large indeed and the results, if no war had come upon us, would have enabled me to retire, if I desired, from practice, but by the time the decision was made, there was not enough in them to pay the costs of the suits.

A little coincidence may not be out of place! The *4th Wallace* like the *4th Wheaton* contains possibly a larger number of great cases—cases involving all sorts of constitutional questions, than any one of the other numerous volumes of the reports of the court. Not long after the appearance of *4th Wheaton*, it is told, that in a church in Louisville, Kentucky, where an eminent divine was preaching with much ardor, an equally eminent lawyer dozing away suddenly half aroused and said audibly, "Oh, that is all overruled in 4th Wheaton, overruled, sir, in 4th Wheaton"—this created a little diversion and commotion in the church, but soon the preaching went on as before.

The reporters during my time with and in the court were Howard (only the 24th Howard), Mr. Black, Mr. Wallace, Mr. Otto and now for the past fifteen years, the assiduous, polite and very competent J. C. Bancroft Davis. I had no acquaintance with Mr. Howard, but with the others I was well acquainted and was on good terms with them, and to Mr. Davis especially am I indebted for many kind and generous attentions in the workings of his office.

The office of the reporter is not a sinecure, nor is it a bed of roses. The work is constant, arduous and exacting. A failure to give full scope in the syllabus to the opinion to the utterances of a judge, brings wrath upon him—and so if he fails, as an attorney thinks, to do him full justice in reporting, or commits a mistake in any way a warm encounter is the result. There are several instances of this within my knowledge, but I will give one only. Our present efficient and competent Governor of Arkansas, Daniel W. Jones, several years ago was Attorney-General of the State, and he came here to represent the State in some important cases before the court. He argued the cases and filed a printed brief duly signed Daniel W. Jones, Attorney-General, &c., but when the cases were reported the name appeared as *David* W. Jones. On seeing this Gen-

eral Jones grew moody and melancholy and then angry, and he wrote the reporter (Mr. Davis) a very warm if not inflammatory letter remonstrating most hotly against this error. To this Mr. Davis replied equally as tartly and showed it was not his fault. There the matter as between the attorney and Mr. Davis seems to have rested, but sometimes since then, by intimate friends the injured party is called *David*, *Davy* or *Dave* as comes most convenient, and this is not at all palatable to *Daniel* W. Jones. General Jones, I believe, had no particular objection to the name of David, a historic and suggestive name, but he did object to this unceremonious and unlegislative way of changing his name, that he had worn for so many years and so honorably, and that change without notice to him. We can usually take all sorts of privileges with our friends, but to tamper with their names, get them wrong by spelling or otherwise is a sin unpardonable. The meekest and most amiable will rebel at that.

Lawyers attending the court are brought much more in communication with the clerk's office than with the marshal's, but my observation is that the marshals of the court, without exception, have been attentive, accommodating, competent and worthy gentlemen, and this includes the time of William

Selden to the present incumbent John Montgomery Wright.

After my visit to the court when the test-oath case was first argued, although having within that time a fair share of the Arkansas cases before the court, I did not attend again till the December term for 1871, when I heard the wonderful effort of Jere Black in the Blyew case from Kentucky (13 Wall.)

The cases I came here then to attend to were not then reached, but the privilege of hearing this argument by Judge Black more than repaid me for the time and expenses of the trip. It electrified court, bar and audience. To be able to make such an argument is worth all the offices, even the highest, a man can hold. Such a display of intellectuality is the very highest power a man exercises. And with all the talent and ambition for place this gift is above all. There are single efforts one would feel prouder to have made than to hold the office of President. This by Judge Black is one; the speech of Judge Curtis in defence of Andrew Johnson is another; and Ben Hardin's speech on appeal to the Senate of Kentucky from Gov. Owsly's attempt to displace him as Secretary of State is another, and others could be mentioned.

Before I came to the court again, I was elected to the United States Senate and took my seat in March, 1877, and this brought me in more frequent contact with the court. I had the undisguised pleasure, as Senator, of voting for the confirmation of Justices Harlan, Woods, Gray and Blatchford, and I have had no reason to repent of those votes. Justice Woods died May 14th, 1887, with a good record. He was, I think, the best and closest listener to arguments of counsel I ever appeared before, and he grew and developed most remarkably from the time he came on the bench. Judge Blatchford left us in July, 1893. He came to the Supreme Court Bench with long years of experience, well and thoroughly equipped in the knowledge of court business as well as in the law generally, and he fully maintained the reputation he won as a circuit judge, and greatly added to it.

Justices Harlan and Gray still hold and adorn their seats, and long may they continue to do so. By years of service they have travelled up nearest to the Chief Justice, to his right and left respectively.

Stanley Matthews' name was sent to the Senate while I was a member of that body, for the position of Associate Justice of the court. A severe contest

was had over his nomination, but it was confirmed. I did not vote for his confirmation, not doubting, however, for one moment, of his ability and capacity to discharge the duties of the office. He went upon the Bench and took hold of his work as easily and familiarly as if he had been trained to it for years, and he did well and most ably his share of the labor, and died when apparently his manhood, intellectual and physical, had not reached its best.

Not long after I came to the Senate, sitting one morning in the clerk's office some little while before the court was to meet, I saw Mr. Conkling come in, in something of a hurry, with a good-sized record of a case in court in his hands, and observing Mr. Carpenter sitting there with his hat down over his eyes and his overcoat pulled up about his neck, said, "Ah, here is the Senator from Wisconsin, the very man I want to see—I have a case coming up this morning in the court, and I am troubled about a point in the record (then he read from the record), now what would you do about it?" Mr. Carpenter, not rising at all or changing his position in the least, said, "Why I would employ a good lawyer." To this Mr. Conkling, pulling himself up to full height, said, "I may do so, but I will not employ the Senator from Wisconsin.

Much merriment with the bystanders was created by the interview, and then the two sat down and went over the matter quietly and in earnest. They were the very best of friends, and this little episode did not disturb their relations, for on delivering the remains of Mr. Carpenter on behalf of the Senate to the Governor of Wisconsin, the little speech made by Mr. Conkling is an exquisite classic.

Some three years after I came to the Senate, the court sustained a great loss in the death of Mr. Middleton, the clerk. In due time the court appointed his deputy, James Hall McKenney, the present clerk, in his place, and he has rendered satisfactory and acceptable service as clerk. I presented a petition for his appointment to all the Senators for their signatures, who appeared as attorneys in the court, and I believe, without exception all signed it. Whether that contributed to the appointment I do not know, but he was appointed in regular succession, as he had been an acceptable deputy for so long—usually a good and wise rule to be observed in such cases.

For the balance of the time I was in the Senate, in my intercourse with the court, nothing of any special note as an experience occurred. I was there almost daily when the court was in session, with a

fair portion of business, and sometimes as a spectator, for its proceedings always interested me.

Becoming Attorney-General necessarily I was brought still nearer to the court, and had to watch its proceedings closely. Among the first cases I argued in the court as Attorney-General was *Lamar* v. *McCullough*, 115 U. S. 153, involving a large amount for cotton seized and disposed of by the government. The pleadings in the case were complicated, and run into the utmost limits of the common law system of pleadings. In preparing a brief in the case I had a map, or so to speak, a genealogical tree of the pleadings made up and attached, and among the mass there were numerous *similiters* (*doth the like*). I called the attention of the court to these especially, and remarked, it brought to mind an occasion in the United States Court at Little Rock when Justice Miller first presided there! A most excellent lawyer and gentleman, Mr. Stillwell, arose on motion call and offered to file a *similiter* in a certain case, and at once Mr. Justice Miller shoved his docket in front and fell back in his chair, and said, speaking a little above a whisper, "Clay (addressing District Judge Caldwell, who sat with him, his name being Henry Clay Caldwell, but his great many Iowa friends

called him tenderly Clay), what is a *similiter?* I have not heard of one for over twenty years!" and to this Judge Caldwell replied, "he did not know, for he did not believe he had ever heard of one." Judge Caldwell, I believe, had not then read Chitty or any of the authors who ventured to tell of *similiters* and such things, and there was little or nothing in the Iowa code about them. During this somewhat subdued colloquy, Mr. Stillwell waited and looked set back, for fear he had offended against some unknown and invisible spirit, when Mr. Justice Miller remarked, "well, Mr. Stillwell, you can file it, and we will look into the thing and see what it is." The court seemed to enjoy this no little, and a Justice who sat next to the right of Judge Miller in a voice loud enough to be heard from where I stood, asked him if this was a true statement, and he replied, "Oh, yes, but really I can't see how it affects this case."

Thinking over this case, with its intricate and complicated mass of pleadings, suggests that the science of special pleadings is now fast becoming one of the obsolete and unknown sciences, but it does have a charm about it that survives to the older lawyers who were disciplined in it. Its boast and pride were to come to an issue single and ob-

vious. In the 7th volume of Robinson's Practice (Appendix), is contained as sweet and finely pointed a travesty, or parody in verse based upon young love's dream, on special pleading as can be found. It will strike the young barrister, who has his sweetheart before he has his first case, or before he has even his license—and many do that—with peculiar force. I venture to append it to this paper, as it may relieve and refresh the reader after going through this dreary article, if he has nerve enough to take him through. As said by Robinson, the verses are curious as illustrating the early bent of a great and original genius, and as showing the language of special pleading is not incapable of adaptation to the emotions of the tender passion. It is entitled *the special pleader's lament!*

The official business in my charge in the court was large and important, but I had an efficient and strong corps of assistants with me, who looked after the most of it, myself now and then attending to some of the cases in person. I adopted a rule which I thought was a good one, and I still think so, to send with a case on appeal from any court in this district the attorney who conducted it in the lower court for the government, to the Supreme Court to present it whoever else might be with him. I be-

lieve the familiarity of the lawyer with the case in the trial court was a great help to properly unfold it in the Supreme Court, and certainly it was no small advantage to that attorney.

Early in 1885 President Cleveland, at my solicitation appointed the Hon. John Goode Solicitor-General, and he proved to be a faithful and very competent officer, but the Senate failed to confirm the nomination on account of Senator Mahone's opposition to Mr. Goode, and another had to be selected. In casting around for one the name of Melville W. Fuller was pressed, and I was requested by the President to make enquiry and find out all I could as to his fitness for the place, which I did, with as much industry as I could command, but in the end Mr. G. A. Jenks of Pennsylvania was selected. In a short time thereafter, comparatively speaking, July 20th, 1888, Melville W. Fuller was appointed Chief Justice of the United States, in place of Judge Waite who had died, but did not take his seat till October of that year. In the vicissitudes of life Melville W. Fuller escaped being Solicitor-General, to fill one of the very highest offices, if not the highest in the land, and I believe all agree, that it was an appointment eminently fit to be made.

In November, 1885, Vice-President Hendricks

died, only a few months after his inauguration as the first Democratic Vice-President for twenty-five years. He was an exemplary man in all relations of life, and a safe, level-headed adviser at all times in public and political matters. Those who knew him best loved him. His loss was such I deemed it my duty to call the attention of the Supreme Court to the event, and the following proceedings were had in that court November 30th, 1885.

Mr. Attorney-General Garland addressed the court as follows :

"May it please the court : Since the adjournment of this court on last Wednesday, the heart of the nation has been sorely touched by the death of the Vice-President, Thomas A. Hendricks.

"This is not a proper occasion to pronounce a eulogy upon the useful life and splendid character of Mr. Hendricks, but he has been so long conspicuous in the public service—has filled thoroughly and admirably so many places of high trust, including the second in rank in the gift of the people, and he has been a prominent member of this bar for so many years, I deem it becoming to request the court to lay aside its docket and pause before this sad event that now overshadows the whole country, and out of respect for the memory of this "good

and faithful servant," to cease its labors until after the last funeral rites are performed on to-morrow ; and I therefore suggest the court do now adjourn until Thursday next.

"And the Chief Justice directed the remarks to be spread upon the record of the court, and adjourned as requested."

About one year after Mr. Hendricks' death, Chester A. Arthur, ex-President, died, after serving well and honorably nearly a full term as President. He was a fair and just man and a most genial one. It was a pleasure, in fact almost a treat, to have business dealings with him, so kind and so affable was he. He possessed the very rare faculty of making you feel almost as happy when he could not grant your request as when he could. I regarded his death as an event important enough in the eyes of the nation to authorize a notice of it by the Supreme Court, and accordingly, on Friday, November 19th, 1886, the following proceedings were had in that court.

Mr. Attorney-General addressed the court as follows :

The President of the United States has by official proclamation announced to the country the sad intelligence of the death of Ex-President Chester

A. Arthur, and pursuant to that proclamation the executive branches of the government will be closed on the day of the funeral, Monday next, the 22d inst.; and in my official capacity as Attorney-General, I make this announcement that the court may pay a fitting tribute of respect to this eminent citizen, and I therefore suggest to the court the propriety of now adjourning until Tuesday next.

The Chief Justice replied as follows :

The court receives with sorrow the sad intelligence, and in compliance with your suggestion will now adjourn until Tuesday next, at 12 o'clock.

Chief Justice Waite presided for many years, fairly, impartially and ably. President Grant had difficulty in filling the place, and several of his nominations were ignored and repudiated by the Senate. Judge Waite was not extensively known at the time of his nomination, and there were misgivings as to his fitness, but time showed the President had made no mistake in that. He was kind and amiable and his executive ability in the discharge of his duties was marked and rare. His character was beautifully rounded up. I was much attached to him and I can never mention his name without the deepest emotion. It was sad, indeed painful to see him in court the last day he ever

attended when he was not able to read his opinion in the Telephone cases (126 U. S.), and had to call upon Judge Blatchford to read it for him. It was evident to the observer death had almost placed its hand upon him. He left the court room before the session ended to return no more, and died within a few days thereafter, March 23rd, 1888.

In the time of my service as Attorney-General it was my sad lot to pronounce eulogies upon Justice Woods, who died May 14, 1887, and Chief Justice Waite, and while this was a sort of official duty, yet I personally felt their loss, and my tributes, though feeble, were honest words from the heart.

In my first annual report as Attorney-General to the President, I advised the creating of the positions of stenographers to the Judges of the Supreme Court—one to each judge. I was satisfied this was, as matters were then, a much needed measure, and the pressure of business upon the judges would never, in all probability, lessen the importance of it. In strict fidelity to the truth of history, Congress did not seem to be losing sleep at all, in order to comply with my requests or suggestions. But in this instance the advice was taken and the measure passed, probably not so much for the reason it came from me. But at all events I believe I did receive the thanks and good wishes of nine very prominent

officials, for even my feeble efforts to establish this new but very wholesome provision, for the helping on the great work of the judges in that court.

The four years passed away and my official services concluded, without anything more of especial personal experience to be told, until at the end when I introduced my successor, Hon. Wm. H. H. Miller, with his commission and tried to make a few remarks valedictory, when the Chief Justice pleasantly remarked they "would speed the parting guest and welcome the coming." This sounded quite well, indeed, but the more I thought of it, I felt there was in it an expression of gladness at the departure of the "parting guest," and I became serious as I pondered over the word *speed*, *speed*, and finally went round behind the seats of the judges to consult large and comprehensive and unabridged volumes of Webster's and Worcester's dictionaries as to the meaning of *speed*, and while examining the word and just about settling down on a somewhat satisfactory definition of it, Mr. Justice Harlan came along and exclaimed somewhat quisically, "Why, how is the parting guest?" "Thinks I to myself," now can it be that he thinks the address of the Chief was an expression of a desire for me to depart! I was sensitive about that time. Then I sat to looking at the word *speed* again,

and I found, *to help onward*, *to push rapidly*, *to cause to prosper*. Oh, on seeing this last (*cause to prosper*) that struck me as what the Chief meant.

I might well be excused for halting and doubting a little on this, for Pope, dealing with the same sentiment, does not express it exactly the same at all times, but makes it different. First he says:

> For I hold sage Homer's rule the best,
> Welcome the coming, speed the parting guest.

Here he plants on Homer, but we all know Homer was unfortunate in welcome and in friendship—

> "Seven wealthy towns contend for Homer dead
> Through which the living Homer begged his bread."

And Pope again said:

> True friendship's laws are by this rule exprest,
> Welcome the coming, speed the parting guest.

All in all I was perfectly willing to believe the Chief meant under true friendship's laws to cause the parting guest to prosper. This construction of the words of the Chief I concluded as just, for two reasons; first, the rule is when words are susceptible of two constructions, take the gentler or softer and most benign :—Pope had put it "true friendship's laws." Second, I wanted it that way, for it is true

in all struggles of this sort we will adopt that course or idea that is best and most comfortable and soothing to our feelings. I put the dictionaries back and feeling somewhat at ease and composed, I proceeded to the clerk's office for my hat and overcoat where I had left them before entering into the court room, and as I got in full view of the occupants of the clerk's office, all of them with one voice as if by concert, exclaimed: "Oh, yes, the Chief and the court want to get rid of you, good!" Here it was again—how brief is our comfort and how fleeting our hopes. But as time has run on, I really believe the Chief was not anxious to be rid of me—at least I give him the benefit of the doubt.

Not many weeks after my retiring from the position of Attorney-General and offering my professional services to the public as a private lawyer citizen, I was engaged by a very excellent lawyer in California to look into a case just recently decided by the court adversely to his client and move for a rehearing. This lawyer's soul was wrapped up in the case, and he was much surprised and grieved at the decision as lawyers generally are who lose their cases, and he was extremely solicitous about the matter.

The rule of the court as to petitions for a rehear-

ing is somewhat nebulous and unsatisfactory (more of this hereafter), but there was something then so urgent about this case, an early adjournment being upon us, I went to the court, intending to step out of the rule just a little as it appeared to me this was an exceptional occasion. The day was wet and cold and forbidding extremely—hardly alligators would venture from their dens and beds on such a day, but the court room was well filled with lawyers as it was about winding-up-time of the term with the court. On motion call I arose and offered to present a motion for a rehearing of the case, and was about to proceed to make a few "brief remarks" when Justice Bradley started as if powder had exploded under his seat, and with much spirit said: "What is that?" I repeated what I was seeking to do, and then he turned somewhat pale and remonstrated with much spirit, and told how hard the court labored at cases—how closely the judges consulted—how wearied they were with these applications for rehearing after all their intense work to arrive at conclusions—how the House of Lords disposed of such things, and growing warmer and warmer, how inappropriate it was in lawyers to be asking the court to travel over all this work again, and many other things not now well remembered, as

my mind just at these utterances was not as clear as the often alluded to *noonday sun.* What astonished me more was that Justice Bradley had not delivered the opinion of the court, but Justice Miller had, and as I thought the storm was lulling and almost lulled, Justice Miller with his usual scratch over his right ear, when he was getting ready to charge, came to Justice Bradley's aid, and really it occurred to me it was superfluous as Justice Bradley then needed no aid;—he was not the suffering one;—then Justice Field, with more moderation gave me a lecture upon the error of such a course, and I did wish that night or Blucher would come. I looked in vain for a friend at court. The Chief Justice looked as if he would say something consoling to me—sympathetic as it were, but he had not been there very long and probably he did not wish to appear too previous, and he did not say it. I thought, too, Justice Harlan once looked like he would help me, but he fell back and sent out a note to some one else. I fought nobly I thought, but it was uphill and against decided odds, and I was somewhat routed and driven back almost in dismay, and the lawyers present did enjoy it;—it did them good as it always does, notwithstanding their so-called clannishness, to see the court pounce down upon and shake up a brother lawyer.

In vain I told Judge Bradley how Chief Justice Marshall liked to have cases reargued, as I had heard he was preparing a life of the great Chief Justice, but that didn't appease his fierce spirit, and in vain I pleaded that the House of Lords was no court compared with this, and that he was bigger than any lord of that sort, and while this seemed to tickle him he did not let up entirely. The motion was received, *looked into*, as it was said and *denied*. At the conclusion of the struggle Mr. Justice Bradley did say, I had always been loyal to the court, or words to that effect—a small salve to the wounds he had given. He seemed to intimate that what he had done was more in sorrow than in anger, probably angered sorrow or sorrowed anger as the case may be.

After an unusual amount of comment on the scene in the clerk's office, with lawyers, officers and judges, I departed for my home, and in going out of the building Justice Bradley and I were brought in direct meeting, he making for his home, and he said, "Oh, see here, Garland, although I talked so this morning you were not the one I was after, but you presented a matter we were being *deviled* about in another direction, and I took this occasion to say what I desired to say on the subject." "Well,"

said I, "Judge, this is a sort of vicarious punishment that is somewhat rough, and you know how the question of vicarious punishment disturbs the world any how." "Oh, well," said he, "it is all right and you can stand it, and you made such a fight your client cannot nor can anybody else complain." "But," said I, "Judge, you did it with such a flourish." And he stopped and said, "I may have been excited, but then we are tried almost beyond endurance on such things, and come get in my carriage and I will drive you home." True his words were somewhat assuaging, but I did not come up quite to their import, and I did not ride in his carriage, as I was not used to that kind of riding, and I had two or three stops to make on my way home, and we parted thus. Not long after this that earnest, learned old man closed his labors and was no more. He had honored, in truth and in fact, a place on the bench for many years, and it is doubtful if ever a man sat in that tribunal who knew more law and more sorts of law than he. His nature was earnest and ardent, and he knew no half-way ground or half-way methods. The episode between him and myself above described left no scar or sign of one with either of us.

Mr. Justice Field served over thirty-four years on

the bench, longer than any other judge served, and Chief Justice Marshall next. Judge Field resigned last winter, and is now in honorable retirement at his residence on Capitol Hill, in this city.

On May 1st, 1890, I had the pleasure and honor of moving the admission of Grover Cleveland to the bar of the court, after he had served four years as President of the United States. He had vouched for me as an attorney for four years before the country, and I could readily and cordially endorse him as an attorney of that court. This is the only instance of an ex-President of the United States being admitted to practice in the court. John Quincy Adams was admitted on February 7th, 1804, before he was President, and practiced there after he ceased to be President. President Benjamin Harrison was admitted long before he became President and he continues to practice there since he retired from the Presidency.

I have continued to practice in the court regularly to this day, some times with success, some times otherwise, and when successful the court always appeared to me sound and capable, but when not successful the court seemed to me to have lost ground and fallen below the mark ; perhaps this is

natural, for it has been truly said, none are so wise and so good as those who agree with us.

No events with me in the court worthy of special note have occurred since the tilt I had with Justice Bradley, and that was such as to live and last a good while. My experience since has been that of a constant practitioner, attending the court as regularly as I could and studying its organization, workings and methods, for in it had been centered from an early day much of my hopes and ambition, and even long after I came to the United States Senate I was wont to go there just to see if I had letters addressed to me there, and to mingle with the officials, even when the court was not in session.

It is a great court—Supreme Court, none higher—great court in its conception, in its make up and in its jurisdiction, and at no time in its history has it failed to be an able court, and fully up to the purposes of its creation. We all, at times fall beneath its utterances, and then we do not feel it is able, but when the excitement and irritation of defeat pass away we do regard it as able. Probably in the nature of things, if there were yet a higher appellate tribunal this Supreme Court would be reversed quite as often as the inferior courts are now reversed by it. Law is not of what we call the ex-

act sciences, and there are many propositions men will differ about, not so much in their theory as in their application to a particular state of facts. But there is one thing I have observed as to its decisions, and that is, leaving out the views of defeated counsel and party, they generally, in a great majority of instances, meet with the approval of the profession. I have taken some pains to test this, and I am satisfied I am correct in the statement.

There is, I think, of late years, and it seems to be growing, an undue haste on the part of the court in hearing and disposing of motions. While it is not true in point of fact, the court looks on motions filed with some suspicion, frequently errors are committed and injustice done by not receiving and listening to motions with more patience than seems to be exercised in such matters. A little more time spent in hearing these would serve, it seems to me, to dispose of business more satisfactorily than such haste would. Chief Justice Taney was in the habit of saying to a gentleman on presenting motions when explaining the same, "And let us understand this, take your time and explain it." This was right and made the attorney feel at home, and court and counsel understood each other, and things went well and smoothly. Very often I have seen

lawyers high up in their profession, but not used to the ways and manners of this court in this respect, frightened, so to speak, out of their wits into forgetfulness of the entire case, when suddenly pulled up by the court to know this or that before they had time to tell anything of it, and when they were getting ready to tell it. This is probably due, to a great extent, to the heretofore over-choked and charged condition of the business of the court.

The gorged condition of the docket has for the past several years been much relieved, under the workings of the Circuit Court of Appeals Act, March 3, 1891, and the Court need not be so restless under the pressure of a docket, which amounts in the aggregate at the beginning of the term in October, to some five hundred cases instead of three times that number before that law was passed. This act has done well, I think, in the main, and has contributed much to bring justice as near as may be to each man's door, the chief wish of all great lawgivers from Moses, Justinian, Alfred and Frederick down to the present day. What supposed infirmities there are in that act are to be discussed before the law-making power and there cared for, and are not proper subjects of debate here.

Under rule six, paragraph two, an hour on each

side is allowed, for the argument of a motion, and no more, without special leave of the court granted before the argument begins. This never occurred to me as a wise rule. The court should hold this matter in its own hand. While it is true motions generally can be fully argued in one-half of this time, yet there are occasions when motions involve great questions that go almost to the bottom of the case and more time should be allowed.

As a general proposition this time is too much, but the court can control it and ought to. Many inexperienced persons seem to think they must take the entire hour, and others shrink under the restriction, and spend much of the time in looking up at the clock to see how time flies. Burton, in his Anatomy of Melancholy, tells of a man who was born in the limits of the city of London, and lived there to be ninety-nine years old, and had never been once out of those limits, and the city council fearing he might some time do so, and wanting to have him as a curiosity that never was beyond the city limits to the age of one hundred years, passed an ordinance forbidding his going out of the city limits before he reached the age of one hundred. The man had never entertained the idea of going out of the city limits at all, but seeing his liberty was re-

stricted, he grew sad and melancholy, sickened and languished, and languishing did die before he reached one hundred. While I have not heard of any lawyers dying under this limitation upon their speaking, yet I have known some to grow melancholy and sicken under it, and I thought, at times, the Court was not helped by the workings of the rule.

These remarks are applicable, in great measure, to the other rule 20, par. 3, allowing two hours to a side only, unless more is granted before argument begins, in arguing a case upon the merits. In referring to these matters I am not giving out any complaint on grievances personal, as I have never yet, in presenting or offering motions or cases upon their merits, exhausted the time allowed me under the rules, but the effects are not the same on all counsel.

Justice Nelson had a plan of taking his record when a case was on hearing, and finding the point or points involved, or on which he wanted argument, would say to the counsel speaking, "Now, what as to this, on page ——?" then he would note down there what was said in response and would proceed, "Well, there on page —— is this, what about that?" carefully noting what was replied, and so on until he got at what he desired, and he would fold up his

record and lay it aside, saying generally, "I have heard all I want." Then if the attorney was observant and cute he would quit, but may be he would not. But the point is, with all the labor of preparing and filing briefs in cases, this sort of colloquy with the judges and lawyers is the shortest and best way to reach the very heart of the case. The largest records used to crumble and fall to pieces when Judge Curtis or Reverdy Johnson or Jere Black would handle them for about three-fourths of an hour, and rarely ever over an hour. All lawyers are not such as these, but it shows what can and might be done in such cases. This, though like many other matters of practice, is to be understood and enforced by a direct comity of the court and counsel; they should and ought to get closer together and not stand apart so far, as lawyers are part of the court naturally and justly. *Ex parte Garland* said that directly, and being so they should come close to the court and the court to them, and allow no room for a suspicion that one was trying to trick or outwit the other.

Speaking of briefs, rule twenty-one of the court would appear to be about as good and as apt as a rule on this subject can be, and it seems to have in view, in presenting their argument sure enough, counsel

should use, as Henry Spelman expressed it, honest and perspicuous words to express the thing intended with all brevity. This rule is much honored in the breach! too much, and the court should not permit it. Not unfrequently we see, not briefs, but long essays, even books put in cases, drawing immensely upon the time of the court to wade through them, which if done would, not unfrequently, leave the judges with vertigo or strabismus. The rule does not require or desire such large or lengthened efforts. It is true, briefs could not be limited to so many pages, but where they cite and recite cases and points, iteration and reiteration, with long passages copied from books, the court could order them withdrawn and direct the filing of *briefs*, in fact, according to the rule. I walked into the court on one occasion and Jere Black was just beginning to address the court, and he was saying, "he had not prepared any brief in the case, but his colleague had filed a *short* one of some several hundred pages, and he supposed that would cover the case if nothing else;" the court smiled audibly at this, and Mr. Black proceeded to argue the case.

This same rule as to briefs (paragraph 1) is defective, in my opinion, in fixing at least six days before argument of a case when the appellant or

plaintiff in error shall file his brief. Having all the time from the filing of the record to prepare and file a brief he should be required to do it some time before this. What is not relied on outside of a jurisdictional question the court heeds not and hears not, and hence the appellee, or defendant in error should have ample time, not merely the three days allowed him under the rule to reply. For, of course, much depends on these briefs, or ought to. Then to this reply brief the other side has the right to rejoin. The time allowed all around is whittled and driveled away, and often the rule is not observed or attended to. The time allowed to both sides should be enlarged and the rule rigidly enforced. When a party files his brief with the clerk they should be required to send a copy to the opposite party or his attorney at once; as it is, the brief is simply placed with the clerk and it is not his duty to furnish the other side with one. This would be fair and just, as well as a decorous practice, and would prevent, if adopted, frequent appeals to the court for further time, and would expedite, no doubt, to a great extent, the hearing of cases.

I have said already the rule as to rehearing (rule 30) is nebulous. I think I speak the truth, the rule is not satisfactory to the practitioners before the

court, and a better one should be adopted for the proper dispatch of business, with more satisfaction to the judges. It provides no way of filing the motion or petition for rehearing, or of bringing it to the attention of the court, and it is not allowed or permitted to be argued unless a justice who concurred in the judgment desires it. By a practice that has grown up in the court, the petition is handed to the clerk, and he slips it in by some process to the judges, and they pass on it, in conference it is supposed, and slip it back to the clerk. It comes in something as a thief at night, and when refused, as it most generally is, it is endorsed *denied*, when the party offering it is notified, but no proceeding is had in open court as to it. If it is to be argued, order is made and time and terms fixed—if it is granted outright, the order is announced and time and term fixed for another argument of the case. Upon a fair calculation there are about two petitions granted out of fifty-seven filed. Petitions for rehearing, or motions for new trials are supposed to gather up the whole case and present it compactly and broadly. This is the great sphere where lawyers are really to show their strength and power and knowledge, and where the courts are at last brought face to face with the very kernel of the case, and after

all, where upon consultation with counsel, after each has spoken and been heard, they are to examine profoundly and see what the case does really call for. These petitions or motions should be filed in open court, and they should be argued. This rule further requires a certificate of counsel filing it that it is offered in good faith, and that he (counsel) believes it is meritorious. Making all due allowance for the partiality of counsel for his cause, it cannot be believed one worthy to practice in that court would file these petitions for his health, or for fun or any frivolous cause or reason. The bar can be trusted not to overdo this work, or to trespass too much upon the time and patience of the court. Every experienced lawyer knows that he may work and toil with a case for years, and at last when it is decided, he can see where possibly he made mistakes, and where he finds new points and ideas, and he could improve upon his work if tried over. This is true as to both sides of the case. And I am of opinion there are very few hotly contested cases in which a court, even after hearing argument and after close examination may not feel its judgment may be wrong. Of course there is, as in all things, a proper medium to be observed here, and the court had better commit an error against time

than even to stand in doubt at last, whether they have not committed an error against the law of the case. And it seems the court should pass upon these petitions by regular opinion to form a part of the reports of the court. This would be a full and complete course of fair and just legal proceedings growing out of this right to ask for a rehearing.

Another idea occurs in this connection. On the last day of the term there are generally many opinions delivered, and as it is, the losing party has no chance or opportunity to ask for a rehearing or modification of the judgment of the court. He can only request the court to stay the mandate for a certain time that he may be enabled to examine and see if he cares to ask for a rehearing or modification. There should be a general rule as to all cases decided on the last day, providing for time to examine and to send a petition for rehearing or modification, in some way, to the Chief Justice for him to take such steps as he might see proper in order to get action of the other judges upon the subject.

In the records of events, in the past, there may be some precedents worthy of notice here.

Stowel v. *Zouch*, in Plowden, was argued twice in the C. B., and twice in the Exchequer Chamber before all the judges in England.

Calvin's case, in Coke, was argued first at the bar of the K. B. by counsel, then in Exchequer Chamber, first by counsel and then by all the judges :— it was afterwards argued by counsel at two different times, and then by all the judges at the next term upon four different days, and then at another term thereafter by all the judges upon four different days.

Manby & Richards v. *Scott*, in Levinz, was argued at the bar three several times, by distinct counsel each time, and afterwards by all the judges at the bench. It was quite common in former times to have a case spoken to at two, three and four several times, and each time at a different term. These re-arguments sometimes were had before judgment. And this court in cases of very great importance has, on many occasions, ordered on its motion re-arguments before judgment.

In Willes's Reports we find a case argued five distinct times and different terms. Not until Lord Mansfield's time that such repeated arguments were done away with. Chancellor Kent thought there were some advantages attending repeated discussions which somewhat compensated for the delay and expense :—they tended to dissipate shadows and doubts, and to unite the opinions on the bench, and to prevent that constant division among judges

which has much weakened the authority of some of our American courts.

Probably it is not well to have as much as all that is stated above as to reargument, by no means; but still in leading or great cases, in principle or amount involved, time is not lost in having the court reaffirmed by reargument, or its judgment set aside if found on reargument to be incorrect. We see in this court and in all courts, decisions reversed and set aside years after the law was supposed to be settled. There are many striking cases in this list in this court, but there is one of peculiar force and I will note it. *Giles* v. *Little*, 104 U. S. (decided October Term, 1881), after standing as law for twelve years was expressly overruled in *Roberts* v. *Lewis*, 153 U. S. 367, both cases arising on the construction of the will of Jacob Dawson, of Nebraska. There was no dissenting opinion in either case. Of the justices who sat in *Giles* v. *Little*, Field, Harlan and Gray remained to pass upon *Roberts* v. *Lewis*, Justice Gray delivering the opinion of the court! With this, and there are others equally as conspicuous, lawyers need not be abashed to make an effort even after decision when no reargument was had. Lord Eldon was accused of being tardy in disposing of cases, and to such an extent

it was said he was *oyer sans terminer:* Sir John Leach, master of the rolls, was expeditious, so much so, he was said to be *terminer sans oyer*, and Samuel Romilly said he preferred the tardy justice of Lord Eldon to the swift injustice of the deputy.

The opinions of the court are, as a rule, too long. The court is not intended to be a law school in which the judges are to deliver law lectures. When a controversy between parties comes before the court, it is enough to state just what the law is in that case, upon its facts. A simple resolution finding, as the facts are such and such, the law is thus and so, and there stop. It is a dangerous business for a judge or any one handling a subject to say more than is absolutely necessary to reach and make known the merits. An attempt of this sort accounts for so many *obiter dicta* that we encounter in opinions. The object of a judicial proceeding is merely the restoration of a violated right, and no more is needed to be said than what can ascertain and fix the right in dispute. More than this is apt to be misleading, and it multiplies law books to such an extent as to render impossible at this day, for lawyers to have even a fair law library of the Reports, to say nothing of the time wasted by judges in preparing and getting ready these essays.

I am persuaded, after a long and close consideration of the matter, the publishing and making known dissenting opinions is not a good practice. It has its advocates, however, and they have their reasons, too, but I think it should not be known to the world if there is a difference among the judges, but the opinion should go forth and stand as that of the whole court. If, as contended for above, the object is to settle the right involved in a particular controversy, what do we care, or what should we care for anything but the opinion of the court? It is the opinion of the court we want, and when that is given as such, of the whole court, it carries weight and is calculated to determine the question and quiet it against any further dispute or agitation. Dissenting opinions only add to the bulk of the volumes of reports, take up much valuable time and weaken the force of the judgment of the court. I have already spoken of the importance of unanimity, or at least the appearance of it as far as the outer world is concerned. In *Miller* v. *Taylor*, 4 Burrows Rep. 2395, we find language of Lord Mansfield that may be well to note here.

Lord Mansfield (not intending to go into the argument) said: "This is the first instance of a final difference of opinion in this court since I sat here.

Every order, rule, judgment and opinion has hitherto been unanimous.

That *unanimity never could have happened, if we did not among ourselves communicate our sentiments with great freedom; and if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction and ready to yield to each other's reasons.

We have all equally endeavored at that unanimity upon this occasion; we have talked the matter over several times. I have communicated my thoughts at large, in writing; and I have read the three arguments which have been now delivered. In short we have equally tried to convince or be

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* Except in this and one other case now depending (by writ of error) in the House of Lords, where Mr. Justice Yates differed from the other three, every rule, order, judgment and opinion, has to this day been (as far as I can recollect) unanimous. This gives weight and dispatch to the decisions, certainly to the law and infinite satisfaction to the suitors; and the effect is seen by that immense business which flows from all parts into this channel, and which we who have long known Westminster Hall behold with astonishment; the rather, as during this period all other courts have been filled with judges of unquestionable integrity, eminent talents and distinguished ability.

convinced; but in vain. We continue to differ. And whoever is right, each is bound to abide by and deliver that opinion which he has formed upon the fullest examination."

His lordship observed that to repeat the two first arguments or go over the same topics again, would be idle and nugatory, when he had already declared "that he read, approved and previously concurred in them," and to be particular in opposing or answering the several parts of the last argument (though he differed from the conclusions of it), would be indecent and look too much like altercation.

I do not pretend to say or to intimate, the judges do not labor anxiously and often painfully to agree and be unanimous, but on the contraryI know they do. Often and often in coming out of the conference or consultation room they look worn and fatigued, and as if they had been on rides on bicycles, or had just returned from participating in a game of football in the most approved modern style, or in a game of golf (*goff*). I do know they struggle to come together and it is not possible to do so in all cases, but I do think the disagreement should be known to themselves only, and the judgment of the majority should go to the public, as that of the entire court.

I understand Louisiana has of late put an inhibition upon this practice, but I have not examined the provision of the law.

The hour of the meeting of the court does not seem to me to be a good one. I should rather think it should commence at ten and one-half A. M. and sit till one P. M. and then take a recess for an hour for refreshments and rest, and then sit from two till four:—this brings in four and one-half hours of hearing and doing court business, and this would be sufficient. There is no peculiar force or enchantment in four hours, and four and one-half could well be substituted. Meeting as the court does now at twelve M., in the course of an hour the judges show signs of weariness and fatigue, and commence one by one to retire to lunch and sometimes barely a quorum is left ; even Mr. Reed, the speaker, with his well known acuteness and adroitness to find a quorum would be puzzled at times to establish the existence of one. And it is true that at the hour from one to two sometimes we do find some of the judges unavoidably

> "Napping, napping, only this
> And nothing more."

The lunch they manage to snatch the way they are now situated can not be very satisfactory. Be-

hind their seats, where persons are passing to and fro, a sort of *ad interim* or *pro tempore* restaurant is in progress, and counsel is arguing in front and hears the rattle of dishes, knives and forks, and the judges eating are in a state of unrest, to eat and get back. Of all things eating should be allowed full time and ease. To meet at ten and one-half when the system is comparatively fresh, alive and active, and not yet vexed by work or study, much work can be done till one. And then all may go and recreate and refresh themselves decently and in order, and resume work, not in a doze or a half awake and half asleep condition, but invigorated and reinforced. There is plenty of time in the meanwhile, with Saturdays entirely given to that purpose, for conference and consultation.*

During the history of the court there have been several painful instances of the secrets of the court getting out, in the way of telling how certain cases are going to be decided—what is called *leaks*. It is really surprising there have not been more. The pressure to get at decisions in advance in important

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* Since this was written the court has made a rule to sit till 2 P. M. and then recess for half an hour and resume till 4.30 P. M,, but I think this is not as good an arrangement as the one here proposed would be.

cases, is frequently unceasing and anxious, and at times the most ceaseless vigilance cannot escape it. The seekers after this information evince the knowledge of the scientists, who from a small bone or ligament work up to and find out the kind of huge animal from which it comes—they, from an item or two dropped inadvertently, make up a report of large proportions, of more or less accuracy or verity, that shakes up the public no little. But the judges are very cautious and quite reticent, although often pumped and tapped.

It chanced one Monday—opinion day—as I was going up to the court in company with Mr. Justice Brown, I asked if there would be many, or any opinions on that day, and he said yes, there would be several, and named some of the cases that would be decided, but in no wise intimating how they would be decided. We were rising on the eastern brink of the hill ascending towards the Capitol, and I asked, I wonder if *Stanley* v. *Schwalby*, a case I was much interested in, would be among them, and at once he said, "Mr. Garland, how lovely those little flowers (calling some name botanical, I suppose, I was not in the least familiar with, and pointing to some yellow buds just opening to our left) are when they first appear." I re-

plied, "Oh, beautiful indeed," but I wondered within myself, what that had to do with *Stanley* v. *Schwalby*. We went in to the court-room saying but little after that. Opinions being called for after the meeting of the court, Mr. Justice Brown's time came to speak for the court and he delivered some opinions, and finally the chief justice spoke out he was directed to announce the opinion of the court in *Stanley* v. *Schwalby* (147 U. S. 508). My sensations were not pleasing at all, and were of a very doubtful and fluctuating character. He had not read far before I saw my hopes in that case were shattered. I was defeated, and then I could not help thinking of the lovely flowers which were blooming on our left as Mr. Justice Brown and I were coming up, and I thought they were not lovely but quite common, and that there was nothing attractive about them. This was as near a *leak* in one of the judges as I ever saw, and this was quite far from one. But I have never inquired more of any one of them, if *Doe* v. *Roe* or any other case was coming up for decision, but have ever since waited patiently or impatiently as the case may be.

Traditions and customs are adhered to and upheld with great precision, and probably it is well. This tribunal sits as a free and independent branch

of the government, and it should have its insignia and devices to fix it and to have respect deep-founded for it. While it should not stand out too far from lawyers and the people, it must of necessity be fixed and steadfast in things pertaining to it in the somewhat ancient ways. Its chief justice is chief justice of the United States and not merely chief justice of that court, thus is his office national and not merely local with the court. Many of the old forms of writs and process are, in so many words used, and no one can question or interfere with them. The court is opened with the old invocation of "God save the United States and this Honorable Court," which is sometimes understood by persons hard of hearing, or of a malicious turn of mind, to be *God save the United States from* this Honorable Court. But this is a mistake.

As the judges approach, the lawyers and audience are expected to rise, stand until the judges reach their places and a respectful bow all round is in order and the judges are seated and the opening proclamation made. This solemnity is impressed upon the proceedings, and men are made to know a great tribunal is now to work upon great things and great ideas.

With all this the judges are robed in dark flowing

gowns which seem to "make assurance double sure," that all will be conducted with due formality and order. To the young attorney first coming into the court, these gowns strike wonder and almost awe, and make him feel not as much at home as he would like to. No law or rule provides for the use of these gowns, but by custom, to the contrary of which the memory of man runneth not, etc., they have been used, and while they are not actually necessary for any practical purpose, and may probably be considered by some as contrary to the spirit of our institutions of democratic simplicity, yet they are harmless, and do make a feeling of respect for the court that might not be without them.

Mr. Justice Miller never tired of telling the story, of how Mr. Lincoln, at a reception, meeting him as he came in, compared the judges, with their long black gowns, to those long-winged black ants that fly out from under the bark of certain trees the season after they were cut down on the farms. Mr. Justice Miller thought the comparison good and fitting, but it may be, as he was reared on a farm, it had a smack of farm to him that others not so reared might not relish.

There is an implacable antipathy, like unto that of Hannibal against the Romans, on the part of the

judges towards the appearing of attorneys before the court in coats not black. They do not regard especially the color of the other garments, but woe unto him who comes in with other than a black coat on. I have several times seen attorneys first coming there, in a coat not black, or of many colors, almost stripped in the clerk's office before the meeting of the court and encased in a deep black coat borrowed, to suit the occasion. This kind of coat is not unlike to the judges the noted red flannel hung out before a certain animal to infuriate and make him mad. Joseph's old coat would have been torn to tatters if it ever came into that presence on the back of an attorney appearing there.

It must not be inferred the judges never unbend and become jocose and mirthful. When without these robes and not at work, they are as lively a set and can punch each other and their friends about as well as any body or bodies you ever saw, and if a man has a weak or raw place about him they find it, and send an unerring shaft right there. Mr. Justice Blatchford, with very serious countenance, congratulated Judge Howell Jackson on his coming in to take his seat as a justice of that court, that he had not graduated at Harvard, while standing around close to him were several justices who

were proud of that honor. Not unfrequently do they, from the bench, send forth a witticism that strikes and cuts as it flies. Mr. Justice Gray, when an attorney was speaking, and exhibiting a map as giving "*a bird's-eye view*" of certain localities, asked if that map was printed in the record, "that he was not a bird and could not see as a bird." Mr. Justice Miller, when the words *Dominus litis* were used, asked "and what is *Dominus litis?*" Why, sir, said the attorney, it is, explaining the meaning, &c. "Well, why did you not say so, instead of coming in here with Latin, or whatever it is, for I think the English sounds better than that." Or Mr. Justice Brewer, in a criminal case, saying, "they would have the party not only released, but taken out and carried home in carriages with a brass band besides." And Mr. Justice Brown saying, "the wicked flee when no man pursueth," did well as Scriptural doctrine, but it had no particular application in a law case; and Mr. Justice Shiras, when the writer referred to one of Mrs. Gaines' cases as furnishing a precedent for his contention, observed, "But Mr. Attorney, that was the case of a woman, was it not?" To which Mr. Attorney replied that was the common or current understanding, but he believed no writ had ever

been issued to determine the fact! These instances could be multiplied almost indefinitely.

This court, too, has received its full share and amount of criticism, if not abuse. All public functionaries do, and this seems to be a part of the price exacted on account of their high positions. And some times, in the zeal if not heat of opinions, the court is raked by its own members, and no mistake. In judging them, however, we must always reflect, we see alone from our standpoint, lawyer and client, and that not the best calculated to do ample and unprejudiced justice, they have to see and act from all the points, the judges, the lawyers and both the parties, and thus acting they must see as others do not, and cannot. This is what they are there for.

We, as attorneys, get literally wrapped up in our client's cause, and we take his place absolutely and see nothing but his side of the case, and generally, whether we believe or not in the somewhat extreme rule announced by Lord Brougham in the trial of Queen Caroline to let nothing stand between the attorney and his client, we each declare not only that we will do our utmost, but at times we even declare we will win the case in spite of all things, and the court can decide it only our way. This is vic-

ious and dangerous. We should go no further than to say we will do our best, and not forecast what the court will do—that is for the court. We know we often gain cases in which we have not the most confidence, and as often lose those in which we have entire confidence. The experience of any lawyer of some years general practice is this. Dr. Samuel Johnson, the eccentric, learned, and laborious, had with Boswell a short discussion on this subject, as follows:

Boswell: "I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty."

Johnson: "Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion. You are not to tell lies to a judge."

Boswell: "But what do you think of supporting a cause which you know to be bad."

Johnson: "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not

convince yourself may convince the judge to whom you urge it, and if it does convince him, why, then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

Boswell: "But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?"

Johnson: "Why, no, sir. Everybody knows you are paid for affecting warmth for your client, and it is, therefore, properly no dissimulation; the moment you come from the bar you resume your usual behavior. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet." (1 Life of Johnson by Boswell, p. 426).

In raising expectations of clients for victory and have them disappointed is a sorrow deep and lasting

to the client, besides a wound to the attorney not easily salved.

In early practice I was much given to this, and in fact I was bound to gain every case in which I was enlisted. But in 1857, some four years after I came to the bar, I got a halt in this, and never more since then have I vowed, declared or asserted I would gain a case. I had a case involving great principles, and with many others of like character involving large sums of money. I had caught a new idea for relief, and had a fine contract for compensation, indeed enough to do me without any more severe labor or hard work if I had been successful. I had inadvertently told the bar generally, I was going to gain it, and would spend the next summer in Kentucky, where I was so long at school, and at Saratoga Springs; going to Saratoga from the South and West in those days was an era in a man's life, and I had promised this to my wife, but with a woman's intuition which every time beats man's reasoning, she did not hurry to make preparations to get off, but waited for events before she looked to the actual trip. The case came on, and I lost it from top to bottom, not a judge on my side, and there I was in the court with forty or more lawyers looking curiously enough at me, and nearly a mile from my office, the road to

which went right through the town. I slipped out of the court before it adjourned and took a kind of outside trail to my office. for I was not in a fix to receive company or to enjoy it. But by some means or other, I did encounter several attorneys before I reached my office, each of whom was quite solicitous to know of me when I would start for Kentucky and Saratoga, and if I would be gone long, &c., and divers perplexing questions of that sort, that I did not appreciate at all. I did not mingle much for some days with people, lawyers and courts, but when I did begin, I was accosted all around with, "When did you return from Kentucky and Saratoga; did you have a good time; I hope so." All of which had a very depressing effect upon me, and my replies were not of the most amiable and assuaging character. Never since then have I indulged in any advanced declaration of victory in law cases, but have done all I could and left it to the court, and when at times in professional excitement I would feel disposed to venture in this promise of success whether or no, I am mournfully reminded of *Booker, Ex parte, 18 Arks. Rep.*, which stands as a positive and permanent admonition and warning to me. It is due to the candid severity of history to say, I have never yet seen Saratoga, and while I

have seen my school-boy spot in Kentucky since that event, yet it was in no wise due to my connection with large realizations out of *Booker Ex parte.*

The ruler, who wanted to know the color of the four-sided sign post some distance from him, had to send four different messengers to ascertain it, as it had a special color for each side, and no one messenger looked at it except on one side. These judges must examine four sides—all sides—and they pass upon laws, constitutional and statutory, common law, equity law, admiralty law, States' laws, Indian laws, international law, and all sorts of law, customs, usages and traditions. In short they are engaged in

> "Mastering the lawless science of our law
> That codeless myriad of precedent."
> "That wilderness of single instances."

And we should be slow to find fault with them or pass condemnation upon them.

In preaching forbearance towards the court in its work, I cannot say I have always practiced it, and that I have been altogether consistent in this, and who has? Not in this merely, but in all things in life, big and little! I too have smarted under rulings adverse to me, and at times retired to the nearest

place of refreshment and vented my spleen in the usual way, and failed to practice what I preach—

"Reproach me not, though it appear,
While I true doctrines teach,
I wholly fail in my career,
To practice as I preach;

"Yon guide post has, through countless days
'To London' pointed on,
Not once has quit the angled ways,
And up to London gone."

It may be of interest to note, that during the existence of the court, there has been one jury trial in it. The *State of Georgia* v. *Brailsford*, 3 Dall. 1, was an amicable issue, to ascertain whether the debt due from Spalding and the right of action to recover it belonged to Georgia or to the original creditors, and whether debts due to B, a British subject residing in Great Britain, were subject to confiscation! (See 2 Dall. 403, 415).

Chief Justice Jay charged the jury upon the law and facts of the case, and among other things said:

"It may not be amiss here, gentlemen, to remind you of the good old rule, that on questions of fact it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed, that by the same law, which recog-

nizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect, which is due to the opinion of the court; for as on the one hand, it is presumed that juries are the best judges of facts, it is on the other hand presumable that the court are the best judges of law. But still both objects are lawfully within your power of decision." This brings to mind the somewhat animated struggle between some of the judges, in *Spark and Hauser* v. *The United States*, 156 U. S. 51. In this case, Mr. Justice Harlan, for the court, announced, in an elaborate and exhaustive opinion, that in the courts of the United States, it is the duty of the jury, in criminal cases, to receive the law from the court, and to apply it as given by the court, subject to the condition, that by a general verdict, a jury, of necessity, determines both law and fact as compounded in the issue, as submitted to them in the particular case. This view was strongly, ably and most learnedly combated by Justices Gray and Shiras in a dissenting opinion delivered by Mr. Justice Gray.

All this revives what the Edinburg Review for

January, 1807, said: "They have been wrangling upon this fundamental point in the institution for these last fifty years, and it is settled we believe, nearly in this satisfactory way—all judges maintain they have the right to dictate the law, and all juries maintain they are bound to take no more of their doctrine than they approve of."

In all personal reminiscences, the *ego* must necessarily stand out prominently, or they would not be the reminiscences of him the writer, but of somebody else. Without any desire or effort at self-laudation, it will not be inappropriate to set forth here the cases in which I have appeared as counsel in that court, for they are published in the reports and are therefore public property. I give them in their chronological order:

McGee v. *Mathis*, 4 Wall. 143, and six other cases on the same point, involving the impairing of the obligation of contracts by State laws.

Witherspoon v. *Duncan*, 4 Wall. 210, argued by Mr. Johnson on my brief before the test oath was held unconstitutional—involving power to tax land before patent issues.

Ex parte Garland, 4 Wall., already referred to.

The State of Miss. v. *Johnson*, 4 Wall. 475: The constitutionality of the Reconstruction Acts.

A. H. GARLAND.

Lukins v. *Aird*, 6 Wall. 78: Fraudulent conveyance of property.

Rector v. *Ashley's heirs*, 6 Wall. 142: Jurisdictional questions as to review; and titles under New Madrid Act.

Field v. *Farington*, 10 Wall. 141: Obeying instructions of consignee by his factors.

Hanauer v. *Doan*, 12 Wall. 342: Recovery of price of goods sold in aid of the rebellion.

Toof v. *Martin*, 13 Wall. 40: Construction of bankrupt act as to the meaning of the word insolvency.

Bevans v. *The U. S.*, 13 Wall. 56: Duress as a defence in law as Receiver of public moneys.

Halliburton v. *The U. S.*, 13 Wall. 463: Same point as in Bevans' case above named.

Osborn v. *Nicholson*, 13 Wall. 654: Validity of contracts for sale of slaves made before the war.

Pennywit v. *Eaton*, 15 Wall. 380: Jurisdiction and power of a military commander during the war to appoint a civil judge.

Hanauer v. *Woodruff*, *15 Wall. 439:* Validity of contract based on war bonds of Arkansas.

Allen v. *Ferguson*, 18 Wall. 1: Promise sufficient to take a case out of the statute of limitations.

Batesville v. *Kaufman*, 18 Wall. 156: Parties necessary in foreclosing mortgage, assignment of debt secured by mortgage or judgment.

Williams v. *Bankhead*, 19 Wall. 563: Indispensable parties, &c.

Yonley v. *Lavender*, 21 Wall. 276: Claim against estate of a deceased person in Arkansas to be collected through the Probate Court.

Ross v. *Jones*, 22 Wall. 576: Limitation during the war, and liability of endorser for accommodation only under the Arkansas statute.

Lewis v. *Hawkins*, 23 Wall. 119: Vendor's lien—bankrupt act—limitation—parties.

Ober v. *Gallagher*, 93 U. S. 199: Limitation—suit on note or in equity to foreclose mortgage.

Sawin v. *Kenney*, 93 U. S. 289: Joint and several contract under the Arkansas statute.

Tate v. *Norton*, 94 U. S. 746: Allowance, classification and payment of claims against estate of deceased person in Arkansas.

Railway Co. v. *Loftin*, 98 U. S. 559: Exemption of R. R. property from taxation (S. C. in 105 U. S. 258).

County v. *Wolcott*, 103 U. S. 559: County bonds.

Wall v. *Co. Monroe*, 103 U. S. 74: County warrants.

Dowell v. *Mitchell*, 105 U. S. 430: Remedy at law not in equity.

Hayden v. *Manning*, 106 U. S. 586; Fraud in obtaining jurisdiction.

Teal v. *Walker*, 111 U. S. 242: Mortgagee's right to rents, &c., under the Oregon law.

Rector v. *Gibbon*, 111 U. S. 276: Contracts of lease on Hot Springs Reservation in Arkansas.

T. P. R. R. v. *Kirk & Murphy* (*2 cases*): Motion to dismiss or affirm, and same cases, 115 U. S. 2, on question of removal to circuit court of U. S. from State court.

Edrington v. *Jefferson*, 115 U. S. 770: Removal of cause from State court to U. S. court.

Davies v. *Corbin*, 112 U. S. 36: On motion to dismiss, and same case in 113 U. S. 687, on enjoining collection of taxes.

Nix v. *Allen*, 112 U. S. 129: Pre-emption Right, &c.

Virginia coupon cases (*5*): 114 U. S. 270 *et seq*: The act of the State of Virginia funding the State debt.

Lamar v. *McCulloch*, 115 U. S. 163: Heretofore referred to.

Merrick, Ex., v. *Giddings*, 115 U. S. 300: Liability of agent on his individual promise.

Baltzer v. *Raleigh, &c.*, 115 U. S. 634: Relief in equity for fraud or mistake.

Zeigler v. *Hopkins*, 117 U. S. 683: Jurisdictional amount.

Iron Mountain, &c., v. *Johnson*, 119 U. S. 608: Forcible entry and detainer of possession of Railroad under the Arkansas law.

Rosenbaum v. *Bauer* (*2 cases*), 120 U. S. 450: Removal of case from State court.

The U. S. v. *Arjona*, 120 U. S. 479: Act of Congress prohibiting the counterfeiting of foreign notes, securities, &c., in the U. S.

Sun Ins. Co. v. Kountz Line, &c., 123 U. S. 65: Petition for rehearing—modification of decree.

Teal v. *Bilby*, 123 U. S. 572: Consolidation of suits—change of written contract by oral agreement.

Brown v. *McConnell*, 124 U. S. 489: Motion to dismiss for want of proper security.

Brown v. *Hazzard and Ranck* (*2 cases*): Same as Brown *v.* McConnell.

Tompkins & Williams v. *Little Rock, &c.*, 125 U. S. 109 (2 cases): Payment of Railroad aid bonds of Arkansas.

Johnson v. *Christian*, 125 U. S. 642: Jurisdiction on question of citizenship in suit in equity to enjoin a judgment in a suit at law between the same parties.

In re Coy, 127 U. S. 731: Fraud upon election laws of Indiana.

The U. S. v. *Irwin* and *The U. S.* v. *Perry*, 127 U. S. 125: Action for property taken by Col. Albert Sidney Johnson in command of the Utah expedition.

Johnson v. *Christian*, 128 U. S. 374: Principal and agent—power of court of equity to enjoin a judgment at law.

Allen v. *Smith*, 129 U. S. 465: Impeaching a judgment for fraud—limitation.

Camden v. *Mayhew*, 129 U. S. 13: Opening bids at chancery sale—making them good, &c.

Stevens v. *Nicholson*, 130 U. S. 330: Removal of cause from State Court.

Oregon Railway cases, 130 U. S. 1: Powers of corporation—*ultra vires*, &c.

Brown v. *Ranck*, 132 U. S. 216: Effect of dismissing suit on demurrer in Territorial court.

Hammond v. *Hastings*, 134 U. S. 401: Lien of corporation on stock of stockholder.

Small v. *N. P. R.*, 134 U. S. 514: Appeal dismissed; not filed at the succeeding term of the court.

N. P. R. v. *Austin*, 135 U. S. 315: Amendments within discretion of the court.

In re Lane, 135 U. S. 443: Sufficiency of indictment, and proceedings in trial, for rape.

Hot Springs R. R. v. *Williamson*, 136 U. S. 121: What court is not asked to charge or instruct on cannot be reviewed—taking private property for public use.

T. P. R. R. v. *Marshall*, 136 U. S. 393: Contract of railroad to build a depot at a town if subscription be made.

Lawrence v. *Rector*, 137 U. S. 139: Same as Rector *v.* Gibbon, in 111 U. S. above referred to.

Alexander v. *The U. S.* 138 U. S. 353: Privileged communications.

Kauffman v. *Wootens*, 138 U. S. 285: Notice of proceedings—Fourteenth Amendment.

St. Paul, &c., v. *N. P. R.*, 139 U. S. 1: Vesting of title under railroad grant.

Henderson & Hitchcock v. *Carbondale Co., &c.* (*2 cases*), 140 U. S. 251: Parties to suit—forfeiture in equity—court has full power over its records and proceedings during the term to correct—voluntary appearance of party.

Caldwell v. *Texas*, 141 U. S. 209 (at the request of the court): No jurisdiction.

United States v. *Old Settlers*, 148 U. S. 427: Indian treaties.

Johnson v. *St. Louis, &c.*, 141 U. S. 602: Change

of contract by mutual agreement—jurisdictional amount.

Rector v. *Lipscomb*, 141 U. S. 557: Affidavits showing value of property in dispute taken after decision in the case.

St. Louis, &c., v. *McBride*, 141 U. S. 127: Voluntary appearance of defendant waives right to challenge jurisdiction on ground that the suit had been brought in wrong district.

Evans v. *State Bank*, 141 U. S. 107: Affirmance of case on facts found by court below.

N. P. R. v. *Washington Territory*, 142 U. S. 492: *Mandamus* to compel R. R. to build a station at a certain place.

Bird v. *Benlisa*, 142 U. S. 664: Tax title under Florida law.

N. O. P. Ry. v. *Parker*, 143 U. S. 42. Jurisdictional amount—Railroad mortgage—appurtenances.

Boyd v. *Nebraska*, 143 U. S. 135: Governorship of Nebraska.

The U. S. v. *Texas*, 143 U. S. 621: Original bill to determine boundaries held good on demurrer.

N. P. R. v. *Amato*, 144 U. S. 465: Jurisdiction on appeal from Circuit Court of Appeals—affirmance of the case that writ was taken out for delay.

Brenham v. *German, &c.*, 144 U. S. 173: Power

of city of Brenham to issue negotiable bonds: Same case, p. 549, rehearing, and modification of the judgment.

N. P. R. v. *Ellis*, 144 U. S. 458: Whether Federal question is presented?

Glaspell v. *Same*, 144 U. S. 211: Time of filing bill of exceptions.

Logan v. *U. S.* 144 U. S. 263: State or Federal jurisdiction—competency of witness to testify: Acts and declarations of co-conspirators after conspiracy is ended.

O'Neil v. *Vermont*, 144 U. S. 323: Whether Federal question is presented on writ of error to State court.

Bardon v. *N. P. R.*, 145 U. S. 535: Segregation of lands under grant to railroad.

Lewis v. *The U. S.*, 146 U. S. 370: Right of prisoner to be present on trial for felony not to be waived—challenge of jurors essential right.

Monroe Cattle Co. v. *Becker*, 147 U. S. 47: Sale of school lands under Texas law, &c.

Stanley v. *Schwalby*, 147 U. S. 508: Statute of limitations by U. S., adverse possession, &c.

Walker v. *Sieberger*, 149 U. S. 541: The tariff act as to trimmings used exclusively or chiefly in the making and ornamentation of hats.

Allen v. *The U. S.*, 150 U. S. 551: Justification in case of homicide.

Brown v. *The U. S.*, 150 U. S. 93: Ruling in Logan *v.* U. S. 144, followed as to acts of co-conspirator.

Hall v. *The U. S.*, 150 U. S. 76: New trial granted because of district attorney addressing jury spoke of matters outside the record.

Rader v. *Maddox*, 150 U. S. 128: Not allowable to repudiate a transaction in part and to ratify it part.

Graves v. *The U. S.*, 150 U. S. 118: Wife of prisoner charged with crime not competent witness.

Famous Smith v. *The U. S.*, 151, p. 50: Sufficiency of proof as to whether a person is an Indian or white man.

Halliday v. *Stuart*, 151 U. S., p. 229: Authority of attorney to make agreement binding on the client.

Hickory v. *The U. S.*, 151 U. S. 303: Doctrine in Allen *v.* The U. S., 150 U. S. followed.

T. & P. Ry. Co. v. *Johnson* (two other similar cases), 151 U. S. 81: Judgment of highest court of State not reviewable on other than Federal question.

T. & P. Ry. Co. v. *Volk*, 151 U. S. 73: Contributory negligence—amount of damages as a delay case.

Bowlby v. *Shively*, 152, 1: Riparian rights.

Prosser v. *N. P. R.*, 152; 59: Power to enjoin board of commissioners from establishing general system of harbor lines.

St. Louis, &c., v. *Schumacker*, 152 U. S. 77: Contributory negligence—decision of the case by court without a jury.

Everett v. *N. P. R.*, 152 U. S. 107: Negligence, &c.

West v. *Cabell*, *153* U. S. 78: Arrest of person under wrong name.

City Bk. v. *Hunter*, 152 U. S. 512: No appeal from a judgment executing mandate of this court if value in dispute is, on appeal, less than $5,000; no appeal lies from decree for costs.

City, &c., ex parte, 153 U. S. 246: *Mandamus* proper remedy when mandate of this court has been disregarded. (See 152 U. S. 152, above referred to).

Hegler v. *Faulkner*, 153 U. S. 109: Statute of limitation in Nebraska.

Starr v. *The U. S.*, 154 U. S. 164: Reversed for the discussion of irrelevant matter by the trial judge in his charge to the jury.

N. P. R. v. *Babcock*, 154 U. S. 190: Case in

which *lex loci* and not *lex fori*, controls limit of amount of judgment.

N. P. R. v. *Hambly*, 154 U. S. 349: Fellow servant.

Barden v. *N. P. R.*, 154 U. S. 288: Exclusion of mineral lands from railroad grant.

Allis v. *The U. S.*, 155 U. S. 117: Making false entries at different times, in books of national bank—power to recall jury and instruct them again.

N. P. R. v. *Holmes*, 155 U. S. 137 (another case similar): Power to review judgment of Supreme Court of State of Washington, denying petition for rehearing.

San Francisco, *&c.*, v. *Gill*, 156 U. S. 649 (and three other cases similar): Exemption of railroad property—State law fixing railroad rates.

Reagan v. *The U. S.*, 157 U. S. 301: Smuggling goods into the U. S.

Gulf, *&c.*, v. *Shane*, 157 U. S. 348: Operation of jury laws of Arkansas in Oklahoma.

Beardsley v. *Arkansas*, *&c.*, 158 U. S. 123: All parties against whom a joint decree is rendered must join in the appeal.

Roberts v. *N. P. R.*, 158 U. S. 1: Eminent domain; right of Wisconsin to authorize county to subscribe to the building of a railroad.

The Catholic Bishop, etc., v. *Gibbon*, 158 U. S 155: The power and authority of Land Department in the administration of public lands.

N. P. R. v. *Nolin*, 158 U. S. 271: Medical expert—instructions—exceptions to depositions.

Conley v. *N. P. R.*, 159 U. S. 569: Special jurisdiction in territorial courts; removal of cases in.

Washington, &c., v. *Couer D'Alene*, 160 U. S. 101: Construction of contract in law should be one that equity would favor.

Hickory v. *The U. S.*, 160 U. S. 408: Case reversed for the want of a calm and impartial charge of the trial court.

Ryan v. *Brosius* (and two other cases), 162 U. S. 415: Rights of mortgagor and mortgagee under Arizona law—judicial sale.

Stanley v. *Schwalby*, 162 U. S. 255: Same as referred to above in 143 U. S.

The U. S. v. *Texas*, 162 U. S. 1: Same as in 143 U. S., already referred to (called Greer Co. case.)

T. & P. R. v. *Gentry*, 163 U. S. 353: Case for jury—negligence, &c.

Acers v. *The U. S.*, 164 U. S. 388: Careless exceptions taken at the trial—self-defense.

T. & P. R. v. *Bloom*, 163 U. S. 636: Action *v.* Rail-

road and receiver thereof for injuries done by the road sustained.

Edgington v. *The U. S.*, 164 U. S. 361: Proof of character of defendant in a criminal case.

Dunlop v. *The U. S.*, 165 U. S. 486: Sending obscene publications through the U. S. mails.

T. & P. R. v. *Barrett*, 166 U. S. 617: Standing upon same question of jurisdiction as Coy's case. *Ib.* 606—negligence, &c., &c.

Waggoner v. *Evans*, 170 U. S. 588: Taxing cattle in Indian reservation in Oklahoma, for county, territorial and judicial purposes.

There are besides these, a good many cases wherein my name is upon the briefs of attorneys for the Government who examined them with me as Attorney-General, but prepared the briefs and presented the the cases, of which no special mention is deemed necessary.

In casting up the account of loss and gain in the foregoing list, the balance is rather against me: I have lost more than I gained. Sometimes it looks strange, a lawyer's *luck*, as it is called, goes in sluices —he gains right along for awhile, then he loses right along. It is told of Judge B. R. Curtis when he returned to the bar after his service on the bench, he attended the Supreme Court and in course of

time argued nine important cases and lost them all in succession, and he was dispirited and almost concluded to quit appearing before the court.

Upon one occasion, on opinion day, the tide ran so heavily against me, losing about five cases and gaining not one, I was quite ill at ease and moody. Coming out of the court, I got in with Judge Harlan and passing the civilities of the day, he asked me how I felt and I told him quite badly, and the reason for it, and that I did not believe I could even get an attorney enrolled in that court any more, and recalled to him my fate on that day. He chided me somewhat, and remarked it was not unusual with the very best lawyers, and told me of his observation here and elsewhere that bad or difficult cases fell to the lot of good lawyers, and they were sought for to deal with just such cases. The remark had some balm in it, but it did not compose me, nor did it serve to buy meat and drink and lodging for the family. Then as a mongrel pup was running after the street car we were in, the Judge told me of the story of the man wondering why a dog would run after a Railroad train so vehemently, and then another man standing by wondered what he would do with the train if he caught it! So in the midst of much mirth, we let the re-

sults in the court of that day pass without further remark, but they did not cease to have an unpleasant effect upon me, for a good while.

At last this court is the anchor, and not to mix metaphors too freely—the safety valve—of our government. This feature of power must be lodged somewhere in the somewhat complicated and tangled jurisdictions given under our Constitution, and there is no place better than this to put it. And with those shortcomings inevitable to all human institutions, we must learn and understand its force and capabilities, and be glad that we have judges sitting in Washington to appeal to, in the last resort for law and justice in all matters affecting the great common weal, and the rights of the citizen.

On more occasions than one, my name has been mentioned somewhat freely for a place as one of the justices of that court, and it cannot, I hope, be construed into any personal vanity for me to refer to it here. Especially after the death of Justice Woods in May, 1887, was it much discussed. I disposed of the question then, as appears in an interview with a member of the Associated Press, which is as follows, taken from the New York "Sun" of May 25th, 1887:

WASHINGTON, May 24th.

Attorney-General Garland to-day talked freely with a representative of the Associated Press concerning his supposed candidacy for the vacant place on the Supreme Bench. Mr. Garland said :

"I do not want the place, and would not take it if offered to me." I do not, "said he," undervalue the place. It has work and responsibility enough to test the ability of any one, and honor sufficient for the most ambitious. When the two last appointments (Gray and Blatchford) for the Supreme Court were made my name was conspicuously mentioned by persons of both parties for selection. At that time, I would have readily accepted such a position, and I do not hesitate to say so, but I was younger by several years and my health was much better then than now. Then there was a period of twenty years between my age and that fixed for retiring, and my health was unimpaired. Now, that period is only fifteen years and my constitution is worn and enfeebled by a severe attack of sickness that came upon me in March, 1886. The duties of the office of Justice of the United States Supreme Court are so important and so exacting, that I feel it is due the public service that, as a general rule, and, other things being equal, one who enters upon their performance should have a fair and reasonable prospect of twenty years of active, unbroken labor before reaching the age named by the law for retiring. For the work done in that court lasts for all the years to come, and goes far to mould and fashion our institutions, make and execute the laws as we may. I could not even indulge the hope of having fifteen years allowed me for continuous hard work, and I would be untrue to duty to accept such a trust with this fact staring me in the face.

"Besides," he said, "some months after the two appointments

referred to, I was elected by the Legislature of Arkansas to the United States Senate for the second time, and without opposition practically each time, and then I formed a resolution to retire from public life and public office at the end of that term, which will expire with the closing of this administration, and I have so shaped my affairs as to carry out this resolution, which becomes more important to me as the time approaches. This resolution, some six months since, I repeated substantially to my friends in Arkansas by a letter that was published, touching my running again for the United States Senate, and I will say that the entire Arkansas representation in Congress has known for nearly or quite two years past of this determination on my part, as well as some few other particular friends."

"May I ask you, then, if the President knows of this?"

"Yes, generally and particularly. Generally, for he has heard me say flatly, more than a year since, that I wanted and would have no other public office than this; and on the 23d of February he asked me to take a place on the Inter-State Commerce Commission, which I declined, repeating positively this determination on my part, that I wanted and would have no other public office after this. And particularly, as soon as I could decently do so (the day after Justice Woods was buried), I told him my name was being used in this connection, and I wanted at once to say, that I did not wish the place and would not have it, and repeated again my resolution as to public office, and I wished him to proceed to the consideration of the question as if he never had heard of me."

This interview stated exactly and truly my feelings on the subject, and it was and is sincere. As it contains views as to the labor, work and respon-

sibility of that court, and as to the age at which one should be placed on that bench, and as it serves to vindicate me, in disposing of frequent requests since then to appear again for public office, its publication now in this connection will not be considered out of place.

If in these pages I have been at times light and trivial, in treating grave matters, and have made too free a use of names, it has been through no ill intention. If in this life beset with so many trials and sorrows, we cannot soften and flavor it with some pleasantry and fun as we trudge along, it would be a dreary and cheerless journey indeed—in fact almost unendurable. My association, professional and personal, with the judges and officers of the court for nearly thirty-eight years has been of the kindest and most cordial; and I have no cause for a grudge, and no room in my heart for one, against any one connected with the court. I admire and enjoy the success of the court as much as one of them would or could, and this little paper is written as a slight testimonial of regard for the court in which I entered so long ago, and at such an early age when life "seemed formed of sunny hours" and was fresh and full of hope and ambition. When I think of *Ex*

parte Milligan, *Ex parte Garland*, *Ex parte Cummings*, and the case of *Lee's heirs* contending for the old family homestead of the knightly Lee, and others of a somewhat similar character that might be named, that settled great principles shielding and saving the people of my section from the horrors of persecution engendered by a most unfortunate civil war, I must yield a deep regard and profound respect to that tribunal, and there in addition are many other high considerations that commend it to my hearty esteem.

These reminiscences and reflections have been written at odd times, which I could spare from professional business, and, too, when pain and suffering were preying upon me. If they will give any one a single grain of knowledge, comfort or interest, I shall be pleased, and shall be satisfied that I wrote them. But if they do not, I shall be content to see them, unhonored and unsung, join the innumerable caravan that moves on to take its place in the waste basket or the obscure corner dedicated to trash.

JUNE 11th, 1898.

APPENDIX.

THE SPECIAL PLEADER'S LAMENT.

Say. Mary, can'st thou sympathize
With me, whose heart lies bleeding;
Condemned to wake from "Love's young dream,"
And take to special pleading?

For since I lost my suit to you,
I care not now a fraction
About these stupid suits at law,
These senseless forms of action.

But in my lonely chambers oft,
When clients leave me leisure,
In musing over departed joys,
I find a mournful pleasure.

How well I know the spot where first
I saw that form ethereal!
But, oh! in transitory things
The *venue's* not material.

And reading Archbold's practice now,
I scarce believe 'tis true,
That I could set my heart upon
An *arch bold* girl like you.

But then that bright blue eye sent forth,
A most unerring dart,
Which, like a *special capias* made
A prisoner of my heart.

And in the weakness of my soul,
One fatal long vacation,
I gave a *pledge to prosecute*
And *filed my declaration*.

At first your taking *time to plead*
Gave hopes for my felicity;
The doubtful negative you spoke
Seemed bad for its duplicity.

And then that blush so clearly seemed
To pardon my transgression,
I thought I was about to snap
A judgment by confession.

But soon I learned, most fatal truth!
How rashly I had *counted*,
For *non assumpsit* was the plea,
To which it all amounted.

Deceitful maid! another swain
Was then adored by thee;
The preference you gave to him
Was *fraudulent to me*.

But then, alas! the Barons held
The transfer of this treasure
Could not by me be set aside,
Being made when *under pressure*.

Ah, when we love, so Shakspeare says,
Ill luck is sure to have us,
The course of true love never ran
Without some *special traverse*.

Say, what *inducement* could you have
To act so base a part
Without this, *that* you smiled on me,
I ne'er had lost my heart.

My rival I was doomed to see
A husband's rights assert!
And now 'tis wrong to think on you,
For you're a *feme coverte*.

When late I saw your son and heir,
'Twas wormwood for a lover;
But the plea of *infancy*,
My heart could not get over.

I kissed the little brat, and said
Much happiness I wish you;
But, oh! I felt he was to me
An *immaterial issue*.

Mary, adieu! I mourn no more
Nor pen pathetic ditties;
My pleading was, alas! in vain,
So now I'll stick to Chitty's