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THE

STORY OF A GREAT COURT

BEING A SKETCH HISTORY OF THE SUPREME COURT
OF WISCONSIN, ITS JUDGES AND THEIR TIMES
FROM THE ADMISSION OF THE STATE TO
THE DEATH OF CHIEF JUSTICE RYAN

BY

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To Agnes, my wife

THIS BOOK IS AFFECTIONATELY INSCRIBED

THE AUTHOR TO THE READER

Any one who offers another book to a profession already burdened with books surely ought to give some reason, or at least some plausible excuse, for his act. My reason or excuse, whichever it may be, is this: In talking with the younger members of the bar of the state I have often been forcibly struck with the fact that many of them had little or no idea of the remarkable men who sat upon the supreme bench during the early years of the state, nor of the heated controversies, political as well as legal, in which the court and its judges were in one way or another involved during those years. With the idea of doing something to dispel this ignorance, I began to prepare a paper covering the early history of the court, intending to publish it in pamphlet form. I had not gone far, however, when I found that the subject could not be treated in any mere monograph, and as I proceeded I discovered many matters of surpassing interest which were entirely new to me and thus the projected pamphlet grew into a book. I cannot but feel that the book will interest not only lawyers but many laymen. If this be not sufficient reason for the existence of this book then there is none. It will be noticed that I have called it "The Story of a Great Court," and possibly some may think that it is scarcely appropriate for one who is now

a member of that same court to apply to it so eulogistic a title. "Let another man praise thee and not thine own mouth; a stranger and not thine own lips." I fully considered this question, however, before adopting the title, and made up my mind that as my connection with the court did not begin until May, 1891, there could be no impropriety in my applying the term "great" to the court of which I write, namely, the court whose history terminates in 1880. Whether the same adjective may properly be applied to the court since 1880 will be a matter for the future historian to settle. I do not attempt to influence his decision.

Madison, Wisconsin, November, 1911.

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The Story of a Great Court

CHAPTER I.

THE TERRITORIAL COURTS AND THE CONSTITUTIONAL CONVENTIONS.

The commonwealth of Wisconsin, as a separate political entity, came into being by virtue of an act of Congress approved April 20th, 1836, by which it was provided that all the territory now embraced within the states of Wisconsin, Iowa and Minnesota, as well as a part of the territory now embraced within the states of North Dakota and South Dakota should, after the third day of July, 1836, constitute a separate territory under the name of Wisconsin. Prior to that act the territory comprising the present state had been successively a part of the Northwest territory under the ordinance of 1787 up to May 7, 1800, a part of Indiana territory from that time up to February 3, 1809, a part of Illinois territory from the last named date up to April 18, 1818, and a part of Michigan territory after the last named date. Before the year 1823 there were no separate courts in that part of the territory now comprised within the state, except county courts of very limited civil and criminal jurisdiction and justices courts; all important cases, whether civil or criminal were tried by the territorial supreme court at Detroit. In January of that year, however, a law was passed providing for the appointment of an additional federal judge for the counties of Brown and Crawford

(covering the whole of the present state) and the county of Michilimackinac, which law also provided for the holding of one term a year in each county. James D. Doty was the first judge appointed under this act and he held his first term at Green Bay in 1824, at which time the judicial history of Wisconsin may be said to have begun. Judge Doty served until May, 1832, when he was succeeded by David Irvin, who held the office until the organization of the territory and the creation of a separate territorial Supreme Court by the act of 1836.

Under this act the President appointed Charles Dunn as chief justice and David Irvin and William C. Frazer as associate justices, and the first term of the new court was held at Belmont, Iowa county, in December, 1836. On the eighth day of November, 1838, Andrew G. Miller was appointed associate justice in place of Judge Frazer, then recently deceased, and the constitution of the court remained unchanged from this time until the organization of the state in 1848.

There is much of interest which might well be written concerning these early territorial judges and the courts over which they presided, but as this period is not included within the scope of the present volume no attempt will be made to treat these subjects here. They will be found very interestingly treated by the late Mr. Justice Pinney in the preface to volume one of Pinney's Wisconsin Reports.

The act of Congress which enabled the people of the territory to form a state constitution and apply for admission to the Union was approved August 6, 1846, and the first constitutional convention met October 5th and adjourned December 16th of that year. The constitution framed by this convention was rejected by vote of the people in the following spring and the second convention met December

15, 1847, and concluded its labors on February 1, 1848. This second constitution was ratified by the people March 13, 1848, and the state was finally admitted by act of Congress approved May 29, 1848. Both constitutions provided for the election of all judges by vote of the people. This provision does not seem in any respect singular to those who have been born and brought up under the elective system, yet the election of judges by the people was by no means a matter of course at that time; in fact it was a radical innovation on long established methods, a pioneer step in a field of experiment which was viewed with apprehension by many whose experience and wisdom entitled their opinions to serious consideration.

From the earliest times in American history all judges had been appointed. Such was and still is the English method and when our federal constitution and the early state constitutions were adopted that method was generally followed with occasional variations giving the legislative arm of the government either the sole power of appointment or some share in that power. In a pamphlet by D. B. Eaton of New York, published in October, 1873,[1] entitled "Should Judges be Elected" it is said of the appointive method that "up to 1846 no other method had existed for the selection of judges in the state of New York, in any other state of the Union or in any enlightened country of modern times." This sweeping declaration was not strictly accurate as we shall presently see; however, the exceptions had been so few prior to 1846 that no serious fault can be found with the substance of the statement.

With the rapid development of the democratic spirit the sentiment in favor of electing the judiciary had been grow-

[1] Law Pamphlets, Vol. 9, Wis. State Library.

ing since early in the nineteenth century. This sentiment was based on the idea that all power was from the people and that as both executive and legislative officers were elected by the people consistency demanded that the judiciary, which under our system constitutes an independent and co-ordinate branch of the government, should also be elected. The controversy between the advocates of the appointive system on the one side and the elective system on the other has been vigorously waged and is yet on, but no discussion of the merits of this question will be attempted in this volume. Rightly or wrongly the sentiment in favor of the elective system developed with startling rapidity in our American commonwealths during the nineteenth century, and in 1893 it was stated by David Dudley Field [2] that in twenty seven of the forty two states then existing the judges of the highest courts were elected by the people, in eight they were appointed by the governor subject to confirmation by the senate or the legislature, and in seven elected by the legislature. I have made no examination to ascertain the exact situation at the present time, but it is entirely safe to say that the present percentage in favor of the elective system is greater than it was in 1893.

The first partial trial of the elective system seems to have been made in Georgia in 1812, when by an amendment to the constitution the judges of the inferior or county courts were made elective; this was followed by a similar provision in the first constitution of Indiana adopted in 1816, but in both states the justices of the Supreme Court remained appointive. The first complete victory of the elective idea, however, took place when Mississippi adopted a new constitution providing for the election of all judges by the people. This was in 1832 but it was soon to be followed by other triumphs. In

[2] Albany Law Journal, Sept. 9, 1893.

1835 the first constitution of Michigan made inferior judges elective. In 1846 constitutional conventions assembled in New York, Iowa and Wisconsin and all of them adopted constitutions requiring the election of all judges, except that in Iowa the judges of the Supreme Court were to be appointed by the legislature. Under the appointive system New York had enjoyed a long and brilliant judicial history; great judges and able courts had adorned its jurisprudence, there was really no serious dissatisfaction or if there was dissatisfaction it was substantially groundless, but the feeling that the judges should be accountable to the people alone was so strong that the old and tried system of appointment was summarily abandoned and has never been reinstated, although the question of a return to the old system was submitted to the people in 1873 only to be overwhelmingly defeated.[3] Iowa and Wisconsin were, however, frontier commonwealths, just aspiring to statehood and it was not surprising that in them new and radical ideas should be in the ascendant. In Wisconsin there was indeed in the convention of 1846 a respectable and able minority, of which Edward G. Ryan was one of the leaders, which favored the appointive system, but the final vote stood seventy-eight to twenty in favor of the elective system.[4] This constitution, as before stated, was rejected by the people largely on account of its radical anti-banking provisions, but the second constitutional convention readopted the elective feature of the first constitution without substantial change and there has been no serious attempt to revert to the appointive system in this state from that day to this. In Iowa a new constitution was adopted in 1857 providing for the election of all judges by the people.

[3] Lincoln's Constitutional History of N. Y. Vol. 2, p. 288.

[4] Strong's History of Wisconsin Territory, pp. 514 and 524.

The example set by the constitutional conventions of 1846 was rapidly followed, and prior to 1860 seventeen other states had adopted either in whole or in part the elective system, some by first constitutions and some by revision or amendment of existing constitutions. Thus in 1860 twenty out of the thirty-four states had adopted either wholly or partially the elective system; the states in which the adoption was partial and affected only inferior courts being Alabama, Arkansas, Connecticut, Georgia and Maine.[5] Since 1860 the new states have generally adopted the elective system and the drift in favor of that system seems still to be predominant although not universal, for Virginia, Louisiana, Mississippi, Florida and Maine have by revised constitutions returned either wholly or partially to the system of appointment.

Perhaps the most effective argument ever used against the elective system has been the argument that by reason of short terms of office and the practical certainty of frequent changes in the personnel of the bench as political majorities change or popular moods vary, elected judges will necessarily lose their independence of action and will merely register the prevailing popular sentiment or whim instead of proclaiming without fear or favor the law as it exists; in other words, that judges who are dependent for their official life upon the votes of the people will almost infallibly cater to that vote and become politicians instead of judges. The strength of this argument is not now to be considered, but that such results are to be seriously apprehended, nay, that they have been to a greater or less extent realized in some of the states must be admitted. Courts of last resort have often been made the playthings of political parties, and too frequently able and fearless judges at the very height of their usefulness have been swept from office by temporary waves

[5] Hitchcock's Am. State Constitutions, pp. 51–52.

of popular sentiment only to make way for new and untried men, who in their turn have been unseated at the next election as the mood of the populace changed.

Such a wave of temporary passion resulting from an unpopular decision removed Judge Lawrence from the Supreme bench of Illinois in 1874, and a similar wave removed Judge Cooley from the Supreme bench of Michigan in 1885, the result in each case being a marked weakening in the strength of the court. Such conditions are certainly not favorable to judicial independence nor to stability of decision.

It is a remarkable fact which may properly be noticed here that while Wisconsin was one of the pioneer states in the full and complete adoption of the elective system, its Supreme Court has been exceptionally free from violent and frequent changes. During the entire history of the separate Supreme Court from its organization in 1853 up to the present time it has had but twenty-five judges; during the same period the Supreme Court of Indiana has had forty-seven judges and comparisons with other states might be easily made with similar results. Since a very early period in the history of Wisconsin, with a single recent exception, no sitting judge who has been a candidate for re-election has been defeated, notwithstanding a number of attempts in that direction, and judges who have reached that bench have been given practically a life tenure. This result is principally due to a sentiment which has slowly crystallized among the people of the state to the effect that judges of that Court should not be nominated by political parties and that a sitting judge who has performed his duties faithfully should be retained during his years of usefulness, regardless of his political opinions.

There is little or nothing to indicate that this idea existed at the time of the holding of either of the constitutional con-

ventions, or that the members of either convention contemplated its subsequent development. Indeed the committee which reported the judiciary article in the first convention assumed in their report that judges would necessarily be nominated by political conventions and spent some time in showing that judges nominated by such conventions would not be as likely to be partisan in their acts as judges appointed by the executive;[6] while in the convention of 1848 the article on the judiciary as first proposed, which provided a ten year term for circuit judges (who were also to constitute the Supreme Court until a separate Supreme Court should be organized), was amended after considerable debate so as to make the terms of both circuit and Supreme Court judges six years upon the express ground that a ten year term was too long and that a judge should frequently render an account of his stewardship to the people.[7] Both constitutions, however, contained a clause giving the governor power in case of a vacancy to appoint a judge to hold until the election of a successor, and a further clause providing that no election of a judge or judges should be held within thirty days of a general election. The first of these clauses is common to many of the states which elect their judges, the second is rare if not peculiar to Wisconsin, although by some constitutions judicial elections are directed to be held at a fixed date not coincident with the general election.

Both of these provisions have had a marked influence upon the elective system. Eleven of the twenty-five judges of the Supreme Court have been placed there originally by appointment and such appointments have, with but one excep-

[6] Journal of the Constitutional Convention of 1846, p. 106 et seq.

[7] Journal and Debates of the Constitutional Convention of 1847–48, pp. 67, 392, 438, and 468.

tion, been approved by the people by subsequent election. Among the appointed judges were Dixon and Ryan, two of the very greatest of the jurists who have occupied that bench. The effect, therefore, of the first named clause has been unquestionably to greatly modify the elective system by incorporating in it the feature of temporary appointment which in practical operation has placed upon the bench permanently nearly fifty per cent of the judges by appointment instead of by election.

The clause prohibiting the holding of a judicial election at the time of a general election or at any time within thirty days of such an election has doubtless had greater effect, however, in eliminating party politics from judicial elections than any other one cause. The original intent of this clause doubtless was to divorce such elections from the excitement and turmoil of a general election, so that the attention of the voter should be given wholly to the relative merits of the opposing judicial candidates. If there was any serious idea that it would have any influence in doing away with party nominations and making judicial campaign non-partisan there is little or nothing in the records of the conventions to show that fact. Nevertheless such has been its influence beyond any question; in fact without this provision it is difficult to see how it would have been possible to make judicial contests in any degree non-partisan. If judges were to be elected at presidential and gubernatorial elections it is reasonably certain that they would be nominated and elected as party candidates upon party tickets; a non-partisan candidate for a judgeship would have great difficulty in making any headway when men's minds were wrought up by the excitement of a great political contest. It must be said, however, that this clause had little

immediate effect in the elimination of partisanship from judicial elections. For more than a decade there was no lack of fierce partisan conflicts in judicial elections. As time went on it had its effect, however, as will abundantly appear to anyone who gives careful attention to the subsequent history of the Court.

CHAPTER II

THE FIRST SUPREME COURT AND ITS JUDGES

The constitution of 1848 divided the state into five judicial circuits, provided for the election of a judge in each circuit and made the circuit judges also justices of the Supreme Court for the term of five years and thereafter until the legislature should provide for a separate Supreme Court which was to be composed of one chief justice and two associate justices. The circuit judges so to be elected were to be classified so that the term of one should be two years and of the others three, four, five and six years respectively and thereafter the term was to be six years.

The circuits were composed as follows: the first circuit, the counties of Racine, Walworth, Rock and Green; the second, the counties of Milwaukee, Waukesha, Jefferson and Dane; the third, the counties of Washington, Dodge, Columbia, Marquette, Sauk and Portage; the fourth, the counties of Brown, Manitowoc, Sheboygan, Fond du Lac, Winnebago and Calumet; the fifth, the counties of Iowa, La Fayette, Grant, Crawford and St. Croix, the county of Richland being attached to Iowa, the county of Chippewa to Crawford, and the county of La Pointe to St. Croix for judicial purposes.

The legislature provided for the first election to take place on the first Monday in August, 1848, and it was so held.[1]

It is stated in the Milwaukee Sentinel and Gazette of July 11, 1848, that the Democrats called party conventions in all

[1] Laws of 1848, p. 19.

of the five circuits. David Noggle was nominated in the first circuit, Abram D. Smith in the second, Charles H. Larrabee in the third, E. W. Drury in the fourth, but for some reason no nomination seems to have been made in the fifth Circuit so far as I have ascertained.

The Whigs nominated Edward V. Whiton in the first circuit and Francis Randall in the second circuit, but seem to have made no further party nominations, probably because the party was in the minority. Levi Hubbell ran as an independent candidate in the second circuit, which then included both Milwaukee and Dane counties. James M. Clark and Charles Acker ran in the same way in the third circuit and Alexander W. Stow in the fourth, while in the fifth there were five candidates all calling themselves independents, viz. Mortimer M. Jackson, Moses M. Strong, B. C. Eastman, Alfred Brunson and Parley Eaton.

The election resulted in the choice of Edward V. Whiton, Whig, in the first district; Levi Hubbell, independent Democrat, in the second; Charles H. Larrabee, Democrat, in the third; A. W. Stow, independent, in the fourth and M. M. Jackson, independent Whig, in the fifth. These men composed the first Supreme Court. As circuit judges they held regular terms of the circuit court in their respective circuits for the trial of causes and assembled at Madison twice a year and sat in bank as the Supreme Court to dispose of appeals from the circuit courts. Lots were drawn, as provided by the law governing their election to determine the length of their terms and Judge Stow drew the short term of two years and was also chosen by his associates as Chief Justice. Judge Stow was opposed to the principle of an elective judiciary and had announced before his election that he would not stand for re-election and upon the expiration of his term Timothy O. Howe of Green Bay was elected as his successor and took his seat January 2, 1851; otherwise

the personnel of the Court remained unchanged until 1853, except that an additional or sixth circuit was created by Chapter 268 of the laws of 1850, consisting of Crawford, Chippewa, Bad Axe, Black River, St. Croix and La Pointe Counties, and Wiram Knowlton was elected judge of the new circuit in July of that year, taking his seat on the Supreme bench at the December term, 1850. Judge Hubbell succeeded Judge Stow as Chief Justice and held one year, when Judge Jackson was elected to the office but resigned on the same day and Judge Whiton was chosen and remained in that position until the court ceased to exist by reason of the organization of the separate Supreme Court.

Short as the life of this temporary Supreme Court was its judges were able and learned men who deserve more than mere passing mention. Brief biographical sketches of them appear in volume three of Pinney's Wisconsin Reports as well as in Berryman's History of the Bench and Bar of Wisconsin and from these sources the following sketches which the author recognizes as inadequate have been principally drawn.

At the head of the list without doubt stands the name of Edward Vernon Whiton; distinguished alike as a legislator, a constitution maker and a judge, his services to the state richly entitled him to a comprehensive biography rather than a mere brief sketch. It is greatly to be regretted that Chief Justice Cole, who served four years with him upon the bench and who entertained for him a love and respect which amounted to veneration, did not undertake the task; had he done so unquestionably much light would have been thrown upon territorial and early state history of which we must now remain deprived.

Judge Whiton was born June 2, 1805, at South Lee, Berkshire County, Massachusetts, of an ancestry which had rendered distinguished services in colonial affairs and in the rev-

olutionary war. He learned the trade of a carpenter and millwright in his native town where he lived until 1835. But the bent of his mind was undoubtedly towards intellectual pursuits and he read law in a lawyer's office and also acted as librarian of the village library of about three hundred volumes. Here he acquired a great fund of historical knowledge which stood him in good stead in his later life.

Coming west in 1835 he stopped for a time in Lorraine County, Ohio, and came to Wisconsin in 1837, settling on a tract of land near the present city of Janesville. Here he built with his own hands his log cabin and afterwards a more pretentious house. In 1838 he was elected a member of the territorial house of representatives and served during the sessions of 1838, 1839 and 1839–40, and being re-elected he also served during the sessions of 1840–41 and 1841–42. The laws of the territory were in a confused state and in December, 1838, a committee was appointed to revise the existing laws and report the revision for passage at an adjourned session, which was held in January following. The committee was composed of Messrs. Morgan L. Martin, Marshall M. Strong and James Collins on the part of the council, and Messrs. Edward V. Whiton, B. Shackelford and Augustus Story on the part of the house. The result is to be found in the revised statutes of 1839, which was the first complete code of law possessed by the territory. Considering the brief time which was allowed the committee for its work it must certainly be considered a remarkable achievement. The legislature after amending the proposed laws in various particulars passed them and placed the printing in charge of Mr. Whiton, whose solid learning, clearness of intellect and ability to dispatch intellectual labor had now become fully recognized. The book appeared in the month of June, 1839, and for ten years remained the basic law of

ALEXANDER WOLCOTT STOW.

the territory and also became the basis of the revisions of 1849 and 1858. During the years 1842 to 1846 inclusive he was a member of the territorial council and in 1848 upon the rejection of the first constitution he was elected a member of the second constitutional convention. Here he was an active and influential figure; the field was well suited to his abilities; he was in his prime both physically and mentally; his intellect had been fully ripened by his legislative experiences and in every important debate he was at the front. Unfortunately his remarks have not been preserved. He was one of three members of the convention who gave notice to the reporters that they did not wish their remarks to be reported for publication in the journal.[2] Thus while it appears upon a very large proportion of the pages of the journal that he made remarks upon the various questions under discussion, in most instances we simply find that "Mr. Whiton spoke" or "Mr. Whiton made some remarks" or some equally disappointing and meagre statement. In a few instances a brief resumé of his remarks is given, but this seems only to have been done where it was necessary in order to enable the allusions of other speakers on the subject to be understood. This fact has been regretted by the Supreme Court in cases involving the construction of constitutional provisions, especially the section as to the rule of taxation (Sec. I, Art. VIII), for it has been felt that his remarks would doubtless have thrown much light on difficult questions of constitutional construction.[3]

His election to the circuit bench followed, as has been already stated, and five years later his election to the bench of the separate Supreme Court as its first Chief Justice. From

[2] Journal and Debates Const. Conv. 1847–1848. Reporter's Preface.

[3] Nunnemacher v. State, 129 Wis. 190; see page 206.

this time on, therefore, his history becomes the history of the bench itself and appears in its proper place in this work.

As to Judge Whiton's personal characteristics a few words ought at least to be said. He was a very self contained man, always taciturn and always having a serious and preoccupied air. He had few social pleasures and never made his residence at Madison but continued to reside in Janesville, only coming to the Capital as official duty called him, and when he did come he generally made his home with his friend Judge Hood, instead of at a hotel or boarding house. It must needs be said that during some part of his earlier life he had an unfortunate weakness for intoxicating liquor but this weakness had been overcome before he went on the bench. He was an excellent presiding officer always listening to argument (even though dull) with respectful attention. His mind at times under such circumstances may have been far away, but his face did not indicate it.

Levi Hubbell, who was elected as an independent Democrat in the second district, was an able and ambitious man of fine presence and courtly manners who cut a large figure in the early history of the state. Born at Ballston, N. Y. in 1808, he graduated at Union College in 1827 and early began the practice of law with his brother at Canandaigua, New York. When twenty-five years of age he became adjutant general of New York and held the office for three years and in 1841 became a member of the legislature of that state. In 1844 he came to Milwaukee and became a member of the firm of Finch & Lynde and in 1848 he was a delegate to the national Democratic convention of that year. His career upon the circuit bench was a stormy one and the storms culminated in his impeachment in the spring of 1853. While he was acquitted by a large vote on all of the charges he never fully recovered from the effect of the impeachment.

General Bryant, who knew him personally, has this to say of the acquittal:[4]

"Judge Hubbell had the sympathies of a large portion of the people of the state, especially the people of Milwaukee, during the trial and his acquittal gave his friends opportunity to manifest their joy at the result. A special train loaded with a committee went out part way to meet him, and on his return to Milwaukee a large throng met him and marched in a triumphant procession through the streets, the like of which that city had never seen. A public reception, then a monster procession to accompany him to his home made the day one of congratulation and holiday parade."

Notwithstanding this enthusiastic reception at his home Judge Hubbell doubtless realized that his reputation had suffered serious injury. He resigned his judgeship in 1856 and resumed the practice in Milwaukee. In 1863 he was elected to the legislature and took a strong stand in favor of the Union. In 1869 when a vacancy occurred in the office of circuit judge, a large and numerously signed petition was presented to Governor Fairchild, asking for Judge Hubbell's appointment. General Bryant says of this incident:

"Governor Fairchild's refusal to appoint him was one of the keenest disappointments of his life. His high but dignified anger, when the suave but stout hearted, one armed Governor told the judge that he did not feel justified in reinstating him upon the bench, was one of the most dramatic episodes which the writer—then executive secretary to Governor Fairchild—ever witnessed."

General Bryant further says:

"Of fine presence, most agreeable manners and a bearing which betokened leadership, a man potent to influence others, it is not unlikely that the unfortunate episode of his impeachment arrested a career which otherwise might have been most successful."

He was appointed United States district attorney for the Eastern district of Wisconsin by President Grant in 1876

[4] Green Bag, Vol. 9, pp. 67–68.

and held the office for five years. He died at the age of sixty-eight years as the result of a fall upon an icy sidewalk.

Charles Hathaway Larrabee, who was elected as a Democrat in the third judicial circuit, was a remarkable man with a varied and romantic history. Born at Rome, Oneida County, New York, November 9, 1820, of Huguenot ancestry, he numbered among his forbears colonial and revolutionary heroes upon both sides. He acquired his education at Springfield academy and at Granville (now Dennison) College in the state of Ohio and read law at Springfield. He spent some time in Mississippi, where he was admitted to the bar in 1841, and came to Chicago in 1844, where he edited the Chicago Advocate for a time and served one term as city attorney; in 1846 he came to Wisconsin and settled at Horicon, Dodge County, and in the following year he was elected a member of the second constitutional convention. In this convention he was active and influential, strongly advocating the exemption of homesteads, the restriction of state indebtedness, the prohibition of state internal improvements and also the clauses preventing the division of counties without local consent.

He served upon the circuit bench until 1858, when he resigned and ran for Congress as a Douglas Democrat and was elected in a district which had a normal Republican majority of 2,500. He was active in his Congressional duties, but was defeated for re-election in 1860. When Fort Sumpter was fired on he at once offered his services to Governor Randall and was appointed Major of the 5th regiment of Wisconsin infantry. He served with distinction in the peninsula campaign and was promoted to the colonelcy of the 24th regiment, which he recruited largely himself, but a year later he was compelled to resign his commission by reason of shattered health. In 1864 he removed to the Pacific coast and

LEVI HUBBELL.

resided for a time in Oregon and subsequently in Washington, but was compelled by ill health to seek the softer climate of Southern California, where he met a violent death in a railway accident January 20, 1883.

Judge Larrabee was a man of great natural ability, prompt and impartial as a judge, a zealous partisan, a devoted friend, an attractive and forceful speaker and his opinions rendered while he was on the bench of the Supreme Court stamp him as a lawyer of ability.

Of the life of Alexander Wolcott Stow prior to his residence in Wisconsin little is certainly known. His life long friend, Hon. Morgan L. Martin of Green Bay, wrote a brief sketch of him which appears in Judge Pinney's biographical sketches,[5] from which the following is taken:

"Alexander W. Stow was born at Lowville, N. Y.[6] on the fifth day of February, 1805. His father, Silas Stow, was a prominent Federalist in the early political struggles of that state, was chief justice of the county court, which made him the associate of the supreme judge at *nisi prius*, and for one term represented his district in Congress. He was a man of superior ability and culture and possessed a fund of general knowledge, which placed him in the front rank of the public men of his day. The son inherited much of the talent of the father. The bench and bar of New York, during the first quarter of the present century, comprised a host of distinguished lawyers. During the ascendancy of such men as Kent, Spencer, Platt, Elisha Williams, Van Buren, Talcott and many others equally prominent it was impossible to attain a respectable position in the profession without the patient study of years, or a brilliant intellect which could win its way even against the subtleties of the accomplished pleader. Judge Stow was never a close student, but under the tutelage of his father and the eminent men with whom he was brought into association in early life, he became almost by intuition an accomplished scholar.

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[5] 3 Pinney's Wis. Reports, 605.

[6] General Bryant says he was born in Middleton, Conn., in 1804. See Vol. 9, Green Bag, p. 70.

"At the age of sixteen he was placed at the military academy where he remained only a single year and returned to enter a law office in his native village. In due time he was admitted to practice and formed a partnership with Hon. Justin Butterfield, late commissioner of the general land office then residing at Sacketts Harbor. That the superior ability of young Stow was fully appreciated by him (Butterfield) may be inferred from a remark of his in 1826 that 'he had never known a man of superior constitutional powers.' A few years of routine practice, during a short respite from which he spent a few months in European travel, bring him to the time of his election as chief justice of our state."

Chief Justice Ryan was a great admirer of Judge Stow and he penned an addendum to Judge Martin's sketch [7] from which the following glowing extracts are taken:

"The writer did not know Judge Stow before they met in Wisconsin. From thence until the judge's death they were intimate and fast friends. Knowing the judge then in the prime of his professional life, the writer finds it difficult to believe that the late chief justice had not been at some time a close and extensive student. His acquaintance with books, in and out of the line of professional reading, was varied and extensive. He might have been called almost a scholar in general literature, and he most surely was one in professional learning. He was one of the best, if not the very best, common lawyer whom the writer has ever met. He was not one of those to whom the common law was a fragmentary confusion of disjointed rules. He had mastered not only its details but the history out of which it grew, and his broad and vigorous mind grasped it as a system in its full spirit, and comprehended the mutual relations and symmetry of all its parts. He well understood that it is, with all its blemishes, the noblest code of personal rights which the world has ever known; which educates men in free and self reliant manhood, and which has done more than all written systems or constitutions for the freedom of the nations who are blessed in its possession. Judge Stow was certainly an accomplished common lawyer. * * * There were indeed occasional eccentricities in his thinking as well as in his acting. Making

[7] 3 Pinney's Reports, p. 607.

CHARLES HATHAWAY LARRABEE

some allowance for these he was surely a great man intellectually. The writer doubts if he ever knew an abler. His views were always vigorous, often profound and generally discriminating and just. He was indeed a man of strong prejudices, but these rarely if ever influenced him on the bench, never consciously. He loved truth for truth's sake with intense love. He loved justice for itself with natural and professional devotion. Many disliked the man but none ever doubted the judge. He reverenced the judicial office and while he held it he made all men respect it. He had a high sense of judicial dignity and authority; and there was no trifling with the Court in which he presided. On the bench he looked what he was, a great judge."

After his retirement from the bench in January, 1851, he lived not quite four years and while he retained his residence on his farm at Fond du Lac his time was principally spent at Milwaukee. General Bryant says that he resumed the practice,[8] but Judge Ryan says he lived in private, "never again resuming the profession."[9]

This apparent contradiction recalls to my mind a story frequently related by the late Charles W. Felker of Oshkosh which may be of interest; the story was to the effect that after Judge Stow left the bench a partnership was arranged between Stow and Ryan, and that in the course of time Stow came to Milwaukee to commence business, bringing with him a cooking kit in a bag, and a coffee pot, as he was in the habit of cooking his own meals; he arrived at the office in Ryan's absence and laid down the bag and coffee pot on the floor and waited for Ryan's appearance; when Ryan came in his attention was at once attracted by the tramplike appearance of the cooking kit, and, with eyes blazing, he said, "What's that?" Stow said somewhat apologetically, "That's my cooking kit." Ryan turned and said, "Judge Stow! this partnership is dissolved."

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[8] Green Bag, Vol. 9, p. 71.

[9] 3 Pinney's Wis. Reports, p. 609.

My curiosity was somewhat aroused by these contradictory statements about Judge Stow's life after he left the bench and I went to the files of the Milwaukee Sentinel to see if I could obtain any light on the subject from the professional cards which at that time were almost universally inserted in the newspapers. Here I found something that puzzled me still more:

From March 24th up to Nov. 30, 1852 the following double card appeared in the Sentinel:

RYAN & BRIGHAM

ATTORNEYS, SOLICITORS AND COUNSELLORS

Will practice in the Courts of this State

E. G. RYAN — JEROME R. BRIGHAM

STOW & BRIGHAM

ATTORNEYS, SOLICITORS AND COUNSELLORS

Will practice in the Courts of the United States

ALEX W. STOW — JEROME R. BRIGHAM

OFFICES

Arcade Building, No. 171 East Water St.

MILWAUKEE

I have not been able to find anyone who can explain the reason for the existence of this strange business card. It would seem that Judge Stow nominally at least practiced in Milwaukee and in the same offices with Ryan, and it would also seem that for some reason, Ryan, though practicing in the same office with Stow, was not in partnership with him and confined his own practice to the State Courts. I asked Judge James G. Jenkins, who was later in partnership with Ryan, if he could throw any light on the subject and he said he could not. Judge Jenkins came to Wisconsin in 1857; he

told me that he had been informed that Stow was for a time in partnership with Ryan & Brigham after he left the bench under the name of Ryan, Stow & Brigham and he had always supposed such to be the case. He could suggest no explanation of the strange card except that possibly Ryan (who never liked the United States Courts) for a time declined to practice in them.

Another story concerning Judge Stow which is related on what appears to be good authority illustrates the nature of the man and his peculiarities. He was devoted to hunting and fishing and very fond of game dinners. Like many gourmands he made a practice of hanging his game a long time before eating it. He at one time invited a friend to dine with him and set out as a great delicacy some game which had hung so long that the odor was very penetrating; the friend could not eat it and, when Judge Stow asked him what was the matter with his appetite, bluntly replied that he could not stand the smell of the game. "Eat away," said Judge Stow, "I didn't invite you to smell it, I invited you to eat it."

Judge Stow died at Milwaukee Sept. 14, 1854, having never married.

The career of Timothy Otis Howe was so distinguished in the great field of national politics that it is rarely remembered that his public life in this state commenced upon the bench, yet so it was. He resided at Green Bay, whither he had come in 1845 from Maine, being then twenty-nine years of age. He was at that time a lawyer of ability and at once took a prominent position both in professional and political life. He was an ardent Whig and in 1848 was a candidate for Congress on that ticket but was defeated. In 1850 he was elected Judge of the fourth circuit to succeed Judge

Stow and thus became for two years one of the justices of the Supreme Court, the duties of which office he discharged with marked ability.

After the organization of the separate Supreme Court he continued to hold the office of circuit judge until 1855, when he resigned and resumed the practice. He was an effective and witty speaker and a logical and strong debator. Probably a political career appealed to him more strongly than a judicial one and the meagre salary ($1,500) of a circuit judge doubtless was a strong inducement to quit the bench. He at once became an active Republican leader, but soon fell at outs with the great mass of his party on the question of state rights, as will appear later in this work; he strongly opposed the doctrine that a state court could declare acts of Congress unconstitutional and that there was no remedy by appeal to the federal courts. This courageous stand undoubtedly defeated him for the United States Senate in 1857, but in 1861 his time came and he was triumphantly elected to that body. After that date his career became a part of the nation's history and no review of it will be attempted here. He died at Racine, March 25, 1883.

Mortimer Melville Jackson was born in Rensallaersville, Albany County, New York, of Puritan ancestry, and after some years spent in mercantile pursuits turned his attention to the law and was admitted to the bar in 1838. He came to Wisconsin and settled at Mineral Point in 1839 and soon became prominent at the bar and in politics. He was a Whig and in 1841 became attorney general of the territory, which office he held for five years. He was deeply interested in popular education and in an educational convention in 1846 proposed a scheme for a common school system which was afterwards substantially adopted by the makers of the state constitution. When he was elected circuit judge in 1848 his

TIMOTHY OTIS HOWE.

circuit comprised about one third of the territory of the state, including a vast area of unbroken prairie and forest and he was obliged to travel great distances. He served as circuit judge and as member of the Supreme Court until 1853. He was a candidate for United States Senator in 1857, when Judge Howe and Judge Doolittle were also candidates, and Judge Doolittle was elected.

Judge Doolittle had joined the Republican party but a very few months previously, he having always been a prominent Democrat. Judge Jackson was greatly disappointed and felt that his long services as a Whig and a Republican deserved recognition; it is said that when asked his opinion of the result he said emphatically, "Prompt pay, gentlemen, d——d prompt pay."

In 1861 he was appointed United States Consul at Halifax by President Lincoln and discharged the duties of the office with great ability and to the entire satisfaction of both governments until 1882, when he resigned and spent his declining years at Madison, where he died of old age October 13, 1889. He was a cultivated and dignified gentlemen of the old school, a man of ability who discharged his duties in every position with great fidelity and in the most honorable and satisfactory manner. Leaving no immediate relatives, he bequeathed the greater part of his competency to the law department of the University of Wisconsin, to support a professorship called after his name.

Wiram Knowlton was born in Chenango County, New York, in 1816, came to Wisconsin in 1837 and read law with Parley Eaton, Esq., at Mineral Point. He first practiced law at Platteville, Grant County, and afterwards at Prairie du Chien, where he resided when elected the first judge of the sixth circuit in 1850. He served as circuit judge six years and was a member of the Supreme Court until the or-

ganization of the separate tribunal. He died June 27, 1863, at Menekaunee, Oconto County, Wisconsin, at the early age of forty seven.

Judge Pinney says of him:[10]

"He was a man of good natural talents, and discharged the duties of his office with commendable ability, and his judicial integrity was unquestioned."

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[10] 3 Pinney's Wis. Reports, p. 619.

MORTIMER MELVILLE JACKSON.

CHAPTER III

THE WORK OF THE FIRST SUPREME COURT

The business transacted by this early Court during its brief existence of five years was not great in volume as measured by present day standards. Its decisions fill less than two volumes of Pinney's reports. While the population of the state had increased ten fold during the decade from 1840 to 1850, it was still but a trifle more than 300,000 in 1850. Moreover it was very largely a rural and scattered population. Milwaukee had but 20,000 inhabitants and Racine but 5,000 and these were the leading cities. Manufactures had hardly begun to develop; business enterprises were small in extent and limited in capital. Only ten miles of railroad had been laid in the state: it was still a pioneer commonwealth, whose scanty population was busily engaged in subjugating the prairies and the forests of a vast empire and had neither time nor inclination for extensive litigation. Such litigation as arose generally involved small sums and litigants were apt to rest content with the result in the circuit court, for the trip to Madison was no trifling matter in those days of no railroads. A large proportion of the cases which reached the Supreme Court involved simply questions of pleading or procedure and this was natural, for the state was new, the lawyers young and frequently inexperienced and the statutes recently revised. Although the code had not yet come with its multitude of new questions and the practice was still governed by common law rules, there was no lack of questions to be settled, arising either from lack of textbooks,

from new conditions or from changes in the practice made by the revised statutes of 1849. The decisions upon such questions are of little moment now; the adoption of the Code of Procedure in 1856 effectually deprived most of them of any permanent value and there seems no occasion to spend time upon them.

There were, however, some cases involving important questions of substantive law, the decisions in which have had permanent influence on the jurisprudence of the state. Perhaps the most important of these cases was *Newcomb v. Smith*, 2 Pinney, 131, which involved the question of the constitutionality of the milldam law passed by the territorial legislature January 13, 1840. This act provided in substance that water mills and dams might be erected and maintained by a riparian proprietor upon and across any stream not navigable, provided no injury should be done to other lawfully existing mills on the same stream and provided, further, that the height at which the water might be maintained and the length of time it might be so maintained each year should be subject to regulation by the verdict of a jury. There were further provisions prohibiting any action at common law by any person whose land should be overflowed, but providing that he might obtain compensation by action in the district court of the proper county.

The law was attacked on two grounds, first, because it took away the common law right of action against the mill-owner, and thus violated that provision of the ordinance of 1787 for the government of the Northwest Territory which guaranteed to the inhabitants the right to maintain "judicial proceedings according to the course of the common law," and, second, because it authorized the taking of property for a private use. Both contentions were overruled by a bare majority of the Court, Judge Hubbell writing the opinion,

while Judge Larrabee filed a long and able dissenting opinion, in which Chief Justice Stow concurred. The question was a new and serious one in Wisconsin. The state abounded in waterpowers; the railroad had not yet come, coal was practically unknown, and the use of the stationary steam engine confined to the large towns, transportation was difficult, lumber for housebuilding had to be sawed out of timber cut in the immediate vicinity and grain had to be milled at the neighboring grist mill. Under these conditions multitudes of small sawmills and gristmills operated by water power and serving a small area for toll had sprung up and their continued and unfettered existence seemed an absolute necessity if the growth of the state was to continue. These considerations were doubtless weighty with the Court and it was decided that the use was a public and not a private use. Had the test come a few years later the decision would in all probability have been the other way, but the decision was made; valuable interests grew up under it and when the question came before the separate Supreme Court in 1860 the early decision was sustained and followed on the ground of *stare decisis*, although it seems quite obvious from the opinion that the Court would have held the act was invalid had the question been a new one.[1]

The act itself was copied almost verbatim from an early Massachusetts law which had been sustained by the courts of that state, not on the ground, however, that there was a taking of land for public use, but on the ground that there was no taking of property at all and consequently no exercise of the right of eminent domain. Right or wrong, however, the decision has been followed and settled the law of the state upon the subject.

[1] Fisher v. Horicon, I. & M. Co., 10 Wis. *351; Newell v. Smith, 15 Wis. *101.

Another case where a very important question was presented was the case of *State ex rel. Resley v. Farwell, Governor, etc.*, 3 Pinney, 393, where application was made to the court for the issuance of a writ of mandamus against the Governor in his official capacity. In this case it was held that the clause of section 3, Article VII of the state constitution providing that the Supreme Court should "have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari and other original and remedial writs" did not confer any original jurisdiction upon the court, but was only intended to enable it to exercise the powers otherwise conferred. The opinion of the court was written by Judge Howe, but Judge Larrabee dissented.

Happily for the state this narrow construction of the clause was promptly repudiated by the separate supreme court at its very first term in the leading case of *Attorney General v. Blossom*, 1 Wis. 318, where it was held that this clause conferred original jurisdiction upon the court for the purpose of preserving the liberties of the people and the rights of its citizens. The importance of this great principle first clearly appeared and its limits were accurately defined in the great case of *Attorney General v. The Railway Companies*, 35 Wis. 425, where the court speaking by Chief Justice Ryan laid down the principle that the clause was designed to give the court original jurisdiction of all judicial questions affecting the sovereignty of the state, its franchises and prerogatives or the liberties of its people. This latter decision has been followed ever since its rendition and constitutes a landmark in our jurisprudence.

Other cases of lesser public importance may be briefly noticed. In *Getty v. Rountree*, 3 Pinney, 379, the doctrine of implied warranty of fitness on the furnishing of an

article for a specific purpose without opportunity of testing it, is laid down; in *Hazleton v. Putnam,* 3 Id. 107, the effect of a parol license to enter upon and improve land is considered and decided; in *Kellogg v. Larkin,* 3 Id. 123, the validity of contracts in partial restraint of trade is affirmed and the limits of such contracts laid down; in *Clark v. Drake,* 3 Id. 228, the principle that equity will not take jurisdiction of a case for the purpose of enforcing a forfeiture but will leave the party to his remedy at law is definitely approved; in *M. & M. R. R. Co. v. Eble,* 3 Id. 334, it is held that before lands can be permanently occupied by a railroad company under its power of eminent domain the compensation must be actually paid or tendered; and in *Martineau v. McCollum,* 3 Id. 455, it is held that the transfer of a negotiable note secured by mortgage to a *bona fide* holder before due carries with it the mortgage security and precludes defenses which would render the contract void as between the original parties. The doctrines laid down in all of these cases have been substantially followed in later decisions and thus they have passed into the great body of our jurisprudence.

Attention must now be given, however, to the separate supreme court which was soon to supersede this temporary tribunal and become the permanent head of the judicial system of the state.

CHAPTER IV

THE JUDICIAL ELECTION OF 1852 AND THE NEW COURT

The five years during which, under the constitution, the circuit judges were to act as judges of the supreme court expired in 1853 and the legislature by chapter 395 of the laws of 1852 created a separate supreme court, to be composed of a chief justice and two associate justices to be elected on the last Monday of September, 1852, and assume their duties June 1, 1853. The salary was fixed at two thousand dollars per annum.

The control of this new supreme tribunal was a prize worth struggling for. The Democratic party was still in the majority, as is proven by the fact that Pierce carried the state by a decisive majority in the presidential election of November, 1852, but the party was torn by factions, both state and national. The free soil movement had made inroads in the ranks of both parties and the domination of the Democratic party by the Southern pro-slavery wing was bitterly resented by many Democrats. Some of the party's strongest and ablest men had openly espoused the anti-slavery cause and called themselves free soilers. On the other hand the Whig party was in a still worse condition; eminently respectable and intellectual though it was, it was not a party of action or achievement and it was fast approaching dissolution and preparing the way for an enthusiastic and virile new party of action and progress, whose leaders were to be drawn from both of the old parties and whose platform was to be based upon a great moral

issue appealing to the hearts of the masses, namely, the issue of freedom and equal rights.

None saw the future, however, and the Democrats, confident of their power, determined to sweep the entire bench and called a convention to meet at Madison, August 4, 1852, which was attended by more than eighty delegates.

The chairman was Hon. Charles Dunn, who had been Chief Justice of the Supreme Court of the territory of Wisconsin from the time of the organization of that Court until the state judiciary was organized in January, 1849. Judge Dunn was a very prominent and interesting figure in early Wisconsin history. He was born of a good family in Bullit County, Kentucky, from which state he removed to Illinois, where he was admitted to the bar in 1820 at the age of twenty-one. Here he practiced law for some years, holding some minor offices, took an active part in the Blackhawk war as captain of a company, was severely wounded at an engagement in the town of Dunn, Dane county during that war, and was appointed Chief Justice of the territorial Court of Wisconsin by President Jackson in the spring of 1836. He was a member of the second constitutional convention in 1848 and was chairman of the judiciary committee of that body.

In this convention he took an active and important part. He proposed and strongly urged an amendment to the suffrage clause of the constitution limiting the right to white, male citizens of the United States who had resided in the state one year next preceding an election or who resided in the state at the time of the adoption of the constitution. In supporting this limitation he opposed the overwhelming sentiment of his party and it was rejected. His support of this measure was afterwards used against him as we shall

see. He is said to have been the author of that important clause of the constitution which reserves to the legislature the power to alter or repeal the charter of any corporation. He was a resident of La Fayette County and lived at the historic village of Belmont, the first territorial capitol, to which place he retired and practiced his profession after the formation of the state. He was a lawyer of ability and unquestioned integrity, a gentleman of the old school, with a distinct southern tinge and commanded the confidence and esteem of the people. He was elected to the state senate from La Fayette County and served as chairman of the judiciary committee of that body during the years 1852 and 1853. He was a candidate for the nomination for United States senator before the Democratic caucus of the first state legislature, but was defeated by General Dodge. In 1858 he was an unsuccessful candidate for Congress against C. C. Washburn and in 1868 reluctantly accepted the nomination for Chief Justice by the Democratic convention against Judge Dixon, but was defeated in both instances. He died April 7, 1872, universally respected and mourned.

His services to the territory and the state deserve larger and more appreciative recognition than can here be given, but I cannot forbear quoting a part of the eloquent tribute paid to him by Edward G. Ryan on the presentation to the Supreme Court of the resolutions adopted by the bar of the state soon after Judge Dunn's death.[1]

Mr. Ryan said, among other things:

"It was Judge Dunn's lot in life to fill many stations, professional and lay, executive, legislative and judicial. So far as I know or have been able to learn, these rather sought him than he them. He certainly intruded himself into none of them. There was a modesty in the man which was rare in his gen-

[1] 30 Wis. 33.

CHARLES DUNN.

eration. I think that his own estimate of his own powers was below, not above the estimate of all who knew him well. And he was a thoroughly earnest man. He filled all his offices with singular fidelity and zeal; as if each in turn were the chief end of his life. To say that he filled them with ability would be faint praise. He did not achieve success in them by just escaping failure. He was a faithful officer; his offices were never below him, but he was always above them. None of them gave opportunity of showing all that he was, of calling out all of the strength that was in him. They were all respectable, some of them were high. But his intellect, his culture, his general capacity towered far above every station he ever occupied. We mourn for the untried powers which die out of the world with the young. Let us mourn for the world when it suffers great powers to die, unused in its service with the old.

"In his life Judge Dunn saw many men around him reach stations which he did not reach. Some of them rose worthily and usefully. Some rose only to show their own unfitness. With like pliancy or like artifice he too might have risen where his inferiors rose. But he was above all these. And standing below on the solid level of his own life and character, he ranked the superior of most and the equal of any of his contemporaries. He might have ennobled many positions filled by them; none of them could have ennobled him.

"For truly, he was a great man in private station. While his intellect was calm, it was solid; while it was not brilliant it was comprehensive and far reaching. It was deliberate, discriminating, clear, wise and just. I doubt if he left among us his intellectual equal. His character was solid, strong and resolute, but not stern or harsh. His stronger qualities were softened by great sense of humor and great kindness of heart. His temper was singularly genial. He was generous and trustful to a fault. His foibles—for like all born of woman—he had them, all arose from his genial character, the warmth of his heart and the kindness of his temper. Strong in character among the strongest; he was in carriage and manner among the gentlest, eminently modest and unobtrusive in demeanor. His culture was of a high order, in and out of his profession; like himself useful and thorough, not superficial or showy. His knowledge of men and things, of the world and its ways was profound. There were singularly combined in him the sagacity of a man of the

world, and the personal simplicity of a child. He had a deep sense of the duties of life. In all its relations, in all its chances and vicissitudes he was always true to his own views of duty. His sense of self respect was unerring and never deserted, never betrayed him. It is little to say that he was the soul of honor; he could be nothing that is false or mean. He did not know what treason was. That which he believed, that which he loved, that to which he gave his faith were part of himself. He could not desert faith, or friend, or duty, without betraying his own life. Dishonor in him would have been moral suicide.

"And this perhaps is the key to much of his life. He could not rise by lessening himself. He could not throw overboard a principle, or a duty, or a friendship. He could not equivocate with others. In matters of duty he could break but he could not bend. In matters of principle he could never tamper with the coward lie of expediency. It were nothing to call him a brave man. Some are brave physically, some are brave morally, some are brave occasionally. These were matters of accident sometimes, of habit often. But Judge Dunn did not comprehend what fear is, physical or moral. His heart was too great for any cowardice. Courage in him was not an instinct; it was a principle, a part of the character of the man. He might fail, but he could not be unfaithful. There was in his soul a pride which could not stoop to falsehood. Fidelity to his own sense of right was the breath of his life. He belonged to a school of men which has nearly passed away. He belonged to a school of politics, which seems to be in the way of following the men who made it illustrious. More is the pity. *Heu pietas, heu prisca fides.* It is not the fashion, but I mourn for both as an inestimable loss to the country.

"When the popular current turned against his school of politics many vacillated, many grew lukewarm, many abandoned it in the day of trial, and rose by the act. Not so he. His political faith was religious truth to him. He would as soon have denied his God. He never wavered. He never temporized. What was it to him that all men seemed turned against the ancient faith of his life? What, that his old and honored party was proscribed and overwhelmed? Faithful among the faithless found, no shadow of turning fell upon his life."

Such was the man who was called to preside over the deliberations of the Democratic convention.

The speeches by the leaders in this convention, which are quite fully reported in the Milwaukee Weekly Wisconsin of August 11, 1852, are interesting as showing the prevailing sentiment in the dominant party on the question of party nominations to the bench.

Upon taking the chair Judge Dunn made a short speech in which he said with characteristic candor and courage that party nomination of judges was an experiment the success of which depended entirely on the fitness of the men nominated, and that he should feel himself at perfect liberty to disregard the choice of the convention if it did not nominate as good men as might be nominated thereafter or as might be called out by the people. Following this there came a discussion participated in by several prominent delegates upon the general subject of the propriety of party nominations. Mr. D. A. J. Upham of Milwaukee said that he favored such nominations but admitted that many Democrats would repudiate them if anything but an unexceptionable ticket was nominated; Mr. Hobart of Sheboygan pledged his county for the ticket "whoever were the nominees"; Mr. Delany of Columbia County thought that every judicial election in the state should be conducted on party principles; Mr. S. P. Coon (who had recently been attorney general of the state) thought that strict party men should be nominated; he did not think that a Whig could arrive at just conclusions on political subjects, and being wrong on these subjects he should be led to distrust the judgment of a Whig upon the bench; Mr. George B. Smith of Madison thought that the convention should nominate upright men and sound Democrats who had never swerved from the straight line of party duty or allegiance to Democratic principles; if they nominated any other kind of a man he should be defeated; Mr. M. M. Cothren of Mineral Point

gladly embraced the opportunity to declare that this system of nominating candidates for the bench was entirely in accordance with his feelings and with the wishes of his constituents.

The sentiment being overwhelmingly in favor of party nominations the convention proceeded to its work. Two of the circuit judges of the state were candidates, either actively or passively, for the nomination for chief justice, Judge Hubbell of the second circuit and Judge Larrabee of the third circuit, and the convention adopted a preliminary resolution declaring that in case any circuit judge should be nominated he should resign his office within five days after notice of his nomination or be deemed to have declined. Milwaukee had two candidates for places on the ticket, Judge Hubbell for chief justice and Abram D. Smith for associate justice. Mr. Smith had been the regular Democratic nominee for circuit judge at the judicial election in 1848 and had been defeated by Judge Hubbell, who had run as an independent. The rivalry between the two men and their supporters was keen and somewhat bitter; both could not be nominated, but one was quite certain to be, not only because of Milwaukee's importance as the commercial metropolis of the state, but also because of its reliable Democratic majority.

Mr. Smith's friends seem to have been the better politicians, for they succeeded in having nominations for associate justices made before the nomination for chief justice. This change in the natural order of business resulted in the nominations of Mr. Smith of Milwaukee and Samuel Crawford of Mineral Point as associate justices and undoubtedly prevented Judge Hubbell's nomination. Judge Larrabee of the third circuit was then nominated for chief justice and

the convention adjourned. The convention struggles left much hard feeling among the Democrats, especially among Judge Hubbell's friends. The nomination of Judge Larrabee was especially disliked and that element of the party which upon principle favored independent candidacies received large additions from those who were dissatisfied with the result of the convention. A call for an independent convention was soon circulated at Milwaukee and received many hundred signatures. The convention so called met at Madison, September 1st, and was largely attended. In a lurid editorial contained in the Madison Argus and Democrat of September 1st (then conducted by Beriah Brown and S. D. Carpenter) it was thus characterized:

"Whiggery in all its phases, disappointed Democrats, defeated candidates, sore heads and sore eyes, whiskey and piety mingling like the conglomerate pillars of which we read, making common cause (but not with common object) some for revenge, some for plunder, some to elevate their friends but more to destroy the organization of the Democratic party, have met here from all sections of the state, assuming to themselves the high prerogative of revising the action of the direct representatives of the people who assembled on the fourth of August."

Better proof than this that the danger of the situation was appreciated by the Democratic leaders could hardly be wished for. The nomination of Judge Whiton for chief justice by this convention was a foregone conclusion; he had fully demonstrated his fitness for the position by his work on the former bench and he was universally respected and admired. As associate justices the convention nominated Marshall M. Strong of Racine, a very able lawyer who had been a Democrat but had become a Freesoiler and Abolitionist, and James H. Knowlton of La Fayette County, a Democrat who had received many votes in the Democratic convention for associate justice.

On August 11, 1852, Judge Larrabee had sent to Governor Farwell his resignation as circuit judge, pursuant to the resolution of the Democratic convention, which, however, was not to take effect until February 1, 1853. The good faith or effectiveness of this resignation was questioned by the Whigs, but the campaign proceeded. The fight was bitter and largely personal; the Democratic papers were full of appeals to Democrats to vote the straight party ticket, the Whigs centered their strongest efforts on the election of Whiton and the result was that Whiton, Smith and Crawford were elected and all by small majorities, though the state was heavily Democratic. Thus the first attempt to control the new Supreme bench by party nominations resulted in practical failure and the principle of independent candidacies received a substantial endorsement.

Under the terms of the law creating the new Court the term of the chief justice was fixed at four years, and the terms of the associates at two and six years respectively, to be determined by lot. The lots were drawn, the short term fell to Judge Crawford and the new court entered upon its duties in June, 1853.

A sketch of Judge Whiton's career prior to his elevation to the circuit bench has already been given and his associates upon the new bench are now to be noticed.

Abram Daniel Smith was a man of strong and original mind, of imperious will and tireless industry and withal an able lawyer and a voluminous and forceful writer. Of his early life little has been preserved and the exact date of his birth seems to be unknown. In General Edwin E. Bryant's sketch of his life published in the "Green Bag" of March, 1897, it is said that he was born in Lowville, Lewis County, New York; he seems to have studied law at Sacketts Har-

bor in that state, but nothing is known as to his early education. It seems probable that he practiced law in New York before coming to Wisconsin, as the Hon. Harlow S. Orton said July 25, 1865, in his remarks before the Supreme Court upon the death of Judge Smith that he first met him in the state of New York over thirty years before when they were both young. Just when he left New York is not known but he came to Wisconsin in the year 1842, having previously spent some years at Cleveland, Ohio, and began to practice at Milwaukee, where his ability, his earnestness and his eloquence at once brought him success. In 1847 he was a candidate for a seat in the second constitutional convention but was defeated by Rufus King. In 1848, upon the organization of the state, he was the regular Democratic candidate for circuit judge of the second circuit, then comprising Milwaukee, Waukesha, Jefferson and Dane Counties, but was defeated by a few votes by Levi Hubbell, who ran as an independent Democratic candidate. His defeat is thus explained by General Bryant:

"Before coming to Milwaukee he was a justice of the peace in Cleveland, Ohio. During a scare in regard to the smallpox a person afflicted with that disease had been placed in an isolated building and then left alone, no one being allowed to visit him. A humane and high spirited physician in violation of municipal regulations broke into the building and ministered to the sick man. For this humane but lawless act he was brought before Justice Smith who imposed a heavy fine. In the office of this young doctor was a young Irish student, William H. Fox, who afterwards became an excellent and influential physician in Dane County. When Mr. Smith became a candidate for circuit judge, Dr. Fox took the field against him, having stored away a grudge for his severity to the good samaritan, his medical teacher. By his activity in Dane County the scales were turned and Smith was defeated by a few votes, and Dr. Fox declared the account settled." [2]

[2] Green Bag, Vol. 9, p. 111.

In 1852 however, when the separate Supreme Court came to be elected, Judge Smith turned the tables and triumphed over Judge Hubbell, as we have already seen. His commanding influence upon that bench, especially in the litigation over the fugitive slave law, will clearly appear as this history proceeds and need not be enlarged upon now. He became the reporter of the Court in addition to his other duties and reported the first eleven volumes of the Wisconsin reports.

Chief Justice Cole paid him the following generous tribute upon the presentation of resolutions by the bar after his death in July, 1865:[3]

"Judge Smith was endowed by nature with a singularly original and vigorous mind, which had been invigorated and enriched by much reading and learning. He had an abiding love for and devotion to the great principles of civil liberty and natural justice, and I believe it was the strongest desire of his soul that every human being, however degraded, should enjoy his natural rights. And if, for the purpose of securing these rights to the downtrodden and oppressed, Judge Smith ever advanced from the bench constitutional views which some deem unsound, it is sufficient to say that the great mass of the loyal people of the country have adopted his views in regard to the particular law which called them forth, overlooking his errors, if he fell into any and freely pardoning something to the spirit of liberty by which he was actuated. Furthermore, he was fearless and independent in all his judgments, following no authority which did not seem to be founded on principle and reason. All his opinions were well written, and will compare favorably with those of any contemporary judge of our sister states, while some of them are marked by remarkable ability and force of reasoning."

Judge Smith was not re-elected upon the expiration of his term in 1859 for reasons which will appear later. He returned to the practise in Milwaukee and for a time became

[3] 18 Wis. 18.

ABRAM DANIEL SMITH.

an editorial writer upon the Free Democrat. He was appointed to a position in the government revenue service in South Carolina during the war and spent most of his time there. His health became impaired by his labors in this position and he sailed by steamer for New York late in May or early in June, 1865. He sank during the trip and died at or about the time of the arrival of the steamer at New York on the third of June; his remains were forwarded to Milwaukee and were followed to the grave by a multitude of sorrowing friends, June 11, 1865.

The work of Judge Samuel Crawford upon the Supreme bench gave ample evidence of his judicial abilities, but his term was too short to admit of any complete demonstration of them. His was fully as picturesque a figure as that of his colleague, Judge Smith, but in a different way.

General Bryant in his "Green Bag" sketches [4] gives the following outlines of his life:

"Samuel Crawford was born in Ballibay, County Monaghan, Ireland, April 11, 1820. He was the fourth son of John Crawford, a wholesale linen merchant, and was given an excellent academic education. He came to the United States in 1840 and studied law at Warwick, Orange County, New York. He came to Galena in 1841 and there continued the study of the law with J. M. Douglass, then a prominent lawyer. He was admitted to the bar in 1844 and began to practice in a smart town of mushroom growth which bore the literal name of New Diggings (La Fayette County). Here were then a number of able lawyers, many of whom afterwards became famous in the state. * * * Young Crawford, a man of most exemplary habits for that region of wild life, where was plenty of money and little of civilization, soon became prominent. He distinguished himself in several important trials, and his fame spread throughout the mining region. He had the bearing of a high spirited, cultured gentleman, and a manner which, while somewhat imperious and masterful, was fascinating, and he soon became

[4] Vol. 9, Green Bag, p. 112.

popular. He was an able politician and a graceful and eloquent speaker. He had no little dramatic power, and in his earlier days, would bear a part in a play with great adaptation. The theatrical troupes in those days thronged to New Diggings, sure of good houses and appreciative audiences. Crawford sometimes took a part and when Joe Jefferson was there in his youth, the young lawyer gave him advice as to his acting and how to reform it.

"After a few months, he was invited by Francis J. Dunn (brother of Judge Charles Dunn), then the lawyer of largest practice in that section of the state, to join him in partnership at Mineral Point. This firm built up a large business, and Crawford's fame extended no less as a lawyer than as a prominent advocate of the principles of Democracy."

His defeat in his campaign for re-election in 1855 and its causes will form the subject of a separate chapter. Upon retiring from the bench he practiced law for a time at Madison as a member of the firm of Crawford, Wakeley & Tenney and then removed to Mineral Point and there practiced until his death. In 1856 he ran for Congress against C. C. Washburn and in 1859 he was the Democratic candidate for Attorney General, but was defeated in both instances. In February, 1861, while engaged in the trial of a case he was taken suddenly ill and died on the 28th of that month in the forty-first year of his age.

SAMUEL CRAWFORD.

CHAPTER V

SOME CONTEMPORANEOUS COMMENTS ON MADISON, THE CAPITOL BUILDING, AND THE EARLY SUPREME COURTS

Accounts of, or comments upon, persons or events written by a contemporary, with no thought of publication, are generally interesting, and frequently illuminating. Accident has thrown in my way a number of letters written from Madison by a Racine lawyer to his wife, while he was in attendance upon the Supreme Court during the years 1850, 1852, and 1853, and as these letters contain a number of interesting references to the Court and to current events at the capitol, I shall insert extracts from them here.

The man who wrote the letters was Moses Bradford Butterfield, a lawyer in active practice at Racine at that time, and senior member of the law firm of Butterfield and Chase. Mr. Butterfield was a direct descendant of Governor Bradford of Massachusetts, and was born in the village of Canterbury, Conn., in 1797, and hence was fifty-three years of age in 1850. At an early age he moved with his parents to the village of Homer, Cortland County, New York, and practiced law there prior to 1847, when he moved with his family to Milwaukee, and practiced a short time, but located in Racine prior to 1850. In 1855 he removed to Preston County, West Virginia, where he remained until 1866, holding the office of District Judge for a time; in 1866 he removed to Ionia, Michigan, where he practiced law until his death in May, 1872. Mr. Butterfield was a fine looking man, six feet three inches in height, and retained

his erect carriage until his death. He was a voluminous correspondent, and when he was away from home he spent much time in writing letters to his wife and daughters at home, describing his experiences and philosophizing extensively upon life and manners. During those early days the whole calendar of cases in the Supreme Court was put on call at once, and the Court called the cases in their order until all were argued. Thus it was necessary for the lawyers to attend Court on the first day and remain in attendance until their last case was argued, and a lawyer with cases near the end of the calendar would be obliged to spend several weeks at the capital, awaiting the call of his case or cases. There were no railroads in the early '50's, and the stage trip was long and tiresome; to attend a term of the Supreme Court in those days was almost as much of an undertaking for the Racine lawyer as a trip to Europe at the present time.

The first letter written by Mr. Butterfield is dated June 11, 1850, and written from the Supreme Court room. Apparently it was the writer's first visit to Madison, and he thus describes the capitol and the Supreme Court room:

"I have just arrived, and had a good dinner, etc., at Welch's Hotel, and am here waiting for the dignitaries to come in. This is a fine site for a capitol, but the capitol, a poor squat, ill-proportioned sort of a thing, all out of gear and enough to make an architect run mad and flee his country. And when you look to see the cost of the thing, you would eulogize the *loco focos* for their liberality. Enough money was expended in making this burlesque upon architecture to have created a perfect Pantheon. This room is well enough when you get in,—a good carpet on the floor, nice desks, pen, ink and paper, sand-box, etc., a nice pen for the judges to sit in, damask hangings at the windows as red as old Stow's nose, and 7 by 9 maps on the wall back of the judgment seat, two astor lamps suspended by close lines, a clock swinging its pendulum away one side, ink bottles, etc., on the clerk's desk."

Later in a part of the same letter, written on the following day, he makes the following comments, suggestive perhaps of homesickness:

"I don't much like this place. I walked all round and saw some pretty places—some pretty faces, but little of the graces. Not a piano, harp, lute or guitar or even the voice of woman, except she scolded the cow while milking, or the children. It was not until I arrived at my lodgings that I heard close by the sound of a very sweet harmonica, played by the rude hand of man. I met several of the dignitaries last night on the walks. But these great men in Wisconsin are bearish, and they want the influence of high intellectual society. I have often wondered how it was possible for high-minded, refined and delicate women to endure the society of men who are so rough, and have nothing to commend them but their bows and flattering words without cincerity."

The next letter is dated July 16, 1852, and is remarkable because it contains detailed descriptions of two arguments made by Mr. Mills (who can be no other than Joseph T. Mills of Lancaster), which are fully as interesting and amusing as the speeches themselves must have been when delivered.

Mr. Mills was one of the most remarkable and interesting characters in the early history of Wisconsin. A Kentuckian by birth, he came to Lancaster early in the '40's and commenced the practice of law. He was eccentric to a degree, an able lawyer, served two terms as circuit judge and often in the legislature, commanded the respect and admiration of all his cotemporaries, and was a large figure for many years in the history of the state; a full and interesting sketch of his life will be found in Volume 98 of the Wisconsin reports at page xlv. His speeches, whether at the bar or on the rostrum, were always full of illustrations and allusions drawn from all the sciences, as well as from biblical and classical literature, and they also sparkled with humor-

ous conceits and witty repartee. It goes without saying that his speeches must have been as rambling and discursive as they were brilliant. It seems peculiarly fortunate, therefore, that we have the following quite full accounts of two of his arguments upon quite simple questions in the Supreme Court. It would seem that the arguments must have consumed at least half a day each; at the present time he would be fortunate if he was allowed half an hour for either of them.

The following is the description of the first speech:

"I have now, 11 A. M., been hearing Mr. Mills on pleading,—a dry subject to all lawyers, but he has given a desertation enlivened with tropes and similies which brought all down in merriment and laughter. The question was whether a certain plea of Bar was good in a case where administrators were sued in common law court when the estate had been settled or partly settled by the Surrogate's court as an insolvent's estate, and the objection taken to the plea was that it did not set out that the estate was insolvent. Mills said that it was unnecessary to plead the estate was insolvent, for it had become common law in this state that all estates of deceased persens were insolvent, that there never had been an estate of a deceased person known in the state not insolvent, and that it was so universal & common a thing that it was the duty of the other party to plead that the estate was not insolvent; that this was also adopted by the statute in this state so that the departed might die & rest in peace, and the estate be settled without his name being brought into court, and he rapping away at the desk of the court to direct his heirs & administrators how to cary on the affairs of suits to settle the estate for years and deprive his mains from entering into that rest of the righteous prepared for just men made perfect. For how could a man enter the mansion of the just while entangled by a common law proceeding to settle his estate and the state had fixed a rule that if the estate was declared insolvent that his estate should not be pestered with common law suits for a year & in some cases 18 months by any suits, and if the creditor did not come into the Probate Court within the time fixed, he should be forever

barred of his remedy. And he claimed that this is so that the creditor should not call the spirits of departed from the pleasures of Paradise to look after terestial things. And besides it was to teach men that they must not stand all the day idle and at night claim their wages; that they must work while the day lasts, 'for the night cometh when no man can work.' He said the glas of time had been handed over to the Probate from the common law court, and when the Probate turned the glas time was cut of, that he held the cord of legal existance in his had (hand) & when he should cut it all was gone. This, he said, was done in a simple way. The Administrator must declare the estate insolvent, and he could always do so here, for no one ever thought of anything living saved from an estate here, and the Administrator must lie, and the safe way was to do as all had done. 'Why,' says he, 'the old law gave to the most vigilant a preference so that if the creditor got a judgt. he had a prior right, but under our law there was no prefference to the judgment creditor, for he may now lie on the sofa and sleep away and submit his claim to the Probate & all will go well. The old law was mad (made) before sofas were invented, when creditors had to set on rocks or trees, but could not rest on lounges as suits do in this court, but had to be up and awake.' So that if a creditor will only place his debt into the Probate mill, it will be ground out & he will have his share of the meal. But if he will get onto the lounge and sleep Rip Van Rimple like till the lock and stock of his rotten and his dog has left him, and his rifle so rusted that he can't draw the charge nor shoot it off, and his own children have forgotten him, he cannot complain that he gets no game. He should be up and work, arouse, be awake, lay up for himself in the Probate court his treasure and then he may rest. He must come ready & by the time with his lamp trimmed or he shall not enter. He must come dressed in the right garments, according to the fashion of the times, not in the old tattered garments of the common law, or he shall be cast out; he must come to the Probate feast or he shall not sit at the table or receive his tallents with their increase, but like the unworth servant he shall loose that which he seemeth to have, and it shall be divided among the other creditors. It is contended say he this may be a privileged debt, that is, it was for Doctor's bill or funeral expenses & charges, but this man died in 1848 and the note is dated in 1843.

He never knew a dead man doctor in his last sicness so long before his death, and in this country the undertaker did not fit out & bury his subject so long before life was extinct. The doctor mad pretty speedy work of it, for if a man had anything to pay with the doctors flocked around him like herron and there would be one at his head, one in the middle, and at his feet, and he was used up in quick time. It was not the process of years for doctors to kill in this country, and the undertaker has so much work in his way to do, that he never could furnish in advance or keep ready work on hand. Besides the lawyers were always ready to grab all as soon as possible, and if the doctor did not do his work in quick time he would be ———."

The second speech was evidently made on the following day, and is described as follows in the same letter:

"This forenoon I have been listening to Mr. Mills of Ioa I think all the forenoon. He is one of the most excentric men I ever heard. He has a fine memory, wonderful imagination, and the most fanciful combination and comparison I ever knew. And chops in every kind of thing, scripture, philosophy, geology, mesmerism, ichthiology, ornithology, zoology, poetry, law, rhetoric, farming and everything all heads and points and binds them up in such a manner one would think he meant to prevent their use for any purpose, loosing sight apparently of his subject and presently they will begin to start out like rockets in all directions and all colors & heights and figures, and darting and dazeling in all directions and finally after flashing and surprising a while he gathers one and another in any way he can and lays them as auquardly as possible and as no one else would upon his premises to prove his proposition by contrast, by deduction, by light & shades & lines & circles, angles and signs & cosigns, tangents & recants, points & postures so quear that all laugh all the while and still admire his wit, good sense & nonsense.

"For instance to show that the court had not jurisdiction he claimed that some crimes were above the power of the court and only cognizable at the bar of judgment where omniscence could detect virtue, although it had purcolated through every stroke of human depravity from Cain down to the Mormon, and had been condensed under the polar frosts & rarified on the maridian. Then again other crimes were so common the court

could not take cognizance of them. What could it do with the deceits of Mahomet, who had spred them throughout the oriental regions, or with the lies of the latter day saints who were drawing tribute from the whole world and peopling with fanatics & villins the Utahs? And what could the court do with the murders by wholesale of Alexander and Bonaparte, but one single murder they might punish. And what of all this figure? Why the court could entertain a cause for a fraud, but could not punish for lying. Again he said the plff. had put in his case more words than were in Webstor's dictionary all counted, and still he had not enough to state in a logical manner a cause of action; he had stated more depravity of human action than was contained in the bible, yet he had not specified anything that would make the defendant amenable. And so he went on for 3½ hours. All listened till all were anhungered, and the court adjourned. His manner was as singular as his logic. He sometimes pulled downward with his hands as though scraching hay from a mow; then he would pitch it up again, then mow it & rake it & cock it; then he would shovel it and whirl it about & up & down and all the time he raised on his toes up & down with the greatest & most vehement action. His face & countenance sometimes turned on the one hand & then on the other, now and then observing the court and then some inanimate thing, as though he was playing hocus pocus with it. If he had been rightly educated he could have written better than Peter Pindar or Pope. But as he is he is only good to amuse, mislead, mimic & mock, smoke & smother his antagonist."

Mr. Butterfield next writes December 16, 1852, after a very strenuous stage trip which he thus describes:

"I am here half dead with bruises and knocks by staging over these rough roads in the night time. Nothing happened to us out of the common course of events. By the power of gravitation we kept pretty near the surface with now and then a jolt that would make a fellow feel after the joints in his neck. One, I remember, gave me the worst shock I ever experienced in that way, and my head aches yet and will I presume till i have time to rest. After we got within about 20 miles of here I found my truck missing and dispatched a hand to get it, and send on today stage. What will be the report of this committee I know not. But this I am well assured, that I am here with tarnished

linnen, long beard & no change of hose. I feel to ill to appear in court. Saw Whiton, told him I was sick, etc. The court had no quorum till this morning, so that little will be done. I do *hate* (I use the word in the worst sence) staging especially in the night. I have got so much of the up & down about me that it makes me quite sensitive when I am canted out of a purpendicular position, and more especially when I am beside a large man who would come upon me with a two hundred pound leveler (?) if we came into a horizontal, so I am under such circumstances inclined to dodge responsibility and rid myself of all such superincumbrance. We had a full load of gents, Hubbel, Finch, Brown, Upham and Watkins."

This trip was evidently made at the opening of the term, and it is interesting to note that in the same stage were Judge Hubbell, Asahel Finch, of the firm of Finch & Lynde, Jas. S. Brown, D. A. J. Upham, and Chas. K. Watkins of the Milwaukee bar.

Upon the following day he writes:

"Thus far I wrote yesterday and my head & bones ached so that I was forced to go to bed, and after sleeping some two hours awoke refreshed. Today I have been listening to the affairs in court. Some arguments came off, but nothing verry interesting. The court took up the calendar and are going through as far as they can. It is rather a heavy one, and will take a long time to go through. Our case stands low on it, and will not be reached till 40 cases more are heard. The bar of Wisconsin are fine looking men, as fine as I ever saw anywhere, —but one or two ordinary looking men. But as a general thing I should say they are not any too much given to hard study. Some appear to have spent much time in study, but most appear to enjoy sport and pleasure, and are apt to try to live by their wits."

Mr. Butterfield next came to Madison apparently in June, 1853, coming part of the way by rail. From Janesville to Madison he came by stage, and one of his fellow passengers was Judge Abram D. Smith of Milwaukee. The separate Supreme Court had just been organized, and the June term, 1853, was its first term. At this time there was much ex-

citement concerning spiritualism and spirit rappings, as they were called, and Mr. Butterfield gives the following account of the discussion in the stage upon these subjects, in which it appears that Judge Smith took an active part:

"When we got into the stage again there were no ladies and we began to talk of the Rappers & Rapping spirits, and drew out theories and suggestions, but could demonstrate but little, but we all concluded it was well to examine these things and see what they might amount to, as at the present day new discoveries were making both in the phisical as well as the spiritual world. And Smith quoted St. Paul, 'Why should ye, etc., that God should raise the dead,' and said this remark of his might be applied to everything passing, as we now saw as through a glass, etc. Human nature was about to be elevated by new lights, and discoveries to be made and perhaps spiritual nature had spiritual atmosphere by which it could come in contact with spirit in a way more subtle than sound is conveyed by air, or sight by light, but yet quite as tangeable as either, and that spirits' existice (existence) within this medium both in & out of the body. This may be electricity, it may be another more extensive & rarified fluid not confined to the surface of our planet, but pervading all space, and when the soul is disembodied it mounts up upon this medium of everlasting existance into a spiritual existance of either happiness or drops into a dark & desolate region of unextinguishable darkness and misery. So we talked & reasoned, remaking (remarking) the objects by the way, and the improvements going on, etc., till we arived about sunset at this place, tired, dusty, durty and glad, and rather pleased with ourselves & each other, and not as I felt last winter that I had not got one new thought, but all I had heard was repugnant."

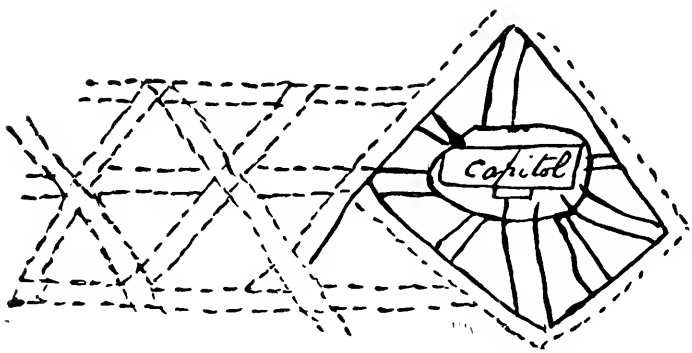
At this time the impeachment of Judge Hubbell was going on before the state senate and Mr. Butterfield (who was evidently much opposed to Judge Hubbell) speaks thus of Hubbell and of Jonathan E. Arnold, one of Hubbell's counsel in the impeachment proceedings:

"The Impeachment case is going on and no man that I have heard speak of it says anything in favor of the impeached; one

said, 'The senate will impeach him or themselves.' Arnold was in the stage behind us; he looks poorly, as though he was reaping an early harvest of wild oats and youthful follies."

On the 23rd of June he writes again, and devotes some space to a description of the geography of Madison, which he illustrates with a diagram, and winds up with a blow at Judge Hubbell:

"I have been in court all day listening to counsel as I (had) nothing else to do and to do that was pleasant for we heard some fine argumints. We had a powerful rain yesterday; it poured down masterly, and today we have had it as cool as we



could wish. The weather has taken a fine turn, much in favor of good wheat. I am certain I have never seen the crops better. This town has improved; the capitol is a miserable object to talk about, or look at, but it stands on the prettiest spot in the whole earth for such a building. It is right on the sumit of a rising ground which slopes off one way, west, to a kind of wet marsh or ravine, north to the lake, south to the lake, and east to the lake & marsh. The publick square is an area of about 8 or 10 acres in square form; the capitol in the center, square with the world. The publick square is cornerwise with the world, a corner to each cardinal point. The broad walks run one east, south, west & North, and one to each quarter, making eight walks. Supose this diagram was square you would have 8 avenues leading from the capitol to the center line, and these main avenues extend out into the country as far as the city extends, cutting the town up into diamonds, so it may (be called)

the city of diamonds. It looks best on paper, if well plated. There are many good houses here, but no good publick houses. They have a fine sand stone for building, which is easily cut and works finely, and several good buildings of it are going up. There are fewer poor buildings in proportion here than any place I know of. I have seen some tolorable gardens, but they are not equal to the houses generally. The soil is fine for gardening, but not as good as in Racine, I think. I have just come from court, where I have again listened to the conclusion of the case yesterday begun. After counsel concluded, Hubbell, the judge before whom the cause had been tried in the court below, came in and made some remark to the court in paliation of some strictures on his character, and showed that he was bleeding at every pore. He is to be pitied, but he cannot be respected. Smith who is now on the bench, who has been galled by Hubbell over & over again, must feel as though the day of retribution had come."

On the 28th of June he is still waiting for his case to be reached; the impeachment trial is still on, and he writes as follows:

"Another day has been passed away in court hearing a short case which has taken a good part of 3 days or more. I think we all got intolorable tired of the concern, and were glad when it was ended, so that we might hope of getting on towards our case a little. But that case is over, and the business of the court will progress again. Hubbell has been on the defence for two days, and it is said his witnesses injure him rather than benefit him. One he had on the stand this A. M. hurt his cause very much. A woman, she swore the judge put his arm about her; she remonstrated. She thought no particular harm was done, but being asked why she remonstrated she said she thought it was a little exciting to human nature. He ought to have known what she would say, and should have avoided calling her. But I think his chain is run out, as it is with all villins, and he must fall. Let us be content with our humble lot, rather than be tormented in the manner those are who seek high places."

On the following day he argued one case, and writes as follows:

"I have just come down from the capitol, having been detained arguing a case before the court; case of Barnes & Killip v. Elm-

linger & Keidle, which was called up rather unexpectedly, standing No. 58 on calendar. A great number of cases were passed on, account of Attys being in court of impeachment. I do not know how that case progresses."

At 7 P. M. of the following day he writes again:

"7 P. M. The court have adjourned, having gone through the calendar, and passed 4 causes I am engaged in on account of the impeachment court, so that I must come up when that court gets through. I have argued one cause only, and that the opposing attorney was not present, and perhaps will not attend during term. If he should I shall be obliged to answer his argument in writing, so I must stay at least till the cases are decided. If there was a railroad from here we would be at home over Sunday."

There are no more letters till July 3rd, when he writes again of the town, as follows:

"I have wandered around this town in all directions, and yet I do not understand it; nothing is square here, all is diamonding, so when you go in any one street you are crossing almost all other streets; such streets cut a city into a vast number of blocks and pointed lots; looks well on paper, but is not so useful as the Philadelphia plan of right angles. I was going up early this morning to the P. O. to get letters, and passed along the side walk newly graviled by the sands of the beach of one of the beautiful lakes surrounding the town, and as the sun was striking it in almost horizontal lines it sparkled as though it was full of small mirrors, and I had the curiosity to examine it, and found mixed with the sand & gravel innumerable small broken shells, white and many nearly transparint, and some I found nearly whole. They appeared to be of two kinds mostly, the univalve & the bivalve, and I was led to consider what a vast amount of animal life had sported in those bright waters & perished on the shores. Many of them doubtlessly were devoured by the sharks of the fresh water, called pike, a large Saurus fish."

On July 10th the impeachment trial was drawing to a close, and he writes as follows:

"Well, the closing speech by Ryan is almost finished,—will be tomorrow. I have not heard him. I have spent my time in

the S. P. Court, where I could learn as much and keep cool. I am told Ryan was brilliant and exerted himself very much."

On July 11th he writes:

"6 P. M. I have spent the day in court; heard several opinions, very good,—one quite stringent and rather in advance of other courts, but I cannot say but in the main correct.

"The court of impeachment have been voting on the specifications and the heaviest vote yet given is one-half against Hubbell; it requires 2/3ds to convict. I am told the most important specifications are passed upon, and the prospect is he will escape, but————————."

At 2 P. M. of the 12th of July, he writes as follows:

"The great farce is over now. Hubbell is acquited, but not cleared. And the irish had a great row,—burned Ryan in effigy, drumed the whole town, and fired cannon, and Hubbell on a call addressed the mob and made himself a fool, as he always was. No one thinks as well for his success of him. I think it will react on him and make him appear mean if those who are opposed will be still. Going to the court."

On July 15th he says:

"I was not quite well last night, and we had a little way from my lodging Dutch fiddle all night, and it kept me awake. But I feel better today. Besides the dogs & cats had concerts last night. I hope they have adjourned and will leave with the legislature. The House were quite incensed by the decision of the Senate in the impeachment case, and would not concur with them as to paying counsel. The party will take a shock by this matter, and must be a good deal divided in consequence. I am not able to say when I shall be able to come home, but probably shall in some two weeks."

On July 19th he achieved some results, as appears by the following extract from his letter of that date:

"You know I suppose that I had a motion served on me a few days since in the Whiting[1] suit which Randall & Ryan thought was to be the means of blowing up the case to all intents and purposes. Randall said to me he should beat me on it, and that

[1] Whiting v. Gould, 1 Wis. *195.

it was what would beat in the suit, and he said in court the motion probably would dispose of the suit for the term, if not for good. But this morning the court decided against him and gave us costs, and I hope to get at least $20 out of them soon so as to defray expenses. We shall soon reach the case, and I hope now to be able to come home in the course of ten days. I believe I have been from home one long month, and I want to see all of you."

The letters here cease. It is not to be understood that in quoting the remarks about Judge Hubbell and the impeachment trial the author of this volume is adopting the views of Mr. Butterfield or approving them. I have not deemed the merits of that prosecution as at all involved in the scope of this work and do not wish to express any opinion concerning it. Judge Hubbell had warm friends and determined enemies, and his impeachment aroused the bitterest feelings on both sides. It must be remembered that Mr. Butterfield wrote from the standpoint of an avowed enemy and the extracts have been inserted here simply to illustrate the feelings of Judge Hubbell's opponents.

CHAPTER VI

PERSONAL RECOLLECTIONS OF WHITON BY HENRY M. LEWIS

One of the oldest members of the Madison bar is Mr. Henry M. Lewis who came to Madison, a young man, in 1852 and has been an active and honored member of the profession ever since that time, being now Referee in Bankruptcy for the Western District of Wisconsin.

Mr. Lewis had an intimate personal acquaintance with Chief Justice Whiton. At the earnest request of the writer Mr. Lewis consented to embody his personal recollections of Judge Whiton in a short sketch which is intensely interesting as it seems to me and it is here inserted in its entirety and form the present chapter.

Judge Whiton, when he first came to the territory of Wisconsin, settled upon a small farm on the prairie near what is now the city of Janesville. In his youth he had learned the trade of a millwright and carpenter, and he built with his own hands a small cabin upon his farm where he lived for some years the life of a bachelor and somewhat that of a hermit. He afterwards erected the dwelling in which he was living at the time of his death,—doing the carpenter work himself. At the time he first settled on his farm, he seemed not to seek acquaintances or social intercourse; yet he was always democratic, simple and unassuming in his intercourse with his fellowmen, and it was the farmer folk who were his neighbors who first discovered his rare abilities and sterling character. It was through their appreciation

of him and their urging him for positions of trust that he was first started upon his political career which was destined to reflect such honor upon him and upon the state of his adoption. As I recollect his appearance when I first knew him, about 1852, he was a man somewhat above the average height and size indicating that in his youth he had been a man of more than ordinary physical strength and vigor, but from the time that my recollection of him began, there was in his walk and movements a suggestion of loss of physical strength which increased until the time of his death. But his face was the most striking feature of the man. There was little color in the face, but it was one that at once inspired confidence in his integrity and purity of character.

The portrait of him which has hung for some years in the Supreme Court room of the state gives a correct and true idea of him as he appeared in life. When I first knew him he was 47 years of age, but had the appearance of being older. His blonde hair was well sprinkled with gray and he seemed more venerable than the four or five circuit judges associated with him upon the bench when the circuit judges of the state constituted the Supreme Court, although two other judges, Stow and Jackson were his elders.

He had at some time in his life been addicted to the use of intoxicating liquors to excess, but he had before I knew him reformed in that respect and become a model of sobriety, in all respects exemplary in conduct and character. But this may have caused the physical decay spoken of and the premature aging of the man, and have sown the seeds of the disease which finally caused his death at the age of fifty-four years.

He was always kindly and courteous in his manner possessing a natural dignity which no circumstances seemed to

disturb. He was easily approachable, but reticent in conversation seemingly never seeking acquaintances, but capable of forming strong friendships with those with whom he had become thoroughly acquainted.

Upon the organization of the separate Supreme Court, in 1853, he had been elected chief justice by the people of the state and his associates were Justices A. D. Smith and Samuel Crawford, the latter being succeeded June 1st, 1855, by Hon. Orsamus Cole, who continued on the bench until the death of Judge Whiton.

It was the practice of that court for the chief justice to announce the decisions of the court orally from the bench before the opinions had been written by the members of the court. Usually these decisions were not written up and reported for a long time subsequent to their announcement as above stated. These occasions were therefore important to the bar of the state who desired to keep in touch with the latest decisions of the court, and especially those who had participated in the argument of the cases upon which decisions were anticipated, and usually the small court room was well filled with attorneys. It was the custom of the chief justice first to give a statement of the facts of the case. Often these facts were long, complicated and involved. They were given without reference to any notes or memoranda. He would state them in their logical sequence omitting everything immaterial or irrelevant, or if alluding to them where they had been urged by counsel, he would merely state that the court considered them immaterial or irrelevant and when the statement of facts was concluded, it was clearly seen what the opinion of the court must be. This marvelous exhibition of memory on the part of the chief justice was always a matter of wonder and of deep interest to the bar, and none of those who listened paid

more rapt attention than his associates upon the bench. If they discovered any omissions or inaccuracies in his statement, they made no sign by word or look.

It was on one of these occasions that the late Myron H. Orton, then a prominent attorney of the city of Madison, was standing leaning upon the end of the bench listening intently to the chief justice as he announced the decision in a case in which Mr. Orton had appeared as counsel and in which the decision was adverse to his client. Mr. Orton, always dramatic, as the chief justice concluded, said in a stage whisper which would be heard through the courtroom, "That sounds plausible." This caused a ripple of laughter among the attorneys present in which the members of the court including the chief justice joined.

When alone or walking upon the streets there appeared about Judge Whiton an absentmindedness, a sort of faraway look in his eyes which indicated that his mind was preoccupied. As illustrating this absentmindedness and preoccupation of mind, this anecdote was told me by the late Judge Thomas Hood with whom Judge Whiton always made his home while attending to his official duties in the city of Madison.

There was a resident of the city, Colonel Wm. B. Slaughter, a man of culture, a good conversationalist, but somewhat of the character of Col. Sellers as depicted by Mark Twain. He had upon a farm he owned a bed of peat and he thought there was millions in it, and he sought to talk peat to every man whom he met whether he expected to induce him to become financially interested with him in the development of his peat beds or not. He told his friend Judge Hood that he would like to meet the chief justice and so Judge Hood kindly invited him to his house to

dinner to meet the judge. During the whole time that he was in the presence of the judge, he discoursed upon the value of his peat beds, what could be done with them, and the money that could be made out of them, etc. But the chief justice made no response, and wishing to know what impression he had made upon him, he finally said, "Well, Chief Justice, what do you think of peat?" Justice Whiton roused himself and said. "Pete who?" showing he had been wholly oblivious of the hour's talk in which Col. Slaughter had indulged.

When presiding in court, Judge Whiton was an attentive listener, seldom interrupting the argument of counsel by question or comment, and attorneys appearing before the court were encouraged with the feeling that they were receiving from the Chief Justice an attentive, impartial and unprejudiced hearing.

Judge Whiton was not an easy or fluent writer. His opinions as found in the Wisconsin Reports from 3d Pinney to the 8th Wisconsin were generally brief and directly to the point. His statements were clear and without any attempt at elaboration of the point decided. His associate, Judge Smith, on the contrary, was an easy and fluent writer and his opinions were often lengthy. This anecdote is told of these two judges.

A case had been assigned to Judge Smith to write up and after working at the matter for some time he came to the chief justice with the manuscript of the opinion which he had attempted to write covering page after page of paper, and showing it to Judge Whiton said, "Chief Justice, I cannot decide this case. I will show you what I have written upon it." Thereupon Judge Whiton took from his desk a small piece of note paper and writing upon both

sides of it, handed it to Judge Smith and said, "Judge, what do you think of that?" Judge Smith, after reading it, replied, "It seems to decide the case." Whiton replied, "I thought it did."

Berryman in his "Bench and Bar of Wisconsin" states that Judge Cole, who with the exception of Judge Smith was longer associated with Judge Whiton upon the bench than any other judge, said that the written opinions of Judge Whiton did not fairly represent his powers; that he was much stronger in the consultation room than with the pen; and that some of his discussions with his judicial associates in the privacy of that room were very remarkable for their learning and disclosed him as a man of extensive powers. And we join with Mr. Berryman in regretting that failing health prevented Judge Cole from writing a sketch of the life and services of Judge Whiton, which he had at one time intended to write.

Judge Smith in his tribute to Judge Whiton at the meeting of the Milwaukee bar called to express their sorrow at his death, said:

"All along his official career he preserved on the bench and in the consultation room, a strictness of propriety which can scarcely be equaled, a conscientiousness which never wavered, a depth of thought and comprehensiveness of the subject-matter ever present, commanding without force, controlling without intrusion, clear and unassuming in his high office, great where he thought least of greatness, but great only wherein man can be truly great,—because he was wise and good."

A friend of mine who was present at the time when the late E. G. Ryan spoke of the then-attorney general, Hon. Experience Estabrook, as the "vagabond attorney general" said that Judge Smith's face colored, Judge Cole looked frightened, but there was not the least appearance of excitement or loss of the usual serenity in the face of Judge

Whiton and that while dealing with the offending attorney his face showed no emotion and his calmness and serenity was the same as upon any ordinary occasion or transaction of business before the court.

Those who remember the case of *Ex rel. Bashford v. Barstow,* will recall the intense excitement in this state while that case was pending. Mr. Berryman in his sketch of Judge Whiton in "Bench and Bar of Wisconsin" before alluded to states that Judge Cole said that the people came armed into the supreme court room and that arms were stored in the basement of the capitol and there was a general apprehension that there would be a bloody conflict between the partisans of Bashford and Barstow, and that in his, Cole's, opinion there would have been such a conflict had it not been for the confidence of the people of the state in the integrity of Chief Justice Whiton and their feeling that he could not be brought to lend himself to a partisan decision.

While he held the office of chief justice of the supreme court, he continued his residence upon his farm near Janesville and was never in Madison except while attending to his official duties and then he kept closely to himself and to his work. He was seldom seen in public and I do not remember during the several years that I knew him to have seen him at any public or social gathering. And I have understood that at his home in Janesville he never sought social intercourse with his fellows.

The late Jonathan E. Arnold at the bar meeting in Milwaukee before alluded to said: "During the long session of 1840–41, I was a member of the council and was a roommate of the deceased. Then I had an opportunity to know the man, and the high impression that I had formed of him

was fully confirmed. I then saw the clearness of his intellect, the kindness of his heart, and the simplicity of his character. I saw something, too, of that peculiar element of his life which was not misanthropy, but a tinge of melancholy and disappointment, and learned something of its causes. All that I saw and knew of him, but served to lead me more highly to appreciate his abilities and his unblemished character."

His appearance was always modest and unaggressive. Whatever political situations he occupied were never sought but accepted by him upon the solicitation of his fellow citizens and the people of the state. At the time of his election as Chief Justice, the state was Democratic in politics and he was the only Whig elected to the bench, Justices Smith and Crawford having been the Democratic candidates for associate justices.

He was to me and has always remained in my memory, the ideal judge.

CHAPTER VII

THE BOOTH CASE AND THE CONFLICT WITH THE FEDERAL COURTS

For the first year the business of the new Court was principally of a routine character, involving the usual controversies, public and private, which would naturally be expected to arise in a new state. Important questions were impending, however, and the infant Court was soon to become the theater of a great political drama, which was to claim the attention of the nation. The great wave of anti-slavery sentiment was sweeping over the north, gathering strength and volume with every passing week and the irrepressible conflict between freedom and bondage was on. In order to fully understand how the Court became involved in one of the preliminary struggles in this historic conflict it will be necessary to take a backward glance at federal legislation.

When our forefathers constructed the Federal Constitution, they placed therein without debate or serious opposition the following simple provision: "No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." [1]

The purpose of the provision is very apparent, and its necessity, so long as slavery existed under the protection of

[1] U. S. Const. Art. IV. Sec. 2.

the law in any part of the Union, is equally apparent. In pursuance of this section, Congress passed a law during the administration of President Washington, providing that the owner of any runaway slave might arrest him, take him before a judge of either the Federal or State Courts, and prove by oral testimony or by affidavit that the person arrested owed service to the claimant under the laws of the State from which he had escaped, and thereupon it was made the duty of the judge to give a certificate that such proof had been made, and the claimant could remove the fugitive to the State from which he had escaped. The law also provided a penalty of $500.00 for obstructing its execution or concealing the fugitive with knowledge that he was such.

Thus the law remained until the year 1850. Meanwhile the moral sentiment of the North became aroused; the liberty party was organized, the underground railroad flourished, and northern men and women refused to act as slave-catchers, or assist in perpetuating the crime of slavery. In proportion as the anti-slavery feeling grew at the North, the devotion of the South to the "divine institution" seemed to become more determined: the constant stream of fugitives that passed through the Northern States to Canada, and the evergrowing difficulty which the slave-holder experienced in attempting to assert his rights in his human chattels in the North, alarmed the people of the South, and they demanded greater guarantees and more certain remedies for the retaking of their runaway property. Finally an act was passed in 1850 which was intended to meet the demands of the South. It placed the whole machinery for the recaption of runaway slaves exclusively in the hands of the Federal officers. It provided for a hearing before a United

States judge or court commissioner, and made the certificate of such officer conclusive; it allowed proof to be made by affidavit on the part of the claimant, but shut out the testimony of the fugitive entirely; it increased the penalties for resistance to the enforcement of the law and for concealment of the fugitive, and contained other obnoxious provisions.

This law was a part of the compromise legislation of that year, but, like most compromises, it failed to satisfy either party. Instead of settling the matter, it simply added fuel to the flame of excitement in the North, and nowhere in the West perhaps did the excitement run higher than in Wisconsin. The immigration into this State from the New England States and New York was very heavy during the early fifties, and the immigrants brought with them their love of freedom and hatred of slave-catchers. On the 19th of May, 1848, Sherman M. Booth arrived at Milwaukee. He was young in years, but he had stumped Connecticut for the Liberty party for six successive years. He was an enthusiastic, perhaps a fanatical, abolitionist, and he came West to further the cause that he loved by editing a newspaper. The "American Freeman" was then being published in Milwaukee, and Booth purchased a half interest in it and became its editor. He changed its name to the "Wisconsin Freeman," and after the Freesoil party was organized the name was again changed to the "Free Democrat," and he became the sole proprietor. For several years it was the only out and out abolition paper in the State. Probably it made up in quality for what it lacked in quantity. The times were exciting, and Booth contributed his share to the excitement without difficulty. After the compromise acts of 1850, his denunciations of the slave power were more

vitriolic than before. The inevitable conflict was approaching faster than any one knew and Booth was one of those who were hurrying it on.

In the spring of the year 1852 a negro slave named Glover ran away from his master, one Garland, who resided near St. Louis, and came to Wisconsin. He stopped at Racine and found employment in a mill about four miles from the city. Here he lived until March, 1854. In some manner Garland ascertained his whereabouts and came to Wisconsin early in March to reclaim his property. He made the requisite complaint before the late Winfield Smith, United States Court Commissioner at Milwaukee, and a warrant was issued for the arrest of the negro. A deputy marshal of the United States proceeded to Racine with Garland and several assistants and during the evening of March 10th forced an entrance to Glover's cabin, knocked him down, bound and handcuffed him and put him in a wagon, drove rapidly to Milwaukee and lodged him in the county jail. The news of the brutal arrest was not long in reaching Racine, and the excitement in that thriving city ran high. In those days the court house meeting was the universal remedy for every public ill. The use of the court house was free to all. Every man was an orator, and resolutions of mighty sound and startling import were easily drawn and enthusiastically passed. So in the early morning of Saturday, March 11th, the court house bell at Racine rang vociferously and the people hurried to the temple of justice. Fiery speeches were made and resolutions were passed. By these resolutions the arrest of Glover was denounced as a brutal outrage, and a fair and impartial jury trial of Glover in this State was demanded; the citizens also resolved that they would attend in person to secure Glover's release,

adopting as their motto the golden rule; and further that "inasmuch as the Senate of the United States has repealed all compromises heretofore adopted by Congress, we, as citizens of Wisconsin, are justified in declaring, and hereby declare, the slave catching law of 1850 disgraceful and also repealed."

The pioneers of Wisconsin were men of high courage and prompt action. These resolutions prove the fact. None other would attempt to repeal an act of the Congress of the United States after a debate of half an hour at a court house meeting. A committee of one hundred citizens was appointed at the meeting to see that the resolutions were carried out, and the committee departed for Milwaukee by steamboat early in the afternoon. Meanwhile history was being rapidly made in Milwaukee. The news of the arrest came to Booth by telegraph early in the morning of Saturday, and he at once consulted with Gen. James H. Paine and his son, Byron Paine, who were then practicing lawyers in Milwaukee, as to the legal measures to be taken to free Glover; a writ of *habeas corpus* was agreed upon as the proper remedy, and it was procured from Judge Charles E. Jenkins, of the County Court. But here arose a serious difficulty. Neither the sheriff nor the United States marshal would obey the writ and produce the prisoner, because they claimed that the prisoner was within the exclusive jurisdiction of the United States Court. This refusal created great excitement and indignation; a meeting was called in the court house square at two o'clock in the afternoon; men rode through the streets on horses summoning "freemen" to the meeting. It was largely attended and was addressed by fiery and eloquent speakers, and as a result a rush was made for the jail at about six o'clock in the

evening, the door battered down, and Glover taken out and hurried away.

The following description of the affair contained in the weekly Racine Advocate of March 20, 1854, may prove interesting:

"A committee of twenty-five of the citizens of Milwaukee was appointed a committee of vigilance and protection. A committee of two was also appointed to wait upon the sheriff to see if he still persisted in refusing to serve the writ. This refusal being persisted in, measures were immediately taken to see what steps were necessary to see that the 'Republic received no detriment' and that the laws of the land were enforced. The citizens of Milwaukee, on this notice being given, assembled to the number of five thousand in the court house square, where they were addressed by the most eloquent and influential members of the Milwaukee bar. The excitement continued and spread to all parts of the city. At five o'clock the delegation from this city arrived at Milwaukee and were escorted to the court house square, where the citizens of Milwaukee were listening to addresses upon the subject matter. The military had been ordered out, but did not appear on the streets. At six o'clock the friends of law and order came to the conclusion that it would be unsafe, as well as eminently wicked, for a human being to be locked up in a jail over the Sabbath against whom no crime had been alleged; accordingly a courier was despatched for a team, and as the court house bell rang the tocsin of liberty the writ of 'open sesame' was enforced, while the glorious sun sank smilingly in the west as he shed his rays upon the spires of Milwaukee for the 11th day of March, 1854; a glorious prelude to the coming day of rest. The doors of the prison shook as though another Peter were within, and the willing cell yielded up its victim to the fresh light and air of God's glorious earth. The negro waved his hat as he mounted the wagon in return to the waving of hats and joyous shouts which arose from that vast crowd of freeman who said that the Milwaukee jail could not be used for the confinement of men who had committed no crime."

The mixture of biblical allusion, "fine writing" and satire in this account is certainly amusing, if not effective.

Booth describes his own share in the rescue in the course of an address delivered by him in Madison, March 12, 1897, as follows:

"In riding through the streets of Milwaukee to call a public meeting, I did not cry as was reported and sworn to, 'Freemen to the rescue.' A forcible rescue was never my purpose; I aimed simply to secure for Glover a fair trial and competent counsel, and in calling the meeting I used but two forms of speech, viz.: 'All Freemen,' or 'All citizens who are opposed to being made slaves or slave catchers turn out to a meeting in the court house square at two o'clock,' the only variation being that I sometimes used the word 'men' and sometimes the word 'citizens'. * * * The immediate cause of the rescue was the speech and report of C. K. Watkins, chairman of the committee to wait on Judge Miller and inquire if the writ of liberty would be obeyed. He reported that Judge Miller said, 'No power on earth could take him from his jurisdiction.' He (Watkins) expatiated on the tyranny of the judge and the hardship of imprisoning Glover over the Sabbath; I had invited the Racine delegation to meet our committee at the American House for consultation and was about to start when I heard a shout and saw a rush for the jail and anticipated the result. I went up to Dr. Wolcott and Byron Paine, standing on the court house steps, and said to them as the crowd was bringing Glover out, that I regretted the act, that it was a bad precedent and the people would not discriminate between this case and one in which a prisoner was rightfully held. To personal appeals of Democrats before the first meeting was opened, 'Mr. Booth, let us take him out,' I answered, 'No, we must use legal and peaceful methods,' and during the whole of this scene I counselled against violence, publicly and privately. Yet in all the histories of this case, in newspapers, pamphlets and books, I am represented as riding through the streets of Milwaukee shouting 'Freeman to the rescue.' * * * I respectfully decline the honor of a deed I never performed. The only responsibility attaching to me for the rescue of Glover is that I helped create a strong public sentiment against the fugitive slave act and called the meeting to protect the legal rights of Glover and give him a fair trial. If, when assembled for peaceable and lawful purposes, the course of the judge and his bailiffs excited the people to take Glover out of jail against my advice, I was guiltless of the rescue."

Glover made good his escape and was never recaptured. The great "writ of freedom" had failed indeed, but a power more effective than any writ, the righteous wrath of an outraged people, had accomplished the purpose. Now commenced the legal battle which was destined to array court against court, and last until the booming guns of Sumter announced the coming downfall of slavery.

While the negro had thus been permanently released, Booth still remained at his post, and the temptation to bring down upon his head the penalties of the law which he had set at defiance was too great to be resisted. He was arrested for aiding in the escape of a fugitive slave, was examined before a United States Commissioner, and bound over for trial before the United States Court. Bail was furnished, but his bondsmen soon surrendered him at his own request, and the Court Commissioner by warrant committed him to the custody of the United States Marshal. Probably this surrender was for the purpose of instituting the legal proceedings which now began in the State Court. Byron Paine was then a young lawyer in Milwaukee, not yet twenty-seven years of age. He had come to Milwaukee with his father, James H. Paine, some seven years before. The father was a man of ability, a lawyer of some prominence, and so strong and pronounced an abolitionist that he found it necessary, or at least desirable, to remove from Painesville, Ohio, to Milwaukee. So Byron drank in abolitionism with his mother's milk. Possessed of a rare power of language and literary composition, he wrote much for Booth's paper, the Free Democrat, while preparing for the bar. He had not attained great eminence in the profession, though his capabilities were known by some and his sterling honesty and courage by many. The time had now

come when he was to demonstrate his abilities and he recognized the opportunity and grasped it. His whole soul was in the cause; he entered the combat as did the knights of old who fought for the holy sepulchre. It was to him the cause of God as well as the cause of freedom. Upon the day following the commitment of Booth to the custody of the marshal, application was made to Judge Smith at chambers for a writ of habeas corpus directed to the marshal. The writ was allowed, the marshal claimed justification under his warrant, but after argument by Mr. Paine and Mr. J. R. Sharpstein on the other side, Mr. Justice Smith in a long and able opinion discharged the prisoner on the ground that Congress was given no power by the United States Constitution to legislate on the subject, but that the clause in the Constitution providing that fugitive slaves should be given up to the owner was simply a command to the State and to be enforced by the states alone.[2]

This decision was received by the partisans of Booth in all parts of the State with great enthusiasm. The court house meeting was immediately reconvened at Racine, and again passed resolutions. It will be interesting to note their tone—they are as follows:

"*Resolved*, That we hail with unmingled satisfaction the decision of Judge Smith by which the constitution is vindicated and restored to its original purity;

"*Resolved*, That Judge Smith's construction is the true and undoubted meaning of the Constitution as left by the hands of the fathers who framed it, that the reasoning by which he arrived at that conclusion is unanswerable and places the Judge in the front rank of constitutional jurists;

"*Resolved*, That it is 'holy light' when compared with the muddy and discrepant opinions of the United States Court in the famous Prigg case, reported in 16th Peters;

[2] 3 Wis. Rep. *1.

"*Resolved*, That with him we sincerely and solemnly believe that the last hope of a free representative government rests upon the *state sovereignties* and fidelity of state officers to their double allegiance to the state and federal government;

"*Resolved*, That Judge Smith has manfully and ably fulfilled the trust of double allegiance which the people of Wisconsin committed to him.

The case was immediately taken before the full bench of the Supreme Court by writ of certiorari, and heard at the June term, 1854. Upon this hearing, Mr. Paine again appeared for Booth, and he then met a foeman worthy of his steel, one who like himself was destined in after years to add lustre to that very bench, Edward G. Ryan. Paine's speech has been preserved in pamphlet form, and it was worthy of the occasion and the man. He argued that the fugitive slave law was unconstitutional on three grounds: (1) because Congress had no power to legislate upon the subject at all, being the ground taken by Judge Smith in his opinion; (2) because it provided that a man might be reduced to a state of slavery without a trial by jury, and (3) because it vested judicial power in Court Commissioners contrary to the terms of the Constitution, which provided for the vesting of such power in certain Courts. The Court affirmed the order of Justice Smith discharging Booth from imprisonment, July 19, 1854.[3] The affirmance was unanimous, but the judges differed on the ground upon which the decision should be based. Chief Justice Whiton admitted that it was finally established by the case of *Prigg v. Pennsylvania*, 16 Peters, 640, that the United States had power to legislate on the subject of fugitive slaves, but he held that the act was unconstitutional for the reason that it vested judicial powers in Court Commissioners, and because

[3] 3 Wis. *49.

it denied to the fugitive a jury trial. Judge Smith retained his views as to the lack of power in Congress to pass any law on the subject, and concurred with the Chief Justice in his objections to the law; while Justice Crawford dissented from the conclusion of the majority, holding the law to be valid, but agreeing in the result because the commitment did not on its face show that the case was within the law.

The legal victory thus won by Byron Paine seemed to be complete. He had met in the highest tribunal of the State one of the greatest men of the profession, and had utterly routed him. The decision of the Court touched and thrilled the popular heart, and the beardless champion of human freedom was unquestionably the hero of the hour. Nor was the enthusiasm over the victory confined to the narrow limits of the State of Wisconsin. The contest had been eagerly watched by leading abolitionists in all parts of the country, and the victory was hailed by them with delight and the youthful victor was overwhelmed with praise.

Charles Sumner wrote on the 5th of August, 1854:

Washington, Aug. 5th, 1854.

"* * * I congratulate you upon your magnificent effort which does honor not only to your State but to your country; the argument will live in the history of this controversy. God grant that Wisconsin may not fail to protect her own right and the rights of her citizens in the emergency now before her. To her belongs the lead which Massachusetts should have taken. * * *"

Wendell Phillips thus congratulated him:

Milwaukee, Nov. 24th.

"Dear Sir:

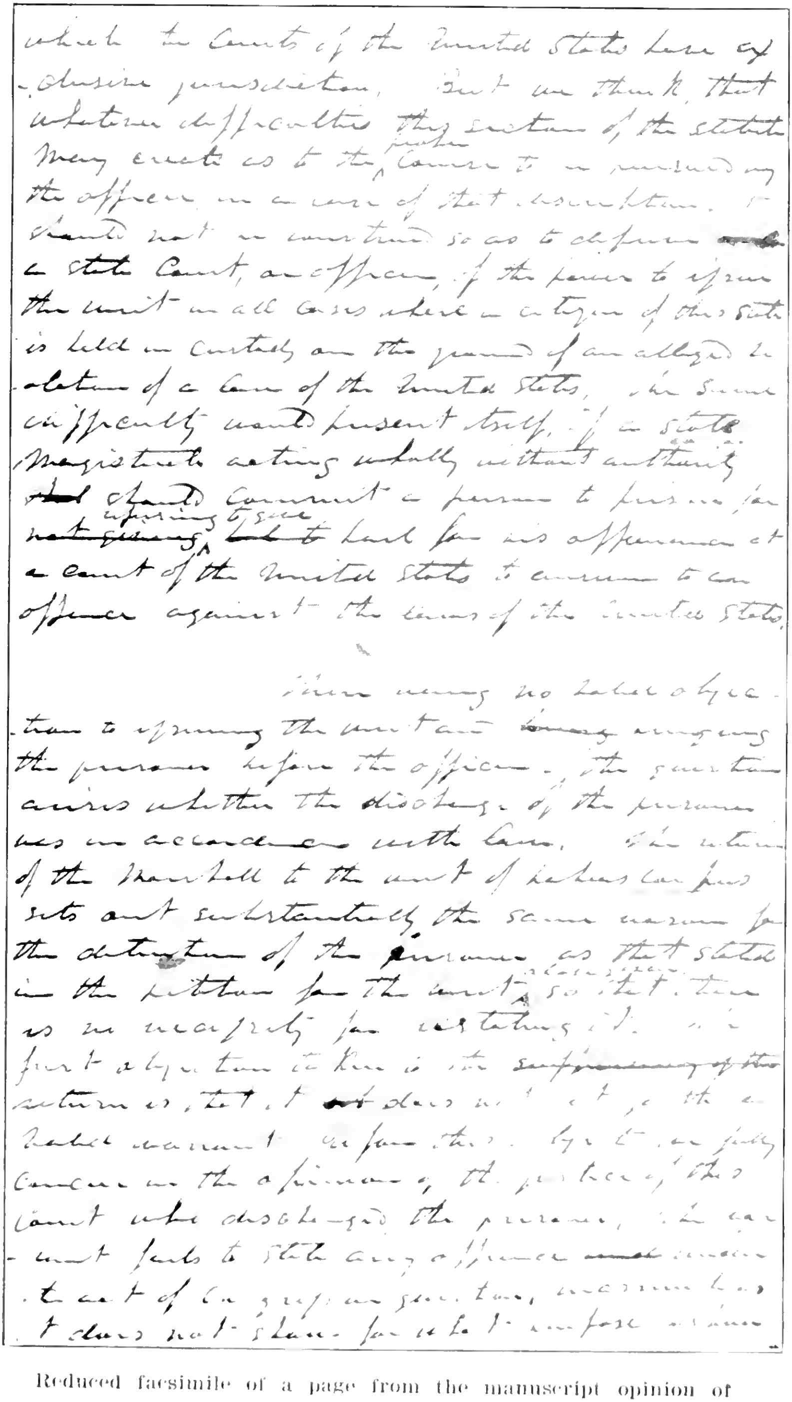
I hoped to have met you last evening to tell you with what unbounded delight I read your argument in the Booth case. You know you have many companions in the pathway of that effort; but I think none excels you in the completeness and force with which the points are presented and some of the views

with which you sustain points made by others are strikingly original. I cannot see that you leave anything further to be argued. * * *"

But the litigation had not ended; it was in fact but just begun. The discharge from confinement did not stop the prosecution of Booth in the United States Court. In July, 1854, Mr. Booth and one John Rycraft were finally indicted for violation of the fugitive slave law, and were arrested on warrants to answer the indictments. Booth again applied for a writ of habeas corpus to the Supreme Court, but it was unanimously denied, not because there had been any change of view in the minds of the justices on the main question, but because, the United States Court having obtained jurisdiction of the case and the prisoner being held by apparently lawful process issued by such Court, (and not by a Court Commissioner), no other Court should interfere and endeavor to take the decision of the question of jurisdiction away from that Court. This is the familiar rule of comity, by which, when the jurisdiction of a matter has been acquired by one Court, another Court of concurrent jurisdiction will not interfere.[4]

Booth and Rycraft were now tried in the United States Court, found guilty, and sentenced to a short term of imprisonment in the county jail and to pay a fine of $1,000.00. This conviction aroused intense feeling all over the State. Indignation meetings were held in Milwaukee and in many of the smaller places, most of which passed resolutions denouncing the conviction, and some going so far as to demand armed resistance. Again a writ of habeas corpus was issued from the Supreme Court and the prisoners were finally discharged in February, 1855, the Court deciding that

[4] 3 Wis. *145.



which the Courts of the United States have ex-
-clusive jurisdiction. But we think, that
whatever difficulties this section of the statute
may create as to the proper course to be pursued by
the officer in a case of that description, it
should not be construed so as to deprive ~~and~~
a State Court, or officer, of the power to issue
the writ in all cases where a citizen of this State
is held in custody on the ground of an alleged vi-
-olation of a law of the United States. The same
difficulty would present itself, if a State
Magistrate acting wholly without authority
~~and~~ should commit a person to prison for
~~not giving bail to~~ refusing to give bail for his appearance at
a Court of the United States to answer to an
offence against the laws of the United States.

There being no valid objec-
-tion to issuing the writ and ~~bring~~ bringing
the prisoner before the officer, the question
arises whether the discharge of the prisoner
was in accordance with law. The return
of the Marshall to the writ of habeas corpus
sets out substantially the same reason for
the detention of the prisoner as that stated
in the petition for the writ, [illegible] so that there
is no necessity for restating it. The
first objection taken here is the ~~sufficiency of the~~
return is, that it ~~not~~ does not set forth the
valid warrant. As for this objection, we fully
concur in the opinion of the justice of this
Court who discharged the prisoner. The war-
-rant fails to state any offence ~~and~~ under
the act of Congress in question, inasmuch as
it does not show for what purpose ...

Reduced facsimile of a page from the manuscript opinion of Judge Whiton in the Booth Case, 3 Wis. *1.

it could review the question of the jurisdiction of the United States Court upon habeas corpus and could discharge the prisoners, even when the Federal Court had tried the case and passed judgment upon them.[5] The position was an extreme one and the judges recognized the fact. It meant a direct clash with the Federal Courts, but the judges did not falter. Justice Smith said in a note:

"This Court has no disposition to interfere with the criminal jurisdiction of the District Court of the United States. Unless that Court proceeds within the limits which the constitution and laws of Congress have prescribed, its acts are a nullity; its jurisdiction is always open to question and must affirmatively appear; if jurisdiction be wanting, its process, judgments and decrees are void. Were it otherwise, that Court might proceed to indict, convict and punish for common assault, libel, breaches of the peace, and so forth, imprison our citizens at its own will and pleasure, administer the whole common law code of offenses and punishments, from whose judgment there could be no appeal and whose prison doors no earthly power could unlock. Such doctrine is monstrous. We have not yet reached the point of submission." [6]

The note of defiance here rings out with unmistakeable clearness; it was magnificent, but it was not good law.

The issue was too important to rest without final decision by the Court of last resort, and writs of error were sued out of the Supreme Court of the United States by the marshal to review both judgments of the Supreme Court of Wisconsin discharging Mr. Booth. To the first writ issued in October, 1854, return was made without objection, but when the second writ was issued and served in June, 1855, the justices of the Supreme Court directed the clerk to make no return to the writ on the ground that no writ of error could run from the United States Supreme Court to the

[5] 3 Wis. *157.

[6] 3 Wis. *157. See page *217.

Supreme Court of a State, and that the act of Congress purporting to authorize such a proceeding was unconstitutional. This was going a step further than before. By the previous action, the Court had only asserted its power to inquire into and decide for itself the question of the jurisdiction of a Federal Court, and the validity of its judgment; by this latter act it asserted in legal effect that its decision was final and supreme and could not be reviewed by any Court on earth. The refusal to return the record in obedience to the writ could not prevent the consideration of the case by the United States Supreme Court, but it did delay such consideration.

The Attorney General of the United States (Jeremiah S. Black) had procured a certified copy of the record, and when it finally appeared that no return would be made to the writ, the Court ordered that this copy be filed with the same effect as if returned by the clerk, and the cases were finally reached in January, 1859. Mr. Black appeared and argued the case for the United States, but no counsel appeared on the other side. Booth sent to the Court a copy of the pamphlet argument of Mr. Paine with copies of the opinions of the justices of the Supreme Court of Wisconsin, and submitted his case on these without argument. The cases were decided and the judgments reversed March 7, 1859, in an opinion by Chief Justice Taney.[7] The issue was of supreme importance, and the opinion was one worthy of the issue and of the distinguished jurist who wrote it.

It has been the fashion to belittle and blacken the memory of Chief Justice Taney by falsely attributing to him the statement that a negro had no rights which white men were

[7] 21 How. (62 U. S.) 506.

bound to respect. Happily, time has to a great extent corrected this great injustice, and there are few now who do not acknowledge the purity and probity of the character of this great jurist, and admit that he stands among the very greatest of the great men who have adorned the Supreme Bench of the United States. While the opinion in this case is of some length, the Chief Justice stated the issue and its inevitable conclusion in a few sentences so clearly that I cannot refrain from quoting them.

"If the judicial power exercised (by the Supreme Court of Wisconsin) in this instance has been reserved to the States, no offense against the laws of the United States can be punished by their own courts without the permission and according to the judgment of the Court of the State in which the party happens to be imprisoned; for if the Supreme Court of Wisconsin possessed the power it has exercised in relation to offenses against the action of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States, and consequently their supremacy and controlling power would embrace the whole criminal code of the United States and extend to offenses against our revenue laws or any other law intended to guard the different departments of the general government from fraud or violence, and it would embrace all crimes from the highest to the lowest, including felonies, which are punished with death, as well as misdemeanors which are punished by imprisonment. And if this power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion, and it would often happen that an act which was admitted to be an offense and justly punished in one State, would be regarded as innocent and indeed as praiseworthy in another. It seems to be hardly necesesary to do more than state the result to which these decisions of the State Courts must necessarily lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which was now lasted nearly seventy years, enforcing its laws by its own tribunals and preserving the

Union of the States, could have lasted a single year or fulfilled the high trusts committed to it if offenses against its laws could not have been punished without the consent of the State in which the culprit was found."

These propositions seem now to be very plain and simple truths, but not so in 1859. The judgment of reversal was followed by a storm of popular indignation in Wisconsin, which will be fully described in its proper place. It is sufficient now to say that in the judicial elections of 1855, 1857, 1859 and 1860 the question whether the Booth case was rightly decided and should be adhered to formed practically the sole issue, and that notwithstanding their radically different positions in that case both Justices Crawford and Smith lost their seats by reason of such positions.

The ordinary litigation which came before the Court during Judge Crawford's brief term of two years was not great in volume, yet some important fundamental propositions took their places in the jurisprudence of the young state.

One of the most important cases was the *Blossom case,* already referred to, where it was held that the Supreme Court had been endowed by the constitution with original jurisdiction in cases *publici juris,* involving the prerogatives and franchises of the state and the liberties of the people.[8] The great importance of this principle and its value to the people of the state was later clearly demonstrated in the railroad cases[9] and the other cases of absorbing public interest and importance which have followed that case. Had the Court been shorn of this great power by a narrow construction of the grant of power contained in Section 3 of Article VII of the constitution the result would have been

[8] Atty. Genl. v. Blossom, 1 Wis. *317.

[9] Atty. Genl. v. R. R. Co.'s, 35 Wis. 425.

to practically deprive the public of redress or relief in many great emergencies, when only prompt action by the court of last resort could be effective.

Among the more important legal principles laid down during this period are the following: that a ministerial officer is protected in the execution of a writ regular on its face and issued by a competent tribunal, so long as he has no knowledge of any lack of jurisdiction on the part of the tribunal which issued it;[10] that repeal by implication is not favored in the law and that on the contrary courts are bound to uphold the prior law if by reasonable rules of construction the two acts may well subsist together;[11] that a deed, absolute on its face, will be held a mortgage whenever the real transaction is a loan of money and the deed is given as security for its repayment;[12] that the right of trial by jury secured by the constitution contemplates a jury of twelve men as understood at common law and not of any less number;[13] that in ejectment the plaintiff must recover, if at all, on the strength of his own title, and that there may be dedication of lands to public use by parol;[14] that a deed obtained by duress is void, not only as between the original parties, but as to a subsequent purchaser with notice;[15] that a riparian owner upon a meandered stream owns to the thread of the stream, subject to the public easement;[16] that a public nuisance may be enjoined at the suit of a private person if he suffer a private or special injury therefrom;[17]

[10] Sprague v. Birchard, 1 Wis. *457.
[11] Atty. Genl. v. Brown, 1 Wis. *513.
[12] Rogan v. Walker, 1 Wis. *527.
[13] Norval v. Rice, 2 Wis. *22.
[14] Gardner v. Tisdale, 2 Wis. *153.
[15] Brown v. Peck, 2 Wis. *261.
[16] Jones v. Pettibone, 2 Wis. *308.
[17] Walker v. Shepardson, 2 Wis. *384.

that in actions *ex delicto* exemplary damages may be awarded when the injury is inflicted with malice or under circumstances of aggravation insult or cruelty;[18] that the consideration for a promise to answer for the debt of another must be expressed in writing as well as the promise itself in order to take a case out of the statute of frauds;[19] that organized towns are not municipal corporations within the meaning of Sec. 2 of Article XI of the constitution, but only *quasi*-corporations;[20] and that when constitutional provisions or statutes which have been the subject of previous judicial construction in another state, are adopted by this state it is presumed that such construction is also adopted.[21]

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[18] McWilliams v. Bragg, 3 Wis. *424.

[19] Taylor v. Pratt, 3 Wis. *674.

[20] Norton v. Peck, 3 Wis. *714.

[21] Atty. Genl. v. Brunst, 3 Wis. *787.

CHAPTER VIII

THE DEFEAT OF CRAWFORD BY COLE

Whether it would or not, the Court now occupied a position upon the very center of the political stage and here it was to remain for years. It had been compelled to take a conspicuous part in a great popular movement which was fast hurrying the nation to civil war. Judge Crawford in the face of great public clamor and excitement had unequivocally taken the unpopular position that the laws of the United States and the judgments of the federal courts within their proper jurisdiction were supreme and could not be held for naught by the state courts. His successor was to be elected in April, 1855; the last judgment of discharge in the Booth case was made in the preceding February and public excitement was still at fever heat. The question was, should Judge Crawford be re-elected in spite of his unpopular views on the burning question of the hour?

The general political situation had now radically changed. The Whig party was dead and its funeral obsequies had been performed. It had indeed nominated a complete ticket for state officers in the fall of 1853, but a part of its candidates withdrew and a coalition was finally formed with the Free Soilers and Abolitionists, which resulted in the elimination of the Whig ticket under that name and the placing in the field of an independent ticket called the People's ticket, composed in part of Whigs and in part of Free Soilers. This ticket had been decisively defeated in November, 1853, but its supporters were not daunted. They were inspired by a

great moral issue and under the new and attractive name of Republicans were disputing every inch of ground with the Democrats. The radical, or abolition element, in the new party had no patience with a man who could assert the constitutionality of a fugitive slave law, or deny the power of the state courts to interfere with its operation and marked Judge Crawford for defeat.

No party convention was called on either side. Judge Crawford's friends, assuming that he was entitled to re-election after his very short first term, put him in the field in February by a call which was generally signed by the bar of the state regardless of party lines. Early in March Orsamus Cole of Grant County was placed in nomination, nominally as an independent candidate, by a call which was signed by about fifty Republican members of the legislature and which was the result of a Republican legislative caucus.

Judge Timothy O. Howe of Green Bay was strongly urged as a candidate before the legislative caucus, but was defeated because he was opposed to the ultra state rights views adopted in the Booth case, whereas it was understood that Mr. Cole was in thorough accord with the position of the Court.

Orsamus Cole was a young lawyer barely thirty-five years of age then practicing at Potosi in Grant County, which was at that time a thriving and ambitious town. He had not thought of or sought the nomination, nor was he even present at the capitol when it was made. At first he was strongly disposed to decline to make the run against a man of the popularity of Judge Crawford, but finally consented at the urgent solicitation of his friends, with little expectation, however, of election.

Though both candidacies were called independent, the campaign was in fact conducted upon party lines. Republican newspapers supported Mr. Cole with substantial unanimity, although with some exceptions, among which were the Mineral Point Tribune and the Fox Lake Times.

Judge Crawford's qualifications were not seriously attacked by any one, nor was there much personal abuse, but his defeat was demanded by the radical element in the newly formed Republican party because of his position on the constitutionality of the fugitive slave law.

A few extracts from the Milwaukee Free Democrat (then conducted by Sherman M. Booth) will serve to show the feeling of the radicals. On March 21st, 1855, replying to the Fox Lake Times, it said, "to vote for Judge Crawford is to vote for the constitutionality of the Fugitive Slave act. Judge Crawford discharged us because the indictment against us was not framed under the Fugitive Slave act or under any law of the United States, and those who sustain him for such a deed must exercise very little discrimination. * * * We can only say that the whole slavecatching tribe in this state are supporting Judge Crawford." On March 26th it said, "If the friends of Cole and freedom will work as zealously as we know the friends of Crawford and slavery will, the right will easily prevail," and on April 5th it called Crawford the "candidate of the rum and slavery party."

In a total vote of something more than 50,000, Mr. Cole received a majority of over 4,000 votes. The result was a surprise to the people of the state and a bitter disappointment to Judge Crawford. No one had fully appreciated the depth and force of the great anti-slavery sentiment among the people. Judge Crawford himself attributed his defeat

to the Know Nothing wave which was then at high tide, and probably this had its effect, but there can be no serious doubt that it was in fact the anti-slavery sentiment which defeated him. He had honestly and rightly (as subsequent events have proven) opposed the popular wish and was for that reason defeated; thus it was that an admittedly honest and capable sitting judge, while still in his physical and intellectual prime was denied re-election. This was not to happen again for more than half a century. Under such circumstances there came to the Supreme bench a man destined to remain there for more than thirty-six years and to render during all that time conspicuously able service to the state. He came there by virtue of what was practically a party nomination and a partisan campaign, but by the irony of fate he was himself to become an apostle of nonpartisanship in judicial elections and to do great service in furthering the principle that justices of the Supreme Court who had demonstrated their ability and integrity should not be set aside by political considerations.

General Edwin E. Bryant gives the following brief and appreciative sketch of Judge Cole's ancestry and early life in his biographical sketches of the judges of the Supreme Court, which has been already referred to:[1]

"Orsamus Cole was born in Cazenovia, Madison Co., New York, August 13, 1819. His ancestors were English of early immigration before the French war, and settled in Rhode Island. The great grandfather was a Tory and disinherited his son, the grandfather of Judge Cole, because he took sides with the colonies and served in the colonial army. The grandfather on the maternal side, Samuel Salisbury, held a commission in the continental army. He fought at Bennington and was with Washington in the terrible experiences in New Jersey during the winter of 1777. He was at the surrender of Burgoyne and of

[1] Green Bag, Vol. 9, p. 114.

ORSAMUS COLE.

Cornwallis and was honorably discharged at the close of the war.

"The subject of this sketch was brought up on a farm. He attended the common schools at Washingtonville, Oswego County, New York, fitted for college at the Clinton County Liberal Institute and at the Black River Academy in Jefferson County. He graduated from Union College in 1843. He then studied law with Curtis & Boomer at Belleville, Jefferson County, and was admitted to the bar in 1845, coming the same year to Chicago. Not finding that a promising place he came in the autumn of 1845 to Potosi, a rough mining town in southwest Wisconsin on the Mississippi, a few miles above Dubuque and in the heart of the lead region. The town was better known to the miners as 'Snake Hollow,' as lead was first found in a ravine of that name.

"Here he entered upon the practice and was successful. A modest, unassuming manner, little in keeping with the rudeness and boisterousness of those times in that section, did not obscure his talents, and he became a popular and prominent lawyer. The miners and settlers soon found that he was careful, painstaking, conscientious, and always sober, and that implicit confidence could be placed in him, and they took his advancement in their own hands, and conferred honors upon him of their own motion, without even stopping to consult him as to whether he would be a candidate or not.

"In 1847 he was elected a delegate from Grant County to the second constitutional convention. He was one of the youngest members of the body and one of the most modest of men. But he soon took rank among the ablest, clearest debaters. Cautious and conservative, careful to details it was admitted on all hands that he made a most valuable member. It is said by those who attended the debates and reported the proceedings that he had taken a prominent part in the shaping of all the more important articles of the constitution."

In 1848 Mr. Cole was nominated for Congress as a Whig and was elected against A. Hyatt Smith, Democrat, and George W. Crabb, Free Soiler. He was a strong anti-slavery man and consistently opposed the Fugitive Slave act of 1850, as well as the compromise legislation of that year.

Upon the occasion of the presentation to the Supreme

Court of the memorial of the bar, after the death of Judge Cole which occurred May 5, 1903, Chief Justice Cassoday in his response on behalf of the Court said, among other things: [2]

"While in Congress he enjoyed the friendship and confidence of President Taylor who, although a slaveholder, on one occasion said to him, 'Cole, if I were a member of Congress and lived where you do, I would vote for the Wilmot proviso.' His party renominated him for Congress in 1850, but he was beaten by a Democrat—Benjamin C. Eastman. In 1853 his party nominated him for attorney general of the state, but he was beaten by the late George B. Smith. Singular as it may seem he was nominated by his party as a candidate for the State Senate at the same election, but was beaten by ex-Governor Nelson Dewey, who received only three majority. In the winter of 1855 he was, without his consent, nominated as the candidate of his party for associate justice of this Court against the sitting member Samuel Crawford, and reluctantly consented to run and was elected in the following April and became a member of this Court June 1, 1855, when he was less than thirty-six years of age.

"Thus it appears that in less than ten years after he became a resident of Grant County he was six times a candidate of his party for important positions, three times defeated and three times elected. From this it might be inferred that he was not only a partisan but an officeseeker; but no one who knew the equipoise and proverbial modesty of the man will think for a moment that he was either. Obviously, as a candidate of his party for the several offices mentioned, he was acceptable to all and objectionable to none.

"His experience in the constitutional convention greatly aided in establishing a commendable state jurisprudence. His term in Congress naturally tended to broaden his views of legislation, government and law; but his ten years residence in a small country village remote from the county seat, from the capitol of the state and from the centers of business, with the political interruptions mentioned, necessarily limited his professional opportunities and business.

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[2] 119 Wis. p. xxxvi *et seq.*

"He came to a bench, however, already occupied by two learned and experienced lawyers and judges. * * * It was fortunate for him and for the state that he had the benefit of working four years upon the bench just when he did with men so learned, able and experienced as Chief Justice Whiton and Justice A. D. Smith. During that time numerous questions of grave importance were presented, ably argued and determined. The junior member of the Court necessarily had an opportunity for study, discrimination and reflection as never before, and no one who knew him will for a moment doubt that he applied himself to his new duties with all the energy he possessed.

"Judge Cole was not a genius with powers to thrill and capture the multitude, but a patient, plodding and conscientious judge, who determined to do what he conceived to be his duty, regardless of public clamor or personal consequences. He was not born for, nor did he covet, leadership, but was always attentive and indefatigable in the performance of the work in hand. He was never aggressive, but always thoughtful, laborious and firm.

"But few prominent men in his time escaped the biting sarcasm of Chief Justice Ryan, and yet the severest thing he ever said of Judge Cole was that he never allowed the statutes of limitation to run on his resentments. In extenuation it may be truthfully said that Judge Cole had but very few resentments and that each was b sed upon what he conceived to be good ground. During my long service with him upon the bench, he never to my knowledge, by word or look, showed any disrespect to any of his associates, and I have no recollection of any of his associates ever showing any disrespect to him."

As has been already said, Judge Cole served continuously upon the Supreme Bench for a period exceeding thirty-six years, a service longer by far than that of any judge who has ever sat upon that bench and longer than any judge is likely to serve in the future. During that long period of service there were submitted to the Court a host of grave and perplexing questions; to the settlement of these questions he gave his life, his ability, and his energies with a single hearted devotion rarely equalled. From the time of

his accession to the bench until his retirement in January, 1892, his history becomes the history of the Court itself and his great record is imperishably preserved in seventy-eight volumes of the Wisconsin reports.

Judge Crawford's last appearance upon the bench was on the 31st day of May, 1855, being the last day of the January term, and Judge Cole assumed his office on the following day, but did not go upon the bench until June 19th, which was the opening day of the June term. That Judge Crawford's term ended and Judge Cole's term begun on the first day of June seems to have been unquestioned at this time, but several years afterward the claim was made by Judge Crawford that his term did not legally end until the first Monday of January, 1856.

This claim was made in the following manner. In May, 1859, Judge Crawford applied to the secretary of state to audit a claim for salary from June 1, 1855 to January 1, 1856, and the secretary audited the same, but on presentation of the warrant to the state treasurer payment was refused. On the twenty-second day of July, 1859, an alternative writ of mandamus was issued out of the Supreme Court against the treasurer, which came on for hearing August 8, 1859. The treasurer made answer denying that Crawford was a justice of the Court during the time, and alleging that in any event Judge Crawford had voluntarily surrendered the office to Judge Cole, who had exercised the same and drawn the salary, and further alleging that the claim had never been presented for audit to the comptroller of the state, as required by law.[3]

Judge Crawford's contention that his term of office did not in fact expire until January, 1856, was based upon Chap-

[3] State v. Hastings, 10 Wis. *525.

ter 41 of the laws of 1854, which provided that "the term of county judges, circuit judges and justices of the Supreme Court shall be for such time as at present prescribed by law, and shall commence on the first Monday of each year next after the election of such officer, unless otherwise specially provided." Section three of Chapter 395 of the laws of 1852, creating the Supreme Court, provided that the terms of the justices should commence on the first day of June and expire on the last day of May, but the claim was that the law of 1854 had extended the term, so that it did not expire until the following January. The case was decided August 20, 1859, and a brief memorandum of the points decided was then filed, leaving the more formal opinions to be prepared and filed at a later time. As the decision could in no way affect the personal or official rights of Judge Cole he took part in the case, and indeed this course seemed almost essential on account of the attack upon the law creating the office of comptroller, as well as on account of the difference of opinion between Judge Paine and Judge Dixon as to the effect of the law of 1854.

It appears by the memorandum that Justices Dixon and Paine held that the act of 1858 creating the office of State Comptroller was unconstitutional and void and from this conclusion Judge Cole dissented; on the other hand Justices Dixon and Cole held that chapter 41 of the laws of 1854 was constitutional and applied to Justices of the Supreme Court and hence that Judge Crawford's term did not expire until January 1, 1856, and from this conclusion Justice Paine dissented. All of the justices agreed, however, upon the proposition that as Justice Crawford had voluntarily surrendered his office to Justice Cole under claim of title and Justice Cole had become a *de facto* officer and drawn the salary, Justice

Crawford had waived and forfeited his right to the salary.

It appears that Justice Paine prepared his opinion first and his argument as to the intent of the lawmakers in the passage of chapter 41 was so cogent that Chief Justice Dixon receded from his former opinion and concurred with Justice Paine in holding that the law did not apply to Justices of the Supreme Court at all and hence no decision as to its constitutionality was necessary. This, as Chief Justice Dixon says in the course of his opinion, is "a singular instance of the advantage of having a dissenting opinion prepared in advance of that of the majority of the Court." Justice Cole retained his former views and only concurred in the result on the ground that Justice Crawford had voluntarily surrendered his office June 1, 1856, and hence had waived any claim for salary after that time. In the course of his opinion Justice Cole says:

"It is needless for me to add that I was ignorant of the existence of the law of 1854 when I qualified and entered upon the d'scharge of the duties of a Justice of this Court. My attention was first called to the law in the latter part of the winter of 1857 at the time of the re-election of the late Chief Justice Whiton. Upon that occasion the proper construction of the law of 1854 was a subject of considerable discussion among the members of this Court in the consultation room and we unanimously took the view of it which I have expressed in this opinion."

The formal opinions were filed during the January term, 1860.

Upon the presentation to the Supreme Court of a portrait of Justice Crawford, November 17, 1904, Mr. Calvert Spensley of Mineral Point paid a graceful and appreciative tribute to Judge Crawford, in which after stating that Judge Cole succeeded him on the bench June 1, 1855, he says:

"It was afterwards determined that Judge Crawford's term under the constitution of the state did not expire until January 1, 1856, and he was awarded the salary of the office from June 1,

1855, to January 1, 1856, although Judge Cole as *de facto* judge occupied a seat on the bench during that time and also drew the salary."[4]

This statement is unquestionably erroneous, but the error doubtless resulted from the fact that as the case was originally decided the majority of the Court held that the act of 1854 applied to justices of the Supreme Court and that hence Justice Crawford's term was actually extended to January, 1856, had he chosen to insist upon his right.

[4] 123 Wis. p. xxxii.

CHAPTER IX

THE DISPUTED GOVERNORSHIP

The bench was now composed of two Republicans, Whiton and Cole, and one Democrat, Smith, but all were agreed that the rulings in the Booth cases were correct and should be maintained. As has been already noted, the writ of error from the United States Supreme Court in the last Booth case was served about June 1, 1855, and to this writ the Court directed the clerk to make no return.[1] This was manifestly a complete defiance of federal authority, the only additional step necessary to be taken to reach the extreme state rights position was the appeal to arms. At the same (June, 1855) term the Court held that state courts had power to discharge a person in custody under a criminal warrant is sued by a United States Court which showed want of jurisdiction on its face, and that a rearrest under the same warrant was unlawful, and thus the controversy became still more acute.[2]

But as if the Court were not already sufficiently involved in the heated political struggles of a period which was surcharged with political excitement and bitterness, it was now obliged to take an active and controlling part in state politics and pass upon a contested election involving the office of Governor of the state, a contest which aroused party passions to the utmost.

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[1] Ableman v. Booth, 11 Wis. *498–*500.

[2] Bagnall v. Ableman, 4 Wis. *163.

Since the admission of the state to the Union the Democratic party had retained control of the state offices except that in the election of 1851 the Whigs had elected Governor Farwell by a narrow majority. In 1852, however, the state was carried by Pierce and in 1853 the Democrats were again successful and elected a full state ticket, headed by William A. Barstow against a People's ticket, composed of Whigs and Free Soilers, headed by Edward D. Holton.

Barstow's administration had been a stormy one and generally unsatisfactory to the mass of the people. He was denounced as hishonest and corrupt by a faction of his own party, and the newly organized Republican party placed its first full ticket in the field headed by Coles Bashford of Oshkosh, then a member of the state senate. The campaign was rancorous in the extreme; both candidates were accused of being Know Nothings, and both denied the charge; personal abuse of all kinds abounded, and charges of dishonesty and fraud were made by both sides. The result was close and for days and weeks both parties claimed the election of Governor by several hundred votes, although it was in a few days conceded that all the Democratic candidates below the office of Governor had been elected by safe majorities. The official canvass was delayed; the returns from distant counties were slow in coming in; the Republicans charged that some returns from Chippewa, Waupaca, and other counties had been manufactured, and that the state canvassing board was delaying the count with the deliberate intention of counting in Governor Barstow.

Finally the board met on the last day allowed by law, and on the 17th day of December canvassed the vote and declared the result to be that Barstow had received 36,355 votes, and Bashford 36,198, giving Barstow a plurality of

157. The remainder of the Democratic candidates were given majorities varying from 1,700 to 5,100.

The cry of fraud was at once raised by the Republican press, and preparations made to contest the seat in the Supreme Court. Bashford took the constitutional oath and demanded possession of the office on the first Monday of January, 1856; his demand being refused, he proceeded to test his right in the Supreme Court.

Barstow had most of the strategical advantages in the contest which was now to begin. He had the official certificate of election from the canvassing board, he was already in possession of the office, and the newly elected attorney general of the state, General Wm. R. Smith, who presumably would have legal control of a contest, was of his own political faith. These advantages of position, however, did not daunt the Republicans, who felt certain of the justice of their cause and viewed with complacency the fact that a majority of the Supreme bench were Republicans, while the sole Democrat was at outs with his party on the state rights question.

By chapter 23 of the session laws of 1855 the legislature had provided that when any citizen should claim any public office which was usurped by another the claimant should have a right to file an information in the nature of a *quo warranto* in the Supreme Court, with or without the consent of the Attorney General and to prosecute the same to final judgment provided he should have first applied to the attorney general to file the same and the attorney general should have refused or neglected to do so, in which case, however, the claimant was to be liable for the costs.

The purpose of the law was evidently to give the attorney general the opportunity to decide whether the public wel-

fare demanded that an action be prosecuted by the state and at the same time to allow the claimant to carry on the contest himself and at his own expenses in case the decision of the attorney general should be adverse.

Bashford employed as his attorneys four of the most distinguished lawyers of the state, Messrs. E. G. Ryan, James H. Knowlton, Timothy O. Howe and Alexander W. Randall and a race of diligence began between these private counsel and the newly elected Attorney General, Wm. R. Smith, to see who should have control of the *quo warranto* action. It was certain that under the statute just referred to the action would be carried on by Bashford's attorneys, if the Attorney General refused to bring it. Manifestly it would be wise for the Attorney General to bring the action himself and thus have it within the control (so far as an attorney could control it) of one who at least had no feeling in favor of Bashford.

The newly elected Attorney General was an interesting and unique figure in the early history of the territory and state. At this time he was sixty-eight years of age, a courtly gentleman of the old school, still wearing knee breeches and his hair done up in a queue. He was almost, if not quite, the sole survivor of a generation which had practically passed from the stage of public activity. His career had been long and varied and it may not be out of place here to insert a short sketch of his life, taken from Berryman's History of the Bench and Bar of Wisconsin, as follows:

"William Rudolph Smith was born at La Trappe, Montgomery County, Pa. August 31, 1787; in 1792 his father removed to Philadelphia, where the son was given institutional and private instruction until 1803, when as private secretary he accompanied his father—William Moore Smith—one of the commissioners under the sixth article of Jay's treaty to adjust and settle the demands of the British claimants, to England. While there young Smith

began a course of legal study under the direction of a competent teacher, which he continued on his return to America.

"In 1808 he became a member of the Philadelphia bar, and in 1809 entered upon the practice of his profession in Huntingdon, Pa. He served as deputy attorney general for Cambria County under appointment from three attorneys general, his first service being rendered in 1811. In the war with Great Britain he was colonel of the sixty second regiment of the Pennsylvania reserves and was in command when it was ordered to Erie to support General Scott in the movement on Canada. He was in Baltimore during the siege of that city and witnessed the disaster at Bladensburg and the burning of Washington. He served as a member of both branches of the Pennsylvania legislature. In 1828 he removed to Bedford County; his residence there continued until 1836 or 1837, when he was appointed commissioner, in conjunction with Henry Dodge, to treat with the Chippewa Indians for the purchase of their Wisconsin lands. This led to his removal to the west and in 1838 he settled at Mineral Point, Wisconsin.

"In 1839 he was appointed by Governor Dodge adjutant general, a position which he held about twelve years; he was also district attorney of Iowa County for several years. In 1840 he presided over the first Democratic convention held at the seat of government and drafted the address of that body to the electors. In 1846 he was clerk of the legislative council and in the same year was a delegate to the constitutional convention; in 1849 and 1850 he was chief clerk of the Senate; in 1852 the legislature authorized General Smith to compile a documentary history of Wisconsin from its earliest settlement to that time; this work was prosecuted with such diligence that it was ready for publication in 1854 and was published by the state. In 1856 and 1857 he served as attorney general, having been elected in 1855.

"At the expiration of his term, having passed his seventieth year he retired from active life; after his retirement he enjoyed the quiet of his home and the society of his friends. He had touched life at many points, had seen much more of the world than the great majority of his associates among the early settlers. Mr. Reed says in his Bench and Bar that his reminiscences of Washington and the statesmen of his day and many incidents and anecdotes of historical interest were related with dramatic effect. The hands of Washington had rested on his head; he had listened to the reading of the farewell address; he was present in the German Lutheran Church in Philadelphia when Major General Lee pronounced the funeral oration on Washington, and he was in the

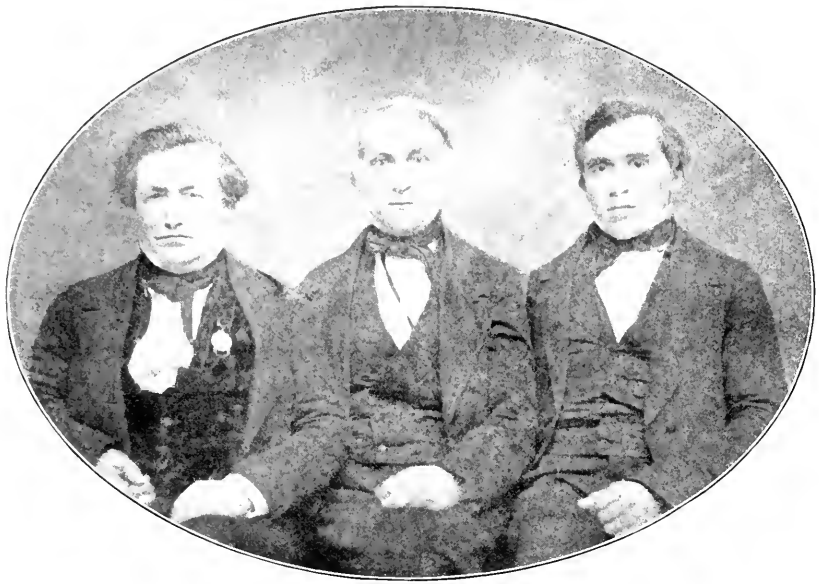
theater on the night when the national anthem of "Hail Columbia" was first sung and was witness to the enthusiasm with which the song was greeted. He had seen every president from Washington to Lincoln. His death occurred at Quincy, Illinois, where he had gone on a visit to a daughter, August 22, 1868."

The maneuvering for control of the proceedings between the attorney general on the one side and Bashford's counsel upon the other, began almost immediately after the rival candidates had taken the oaths of office. Bashford's counsel had investigated the facts as to the supplemental returns from six counties, of which the counties of Waupaca and Chippewa were the most important, and charged that not only had the returns from a number of precincts been falsified by increasing Barstow's vote and decreasing Bashford's but that fictitious precincts had actually been created and endowed with votes, all of which were heavily in favor of Barstow. Among these nonexistent precincts were "Bridge Creek" in Chippewa County, "Gilberts Mills" in Dunn County and "Spring Creek" in Polk County. They, therefore, prepared a long information setting out in detail these alleged falsifications of the actual vote and on the eleventh day of January, 1856, presented the same to the Attorney General and requested him to sign and file the same and to bring the action thereon; to this request the Attorney General replied that he (Bashford) might make his request in writing and that he would then take the same under consideration. On the fifteenth day of January, without notice to Bashford or his attorneys, the Attorney General filed in Court a very brief information charging simply that Bashford was elected Governor, November 6, 1855, and that Barstow had usurped and intruded into the office. Upon this information a summons was issued out of the Supreme Court January 17th, returnable February 5th following and

served upon Barstow.[3] This proceeding was by no means satisfactory to Bashford's counsel; they desired to put the Attorney General in the position of having refused to bring the action and they immediately made a motion to strike out the Attorney General's information and file in place of it the one which they had prepared and that Bashford be at liberty to prosecute and control the action. This motion was resisted by the Attorney General and in the course of the hearing a formal appearance for Governor Barstow was entered by Jonathan E. Arnold, Harlow S. Orton and Matt. H. Carpenter, and they took part in the argument in opposition to the motion; the motion was denied January 24th, the Court holding that the Attorney General had not refused to bring the action within the meaning of the act of 1855 and hence that the relator had not the right to control the action or dictate as to the form of the information, and that at least until it appeared that the Attorney General was acting in bad faith in the matter the Court should not interfere. Thereupon the Attorney General's information was amended in some minor particulars and on the second day of February the attorneys for Barstow filed a formal motion to quash the summons and dismiss the action on the ground that the Court had no jurisdiction in the premises. Upon this motion the respondent moved for thirty days' time in which to prepare for the argument but the Court fixed the hearing for the eleventh day of February and upon that day the argument was begun by Mr. Carpenter.

The respondent's position was that the Court had no power to consider or decide the question as to who was Governor of the state; that the Executive, Legislative and

[3] Atty. Genl. v. Barstow, 4 Wis. *567.



SMITH. WHITON. COLE.

The Supreme Bench from 1855 to 1859.
From an old daguerreotype.

Judicial departments of the government were co-ordinate branches and that each was the final judge of the election and qualification of its own member or members. The argument of the motion consumed three days and was participated in by Messrs. Carpenter, Orton and Arnold for the respondent, and by Messrs. Randall, Knowlton and Howe for the relator, Attorney General Smith declining to take part.

That the argument was a brilliant one goes without saying; even the meagre report of it which has been preserved demonstrates this fact. It took place at a time when oratory was still heard in courtrooms, when the profession was not yet overwhelmed with whole libraries of precedents, and when argument based upon general principles was still possible. Trope and simile, metaphor and classic allusion, apt quotation and biting satire abounded in the speeches made by men who were at that time the intellectual giants of the bar of the state. On the eighteenth of February the motion was denied in an opinion by Chief Justice Whiton, holding that the Court had the same power under the statute to remove a person who had unlawfully intruded into the office of Governor as it had in case of intrusion into any other office. The Court gave the respondent time for answering until the twenty-first of February, at which time counsel for all parties filed a stipulation to the effect that the state board of canvassers had canvassed the votes and determined that Barstow was elected and had given him a certificate of such election in proper form and further that Barstow had taken and filed his oath of office and submitting to the Court the question whether the Court had any jurisdiction to receive proof and examine the question as to which candidate in fact received the greatest number of votes. After consul-

tation the Court concluded that the question submitted by the stipulation was merely a moot question, calling for no action on the part of the Court and directed that the respondent plead to the information by the twenty-fifth of February. On the last named day the respondent filed a plea to the effect that he should not be compelled to answer because of the final determination of the question by the state board of canvassers and also filed with the plea copies of the canvass and certificate and the oath of office taken by Barstow. To this plea the relator immediately demurred and on the following day a joinder in demurrer was filed. On the twenty-ninth of February the argument on the demurrer was opened by Mr. Ryan and continued by Mr. Orton and Mr. Howe and on the fourth of March the demurrer was sustained because the plea was simply a plea to the jurisdiction and not a plea in bar and the respondent was allowed four days in which to plead over. On the eighth of March the respondent's attorneys appeared and through Mr. Carpenter announced that by direction of Governor Barstow they withdrew from the case; at the same time they handed to the Court a communication from the Governor, protesting that he had been elected by an unquestionable majority, declining to submit his official rights and powers to the determination of the Court and concluding as follows:

"Deeply impressed with the responsibilities under which I act, and of the solemnity of the oath which I have taken to support the constitution of the state, to no infraction of which can I submit or consent, and believing that the Supreme Court will best subserve the interest of the people of the state and answer the constitutional purpose of its creation by discharging its legitimate functions without arrogating to itself the high prerogative of transferring the sovereign powers of the government to partisan claimants, I hereby take my leave of the Court and of these unwarrantable proceedings in which the Court seems but too willing

to receive my full and unreserved submission; and I shall deem it my imperative duty to repel with all the force vested in this department any infringement upon the rights and powers which I exercise under the constitution."

In the published volume entitled, "The Trial in the Supreme Court of the Information in the Nature of a *Quo Warranto* Filed by the Attorney General on the relation of Coles Bashford v. Wm. A. Barstow," to be found in the state library, it is said in a note on page 226 that this paper was sent up folded to the Court and was not read, as the Court was just about to adjourn till the eleventh of March, but that on examination of the paper after reassembling of the Court they refused to receive it on account of the indecent language in which it was couched. It is published in full, however, in the Supreme Court reports (4 Wis. pp. *732–3–4–5) with no suggestion of a refusal to receive it.

On the same day Governor Barstow sent a message to the legislature, detailing the court proceedings, embodying a copy of the above communication to the Court, and stating that he deemed the proceedings on the part of the Court to be a "bold and dangerous assumption and usurpation of power" which it was the duty of every department of the government and of every good citizen of the state to resist to the last. This was plainly a threat of armed resistance in case the Court proceeded to seat Bashford. Especially significant was the threat in view of the fact that arms were known to have been stored in the state house for use in case of an emergency. The Court, however, proceeded calmly on its way regardless of threats or public clamor.

On the eleventh of March the relator moved for judgment by default, but, the Attorney General, desiring time to consider what course he should pursue, time was given by the

Court until the eighteenth of the same month, when he came into Court and filed a written statement, purporting to dismiss the case so far as the state was concerned; upon the following day the Court held that the case should proceed at the suit of the relator alone and that, on account of the importance of the office and the great public interests involved, he should be required to make his proofs and show a *prima facie* title to the office, instead of taking judgment by default. On the thirtieth of March the taking of testimony begun, the irregularities and fraudulent returns were amply proven and on the twenty-fourth day of the same month judgment was formally entered, adjudging that Bashford was duly elected and that he should recover the office.

This result had been anticipated by all, including Governor Barstow himself. While in his communications to the Court and the legislature of March 8th he had announced his intention to resist the pretensions of the Court to the last, he had become convinced before the judgment was pronounced of the futility of any attempt at armed resistance. The sentiment of the people at large was strongly against him; the attempted frauds were too palpable, and moreover it was evident that the legislature would not support him in the use of force. The majority of the Senate was both politically and personally hostile and it became certain that if he resisted he would stand practically alone.

On the twenty-first of March he sent a formal resignation to the legislature, accompanied with a message protesting against the usurpation of power by the Court and placing his resignation upon the high ground of a desire to save the state from the calamities of civil strife. Upon the following

day Lt.-Governor Arthur McArthur assumed the duties of Governor and announced that fact in a message to the legislature. His administration is described as follows in Berryman's "Bench and Bar of Wisconsin" (Vol. 1, p. 387):

"He held the office four days. One of his first official acts was to order that the arms and ammunition stored in the executive office by Barstow be removed from the capitol. After the Supreme Court determined that Bashford was elected and that the right to the office was a question for judicial determination, Bashford and his counsel went to the executive office and demanded of McArthur that he surrender possession of it. 'Am I to understand,' said he, 'that if I do not surrender the office you will resort to force?' Timothy O. Howe, Bashford's counsel, said, 'My advice is that Mr. Bashford hang his coat upon a nail and proceed to the performance of his gubernatorial duties. I would not of course advise him to lay violent hands upon so distinguished a gentleman as Governor McArthur.' After further talk Mr. Bashford said that unless Mr. McArthur retired he would 'probably be compelled to expel him by force,' whereupon McArthur withdrew and resumed his duties as president of the Senate."

Thus the contest closed and Governor Bashford held the office unchallenged for the remainder of his term. There can be no doubt that there was grave danger of an armed conflict between the partisans of Barstow and Bashford at this time. Many Democrats believed that the action of the Court was bald usurpation of power. Chief Justice Cole is authority for the statement that "but for the implicit confidence which nearly all the people of the state felt in the judicial integrity of Judge Whiton, bloodshed would almost certainly have followed the Court's decision." [4]

[4] Berryman's History of Bench and Bar of Wisconsin, p. 94.

CHAPTER X

CHIEF JUSTICE WHITON'S RE-ELECTION

During the year following the Barstow and Bashford controversy the Court was not called upon to pass upon any other cases of a political or public character, but was busily occupied in disposing of private litigation and laying down fundamental principles governing private rights and their preservation and enforcement. This was important work, perhaps fully as important as the determination of the great political and public controversies of which mention has been made, but it could scarcely be of interest here to attempt any extended notice of the cases themselves or the principles involved in them; it is sufficient to say that the work was done with ability and care and that the propositions decided have largely passed into the fabric of the jurisprudence of the state without change.

In October, 1856, the legislature passed the New York Code of procedure with some slight modifications, and provided that it should go into effect in the following March. This was welcomed as a great reform by the younger men of the bar and by the people at large, while it was regarded as a dangerous innovation by the elder lawyers who had passed their lives under the common law system. After an experience of more than fifty years under the code it seems fair to say that the results have been in the main satisfactory. It is true that it has not resulted in the elimination of all technicalities, nor has it made it possible for a layman to draw his own pleadings and try his own case, as some of

its enthusiastic supporters predicted, but on the other hand it must be regarded as a long step in the direction of simplifying pleading and procedure and cutting off many of the very technical and useless refinements which had gradually developed in the old common law system. This is largely due to the fact that Wisconsin has added very few amendments to the original code, but has allowed the system to develop naturally by judicial interpretation and thus has escaped the infliction of a vast and complicated statutory system of pleading and procedure, such as New York now has and which seems almost as cumbrous and artificial as the previous system.

The term of Chief Justice Whiton was now nearing its close and the election of his successor was to be held in April, 1857. Whiton was personally very popular and his ability and integrity of character were fully conceded by the Democrats, but it could hardly be expected that political considerations could now be laid aside in view of the violence of party feeling and the active part which the Court had been compelled to take in party struggles, both state and national.

Early in the year 1857 Whiton's name was put up by Republican newspapers in various parts of the state and in February a call, largely signed by electors without regard to party, was presented to him and he accepted. Fremont had carried the state by more than 3,000 plurality in the presidential election of 1856 and in January, 1857, the Republicans had elected their first United States Senator in the person of James R. Doolittle of Racine, but the Democrats were still in possession of the national government, and though doubtful of success, they called a convention at Madison March 4, 1857, and nominated Montgomery

M. Cothren, then circuit judge of the fifth circuit, by acclamation, as Whiton's successor.

Judge Cothren was a very able man, a pronounced Democrat and had taken a very prominent part in the political and judicial life of the territory and state. He was an unsuccessful candidate for the office of Chief Justice twice and for associate justice once; he held the office of circuit judge of his circuit for three terms, and it seems that he deserves something more than mere casual mention in a work of this kind. He had not the advantages of a college education or even of academic training, but he made his way upward through a laborious childhood and youth by his own almost unaided efforts.

He was born in Yates County, New York, September 18, 1819, of parents in very moderate circumstances and came to Michigan with his father in 1829, where he remained until 1838, assisting in the cultivation of his father's farm and taking advantage of such limited elementary educational opportunities as the pioneer country afforded. At the age of nineteen he started for Wisconsin, intending to teach school and pursue the study of the law. For about a year he lived near Rockford, Illinois, and at the age of twenty came to New Diggings in Wisconsin, where he secured a position as school teacher, at the same time pursuing the study of the law as he could find time. In 1843 he was chosen clerk of the board of county commissioners of Iowa County and removed to Mineral Point, which remained his home ever afterwards. During the same year he was admitted to the bar and soon afterwards formed a law partnership with Parley Eaton and the firm entered upon a prosperous career, largely due to the ability and force of character of Mr. Cothren.

In 1847 and 1848 he was a member of the house of representatives of the territorial legislature and in 1848 he was elected a member of the first state senate from the counties of Iowa and Richland and served until January 1, 1851. He was chairman of the joint committee of the legislature which was appointed to co-operate with the revisers of the statutes and the result of the joint action of the revisers and of this committee was the Revised Statutes of 1849.

In 1852 he was nominated by the Democrats for the office of circuit judge of the fifth circuit, as the successor of Judge M. M. Jackson, and elected by a large majority. In the same year he was elected a presidential elector and assisted in casting the electoral vote of Wisconsin for Pierce. He was a delegate to the Democratic convention held at Madison in August, 1852, which nominated a full ticket for the separate Supreme Court and took strong ground in favor of the nomination of all judges by party conventions.

In 1858 he was re-elected as circuit judge without opposition. In 1863 he was nominated by his party for Chief Justice against Chief Justice Dixon but was defeated, and in 1879 he was put in the field by a Democratic legislative caucus as a candidate for associate justice against Justice Cole and again defeated. From January, 1865, until April, 1876, he practiced law, but in April of the last named year he was elected to the circuit bench as a non-partisan candidate and in April, 1882, was defeated for re-election by George Clementson.

After this defeat he again took up the practice of the law and so continued until his death October 27, 1888.

His lifelong friend and neighbor, Moses M. Strong, in his remarks before the Supreme Court January 8, 1889,[1] gave

[1] 73 Wis. p. xxix et seq.

an estimate of his character as a man, a lawyer and a judge, from which the following excerpts are taken:

"The prominent defect in the character of Judge Cothren as a lawyer was that his professional like his scholastic education had been fragmentary and without system. He had none of the advantages of law schools, or lectures, nor even the benefit of a regular course of study under the supervision of any competent lawyer. Notwithstanding these embarrassments, which he alone appreciated at their full importance, the uncommon strength of his native intellect, his quick intuitive perception and his ready faculty of making the appropriate application of the proper legal principle to each case as it arose, enabled him to overcome the latent defects of his professional education to such an extent that to the layman and to the superficial lawyer genius had the appearance of education, and tact and intuitive perception effectually concealed any lack of professional education. It was in the trial of jury cases, the examination of witnesses and in arguments to the jury that Judge Cothern won his principal distinction as a lawyer. To his intellectual and perceptive faculties, to his genius and tact, were added a wonderful knowledge of human nature and of the influences which affect human action. The confidence which was reposed in his integrity and his unswerving devotion to truth and honesty by all with whom he came in contact was unlimited. His warm sympathy with all the better feelings of our nature permeated his whole life. His generous and noble nature and his universal self sacrificing love of his fellow men seemed to attach all to him. These elements of his character gave him such an influence over the hearts of witnesses, jurors and all whose concurrent thought and action he desired, that his power over them may most appropriately be called magnetic. Possessing these faculties, he supplemented them in arguing a case to the jury by an intelligent and attractive mode of arranging for their consideration the issues presented by the case, a clear and fair statement of the facts and evidence of facts existing in the case, as well against him as in his favor, superadded to which he made the most powerful arguments sustained by analytical and synthetical reasoning of which the case admitted.

"Called to the bench at the early age of thirty-three, with only nine years practice at the bar, it would have been wonderful indeed if the manner in which he discharged the duties of his position had not elicited criticism. He had from the beginning of his term a modest diffidence of his ability, but it was overweighed

by a sensitive consciousness of the integrity of his intentions and an inflexible determination that truth and justice should be his guiding star which under all circumstances he would impartially follow without fear or favor, and that he would administer the law as he understood it, according to the best lights which had been vouchsafed to him. This determination, upon which he ever acted, always sustained him, and if it led him into any error he knew and all knew that it was of a character which is ever liable to result from the infirmities and ignorance of the most perfect of men. To parties litigant every reasonable opportunity was always afforded of presenting the whole cause of action or their whole line of defense. To attorneys and counsel the judge, while careful to maintain the observance of the duty due from them to the bench, was as scrupulously observant of every right and courtesy due to the members of the bar. He appeared to act upon the apothegm of Lord Bacon in his essays, that 'patience and gravity of hearing is an essential part of justice and an over-speaking judge is no well tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short.' To jurors he was (to quote Bacon again) 'a light to open their eyes, but not a guide to lead them by their noses.' His charges were always fair and perspicuous, and, if exceptionable, a fair bill of exceptions could always be obtained, as it could upon all questions arising in the progress of the trial. Witnesses were always protected by the judge from any improper or impertinent examination.

"The predominant trait in the character of Judge Cothren—the one uniformly recognized as such by all his large circle of friends—was his charity in the most enlarged meaning of the word. * * * So far from indulging in expressions of malice or unkindness to any, it was his uniform habit to speak well of all, and if that could not be done with conscientious regard for truth, to give them the charity of his silence. But his charity, in the more popular and limited sense of beneficience, was great and characteristic. He visited the sick, clothed the naked, fed the hungry, and never refused charitable aid to the deserving poor. His uniform, unswerving integrity was a marked feature of his character, not alone in the more restricted sense of fidelity to his pecuniary obligations, but with reference to all his duties to society and his fellow men. While he had that dignity of character which always commanded the respect and appreciation of all who met him, he was one of the most approachable and social of man-

kind and enjoyed the kindest regards of hosts of friends. To young man and especially to young lawyers he extended the kindest consideration and the assistance of his friendly counsel and advice."

Mr. Berryman, in his history of the Bench and Bar (Vol. 2, p. 160) says of him:

"As a natural result of his meditative cast of mind, we find him pondering deeply over religious matters, and quite as naturally, shifting about as his convictions altered in the effort to find firm ground. He was brought up in the Presbyterian sect. In 1857 he was confirmed by Bishop Kemper in the Protestant Episcopal Church, but did not permanently continue that relation. At one time he was a devout Methodist; at another he investigated the Catholic creed, ritual and ceremonies, declaring it to be the only true church. He did not, however, give practical effect to his inclinations in this direction. Later he stated that Beecher was preaching the only consistent doctrine of the age, and still later took up the study of Swedenborg's writings and was so deeply interested in them that he became a firm disciple of his faith, which he openly avowed and consistently practiced until his death. He was a believer in the communication of those gone before with those still in mortal garments dressed, affirming his own experience of the truth of the tenets of spiritualism. He loved and honored his profession with an unchangeable devotion and never violated its ethics or amenities. His faults were the result of frontier civilization; they were superficial. The sterling worth of the man shone through them as the sun through the mists. His frailties will be soon forgotten, while his good heart and right mind will live on."

The contest between these two eminent citizens was essentially a party contest. No serious question was raised as to the ability of either, but Judge Whiton's re-election was urged by Republican newspapers principally because of his record on the fugitive slave law and Judge Cothren was denounced as a friend of human slavery.

The Milwaukee Sentinel of March 31, 1857, said in bold capitals "The issue of Freedom or Slavery is upon us; we cannot shrink from it if we would."

On the other hand, the Madison Patriot (Dem.) in March, 1857, said that Whiton was above reproach and "aside from his views on the fugitive slave law question we honor him as a judge, but on that subject the Democratic party is compelled to wage a warfare against him, and with the revolution which is now going on in the public mind he may be compelled to bow before the sober second thought of the people, and yield the robe of office to one whose principles are more in harmony with our union and the genius of our institutions, both state and national."

However, the "sober second thought" of the people had not yet come, the great personal popularity of Judge Whiton made the campaign against him a hopeless one and he was re-elected by a majority of more than 10,000 votes.

CHAPTER XI

THE LAST VICTORY OF THE STATE RIGHTS IDEA

Sweeping as Chief Justice Whiton's triumph was it was not certain how much of it was due to the great respect felt for him by the people at large and how much to his prestige as the sitting judge. Another contest was rapidly approaching, however, in which there would be no such advantages on either side; a contest in which man was to be pitted against man and principle against principle and in which the people would be called on to pass upon the simple issue whether any man who believed in the supremacy of the federal courts on federal questions should have a seat on the Supreme bench of Wisconsin.

Justice Smith's term was next to expire and the election to choose his successor was to take place in April, 1859. Justice Smith was a man of strong and original mind and of tireless industry. He had taken the lead in the ultra state rights position assumed by the Court. In so doing he had followed his own honest convictions, but he had also severed himself from the great body of the Democrats of the north in general and of Wisconsin in particular. He was a man without a party. There were indeed many in the Republican party who were enthusiastically of the opinion that he should be endorsed by that party for re-election on account of his stand in the Booth case, but there was another figure which that famous litigation had brought to the front, a youthful, almost romantic, figure, which overshadowed all others and that was the figure of Byron Paine, the champion of the fugitive slave. In 1856,

when but twenty-nine years of age, he had been appointed county judge of Milwaukee County in place of Charles E. Jenkins, who had resigned, and he had been triumphantly elected to that position in the following spring and to the great majority of Republicans he seemed to be the natural candidate.

On the evening of March 3, 1859, a caucus of Republican members of the legislature and other prominent leaders of the party was held at Madison at which Judge Paine was nominated and an address issued calling on the people to elect him, declaring that the issue was between slavery and liberty.

On the same day a Democratic convention, called by the state central committee, had been held at Madison and William Pitt Lynde, an eminent lawyer of Milwaukee, had been unanimously nominated. When this nomination was made Mr. Ryan, who was a member of the convention, thanked the convention on Mr. Lynde's behalf and said that he hoped to see the Court brought back into sound, constitutional hands again. Thus the battle between so-called federal usurpation and state rights was again on. The contest was strictly a party contest and was fought with all the bitterness of such contests.

There was some dissatisfaction at first on the part of many Republicans because they thought Judge Smith fairly deserved re-election because of his state rights views. Prior to the legislative caucus calls and petitions numerously signed had been sent to him requesting him to run; there were about forty Republican papers in the state and a number of them had already put his name at the head of their columns, among which were the Sparta Herald, the Racine Journal, the Ripon Times and the Neenah and Menasha

Conservator.[1] Some Republican indignation meetings seem to have been held after Judge Paine's nomination.[2]

On the fifteenth of March, however, Judge Smith in a long communication to the Free Democrat declined to run on the ground that party nominations had been made and clear issues raised which he did not wish to embarrass in any way. The Republican papers fell into line and on March 21st the Wisconsin State Journal announced that every Republican paper in the state carried the name of Judge Paine at its head.

Curiously enough the Supreme Court of the United States decided the Booth case on March 7, 1859, and reversed the decision of the Supreme Court of Wisconsin discharging Booth. As has been before stated, the opinion was written by Chief Justice Taney with characteristic clearness of statement and cogency of reasoning and laid down the broad proposition (now unquestioned) that the state courts had no power to interfere with the execution of the process or judgments of the United States courts.[3] The Republicans of Wisconsin were in no mood to chop logic with any one and certainly not with the judge who had written the Dred Scott case. When passions are deeply aroused reasoning cuts little figure, except perhaps to intensify the passion in proportion to the convincing power of the opponent's reasoning.

Public indignation was intense; denunciation of the federal courts and of the federal government ran riot in the Republican newspapers and at indignation meetings all over the state. The legislature which was then in session and strongly Republican in both branches (William P. Lyon

[1] Fond du Lac Commonwealth, March 9, 1859.
[2] Madison Argus and Democrat, March 31, 1859.
[3] Ableman v. Booth, 21 Howard, 506.

BYRON PAINE.

of Racine being speaker of the Assembly) passed the following resolutions, which were approved by the Governor March 19th:

"WHEREAS, The Supreme Court of the United States has assumed appellate jurisdiction in the matter of the petition of S. M. Booth for a writ of *habeas corpus*, * * * and

"WHEREAS, Such assumption of power and authority by the Supreme Court of the United States to become the final arbiter of the liberty of the citizens and to override and nullify the judgments of the State Court's declaration thereof is in distinct conflict with that provision of the Constitution of the United States which secures to the people the benefit of the writ of *habeas corpus;* therefore,

"*Resolved, the Senate concurring*, That we regard the action of the Supreme Court of the United States in assuming jurisdiction in the case before mentioned as an arbitrary act of power unauthorized by the Constitution and virtually superseding the benefit of the writ of *habeas corpus* and prostrating the rights and liberties of the people at the foot of unlimited power.

"*Resolved*, That this assumption of jurisdiction by the federal judiciary in the said case and without process is an act of undelegated power and therefore without authority and void and of no force;

"*Resolved*, That the government formed by the Constitution of the United States was not made the exclusive or final judge of the extent of the powers delegated to itself; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress.

"*Resolved*, That the principle and construction contended for by the party which now rules in the councils of the nation that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism; since the *discretion* of those who administer the government, and not the *constitution* would be the measure of their powers; that the *several states* which formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a *positive defiance* of those sovereignties of all unauthorized acts done or attempted to be done under color of that instrument is the rightful remedy." [4]

[4] Session laws of 1859, p. 247.

These resolutions are practically a literal copy of the famous Kentucky resolutions of 1798 with the words "positive defiance" inserted in place of the unpopular word "nullification." The doctrine of state rights could go little further; "positive defiance" means effective defiance and effective defiance means war or it means nothing. That the resolutions voiced the sentiment of the great mass of the Republicans of the state there can be no doubt; the Republican newspapers supported them with practical unanimity and mass meetings were held in all parts of the state approving of the position taken by the legislature and calling upon the people to ratify them at the polls by electing Paine.

Carl Schurz, then a young man and a power in the politics of the state, threw himself into the fight upon Paine's side with all the enthusiasm of his nature; in a speech at Milwaukee, March 23rd he made a long and brilliant argument for state sovereignty and closed with the following peroration:

"Our poor state has suffered much, its credit is ruined, its prosperity blighted, its political honor has been forfeited by wholesale corruption and maladministration. There is almost nothing to be proud of but the gallant independence of our Supreme Court and the spirit of liberty which caused the people to sustain them. Will you sacrifice that also? Will you suffer the enemies of your liberties to nestle in your own citadel? Will you see Judge Miller's opinions and pretensions infest the highest court of this state? (Cries of no! never!) Will you see the dirty fingermarks of Buchanan's administration on the Supreme Bench of Wisconsin? If not, place a man there who dares to be himself. Let the friends of liberty and self-government present an unbroken front. Their banner bears the inscription, 'State rights and Byron Paine.'"

The Milwaukee Sentinel of March 23rd said:

"Can there be any doubt what the decision of the people of Wisconsin will be in the contest between federal usurpation and state rights, between slavery and freedom?"

The Wisconsin State Journal, in an appeal to the voters, of April 1st, said:

"Will freeman of Wisconsin have an able, honest and responsible elective judiciary of their own choice, or shall they have a servile, irresponsible federal court with life lease judges? Shall one man or the people rule? Shall the Supreme Court of Wisconsin be obliterated and superseded by Judge Miller and the Southern Democratic judges at Washington?"

Mr. Lynde stood squarely upon the doctrine that in matters touching the constitution and laws of the United States, the decision of the Federal Courts must be final and conclusive. Election day came; Byron Paine received a majority of more than 8,000 votes as actually cast but owing to defects in the returns many counties were thrown out and the official canvass gave him a majority of only 2,145.[5] The people had deliberately approved the doctrine that the state could and should nullify and defy a law of the United States which the Federal Courts had pronounced constitutional and valid, provided such law was thought by the courts of the state to be unconstitutional.

It is not to be understood, however, that all Republicans approved of the extreme position of the past on the question of state rights. There were some able men, and among them Judge Timothy O. Howe of Green Bay, who had no sympathy with state rights and nullification doctrines, but who were unable to stem the current and stood aloof from the campaign. After the election the Free Democrat of Milwaukee stated that Judge Howe had voted for Mr. Lynde. To this Judge Howe replied in an open letter in effect stating that he voted for neither, and that he wishes to save the party from the great fundamental political heresy of state rights and nullification.

[5] Wisconsin State Journal, April 20th and May 9th, 1859.

CHAPTER XII

THE ADVENT OF LUTHER S. DIXON AND THE CAMPAIGN OF 1860

Only a few days after this complete victory of the state rights doctrine the Court lost its chief by death. The much loved and honored Whiton had been sick for some weeks and had temporarily retired from the bench in the hope of regaining his health, but it was not to be, and on the twelfth of April, 1859, he died at Janesville, universally mourned. One week later Governor Randall appointed Luther S. Dixon to fill the vacancy and he took his seat the beginning of the June term following. Dixon had just reached his thirty-fourth year and had been but nine years at the bar. The following extracts from the memorial of the state bar association gives the events of his life in brief prior to his elevation to Supreme bench:[1]

"Luther S. Dixon was born in Milton, in the valley of the Lamoille in the state of Vermont June 17, 1825, of the sturdy stock of the New England farmers of the early part of the century. After laying the foundation of a good English education in common schools and academies he entered the military school at Norwich in that state, then under the conduct of instructors of marked ability. There he ranked high as a cadet and was an excellent scholar in Latin. There he received the thorough instruction, severe mental and physical discipline so valuable in forming character. After teaching school to procure the means of prosecuting his studies, he entered upon the reading of law in the office of Hon. Luke P. Poland, then of high standing among the lawyers of Vermont. He was admitted to the bar in 1850. The west was then the inviting field to the young men of New England, and

[1] 81 Wis. p. xxxi.

Wisconsin was regarded as well out on on the frontier. The young lawyer established himself at Portage in this state about the year 1851 and entered upon the practice. His sterling qualities drew him clients and he was twice elected district attorney of Columbia County, serving with zeal and fidelity. In 1858 upon the retirement of Hon. A. L. Collins, he was appointed judge of the ninth judicial circuit, the duties of which office he discharged with such marked ability as to give great satisfaction to the bar, then composed of some of the most distinguished and able practitioners of the state."

Of his life at Portage, Judge Chester A. Fowler of Fond du Lac writes as follows in a very appreciative sketch of Judge Dixon's life, read before the Wisconsin Bar Association in July, 1908, and printed in Vol. 8 of the Reports of that Association, at page 173:

"Portage was then a thriving and promising frontier town. It was quite widely known through occupying the site of old Fort Winnebago. Being at "the portage" between the Fox and Wisconsin rivers, a canal had just been constructed connecting the two rivers, and establishing a water-way from the Mississippi Valley through the great lakes to the Atlantic ocean. In those days of steamboat transportation the little city bid fair to become a port of entry. It was then the headquarters of the old "pinery" trade. With the outfitting of lumbermen, the supplying of camps and the trade of rivermen, the town was full of business and life. It had attracted a bar of eminence. I have been told by many members of the old bar of the state not resident of Portage that in the old days the Portage bar was considered as one of the very best in the state.

"These matters no doubt had their influence in attracting your Dixon. He was not long in making friends and securing a foothold in his profession. At the September term of the circuit court after his admission I find him appearing to some extent. From that time on his appearances become more and more numerous, and in three or four years he was occupying a leading position at the local bar. His splendid personal appearance and attractive manners would have made it easy for a man of ordinary ability to establish himself. While dignified and stately in his demeanor and bearing and somewhat reserved in his manner and in general intercourse, he was approachable and companionable, and sociable, thoroughly likeable and of winning personality in every way.

These qualities, added to his abilities, made his progress rapid. The year after locating at Portage he was elected district attorney, and two years later re-elected.

"Dixon did not in the days of his early practice prosecute the study of the law with remarkable industry. The cases he had he prepared thoroughly and well, but it was only in connection with these cases and along lines of general public interest that he read much law. He took no part in the discussion of the public questions of the time. He was no politician. While he at first affiliated with and was elected to office as a member of the Democratic party, he quite as often sided during the early fifties, when he expressed himself at all, against his party as with it upon the burning questions of the day, and it was not long before his democracy came to be rated as questionable, and he gradually came to be considered a Republican after the formation of that party. In a year or so Dixon associated with him in practice Guy C. Prentiss, whom he had known in Vermont and who followed him from that state, and later Emmons Taylor, also from Vermont, who succeeded to his practice on his going upon the bench. His practice seems to have been entirely local. He was more commonly than anyone else the associate and advisor of attorneys younger in the practice, whom he always received with cordiality and upon terms of perfect equality and treated with unfailing courtesy and kindness. He came finally to be retained locally on one side or the other of nearly or quite all cases of importance. A few of these were of a nature to give him some considerable local prominence, notably one or two cases of contested election, and a murder case which he ably prosecuted against two eminent attorneys from away. His supreme court practice was not extensive. I find him or his firm named as counsel in eight cases from the 1st to the 5th Wisconsin Reports. In all of these but two, however, he appears on the winning side. Only one of these cases appears to have involved any question of importance; this lays down the rule as to estates in entirety. Dixon was not considered particularly strong as a jury lawyer, although he could state his case to a jury or court with clearness and precision, or present an orderly and logical argument. He seems not to have been strongly litigious. In no case in the supreme court does he appear for the appealing party. It was as he said of his former partner, Emmons Taylor, upon the latter's death, 'in his capacity of counsel, in his office, where every lawyer is a judge, and where

LUTHER SWIFT DIXON.
At the age of 40 years.

in matters not litigated, vastly exceeding those which are, he decides all questions,' that he was at his best. Here, as he again says of Mr. Taylor, whose conduct as a lawyer was largely influenced by his early association with Judge Dixon and whose eminent and worthy career as such was largely due to emulation of his example, 'his learning, his ability, his truth and integrity were invaluable. How many lawsuits has he not saved, how much litigation, strife and bitterness, and useless expense, by his prudent and sagacious advice. He was always a pacificator, when pacification was proper and possible. He knew nothing about that art vicious in itself and disgraceful in those who practice it, which fosters and foments useless litigation.' It was because Dixon held and put in practice these views, that he was so highly and universally esteemed at his old home. His extreme popularity here is perhaps attested by the fact that while he was elected to the office of district attorney as a Democrat, his successor, who was a Republican, was elected by a majority greater than the entire vote of his opponent. It was of course a time of great political changes, when the Whig party was breaking up and re-alignment of Democrats was taking place, but Dixon's local popularity in the days before he was judge, is sufficiently attested by men still living who knew of it personally. This popularity was of the kind that springs from respect and esteem. Dixon was not the sort of a man with whom people generally are familiar. He did not cultivate acquaintance, and had comparatively few intimates.

"Once after locating at Portage Dixon took a trip to Minnesota with a view of bettering his situation, but finding nothing more attractive he returned to his friends at Portage and settled down with the expectation of passing his days in the practice of his profession among them. He built the first brick residence in the city, which still stands, although enlarged and remodeled since he left it. He took his place in the social and civic life of the place, doing his part in both. He was the alderman from his ward the year before he went upon the circuit bench, and some of the old residents still remember Mrs. Dixon's first appearance at a ball, with her husband, soon after he brought her from his old home in Vermont as his bride. The friends he made at Portage remained dear to him, as he did to them, to the last days of his life. In a letter read at memorial exercises in honor of Emmons Taylor, whom I have before re-

ferred to, he speaks of some of these friends in terms of deepest and most sincere affection.

"I doubt if Dixon ever entertained for any other man such strong and tender affection as he felt for Mr. Taylor. Of him Dixon said: 'His social qualities, I may safely say, were more pleasing and attractive than those of any person I have ever met.' He also refers to 'the many hours he had listened' to the readings to him of this friend from poetry and fiction, and to him as 'agreeable in all his intercourse, fond of anecdote and appreciating humor'—words which apply with equal force to Dixon himself. Dixon enjoyed the society of this friend as long as he lived as he did that of no one else, and at his grave mingled his tears with those of the immediate family. This is of course of no importance except as it may show the inherent tenderness, simplicity and faithfulness of Judge Dixon's nature, and the warmth and depth and lasting tenure of his affections, and serve to explain the contentment with early conditions that might otherwise seem strange.

"With his surroundings and associates in the frontier community where he lived, and such practice and professional employment as they brought him, Dixon was content. He had no desire or thought of judicial position, so far as any of his friends ever knew. His appointment to the circuit bench was entirely unsought, and came as a surprise to himself and friends. He did not at once accept, and it was thought he might decline. A meeting of the local bar was held, and resolutions were passed strongly urging his acceptance.

"Though while at practice Dixon became recognized where known as a lawyer of more than ordinary ability, the exceptional mental powers and qualities that he afterwards displayed upon the supreme bench were hardly suspected by his most intimate friends, and upon his appointment as circuit judge those who best knew him hardly anticipated that he would measure up to the high standard of excellence with which he immediately began to administer that office. He was appointed by Gov. Randall in 1858 judge of the ninth judicial circuit, to succeed Judge Collins, who had resigned to resume practice. The circuit then embraced the counties of Jefferson, Dane, Sauk and Columbia, and the bar was one of great ability and rather critical. Judge Dixon discharged the difficult duties of a trial judge to the entire satisfaction of that bar. Though he went upon the bench at

the age of 32 years, and after an experience of only seven years' practice, and that not varied or extensive, to read what has been said of Judge Dixon as a circuit judge,—of the commanding presence and quiet dignity, the frankness and unaffected simplicity, the unvarying courtesy and kindly ways, the serene and even temper, the patient attentiveness, the calm deliberation, the self-evident fairness and singleness and integrity of purpose, the equal and just consideration, the open and unbiased mind, the strong common sense, sound judgment and wise discretion, the resolute, orderly and efficient method, with which he presided over and transacted the business of his court, all which are vouched for with singular unanimity by those who knew and appeared before him as a trial judge—makes most of us in the position today seem, to ourselves, at least, small and weak indeed, and our shortcomings all but appalling. Notwithstanding the great satisfaction which his service gave, Judge Dixon had declined to stand for re-election, and contemplated resuming his practice at Portage, doubtless because of the small salary then attaching to the office, but before the expiration of the term for which he was appointed the death of Chief Justice Whiton left vacant the chief justiceship of the supreme court, and Governor Randall appointed Dixon to this position."

His youth and comparative inexperience made the appointment seem almost experimental, but he soon demonstrated his eminent fitness for the great position. In the before mentioned memorial of the bar, which was presented to the Supreme Court December 19, 1891, after Judge Dixon's death, it was most truly said of him:

"He was happily constituted for judicial labor. If there was aught in him of the partisan it was completely subordinated in the judge. Free from all bias or prejudice, his mind serenely sought the right of the matter, never swayed, even unconsciously, by thought of popularity or personal consequences."

He was a man of commanding stature, fine presence and charming personality, a learned lawyer gifted with a mind of comprehensive grasp, perfect intellectual honesty and absolute fearlessness. Thus Dixon and Paine, two great men who were both destined to do illustrious labor in build-

ing up the fabric of Wisconsin jurisprudence, took their seats upon the bench on the same day, one by appointment of the Governor and one by the voice of the people, speaking under the stress of great political emotions.

The state was fortunate in the choice of each. The times called for strong and constructive minds. Constitutional questions involving taxation and municipal indebtedness were at hand, as well as the great question of the relations of the state and the federal courts; the important questions arising out of the civil war, such as the power of the president to suspend the writ of *habeas corpus*, the validity of the draft laws, the legal tender act, the bounty laws and the law authorizing soldiers to vote while in the field were soon to come.

Both the ability and the courage of the new Chief Justice were soon to be severely tested. The mandates of the Supreme Court of the United States reversing the judgments of dismissal in the Booth cases were presented to the Court on the twenty-second day of September, 1859, and motions made that they be filed. If the Supreme Court of the United States had no power to reverse those judgments then the mandates had no more business on the files of the Supreme Court of Wisconsin than the ukases of the Czar of Russia, but if it had such power then the mandates were entitled to be filed and must be obeyed. So the question whether they should be filed or not, though not important so far as tangible results were concerned, involved the whole question of jurisdiction upon which the two courts were at issue. Judge Paine, having been of counsel in the cases, could not sit and hence the duty of deciding the motions fell on Judge Dixon and Judge Cole. Judge Cole retained his former view, that the Federal Court had no power to

review the judgments; hence, even if Judge Dixon took the opposite view, he could do nothing, because there would be an equal division of the judges participating and in this situation no affirmative action could be taken. He was powerless to accomplish anything; he might without serious impropriety have said nothing and let the mandates be rejected in silence.

Such, however, was not his nature. A great question was presented to him for examination; the clamor of the partisan moved him not; neither the echoes of the battle which had just closed, nor the premonitory murmurs of the contest which was soon to rage about him disturbed the serenity of his judgment. Duty called upon him to investigate the question for himself and record his conclusion upon it. This he proceeded to do and in a luminous and convincing opinion demonstrated both upon reason and authority that the United States Supreme Court had jurisdiction to review and reverse judgments of the state courts in cases where the validity of a law of the United States was attacked and the law had been held void.[2] This opinion was filed December 14, 1859, and was immediately published in full.

Upon the next day the following declaration of war appeared in the Milwaukee Free Democrat:

"The opinion simply marks its author as belonging to the consolidation and anti-state rights school of politicians who, considering the emphatic expressions of the people of the state, *has no right on the bench* and will probably remain there no longer than the people have an opportunity to express themselves in April next. So far as the cases are concerned, the opinion has no practical importance. It will have the effect, however, to compromise for a time the position of the state,

[2] 11 Wis. *498.

so clearly and emphatically defined and declared by the people, and gives us our work in a measure to do over again. In this view it is to be regretted."

This doubtless expressed the view of the radical element which comprised the great majority of the Republican party. Their disappointment was keen; just as they had succeeded in reconstructing the bench so that it was constituted not only of Republicans, but of state rights Republicans, the fruits of their labor had been practically taken from them by death and executive appointment. There were indeed some Republicans, especially among the abler lawyers, who saw the danger of the state rights idea and recognized that it was a two edged sword which would certainly be used against the party in case it obtained national power, a contingency which the torn condition of the Democracy rendered more probable every day. Their counsels, however, fell on deaf ears, the radicals were in the saddle and they demanded a straight party nomination on a state rights platform and the defeat of Dixon.

Judge A. D. Smith was urged by many as the logical candidate, which indeed he was if the question of state rights was to be the sole test, but the names of A. Scott Sloan, David Taylor, William P. Lyon and others were brought forward by newspaper communications. There was a strong undercurrent of feeling against a party nomination and in favor of supporting Judge Dixon as an independent candidate, but it made little headway; the presidential election was approaching, party passions were running high, a victory in April would add greatly to the prestige of the party and improve its chances in November, the state central committee on December 29, 1859, published a call for a state convention to be held at Madison, February 29, 1860, to choose delegates to the national convention, also presidential

electors at large "and to adopt such action as may be advisable in view of the approaching election of Chief Justice of the Supreme Court of the state." The challenge neither surprised nor dismayed Judge Dixon, indeed it may be said that he was the challenging party himself, for he was on principle opposed to party nominations and let that fact be known to the Republican leaders. Carl Schurz, who had now become a national figure and was actively at work spreading the doctrines of Republicanism among the Germans of the country, but still keeping track of the political situation in Wisconsin, on February 11, 1860, wrote a letter from Philadelphia to Senator Dooolittle, in the course of which he said:

"I had several letters from Wisconsin lately; the approaching judicial election gives our friends considerable trouble. Dixon will not accept a party nomination and refuses to lend himself to factional purposes in any way. But I understand he would allow himself to be called out as an independent candidate in case A. D. Smith should run." [3]

The convention was held in pursuance of the call and after the transaction of its purely political business I. C. Sloan of Janesville moved to proceed to the nomination of a candidate for Chief Justice. A warm debate followed, which is quite fully reported in the Madison State Journal of March 2nd. Judge Timothy O. Howe and his brother, James H. Howe, then Attorney General of the state, opposed a party nomination on the ground that the nomination of party candidates for the bench was inadvisable and that the party had in the past taken that position; Mr. Schurz was present and spoke warmly in favor of a nomination, claiming with truth that Judge Paine's nomination in the previous year, though not made by a convention, was to all

[3] Wis. Alumni Magazine, Vol. 9, No. 4, p. 137.

intents and purposes a party nomination. The motion was carried by the decisive vote of 137 to 84. Upon the first ballot A. Scott Sloan of Beaver Dam received 63 votes, the balance being divided among many candidates, Judge Dixon receiving but two votes. Upon the third ballot Sloan received 158 votes and was nominated.

On the seventh of March Judge Dixon was put in the field by a non-partisan call signed by several thousand electors of the state, including many of the ablest members of the bar. Practically the entire bar of Madison joined in the call, among the names being E. W. Keyes, D. K. Tenney, F. J. Lamb, W. A. P. Morris, H. M. Lewis, Geo. B. Smith, S. U. Pinney, B. J. Stevens and J. C. Gregory.

There was no move for a Democratic nomination. The principle of non-partisanship always appeals strongly to a minority party and such the Democratic party now was for, in the fall of 1859, the Republican party had elected a full state ticket.

The Madison Patriot (a Democratic paper) of March 6th said in course of a long editorial, "Away with party judges, away with party decisions, away with politics on the bench," and this doubtless expressed the feeling of Democrats generally at this time, notwithstanding the fact that with a regular Republican candidate and an independent candidate, recently appointed as a Republican, in the field the chances of a straight Democratic nominee who could poll the vote of the party would seem to have been very good.

So far as the ability and personality of the candidate was concerned, the nomination of Judge Sloan was an eminently fit one. Both he and his brother I. C. Sloan of Janesville were recognized as among the ablest lawyers of the state.

He was nearly forty years of age at the time of his nomination and had come to the state from New York in 1854, and located at Beaver Dam, where he entered on the practice of the law with H. W. Lander. He was elected a member of the Assembly as a Republican in 1857 and was also elected mayor of Beaver Dam in 1857 and 1858. He was appointed circuit judge of the third circuit in 1858 upon the resignation of Judge Larrabee and served in that capacity for ten months, but was defeated for re-election in 1858 by John E. Mann by a very small majority. He was elected to Congress in 1860 and served one term. He was appointed county judge of Dodge County in 1868 and held the office for nearly six years. In 1872 he joined the independent Republican movement, which resulted in the nomination of Horace Greeley for president and afterwards acted with the Democratic party. He was elected Attorney General of the state upon the Democratic or reform ticket in 1873 and re-elected in 1875. During his administration the great railroad cases, involving the question of the power of the state to fix fares and rates, were brought and decided favorably to the state.[4] In 1881 he was elected judge of the thirteenth circuit and held that position by virtue of successive re-elections until his death, April 8, 1895.

As circuit judge he commanded the respect and love of both bar and people. In the course of an eloquent tribute to his memory before the Supreme Court by Samuel S. Barney, Esq., September 2, 1895, the speaker gave him the following just praise:[5]

"I speak the plain truth as I believe it when I say that but few men ever sat upon the bench better qualified in every way to discharge its important and solemn duties than he. A great

[4] 35 Wis. 425.

[5] 90 Wis. p. xlvii.

lawyer, in the sense of a ready and technical knowledge of all the rules of law and practice, he perhaps was not; but in the sense of a thorough and almost intuitive knowledge of all the great principles which are the foundation of our system of law and equity, he was a great lawyer. He never spent the years that some jurists have in close study of cases and the text-books of the law, but he had spent a long life in the careful and thoughtful conideration of good books of all kinds and of men, and thereby acquired a wider and safer knowledge of the principles of our jurisprudence. For the technicalities of the law he had but little sympathy or consideration; but he never for a moment forgot the truth of the great principles of God's eternal justice, which should be the foundation of all law.

"Above all, he brought to the discharge of his duties a great, good and honest heart, a moral perception which enabled him in every case to see the right, and the gift of a lofty, moral courage, which prompted him in all cases to do the right as he saw it, regardless of criticism or consequences. This was the quality which was the crowning glory of Judge Sloan's life. He may at times have been mistaken in the law, he may also sometimes have failed, from the facts presented to him, in arriving at a just conclusion, in the judgment rendered by him, but every decision which he ever made, either upon a question of law or fact, was the unprejudiced conclusion of a good head and an honest heart."

Though the radicals in the Republican party had thus succeeded in forcing a party nomination, they had not succeeded in securing the adoption of a platform nor did any one know certainly what Judge Sloan's position was on the question of state rights; and as this was, to them, the supreme test of fitness for the bench there was considerable dissatisfaction among them with the result of the convention. Loud demands were at once made that Judge Sloan define his position as to the state rights doctrine; the Free Democrat of Milwaukee declined to put up his name at the head of its columns and on March 8th called on him to state his position and threatened to bolt the nomination

and put up another candidate if he did not make a satisfactory statement.

Thus the situation became acute, if not alarming. Judge Sloan's sense of judicial propriety undoubtedly told him that a candidate for the bench could not properly give pledges in advance as to his action upon a question which might be presented to him for decision after his election, but in response to the entreaties of his friends he finally adopted a doubtful expedient for making his views known by way of a professedly private letter to his brother, I. C. Sloan. This letter was addressed "Dear Brother" and was published in the Janesville Gazette of March 14th. In it, after noticing the demand of the Free Democrat for a statement of his views, he said:

"You, of course, know that I agree with Judge Smith and not with Judge Dixon; you also know that I would not have accepted the nomination otherwise; Judge Dixon was dropped mainly because of his unsoundness on that question. It would be bad faith in me to take the nomination unless I agreed fully with the Supreme Court in the Booth and Rycraft cases, knowing as I do that a large majority of the Republicans of Wisconsin regard the question as a vital one and intended to nominate a candidate who would represent the views of that majority. But I cannot feel that I ought to make any avowal of my opinions on that or any other question and shall for the present decline to do so. A little reflection will convince all reasonable men of the justice and propriety of this course and I trust you will agree with me."

This roundabout method of making his position known upon the burning question of the hour, while protesting that he could not properly do so was satisfactory to the radicals and the Free Democrat immediately gave Judge Sloan its active support. Naturally enough the letter excited laughter among Dixon's supporters and became derisively known in the campaign as the "dear brother" letter. Whether it was

useful or not in Judge Sloan's canvas may well be doubted: it removed the possibility of a third candidate, but it doubtless alienated many of the soberminded Republicans who were at first inclined to follow the party nomination, but could not approve this palpable bid for votes by a candidate for the highest judicial office in the state. The campaign was spirited, especially in the newspapers. Most of the Republican papers supported Judge Sloan, but there were some which openly advocated Judge Dixon's election and among these were the Milwaukee Sentinel and the Wisconsin State Journal.

About March 20th Marshall M. Strong of Racine published in the Racine Journal a very able plea for the reelection of Judge Dixon and for independence of the judiciary.

Ex-Justice Abram D. Smith took an active part in the campaign and made an exhaustive speech in support of the state rights position and the Booth decisions, which was ably answered by Timothy O. Howe. It was apparent to all that notwithstanding Paine's brilliant victory on this issue in 1859 the question whether belief in the extreme state rights theory was to be the test of Republicanism in Wisconsin was still an open one. The Republican papers urged all Republicans to stand by the party, especially in view of the adverse effect of a party defeat upon the approaching presidential contest in the fall; the story was also circulated that Governor Randall had been deceived when he had made Dixon's appointment; that he had inquired of Dixon's friends before the appointment as to his position on the state rights' question and had been answered by them that Dixon was all right on the question; this, however, was vigorously denied by Dixon's friends.

Another question on which strong feelings were beginning to be held by the people was injected into the campaign, although it could hardly be called an issue, because the position of neither candidate upon it was certainly known. This was the so-called "farm mortgage" question and it arose as an aftermath of the railroad building epidemic of the early fifties and the business depression following the panic of 1857.

The influx of settlers during the years of prosperity and inflation prior to the panic was enormous. They arrived at the lake ports in whole ship loads; and by wagon and on foot went westward and spread over the vast and fertile prairies of southern Wisconsin and northern Illinois, which were only waiting for the plough and the sickle to break forth into abundant harvests. This region became almost by magic the granary of the nation and in the fall the highways became filled with farmers' wagons drawing the grain for scores and even hundreds of miles to the ports of Lake Michigan for shipment.

To meet these new conditions railroads seemed to be an absolute essential and in Milwaukee and Racine and other lake cities companies were organized to construct railroads to the interior and a race of diligence began to reach and tap the area of the great grain fields. Milwaukee sent out two lines, Racine one, Kenosha one and still others were projected.

High finance was known even then, and the companies sent out agents with glowing prospectuses to obtain subscriptions to the stock of the new companies by the towns, villages and cities on the proposed line to be paid for by municipal bonds. So anxious were communities to obtain the benefit of the railroad lines that they frequently bid

against each other and saddled themselves with a load of indebtedness which blighted their future for many years. Nor did the agents confine their efforts to municipalities, but many were sent to the prosperous farmers in the vicinity of the proposed lines and these painted the same glowing pictures of the wealth which the railroads would bring and urged the farmers to take stock in the enterprises and give mortgages upon their farms in payment.

It was a time of optimism and prosperity; croakers were the exception. Few doubted that the railroad stock would pay dividends from the outset and become worth more than dollar for dollar in a short time. It was regarded as certain that the coming of the railroad would greatly enhance the value of farm lands. Thus many farmers were induced to subscribe for stock and give their negotiable notes secured by mortgages on their lands to pay for it. As matter of course the railroad companies disposed of the notes and mortgages by sale or pledge as soon as they received them in order to obtain the money with which to build their roads. Whether the purchasers were all bona fide holders without knowledge of the glittering promises held out to the farmers may be doubtful, but it was impossible to prove them otherwise and hence they became for all practical purposes innocent holders of commercial paper transferred in due course of business before due.

From these dreams of wealth there was soon a rude awakening. Some of the projected roads were never built; those that were built paid no dividends on their stock; the great panic of 1857 came and forced them all to the wall, wiped out the stock and left in the hands of the farmers only the lithographed certificates. The expected rise in values of lands did not come, in fact in many localities land

decreased in value and the farmer was left with a heavy incumbrance on his farm and nothing to show for it.

Cities and towns repudiated their bonds and refused to levy taxes to pay the annual interest; the farmers declined to pay the interest on their notes and in many cases could not do so, and the holders began to commence foreclosure proceedings and thus ruin stared many a farmer in the face. The question became a serious one in the southern part of the state and the legislature was appealed to for aid.

The Supreme Court at the December term 1850 had decided [6] that a negotiable note secured by a mortgage transferred to a *bona fide* holder before due, carried with it the mortgage so as to preclude the defense of fraud or any other defense which would have been good as against the mortgagee and this decision had been reaffirmed at the December term, 1852,[7] and at the June term, 1859.[8]

If these decisions were to be followed (and they only stated a principle universally established) the farmers had practically no defense. Their notes had been duly made and were in the hands of innocent purchasers; they were contracts and as such were protected by the constitutional provision prohibiting the passage of any law impairing the obligation of contracts.[9]

Notwithstanding the fact that the rights of the note holders had thus become vested the legislature was not unwilling to pass an act purporting to grant relief to the farmers whether it was constitutional or not, thus throwing upon the courts the burden and the odium of declaring it

[6] Fisher v. Otis, 3 Pinney, 78.

[7] Martineau v. McCollum, 3 Pinney, 455.

[8] Croft v. Bunster, 9 Wis. *503.

[9] Const. Wis. Art. I. Sec. 12.

invalid. By chapter 49 of the laws of 1858 it was declared in substance that in all actions brought to enforce such notes or mortgages the defense of fraud should be available as well against the assignee as against the original holder and that no assignee of such a note or mortgage should be permitted to claim that he was an innocent holder without notice.

In 1859 several cases had been decided in the circuit courts of Dodge, Rock and Racine Counties involving the validity of such mortgages in the hands of innocent purchasers, in some of which the defense of fraudulent representations had been interposed, and in others the defense that the railroad companies had no power to receive notes and mortgages in payment for stock.[10] In these cases the decisions had been favorable to the mortgagors and, while the law of 1858 was not specifically made the ground of the decisions, still it was inferentially at least sustained in at least one of the cases. These cases were now pending upon appeal in the Supreme Court and thus the question of the validity of the law, so far as it concerned past contracts, was soon to be presented to the Court.

Public sympathy was unquestionably largely with the farmers and in favor of the law and in order to conciliate this interest the partisans of each candidate endeavored to make it appear that their candidate was favorable to the law and that the opposing candidate was against it. It was charged that Democratic lawyers had sent out letters asserting that Judge Dixon favored the mortgagors while, on the other hand, Republican papers claimed that Judge Sloan was unquestionably favorable to the validity of the law.

[10] Clark v. Farrington, 11 Wis. *306; Blunt v. Walker, 11 Wis. *334; Cornell v. Hichens, 11 Wis. *353.

Upon this question the campaign amounted to little more than firing in the air for, as before stated, the position of neither candidate was definitely known. The contest was a heated one and the vote so close that the result was not known for about two weeks. Both sides claimed the victory, there were charges of irregularities and the throwing out of votes, but when the official canvas was finally made on May 4th it was found that Judge Dixon had won by a majority of less than 400 votes in a total vote of over 116,000. After election the Milwaukee Sentinel and the Wisconsin State Journal, both of which papers had supported Judge Dixon, were bitterly denounced as traitors to the Republican cause by the Fox Lake Gazette and by other Republican papers.

In a review of the various judicial campaigns of the state printed in the Milwaukee Sentinel of April 15, 1895, Hon. E. W. Keyes of Madison, who participated actively in the campaign in favor of Judge Dixon, says:

"A bitter feeling was stirred up in the ranks of the party in the state and those who supported Judge Dixon * * * were criticized, condemned and stigmatized as bolters and threatened with political vengeance. * * * Republicans were berated for standing firm for the principle of a non-partisan judiciary and for supporting for election the incumbent of the office be he Republican or Democrat. The result of this election was a vindication and approval of Judge Dixon for his boldness and courage in adhering to his convictions of duty against what appeared to be at that time a popular clamor in this state—the dogma of state rights—which incited the rebellion and which soon thereafter was repudiated here, and by the nation; blotted out by the arbitrament of war, it is hoped forever. * * * I have voted for every judge of the Supreme Court since the days of Whiton and including him. I was active in behalf of Chief Justice Dixon in that most extraordinary judicial campaign of 1860. At that time the hotheads of our party classed me and others like me as bolters, to be punished galore. In looking

back I can recall no political act of my life that meets more heartily the approval of my judgment and conscience."

Mr. Keyes had ample reason to be proud of his position in that election and so had the Republican lawyers of the state, the great majority of whom supported Judge Dixon in that memorable campaign. It is not too much to say that by their action at this critical time, they not only gave the death blow to the heresy of state rights which had for six years dominated the party and dictated its candidates, but they also did much to establish the principle of non-partisanship in judicial elections in the first great contest where it was squarely and fairly raised, a principle which was destined to become paramount in the state and lift the Supreme Bench above the plane of party politics.

Although Judge Sloan would unquestionably have made a creditable Chief Justice, it must always be a cause for congratulation that at this crucial period in the state's history, when great questions were impending and our jurisprudence was in its formative state, a superlatively great lawyer and judge like Luther S. Dixon should have been placed at the head of its highest court. There he was to remain for fourteen years, growing in strength as the years went by and doing invaluable service in placing the Supreme Bench of Wisconsin in the very first rank of the state judiciaries.

CHAPTER XIII

DIXON AND PAINE

The Bench was now made up of two men elected because they were Republicans (though not nominated by party conventions), viz.: Paine and Cole, and one man originally appointed as a Republican but elected as an independent, Dixon. Thus it was to remain for a little more than ten years, with the exception of the period from November 15, 1864, until September 10, 1867, when owing to Judge Paine's resignation on the former date, Jason Downer of Milwaukee occupied his seat.

All of these men were well fitted for the task and may be said to have admirably supplemented each other. Dixon and Paine were men of great intellectual grasp, of vigorous and constructive intellect, and great lucidity of expression. Cole possessed perhaps less of originality and genius, but his mind was clear and logical, his industry tireless, his judgment conservative and safe, and his power of expression admirable. When Dixon and Paine locked horns, as they frequently did, Judge Cole's opinion was necessarily controlling and thus it was that upon him fell the burden of giving the casting vote in many important cases.

Of the personal and mental qualities of Dixon and Paine much has been written by their friends from the vantage ground of intimate personal acquaintance. As the writer had not this advantage, it seems better to insert here some excerpts from the appreciative notices thus already made than to attempt to write anything new.

In the course of the memorial of the bar before referred to[1] (presumably written by General Edwin E. Bryant) it is said of Judge Dixon:

"He came to the bench at an important and critical time in the history of the state and nation. Questions involved in the contentions of political parties must be decided and the judgments of courts could but provoke fierce criticism. Questions were pending which directly affected the interests of large classes of citizens, arising out of the early efforts in railway development and the involvement in that behalf of public spirited men. Fortunes and even homes were imperiled. Decisions were demanded favorable to those in jeopardy and judges were threatened with the displeasure of the masses if decisions gave disappointment. The then recent adoption of the Code had displaced the ancient, familiar practice, and thrown much labor on the Court in settling the new procedure. New and important questions sprang up in the period of rapid development during and following the war, and the rapid growth of the state largely increased the labors of the Court. Chief Justice Dixon and his illustrious associates in that formative period worked with noble diligence for the welfare of the state. * * * The work of Chief Justice Dixon and his eminent colaborers on the bench, it may truly, and we hope not inappropriately, be said, placed our Supreme Court well forward among the strong, able tribunals of the country. His decisions, embraced in twenty-six volumes of our Court reports, constitute a record imperishable, and his ennobling influence upon the body of our law will be felt and acknowledged, as it now is, in the long future.

"In private life stainless, in the domestic relations and those of the neighbor and citizen irreproachable, he lived among us. In social intercourse, when professional toil could for a brief space be laid aside, it was a pleasure to meet him. Of commanding presence, tall but well formed, with a natural grace of deportment perfected by his early military education, he bore nature's stamp of superiority. But he was unostentatious, simple and direct in manner as a child, cordial and generous; and there was something in him that won and held friends and gave him a wide but unsought popularity. He had the sparkling wit without trace of bitterness, the buoyancy of spirit and keen

[1] 81 Wis. p. XXXI.

sense of humor, so often observable in great lawyers. An agreeable converser, attent and sypathetic listener, he was the charm of a social circle. His kindly grace put all at their ease and he could be interested in all with whom he came in contact. His career after he left the bench was in keeping with his noble work upon it. He remained true to his profession though political honors were within his reach. Avoiding all notoriety, shunning all display, he modestly went about his work; at once assumed high rank at the bar, and enjoyed the rewards of extensive and important practice. His health forced him some years ago to seek the higher altitudes and rarer atmosphere of the western mountains. Thereby, although he retained his residence in Milwaukee and considered this state his home, the profession here lost for the most part his delightful companionship and his powerful aid. It was almost as an exile that he went to Colorado, banished by the rigor of our climate. He went at a period in life when men are not wont to form new attachments, and, if engrossed in care, are unlikely to attract new friends. Depressed by suffering, for his asthmatic ailment deprived him of the blessedness of refreshing sleep, the cheerfulness which was one of the charms of his nature might well be quenched. But he entered at once upon an extensive practice, and amid the strife of constant legal controversy he came to be loved by his professional brethren there no less than here. In the resolutions passed at a large meeting of the bar in Denver, called when the announcement of his death reached them, they express in words of tenderness 'their reverent respect and heartfelt affection.'

"He returned to his family in Milwaukee, a few weeks since, after a professional visit to Washington, so worn out by the long struggle with the malady which finally overbore his superb physical constitution, that age and the hand of death seemed visibly upon him. A short illness brought the last great change, and after a life of unsullied honor, faithful service in the highest field of usefulness, with a lasting fame firmly assured, life's work well done, his body sleeps in the soil of the state he served so well, near the scene of his judicial labors and by the graves of his children. His immortal part, with God who gave and imbued it with such love of justice, such high intelligence, such sweetness and charity, now as we devoutly trust, sees the right, not in the crepuscular dimness of human imperfections, but in the clearness of eternal day."

Upon the same occasion the Hon. Gerry W. Hazleton said of him:

"In December, 1856, I met him for the first time at his office in the city of Portage. There was at that time no railroad communication with the place and I had made the journey by private conveyance from Columbus, a distance of thirty miles, for the purpose of consulting him in relation to professional business. It is difficult to realize the years which have elapsed since then, and still more difficult to realize the magnitude of events which crowd and illuminate the history of the intervening period; but I recall, as if it were only yesterday, the cordial greeting which was extended to me as a young attorney, and the pleasant impressions which I carried away, impressions which were only to be emphasized by the intercourse of after years.

"He had then but recently returned from a six weeks' absence in Minnesota and still further west, as I remember, in search of a location which might please him better than Portage for the practice of his profession. His observations and experiences on the journey fortunately led him to the conclusion to remain in Wisconsin, and he had returned to resume his practice among the friends and acquaintances who were only too greatly delighted to welcome him back to his former home. Here he continued prosecuting his labors, holding the leading practice in the county and, so far as his friends knew, having no ambition for judicial honors. It was while thus employed that he received and accepted the appointment of circuit judge for the ninth judicial circuit, to take the place made vacant by the resignation of Judge Collins—an event which opened up to him a judicial career in which he won honorable and lasting distinction, and upon which he shed unquestioned lustre, not so much by his ample learning as by the force and greatness of his character.

"It happened to me to be a resident of Columbia County when he entered upon his office as circuit judge and to have been a witness to his capacity for judicial service at the very outset, and I am sure I shall be pardoned for referring briefly to this portion of his public career. Unquestionably the popularity he at once acquired as circuit judge directed attention to him and led to his promotion to the Supreme Bench. The lawyers who had occasion to appear before him at that time will not fail

to recall his easy self-possessed and agreeable bearing. His bench manners were simply perfect. He combined with a natural and becoming dignity an unaffected simplicity, a frankness, an even serenity of temper, an unfailing courtesy which absolutely disarmed criticism. It is said of the eminent Chief Justice Gibson, who was noted for his deference to the bar, that he boasted in one of his merry moods that he had reached at last the object of his highest ambition, which was to keep his eye fixed on a dull speaker, while his thoughts were employed with more agreeable objects. Judge Dixon disclosed the rare faculty at the circuit which he brought with him to this Court—the faculty of listening to a dull speaker with the same apparent consideration he would accord to the most entertaining, and if with less interest no one ever knew or suspected it. He was patient and helpful particularly with the younger members of the bar, while at the same time prompt, orderly and efficient in advancing business. He had no favorities, no prejudices, no idiosyncrasies. His charges—at that time oral—were clear, methodical and brief; delivered with an easy and natural grace and with a distinct articulation which rendered it a pleasure to follow him. In a word, he was the ideal circuit judge.

"There was an affluence of manhood in his personality which no one could mistake. This he carried with him to the bench. It constituted the basis of his honorable career. It permeated and reflected in all his judicial labors, and was indeed as marked and unmistakable as the strong, sturdy common sense which guided him to sound and just conclusions. He was pre-eminently one of those of whom it can be said without overpraise, 'He stood four squares to all the winds that blew.'

"I shall not be misunderstood when I say that he was entitled to little praise for being honest and upright. He could not be otherwise. His integrity was so wrought into the fibre of his nature and was so essentially a part of himself, that he could no more divest himself of it than the violet can divest itself of its perfume. It did not spring primarily from a sense of the duty which judicial station laid upon him, nor from his high appreciation of the sacred trust which he had assumed, but from innate rectitude of character and purpose—in other words from the essential quality of his organization. Not that he was indifferent to this sense of duty or unmindful of the meaning of

his trust, but that he was happily so constituted as not to need such stimulant.

"Very few men are favored with greater aptitude for judicial station. He had the judicial temperament, the trained habit of investigation, the quick perception of right and wrong, the natural love of justice, the courage of his convictions, the broad and comprehensive notion of equitable principles, which ensure success on the bench; and when we reflect that he supplemented these with painstaking study and research we can readily understand the basis of his eminence as a jurist.

"In his old circuit he has always been regarded with pride and affection. Particularly is this true of Columbia County, in which he spent the early years of his professional life. He surrounded himself during this interesting period with friends who have never forgotten his genial and lovable qualities. Indeed his circle of personal friends in Portage embraced the entire community."

Judge Charles E. Dyer, in the course of an eloquent address on the same occasion, said:

"His judgments are among the jewels of our jurisprudence. Without exception they bear the stamp of his penetrating and vigorous mind. None fails in that lucidity of statement, strength of diction and cogency of argument which were his happy gifts. If his intellect was not what may be called brilliant, it was comprehensive and powerful. If he was sometimes wanting in that mental alertness and dexterity essential to emergencies in forensic strife, his masterly powers of deliberation and discrimination made him an ideal judge and a wise and safe counsellor.

"He had high respect for sound authority, but he believed also, as his opinions show, in original processes of reasoning. Some men have the faculty in the highest degree of stating with precision what the law is. Others have the faculty of stating what the law ought to be. Dixon knew what the law is, and could state it so accurately that it was dangerous to controvert his proposition. If, as a judge, he was convinced that he had committed error, no pride of opinion would stand in the way of its correction, for like Lord Hardwicke he would think it 'a much greater reproach to continue in error than to retract it'.

"At all times frank and courteous, every impulse of his nature was generous and noble; his heart was large, his society con-

genial, his salutation hearty. He was plain and unobtrusive, he affected nothing. On the bench and at the bar his demeanor toward his professional brethren was always that of kind and cordial recognition. I recall as a pleasant memory my first case in this court more than thirty years ago, when Mr. Justice Lyon came with me as associate counsel and as my personal friend, for I found that the young lawyer was received by Chief Justice Dixon and his associates with the same consideration and kindness as was any veteran of the bar.

"As a companion Judge Dixon was delightful. Judge Drummond, who also sleeps the sleep of the just and whose name I reverently speak, was wont to say that it was always a pleasure to meet Dixon, he was such a likable man. Genial in temperament, cultured in literary acquirements, fond of anecdote, and abounding in a great sense of humor, he possessed most happily those qualities which drive away dull care when the hours of serious occupation are past."

There probably has never been any other judge upon the Supreme Bench of the state who mixed so freely in a social way with the members of the bar as Judge Dixon. Judge Dyer truly says that he was a delightful companion and that he possessed those qualities which drive dull care away when serious duties were past. The state was still young and manners quite unconventional; Dixon loved to meet his fellow lawyers in familiar conversation and such meetings were not seldom held around the small table of the restaurant or bar room, where jest and anecdote went around as well as the convivial glass. To tell the plain truth his conviviality sometimes went entirely too far as is evidenced by a number of stories which formerly floated about legal circles in his old circuit. As illustrative of their character the following which is told of him while still living at Portage will suffice. One evening in winter when a snowstorm was raging Dixon spent the evening down town with friends over cards, and the bottle went merrily around; when he came to go home it was suggested that there were no street

lights and it was so dark and stormy that he needed a lantern and so his host provided one for him. He made his way slowly and laboriously to his home and left the lantern in the front hall. In the morning Mrs. Dixon remarked it and asked whose it was and how it came there and the Judge dramatically told her of the terrible storm and the inky darkness of the night and of the kindness of his friend who loaned him the lantern without whose kindly light he could hardly have got home. When he had completed this affecting tribute to his friend's kindness Mrs. Dixon observed, "Well Luther, the next time you borrow a lantern to light your way home you had better see to it that it has a wick and some oil in it."

Among his friends he was familiarly known as "Dick", but, notwithstanding this freedom of approach and unconventionality of manner, no man ever suspected or suggested that he had friends to reward or that his treatment of judicial questions was ever in the slightest degree affected by friendship.

He was a great man, strong in body and in intellect, possessed of little patience with small and inconsequential refinements, either of manners or of dress. The blood in his veins was rich and red; there was, as Mr. Hazleton well says, "an affluence of manhood in his personality" which none could fail to see. Easy going and careless of trifling matters, Court would frequently convene a half hour or more late while the Chief Justice was exchanging anecdotes with members of the bar who had come to argue their cases.

Illustrating this irregularity in the opening of Court, General Winkler of Milwaukee relates the following story:[2]

"While Judge Dixon was chief justice the court was guilty of a certain laxity of practice. It had no very definite hour of

[2] Vol. 8 Repts. Wis. Bar Ass'n, p. 39.

meeting. It had a theoretical hour, of course, but this was not strictly adhered to, the judges frequently not coming in until half an hour or even an hour after the appointed time. Under Judge Ryan as chief justice this practice was changed and the strict hour of opening at ten o'clock every morning was observed. One morning when I happened to be there the first case called was one in which Judge Dixon was interested. Judge Dixon was not present. Word was sent for him to his hotel but he was not found. There was some waiting but he did not ap pear. Finally a suggestion was made to substitute some other case and Mr. John W. Cary and myself, who had a subsequent case on the same day's docket, took up the argument of that in place of Judge Dixon's. In the afternoon at the opening of court Judge Dixon appeared ready to argue his case. Judge Ryan looked at him with great sternness and said, 'Judge Dixon, the court lost a valuable half hour this morning waiting for the late chief justice.'"

General Winkler also relates the following story of the same two great men:[3]

"After his resignation he was, as we all know, succeeded by Chief Justice Ryan, and Judge Dixon and Judge Ryan mutually seemed to take great pleasure in poking a little fun at each other whenever they could, and in one of these cases relating to the Northwestern road that Judge Jenkins has alluded to, there arose the question of the effect of a certain plat of property in the city of Milwaukee. I heard it argued in the supreme court. The same question had been before the court in a previous case,—Emmons v. The City of Milwaukee—and argued by Mr. Ryan in behalf of the city of Milwaukee, he being then city attorney. The decision had been against his contention, Chief Justice Dixon delivering the opinion. Judge Dixon was now, as attorney for the railway company, compelled to take an opposite position as to the proper construction of this plat. The former decision stood in his way and he strenuously argued against its correctness. Chief Justice Ryan interrupted him, finally saying: 'That is all very well, Judge Dixon. It is the very position I took in Emmons v. The City of Milwaukee. But you overruled me. You say the ruling was wrong. In this you may be right. But the great difficulty is that you may

[3] Vol. 8 Repts. Wis. Bar Ass'n, p. 38.

possibly succeed me in my present position, as I have succeeded you, and then, I am afraid, you will go back to your former error.'"

Hon. G. W. Hazleton relates the following story, which illustrates his ready wit:[4]

"Of course I knew him very well, after I came to Columbia County, and while he was practicing at Portage, and I remember very well when he was appointed judge of the circuit court, and having quite a large list of cases to be tried, he requested Judge Noggle to attend the term and try the cases in which he was interested. At the close of the term we had a banquet at the old Vedder Hotel, the old yellow building, some of you may remember, and in the course of the evening when the time came for speech making, one after another had been called, and finally a certain Mr. X, I will call him, who was quite noted in the city for his voice, and the vigorous use of it, was called on for some remarks, and he opened by saying: 'When I came to Portage this country was a howling wilderness'—and Judge Dixon sprang to his feet with this query: 'I would like to inquire of the gentleman, whether it was a howling wilderness when he came or after he came.'"

Judge Dyer used to tell this story of Dixon. After leaving the Supreme bench he was retained by one of the great railway companies and was obliged to defend a series of condemnation actions in which large verdicts were rendered against his company. One day Dyer met him on the street in Milwaukee looking exceedingly glum. Dyer greeted him as usual and said: "Why so solemn today?" Dixon told him of his disastrous experiences with condemnation cases. After his tale of woe was told Dyer said with a twinkle in his eye (which only those who knew that delightful character can appreciate), "Judge do they ever quote Driver v. Western Union R. R. Co. to you in these cases?" "Yes

[4] Vol. 8, Repts. Wis. Bar Ass'n, p. 37.

they do," said Dixon, "and there isn't a word of good law in it." The case which Dyer referred to was a condemnation proceeding in which he was defending a railroad company (32 Wis. Rep. 569) and in which Judge Dixon concurred in an opinion compelling the company to pay a large verdict on what always seemed to Dyer as a very erroneous principle.

The following story was told at Racine with circumstantiality and every appearance of truth. At some term of Court during the sixties a number of members of the Racine bar were for some reason late in reaching Madison to argue their cases and the consequence was that when they arrived in the evening they found that their cases had all been called and continued or dismissed early in the day. They agreed that upon the opening of Court in the morning they would all appear and state the reason of the delay and jointly ask that the cases might be reinstated and argued. Major Ira C. Paine (then a leading lawyer of Racine and uncle of Judge Paine) was chosen to present the request. The Major was somewhat irascible and had, when excited, a high falsetto note in his voice. After he closed his appeal to the Court a moment's consultation was held between Chief Justice Dixon and his colleagues which resulted in a denial of the motion, the Chief Justice remarking that the bar must remember that nothing was more uncertain than the time when cases would be reached in this Court. At this Major Paine jumped to his feet and said in his shrill treble: "Yes there is, Your Honor; yes there is; it's a good deal more uncertain how the cases will be decided after they are reached." The remark disturbed the dignity of the bench for several minutes.

The following brief summary of the leading events in the short life of Judge Paine is found as a preface to the memorials presented to the Supreme Court after his death:[5]

"Byron Paine, late an associate justice of the supreme court of Wisconsin, was born in Painesville, Ohio, October 10, 1827. In the autumn of 1847, he removed to Milwaukee with his father, Gen. James H. Paine, with whom he studied law in that city. He was admitted to the bar in 1849; was clerk of the senate of Wisconsin in 1856; was elected county judge of Milwaukee county in 1857, and held that office until the first of June, 1859, when he took his seat as one of the associate justices of the supreme court of this state, to which position he had been chosen at the previous spring election, for the full term of six years, to fill the vacancy created by the expiration of the term of the Hon. Abram D. Smith. On the 10th of August, 1864, for the purpose of entering the military service of the United States, he tendered his resignation of his judicial office, to take effect on the 15th of November following. He was appointed lieutenant-colonel of the Forty-third Regiment of Wisconsin Volunteer Infantry, and continued in the service until May, 1865. He then resumed the practice of the law in Milwaukee; but on the 10th of September, 1867, he returned to his former seat on the supreme bench, having been appointed by the governor upon the resignation of Mr. Justice Downer. At the following spring election in 1868, he was elected for the residue of Judge Downer's term, which would expire on the first of June, 1871. He appeared in the consultation room for the last time on the 23rd day of November, 1870; from which time he was confined at his own home by a severe attack of erysipelas, until his death.

"On the first three days of the January term of the supreme court, to wit: the 10th, 11th and 12th days of January, 1871, the court met and transacted business without the presence of Judge Paine. On the third day, the illness of the absent justice continuing to be of an alarming character, the court adjourned until the 23rd of the same month. On the evening of the 13th Judge Paine died."

I think no man who has reached the Supreme Bench in this state has been better loved than Paine. He reached

[5] 27 Wis. 23.

that goal by call of the people before he was thirty years of age; he was called not because the people knew him to be a great lawyer (though such he in fact was), nor because he had made a great record as a judge, but because the public heart had been touched and thrilled by the great battle that he had made for the freedom of man in the Booth case. Few popular heroes win their laurel crowns in the court room, but Judge Paine was one of the few.

But though he was carried to the bench by a great wave of sentiment, it is certain that no mistake was made. For once at least sentiment reached the same conclusion which calm judgment with nice measurement of abilities would have been compelled to reach. Byron Paine needed no aid from mere sentiment or claptrap of any kind. It was said of him by Edward G. Ryan on the occasion of the presentation of the memorials before referred to:[6]

"He was emphatically a marked man. His character was uncommon. There was no possibility of confounding him with the crowd of respectable mediocrity. His was a high type of manhood, physical, mental and moral. He was strong in all the nobler attributes of humanity; singularly free from all its meaner weaknesses; he was essentially a gentleman, not by force of training, but by the intelligence and integrity of his manhood. He was not a man of genius, but he had a force of character, a firmness of will, a strength of conviction, which made his high ability of more value to the world than genius often is."

Speaking of the Booth case, Mr. Ryan on the same occasion said,

"The printed brief which he submitted in this court in that case was the ablest argument I ever met against the constitutionality of the fugitive slave act. It is a professional loss that it was not inserted at length in the report of the case. It established in my mind his great learning and resources as a cultivated lawyer."

[6] 27 Wis. 34.

Referring to Judge Paine's management of Booth's defense on the trial of the indictment in the federal court Mr. Ryan said,

"I shall never forget his closing argument. It has been my lot during a long professional life to encounter many able advocates; but I never listened to an argument before a jury more perfect for the case than that was."

This is high but well merited praise. A sketch of his life, understood to be from the pen of the late Chief Justice Cole, appears with the memorials presented to the Supreme Court.[7] There can be no closer contact between man and man than the contact of the consultation room, nor can there be any place where more intimate and just judgments can be formed as to the abilities and personal qualities of another. From these considerations Chief Justice Cole's tribute possesses far greater significance than the ordinary eulogy, and it is inserted here in full:

"Of the early life of Judge Paine we really know but little. It was doubtless not unlike that of the youth generally of his native state (Ohio) who happened to be blessed, as he was, with most kind and affectionate parents in moderate circumstances. It may therefore be assumed that there were no incidents in his early life of special interest, or which in any manner presaged his future brilliant career. He must have received in his youth a thorough academical education, and he certainly acquired some knowledge of the Latin language. But he never made pretentions to any great familiarity with Latin authors, and in the estimation of some, rather underrated the value of a thorough classical education. He, however, became a very fine German scholar; could read that somewhat difficult language with great ease, and of course with much satisfaction; and at one time had so fully mastered the language, that he was able to deliver political speeches in German. But this was after he removed with his father's family to Wisconsin, and when he began to take an active part in the discussion of the great political questions of the day. Even up to the period of his last illness, Judge Paine

[7] 27 Wis. 58.

seemed to delight in occasionally turning aside from the severe writers of his chosen profession, to refresh his mind with the noble productions of Lessing, Schiller and Goethe. He read law in Milwaukee in the office of his father, General James H. Paine, and was admitted to the bar of this state in 1849. Without any particular information upon this point, it is quite safe to say that he must have been a hard student, reading with care and discrimination the elementary works upon the different branches of equity jurisprudence and the common law, and then becoming well grounded in the leading principles of legal science. For some time after his admission to the bar, not being pressed with a large practice, he had an ample opportunity to write for the public press upon such subjects as he felt a peculiar interest in, and this opportunity he well improved, to his great advantage in after life. For by these frequent contributions to the newspaper press, and the popular discussions which they necessarily led him to engage in, Judge Paine acquired a facility of composition, a readiness to express his ideas, either orally or in writing, with a clearness of expression, a force of logic, and an eloquence rarely equalled, and never excelled, by any public man of the state.

"But a few months after the admission of Judge Paine to the bar, Congress passed the fugitive slave law of 1850. This enactment, so cruel and inhuman in its provisions, as many good people thought, certainly freighted with much evil and mischief in the then state of public sentiment in regard to chattel slavery, was at once challenged upon constitutional grounds by some of the ablest and best lawyers in the country. An event soon happened in this state which brought the discussion as to the validity of the law to a practical issue. In March, 1854, an alleged fugitive slave, by the name of Glover, was seized by the United States marshal as the *property* of one Garland, of Missouri, under this law. Some persons rescued Glover from the custody of the marshal, and set him at liberty. Certain parties, supposed to have been present, aiding and assisting in the escape of Glover, were then arrested for a violation of its provisions, and committed to prison. The persons thus imprisoned sued out a writ of *habeas corpus*, and the question of the constitutionality of the law was finally presented to the supreme court for decision. Judge Paine made the leading argument against the validity of the law, and his views prevailed with the court. The

argument made by him on that occasion he regarded as the greatest intellectual effort of his life. It was certainly a most masterly discussion of the question involved, and established his reputation as one of the ablest constitutional lawyers in the country. He had a great fondness for the investigation and study of constitutional questions, and the discussion of them afforded a fine field for the display of his great powers of reason and logic. He was sincerely attached to the Union and the constitution of the United States, and desired to see them maintained in their original purity and integrity. His view of the federal government was, that it was a government of delegated powers; that it was supreme within the scope of those powers; but that it could not rightfully exercise any power not expressly granted in the constitution, or which was not incidental and necessary to the proper execution of some power clearly granted. The preservation of the complex system of state and federal government he deemed of vital importance for the security of liberty and personal rights. But to secure the blessings of liberty, and to perpetuate the Union, it was essential to maintain the reserved powers and rights of the states in all their integrity. Hence, he was always ready to vindicate the rights of the states, whenever in his judgment those rights were usurped by the general government. But his affection was as strong and his zeal as active to sustain the just rights and powers of the one as the other. He favored no new glosses, no new interpretations calculated to make the federal constitution a different instrument from the one our fathers had made, construed and adopted. And if experience had shown that there were defects in the instrument, then the wise course was to remedy them by proper amendments, and not by doubtful construction. This, in brief, was the constitutional doctrine of Judge Paine. He had an intense hatred of slavery, and resisted with all the energy of his nature its insidious encroachments, whether under the guise of constitutional power or in its more open violation of sacred rights and principles. Therefore to overthrow and annul the fugitive slave law was a labor in which his head and heart worked together in perfect accord. After his argument just referred to, he continued his practice at the bar but a short time. He never acquired what would be called an extensive and lucrative practice. But he was always laborious as a lawyer; mastered fully the law and facts of every case entrusted to his

charge; never sought to succeed on any mere technicality, but only upon the strength and real merits of his cause; was clear and strong in argument; thoroughly in earnest in what he said; treating his opponent fairly and ever perfectly honest with the court. Such was his sincerity and love of truth that no one ever heard him insist upon a position before the court that his better judgment admonished him was unsound. He was, in a word, a high-minded, conscientious, thoroughly upright lawyer; proud of his profession; desiring to see its members working together for the improvement of legal science, cherishing fraternal feeling among themselves, and ever maintaining a high standard of morality and excellence.

"In 1857, Judge Paine was elected county judge of Milwaukee County. Under the circumstances, this was a great popular tribute to his qualifications as a lawyer and his worth and integrity as a man. The Republican party, of which he had been from its organization an active and powerful leader, was largely in the minority in the county. A democratic candidate was regularly nominated for the office by that party. The office was an important one. In addition to its civil jurisdiction over a certain class of cases, the county court was vested with probate powers. It is the peculiar duty of that court to settle the estates of deceased persons, to adjust the accounts of guardians, to guard and protect the rights and interests of widows and orphans, who are frequently unable to protect themselves. Such was the public confidence in Judge Paine, that the electors of Milwaukee county did what is not always done in this country—they elected the best man regardless of party. They fully appreciated how essential it was to have a wise and incorruptible judge in that place, and they put him there. They never had reason to regret their choice. Judge Paine held the office of county judge until he was elected judge of the supreme court, in the spring of 1859. He remained on the bench of that court until November, 1864, when he resigned his office and entered the volunteer forces of the United States, raised to suppress the rebellion. He was appointed lieutenant-colonel of the Forty-third Wisconsin Infantry. It is doubtful whether the entire loyal states furnished another instance of a judge of the highest state court resigning his position upon the bench to accept such an appointment, or even any appointment in the army. And yet this was so in accord with the disinterested and patriotic spirit which marked the

conduct of Judge Paine, that it excited no surprise and scarcely a remark among his friends. Some of them well knew what a trial it had been to his feelings that he could not enter the service at the very commencement of the war. But controlling reasons of a private nature forbade his doing so. He had no opportunity to distinguish himself in this service, even if the acquisition of military fame and distinction had been the inducement for his entering the army. But no such motive operated upon his mind. He went into the army solely from a sense of patriotic duty, and to aid in sustaining the Union in the great crisis of its history. At the close of the war he returned to his home and his practice, and continued to labor in his profession until his appointment to the bench of the supreme court, September 10, 1867. He remained upon the bench of that court, discharging faithfully the highly responsible duties of his office, until stricken down by the illness which caused his death.

"The question as to Judge Paine's eminent qualifications and fitness for this position is settled finally—conclusively put at rest—by the published decisions of the supreme court. These will abundantly vindicate, it is believed, so long as they exist, his reputation and character as an able, independent and incorruptible judge. Causes of great difficulty, magnitude and importance have come before the court while he has been upon the bench, have been determined, and have passed into judgment. The record is therefore made up; so far as he is concerned, it cannot be changed; and his judicial fame and merits may rest upon it as it is. His friends should be willing, as they doubtless are willing, to let his published opinions decide the matter. Do not these opinions show patient and careful examination; laborious research and investigation; a proper deference to authority; just discrimination of adjudged cases; a clear and firm grasp of sound principle? Do they not show that he at least sought to decide causes according to the well established rules and principles of law, impartially, justly, without regard to personal, party, or any unworthy consideration? That he made mistakes and sometimes fell into error, is no more than saying that he had the infirmity of our common nature. It is impossible to get a just idea of his strength and ability as a judge from any one of these opinions. Those upon the true limits and principles of taxation, and upon questions of constitutional law, seemed most fully to call forth the resources, as they taxed most severely

the powers, of his mind. Many of his decisions might be cited as fine specimens of judicial reasoning and clear persuasive argument. The remark was sometimes made, that he was too little inclined to follow in the beaten path of the law—to stand *super antiquas vias.* If by this was implied that he had not such a blind reverence for authority that he dare not question an unsound decision which had the support of a great name, or any number of them, the remark was undoubtedly just. He certainly had but little idolatry for mere precedents as such, which violated correct principles. His mind was critical, but not revolutionary. He laid no violent hand upon the great systems of equity and common law jurisprudence which the great sages of the past have left us. But he realized that those systems, however wise and excellent, were still not perfect. They will bear improvement, and must at times be modified to adapt them to the wants of a highly refined society and a new condition of things. What wise jurist thinks otherwise? He also had a just appreciation of the responsibility of his office. He knew that an independent, pure and intelligent judiciary was a sheet-anchor of our institutions; and, as far as he could, he labored to render it all that, in this state. No one will say that the fountains of justice were polluted by him.

"From his first appearance in public affairs, he enjoyed a large measure of public favor and confidence. This was doubtless due to the liberality of his principles and his consistent course of action. Having capacity sufficient to take a leading part in the most important affairs, he never sought office. His sympathies were large, and always on the side of liberty, humanity and progress. He gave his earliest and best efforts to the cause of the poor, oppressed slave. His whole soul revolted at the 'horrid fantasy that there could be property in man.' Every good cause in him had a friend. With the Latin poet he could say: '*Homo sum; humani nihil a me alienum puto;*' 'I am a man; I think nothing that relates to man foreign to my feelings.'

"He enjoyed the full confidence and affection of his associates upon the bench, who fully appreciated his many noble qualities of head and heart. And it is true, to use the language of a great man, when speaking of another almost equally distinguished: 'Political eminence and professional fame fade away and die with all things earthly. Nothing of character is really

permanent but virtue and personal worth.' (Mr. Webster's remarks on the death of Jeremiah Mason, vol. 2.) Virtue and personal worth Judge Paine indeed possessed in a high degree, if ever man did. He was temperate, truthful, sincere, continent. He wronged no man. He outraged no rules of morality. His palm never itched for unlawful gain. He was true and faithful to his friends. He was true and faithful to all public trusts. He would not have done a base act for any place or any profit. He would have felt a stain upon his reputation more keenly than a wound upon his body. Under no temptation, under no trial, did his moral feeling lose its 'sensibility of principle and chastity of honor.' He was of rare simplicity of character, large hearted, charitable as far as his means would allow, ever preferring to be estimable rather than seem to be so.

"He read much outside of his professional studies. He had an inquiring, critical mind. His apprehension was quick, his power of acquisition remarkable, and his memory very tenacious. He was intellectually honest; not afraid to read what might be said against his views, and ready to accept the truth from any source. He read much upon theology, and reflected more upon the great problems of human destiny. These queries seemed to be constantly hovering in his thoughts: Whence did we come? Whither do we go? And why have we been summoned on the shores of earthly being? That he solved these momentous questions to his own satisfaction, even, no one can affirm. But he had decided convictions upon the subject of religion. He brought to the examination of that subject, as of all others, an honest, independent spirit. It was impossible for him to accept any man's creed unless it commended itself to his reason and moral sense. Whatever opinions he entertained upon religious subjects, he retained to the last, and there is no evidence that he was dissatisfied with them, even in presence of death itself.

"He had favorite authors that he was accustomed to resort to at all times, turning them in his hand both day and night. He was very fond of the dramas of Shakespeare, the poetry of Milton and Byron; he greatly admired the manner and style of Webster's great efforts, and read with infinite relish Scott and Thackeray. He placed the latter author far above Dickens as a writer of fiction. Indeed he did not greatly admire Dickens, which seemed a little strange, as he had himself a great deal of humor in his nature, and a nice sense of the ridiculous.

"He was blessed by nature with a fine, vigorous constitution. He was nearly six feet in height, and well proportioned. His countenance indicated great resolution and decision of character. He was very fond of active out-door sports, especially hunting. He was so full of vitality and life that no one, before his sickness, would have hesitated to predict that he was to have 'length of days in his right hand, and in his left hand riches and honor." When a man full of years and full of honors comes to his grave 'like a shock of corn cometh in his season,' we readily acquiesce in the providence which removes him from earth. It is with a somewhat different feeling that we see the strong man fall, when in the full maturity of manhood, while in the full vigor of his mental and physical powers, when his fame and usefulness are widening, and his life-work but partly done."

CHAPTER XIV

THE FARM MORTGAGORS AND JUDGE COLE'S SECOND CAMPAIGN

The year 1860 was a stirring one in national and state politics. The old Democratic party which had guided the destinies of the nation for the greater part of the time since the days of Jefferson had been rent in twain. The northern and southern wings of the party had finally separated at Charleston and the division had become complete by the nominations of Breckenridge and Lane by the southern wing and of Douglas and Johnson by the northern wing. The Republican party, flushed with local successes all over the north and imbued with all the enthusiasm which devotion to a great moral principle incites, placed before the people as its candidate for President the great rail splitter sprung from the loins of the common people and preferred above the polished eastern statesman Seward. It was a time of political disintegration and turmoil.

The effects of the panic of 1857 had not yet passed away; times were still hard; there was no national currency, state banks were still failing, and a man who received a bank bill in payment for a debt could not tell whether it would be good on the morrow. The national campaign was active and acrimonious. As it progressed and the Democratic factional fight gave promise of dividing the party into nearly equal parts and thus making the election of Lincoln possible, threats of secession by the southern wing of the party became louder and louder and these threats were answered by threats of force on the part of the north.

Stirring as national politics were, however, in the summer of 1860 there was another question which came to the front in the southern part of the state which agitated several thousand of the farmers in that region more than the question of the preservation of the union or the freedom of the slaves.

Reference has been made in a preceding chapter to the great number of notes and mortgages executed by farmers in several of the southern counties and given to railroad companies in exchange for railroad stock during the years of great railroad building prior to the year 1857. The panic of 1857 had wiped out all of this stock and left many of the farmers who executed the mortgages facing financial ruin. To relieve them if possible the legislature had passed chapter 49 of the laws of 1858, intended to deprive the assignees of such notes and mortgages of their rights as holders of commercial paper or, in other words, making the defense of fraud good not only against the original payee, but against an innocent purchaser as well. The farmers to a man repudiated the mortgages and rested upon two claims; first, that railroad companies had no power under their charters to accept anything in payment for stock except cash, and, second, that the mortgages were obtained by means of fraudulent representations and (under the law of 1858) were invalid for this reason in the hands of any person, even though he might be an innocent purchaser. Actions to foreclose some of the mortgages were begun and brought to trial in 1859 and Judge David Noggle in the first circuit and Judge John E. Mann in the third circuit both upheld the contention that the railroad companies had no power to accept notes and mortgages in exchange for stock sold and Judge Noggle upheld the defense of fraud

as against an innocent purchaser. Having obtained these rulings in their favor in the trial courts the farm mortgagors rested in fancied security. The cases were appealed to the Supreme Court, however, and came on for hearing in February and March, 1860, but were not decided until June and July of that year.[1] *Clark v. Farrington* and *Blunt v. Walker* held that the companies might lawfully receive a note and mortgage in payment of a stock subscription, although their charters did not expressly authorize payment to be made in that way, the broad ground being taken that a corporation in exercising the powers expressly conferred upon it might adopt any proper and convenient means tending directly to accomplish those powers which did not amount to the transaction of a separate unauthorized business. In the *Cornell* case it was further held, following the very early cases, that a bona fide purchaser of negotiable paper took not only the paper itself but the mortgages collateral thereto free from all defenses of which he had no actual notice. In considering this question the act of 1858 was discussed and summarily disposed of as unconstitutional on the ground that the legislature could not impair the obligations of an existing contract. The discussion of this question in Judge Dixon's opinion in the *Cornell* case was comprised in a few brief sentences; after stating the general rule that vested contract rights could not be divested or impaired by legislation, he says:

"In these cases the plaintiffs had, by the act of transfer and the operation of the law as then in force, an immediate and vested right to look to the makers for full payment regardless of any equities which existed as between them and the company. This right the legislature could not destroy, or cut off, either by

[1] Clark v. Farrington, 11 Wis. *306; Blunt v. Walker, 11 Wis. *334; Cornell v. Hichens, 11 Wis. *353.

changing the rules of pleading or the laws of evidence, or by endeavoring to operate directly upon the right itself."

This conclusion seems inevitable now but it came with a rude shock to the farm mortgagors. It spelled bankruptcy and ruin to many of them and they at once began to take measures to organize for defense. There had been already formed local associations called farm mortgage leagues and having a central organization called the Grand League. A meeting of the Grand League was held at Rolling Prairie July 5, 1860, at which it was resolved to establish a newspaper organ and to call a state convention of farm mortgagors at Watertown July 12th. The convention was held and was largely attended; the victims of eight railroads were represented, coming principally from the counties of Dodge, Columbia, Green Lake, Adams, Green, Winnebago, Walworth, Rock, La Crosse, Waukesha, Kenosha, Washington and Ozaukee, which were the counties which had suffered most. A permanent organization was effected called the Grand State League of Farm Mortgagors, a constitution and by-laws adopted and adjournment was taken until October following.

Mr. A. M. Thomson of Hartford (in later years editor of the Milwaukee Sentinel) was himself a farm mortgagor and writer of force and ability and he was designated to publish the official paper of the league, a neat four page country weekly, the first number of which was issued from Hartford, August 11, 1860, under the name of the "Home League." It contained some local and political news, but was independent in politics and specially devoted to the interests of the Farm Mortgagors. This paper ran nearly four years and was suspended by reason of lack of support March 5, 1864. A practically complete file of the paper (probably the only

one) is in the possession of the State Historical Society at Madison and from this file I have obtained much of the data for what is here said about the farm mortgage movement, a movement which assumed great proportions and for several years intimidated political parties, dominated legislation and threatened the independence of the Supreme Court. It forms an interesting story, concerning which a book might well be written, but which can only be briefly referred to here. The object of the League was to influence public opinion, legislatures, and, if possible, courts, by showing a united front. It is said in the first number of the Home League that there were six thousand of the farm mortgagors who owed about $5,000,000, and there seems no good reason to doubt the statement. Such a mass of voters acting together constituted a force to be reckoned with. No political party could afford to offend them.

The following are the closing paragraphs of an editorial in the first number of the Home League:

"The Home League is the farm mortgagor's flag! It is the olive branch to those who desire peace, but the gleam of the battle axe to such as prefer war. That flag has been nailed to the mast by their own brawny arms, and woe to the kid gloves that essay to tear it down. * * * Does it do any good to ring the alarm bell when the conflagration spreads at midnight? Does it do any good to fire the signal gun when the ship is sinking? Why, even wild horses, it is said, with instinctive caution, set one of their number to keep sentinel while the herd is feeding to give alarm of the approach of danger, and is it not wisdom in us to put a watchman on duty when we know there are robbers about? *The rattlesnake gives fair notice ere he strikes; so beware O stockjobber when you hear the rattle! The fang follows the warning!*"

In another editorial in the same number of the paper it is said that the decision in *Clark v. Farrington* and the comments of leading papers of the state thereon showed that

the Court and the press were both on the side of the bondholder; "the former deciding adversely to the mortgagor and the latter justifying and extolling the unrighteous judgment."

It seems to be true that the leading papers of the state, i. e. the papers published in Milwaukee and the larger towns, approved of the decisions in the farm mortgage cases on the ground that any other decision would subject the state to the charge of repudiation and thus would effectually ruin the credit of the young state; there were, however, some papers published in the smaller towns which sympathized so strongly with the farm mortgagors that they did not hesitate to denounce the decision; the Democratic papers hoping to gain a party advantage thereby, and the Republican papers being all the more bitter because all the members of the Court were known to be Republican in politics. A number of expressions of this kind are reproduced in the first number of the "Home League" and from them two may be quoted as typical.

The La Crosse Union (a Democratic paper), said:

"Those farmers who voted the Republican ticket last fall under promise that a Republican Supreme Court would release them from their railroad obligations are now waking up to their sorrow. The greater the steal, the greater the Republican leaders labor to make it legitimate. It may be a good thing for the state but it pains us to see the thousands of little farms with their white cottages or more humble cabins, the growing crops, the labor of years, the result of toil, the earnings of honest men, intended to be left to the widow and orphans, all swept into the pockets of railroad owners as the roulette keeper sweeps the dollars into the bag under the table and turns again to catch new victims. It may be an honor to legalize fraud but it is not honest nor is it humanity. There is scarce a county in the state but soon will see going forth from the little homes, hallowed by joy and made sacred with grief, leav-

ing a loved fireside wet with tears, a caravan of broken hearts and blasted hopes, wending its way on toward the golden sunset where fraud, trickery and dishonesty is not yet in the full tide of successful operation."

The Wisconsin State Rights (a Republican paper), said: "The Supreme Court may do what it pleases. It may overthrow all the law of corporations and encourage combined swindling to the last degree, but an appeal will be taken to the great jury of the people. There can be little doubt of the verdict. Justice, common sense, law, right and equity are on the side of the farmers. The community will not stand tamely by and see hundreds of their best citizens cleaned out through the operation of lying, deception and fraud in their worst forms, and we trust none other in the state will. If the decision shall meet with the contempt and disrespect from the people which its mutable doctrines provoke the *astute* court may thank itself. It may have the natural fruits of its incubation to itself. The people, when they fully understand the nature of the decisions in the cases, will sit in effective judgment thereon."

Nor was the denunciation of the decisions confined to the newspapers. Mr. James H. Knowlton of Janesville, one of the most prominent and active of the early lawyers of the state, reviewed the decisions from a legal point of view in a long communication published in the "Home League" in the numbers dated September 8th and September 15th respectively and took the ground that the Court was wrong in holding that corporations possessed all the powers *convenient* for the carrying out of their express powers, and arguing strongly that they possessed only the powers expressly granted to them by statute and such incidental powers as were *necessary* in order to accomplish their express purposes; as it was not *necessary* that the railroad companies should receive notes and mortgages in payment for their stock he maintained that the decisions were wrong and gave entirely too great powers to corporations. In view of

the very widespread dissatisfaction as to the aggressions of corporate power which was to sweep over the country half a century later the closing words of Mr. Knowlton's brief are interesting; they are as follows:

"The doctrines laid down in this opinion apply to all corporations. If they are the law, the rights of the people must soon lie buried beneath the crushing weight of irresponsible monopolies."

The second convention of the Grand State League of Farm Mortgagors was held at Watertown, October 9, 1860, and a committee, of which A. M. Thomson was chairman, was appointed, to prepare an address to the people of the state. In the mean time local lodges of the league, with regular stated meetings, were being formed in all the communities where there were a sufficient number of farm mortgagors to justify it, and thus a very complete organization of a fraternal order was perfected.

Judge Cole had been elected in the spring of 1855 for a term of six years and hence the election for his successor must necessarily take place in the spring of 1861 and naturally in the fall of 1860 the thoughts of the farm mortgagors began to turn toward the question of who that successor should be.

Probably it was not seriously expected that the Court would reverse its former holding, even if a new member should be put on in Judge Cole's place, but it was unquestionably expected that legislation of some sort would be obtained making the collection of the farm mortgages very difficult, if not impossible, and it was of great importance that a man should be placed on the bench in sympathy with the farm mortgagors in order that they might have a friend at court when the question of the constitutionality of the expected legislation should be presented for decision. In

an editorial in the "Home League" of October 27, 1860, it is said that a rumor is in circulation that Judge Dixon now repudiates the decision in *Clark v. Farrington* on the ground that Judge Paine's opinion is exactly the reverse of the decision actually made by the Court. The absurdity of this rumor is apparent when it is remembered that Judge Dixon himself wrote the opinion in *Blunt v. Walker* (decided within a month after *Clark v. Farrington*) in which the same principles laid down in the latter case were emphatically approved and reaffirmed. The editorial is extremely bitter in its language and closes with the statement, "That he (Dixon) ought to be impeached we have every reason for believing."

In the same issue is to be found a communication from an anonymous farm mortgagor containing the following sentences with regard to the Supreme Court:

"These judges are my friends and do very well as a general thing for a 'boy court,' but we who have the votes with which to manufacture judges intend to supply their places one of these days with men who have the nerve to grapple with great questions and are not to be warped from their line of duty by the clamorous voice of railroad thieves and stock jobbers, even when backed by a venal press."

The reference to the "boy court" is better understood when it is remembered that in the fall of 1860 Chief Justice Dixon was but thirty-five years of age and Associate Justices Paine and Cole were but thirty-three and forty-one years of age respectively.

The address to the people, prepared by the committee of which Mr. Thomson was chairman, appeared just as the legislature of 1861 was assembling and will be found printed at length in the issue of the "Home League" of January 12, 1861. It details at length the wrongs of the farm mortgagors and appeals for legislative help.

In the same number appears a communication suggesting that the state should assume the debts of the farm mortgagors. In his message to the legislature (which appears in the same paper) Governor Randall suggests that the railroad land grant lands be sold with the consent of Congress and the proceeds used to relieve the burdens of the mortgagors. Both of these propositions were manifestly chimerical and came to nothing. The legislature, however, spent much time endeavoring to devise a law which, while not impairing the obligations of contracts, should throw such difficulties in the way of foreclosing the railroad mortgages as to render them nearly or quite valueless. The task was a difficult one as may be imagined. There was little if any party politics involved. The members coming from farm mortgage districts, whether Republicans or Democrats, were nearly all anxious for the passage of some law helping the mortgagors out of their difficulties and few members from other districts wished to antagonize the farm mortgage vote. The question was, how far could legislation go in making the mortgagees' lot uncomfortable and still escape condemnation by the courts? There were some members indeed, and notably among them were John G. Clark of Grant County and Wyman Spooner of Walworth, who boldly denounced the attempts to nullify contracts by making their enforcement impossible, but they made little impression and chapter 88 of the laws of 1861 was passed early in March, 1861, and published three days later.

The act covers eight pages, relates only to mortgages given for stock in corporations and is an interesting example of a legislative attempt to accomplish unconstitutional ends by strictly constitutional means. In a word, it makes foreclosure proceedings so long, laborious and uncertain that, in

effect, it takes away any effective remedy, and this was unquestionably the result desired.

Its principal provisions are in substance (1) that a compulsory reference shall be had and that *all testimony which either party may desire to give* be taken by the referee; (2) that a motion may be made before the court to strike out or suppress all or any part of the testimony taken; (3) that an appeal may be taken from any order made on such motion, which appeal shall constitute a stay of proceedings; (4) that any issue of fact be tried by a jury on demand of either party; (5) that if fraud or want of consideration be set up as a defense the instrument itself shall be deemed prima facie to be held by the plaintiff *with full notice* of all equities existing between the original parties, *and the plaintiff's oath shall not be deemed* sufficient evidence to remove the presumption; (6) that plaintiff, if defeated in the action, shall file the mortgage and note for cancellation, and in case of appeal the same shall not be effective till the note and mortgage are filed and *all costs paid;* (7) that the referee shall have power to require production before him of any record, paper, book or memorandum belonging to or which ever belonged to the corporation, and any such record, paper, book, memorandum or statement in writing made by any officer, agent, director or employee in the due course of his business as such shall be held an admission of the corporation and sufficient evidence as against the corporation of the facts stated in it; (8) that all such actions shall be brought and tried in the county where the mortgaged premises are situated *provided* that the persons contesting the validity of the instrument shall be entitled to a change of venue for the reasons provided by law in other civil actions; (9) that the defendant shall not be required to pay costs on

continuances or on appeal until after final judgment in the action, and that plaintiff shall be required to give security for costs on application of any defendant; (10) that the referee shall be entitled to receive ten cents per folio for all writing necessarily done by him and ten cents for every mile necessarily traveled in going to the place fixed for taking the testimony, all of which charges must be paid (unless waived by the referee) before the testimony is reported to the court; (11) that either party may appeal to the Supreme Court from final judgment by filing and serving a written notice of appeal within four years after written notice of the judgment, which notice shall constitute a stay of proceedings until the appeal is determined; (12) that in case plaintiff recover judgment and the land be sold no title shall be acquired by the purchaser until the time for taking an appeal has expired; (13) that no judgment for deficiency shall be rendered in such an action; (14) that any defense which may be made by the makers of the mortgage may also be made by all persons having any interest in the lands; (15) that if any mortgagee advertise the mortgaged premises for sale under a power of sale in the mortgage, the circuit or county court of the county upon petition of the mortgagor, stating that the mortgage was obtained by fraud or given without consideration, shall make an order enjoining the sale and ordering an issue to be made up and tried in the circuit court in the same manner as prescribed in the act for foreclosures; (15) in all such actions the parties shall be limited to the remedies prescribed by the act; and (16) that no witness shall be excused from answering any material question, but his testimony shall not be used against him criminally.

The farm mortgage question was unquestionably the most interesting public question which came before the legislature during the whole session and it provoked much debate. Meanwhile, however, the question as to whether there should be party nominations made of candidates for the judicial election in April was vexing the politicians.

The Republican politicians had received a severe lesson in the spring of 1860 when they had turned down Dixon's name and nominated A. Scott Sloan simply because of his views on state rights and had been rebuked by the people at the polls; on the other hand the Democrats had been defeated by more than 20,000 votes at the presidential election in the fall of 1860 and manifestly were in no condition to make a winning fight. Moreover the shadow of the farm mortgage agitation was over the whole political field. While neither party wished to surrender to the farm mortgagors, at the same time neither party wished to put up a candidate known to be antagonistic to them. There were also serious differences of opinion in both parties. Judge Cole had been elected on the state rights issue, and while the ultra state rights men were still in control that doctrine was every day losing ground on account of the secession movement in the south, which was but the logical result of the extreme state rights view which the Republicans of Wisconsin had adopted. So Judge Cole was not popular with that section of the Republican party which believed in the supremacy of the federal authority, nor with the farm mortgage element. On the other hand, the Democrats were demoralized by their recent sweeping national defeat; and the weakness of the closing days of the Buchanan administration was driving thousands of the strongest men of the party into the Republican ranks.

Thus matters drifted along without party action until February 20, 1861, when a caucus of Republican members of the legislature was held and after full discussion it was resolved to present no party candidate to the people.

At about the same time calls began to be circulated among the bar and the people requesting Judge Cole to stand for re-election as a non-partisan candidate. This served to clarify the situation. Whatever else Judge Cole stood for he certainly did not stand for the ideas of the farm mortgagors for he had been a member of the Court which had held the mortgages valid and set aside the law of 1858 intended to relieve the mortgagors of their burdens. It was evident that the farm mortgagors must look elsewhere for help.

Naturally and almost necessarily they turned their eyes to James H. Knowlton of Janesville; he if any one was the logical candidate. He was a brilliant lawyer and had been very prominent in the history of the state. He had stood side by side with such legal giants as Jonathan E. Arnold, Edward G. Ryan, Matt H. Carpenter and Harlow S. Orton in such cases as the Hubbell impeachment and the Bashford-Barstow controversy; he had also been deemed worthy to be upon the same ticket with the lamented Whiton as a candidate for Associate Justice of the Supreme Court at the judicial election in 1852. But more than all this, in the eyes of the farm mortgagors at least, he had dared to attack the decision in the *Clark* and *Farrington* case and declare that decision to be bad law in a newspaper article which was at least an able and lawyerlike argument, whatever may be said as to its correctness. Mr. Knowlton was a Republican and for this reason might be expected to cut into Judge Cole's vote, moreover he was willing and even anxious to run. Mr. Knowlton was then living at Janesville and in

February calls were put in circulation in Janesville and in other parts of the state, asking him to become a candidate. Judge Cole accepted the call upon him in a communication dated March 6th and Mr. Knowlton accepted under date of March 13th and the campaign was on.

The Democracy generally seem to have been disposed to let the two Republicans fight it out without interference, but a faction of the party led by Beriah Brown of Milwaukee, chairman of the Democratic state central committee, thought the opportunity to run in a Democrat too good to be lost and in March the committee took the responsibility of naming Charles A. Eldridge of Fond du Lac, afterwards member of Congress for some years, as the Democratic candidate. Mr. Eldridge was absent from the state when this announcement was made and on his return a few days later he withdrew his name. No further nomination was made, but some five thousand Democrats refused to accept Mr. Eldridge's declination and persisted in voting for him.

The campaign between Cole and Knowlton was conducted with some vigor by the farm mortgagors. They generally conceded Judge Cole's ability but urged that he was in sympathy with stock jobbers, as shown by the farm mortgage decisions. Returns were slow in coming in after the election and the first returns came principally from the farm mortgage country and showed enormous losses for Cole. In some of the towns of Washington County he received but a beggarly half dozen of votes or none at all. For several days it looked very much as though Knowlton was elected and his supporters confidently claimed that such was the result and Judge Cole's friends were not disposed to seriously contest the claim. But about a week after the election, as the returns from the northeastern and northern

parts of the state began to come in, the prospects changed and about ten days after the election it was generally admitted that Judge Cole was re-elected. His final majority over Knowlton amounted to something more than five thousand votes.

Thus ended in well deserved defeat another attempt to defeat a sitting judge because of a decision. The idea that an honest judge is to meet with defeat whenever a decision made by him does not accord with the popular idea upon the subject is an idea which can only make timeservers and cowards of the occupants of the bench. It is at least one degree worse than the idea that an honest judge should be defeated because his political views are at variance with the majority. Fortunately for the stability and manhood of the bench both of these ideas have been generally repudiated in Wisconsin. The election of Judge Dixon in 1860, in the face of a Republican party nomination against him, and the election of Judge Cole in 1861 in the face of a demand from the farm mortgagors that he be defeated because of a decision, are the two early finger posts which pointed the way to non-partisan judicial elections in Wisconsin. To the credit of the state be it said that these early examples have been generally followed.

Early in the January term, 1862, chapter 88 of the laws of 1861 came before the Court for review [2] and was condemned as substantially impairing the obligations of contracts in a brief opinion written by Judge Cole. Without going into the details of the law he thus characterized it:

"It is difficult to perceive how any candid person capable of reading the law and comprehending its provisions, can fail to see upon its very face an intention to clog, hamper and em-

[2] Oatman v. Bond, 15 Wis. *20.

barrass the proceedings to enforce the remedy, so as to destroy it entirely and thus impair the contract so far as it is in the power of the legislature to do it."

Judge Paine concurred in the decision but placed his concurrence on the ground that the law infringed that provision of the constitution which guarantees to every person a certain remedy in the law for all injuries or wrongs to person, property or character.

Thus the second attempt of the legislature to relieve the mortgagors from their contracts failed and again the Court was compelled to bear the odium of the failure. It seems best to make brief reference at this time to the further legislative attempts which were made along this line in order that the whole subject may be consecutively treated. In April, 1862, an act was passed making elaborate provisions for the creation of sinking funds in the hands of commissioners to which the various railroads were to contribute a certain percentage yearly and out of which payments were to be made to the holders of farm mortgages who chose to surrender their securities up to certain given percentages of the face thereof, but as this act never came before the Court no time need be spent in considering it.[3]

By chapter 305 of the laws of 1863 a new and special action to quiet title of real estate and cancel mortgages thereon was created which was evidently expressly intended to cover this class of mortgages; it provided for publication of the summons against unknown holders of the mortgage and for an adjudication declaring the same void if it was shown to have been obtained by fraud, also that the judgment should have the same conclusive effect against unknown defendants as against absent defendants and that any

[3] Chap. 330, Laws 1862.

appeal from the judgment must be taken within six months from its entry and not thereafter; it also provided for a jury trial on demand of either party which should not be set aside for informality but *should be conclusive on the facts* in the case. Following this act came chapter 169 of the laws of 1864 which provided that in every foreclosure of a mortgage given to a corporation every issue of fact upon demand of either party should be tried by a jury, whose verdict should be conclusive as in other cases of trial by jury. This act came before the Court at the January term, 1866,[4] and it was held that in an equity case the Court was not obliged to submit an issue to a jury unless it thought proper to do so, and the power of the legislature to make the finding of the jury in such a case conclusive was questioned. In 1867, however, the legislature again returned to the subject and passed chapter 79, which contained sweeping provisions that in all foreclosure actions all issues of fact should be tried by a jury, unless the right was waived; that all power of the Court to pronounce judgment in such an action without the intervention of a jury was abrogated, except where the parties expressly waived jury trial, and that the verdict should be conclusive, as in cases of common law origin.

This law came up at the June term, 1868,[5] and was held unconstitutional in a very lucid opinion by Judge Paine on the ground that the constitution had vested the circuit court with the judicial power of the state, both as to actions at law and in equity and hence the legislature could not withdraw from that court the judicial power in equitable actions and confer it upon juries.

[4] Truman v. McCollum, 20 Wis. *360.

[5] Callanan v. Judd, 23 Wis. 343.

Here the efforts of the legislature to relieve the farm mortgagors seem to have ended in what might be called complete failure. This conclusion, however, would hardly be an accurate one. It is true that the relief laws had all been set aside but still they had been of some practical effect. While on the statute books they had undoubtedly served as a club under the fear of which many holders of mortgages had deemed it best to settle their claims at a reduction and sometimes a considerable reduction from the face value. Probably not many of the farmers paid dollar for dollar of the principal and interest of their mortgages and some secured very favorable settlements.

In reviewing this long contest one can hardly help feeling considerable sympathy for the mortgagors. After all has been said that may be said about the inviolability of contracts and the unconstitutionality of legislation impairing the obligations of contracts the fact remains that six thousand and more of the sturdy farmers of the state had been sadly victimized. Not a few of them had been the dupes of coldblooded swindlers, while others had simply acted on the erroneous supposition (in which both the farmer and the railroad agent innocently shared) that the farmer's land would be vastly enhanced in value by the construction of the railroad.

But whether the farmers suffered from deliberate fraud or from a mere honest mistake none of them had in fact received a dollar in value for the mortgage on his farm. The layman who is threatened with the foreclosure of a large mortgage upon his home is not likely to be particularly moved by the argument that a law relieving him from his difficulty would impair the obligation of his contract, when in fact he received no value for the mortgage and its present

holder bought it for a song. One can hardly blame men placed in this unfortunate situation for organizing and attempting to obtain legislation which should avert financial ruin.

On the other hand, the Court showed commendable courage in a difficult situation. Doubtless the judges would have greatly preferred to decide the other way. They would have achieved great present popularity by such a course. But they hewed to the line and preserved inviolate the legal principles which the constitution had laid down, though they were threatened with defeat and denounced as the tools of stock jobbers and swindlers.

Taken altogether the farm mortgage chapter is a chapter in the history of the Court of which every citizen may well feel proud. An elective bench in the midst of great popular clamor and threats of defeat preserved its judicial independence intact, refused to be coerced or dragooned and was finally sustained in its course by the people at large.

CHAPTER XV

WAR QUESTIONS; THE CLASH WITH PRESIDENT LINCOLN

The first seven years of the history of the Supreme Court had been eventful, not to say exciting, years. The Court had been obliged to act judicially on a number of questions political in their nature concerning which the public mind was at fever heat. It had defied the judicial power of the United States and practically ousted an acting chief magistrate of the state from his office. Its judges had been violently denounced as usurpers and tyrants on the one hand and hysterically applauded as deliverers from federal despotism on the other, and they had all reached their seats after contests as violently partisan as could well be imagined. Nor was the Court to be soon released from the consideration of public questions which were political in their nature. The great civil war was approaching more rapidly than any one knew: naturally it was to bring its own new and difficult questions, but few could have anticipated that as a result of one of these new questions the same Court which locked horns with Chief Justice Taney as to the constitutionality of the fugitive slave law was to stand shoulder to shoulder with Taney in opposition to President Lincoln and deny the President's power to do an act which he deemed absolutely essential to the saving of the Union, yet such was the fact.

Probably no war in the world's history had raised so many questions which came before the courts for decision as our civil war was destined to raise and a moment's reflection will demonstrate that this was only natural. Since the days

of Alexander the Great, the tyrant has ever been the successful warrior. Republics have indeed existed and Republics have waged successful wars, but the genius of the true Republic is not for war, least of all civil war, but for peace. Especially is this true of the Republic formed by the colonists of America. They had fled from Europe for the express purpose of escaping tyranny; they had braved the terrors of the ocean and defied the dangers of the wilderness and its savage hordes because they would have no despotic rule, but would have the rights of freemen. When they formed their constitution they laid emphasis first and last upon individual liberty and its adequate protection. They took infinite precautions to guarantee to themselves and their children freedom of thought, of speech and of action, freedom from arbitrary arrest, fair and open jury trial as well as all the other rights and privileges which had been dear to the Anglo Saxon heart since the days of Runnymede but which had often been greviously disregarded by Tudor and Stuart kings. Thus they fenced in the executive power with constitutional inhibitions and restrictions so that the chief magistrate became frequently little more than a figure head.

They themselves had suffered from the exercise of arbitrary power, they were jealous of it and would have none of it. If this was the situation as to state constitutions it was doubly true as to the federal constitution. At the time of its adoption and up to the very outbreak of the civil war the federal government was unquestionably viewed askance and with suspicion by the people at large. True they had voluntarily organized the national government but still it was generally regarded rather as an unpleasant necessity than as a desirable institution, and whenever any section felt

the weight of federal power that section had been prompt to threaten nullification or secession or both and this tendency was fully as great in the north as in the south.

Grudgingly they had given power to the federal government and jealously they watched its exercise. They had been specially careful to limit the powers of the President. The danger that a strong and ambitious executive might some day arise who should stretch forth his hand and grasp the kingly crown was evidently very real to them and so they took care to place the great powers of government so far as possible in the hands of Congress and simply made the President commander in chief of the army and navy and required him to see that the laws were faithfully executed. These were practically all of the independent governmental powers given to the chief magistrate; in the negotiation of treaties and in the appointment of officers (even including the members of his own official household) he could do nothing save with the consent of the Senate, while the power of making war and of providing armies and navies was conferred upon Congress alone.

With such limited power vested in the executive and so many sweeping constitutional guarantees against violations of individual liberty, all of which the courts were bound to enforce, it was inevitable that when civil war broke out there must come clashes between the executive and the citizen. Individual liberty and war are utterly incompatible. He who successfully prosecutes war must be able to exact unquestioning obedience; he must for the time being be a despot; paper constitutions drafted in the quiet of the council chamber with their nice checks and balances will have little weight with the warrior when their provisions tend to thwart the execution of measures necessary to the

successful prosecution of the war; constitutional government and war cannot exist in the same territory, the clash between the warrior and the constitution will be unavoidable and the appeal to the courts will follow as a natural result.

Among the rights preserved in practically every state constitution is the right to the free exercise of the great writ of liberty, the writ of *habeas corpus ad subjiciendum*. By this writ every man deprived of his liberty by private or official power is entitled to be brought before a magistrate and have the cause of his detention examined into judicially and if he be not detained in pursuance of the laws of the land is entitled to be discharged. It is the writ which guarantees the citizen from arbitrary arrest and makes impossible an English or American bastille. The federal constitution after enumerating the powers given to Congress contains certain inhibitory clauses and among them this,

"The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

Up to the time of the civil war there had been no serious doubt in the minds of either lawyers or laymen as to the proposition that the power to suspend the operation of this great writ was vested in Congress alone. In England unlawful and arbitrary suspension or disregard of the writ by kingly power had been one of the grievances which was ever at the front during all of the numerous contests between the people and the kings from the time of Magna Charta down to the great *habeas corpus* act of Charles the Second, when the remedy was supposed to be secured from aassault by executive power for all time.

Speaking of the power to suspend the writ Blackstone says (Vol. I, p. 136):

"But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the

state is so great as to render this measure expedient; for it is the parliament only or legislative power, that whenever it sees proper, can authorize the crown by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing."

The makers of the federal constitution, presumably following this principle, placed the clause recognizing the writ and preserving it from suspension except in case of rebellion or invasion, in the section which defines and limits the powers of Congress, and thus, though the question had not come before the courts for decision, the opinion was well nigh universal that the power to suspend the writ was with Congress alone.

At the time of the conspiracy of Aaron Burr in 1807 President Jefferson, deeming that the public welfare called for the suspension of the writ, communicated his opinion to Congress in order that Congress might act upon the subject; the Senate passed a bill suspending the writ, which was defeated by a large majority in the house, but neither the President nor any member of Congress suggested at any time that the President might exercise the power himself. Chief Justice Marshall in the case of *Ex parte Ballman*, 4 Cranch, 95, decided in 1807, said (though the point was not before the Court):

"If at any time the public safety should require the suspension of the powers vested by the act" (i. e. an act granting to the federal courts the power to issue writs of *habeas corpus*) "in the courts of the United States, it is for the *legislature* to say so."

Judge Story in his Commentaries on the Constitution (5th Edition, Sec. 1342) says:

"It would seem, as the power is given to *Congress* to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body."

When President Lincoln came to Washington in March, 1861, he found Washington and its environs filled with active or passive disunionists and honeycombed with plots. He was a good lawyer and, of course, knew the construction that had always been placed on the clause quoted, but he doubtless felt that the preservation of the Union could not wait on the slow processes of courts. It was a case of necessity and necessity knows no law. He determined to take the bull by the horns and exercise the right of suspension regardless of what the courts might say and on the 27th of April, 1861, he addressed to Lieut. Gen. Scott an order authorizing him to suspend the writ of habeas corpus at any point on or in the vicinity of the military line between Philadelphia and Washington if necessary for the public safety, either personally or through any officer in his command. Similar orders were afterwards issued for other lines and places and on May 25th John Merryman was arrested at Baltimore by military authority, charged with enlisting soldiers for the confederate army and confined in Fort McHenry. He sued out a writ of *habeas corpus* from Chief Justice Taney but General Cadwallader, who was in command of the fort, refused to obey the writ on the ground that the privilege of the writ had been suspended by the President. An attachment being issued against General Cadwallader for his disobedience, the officer who attempted to serve it was denied admission to the fort. No further efforts were made to enforce obedience to the writ, but the aged Chief Justice wrote and filed an opinion in which he denied the authority of the President to suspend the privilege of the writ and forcibly gave his reasons for holding that the power to suspend the writ was vested in Congress alone.[1]

[1] Ex parte Merryman, 9 Am. Law Reg. 524.

Thus the contest ended in the complete triumph of the military over the civil power so far as the fate of Merryman was concerned. The times were too troublous and the loyalty of the North to President Lincoln was too pronounced to permit of anything like serious resistance to any act which he deemed necessary in the great struggle for its life which the nation was then going through.

The academic question whether the power to suspend the privilege of the writ was vested in the President or in Congress was not so easily disposed of, however; a war of pamphlets broke out in which the subject was discussed by eminent lawyers with great vigor and ability. A few of these are gathered in the volume of law pamphlets entitled "Writ of Habeas Corpus" in the Wisconsin State Library. The most important of these contributions to the constitutional literature of the land is the argument of the eminent lawyer, Mr. Horace Binney of Philadelphia, in which the power of the President to suspend the privilege of the writ is very ingeniously and ably maintained. It is said in the note on page 215 of the second volume of Story on the Constitution (5th Edition) that Mr. Reverdy Johnson and Professor Theophilus Parsons held the same opinion as Mr. Binney. Attorney General Bates in July, 1861, sent a letter to the House of Representatives taking the same ground but there were many very able arguments made upon the other side. The opinion of the bench and bar probably inclined to the view that the President had transcended his power. As the Congressional campaign of 1862 approached the President was denounced by the Democrats as a violator of the Constitution and political excitement ran high. The Wisconsin Democratic convention of that year adopted a long and eloquent address and sent it forth broadcast which,

while demanding the vigorous prosecution of the war, denounced the violation of the Constitution by the President in various ways but especially in the matter of the suspension of the privilege of the writ of habeas corpus. This address was called at the time the "Ryan address" because understood to have been prepared by Edward G. Ryan.

Drafts becoming necessary in the summer of 1862 to fill the depleted ranks of the Union armies and these drafts being sometimes the occasion of riots and disorder, the President on the 24th day of September, 1862, issued a proclamation declaring that all persons resisting the drafts should be subject to martial law and suspending the writ of habeas corpus as to all persons imprisoned in any fort, camp, arsenal or military prison by military authority.

A draft riot occurred at Port Washington, Ozaukee County, November 10th following and one Kemp was arrested by the special provost marshal of the state for participation in the riot and turned over to Gen. W. L. Elliott, who kept him imprisoned at Camp Randall in the city of Madison. A writ of habeas corpus was sued out of the Supreme Court December 4, 1862, and General Elliott declined to produce the body of Kemp before the Court, but made a return setting up the facts of the arrest and justifying the imprisonment under the proclamation of the President suspending the writ of habeas corpus. This brought the question squarely up for decision. Edward G. Ryan appeared and made an elaborate argument in support of the petitioner to the writ and there was no appearance upon the other side.

There can be no doubt that the case attracted the attention of the federal government and of the people at large; at last the question had emerged from the academic field and

had come before a court which had already shown itself unafraid of a conflict with federal authority. Still it was a court of high standing for ability and composed entirely of Republicans who certainly would not desire to embarrass a Republican administration or give aid and comfort to its critics. If its decision should be adverse to the alleged right of the President to suspend the writ, the opponents of the President would consider themselves justified in their arraignment of him as a lawbreaker.

That the case was given earnest consideration befitting its importance there can be no doubt. On the 13th day of January, 1863, a decision was rendered holding that the President had no power to suspend the issuance of the writ in places where war did not actually exist and that such power was vested solely in Congress. Each of the justices wrote an opinion and all concurred in the result.[2]

Chief Justice Dixon summed up the matter in the leading opinion in these words:

"And first, I think the president has no power, in the sense of the ninth section of the first article of the constitution of the United States, to suspend the privilege of the writ of *habeas corpus*. It is, in my judgment, a legislative and not an executive act; and the power is vested in congress. Upon this question it seems to me that the reasoning of Chief Justice TANEY in *Ex parte Merriman* is unanswerable."

Judge Paine's opinion was more elaborate but reached the same conclusion. In characteristic language Judge Paine answered the claim that the act of the President should be sustained as a necessity of the war power, as follows:

"All acknowledge the terrible necessities of the war power; but the more terrible those necessities, the stronger is the argument for confining them strictly to the field of conflict. Within those limits let the war power rage, controlled by nothing but the laws of war. But outside of them let the constitution, with

[2] In Re Kemp, 16 Wis. *359.

all its safeguards, remain undisturbed. Let it stand, like the cities of refuge or the temples of the gods, a shield against illegal violence, even to the guiltiest traitor that ever raised his sacriligious hand against it."

That the conclusion reached was unwelcome to the Court is very clearly evidenced by the following language of Chief Justice Dixon at the close of his opinion:

"These I believe to be the real questions presented: and in stating my convictions of the law, I desire to add that they are given without the slightest disrespect to the president, who has in all his actions, been governed by the highest motives of patriotism, public honor, and fidelity to the constitution and laws. Penned at the gloomiest period of our public misfortunes, when over fifty thousand of the noblest of the land, answering the summons, had fallen a sacrifice to the cause of our nationality, when one division of the army of the Union, already most sadly repulsed, was threatened with complete overthrow by superior, almost irresistible numbers, and another, broken and wavering, was retiring before the restless and implacable foe—when the only way to national life, honor and peace, lay through the fire and blood of battle—and when, in response to a recent call for additional forces, instead of the utmost loyalty and patriotism on the part of every citizen of the loyal states, each asking where he could be most useful, or how he could best promote the welfare and safety of his country, there was reason to apprehend, in some quarters, factious and disloyal opposition—the proclamation in question is not a welcome subject of criticism. As not unfrequently happens in the affairs of war, it is easier, sometimes most painfully so, with time for deliberation, to point out mistakes after they are committed, than to see and avoid them amid the difficulties and dangers by which the military commander is at the moment surrounded. If, under these circumstances of national and executive embarrassment, the president has transcended his lawful authority, he has committed an unintentional error, which he will be the first to repair, and the last to vindicate. My duty, however, compels me to judge his acts, not by his intentions, but by the constitution and laws, giving a fair and reasonable scope to all the powers which they confer upon him."

The effect of this decision coming from a court of recognized ability and unquestioned loyalty was immediate.

Party leaders saw at once that there must be action by Congress which should relieve the President of the charge of lawbreaking which could now be made with far greater force than ever before. On the third of March, 1863, less than sixty days after the decision in the *Kemp* case, Congress passed an act providing that the President during the existing rebellion wherever in his opinion the public safety required it, might suspend the writ in any case, and that when he did so no military or other officer should be compelled upon *habeas corpus* proceedings to produce the body of any person held by authority of the President, but upon certificate showing that the detention was by order of the President the proceedings under the writ should be suspended as long as the suspension by the President should remain in force and the rebellion continue. Under the provisions of this act President Lincoln issued a proclamation September 15, 1863, suspending the privilege of the writ in cases where persons were held under the command of the government as prisoners or as soldiers.

Upon its face the act seems pretty clearly to be simply a delegation of legislative power. The language is that the President "is authorized to suspend the privilege of the writ," not that the privilege of the writ is or shall be suspended in cases in which the President shall determine that proper occasion exists therefor.

The validity of this act came before the Court in the January term, 1864, in the case of *Oliver*[3] where a writ of habeas corpus was sued out by a father on behalf of his minor son who had enlisted in the army while under the age of eighteen and hence in violation of the law of Congress on the subject. The sole question in the case was whether

[3] In Re Oliver, 17 Wis. *681.

the privilege of the writ was legally suspended by the act and proclamation, for it was certain that the detention was illegal because the minor was less than eighteen years of age.[4] The application was made by Silas U. Pinney on behalf of the petitioner and it may be assumed that it was presented with ability and learning. The writ was denied in an opinion by Judge Paine, but not without much difficulty as to the proper construction of the act. He acknowledges very serious doubts as to whether the law is not merely a delegation of legislative power to the President, but he finally concludes that it may properly be construed as a suspension by the legislature with power to the executive to determine the proper occasion, in other words, a legislative suspension which took effect only upon the ascertainment of the facts by the President.

The conclusion was certainly a difficult one to reach in face of the language of the act and it will be interesting to note Judge Paine's language, for it must be admitted that he had a singular ability for expressing in accurate and felicitous language a delicate distinction. He says, after quoting the language of the first section of the act:

"Upon this language and that of the remainder of the section, which is of a similar character, I doubted whether the act could be sustained. But a law must not be judged by its artificial structure merely, but according to its substance and effect. And I have finally come to the conclusion that although this act professes to confer on the president authority to suspend the privilege of the writ, whenever in his judgment the public safety should require it during the present rebellion, yet that is itself an expression of the legislative judgment that the time has already arrived when the public safety requires the legislature to provide for a suspension, and that it does provide for a suspension, not absolute, but to take effect according to the judgment of the president whether the authority conferred should be exercised in particular cases or not. Suppose that instead of being

[4] In Re Higgins, 16 Wis. *351.

in its present form, this act had expressly declared that the public safety required provision to be made for a suspension of the privilege, and had then provided that during the present rebellion the writ should be suspended in all cases in which the president might elect to have himself and his subordinates relieved from the duty of obeying the writ. I think if such had been its form it could fairly have been sustained within the reasoning of the cases cited. The legislature would then have exercised its own function of determining that the emergency had arisen, requiring the privilege to be suspended, and would have made general provision for it, leaving the president, however, a discretionary power about using the authority conferred in particular cases. Such a power may be confided to him. And although the language of the act as it now is affords stronger ground for a mere verbal argument that it was an attempt to transfer the entire legislative function to the executive, its real substance and effect are the same as they would have been in the form supposed. The law itself suspends the right in those cases where the president, in the exercise of the discretion conferred upon him, elects to have it suspended."

Another question of vital importance in connection with the prosecution of the war came before the Court immediately after the *Kemp* case, namely, the question as to the validity of the draft laws. As early as the summer of 1862 the great wave of patriotic feeling which swept over the north when the first guns were fired upon Fort Sumpter had receded. Discouragement at the slow progress of the war had taken the place of the confidence which reigned at its beginning and voluntary enlistments had practically ceased; and this, too, at a time when it had become obvious to all that an army far exceeding in size any army which had previously been contemplated must be put in the field if the war was to be successful.

By an act of Congress passed February 28, 1795, the President was authorized to call forth the militia of the states to repel invasions or suppress insurrections and this law had been construed as vesting the power in the President to conclusively decide when the exigencies named in

the law existed.[5] In order to render this law more effective Congress passed an amendatory act July 17, 1862, providing that whenever the President should call forth the militia he might fix their period of service, not exceeding nine months, and that "if by reason of defects in existing laws or in the execution of them in the several states or any of them it shall be found necessary to provide for enrolling the militia and otherwise putting this act in execution, the President is authorized in such cases to make all necessary rules and regulations."

In the summer of 1862 the President called upon the states to furnish several hundred thousand additional soldiers and promulgated rules and regulations for the making of drafts for the militia in the various states, which formed a complete scheme governing the whole subject. These rules were put in force in Wisconsin and in the states generally and several residents of Manitowoc County being drafted and taken into custody as militia men brought habeas corpus proceedings to secure their release.[6]

The claim was that the act of 1862 was unconstitutional because it was an attempt on the part of Congress to delegate its legislative power upon the subject of detaching drafting and calling forth the militia to the President. This contention was rejected by the Court and it was held in an opinion by Judge Cole that the making of rules for the enrolling and detaching of the militia were largely ministerial acts which might properly be performed by the chief executive.

At the same time it was held that a resident alien who had declared his intention to become a citizen of the United

[5] Martin v. Mott, 12 Wheaton, 19.

[6] In Re Griner, 16 Wis. *423.

States, though not in fact a citizen of the United States, was liable to be drafted into the military service of the United States because he had become a citizen of this state by virtue of his declaration of intention.[7]

The legislative session of 1861 came to its end just as the war opened. On the thirteenth of April an act was passed authorizing the Governor, in case of a call for troops by the President, to take all necessary steps in organizing volunteers to meet the call and appropriating $100,000 for the purpose; the act also authorized the Governor to issue state bonds to the amount of $100,000 for the same purpose.[8]

Three days later this act was amended by raising the amount of the cash appropriation to $200,000 and making the same raise in the amount of the authorized bond issue. After making these preparations for the war which had already begun the legislature adjourned. It soon became evident, however, that millions rather than hundreds of thousands would be required for the suppression of the rebellion and the Governor reconvened the legislature in special session May 15, 1861.

At this session a number of war measures designed to meet the existing situation were passed. Among these were an act authorizing municipal corporations to raise money by taxation for the support of the families of volunteers,[9] an act providing for the raising of not exceeding six regiments of infantry for active duty, with a reserve of two regiments, and appropriating one million dollars therefor,[10] an act prohibiting the rendering of aid to the rebellion and

[7] In Re Wehlitz, 16 Wis. *443.
[8] Chap. 239, Genl. Laws, 1861.
[9] Chap. 2, Laws 1861, Spec. Session.
[10] Chap. 4, Laws 1861, Spec. Session.

directing the seizure of arms or munitions of war intended for use by the rebels,[11] an act appropriating $50,000 for the purpose of arms and accoutrements of war,[12] also an act adding five dollars per month to the pay of all volunteers having dependent families.[13]

The most important act of the session, however, was Chapter 13, which authorized the Governor, Treasurer and Secretary of State to issue bonds and borrow money on the credit of the state to an amount not exceeding one million dollars. As the state could only borrow this amount of money "to repel invasion, suppress insurrection, or defend the state in time of war" [14] it was very evident that the validity of any bond issue would be seriously questioned, for the state itself was not even remotely threatened with invasion nor was there any insurrection within its limits.

In this dilemma, Governor Randall appealed to the justices of the Supreme Court to give an opinion upon the validity of the bonds in advance. It is certain that the justices had no power to give any such opinion. Some courts of last resort are endowed with such powers and authorized or required to render opinions to the executive department as to the constitutionality of legislative action in advance of any controversy, but such power has never been given to the Supreme Court of Wisconsin. Any opinion which the justices might give, therefore, was not only *coram non judice* but absolutely unauthorized and improper. Courts have no power to decide questions in advance of a real controversy unless the power be given them by legislative act.

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[11] Chap. 5, Laws 1861, Spec. Session.
[12] Chap. 6, Laws 1861, Spec. Session.
[13] Chap. 8, Laws 1861, Spec. Session.
[14] Const. Wis. Art. VIII, Secs. 4, 6, 7 and 10.

But the emergency was to the last degree grave. If any situation could justify the doing of an unauthorized act by the justices this was the situation. Unless money loaners could be satisfied that the bonds were valid they would give little for them and the governor's arm would be well-nigh paralyzed.

In this situation Chief Justice Dixon and Associate Justice Cole sent the following joint letter to the Governor in response to his anxious inquiry.

"STATE OF WISCONSIN, SUPREME COURT,

"Clerk's Office, Madison, June 5th, 1861.

"His Excellency Alex. W. Randall,
Governor of Wisconsin,

"Sir:—We are in receipt of your communication of the 4th inst asking our opinion as to the constitutionality of chapter 239 of the general laws of 1861, entitled 'an act to provide for the defense of the state and to aid in enforcing the laws and maintaining the authority of the federal government,' and chapter 13 of the extra session held in May, 1861, entitled 'an act to provide for borrowing money to repel invasion, suppress insurrection and defend the state in time of war,' and as to whether bonds, issued under the above acts and in conformity to their provisions, would be valid and binding against the state.

"Your excellency is pleased to intimate that it has become a necessity in the present exigencies of the state and country to appeal to us for an opinion upon the above question. Yielding to this emergency, we have felt it to be our duty to give you our opinion upon the question suggested in your communication, and we would therefore state that we have considered the above mentioned laws, and from the examination we have given them we entertain no doubt as to their constitutionality, and we are of the opinion that the bonds issued in conformity to their provisions will be valid and binding upon the state of Wisconsin.

"Respectfully yours,

"Luther S. Dixon, Chief Justice,

"O. Cole, Associate Justice.

"P. S. Mr. Justice Paine is at present in Milwaukee and has had no opportunity of acting upon the subject matter of your communication.

"O. Cole."

By the aid of this decision, rendered in advance, the bonds were negotiated and none ever had the hardihood to contest their validity.

The last act passed by the legislature of 1861 at its regular session (Chapter 309) was an act exempting from civil process all volunteers in the military service of the United States, and suspending all legal proceedings against such volunteers as long as their service continued. This act was somewhat amended by Chapter 7 of the laws passed at the extra session of 1861 and its constitutionality challenged in several cases which came before the Court at the June term, 1862.[15] It was held unconstitutional as impairing the obligation of contracts in a brief opinion by Judge Cole. The ground of the decision was that the law took away all remedy for the breach of the contract for an indefinite period and that the taking away of all remedy was in effect the destruction of the obligation of the contract itself. From this conclusion Judge Paine dissented, but filed no opinion.

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[15] Hasbrouck v. Shipman, 16 Wis. *296.

CHAPTER XVI

CHIEF JUSTICE DIXON'S SECOND CAMPAIGN

Chief Justice Dixon's term was to expire in January, 1864, and the election of his successor was to take place in the preceding April. The state rights issue, which all but defeated him in 1860, was practically dead. Except for a few irreconcilables, the Republicans had become satisfied that there was no room in their party for such a doctrine. The secession of the southern states was but the practical application of the doctrine of defiance of federal authority which the *Booth* case inculcated and the object lesson thus afforded was sufficient. Then, too, the Chief Justice had fully demonstrated his great abilities in the meantime and the state had come to know him and feel proud of him. He had been elected largely by Democratic votes in 1860 and there seemed to be no good reason why the Democrats should not support him again. Many of them in fact desired to do so and thus it seemed quite probable that he might be elected without opposition. He was to meet a very bitter fight, however, and in order to understand the reasons for this it is necessary to take a brief glance at the political situation in the fall of 1862 and prior thereto.

The wave of patriotic feeling which swept over the north when the guns of South Carolina were turned on Fort Sumpter in 1861 wrought havoc with the Democratic party. Many of its best members felt that there was not room in the north for two parties, but that all should unite in support of the administration and that the only practicable way

to do so was to vote the Republican ticket. In order to welcome and encourage these voters, the Republicans soon began to call their party the Union party, or the Republican —Union party. The great mass of the Democrats, however, felt averse to leaving the historic party whose achievements they remembered with pride and also felt that it was wise that there should be two parties. The great majority of these men were just as patriotic, just as willing to make sacrifices for the preservation of the Union, and just as earnest supporters of the war for the Union as the mass of the Republicans. They and their sons went to the war by thousands and tens of thousands. Indeed the civil war could hardly have been brought to a successful close had it been otherwise. The writer was a youth of nine years when the civil war broke out, but he remembers those days most vividly. His father, Horatio Gates Winslow, was one of the "War Democrats" at Racine, who ever maintained his membership in the party, but whose hand, voice and pen were ever at the service of the Union cause. Physically unable to enter military service himself, his place of business was the headquarters for patriotic activities of all kinds. No war meeting was complete without his presence, and no movement in aid of the prosecution of the war lacked his help. There were very many such. Scant justice has been done to these men by the historians generally.

But notwithstanding the great preponderance of patriotic voters in the Democratic party, it was at the same time in some sense an opposition party and naturally, if not necessarily, the faultfinders, the dissatisfied, the believers in the ultra state rights doctrines all arrayed themselves under its banners.

As the year 1862 wore on without any decisive successes for the Union arms, but rather with discouragement and disaster, enthusiasm waned very perceptibly at the north and the faultfinders multiplied. Some found fault with the lack of vigor in the prosecution of the war; some with its too vigorous prosecution; some found fault with the arbitrary arrests found necessary by the President, and some with the leniency of the government in its treatment of suspected persons; some complained because the negroes had not been emancipated and some because they thought the war was being turned into an abolition crusade. All of this dissatisfaction tended directly to weaken the Republicans and strengthen the Democrats. Not that all of the dissatisfied Republicans joined the Democratic party by any means, but many did so and many more became lukewarm and staid away from the polls at election time. It was a time of dissatisfaction, doubt and discouragement. Three hundred thousand more soldiers were called for by the President; the taking of Richmond seemed further off than ever before and early in September Lee crossed the Potomac and the bloody battle of Antietam was fought, leaving the Union army in possession of the field, but too exhausted to pursue the foe or interfere with his orderly retreat.

Under these circumstances, discouraging indeed to Republican prospects, the congressional elections of 1862 approached. No state ticket was to be elected in Wisconsin, consequently no state convention would ordinarily have been called; but legislative and county officers were to be elected and early in August the Democratic party leaders, deeming that an advantage might be gained by placing an address before the people issued a call for a convention, to

be held in Milwaukee in September, which call is inserted here at length, in order to show the gravity of the situation as seen through Democratic eyes:

"The State Central Committee of the Democratic party of the state of Wisconsin, after consultation with many Democrats from various parts of the state, have concluded to call and now do hereby call a state convention of the Democracy to meet at Milwaukee on the 3rd of September next at noon.

"It is considered fitting that the only national and historical party now left in the country should give solemn expression to their views on the present perilous condition of constitutional government, the fearful civil war in which the nation is now engaged, the danger of a final and utter destruction of the Union established by the sacrifices and wisdom of our fathers and the constitutional means necessary to secure to the future the blessings of the past. The Democratic party, *always* loyal, *always true to the constitution*, and now as ever determined to maintain the government under it, has, at this time and this hour when the Union is in such imminent peril, and constitutional liberty on the American continent threatened with destruction, a most solemn duty to perform. In view of this duty, with unselfish patriotism *let us meet and counsel together.*

"C. A. Eldridge,
"Chmn. State Central Committee."

The convention was held and was largely attended; it resolved to issue an address to the people, which was prepared and submitted by Edward G. Ryan. It has passed into history as the "Ryan address." In eloquent periods it reviewed the history and achievements of the Democratic party, declared for the vigorous prosecution of the war and the crushing of the unholy rebellion, but denounced with severity various alleged infractions of constitutional and legal rights by the President and his party in the suspension of the writ of habeas corpus, the making of unlawful military arrests, the transportation of persons accused of crime to other states for trial, the trials of accused persons before military tribunals, the suppression of freedom of the press,

the abolition of slavery in the District of Columbia, and other violations of rights guaranteed by the constitution.[1]

When this address was presented to the convention for consideration George B. Smith of Madison made an eloquent speech, in which, while approving of the abstract principles stated in the address, he argued against its adoption, because he believed it unwise, and he proposed to substitute resolutions simply declaring the devotion of the party to the Union and the Constitution, and its readiness to make all possible sacrifices to support the government and deprecating any effort to divide the people of the north on old political issues until the rebellion was suppressed and the authority of the government restored.

S. U. Pinney of Madison read to the convention an eloquent extra from a speech delivered by the lamented Douglas in 1861, in which he recommended a cessation of party strife until the government was rescued from its perils; after reading the extract he moved that it be substituted in place of the proposed address.

Both propositions were overwhelmingly rejected and the address was approved and sent forth broadcast to the people.

It is not proposed here to discuss the merits or the demerits of this address. It was called a disunion document by the Republicans; it was deprecated as a sort of a fire in the rear by the War Democrats. For a year at least it was made the test by which the quality of a man's Democracy was to be determined in Wisconsin. At the state convention held August 4, 1863, at which Henry L. Palmer was nominated for Governor, it was re-adopted and approved. Soon after this, however, a public protest came.

[1] Madison Daily Patriot, Sept. 6, 1862.

On the 20th of August a preliminary meeting of War Democrats was held in Milwaukee and a convention of War Democrats was called to meet at Janesville, September 17th following. This convention was attended by such men as Arthur McArthur, J. E. Arnold, Matt H. Carpenter, Wm. C. Allen, Edward S. Bragg, A. Hyatt Smith, Geo. H. Walker, J. J. Tallmadge, C. D. Robinson, and many others who up to this time had been loyal Democrats, and it enthusiastically passed resolutions and issued an address to the people, pledging hearty support to the war and demanding its most vigorous prosecution, and repudiating the Democratic platform and the Ryan address. The Democratic Bourbons were in the saddle, however, and remained there and succeeded in driving many of the War Democrats into the Republican party.

The address certainly did no good to the Democratic cause in the state, however sound its legal propositions were. The great majority of voters, both Republican and Democratic, felt that when the existence of the Union was at stake it was no time to discuss abstract legal propositions. Especially when the very fact of such discussion was hailed by the enemy as a sign of serious division at the north and an encouragement to continued resistance to the federal arms.

Notwithstanding the fact that the address probably alienated more votes than it attracted, the election in November, 1862, reflected very clearly the prevailing feeling of dissatisfaction with the administration. The legislature at an extra session in September, 1862, had passed a law enabling soldiers to vote while in the field, under the supervision of military officers,[2] but even with this advantage (for the

[2] Chap. 11, extra session 1862, bound in volume for 1863.

great majority of the soldiers in the field, whether Republicans or Democrats at home, naturally voted the Republican or Union ticket, because they were so deeply impressed with the necessity of supporting the administration) the general election of 1862 resulted in a practical Democratic victory. Three out of the six Congressmen elected were Democrats and the Democratic county tickets were successful in many counties, while the legislature, though republican in both branches, was only so by very small margins.

But encouraging as the local result was to the Democratic politicians, the results in the great middle states of the North were far more encouraging. New York, Ohio, Indiana, and Illinois were swept by the party and the majority of the new House of Representatives were also Democrats.

It seemed to the leaders of the party that the reaction from Republicanism had come and thus the approaching election for Chief Justice of the Supreme Court was viewed by many of them seriously as an opportunity for regaining party prestige and placing a representative of the party upon a bench where it had had no representative for years. The principle of non-partisanship in judicial elections had as yet obtained no very serious hold upon the people, especially in the estimation of a party which deemed itself in the majority.

On the 26th day of January, 1863, Charles A. Eldridge of Fond du Lac, Chairman of the Democratic state central committee, issued a formal call for a Democratic convention, to be held at Madison on the 25th day of February "for the purpose of nominating a candidate for Chief Justice of the Supreme Court, to be supported by the Democracy at the coming election."

A few days before the assembling of the convention and on the 13th of January, 1863, the decision of the Supreme Court in the *Kemp* case before mentioned [3] holding that the President had no power to suspend the operation of the writ of *habeas corpus,* was announced and was hailed by the Democracy generally as a vindication of the doctrines of the Ryan address. About one hundred delegates attended the convention (the number of votes cast would indicate an attendance of over one hundred and sixty, but this results from the fact that many delegates were empowered to cast two votes), and ex-Governor Nelson Dewey was elected chairman with Edward G. Ryan chairman of the committee on resolutions.

An informal ballot being taken, John W. Cary of Milwaukee received 32 votes, M. M. Cothren 30, M. A. Edwards 23, E. Wakely 15 and the balance were scattering; Cary directed Ryan to withdraw his name, after doing which Ryan nominated Dixon, extolling him as an upright judge and a true Democrat in principle: "Dixon," said Ryan, "is a man who does not care for party and is in the essentials as good and sound a Democrat as could be found in the state." Moses M. Strong arose and opposed the endorsement of Dixon and formally nominated M. M. Cothren. Satterlee Clark of Dodge County was skeptical as to Dixon's orthodoxy as a Democrat; he wanted to know whether he was in favor of the confiscation and the emancipation proclamations, and, if not, whether he fully agreed with the principles of the Ryan address; if he did not agree with the address he did not consider him a Democrat. Joshua La Due of Milwaukee thought Dixon a good enough Democrat for him; he (Dixon) had just rendered a decision

[3] In Re Kemp, 16 Wis. *359.

upholding the federal constitution (referring to the *Kemp* case). The second informal ballot being taken, it resulted as follows: Cothren 44, Dixon 51, Edmonds 25, Cary 17 and the balance scattering. The first formal ballot resulted as follows: Cothren 76, Dixon 68, Edmonds 18 and J. E. Arnold 1; the second formal ballot nominated Cothren, he receiving 88 votes and Dixon 73. Thus, by a very close vote, Dixon was rejected. It is evident that the capacity of the Democratic party to make mistakes is not a recent acquirement. The convention adopted a platform evidently the work of Ryan, which is interesting as showing the attitude of the Ryan Democrats at the time. It is as follows:[4]

"(1) *Resolved*, that a judicial convention of the Democratic party held for the purpose of nominating their candidate for a seat on the bench of the Supreme Court of the state, is not the proper opportunity to enter into a discussion of party differences or party principles, and that this is the less necessary as the political position of the Democratic party in this state is now well defined and settled. But that a judicial convention is emphatically a fit and appropriate occasion to declare certain constitutional principles without assent to which the Democratic party cannot consent to support a judicial candidate.

"(2) *Resolved*, that in all things relating to the state government the state constitution is the supreme law, and that in all things relating to the national government the constitution of the United States is the supreme law of the land; that there is no power, state or national, outside of or inconsistent with the provisions of the constitution; that all assumption or assertion of unconstitutional power by the state or national government is a dangerous and treasonable usurpation which the Democracy will not sanction or tolerate.

"(3) *Resolved*, that the government of the United States can claim no powers not granted by the constitution expressly, or by necessary implication as an incident to powers expressly granted; that it is a government of delegated powers, and that the public security and the perpetuation of American liberty peremptorily

[4] Madison Daily Patriot, Feb. 26, 1863.

require a strict construction of its provisions and grants; and that it is not the spirit or duty of the American people to submit to new, loose and dangerous rules of construction which tend to subvert the safeguards of the government and the rights of the states and people and which, if unchecked, will aid in making the great American experiment of free constitutional government an utter failure and all previous American history a fable. That it is the peculiar duty of the Democratic party to support and defend the constitution as our forefathers made it, and as our fathers and ourselves prospered under it, vital and sacred against all usurpations by all persons, people, bodies and officers. And that to this end it is our solemn duty to see that the judiciary is so constituted that the constitutions of the state and of the Union shall be safe in their hands, as the holiest trust of the people to their servants, to be upheld and maintained without compromise or exception against all assaults from every source.

"(4) *Resolved*, that on these principles we submit our nominee for the office of Chief Justice to the people of this state for their suffrages, fully believing that the people will be found true to their own liberties and duties in electing him to that high office.

"(5) *Resolved*, that the Democratic party of this state utterly condemns all efforts by the President and Congress to convert the existing war into an abolition crusade, all efforts by the President and Congress to change our old system of government into a military despotism, all efforts of the President and Congress to break down the liberties of the people and the government of the states by an overshadowing government different from the limited system established by the constitution, all efforts by the President and Congress to take one iota from or add one iota to the constitution as established by our fathers; and that we pledge our party to a faithful support of the constitution against all who assail it, whether fanatic factions or faithless officers of any and every grade of authority, and that we will do this under all denunciations showered upon us by the faithless amongst the people and under all persecutions inflicted upon us by a usurping government."

While the improved prospects of the Democratic party in the state and nation were doubtless the main reasons for the rejection of Dixon as a candidate and the nomination of a partisan Democrat, there was another consideration which must have had a considerable, if not a controlling, influence

on the action of the party at this time, and that was the attitude of the farm mortgagors toward Dixon.

This organization was still in existence and still feared by both parties. True, the Supreme Court had set aside the law which the legislature of 1861 had passed for the relief of the mortgagors,[5] but this had only added fuel to the flame. It was now certain that Dixon was against them and if they could do nothing else they could at least defeat the man who had actively assisted in riveting the chains of debt upon them.

The temper of the organization generally may best be ascertained from the columns of the official organ before mentioned, the "Home League." In the issue of February 16, 1863, the Madison correspondent of the paper (probably the editor, A. M. Thomson, in person) writes that the Republicans had caucussed several times on the subject of the approaching judicial election; that the brilliant Matt Carpenter was the candidate of some while the names of David Taylor, O. H. Waldo, David Noggle and John R. Bennett had also been mentioned; that both parties were embarrassed by the farm mortgage question, neither desiring to ignore it as they were both well satisfied that no man would be allowed to go on the bench who was known to be openly hostile to that interest. The article then proceeds as follows: "While it might be imprudent for the mortgagors to insist that no man but one pledged to their interests shall be elected, they have the right to protest against the election of any man who is openly pledged against them. They know their rights, and knowing dare to maintain them."

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[5] Oatman v. Bond, 15 Wis. *20.

In the issue of the same paper of date April 4th, and on the eve of the judicial election, the editor in a long editorial denounced Dixon as a Democrat, as the candidate of all the lawyers of the state who had farm mortgages to collect, also as the candidate of the corporations, the railroads, the tax title speculators and of all the other interests of the state except its true interests. The editorial goes on to say, "Before such a judge the people are always beaten, as witness the action of that court in their notorious decision declaring unconstitutional the law taxing railroads, the moment one of their actions squinted a little against the speculator they made indecent haste to reverse it, though they persisted that their first decision was the law. The judicial question is surrounded by perplexing embarrassments, and it is the duty, as well as the privilege, of every intelligent man to act boldly and conscientiously in the matter."

What sort of a situation might have developed had Dixon been nominated by the Democratic convention it is impossible now to say. He had asked for no indorsement at the hands of any convention. Prior to the meeting of the Democratic convention he had been put in the field as a non-partisan candidate by calls signed by large numbers of lawyers, both Democrats and Republicans, and these calls he accepted.

On the day following the Democratic convention the Republican legislative caucus was called together for final action on the judicial question, and passed the following resolution:

"*Resolved*, that we have full confidence in the ability, uprightness and impartiality as a judge of Hon. L. S. Dixon; that in the discharge of the high and responsible duties of Chief Justice of the Supreme Court we believe he has been governed only by an earnest and conscientious desire to administer justice under

the constitution and the laws, and that we have entire faith in his loyalty and unswerving patriotism;

"*Resolved*, that we do not approve of conducting judicial elections upon party issues;

"*Resolved*, that this caucus adjourn without balloting for Chief Justice."

This seems like rather fainthearted praise. Perhaps it was the best course that could have been pursued. It gave to Dixon a quasi-certificate of party approval which doubtless counted with the voters who were inclined to vote the party ticket under all circumstances and there were many such in those days. At the same time there was much discord in the Republican ranks. The attitude of the farm mortgagors, a majority of whom were doubtless Republicans, has already been noticed. It is said that the League had a meeting in Milwaukee, at which they resolved to support Cothren;[6] the irreconcilables who still stood by the doctrines of the *Booth* case gave Dixon a very grudging support or none at all; the ardent supporters of President Lincoln were inclined to rank him as a Democrat on account of the decision in the *Kemp* case, and Ryan's warm indorsement of him as a sound Democrat in principle did much to encourage this idea. At this time the indorsement of Ryan was sufficient condemnation in the eyes of those Republicans who regarded the "Ryan address" as a disunion document, and there were many such.

Thus there was much lukewarmness in the Republican support of Dixon; the Racine Journal (Rep.) said that many of the people could look on the contest with indifference, as the woman did when she saw her husband and the bear fighting, not caring which whipped; the Grant County Herald (Rep.) bitterly assailed Dixon as not a

[6] Wis. State Journal, March 28, 1863.

Republican and saw nothing to choose between the candidates. The great majority of the Republican papers, however, supported Dixon. The Democratic press generally, if not universally, supported Cothren. In March he (Cothren) made a tour of a part of the state and it was charged that he was treating to whiskey. He was also called a copper head and a drunkard, and thus the campaign took an acrimonious personal tinge.

As the campaign advanced it became evident that the vote would be close, with the chances in favor of Cothren, and it seemed that the soldier vote alone would save him from defeat. Reference has already been made to the law passed in September, 1862, allowing soldiers to vote while on the field, but this law applied by its terms only to general elections held in November, hence in the absence of further legislation there could be no soldier vote cast at the judicial election in the spring. This law had been attacked as unconstitutional in the case of *Chandler,* who had received the majority of the home vote for sheriff of Dane County in November, 1862, but had been defeated by the soldier vote if the same was legal.[7] The case was argued and submitted January 27, 1863, but no decision had been announced in February and March wore on and still the case was undecided. In this situation the legislature passed chapter 59 of the laws of 1863, extending the soldiers' right of suffrage to judicial elections in the spring; the act was approved March 16th and published March 17th and went into effect at once.

On the 25th day of March the *Chandler* case was decided and the constitutionality of the first act upheld Judge Paine writing the opinion and all the judges concurring.

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7 State ex rel. Chandler v. Main, 16 Wis. *398.

The question decided vitally affected the approaching judicial election, because if the law allowing soldiers to vote in November was valid then the law allowing them to vote in the spring at the judicial election was also valid. The question will doubtless occur to the mind of a lawyer at once whether Chief Justice Dixon should not have refused to take part in the case inasmuch as his own election would in all likelihood depend upon the ruling made. When the facts are all considered, however, it seems clear that there is no just ground on which to criticise his action. When the *Chandler* case was presented and argued in January there was no question involved in it which apparently could ever affect Judge Dixon. At that time there was no law allowing soldiers to vote at judicial elections and none proposed. Assuming that the case took the usual course it was undoubtedly considered and decided in the consultation room some time in February, certainly long before March 16th, for the elaborate opinion of Judge Paine must have taken two weeks at least for its proper preparation. Therefore it is beyond doubt that both when the case was argued and when it was considered and decided by the judges there was not only no impropriety in Judge Dixon's taking part in the discussion and decision, but he had no excuse for declining to take part. To refuse to act would be to shirk his duty.

The case was a novel and delicate one; it manifestly called for the wisdom of the whole bench and Judge Dixon had no course open to him either in January or February, but to shoulder his share of the burden.

When the decision was announced, however (owing to the action of the legislature nine days previously) it directly affected the prospects of Judge Dixon's election, for it was

morally certain that the great majority of the soldier vote would be cast for him. What was he to do under these circumstances?

He must have considered the question and I have no doubt he answered it somewhat in this manner: "If I announce that I took no part in the decision I shall announce a falsehood, for I did take part in the discussion and decision of the case and cannot now change the fact. My act in taking part was absolutely right at the time, and I shall make no false pretense of judicial delicacy. Lawyers examining the record in the future will appreciate the exact situation."

This, I think, would be likely to be his thought. Dixon possessed a great store of moral courage and was careless of criticism when he felt that criticism was unjust; he would not descend to hypocritical pretense and it would have been mere hypocritical pretense for him to say that he had taken no part in the case.

When the returns of the election first began to come in it was evident that the contest would be close; for several days both sides claimed a majority of the home vote, but Cothren's gains went steadily on and it finally appeared that he (Cothren) had received a majority of about 4,000 of the home vote. The soldier vote, however, reversed this result and gave Dixon a net majority of about 4,000 votes.

Thus Dixon was twice elected as an independent candidate, once against a Republican party nominee, and once against a Democratic party nominee. Truly he was the great protagonist in Wisconsin of fearless judicial action and of non-partisanship in judicial elections.

CHAPTER XVII

THE RAILROAD TAX DECISIONS

The attentive reader of the last preceding chapter will probably have noticed that one of the arguments urged by the farm mortgagors against Judge Dixon in the campaign of 1863 was that the Supreme Court had made a decision declaring the railway taxation law unconstitutional and then to please stockjobbers had reversed the decision. This, of course, was in effect a charge of favoritism or corruption or both and considered as such was absolutely groundless. The Court had, however, changed front twice on the question and a review of the decisions can hardly fail to be interesting.

The only provision of the state constitution which purports to govern the general principles of taxation is Section 1 of Article VIII, which simply says, "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

This laconic and important provision was adopted by the constitutional convention of 1848 after a debate in the committee of the whole of less than half a day, which debate was devoted entirely to the question whether it was advisable to enumerate in the constitution the classes of property which should be exempt from taxation, or give the legislature power to fix exemptions from time to time as it might deem best.

It cannot be for a moment supposed that the convention meant by this clause that there should be no taxation except

taxation of property. There were many excellent lawyers in that convention, including Chief Justice Whiton and Cole, and they well know that excise taxation was a widely used and very valuable form of taxation, and it is well nigh ridiculous to imagine that they intended to strike this power from the hands of the state by a clause simply purporting to regulate property taxation. The only sensible conclusion as it seems to the writer (and this is the view adopted by the Court in a recent case),[1] is that the convention by this clause desired to place the power of exemption of property from taxation in the hands of the legislature and to require that property taxation should be uniform. It is as though the clause read: "Taxes shall be levied upon such property as the legislature shall prescribe upon a uniform rule."

In 1848 when the constitution was adopted the state was still a part of the frontier and property taxation was really the only form of taxation which could be seriously regarded as a source of revenue. Taxation of occupations or any other form of excise taxation could not be expected to bring in any appreciable sums to the public treasury. Such taxation only brings satisfactory results in thickly settled communities. Manifestly this was the reason that the debate in the convention related only to the taxation of property and the question where the power to exempt property should be placed. It was assumed that the state had the power to tax occupations without special mention of such power in the constitution and, further, that little could be derived from such taxation in any event.

All this appears very clearly to the writer from examination of the printed journal of the second constitutional convention,[2] as well as the newspaper report of the debate

[1] Nunnemacher v. State, 129 Wis. 190.

[2] Journal Const'l Conv. of 1848, pp. 113-195 et seq. 202-205.

appearing in the Wisconsin Democrat of Jan. 5, 1848. The principal parts of the debate were incorporated by the writer in the opinion of the Court in the *Nunnemacher* case before cited and may be there referred to.

The coming of the railroad, however, in the early fifties changed the situation very materially; here was an industry requiring for its successful operation not only vast amount of property but a kind of property quite difficult, if not practically impossible, to subject to piecemeal and unequal taxation by the separate communities through which it operated its business. Manifestly some other form of taxation which should not involve the possibility of the severing of the system into separate parts by local tax sales would be very desirable in dealing with this new and important industry. To this suggestion the legislature soon responded by passing Chapter 74 of the laws of 1854, entitled "An Act taxing railroads and plank roads," which provided that all railroad and plank road companies should pay into the state treasury one per cent of their gross earnings for the previous year, *in lieu of all taxes*, and authorized a levy upon the entire property and franchises of the company and sale of the same in case of default.

It seems very clear that if this was taxation of property it was impossible to sustain it. By no process of reasoning can a tax of one percent upon the gross earnings of a business be called taxation upon a uniform rule with other property of the state which is appraised and taxed according to its value and not according to the revenue obtained from it. Naturally the law was at once attacked as unconstitutional by the railway companies. In 1855 the action of the *Milwaukee & M. R. Co. v. Waukesha County* brought to test the law was tried before Judge Hubbell on the circuit bench and he upheld the law on the ground that it provided not

for a tax, but really for exemption from taxation and for the payment by the company of compensation to the state for such exemption. The case was immediately brought to the Supreme Court by appeal and was argued by Edward G. Ryan for the appellant and Finch & Lynde for the respondent, and the judgment of the trial court was affirmed. The bench at this time was composed of Whiton, Smith and Cole, the first and last named having been members of the convention which framed the constitution.

Unluckily and for some reason never fully explained no formal opinion was written in the case. It was perhaps as important a case as the Court had ever had presented to it, but notwithstanding this fact only a mere memorandum of the points decided was made, the memorandum was lost and the case did not go into the reports. It seems probable that the judges did not realize the importance of the decision at the time.

Upon the strength of this decision the taxing officers all over the state omitted railway property from the assessment rolls for the years immediately following 1854, and such property paid no local taxes. Under a decision of the Court made in 1859 such an omission if illegal would invalidate the entire general tax.[3]

No further attacks were made upon the law until 1859, after the decision of the Supreme Court in *Knowlton v. Supervisors of Rock County*.[4] This last named case involved the constitutionality of an act of the legislature providing that farming lands within the city limits of Janesville should not be taxed more than half of one percent, whereas the other taxable property in the city was subject

[3] Weeks v. Milwaukee, 10 Wis. *243.

[4] 9 Wis. *410.

to a tax of one percent or more; it was held and very rightly held, as it seems, that such a law clearly violated the constitutional provision that the rule of taxation should be uniform. It was a case of the taxation of acre property by one rule and platted property by another rule and seems entirely indefensible.

Prior to the decision of this case at the June term, 1859, Chief Justice Whiton had died and been succeeded by Judge Dixon, while Judge Smith had been succeeded by Judge Paine, and only Judge Cole was left on the bench of the three judges who decided the early unreported railroad case. As matter of fact that early case had little legitimate bearing upon the *Knowlton* case, but it was referred to and relied on by counsel, and Judge Dixon in the opinion of the Court thus disposes of it:

"Upon the argument we were referred to, and much stress was laid by the defendant's counsel as an authority sustaining his positions, upon the decisions of this court in the case of *The Milwaukee and Mississippi Railroad Co. v. The Board of Supervisors of the County of Waukesha and others*, made at the June term, 1855. Upon examination of the records and files of the court in that case, we can find neither head note nor opinion. As a matter of fact, we are told that none were ever written. We are therefore without any authoritative information as to the points there determined, or the views taken by the court; and under such circumstances we can hardly say that we should not consider the questions there involved as still open. However, from the best information we have been able to obtain, we are relieved from any embarrassment growing out of the doctrines which it was claimed by counsel were established by it; as we learn that it was determined by the court that no question of the exercise of the taxing power was involved in it."

Judge Cole dissented with vigor, holding to the view that property with differing characteristics might be classified and subjected to different rates of taxation without violating the Constitution, providing that the classification was

proper. He then goes on to give his own personal recollections of the decision in *Mil. & M. R. Co. v. Supervisors of Waukesha County,* the unreported railroad case decided in 1855. On this subject he says, after stating what that case was:

"This court, after as full an examination and as careful consideration as has been given to any case, which I have participated in deciding, sustained the law; the validity of which had been called in question. Though no opinion has been prepared, yet the points decided were written out by one of the members of the court, and, as he informs me, placed upon file with the papers in the case. It appears that the paper containing these points has been misplaced or cannot now be found. Still, I supposed the ground of that decision was well understood throughout the state. This court did not decide, as has been intimated, that the law of 1854 did not impose a tax in the just and proper sense of that term, but was a payment made to the state by the several corporations, to which the law applied, in the nature of a bonus or compensation for the exemption granted. This is certainly not the place to state, at length, the reasons which led the court to the conclusions arrived at in the case, even if I had the time to do so; and I shall barely allude, therefore, to the construction we then placed upon section one of article VIII of the constitution, to show that it would have been competent within the principle of that decision, for the legislature to have provided that the farming and garden lands, within the limits of the city of Janesville, might be subject to a different rule of taxation for city purposes, than the other real estate therein situated."

He then proceeds to state in substance that it was decided in the *Milwaukee* case that property might be classified, i. e. that all railroad property might be put in one class and be subjected to one rule or percentage of taxation, while other essentially different kinds of property could be classified by themselves and each subjected to its own rule or percentage, and that so long as the classification was proper the rule of uniformity was not broken. It is interesting, to say the least, to note the varying statements with regard

to the unreported case; Judge Dixon says that "we are told" that no opinion or headnote was ever written and that "we learn that it was determined by the Court that no question of the exercise of the taxing power was involved in it."

This statement seems diametrically opposed to Judge Cole's assertion that the Court "did not decide, as has been intimated, that the law of 1854 did not impose a tax in the just and proper sense of that term."

Judge Cole further says that though no opinion was prepared the points decided were written out by one of the members of the Court and, "as he informs me," placed upon file with the papers in the case.

The member of the court referred to could be only Judge Smith (Judge Whiton being deceased), and Judge Smith was still the official reporter of the Court. Now comes a most remarkable fact. Judge Smith, in reporting the *Knowlton* case, inserts as a note the *Milwaukee* case complete with the arguments of counsel, the decision of Judge Hubbell at the circuit and an opinion brief indeed but with all the indicia of a formal opinion, and beginning in the usual way, "By the Court, Smith, J.," and places the following note at its head, "(The following paper contains all the opinion of the Court which has ever been written, except the order affirming the decree of the circuit court, and which has been discovered since the opinions in *Knowlton v. Supervisors of Rock County* were written—Rep.)."

This amounts to a categorical statement by Judge Smith that it is the statement of points decided which Judge Cole refers to as having been written out by one of the members of the court and placed on file with the papers in the case. One can come to no other conclusion without charging

Judge Smith with deliberately manufacturing the document after the decision in the *Knowlton* case, and this is not to be thought of. Regarding it, therefore, as the statement of points decided in the *Milwaukee* case, we find by reading it that two points affecting the merits were decided in that case: *First,* that the law does not violate the uniform taxation rule provided all railroad property of the same class is taxed alike or exempted alike as it appears to be; *Second,* that the court does not think that the law imposes a tax within the meaning of the constitutional provisions and therefore is valid so far as the government is concerned.

The first proposition is the proposition which Judge Cole says was decided, and the second proposition seems very like the proposition which Judge Cole says was not decided.

There was evidently a radical difference between Judge Cole's recollection and Judge Smith's recollection, for it must have been upon Judge Smith's recollection that Judge Dixon based the statement in his opinion that "we learn that it was determined by the court that no question of the exercise of the taxing power was involved in it." Assuming, as we apparently must, that the memorandum published by Judge Smith in the note to the case was the long lost statement of points filed at the time, then it seems that Judge Smith's recollection was the better. There is just one way in which they may perhaps be harmonized. The memorandum says that it was held that the act does not impose a tax *within the meaning of the constitutional provisions;* Judge Cole says that it was not held that the act did not impose a tax *in the just and proper sense of that term.* Now if the constitutional provision refers only to property taxation and the law was considered to be an excise law, or law levying an occupation tax, both state-

ments might be true. The tax was not a tax of the kind referred to and regulated by the constitution, but was a tax within the broad and true sense, as every excise or occupation tax is, although it has also contract elements in it.

This is practically the conclusion to which the court came when the whole subject of taxation was presented in the railway and inheritance tax cases presented in the year 1906. Reference to those cases will disclose that the history of the early decisions and especially the unreported decision was there quite fully reviewed.[5]

The discussion of the *Milwaukee* case in the *Knowlton* case, and especially the statement by Judge Cole that the *Milwaukee* case was overruled by the later case, again involved the railway tax law of 1854 in serious doubt, and the state brought an action of mandamus in January, 1860, to compel a delinquent plank road company to pay one per cent of its gross earnings into the treasury of the state,[6] and thus the question was again presented.

In this case Judge Paine wrote the opinion. He and Judge Dixon agreed that there could be no classification and difference in rates between the different classes of property; that uniform taxation of property meant equal taxation according to valuation; that the law in question was a property tax law, and not a licensing act, or a police measure, and hence violated the rule of uniformity and was void.

Judge Smith was still the reporter of the Court and apparently gave some additional information to the Judges

[5] State v. Railway Companies, 128 Wis. 449; C. & N. W. Ry. Co. v. State, 128 Wis. 553; Nunnemacher v. State, 129 Wis. 190.

[6] State v. W. L. & F. R. P. Co. 11 Wis. *35.

with regard to the decision in the unreported case, for Judge Paine says:

"It is claimed at the outset, that the question has already been decided by this court in the case of the *Milwaukee and Miss. R. R. Co. v. The Supervisors of Waukesha*, which was decided several years ago, but in which there never was any opinion written. The same position was taken in *Knowlton v. Supervisors of Rock Co.;* and it was there intimated in the opinion of the chief justice, that under the peculiar circumstances of that decision, not knowing the precise ground upon which it rested, nor the reasons of the court, we could hardly feel bound by it as an authority. Its effect, however, was at that time avoided by the fact that, according to the best information we had of it, the court held that the imposition upon the railroad was not a tax within the meaning of the constitution. The source of that information was a letter written by one of the judges to one of the counsel in the case, stating the points decided. And it was there said that the court held: 1. That the amount required to be paid by the railroad company was not a tax; and that if it was a tax, the constitutional requirement of uniformity was complied with, inasmuch as all railroads were taxed alike. Mr. Justice Cole, however, who was then on the bench, places his decision upon the last ground, and does not understand that the court relied very strongly upon the first."

It will be noticed that it is now said that one of the Judges (necessarily it must have been Judge Smith) wrote a letter to one of the counsel, and in this letter it was said that the Court held "1. That the amount required to be paid by the railroad company was not a tax." The statement that the decision was contained in a letter seems to introduce a new element of uncertainty into the question as to what was really decided in the early case. Judge Cole again dissented on the same grounds as in the *Knowlton* case.

In the opinion of the Court Judge Paine takes up and disposes of the claim that the exaction may be sustained as a license fee, and not a property tax, and rejects it for

various reasons, among which are, that it is called a tax in the title of the act, that the law provides for no license, does not pretend to grant any authority or privilege to do any act and hence does not perform any of the functions of a license law.

The subsequent history of the railway tax litigation and the final overruling of the *Plank Road* case is briefly given in the opinion of the Court in the *Nunnemacher* case, supra, and the statement there made is inserted here because it seems to present the matter fully as well as the writer could hope to do again.

"This decision was made at the January term, 1860, and evidently threw the financial systems of the state and municipalities into great disorder. The legislature at once passed chs. 173 and 174, Laws of 1860; the first-named chapter exempting all railroad property from taxation, and the last-named chapter providing for taxation of railroads by the license system. In these acts the attempt of the legislature to follow the suggestions of the court in the *Plank Road Case* (11 Wis. 35) and make a law which should, in fact, be a license law is very manifest. Every reason suggested in that case why the law of 1854 could not be considered a license law was observed, and an attempt made to obviate it. But the question would not down. It was presented gain in *Kneeland v. Milwaukee*, 15 Wis. 454, in 1862, when the extent of the financial ruin and governmental paralysis resulting from the holding in the *Plank Road Case* was evident on every hand. The Court in this case, after affirming the *Plank Road Case* upon the first argument, entertained a motion for rehearing, and while Justices Dixon and Paine remained of the same opinion upon the merits they finally agreed in overruling their former decision and returning to the decision in the *Milwaukee & M. R. Co. Case*, on the ground of *stare decisis*. So the law was settled in this state that the act of 1854 was constitutional.

"The only thing that can be said to have remained doubtful was the question as to what ground or grounds the decision in the *Milwaukee & M. R. Co. Case* went on. According to Judge Smith's memorandum, the only contemporaneous written evidence which we have, it went upon two grounds: (1) That if a tax, it did not violate the rule of uniformity because all railroad

property was treated alike, and (2) because the court did not deem it a tax within the constitutional provisions (i. e. sec. 1 of art. VIII of the constitution). This second proposition can only mean that it was not a tax upon property. According to Judge Cole it was *not* decided that the law did not impose a tax, but Justice Paine in the final opinion in the *Kneeland Case* treated this difference of opinion as, in fact, immaterial, and said that all that it was necessary to know was that it was held that, if it was a tax, it was no violation of the rule of uniformity, and that the law was held to be no violation of the constitution. It is not very surprising that Judge Cole's recollection should not agree with the written memorandum. Doubtless the discussion in the consultation room took a wide range, and all know how rare it is that two persons will remember a long conversation or consultation alike. Both versions may be practically harmonized on this theory, namely, that it was held not to amount to a property tax under sec. 1 of art. VIII of the constitution, as Judge Smith says, but *was* held to be an exercise of the inherent taxing power of the state. Judge Smith's memorandum nowhere negatives this theory, but rather tends to support it, while this also justifies Judge Cole's statement that it was not held that the law did not impose a tax. However this may be, it would seem that the question is authoritatively settled in the case of *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, where it was held, after an historical review of the cases in an opinion by the present chief justice, that 'the decision of this court in the case of *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 449, appears to be eminently sound *on all points involved*, and all contained in subsequent opinions *inconsistent therewith* is hereby disapproved.' Just what is meant by 'all points involved' may not be entirely certain, although it would seem to refer to the points named in the memorandum of the decision made by Judge Smith; but there can be little doubt as to what is meant by the phrase 'all contained in subsequent opinions inconsistent therewith.' The positions which Justices Dixon and Paine took in the *Plank Road Case* (11 Wis. 35) which were inconsistent with the *Milwaukee & M. R. Co. Case* and upon which the latter case was overruled were that the railroad tax was a tax upon property, and that hence it was void because not uniform under sec. 1 of art. VIII, and these positions are certainly disapproved by the *Taylor County Case*. So we regard it as settled by the necessary effect of the decisions named that the railroad tax legislation of 1854, and *a fortiori* the railroad license legislation of 1860 and

of following years, while imposing a tax in the proper sense, did not impose a tax upon property within the meaning of sec. 1 of art. VIII of the constitution, but was in fact excise taxation upon the privilege of transacting business."

It is only history now to recall the fact that the railway tax law of 1860 remained upon the statute books with changes and increases befitting the growth of the great business from the time of its enactment up to the passage of the ad valorem tax law of 1903;[7] that the same system of taxation by license of the business and exemption of property has been extended to street railways, electric light companies, and telephone and telegraph companies, and that for many years these occupation or privilege taxes aggregated millions and formed the principal source of the revenues of the state.

[7] Chap. 315, Laws 1903.

CHAPTER XVIII

JUDGE PAINE'S RESIGNATION AND THE APPOINTMENT OF JASON DOWNER

After Chief Justice Dixon's re-election for a full term in the spring of 1863 it might well be anticipated that the bench would remain as then constituted for a number of years at least.

All of the judges were young and vigorous; both Dixon and Cole had recently and successfully run the gauntlet of the farm mortgage movement and had overcome factional opposition in their own party, while Judge Paine certainly had little reason to apprehend the result of the campaign for re-election which he would be compelled to make in the spring of 1865. Democratic hopes which had risen so high in the fall of 1862 were practically extinguished in the summer of 1863. The administration needed only victories in the field to arouse again the drooping spirits of the Republicans, and these victories came in July, 1863, when Vicksburg and Gettysburg sounded the death knell of the Confederacy. There was little prospect that any faction or any party would be bold enough to nominate a candidate against Judge Paine if he chose to run again. Moreover, the judicial work was congenial to him and he had fully demonstrated his eminent fitness for the bench.

Nevertheless, as has been briefly stated in a preceding chapter, Judge Paine resigned on the tenth day of August, 1864, for the purpose of entering the military service of the United States, and did actually enter the service as

lieutenant-colonel of a regiment and continued therein until May, 1865, when the war had practically ceased.

At this distance of time Judge Paine's action seems strange, not to say unaccountable. When he resigned the war was in fact in its last stages, and it was apparent to all that the end was only a question of months. There was no great emergency; no danger of disruption of the Union; there was no situation even suggesting the necessity that a high official of the state, performing public duties of the highest importance should lay down those duties and take up arms. Why then did Judge Paine resign?

The writer will not presume to answer this question positively, but will simply say that he has little doubt that Judge Paine entered the army because he desired to demonstrate to all his entire loyalty to the Union. If the question be asked why Judge Paine should feel it necessary to make a practical demonstration of his loyalty the answer is not far to seek.

Up to the time of the outbreak of the civil war the Republican party in Wisconsin had been an ultra state rights party; it had made the doctrines of the *Booth* case the test of party fealty and had won its victories on that platform; Judge Paine had been the chief and most brilliant exponent of these doctrines and was still so regarded. But as the war dragged along year after year, and as it became more and more evident that the southern states founded their entire contention on the doctrine of state rights it became evident to the great mass of the party that they must part company with the state rights idea and that if the Union was to exist the doctrine that each state could nullify any federal law displeasing it must be abandoned. There was a very respectable minority of the party, led by such men as

Timothy O. Howe, who had always opposed the principles of the *Booth* case and claimed that federal power must be supreme upon all federal questions, and as the war progressed this minority had the satisfaction of seeing their ideas vindicated and approved by the great majority of the party.

Judge Paine fully appreciated this change of sentiment in his party associates, but he never himself abandoned the principles upon which the *Booth* case rested. To him those principles were essential to human freedom. He had embraced them in early manhood and fought a successful battle for their vindication as gallant and knightly as ever was fought by any Galahad in coat of mail. He could not abandon them; they were a part of his very life; to him they did not mean disunion or secession, whatever others might think. He afterwards drew the distinction between the state rights doctrines of the *Booth* case and the doctrine of secession in a dissenting opinion in a case arising in 1869,[1] and which will be more fully treated later in this work.

But the distinction which his accurate legal mind saw existing between the two doctrines was too fine for the great mass of the people to appreciate. To them state rights meant the right to secede. In their view the doctrine of state rights was directly responsible for the existence of a war which had drained the country of millions upon millions of its treasure and thousands upon thousands of the flower of its youth.

Judge Paine could not help seeing the popular verdict though protesting against its correctness. He saw himself pilloried in the public estimation as believing in the right of

[1] Knorr v. Home Ins. Co. 25 Wis. 143.

secession. This could not fail to grieve him sorely and his conclusion doubtless was that the only effective way to prove his absolute loyalty to the Union and his hatred of secession was to enter the army and prove it by "wager of battle."

This was thought by some of his contemporaries to be the controlling reason for his resignation, and there seems to the writer little doubt of the fact.

Judge Paine's last appearance on the Supreme bench (prior to his return to it after the close of the war) was on the 11th day of August, 1864; his resignation, however, did not take effect until November 15th following, on which day his successor, Jason Downer, of Milwaukee, who had been appointed by Governor Lewis to fill the vacancy, took his seat.

There is very little historical material at hand from which to draw any extended sketch of the life of Jason Downer prior to his service as Justice of the Supreme Court. He was fifty-one years of age at the time of his appointment and had practiced law at Milwaukee for twenty-two years, during which time he had built up a profitable and steady business. His career as a lawyer had not been brilliant or startling, but it had been successful because he combined with a clear head and logical mind great industry and unquestioned integrity. He was a safe counselor, a diligent student and a careful, thrifty man of business, who accumulated a considerable property, much of which went at his death in 1884 to endow the Milwaukee-Downer Woman's College.

Perhaps the most satisfactory sketch of his life now existing is the sketch prepared by Hon. D. H. Johnson of Mil-

waukee, and presented to the Supreme Court May 15, 1884,[2] as follows:

"The sober, diligent, and well-rounded career of Judge Downer was free from startling adventures, and was calculated to command respect, rather than inspire enthusiasm. His eulogy, like his own utterances, should be characterized by decent moderation, just discrimination, and careful abstention from irrelevant and overdrawn statements.

"Jason Downer was born at Sharon, Vermont, September 9, 1813. His father was a wealthy farmer, as wealth was counted in those days. He remained at the homestead farm until he was nineteen years of age. He then entered Kimball Union Academy at Plainfield, New Hampshire. In 1834 he entered Dartmouth College and graduated in 1838. He soon afterwards went to Louisville, Kentucky, where he studied law and was admitted to practice. In 1842 he removed to Milwaukee. About that time the *Milwaukee Sentinel* was established. Mr. Downer was one of the original proprietors of the paper, and for about six months he filled the editorial chair. He retired from that position in favor of Gen. Rufus King. Thenceforth he devoted himself to the practice of the law.

"In 1842, Milwaukee was a small, straggling, lake-shore village, giving slight promise of its future greatness. Its commercial and manufacturing prosperity was visible only to the eye of faith. A reference to the files of the first volume of the *Sentinel* will show that Mr. Downer had the faith and sagacity requisite to discern the destiny of his chosen home. He was satisfied to grow with its growth and wait for his just share of the business and wealth in store for it. From 1842 to the day of his death he was a loyal Milwaukean, always taking a deep interest and frequently an active part in the various enterprises whose history constitutes the main chapters in the annals of the city.

"In November, 1864, he was appointed an associate justice of this court in place of Byron Paine, resigned, and the following spring he was elected to that position for a full term. He participated in the labors of this court until September 11, 1867, when he resigned.

"His judicial career, including a brief period when he occupied the circuit bench, by appointment to fill a vacancy, did not exceed three years. But it was long enough to establish his standing as a learned, industrious, and able jurist.

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[2] 60 Wis. p. xxxii.

"By far the greater portion of his active life was spent in the practice of the law in Milwaukee county. At the Milwaukee bar his powers were formed; there they were put forth in their full vigor for more than thirty years; there he acquired the professional distinction that led to his elevation to the bench; there he earned the greater part of his fortune. He returned to the Milwaukee bar when he laid by the judicial ermine, and he was a member of that bar down to the day of his death. It is therefore eminently fit that the Milwaukee bar should announce his death to this court and here bear testimony to his worth.

"As a lawyer he was distinguished for the extent and depth of his learning, for the soundness of his judgment, and for professional diligence and fidelity. As an advocate he was strong and convincing, whether dealing with questions of law or fact. If he lacked the eloquence and magnetism of Ryan, Arnold, and Carpenter, or the ingenuity and originality of Byron Paine, the deficiency was well supplied by the soundness and extent of his learning and the clearness of his views. His arguments were seldom ornate, never florid, but always direct and to the point. As an adviser he was cautious and conservative, not given to raising false expectations, never blind to the strength of the adversary's case, and never tempted into that wild professional partizanship so apt to injure the cause which it espouses. In short, his cases did not run away with him. He was therefore justly considered among the safest of advisers. It was mainly this quality that built up for him a large practice and an enviable fame. His clients felt secure in his judgment, his learning, and his industry. He was chary of promises of success, and was apt to accomplish more than he predicted.

"As a judge his record was made here. I need not say to this court that it is an honorable record. The reports of his opinions are redolent of deep learning and vigorous thought. They are models of clearness and conciseness. He was the organ of the court in the promulgation of some of its important decisions, and the court has never, I believe, been embarrassed by any looseness or redundancy in his manner of pronouncing its judgments. It is surely better that one's style should be colorless than that it should be colored by prejudice or whim, or darkened by uncertainty.

"In his business relations his thrift and his integrity went hand in hand. He accumulated a handsome fortune, but he wronged no man. In all his business ventures his caution and his enterprises were happily balanced. He was not afraid of

JASON DOWNER.

large and complicated undertakings, and he was not reckless or thoughtless in small and simple matters.

"It is but justice to add that although he made little public show of any non-professional attainments or accomplishments, he was in fact a ripe scholar and a diligent student of the ancient and modern classics.

"In his domestic relations, it is enough to say that he was above reproach. He leaves behind him a well-earned reputation for probity, diligence, and ability. The disposition which he made of his large estate in his last will and testament may well serve as a model for other rich men. Without neglecting any of the claims of kindred and friends, he remembered in a munificent manner an institution of learning in which he felt an interest, and did not couple his gift with any of those absurd and crotchety conditions which often make such a bequest a burden rather than a help."

Chief Justice Cole's estimate of him is interesting, and a part of it is as follows:

"He was a hard student and exclusively devoted to his profession. The prizes of political life did not excite his ambition or have attraction for him. And he gave his whole heart and soul and energy to the study and practice of his chosen profession. They seemed to be his delight by day and his solace by night. The law is said to be a jealous mistress, who will tolerate no rival. As a rule she certainly bestows her highest favors, her brightest honors, upon those who court her most assiduously and with the most unwearied devotion. This Judge Downer did do; consequently he became, and was acknowledged to be, a thorough and profound lawyer. In his arguments before this court he never indulged in any declamation or in fine speaking, but addressed the understanding and reason. His efforts were never enlivened by any flashes of wit or humor, nor embellished with any eloquent and rhetorical language. His arguments were plain, clear, forcible, and learned. His manner earnest, direct,—at times, owing to the strength of his convictions, almost dogmatic. But when he closed his argument you were sure to have an exhaustive discussion of the law and facts on his side of the case, all presented in a lucid order with great clearness and force of reasoning.

"On Judge Downer's appointment to this bench he brought into exercise the same useful and laborious habits, patient industry, and careful examination of causes, which had characterized his

practice at the bar. He conscientiously investigated each case for himself and mastered all its facts. He had great respect for authority, and wished to walk in the old paths of the common law; *super antiquas vias legis.* He had a strong sense of justice, and thought the rights of parties would be the most fully protected and secured by a rigid adherence to settled principles. Some thought he was too technical and did not sufficiently appreciate the necessity for new rules, or the modification of old rules to meet the demands of modern society and its ever changing business relations. The opinions which he delivered from this bench are well described in the memorial as being distinguished for the soundness of their logic, the depth of their learning, and as safe and valuable precedents and expositions of the law. He remained on the bench for about three years, during which period he left in the published reports an enduring monument to his industry, discrimination, and exact and comprehensive learning. To say that he was honest and impartial in the discharge of his duties as a judge may be faint praise, but it is true nevertheless."

Judge Downer was elected without opposition in the spring of 1865, being the first instance of that kind in the history of the Court, and remained upon the Supreme bench nearly three years, during which time many important questions were presented to the Court and decided, in all of which he took his full share of the burden. Some of these cases will be more fully referred to hereafter. There seems no reason to doubt the correctness of Chief Justice Cole's estimate of his abilities as a judge. It seems quite certain, however, that he did not entirely enjoy the work upon the bench. During these years the volume of work began to increase with considerable rapidity, and evidently the labors of the bench became somewhat onerous to him. He was in easy circumstances financially, and in the fall of 1867 he tendered his resignation to Governor Fairchild, to take effect on the tenth day of September.

Byron Paine, who had returned from the war in May, 1865, was again practicing law in Milwaukee, and Governor

Fairchild without hesitation re-appointed him to the bench, an act which was universally recognized as not only a graceful act, but as the most fitting appointment that could have been made.

By virtue of this appointment the state regained in its service the ability and experience of Byron Paine upon the bench of its highest court, and might reasonably hope to retain him in that position for many years, for he was then not quite forty years of age.

CHAPTER XIX

MORE WAR QUESTIONS

In a former chapter a number of very important cases, involving questions arising out of or closely connected with the civil war in its earlier stages have been considered. There were other questions of a similar character which arose later, which are deserving of mention and which will be taken up in the present chapter.

The first cases presenting questions arising out of the civil war and its prosecution were two cases regarding the validity of the enlistment of minors without the consent of their parents or guardians.[1] The federal law provided that no person under the age of eighteen should be mustered into the federal service. In the *Gregg* case, the minor was over eighteen, but under twenty-one years of age, and had enlisted without the consent of his father, and it was held that the enlistment was valid; in the *Higgins* case, where the enlisted person was under eighteen years of age, and had so stated to the recruiting officer, but was enlisted without his father's consent, the enlistment was held unauthorized and the boy was discharged from military control.

On the 25th of February, 1862, the President approved an act of Congress authorizing the issuance of United States treasury notes, familiarly known as greenbacks, and declaring that they should be "a legal tender in payment of all debts, public and private."

[1] In re Gregg, 15 Wis. *479; In re Higgins, 16 Wis. *351.

The question whether Congress had power under the Constitution to declare anything except gold and silver coin to be legal tender in payment of pre-existing obligations was a serious and much mooted one.

It was squarely raised at the January term, 1864, in a foreclosure action where it appeared that in October, 1862, the defendant had made a tender of the full amount of the debt in treasury notes.[2] The lower court had held that the tender was not good because not made in coin. The court, in an opinion written by Judge Paine, sustained the validity of the act, following the decision of the Supreme Court of New York in a then very recent case.[3] In the New York case Chief Justice Denio dissented and wrote a very elaborate and able opinion. Judge Paine in his opinion first says that the reasons for holding the act valid are so fully set forth in the opinions in the New York case that it would be mere repetition to re-state them. He then proceeds, however, to take up the dissenting opinion of Chief Justice Denio, and in a very lucid argument attempts to demonstrate the inconsistency in the positions taken by that great jurist. It would take some courage to attempt to show that an opinion of Chief Justice Denio was erroneous in its logic, yet that is what Judge Paine did, and the question whether he did not do it successfully is, I think, an open one. Both opinions are worth reading.

It will be remembered that the Supreme Court of the United States met this question in 1869, and first held in an opinion by Chief Justice Chase that the act was void as applied to pre-existing debts,[4] but when the question was

[2] Breitenbach v. Turner, 18 Wis. *139.

[3] M. B. S. & L. Bank v. Van Dyck, 27 N. Y. 400.

[4] Hepburn v. Griswold, 8 Wall. 603.

again presented in the following year the Court, after several arguments and by a bare majority, overruled the *Hepburn* case and affirmed the constitutionality of the law against very strong dissenting opinions by Chief Justice Chase, and Justices Clifford, Field and Nelson.[5]

The last named cases, or "the legal tender cases," as they were familiarly called, aroused much criticism at the time among the bar and the people. When the *Hepburn* case was decided there were but eight justices in commission and a vigorous dissent was filed by Justices Miller, Swayne, and Davis; Mr. Justice Grier was physically very feeble and, while he participated in the consultation room in the decision of the case, had already sent his resignation to the President, and sat for the last time on January 31, 1870, two days after the decision.

The decision in the *Hepburn* case was disappointing to the government and to the people generally, and was not generally accepted as final, especially in view of the feeble condition of Mr. Justice Grier, who voted with the majority.

The two vacancies on the bench were filled by President Grant by the appointment of William Strong of Pennsylvania, February 18, 1870, and Joseph P. Bradley of New Jersey, March 21, 1870. It was currently charged by the enemies of the administration at the time, that these appointments were made for the purpose on the part of the President of packing the Court in order to prepare the way for overruling the *Hepburn* case. Justices Strong and Bradley were very able men who were entirely worthy of seats on the Supreme bench; the charge that the bench was intentionally packed to accomplish the reversal of the *Hepburn* case was one easily made and hard to disprove, and

[5] Knox v. Lee, 12 Wall. 457.

the fact that both judges voted to reverse that case lent some color to the charge; it may probably be safely assumed that the President took care not to appoint any jurist known to be hostile to the law, but, on the other hand, it cannot be supposed for a moment that he went further than this.

At the January term, 1865, another federal war measure came before the Court, namely, the stamp act of July 1, 1862, which provided, among other things, for the affixing of stamps to "writs or other original process by which any suit is commenced in a court of record." [6]

The action in which the validity of the law was attacked had been dismissed in the circuit court because no stamp had been affixed to the appeal papers, and the sole question in the supreme court was whether the dismissal was right. The Court held that the provision in question was void because such writs or other processes were the essential means by which the state governments exercise their judicial functions, and hence must be exempt from taxation by the federal government; otherwise the federal government must have the power to tax all the means used by state governments to carry out their duties, and if it has the power to tax, it has the power to tax to excess, and thus destroy the ability of the state governments to perform their functions.

The opinion in this important case was written by Judge Cole, and is an example of his logical reasoning and terse but clear judicial style at its best.

In this case Judge Downer dissented and wrote an able opinion which is also well worth reading in connection with Judge Cole's opinion. Judge Downer's position was that the tax was in no sense a tax on the instrumentalities of the government, but on the individual who commences a law-

[6] Jones v. Estate of Keep, 19 Wis. *369.

suit. He instances the fact that the state levies a tax of one dollar on every civil suit commenced in a court of record, but that this tax had never been supposed to be a tax on the instrumentalities of government, and says, "The idea that underlies both the state and United States law * * * is that the *individual suitor* is taxed. * * * It is a tax *on the person who caused the lawsuit,* who is in the wrong, and against whom the aid of the state is invoked."

The same federal law required stamps to be put on every deed of conveyance of land, and the question whether this covered tax deeds executed under the laws of the state was presented at the September term, 1867,[7] and the *Jones* case was followed in an opinion by Judge Dixon, who briefly says, "We are of opinion that Congress possesses no constitutional power without the assent of the states to tax the means or instruments devised by the states for the purpose of collecting their own revenues; and for our reasons in support of this conclusion we refer to the opinion of this Court in the case of *Jones v. The Estate of Keep.*"

Another important question arising at the close of the war was the question of the validity of the state law of 1865 (Chap. 14), authorizing towns, villages and cities to levy taxes to pay bounties (not exceeding $200) to men who might have enlisted or should thereafter enlist under the call of the President for 300,000 men made in December, 1864, or any subsequent call.[8] The act also provided for payment of bounties to persons who before being drafted furnished substitutes, and for giving pecuniary aid to the families of volunteers and drafted men.

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[7] Sayles v. Davis, 22 Wis. *225.

[8] Brodhead v. Milwaukee, 19 Wis. *624.

The main argument here was that such purposes could not be said to be public or municipal purposes, but purely private purposes; that it was taking the money of citizens at large and giving it to an individual, the public being in no legal sense benefited by the transaction. Following a Pennsylvania case then recently decided,[9] the Court sustained the law in an opinion by Chief Justice Dixon, against a sharp dissent by Judge Downer, who was of opinion that as to volunteers who had enlisted before the voting of the tax the law was void, because the city or town had no special public interest in the payment of such bounties; he also thought the law was by its terms inapplicable to the city of Milwaukee.

An echo of the Ozaukee draft riots of 1863 was heard at the January term, 1867, in a case in which one of the persons who was resisting the draft and was arrested and detained for a time sued ex-Governor Salomon for false imprisonment.[10] The Governor justified his action on the ground that he, as Governor, was enforcing the draft laws and lawfully used the discretionary authority conferred upon him by the President under the provisions of the draft laws of the United States. In the trial court judgment went for the defendant, and that judgment was affirmed by the Supreme Court in an opinion by Judge Downer, in which the Governor's contention was fully sustained.

An extract from the opinion will give an idea of Judge Downer's pithy and terse style:

"it is clear that the defendant did not transcend the discretionary authority conferred upon him. His acts must therefore be regarded, in a certain sense, as the acts of the president. The same principles apply to his defense as would to that of a mili-

[9] Speer v. Blairsville, 50 Pa. St. 150.

[10] Druecker v. Salomon, 21 Wis. *621.

tary commander, if sued for acts by him done in fighting a battle to put down an insurrection or rebellion.

"But it is said, such executive power is dangerous to liberty. Admit it. It is also absolutely necessary to every free government. Ever since the downfall of the feudal aristocracies of Europe, the champions of freedom have labored so to limit executive power as to prevent usurpation and despotism; and they have succeeded in England and in this country, by throwing around it various checks and safeguards. Not one of these would we remove, or do aught to impair its efficiency. While, however, executive power is dangerous to liberty, no government has ever existed long without it. Without it, in the great crises which await every nation, government dissolves in anarchy."

Probably the most interesting case decided by the Court at this period was the case involving the question of the right of negroes to vote.[11] The decision in favor of the right came as a great surprise to the greater part of the people of the state, and in order to understand how it came about and why it was a great surprise it is necessary to hark back to constitutional times.

Section 1 of Article III of the State Constitution, after enumerating the various classes of citizens entitled to vote, provides that the legislature may at any time by law extend the right to others, but that no such law shall be effective until submitted to vote "at a general election and approved by a majority of all the votes cast at such election."

The legislature of 1849 passed an act (Chapter 137) conferring the right of suffrage on all colored male residents over twenty-one years of age, provided that a majority of all votes cast at the general election in November of that year should be cast in favor of such extension of the right.

The question was submitted at this election, separate ballots and ballot boxes being provided. The great majority of the electors voting did not take interest enough in the

11 Gillespie v. Palmer, 20 Wis. *544.

question to vote upon it. The total votes cast for Governor was nearly 32,000, of which Dewey (Dem.) received 16,649, Collins (Whig) 11,317, and Chase (Free Soil) 3,761. But upon the question of negro suffrage only 9,330 votes were cast, of which 5,265 were for and 4,075 against the extension of the ballot to the negro.

There were very few who claimed that a majority of all the votes cast at the election had been cast in favor of the proposition. True there were some ardent negro sympathizers who held this view, and among them was Sherman M. Booth of Milwaukee, who argued in the columns of the Free Democrat that because a majority of the votes cast upon the subject were favorable the proposition had carried. He found very few who agreed with him, however, and when the state board of canvassers made the official canvass in December they certified that the whole number of votes cast was 31,759 (this being the total vote cast for the state office for which the great number of votes was cast), of which 5,265 were cast in favor of equal suffrage to colored persons and 4,075 were cast against equal suffrage to colored persons.[12]

This was virtually a determination that the proposition had been defeated, and it was accepted by press and public generally as the end of the matter.

When the general revision of the statutes was made in 1858 no one claimed that the negro suffrage law of 1849 was a part of the state law of the state, and no notice was taken of it. The negroes themselves did not suppose that they possessed the right to vote, and made no claim to it, except perhaps in some few cases.

[12] Wisconsin Express, Madison, Dec. 25, 1849.

So universal was the impression that the law of 1849 had been rejected by the people that the Republican legislature of 1865 passed an act (Chap. 414) providing for submission of the question again to the people. This time it was provided that the vote should be upon the regular ballot and cast in the regular ballot boxes, so that there would be less danger of an insignificant number of votes being cast.

There was much difference of opinion in the Republican, or Union, party, as it was then called, and the platform of that year contained no reference to the question.

As finally canvassed the vote on the proposition stood 46,588 in favor and 55,591 against it, thus defeating it, although Lucius Fairchild, the Union candidate for Governor, was elected by a majority of about 10,000. This time it was defeated by a clear majority of all the votes cast, whatever theory of the meaning of that expression might be adopted.

It seemed that the question had been set at rest for a time, but not so. There were those who still believed that the law of 1849 had been in fact constitutionally approved by a majority of all the votes cast, and among these was Byron Paine, who was now again practicing law at Milwaukee, having returned from the war. Whether it was on his suggestion or not I do not know, but at the November election of 1865 a negro named Gillespie, who possessed all the qualifications of an elector, except the Caucasian blood, if that was necessary, presented himself at the polls in Milwaukee, offered his vote, and upon its rejection sued the inspectors for damages for the wrong done him.

Byron Paine brought the action and put his whole heart in it as he had put it in the *Booth* case eleven years before.

He was then fighting to make the negro a freeman; he was now fighting to insure to the negro the necessary weapons of the freeman. A demurrer to the complaint was sustained in the circuit court, but upon appeal the Supreme Court unanimously held that the law of 1849 was approved by the people, because a majority of all the votes cast *upon that subject* were cast in favor of the proposition.

Judge Downer wrote the opinion of the Court, and it is undoubtedly one of the most important opinions which he wrote during his brief term on the bench. There may well be two ideas as to the abstract correctness of the holding, but the arguments in its favor are certainly strong, and it has been accepted in Wisconsin as settling the law on the subject of the number of votes required to carry any question submitted to vote of the people ever since its rendition.

Thus it came about that just after the white voters of the state thought they had decided by a decisive vote that the ballot should not be extended to the colored man, they woke up one morning to find that for sixteen years the colored man had been and still was a legal voter. It was something more than a surprise—it amounted to a practical joke upon an entire state.

CHAPTER XX

CHIEF JUSTICE DIXON'S RESIGNATION, REAPPOINTMENT AND RE-ELECTION

Chief Justice Dixon was not a good business man; he was careless of money and was always hard up. The salary of a Justice of the Supreme Court was fixed by the law creating the Court in 1852 at $2,000. This amount had been increased by Chapter 102 of the laws of 1857 to $2,500.

Upon this princely income the Chief Justice had lived and supported his family since his appointment in 1859, each year seeing his needs increase and his income decrease as greenbacks diminished in purchasing power. It is said that Mrs. Dixon bestowed upon him the title of "Cheap" Justice, and she was well justified in doing so, but the gibe was too grimly truthful to be very humorous.

The niggardliness of the salary was faintly appreciated by the legislature of 1867, and they passed a brief act (Chap. 33) fixing the salary of any Justice "hereafter elected or appointed" at $3,500. This act was approved March 21, 1867, and was published and went into effect March 26th. Under the constitutional provision forbidding any increase or diminution of the compensation of any public officer "during his term of office"[1] the act could not have been made applicable to persons holding office at the time of its passage during their existing terms. By universal precedent, however, it had been considered that if a person was

[1] Const. Wis. Sec. 26, Art. IV.

appointed to fill a vacancy he could lawfully receive the increased salary, even though the law increasing the same was passed during the part of the original term which his predecessor held.[2]

Chief Justice Dixon's term was not to expire until January, 1870, and thus it seemed certain he would get no benefit from the increase of salary until after his re-election in the spring of 1869,—but under all the precedents if he were to resign and some third person were to be appointed to fill out the term such third person would be entitled to the increased salary. Such being the case there was no reason in law why he might not resign and leave the matter of an appointment in the hands of the Governor. If, after his resignation had been accepted and his term of office closed, the Governor chose to reappoint him he would, if he accepted the reappointment, be serving another term and would be lawfully entitled to draw the increased salary. He had nearly three years yet to serve at the beggarly salary of $2,500, if he let the matter pursue its natural course. Under these circumstances he concluded to resign, and he presented his resignation to Governor Fairchild March 27, 1867, who accepted it and upon the same day reappointed him.[3] There can be little question but what this course was anticipated by the legislature when the law was passed, nor can there be any question but that the people generally recognized the pitiful meagreness of the former salary. The act was not seriously criticised at the time, but was later on as we shall see.

Concerning the ethics of the matter, the writer has but a word to say. If Judge Dixon resigned without communi-

[2] State v. Frear, 138 Wis. 536.

[3] Records of Executive Office, Wisconsin.

cation or arrangement with the Executive, and simply ran his risk of reappointment no just criticism of his action can be made by anyone.

I have information, however, which I cannot doubt, that prior to his resignation he told at least one friend that he was certain that he would be reappointed. This means, of course, that either he or someone for him had been assured by the Governor of reappointment; this is assumed to be the fact by the opinion in the case of *State v. Frear*, supra. I have always felt great reverence for Chief Justice Dixon, both as a lawyer and as a man; I have also felt high regard for Governor Fairchild, but if it be a fact that it was expressly or impliedly arranged between them that the Chief Justice should resign and be at once reappointed it seems to me that the result was a successful evasion of the constitutional provision inhibiting the change of compensation during an officer's term of office. I should greatly prefer that it had never taken place.

However, the whole matter was soon to go before the people for their verdict, for the appointment only held until the following spring, and it was necessary that the Chief Justice should be re-elected in the spring of 1868, if he were to serve out the full term for which he was elected in 1863.

In passing it is interesting to notice that Judge Cole was re-elected in the spring of 1867 substantially without opposition. It is true that Lucien P. Wetherby of Hudson, who had been circuit judge of the eighth circuit from 1861 up to 1867, received 8,239 votes for the position, but he made no campaign and was not in fact a candidate, but is understood to have supported Judge Cole. Judge Cole received 46,895 votes; it is probable that the vote for Judge Wetherby was principally made up of farm mortgagors and their

LUTHER SWIFT DIXON.
At the age of 60 years.

friends, who could neither forgive nor forget the decision upon the farm mortgage relief laws.

Judge Downer having resigned in September, 1867, and Judge Paine having been appointed to fill the vacancy, it became necessary to elect two Justices in the spring of 1868.

There was no doubt, of course, that both Dixon and Paine would be candidates to succeed themselves, they would not have accepted appointments if they did not desire election in the spring. The Democrats had had no representative upon the bench since the retirement of Judge Smith in 1859; while they were in the minority in the state, the difference between the two parties was only a few thousands, and it seemed to many of them that if there was anything in the principle of non-partisanship in the selection of Judges it ought to be a principle which would work both ways once in awhile. There had been some Democratic successes in the state elections in the fall of 1867, and the leaders of the party determined to take the gambler's chance and nominate two candidates and gain control of the bench if possible. The chance was by no means a forlorn one; the farm mortgage feeling against the Judges who had rendered the unpopular judgments was still very bitter, while the matter of the resignation and reappointment of Dixon was a card which might prove of considerable strength, and the negro suffrage decision was regarded as unpopular.

The Democratic state central committee called a state convention to meet February 19, 1868, for the purpose among other things of nominating candidates for Chief Justice and Associate Justice. The Republican convention was called one week later for the same purposes.

At the Democratic convention Charles Dunn, the former Chief Justice of the territorial court, then sixty-eight years

of age, was named for Chief Justice, and E. Holmes Ellis of Green Bay for Associate Justice. At the "Republican Union" convention held one week later, Chief Justice Dixon and Judge Paine were renominated, but the nomination of Judge Dixon was not made without a struggle.

Circuit Judges William P. Lyon of the first circuit, and Joseph T. Mills of the fifth circuit were placed in nomination for the Chief Justiceship. Judge Lyon was strongly urged by A. H. Barnes of Walworth County, O. S. Head of Kenosha and Stoddard Judd of Milwaukee, in speeches which expressed great apprehension that Judge Dixon could not be elected if nominated. On the informal ballot Dixon received 140 votes, Lyon 92 and Mills 27. Judge Dixon, having shown greater strength than both of the other candidates, was on motion of Mr. Barnes of Walworth County unanimously nominated. Following this nomination, Judge Paine was nominated by acclamation, and the campaign was on.

For the first time since the election of 1852 the control of the bench was at stake at a single election. The approaching presidential election added earnestness to the struggle, for the prestige of victory in the spring would mean much in the fall campaign, and the contest became bitterly partisan, as well as bitterly personal. Judge Dixon had been through two heated contests, but he was now to enter a fight more rancorous and abusive than either of the others. Judge Dunn was of Kentucky birth and had always been an unswerving, if not an extreme, Democrat; he had voted for Breckenridge in 1860. In the spring of 1868 the passions and prejudices aroused by the civil war were still at fever heat and the word "copperhead" was readily applied to anyone whose

views did not coincide with those of the dominant party. Judge Dunn was immediately assailed by the Republican press as a secessionist at heart and a "copperhead" in fact; he was also accused of being immoderate in his use of liquors. But the personal abuse did not stop here. As has been said, Judge Dunn was more than sixty-eight years of age; he had seen twelve years service on the territorial bench, but that service had closed in 1848, since which time he had been practicing law at the old territorial capital, Belmont, where he resided; it was charged that he was "a superannuated pro-slavery fossil," that he had not kept up with the times, that he was ignorant of code practice, that he had been unable to practice his profession with success under it.

It will be remembered, perhaps, that he was a member of the second constitutional convention, and acted as chairman of the judiciary committee, and thus exerted great influence in the molding of the constitution. He strongly opposed that clause of the constitution giving foreigners the right of suffrage after one year's residence in the state, and favored a residence of five years. Whether his views would not prevail were the question to be presented now is at least an open question. However, in 1868 the feeling was decidedly the other way, and embittered appeals were made to foreign born voters to defeat the man who had wished to restrict or postpone the exercise of the right of suffrage by newcomers.

The entire injustice of the personal abuse of Judge Dunn may be best demonstrated by reading the tributes to his character presented to the Supreme Court after his death in 1872, and the telling reply thereto by Judge Cole, who had known him from the early days.[4]

[4] 30 Wis. 21.

The Democrats, on the other hand, were not slow to reply in kind. They at once attacked Judge Dixon's resignation and reappointment as a palpable violation of the spirit, if not of the letter of the constitution. This attack had enough of truth in it to make Judge Dixon's supporters wince, and several replies going over the whole matter and justifying the action from a legal standpoint were published in the Republican papers, of which one of the most satisfactory will be found as an editorial in the State Journal of January 16, 1868.

While the organ of the farm mortgagors had suspended publication and many of the farmers had settled with the holders of the mortgages, the feeling among the victims was still strong against the judges who had upheld the law of contracts, and prevented the legislation for their relief to become effective. Revenge might perhaps be had, if not relief. The Democratic press fostered these bitter feelings as much as possible and revived the old charge that the judges had favored stock jobbers and railroad corporations by applying extreme rules of law in their favor. Thus the charge was made by the Jefferson County Banner that "Dixon and Paine have decided that to be valid in favor of railroad corporations which they have asserted to be void between individuals," referring to the case of *Crosby v. Roub*, 16 Wis. *616.[5] This charge was of course false, as examination of the case discloses. Just prior to the election a broadside was widely circulated through the farm mortgage country, reciting the wrongs heaped on the farm mortgagors by the Court, ascribing to Judge Dunn the authorship of Chapter 49 of the laws of 1858, which was declared unconstitutional in the *Cornell* case,[6] and appeal-

[5] Wisconsin State Journal, March 28, 1868.

[6] Cornell v. Hichens, 11 Wis. *353.

ing in impassioned phrases to the farm mortgagors to vote against the judges who had wrought the mischief.[7]

This circular was signed "Farm Mortgagor," and was addressed to "Brother Farm Mortgagors:" a few sentences from it will show its bitter character:

"Every lawyer in the state (except those employed against us) has told us that we have a good defence; every circuit judge before whom any of these farm mortgage suits have been tried has decided our defence to be good. Dixon himself while at the bar so advised his clients, and so decided while sitting as Judge of the Circuit Court of Jefferson County. Why did Dixon, when he got upon the bench of the Supreme Court so suddenly change his mind. Let him who can answer. Shall we meekly bow the head and kiss the hand that scourged us? Are railroad swindlers and eastern sharks to be preferred to honest men? * * *

"Brothers, let us forget party in this contest, let us remember our wrongs, our losses, and our sufferings. We have been in their hands, they are now in ours. Let us show them the same mercy that they in our great trouble showed to us. It is time that they should *at least taste* the bitter bread that they have so long compelled us to eat."

The Milwaukee Sentinel of March 24, 1868, urged the election of Dixon and Paine in order to maintain the stability of the Court in analogy to the Supreme Court of the United States, where the appointments are for life, and defended Judge Dixon's action in resigning after the act increasing the salaries.

There was evidently fear of defeat in the Republican party management, as is well shown by the issuance of a long circular to the voters on the 23rd of March, 1868. In this circular the Republican State Central Committee charge the Democrats with the responsibility for the partisan contest which is on and say that however desirable it may be that partisan considerations should be dropped when judicial officers are to be chosen, it is impracticable to do so

[7] Wisconsin State Journal, April 9, 1868.

while one political party insists on making such considerations paramount to all others. It is then charged that the chief reasons why the Democrats now wish to elect Dunn and Ellis are (1) because a presidential election is at hand, and a victory in the spring would give the party prestige not only in the state but in the whole country, and (2) because, if elected, Dunn and Ellis would be expected to reverse the negro suffrage decision. The address concludes by warning Republicans of the danger and appealing to them to work hard to keep Wisconsin in line staunch and true.[8]

The negro suffrage decision of 1866 also provoked much criticism on the part of the Democratic press. Examination of the files of the Milwaukee News (which was then the principal Democratic newspaper of the state) for the months of February, March and April, 1868, will show the scope and course of the Democratic campaign. It consisted principally of violent criticism of the Judges for their decisions in the cases of great public interest which had been presented to them, denouncing such decisions as either foolish or corrupt. The decisions principally attacked were, the railroad tax decisions, the farm mortgage decisions, the decision as to the soldiers' right to vote, and the negro suffrage decision. An anonymous correspondent of the Milwaukee News of March 18, 1868, thus refers to the last named decision:

"The negro suffrage question, after having been repeatedly defeated before the people and such decision of the people acquiesced in by the whole people with no dissenting voice for over fifteen years, was decided by the Court in a trumped up case against the plain accepted commonsense meaning of the constitution in a way that pleased the party in power."

[8] Milwaukee Sentinel, March 28, 1868.

The same correspondent refers to the resignation and the railway tax decisions as follows:

"One judge goes through the farce of resignation and reappointment to pocket an extra $1,000. Another makes up and writes out an argument against the constitutionality of a law, and then on the score of policy decides against his own argument."

The storm raged most fiercely about Dixon's devoted head; the fight between Paine and Ellis was only an accessory to the principal battle between Dixon and Dunn.

For two or three days after the election it was claimed by the Democrats that the result was in doubt, but there was really no substantial doubt at any time of the re-election of Dixon and Paine, although not by large majorities.

The final count showed that in a vote of a trifle over 138,000 Judge Dixon had a majority of 6,777, and Judge Paine a majority of 5,765.

In the matter of the resignation and reappointment Judge Dixon had literally put "himself upon the country," and the country had vindicated him.

This was his last campaign; he was re-elected for a full term in the spring of 1869 without opposition, and probably could have remained upon the bench for many years without further serious opposition. He had successfully withstood the temproray gusts of feeling and passion aroused by the fugitive slave law question, and the farm mortgage question, and had demonstrated his paramount fitness for the bench by not moving a hair's breadth from the line of duty, notwithstanding public clamor. From this time out he was to reap the reward of his manhood and independence; with each succeeding year his state has view with greater pride and satisfaction the judicial career of Luther S. Dixon.

CHAPTER XXI

THE LAST APPEARANCE OF THE STATE RIGHTS HERESY

At the January term, 1870, the question of the power of a state court to release by *habeas corpus* a person held in custody by a federal official under federal laws came again before the Court, and at the June term preceding the cognate question of the power of federal courts either by writ of error or change of venue to obtain jurisdiction over actions properly commenced in state courts was also presented.

These were the questions presented in the *Booth* case, where the Court had defied the United States Supreme Court, and refused to obey its mandate.

The *Tarble* [1] case was a *certiorari* action, brought to review the order of a court commissioner upon *habeas corpus* discharging Edward Tarble from the custody of a recruiting officer of the United States because he was not eighteen years of age when he enlisted.

The case was on all fours with the *Higgins* case [2] already considered in this work, where the Court had affirmed the order of a court commissioner discharging a minor from military service on the same ground. But in the *Higgins* case the jurisdiction of the state court to entertain *habeas corpus* proceedings and discharge an enlisted man from the military service of the United States had not been questioned, and hence passed without mention.

[1] In re Tarble, 25 Wis. 390; Knorr v. Ins. Co. 25 Wis. 143.

[2] In re Higgins, 16 Wis. *351.

In the *Tarble* case, however, the United States District Attorney, Hon. G. W. Hazleton, raised the question of jurisdiction of the Court, and made that the only question in the case. Of course, if the *Booth* case was to be followed the question whether the State Court had jurisdiction was not only settled in the affirmative, but conclusively settled beyond the power of the Federal Courts to interfere; but the world had moved on a long distance since the final appearance of the *Booth* case. Abstract theories which seemed vital to the preservation of individual liberty at that time had been proven under the stress of civil war to be so far incompatible with the powers which the federal government must possess in order to preserve its own existence that they must give way if the nation was to remain. Judge Paine himself had been in the army and had actual experience of the necessities of the situation. Did he and Judge Cole retain their former views or nor? This was the question upon which the case would turn.

The exact question presented in the *Knorr* case was whether Congress had power under the constitution to provide for the removal of a cause commenced in a state court against a citizen of another state to a federal court, i. e., whether the 12th section of the judiciary act of 1789 was valid.

This question had been met by the Court in 1861 in the case of *Moseley v. Chamberlain*,[3] and it was there held by Justices Cole and Paine that Congress had no such power, Chief Justice Dixon dissenting.

So the question in the *Knorr* case was also a closed question, if the former decisions of the Court were to be followed.

[3] 18 Wis. *700.

The *Knorr* case was presented at the June term, 1869, and resulted in a reversal of the doctrine of the *Moseley* case by the votes of Judges Dixon and Cole, in the face, however, of a dissenting opinion by Judge Paine.

Judge Cole wrote the opinion of the Court, and had evidently come to the conclusion that there was no longer any use in holding to the extreme doctrine that there could be no removal of a cause from state to federal courts where the citizenship of the parties was diverse. He abandoned the doctrine not because convinced of its unsoundness, but because convinced that it was useless to seek to maintain the doctrine in the face of the holdings of the United States Supreme Court. After holding that the defendant insurance company must be treated as a citizen of New York, he says:

"As stated by the chief justice, in the case of *Moseley v. Chamberlain* (18 Wis. 700), I have always been of the opinion that congress has no power to provide for the removal of a cause from a state to a federal court, and, consequently, that the twelfth section of the judiciary act is invalid. I shall not, however, attempt to give any reasons for that opinion at this time. Suffice it to say, as that opinion was maturely formed, after all the examination and reflection I could bestow upon the question, it remains unchanged. But my adhering to that opinion now would be of no earthly advantage, that I can see, to any person or any principle. On the contrary, it would only be productive of great embarrassment, trouble and expense to these parties, and others similarly situated. For we well know that the supreme court of the United States, in the exercise of that jurisdiction which it assumes, would pronounce all the proceedings in the state court, after the application for removal was made, as *coram non judice*."

Judge Paine filed an eloquent dissenting opinion which almost persuades one as he reads it of its correctness.

This was really a receding of one step from the radical doctrine of the *Booth* case. That case in substance held that the clause of the federal constitution which says that

the federal judicial power "shall extend to all cases in law and equity arising under this constitution, the laws of the United States * * * to all cases * * * between citizens of different states" [4] did not cover cases rightfully commenced in a state court. This really indefensible position was now abandoned.

It is interesting to note in this connection that in a case decided at the following term [5] Judges Cole and Paine held (Chief Justice Dixon dissenting) that where a foreign plaintiff had brought his action in a state court against a citizen of the state he thereby irrevocably elected to pursue his remedy in the state court, and could not remove the case to the federal courts and that the act of congress purporting to give him that right was invalid. This ruling was reversed by the Supreme Court of the United States in the same case in February, 1872.[6]

The *Tarble* case followed in January, and here the simple question was whether a state court had jurisdiction to discharge by *habeas corpus* a prisoner held by a federal officer under federal laws. In this case Judges Cole and Paine adhered to the doctrines of the *Booth* case, and affirmed the discharge against Chief Justice Dixon's dissent. In this case Judge Paine wrote the opinion of the court, and made it as strong probably as human reasoning could make it.

It is interesting to read the opinions of Judge Paine in the *Knorr* and *Tarble* cases side by side. It is evident that in them he endeavored to set forth with the strongest logic and most convincing phrase the doctrine of the jurisdiction of the state courts to determine the validity of federal imprisonment, and the doctrine that the United States Courts

[4] Const. U. S. Art. III, Sec. 2.
[5] Whiton v. C. & N. W. Ry. Co. 25 Wis. 424.
[6] C. & N. W. Ry. Co. v. Whiton, 13 Wallace, 270.

could not be given power to interfere with or reverse a ruling of the state court in a proceeding properly brought in that court. It seems evident that he was writing partially at least with a view of vindicating himself in the eyes of posterity; they may be said to constitute his *"apologia pro vita sua."*

Extracts from these opinions will serve well to show the quality of his reasoning and the beauty of his style. In the *Tarble* case, on the question of the jurisdiction of a state court to enquire into and decide upon the validity of the judgment or order of a federal court, he says:

"That Court" (i. e. the Supreme Court of the United States) "suggests, in the *Booth* case, that this court could no more inquire into the legality of the imprisonment of a citizen of this state within its borders, under the order of a federal court, than it could send its writ into Michigan and inquire as to the legality of the imprisonment of a person there. It may be conceded that the state and federal judicial systems are distinct and separate, and independent of each other, as those of different states. Such a concession is clearly contrary to the existence of that appellate jurisdiction over the state courts which the federal court has asserted and exercised. But the repugnance between the doctrine of the *Booth* case now under consideration and the existence of that appellate jurisdiction will be hereafter noticed. I allude now to that illustration of the court simply to say, that, if the validity of a judgment of a court of Michigan should be drawn in question in any court of this state, in the exercise of its ordinary jurisdiction, the court here could decide, and must necessarily decide, whether the court of Michigan had jurisdiction to render it. The fact that the two jurisdictions are utterly foreign to each other does not prevent either from deciding to that extent upon the validity of the judgments and proceedings of the other. Here, too, the federal authority is clear and emphatic. In the case of *Rose v. Himely*, 4 Cranch, 241, the court sustained the right of an American court to decide collaterally upon the jurisdiction of a court of *Santo Domingo*. The chief justice said: 'The great question to be decided is, *was this sentence pronounced by a court of competent jurisdiction?* At the threshold of this interesting inquiry, a difficulty presents itself, which is of no inconsiderable magnitude. It is this: *Can this*

court examine the jurisdiction of a foreign tribunal?' The latter question he answered in the affirmative, and in discussing it he said: 'A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, *could have no legal effect whatever.* The power of the court, then, is *of necessity* examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into; and its authority to decide questions which it professed to decide must be considered.' And again, he says: 'Upon principle it would seem that the operation of every judgment must depend upon the power of the court to render that judgment, or in other words, on its jurisdiction over the subject-matter which it has determined.'

"Although all this doctrine is, as before remarked, entirely familiar, I have felt justified in thus quoting it from the supreme court of the United States, in order to show that when this court, in the *Booth* case, assumed the power, in the exercise of its ordinary jurisdiction to issue the writ of *habeas corpus*, to pass collaterally upon the jurisdiction of the district court of the United States to pronounce the judgment under which Booth was imprisoned, it was not assuming any such unwarrantable or unheard of power as it has been charged with doing; and that, on the contrary, whatever might be said as to the correctness of ist decisions, still, in exercising the right to decide the question, it was proceeding upon a principle universally recognized, and exercising a right that is and must of necessity be exercised by all courts. For there is no just reasoning upon which any distinction can be asserted between a *habeas corpus* and any other judicial proceeding or suit, in respect to the right of the court to decide upon the validity of the judgment of any other court that may be drawn in question.

"It is true, that, as states have no extra-territorial jurisdiction, and each can, therefore, by the writ of *habeas corpus*, inquire into the legality of imprisonment only within its own limits, such a proceeding would be less likely to draw in question the validity of any foreign judgment, than would litigation concerning rights of property. But this can make no possible difference in respect to the right of the court to decide the question, if it should arise. And although such a case may be very unlikely to arise, yet if any one should assert a right to imprison any person within this state under the judgment or order of a court of

Michigan, or of any other state or country, it would scarcely be claimed that the entire separation of the two sovereignties, and the absence of any power to review the judgments of such other court, would prevent this court from inquiring upon *habeas corpus* into the legality of such imprisonment.

"But under our peculiar system, where the state and federal governments, with their distinct judicial systems, exercise a divided sovereignty and jurisdiction over the same territory and people, such a question may well arise, as it did in the *Booth* case. And for this court, in that case, in the exercise of its acknowledged jurisdiction of the writ of *habeas corpus*, where the judgment of the district court was returned as the justification for Booth's imprisonment, to pass upon the question whether that court had jurisdiction to pronounce such judgment, was no more a usurpation of authority, that it would have been to have passed upon a judgment of a court of Michigan or any other state, if such had been set up in justification. The fact that the district court might render a valid judgment that would justify imprisonment in this state, and that no court of another state could do so, does not vary the question. That fact gives no validity to its judgment rendered without jurisdiction, and has no legitimate tendency to impeach the right of the state court to pass upon this question. And there is nothing in the relations between the federal and state governments, nothing in the conceded supremacy of the constitution and laws of the United States, nothing in the nature or character of the federal courts themselves, which can have any just effect to make their judgments an exception to that universal rule, which, as already seen, they have so emphatically asserted, or to place them on any different footing, in this respect, from that on which the judgments of all other courts must stand."

In his dissenting opinion in the *Knorr* case he draws the distinction between the doctrine of secession and the doctrine of state rights as understood by him. If any one could draw that distinction satisfactorily he could do it. After stating that if the appellate jurisdiction of the United States Supreme Court over State Courts in fact exists then there is in reality no such thing as state rights, because the state courts become then simply inferior courts of a system

in which the United States Court is the superior and final arbiter, he says:

"But if under our system where the powers of sovereignty are divided between the federal and state governments, this jurisdiction does not exist, then no common arbiter has been provided to decide conclusively for both such questions of difference as may arise concerning the delegated and reserved powers. It would then be proper to speak of state rights as such, for the states would then hold the reserved powers by a tenure as valid as that by which the federal government holds the delegated powers. The powers of neither could be wrested from it by the judgment of the other. And this is all that the idea of state rights properly understood ever involved. It asserts no claim that the judgment of the state tribunals is at all binding upon the federal government upon questions involving their respective powers. It claims only that judgments of the Federal Court are alike inefficacious to bind the state. I am aware that the idea of state rights is at present exceedingly odious and unpopular. It is branded as a legal and political heresy and held directly responsible for the attempt at secession with all its disastrous consequences; but the two claims are entirely distinct and dissimilar. Secession is revolutionary; state rights not. Secession seeks to withdraw and overthrow the powers admitted to have been delegated to the Federal government. State rights makes no such effort. Secession throws off entirely all obligation under the Constitution of the United States. State rights throws off none of that obligation, but concedes that that Constitution and the laws made in pursuance of it are the supreme law of the land, and that it is the sworn duty of its tribunals to regard and enforce them as such."

Judge Paine was right as far as he went; secession was revolution and state rights was not necessarily revolution; but he did not seem to appreciate that state rights as he advocated it, though not revolution, was necessarily legal and governmental chaos. Judge Paine lived less than a year after the decision of the *Tarble* case. Doubtless he appreciated before his death that it was another "lost cause," but whether he appreciated it or not such was the fact, and had it not been so the national government could

not have existed save as an impotent and nerveless shadow of a government unable to execute its own decrees save by the courtesy of the states, and worthy only of contempt.

The *Tarble* case was taken to the Supreme Court of the United States and reversed, Chief Justice Chase dissenting. It was held in the opinion that a State Court has no authority to discharge on *habeas corpus* a prisoner held by a United States officer under the authority or claim of authority of the United States government, and that whenever that fact appears the State Court can proceed no further. This case may be said to have settled the law upon the subject; it has been acquiesced in by all State Courts since that time, and is now the unquestioned law.[7]

This decision was made in March, 1872. Judge Paine died in January, 1871; consequently he never knew how completely the doctrine to which he had dedicated a large part of his life and his talents was finally swept away forever.

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[7] U. S. v. Tarble, 13 Wallace, 397.

CHAPTER XXII

DEATH OF JUDGE PAINE AND APPOINTMENT OF JUDGE LYON

The old triumvirate upon which the bench composed of Dixon, Cole and Paine was now permanently restored, and there seemed no reason why it should not continue for years. On the 13th day of January, 1871, however, Judge Paine died as the result of a short but severe attack of erysipelas. Barely forty-three years of age and apparently in the best of health, his sudden death was a most profound shock to the people of the state, the great majority of whom did not even know that he was sick.

Byron Paine was very dear to the hearts of the people. Since that day in May, 1854, when at the age of twenty-six he had appeared in the Supreme Court as the champion of human freedom and successfully challenged the constitutionality of the fugitive slave law in the *Booth* case, the people had loved him and delighted to honor him; and right well had he deserved the love and honor, for his abilities were as great as his character was pure.

There was an universal outburst of grief throughout the state. The legislature being in session, Governor Fairchild at once sent a special message notifying the houses of the sad event; following an eloquent and touching tribute by Harlow S. Orton, then a member of the assembly, resolutions of condolence were adopted by both houses, and on the 25th of the same month the death was formerly announced to the Supreme Court; at which time addresses were made by John W. Cary, E. G. Ryan, and Winfield Smith of Milwaukee, J. S. Curtis of Green Bay, Charles E. Dyer of

Racine, S. U. Pinney of Madison, and Daniel Hall of Watertown, in addition to which resolutions of love and respect adopted by the bar of the Supreme Court and by the bar associations of Milwaukee, Green Bay, Racine and Madison were presented. To these tributes Chief Justice Dixon responded most feelingly.[1]

But the business of the Court must go on notwithstanding the call of death; the great increase of manufacturing and transportation enterprises which had followed the close of the civil war had brought with it new and numerous questions, and the business of the Court was rapidly increasing year by year. There were but three men to bear the load even when the bench was complete, and hence there could be no unnecessary delay in filling the vacancy.

In this emergency I am certain that Governor Fairchild did not feel the necessity of spending any considerable time in deliberation. I think he had no doubt as to whom he should appoint from the very first moment. William Penn Lyon of Racine at that time had been judge of the first circuit court for a little more than five years, and had signally demonstrated his fitness for the judicial office; he had made a *nisi prius* judge remarkable for his judicial equipoise, clearness of mind and firm but just and reasonable enforcement of the law.

Governor Fairchild knew Judge Lyon's record and qualifications well, and felt no necessity for extended formal endorsements. On the 20th day of January Judge Lyon was appointed to fill the vacancy and on the 26th of the same month he took his seat. Governor Fairchild himself told the writer more than twenty years later that he regarded the appointment of Judge Lyon to the Supreme

[1] 27 Wis. 23–58.

bench with greater satisfaction than any other single act of his long administration.

Judge Lyon was a man of strong natural legal mind and excellent legal education and experience, of strong physique and handsome person; he had seen life from many angles and he brought all his talents, his experience, and his virtues to a place where they could be and were utilized to the utmost for nearly a quarter of a century. Judge Lyon's life had been varied and interesting, more so in fact than that of any of his colleagues.

He was born of Quaker parentage at Chatham, Columbia County, New York, October 28, 1822. His early educational opportunities were confined to district and select schools, and these only at intervals, but at fifteen he had acquired what was for the period a fair English education, including some knowledge of algebra, geometry and natural philosophy, beside some acquaintance with Latin. He taught a district school for a time at the age of fifteen, but teaching was not to his taste, and he soon went to Albany where he obtained employment as clerk in a grocery store, spending his leisure hours assiduously in attending the courts and legislative sessions, in which direction the attraction was strong.

In 1841 his father and the family, including the future judge, removed to Wisconsin and settled in what is now the town of Lyons in Walworth County, which, I believe, was named after the family. For three years he did farm labor, excepting during his two terms of school teaching; but he read Blackstone and Kent meanwhile, and in 1844 entered the law office of Judge George Gale at Elkhorn as a law student. After a few months with Mr. Gale he went home to work through the harvest, and soon after was attacked with an acute inflammation of the eyes, which pre-

vented all use of the eyes for a year. In 1845 he entered Judge Charles M. Baker's law office at Geneva, and remained there until the spring of 1846, when he was admitted to the bar. At once he commenced to practice law at Lyons (then Hudson), being elected a justice of the peace the same spring. He remained here five years and removed in 1850 to the village of Burlington, Racine County, where he formed a partnership with Caleb P. Barns, the leading practitioner of the place. Here his talents began to receive due recognition, business came to him in increasing volume, and in 1854 he was elected District Attorney of Racine County, and removed to Racine, the county seat, in the spring of 1855. He was now well before the public eye, and was soon at the head of the firm of Lyon and Adams, which became one of the leading firms at the Racine bar at a time when the Racine bar was one of the strongest in the state.

Two terms were spent in the office of District Attorney, and in the fall of 1858 he was chosen by the Republicans as their candidate for the assembly and elected. It was his first legislative experience, and he was but thirty-six years of age, but such was the estimation in which he was held that he was chosen speaker of the assembly in the session of 1859 and performed the duties most acceptably. He was re-elected to the assembly in the fall of 1859 and was again chosen speaker at the session of 1860.

When the call to arms came in 1861 Mr. Lyon could not resist the call of duty, and he raised a company which became Company K of the Eighth Regiment of which he became captain, his commission being dated August 7, 1861. This was the famous "Eagle" Regiment which had with it for a mascot the live eagle, "Old Abe."

The regiment left Madison October 12, 1861, and by the 21st was in conflict with the Confederates under Jefferson

WILLIAM PENN LYON.

Thompson at Greenville, Mo., and assisted in the victory at that time gained. In this battle Captain Lyon took an active part.

Captain Lyon remained in active service during the entire war. Interesting as it would be to follow his steps, it is hardly within the scope of the present work. That he was a good soldier, and a commander beloved by his troops goes almost without saying. In August, 1862, he became colonel of the 13th Wisconsin Regiment, and with his regiment performed duty in the states of Kentucky, Tennessee, Alabama, and Texas, until the resignation of his commission September 11, 1865. Subsequently he was brevetted a brigadier general of U. S. Volunteers, dating from October 26, 1865.

Judicial honors come to him unasked and unexpectedly in April, 1865, while he was still on duty in the field. This was the manner of it.

David Noggle, a man of strong natural abilities but limited education, had been Circuit Judge of the first circuit (then composed of Racine, Kenosha, Walworth, Rock and Green Counties) since his appointment by Governor Randall in July, 1858. He had made some very determined and bitter enemies both among the bar and the people. There were charges of dishonesty and unworthy methods openly made against him when the spring of 1865 approached, at which time the election of a successor was due. No attempt will be made here to determine the question of the truth or falsity of these charges. Judge Noggle was a forceful and ambitious man; he was fully determined to succeed himself; he caused his nomination papers to be circulated among the bar in the winter of 1865 as he held court in the various counties of his circuit. The bar generally do not wish to actively antagonize a judge before

whom their cases are about to be tried; whether from this cause or not Judge Noggle's "petitions" were generally signed by the bar of his circuit. Only a very few refused to sign. The late Chief Justice Cassoday told the writer that he himself refused to sign.

It seemed for a time that there was to be no opposition to Judge Noggle; his machine seemed to be perfect and he had the prestige of being "in."

But there were men who had deep sense of personal wrong (whether justifiably or not is not material here) against Judge Noggle, and they were willing to go through the

> "Patient search and vigil long
> Of him who treasures up a wrong."

if thereby they might defeat him.

Among these was William H. Tripp of Rock County, who had been a member of the assembly in 1857. To him more than to any one else is due the credit of launching Judge Lyon upon a judicial career. He first suggested the name of Lyon as a candidate and he was mainly responsible for the calling by a self-constituted committee of an independent judicial convention, which met at Elkhorn, Walworth County, March 17, 1865.

In numbers the convention was ludicrously small; there were eleven gentlemen present from Rock County (John R. Bennett and John Winans of the Janesville bar being among them), seven from Walworth County, one from Racine (Colonel Lyon's home county), one from Green County, and none at all from Kenosha.

Lack of numbers, however, did not dismay the gentlemen who made up the convention. What they lacked in numbers they made up in determination. They promptly nominated Colonel Lyon, appointed a committee of notification,

and a committee to prepare and distribute a campaign address, and adjourned.

The entire thing had been done without Colonel Lyon's knowledge or consent. On the 19th of March, 1865, the news reached him at or near Huntsville, Alabama, and he wrote home concerning it as follows:[2]

"March 19, 1865.—I was awakened about ten o'clock last night by one of the boys, who told me I had a telegram from home but there was no bad news in it. It was from Janesville, announcing my nomination as Circuit Judge. I am entirely in the dark about the position of affairs there, but if matters are as I suppose I see no earthly chance for my election. I concluded, however, that a defeat would not hurt me much and so accepted the nomination. It is tantalizing to be a candidate for so important a place and know nothing of your position or prospects. The time is so short between the nomination and the date of election that I shall probably lose most of the army vote. I shall not be unhappy about it if I am defeated, and you must not be."

The audacity of the move at first provoked mirth and ridicule on the part of Judge Noggle's adherents. Practically all the newspapers of the circuit, even including those in Colonel Lyon's home county were committed to the support of Judge Noggle; the bar had generally signed his call; supervisors, jurors and other prominent men had almost universally signed it, and it seemed little less than madness to undertake such a campaign.

But there was no dismay in the camp of the insurgents. Colonel Lyon accepted the nomination in a modest and graceful letter; the committee prepared and gave forth an address to the people libellous in every line if not true, which was went all over the circuit,[3] and published in the local papers. In this circular it was charged that Judge

[2] Reminiscenses of the Civil War by Mrs. Adelia C. Lyon, pp. 208–9.

[3] Janesville Gazette, March 26, 1865.

Noggle at once took sides in a case on trial and became unfair; that the appeals taken from his judgments were numerous, and that in three-fourths of the appeals the judgments were reversed; that he refused to obey the Supreme Court; that he favored those who were fighting their taxes, and granted injunctions without reason in such cases, thus hindering and delaying the public business; that he was deficient in scholarship to such an extent that his published opinions were a mortification to the people of the circuit on account of their many ludicrous literary blunders. The following extract will show the direct language used in the address: "It is notorious that the present incumbent of the judicial bench of this circuit * * * has employed himself personally for many months in procuring calls for his own nomination. These have been circulated in his own court while he was on the bench and thrust by his agents offensively before members of the bar while their cases were on trial, and at the end of the term to jurors. If this be true, and we appeal to a cloud of witnesses who have seen it, then he must be pronounced unworthy of re-election. It is time that the people of this circuit had placed upon the bench a man above such acts and nearer to the high moral and intellectual standard of the first judge whom they chose to that position, the lamented Whiton."

In addition to this address a broad side containing distinct charges of dishonesty in several business transactions, and signed by reputable citizens of Janesville, was widely circulated; this broadside will be found preserved among the archives of the State Historical Society at Madison. It formed the basis of a libel suit after the election which, as the writer has been informed, the defendants finally settled by the payment of damages.

It will thus be seen that the campaign was bitter, but still the advantage seemed to be with Judge Noggle, who had his earnest friends as well as his earnest enemies. When the votes were counted, however, it was found that Colonel Lyon had received a decisive majority even without the soldier vote.

The newly elected judge returned to Wisconsin after the acceptance of his resignation from the army about the first of October, 1865. Judge Noggle having resigned before the expiration of his term of office, Judge Lyon was appointed to fill the vacancy, and he commenced his judicial duties December 1, 1865.

From this time until his appointment to the Supreme bench his duties upon the circuit bench kept him fully occupied. The circuit was then large and he had little time between terms. It is only justice to say that he made almost an ideal trial judge. Calm, fair, gentle in manner but firm and strong of determination when occasion required, his court ran easily and without apparent effort, but always with the consciousness that there was a master hand at the helm. Every lawyer and every client had and felt that he had fair treatment, that he had been allowed to present his case, and that it had received the best attention which judge and jury were able to give it. He became endeared to the hearts of the people of the circuit as few men have been either before or since, and there was universal regret to part with him when he was translated to the Supreme bench.

I do not think Judge Lyon ever claimed the gift of eloquence either as a writer or an orator, yet such claims have been made by many upon far less basis of fact than could be presented in favor of Judge Lyon's claim.

Several public addresses made by him are preserved in a volume recently published by Mrs. Lyon (his wife, who is recently deceased) for private distribution, entitled "Reminiscences of the Civil War," and they will be found to justify the assertion that upon appropriate occasion at least Judge Lyon was capable of lofty thought clothed in language entirely fitting to the thought.

On July 4, 1866, the tattered battleflags of the various Wisconsin regiments were presented to the state for preservation at the capitol, and Judge Lyon was chosen as the representative of the soldiers to present them in appropriate words to Governor Fairchild, acting for the state. He discharged this task with conspicuous ability, and from this address I extract the following, which will serve to illustrate its thought and diction:

"This is a sublime spectacle; and I repeat with emotion of profound gratitude that the most efficient, the most powerful agency in producing a result of such priceless value, was that spirit of deep, heartfelt sympathy for our soldiers, and that active interest in their welfare, so universally manifested by our people at home during the whole period of the war.

"And now, sir, having acknowledged our obligations to our people, I return for a few moments to the theme which the occasion presses more directly upon our attention. These banners are the glorious symbols of our national unity, the material representations of the institutions of freedom and of the patriotism of the people. Like the cross to the believer—to the soldier the flag under which he fights is the cherished emblem of his faith and his hope and the object of his devoted love. To his mind, the honor of the flag is synonymous with individual honor and with the honor and glory of the State and the Nation, and includes them all. Every patriotic heart cherishes the same sentiment.

"Hence do these banners become to us the symbols and emblems and mementoes of all the labors and sacrifices and prayers of all the people for the success of our arms. In this view they have a history; a history eventful, thrilling and glorious in some of its details, and yet inexpressibly mournful and touching and sad in others. A history which may never be traced on parch-

ment or fully uttered by human lips, yet which is written in indelible characters upon the hearts and memories of thousands throughout the land.

"The mother who sent forth her son with prayers and blessings and bitter tears from her peaceful home, to fight and die for his country, and who sits today by her desolate hearth-stone and weeps because he returns no more, and yet who thanks God that she had an offering to lay upon the altar of her bleeding country; the wife whose husband sleeps his last, dreamless sleep upon some distant Southern battlefield, and from whose life the light and joy and beauty have gone out forever; these, and every sorrowing, desolate heart made such by the war, are amongst the custodians of this wonderful history. So, also, is every soldier who has marched and fought beneath these banners; so, also, is each patriot who has labored in civil life for the success of our arms, or who has breathed fervent prayers to heaven for the triumph of the right.

"But I must hasten to a conclusion. When these banners were entrusted to our care we promised with hands uplifted to heaven that we would defend the honor of the State and the Nation, of which these were the symbols, under all circumstances and to the last extremity; and in behalf of those to whom they were thus entrusted I solemnly declare that this promise has been faithfully performed.

"So we return these banners to the State, from whence we received them. They are bruised and torn and tattered; but, thanks be to God, there is no stain of dishonor upon one of them!

"Receive them sir, from our hands, and deposit them with the archives of the State. Let us always fulfill our sacred obligations to those who are maimed or who fell in their defense, and to their helpless families; and as we gaze with affectionate veneration upon these sacred symbols of our national faith, let us never forget the lessons of patriotism and of fidelity to duty which their history inculcates."

It was by no means an easy task to follow Judge Paine upon the bench. The remorseless accuracy of his thought, the clearness of his reasoning, and the simple eloquence of his verbal expression combined to make his opinions legal classics. Judge Charles E. Dyer of Racine truly said of him on the presentation of the bar memorials before mentioned, "He stood not always upon precedent, but at times

struck out new paths in the far reaching field of the law, seldom failing, however, to plant his judgments upon the basis of sound logic. His analytical mind always first sought safe premises from which it progressed to unanswerable conclusions."

Perhaps all this may not be unreservedly said of Judge Lyon, still, in the writer's judgment, there is no great room for choice between the two in respect to the quality of their minds, indeed in their essential traits they seem surprisingly alike. Both had a strong sense of justice, both had the rare faculty of stripping the non-essentials from a case and going at once to the vital question, both were content to part with precedent if precedent spelt injustice, and both possessed terse simplicity of style and clarity of thought which make their opinions a delight to the lawyer.

General Edwin E. Bryant of Madison very truly said of him, "It is but stating a truth to say that no man ever stood higher than Judge Lyon for all the qualities and equipoise of qualities that constitute the just judge; confidence in his integrity is universal; his mind is happily constituted to see the right of a case. Calm, patient, unbiased, he brought to investigation that sincere desire to be right that opens the mind to perceive justice. His professional labors covered a period of forty-eight years. He was judge twenty-eight years, of which twenty-three years were on the bench of the Supreme Court. His style is remarkable for its simple directness, lucidity and freedom from ornament."

Judge Lyon was a trifle more than forty-eight years of age when he took his seat upon the Supreme bench, and was in vigorous health physically and mentally. His life had been singularly varied and active. He had been lawyer, a legislator, a soldier and a trial judge, and in each capacity he had met the responsibilities thrown upon him

with the calm grasp which comes from conscious but in no sense egotistical strength. He came to this crowning work of his life possessed of a wealth of experience both with men and things which rarely falls to the lot of a man less than fifty years of age. His service began at a time which may properly be called the beginning of a new period. The Court had been in existence some eighteen years; during that time the state had grown from a frontier community composed of straggling rural settlements far distant from each other to a great state of more than a million souls, with prosperous cities, great railroads and manifold industries. The time during which the jurisprudence of the state was being fundamentally molded and the general policies determined had largely passed, but a period fully as important was beginning, namely the period when with the great growth of wealth and population and the development of great industrial and transportation corporations, new legal and economic questions were pressing to the front and demanding wise solution. The volume of the business of the Court had largely increased with the close of the civil war, and was still increasing. While formerly the decisions of a year filled only a single volume of reports, more than two volumes were now required, and the end was not yet. So Judge Lyon's new position was not one of elegant leisure, but rather a position in which he was to spend twenty-three years in hard, unremitting and tedious labor; but he entered on it cheerfully, with the determination to do his entire duty. He had the confidence and respect of his veteran colleagues, Dixon and Cole, and together these three men carried the great and increasing burden of the litigation of the state until the resignation of Chief Justice Dixon in June, 1874.

An innovation which he at once made in the manner of the preparation of opinions, while not vastly important in itself, may well be noticed, because it is essentially characteristic of the man. The judges had been accustomed in their opinions to take up and treat the questions presented without making any preliminary statement of the facts of the case, or of the result in the trial court, leaving those matters to be supplied by the official reporter. This method, while generally satisfactory, left much to be desired at times, for in a complicated case with a large record, it could not always be certain that the reporter would accurately distinguish between the facts which were material, and those which were immaterial to the Court's treatment of the case. Of course, the judge writing the opinion should, of all persons, be able to extract and present the vital and necessary facts, and so Judge Lyon from the first prefaced every opinion with a brief statement of the salient and necessary facts, and the result in the trial court. These statements were at first made a part of the opinion, but soon were printed separately, with a statement that they were prepared by Justice Lyon, and in Volumes twenty-nine and thirty of the reports the reporter printed a notice, stating that in all cases where the opinion was written by Justice Lyon, the statement of facts was also from his pen, whether they appeared as part of the opinion or not. For some years Judge Lyon remained alone in this practice, but as new judges came on the bench his example was followed, and before he left the bench every judge prepared his own statement of facts, and it is now one of the unwritten rules of the Court.

While the work of the Court during the first three years of Judge Lyon's service was arduous and steadily increasing in volume, these years were doubtless pleasant years to

him. The judges were all comparatively young men and all vigorous in body and mind. Judge Cole, who was the eldest, was but fifty-one years of age at the time of Judge Lyon's accession, while Judge Lyon himself was forty-eight and Judge Dixon forty-five. They were all capable of hard work, all intellectually honest, and were of congenial tastes, and dispositions, and we may be sure there was very little friction.

CHAPTER XXIII

LYON V. PULLING

Judge Paine's term of office would have expired on the first Monday of January, 1872, and hence the election for the next full term was due in April, 1871. Had Judge Paine lived he would doubtless have been elected as his own successor, without opposition, but his death, and the appointment of his successor by the Governor at a time so close to the election changed the situation radically in the opinion of some of the Democratic lawyers and politicians, especially those in the northern and northern central portions of the state. They said, and with some degree of truth, that a non-partisan judiciary could only be secured by giving both parties representation on the bench, and that the Governor should have demonstrated his belief in the principle by placing a Democrat upon the bench to sit with the two Republicans already there. However, Judge Lyon was on the bench and his friends were enthusiastically for him, and hence, if the Democracy desired a representative, there was no way open except to place another candidate in the field. By this time the idea of a party convention to nominate judicial candidates seems to have been permanently abandoned, and the convention had been succeeded by the legislative party caucus, which, after consultation, put candidates in the field. In pursuance of this custom legislative caucuses were held by both parties on the evening of February 9th. At the Democratic caucus Harlow S. Orton, who was then a member of the Assembly, was nominated, but he immediately declined to run; at the Repub-

lican caucus a resolution was unanimously adopted which ran as follows:

"*Whereas*, in the opinion of the Republican state central committee, it is not deemed advisable or necessary to nominate a candidate in view of the course which has generally pursued by the Republicans of this state in selecting candidates for Judges of the Supreme Court without the interposition of a nominating convention, but through the recommendation of the Republican members of the legislature in session at the Capitol, and

"*Whereas*, his Excellency, the Governor, has appointed Hon. William Penn Lyon of Racine to serve out the unexpired term of the late Judge Byron Paine, therefore,

"*Resolved*, that we recognize the appointment of Judge Lyon as one eminently fit to be made; that in his election to the bench of the Supreme Court for the full term the people of this state will secure the services of an honest man, an able lawyer, an experienced jurist, and an incorruptible judge, whose integrity is above reproach, a fit successor to the lamented Paine, a worthy associate of the two judges who have so long, so ably, and so well constituted a majority of the Court and contributed to make it fully equal to any Court of last resort in the several states of the Union; to the intelligent voters of Wisconsin for Associate Justice of the Supreme Court we recommend the election of William Penn Lyon."

The declination of the Democratic caucus nomination by Mr. Orton made it seem for a time as if Judge Lyon would have no opponent, but there was a feeling on the part of some Democrats that they ought to have a representative upon the bench, and that this was the only way to make the bench really non-partisan. On March 7th the Madison State Journal stated that some Democratic papers in the state had placed Judge David J. Pulling's name at the head of their columns, but the Journal also stated that it did not believe he would allow his name to be used. In this, however, the Journal was mistaken. Judge Pulling was then and had been for some years presiding judge of the third judicial circuit, which included the county of Winnebago

and city of Oshkosh. He was recognized as a very able lawyer and a *nisi prius* judge who dispatched business not only with rapidity but with a masterly grasp of the case and the principles of law involved. Judge Pulling was unquestionably ambitious, but he was also an able politician, and he did not propose to lead any forlorn hope, or enter a fight lost before it was begun. It is said in Berryman's Bench and Bar of Wisconsin (Vol. 2, p. 79) that "when first called to be a candidate he peremptorily declined." However, this may be, it seems certain that he was not averse to making the contest if he could be convinced that he stood a good chance of election, and his friends accordingly took steps to make the call more emphatic. Petitions were largely circulated among the bar requesting him to run, which received many signatures and many of the Democratic editors of the state also joined in the request. The members of the Democratic state central committee met and tendered their support, and on the 8th of March the Democratic members of the legislature met in caucus and formally nominated him.

On March 11th Judge Pulling published an acceptance, addressed as follows:

"To Hon. John W. Cary et al. members of the bar; Hon. Sam. Ryan, Jr. et al. members of the press; Hon. Andrew Proudfit et al. members of the state central committee; Hon. P. V. Deuster et al. State Senators, and Hon. D. W. Maxon et al. Members of the Assembly."

In this acceptance he said in substance that when a few weeks earlier it was proposed that he be nominated for the position by the Democratic state central committee, and the Democratic members of the legislature, he declined, because he believed the office ought not to be treated as a purely political office, and because his personal preferences were opposed to running; but that, many newspapers hav-

ing put up his name, and having read the proceedings of the Democratic members of the legislature, as well as the requests from the Democratic state central committee, and from a large number of attorneys of both parties, he did not feel at liberty to refuse.

While the campaign was quiet, there is no doubt that it was pressed with considerable energy by Judge Pulling and his partisans. It was a time when the Republican dissatisfaction with President Grant, which resulted in the Liberal Republican movement in 1872, was becoming acute, and thus Democrats were feeling somewhat encouraged. The attempt was made also to give Judge Pulling's canvass the character of a non-partisan movement, but without much success. The Milwaukee News of March 18th said that it was informed that on the death of Judge Paine the two surviving judges on the Supreme bench, Dixon and Cole, requested the Governor to appoint a Democrat as Paine's successor. The State Journal of March 20th denied this statement on the authority of the Governor himself. The Winnebago County Press published an article claiming that at some time in the past Judge Pulling in his real estate operations at Menasha had given to purchasers of land deeds which he represented to be full warranty deeds, which in fact contained warranties against his own acts only, and that he had been burnt in effigy by his victims.

Judge Lyon remained quietly at work at his desk, although the writer feels little doubt, from his own recollection of the campaign made against himself under somewhat similar circumstances twenty-four years later, that the experience was not altogether a pleasant one.

The election was held on April 4th, and Judge Lyon received a majority of 11,668 for the unexpired term of about nine months, and 11,647 for the full term of six years.

These majorities were somewhat greater than the Republican majority at either of three immediately preceding gubernatorial elections, so that it is evidence that the attempt by Judge Pulling's friends to give his candidacy the aspect of non-partisanship was unsuccessful.

CHAPTER XXIV

SOME OF CHIEF JUSTICE DIXON'S NOTABLE OPINIONS

Casual reading of Chief Justice Dixon's opinions leaves the impression that they were written easily and without spending a great deal of time in polishing or cutting them down; not that they are carelessly written, but that at times they seem to lack compactness. There is in them, however, at all times an abounding virility, a certain assured and easy swing which comes from the possession of intellectual strength, a power to gather up the case and consider it with the comprehensive mental grasp of a master mind. His literary style has not the stately grandeur of Ryan, nor the remarkable clarity of thought and purity of diction of Paine, but it has a strength and convincing power which is all its own, and which renders it impossible, for the writer at least, to assign it to position inferior to that of either of the judges named, so far as its merits as judicial writing are concerned.

In order to judge of the character and strength of his opinions, it will not be amiss to consider a few of his more important cases, and give extracts from the opinions.

At the very first term after Judge Dixon's appointment to the bench a very interesting case involving the construction of the homestead law came before the Court.[1] This law exempted from execution sale a quantity of land (in a city or village) not exceeding one-fourth of an acre, "and the dwelling house thereon." [2]

[1] Phelps v. Rooney, 9 Wis. *70.

[2] Sec. 51, Chap. 102, Wis. Stats. 1849.

A judgment debtor owned a three story and basement store building in the city of Milwaukee; the basement and first story being rented for business purposes, and the second and third stories being occupied by the debtor and his family as a residence. The question was whether that fact made the entire building exempt as a homestead. In an opinion by Judge Cole, the Court held (Judge Dixon dissenting) that the whole property was exempt as a homestead.

The case evidently appealed strongly to Judge Dixon's sense of justice and fairness, and he filed a strong and convincing dissenting opinion. Like many other dissenting opinions, it forms more interesting reading than the majority opinion. I do not think this is necessarily proof that it is sounder or abler. Dissenting opinions are generally written under strong sense that the Court is radically wrong, and then, too, there is a sense of freedom which the writer feels and which enables him to cut loose and discuss questions entirely fearlessly, because he is not speaking for the Court, and placing on record the law for the future, but is simply expressing his own ideas for which no one but himself is responsible. Speaking from experience, I can say that it is frequently a luxury to write a dissenting opinion. The question in the case was, of course, whether this store building was in any proper sense a "dwelling house" within the meaning of the statute, even giving the statute the most liberal construction possible, in order to preserve the exemption. Chief Justice Dixon said not, and reinforced his opinion in this fashion:

"I think it an utter perversion of language to call this building a dwelling house. It is not, in any fair sense of the word. No one knows it as such; no one calls it such. A circumstance worthy of note here, and which appears from the case, is, that neither the defendant, nor any of the witnesses called to testify,

not even those called by him to prove that it was his *dwelling house*, call it by that name. No one ever seems to have imagined that it was a dwelling house. It seems to have been left for the courts to make that discovery. The defendant, in his mortgage, called it 'store No. 107 East Water Street,' and every witness spoke of it in that way, or as 'the Rooney store.' If the defendant had possessed a water power upon the premises, which he had improved by the erection of a mill or a factory, in some part of which he resided, the result must have been the same.

"We are told in history that Diogenes, the celebrated cynic philosopher, at one time took up his abode in a tub belonging to the temple of Cybele; I suppose the tub became *ipso facto* a dwelling house in the ordinary sense of that word, and that hereafter strict propriety of language will require us to say that he lived in a dwelling house belonging to the temple instead of a tub. Nay, more, I suppose the moment the philosopher got into the tub, the whole temple instantly became a dwelling house, and that he might, had he been so inclined, have claimed it as exempt under the operation of a statute like ours.

"If tomorrow a man in Madison should sell to another a lot in the city of Milwaukee, which the purchaser had never seen, and should represent to the purchaser that it had a dwelling house upon it, and should convey it as a house and lot, and the next day the purchaser should go to Milwaukee to see his property, I sincerely believe, if he had never heard of the decision in this case, that he would be surprised to find himself the owner of a lot with a shot tower upon it. If afterwards he should return to the seller and complain of fraud and misrepresentation, I suppose the justification of the seller would be that the courts had decided that whatever building a man lives in, is a dwelling house; that at the time he sold, his family resided in the tower, and therefore the purchaser had got what he bargained for. I mention these things for no other purpose than to show what appears to me to be the absurdity of the meaning attached to the words dwelling house, and how totally variant it is from our common understanding of them."

A motion for rehearing being made, Judge Dixon wrote another opinion, elaborating his views and adopting the rule of the Iowa Supreme Court to the effect that a division of the building should in such case be made horizontally, and the non-exempt part sold.

The question has been presented in many jurisdictions, and it is undoubtedly true that the majority of the courts have held, as the Court held in the *Phelps* case, that the entire building must be considered exempt. Nevertheless, the view taken by the Chief Justice has been approved by a number of courts, and the question may be truly said to be doubtful. The practical difficulties in the way of a horizontal division constitute perhaps the strongest argument against Judge Dixon's view. As most of the states are now limiting the value of the property which can be held exempt as a homestead, the question has ceased to have the importance which it once had.

Another case at the same term presented fully as important a question, namely, how far may the legislature change or curtail existing remedies without impairing the obligations of contracts, or infringing upon that certain remedy in the law for all wrongs which the constitution guarantees to every person.[3] The law attacked was what was called the "mortgage stay law" of 1858,[4] which provided that in actions to foreclose mortgages executed prior to its passage the defendants should have six months' time in which to answer, instead of twenty days as before, and that the premises should only be sold upon a previous notice of six months, instead of six weeks as had been the practice.

This law was plainly passed to give mortgagors relief from speedy foreclosure in the hard times following the panic of 1857, when practically the whole state was bankrupt. The Court reached the conclusion that the legislation was constitutional because, though the remedy was altered still a substantial remedy was left according to the course of justice as it existed at the time the contract was made,

[3] Von Baumbach v. Bade, 9 Wis. *559.

[4] Chap. 113, Laws 1858.

or, in other words, it was held that the legislature may alter and vary existing remedies so long as a substantial remedy is left, and the rights and interests of the parties are not materially impaired. This doctrine has been consistently followed by the Court ever since that case.

Judge Paine concurred in the judgment, but filed a separate opinion, basing the result on different reasoning. Both opinions are well worth reading, and they furnish a good concrete illustration of the differing mental characteristics of the respective authors.

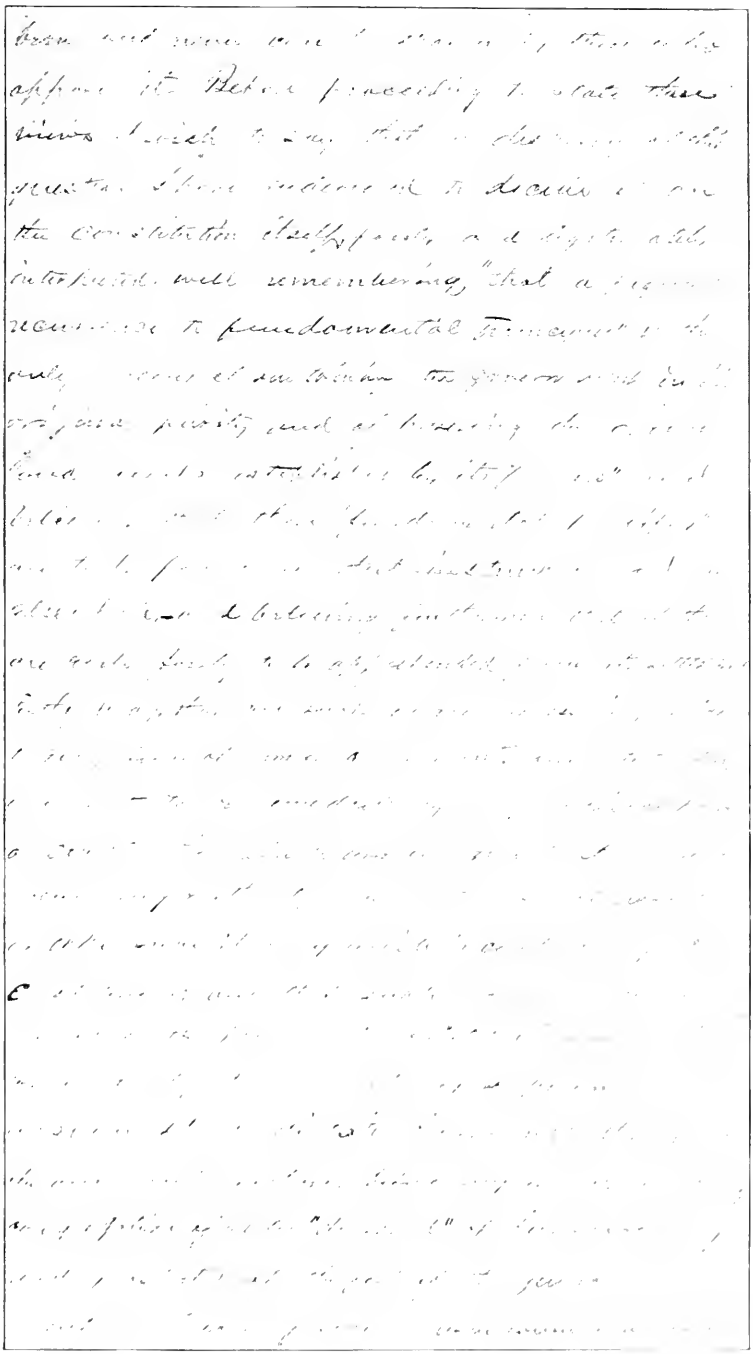
In the fall of 1859 Chief Justice Dixon was confronted with the mandate of the Supreme Court of the United States in the *Booth* case, and the question whether that mandate was to be filed and obeyed. He could not settle this question affirmatively, because Judge Cole's position was certain in favor of standing by the former attitude of defiance, while Judge Paine could not sit. Judge Dixon could do nothing but define his position, his vote would avail nothing if against Judge Cole's view. However, he deemed it his duty to investigate and determine the question for himself, though he must have known that an affirmative opinion would bring down on his head the wrath of the state rights Republicans, who were then in command of the party, and probably work his defeat in the approaching election. He was then but thirty-four years of age, but he prepared and filed what is perhaps his ablest opinion on a question which was fully worthy of it. In all the opinions which have been written on the subject of the appellate jurisdiction of the federal Supreme Court over cases decided in the state courts, I know of none more satisfactory than this. After stating his conclusion that the second section of the third article of the United States Constitution gives congress the power to provide for an appeal to the

federal Supreme Court from judgments in state courts in the cases mentioned in the judiciary act of 1789, he says:[5]

"Under the different circumstances, I would not, at the risk of repeating what has often been said before, venture to assign a reason for the conclusions to which I have arrived, but would content myself with simply referring the reader to those authorities and works where the whole question will be found fully discussed. But since, in view of what appears to have been the former solemn action of this court, we have arrived at a point in our system of double allegiance, where "fidelity to the state is treason to the United States, and treason to her, fidelity to them," I trust I shall be excused for stating, briefly as I can, some of the positions taken by those who assert the appellate jurisdiction, which appear to me to be unanswerable, and which in my humble judgment never have been, and never can be shaken by those who oppose it.

"Before proceeding to state these views, I wish to say that in disposing of this question, I have endeavored to decide it on the constitution itself fairly and legitimately interpreted, well remembering 'that "a frequent recurrence to fundamental principles," is the only means of sustaining the government in its original purity, and of preserving the original landmarks established by its framers,' and believing that those 'fundamental principles' are to be found in that instrument and not elsewhere; and believing, furthermore, that if there are evils fairly to be apprehended from its settlement either way, they are such as are necessarily incident to every form of human government, and that they are not to be remedied by any judicial powers of construction which would give to the government an authority which it does not possess, or take from it any which is conferred by the constitution; but that the remedies lie in the hands of the people who created it, and who can apply them or not, as experience and wisdom shall dictate. I have not, therefore, on the one hand, pictured before my mind a gloomy congregation of states 'disrobed' of their sovereignty, and prostrated at the feet of the general government by means of federal usurpation and assumption, nor, on the other, the weakened and powerless republic, begging at the hands of the mighty rulers of the states, the privilege of executing her laws within their borders. I have not placed on one side of me the horrors of 'consolidation' and 'despotism,' and on the other those of 'dissolution' and 'anarchy,'

[5] Ableman v. Booth, 11 Wis. *498–*503.



Reduced facsimile of a page from the manuscript opinion of Judge Dixon in Ableman v. Booth, 11 Wis. 498.

and endeavored to make choice between them. Neither have I attempted nicely to adjust and balance the centripetal and centrifugal forces of our government. These, though very proper to be considered in connection with such a question, are not the considerations which should control and govern the judicial mind. Its action is to be determined by the plain letter and spirit of the constitution, leaving the adjustment of such matters to the people who made, and who can unmake or amend it. The judiciary are not responsible for the consequences which flow from a proper construction of that instrument. While I have a high regard for those illustrious judges and statesmen whose opinions I adopt, I trust it does not diminish my respect for those equally illustrious, who differ from them in opinion. I have not yielded my assent to the doctrines of the federal courts through any mean spirit of 'dignified judicial subordination,' nor as 'hoary usurpation of power and jurisdiction, or time-honored encroachments on the reserved rights of the sovereign states,' rendered sacred by 'their antiquity,' but because I believe those doctrines to be right. Neither policy, expediency, 'uniformity,' the peculiar characteristics of the controversy before me, nor vague speculations upon possible events or contingencies which may never happen are the foundations upon which I would frame a legal conclusion upon a constitutional question. With these remarks I will state the view of the constitution which, for the most part, leads me to the conclusion to which I have arrived."

After citing the federal cases of *Martin v. Hunter*[6] and *Cohens v. Virginia*,[7] where the United States Supreme Court directly held that the words "all cases in law and equity" in the federal constitution mean all such cases in any court, state or federal, in which a federal question is raised, he says:

"It was further remarked by the court that the constitution unavoidably dealt in general language; that it did not provide for minute specification of powers, or declare the means by which those powers should be carried into execution. It was foreseen that this would be a difficult and perilous if not an impracticable task. Hence its powers were expressed in general terms, leaving it to congress from time to time to adopt its own means to

[6] 1 Wheaton, 304.

[7] 6 Wheaton, 264.

carry into effect legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interests should require. They observed that a distinction seemed to be drawn between the two classes of cases enumerated in the constitution. The first class included cases arising under the constitution, laws and treaties of the United States; cases affecting ambassadors and other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In that class the expression was that the judicial power should extend to all *classes*. That as these cases were of vital importance to the sovereignty of the union, the original or appellate jurisdiction in them ought therefore to be commensurate with the mischiefs intended to be remedied and the policy in view. But that in the subsequent clauses, which embraced all the other cases of national cognizance and formed the second class, the constitution seemed, *ex industria*, to drop the word all and to extend the judicial authority not to all controversies, but to controversies in which the United States should be a party, etc., leaving it to congress to qualify the jurisdiction, original or appellate, as sound policy might dictate. It was furthermore said by the court that, as the state tribunals might, in the exercise of the powers with which the constitution found them invested, as the courts of independent sovereignties, have and exercise concurrent original jurisdiction over all or some of the cases provided for in the constitution, and as the constitution contemplated that they should exercise such jurisdiction, and as many cases under the constitution, laws and treaties of the United States might arise in the state courts which could not originate or exist in the federal courts, it would necessarily follow, if the constitution was held to limit the appellate jurisdiction to cases pending in the courts of the United States, notwithstanding the absolute and imperative language of the constitution that 'the judicial power shall extend to all cases in law and equity arising under this constitution,' etc., that there would be a very large class of cases under the first and most important clause of the section which could never be reached by the federal courts, either by virtue of their original or appellate jurisdiction.

"It is this conclusion, to which a denial of the appellate jurisdiction inevitably leads, that determines my mind upon the question. I have looked in vain through the arguments and commentaries of those who maintain that there is no appellate jurisdiction, for a satisfactory answer to it, I can find none. It is either passed in silence, or with a few general remarks, founded,

for the most part, on assumptions which cannot be sustained. It virtually makes the first and leading clause, which declares that the judicial power of the federal courts shall extend to all cases arising under the constitution, laws and treaties of the United States, a dead letter—mere surplusage, and limits those courts, in a great majority of instances, to taking jurisdiction of such cases merely as an *incident* to the jurisdiction which they acquire by *reason of the character of the parties litigant* under the minor grants of power contained in the subsequent part of the section; for all practical purposes under such construction, the first clause might as well have been entirely omitted. The judicial power of the federal courts would have been nearly as extensive, without, as with it, the only difference being that with it, a shadow of power is given with reference to a particular, and by far the least numerous of any class of cases, where otherwise the character of the parties would not confer jurisdiction; that is, in those cases where the plaintiff is able, from the nature of his case, to set up in his declaration or complaint, some right or equity against the defendant, arising under the constitution, laws or treaties of the United States. In such cases, the facts conferring jurisdiction, would, by the plaintiff's showing appear affirmatively upon the record, and the court might entertain the case. Without the power of appeal, this, so far as I can see, is the utmost practical effect that can be given to the clause in question. Such a construction, if it were not directly at war with the words used, is, in my opinion, altogether too narrow and illiberal. It makes the provision altogether inadequate for the ends designed to be attained by it, viz: Protection and preservation to the government, by means of its own judiciary, and an equal regard to the constitutional rights of all of its citizens."

Two important cases, involving serious questions of corporate and legislative power, were presented at the June term, 1860, and in both cases the opinions were written by the Chief Justice.[8] In the first of these cases the question was whether the legislature could directly or indirectly divest a municipal corporation of its private property without the consent of its inhabitants, and the question was answered in the negative.

[8] Town of Milwaukee v. City of Milwaukee, 12 Wis. *93; Hasbrouck v. City of Milwaukee, 13 Wis. *37.

In the second case cited, the city of Milwaukee had been authorized by legislative act to expend $100,000 in building a harbor, and issue bonds to pay therefor; the city proceeded to expend not only the $100,000, but made contracts far in excess of that sum; the contractor completed the work, and a further act of the legislature was then passed authorizing the city to issue such amount of bonds as might be necessary to complete the harbor, but the city issued no bonds under it. The contractor then brought action against the city for the balance of the contract price exceeding the $100,000, and the question was whether the city was liable for this excess. The Court held that the city had not the power to engage in a work of internal improvement like building a harbor, without specific legislative authority; that the contracts providing for a greater expenditure than $100,000 were void as to the excess, for want of corporate power, and that the subsequent act authorizing the issue of bonds for the excess was not sufficient *proprio vigore* to constitute a ratification, and that only evidence showing that such act was procured with the assent of the corporation or had been subsequently acted upon or confirmed by it would make it available as a ratification which would bind the corporation.

Probably the most frequently quoted opinion which Chief Justice Dixon ever wrote is the opinion in the *Kellogg case,* which came up at the January term, 1871. This was the case in which the doctrine of proximate cause in negligence actions was first extensively discussed and settled in accordance not only with reason, but with the great mass of decision which has followed since that time. Though not perhaps entitled to the name of a pioneer case, still it may

[9] Kellogg v C. & N. W. Ry. Co. 26 Wis. 233.

truthfully be said to be one of the first to luminously treat and settle the very important question as to what may be considered the proximate cause of an injury in that vast flood of negligence actions which was then beginning.

The action was brought against the railway company, charging that it allowed great quantities of dry grass and weeds to accumulate on its right of way, and that they were set on fire by sparks from its engines, which fire was carried by the wind to the adjoining field of the plaintiff, and totally destroyed his stacks of grain. The argument of the railroad company was that the plaintiff's damages were too remote from the alleged act of negligence, and resulted from intervening independent causes, such as a strong wind which was blowing, and the extreme dryness of the time.

The first opinion in the case is quite brief, and by no means forms a satisfactory treatment of the question, and Judge Paine filed a dissenting opinion. On motion for rehearing, however, the Chief Justice wrote a very exhaustive and satisfactory opinion, discussing the question fully, both upon reason and in the light of the limited number of authorities, English and American, then in existence, bearing on the subject, and lays down substantially the rule which has been followed ever since, both in this jurisdiction and in the great majority of other jurisdictions, that, where an injury is the natural and probable, though not the necessary, consequence of a negligent act, and one reasonably to be anticipated according to the usual experience of mankind, the negligent act is the proximate cause of the injury. It is in all respects a very satisfactory opinion, but I have found no way of making an extract from it which would give any adequate idea of its quality, and I leave the reader to examine it for himself.

Fully as interesting was the question presented in *Sutton v. Wauwatosa,*[10] which was whether a man driving cattle to market on Sunday in violation of the Sunday law could recover damages of a town on account of a defective highway bridge, which gave way under the cattle, and killed some of them. Did his violation of the Sunday law bar him from recovering?

There were Massachusetts decisions holding in the affirmative, but the Chief Justice discusses the question most satisfactorily, and comes to the conclusion that the doing of an unlawful act at the time of the injury will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury; and the driving of the cattle to market on Sunday would not tend to break down the bridge any more than the same act on Monday.

In discussing the question, he says:

"In the present case the weight of the same cattle, upon the same bridge, either the day before or the day after the event complained of, when the plaintiff would have been guilty of no violation of law in driving them would most unquestionably have produced the same injurious result. And if, on that day even, the driving had been a work of necessity or charity, as if the city of Milwaukee had been in great part destroyed by fire, as Chicago recently was, and great numbers of her inhabitants in a condition of helplessness and starvation, and the plaintiff hurrying up his drove of beef cattle for their relief, no one doubts the same accident would then have happened, and the same injuries ensued. The law of gravitation would not then have been suspended, nor would the rotten and defective stringers have refused to give way under the superincumbent weight, precisely as they did do on the present occasion. There are many other violations of law, which the traveller or other person passing along the highway may, at the time he receives an injury from a defect in it, be in the act of committing, and which are quite as closely connected with the injury, or the cause of it, as is the violation of which complaint is made against the present

[10] 29 Wis. 21.

plaintiff. He may be engaged in cruelly beating or torturing his horse, or ox, or other animal; he may be in the pursuit of game, with intent to kill or destroy it, at a season of the year when this is prohibited; he may be exposing game for sale, or have it in his possession, when these are unlawful; he may be in the act of committing an assault, or resisting an officer; he may be fraudulently passing a toll gate, without paying his toll; and he may be unlawfully setting or using a net or seine, for the purpose of catching fish, in an inland lake or stream.

"All of these acts prohibited by the same chapter or statute in which we find the prohibition from work and labor on Sunday, and some of them under the same, but most under a greater penalty than is prescribed for that offense, thus showing the character or degree of culpability which was variously attached to them in the opinion of the legislature. And there are many other minor offenses, *mala prohibita* merely, created by statute, which might be in like manner committed. There are in Massachusetts, and doubtless in many of the states, statutes against blasphemy and profane cursing and swearing, the prevention of which seems to be equally if not more an object of solicitude and care on the part of the legislature, than the prevention of labor, travel or other secular pursuits on Sunday, because more severely punished. It has not yet transpired we believe, even in Massachusetts, that the action of any person to recover damages for an injury sustained by reason of defects in a highway, has been peremptorily dismissed because he was engaged at the time in profane cursing or swearing, or because he was in a state of voluntary intoxication, likewise prohibited under penalty by statute."

The doctrine of the *Sutton* case has been approved in many jurisdictions, and may be said to be the law of the land; in Massachusetts the legislature has come to the relief of the courts, and provided that the provisions of the Sunday law shall not constitute a defense to an action for injury suffered by a person on that day.

Many other important opinions by Chief Justice Dixon might well be cited and quoted from, but it is not within the scope of this work to follow the course of mere private litigation. Enough examples of his opinions have already been given to demonstrate their high quality. One opinion,

unique in the occasion which called it forth, as well as the circumstance that no action was pending when it was written and filed, seems to deserve mention.

When in January, 1874, a change of administration took place, and the Democratic, or reform, administration came in with Governor Taylor, there was great pressure for jobs about the capitol by the privates in the victorious political army. The position of crier or janitor in the Supreme Court had always been filled by the Court itself, and was at this time held by Christian Henry Beyler, a very competent and satisfactory employee. The longing eyes of a perspiring patriot discovered the place, however, and the superintendent of public property assumed to remove Mr. Beyler and appoint the patriot in his place. The new appointee came and saw, but can not be said to have conquered. The members of the Court concluded that the time had come to demonstrate that the Court had power to choose its own bailiff, and the Chief Justice wrote and filed one of his most vigorous opinions in vindication of that power.[11]

In this opinion, after stating that the members of the Court, in order to avoid unpleasantness, had made application to the superintendent of public property to withdraw his interference and allow the service to remain as it was, he says:

"Fortunately for the members of the court and for the public service in which they are engaged, they are left in no such attitude of humiliation as compels them to petition the superintendent, or any other administrative or executive offer, to redress the wrong; nor are they obliged to suffer the inconveniences and trouble which must flow from it if not so redressed. It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper

[11] In Re Janitor, 35 Wis. 410.

conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it. As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separate and independent in its sphere of action from the other branches, it seems to be under the protection of the constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of either of those departments."

This language seems sufficiently definite and positive, but when he reaches the end of the opinion there is a note of defiance which clearly shows the very serious character of the clash. After stating that the conclusion of the Court is that the power to appoint and remove is possessed by the Court alone and that the janitor theretofore appointed must be retained until his resignation or removal by the Court with the same compensation as before, he says:

"In case his name shall be omitted by the superintendent from the pay-roll, so that his compensation cannot be made to him monthly as heretofore, it will devolve upon the next legislature to make the requisite appropriation and likewise to provide against the recurrence of similar contingencies in the future. It is not within the range of presumption, or a supposition to be for a moment indulged, that any legislative body will neglect or refuse to make such appropriation or to enact suitable measures for the future; but if it should refuse to appropriate, the appointee will have his remedy by action against the state in the manner prescribed by law."

It is perhaps unnecessary to say that the Court retained its janitor, and that there have been no further attempts by either legislative or executive power to interfere with such appointments.

As the end of his term approached, Chief Justice Dixon became more and more dissatisfied with his financial situation. He was now receiving a salary of $4,000 a year, and if he should be re-elected in the spring of 1875 he would receive $5,000 per annum after the first Monday in January,

1876. This, however, was no great inducement. He was conscious of his abilities, and well aware that if he were at the bar he could command compensation almost princely in comparison to the salary. He saw his youth and manhood slipping by with ever accelerating speed, and each year he found himself in deeper financial difficulties.

He therefore determined definitely to resign, and in June, 1874, he tendered his resignation to the Governor, and formed a law partnership in Milwaukee.

CHAPTER XXV

EDWARD GEORGE RYAN

Upon receipt of Chief Justice Dixon's resignation, Governor William R. Taylor first offered the position to Colonel William F. Vilas, then not quite thirty-four years of age, but doubtless the most brilliant of the younger generation of lawyers in the state. It must have seemed a glittering prize to the future statesman, but he declined, as it is said, on the advice of his father, who thought the future had greater rewards in store for his gifted son if he remained in the practice.

Thereupon on the 17th day of June, 1874, the Governor appointed Edward George Ryan of Milwaukee to the vacant seat, and the appointment was at once accepted. The appointment was quite favorably received by the press and public, although with considerable surprise. It was by no means the case of the appointment of an unknown or obscure person to high office. Mr. Ryan was very far from that, as we have already seen; he had on numerous occasions taken a commanding part in matters of the highest importance in the political and judicial history of the state, and had demonstrated beyond cavil or doubt his great abilities as an advocate, an orator and a scholar. But it may fairly be said that there was a widespread doubt as to whether his abilities, great as they confessedly were, were of the character which would render him a great or successful judge. He was nearly sixty-four years of age, his temper was known to be uncertain and at times violent, he had had no experience upon the bench, his entire profes-

sional life had been spent at the bar, the great cases in which he had appeared were of the kind which aroused the deepest passions and party feelings, and it was felt that the great qualities which had given him prominence as an orator and advocate were not of the kind which would tend to promote success upon the bench. Thus the appointment was in many quarters looked upon as an experiment, and, at the best, a doubtful one.

However, the experiment was made and Judge Ryan took his seat with the good will and good wishes of all, and for more than six years presided in the highest tribunal of the state, and during that six years he not only dispelled the doubts which followed his appointment, but added vastly to the standing and prestige of a Court which already stood high among the courts of the nation, and in his opinions upon great questions left a monument to his memory more enduring than brass or marble.

More than a score of years have now passed since his death; the mists of passion and prejudice have passed away; the clamor of the political partisan has ceased; time has drawn the kindly mantle of forgiveness, if not of forgetfulness, over all mere infirmities of temper, and the time has come when a just and appreciative estimate may well be made of the character and abilities of this great man.

A few months before his death, during the early part of the year 1880, he was applied to by a Mr. Reed, who was preparing a book on the Bench and Bar of Wisconsin, for some biographical material; after considerable urging he wrote a brief sketch of his life in a letter to his son Hugh (now a prominent lawyer of Milwaukee) and authorized him to make such use of it as he chose in preparing an article for Mr. Reed. This, I believe, is the only written

document left by the Chief Justice relating to the history of his life. It is dated July 2, 1880, and reads as follows:

"I was born at New Castle House, my father's residence, near the village of Enfield in the County of Meath (Ireland) November 13, 1810. My father, Edward Ryan, was a son of the family of Ryan of Ballinakill. He had married Abby, eldest daughter of John Keogh of Mt. Jerome, the chairman of the famous Catholic committee. At the time of my birth, my father was a prosperous man, the owner of lands purchased in part with the fortune he received with my mother. Between the peace of 1815 and the passage of the Corn Laws he was ruined as almost all others were who owed money on land. He then removed to Blackhall in the County of Kildare, which he rented and where he lived till near his death, barely supporting his family. My mother's father was a very wealthy man who died while I was a mere youngster. He left an annuity to my mother for the purpose of educating her children. There were ten of us, and we all received an excellent education. I received mine at Clongowes Wood College, where I remained for seven years, from 1820 to 1827. I was always destined for the law, in the study of which I was nominally engaged in 1828 and 1829. But I was an expensive and improvident youth, and a great burden to my father. I had exaggerated notions of the ease with which men get on in this country, and I finally obtained my father's consent to come here. So I came in 1830. I did not know then, but have long since known that my father expected me to fail and to return to Ireland. I was too proud to do so. I studied law in New York, as I could, supporting myself by teaching. I was admitted in 1836 and came that year to Chicago. Up to that time I had never known what sickness was, but I was particularly subject to miasmatic diseases, and I was in very poor health during the whole time I remained in Chicago.

"In 1842 I was married to your mother, Mary, eldest daughter of Hugh Graham, and immediately moved to Racine. I lost your mother in 1847, and, as soon as I rallied from the blow, prepared to move to Milwaukee, and moved there in December, 1848. When I first went to Racine it seemed doubtful which would be the larger place; that doubt was settled long before I moved. In 1850 I was married to Caroline Willard, daughter of ———— Pierce of Newburyport, Mass. The rest you know as well as I. Above you have the outlines of my life. You can fill it up for Mr. Reed, using no superlatives and making it a mere biography. I gave the same data to the late Colonel Slaughter, who wrote

an extravagant panegyric, of which I was heartily ashamed. I have an instinctive aversion to putting my face, of which I am not proud, in a book, and I have a perfect horror of the distorted caricatures of wood cuts which they put in Wisconsin publications."

Here the autobiographical sketch ceases. None can accuse its author of egotism.

He had reached the ripe age of three score years and ten when he wrote the foregoing. While his life has been full of disappointments, and had resulted in failure from a financial point of view, it had been tumultuous and stirring; he had played the leading part in many a serious drama that had moved the great heart of the public to the utmost; he had had great opportunities and he had seized some of them and scored brilliant intellectual triumphs; he had been abused, maligned and condemned, but his great abilities had never been questioned; his life had been one of storm and stress, like a day full of darkness and tempest, but made glorious by a great burst of golden light flooding the sky at its close.

Such being the case, this brief record of his life must be considered as provokingly meagre and unsatisfactory. The outlines certainly need filling up, though the limits of this work will not admit of great detail.

Mr. Ryan was of Roman Catholic parentage, and was baptized when six days old by the Rev. Lawrence Graham R. C., Pastor of the parish of Rathcone. This appears by a certificate found among Judge Ryan's papers, dated March 4, 1834, signed by the reverend gentleman himself, who, it seems, was still after the lapse of twenty-four years pastor of the parish. When and why he left that communion and attended the services of the Episcopal church I have been unable to ascertain. I judge from the tone of one of his essays, which I shall hereafter refer to, that he rejected the

claims of the church to settle authoritatively and finally all questions of belief, but this is mere surmise.

I have found nothing that throws any light on his life in New York further than he himself has told us. Doubtless it was a period of hard work and poverty. He received his second naturalization papers April 9, 1836, and was admitted to the bar May 13th following. He soon came to Chicago. His practice here was not so engrossing as to occupy all of his time, but his active mind could not brook idleness and he became in 1839 the editor of a Democratic paper called the Tribune, through which for about two years he gave expression to his views upon the politics of the day in vigorous English and stately periods which must have spent their force far above the heads of the frontier community at which they were levelled. The paper died in 1841. I find among his papers a commission signed by Thomas Carlin, Governor, and Lyman Trumbull, Secretary of State, dated March 4, 1841, appointing him State's Attorney for the 7th Judicial Circuit of Illinois. Whether his term of office expired, or whether he resigned I do not know, but evidently he tired of Chicago, and came to Racine with his young wife in 1842. While living here he was elected a delegate to the first constitutional convention held in 1846, and took a very prominent part in the debates of that body. After his removal to Milwaukee he was associated at different times as partner with a number of prominent lawyers, among whom were Judge J. G. Jenkins and Sen. M. H. Carpenter, and he was engaged in many important causes, some of which were of state and even national importance, which will be referred to later in this volume. During the years 1870, 1871 and 1873 he was City Attorney of the city of Milwaukee, and in June, 1874, as before stated, he was called by the Governor to be Chief Justice of the

State. This appointment crowned a long and troubled life. Doubtless he knew his own abilities as well as his infirmities full well. When he was appointed he said, "This is the summit of my ambition, it is the place to which I have looked, but it has been so delayed that I have ceased to expect it."

His physical appearance is thus described in the book called "Fathers of Wisconsin:"

"In person Mr. Ryan is five feet ten inches in height, weighs about 180 pounds, neither of robust nor delicate frame, but muscular, sinewy and capable of much long and continued labor. His movements are quick, and his step elastic; his complexion is florid, his hair light, his eyes blue, large and expressive."

Although I saw him in my boyhood at a time when he was perhaps fifty years of age, I do not remember his appearance at that time, and my only distinct recollection of his personality is that which is left on my memory by his appearance upon the supreme bench. He was then quite bowed by age, and his walk was plainly infirm, but the piercing brilliancy of the eyes, which seemed almost starting from from his head as he bent them upon a lawyer who was arguing a case before him, I shall never forget. He was a good listener; he apparently gave his whole mind to the case, and it always seemed to me that he was dissecting the case and the argument in his mind. With that gaze bent upon one, pettifogging seemed out of the question, and any attempt to lead the judicial mind astray worse than useless. His features were large and striking, rather than handsome; his face would attract attention at any time and in any company, but when illuminated by the fire of intellectual combat the eyes blazed, and the whole countenance seemed leonine in its strength.

Chief Justice Cole in reply to the addresses of the bar after Judge Ryan's death, referred to him as having a "susceptible" temper. This mild expression was characteristic-

ally kind, but extremely inadequate. From his very youth Mr. Ryan was afflicted with a violent temper. It was unreasoning and unreasonable. The most trivial incidents aroused his anger, and when aroused it was almost impossible to appease it. By his ebullitions of temper he drove his clients from his door and well nigh wrecked his professional career. He made bitter enemies without necessity or reason, and alienated those who would fain have been his friends. This failing was the curse of his whole life, it was the greatest weakness in a character which in other respects had most if not all of the elements of true greatness.

In an eloquent and discriminating eulogy delivered by ex-Senator Vilas before the Supreme Court soon after Judge Ryan's death,[1] he truly said of this failing: "The chiefest misfortune of his life was his weakness in presence of his own passion. That subdued and governed him, turning his power to his own destruction. It made him terrible to his friends as well as his enemies; tyrannical, perhaps sometimes cruel, where he should have been tender and loving; suspicious and jealous where he should have been confiding; violent and hostile where he ought to have been friendly. It led him into false positions from which he was too proud to withdraw. It stood in the path of his advancement among men like a flaming sword. It turned friends into enemies and froze off the tendrils of life. It brought humiliation, grief and loneliness to his soul and his hearthstone." Judge Jenkins, upon the same occasion, said of this same failing, "The life of Judge Ryan was one long struggle—a struggle against himself, a struggle against untoward fortune, a struggle against infirmity which the world knew little of and allowed not for. And so to most men he seemed arrogant and proud, whereas to those who knew him best he was,

[1] 50 Wis. 23.

when acquit of infirmity, compassionate and considerate." I shall not dwell upon this serious infirmity of temperament. It was an inborn, not an acquired or cultivated failing; doubtless it was greatly aggravated by his ill-health in later years; its most serious effects descended upon his own head; it seemed necessary to speak of it, however, in speaking of the character of the man; it throws light upon many things in his life which are otherwise inexplicable; it explains in some degree at least why there was so much of disappointment and bitterness and failure in it; why he made so few warm friends, and why at the close of a long life he was solitary and alone.

Turning from this painful subject, we shall find many admirable characteristics upon which we may dwell with pleasure. His nature was deeply religious. Whether or not there is any truth in the report which is given currency by Mr. Reed in his Bench and Bar that his parents designed him for the priesthood I know not, but it is certain that he came of a reverent and religious parentage, and that he carried the impress of those early influences through his life to the very end. In Milwaukee he was for a long time a communicant and attendant of one of the Episcopal churches, and at Madison of Grace church. That his thoughts were often directed toward religious subjects is shown by the character of several essays or lectures which he left among his papers, among which are lectures on "Faith," and "Heresy," and on unfinished lecture on "The Crucifixion," all of which will be referred to later; he often, especially in his later years, discussed the great problems of life and immortality, and always with the strong convictions of a Christian. Thus Chief Justice Cole in his reply to the addresses of the Bar before mentioned says of him, "I well remember that on one occasion he put an end to our conversation on these

intensely interesting questions by uttering with great solemnity of manner, substantially this language, 'As for myself, I know I possess a soul—an intellectual and moral part which is immortal. I believe that I shall have a conscious personal existence after death; that I shall meet beyond the grave friends and those I loved here, that I shall know them and they will know me. All this I as firmly believe as I believe that I shall see the sunlight tomorrow if I live.' "

Not only did he have this theoretical belief, but he also made practical application of his belief in the Christian religion by prayer. I know this not only from the fact of his regular attendance at church, but also from having found among his papers, which were kindly placed at my disposal by Mr. Hugh Ryan, a manuscript prayer, much worn and in his own handwriting, which I believe to be original and evidently prepared by him for daily use after he came to the bench. Its beauty and simple pathos should give it a place in any liturgy. I cannot forbear quoting it in full.

"O God of all truth, knowledge and judgment, without whom nothing is true or wise or just, Look down with mercy upon Thy servants whom thou sufferest to sit in earthly seats of judgment to administer Thy justice to Thy people. Enlighten their ignorance and inspire them with Thy judgments. Grant them grace truly and impartially to administer Thy justice and to maintain Thy truth to the glory of Thy name. And of Thy infinite mercy so direct and dispose *my* heart that I may this day fulfill all my duty in Thy fear, and fall into no error of judgment. Give me grace to hear patiently, to consider diligently, to understand rightly and to decide justly. Grant me due sense of humility, that I be not misled by my wilfullness, vanity or egotism. Of myself I humbly acknowledge my own unfitness and unworthiness in Thy sight, and without Thy gracious guidance I can do nothing right. Have mercy upon me a poor, weak, frail sinner, groping in the dark; and give me grace so to judge others now, that I may not myself be judged when Thou comest to judge the world with Thy truth. Grant my prayer I beseech Thee for the love of Thy son, our Savior, Jesus Christ. Amen."

I also found among his papers a manuscript form for daily family prayers, also in his own handwriting and rivalling in beauty and dignity the personal prayer just quoted.

Again Judge Ryan passionately loved justice and hated oppression or wrong. It may perhaps be said that he was frequently unjust and cruel to his personal friends and this is true; but it is also true that this was the result of his uncontrollable temper which carried away his judgment and blinded his mental vision, and hence this fact cannot be considered as in any degree impeaching the sincerity of his love of justice. Akin to this was his love of truth and hatred of anything like hypocrisy and time serving. That which he believed he proclaimed without thought of popularity or fear of the result. Thus, although he was always a Democrat, he became the leading counsel for Bashford in the celebrated case of *Bashford v. Barstow*, in 1856, when it seemed that the will of the people was about to be defeated by fraud, and in the course of that litigation vindicated the principles of honest government, although the result was to place a political opponent in the Governor's chair. The famous Ryan address of 1862, before mentioned, also demonstrates, as it seems to me, this same quality. While this address was ill-timed and doubtless gave aid and comfort to the enemy, it was in no sense a disunion document: it denounced the rebellion of the Southern States as "unnecessary, unjustifiable, and unholy," and demanded the most vigorous prosecution of the war, and the burden of it consisted of an impassioned appeal for the maintenance of the constitution of the United States against certain measures and acts which had been deemed necessary by the administration for the due prosecution of the war, such as the suspension of the writ of *habeas corpus* by the executive, arbitrary arrests, and other acts of

doubtful constitutionality. Here appeared Mr. Ryan's great respect for established law. He reverenced the constitution and when he saw it invaded and disregarded, as he deemed, he hesitated not to denounce such acts with all the vigor of his matchless rhetoric, though he must have known that his act would bring upon his head, as it in fact did, a storm of obloquy; a storm which lasted for years, and effectually killed any political ambitions which he possessed.

Instances might be multiplied of his love of abstract justice, his reverence for law, and his hatred of wrong, but others have written of these qualities far more effectively than I can hope to do. Judge Jenkins, in the address before spoken of, says:

"He possessed none of the arts of the courtier; he would neither bow subservient to power, nor be patient in the presence of wrong and oppression. Like the oak of the forest, he could break but not bend. Power might crush him, it could not silence him. So he was often the champion of the lowly against the powerful:—I think out of abhorrence of the oppressor, rather than from sympathy for the oppressed. He hated the wrong more than he loved the victim of the wrong. Such a man could never be popular; he never sought to be. *He despised the popularity that is run after.* He challenged the fame that waits upon grand deeds, upon great intellectual and moral power. Men admired him. The world recognized a grand intellect and marvelled at its power. It apprehended his great acquirements and honored him; but it could not love him. It neither comprehended the man, nor allowed for his infirmity. Indeed he never sought the world's appreciation. He was all sufficient to himself. He shut himself up within himself, asking neither sympathy nor love. He seemed of different mould from other men; above the need of sympathy or too proud to claim it."

It goes without saying that such a man must have had a high code of professional and judicial ethics. The tributes of lifelong acquaintances leave us not in doubt as to these matters, but he has expressed himself so eloquently as to the scope of the duties of lawyers and judges in his famous ad-

dress to the University Law class of 1873 that I cannot do better than to quote a few sentences. Of the lawyer he says:

"This is the true ambition of the lawyer: To obey God in the service of society; to fulfill His law in the order of society; to promote His order in the subordination of society to its own law adopted under His authority; to minister His justice by the nearest approach to it under the municipal law which human intelligence and conscience can accomplish. To serve man by diligent study and true counsel of the municipal law; to aid in solving the questions and guiding the business of society according to law; to fulfill his allotted part in protecting society and its members against wrong, in enforcing all rights and redressing all wrongs; and to answer before God and man according to the scope of his office and duty for the true and just administration of the municipal law. There go to this ambition, high integrity of character and life; inherent love of truth and right; intense sense of obedience, of subordination to law, because it is law; deep reverence of all authority, human and divine; generous sympathy with man, and profound dependence on God. These we can all command. There should go high intelligence. That we can not command. But every reasonable degree of intelligence can conquer adequate knowledge for meritorious service in the profession."

Of the Judge he says:

"The Bench symbolizes on earth the throne of divine justice. The judge sitting in judgment on it is the representative of divine justice, but has the most direct subrogation on earth of any attribute of God. In other places in life the light of intelligence, purity of truth, love of right, firmness of integrity, singleness of purpose, candor of judgment, are relatively essential to high beauty of character. On the bench they are the absolute condition of duty, the condition which only can redeem judges from moral leprosy. * * * The judge who palters with justice, who is swayed by fear, favor, affection, or hope of reward, by personal influence or public opinion, prostitutes the attributes of God and sells the favor of his maker as atrociously and blasphemously as Judas did. But the light of God's eternal truth and justice shines on the head of the just judge and makes it visibly glorious."

Higher ideals than these could hardly be expressed in human language. That deep reverence for God and for law

and order before spoken of shines forth from the quoted lines with the clear radiance of the sun at noonday. Did he fail at times to reach the height of these ideals? Probably so, but does poor human nature ever realize and live up to its ideals? If it did the ideals would be no longer ideals. It may be said with confidence that whatever Judge Ryan's failings were it was never charged for a moment that he willfully departed from these high ideals of professional and judicial conduct. His mind was clean, his thoughts pure, vice did not allure, loose living did not attract him.

It has been said that a good man always has a deep respect for woman. Judged by this test, Judge Ryan was a good man. His respect for woman and womanhood was deep and almost reverential. Whenever and wherever he has written or spoken of woman or womanhood he has done so with a deference as charming as it is appreciative and respectful. True he had his own ideas of her proper sphere, which were expressed quite fully in his lecture entitled "Mrs. Jellyby," which will be referred to later. He had no patience with the "new woman," even at the moderate stage of development which she had reached forty years ago; what he would have thought of the "new woman" of the 20th century can be easily imagined. His idea was not that woman was inferior to man, but that she was intended by the Creator for a different and really nobler sphere of action, and that it was a perversion of the divine purpose to attempt to take her from that sphere. When Miss Lavinia Goodell moved for admission to practice as a lawyer in 1875, Judge Ryan wrote the opinion of the Court denying the application and and said, among other things:

"There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick

sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling are surely not qualifications for forensic strife. Nature has tempered woman as little for the judicial conflicts of the court room as for the physical conflicts of the battle field. Woman is moulded for gentler and better things."

This view is more fully brought out in the Jellyby lecture and need not be dwelt upon now.

In addition to the admirable qualities already mentioned, it may be said that he loved truth, as he loved law and justice, with a love that was almost worship. Deceit and falsehood stirred his indignation profoundly. He was careless of money; avarice and greed were foreign to him; large fees tempted him not; the wealthy client whose cause seemed tainted with wrong or whose conduct displeased him was turned from his door just as quickly as the client who came in rags. It goes without saying that he died poor; he had no faculty or inclination for acquiring this world's goods. It is related of him that he once said in debate:

"I never so much esteem my Divine Master, I never feel such a nearness to the Nazarene, as when I read that in His exalted and righteous anger He scourged the money-changers and drove them from the temple."

An incident which occurred while he was on the bench well illustrates his jealous regard for his own honor, as well as his emotional character. He received one morning by mail a one hundred dollar bill, with a letter requesting a favorable decision in a case about to be argued. The letter came from a German who had come to Madison to watch his case, and who probably had no idea of the impropriety or criminality of the act. Judge Ryan took the letter and bill to Judge Lyon who was sitting in the same room, and said in a voice trembling with emotion and with tears running down his cheeks, "What has there ever been in my life that would lead any one to believe that I could be bribed?"

Judge Lyon soothed him with the assurance that the would-be briber doubtless supposed all judges to be approachable with money, and advised laying the matter before the District Attorney, which was done, and the man was at once prosecuted and fined $100 for his crime.

Some further anecdotes which have been already printed may not be out place as throwing light upon his character. The following anecdote was long current in Milwaukee, and is related in the work called The Bench and Bar of Wisconsin, prepared under the direction of Mr. Berryman, the State Librarian, and published in 1898. While in partnership with Senator Carpenter, there was employed a clerk in the office who was more especially under Mr. Carpenter's direction, and against whom Mr. Ryan had taken a violent and uncontrollable dislike, which was so extreme that he could not abide his presence in the same room. At one time while Mr. Carpenter was absent attending court in Beloit, this clerk came into Mr. Ryan's room and asked him if he had any instructions to give him as to the office work. "Yes, sir, I have," said Ryan, and, turning to his desk, hastily wrote a few lines, sealed the note, handed it to the clerk and directed him to take it to Mr. Carpenter as soon as he could. The clerk, impressed with the importance of the message, rushed to the station, just succeeded in catching the train as it was moving out, and on his arrival in Beloit made equal speed in taking the note to Mr. Carpenter, who was engaged in trying a case. Tearing it open, Mr. Carpenter read as follows:

"Matt H. Carpenter,

"Dear Sir: I want you to keep your lackey out of my office.

"Yours respectfully,

"E. G. Ryan."

Tradition frequently affixes a vigorous adjective to the word "lackey" in the note.

General Bryant, in an article in the Green Bag, relates the following incident:

"He was once arguing a case in the Supreme Court of the United States. Chief Justice Chase presided and during Ryan's argument the great chief justice turned to an associate and began a whispered conversation. Perceiving this Ryan paused and waited until the chief justice turned, as if to inquire the cause of his silence. Then Ryan said, with great dignity but significant impressiveness, 'What I am saying is worth hearing.' It is said that the chief justice blushed deeply and afterward gave perfect attention."

As an instance of his sarcasm, it is related that on being informed that a legal acquaintance had married a fortune and obtained a fine federal appointment, he exclaimed: "God bless him! The lucky, lazy dog! He never opened his mouth but to yawn and never opened it but a sugar plum fell into it."

Another anecdote which was current at Racine when I was a young practitioner (but for the truth of which I do not vouch), runs as follows: When Hon. Experience Estabrook of Lake Geneva was attorney general in 1852 or 1853, Mr. Ryan was engaged in the argument of a case in the Supreme Court in which the Attorney General was opposed to him, and in the course of his remarks Mr. Ryan referred to Mr. Estabrook as "this vagabond Attorney General." The Court was shocked by this breach of courtesy toward its officer and the Chief Justice presiding called Ryan to order and informed him that he would be required to show cause when the Court came in after the noon recess why he should not be punished for contempt of court. Ryan came in at the appointed time with a dictionary and showed that the word vagabond was an adjective as well as a noun; that as an adjective it meant simply "strolling or wandering from

place to place," that he had used it as an adjective and simply in this inoffensive sense, and that it was strictly true, because the Attorney General resided at Lake Geneva and only came to Madison as duty called, and thus he might be truly said to stroll or wander from place to place. The judges conferred a moment and decided that the explanation did not explain, and a fine of $50 and costs was imposed. As he paid the fine at the clerk's desk, he said in a reflective way, but loud enough to be distinctly heard, "I am compelled to pay this fine because the Supreme Court of Wisconsin doesn't know the difference between a noun and an adjective." Another version of the story is that after he paid the fine he walked up and down the room and said *sotto voce,* "I have been fined $50 for expressing my opinion of the Attorney General of this Court. Great Heavens! What would I have been fined if I had expressed my opinion of the Court itself?"

The two stories immediately following were told to the writer by Judge James G. Jenkins of Milwaukee. Soon after the publication of Darwin's book on the Origin of Species, when the doctrine of evolution was the principal subject of discussion everywhere, a man came into Ryan's office in Milwaukee to sell tickets for a lecture by some distinguished person on the new doctrine. Ryan was busy, and not inclined to pay any attention, but the man became insistent, explaining that the lecture must be worth hearing on account of the great importance of the subject; finally Ryan became aroused, and, turning to the ticket peddler, said with characteristic vehemence: "Sir, you may be descended from a monkey, but I know that God Almighty made me."

During the early '60s an eccentric clergyman named James Cooke Richmond was rector of the Episcopal church

in Milwaukee which Ryan attended. The reverend gentleman was continually in difficulty with some part of his congregation, and a meeting was held at one time in a law office in Milwaukee between the Rector and the leaders of the opposing faction with the idea of settling if possible some more than usually troublesome difficulty. The insurgents were represented by counsel at the meeting and Ryan represented the rector. The lawyer who represented the insurgents made a statement in which there were included some very uncomplimentary remarks about Mr. Richmond, which so aroused Ryan's ire that he jumped from his seat, spat in the lawyer's face and exclaimed, "I will be ——— ——— if I will calmly sit here and hear my pastor insulted." There was a clinch at once, but the combatants were separated and the incident was closed for the time, but probably never forgiven.

Dr. Charles H. Vilas, whose boyhood and early manhood were spent in Madison, related to me this story: Strolling into the old Supreme Court room one day while arguments were going on, he found Mr. Ryan arguing a case in his usual earnest and eloquent manner; as he paused for a moment Chief Justice Dixon said to him, "But Mr. Ryan, did not your client have a complete and adequate remedy by legal proceedings?" Mr. Ryan, advancing toward the bench, and shaking his finger said impressively, "I tell you, Mr. Chief Justice Dixon, there are wrongs for which there is no adequate remedy, except the toe of the boot properly applied."

A witty Milwaukee friend once said to Ryan (referring to his utter inability to control his temper), "Ryan you ought to be incorporated and have a board of directors."

An anecdote, showing his unconsciousness of the splendor of his own diction, may not be out of place. In the January

term, 1875, the divorce case of *Campbell v. Campbell* came before the Court. It involved simply the question of alimony, but in the course of the opinion which Judge Ryan wrote there occurs a tribute to marriage as a divine institution, the majesty and beauty of which can only be appreciated by reading it. Judge Dixon, who but a few months before had been chief justice, was attorney for the prevailing party in the case and came to the consultation room after the decision was announced, and desired to read the opinion. Judge Ryan said, "Let me read it to you; you will find it hard to read my writing." At this point Judge Lyon, who was present, said to Judge Dixon, "And when he reads it, Judge, remember what he said to us a few months ago about the rhetoric in the opinions of this Court." It seems that shortly before Judge Ryan's elevation to the bench he had expostulated with the judges on the great amount of rhetoric which they were putting in their opinions, and it was to this that reference was made. Judge Ryan read the opinion to Judge Dixon, and then came to Judge Lyon's desk as though troubled, and said, "Do you really think, Judge, that that opinion is rhetorical?" To this Judge Lyon replied that he thought it was slightly rhetorical. The answer seemed to surprise Judge Ryan, and he said no more, but a mere reading of the opinion will show to any one that finer rhetoric is very rare.

That Judge Ryan was a profound scholar, there can be no question. As well might one doubt the resistless power of Niagara while standing on its brink as to doubt the learning and scholarship of Ryan while reading one of the masterpieces of his massive brain. Whether the subject be religious, philosophical or purely legal, the sweep of his eloquence is overwhelming. His English is pure and undefiled; every word expresses the exact shade of meaning

desired. The sentences are short and intensely virile. He well understood the telling force of the short Anglo-Saxon word, the brief explosive sentence, the startling antithesis, the striking epigram, and he used them all with marvellous effect, but he also was master of metaphor and simile, of the stately period and the classic allusion, and these also he called to his aid at will. They all flowed in a limpid and copious stream, apparently without stint, and without effort, as though language was his plaything and eloquence his birthright. All knowledge seemed at his command, satire, philosophy and logic his willing handmaids. He transformed and illumined the most commonplace subject. Wit and humor he had in good degree, but it was apt to be trenchant and sarcastic, rather than rollicking. It was more often than otherwise used to drive home a telling shaft of ridicule or tip a barb of satire. His power over invective was absolute, and he was not slow to use it; pitiless and scathing, it left its unhappy victim to writhe in helpless agony. His conclusions were always radical and frequently extreme. This was the natural result not only of his disposition and temperament, but largely also of the brilliancy of his literary style. He who makes frequent use of antithesis and epigram will surely make literature which will chain the attention and thrill the heart, but he will almost as surely be guilty of exaggeration and inaccuracy. The temptation is too great to be resisted; truth will be sacrificed to style; antithesis is ineffective if it be not extreme, epigram falls flat if it be not radical. By their striking and brilliant effects they often take captive the judgment for the moment and lead it to a conclusion which calm reflection will afterwards repudiate. But if we admit, as I think we must, that this was the case with Judge Ryan, we must still admit that his writings, whether legal, philosophical or re-

ligious, show a marvellous power of reasoning, a depth of learning rarely equalled, an ease and grace of composition which carries the reader spellbound upon its current, and that there runs through them all the great strong note of genius; they claim our admiration and attention with an imperious and resistless demand which can come only from merit.

The question as to whence came these great and commanding qualities will naturally be asked. That he was endowed by nature with a massive intellect cannot be doubted, but that he developed and added to his great natural abilities by lifelong study can as little be doubted.

As appears from the autobiographical sketch before quoted, he left college with his degree at the early age of 17. This fact does not, I think, necessarily indicate great precocity. I have no knowledge of the standing of the institution. I do not remember ever to have heard of it in any other connection, except that Francis Mahoney ("Father Prout"), author of "Shandon Bells," was one of its alumni. Presumably it was a small institution, giving that predominance to the classics which was universal at the time. It can hardly be supposed that it furnished anything approaching what we now call a liberal education. But whatever its merits or defects, here it certainly was that the beginnings of the learning of the great Chief Justice were acquired, and here it was that the foundations of the splendid literary edifice which he left behind him were doubtless deeply laid.

But it is evident that his education was only begun in college; much as he may have there learned, it was but the prelude to a lifelong course of study. Books were his delight, and he read them not to pass the hours away, but to lay up the contents in the treasurehouse of his brain, where they were always at his command. Contact with men and

things, the fierce attrition of mind against mind in the profession broadened and developed him. His conversation was a perpetual delight, and he delighted in it. Dictionaries surrounded him, and were in constant use; he was content with no written sentence until it was perfect. Slovenly writing was an abomination to him; the proper word was the word to be used, and there was but one proper word.

To quote again from Senator Vilas:

"So in all his labor of writing, dictionaries were his companions and friends. He trusted to no one of them, but surrounded by many he gathered from the best linguists the perfect hue of intelligence and beauty that belonged to every word he used, and set it then in happy harmony with its fellows in the finished picture of thought which his every period became. Such discipline had its reward. His style is his own, strong, clear and beautiful; not wholly without fault, but as worthy of study as Addison's; not always in his opinions perfectly judicial, but turning from the path only to bring in gems of beauty by the way. To be able to write as Edward G. Ryan has written is a crown of glory in letters, a sufficient title to literary renown."

His knowledge of the law was profound. When he spoke or wrote on legal subjects, he spoke or wrote as one having authority. Mindful of precedents, he did not follow them with a blind and slavish reverence because they came from the pen of a Coke or a Mansfield, but because they were the voice of the law, which was to him as the voice of God.

While Judge Ryan's fame must always rest primarily upon his achievements as a lawyer and a judge, it must not be forgotten that he left some efforts in the line of general literature which by reason of beauty of style and strength of thought should of themselves serve to rescue his name from oblivion. It is true that these remains are not many in number, and most of them exist only in manuscript, but they are well worth our attention. His first serious literary efforts seems to have been poetical in their nature. There is among his papers a large blank book, handsomely bound

in leather and marked on the outside, "E. G. R. 1835." It seems to have been intended to contain the poetical works which he deemed worthy of preservation. It contains, however, but five short efforts, each occupying about a page, and the rest of the book is blank. The first of these bears the heading, "Written at College, February, 1827," and is in the nature of a complaint that he cannot follow his own will as to his vocation, but must submit to the dictation of his parents or guardians.

The second consists of a number of verses written on the ship Atlantic in a storm in January, 1831. They are sombre in their nature, and evidently written in contemplation of possible shipwreck. One verse may, perhaps, be quoted:

"Then Welcome death, if nothing worse
Than from existence thus to sever
I'd barter not man's earliest curse
For all life gives, and life forever;
Thee—fortune's sickening child may shun
Thee—heroes brave—to meet in sorrow
I know no hope beyond this one,
I am today—and not tomorrow."

The other verses are in similar vein and they seem to indicate an agnostic condition of the mind. Another is entitled "Lines written in a young lady's album at her repeated request, March, 1831." These are also deeply tinged with melancholy, as the following verse will show:

"You spoke—the soft tone of those flattering words
O'er this desolate heart is yet stealing,
You looked—but you saw not its festering chords
As they thrilled to a long blighted feeling.
For as the fond hope of youth, that from love caught its tone
And still, still promised hope for the morrow.
But ere one short month had yet made her my own,
Died—and left me alone to my sorrow."

He was not yet twenty-one years of age when he wrote these lines; whether there had been any foundation in his life

for the intimations of wrecked love which they contain, or whether they are simply an excursion into that luxury of imaginary woe into which the poetical mind so frequently turns without apparent cause, I do not know. The other verses are entitled, "The Exiles, a duet," 1831, and "Occasional Lines," May, 1831; both are serious in their nature and in much the same vein as those quoted. Here his poetical efforts end, if we except a parody on Moore's, "Oft in the Stilly Night," which is preserved among his papers undated and entitled, "Mr. Ryan's Song." The first verse runs as follows:

"Oft in the stilly night
Ere slumber's chain hath bound me,
Fond memory brings the light
Of other days around me;
The toasts, the lays
Of drinking days,
The bumpers gay then swallowed,
The nights we spent in devilment,
The aching heads that followed.
Thus in the stilly night,
When my poor throat is roasted,
Fond memory brings the light
Of many a health I've toasted."

It would be a fair guess from this effusion that he did not allow the "festering chords" of his heart to absorb his entire attention. Blackstone abandoned poetry for the law. Ryan did the same: I do not think there is any just ground to regret the decision in either case.

Passing to his manuscript essays or lectures before spoken of, doubtless the most finished of them is the one entitled, "Mrs. Jellyby," which was delivered as a lecture a number of times to appreciative audiences. It was evidently written shortly after the appearance of Dickens' novel "Bleak House." In this lecture Mrs. Jellyby is taken as the type of the strong-minded or new woman, who desires to share

the ballot with man. After paying a deserved compliment to the amiable personal character of Mrs. Jellyby, and suggesting that her desire to share with man his public duties should be examined without prejudice, he says that conservatism meets her with the statement that her position in modern society is the best possible position for her, and could not be improved. He then pays his respects to mere conservatism in the following inimitable manner:

"Pure conservatism is always wrong, civilization is never fixed. No Joshua has power to stay the course of the human mind. Change is the necessity of human history, progress the duty of the human race. Pure conservatism has no place in the annals of mankind. It concedes the past but denies the future. It worships the actual but anathematizes the possible. Its creed is the present, because it is the present. It holds with Pope that 'whatever is is right.' It is a bigot of the present without sympathy with the past, or prophecy of the future. Content where it finds itself, pure conservatism sits down by the wayside while the march of civilization passes by and presses on to the promised land of the future, guided on its dark way by faith in the destiny of man as by a pillar of fire. Civilization never pauses, and the progress of society is the progress of both sexes. The amelioration of the condition of woman must keep pace through all time with the amelioration of society. The civilization of both sexes is inseparable. God hath joined them together, and man hath no power to put them asunder. Conservatism would have given the same answer to woman in any age of the world."

The writer then rapidly sketches the great advance in the position of woman from patriarchal times to the present coincident with the advance of the position of man, and concedes that Mrs. Jellyby is right in her insistence that there must and will be further advance in woman's position, but suggests that mere change may not be progress, but may be simply retrogression. Granting that there have been hardships in woman's position, especially as to property rights, he proceeds to argue that in God's economy men and women

were created to perform different, not identical duties, in human life and society. After noting the evident differences in the mental and physical qualities of man and woman, he says, "These distinctions are not the inferiority of one sex to the other. What man gains in general force is compensated to woman by the purer beauty of her mental, moral and physical organization. It is no more woman and her master than it is man and his mistress. The differences between the sexes are not the mere favoritism of nature to either sex, they are her exquisite adaptations of the agent to the function."

The writer then paints in glowing language the functions and position of woman as the mistress of the home, the first priestess and teacher of the human race, and shows that the influence so wielded by her is greater than governments or philosophies, and asserts that every position assumed by woman which detaches her from the home or lessens her adaptation for the performance of the peculiar duties of the home is a sin against nature.

This is the central idea of the whole essay, namely, that the natural endowments and duties of man and woman are essentially different, but at the same time co-ordinate and not inferior the one to the other; that God has so designed the two sexes, and that the attempt by one sex to invade the province of the other is a perversion of the divine purpose, and that hence the attempt by woman to perform governmental duties which necessitates her practical abandonment of her character as mistress of the home and the guardian of the cradles of the race is not progress but error. This argument may perhaps have been as strongly put by others, but I have never seen it.

Another essay, entitled "Faith," is an eloquent plea for faith both in our fellowmen and in God, taking for his text

the words of the Psalmist, "The fool hath said in his heart, 'There is no God.'" The following excerpt may be said to be the keynote:

"Faith is a fruitful mother—Hope and Charity her twin first-born. 'The greatest of these is charity.' The *greatest*, not the *first;* greatest in degree, not first in order. Without faith there is no charity. Faith comes before charity; charity follows after faith. Man must believe before he can love; he loves only because he believes. Faith, hope and charity all operate externally, but faith must go before to show the way, and hold the light. The Apostle speaks of faith without charity, but not of charity without faith. There may be faith without hope or charity, but there is neither hope nor charity without faith, unless we believe there is nothing to hope, nothing to love."

The essay develops into an argument in favor of the idea that the Episcopal Church of this country is a true branch of the Apostolic and Universal Church into which should in time be gathered the great body of the American people.

The essay entitled "Heresy," opens with the following tribute to Christianity:

"It is often said that Christianity is the great element of modern civilization. It is more; it is civilization itself. It is the essential distinction between the ancient and the modern order. It found a sensual civilization and replaced it by a spiritual. If our civilization is imperfect, it is because our Christianity is imperfect. Pure Christianity would be pure civilization. It gave to man his great charter of the freedom and immortality of the soul. It gave him a dignity and a career far above his mere animal being. It redeemed him from being, at his best, a polished brute. It revealed to him his soul, and his destiny, and inspired his life by the knowledge of Eternity and the sense of immortality. It revealed a new order here and hereafter. As a new civilization its effect has not been upon the Christian alone. * * * It is abroad in the world to humanize all races and creeds. Christianity has its temporal as well as its eternal uses. It not only drew the veil from before eternal truth; it also revealed to man his own nature and relations in life, and founded the highest temporal philosophy. Philosophy has sometimes mistaken it for an enemy and wrestled with it. But whatever in philosophy found a real antagonist in Christianity has died the

death of error. True philosophy finds its surest ally in Christainity. True philosophy finds its surest foundation in revelation. Religious disbelief has no place in modern philosophy. Skepticism, not faith, is supersitition now. Christianity gave a soul to Philosophy that had no soul before."

This essay is an earnest plea for freedom of the individual soul in matters of faith and a protest against any attempt to fetter the operations of the mind. A few sentences will show its drift.

"Human enactments cannot control the operations of the mind. The soul is not the subject of legislation; opinion cannot be imposed by law. The law can operate on the external manifestations of the thoughts, passions and feelings, but it cannot operate on the thoughts, passions and feelings themselves. Punishment of thought may make cowards and apostates; it cannot make converts. Punishment affects us outwardly; reason, feeling and passion control us inwardly. The law may torture, deface or kill tbe body, it cannot imprison the mind. The soul is an outlaw. The spirit of man is inviolate. His mind is subject to no human authority. * * * For nineteen centuries it has been, and while time lasts it will be the most solemn right and duty of every intelligent man to study for himself after his ability the life and teachings of Christ, to adopt or reject up on his own conscience the faith of Christ; and adopting it to accomplish for himself, with the aid of all light cast upon it by the efforts of others, but in submission to Christ's word only, a comprehension of Christ's religion, and to determine for himself within and for his own conscience, how far historical Christianity has obeyed or rebelled against the very law of Christ himself."

The last of the essays upon religious subjects is entitled, "The Crucifixion," and is merely an unfinished fragment. It presents the crucifixion as the central fact of all human history. Let me quote a few characteristic sentences:

"Thus centrally and momentously in history stands the dread mystery of the crucifixion; the sacrifice of the incarnate Son of God to redeem man from sin and death. The imagination stands appalled before the cross. The soul pales, and the heart quivers to think of it. And yet we cannot choose but contemplate it. We cannot study the things of time or eternity without it. Turn

whither we may we meet the awful fact, and there is dread fascination in it. We cannot escape it. We all have a portion in it. Not Simon of Cyrene alone bore the cross of our Lord after him. Planted by God as the monument of our redemption, we look upon the cross with awe; but with reverence which is inseparable from awe we look into the gospel of the cross to study the crucifixion."

Enough has perhaps been said of the essays, although they present an inviting field for further consideration. On every page they glow with wisdom, wit and eloquence; but the preparation of essays and lectures did not form the business of Judge Ryan's life; he was a lawyer first, and to his chosen profession he gave the best efforts of his genius. The essays were but the diversions of his all-embracing intellect.

His address to the graduating law class of 1873 has already been mentioned. It is a legal and literary classic. There have been many such addresses made by distinguished men, but I have yet to read one which so completely fills the ideal as this one. It takes a lofty view of the law, and of the legal profession. It opens with the sentence, "Law in its highest sense is the will of God!" This is the keynote, and from this he deduces the proposition that lawyers and judges who perform their duty faithfully are in a true sense the ministers of God's justice.

"There it stands, the profession of the law; subrogated on earth for the angels who administer God's law in heaven; there it stands, charged with the peaceful protection of every public right of the state, of every civil and religious right of the people of the state; charged with the security and order of society. In peace the life, liberty and property of the country, its personal freedom and its political symmetry are in its ultimate keeping."

I think this address may well be called Judge Ryan's literary masterpiece. Its loftiness of thought is only equaled by the magnificience of its rhetoric. It abounds in brilliant epigram; satire sparkles on its pages like priceless jewels

in a kingly crown. Witness his characterization of the pettifogger, a part of which I quote:

"Behold the pettifogger, the blackleg of the law. He is as his name imports, a stirrer up of small litigation, a wetnurse of trifling grievances and quarrels. He sometimes emerges from professional obscurity, and is charged with business which is disreputable only through his own tortuous devices. For the vermin cannot forego his instincts even among his betters. * * * Indeed he is the troglodyte of the law. He has great cunning, he mistakes it for intelligence. * * * He knows all things. Nothing is new to him. Nothing surprises him. Nothing puzzles him. But it is in the law that his omniscience shows best. His talk is of law incessantly. He has a chronic flux of law among his followers. He prates law mercilessly to everyone except lawyers. He discourses of his practice and his success to the janitor of his office, and the charwoman who washes his windows. He revels in demonstrative absurdity, and boasts of all he never did. He is the guide, philosopher and friend of vicious ignorance. He is the oracle of dullness. * * * There is a variety of the animal known by the classic name of shyster. He has forced the word into at least one dictionary, and I may use it without offense. This is a still lower specimen; the pettifogger pettifogged upon; a troglodyte who penetrates still deeper darkness. * * * He thinks all lawyers are as he, but not so smart. He believes in the integrity of no man, in the virtue of no woman. He loves vice better than virtue. He enjoys darkness rather than light. His habits of life lead him to the back lanes and dark ways of the world. He is the counsel of guilt. He is the attorney general of crime."

No young lawyer should consider himself ready to practice until he has read this address. No law library should be considered complete which does not contain it. In these days of commercialism in the law it would be well if its lofty sentiments could be printed in letters of gold upon the doorposts of every law school in the land.

As has been before said, Mr. Ryan was a delegate from Racine to the first constitutional convention, which assembled in Madison in 1846. This may be said to have been his introduction to the people of the young state. Few knew

him or appreciated his abilities when the convention opened, but none of his colleagues doubted his great powers as a debater and a lawyer when it closed. He was chairman of the Committee on Banking, and took strong ground against banks of issue, as well as against the granting of banking powers to corporations; he also strongly opposed an elective judiciary on the ground that the terms of office of judges should be permanent. The constitution proposed by the convention was rejected by the people largely on account of its restrictions upon banks. He was a delegate to the Democratic National Convention held in Baltimore in 1848, and removed to Milwaukee in December of that year. Here he soon attained that prominence as a lawyer which his abilities deserved, and his services were sought after in many important causes. Among these were a number of notable criminal cases, of which the Radcliffe murder case of 1852 was perhaps the most celebrated one. In this case he appeared for the prosecution with Mr. A. R. R. Butler. Upon the defense there appeared Jonathan E. Arnold and Abram D. Smith. It was a veritable battle of the giants, for the four men named were all in the very first rank of the Wisconsin bar. The trial lasted for more than two weeks, and attracted great crowds, so much so that when the evidence had been taken the court adjourned to a large public hall in order to accommodate the desire of the people to hear the great forensic duel. It was perhaps the greatest opportunity that Ryan had then had to demonstrate his power, and he did not fail to take advantage of it. A few sentences from his address to the jury will serve to give an idea of its lofty tone:

"Life is the gift of God, yet one which any however weak may take away, but which not the united power of all men in all countries and of all times can restore. * * * It is not that we crave for the defendant's blood that we stand here. We pity

him. God knows that we pity him, and those that are connected with him. But we stand here for the blood of the living. It is not for the blood of Ross, but for the blood of every one in this hall and in this community; it is for the blood of those yet unborn, and of all who are to live after us; it is that murder may cease, that men may reflect, pause, turn cowards before they strike down their fellowmen; it is because the law of God and the law of man, and the safety and existence of society demand it, that we stand here and urge upon you the conviction of this defendant."

Notwithstanding a very strong array of circumstantial evidence (for none had seen the act), the defendant was acquitted. Judge Levi Hubbell, then Circuit Judge, and ex-officio a member of the Supreme Court, was on the bench, and so convinced was he of Radcliffe's guilt that when the verdict of acquittal was rendered, he asked the foreman in surprise, "Is that your verdict." "It is," said the foreman. "Then may God have mercy on your consciences," said the Judge. This incautious remark of Judge Hubbell cut deeply, and one of the jurymen, William K. Wilson, appeared before the legislature on the 26th of January, 1853, and demanded the impeachment of Judge Hubbell, charging him with numerous acts of official misconduct upon the bench. Thus was initiated the first and (up to the present time) the last impeachment trial which the State has witnessed. Here, too, Judge Ryan was the leading figure, here at last he stepped fully and fairly into the greatest forum of the State, where every eye was turned upon him, where party passions and personal hatreds were turned loose, and where not the future alone, but the distinguished past, as well of one of the State's most honored sons hung trembling in the balance. Judge Hubbell was an ambitious and able man. He was a Democrat in politics, and that party was then in control; he was courteous and dignified in manner, of great industry and prompt in the despatch of business. Inspired

by the sense of personal wrong, Wilson ran down every wandering rumor, and presented to the Assembly a long array of charges and specifications covering almost every phase of judicial misconduct. The Assembly resolved to report articles of impeachment, and appointed as managers of the prosecution Messrs. H. T. Sanders, G. W. Cate, J. Allen Barber, P. B. Simpson, and E. Wheeler. The managers employed Mr. Ryan to conduct the case, and upon him fell the brunt of the battle. His opening argument was made on June 13, 1853, and the trial continued until July 11th of the same year. The testimony was voluminous and the legal questions arising were many and intricate, but he met all the questions, whether of fact or law with a quickness of mental discernment, a brilliancy of rhetoric and a wealth of learning which amazed his friends as well as his enemies. Wit and satire sparkled in his speech, apt quotations and allusion added splendor to his diction, while ever and anon merciless invective gleamed like the fabled sword Excalibur.

He had need of all his talents, for opposed to him was Jonathan E. Arnold, his antagonist in the Radcliffe case, one of the ablest lawyers who ever graced the bar of the State. The result was an acquittal upon all of the charges. Upon most of the specifications the majority for acquittal was large, but upon one the vote stood twelve for conviction and twelve for acquittal. It is impossible to give extended extracts from the many addresses made by Judge Ryan during the course of this trial, nor even any adequate resume. It was reported in shorthand, and fills a volume of more than eight hundred pages, copies of which are now quite rare. The criticism (and perhaps the only criticism) to be made upon the conduct of the case is that the charges were pressed with a vehemence amounting almost to extrava-

gance, and this fact must have gone far to create sympathy for the accused. A single extract from his peroration will perhaps serve to demonstrate all I have said as to the strength of his diction, as well as to the scathing power of his invective.

"It is a habit in many of the states to place a statue of justice upon their courthouses and capitols. It is well, Mr. President, that no such statue adorns the dome of this capitol, before the judgment in this cause shall have settled the standard of public justice in this State. If by your judgment this defendant is to be the model of judicial integrity, let the statue of justice be ordered for your Capitol. But be true to your standard. Follow no false precedents. It is the habit to represent Justice as a pure, young and beautiful maiden, chastely and modestly robed, with her eyes blindfolded, with her virgin hand holding out the pure scales of Justice, suspended and poised in the open light of day before the world. That has been the sculptor's dream of justice, sanctioned by the nations of the earth. But with a new standard, follow no old precedents. Ask your sculptor for no pure, blinded virgin as your ideal of justice. Tell him to erect upon the dome of this Capitol the marble image of a jaded, decayed, broken, unclean, diseased wanton, blinking from behind the distorted bandage put upon her eyes to dupe the scruples of mankind, and reaching forth the hand which has dropped the sword of justice, to put the weight of avarice and lust and every unclean passion into the scales to bear down truth and right."

The *Booth* case and the *Bashford* case followed the *Hubbell* impeachment in rapid succession, and in both of these thrilling and important controversies Mr. Ryan took a leading part as we have already seen. Notwithstanding his commanding abilities, however, his infirmities of temper had stood in the way of his success in the ordinary practice of the law, and for two or three years before his elevation to the Supreme Bench he had been glad to accept the position of City Attorney of the city of Milwaukee.

EDWARD GEORGE RYAN.
At the age of 45 years.

CHAPTER XXVI

NOTABLE OPINIONS OF JUDGE RYAN

The first case which came before the newly constituted bench was not only a great one, but one which may truly be said to mark the beginning (in Wisconsin) of the great struggle between corporate power and privilege on the one hand, and the people on the other.

The day of the little railroad of a hundred miles or more in length, operating one or two daily trains and doing a small business local in its character, had gone; the great railroad corporation, operating thousands of miles of road, doing an interstate business amounting to many millions annually, and attempting perhaps to pay dividends on fabulous amounts of watered stock, had come, and the people had begun to realize the changed conditions.

Two really great railway corporations were then operating in Wisconsin, namely, the Chicago, Milwaukee and St. Paul, and the Chicago and Northwestern companies. Between them, they covered practically the whole state, but their termini were in adjoining states and their interests were largely foreign. They had generous charters which clothed them with full powers to regulate freight rates and passenger fares as they chose. By means of this power they could either make or break a given community or locality by the single stroke of a pen as whim or interest might dictate. The long tilled fields of Wisconsin had now begun to come into competition with the virgin acres of Minnesota and Dakota, which were almost boundless in their fertility, and it required but slight discrimination on the part

of the railroads to put the Wisconsin shipper at a great disadvantage in the race with his more favored western brother.

The cry that railroad freight rates were exorbitant, arbitrary, and discriminative became a very loud one. It was taken up by the Patrons of Husbandry, a national organization of farmers, commonly called the "grangers," which now had become a great power in the west, and in the fall of 1873 the long rule of the Republican party was broken by the election of William R. Taylor, the Democratic, or "reform" candidate, as governor, and a legislature which may be properly called the first distinctively anti-railroad legislature in Wisconsin.

In the senate there were seventeen Republicans and an opposition of sixteen senators, made up of Democrats, liberal (anti-Grant) Republicans and so-called reformers; in the assembly there were forty-one Republicans and fifty-nine opposition members of various brands; but there was a clear majority in both houses in favor of railroad rate regulation.

An act fixing maximum freight rates and passenger fares to be charged by the railroads of the state, and providing penalties for disobedience, popularly known as the "Potter law" (because introduced by Robert L. D. Potter, a Republican senator from Waushara County), was promptly passed and approved by Governor Taylor. It was one of the very first laws which attempted to fix railroad rates, and was brief but quite comprehensive. It divided the railroads of the state into three classes, according to volume of business, fixed maximum passenger rates per mile for each class, and then divided freights into special classes, and fixed maximum rates to be charged for the transportation of each class. It also created a railroad commission, composed of

three members, and gave this commission power to investigate into the actual cost of the roads, their gross and net receipts and indebtedness, and to reduce the freight rates fixed by the law when it could be done without injury to the road. The law went into effect in April, 1874, but was absolutely disregarded by the great railroad companies, who took the ground that their charters formed inviolable contracts with the state, and gave them power to fix freight rates as they chose, with which power the legislature could not interfere.

Early in July, 1874, Hon. A. Scott Sloan, then Attorney General of the State, filed informations in the Supreme Court, and moved for writs of injunction against both of the great railway corporations already named to restrain them from charging greater passenger and freight rates than were permitted by the act. With the Attorney General in this litigation were associated I. C. Sloan, his brother, Harlow S. Orton and ex-Chief Justice Dixon, all great lawyers; for the Northwestern Company, C. B. Lawrence and B. C. Cook of Chicago and George B. Smith of Madison appeared, and for the St. Paul Company, John W. Cary of Milwaukee and Phillip L. Spooner of Madison.

The motions were argued together in August, 1874, the arguments occupying nearly or quite a week. Before the question of the power of the legislature to regulate rates could be taken up two preliminary questions had to be considered, namely, the extent of the original jurisdiction of the Supreme Court, and whether it covered such a case, and the further question whether the constitution makers, when they named the writ of injunction in connection with the strictly prerogative writs like mandamus and *habeas corpus* in the last clause of Section 3 of Art. VII of the constitution, intended to raise it to the character and give it the functions

of a prerogative writ, or intended to leave it simply a judicial writ or order issued in aid of a judgment, either interlocutory or final. The case was worthy of the Court which heard it, and of the eminent counsel who argued it.

It was decided September 15, 1874, and the state was successful on all points raised.[1] Not only was the original jurisdiction of the Court sustained on the ground that the question was one affecting the sovereignty of the state, its franchises and prerogatives, but the power of the legislature, by virtue of that clause of the constitution reserving the right to alter or repeal corporate charters,[2] to control its corporate creations by reasonable regulations not confiscatory in their effect was fully vindicated.

The opinion was written by Chief Justice Ryan, and probably it is his greatest. The case has passed into the books as a leading case. It was the first case to mark out with precision the previously ill-defined field of the original jurisdiction of the Supreme Court, and it also was a pioneer case in vindication of the legislative power of control over corporations. It has been cited with approval in fifteen states, as well as in the federal courts. Had Chief Justice Ryan written no other opinion than this, his high rank as a jurist would still have been secure.

All the questions raised are treated in a style which betrays not only the master hand of the learned lawyer, but the lucidity and eloquence of the great orator. The opinion was read at length from the bench by the Chief Justice, a proceeding which was very unusual in the Court, and consumed nearly or quite an entire session. It left no substantial question undecided, and in fact terminated the entire litigation. The railroad companies recognized the futility

[1] Att'y Gen. vs. Ry. Co's. 35 Wis. 425.

[2] Const. Wis. Sec. 1, Art. XI.

of further litigation and concluded to obey the law while it existed; reserving to themselves the right to take measures to secure a legislature which would repeal the law, in which they succeeded two years later. The times were not yet ripe for efficient railway regulation; the Potter law was ahead of its time, but it and the decision under it remained as landmarks, by the aid of which a later generation reached effective results.

It would be impossible to give any adequate idea of the opinion by isolated extracts, but a quotation or two may not be out of the way. In discussing the remedy by injunction, after noting the marvellous growth in wealth and power of modern corporations, he says:

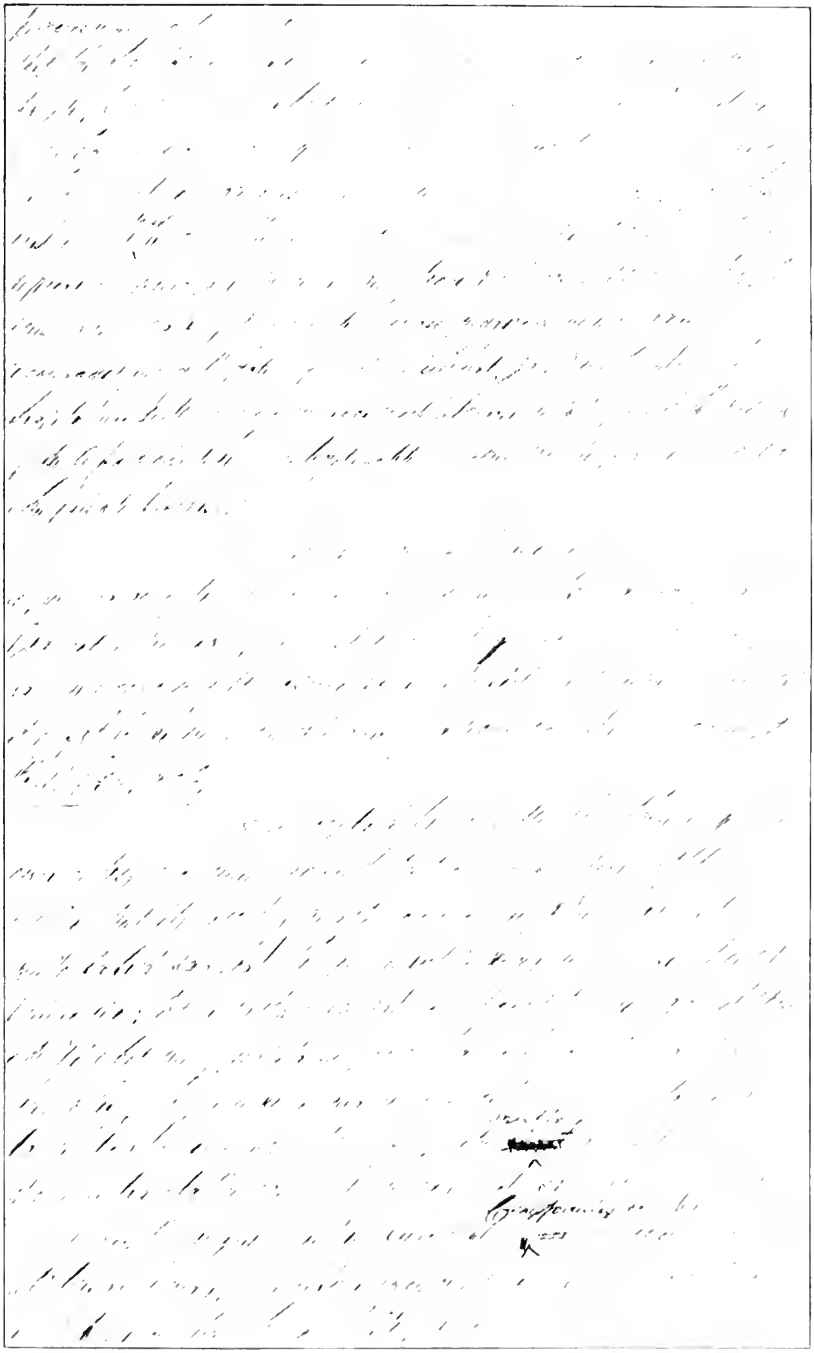
"It would have been a mockery of justice to have left corporations, counting their capital by millions, their lines of railroads by hundreds and even sometimes by thousands of miles, their servants by multitudes, their customers by the active members of society, subject only to the common law liabilities and remedies which were adequate protection against turnpike and bridge and ferry companies in one view of their relations to the public; and in another view to the same liabilities and remedies which were found sufficient for common carriers who carried passengers by a daily line of stages and goods by a weekly wagon, or both by a few coasting or inland craft, with capital and influence often less than those of a prosperous village shopkeeper. The common law remedies, sufficient against these were, in a great degree, impotent against the great railway companies, always too powerful for private right, often too powerful for their own good. It was in these circumstances that the English courts of equity applied their restraining jurisdiction at public or private suit, and laid on these great companies the strong hand of equitable control. And all England had occasion to bless the courage and integrity of her great judges who used so ably and so freely and so beneficially the equity writ, and held great corporations to strict regard to public and private right. Every person suffering, or about to suffer their oppression by a disregard of corporate duty may have his injunction. When their oppression becomes public, it is the duty of the attorney general to apply for the writ on behalf of the public."

The general claim made by the railroad companies that the act of the legislature was confiscatory and violates the rights of creditors of the companies, he answers as follows:

"Of the same type is the argument that ch. 273 violates the contracts of these defendants with their creditors. This position appears to us to rest in the absurdity that the mortgagor can vest in his mortgagee a greater estate than he had himself. Perhaps the statute may lessen the means of payment of the defendants. So would a fine for homicide, under the police power of the state. But to lessen the means of payment of a contract, is not to impair the obligation of the contract. These defendants took their franchises, and their creditors invested their money, subject to the reserved power, and suffer no legal wrong when that is exercised.

"It was said that ch. 273 violates the rights of property of these defendants. We cannot perceive that it does. Whether it will lessen the income of their property, we cannot foresee. We only know that it does lessen their rates of toll. But it does not wrongfully touch their property. As far as the franchise is to be considered property, it was subject to this very limitation; and the limitation is the exercise of a right over it, which does not violate. The right of limitation entered into the property and qualified it. And the act does not at all meddle with tho material property, distinct from the franchise. It acts only on the franchise, not at all upon the material property. And it is sufficient to say that they acquired the material property, as distinct from the franchise, subject to the alteration of the franchise under the reserved power. That was a condition under which they chose to hold their property; and they have no right to complain when the condition is enforced. Their rights in their material property are inviolate, and shall never be violated with the sanction of this court. But they are no more violated by this act and its enforcement, than by foreclosure of a mortgage or ejectment by paramount title. It is a right over property which is enjoyed, not a wrong to right in property.

"We listened to a good deal of denunciation of chapter 273, which we think was misapplied. We do not mean to say that the act is not open to criticism. We only say that such criticism is unfounded. It was said that its provisions, which have been noticed, were not within the scope of the legislative function; as if every compilation of statutes, everywhere, in all time, did not contain provisions limiting and regulating tolls; as if the very franchise altered were not a rebuke to such clamor



Reduced facsimile of a page from the manuscript opinion of Judge Ryan in the Railroad Cases, 35 Wis. 125.

It was repeated, with a singular confusion of ideas and a singular perversion of terms, that the provisions of the chapter amount to an act of confiscation; a well defined term in the law signifying the appropriation by the state to itself, for its own use, as upon forfeiture, of the whole thing confiscated. It was denounced as an act of communism. We thank God that communism is a foreign abomination, without recognition or sympathy here. The people of Wisconsin are too intelligent, too staid, too just, too busy, too prosperous, for any such horror of doctrine; for any learning towards confiscation or communism. And these wild terms are as applicable to a statute limiting the rates of toll on railroads, as the term murder is to the surgeon's wholesome use of the knife, to save life, not to take it. Such objections do not rise to the dignity of argument. They belong to that order of grumbling against legal duty and legal liability, which would rail the seal from off the bond. They were not worthy of the able and learned counsel who repeated them, and are hardly worthy even of this notice in a judicial opinion.

"We have, according to our duty, dealt with the questions we have considered as questions of law. We cannot judge of the policy or of the fairness of the fact. That is for the legislature. We can only say that it is the law. We cannot judge of the propriety of these informations. That is for the law officers of the state. We are only to determine what the law is, and to administer it as we find it, in causes over which we have no other control. And we can join in no outcry against the law, which it is our duty to administer. Neither can we countenance any outcry against the railroads. We cannot consider any popular excitement against them warranted or useful. The railroads have their rights, and so have the people. Whatever usurpation or abuses, if any, the railroad companies may be guilty of, can find a remedy in calm, just, appropriate legislation. And this court will firmly and impartially protect all the rights of the railroads and of the people, in all litigation which may come here. But we can take no part in popular outcry against these companies, or countenance any prejudice against them."

The question as to the extent of the original jurisdiction of the Supreme Court was further elaborated by Chief Justice Ryan in the case of *Attorney General v. Eau Claire*,[3] which arose at the January term, 1875, and the treatment

[3] 37 Wis. 400.

of it there is so full and satisfactory that it has served to settle and define that jurisdiction ever since. That treatment is as follows:

"It is not enough to put in motion the original jurisdiction of this court, that the question is *publici juris;* it should be a question *quod ad statum reipublicae pertinet;* one 'affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.' *Att'y Gen. v. R. R. Companies*, 35 Wis. 425.

"It was repeated in that case, as it had been held in *Att'y Gen. v. Blossom*, 1 Wis. 317, that 'this court takes the prerogative writs, for prerogative jurisdiction, with power to put them only to prerogative uses proper.' Prerogative writs often go in aid of private right or of local public right. But the original jurisdiction of this court is not only limited to the prerogative writs, but it is confined to prerogative causes. The word properly implies sovereign right. Jacob defines it as 'that power, pre-eminence or privilege which the king hath and claimeth over and beyond other persons, and above the ordinary course of the common law, in right of his crown.' And so we find the object of the prerogative jurisdiction of this court declared in *Att'y Gen. v. Blossom:* 'Contingencies might arise, where in the prerogatives and franchises of the state, in its sovereign character, might require the interposition of the highest judicial tribunal to preserve them.' And though the question did not arise in the case, it is quite evident from all that has any bearing on it in *Att'y Gen. v. R. R. Companies*, that to bring a case properly within the original jurisdiction of this court, it should involve, in some way, the general interest of the state at large. It is very true that the whole state has an interest in the good administration of every municipality; so it has in the well doing of every citizen. Cases may arise, to apply the words of C. J. Stow, geographically local, politically not local; local in conditions, but directly affecting the state at large. Cases may occur is which the good government of a public corporation, or the proper exercise of the franchise of a private corporation, or the security of an individual, may concern the prerogatives of the state. The state lends the aid of its prerogative writs to public and private corporations and to citizens in all proper cases. But it would be straining and distorting the notion of prerogative jurisdiction to apply it to every case of personal, corporate or local right, where a prerogative writ happens to afford an appropriate remedy. To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or

remote; peculiar perhaps to some subdivision of the state, but affecting the state at large, in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state, in its sovereign character; this court judging of the contingency, in each case, for itself. For all else, though raising questions *publici juris*, ordinary remedies and ordinary jurisdictions are adequate. And only when, for some peculiar cause, these are inadequate, will the original jurisdiction of this court be exercised for protection of merely private or merely local rights."

The case of *State ex rel. Drake v. Doyle*,[4] arising in 1876 was in some respects quite as important as the railroad cases. It involved the power of the state to impose conditions upon foreign corporations desiring to transact business in this state, and seemed to involve also a direct conflict with a decision previously made by the Supreme Court of the United States. It arose in this wise: by chapter 56 of the laws of 1870 the legislature of Wisconsin had provided that a foreign insurance company might be licensed to do business in this state upon filing with the secretary of state documents, among which was an agreement not to remove any actions brought against it to the United States courts. The Home Insurance Company of New York had filed the agreement and received its license, and then when suit was brought against it in the state court had petitioned that court to remove the case to the United States court, under the act of Congress providing for such removal. The court denied the petition, tried the case and rendered judgment for the plaintiff, and the Supreme Court of Wisconsin on appeal affirmed the judgment in an opinion by Chief Justice Dixon, on the ground that it was perfectly competent for the insurance company to waive its right of removal, and that the courts would enforce its agreement to that effect.[5]

[4] 40 Wis. 175.

[5] Morse v. Ins. Co. 30 Wis. 496.

This case went to the Supreme Court of the United States, and the judgment was reversed by a divided court, the majority holding that the statute was an obstruction to the right of a citizen of another state to remove a case to the United States Courts guaranteed by the federal constitution, and hence void.[6] In 1872, by chapter 64 of the same laws of that year, the legislature of Wisconsin passed another act providing that if any foreign insurance company made a petition to remove an action pending against it to the United States Court, its license to do business in this state should be immediately revoked by the secretary of state. Action having been brought in the state court against the Continental Insurance Company of New York, it made its petition for removal to the United States Court, and the case was removed. Thereupon a private citizen applied to the Supreme Court of this state for a writ of mandamus, compelling the secretary of state to revoke the license of the company for this violation of its agreement. At first blush it would seem that the case of *Insurance Co. v. Morse* was decisive on the question, but the court held in a very learned and persuasive opinion by the Chief Justice that the case was not decided by the *Morse* case, and that the state, having power to entirely exclude foreign corporations, had necessarily power to license them to enter the state, upon condition of their forbearing to exercise a right and revoke that license upon their attempting to exercise it. The importance of the case and the gravity of the situation was fully recognized, but there was no attempt to gloss over or evade the points involved. The opinion was an unanswerable argument based upon decisions rendered by the Supreme Court of the United States itself. Of course, the case was at once taken to the Supreme Court of the United States

[6] Insurance Co. v. Morse, 20 Wall. 445.

and that Court, while announcing that the *Morse* case was not overruled, in fact receded from the position taken in that case, and affirmed the judgment of the Supreme Court of Wisconsin. The result was not only a victory for the state, vindicating its right of effective control over foreign corporations, but also a rare tribute by the greatest judicial tribunal of the nation to the reasoning powers of Chief Justice Ryan.

Great constitutional cases are, however, not very frequent even in courts of last resort. The great mass of litigation concerns merely private rights, and requires the application of very ordinary legal principles; it gives neither opportunity nor excuse for bursts of eloquence. The desideratum in such cases is a clear and accurate statement of legal principles, and a logical demonstration of their application in the case in hand, rather than a display of rhetoric. Yet even in such cases it must be admitted that fitting language and faultless diction add materially to the strength and convincing character of the opinion.

A few extracts will show that Jude Ryan was not lacking in this regard. Thus in the *Craker* case[7] commonly known as the "Kissing case," where a young lady passenger on an accommodation train was forcibly kissed by the conductor, and sued the railway company for damages, the following very conclusive argument occurs in the opinion of the Chief Justice. After noting the argument made by the railway company that it might have been liable had the young lady not been protected by the conductor from assault by a third person, but was not liable when its own employee made the assault, he says:

"It is contended, * * * as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep

[7] Craker v. C. & N. W. Ry. 36 Wis. 657.

while the wolf makes way with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is that it limits the contract. The carriers' contract is to protect the passenger against all the world; the appellant's construction is that it was to protect the passenger against all the world except the conductor, whom it appointed to protect her, reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity."

In *Wight v. Rindskopf*,[8] where the question was whether services rendered by a lawyer in endeavoring to influence a public prosecutor, so that the client might escape with a minimum punishment could be recovered for as legal services, it was held that such a contract was against public policy and sound morals, and could not be the basis of a contract to pay for them; in the opinion it is said:

"The profession of the law is not one of indirection, circumvention or intrigue. It is the function of the profession to promote, not to obstruct the administration of justice. In litigation a lawyer becomes the *alter ego* of his client; and professional retainer rests in absolute and sacred confidence. But the duty imposed by professional retainer is direct and open. Professional function is exercised in the sight of the world. Professional learning and skill are the only true professional strength. Forensic ability is the only true professional influence on the course of justice. Private preparation goes to this only as sharpening the sword goes to battle. Professional weapons are wielded only in open contest. No weapon is professional which strikes in the dark. The work of the profession is essentially open, because it is essentially moral. No retainer in wrong is professional. A lawyer may devote himself professionally to the legitimate business of his client, but he cannot be retained in what may not be rightfully and lawfully done. He may defend a wrong done in the past, but he cannot be privy to the doing a wrong in the present. The profession is not sinless, but its sins are all unprofessional. When a member of the bar is privy to the wrongdoing of his client, he is his client's accomplice, not his lawyer."

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[8] 43 Wis. 344.

A divorce action in 1875,[9] afforded opportunity for an eloquent tribute to Christian marriage, which is well worth reading; it runs as follows:

"It was argued that a statute providing for the support of the wife by the husband, after divorce *a vinculis*, is a hard statute, which should be strictly construed. It was urged that in such a case the husband and wife are strangers; as merely so, as if they had not been married; and that calling upon a divorced husband to support his divorced wife, out of his subsequent estate, is calling upon him to support a person standing in no relation to him, having no moral claim upon him. We cannot assent to such a view, or even appear to sanction it by silence. Without considering the moral effect on society of the easy rule of divorce current in our day, we take occasion to say that there are things too sacred and too steadfast in nature, for any statute, or any judgment under a statute, to affect. Judgment of divorce can sever the legal bond of marriage, but it cannot undo the natural relation which husband and wife bear to each other and to their children, cannot help but bear, and must bear always. Statutes and judgments may control the future, but cannot cancel the past; may solve social, but cannot annul natural relations. Marriage was before human law, and exists by higher and holier authority—the Divine Order, which we call the law of nature. The law and the judgment of the law of the land may separate husband and wife, and set them legally free; but law or judgment cannot obliterate their cohabitation in marriage, or the natural and indelible relation which cohabitation in marriage fixes on them forever. It is shocking to the moral sense of mankind to reduce the natural correlation of man and woman in marriage, to a mere partnership of sex, absolutely effaced and undone by dissolution. The natural tie of marriage is beyond the jurisdiction of divorce; as essentially without the power of the law, as the natural relation of parent and child. The power of the law, over either, is limited to legal relations. It may attaint the heritable quality of blood, but cannot corrupt the natural blood. And the law which is impotent to estrange the mutual blood of husband and wife in the bodies of their children, cannot estrange the mutual bodies from whose union the children spring. The natural seal of affinity is upon them. They can never again be mere strangers on earth. The intercourse appearing in this record between these unhappy parties, during their nine years of

[9] Campbell v. Campbell, 37 Wis. 206.

legal alienation, proves that they are not strangers; that there is a tie between them, a privity of life, an affinity of being, as enduring in hate as in love, in disjunction as in cohabitation; which survives in their child, and would survive their child in themselves, as long as both should live; which God will not and man cannot dissolve, until death shall part them.

"*Naturam expellas furca; tamen usque recurret,*
Et male perrumpet furtim fastidia victrix."

Sometimes, though rarely, a play of wit lightens the opinion, as in the case of *Vassau v. Thompson,*[10] where a man was sued because his dog worried a cow to death by chasing it. It seemed that the master was not present, but had been accustomed to set the dog upon cows on other occasions. In a dissenting opinion in this case, the Chief Justice says:

"The subject of the complaint is a dog and a cow, hereditary enemies since the days of the House that Jack built. But in this case it was the dog that killed the cow. * * * It would be a violent and irrational presumption that either human or brute servant, trained to a particular vice by a master whom he loves and reverences would never indulge in the vice for his own gratification without orders. Habit becomes a second nature, and this dog presumably acquired a personal taste for oxtail."

When the conduct of client or counsel called for rebuke, he was apt to administer it in scathing language, yet he could be gentle, as the following instance demonstrates. An eminent lawyer of Milwaukee when defeated in an important case, made a motion for rehearing, and opened his brief with the following sentence:

"The series of misfortunes which I have latterly met with at the hands of this court has shaken my confidence in the result of any effort I may make to convince the Court, or to obtain its favorable judgment in any case where a serious contest is possible."

After quoting this sentence, the Chief Justice says:

"The fact may be as stated, though the late volumes of reports do not quite appear to verify it. But the suggestion is not fair,

[10] 46 Wis. 345.

either towards the learned counsel himself or toward the court. For it may be an imputation of failure in the intelligent discharge of duty equally to either. It does not seem to have occurred to the learned counsel that the misfortune of which he complains may be attributable to his clients, or to the work which they give him to do. A great judge once said that great lawyers were frequently unsuccessful for the reason that, being generally expensive luxuries, they are apt to be employed only in desperate cases. This may be the occasion of the learned counsel's complaint, and his consolation."

Extracts from his opinions might be multiplied almost indefinitely to show how he illumined every legal question which he discussed, but the proper limitations of this work seem to forbid. Singularly enough, his opinions may be searched almost, if not quite, in vain for any examples of the vehement language or extravagant statement which were so frequent with him as an advocate, and this notwithstanding the fact that his health was shattered by disease. Either his elevation to the Supreme Bench had sobered him, or his exalted ideas of the proper functions of a judge had made him more careful and considerate.

Chief Justice Cole has borne testimony to the fact that in the consultation room he was uniformly courteous to his associates, always the calm dignified judge, freely expressing views and discussing all questions of law and fact with the manifest desire of reaching the right result. The truth of this statement seems to be borne out by the character of his opinions. Ex-Senator Vilas says of them:

"His opinions were not only profound, but profoundly beautiful in every circumstance which excites the admiration of a lawyer. It is matter of no wonder that a great university of the land has chosen them for recommendation to students of law, as models of the purity, beauty and strength of the English tongue. They will carry his name with growing honor to generations of students and lawyers yet unborn."

CHAPTER XXVII

ENLARGEMENT OF THE BENCH—JUSTICES ORTON AND TAYLOR

The business of the Court, which had been rapidly increasing before Judge Dixon's resignation, continued to increase after Judge Ryan's appointment with accelerated speed. The flood of personal injury litigation had begun to come and was to increase for many years. There were no stenographers, typewriters, or even copyists. Each judge wrote and copied his opinions in longhand. The purely clerical work was necessarily very tedious in addition to the heavy judicial labor. Judge Ryan's health was bad and his temper worse. While on the bench or in the consultation room he was the courteous, dignified and able judge, as we know from Judge Cole's testimony, but there his courtesy to his colleagues practically ceased. For weeks at a time he would not speak to them when he met them outside of the court room or consultation room. When they deemed it necessary to increase the number of cases upon an assignment from fifteen to twenty-five in order to keep up with the business and clear the annual calendars, he strenuously objected, and charged them with deliberately desiring to kill him with labor. When fifteen cases had been argued, he would leave the bench and take no part in the balance. He even went so far as to urge his friends to try and secure the passage of a law making the opinion of the Chief Justice preponderating and decisive on all questions.

These harassing circumstances, combined with the unremitting and strenuous intellectual toil of the bench, were

enough to wear upon the nerves of the strongest man. Judge Lyon, however, was happily endowed with an even temper, and he and Judge Cole calmly performed their multiplying duties without complaint.

An instance of the kind of difficulties which these two men had to meet during these years was related to the writer by Judge Lyon many years after, and may, with no breach of propriety, be repeated here. Judge Ryan had at one time a great grievance against John Bascom, the great president of the University of Wisconsin. Both men were great intellectually, but their viewpoints were radically different. If anyone attacked the bench or bar, Judge Ryan was ready to take up arms in defense of the profession immediately. In a baccalaureate sermon preached at the University (I think in 1876 or 1877), President Bascom made some strong comments upon the corruption of the bench, as shown by the then recent disclosures concerning Judges Barnard and Cardozo in New York. Judge Ryan took the remarks as a denunciation of the bench in general, and his indignation took fire at once, and he determined to make a scathing reply at the time of the admission to the bar of the graduates of the law school a few days later. This reply he prepared and in it used his great powers of sarcasm and invective remorselessly, and with telling effect. On reading it to Judges Cole and Lyon and informing them of his intention, they insisted that it should not be read in court. Judge Ryan stormed and insisted that he would read it despite their protests. They told him that if he commenced to read it they would direct the crier to adjourn court, and would quit the bench, thus leaving him without a quorum. Judge Lyon was a man who would go far to avoid an unpleasant clash, but if he was convinced that duty required him to take a given course bluster and threats had no effect

upon him. Judge Ryan had undoubtedly become aware of this fact; he was very angry and none knew what he would do, but when the day came he had evidently realized the futility of his intended action and did not attempt to read the paper. It was preserved, as I understand, and is still in existence, and is said to be a literary masterpiece.

It was becoming more apparent every year that the bench must be enlarged or it would be overwhelmed with labor, and in November, 1877, a constitutional amendment was ratified by the people, increasing the number of judges upon the Supreme bench from three to five, and fixing the length of their terms at ten years instead of six.

In the winter of 1878 legislative caucuses were held by both parties, and finally it was arranged that David Taylor of Fond du Lac, a Republican, and Harlow S. Orton of Madison, a Democrat, should stand together as non-partisan candidates for the two new places on the bench. The arrangement was unanimously ratified by the people, and the two men were elected without opposition early in April, 1878, and commenced their duties on the eighteenth of the same month.

They were each sixty years of age, but both were men of strong physique and both had been lawyers of the highest standing in the state for many years. It may well be imagined that their coming was hailed with unfeigned relief by the two judges who had been carrying so heavy a load for years.

This increase in the number of judges greatly minimized the embarrassment resulting from Judge Ryan's uncertainties of health and temper, and from this time forward the business of the Court, though large in volume, was carried on with comparative ease.

From the very earliest days of the state Harlow S. Orton had been a commanding figure, both at the bar and upon the political rostrum. He had held his own in intellectual, legal and forensic combats with such men as Ryan, Whiton, Arnold, the two Strongs, John W. Cary, Matt. H. Carpenter, and with practically all of the legal giants of that period. There was no question as to his abilities, although, as in the case of Ryan, there was some doubt whether they were of the highest judicial quality. His lifelong friend and long time partner in the profession, Judge E. W. Keyes, gave the following brief summary of his life and estimate of his character at the time of the presentation of the memorial of the bar to the Supreme Court after Judge Orton's death in 1895:[1]

"Judge Orton was born in Niagara County, New York, November 23, 1817. His father, Harlow N. Orton, M. D., was a native of Vermont, and his mother, Grace Orton, *nee* Marsh, was born in Connecticut. His paternal ancestors migrated from England in the middle of the 18th century, and his maternal progenitors were of the early Puritans of New England. The members of both branches of the family were enlisted in the service of the Revolutionary war. Both of his grandfathers were Baptist clergymen, who shouldered muskets and fought for liberty and independence.

"Judge Orton was educated first at the common schools, and later at the Hamilton academy and Madison University in his native state, receiving at the latter institution his degree of graduation. Upon leaving the university he became a school teacher in Kentucky, and while thus engaged, in 1837, he began the study of law. In the same year he left Kentucky to join his brother, Myron H. Orton, late of this city, but now deceased, who was then practicing law in La Porte, Indiana. At this place, in 1838, he was admitted to the bar, and began to practice in the northern Indiana circuit. He became deeply interested in the political campaign of the year 1840, and he was enlisted into the service as a speaker in several of the states of the Union, making

[1] 90 Wis. p. xxxii.

nearly one hundred speeches advocating the election of General Harrison. In 1843 he was appointed probate judge of Porter county by the governor of Indiana. In 1847 he moved to the territory of Wisconsin, and commenced the practice of law in Milwaukee.

"In 1852 he became private secretary and legal adviser of Governor L. J. Farwell, and moved to Madison, his last residence. In 1854 he represented the Madison district in the assembly of the state. In 1859 he was elected judge of the Ninth judicial circuit, and re-elected without opposition. He resigned that office in 1865 and resumed the general practice of his profession. In 1869 he was again elected to the legislature, and was re-elected in 1871. In 1876 he was the candidate of his party for Congress, but was defeated in a Republican district by a few votes. In the same year he was appointed one of the revisers of the statutes of the state. From 1869 to 1874 Judge Orton was dean of the law faculty of the university, and during his term of service as dean the degree of LL. D. was conferred upon him. In 1877 he was elected mayor of Madison, and he served one term. From 1870 to 1878, the time of his election as justice, he was the senior in the law firm of Orton, Keyes & Chynoweth. * * *

"Politically, Chief Justice Orton affiliated with the Whig party until 1854, since then he has been an independent Democrat, but he never identified himself with politics while on the bench, and never allowed his decisions to be affected by partisan lines.

"Judge Orton has always taken a deep interest in history, literature, and art. He aided in the organization of the Wisconsin State Historical Society, and was vice-president for many years, having declined the presidency. He was also for a long time actively indentified, as a member, with the Wisconsin Academy of Sciences, Arts and Letters. * * *

"Judge Orton was a remarkable man; he possessed a high order of talent and ability. But in the first place I wish to speak briefly of those qualities which found expression as a friend and neighbor, in the everyday walks of life. In his intercourse with the people of every class he was gentle, sympathetic, and kindly, and he was gallant and courteous in a strong degree. His radiant smiles and his ringing cheery voice were in themselves mediums of encouragement and hope to all who came within the circle of his presence. He was natural and true, the same yesterday and today; and his genial manners, wherever he might be, were as a ray of sunlight to clear away the clouds. His demeanor was

HARLOW S. ORTON.

peculiar to himself. He was fashioned in a mold of his own; there was no one like him. His geniality was proverbial. He was a born actor, and in his style there was evidence at times of the natural attributes of tragedy and comedy. In his step he was light and active; his movements were graceful and dignified; and he ever evoked, in his personal presence, the admiration of those with whom he came in contact. He was democratic in the highest and truest sense of the word; he was emphatically one of the people. His feelings and sympathies went out strongly and in no mistaken terms in behalf of the poor, the suffering, and the downtrodden, as against injustice and oppression in whatever form they might appear. As he was always ready to lend a helping hand to relieve the distressed, to strengthen the weak, and to give words of hope and encouragement to those who were respondent and in trouble. These noble and manly qualities so characteristic of Judge Orton, were given manifestation, in a greater or less degree, every day of his life. His greetings to friends and neighbors were cordial, sincere, and came from the heart. The magnetism of his presence, the shake of his hand, would seem to impart his own impulses and to gladden the heart with pleasure almost unaccountable. The manner of his intercourse with his fellow men, of high or low degree, was always the same, prompt, cordial, and genuine. There was no selfishness in it. He sought not to ply the arts of the intriguer or politician, to reap benefits therefrom. It was all spontaneous with him, the natural outpouring of his sincere and generous nature.

"While, at times, he seemed inexorable in his ideas of propriety, justice, and right, and perhaps was subject to the charge of severity, still he was always reasonable and ready to modify his views and opinions, of a personal or general nature, to correspond with those of his friends and associates, when such modification required no sacrifice of principle. He was a man of firm and lasting friendships, true as the needle to the pole, and while he was inapt to be presumptuous or to crowd himself forward in his associations with others, yet he enjoyed in a high degree close and intimate companionship.

"It is true, however, that he lived much within himself, keeping closely within the family circle, and was disinclined to society in its ordinary course. Still his sociability and fraternity were strongly developed and cultivated by him on all possible occasions.

"Judge Orton had a high sense of honor. He could not tolerate a mean or dishonest action in any one, and when knowledge of such conduct came to him he would denounce it in language forcible and strongly condemnatory."

On the same occasion ex-Chief Justice Cole paid a tribute to him, from which I extract the following:

"I think I became acquainted with Judge Orton in the winter of 1854. I well remember the first argument I ever heard him make in court. It made a deep impression on my mind. It was before his court in the case of *Veeder v. Guppy*, reported in the 3rd Wisconsin. The case was one which excited much interest and public feeling in the neighboring county of Columbia, and was hotly contested. Such giants in the profession as Judge Alexander Stow and E. G. Ryan were engaged in the cause as opposing counsel. When I mention that fact, it will be sufficient evidence to every lawyer that Judge Orton's intellectual ability and learning in his profession was then generally recognized; otherwise, he would not have been called upon to meet such antagonists in an important cause.

"From that day to the time he left the practice to take a place on the bench of the circuit court, and subsequently on the bench of this court, he maintained his position in the front rank of the profession, and was justly regarded as one of the ablest lawyers, and of the most eloquent advocates at the bar in this state. He had a large practice in the trial courts and in this court. And in this connection I may add, as I am now the only survivor of all those who participated, either on the bench or at the bar, in the trial and decision of the novel and somewhat celebrated case of *Bashford v. Barstow*, reported in the 4th Wisconsin, which, it will be remembered, was a contest for the office of governor of the state and excited intense interest and strong public feelings, certainly in the political parties, Judge Orton appeared for the defendant. He was associated with such eminent and accomplished lawyers as Jonathan E. Arnold and Matt. H. Carpenter, but the burden of the argument upon all motions and questions of law arising in the preliminary proceeding rested mainly upon the shoulders of Judge Orton, who seemed, by consent, to be given the management of the cause in court. The questions involved were certainly new,—I might say, almost of first impression under our form of government. They could not, of course, arise under any other form. Judge Orton met and discussed these questions with wonderful learning and ability. He was

called upon, likewise, to discuss them often on the spur of the moment, without any time for reflection, examination of the authorities, or even to make preparation, and against such lawyers as Judge Timothy O. Howe and E. G. Ryan, whose supremacy at the bar will be questioned by no one. But Judge Orton was not surpassed by any lawyer in the case in the efforts he put forth or in the intellectual powers he exhibited. His clients surely had no grounds to complain that his rights and interests in the litigation had not been well and fully protected and presented to the court.

"In 1859 Judge Orton was appointed judge of the Ninth circuit, to fill the vacancy created by the resignation of Luther S. Dixon, who was then commissioned as Chief Justice of this court. Judge Orton could have retained his place on the bench of the circuit court indefinitely, had be been so disposed, for he had made a most acceptable judge, but he declined a re-election to the office and resumed the practice.

"As an advocate, Judge Orton was most effective, often eloquent and impassioned as a speaker. His mind was clear, logical, and he had at his command a ready flow of vigorous language to express his ideas. He was earnest and sincere in the treatment of all subjects. His sensibilities were lively and always excited by any act of fraud or injustice which he was called upon to review; and when he had to deal with such cases, which sometimes happens to every lawyer in practice, he did not soften his denunciations nor spare the wrongdoers, but hurled his words of wrath and sarcasm with pitiless contempt and scorn. Woe to the man who had excited his indignation by any base and dishonest conduct, for he was sure to receive a castigation in words which stung like the whip of a scorpion. And yet he could and did move human sympathies and excite deep emotion and tender feeling, while he captivated the judgment and carried away the understanding of his hearers by his appeals. But enough will have been said on this point when I add, he was a most effective speaker, and by the enthusiasm of his temper and magnetism of his manner he had great power and influence over courts and juries."

The personality of Harlow S. Orton was one of the most picturesque of any among a bar that was crowded with picturesque characters. Many interesting anecdotes have been related of him, but unfortunately most of them have been lost.

Col. J. A. Watrous, of Milwaukee, vouches for the two following anecdotes:

"In early life Judge Orton studied law and was admitted to practice in Indiana. For some reason he gave up the law for the ministry, and was the popular pastor of a Baptist church, being known as the boy preacher. An unpleasant dispute between two of his church officers had a bad effect upon the pastor. He called the officials together and tendered his resignation. The officials took the matter under consideration, and decided that they could not spare so eloquent and popular a minister.

"'Well, brethren,' said the future chief justice, 'your determination is a great disappointment to me, for I have a strong desire to return to law practice. However, I suppose I must remain your pastor, but it is too damn bad.'

"The brethren consulted again and concluded that it was best to let him go, and not long after that he started for Wisconsin.

"It was a day in 1848, the year that 'old rough and ready' General Zach Taylor was the whig and Lewis Cass of Detroit the democratic candidate for president, that the discredited boy preacher and ambitious lawyer took passage on a boat at Chicago for Milwaukee. At Racine a peace officer and three men stepped on board. The sheriff, as Orton learned, was in charge of a minister, and was taking him to Port Washington where he had formerly lived, for trial, and the two business men, Horace T. Sanders and a Mr. Brown, were going along to see that the elder had a square deal. The Indiana lawyer joined the party, and when he learned the particulars, tendered his services to defend the elder. Sanders, who seemed to be the leader, gladly accepted, and the plan of battle was made.

"The prisoner and his two friends were to obey the lawyer's orders without questioning. In passing let me say that Sanders afterwards became a lawyer, was a state senator and in the civil war led a Wisconsin regiment and became a brevet brigadier general.

"A large crowd was waiting for the sheriff and his prisoner when the boat landed at Port Washington. The court room was crowded when the justice of the peace opened court. Lawyer Orton took charge of the case for the defendant and at once showed such skill and vigor that he quickly had matters moving. It was made plain to him, however, that the people were strongly prejudiced against the elder, and that the justice of the peace was in strong sympathy with them. Evidence that should not have

been received was stoutly objected to by Orton, but the justice overruled him again and again. That angered the boy preacher and after an exceptionally outrageous decision, Orton sprang to his feet, and pointing a finger at the justice, said in a loud tone: 'You are a d——d scoundrel,' and whirling around caught the preacher by the shoulder and said, 'Come on elder. You can't get justice in this court,' and led the way to the door. Sanders, a giant in size, fell in behind the preacher-prisoner and Brown behind him, and they forced their way through the excited crowd. They rushed to the hotel. Orton hurried the prisoner into a bedroom, locked him in and pocketed the key.

"By this time the sheriff had begun to take notice. He met Orton on the stairs and demanded his prisoner.

" 'You have no prisoner, there is no case against him, and if you don't mind what you are at I will have you on the way to the penitentiary.'

"That alarmed the sheriff and he returned to the justice for new orders. The court had been so frustrated by being called a 'd——d scoundrel' that he didn't know what to do.

"Orton, Sanders and Brown, fearing an attempt to recapture the elder, turned their attention to amusing the crowd. Sanders smoked two large-sized cigars at a time, Orton made funny speeches, and Brown was the contortionist. The assemblage mellowed, got to laughing and seemed to forget their thirst for the preacher's recapture.

" 'The steamboat cometh,' shouted Sanders, and the crowd laughed again. Just as the steamer from Sheboygan was close to the dock, Orton dodged back to the hotel, caught his client by the arm, rushed him down the back way on a hot run and fairly threw him onto the boat, in spite of the sheriff's efforts to prevent it.

"Court adjourned and watched the steamer bear away the elder and his rescuers. The case was dropped and the minister completed his year as pastor of the Racine church.

"Twenty years after that the Port Washington justice and Judge Orton were members of the assembly and sat at adjoining tables. The judge did not recognize the dignitary before whom he had tried and won his first case in Wisconsin, and the justice was content to remain silent on the subject."

It seems very certain that Judge Orton was one of the most eloquent and convincing jury lawyers whom the state has ever seen; I never had the good fortune to hear him

upon such an occasion, but the testimony to that effect is so uniform and overwhelming coming from those who did hear him that there can be no doubt of it.

In 1875, when I was about to graduate from the University law school at Madison, the class after much discussion decided to ask Judge Orton (then a practicing lawyer) to deliver the commencement address; Philip L. Spooner (father of ex-Senator Spooner) was then Dean of the law school, and when we told him of our choice, he said with that grave and gentle air which endeared him to all of us, "Why of course, that's all right, Harlow was born with an oration in his mouth."

Apropos of this address, another story comes to me. Judge Orton readily consented to deliver it, and while I cannot remember its title, I remember very well that it dwelt eloquently upon the great achievements of the bar of the past, in the endeavor doubtless to imbue our minds with the nobility of the profession. On the following day I overheard two men discussing the speech who were evidently business men who had been in attendance on the commencement exercises. One said to the other, "Well, what did you think of Orton's address?" and the other replied, "It was a fine speech. I must say, however, that I had always supposed that the Almighty had considerable to do with the management of the universe, but it seems now that I have been mistaken, and that the lawyers have always done it all."

David Taylor was a man cast in very different mold from that of Harlow S. Orton, but he had been a no less distinguished figure in the state and territory since his arrival at Sheboygan in 1846.

Not a natural orator as Orton was, but a prodigious worker, a man capable of almost endless hard labor, he more

than made up in the solid qualities of good judgment, industry and calm study what he lacked in brilliancy.

His life was thus sketched by the committee who presented the memorial to the Supreme Court after his death in 1891:

"David Taylor was born at Carlisle, Schoharie county, in the state of New York, on March 11, 1818. On his father's side he was of Irish ancestry, on the mother's of Dutch descent. He graduated from Union College in 1841, and was admitted to the bar at Cobleskill, N. Y., in 1844. After two years of practice here, he turned his face to the opening west, and in February, 1846, came to the territory of Wisconsin. He visited Milwaukee and Green Bay, but chose Sheboygan as his resting place, and there formed a law partnership with Cyrus P. Hiller, in July of that year. The copartnership of Taylor & Hiller continued until Judge Taylor's elevation to the circuit bench. It enjoyed a large practice, extending over a wide section of the state, which was chiefly conducted by Judge Taylor. During these years he was also an active leader in politics; originally as a Whig; after its organization as an ardent supporter of the Republican party. He was a member of the assembly in 1853, of the state senate in 1855 and 1856, and again in 1869–1870, always a recognized leader in legislative work.

"He developed strong elements as a lawyer. Well equipped in the learning of his profession, his very great industry, his untiring energy, his clear and robust judgment made him a strong man at the bar.

"In 1857 he was called to the bench. He was appointed judge of the fourth judicial circuit to fill the vacancy caused by the resignation of Judge William R. Gorsline. At the next election, he was chosen to fill the full unexpired term. Upon its expiration he was elected again, so that he served as circuit judge until January 1, 1869. These terms covered an important period in the growth of the state, especially in juridical affairs. They concluded the trying time of war, when many new and most important questions were brought before the courts, and Judge Taylor earned wide reputation for judicial ability.

"Retiring from the bench, he resumed the practice of his profession at Sheboygan. In 1872 he removed to Fond du Lac, where he entered into partnership with the late J. M. Gillet, and subsequently with George E. Sutherland. He was in constant

active practice; but did not allow the causes of his clients to monopolize his time. His natural patient industry made him a most valuable compiler of laws. He had already shown his ability and skill in this direction as one of the revisers who brought out the Revised Statutes of 1858. In 1871 he gave to the profession the much-needed, excellent compilation of all our public statute law, with valuable annotations, which became known by the name of 'Taylor's Statutes.' It was but natural that when the state undertook another revision Judge Taylor became one of the revising commission appointed by this court, and was made its president. This commission produced the Revised Statutes of 1878."

Upon the same occasion William F. Vilas gave an eloquent estimate of his abilities and character, from which I take the following:

"Judge Taylor's most distinguishing peculiarity, which governed and explained his career, his general conduct and manners as well as accomplishments, was the constancy and intensity of his devotion to the labors of the law. No man within my range of observation ever gave himself more exclusively, so unceasingly and untiringly, to this single field of thought and effort. Whatever other studies may have engaged his care, if any ever did for much time, he manifested in his later years little interest in them. Beyond a passing attention to the current affairs of the country and topics of the day, of which information came easily, he never seemed to yield himself or his thoughts at length.

"But to the law he addressed a capacity for labor unexcelled and rarely equalled, with a constancy as faithful as his capacity was great. He seemed never weary, never wistful to interrupt the calm, steady, unremitting assiduity of his toil. The magnitude of effort to understand or elucidate any subject under his hand, the measure of time or personal labor, was no consideration with him. No task was formidable to his simple steadfastness. Through all the hours of the day, day after day, week in and week out, year upon year, without excitement and without ceasing, he bent his mind to the tasks before him, toiling on with each to its complete and satisfactory accomplishment, and entering upon the next as readily as he finished that in hand. Relaxation and recreation were nothing to him. Seemingly he never desired either; holidays and vacations were merely interruptions. The pleasures and enjoyments which others indulge

DAVID TAYLOR.

and seek, games, pastimes, entertainments, had no apparent charm; and if he suffered them to check his labor, it was rather from a consideration of others than to please himself. He was, therefore, essentially a contemplative man, his mind ever meditating his problem, the intellectual machinery always running, always grinding its grist. His thought was ever introverted; his attention occupied by that within him, not by things without. Incidents external were rather a hinderance than a help; interruptions, not attractions.

"Necessarily, his were the manners of a pre-occupied man. Yet such was his composure of countenance that his introspection was commonly not apparent to the ordinary observer, and when he passed with slight notice a friend or acquaintance, it happened not infrequently that the reason for it was denied the credit due. But it needed only to enter the chambers of his mind and witness the busy scene within, to understand the subjects and the methods of his thought, in order to dissipate utterly the superficial misconception. Once in appreciative communion with him, the perception was instant and easy of simplicity and sincerity of purpose, of patient effort to discern and unfold the right, of sympathy with the interests and concerns of men, and the utmost readiness to accept any aid or criticism which helped him to solution of the doubt he wrestled with, or unfolded the true course of thought. Any man more free of the mere pride of personal opinion, less impatient of correction, more ready to receive any benefit of another's thought, so that it truly informed his own, I never encountered. In performance of the public duty already mentioned—to which we were called by appointment of this court—it happened that he and I wrought much together, in a close co-operation, not only on important measures of the law, but often upon words and phrases, those stubborn substantives of useful statutes. He was the old, well-stored lawyer, surcharged with a life of study, long professional and judicial service, and specially expert in statutory knowledge, as one of the revisers of twenty years before and the compiler of a later edition which had long superseded in use the former work. He brought to the undertaking not only his extraordinary ability for labor, but unusual fulness of legal learning and ripeness of study. Yet the just precedence of these circumstances he never manifested in anything but their value to the duty before us. In every moment of conference, his acceptance was as free and easy as his contribution of everything, in every form, whether of suggestion or of criticism, that might promote the

utility and excellence of the work in hand. I speak now to his associates of many years in judicial labor; but confidently, that your testimony may be invoked to superadd in more effective tones the proof of these marks of a just, strong, honest-minded man, too great and too generous, too simple and too true, to think of anything but the worthy end of legal labor in its highest usefulness to men."

CHAPTER XXVIII

JUDGE COLE'S LAST CONTEST

Chief Justice Ryan was re-elected unanimously and without opposition in 1875, and Judge Lyon received the like compliment in 1877. From these facts it might well be assured that the golden age had arrived when sitting judges, who had demonstrated their fitness and ability, were not to be opposed by partisan nominations, whatever might be their political views or their decisions upon cases arousing public interest. But while the sentiment in favor of non-partisanship in the selection of judges for the Supreme bench had unquestionably developed greatly, as evidenced by these elections, it was not yet controlling.

Jude Cole's term was nearing its end, and the election to choose his successor was to take place in April, 1879. As has been seen, the Democrats had carried the state in 1873, and had also elected the entire state ticket, except Governor, in 1875. They had lost the state by a small majority only in 1876, and, while they had lost in the state election of 1877, they were still aggressive and determined, for nationally the party was in excellent conditon; it controlled the popular house all through the administration of President Hayes, and had small majorities in both senate and house in 1878 and 1879.

Thus everything seemed encouraging to "the hope that springs eternal" in the Democratic breast, and as the end of Judge Cole's term approached, the Democratic leaders, with an invincible bourbonism worthy of a better cause, determined to put up a candidate against him, and make an-

other supreme effort to obtain control of the bench. Their deliberations resulted in the determination that Judge Cothren must again, and for the third time, be led to political slaughter and, in sooth, Judge Cothren seems to have been a willing victim.

On the evening of February 19, 1879, a caucus composed of Democratic members of the legislature and a number of members of the Democratic State Central Committee was held in Madison, at which Senator Thomas R. Hudd of Green Bay was elected chairman. A. R. Bushnell, J. H. Earnest, and Matt Anderson made speeches favoring the nomination of Judge Cothren. Chairman Hudd made an argument in favor of supporting Judge Cole, who it was known would be an independent candidate. Mr. Hudd's argument, however, found little favor with the caucus, and a resolution was adopted requesting Judge Cothren to become a candidate for the place, and recommending that the State Central Committee formally place him in the field as the Democratic candidate.

In response to this resolution, the Democratic State Central Committee, on the 27th of February, issued a brief address to the people, signed by Joseph Rankin of Manitowoc as chairman, reciting the passage of the resolution of the caucus, giving a brief sketch of Judge Cothren's career, and formally presenting him to the people as a candidate for the position, requesting "that our friends everywhere use all honorable means to secure his triumphant election." [1] This nomination was accepted by Judge Cothren a few days later, and he made a trip through a considerable section of the state in the interest of his canvass.

At about the same time that the caucus before mentioned was held, calls began to be extensively circulated among the

[1] Madison Democrat, Feb. 27, 1879.

bar of the state, requesting Judge Cole to run as non-partisan candidate. These calls were very generally signed by Democrats as well as by Republicans, and one hundred and five members of the legislature, including twenty Democratic members, signed Judge Cole's call.

No nomination was made by the Republicans, either in caucus or convention, and so the contest became one between an independent candidate and a party nominee.

As a matter of fact, the so-called nomination of Judge Cothren was not a real nomination, but only the work of a self-appointed coterie of politicians, who did not really represent the party. There was clearly no desire on the part of the party generally to enter on any campaign against Judge Cole. It was quite well known that Judge Cole did not sympathize with the ruling wing of the Republican party; it was said that he had not been at all pleased with the management of the party for years. Quite a number of Democratic papers through the state actively supported Judge Cole, and others refused to support Judge Cothren. As for the bar, the great majority in all parts of the state, except perhaps in Judge Cothren's old circuit, supported Judge Cole. At Racine, where the writer was then practicing, the entire bar, with the exception of one firm, supported Judge Cole, and the writer well remembers that he spent practically the entire day in attendance at the polls endeavoring to procure votes for Judge Cole.

For some reason not particularly obvious, the Milwaukee News, then the leading Democratic paper of the state, made a very active and somewhat bitter campaign against Judge Cole. Its efforts to find some plausible objections against Judge Cole were somewhat amusing, and demonstrate the scarcity of material in that line.

On the 23rd of February, the News, after stating the result of the legislative caucus, and commenting favorably on Judge Cothren's ability and record, says:

"Judge Cole has occupied a seat on the bench for many years; he has arrived at an age where man's perceptions grow dim, and it is certainly a wise measure to retire him and seat a younger and abler man in his place."

The great age of Judge Cole troubled the News exceedingly; on the 26th of February it said that Judge Cole was the candidate of the Madison Ring or Regency and that

"He has been on the bench twenty-three years, and in all that time has not developed such an immense ability that he should be given a life lease of the position. Judges continued long in office gradually fall into a rut from which it is impossible to rescue them, and when, as in this case, a candidate like Judge Cothren is presented the interests of the people will be more surely served by electing him than by retaining Judge Cole."

Again on the 4th of March the News recurred to the subject of age and said, "He is an old man, the duties are becoming irksome to him, he has arrived at an age when United States Judges are retired and pensioned off." The length of Judge Cole's official life and the desirability of rotation in office were almost daily urged by the News in its editorial columns.

The absurdity of these arguments based on Judge Cole's great age and supposed waning faculties appears very clearly when it is remembered that at this time Judge Cole was fifty-nine years of age, in excellent health physically and mentally, and was just *twenty-six days older than Judge Cothren.*

When the News was overhauled by the Wisconsin for its wild statements about Judge Cole's age, it developed (as might have been expected) that the editors knew nothing about Judge Cole's age, for it then said in the issue of March 8th that it did not know what Judge Cole's age was, but did

know that he had been an office holder for thirty-two years, with but slight interruptions, and whether he were sixty-seven or seventy-seven he should retire to make way for a new man. The plain implication here that Judge Cole was at least sixty-seven years of age, when he was in fact but fifty-nine, might well be called dishonest politics.

In 1873 the Court had met the question whether the "Graham" liquor law [2] was constitutional and unanimously sustained the law, Chief Justice Dixon writing the opinion.[3] This law was a law regulating the licensing of saloons and sale of liquors with uniformity over the whole state, and was a great step in advance from the point of view of temperance men.

In its issue of March 2nd the News very adroitly attempted to turn this decision to the advantage of Judge Cothren. It said in substance that Judge Cole's friends were urging his election among temperance men for the reason that he was sound on the temperance question, because he was on the bench and participated in the decision sustaining the "Graham" liquor law; that it did not believe in criticizing the opinions of courts, but when a candidates's friends make political capital out of them and assure voters that the judge can be relied on in the same direction in the future, then such opinions are proper subjects of criticism, and persons holding opposite views are justified in opposing the candidate on account of their belief that his views are erroneous.

This covert attack not apparently bringing very encouraging results, the News on March 12th denounced Judge Cole as the lawyers' candidate, and said that the fact that he was supported by the lawyers was a weighty argument for his

[2] Chap. 127, Laws Wis. 1872.
[3] State v. Ludington, 33 Wis. 107.

defeat, for lawyers always desired a slow and easy-going judge so as to protract litigation, while clients desired a judge who dispatched business and brought the lawyers to time, hence the people should vote for Cothren.

This appeal to popular prejudices against lawyers is always contemptible; sometimes, however, it works, but it conspicuously failed in the present instance.

On the 23rd of March the News took another tack and made an attempt to alienate Judge Cole's Republican support. It published what purported to be special correspondence from Madison, detailing the reasons why Judge Cole was not acceptable to true Republicans. The meat of the article was contained in a story circumstantially told concerning the Carpenter senatorial deadlock in 1875, when fifteen or more insurgent Republicans united with the Democrats and elected Angus Cameron as senator. It was asserted that the insurgents and Democrats had practically agreed on Cole as the compromise candidate on the same evening in which they finally agreed on Cameron; that Cole was informed of the fact and prepared a speech of acceptance to be made before the joint caucus; that he was sent for to come to the capitol in a blinding snowstorm on the night in question and came with his speech in his pocket, explaining away the Graham law decision; that he waited for two hours in the Attorney General's office; that a hitch occurred in the caucus negotiations and that several Milwaukee German members, under the lead of Senator Cotzhausen of Milwaukee, at the last moment refused to vote for Cole on account of his temperance views, and so the Judge was finally compelled to go home with his speech undelivered, and Angus Cameron was selected. This story was denied by the Wisconsin.

The Republican papers had much to say about the advantages of non-partisanship in judicial elections, and to these suggestions the News replied by asking how many Democrats had been appointed to judicial offices since 1861 by the United States Government, and urged every Democrat to stand with his fellow Democrats and cast a solid vote for Cothren, a true Democrat, and a worthy man. On the 28th of March, it said, "Judge Cothren is the Democratic candidate. Let every Democrat vote and work for his election."

The appeals of the News, however, fell on deaf ears; the Democrats refused to consider it a party matter; in a total vote of 168,605, Judge Cole's majority was 33,133.

One of the results of this election was that the legislative caucus as a judicial nominating body followed the party convention to the political graveyard. Henceforth nominations for justices of the Supreme Court were to be made by non-partisan calls.

CHAPTER XXIX

RYAN'S LATER DAYS

The enlargement of the bench to five members greatly lessened the heavy burden which had rested upon the shoulders of the members of the bench, but it neither improved Judge Ryan's temper nor his health. Though he was doubtless of strong constitution originally, his health had not been good for some years before his elevation to the bench. The strenuousity of his life and the vehemence of his emotions had made serious inroads on his strength before he reached the bench, and after that time he was frequently obliged to cease work for a time on account of temporary illness.

Notwithstanding their radical political differences, he was personally very friendly with Elisha W. Keyes, familiarly known at that time as "Boss" Keyes, then Postmaster at Madison, Chairman of the Republican State Central Committee, and unquestioned ruler of the party in the state.

During the winter of 1876 and 1877 Judge Ryan was frequently ill, and in January was confined to his house. Mr. Keyes called on him from time to time, and on January 16, 1877, found him more than usually depressed; he complained that the work was killing him, and said that if he could only have a vacation of a few months he might throw off his physical difficulties, but that as it was he felt that he should soon die or be compelled to resign. Mr. Keyes tried to cheer him up as best he could, and finally told him that the legislature (which was then in session) would willingly grant him a vacation, if informed of the situation. Judge

Ryan scouted the idea, but Mr. Keyes insisted that it could be done, and leaving Judge Ryan's residence he went immediately to the capitol and set his friends at work. The result was that the following joint resolution was immediately drawn by William E. Carter, and at once adopted without opposition in the assembly:[1]

"*Whereas*, His Honor, the Chief Justice of the Supreme Court of Wisconsin, Edward G. Ryan, is suffering from illness and debility resulting from confinement and overwork in discharge of the arduous and responsible duties of his position, and

"*Whereas*, rest and recreation are absolutely necessary to his speedy restoration to health and strength, to enable him to resume his labors upon the bench, therefore

"*Resolved by the Assembly, the Senate concurring*, that leave of absence be and hereby is granted him during the present term of said Court."

The resolution was sent to the senate on the following day (January 17th), and concurred in without debate or opposition.[2]

At once upon the passage of the resolution by the senate, Mr. Keyes took a copy of it to Judge Ryan's residence. The Judge was incredulous at first, but upon being convinced that the resolution had in fact been passed, was greatly pleased, as indeed he well might be. So far as I have been able to ascertain, Judge Ryan made no extended trip during his vacation, but took his rest principally at his home in Madison.

This vacation, of course, resulted in putting more work upon the shoulders of his colleagues, Cole and Lyon. These two men carried the whole burden of the work from January 1st to the adjournment of Court for the summer vacation, the work during that time filling practically the whole

[1] Assembly Journal, 1877, p. 19.

[2] Senate Journal, 1877, p. 23.

of volume forty-one and the first two hundred pages of volume forty-two of the Wisconsin reports.

The Chief Justice returned to work at the opening of Court in the fall of 1877, with somewhat improved health, but it will be seen by examination of the Wisconsin reports from this time on that, either on account of illness or because he felt that too much work was being undertaken, he took no part in a large number of cases. He was absent from the Court, evidently because of physical incapacity, after December 19, 1879, and during the entire January term, 1880. He went to work again at the opening of the August term, 1880, but with difficulty. His last day upon the bench was the 13th day of October, 1880. The first case argued on this day was the case of *Kalk v. Fielding*,[3] in the argument of which I participated. I think the Chief Justice also heard the following case of *Jaffray v. Crane*,[4] but left the bench when the case of *Hill v. Durand*[5] was called, because he had formerly been counsel for one of the parties.

The next day he sent word to his colleagues that he was ill, and on the 19th of October he died. He had wished to die "with his harness on," and Heaven granted his desire. There was no dreary waiting for release, no slow decay of mind and brain. His wonderful intellectual powers were unimpaired, the matchless eloquence of tongue and pen were still his in all their perfection; but the body was weary, disease had racked it sorely, and storms of passion had enfeebled it; the mysterious veil which separates us from the other world was drawn aside for a moment and the great, but storm-tossed, spirit of Edward George Ryan passed into the presence chamber of its Creator.

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[3] 50 Wis. 339.

[4] Id. 349.

[5] Id. 354.

EDWARD GEORGE RYAN.
At the age of 65 years.

CHAPTER XXX

CHANGES SINCE 1880

The death of Chief Justice Ryan has seemed to me to be the natural and fitting stopping place for this work. That event may be said in a general way to mark the close of the great formative period of Wisconsin jurisprudence. Not that the law had then been entirely settled, but that basic principles had been determined on, and the foundation broadly laid for Wisconsin's temple of justice. Hereafter the work was to consist very largely of the working out of details, and the adoption of the great general principles already established to new and varying conditions. That event marks also the end of a generation since the admission of the state to the Union, and the men who occupied the stage during the activity of that generation have nearly all passed away. Impartial judgment may now be passed upon their work and their motives with little danger of bias, political or personal. This can hardly be said of the events of the following thirty year period. The time has not yet come when a strictly impartial view can be taken of these latter events. I trust that at some time in the future another thirty year period may be taken up and reviewed impartially and sympathetically by some one who feels interest in the subject. It is quite certain that this latter period cannot approach in dramatic interest the period covered by this work, yet there will be found in it many events well worth the consideration of the historian. But, although no attempt will now be made to write the history of the Court after November, 1880, it will be interesting to briefly note in this chapter the changes in

the bench from that time until the present, in order to observe how completely the idea has prevailed that neither party conventions should nominate, nor party organizations should be used to support candidates for the Supreme Bench.

Upon the death of Chief Justice Ryan, Governor Smith advanced Associate Justice Cole to the vacant chair of Chief Justice, a compliment as well deserved as it was popular, and appointed as Associate Justice, John B. Cassoday of Janesville, an eminent lawyer, who remained upon the bench for twenty-seven years, rendering very valuable service to the state.

It was felt by many Democrats that the Governor ought, in the interest of the non-partisan idea, to have preserved the equilibrium of the bench by appointing some eminent Democrat in Judge Cole's place; however, the appointment made was a most excellent one and the feeling was not strong enough to overcome the repugnance to partisan contests which had now become well established, and thus in the spring of 1881, both Chief Justice Cole and Justice Cassoday were re-elected without opposition. The terms of the Justices had been increased to ten years by the constitutional amendment of November, 1877, and by a further amendment, adopted in April, 1889, the office of Chief Justice as distinguished from Justice was abolished, and all persons thereafter elected were denominated Justices of the Supreme Court, the one longest in continuous service to be *ex officio* Chief Justice. Orsamus Cole was therefore the last elected Chief Justice of the Court.

In 1883 William P. Lyon was re-elected, in 1885 David Taylor, in 1887 Harlow S. Orton, and in 1889 John B. Cassoday, all these elections being unopposed.

In 1891 it was generally understood that Chief Justice Cole did not desire a re-election, and as the state had elected

a Democratic state ticket in the fall of 1890 by a large majority it was universally recognized that a Democrat should be elected in his place. Two Democrats were placed in the field as independent candidates by non-partisan calls, viz., Silas U. Pinney of Madison, and Eleazar H. Ellis of Green Bay. In a vote of about 174,000, Mr. Pinney received a majority of 19,000.

Judge Taylor died very suddenly April 3, 1891, and Governor Peck appointed the writer to the vacant place on the fourth day of the following May.

Thus when, in January, 1892, Judge Pinney succeeded Chief Justice Cole, there were a majority of men upon the bench considered to be Democrats, namely, Justices Orton, Pinney and the writer. This had not happened before since 1855, when Judge Cole defeated Judge Crawford.

In April, 1892, the writer was elected to fill out Judge Taylor's unexpired term, without opposition.

Some time prior to April, 1893, Judge Lyon (who had become Chief Justice on the retirement of Judge Cole in January, 1892) announced that he would not run again and, though strongly urged to reconsider his determination, refused to do so. He would have been unanimously re-elected, had he consented that his name be used. It was now conceded all around that his successor should be a Republican and two Republican circuit judges, both men of high ability, were placed in the field by non-partisan calls, viz: Judge Alfred W. Newman of the Sixth Circuit and Judge Charles M. Webb, of the Seventh. The election resulted in the choice of Judge Newman by a majority of nearly 50,000, in a total vote of 197,000.

In the fall of 1894 the state went back to the Republican column by a very large majority, and party spirit ran high. There were many republicans who thought that a Republican

should be placed on the bench in the place of the writer, and though no party convention or legislative caucus was held, the able and popular circuit judge of the Fifth Circuit, George Clementson, was placed in the field by a non-partisan call or petition as a candidate against the writer. It was well understood that Judge Clementson was a Republican and that the writer was a Democrat. The voters of the state, however, adhered to the principle that a sitting judge should not be defeated simply because of his politics, and the writer was elected by a majority of 9,000 in a vote of 222,000. The canvass did not disturb in the least the friendly personal relations of the candidates.

On the 4th day of July, 1895, Judge Harlow S. Orton, who had become Chief Justice on the retirement of Judge Lyon in January, 1893, died after a long illness. On the 5th day of August following, Governor William H. Upham appointed Hon. Roujet De Lisle Marshall, Circuit Judge of the Eleventh Circuit, to fill the vacancy. Judge Marshall was known to be a Republican in politics, and it was universally recognized that his appointment to succeed Judge Orton, who was rated as a Democrat, was the most appropriate thing which could be done in order that the majority of the bench should be in political sympathy with the dominant party. Judge Marshall was elected in April, 1896, to fill the unexpired term of Judge Orton, and in April, 1897, for a full term, both times without opposition.

Judge Newman died suddenly January 12, 1898, as the result of a fall upon an icy sidewalk, and Charles Valdo Bardeen, Circuit Judge of the Sixteenth Circuit, was appointed to fill the vacancy eight days later. Judge Bardeen was elected to fill out Judge Newman's unexpired term in April following, without opposition.

Judge Pinney resigned November 8, 1898, on account of failing health, and on the nineteenth day of the same month Governor Edward Scofield appointed Joshua Eric Dodge, a Democrat, of Milwaukee, to fill the vacancy. Thus the principle of non-partisanship was at last fully recognized by the executive branch of the government. The bench prior to Judge Pinney's resignation had been composed of three Republicans and two Democrats, and Governor Scofield, although a Republican, deemed it his duty on Judge Pinney's resignation to appoint a Democrat in his place, and thus preserve the political equilibrium of the bench. The choice was unanimously ratified by the people by the re-election of Judge Dodge for the unexpired term in April, 1899, and in April, 1901, for a full term.

Judge Bardeen died March 20, 1903, after an illness of several months. Had he lived his re-election would have taken place on the first Tuesday of April following, without opposition, as his nomination papers had been filed, there was no candidate against him, and his would have been the only name on the ticket. This death, occurring so near election and after the time when nomination papers could regularly be filed, produced some confusion, but the legislature being in session, an emergency act was passed (Chap. 27, Laws 1903), enabling nominations to be made and filed within a brief time. Under this act three candidates were placed in the field: Robert G. Siebecker, Circuit Judge of the Ninth District, William Ruger, Esq., an eminent lawyer of Janesville, and J. G. M. Wittig, Esq., of Milwaukee. Judge Siebecker, a Republican, was elected, receiving nearly 69,000 votes as against about 45,000 for the other two candidates combined.

At this election a constitutional amendment was adopted, creasing the number of Justices to seven, and the first of the

additional Justices was elected in April, 1904, in the person of James C. Kerwin of Neenah, who received 123,828 votes as against 112,428 cast for Louis K. Luse of Superior. Both were Republicans and were put in the field as non-partisans.

In April, 1905, the writer was re-elected without opposition for a full term.

In April, 1906, the second of the additional Justices authorized by the constitutional amendment of 1903 was elected. There were four candidates placed in the field by nomination papers, all as non-partisans, viz: William H. Timlin of Milwaukee, James O'Neill of Neillsville, Circuit Judge of the Seventeenth Circuit, Allen R. Bushnell of Lancaster, and H. H. Grace of Superior. Messrs. Timlin and Bushnell were known to be Democrats, and Messrs. O'Neill and Grace to be Republicans. Mr. Timlin received 90,528 votes, Judge O'Neill, 51,848, Mr. Bushnell, 39,818, and Mr. Grace, 16,419. Thus the voters apparently again recognized the principle of non-partisanship, for the state was overwhelmingly Republican in its political complexion, as is abundantly shown by the fact that in the November election of the same year the Republican candidate for Governor received a plurality of 80,000 votes over the Democratic candidate. In April, 1907, Judge Marshall received 116,951 votes as against 55,097 for Henry T. Scudder. Both candidates ran as non-partisan.

Judge Cassoday, who had become Chief Justice on the death of Chief Justice Orton, died December 30, 1907, and on January 4, 1908, Governor James O. Davidson appointed Robert M. Bashford, Esq., of Madison, to fill the vacancy. Judge Bashford was a candidate at the April election, 1908, and was opposed by John Barnes of Rhinelander who had recently been chairman of the Railway Commission of the state.

Both candidates were placed in the field as non-partisans, though it was well understood that Judge Bashford was a Republican, and Mr. Barnes was a Democrat. The result was that Mr. Barnes received 134,612, Judge Bashford, 84,656, and William Ruger, 15,168. The question of geographical location of the candidates cut considerable figure in the result, as the north central portion of the state had had no representative on the bench since the death of Judge Bardeen in 1903, but the absolute disappearance of partisan considerations is shown by the fact that though the election of Mr. Barnes placed on the bench a majority of Democrats in a state overwhelmingly Republican, no attention was apparently paid to that fact. Judge Barnes was elected for a full term in April, 1909, without opposition.

September 1, 1910, Judge Dodge resigned, and on the tenth day of the same month Governor Davidson appointed Aad J. Vinje, Circuit Judge of the Eleventh Circuit, to fill the vacancy. Judge Vinje was known to be a Republican, and his election for a full term in April, 1911, was unopposed. Thus the political equilibrium of the bench was again restored.

If any further proof were needed of the strength of the non-partisan idea as applied to judicial elections, it would be found in the fact that such elections were expressly exempted from the operation of the primary election laws, owing to the fact that it was universally recognized that candidates for the bench should not be nominated through party primaries or conventions.

I know of no state which has been so successful in eliminating political considerations from judicial contests as Wisconsin; indeed, the sentiment has gone so far that any political activity on the part of an occupant of the bench or a candidate for the bench is universally considered as a

breach of judicial etiquette. The sentiment prevails also with reference to the circuit bench. While, in most of the circuits, the politics of the judge agrees with the prevailing political view in his circuit, still this is by no means universal, nor are party conventions called to nominated candidates. An attempt to place a party candidate in the field would almost certainly meet defeat. That this condition of public opinion makes for the independence and efficiency of the judiciary there can be no doubt. In this respect, as in many others, Wisconsin is in the best sense a progressive commonwealth.

CHAPTER XXXI

RECENT HONORS TO DIXON AND RYAN

I fully thought when I wrote the concluding words of the last preceding chapter that I had finished this book, but since those words were written some very interesting events have taken place which seem to me to demand a place in the book. The improvidence of both Dixon and Ryan in pecuniary matters was almost proverbial, and the natural result of that improvidence was that neither left any considerable amount of property at his decease. Thus it came about that Judge Dixon's remains rested at Madison and Judge Ryan's at Milwaukee with no fitting stone to mark either grave. Thus the situation remained until late in the year 1909 when the fact that both graves were unmarked was brought to the attention of Mr. Justice Marshall, and he determined that suitable memorials should be placed over the graves of these great jurists. He brought the matter to the attention of Hon. James G. Flanders, president of the State Bar Association, in the year 1910, and the following gentlemen were appointed a committee to undertake the task of raising the necessary funds and erecting a suitable monuments over each grave: Justice R. D. Marshall, Col. E. W. Keyes, Gen. Fred C. Winkler, Hon. George G. Greene, Hon. A. W. Sanborn and Hon. J. E. McConnell. It is but justice to say that the successful accomplishment of this task was due to the indefatigable energy and personal efforts of Mr. Justice Marshall, who took up the task of raising the necessary money and pursued it systematically

and relentlessly until the sum of $7,610.52 was raised, largely from the bar and business men of the state, but aided by substantial sums contributed by former residents of the state who now reside in other states.

With this sum two handsome white granite monuments were procured and placed in position, the Dixon monument at Forest Hill cemetery, Madison, and the Ryan monument at Forest Home cemetery, Milwaukee, the former being forty feet and the latter thirty-six feet in height.

The Dixon monument bears on the front face of the die the single word "Dixon," and on the reverse face thereof the words:

"LUTHER SWIFT DIXON,
CHIEF JUSTICE OF WISCONSIN,
1859–1874."

On the right face of the die, this:

"The State Bar Association of Wisconsin on behalf of its members and others at home and abroad, A. D. 1911, dedicate this memorial structure to the memory of Luther Swift Dixon and to that conception by law personified by his distinguished services as Chief Justice of the State in upbuilding its system of jurisprudence."

On the left face of the die, the following excerpt from the address by Hon. Charles E. Dyer at the memorial proceedings before the Supreme Court of the State December 29th, 1891, and found in Volume 81 of the Wisconsin Reports:

"It is a serious thing to be the arbiter between one's fellow men. No functions are more exalted, no duties more grave. He who in the slightest degree by partisanship or

otherwise dishonors its dignity, he who does not keep the ermine as white and spotless as virgin purity, is unworthy of the trust. This was the sentiment of

LUTHER SWIFT DIXON.

His name is the synonym of Justice, Integrity, Truth and Honor. These were the virtues which illumined his character, radiant as the sunlight, shining as the stars."

The Ryan monument bears on the front face of the die the single word "Ryan," and on the reverse face thereof the words:

"EDWARD GEORGE RYAN,
CHIEF JUSTICE OF WISCONSIN,
1874–1880."

On the right face of the die, the words:

"To the memory of Edward George Ryan, who, as Chief Justice of Wisconsin, wrought with master hand in upbuilding its system of jurisprudence, and added dignity to government by law, this memorial structure is erected by the State Bar Association on behalf of its members and others at home and abroad, A. D. 1911."

On the left face of the die, this excerpt from the famous Ryan address to the graduating class of the Wisconsin College of Law, delivered in 1873, being the distinguished Chief Justice's conception of the ideal judge.

"In other places in life, the light of intelligence, purity of truth, love of right, firmness of integrity, singleness of purpose, candor of judgment, are relatively essential to high beauty of character; on the Bench they are the absolute condition of duty. The Judge who palters with justice, who is swayed by fear, favor, affection or the hope of reward,

by personal influence or public opinion, prostitutes the attributes of God, and sells the favor of his Maker. But the light of God's eternal truth and justice shines on the head of the just Judge, and makes it visibly glorious.—Ryan, 1873."

The Dixon monument was unveiled June 1, 1911, the following named persons by invitation of Hon. M. A. Hurley, the president of the Association, acting in behalf thereof and of the donors as an acceptance committee, viz.: Governor Francis E. McGovern, Chief Justice J. B. Winslow, Hon. Geo. H. Noyes, Mrs. Anna M. Vilas, Hon. John M. Olin, Mr. A. E. Proudfit, Mrs. Eliza M. Keyes, Hon. Burr W. Jones, Mr. William R. Bagley, Judge A. L. Sanborn and Mr. L. S. Hanks.

Mr. Justice Marshall delivered the presentation address as follows:

Mr. President and Members of the Dedication Committee:

The mortal of Dixon—Luther Swift Dixon—he who gave so much lustre to Wisconsin jurisprudence, inspiring this conclusion of the eloquent word picture of him, his ideals and fidelity to them, inscribed on the granite before us; "His name is the synonym of justice, integrity, truth and honor"—"These were the virtues which illumined his character, shining as the sunlight, radiant as the stars," long ago was returned to earth here for that sleep which must come to us all; the long repose to be broken when, if at all, we can but hope. The event was near the close of a beautiful springlike afternoon, a time for winter's blasts and garb of white, but there was no winter yet. The season, seemingly, had paused, turned backward as it were, nature thus furnishing a fitting accompaniment for the closing scenes

of a most praiseworthy earthly career. As the eloquent memorialist of the occasion thus beautifully discoursed: "that afternoon so calm and bright, with an air of vernal mildness rather than the chill of winter, and as the setting sun, rapidly sinking in the west, threw a flood of light and glory above and around the spot where we stood, with not a cloud to be seen in the sky, the whole scene in nature seemed to be a fitting emblem of his life," and its close: "Everything which the eye rested upon was serene, pure, beautiful and glorious; and so was his life, and so it closed, leaving a name illustrious with professional fame and honor."

Reflect upon that picture. An occasion, an environment, a subject, a concurrence of all things to emphasize a career, eminent, beneficial and lovable, suggesting some physical indication here of a state-wide appreciation thereof, speaking day by day a people's admiration and love to future generations.

The seasons and the years rolled on, the absorbing activities of busy life, seemingly, obscuring or displacing the sentiment ordinarily expressed in physical monuments. Springtime came, and summertime, autumn and winter again, around and again and oft repeated till more than twenty years had passed, and yet nothing here to signify that here was the resting place of the illustrious Dixon. Time so long had intervened that the fact itself had nearly faded from human memory. Strang sequel! all mentally exclaim. And again exclaim, what a lamentable reflection it would have been upon the people of Wisconsin, particularly upon the members of the legal profession, if the situation found to exist after the lapse of so much time had been allowed to permanently remain. There seemed to exist danger of it.

Mr. President, on behalf of the committee appointed by your predecessor to cope with that danger, I have the honor and pleasure to announce that—through the generosity of many persons, members of the bar and others within and without the state—the task has been fully accomplished. We now present, in this dignified beautiful memorial, the evidence thereof, trusting it will meet with approbation of the donors. I assure you, Mr. President, and you, members of the dedication committee, whom the president has been pleased to appoint for the ceremonial acceptance of the work, and assure all that its substructure is laid so deep and so broad and is so generously reinforced with ribs of steel, as to successfully withstand the hand of time, preserving the stately appreciation of the life it commemorates and inculcating the moral lesson it proclaims through ages to come. The character of the memorial was decided upon as best responding to the subject and the sentiment for which it stands. Nothing short of something really monumental would do for so monumental a character as that of Luther Swift Dixon.

The committee, in parting with the evidence of its completed task, constructively, now delivers the result to the Bar Association of Wisconsin to be by it left in trust to the authorities of this beautiful silent city. The committee also now conveys, by duplicate writings, to be likewise left in trust, an ample fund to bear the expense of caring for this place and memorial in perpetuity. One duplicate conveyance is for the records of our Association, and the other for the trustee of the fund.

Mr. President, all is finished and we now submit the memorial to the dedication committee and for the address by Chief Justice John B. Winslow.

The dedicatory address was delivered by the author of this book as follows:

Mr. Justice Marshall and Gentlemen of the Committee:

On behalf of the Bar Association of the state, the donors of the monument fund and the people of Wisconsin at large, I accept at your hands this beautiful memorial to the memory of a great jurist, and I beg to assure you that the long labor of love of yourself and the committee which has culminated so successfully is most gratefully appreciated.

To those who believe in government by law under constitutional limitations and safeguards the present occasion is of great significance.

He in whose memory this granite colmun has been erected, great and many-sided though he was, may truthfully be said to represent one great idea above all others, namely, the supremacy of the constitution and the law as administered by fearless and incorruptible courts.

For nearly twenty years the snows of winter and the dews of summer have descended upon his unmarked grave; the great majority of his contemporaries and friends have passed away; vast social and economic changes have taken place in the state and in the nation; to all apparent seeming the memory of his life and work was dying out as die the ripples on the lake at eventide.

But this noble shaft reared by the loving and spontaneous contributions of hundreds of citizens at home and abroad, most of whom never knew the great man personally, demonstrates that this was mere seeming and nothing more.

The career of Luther Swift Dixon was not spectacular in the ordinary sense; he was no warrior leading triumphant hosts to victory, no orator moving multitudes with his eloquence; his life here was the tedious and laborious life

of the study, the library and the court room, where there was no applause to cheer the spirit, nor adequate pecuniary reward to compensate the toil of the weary brain.

During the fifteen years which he served the people of the state upon the supreme bench, though he was frequently attacked and often misjudged, there was ever present to his calm, clear gaze one great conception—the conception of government by law, so administered as to give equal and exact justice to every citizen. Equal and exact justice has been the passionate demand of the human soul since man first wronged his fellowman; it has been the dream of the philosopher, the aim of the law-giver, the supreme endeavor of the judge, the ultimate test of every government and every civilization.

True, man has never attained and doubtless never will attain perfect justice; this must every remain exclusively the prerogative of an omniscient and omnipotent God, but it has been well said that to attain as near as possible to perfect justice is the great interest of man on earth.

Pain and suffering may be bravely met, poverty and want endured without complaint, the daily round of exacting toil taken up with cheerful heart, but the soul of man in all ages has bitterly cried out against injustice and insistently demanded that it must not be. Every government, past and present, may be known and properly judged by the quality of the justice administered by its courts. The nearer the approach to ideal and perfect justice in the courts, the nearer the approach to Utopia in the government.

And so it is and ever must be that he who aids in establishing an enlightened, impartial and righteous system of administering justice in his state deserves well of his fellow-

men, and he who acts as master builder upon the temple of justice deserves to have his name and deeds written thereon in letters imperishable.

A master builder upon Wisconsin's temple of justice was Luther Swift Dixon; a man of comprehensive and compelling intellect, of remorseless accuracy of thought and absolute integrity of heart and mind; a man pre-eminently fit "to mold a mighty state's decrees." He came to the highest judicial office in the state in 1859 in succession to the much loved Whiton at the age of thirty-three years. With his great qualities of mind and heart he brought also physical strength, abounding manhood and a great capacity for labor. There was need of all of them; the basic law of the state had indeed been written and its construction well begun, but the effective molding of that basic law, the building of the great superstructure upon the foundation already laid, remained yet to be done, and to this work he devoted himself for the fifteen years which formed the great constructive years of his life.

Happily fitted indeed he was for the task and happily was he mated with his co-laborers, Orsamus Cole and Byron Paine. All were young, all had their faces turned to the light, all were strong men, but it is no disparagement to his colleagues to say that Dixon was as truly the Chief Justice by inherent fitness and strength as he was by official title. His mind was in the highest sense judicial; no mists of passion could dim its vision, no temporary tumult could affect its serenity, no thought of consequences could swerve it from its course.

How well he builded the fair structure of Wisconsin's jurisprudence is known to all who have given the subject

any thought. The record is forever written in twenty-seven volumes of Wisconsin reports: that record went very far to place Wisconsin in the front rank of American states so far as quality of its jurisprudence is concerned; on every page there is convincing evidence of the moral and intellectual greatness of the author and every volume bears witness to his constant struggle to realize the ideal of equal and exact justice. This is what has caused this noble shaft to rise; this is what causes the name of Dixon to live today, and this is what shall cause his name to live as long as the state itself shall live.

To his memory, therefore, we now dedicate this monument, confidently believing that it shall ever stand proclaiming his name and deeds to the people of a grateful state; but not alone do we dedicate it to the memory of Dixon; this were far too narrow a view of its significance; we reverently dedicate it also to the imperishable vision of perfect justice under the constitution, and the law, the vision under whose inspiration he wrought, praying that the vision may continue to inspire the statesman, the judge, and the American patriot of every degee until time shall cease, "the sun grow cold" "and the leaves of the judgment book unfold."

On the following day the monument to the memory of the late Chief Justice Ryan was unveiled, presented for acceptance and formally dedicated; by invitation of the president of the Association, the following named persons acting as an acceptance committee: Hon James G. Flanders, Hon. Thos. W. Spence, Mr. W. A. Hayes, Mr. Geo. D. Van Dyke, Mr. Fred Vogel, Mr. Geo. P. Miller, Judge L. W. Halsey, Mr. C. C. Markham, Hon. Gerry W. Hazleton and Mr.

H. A. J. Upham. The presentation address was by Gen. F. C. Winkler as follows:

Mr. President and Members of the Dedication Committee:

Among the prominent and efficient men who made and marked the early history of Wisconsin none looms up more conspicuously than Edward G. Ryan. The light of his genius gleamed from his eye, expressed itself in his attitude and riveted the attention of all whom he met. His great qualities are familiarly known and common topics of conversation in the legal profession. When obituary services were had after his decease an eloquent member of the Milwaukee Bar truthfully said of him:

"He died as he long wished to die, in the exercise of judicial functions, with mental power unabated, with his professional harness upon him. A mind comprehensive and powerful in its grasp, quick of perception; profound learning of the law; close familiarity with the writers of the past; thorough mastery and precision of language; classical beauty of diction; wonderful power of imagery; great nervous force and energy—were the marked characteristics of him who towered above all others at our bar—*the* lawyer among lawyers."

He was laid to rest with remarks like these. But his resting place in this city of the departed remained without mark. The same was true of another Chief Justice who had rendered invaluable services to the state.

After a lapse of many years a valued member of the court over which they once presided gave voice to the thought that this ought not to be, that the bar of the state owed it to itself to see that proper monuments be placed where these great jurists lie buried. Pursuant to his call a committee was organized of which he was made chairman. Through

his zeal and care, aided by generous contributions from members of the bar and friends, a stately and noble monument has been erected in commemoration of each of these men.

The chairman himself yesterday made formal presentation to representatives of the State Bar Association of the shaft erected to the memory of Chief Justice Dixon in the city of Madison, and I now, at his request, on behalf of the committee and the donors, make presentation through you, the members of the dedication committee, to the State Bar Association of the tasteful granite memorial which stands before you and which will through all time bear testimony to the greatness and distinguished public services of Chief Justice Edward G. Ryan.

The committee has also been able to provide for an ample fund, in trust, permanently to care for this place of burial, of which evidence is placed in the hands of your Association.

The work of the construction committee is done, and it herewith transfers the monument, together with the fund deposited for its support, to the dedication committee appointed to receive them.

The dedicatory address was by Hon. James G. Flanders in these words:

Thirty years ago Edward George Ryan, then and for six years prior thereto Chief Justice of the Supreme Court of Wisconsin, laid down the duties and responsibilities of his life.

In 1842 he came to the sparsely settled territory of Wisconsin. Its inhabitants scarcely exceeded in number one-tenth of the present population of the metropolis of the state. For more than thirty years he followed the duties of his profession and was an active participant in most of the im-

portant trials in the state. He was endowed with great ability and possessed great learning and unsurpassed eloquence. The logical and analytical powers of his mind enabled him to at once grasp and apply legal principles. His devotion to the profession was without reserve. His respect for the law as administered for centuries in English-speaking communities was unbounded. Some of the eccentricities and weaknesses of genuis inhered in his character and his life was at periods stormy, but his adherence to the highest principles of the law and the best standards of the profession never varied, notwithstanding some infirmities of temper. Chief Justice Cole in his response to the resolutions presented in the Supreme Court not long after his death said of him:

"In order to correct a popular misapprehension upon this point, I will say that in consultation, while engaged in the labor of considering and deciding causes, the deportment of the Chief Justice towards his associates was uniformly kind, respectful and courteous. No irritating word, no offensive language, fell from his lips while thus employed. He often made up his mind quickly how a cause should be ruled, but he was not impatient of hesitation or opposition on the part of others. On the contrary, he listened with attention to whatever any one had to say adverse to his views, and often readily came to their conclusion when it seemed supported by the better reason or authority."

His standard of professional honor and of professional duties was the highest and his sentiments in reference to the responsibilities of a lawyer were lofty. His memorable address before the law class of the university in 1873 at once became a classic. It has been the treasury from which has been selected one of the inscriptions upon this monument

and in widely separated communities from that address portions have been drawn as precepts to which all members of our profession can look as rules of conduct.

It has been said that the triumphs of the advocate are written in the sand and quickly pass from the memory of man. It is the fact, nevertheless, that his forensic efforts still live in the recollection of many now living and that tradition has handed them on to the coming generation. Nearly sixty years ago his powers of satire and invective and his eloquence placed a trial before the Senate of Wisconsin in the front rank of the great trials of history. The opinions filed by him while Chief Justice are examples of the purest English. His command of language selected without failure the precise words to express the principles he was expounding and those opinions have helped to create the high position maintained among lawyers of the country by the Supreme Court of Wisconsin.

At the time of his death the thinly populated territory had become an empire with boundless resources and a population of a million and a half. At the time we assemble here to do honor to his memory the state he served so well is in the front rank. Its bar, always a strong one, has increased in number and in strength. It has contributed members to the profession in different states. Not a few of them have attained positions of honor and distinction.

When, something more than a year ago, the movement was inaugurated to erect the monuments to Chief Justice Ryan and Chief Justice Dixon, contributions came to the committee from Wisconsin men in many different cities. Nor were these contributions confined to the members of our profession. Sons of Wisconsin pursuing other occupa-

tions in this and other states gave liberally. Some contributions came without solicitation.

It is well that such a memorial should be erected. It is well that, towering toward the sky, it should serve to remind those who visit this silent city of the dead of the man whose name is graven on it, but the deathless fame of this great lawyer may well endure after the ravages of time have caused the granite to crumble. It is said that through every rope manufactured for the British navy there runs a single scarlet strand. The cumbersome cable which moors the man-of-war and the small halyard which raises the pennant to the masthead alike disclose in every section this inseparable proof of ownership. So the triumphs and achievements of the great Chief Justice are interwoven in the history of Wisconsin, and so long as there is a state its citizens will honor and remember his great ability.

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