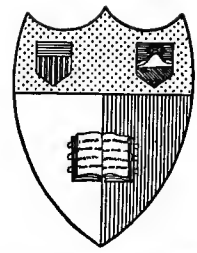
BENCH AND BAR IN CALIFORNIA.



BENCH AND BAR

—(IN)—

CALIFORNIA.

HISTORY, ANECDOTES, REMINISCENCES.

BY

OSCAR T. SHUCK,

(*"Scintilla Juris"*)

OF THE SAN FRANCISCO BAR.

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TO THE

HON. S. C. HASTINGS,

Whom I have known the longest of them all—Chief Justice of our Supreme Court in 1850, and still exhibiting a sturdy manhood in 1887—I would regardfully inscribe this volume: counting it a happy circumstance that I may associate the only Chronicle of our BENCH AND BAR with the name of the honored founder of our only College of Law.

THE AUTHOR.

PREFACE.

The omission of this page might be noticed, as being an innovation. I publish my book because the story of the California Bar has never been told. In a free State, the profession of the law is the highway of ambition—a broad avenue, whence open fields of splendid possibility. Bar leaders walk before the universal eye. In older lands, a copious literature has made them its subject. Here, too, are masters of the Forum, to whom, with others gone before, many notable triumphs are to be credited. The meteoric McDougall, the eccentric Lockwood, the eloquent Hawks, the brilliant Byrne; Baker with a voice like Israfel; Randolph and Baldwin, noble remembrancers of the land and fame of Marshall; Felton and Murray, cut off in their manly pride and prime;—all have passed to their ultimate appeal. But their peers survive, and it is given me to tell the stirring story of the living and the dead.

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CHAPTER I.

Edward D. Baker—Orator, Lawyer and Statesman—A Soldier in Three Wars—Great Criminal Trials—Baldwin's Witty Thrusts at the "Old Gray Eagle"—Gov. Low's Wager—Verdenal's Jest—Bret Harte's Enthusiasm—The Political Campaign of 1859—Brief and Brilliant Period in the Federal Senate—Death on the Battle Field—Celebrated Speeches—References to A. C. Monson, George Cadwalader, Edward Stanly, Jacob R. Snyder and Thos. Starr King.

"Baker, you know *everything*—except law."

It was the elder Baldwin who spoke, a master mind in legal science. It was in the long ago, and he was rallying no less a man than Edward D. Baker, even then famed at the bar and in arms. Baker had held a brilliant place at the bar of Illinois, among those to whom he afterwards pointed (with a modesty that excluded himself) as "the pride and boast of the Mississippi Valley." He had won distinction in Congress, and as a soldier in the war with Mexico. Now, early in the "Fifties," having established himself in law practice in San Francisco he had gone to Sacramento, the capitol, on a professional visit. It was his first appearance in the interior of the State. While happiest in criminal cases, he was now enlisted in a civil trial. The plaintiff was the well-known lawyer, Joseph W. Winans, suing Hardenberg & Henarie, of the Orleans Hotel, to recover $3,000 on a promissory note given for legal services. The defense was made by only one of the partners, who said the note was executed by the other after the partnership was dissolved. But the other partner testified to the contrary.

Baker was for the defense. He made a splendid effort to uphold a lost cause. In spite of the evidence he at least upheld his own fame for ingenuity and eloquence. But the plaintiff obtained a verdict, and the judgment thereon was affirmed on appeal. The trial below was before Hon. A. C. Monson and a jury. George Cadwalader, who had just come to the bar, was the lawyer who had the honor of the triumph. It was on this occasion that Joseph G. Baldwin, who had witnessed Baker's felicitous performance, accosted him with the opening words of this chapter. And the witty Southron followed them with a specimen of that infectious laughter that was his alone.

There was no political campaign pending just then, but the Sacramentans were bound to hear Baker outside the court room. They called him out on the lecture platform. He gave them "Books." He was full of his theme, and Baldwin was perhaps the most appreciative and most charmed of all his auditors. But the next day the Virginian had another sally for the lecturer

on "Books." "Baker," he said slowly, "you know everything about books —except law books."

The "Old Gray Eagle," as we fondly called him, soared close to the sun. His soul fed on poetry and fame, he was brilliant in the nation's eye, and "the path of glory led him to the grave." He was not very long at this bar, but his career here was cast in a crucial and eventful period. His triumphs and defeats were notable, and his figure looms up as the most striking in our legal annals.

He was born in London, England, in 1811. When five years old his parents came to the United States, bringing him with them. They came to this country, loving its institutions. They were teachers, educators, and making their home in Philadelphia when the echoes of the old bell of freedom yet lingered on the air, they opened a school and taught the youth of that city until the father's death, ten years later. The mother lived to a great age, surviving her distinguished son.

When in the fullness of time, the latter became a United States Senator, his first letter bearing the Senatorial frank was addressed to the aged mother. The Rev. Thomas H. Pearne, of Portland, Oregon, is authority for the statement that, on the way to the Post Office with the letter in hand, and conversing with a friend, the Senator remarked with fond pride that his mother, then more than eighty years old, was a woman of strong, cultivated mind; that she had often taken down his speeches in short-hand, which she wrote with elegance and rapidity; that she was a beautiful writer and still retained in vigor her mental faculties. Tears were in his eyes as he recounted her virtues and excellences.

At seventeen Baker went to Illinois, settling at Carrollton. He studied law and elocution. When he was twenty-one he entered the Black Hawk war, obtaining a Major's commission. He distinguished himself in that war. In 1845–6 he represented the Springfield district in Congress; and the old *Globe* will show that he was then gifted with that clearness of vision, and that charm of speech, which later so often fascinated the people of the New West. He was then the first orator of Illinois. He was a Whig, but, unlike most of the Northern Whigs, he favored the Mexican war. He gave up his seat in Congress to fight under Taylor. He was at Cerro Gordo, at the head of the Fourth Illinois Regiment, which regiment was raised by him. Without following him through the war, let it be said that at its close his State presented him with a sword.

In 1849 he went to Congress again—a Whig from a Democratic district. Governor Stanly, in his oration at Baker's funeral, said: "He had, if not all the ambition, the courage and genius of Julius Cæsar." Governor Stanly might have said he had, too, the ambition of Cæsar. Baker was among the most ambitious of men. He loved fame. His soul was ever athirst for glory.

I am tempted to believe that he favored the Mexican war, in opposition to his Whig friends, chiefly because it was *war*, and afforded him an opportunity to slake the burning thirst of his heart.

In 1851 we find Baker in a strange role—superintendent of construction of the Panama Railroad. He had a heavy force of men under him, and managed them with ability.

In June, 1852, Baker arrived in San Francisco, and until he departed for Oregon, eight years later, he practiced law here with distinguished brilliancy and success. In 1859 he ran for Congress on the Republican ticket. That was, without exception, the most interesting year in the political history of California. It was the year of Broderick's death—the year when the great Democratic party broke in two. Burch and Scott were the regular Buchanan administration candidates for Congress. The anti-Lecompton or Douglas candidates were Joseph C. McKibben of Sierra, and Judge Booker, of Stockton. The Republican candidates were Colonel Baker and P. H. Sibley. California then was strongly Democratic. By a tacit understanding between the Republicans and Douglas Democrats those two elements coalesced on candidates for Congress, and cast their united vote for Baker and McKibben. It was of no avail. Burch and Scott were elected by a heavy majority. But Baker made a magnificent canvass. From San Diego to Yreka his eloquent tongue was heard, and never before or since have our hills and plains echoed so marvelous a voice. The Sacramento *Union* employed short-hand reporters to accompany the orator, and to report his speeches verbatim. It was in that campaign that Baker made his great speech at Forest Hill, Placer County, known as his "Forest Hill" speech.

"I am here speaking in the mountains," were his opening words, "always in all lands favorable to the great idea of real liberty; always an inspiration to its defenders; always a fortress for its warriors." Henry Edgerton, himself an orator worthy of the name, who was with Baker at Forest Hill, declared he never heard so grand a speech. It may be found in full in the Sacramento *Union* of August 23, 1859.

It was in this campaign that I, a boyish worshiper of this magnetic orator, had the pleasure of grasping his warm hand for the first time? It was on the very day of election, and at the Third ward polls in Sacramento. The "Old Gray Eagle" had closed the fight by a magnificent speech in Sacramento the night before and was about to take the two o'clock P. M. boat for San Francisco, but visited in person the various polling places. Just as he was leaving the Third ward precinct he caught my eye and saw the tickets in my grasp. Lifting my hand with his he read the tickets which I held, and seeing thereon his own name, said: "The young and the old work together today."

Colonel Baker lost this fight. As he afterwards publicly declared, his

hopes and his heart were crushed. But in less than one year from the time of that Waterloo, he was a Senator of the United States! Oregon was his constituency. On the eve of his departure for Oregon, to capture a State of which he was not a resident, Governor Low bet him a suit of clothes that he would not succeed in getting to the United States Senate. When he came back triumphant, Governor Low was in the van of the great throng that welcomed him. "I'll take that suit of clothes, Low," was the first thing Baker said. He got the suit, but some people say that if he had lost the wager, his memory would not have proved so reliable.

While attention is turned to Oregon, I may tell this also, which I get from Mr. J. M. Verdenal. The latter, by the way, declares that Baker was the greatest orator he ever heard, and he has listened to Daniel S. Dickinson, Judah P. Benjamin, Robert G. Ingersoll, and other famous speakers. Mr. Verdenal's brother, D. F., now a leading newspaper correspondent in New York City, and who practiced law for a few years in San Francisco, pursued his legal studies in Baker's office. Being in Washington shortly after his old friend had become a member of the Federal Senate, he took occasion to pay his respects to "Baker of Oregon" in the senate chamber. "Young man," said the senator, grandly, "I hope that *you*, some day, may stand on this floor as a senator from a sovereign State." "Thank you," responded Verdenal, "I hope I will not have to emigrate to Oregon in order to get here."

Baker was very engaging on the lecture platform. Few, if any, of his efforts in that line, were reported with any attempt at fullness. Indeed, before 1859, short-hand was a very rare accomplishment in California. Notable among his lectures, besides that on "Books," were "The Sea," "The Plurality of Worlds" and "Socrates." These he treated with a glowing imagination, closing the last named with a noble tribute to TRUTH. At the Burns' Centennial, 1859, he was very happy.

Another fine effort was his oration at the dedication of Lone Mountain Cemetery (where his body rests), May 30, 1854. Starr King, in his touching address, six years later over Baker's open grave, made this allusion: "We have borne him now to the home of the dead, to the cemetery which, after fit services of prayer, he devoted *in a tender and thrilling speech*, to its hallowed purposes." Then Mr. King gave these lines from it: "Within these grounds public reverence and gratitude shall build the tombs of warriors and statesmen who have given all their lives and their best thoughts to their country."

Baker's most deliberate, thoughtful and polished production, was his oration at Broderick's funeral, September 18, 1859. It contains his stirring protest against dueling. Never was man so eloquently mourned as Broderick.

Baker worshipped the beautiful as ardently as Poe—the beautiful in art, in literature, in nature. His soul was full of poetry. One day, during the recess of a murder trial, in which he was about to speak for the prisoner, his

eye fell on one of those beautiful little fugitive poems that sometimes come and go, no one knows where. After reading it repeatedly and examining it thoughtfully, he showed it to a brother lawyer (the late Lewis Aldrich) saying: "Isn't that beautiful? I have been thinking how could I weave it into my speech this afternoon. I don't know where I can bring it in, but I'll find a place for it, if I hang my man."

Baker was counsel for the defence in the Snyder embezzlement case. Major J. R. Snyder came to California from Pennsylvania, his native State, several years before the Argonauts. He was in the first Constitutional Convention (1849) from the Sacramento district and in 1852–53 was a State Senator from San Francisco. He died on his Sonoma farm about 1877, leaving a valuable estate, including business property in San Francisco. While he was superintendent of the San Francisco Mint, he was tried in the Court of Sessions (T. W. Freelon, Presiding Judge), A. D. 1853, on a charge of embezzlement—it being asserted that there was a continuous shrinkage in the precious metals brought to the Mint. The defense claimed that the missing gold had gone, not where the woodbine twineth, not exactly up the spout, but—up the chimney, and had been wafted off in those golden clouds that are wont to circle above all mints, where they

> "Become enthroned in upper air
> And turn to sunbright glories there."

During the progress of the trial, the Mint whistle blew one day at twelve o'clock noon. "What is that?" said one lawyer to another. "It is Uncle Sam whistling for his money," was the reply.

Judge Freelon remarked to me that Baker's argument on that trial was the finest he ever heard him deliver. Baker had a faculty of understanding mechanical principles. Major Snyder did not; nor did more than a few of the witnesses. Baker must have spent several weeks in studying in detail the chemical operations of the Mint, for on the trial he showed that he knew more on this subject than anybody else. In his argument he turned his knowledge to good account, and also displayed his best powers of oratory and illustration. He acquitted his client, who was generally believed to be an honest man, but an incompetent manager. Judge Freelon also heard Baker in the Cora case; and thought while his speech in that case was more brilliant and eloquent and impassioned, yet, as a forensic effort, an argumentative display, a union of fact, argument and expression, the speech in behalf of Major Snyder was more creditable to him as a lawyer and advocate. Mention of the Cora case recalls the fact that Baker suffered a severe penalty for his brilliant defense in that celebrated trial. For a time he was socially ostracized. Society indicted him. It would never have visited such censure upon an advocate of ordinary powers. Cora had killed General Richardson, United States

Marshal, and his trial for the crime commenced January 8, 1856. He employed Colonel Baker to defend him, but public opinion insisted that the Colonel should leave the accused to his fate. He did his duty, and, in consequence, such was the inflamed state of the public mind, the eloquent old man suddenly found himself like a stranger in a strange land. Day after day the newspapers poured out their wrath upon his head. He stood his ground and "hung the jury." Before Cora could be put on trial the second time the Vigilance Committee hanged him. I will not say anything of that great popular uprising; I only touch the Cora trial because it concerns Baker's fame. It is hardly necessary, now, to argue that Baker had a clear right to defend the prisoner. The public opinion, which would tell a lawyer whom he may and whom he may not defend, would, if permitted, dictate the judgments of courts of justice.

But Baker may be quoted in his own vindication. In his defense of Cora before the jury he took occasion to say:

"The legal profession is, above all others, fearless of public opinion, candid and sympathetic. It has ever stood up against the tyranny of monarchs on the one hand, and the tyranny of public opinion on the other. And if, as the humblest among them, it becomes me to instance myself, I may say it with a bold heart—and I do say it with a bold heart—that there is not in all this world a wretch so humble, so guilty, so despairing, so torn with avenging furies, so pursued by the vengeance of the law, so hunted to cities of refuge, so fearful of life, so afraid of death—there is no wretch so deeply steeped in all the agonies of vice and misery and crime—that I would not have a heart to listen to his cry, and find a tongue to speak in his defense, though around his head all the fury of public opinion should gather, and rage, and roar, and roll, as the ocean rolls around the rock. And if I ever forget, if I ever deny, that highest duty of my profession, may God palsy this arm and hush this voice forever."

It is the judgment of many that Baker never stood forth as the orator so irresistibly as in the old American Theatre (where now stands the Halleck Block) on the night of October 27, 1860. Perhaps on that occasion he excited his audience to a pitch of enthusiasm and delight beyond all his other triumphs. One year before, he had left the State—defeated in a tremendous struggle, but hopeful and free of soul. He was now on his way from Oregon to Washington to take his seat as a Senator of the United States. He seemed inspired. The speech was fully reported and widely distributed. Delivered without notes, it was full of gems that will sparkle forever, as this:

"Here, then, long years ago, I took my stand by freedom, and where, in youth, my feet were planted, there my manhood and age shall march. And, for one, I am not ashamed of freedom. I know her power; I rejoice in her majesty; I walk beneath her banner; I glory in her strength. I have seen her struck down on a hundred chosen fields of battle. I have seen her friends fly from her. I have seen her foes gather around her. I have seen them bind her to the stake. I have seen them give her ashes to the winds, regathering them again that they might scatter them yet more widely. But when they turned to exult I have seen her again meet them, face to face, clad in complete steel, and brandishing in her strong right hand a flaming sword, red with insufferable light!"

The natural grace, the manly animation of the speaker, the way he suited the action to the word, were peculiarly his own and full of fascination. He appeared to brandish in his own "strong right hand," the "flaming sword red with insufferable light;" and his audience, tossed on the mountain waves of his eloquence, seemed to see him standing, unconquerable, the especial champion of Freedom, who, no more to be bound to the stake, was to exult in majesty and triumph forever. The daily papers, reporting the occasion, told of one individual in the audience, who, in the exuberance of his enthusiasm, leaped on the stage, and cheered as he waved the flag of freedom before the throng. This was no other than Bret Harte, then "a youth to fortune and to fame unknown."

During his short term in the Senate he delivered a few great speeches, in one of which occurred his oft-quoted tribute to the press. He also quickly won a high reputation for skill in debate, while his reply to Benjamin, in January, 1861, evidenced great logical power as well as majesty of expression.

It surprised the country when Baker left the Senate for the "tented field." It was thought an unnecessary sacrifice. But Baker was under an uncontrollable impulse. He once told Samuel B. Bell that eloquence was not his forte. Bell, in astonishment, said: "If you can beat yourself as an orator, in another direction, you are certainly an extraordinary man." "Well, think what you may," replied Baker, "my real forte is my power to command, rule and lead men. I feel that I can lead men anywhere." He raised a regiment, and went into this his third warfare as a Colonel. His career in the field was even shorter than his time in the Senate. He fell in his first fight, on the 21st day of October, 1861—gallantly, gloriously, and was commissioned Major-General after his death. Brilliant, restless and checkered life! These lines close a pathetic little poem, "To a Wave," written by him twelve years before his death:

> "I, too, am a wave on a stormy sea;
> I, too, am a wanderer, driven like thee;
> I, too, am seeking a distant land,
> To be lost and gone ere I reach the strand;
> For the land I seek is a waveless shore,
> And they who once reach it shall wander no more."

Baker's delivery was rapid, his voice melodious, his diction polished, his gesture free and full of grace. He had a splendid person, an eye full of fire, a noble forehead; and nose and mouth and chin were finely chiseled. His hair had long been very gray. On the platform his manner was marked by perpetual animation. He loved all arts, all sciences. His imagination was rich, his reading wide, his memory extraordinary. His countenance and bearing and his gray locks recalled the picture of Thorwaldsen, of whom it was said that when he moved in the midst of a crowd, it would separate as

if it felt the presence of a superior being. His disposition was the perfection of amiability. In his most heated forensic and political contests he was never betrayed into saying an unmanly thing of an adversary. He was a giant before a jury. So great were his gifts of oratory that his knowledge of law has been underestimated. But he was learned in the profession of his choice —a profession that opened so broad a field for the display of his varied powers.

Now and then, and here and there, has been heard the promise of a publication of Baker's Speeches, Lectures, etc., in book form. So engaging a volume may never appear. There has been issued, however, a "Sketch of the Life and Public Services of Edward D. Baker," by Joseph Wallace, (Springfield, Illinois, 1870). Those interested will find Baker's best political speeches in our libraries, in the files of the old Sacramento *Union* under dates of June 9–10; July 2–13–15; August 23–24; September 22–30—all in the year 1859; and October 26, and November 5, 1860. His "Atlantic Cable Oration," beautiful beyond eulogium, is the opening piece in my "California Scrap Book" (1869). His moving address at the burial of State Senator William I. Ferguson (who fell in a duel) September 16, 1858, his nobler "Broderick Oration," September 18, 1859, the imperishable words of Gen. James A. McDougall on the death of Baker, delivered in the United States Senate, Gov. Stanly's Oration at Baker's burial, and Thos. Starr King's brief but thoughtful address at the great man's newly opened grave, are all given in full in my "Representative Men of the Pacific" (1870). The address last referred to is a masterly assertion of the soul's immortal life. The declaration "Paul goes to an immense service still as an Apostle; Newton to reflect from grander heavens a vaster light," never fails to stir me when I see the preacher's marble tomb.

A broad street in San Francisco, not open at Baker's death but now lined with dwellings, bears his name. It will recall his fame when the cemetery where his mortality lies has long ceased to be the city of the dead and been added to the domain of throbbing life.

CHAPTER II.

Hall McAllister—The Veteran of the Bar—Scion of a Line of Lawyers—A Name Scattered Through Seventy Volumes of Reports—Personal Description—A Practice of Widest Range—Extraordinary Capacity for Work—Manner of Trying Cases—A Contrast with Edmund Randolph—Anecdotes—Judge Lake's Estimate of His "Muse"—Mr. Papy's Pleasantry.

Glance at the date on the title-page of this volume, and reflect that Hall McAllister has been in continuous practice at the San Francisco Bar since the year 1849! If there have been some in whose variable radiance his steady light has been dimmed now and then, he has illustrated the happily expressed truth that the prolonged sunshine is better than a flash of lightning.

Through all this stretch of years he has kept faith with his profession in all its branches. The tide of his practice has known no ebb since its first swell in the middle of the century, and it has had an exceptionally extended range. Moreover, his indefatigable industry in preparation, his serene patience in the elucidation of intricate facts, the remarkably thorough way in which he tries his whole case, and the freedom with which he is consulted by lawyers generally, are qualities and considerations that lift him to the distinction of *primus inter pares.*

Is he as old in years as all this implies? No. His step is light, his mind clear and strong as ever, and, besides doing a great deal of work at night, he is regularly in his office long before "office hours" open. He was born in 1826. A native of Georgia, of remote Scotch extraction, he comes of a line of American lawyers. His grandfather, Matthew McAllister, held under Washington the office of United States District Attorney for the southern district of Georgia. His father, Matthew Hall McAllister, held the same position by appointment of John Quincy Adams, and in 1855 became, by appointment of President Pierce, the first United States Circuit Judge of California.

Hall McAllister arrived in San Francisco in June, 1849, a year before his father came, and by way of the Straits of Magellan and Valparaiso. He took his place at this bar in August of that year, a novice among experienced men. He was a wary observer, in love with his calling, and entered the lists with that resolute purpose, which, if stubbornly adhered to, rarely fails to bring to the legal practitioner a fair measure of success.

That period of probation from which lawyers—even those of the brightest

parts and promise — seldom find exemption, was with Hall McAllister exceptionally brief. Several favorable circumstances conspired with his native bent and energy of character to cut his probation short, and to launch him auspiciously into the full tide of practice. Of an honorable and talented family, courted by society, enjoying the affectionate help of a father distinguished in his own profession, anxious and able to assist and advance him; of fine person, robust health, resolute purpose, vigorous mind and a fixed ambition, he stepped into the arena of professional life with the air of one who feels he has a hold upon the future, and with the almost absolute assurance of success. It is most true that he owed much to fortuitous circumstances; much to paternal promptings and guidance, "which nursed the tender thought to reason, and on reason build resolve—that column of true majesty in man;" but it is just as true that even without such aids he was born to be what he long ago became, one of the few unchallenged leaders of a large and able bar. He has never known what it is to be poor, or without friends, although he is nobody's hero, and has never wielded great wealth. But even if he had set forth upon his brilliant career without the advantages of competency, friendship and a liberal education, he would surely have arrived at the desired goal by slower marches but in good season. If we attribute his auspicious entry into professional life chiefly to good fortune, we must give him credit for the unsurpassed zeal and industry which have distinguished his progress. He might have builded on his father's fame, but instead thereof he laid his own foundations, and the superstructure which he has erected is entirely his own. He has a more vigorous and comprehensive legal mind than his father possessed.

The personal appearance of some men conveys a false idea of their ability and standing. Some really little fellows are unduly exalted in the mind of the stranger, by their Websterian heads, and countenances cast in the very mold of wisdom. Others, who possess abilities of the first order, attract attention only when deep emotion lights up their else expressionless faces, or when some great cause or occasion stirs their sluggish blood. But the features and presence of McAllister certainly deal honestly by the observer. His very build and bearing give to the beholder a correct suggestion of his capacity. The impression is not that of greatness or genius, but of strength. Whether we meet him in the street, in the court-room or in his office, we feel that we are in the presence of a strong man, to grapple with whom in his chosen calling must be serious business. We look upon him generally as a leader among men, and in the court-room, especially, we see in him the monarch of the local bar.

He has a large, square face, an unusual proportion of it below the eyes; a forehead neither full nor high, and lower than the average of men of ability, with no corrugations to betray the earnest study he concentrates upon his

causes; a head thick through and noticeable chiefly for its peculiar and irregular shape; the whole suggesting the seat of a practical mind, highly endowed with the powers of analysis and conclusion. His large and heavy frame lends to him the aspect of solidity and power, but his movements of body, notably lively for a man of his stature, militate somewhat against this impression. This alertness of movement corresponds with the action of his mind; and, like the latter, never runs into haste. Thoroughness and dispatch exercise joint and harmonious control over his whole being.

I have alluded to McAllister's custom of bringing out his case in all its strength and symmetry. In the trial of a cause his manner is, on the whole, admirable. He is cautious, but caution never fetters him. He is rapid, but is never carried beyond his object. Whether he goes over, around or through the chosen position of an adversary, he opens up a broad road, and leaves that position harmless behind him. One of his most noticeable habits is to take down with his own hand all the evidence of witnesses. He is eternally writing. St. Augustine said of that "most learned of the Romans," Marcus Terentius Varro, that he had read so much that we must feel astonished that he found time to write anything, and he wrote so much that we can scarcely believe that any one could find time to read all that he had composed. It may be said of McAllister, that he reads so much, it seems hardly possible he can write much; yet it would engross the time of almost any person to read, not what he composes, but what he writes down in court. What he writes would hardly prove as entertaining as the critical, philosophical and other treatises of Varro, for what drops from his pen is testimony. This, however interesting to him as bearing on his cause, would be dry, cold and barren enough to others.

This habit of taking down testimony, although the short-hand reporter is doing the same task more accurately, is very advantageous to an advocate. And it loses half its benefit when done by proxy, for the evidence is then the less impressed upon the advocate's mind. This duty is generally shirked, because it is hard work, and is unjustly regarded as merely manual. Successful lawyers usually turn aside from the clerical details of their business. In McAllister this habit of which we speak is in keeping with his unflagging industry.

The late Edmund Randolph was the opposite of McAllister in this as in some other respects. These two advocates, opposed in the trial of a cause, presented an interesting contrast. Randolph's wonderful memory was one of the most noticeable of his brilliant faculties. No matter how lengthy the trial, how numerous the witnesses, or how important the testimony, he disdained the use of notes, even though McAllister were opposed to him, urging his tireless pen through the whole trial.

When a motion was made in the Twelfth District Court to adjourn as a

mark of respect for Randolph's memory, the then Judge of that tribunal, called attention to this practice of the deceased, of trying his causes without taking notes, and urged the junior members of the bar to imitate the example as a means of strengthening the memory. It is to be hoped that this advice though given by a very excellent judge and lawyer, has not borne its legiti mate fruit. Few men have remarkable memories; none have perfect memories. To strengthen the memory is commendable, and it is feasible, but to make it entirely reliable is hardly possible. Randolph could trust to this splendid faculty; but, generally, the advocate who imitates him will fall far short of his success. Whoso relies implicitly upon his memory is usually more showy than safe.

One of the best teachers in the public schools of this State, Andrew R. Jackson, then principal of the Sacramento High School, once told his scholars of a man who, many years previously, had been Clerk of the National House of Representatives, and who possessed a memory so extraordinary that he was able to write up accurately the minutes of the most busy and stormy session, without having taken notes. He did this day after day and week after week, until it was generally known how he got through with his work, when, although the fidelity of his journals could not be impeached, he was removed from his responsible trust. I am satisfied that my old preceptor believed this story, though he may never have investigated it more than I did. If it is true, the House of Representatives acted wisely in dismissing their brilliant and lazy servitor, because in his position he was unconsciously a dangerous man. McAllister has a good memory, but had he succeeded to that of Randolph he would yet adhere to his practice of taking copious notes. Without this practice he could try his causes well, but without it he does not seem to feel that he could try them thoroughly. This habit has so grown upon him that he sometimes goes through the motion of writing, even when listening intently to the court or opposing counsel.

In trying a jury cause, he sits usually facing the jury, and rarely rising from his chair. His table is covered with books and papers, and a boy is generally waiting to make fresh drafts upon his well-stocked library and his plethoric pigeon-holes. The court-room is for him a place of earnest work. He rests only when court takes a recess, and not often then. From the beginning to the end of the trial, he is writing, reading, questioning, objecting, arguing, appealing. The observer is constantly impressed with his industry and watchfulness.

In eliciting testimony, McAllister exhausts the information, without exhausting the patience of the witness. He never bores or insults. He never plays the tyrant over a timid witness, and never leads a rash one to his undoing, just for the love of the thing; never figures in any of the discreditable scenes in which lawyers and witnesses grapple in wordy combat.

McAllister, like every thoroughly trained lawyer, is politic, and therefore polite —alike courteous to court, counsel, jury and witness. To counsel associated with him in the trial of a cause he is uniformly deferential, but will not play second fiddle. He always leads his side. He is not troubled with the idea, which haunts so many legal small fry, that to be respectful to an adversary is to succumb to him, or that to listen decently to a postulate is to admit its soundness. He never sneers at a proposition, and never states one dogmatically. He meets the tyro with his hesitating step, and the veteran with his measured stride, with the same air of respect.

With all his dispatch, it is yet in the fullness of time, and, with a clear comprehension of his cause, that McAllister rises to address his familiar and favorite auditory—the jury. He is now in the house of his friends, and in speech and manner he shows that he is conscious of it. Having omitted nothing as regards introduction of evidence, so now he leaves nothing unsaid which the jury should hear. He speaks smoothly, exhaustively, yet avoids prolixity. The jury have witnessed his patient management, his shrewd generalship, the evidences of his careful preparation, and if, when he rises before them, they have not already recognized the fact that he knows his case to the utmost details, he soon convinces them of it. They appreciate his address to their reason, admire his methodical arrangement of facts, and find entertainment in his argument. Without betraying any effort to subject them to any personal influence; always respectful without being patronizing; ever earnest, but never inflamed; fluent, yet not verbose; easy in manner, yet a stranger to dramatic effect, he challenges respect for himself, even when he fails to elicit sympathy for his cause. His voice and physique, as well as the cast of his mind, are more suited to the argumentative than the pathetic style. At times, however, in capital cases, he approaches eloquence, drawing on the classics to give point and polish to his appeals. In quoting Shakespeare and the Bible he is quite happy. His elocutionary powers belong neither to the first nor the second order. Nothing can be said for his gesticulation; his metaphors are few and not striking, and, as to apostrophe, that perfect flower of Baker's oratory, he rarely calls it to his aid.

This Bar leader has no specialty. Great lawyers are often distinguished for specialties; too often the public assign them to specialties, when, in truth, they have none. McAllister has never suffered from this popular propensity. Not only has he no specialty, but the fact is acknowledged by all. Whether his case involves land titles, inheritance, patent right, private franchises, personal liberty, human life, or constitutional law, he is equal to the occasion. A prominent member of this bar—a former Judge of one of our District Courts* —once took occasion to bear public testimony to this fact.

*Address of E. D. Sawyer to the jury, in Tyler vs. Holladay, Twelfth District Court, April, 21, 1875. The parties to this suit were lawyers.

As a pleader—a writer of pleadings—our friend is careful and correct, evincing an intimate acquaintance with English forms and precedents. Although he probably does more work than any member of the California Bar, there is no one who takes things easier, or whom work hurts less. He owes this in a great measure to his powers of endurance—a splendid auxiliary to close mental application—and to his habit of investigating and methodizing at the same time. He is full of life and energy, has naturally a high temper, which he has under good control; seems to have schooled himself to be slow to anger; is not combative; has few intimates.

This advocate has one habit, which some commend and some condemn—that of interjecting into his arguments doggerel of his own manufacture. Perhaps it ought not to be condemned, because he generally turns it to account. It is at least better than punning, and an advocate perforce often indulges in pleasantry of some kind to cause a laugh and give surcease from the monotony of argument.

"A little nonsense now and then
Is relished by the wisest men."

It may be said of McAllister's poetry, that it is more pleasing to the ear when spoken by its author in court than it would be to the eye if in print. At any rate I shall not print any of it. Occasionally he receives punishment for his temerity in this line—or rather in these lines. In his argument in the case of the Hibernia Savings and Loan Society vs. Mahoney et al., Fourth District Court, 1877, he let go some verses on which issue was joined by the opposing counsel, Judge Delos Lake. The latter, recalllng the stereotyped expression "more truth than poetry," declared that his adversary's verses contained "more poetry than truth," and added that "that was not saying anything for the poetry."

Among this advocate's minor resources is an unfailing vein of humor, not noteworthy for its richness, yet not to be omitted in this sketch. On one occasion he was called at the eleventh hour, into a case in which he had a colleague who was well prepared. While the latter was examining a witness, his memorandum of authorities fell under McAllister's eye, and was soon copied on a fresh sheet of paper, and, in a short time, a messenger laid the books on the table. The time for argument arriving, McAllister's colleague called on him to open, which he did by reading from his own books his associate's authorities. In closing, he said his associate would supplement what he had said by further argument. The "associate" arose, with serious front, and observed, poor man! that he had intended to address the court, but that Mr. McAllister had covered the ground so thoroughly that he deemed it unnecessary to add anything.

A certain lame lawyer had a certain lame client. The two resembled each other strongly in their awkward gait and clumsy locomotion. The

litigant, while looking for his attorney on the street one day, hobbled up to McAllister and asked: "Have you seen lawyer —— going along this way?" "I never saw him go along any other way," was the reply.

Among the more important of the law causes in which McAllister has won renown worthy of special note was that of Tompkins vs. Mahoney, tried in San Francisco in the year 1865. The plaintiff, a lawyer, recovered judgment against the defendant for some $30,000, including interest for legal services rendered during a period of several years. McAllister was his attorney, and his excellent address to the jury so pleased his client that the latter declared, in his enthusiasm, that he would have given one-half of the amount of the verdict for a verbatim copy of the speech. (The courts had no official stenographers at that time.)

Mr. McAllister married a lady of rare accomplishments, a daughter of the late Samuel Hermann, and has raised a large family. He owns a city residence, a beautiful summer home in Marin County, and is in comfortable circumstances. Reference to family recalls a scene which occurred in the early days in the United States Circuit Court, of which tribunal Hall's father was judge, Hall's brother was clerk, and Hall himself the chief practitioner. It happened one day, so goes the story, that as McAllister was presenting an ex parte motion, no one being in the court-room but the father and the two sons—judge, clerk and counselor—J. J. Papy, a well known attorney, now deceased, having business in the court, opened the court-room door, and, after a hasty glance, was about to withdraw, when the judge said: "Come in, Mr. Papy." The latter bowed his acknowledgments to the bench, and said: "Your honor will pardon me; I hate to intrude into a family meeting." The punctillous Mr. Papy then silently stole away, and the argument was resumed.

As I turn from this commanding figure, his "chariot rolls on fortune's wheel" as ever. Though his triumphs are many and enduring; his name scattered all over our seventy volumes of Supreme Court Reports, beginning with the case of Payne vs. Pacific Mail Steamship Company in volume I; he continues to work as might one who felt the sharp spur of want. Possessing a powerful constitution, mindful of the laws of health, and retaining all his first love for his profession, he is destined, in the ordinary course of nature, to hold his place at this bar for yet a considerable period. He is one of the men who labor through life. He will die in harness.

CHAPTER III.

John B. Felton—College Days—Early Partnership with Edward J. Pringle—Celebrated Cases—The Great Limantour Conspiracy—The Local Option Question—"Mortgage Tax"—The "City Slip" History—Felton's Enormous Fees—His Learning, Genial Nature and Sparkling Conversation—The Bulkhead Bill—Allusions to Professor C. C. Felton, Judge Lorenzo Sawyer, Judge T. W. Freelon, Levi Parsons, Gov. John G. Downey, and others.

John B. Felton's professional life began and ended in San Francisco. He was born in Saugus, Essex county, Massachusetts, in 1827, and died at his home in Oakland, May 2, 1877. His father was superintendent of an almshouse in Cambridge, and lived and died in very poor circumstances, leaving three sons, all of whom became men of mark. One was President of a railroad company in Pennsylvania. Another was the great scholar, lecturer and writer, C. C. Felton. The father managed to get this son into Harvard, and lived to see him attain great literary fame. C. C. Felton was connected with Harvard from the time she received him as a scholar until his death. After graduating he became successively a Latin tutor, a Greek tutor, Professor of Greek, Eliot Professor of Greek Literature, and President of the College. Dearly he loved "the bright clime of battle and of song" and was said to dwell in "the atmosphere of ancient thought." Some of the most instructive and entertaining pages of the New American Cyclopedia are from his pen—the articles on Agassiz, Athens, Attica, Demosthenes, Euripides, Greece and Homer.

Professor Felton educated his brother, John B., who was many years his junior, and who upon graduating from Harvard in the class of 1847, obtained through the Professor's influence a position as Greek tutor. He had proved himself to be one of the best Greek scholars of his time. He did not long pursue this vocation, having determined to read law. Among his classmates at Harvard were E. R. Hoar and Horace Gray.

While at his law studies John B. Felton was sent by his brother, the Professor, to Paris, where he remained a year, studying the Civil Code, indulging in the amusements of the gay capital, and making himself thoroughly acquainted with the French language, which he ever after spoke with great ease and correctness. He also obtained a good knowledge of Spanish, having made up his mind to settle in San Francisco, and knowing this tongue would

be of service to him professionally, as it proved to be more than once—notably in the Limantour case, to be noticed.

It had been agreed at college between Felton and Mr. E. J. Pringle that they would commence the practice of law in partnership, in San Francisco. The two young men were in college together two years, Mr. Pringle being the elder and graduating two years before his friend. This was an alliance between Massachusetts and South Carolina. Mr. Pringle, who is still in active practice here, came to San Francisco by the Nicaragua route, arriving in December, 1853. Felton sailed around the Horn, in order that he might thoroughly acquaint himself with the structure of seagoing vessels and with nautical terms, hoping to profit by it in admiralty practice. He never had much admiralty practice, however. He arrived here in the spring of 1854, and immediately formed a partnership with Mr. Pringle and commenced law practice. Both gentlemen had been admitted to the bar in the East. Felton came to San Francisco a young man, but thoroughly equipped as a lawyer. He had large resources of mind, great breadth of comprehension, wonderful inventive power as applied to principles, and astonishing quickness and exactness of observation. The faculty was his of finding out what the law ought to be, and what, therefore, it is, unless fettered by technicalities; and the adroitness and subtlety to use technicalities when they suited his purpose; but he preferred broad, catholic views upon all questions of right and wrong between man and man.

The city slip litigation was what first brought Felton fame and fortune. A. C. Whitcomb, now a wealthy resident of Paris, was then a member of the firm, its style being Whitcomb, Pringle & Felton. How Felton's name seems out of place at the tail end of a firm! *This* firm seems to have stood on its head. The eastern part of San Francisco had been laid off into water lots of uniform size, 25x59.9–12, except a slip now embraced within Clay, Sacramento, Davis and East streets, which had been left open for purposes of navigation. In December, 1853, the city sold this slip at auction to many purchasers—in lots 25x59.9–12. There was a great boom in real estate then, and the property brought enormous prices; terms, twenty-five per cent cash, fifty per cent in sixty days, and twenty-five per cent in four months. When most of the purchasers had made the second payment, but before any had made the last, there was a sudden collapse in the real estate market, the lots in question depreciating some fifty per cent. One of the purchasers consulted Felton, to see if there was not some way to repair the loss. After examination, he replied that the purchasers could recover their money from the city; one after another of the unhappy men went to Felton, until his firm became attorneys of record for every purchaser. About one million of dollars was at stake. Felton discovered that the ordinance of the Board of Aldermen, under which the lots were sold, was passed by a majority of those present, but not

by a majority of a full Board, while the city charter declared that every ordinance must be passed by a majority of a full Board. One of the Board had resigned, leaving only seven members. The ordinance was passed by a vote of four against three. Felton took the ground that the ordinance was invalid, and consequently that the sale was void; and that the purchasers could recover their money. The pioneer case in the long litigation that followed was The City of San Francisco vs. Hazen (5 Cal., 169). The city sued Kelsey Hazen, a real estate operator, to recover on his promissory note, given for a deferred payment. Judge Lorenzo Sawyer was then City Attorney. The case was very elaborately argued in the Twelfth District Court, by Sawyer for the city and Felton for the defendant. The lower Court gave judgment for the city, but on appeal the Supreme Court sustained Felton's position and reversed the judgment, with costs. But, as Judge M. C. Blake once said from the bench: "No man knows the law; only the Supreme Court can tell it." And the Supreme Court sometimes takes back its decisions. In the second city slip suit—Nathaniel Holland vs. the City of San Francisco (7 Cal., 361) the plaintiff sought to recover back the purchase money. The city called Hoge & Wilson into the case, and the District Court decided for the plaintiff. The city appealed. In the Supreme Court Messrs. Hoge & Wilson made the point that the sale of the lots was valid, because the city had ratified it; that the ratification consisted in the city's receiving the money, and by a subsequent Board of Aldermen making appropriations of the same. This view prevailed in the Supreme Court which stated that its decision was not in conflict with the prior one in The City vs. Hazen, inasmuch as the second, or ratifying ordinance, had not been cited to the Court on the appeal in that case.

In the case of McCracken vs. the City, reported in 16 Cal., 591, Judge Field ably and patiently reviewed the whole question. He held that the law was not properly laid down in Holland vs. The City. (The opinion in the Holland case was by Judge Burnett, Judge Terry concurring and Judge Murray dissenting). Judge Field held that the subsequent ordinance was not a ratification of the sale—that the city had not conveyed any title to the purchasers—that the city still owned the property and must refund the sums collected. Judge Cope, in a separate opinion, held that a purchaser, in order to maintain an action for money had and received, must first make a reconveyance to the city. Acting upon this all the purchasers made deeds to the city and got judgment against the city for their several sums. The Legislature, on April 17, 1862, passed an act providing that the purchasers should take the lots at an appraised value, they to be credited with all payments made, and the city to issue to them its bonds for the amount of the difference between what they had paid and what the lots were worth. In pursuance of this law the Supervisors, in 1863, passed an ordinance, under which the lots

were sold to the original purchasers on these terms.

All of these cases were argued elaborately and with great power by Mr. Felton. His connection with them made him very widely known and created for him a vast constituency of clients.

The very extraordinary case of Limantour, in which Mr. Felton made a fine struggle against fate, will attract the attention of times remote, on account of the unparalleled audacity and magnitude of the plaintiff's claim and the criminal romance which invests it. Jose Yves Limantour was a Frenchman, who, before coming to California to prosecute the largest claim ever presented to our courts, had lived some twenty years in Mexico, where he was a government contractor and dealer in arms. In the pursuit of that business he had greatly prospered, fattening on the misfortunes of the country, which was generally convulsed with civil wars. In 1841 he visited California and remained a year at Yerba Buena, now San Francisco. He met here the traveler and author, Duflat de Mofras, who was his countryman, and who advised him to buy land on this peninsula. In 1844 he made a second visit, and a third in 1847, his business in the latter year being to supply arms to the California forces then feebly struggling to save their native land from the grasp of Uncle Sam. His vessel, loaded with munitions of war, was overhauled at San Pedro by the United States sloop-of-war Warren, under Commodore Biddle, but a search revealed nothing contraband. He had learned that he was pursued and had thrown his cargo into the sea. Being allowed to proceed, he returned to Mexico, where he remained five years. In November, 1852, he came again on a mission of peaceful conquest, not as the representative of a foreign government, but as his own embassador; not *vi et armis*, but with pockets full of parchments wherewith to subject the richest, and most populous part of the country to his legal dominion. Congress, in 1851, had passed "An act to settle land claims in California," and had established at San Francisco a Land Commission to pass upon all land claims based on Mexican titles. It was provided that no claim should be heard that should not be presented before the third day of March, 1853. In February, 1853, Limantour filed with the Land Commission eight claims to land, which, by reason of their magnitude and the profound ignorance of everybody concerning them up to that time, created consternation throughout the city and the adjacent country affected.

Limantour claimed, First—Four square leagues, comprising over 15,000 acres, covering the city of San Francisco, except a strip off the northern end. Second—Yerba Buena, Alcatraz and the Farallones Islands and Tiburon Point, which commands the strait between Angel Island and the Marin main land. Third—The Laguna de Tache, covering eleven square leagues. Fourth—The tract of eleven square leagues called Lup Yomi. Fifth—Eighty square leagues near Cape Mendocino. Sixth—The vineyard of San Francisco

Solano. Seventh—Six square leagues called Cahuenga. Eighth—The Cienega de Gabilan of eleven square leagues, which embraced the city of Stockton. The claims aggregated about 620,000 acres, and a money value which exceeds to-day, and did even then, the combined wealth of all the railroad magnates of the United States. A protracted judicial inquiry followed. Limantour asserted that the lands claimed by him were granted him at different dates in the years 1843 and '44 by Governor Micheltoreno in satisfaction of and reward for his services to the Mexican government in advances of money and military supplies. The Land Commission confirmed the first and second claims—those covering the city of San Francisco and the islands named—and rejected the other six.

An appeal was taken to the United States District Court, where Edwin M. Stanton was specially employed to assist the United States District Attorney, and Whitcomb, Pringle & Felton appeared for Limantour. Pending this appeal, a card was published by one Augustus Jouan, agent of Limantour, who had accompanied the latter from Mexico to San Francisco, setting forth that Limantour had broken faith with him, and that for a consideration, he, Jouan, would make a revelation that would defeat the Limantour claims. The citizens "saw" him, and he revealed. He said Limantour had frequently told him that his grants were fabricated; he had himself, at Limantour's request, altered figures to reconcile dates; that Limantour had shown him a letter from Robin—Limantour's partner—in which Robin, in consequence of a quarrel with Limantour, threatened to expose the latter as a forger of title papers; that Francois Jacomet, a clerk of Limantour, had declared that one Letanneur wrote one of the grants in 1852—nine years after its alleged execution. He suggested that Jacomet be sent for. Jacomet was prevailed upon to come from Mexico, and, in 1856, he gave testimony corroborative of that of Jouan. Letanneur, who was here in the city "on business," was taken before the grand jury, and there testified that he had written one of the alleged grants.

Mr. Limantour (whose name should not be given the French pronunciation, but should be called in broad English, Lie-man-tour—that's the way most of our citizens pronounce it), was tapped on the shoulder by a federal officer and locked up. The grand jury indicted him for forgery and perjury. He gave bail in $10,000. One of his friends was willing and able to qualify on his bond, but a second surety was requisite. Messrs. Whitcomb, Pringle & Felton persuaded Michael Reese to come to the rescue. But Michael required a written obligation of indemnity from Whitcomb, Pringle & Felton before he would sign the bond. So great was the faith of these gentlemen in the validity of their client's title, that they promptly agreed to indemnify Reese. This is good enough proof that the insinuation against their integrity in this cause was baseless. The Land Commission did not find out any

fraud. The United States Court *discovered* no fraud. The villainy of the claimant was uncovered by an accomplice. After it was revealed, it was clear enough. Everybody wondered that it was not sooner found out. John B. Felton enlisted his great abilities in the cause, because he honestly believed it to be a great cause and a good cause. Its fraudulency was brought to light by a mere accident, and the most astonished man in the community was John B. Felton. To quote the Hon. Jeremiah S. Black:

"The genuineness of Limantour's title was attested by the signature of a Mexican Secretary of State, who had previously been a foreign Minister, and was afterwards (even after the fraud was shown) a Judge of the Supreme Court. It was sworn to by a Mexican statesman, who had a reputation as high as any of his class, and it was certified under the hand of the President of the Republic in a communication addressed from the National Palace at Mexico to the Land Commissioners. But all these seeming marks of authenticity were placed there to cheat and defraud. It was afterwards demonstrated and solemnly adjudged that Bocanegra's attestation was a shameless falsehood; Castanares was perjured; and Arista, the President, was engaged with the others in a scandalous conspiracy to impose on the courts of the United States."

Limantour, after a few months absence, returned to San Francisco with additional "proofs," and had his cause tried. Mr. Felton felt reassured, and made out what was considered a perfect case. But in the very first fruition of hopes long deferred, it was hinted that the impression on the alleged "grant" should be compared with the government seal! This was done, and at once many differences were apparent. The end then came soon, and Limantour was revealed as a gigantic forger and conspirator. Mr. Felton declined to argue the case. Limantour succeeded in getting safely out of the country. The government brought suit on his former bail bond for $10,000, and recovered judgment against Michael Reese and his co-surety for the amount. An appeal was taken to the United States Supreme Court, Messrs. Whitcomb, Pringle & Felton being the real parties interested, as they had contracted to hold Reese harmless. They succeeded in getting out of it, but paid Hon. Eugene Casserly $1,000 for arguing the case at Washington, he then being a United States Senator. The Supreme Court held that Mr. Casserly's point was good—that the sureties were released from liability, because the United States District Court had once continued the Limantour criminal case against his consent! There is a lawyer in San Francisco who is in the habit of referring, now and then, to a Supreme Court decision as "a *beautiful* decision." This was a "beautiful" decision. It takes a lawyer, though, to detect the beauty. A man outside the profession might be excused for insisting that Uncle Sam was entitled to this $10,000. He was not suffering for it, however. He could lose it better than Whitcomb, Pringle & Felton could.

It would be tedious to go over the list of celebrated causes with which Mr. Felton was connected. Two of the most important of them were the mortgage tax case and the local option case. On the first the court, in a model opinion by Judge McKinstry, took Mr. Felton's view—that to tax a mortgage and also the mortgaged property as though it were not incumbered, is double taxation, and in some cases may be manifold taxation. In the local option case the question was whether the law was constitutional, which provided that the people of any city, town or township might by vote decide whether spirituous liquors should be sold in such city, town, or township. In the Supreme Court S. W. Sanderson and Lloyd Baldwin appeared for the temperance men, and John B. Felton and W. H. Patterson for the other side. None of these survive. Sanderson (an ex-Supreme Judge) and Felton were the men who studied and argued the case. It was another great triumph for Felton. He contended that the law was in direct opposition to the natural rights of man. The constitution of California, said he, declares these rights to be inalienable. The rights of property, life, liberty and the pursuit of happiness precede government, and the only limitation of these rights is the rule that they shall not be used to the injury of others. A man has the right of using or abusing his own property, provided that in so doing he does no injury to another. His natural rights can only be bounded, limited or restricted by the natural rights of others. The acts which a man can be prohibited from exercising over himself or his property must be *directly* and *necessarily* injurious to others. He cannot be prevented from using or abusing his own property merely because other individuals, or the community, are *indirectly* injured thereby. The right to use wines, beers, liquors, etc., is a natural right of property. It can only be limited or restricted by the Legislature, and then only so far as the exercise of that right interferes directly with the rights of others. If a man uses these articles in excess—to his own injury only, and not to the injury of others—he is exercising the right of abusing his own property, and, though blameworthy, is not within the prohibitory power of the law. If, through such excess, he becomes dangerous to the lives or property of others, he then becomes amenable to the law. But, the article, the abuse of which has led to his thus becoming dangerous, cannot be taken away from others, who are capable of using it in a proper manner. When an article capable of proper and legitimate use is also capable of being used to excess, and thus produce misery, the simple possibility of its being used to excess does not prevent it from being property. The Legislature can regulate the use of it, but cannot prohibit the use of it. The Local Option law prohibited the use of liquors. It was, therefore, void.

Continuing Felton's argument, if a man takes his own life by eating or drinking things that are unhealthy, so long as he is the only one injured,

the law cannot reach him. There is no power in the Legislature, if he is sick, to lend its sanction to the prescription of the physician. Though assured that what he is about to eat is sure death to him, the law cannot interfere. His actions are a source of grief and woe to his family, the grief may be a source of disease or death to his father or mother, but society has no correctives to apply and no punishment to inflict. The injury, though great, is indirect. His opinions are so perverted and backed with so much plausibility that, through their influence, another loses his faith in all religion, becomes a profligate or murderer, yet he is not an accomplice in the crime or a sharer of the punishment.

The minister who bought the place of Shakespeare, cut down the mulberry tree planted by the poet's own hands. The civilized world still execrates him for it. If Shakespeare had left the single copy of "Macbeth," or "Hamlet," or "Lear," to a friend, that friend could have destroyed it and caused incalculable damage to the world. The owners of the collections of Raphael, of Rubens and Titian, can destroy them and cause more evil than if an army were slaughtered. I may make such use of my land that property in the neighborhood will lose all its value. Yet the law is powerless. I may so conduct myself in my family that my wife and children cannot live with me. I may promulgate opinions which set society on fire. Yet, inasmuch as the injury resulting from all these things is not the *necessary* consequence, but only an indirect one—inasmuch as I have exercised a *natural* right without *directly* hurting another—I cannot be punished. I deserve punishment, but there is no one possesses the right to inflict it.

The natural rights that belong to the citizen cannot be taken from him without vesting absolutely despotic power in some one or somebody. Force, ignorance, the pride of caste, may ignore them, but, if suppressed, they will rend asunder any government. An able, bold judiciary must stand forever on the frontier which separates natural rights from civil rights. Spirituous liquors are property in all civilized countries. Their use is general. A very great class of persons make a good use of them. The Local Option law practically denies their use to the man of melancholy disposition, the man of impoverished blood, those enfeebled by disease and to the *temperate* man who can *use* the good things of this life. Why not regulate love? If I use ardent spirits discreetly, I do no harm to society, to my family or to myself. Why, then, interfere with me because another man uses them indiscreetly? It would be as reasonable to prohibit me from keeping horses, because my neighbor, a bad driver, may be killed by his; as reasonable to prohibit me from begetting children, because my neighbor is guilty of debauchery, adultery or rape; as reasonable to prohibit me from indulging in love, because an ill-regulated love in another leads to jealousy and crime. Love is the cause of more crime than drink.

laughter of his own. Herein, he closely resembled his distinguished father-in-law, Judge Joseph G. Baldwin. Baldwin was full of fun, and laughed uproariously at his own jokes. Baldwin and Felton never impaired the effect by their turbulent enjoyment of their own sayings. Their laughter seemed to follow naturally, and it was as refreshing to hear it as the wit that evoked it. It convulsed all who heard it. Of course Felton was intimate with Shakespeare. J. F. Bowman (who died in 1884), once entertained the members of the Bohemian Club with a disquisition on the authorship of the Shakespeare plays. Felton heard of it and asked Bowman if there was really any basis for the claim that Bacon was the true author. He was assured that there was a good deal to be said in favor of the Baconian theory. Felton and Bowman oystered together that night, and Felton listened with great interest to Bowman's recapitulation. In the discussion that ensued, Felton astonished Bowman by his thorough Shakespearean scholarship. He spoke with enthusiasm, and Bowman wondered if his friend had not made Shakespeare the special study of his life.

The profession, and the people heard with genuine sorrow of the death of this unselfish spirit, this master of the law. In the Supreme Court, Mr. Pringle, his old college mate, friend and partner, and his ardent admirer, Clark Churchill, since Attorney-General of Arizona, paid tender tribute to his memory. Eminent counsel made appropriate remarks in all the courts, and the judges responded with feeling. The bar memorial, addressed to the courts—a classical production—was from the prolific pen of Joseph W. Winans. I doubt if Mr. Winans ever wrote anything finer than this, of which I offer two extracts.

"To the profession of his choice he consecrated the supremest labors of his life. With him the law was no narrow system, fettered by precedent and cramped by forms, but a broad, comprehensive science, devised by the highest wisdom, for the proper direction and government of man in all the relations of society and State. Imbued with such a conception of its dignity and objects, he was singularly successful, through the soundness of his reasoning, the persuasion of his address, and the resistless power of his logic, in eliminating and bringing into practical enforcement those great principles of truth and right which constitute the theory of jurisprudence. It was the aim of his mental effort to convince the understanding, rather than inflame the passions. Possessing a faculty for accumulation almost unexampled in the practice of the law, he made no idol of his acquisitions, but what his toil had won his liberality dispensed with lavish hand. In his munificence he was a prodigal; in his hospitality, a prince.

"His life, though blasted in its prime, was fruitful of achievement, and his memory is fragrant with reminiscences of noble words and manly deeds. Contemplated as a patron of the arts and sciences, a promoter of public and private enterprises, and a philanthropist, he was in each capacity alike conspicuous; and severely will be felt the absence of that stimulating hand."

Of Felton, let me recall last what I love to recall best—his own noble utterance in closing the oration at the dedication of the Mercantile Library building, at San Francisco, June 18, 1868:

"And now," he said, "I dedicate this temple to the true mercantile spirit—to the spirit of true honesty, which, rejecting the letter of the written contract, looks to its spirit; which, disdaining all deceit, all mean and petty advantages, takes the just for its rule and guide; to the spirit of true equality, which, stripping off from man all accidental circumstances, respects and reverences him according to his merit; to the spirit of enterprise, whose field is the earth, the air, the sea, the sky, and all that in them is; to the spirit of munificence, that never tires in lavishing its treasures on all good objects, on the scientific expedition, on the library, the University, on the cause of religion, and on the soldier battling for the right; to the spirit of loyalty, that submits calmly and patiently to that great bond which holds society together—the law—which aims to reform, but never to resist or overthrow; to the spirit of patriotism, which follows with affection, pride, and devotion the daring mark of our country's flag; and to the spirit which worships God."

CHAPTER IV.

Joseph P. Hoge—Sage of his Party and Nestor of the Bar—His Record in Congress—A Colleague of Stephen A. Douglas and E. D. Baker—The Oregon Question—The Wilmot Proviso—The Galena Lead Mines—At the Bar in Three States—Homorous Notes—A Long Prosperity and a Green Old Age.

It would seem to imply a lack of respect to refer to this venerated Nestor of the San Francisco Bar as plain Mr. Hoge! But such he is, and no more. He is no Colonel at all, except by courtesy. He never had his "baptism of fire," as Napoleon III. styled it, or, to use the heroic speech of Caleb Cushing, he was never immersed in "the red baptism of the battlefield;" nor was he in the militia, even. "I tell you it is a great thing," said the versatile William H. Barnes (not William H. L. B.), in one of his capital temperance talks, "I tell you it is a great thing to be able to do something for your fellow man." It is very true. And the man who can make a Colonel, or a General, or a Governor of another by his own simple fiat, has not lived in vain. When the late Benjamin F. Washington, once collector of this port, and for so many years editor of the *Examiner*, arrived at Sacramento in 1850, after a weary tramp across the continent, as soon as he had washed himself and put on a clean shirt, he was ushered by General A. M. Winn (who later founded the order "Native Sons of the Golden West") into a little circle of pioneer upper tendom, where some half dozen ladies were trying to accommodate ten times as many gentlemen in the labyrinths of the dance. "Ladies and gentlemen," said the General, "let me introduce Colonel Washington, of Virginia." "That's the way I became Colonel," the Colonel told me in 1870. When Judge George W. Tyler concluded to make "General" Cobb he only spake the word, and it was done. I refer not to H. A. Cobb, the militia General, who, by the way, had his birth in the Azores Islands, but to Moses Gill Cobb, of Boston. Judge Tyler and M. G. Cobb were about forming a law partnership in Stockton. The former had been County Judge of San Joaquin, and having a title, determined that his partner should, for the sake of the firm, enjoy a like dignity. So he introduced him to all Stockton during the first week after his arrival as "my partner, General Cobb, gentlemen." "Yes, I made him a General," said the Judge to me in 1874.

After this fashion did Joseph Pendleton Hoge become a "Colonel," and his military creator was a Galena editor, who did the business about 1840. It seems that plain "Mr." is too common a title for a man of fame, even in a Republican-Democratic country. The tendency is to distinguish by some higher style those who have won our special regard. So it is generally accepted all over the Pacific slope that if J. P. Hoge is not a Colonel he ought to be. It seems entirely out of place to say "Mr." to him, or of him. No Judge on any bench would address the Colonel thus. Imagine Chief Justice Searls saying in open court, "Mr. Hoge, will you state that proposition again!"

Colonel Hoge is a native of the great State which has become a new mother of statesmen, and which has been doing so much for the country of late years in the way of supplying it with officeholders. He was born seventy-six years ago, according to our Great Register. He studied law and was admitted to the bar also in Ohio. He received what is called a classical education, graduating from Jefferson College, Pennsylvania. When he was about thirty years old he removed to the Prairie State, settling at Galena and there entering on his profession. He soon became popular and moderately prosperous. An inborn love of politics was his, which has ever since asserted itself, but which was never so strong as to require medical treatment. He has not been "discharged cured," becaused he has not needed curing. He has always desired to be United States Senator, but has never set his heart upon it.

The Colonel had not been long in Galena when the Democracy sent him to the Twenty-eighth Congress. In the campaign which preceded his election he made many brilliant stump speeches, and took his place among party leaders of the great West. At Washington his was a prominent figure, and he was returned to the Twenty-ninth Congress. His political period was 1843–47, and in the House of Representatives, during his four years of service were these eminent men: Hannibal Hamlin, Robert C. Winthrop, John Quincy Adams, John P. Hale, Hamilton Fish, Washington Hunt, Henry A. Wise, R. Barnwell Rhett, Howell Cobb, Alexander H. Stephens, Lynn Boyd (once Speaker), John W. Jones (once Speaker), Garrett Davis, Andrew Johnson, Cave Johnson, John B. Weller, Robert C. Schenck, Joshua R. Giddings, John Slidell, Robert Dale Owen, Thomas J. Henley (since prominent in California and father of the brilliant advocate, Barclay Henley), John A. McClernand, John Wentworth, Stephen A. Douglas, Jacob Thompson, David Wilmot, E. D. Baker, John A. Dix, Beverly Johnson; while in the Senate during the same period were: Levi Woodbury, Silas Wright, W. L. Dayton, Rufus Choate, James Buchanan, Wm. C. Rives, John J. Crittenden, Thos. H. Benton, Robert J. Walker, John C. Calhoun, Thos. Corwin and Lewis Cass.

The Congressional Globe discloses that on March 26, 1844, Col. Hoge presented the petition of L. W. Guiteau and fifty-six others, citizens of Stephenson county, Illinois, praying Congress to make appropriations for the immediate improvement of the Missouri and Upper Mississippi Rivers. The chief petitioner was the father of him who was destined to be President Garfield's assassin. On April 3, 1844, he spoke in favor of the bill introduced by him March 6, 1844, directing the sale by the government, of the reserved lead mines of Illinois, Missouri, Iowa and Wisconsin. In this debate he had a tilt with Cave Johnson, of Tennessee, afterwards Postmaster General under President Polk. He alluded to Johnson as "the Cerberus of the Treasury," when Cerberus turned upon him and charged him with indulging in ridicule and personalities, which he promptly disclaimed. Johnson "expressed his satisfaction at the explanation of the gentleman," but wanted to know what the gentleman meant by calling him the Cerberus of the Treasury. He continued that he had always gone as far as any man in liberality to settlers. If he had his way, he would not sell an acre of the public domain, but give the soil to those who settled upon it in good faith. He opposed the pending bill because he wanted to keep the lands out of the hands of speculators. He desired to see some other plan adopted for their disposition.

Col. Hoge did not reply. The bill was defeated, but on reconsideration was amended so as to make the minimum price of the lands five dollars per acre, and as thus amended passed the House by 92 to 71. But in the Senate, being referred to the Committee on Public Lands, it was there smothered.

On December 10, 1844, Colonel Hoge introduced another bill, directing the President of the United States to cause the reserved lead mines of Illinois, Iowa and Wisconsin to be exposed to sale. The bill was referred to the Committee on Public Lands. This bill shared the fate of its predecessor.

At the first session of the Twenty-ninth Congress, Dec. 19, 1845, Colonel Hoge introduced a similar bill, which was referred to the Committee on Public Lands. When the bill came up, June 1, 1846, an amendment making the minimum price ten dollars was offered and rejected, Another amendment making the minimum five dollars was then offered. Colonel Hoge spoke at length against the amendment. He said the settlers could not pay so much, and declared that the lands were chiefly valuable for agricultural purposes. On June 9, 1846, the bill was passed in the House with the five dollar amendment. It went to the Senate, and came back with another and longer amendment, and the House amended it further and finally passed it, in a shape obnoxious to those who favored the original bill.

On January 30, 1846, Colonel Hoge made a powerful and brilliant speech in the House of Representatives, on "The Oregon Question," which so long agitated Congress and the country. He took strong ground in favor of "Fifty-four Forty, or Fight." "I do not like," he said, "the patriotism which

counts the costs, which turns pale and trembles at the consequences; which hesitates, falters and doubts when great national questions are to be decided, when great national interests are at stake." The question was on the resolution of Stephen A. Douglas, Colonel Hoge's colleague, declaring that a title to any part of the Oregon Territory south of 54 deg. 40 min. of north latitude is *not* open to compromise so as to surrender any part of said Territory. E. D. Baker, another colleague of Colonel Hoge's, although a Whig and English-born, came out bold and brilliant for "Fifty-four Forty, or Fight."

Colonel Hoge's speech, just alluded to, occupied fourteen columns of the *Congressional Globe.*

As everybody knows, we did not get Fifty-four Forty, and we did not fight. The country decreed a change of administration, calling to power a great party, one of whose rallying cries was, "Fifty-four Forty, or Fight;" yet the President of its choice (I do not say it in criticism or censure) suggested to the British government a settlement upon the forty-ninth parallel as the dividing line. It is said that Mr. Buchanan, Mr. Polk's Secretary of State, felt bound to make this offer, because it had been made by Mr. Tyler before him. It was declined by Mr. Packenham, the British representative, whereupon Mr. Buchanan withdrew the offer, setting forth in a fine state paper the justice of the claim of the United States to the whole of the northwest Territory. Subsequently, the British government expressed its readiness to accept the forty-ninth parallel as the dividing line, if the offer of settlement were so modified as to secure to Great Britian the whole of Vancouver Island. This it announced as its ultimatum. President Polk submitted this proposition to the United States Senate, which advised its acceptance, and it was accepted. In June, 1846, a treaty was signed between the two governments, declaring the forty-ninth parallel to be the dividing line. And thus was surrendered the country's claim to a vast region which it had, with loud acclaim, declared its readiness to fight for; an area as great in extent from north to south as that of the State of Oregon added to one-half of Washington Territory.

The famous "Wilmot Proviso" came before Congress while Colonel Hoge was a member of the lower House, and he voted for it. He has been censured therefor by many of his party. Owing to the subsequent events it has been a very long while since his vote on this measure has been criticised however. The "Wilmot Proviso" was one of the entering wedges which split the old Democratic party in two. On August 8, 1848, while the House was considering the bill to place $3,000,000 in the hands of President Polk, to negotiate a peace with Mexico, Mr. David Wilmot, of Pennsylvania, a Democrat, but a Free Soiler, offered his celebrated amendment: "provided, that, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any

treaty which may be negotiated between them, and to the use by the executive of the moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted." This was adopted in the House by a good majority, every Northern man voting for it, except two of Colonel Hoge's colleagues, Stephen A. Douglas and Jno. A. McClernand. It was being debated in the Senate when the hour arrived for the final adjournment of the session. When Congress next met, Mr. Wilmot again offered his proposition, and, after a long and heated struggle, which spread excitement and alarm throughout the country, the House again adopted it, and again it went to the Senate.

The Senate now struck out the Wilmot Proviso from the $3,000,000 bill just mentioned and sent the bill back to the House. The House, in Committee of the Whole, March 3, 1847, again tacked on the proviso by a vote of 90 to 80. But, strange to say, right afterwards, in the House, after the report of the Committee of the Whole, the previous question being ordered, and recruits summoned, the proviso was defeated by 102 to 97. Colonel Hoge did not vote on this motion. Mr. Wilmot then moved to lay the bill on the table. This was negatived—ayes 87, noes 114. The bill then passed *without* the Wilmot proviso—ayes 115, noes 81, Hoge voting with the Free Soilers in the negative. Allen G. Thurman, of Ohio, Democrat, voted for the Free Soil proviso in Committee of the Whole and in the House, but when the House rejected it he voted for the Three Million bill, with the proviso left off.

It is a curious fact that, while Colonel Hoge, who has through thick and thin, steadfastly to date preserved his allegiance to the Democratic party, voted for this celebrated proposition, it was yet opposed by Stephen A. Douglas, General John A. McClernand and even Daniel Webster.

At the close of the second session of the Twenty-ninth Congress, in 1846, Colonel Hoge resumed law practice at Galena. He had kept his office open while in public life, and during his second term in Congress had formed a partnership with Mr. Samuel M. Wilson, who removed from Ohio to take charge of his business. The firm of Hoge and Wilson practiced in Galena until 1853, when the two partners came to San Francisco in company and continued their business association here until 1864, when they "parted friends," always to remain such.

Colonel Hoge's life in California has been a very active one, politically and professionally. He has been conspicuous in State conventions, and was Mr. Casserly's chief opponent when that gentleman was elected to the United States Senate in 1869. He is the acknowledged sage of his party. He was President of the Constitutional Convention of 1878, and also pre-

sided over the body of Fifteen Freeholders of San Francisco, which prepared the defeated charter of 1879.

In his profession the Colonel has been eminently successful, having amassed a fortune of $100,000. In 1880 I found by consulting the Supreme Court reports, that, either by himself or in connection with his long-time partner, S. M. Wilson, he had appeared in the Supreme Court of this State oftener than any other member of the bar, with four exceptions.

In arguing a cause, Colonel Hoge is always animated, his countenance full of expression and his eyes full of speech. His ideas are expressed with wonderful clearness. He argues a law question like a master. Bench and bar go to him for instruction. He is restive, however, in argument. He doesn't like to be interrupted by counsel or even by the court.

In the matter of business location, this veteran has shown rare conservatism: he still looks out to the south and west from the same sunny offices in Montgomery Block where he has prepared his briefs for thirty-four years!

In personal appearance he is striking. Only his gray hairs tell of his age. He is very lively in his movements. So also, his conversation is vivacious, and readily turns into a channel of play. Considering his age, his alertness of mind and body are remarkable.

I must tell a story of the Colonel before I part with him. If it is not true, it is yet perfectly harmless, and I get it from a warm admirer of his. The Colonel, ever since his arrival in California, and for some years previous thereto, has been distinguished for his habitual neatness of dress and his absolute purity of linen. It was not always thus, they say. During the first years of his practice among the rough miners of Galena, he is represented to have been very loose and careless in this respect. It chanced that, about the year 1843, he visited Philadelphia, where he heard a legal argument by that advocate of national renown, David Paul Brown. Brown was very graceful and impressive in his delivery, and always studiously faultless in his attire. Some friends who had accompanied Colonel Hoge into court asked him, as they left the chamber, what he thought of the great lawyer's effort. The Colonel replied that he could make a better speech himself. There seemed to be something on his mind, but he said nothing more. Upon his return to Galena a striking change was observed in his exterior, and ever since then he has been one of the best dressed of men.

I will close this chapter with an incident which illustrates the Colonel's love of fun:

In the Supreme Court, in December, 1876, while an argument was being addressed to the bench, Colonel Hoge, Judge Cope, and another leading lawyer were carrying on a conversation in a subdued tone, but not subdued enough, and Chief Justice William T. Wallace concluded to subdue it altogether. Not caring to openly rebuke such eminent counsel, one of whom

had once occupied a seat on that very bench, the Chief Justice beckoned to the bailiff and whispered something in the ear of that functionary, who then softly approached the talking trio, and in his turn whispered to each : "Judge Wallace says stop talking." Colonel Hoge, who was the last to hear the gentle command, straightened up in his chair, motioned the bailiff back and said to him, in a tone just loud enough to be heard by his fellow culprits : "You tell Chief Justice Wallace to —— —— ——." The bailiff reddened up, glanced hastily at the Chief Justice, then, with a bewildered expression, moved to his regular station. There, for some time, he seemed lost in deep thought. Suddenly he brightened, and turned his eyes toward Colonel Hoge, with a look which plainly said : "May be you think I *won't* tell Judge Wallace ?" Did he ? I never heard ; but I hope he didn't.

CHAPTER V.

Samuel M. Wilson—Association With Joseph P. Hoge in Illinois and California—A Broad Practice and Princely Revenue—The Broderick Will Case—The Nitro-Glycerine Explosion, 1866—The Mining Debris Litigation—A Striking Instance of the Law's Delay—The Conflict Between State and United States Land Patents—A Seat on the Supreme Bench Declined—Meeting the Giants of the Eastern Bar.

As I turn to this bar leader, an observation of Prof. Max Muller recurs. It was in the address on Freedom before the Birmingham and Midland Institute, October 20, 1879: "If there is one among the leaders of English thought, who, by the elevation of his character and the calm composure of his mind, deserved the often misplaced title of 'Serene Highness,' it was, I think, John Stuart Mill." If there is one among the leaders of this bar, who, by the elevation of his character and the calm composure of his mind, deserves this title, it is Samuel Mountford Wilson. In him we behold no meteor of brief career, speeding along its dazzling track, but an orb of massive momentum, pursuing with stately motion an orbit well defined. Happily, as Starr King once said of the sun, "he has no French ambition for display." In him we see character,

> "Constant as the northern star,
> Of whose true, fixed and resting quality
> There is no fellow in the firmament."

This gentleman was born in Steubenville, Ohio. When he placed his name on the San Francisco great register, June 2, 1866, he gave his age as 42 years—making him 63 in 1887. When he was four years old his father died. He attended Grove Academy a few years, but never received a college diploma, being compelled to maintain himself from the time he had the physical strength to do so. He read law in the office of General Samuel Stokely, a member of Congress from Ohio, pursuing Latin and other studies at the same time. After his admission he practiced at the bar in Steubenville a short time, when Colonel J. P. Hoge, who had a good law practice in Galena, Illinois, and who was then in Congress, invited him to Galena and offered him a partnership, which he accepted. This was in 1845. Colonel Hoge was thirteen years older than Mr. Wilson. They had known each other well in Ohio, where Colonel Hoge was also born, and where the Colonel's sister and Mr. Wilson's brother intermarried. While at Galena the District Attorney of the county resigned and Mr. Wilson was

appointed to fill the vacancy. The only criminal law business which he ever attended to, devolved upon him during his fragment of a term as District Attorney of Jo Daviess county. He never liked this branch of law practice.

Mr. Wilson first met at Galena the lady who became his wife. Having studied for his profession in the office of a Congressman, afterwards having effected a business partnership with a Congressman, it very curiously coincided that he should form a matrimonial alliance with the family of another M. C. His wife was a Missouri lady, daughter of John Scott, delegate to Congress from Missouri Territory, and the first Representative to Congress after the admission of Missouri as a State. Messrs. Hoge & Wilson remained in partnership in Galena until 1853, when they came together to San Francisco, closing their Galena business and continuing their partnership here. I do not recall another instance of such a far translation of an entire law firm at one time.

The old Galena firm held together in San Francisco, having offices in Montgomery Block and conducting a large business until in 1864, when it was "dissolved by mutual consent," over eighteen years after its formation. The old law partners have since steadily continued their friendship for each other, and each frequently takes counsel of the other in the conduct of important cases.

Upon the separation of Messrs. Hoge and Wilson the latter formed a partnership with his brother, David S. Wilson, which continued about one year and a half, when David S. removed to Iowa, where he was afterwards elected a Circuit Judge. In 1866, Mr. A. P. Crittenden joined Mr. Wilson, and the firm of Wilson & Crittenden continued until the death of Mr. Crittenden in 1870. From 1870 to 1874 Mr. Wilson had no partner, but retained Judge W. W. Cope to assist him in his business. In January 1874, Mr. Wilson and his second son, Russell J. Wilson, became associated in business, and the firm of Wilson & Wilson has since continued without change, other than the admission of another son, M. S. Wilson. Russell J. Wilson had been admitted to the bar by the California Supreme Court in October, 1873, and had not long before returned from Knox county, Ohio, a graduate of Kenyon College, from which college had graduated Judge David Davis, Judge Stanley Matthews, Henry Winter Davis, the peerless orator of Maryland, and many other men since prominent in the national councils.

Mr. Wilson has a larger income from his regular practice than is enjoyed by any other lawyer in California. He is attorney for a score of millionaires; also, for many of our most prosperous mining companies; for the Safe Deposit Company; for Wells, Fargo & Co., which corporation, by the way, is organized under the laws of Colorado; also, for the Bank of California, the original articles of incorporation of which he drew when the institution was located at the southwesterly corner of Washington and Battery streets, in

1864. He also frequently appears as attorney for the Central Pacific Railroad Company.

Mr. Wilson is a methodical, patient, tireless worker and investigator. With the aid of his sons he wields his immense practice without difficulty. While perfectly unassuming, he has the fullest confidence in his capacity, as may be inferred by his opposing, single-handed, as he has done, the giants of the eastern bar before the most august bench in the land. He equips himself in complete armor for every encounter. His library is well selected, and in utility and number of volumes is not exceeded by any private law library in the State. He has what is called a legal mind—a well balanced mind. He is a lawyer clear through, and makes law his constant study. He loves the science. He has a genius for work. His habits are excellent—his life blameless. He has a reflective cast of mind, a fine judgment, a vast fund of common sense. His success, therefore, is not at all surprising. Success was his destiny.

I have heard some good lawyers assert that Mr. Wilson was at his best before a jury, while others say his place is before the court. The truth is, he is good in either position, but not being a magnetic or eloquent speaker his jury addresses are not powerful appeals. His delivery is quiet and deliberate, his speech plain. He very rarely touches ornament, and, while always earnest does not often warm up. Simple in his tastes and dress, free from haughtiness and affectation, he yet possesses a more magisterial air than any bar leader here. He enjoys the unqualified respect of the entire bench and bar. Both in and out of court you recognize in him the thoughtful counselor and well bred gentleman. And the high esteem in which he is held by the profession is due not more to his legal ability than to the uniform gentility which marks his treatment of his brethren.

It would be tedious to briefly glance at one-half of the more important causes in which Mr. Wilson has appeared at this bar. In the mortgage tax cases, the Beale street cases, the New City Hall case, the case of Sill vs. Reese, the Black will contest, and many others which excited deep interest in the public mind, he was conspicuous, and generally led the successful side. The case of Cunningham vs. Ashley *et. al.*, tried here at an early day, involved the title to the lot of land on which Platt's Hall stands. The plaintiff was D. O. Mills' father-in-law, who built and owned the Nucleus Building. The defendants were Delos R. Ashley and Jesse D. Carr, the latter now a wealthy farmer in Monterey county, and Ashley afterwards becoming State Treasurer of California and Member of Congress from Nevada. Mr. Wilson was for Cunningham, and prevailed over John B. Felton, D. P. Barstow and John Garber. The case of Porter vs. Woodward, *et. al.* was brought to recover a part of Woodward's Gardens and adjacent grounds of large area. There were many defendants and some twenty-five attorneys appeared on their

behalf, but the defense was chiefly conducted by Messrs. Wilson and J. R. Jarboe. The plaintiff's attorneys were William H. Patterson and B. S. Brooks. The case was ably contested and was taken to the Supreme Court. The defendants were successful in the District Court and on appeal.

Mr. Wilson has done well to eschew criminal practice. In the line of civil business, he keeps farther from the people, his name is less before the public eye, he is seen less, but he is felt more. He is not suited to the bustle and excitement of criminal trials. His deliberation and judicial cast of mind, keep him off the stage where guilt and justice meet. He is not strong in appealing to the feelings, the passions.

> "He has not learned the mystery of awaking
> Those chorded keys that soothe a sorrow's aching,
> Giving the dumb heart voice, that else were breaking."

But in the wide domain, which he has been so industriously exploring for so many years, his capacity for investigation, his powers of argument, his poise of judgment, have found a congenial field. They impress his mind upon the jurisprudence of the State. In court Mr. Wilson is of easy bearing, but not courtly. He keeps full notes and never mistakes evidence. He uses his books with much discrimination. His authorities are in point. He talks forcibly, but not finely. He is cool, clear, eminently practical, concise, cogent, logical. His style is strictly argumentative; there is no hurry, no fretfulness, no impatience. Having improved his office hours he enters the court-room "strong in the assured sense of present skill, in the calm knowledge that the hours will bear good fruit."

In our Superior Court, Department 2, 1880—Calhoun Benham appearing for plaintiff, Mr. Wilson for defendant—a jury being impaneled, Benham wanted to amend his complaint and proceed with the trial. Mr. Wilson objected, and insisted that if the amendment was allowed the trial should be postponed. "I prepare my cases," he said. "I have analyzed this complaint. I know just what the plaintiff will be permitted to prove under each count (holding up a list of his authorities). If this amendment is allowed I may desire to demur; or I may move to strike out; or I may answer it; I *prepare* my cases, so that when I come into court I may be able to assist the court and jury."

John M. Burnett (sotto voce)—And to beat the other side.

The oldest short-hand reporter in California, the late A. J. Marsh, gave it as his opinion that Mr. Wilson was the most subtle cross-examiner he ever heard, except Durant, of Boston, a contemporary of Choate. Speaking of Choate, who was never properly reported, the reporter whom I have just named, stated that there were a dozen short-hand gentlemen in San Francisco who could report Choate's speeches verbatim. This he said in 1881.

Mr. Wilson has appeared in the Supreme Court of the United States

more frequently than any member of the California bar. One of the most interesting of the causes which took Mr. Wilson to the highest tribunal of the nation was the Broderick will case. Broderick, United States Senator from California, shot in a duel by Judge David S. Terry, September 12, 1859, died four days later, as Harry Byrne afterwards died, without wife, parents, children, brother or sister. A paper, purporting to be the last will of Broderick, dated at New York City, January 2, 1859, was admitted to probate in our Probate Court, October 8, 1860. Under his alleged will John A. McGlynn received $10,000, and the remainder of the estate went to George Wilkes, of New York City. McGlynn, Wilkes and A. J. Butler were named executors. The estate, consisting chiefly of land now in the heart of San Francisco, was sold to several hundred purchasers in 1861, under order of court.

A little over eight years elapsed, when, on the 16th of December, 1869, a suit in equity was instituted in the United States Circuit Court in San Francisco to set aside the probate of Broderick's will and have the same declared a forgery, and to recover the estate. The complainants were John Kieley and Mary, his wife, George Wilson, and Ann, his wife, and Ellen Lynch, all residents of Sydney, New South Wales. The bill alleged that the three women named were daughters of Catherine, deceased sister of Broderick's father, Thomas, and were the only heirs at law. The complainants excused their long delay in asserting their rights by declaring that they lived in a remote and secluded region in Australia; that they were illiterate and did not hear of Broderick's death until eight years after the probate of his alleged will.

The high position of Broderick, the tragedy of his death, his great popularity at the time, and the extensive possessions he left behind him, drew wide attention to this contest in the Circuit Court. The history of this controversy is replete with interesting facts and incidents. Mr. Wilson appeared with other leading counsel in support of the genuineness of the will, and interposed a demurrer, which was sustained, and the complainant's bill was dismissed. The complainants appealed, securing the services of I. T. Williams, who made an oral argument, and S. H. Phillips, who filed a brief. In the Supreme Court of the United States Mr. Wilson was alone for the defendants. He contended that a court of equity had no jurisdiction of the subject matter of the suit, the same being vested exclusively in the San Francisco Probate Court, and that the action was barred by the several California statutes of limitations. He made other points, but upon these just stated he obtained an affirmation of the decree of the Circuit Court. Considering the interests involved in this controversy, and the large number of persons affected, Mr. Wilson must have received a princely fee.

The case of Meeks vs. Olpherts, Sharon *et. al.*, in which Mr. Wilson

appeared for the defendants, was won by him in the United States Circuit Court in this city; and the plaintiff appealing, the judgment was affirmed. Mr. Wilson had Montgomery Blair against him in the United States Supreme Court. The action was to recover possession of a hundred-vara lot back of the Palace Hotel. This case reveals a striking instance of the law's delay. George Harlan, who once owned the property in dispute, died at San Francisco, intestate, July 8, 1850. Henry C. Smith took charge of the estate, as administrator, August 19, 1850, and afterwards resigning, Benjamin Aspinall was appointed in his stead, June 15, 1855. Aspinall settled up and was discharged May 12, 1864, having meanwhile sold the lot in question, under order of the Probate Court. At the time of the decision by the United States Supreme Court in Meeks vs. Olpherts (100 U. S. Reports, 564), A. D. 1879, the Harlan estate was still in court, where it had been twenty-nine years, Joel Harlan and Lucien B. Huff being then administrators.

The defense in Meeks vs. Olpherts was the statute of limitations, and the United States Supreme Court held: (1) The statute of California which provides that no action for the recovery of real estate sold by order of a Probate Court, shall be maintained by any heir or other person claiming under the intestate, unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs. (2) When by lapse of time the action is barred against him, it is also barred against them, because the right of possession is, by the law of California, in him and he represents their interests.

In the official report of this case Mr. Wilson is presented to the world in italicized type as *Mr. S. M. Watson*. But, perhaps, Mr. Wilson was not working for glory altogether. S. M. Watson did not get the fee.

The case of Sherman vs. Buick (93 U. S. Reports, 209), was the initial fight of the conflicts between State and Federal patents for lands in the sixteenth and thirty-sixth sections, under the act of Congress of March 3, 1853. This case was instituted in 1872, in the Third District Court, Santa Clara county, to recover possession of the southwest quarter of section thirty-six, township five south, range one east, Mount Diablo meridian. The plaintiff claimed under a United States patent, issued May 15, 1869, while the defendant relied upon a State patent, issued January 6, the same year. The act of Congress referred to having granted to the State the sixteenth and thirty-sixth sections of public lands within the State, provided (section seven) that the State should respect the claims of persons settling in such sections *before survey*, the State to select other lands in lieu of those so settled upon; while section six declared that no settlement should be protected unless made within one year after the passage of the act. Samuel J. Sherman had settled on the land in dispute December 20, 1862. The land was surveyed by the United States in August, 1866, and Sherman received his patent from the

general government, as before stated, May 15, 1869, four months after the State of California had issued its patent to D. S. K. Buick. Sherman offered to prove these facts in the District Court, but the court excluded the evidence as immaterial, holding that at the time of his settlement the title to the land was vested in the State. On appeal to the Supreme Court, the judgment in favor of Buick was affirmed by a unanimous bench (45 Cal., 656).

The case was taken to the Supreme Court of the United States. Mr. Wilson, with whom were associated Mr. P. Phillips and Mr. George A. Nourse, representing the twice defeated plaintiff, and Mr. Montgomery Blair, the defendant, the latter took the ground that the grant of sections sixteen and thirty-six was a grant *in præsenti*, and that, no settlement on the lands in controversy having been made by the plaintiff at the date of the act, or within one year thereafter, they were not excepted from the grant. Of eighteen authorities cited by this eminent counsel, nine were from the California Supreme Court. Mr. Wilson contended that the title to sections sixteen and thirty-six did not vest in the State until they were marked out and defined by survey ; that until that was done, the grant was in the nature of a float ; that the settlement of Sherman, having been made before survey, was within the exception contained in the seventh section of the act of 1853 ; that, accordingly, the grant did not embrace the lands covered by that settlement, and the State patent was an absolute nullity. The opinion of the court (by Justice Miller) held that there was no real conflict between sections six and seven of the act of 1853—that the apparent conflict (one provision being that settlements shall be protected if made before survey, the other providing that no settlement shall be protected unless made within one year after the passage of the act) was reconciled " by holding to the natural construction of the language and the reasonable purpose of Congress by which the limitation of one year to the right of pre-emption, in the sixth section, is applicable alone to the *general body* of the public lands not granted away, and not excepted out of the operation of the pre-emption law of 1841, as the school lands were, by the very terms of the previous part of the section ; while section seven is left to control the right of pre-emption to the school sections, as it purports to do." (93 U. S. Reports, 209.)

The judgment of the Supreme Court of California was, therefore, reversed.

The case of The Ivanhoe Mining Company vs. The Keystone Consolidated Mining Company (102 U. S., 167) involved the title to all the real estate and mines of the flourishing mining town of Amador City, California. Here was another conflict between two patents, one issued by the State the other by the United States. Mr. Peter Van Clief and Mr. Oliver D. Barrett appeared for the plaintiff ; Mr. Samuel M. Wilson and Mr. George A. Nourse for the defendant ; Mr. Benjamin F. Butler for the State of California, and the Attorney General for the United States. Mr. Wilson was again successful, the court holding that the grant of the sixteenth and thirty-sixth sections

of land to California by act of Congress of March 3, 1853, did not cover mineral lands—that it was the settled policy of the general government to exclude mineral lands from all grants.

John Parrott, the well known San Francisco millionaire, brought suit against Wells, Fargo & Co., in the United States Circuit Court in San Francisco to recover damages for injuries to the granite structure on the northwesterly corner of Montgomery and California streets, caused by the explosion of a case of nitro-glycerine in the charge of that company on the sixteenth of April, 1866. The dangerous explosive was brought here with other express matter April 14th, 1866, from New York City, by way of Panama. On the wharf here it was discovered that the contents of the box, which resembled sweet oil, were leaking, and on the sixteenth, in accordance with custom, the box was carried to the building mentioned for examination in the presence of the agents of the express company and the Pacific Mail Steamship Company, that it might be ascertained, if possible, which company should repair the loss. An employee of the express company, under instructions, with mallet and chisel, was in the act of opening the box when the contents exploded, instantly killing all present, among them Mr. Knight, a brother-in-law of Governor Haight, and Mr. Webster, a well-known citizen, the two gentlemen being agents of the two companies. Supervisor Bell, of the eighth ward, who was passing the building on the California street side, was also killed instantly. The building was badly damaged, and windows were shattered in a large number of other edifices within a circuit of two blocks. It cost Wells, Fargo & Co. $6,000 to repair the damages to the part of the building occupied by them, Parrott's suit being for injuries to other parts of the same structure. Mr. Wilson, appearing for Wells, Fargo & Co., won this case in the Circuit Court and also on appeal. In the United States Supreme Court he was alone on his side, and, as the reporter states, he "argued the case thoroughly, on the precedents English and American." He had for antagonists Mr. R. M. Corwine and Mr. Benjamin R. Curtis, the latter, in the judgment of many, the foremost lawyer of the country. The court held that there was no negligence on the part of either the steamship or express company, nor of any of their agents or employees—that they had no knowledge of the contents of the box, and no means of knowledge; that nitro-glycerine was not then known as an article of commerce; and that the companies named, as common carriers, were not bound to inquire concerning the contents of the box, having no reason to have their suspicions awakened.

Mr. Wilson was also on the prevailing side—for the defendants—in the case of McGarraghan vs. The New Idria Mining Company. In this case he was opposed by Montgomery Blair and Matthew H. Carpenter. He was leading counsel for the hydraulic mining companies in their great contest with the farming interests upon the debris question—a great contest, indeed, and

a protracted one, 1880–1886. Many farms had been ruined by the flow of "slickens" from the mines, and the farmers, combining, sought to have the miners enjoined from committing further injury of this nature. In such a conflict Mr. Wilson's usual good fortune could not attend him. The issue marked the end of the long domination of the mining interests over those of orchard, and vineyard, and farm.

The case of the Giant Powder Company against the Vulcan Powder Company involved the constitutionality of the patent laws, so far as the same are designed to extend or renew patent rights. On the trial before Judges Field and Sawyer, U. S. Circuit Court, Mr. Wilson raised the point that the time for which a patent is originally issued cannot be extended, and the point was sustained by both of the sitting Judges. Mr. M. A. Wheaton was associated with Mr. Wilson on this trial, while Mr. Causten Browne was opposed. Mr. Browne is a Boston lawyer of repute, author of an approved work on the Statute of Frauds. He came out from "the hub" with much promise and confidence, to measure swords with Wilson, but was badly wounded and his retreat was precipitate. This recalls a refreshing memory of the great New Almaden case, tried in the same court. Our Eastern friends sent out three of the greatest lawyers of the country to present one side of that case; *but they found our Randolph on the other!*

It is worthy of especial mention that of the many causes in which Mr. Wilson has appeared in the highest tribunal of the United States, he met defeat in but one. This was the case of Eureka Consolidated Mining Company vs. Richmond Mining Company—error to the Circuit Court of the United States for the State of Nevada. This was an action of ejectment for mining ground of great value. Having met the ablest lawyers of the East in the argument of great causes, it was remarkable that in the only case he lost in the United States Supreme Court, he should have been vanquished by an attorney of his own local bar. His adversary was Harry I. Thornton, who is represented to have made a magnificent argument. The Eureka-Richmond case is reported in the 103d volume of United States Reports, page 839.

Mr. Wilson has not been active in politics, but has several times been a member of local conventions. Governor Haight once tendered him a seat on the Supreme bench, and wrote him a letter, earnestly pressing him to don the ermine, but he declined. With his old partner, Colonel Hoge, he was a member of the body of Fifteen Freeholders of San Francisco who prepared the defeated charter of 1879, and also of the State Constitutional Convention of 1878. Of the latter body Colonel Hoge was president, and Mr. Wilson was Chairman of the Judiciary Committee. He refused to sign the new constitution. He rarely addresses the people. Among the few occasions when he has done so may be mentioned his Fourth of July oration at Sacramento in 1860, and his address at the laying of the corner-stone of the State Capital. His latest

production outside of his profession was also his best—his eulogy upon Samuel J. Tilden, before the State Democratic Club, at San Francisco, shortly after the statesman's death in 1886. This he had written out, and he read it with fine emphasis and effect before a large and select audience. It was excellent in thought and expression, and is preserved in pamphlet form.

It may be added, that Mr. Wilson has husbanded an ample competence, and owns one of the most valuable and commodious private residences in the city. He is of fine personal presence, of medium stature, with dark features and high forehead. Having raised a large family, and become a grand-father, he still seems to "wear the rose of youth upon him," and at three-score-and-three he securely holds the proud eminence which has long been his of right.

CHAPTER VI.

Henry H. Byrne—A Picture of The Man and the Advocate—A Popular Idol But Distrustful of the Poor—Four Terms as District Attorney of San Francisco—Bouts with Baker and the Elder Foote—The Unfortunate Marriage with Matilda Heron—The Contest of the Actress for his Estate—Her Pathetic Story Told in Her Own Words—Explanation of the Last Will—Amusing Anecdotes and Reminiscences.

Henry Herbert Byrne whose period at the San Francisco Bar covered the eventful years 1850–71, was born in New York City. His father was Irish and his mother English. He was well educated at a French Catholic college in Canada. Admitted to the bar in his native city, he came to San Francisco at the age of twenty-six, without money or reputation. He soon formed a partnership with T. W. Freelon, and during all his professional life afterward was associated with that gentleman, except when the latter was on the bench. Byrne was District Attorney of San Francisco, for two terms 1851–52, 1853–54 and also two terms, 1858–69, 1870–71. In that responsible office he brought many distinguished rogues to justice, some of whom "felt the halter draw." He won encomiums from bench, bar, the community and the press. He was an able, faithful and diligent minister of the people. He was known only as a criminal lawyer. It is to be wondered at that he accepted the District Attorneyship for his last two terms, well knowing the arduous duties of the place, and having since he first occupied the office attained considerable reputation and wealth.

The most important trial in which he appeared was that of Mrs. Fair, charged with the murder of the prominent lawyer, A. P. Crittenden. He was then District Attorney. The trial was opened March 27, and closed April 26, 1871. Byrne made the closing argument for the prosecution, consuming two days, and this was published in full by Marsh & Osbourne, the official shorthand reporters, with all the proceedings of the trial. It was certainly an admirable effort, a fine exhibition of his power of invective, his unimpeded flow of speech, his subtle reasoning, the precision of his ideas and his varied learning. It is full of interest and attractive for all classes of readers. His quotations were many, but not lengthy, and not unduly frequent, considering the great length of his speech. He was, however, corrected several times by Mr. Cook, his chief opponent, in statements of the evidence. To give edge to his

points, beauty to his periods and emphasis to his conclusions, he quoted from, or made allusions to, Byron's "Don Juan," Pollock's "Course of Time," Byron's "Childe Harold," Lord Brougham's "Opinions on Politics, Law, Science, Education, Literature, etc.," "The Confessions of Rousseau," Sappho, "The Monk," of Matthew Lewis; "Little's Poems;" Mohammed, Milton, Shakespeare, Esculapius, Hippocrates, Locke, Jeremy Bentham, Edwards, Kant, Aristotle, Thackeray, Dickens, Michelet's "L'Amour," Marc Antony, Cleopatra, Lord Nelson, Lady Hamilton, Telemachus, Diana, Cæsar, Lucrezia Borgia and Daniel Webster. This address abounds with beautiful periods and striking passages, but it must not be supposed that because of its ornament it was not logical. It was argumentative, forcible, convincing. In reminding the jury of their responsibility, he said: "The juror's oath is not a by-play. It is held most solemn by all Christian communities where the jury system prevails. It is that chain which binds the integrity of man to the throne of eternal justice. And when that chain is broken, conscience swings from its moorings and society is again in a condition to resolve itself back into the original chaos out of which it was carved."

In examining the testimony of the medical experts for the defense which was to the effect that the accused was insane, he declared: "If these theories are correct, why, the mothers of posterity will produce nothing but a band of fools. I am rather inclined to think, after hearing the testimony of some of these physicians, that they have read "L'Amour," of Michelet, a crazy Frenchman, who, in the first instance, idealizes women, taking from them their blood and their brains, and then turns around and bows down before them as an idolater. There is no practical sense in the theories advanced. It is a reflection upon our mothers, upon our wives, and will send down to posterity a nation of fools, if these theories are correct." His most forcible and eloquent passages were hurled directly at the prisoner, and it would be out of place, probably, to repeat them here. Alexander Campbell was associated with Byrne in this case, and made the opening argument for the prosecution. The prisoner was convicted and sentenced to be hanged, but secured a new trial, and before she was again placed at the bar Byrne had gone out of office and passed away from earth.

He died at San Francisco, March 1, 1872, a few months after the close of his last term as District Attorney, aged forty-eight years. He had no relatives in California, and no immediate kinsfolk anywhere. A younger brother, Lafayette M. Byrne, died before him in this city. He had long enjoyed a valuable practice and had made some judicious investments in city real estate. His estate was appraised at $77,798. It proved, before final settlement, to be worth $90,000. All of this, after making a few small legacies, he bequeathed to his personal friend and brother lawyer, already well off, E. R. Carpentier.

The minor legacies were : To David Scannell, Elijah Nichols and H. H. Byrne Ciprico, a little son of George Ciprico, the barber, $1,000 each, and to Mary Cross $5,000. David Scannell had been Sheriff in the days of the great Vigilance Committee, and has now been for many years Chief Engineer of the Fire Department of San Francisco. Three of Byrne's nieces—Mary E. Holcomb, Catherine F. Holcomb and Julia H. Howard, daughters of a deceased sister —came from Connecticut and contested the will on the grounds of unsound ness of mind and undue influence. They were offered, and accepted from Mr. Carpentier, $2,500, in full settlement, before trial.

Excepting James King of William, David C. Broderick, General E. D. Baker, and Thomas Starr King, no man was ever buried in San Francisco amid such genuine manifestations of popular sorrow as was Byrne. An immense concourse of mourners attended at St. Mary's Cathedral, where Father Speckels delivered a discourse at once impressive and ornate. Byrne had had Catholic doctrines instilled into his young mind, but through life after his maturity he claimed to be a freethinker, being a close reader and admirer of Darwin, Spencer, and others of that school. His partner used to tell him his freethinking was only skin deep, and, reminding him of Napoleon's saying : "Scratch a Russian and you'll find a Tartar," said he, "Scratch Byrne, and you'll find a Catholic." Byrne dwelt apart from all churches, creeds and religious forms, but as the supreme hour approached, after stoutly holding out against many friendly importunities, he permitted a visit from a Catholic clergyman, to whom he made confession. Personally, he was perhaps the most popular man who ever lived in our metropolis—more popular than Baker. Baker dazzled the multitude from an eminence; Byrne thrilled them by actual contact. He had the faculty—not faculty, but fortune, because it was an attribute unconsciously possessed—of enlisting the affections of those with whom he conversed. Mention his name in San Francisco to-day, in any knot of men, and some one will say, "I knew Byrne intimately." The average man, after having two or three interviews with him, seemed to feel that he had been admitted unreservedly to his confidence. His funeral procession embraced hundreds of the poorer classes, in humble vehicles and on foot. In the Supreme Court the death of Byrne was announced to the Supreme Bench on July 11, 1872, by the Attorney General, John Lord Love, who made a brief address, and moved an adjournment of the court. Chief Justice Wallace, who had himself, as Attorney General, in earlier times, announced to our highest tribunal, the deaths of leading advocates, responded as follows :

The court recognizes the propriety of the motion submitted by the Attorney General. When a professional man, distinguished in the battle of life, exchanges his armor for the tomb, it is becoming that his surviving comrades pause and pay deserved tribute to his memory.

Mr. Byrne held repeatedly and for a long period of time, the responsible and im-

portant office of District Attorney of San Francisco. In the discharge of the duties of that position, he exhibited rare and admirable qualities. In that branch of professional learning peculiarly within the province of his public labors, he exhibited a profound knowledge of the law, accompanied with a forensic ability and eloquence rarely equaled at any bar, and which, together, advanced him to the front rank of the advocates of the country. That he filled his office to the satisfaction of the community and the benefit of the public, is attested by the general voice, and by his repeated elections to the place.

Firm, yet courteous, he endeared himself to his brethren at the bar, and won their admiration and respect for his talents and integrity, while we are assured of the affection inspired by his social virtues by the universal manifestations of sorrow at his grave. As a lawyer, he was learned, and as an advocate, eloquent and persuasive; as a public officer, he never faltered in the pathway of duty; as a man, he was unasuming, true and unselfish.

It is ordered that the proceedings of this occasion be entered at large upon the records, and, as a further testimony of respect to the memory of the deceased, the court will now adjourn.

Byrne was of short stature, but compactly built, with his head set firmly on his shoulders. His eyes and beard and hair were jet black, the latter abundant and curly. He walked with his head and shoulders thrown back, and his carriage was somewhat stiff. One hand was invariably pocketed. He had the aspect of great physical strength and solidity. He did not look the lawyer at all. His dress was plain and in good taste. His voice was most peculiar; it was harsh, sharp, screeching, a great impediment to his popularity as a speaker. No man with such a voice could attain distinction on the stump or in the lecture room, unless endowned with abilities of the very first class, as well as all the graces and magnetism of person. Yet he made the most of it. He had severely cultivated it under the ablest professors of voice culture, and it had these compensations: he never tired in speech, was never hoarse, and was always distinct. Nor did his voice steadily repel, but the auditor, on hearing him a second time, would gradually become accustomed to its tone and forget its oddity. Music he had studied *con amore*. He *knew how* to sing, and yet *could not* sing—his voice would not permit it. As to correctness of rendition, he could give you almost any popular air from any leading opera. He was quick, bright, apt at repartee, convivial, and a lover of fun.

He spoke off-hand always—that is, he never wrote out anything; but he marshaled his ldeas and prepared his plans. He was a powerful prosecutor—watchful, all-seeing, intrepid, not afraid of man or devil. His invective was scathing—it made you shudder at times. Before a jury he was very rarely eclipsed. In force, animation, beauty of imagery and illustration, his jury addresses yield to Baker's only. While he could not stand against the silver tongue* orator before the masses, or on the stump, or in great conventions, yet

*The first use of this expression "silver tongue," so far as my researches have disclosed, was made by the poet Quintus Ennius, who has been styled "The Father of Roman Literature" [239–169 B. C.] Ennius referred to Cornelius Cethegus as "The Orator with the Silver Tongue." According to Forsyth, Cornelius Cethegus was the first Roman whose reputation for eloquence rests upon positive testimony.

did he at times burst into eloquence as lofty and impassioned as that of Baker himself.

Our advocate was in his speeches too fond of quotation—too fond of talking about the old Greeks and Romans, too fond of airing his stores of information. In quoting, he was sometimes inexact (several times so, in the Fair case), but generally he was correct and happy. He overfed his mind on books, and possessing a good memory (notwithstanding he had also a strong understanding and an original intellect), he found it difficult, now and then, to repel the stirring thoughts of great minds which pressed upon him, bringing "news from the empyrean."

Many anecdotal reminiscences of Byrne are preserved. One day in Judge Freelon's court, in 1852 or 1853, when he was District Attorney, Governor Henry S. Foote, then a practicing lawyer here, demurred to an indictment written with Byrne's puzzling pen, on the ground that it could not be read, and did not appear to be in the English language. Judge Freelon called for Foote's demurrer, and, examining it, observed that its chirography was, if possible, more of an enigma than that of Byrne's indictment. Solomon could hardly have done better than the Judge in this perplexity. He directed each counsel to read his own pleading, which being done, the demurrer was overruled. If Governor Foote thought the indictment was expressed in Irish he heard Byrne perform the feat of reading it in English, with uninterrupted flow of language from beginning to end.

In a half jocular way, Byrne was in the habit of boasting that he was descended from an Irish king. He was wont to attach to himself certain persons, who accompanied him in his pleasures at table, etc., and whom he made his butts—whose flattery, however, was not altogether distasteful to him, but was taken as return for their entertainment. One of these was a certain well known "count." Lafayette Byrne said, one happy night, that he had never really believed in his descent from an Irish king until he saw that his distinguished brother kept a fool—a practice, he understood, of royalty in the old times.

A man was indicted for mayhem—gouging out an eye, and Byrne, as District Attorney framed the indictment. This was demurred to, and on the argument, Byrne's attention was called to the fact that he had left an "i" out of a word. He replied, "Well, my offense is the same as the defendant's—each of us has put out an eye." "But," remarked a brother lawyer, "your offense is the greater in degree—you destroyed the whole sense of *your* victim; the defendant only partially destroyed *one* sense of *his*." "And this is the first time," added Byrne's partner (striking the District Attorney while he was down), "that I ever heard Byrne leave 'I' out."

He would sometimes make a bull: "Mr. Policeman, how far were you behind this boy when you caught up with him?"

"I don't understand you, sir."

The court suggested that, perhaps, Mr. Byrne meant how far he had to run before he caught him.

"No, your honor," said Byrne, "I meant what I said. How many feet or rods were you behind him before you caught up with him?"

Failing to get any enlightenment on this point, he asked some other question. But he never would admit that he had blundered. Indeed, he never, in or out of court, would concede that he was at fault in anything. He was very obstinate. If he made a mistake, he would stick to it, would twist around it, climb over it, or dig under it, would obscure it with multiplicity of words, of allusion, of phrase, would do anything rather than let the court or jury see that he recognized discomfiture or defeat. He was, as are men of his temperament generally, very vain, but his vanity was perfectly harmless. He was never envious of other men's success in his peculiar line, and never underestimated the efforts of those with whom it was his hap to contend. Withal, he really possessed great simplicity of character. He would take advice from those qualified, in his judgment, to give it, and would follow it, so far as his impulsiveness would allow.

He enjoyed exuberantly life, literature, society; but, for many years before his death he seemed to labor under a burden which he vainly tried to shake off. As Dr. Griswold observed of Edgar A. Poe, he bore through life "the memory of a controlling sorrow." This was his unfortunate marriage. In the press of business, in hours of idleness, in the solitude of study, it was ever present.

Byrne was frequently pitted against Baker at the criminal bar. They, whose names I love to couple, delighted to cross swords with each other. "O, the blood more stirs to rouse a lion than to start a hare!" By a masterly stroke of cool presumption, Byrne once lifted Baker from his footing. The latter recited a fine poetic extract, and remembering Byrne's proneness to quote poetry, he turned to him and remarked, "I suppose the learned District Attorney is familiar with this quotation!" Byrne quickly responded with imperturbable front, "*I should think so; I wrote it myself.*" The "Old Gray Eagle" curved his neck. Would Byrne dare to confront him in open court on such an issue? Could it be possible that in the crowded court-room there were some who would believe that Byrne really wrote those lines, and that he, Baker, was ignorant of the author of his own quotation? But he soon recovered himself and replied: "I never before saw or heard this gem attributed to the learned counselor, but when he asserts his paternity, it is not for me to deny it. I cannot say I *know* he did *not* write it, but I am ready to take the witness stand and state under oath, that I read these very words in Milton before the gentleman was born."

"Great minds often think alike," said Byrne, quietly.

In 1854, in San Francisco, Byrne met and married Matilda Heron, whose almost faultless impersonation of Camille afterwards won her a widely extended celebrity. They married in haste, and repented at leisure, if ever a couple did. So little was known of this marriage that after Byrne's death, some eighteen years later, when Matilda Heron came from New York to contest his will, the announcement created universal surprise. Although he always ignored it, the marriage was a solemn fact. Col. Philip A. Roach was an intimate friend of Byrne both in New York and San Francisco. When the actress told her story to the public in 1872, Col. Roach made an investigation and found that she had been duly married to Byrne by Father McGinness of St. Patrick's Catholic Church at San Francisco, in 1854. I had this from the Colonel on November 29, 1881. The light that was thrown upon this unfortunate alliance came from the sentimental actress herself. In an affidavit filed by her in our Probate Court, August 28, 1872, in the matter of her contest of Harry Byrne's will, she thus expatiated:

In the Probate Court of the City and County of San Francisco, in the matter of the estate of Henry H. Byrne, deceased. City and County of San Francisco, ss.

Matilda Heron Byrne, at present in aforesaid city and county, being first duly sworn, says: I deny that I have a considerable quantity of, or any quantity of, or any real or personal estate, either in the State of New York or elsewhere, sufficient for my support, or held by me in common with Robert Stoepel, or held by Robert Stoepel for my benefit. I have not a dollar in the world, either in real or personal estate, nor is there any relation under heaven between Robert Stoepel and me, not even our only living child, the posession of which I have obtained through her father's proclaiming her illegitimacy. Since the dissolving of my marriage with Robert Stoepel, he has refused to pay one dollar towards the support of either his child or me. When my sad illness, caused by suffering through the overwhelming calamity of my domestic wreck, between those two men, Henry H. Byrne and Robert Stoepel, overcame me, Robert Stoepel refused to pay my doctor's bill or that of his child; refused to clothe or pay for the education of his child. What, then, can be meant by his now holding property for my benefit, I am at a loss to know. Before my leaving New York for San Francisco, Mr. Stoepel sent a messenger to me offering to settle on my child a large sum of money, if I would sell all right and claim to her. This when I was on the bed where I had lain an almost confirmed invalid for fifteen months, and whence I arose to recover, by act of habeas corpus, my little daughter, who was being kidnapped from me to be transported to an obscure and remote place in the Pyrenees. So much for the estate now being held for my benefit.

As to the suit alleged to have been commenced by me in 1869 against Robert Stoepel, if such suit was, or is, in existence, I have no recollection or knowledge of it whatever. About eighteen years ago I was married to Mr. Henry H. Byrne, with the agreement that I should remain on the stage for two years, with the hope, on my part, that I might achieve as great a success in the East as I had in San Francisco. After my return from Europe where I dramatized "Camille," studied under the best masters, and purchased a complete theatrical wardrobe, there was not one prominent manager who would open his doors to me. It was failure after failure. The large amount of money I spent in Europe, and what I sunk in San Francisco under bad advice, had now impoverished me. To Mr. Byrne I faithfully depicted every disaster.

The two years passed; he came, as by promise, and, as I thought, to claim me.

I was in Philadelphia, in the bosom of my family. Mr. Byrne remained three weeks in New York, without even writing to me. Even this I forgave.

At this time an engagement in Pittsburg was opened to me, whither he at length followed me, accompanied by two members of my family. Inquiring why he so neglected me, he answered he had been led astray by some California friends. This, I also forgave. During the four days he remained with me, we discussed all my professional calamities, wherein I told him my sorrowful conviction that I never would be the great artist my soul had so long hungered to become, and that now I was perfectly resigned to follow him and his fortunes. To all of this the dear gentleman most evidently thought a great deal, but very little answered.

The last morning came. I was offered an engagement in Buffalo, and I asked, "Must I go to Buffalo, or may I go with you?" To which he answered: "Go to Buffalo."

Then and there we parted; I to Buffalo; he to his friends. One other year passed, when Mr. Byrne's letters came rarely. At last they ceased entirely. I could not believe he had failed to write to me, and so I mentioned it to my brother, Alexander Heron, President of Heron's Line of Steamships from Philadelphia to Charleston and Savannah, but my brother said, "Tilly, if you had one spark of your mother's pride in you, you would never speak to that man again; he has deserted you." This was a bitter blow to the young actress. A third year had passed since our marriage, since which I never received one dollar from him—not even a little token. After my first shock was over, I wrote to Mr. Byrne calmly, and, under the advice of my brother, asked for a divorce. An immediate reply came to me, in which he used these exact words: "Place this letter in the hands of a lawyer, and it will make you as free as the hour you were born." I placed the letter in the hands of a lawyer, John Hopper, of 110 Broadway, New York, and told him to procure me a divorce. About this time I had begun slowly to succeed in my profession, and it was not surprising that a young girl should have flatterers and snares about her. Often, rehearsing "Camile," I envied the humblest woman in the theater who had a husband's protection. In New Orleans I met the conductor of our orchestra, who was polite, respectful and kind to me. We met again in New York, where he presented his parents, sisters and brothers to me; also, his brother-in-law, Vincent Wallace, the composer. They hinted a marriage. I told them I was poor. Robert Stoepel answered: "Wealth is impertinent: we will be poor together; I love you and will labor for you; it is your love I would marry, not your purse." I asked for time. Time passed and I played Camille in Wallack's Theater for 100 nights, achieving a great success. In that triumphant hour I did not forget the poor musician. After a successful trip all over the Union, I sought John Hopper, who told me my case was all right, and that I was a free woman. An inexperienced girl, how could I then know the world or its laws? And I was away from my only friend, my brother. John Hopper urged my marriage, assured me I was free to marry, and engaged his brother-in-law, Rev. Mr. Gallordet, to marry Mr. Stoepel and myself in St. Ann's Church, where, in the presence of a large number of friends, Mr. Hopper and his wife Rosalie placed Robert Stoepel's hand and mine together before the altar. Years passed, honor accompanied, and prosperity attended our mutual industry. Certain obligations called me to San Francisco. I left our happy home, where I left my only child and her father, and arrived here. The day after my arrival Judge ——— called on me, and informed me that through an old friend he came on behalf of his client, Mr. Byrne, relative to a divorce which Mr. Byrne claimed. I was naturally annoyed, and requested to see Mr. Byrne in person, which the judge positively and imperatively refused. Worn by a long voyage, away from friends and home, in a strange land, I said it was not fair to bring me in such light before the

public, to which —— —— replied that the matter could be settled up in the country by parties there who would be operated upon to keep it secret. I answered: I did not know that that was the way in which justice was dispensed in California, and asked on what ground could Mr. Byrne make so outrageous a request. Whereupon, Mr. —— read to me a certain paper, which I could not comprehend until he came to the word "adultery," when I told him to proceed no further. He then substituted for the odious word "desertion." Again I entreated an interview with Mr. Byrne, and again was denied, the judge adding, "Have you no pride? I tell you if Harry was weak enough to see you, I, as his counsel would forbid it. The man despises you." Next day I met Harry on my way to rehearsal. He turned ashy pale, and exclaimed, "Why, Tilly!" I asked what he meant by sending —— every day to annoy me in the midst of my labor. He denied all knowledge of the affair, and an interview between us was decided upon.

Thereafter we had a long, serious and affecting interview, explanation and reconciliation. After that he came constantly to see me during my stay in San Francisco. During our long conversations Mr. Byrne's constant theme was my being his wife again. He forbade —— ever to mention divorce to me. But the industrious —— was not disheartened, for he reminded me that after I was two months married to Harry, the latter had sent me $1,000 and that it would be a graceful thing to repay it. Well, I said, since you are so zealous in your friend's behalf, I will pay it. Sell that water lot, on which you insist he has been paying taxes, while I can prove my brother-in-law has been really paying them. Sell the lot—pay your client principal, taxes and interest on the same. The lot was sold for $2,300. The purchaser refused to lay down the money until I signed it by my real name in the presence of Dr. Harris, Judge Freelon and some others. I took the pen and wrote "Matilda Heron," then, hesitating, I said: What else? and both Harry and Freelon answered aloud: "Byrne," which, to the best of my knowledge, I then signed.

In our next interview I asked Harry what on earth that signature meant, and he answered: "You are not Stoepel's wife, but mine; your property is mine; that beautiful home of yours is mine; you are mine; your very child is mine; you are my wife. Your divorce from me was either illegially obtained or fraudulent."

This intelligence pained me exceedingly. Just then I received a dispatch of my brother's death. I was obliged, even in my double affliction, to perform three nights. At last I broke down ill, and all that tender respect and love could do, Harry Byrne did for me. I had two physicians, but he sent his own. He sent Mr. Freelon to assure me that, if anything serious should arise from my illness, he would send a faithful messenger to accompany me home. I got well and traveled up the country. Not a city I performed in, scarcely a day passed, but brought a letter from Mr. Byrne. When it became necessary for me to go East, he became extremely melancholy, even to weakness. I could only arouse him by expressing the hope that I would return to him. He planned that we should go abroad for some years. I told him I would go home and state my position frankly to Mr. Stoepel. In parting with me he exhibited great sensibility and deep feeling. On my return to New York I immediately and frankly told Mr. Stoepel all, without a particle of reserve. Then arose a question of property between us. Mr. Stoepel saying: "Then if you should die Byrne can claim all." I answered: "These were Mr. Byrne's exact words." From that hour strife and confusion surrounded me. Between two husbands—my brother dead, a daughter's honor and my own involved—I knew not whither to turn. I made a retreat to the convent to compose myself, leaving which I was thrust into the Supreme Court by Robert Stoepel vs. Matilda Heron Byrne, to compel me to consent to a division of property as partners in business. I did not wish to divide our property, but to keep it together for the child, so I engaged Mr.

James T. Brady to defend the case. Unfortunately that gentleman in a short time died. On requesting his partner to resume the case that gentleman said: "Matilda, you will have trouble with Stoepel, for I have had a communication from Mr. Byrne who says you are his wife, that your divorce from him was not legal." Weary of publicity, disheartened, desperate, I left that office, and made over to Robert Stoepel every piece of property and every dollar I possessed on earth. From that time, too depressed to act, I was supporting myself and my child by my education, when two years ago I was prostrated by severe fever, and kept my room and bed for fifteen months. I was convalescent, and was sent in midwinter to the seashore, where the news of Mr. Byrne's death reached me; also, telegrams and letters telling me to come to San Francisco. I have come to defend my honor and my rights. From the investigations made by my lawyer in New York at the time of the litigation between Robert Stoepel and myself, I became fully satisfied, and do now firmly believe, there never was a divorce between Henry H. Byrne and myself.

[Signed] MATILDA HERON BYRNE.

Subscribed and sworn to this 27th day of August, A. D. 1872, before me,

[Seal] SAMUEL HERMANN,
Notary Public.

There was a compromise effected between Mr. Carpentier, the executor and legatee before named, and Matilda Heron. Mr. Carpentier's final account shows that Matilda Heron received $1,000. The fact is, I have it on good authority, she actually received $5,000.

The Mary Cross, to whom Mr. Byrne left $5,000, was a young woman from Philadelphia, who learned the millinery art in the same institution with Matilda Heron, through whom she became acquainted with Mr. Byrne. She was Mr. Byrne's housekeeper in one of his houses, corner of Howard and Twelfth streets, and in his sickness showed him unremitting attention. He really was indebted to her for many acts of kindness. He was not married, and in periods of sickness and gloom, consequent upon excess of conviviality, he invariably sought her house and found hospitable welcome.

It has always been an enigma to the bar and the community that Byrne left his estate to a man who already had ample means and was not of his blood. This may clear the mystery: Byrne, while not a money worshiper, and while numbering among his ardent friends and admirers thousands of people in the humble walks of life, yet looked up to moneyed men, and cherished unfeigned regard for those who had displayed the ability to accumulate wealth. He sometimes repeated an expression which he attributed to his father, that "a poor man could not be honest." He had no near relatives to survive him. He did not want his estate squandered, and felt that it would not be appreciated if left to any impecunious companions. Among his immediate personal friends was one who knew how to make money and how to take care of it. Carpentier and Byrne, moreover, had known each other in the East. When Byrne, before the close of his second term as District Attorney, in 1854, went to New York on a visit, he left his

office in charge of Carpentier. The two men were both bachelors (Byrne practically, at any rate), and this tended to knit them closer together. Just as Byrne was about to pass into decline, and softening of the brain seemed approaching (in 1871) he told a friend that he would like to spend some years in Europe, but did not have the ready means. Like many other well-to-do men he sometimes felt that he was poor. He said he did not want to mortgage his property. This friend mentioned the matter to Mr. Carpentier, who promptly said that Mr. Byrne need not let money matters trouble him an instant—that he, Carpentier, would supply him with all funds required. This was communicated to Mr. Byrne before his will was drawn. Shortly afterwards Mr. Byrne was ill and on the bed from which he never arose. Mr. Carpentier visited him and seeing his serious condition, staid by his bedside day after day and night after night until the end came.

It seems, then, that although Byrne left his estate to one who did not need it, although he could certainly have done more good with it, he yet bequeathed it to one of whom he could say: "He was my friend, faithful and just to me."

CHAPTER VII.

Lorenzo Sawyer—With McDougall in Illinois—In the El Dorado Mines in 1850—The Early Bar of Nevada County—A Remarkable Murder Case—Honors in San Francisco—A Long Tenure on the Bench—Judicial View of the Chinese Question—The Authorship of the Sole Trader Act—The Principles of Masonry—First Meeting with the Eccentric Lockwood—References to A. A. Sargent, Judge J. B. Crockett, Jno. R. McConnell, E. W. Roberts, E. F. W. Ellis, Stanton Buckner, C. H. S. Williams, Roderick N. Morrison, Frank M. Pixley and Tiburcio Parrott.

Lorenzo Sawyer holds for life the most exalted judicial station in California, and his career on the bench has already been longer than any other in the annals of the State, except those of Judges Hoffman and Field. A quiet, unassuming man, his forensic record is yet full of interest, and to those who may have the idea that his life has been uneventful, I promise a pleasant surprise.

He was born in Jefferson County, New York, May 23, 1820. (Judge S. C. Hastings was born in the same county, six years earlier). Like the Shafters, who were born in Vermont, four and eight years before him, he had the blessing of a noble parentage, and, like them, reared in the home of honesty, simplicity, sobriety and frugality, he heeded every parental counsel, and has led a life of exceptional beauty and purity. His father has been dead some years but his mother lingered until passed ninety-two, dying on June 9, 1886, at Belvidere, Illinois. Their golden wedding was celebrated at that place, February 11, 1869, when there was a happy reunion of their descendants and relatives. On that occasion the Hon. Joel Swain Sawyer, of Minnesota, the next eldest son, delivered to the aged couple an affecting memorial address, which closed with these words:

"To the principles of morality, virtue and Gospel truth, early instilled into their minds, enforced by your examples, do your children owe whatever of good may appear in their characters, whatever of success they may obtain in life, whatever of public or private consideration and esteem they may inspire; and as a fitting return for your care, your integrity, and the other Christian graces illustrated by your daily lives, you now realize the assurance of the sacred proverbialist; your children shall arise and pronounce you blessed—as we do this day."

At this "wedding" a hymn was sung which had been sung at the

marriage fifty years before, to the same tune, Exhortation, and from the same books.

Lorenzo Sawyer was born on a farm, and lived there until his sixteenth year. In winter he attended the district school; in summer he helped to bear the harvest home. The neighborhood contained a large and excellent library, of which he availed himself at night and on Sundays. After passing a year at the high school at Watertown, New York, called the Black River Institute, he went with his father and family to Pennsylvania, where a new farm was located and cleared. The next eight years were spent in teaching school in New York and Ohio, and in reading law, which profession he had decided to follow before he first left his native State.

The first law office he entered was that of Hon. Gustavus Swan, who then led the Ohio bar in land controversies. Judge Swan soon retired from practice, and Lorenzo Sawyer then was received into the office of Noah H. Swayne, afterwards a Justice of the United States Supreme Court. There he had the benefit of excellent instruction until his admission to the bar in 1846. He then went to Chicago, and passed a year in the office of James A. McDougall, who was three years his senior, and who was then Attorney General of the State, and who afterwards represented California in the upper house of Congress. He then went to Wisconsin, settling in a little town which bore the name of his native county, and, forming a partnership with John E. Holmes, then Lieutenant Governor, commenced the practice of law.

The old Whig party is dead only in name. Its principles are interwoven with the country's life. Daniel Webster and Henry Clay—these were the men whom Lorenzo Sawyer followed in politics. He had pitched his tent, however, in a locality not very congenial to Whig ideas. His industry, good habits and strong common sense showed that he was the right man, but he was not yet in the right place.

He built up a lucrative law practice for that locality but he was ambitious, and his chance for political preferment in that region was not flattering. So, when the cry of "Eureka!" echoed around the world, he was glad to respond.

In July, 1850, he arrived in California, having crossed the plains with a company of young men from Wisconsin. It was a journey of seventy-two days—"an unprecedently short trip" they called it. Mr. Sawyer sent to the Ohio *Observer* many incidents of this trip, and his articles were copied by several Western journals, furnishing valuable data to emigrants who followed him.

El Dorado! Beautiful name, most appropriate for a county of California. In that county Mr. Sawyer first rested after crossing the plains. Like Judge Bennett, immediately on his arrival he went to work in the mines to get a stake. Finding that his profession presented a golden opportunity, he went to Sacramento and commenced law practice. He soon removed to Nevada

City. His career there was comparatively short, but was cast in an eventful period, and the history of the bar of Nevada county, which was written by the Hon. A. A. Sargent, makes Lorenzo Sawyer one of the most prominent figures of that day. His library at first consisted of eleven volumes, brought from the Prairie State. His brief life at Nevada was broken by a visit to San Francisco, where he had decided to locate permanently. Disaster here came upon him. The honors this people had in store for him were unrevealed, and, being twice burned out of his office, he returned to his mountain town, where he was destined to win great local fame.

In 1852 he was counsel for the defense in one of the strangest criminal cases on record. A woman of the world, "Old Harriet," kept a saloon on Broad street. A mountain stream, Deer creek, dashed by in the rear of her house—right through the heart of the town. It was an early day, and she had a business which "paid." At the foot of the street there had been a bridge, which was the highway of communication between the two divisions of the settlement. On Little Deer Creek, a mile off, on the other side of the main creek, was the mining camp of Pat Berry, a prosperous miner. Right across the street from "Harriet's" there was, perhaps, the liveliest dance-house to be found in "the mines." It was nightly visited by men of all conditions, who made night, and sometimes morning, "hideous" with their revelry. Among these festive arrivals were many who came from across the creek—from mining camps, here, there and everywhere.

During one rainy season a freshet broke down the bridge across the raging creek, but a tree was felled so as to afford a passage to footmen. At the time referred to the creek was a turbulent torrent, and went roaring and dashing and crashing through the town, cutting it in two, with only the fallen tree for a footway between the two sections. On one Saturday Pat Berry came to town. He had made money during the week, and brought it with him. Arrived in town he bought an entire new outfit of outer and under-clothing. After dinner he went to the dance-house, and spent an hour. Then he crossed the street to "Old Harriet's." He was seen at the latter place at a late hour. But thereafter he was never seen alive.

A cry of "murder!" rang out upon the air that night, but not being repeated those whom it aroused gave it little thought.

But where was Pat Berry? His nude body was found in an eddy of the creek, about six miles below, a few days afterward. A trifling scratch was upon the abdomen, but on the forehead was a large, extravasated wound, which, according to medical testimony, must have been inflicted upon the victim while he was still alive. On the following day Harriet was accused of the crime of murder and arrested—also a stalwart Cornishman, her "fighting-man," so-called. In those days gold dust, instead of stamped money, was the medium of exchange. Everybody who was in business kept a pair of scales

to weigh and determine the value of gold dust. Harriet had such a pair of scales; and there was a large iron weight used with it, which, the prosecution said, was the instrument of the death of Pat Berry.

On the trial of the woman and her fellow, John R. McConnell, a bright but eccentric and erratic leader of our bar, who died in Colorado in 1879, prosecuted, and Lorenzo Sawyer defended. Justice John Anderson, brother of one of the earliest and ablest of California lawyers, and who, thirty years later was a Justice of the Peace in the same old town, heard the preliminary examination of the case. This consumed two or three days. It was established by the prosecution that Berry had money upon his person when he visited Nevada City on that fatal night. His movements were traced; the time and manner of the recovery of his body were shown; that the wound on his head was given in life was made clear, and it was also proved that this wound was inflicted with a round, blunt weapon.

The theory of the prosecution was that Berry had been murdered for his money in the brothel of Harriet by the latter and her "friend," then stripped of his clothing, which, as stated, was all new, and thrown into the convenient creek at the rear of the house.

Against so plausible a theory Lorenzo Sawyer had to contend. It is to be regretted, from a strictly legal standpoint, that Justice Anderson did not decide this case as it was at first submitted to him. It is to be regretted that the highest tribunal of our country had not been called upon to pass on this very case. It would have furnished a fine test of the certainty of human judgment. It would be decidedly interesting to know what would have been the issue of that trial, if the evidence mentioned below had not been elicited.

Judge Sawyer's theory for the defense was that Berry had started about midnight from the woman's house for home; that he was heavy with alcohol when he set forth upon his dark, homeward journey; that in crossing the creek he fell off the narrow log; and that, in falling, his head struck upon a rock—there were plenty of rocks in that vicinity—and thence received the wound from which he died some minutes later, thus accounting for the extravasation of blood. The missing clothes were a puzzler, but the counsel sought to account for their absence by invoking certain principles of natural philosophy as to the action of the roaring torrent of water, rocks, trees, etc., in the bed of the stream.

Justice John Anderson, did not know what to do with the case as submitted to him. He took it under advisement for a week.

It so happened, that, during the week, at midday in view of several witnesses, two men started across the creek aforesaid—to walk the famous log in company. In the middle of the riotous stream one of them pitched off. *He* was never seen alive. His companion and others—for this was in the daytime—ran down the banks of the creek, and, some miles below, found his

dead body in the very same eddy in which Pat Berry's body had been found a few days before. An extravasated wound was found upon the head, just like that which was on the head of Pat Berry. There were no other wounds on the body, but all the clothes were stripped off except the undershirt, which, turned inside out, and drawn over his head, was clasped around the wrist, and held by a single button.

This last mishap coming to Judge Sawyer's knowledge, he moved the court to reopen the case. It was so ordered, and new evidence of the circumstances just related being submitted, the defendants were discharged.

When informed of the circumstances of the second death, "Harriet" lifted her hands and eyes towards heaven and in tones and manner intensely tragic, but with manifest sincerity, exclaimed: "God himself has interposed to save an innocent woman!"

There was tried, in 1851, at Rough and Ready, Nevada county, before E. W. Roberts, Justice of the Peace (since a County Judge and State Senator) a case which involved the possession of a mining claim on Industry Bar, valued at $100,000. It was the case of the period. The parties to the suit were many and prominent, and fully supplied with the sinews of war. Lorenzo Sawyer was leading counsel for the plaintiffs. It was agreed that the hotel bill, wines, cigars, tobacco, etc., for both sides, should go into the bill of costs in the case, and be paid by the losing party. After a three days' trial the jury disagreed. A second trial, lasting ten days, resulted in a victory for Judge Sawyer's clients. The bill of costs, recovered against and paid by the defendants, was $1,992. The hotel bills were probably twice as much more.

Among Judge Sawyer's leading cases are Taylor vs. Hargous (4 Cal., 268), and Eddy vs. Simpson (3 Cal., 251). These cases are "leading," not only in the sense that they are important, but that they first established, in this State, the principles therein laid down. In Eddy vs. Simpson, the plaintiffs sued to recover damages for interference with their water rights. One Artemas Rogers was the heavy man of the defendants. He was a very active, positive character, and anticipating the suit, he visited Sawyer at his office to retain him. Sawyer had prevailed against Artemas in a hot legal conflict a few months before, and he remembered it. He now wanted his help. Having stated his case, he asked:

"Can you win it?"

"I don't think I can," said Sawyer.

"By ——, sir; you are not the man for me, then," exclaimed Rogers.

"I don't think I am," said Sawyer, quietly.

Rogers then narrated a chapter from his experience in Sawyer's native State. He said he had once consulted a lawyer in an important cause in that State, who did not think he could win. He thereupon declined to retain him, employed another lawyer, who thought he could win, and he did.

"I had rather be against you than for you in this matter," said Sawyer. "As you do not want me, you will not object if I accept employment from the other side. I know they will call on me.

"Not at all," replied Rogers. "If I do not employ a lawyer, I will not keep him out of the case. Do what you can for them, and charge a d—— big fee. But you can't win."

Within an hour Sawyer was retained on the other side. The trial soon came off before the District Court. Barbour, the Judge, having recently been elected was disqualified in many cases, and Judge A. C. Monson, of Sacramento, who afterwards became one of the richest men in the State, presided at that term. Judge Monson instructed the jury as requested by Sawyer. There was a disagreement, only one obstinate juror favoring the Rogers party. A change of venue was had to Marysville and the case was tried again before Judge W. T. Barbour. John R. McConnell conducted the plaintiff's case, Sawyer being unable for various reasons to attend. Judge Barbour refused to give the instructions which Judge Monson had given on the first trial but gave instructions directly the reverse, and a jury brought in a verdict for the defendants. Then Artemas Rogers took particular pains to wait upon Sawyer and announce the result.

"You laugh too early," said Sawyer; "I'll show my hand in the Supreme Court. We will meet again at Phillippi."

Rogers afterwards discovered that he had laughed too soon. The plaintiffs were the men who laughed last and who laughed best. The Supreme Court reversed the judgment, in a very brief decision written by Justice Wells, one of the very few opinions penned by that Justice.

In the case of Taylor vs. Hargous, which was commenced after Judge Sawyer's removal to San Francisco, and which he won both in the old Superior Court and on appeal, the Supreme Court declared that when a homestead has been duly selected, and occupied as a residence, and the husband executes thereafter a deed of the property and removes with his wife therefrom, but the wife does not join in signing the deed, the homestead is not abandoned and the deed is void. Justice Heydenfeldt, who wrote the opinion, said: "If the husband can sell at pleasure, and remove to another place, without the consent or approbation of the wife, then the design of the statute to protect her against the improvidence, misfortunes or misconduct of the husband, would be totally nugatory."

While in Nevada City, Judge Sawyer practiced law in partnership, first with E. F. W. Ellis and afterwards with Judge Stanton Buckner. It was announced in a local print recently that a certain lawyer was the author of the Sole Trader Act. It was an error. E. F. W. Ellis wrote and secured the passage of that measure, its necessity being suggested to him by the circum-

stances of a certain female friend of his in Nevada City. It is one of th wisest acts on our statute books, although it has often been made the cover c gross fraud.

Ellis was in the lower house of the California Legislature in 1852. H was an able lawyer; but, like Baker, he was restive in harness, and thirste for glory. He went back to his State and Baker's State, and, during th war, was Colonel of the fifteenth Illinois regiment, one of the earliest t volunteer on the first call. He fell in a charge at Shiloh. "Catch me boys!" were his last words. While criticising the evidence of a witness, o one occasion, in a Nevada City court, Ellis glanced at the subject of hi remarks just in time to see him draw a pistol. Ellis drew a long knife which he carried, and leaping over the bar table, rushed upon his enemy who at once fled into the street. Ellis then returned and concluded hi argument. Judge Stanton Buckner was from Missouri, to which State h returned. Sargent, in his hasty history of the Nevada bar, tells this o Buckner: To demur was his strong forte. He was a kind and gentlemanl man, but disagreeable to practice with, by reason af his prolixity and slow ness. In arguing a petty criminal case one day before Justice Endicott, wh was very thin and bony, and who had a very hard seat to sit upon, Buckner after a long talk, assumed a certain attitude peculiar to him, and whicl indicated that he had a great deal more to say. "I will now show you honor," he said, "that a man is presumed to be innocent until he is prove guilty." "The court admits that," said Endicott, interrupting; "the cour is with you in that; but there is no presumption that the court's bottom i made of cast-iron."

In the autumn of 1853, Judge Sawyer removed to San Francisco, an he has ever since resided there. During his short stay there in 1851, he wa in partnership with Roderick N. Morrison, then County Judge and Presidin Judge of the Court of Session, and Frank M. Pixley. Judge Morrison wa Mr. Pixley's uncle. His name is upon many pages of our earlier Supreme Court Reports.

San Francisco has always been a very easy city to get acquainted with At least a hundred men have won substantial honors there before they wer well acquainted with a hundred men in the city. Judge Sawyer had no been there a year when he was elected City Attorney. Litigation was ver heavy at that time; the city, too, was involved in many suits. During hi term of office, no judgment was obtained against the city, and of the judg ments which were rendered in her favor only one—Hazen vs. San Francisco— was reversed on appeal. In the case of the San Francisco Gas Company vs the City of San Francisco (9 Cal. 433), Judge Sawyer, then having passed ou of the service of the city, appeared against the city. He conducted th plaintiff's case in the District Court, and, on appeal, made an argument an

prepared an elaborate brief. The final decision in this case, which was in his favor, overturned principles upon which many judgments in favor of the city rested.

In 1855 he was a candidate before the State Convention of his party for the nomination of Supreme Judge, and was defeated by six votes. At that election a nomination was equivalent to an election. In the spring of 1861 he formed a partnership with General Charles H. S. Williams, which continued until his appointment to the bench of the Twelfth District Court.

This firm established a branch office at Virginia City, Nevada, where Judge Sawyer was temporarily engaged, when, in May, 1862, Governor Stanford appointed him Judge of the Twelfth District Court, Judge Alexander Campbell having resigned. Crossing the snow-wrapped mountains on horseback, he reached San Francisco on Saturday night, and on the next Monday, June 2, 1862, he opened court at Redwood in San Mateo County—the counties of San Francisco and San Mateo comprising the Twelfth Judicial District. He was elected at the next election for a full term without opposition, both parties having put him in nomination. Under our reorganized judicial system, pursuant to our second State Constitution, in 1863, Judge Sawyer was elected on the Republican ticket a Justice of the Supreme Court. On casting lots, as required by the constitution, he drew the middle term, six years. During the last two years of his term he was Chief Justice. In 1869, as his term as Supreme Judge was drawing to a close, Judge Sawyer was appointed by President Grant, Judge of the United States Circuit Court of the Ninth Circuit, embracing the Pacific States. The Senate confirmed the nomination without dissent, and he entered upon the office in the beginning of 1870.

At the bar and on the bench Judge Sawyer has always been distinguished for industry and honesty. He never laid claim to brilliancy or genius. He is a man of business, richly endowed with common sense, practical, prudent. Truth and duty are his watch words. In investigation he dives to the bottom and explores with rare patience and application. He always made it a habit to investigate thoroughly whatever might be the subject of his study. His staying qualities are great. The eccentric Lockwood, whose logical power was universally acknowledged, once found Sawyer opposed to him. It was the first case in which Sawyer appeared in San Francisco. Lockwood made an ingenious argument, and sat down, giving to Sawyer, whom he had never met before, a glance which said, "Who are you, I wonder?" Sawyer was well prepared, and made an argument full, forcible, conclusive. He had the right side of the case, too. When he closed, Lockwood, who had followed him closely, arose and told the court that Sawyer's argument was sound, and he felt it his duty to surrender. A few minutes afterwards Lockwood seeing Sawyer in the corridor, approached him with extended hand, and said: "I don't know who you are, or where you came from, but you laid me out as

cold as a wedge." After some further complimentary remarks, he suggested a partnership.

Judges Field, Sawyer and Hoffman, Federal Judges in California, are of one mind on the Chinese question. That is, while they might differ as to the *kind* of legislation appropriate to the subject, they agree perfectly as to *where the power* of legislation lies. They believe this undesirable immigration should be checked, but hold that all the State can do in the premises is by way of agitation and petition to Congress. In the case of Tiburcio Parrott on habeas corpus, Judge Sawyer has given his views at length.

Mr. Parrott, who was President and a Director of the Sulphur Bank Quicksilver Mining Company, a California corporation, was arrested, and held to answer bfore the proper State court for having employed, in the business of the corporation, certain Chinamen. He was taken on habeas corpus before Judges Sawyer and Hoffman, when elaborate arguments were made by able counsel, pro and con, on the question of the validity of the State law prohibiting the employment of Chinamen in certain cases, and of the article in our new constitution upon which that law was based. Judge Sawyer held that the constitutional and statutory provisions were in conflict with the constitution and laws of the United States, and of the Burlingame treaty between this country and China. In dealing with the question he threw out these suggestions :

> Holding, as we do, that the constitutional and statutory provisions in question are void for reasons already stated, we deem it proper again to call public attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that, however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the State, but with the general government. The Chinese have a perfect right, under the stipulatious of the treaty, to reside in the State and enjoy all privileges, immunities and exemptions that may be enjoyed by the citizens and subjects of any other nation; and under the fourteenth amendment to the national constitution, the right to enjoy life, liberty and property, and the equal protection of the laws, in the same degree and to the same extent as these rights are enjoyed by our own citizens. To persist in State legislation in direct violation of treaty stipulations and of the constitution of the United States, and to endeavor to enforce such void legislation, is to waste efforts in a barren field, which, if expended in the proper direction, might be productive of valuable fruit; and, besides, it is little short of incipient rebellion."

Unlike his brother Hoffman, Judge Sawyer sometimes makes public addresses. At the fifth annual meeting of the Associated Alumni of the Pacific coast, held in Oakland, June 3, 1868, the Judge responded to the toast, "The Judiciary" at some length. He was then the Chief Justice of our State Supreme Court. In this speech he said, among many quotable passages :

> The bar is the fountain from which the judiciary is to be continually replenished; and, as it is a well established principle in natural philosophy, that the stream can never

rise higher than the fountain which supplies it, so the bench can never rise far above the level of the bar.

I cannot believe it possible that one endowed with fair natural abilities, a sound and unbiased judgment, who has cultivated his talents with diligence and care, and become well grounded in the ethics of the law—who has risen to a true conception of the magnitude, and become thoroughly penetrated with the vast importance of the mission of the judiciary in its relation to the well-being of man, and to the stability of good government—can make a *bad* judge. Such a man may not attain the summit of judicial greatness; he may not be a brilliant luminary, shedding his light afar, imparting aliment and warmth to nourish and promote the administration of justice in distant lands; but he cannot fail to be a worthy judge and useful in the immediate sphere of his influence; he cannot fail to contribute, in some degree, to the perpetuity of free institutions.

In 1879, Judge Sawyer was the Grand Orator of the Masonic Order in California, and on October 13th of that year he delivered the annual oration before the Grand Lodge of this State. It was mainly historical, commencing in the misty dawn of architecture, and tracing the course of operative Masonry through many centuries, pointing the while to the many monumental splendors that yet attest its handiwork, down to the time, when, reorganized upon the speculative basis, and using its implements as symbols only, the craft entered the field of charity and free inquiry. Then, following his enlarged theme down to the present day, he said :

Masonry is not, and it does not profess to be, a religion, or a substitute for religion; but it inculcates a system of the purest morals, which is an essential element and necessary concomitant of all true religion. There are certain elements or principles which are universally accepted as essential to all systems of faith worthy the name of religion—such as a belief in a Supreme Being; a recognition of the moral distinction between right and wrong; the obligation to recognize and cultivate the practice of all the virtues, such as temperance, sobriety, chastity, fortitude, prudence, justice and, chief of all, charity. On these principles all must and do agree. There are other points of faith upon which the reason may and does pause, inquire, doubt: and yet it is upon these latter that zealots and enthusiasts dogmatize most confidently, dispute most furiously, and hate most implacably. It is upon these very points where we should be most distrustful of the correctness of our judgment, and most charitable towards the views of others, that man is most confident, most obstinate, most uncompromising; and it is upon these that he consigns his fellow man to the dungeon, stretches him upon the rack and burns him at the stake. Into that disputed territory Masonry does not enter. Its leading tenet, charity, forbids it—all its principles prohibit it. It accepts and plants itself upon those self-evident and universally accepted principles which lie at the foundation of all true religion and all morality, and upon the recognition and practice of which all human happiness must rest.

On March 17, 1869, at a banquet at the Brooklyn Hotel, San Francisco, at which many had gathered to commemorate, in that agreeable manner, the life and services of Ireland's patron saint, Judge Sawyer spoke for "The Judiciary of California and of the United States." The specimens of his humor in his remarks on public and social occasions are so few that it may

be well to give the following a place in this sketch. In closing his response on the occasion just alluded to, he thus sought to call out Judge Crockett, his venerable associate on the bench of the State Supreme Court:

Mr. President: I see near me my distinguished associate, Mr. Justice Crockett. The law and the Gospel are intimately connected, and it has often happened that the ministers of the one were alike the ministers of the other. In former times it not infrequently occurred that the Lord Chief Justice of England was also a bishop. Even I, myself, Mr. President, have occasionally been set down by careless observers for a priest, but my distinguished friend here never passes among strangers for anything less than a bishop. That severe and dignified gravity, which sits so gracefully on my friend here, is well calculated to produce an impression of superior sanctity. I am told, sir, that it has even become dangerous for him to venture abroad unattended; and that on his last excursion from home an expectant cavalcade of pious people, in the southern part of the State, mistaking him for your very eminent and worthy Archbishop, captured my distinguished brother, and, before he could fully comprehend the situation, whisked him off to the Mission Church. What they did with him, and how he escaped, I have never been able to learn. Perhaps he will inform you. Can you wonder at this mistake? Is it possible to contemplate that benignant countenance, and doubt that, had he lived in the year of grace 492, the mantle of St. Patrick would have fallen on his sanctified shoulders? It seems to me eminently fitting that he should be present at this festival of St. Patrick.

Judge Sawyer's latest public address was that delivered at the laying of the corner-stone of the Leland Stanford, Junior, University. The act of placing the stone was done by Senator Stanford, the founder of the University, at the site at Palo Alto, Santa Clara County, May 14, 1887. Judge Sawyer's name had led the list of the honored and worthy men whom the founder had selected as trustees of the institution, and at the organization of these gentlemen as a Board of Trustees the Judge was unanimously chosen as President of the Board. By virtue of that office he was called upon to make the address on the occasion stated. A lengthy extract from this address will fitly close this chapter.

The little grove in the suburbs of Athens, which Academus presented to the Athenians, constituted the academy in which Socrates, and Plato, and their disciples, taught their pupils philosophy, rhetoric, logic, poetry, oratory, mathematics, the fine arts and all the sciences so far as then developed. The influence emanating from those schools, notwithstanding their limited resources, has been largely felt through all succeeding ages; and it has, to this day, given direction to thought, and contributed largely to mould the characters and the civil institutions of all the peoples of Europe, and their descendants in America, and wheresoever else they may be found on the face of the earth. The people of that little Republic of Attica—the whole area of whose territory was only about two-thirds as large as that of the county of Santa Clara, in which our coming University is located—exercised a greater influence over the civilization, institution and destinies of modern nations, than any other people, however great.

The groves of Palo Alto—the Tall Tree—are much larger than "Academus' Sacred Shade." These sturdy, umbrageous oaks, with Briarean arms; these stalwart spreading laurels, and these tall eucalypti, are much grander, and more imposing, than the arbor-tenants of the grove at Athens. The soil of Palo Alto is far richer, and more productive than that of Attica; it yields as fine wheat, as delicious figs, grapes, olives and other

fruits. Its scenery is almost as grand, and awe-inspiring and quite as picturesque. Its climate is as dry, equable, and delightful. The arroyo de San Francisquito is as flush, and turbulent, in winter, if—while abundantly supplied for all purposes of the University above—as waterless in its lower reaches, in summer, as the two rivulets Cephissus and Ilissus. The transparent clearness and coloring of our sky is as "matchless" as that of Attica; and the azure dome above our heads, by day or night, is as pure and as brilliant as the "Violet Crown of Athens." All our conditions are equally favorable to health, to physical and mental development, and to physical and mental, enjoyment. Not an hour in the year is so cold as to interfere with mental or physical labor, not an hour so hot as to render one languid, indisposed to physical or mental exertion, or as to dull the edge of thought. There is not a place in our broad land, outside our own beloved State, where one can perform so much continuous physical or mental labor without weariness or irksomeness. Should the plans of the founders of the Leland Stanford, Junior, University be carried out, in accordance with their grand conceptions, with such advantages as the location and climate afford, why should not students be attracted to its portals, not only from California, but from all other States of our vast country, now containing 60,000,000 of people and even from foreign lands? What should prevent this University from becoming, in the great future, the first in this or any other land? When fully developed, who can estimate its influence for good upon the destinies of the human race?

A word to the founders of the Leland Stanford, Junior, University. It is fit that the corner-stone of this edifice should be laid on the anniversary of the birth of him, who, while yet a mere youth, first suggested the founding of a university—a suggestion upon which you have nobly acted, and to the establishment of which you have devoted so large a portion of the accumulations of a most energetic, active, and trying life. It is, eminently fit, that an institution founded and endowed on that suggestion should bear his name. The ways of Providence are inscrutable. Under Divine guidance, his special mission on earth may have been to wake and set in motion those slumbering sentiments and moral forces which have so grandly responded to the impetus given, by devoting so large a portion of your acquisitions, and the remainder of your lives, to the realization of the objects thus suggested. If so, his mission has been nobly performed, and it is fit that both his name and the names of those who have executed his behests should be enrolled high upon the scroll of fame, and of the benefactors of the human race. You have wisely determined, during your lives, to manage and control for yourselves the funds of the foundation; to supervise and direct the arrangement and construction of the buildings, and the required adjuncts, and to superintend and give direction to the early development and workings of the new University. This is well. He who *conceives* is the one to *successfully execute*. May you remain among us, to manage and control this great work, until you shall see the institution founded by your bounty, firmly established on an immovable basis, enjoying a full measure of prosperity, affording the citizens of your adopted State the educational advantages contemplated, and dispensing to all the blessings and benign influences that ought to flow from such institutions. Long may you enjoy the satisfaction afforded by hopes fully realized—*Seri in coelum redeatis*.

Fellow-members of the Board of Trustees of the Leland Stanford, Junior, University in accepting this grand trust you have assumed the most weighty responsibilities, not only to the founders of the University, but to the children and youth of the Commonwealth, and to their posterity, in all time to come. You have assumed the guardianship of the vast inheritance, to which they have fallen heirs. In the near future, and thenceforth till time shall be no more, the duty will devolve upon us and our successors to

administer this inheritance in such manner as to accomplish its great end. I call to mind no instance where so large an estate has, at one time, been devoted by the same persons to the foundation of a single institution of a similar character—certainly, none to take effect during the lifetime of the donors. Since our organization, other lands' with ample water rights and facilities, have been added to the estate at Palo Alto especially dedicated as the *situs* and future home of the University; so that the tract now embraces about eight thousand four hundred acres. The estate at Vina, set apart for all time, as a source of revenue, embraces about fifty-five thousand acres, of which some four thousand acres are planted in vines, already in bearing, and the remainder is devoted to various other agricultural and grazing purposes. The Gridley estate, at this time devoted largely to the production of grain, embraces an area of about twenty-two thousand acres. Since our organization, at an expense of nearly $100,000, a winery has been erected at Vina, and furnished with vats, casks and other appliances for making and handling 300,000 gallons of wine—the product of the vineyards—and other wineries and their necessary adjuncts are now in course of construction, sufficient to afford facilities for the manufacture and handling of 1,000,000 gallons. These improvements are in pursuance of the statement, made in their address, upon the organization of the Board of Trustees, wherein the founders of the Leland Stanford, Junior, University say: "As a further assurance that the endowment will be ample to establish and maintain a University of the highest grade, we have, *by last will and testament, devised to you and your successors additional property.* We have done this as a security against the uncertainty of life, and in the hope, that, *during our lives, the full endowment may go to you.*" The aggregate of the domain thus dedicated to the founding of the University is over eighty-five thousand acres, or more than one hundred and thirty-three square miles, among the best improved and most valuable lands in the State.

The contemplation of these facts will suggest some idea of the magnitude of the responsibilities resting upon us and our successors.

CHAPTER VIII.

Solomon Heydenfeldt—An Oracle of Quiet Counsel—His Only Criminal Case—The Senatorial Contest of 1851—On the Supreme Bench and Resignation Therefrom—Other Early Supreme Judges, Hugh C. Murray, Alexander Wells, Alexander Anderson and the Patriarch, Peter H. Burnett—Reminiscences and Anecdotes of John C. Fremont, T. Butler King, John B. Weller, Wilson Flint, Henry S. Foote, Tod Robinson, Newton Booth, Solomon A. Sharp, E. D. Wheeler and Edward Norton—The Roll of Governors of California.

In another chapter has been given the incident of the lawyer who, on entering Court one day, found the McAllister family in sole but not adverse possession. They held the bench, the clerk's seat, and the bar. The lawyer withdrew softly—he didn't want to intrude. A feeling akin to his is mine, as the pensive face of another sage comes impressively into the field of view. I would not intrude into so quiet a life. The features we now see testify to serious problems solved by untiring effort, but they show lines of tenderness and sympathy that have held their place beside the imprint of absorbing thought. They speak, too, of reputation won, not in forensic encounter but in council. "Cautious, silent and laborious," as Macaulay pictured Godolphin, here is a mind that has kept tranquil amid the severest employments reaching through a long flight of time. Here is one whose lifework has been done apart from public observation. I would have to go into his office to study him. But, like Mr. Papy (in Chapter II), I don't like to intrude. However, it must not be understood that this prime character has lived and labored as a recluse. Some open views, even of him, are to be had now and then.

Solomon Heydenfeldt was born at Charleston, South Carolina, in 1816. When he was eight years old his father died, having been a teacher of ancient languages, and having been completely stripped of a considerable estate during his absence from home, by the defalcation of an agent who held his power-of-attorney. Being fortunately reared with maternal care, Solomon Heydenfeldt was sent to a college in Pennsylvania, where he studied Latin and Greek and mathematics; but he left college without graduating. Returning to Charleston he studied law in the office of the eminent advocate De Saussure, son of the great Chancellor of the Palmetto State. In the year 1837, at the age of twenty-one, he removed to Alabama, first stopping at

Montgomery, where he was admitted to the bar. He soon afterwards settled in Russell county, near the Georgia line, and practiced law in both Georgia and Alabama. In this region he married, and passed thirteen years of his life in active and successful law practice. This period of his career was, however, marked with no events of public interest. He removed to California in the spring of 1850, settling at San Francisco, and opening an office in what is now the Old City Hall. His excellent habits and business assiduity, his generous disposition, broad legal knowledge and dignified presence quickly made him a man of mark, in that era of reckless activity. He acquired a fine practice in civil business.

The only criminal case he ever had in his life was tried in the fall of 1851. For this reason it is worthy of note. Furthermore, it gives a glimpse of the loose mode of judicial procedure at that time, and presents a ludicrous instance of a jury's sense of propriety. Samuel Gallagher had killed Lewis Pollock on the night of June 22, 1851. Gallagher was tried for murder in the Fourth District Court, Delos Lake presiding, August 12, 1851. His counsel were Solomon Heydenfeldt, John B. Weller (afterwards Governor and United States Senator) and Colonel Barton. It may be said that Barton was a "Philadelphia lawyer," a beautiful speaker, a brilliant fellow, but cursed by the greatest infirmity of genius. His career was brief; he was suddenly missed at the bar, and a rumor came back that he perished at sea, a fate which some years later befell Lockwood, another legal genius with riot in his blood, who will be noticed in a subsequent chapter. The case of Gallagher was a hard one to defend. Harry Byrne, District Attorney, made a strong prosecution. Judge Heydenfeldt had the general management of the prisoner's cause, but did not address the jury. The speaking was done by Weller and Barton, the latter coming out strong and fervid. The jury disagreed. At the second trial, which occurred on November 14, 1851, Gallagher insisted that Judge Heydenfeldt should speak for him, and the Judge complied, closing the argument for the defense. The case was given to the jury at about six o'clock in the evening, the court taking a recess and Judge Heydenfeldt going into his office, which adjoined Judge Lake's court-room, to "wait for the verdict." At nine o'clock that night the bailiff entered Judge Heydenfeldt's office and informed him that he was directed by the jury to state to him, Heydenfeldt, that they stood, firmly, seven for conviction of murder in the first degree and five for acquittal, but that if it pleased *him* (Heydenfeldt) they would agree upon a verdict of manslaughter? Judge Heydenfeldt quickly returned an expression which he afterwards had occasion many times to use while Supreme Judge, "I concur." Judge Lake was sent for, and a verdict of manslaughter was brought in. The prisoner was sentenced to three years' imprisonment and was fined $500. Fining prisoners in capital cases, in addition to imprisonment, was quite the fashion

here in early days. The law and the courts never got so far advanced, however, as to *fine* a man and *hang* him, too. After Gallagher had been in jail—there was no State Prison then—about six months, he was pardoned by the Governor.

After the sentence of Gallagher, Judge Heydenfeldt told his friends generally of the communication between himself and the jury. Judge Lake did not learn of it until the sentence had been imposed, or, it is safe to say, there would have been a signal exhibition of judicial wrath.

The legislature which met at San Jose in January, 1851—the first session after the admission of California into the Union—was nearly evenly divided between Democrats and Whigs. On joint ballot the Democrats had a slight supremacy. When the two Houses met in convention to ballot for a United States Senator to succeed John C. Fremont, Solomon Heydenfeldt was the Democratic caucus candidate, and T. Butler King, then Collector of this port, was the Whig nominee. Fremont, it may be explained, had been elected for the short term by the legislature which met *previous* to the admission of the State, on the happening of which event (September 9, 1850) he took his seat in the United States Senate, to serve until the following March. In January, 1851, in the contest now to be noticed, he was a candidate for the succession, and received seven votes, his supporters being native Californians, (not Native Sons of the Golden West, so-called, but of Spanish and Mexican extraction). Judge Heydenfeldt, being Southern in his politics, three or four Northern Democrats, all of whom had participated in the Democratic caucus, "bolted" the caucus nomination, refusing persistently to vote for him. They voted for John W. Geary, who was afterward Governor of Pennsylvania. The legislature took no less than one hundred and forty-two ballots without an election. There was danger during the protracted struggle that Fremont's native sons would vote for King, and end the fight, in which event the Democratic bolters would not have accomplished anything of extra value, inasmuch as King was himself a proud Southron. That legislative session closed without an election of Senator. At the next session John B. Weller was chosen. But for this unexpected miscarriage, Judge Heydenfeldt would have entered the Senate in his 35th year.

His discomfiture recalls a similar fate which befell Henry S. Foote in 1856. The California legislature in that year had a large native American or Knownothing majority in the Assembly, and a majority of one in the Senate. Governor Foote, who had been Governor of Mississippi, and United States Senator from that State, was the caucus nominee for the United States Senate. But the present act of Congress governing the mode of electing Senators was not then a law, and it required the concurrence of both branches of the legislature to bring on an election. The Knownothings were not able to bring the two branches together, because

Wilson Flint, one of their party in the Senate, voted steadily with the Democrats *against* a joint convention. Flint was a hold-over Senator from San Francisco, an Independent, but had after his election joined the Knownothings, and, in the Fall campaign of 1855, had made speeches on the stump in behalf of that party, in company with Governor Foote. The Knownothings had intended to go into joint convention without first holding a caucus, but Flint said a caucus must be held, and one was held accordingly. Foote being nominated, Flint refused to vote for him. He was very patient under the anathemas which William I. Ferguson and others poured upon him. One reason assigned for his bolting was that in the canvass of the preceding Fall Governor Foote had written to the Knownothing State Central Committee to call Flint home, as his prosaic speeches were repelling instead of persuading the dear people. Flint heard of this letter and took his revenge. Newton Booth, elected by the Independents United States Senator in 1873, narrowly escaped the fate of Heydenfeldt and Foote. A most zealous friend of Judge Heydenfeldt in his contest for the United States Senate was Judge Stephen J. Field, then a member of the Assembly.

It was the general belief among Democrats, after the legislature adjourned, in 1851, that Judge Heydenfeldt would be the party candidate for United States Senator at the next session, one year later. But before that session opened he was nominated by the State Convention of his party for Judge of the Supreme Court. As will be readily believed, he was enthusiastically urged for this position by all the other leading men of his party who had their eyes upon the United States Senate. When the legislature next met the Democrats had a majority, and John B. Weller was sent to Washington as Fremont's successor.

Judge Heydenfeldt was elected in the Fall of 1851 a Justice of the Supreme Court, his Whig opponent being Hon. Tod Robinson, father of the well known lawyer Cornelius P. Robinson. Judge Robinson had been Judge of the Sixth Judicial District at Sacramento. He was a North Carolinian, and a lawyer of fine ability. This was the first election for Supreme Judges under the State government, the first Justices of the Supreme Court having been chosen by the legislature previous to the admission of the State. Judge Heydenfeldt succeeded Judge S. C. Hastings, and his term was for six years, commencing January 1, 1852. After only two months' service he left the State on a visit to Alabama, where he had left his family. This departure of a Supreme Judge from the State precipitated a judicial controversy, which was certain to arise sooner or later—in consequence of the inadvertence of the first constitutional convention—and which resulted in one of the most interesting adjudications to be found in all the Reports. The legislature had, a few weeks before, by a joint resolution of the two Houses, granted the judge leave of absence for six months. A month after his departure the legislature

passed an act authorizing the Governor to fill the "vacancy" by appointment; and the Governor, Bigler, immediately appointed Alexander Wells. On April 12, 1852, six days after presenting his commission, Justice Wells stated to the court that a doubt having been expressed as to the constitutionality of the act of the legislature authorizing executive appointments to supply vacancies caused by temporary absence, he would absent himself from the bench until the validity of his appointment should be adjudicated, and suggested that the Attorney General be directed to iustitute proceedings in the nature of a quo warranto, in order to test the question. The court directed an order to that effect to be entered on the record. The proper writ was soon afterwards issued out of the Fourth District Court, judgment was entered in favor of Justice Wells, and an appeal, upon an agreed statement in writing, was taken to the Supreme Court, where the question was argued on the part of the people by the Attorney General, who was ex-Chief Justice S. C. Hastings, while Justice Wells himself, aided by Gregory Yale and R. A. Lockwood, presented the other side. The only brief on file was Lockwood's. This brief has been retained in the new edition of the old Reports. It is a strong, logical paper—one of the very few testimonials that Lockwood left on record of his legal knowledge and acumen. The temporary retirement of Justice Wells left only two Justices on the bench—Chief Justice Murray and Justice Anderson. They disagreed in deciding the question involved. Both filed elaborate opinions, Murray holding that Justice Wells was not entitled to a seat upon the Supreme Bench, the law under which he was appointed being unconstitutional, inasmuch as the temporary absence of Judge Heydenfeldt created no vacancy in the office. Justice Anderson declared that Justice Wells' appointment was constitutional, and that he ought to take his seat upon the bench. These two early opinions are models of cogent reasoning, and engage the intelligent reader by their vigor of expression and eloquence of style; probably, in these respects, they are not eclipsed by any decision to be found in the California Reports. (Vide 2 Cal., 198.)

The concurrence of two Justices being necessary to pronounce a judgment, the Chief Justice remarked that, on the subject of resuming his seat, Justice Wells must exercise his own discretion. Justice Wells, who had brought the question into Court, "exercised his own discretion" very promptly—he took his seat on the bench. Justice Heydenfeldt returned and relieved him at the expiration of the six months' leave of absence, and immediately filed the following opinion in the case:

"When this case was first argued, opinions were delivered by the Chief Justice and Mr. Justice Anderson, and their opinions being in conflict with one another, it was necessary, in order that the case should be decided, that there should be a reargument or submission. The counsel for the respondent (Justice Wells) insists that, as the term of office in dispute has already ended, there is no necessity for a decision, and it is unusual

in such cases to make one. His position is entirely true; but, at the same time, it is always a matter of discretion with the court, whether it will be influenced by those reasons. In this case we consider the question involved as one of vast importance, and, governed by that consideration, we have determined to decide.

"The Chief Justice has advised me that his opinion already on file will be adhered to; that he will make no alteration, and considers it unnecessary to prepare any other. I have examined that opinion carefully and concur fully in its reasonings and conclusions. The whole subject has been fully examined by him, and he has so well demonstrated the unconstitutionality of the law under which the appointment of the respondent was made, that it would be supererogation to enter into any future discussion.

"The judgment of the court below is reversed; and, as we are judicially notified that the term of the respondent has expired, it is, therefore, ordered that the proceedings in the district court be dismissed."

At the new election, Justice Wells was chosen by the Democracy a Supreme Judge. He served through the year 1853, and nearly all of the year following, dying October 31, 1854. His opinions were remarkably few, nearly all the decisions of the court during his term being written by Judge Murray or Judge Heydenfeldt. He was a New Yorker and a wife and daughter survived him.

On January 6, 1857, having served five years on the bench, only one year of his term remaining, Judge Heydenfeldt resigned. His opinions are contained in volumes two to seven, inclusive, of the Reports. He left the bench because the salary did not enable him to support himself and family and other dependent relatives. He has had, ever since he came to this State, a large number of persons to provide for. Resuming practice in San Francisco, he followed it with activity and success until the Test Oath Act was passed by the legislature, which required all lawyers, as a condition precedent to the right of practice in the courts in civil cases, to take and subscribe a strongly worded oath of loyalty. A few Southern lawyers, among them Judge Heydenfeldt, Gregory Yale and E. J. Pringle, could not conscientiously subscribe to this, and accordingly withdrew from the courts. Gregory Yale had the question of the constitutionality of this act adjudicated by the Supreme Court, and that tribunal decided in favor of its constitutionality (Vide 24 Cal., 242). Hon. John F. Swift had filed an objection to Mr. Yale's appearing in the Supreme Court without taking the oath. The act was repealed several years later, but by that time Judge Heydenfeldt had obtained a lucrative office business as advisory counsel to many large firms, capitalists and corporations, and he has since steadily adhered to that department of the profession. He tried a few large mining cases in the District Court of Storey county, Nevada, at a time when a test oath act, similar to the California statute, was in operation in that State, but he was not required to take the oath, the act being treated as a dead letter. He has long been counsel for large mining corporations, is learned in mining law, as well as informed in

practical mining, and owns valuable mining interests scattered over many districts.

It is to be recorded of this gentleman, that, having done a vast amount of business for women of all conditions for many years, he has never yet charged a woman a fee, whether she was rich or poor. His beneficence has been widely felt and is unfailing in many lines. He has accumulated a large fortune, but his expenses and charities are a constant and serious drain upon it. To the yellow fever fund of the last decade, he made a princely contribution, and had it credited to "cash." In person he is diminutive, with small hands and feet, dark hair and complexion, a kind eye, well shaped head and finely chiseled features. His weight is suited to his stature, he is well preserved, and possesses distinguished dignity of manner. A man universally esteemed, he yet holds himself aloof from the people. He is not a man of the masses. I once heard him on the stump addressing a multitude of the "unterrified." He was out of place. He dislikes all gloss, and glitter, and tinsel, yet is void of arrogance or affectation. He has known sorrow, borne the burden of care, and has been thrown amid all the snares of pioneer adventure, yet his have been the mood and habit of the philosopher, and he has steadily preserved his peace of soul, and the purity of his private, public and professional life.

Judge Heydenfeldt is a widower, having been twice married. The eldest of his children, an accomplished gentleman of middle age, bears the same name and dignifies the same profession.

In the Supreme Court, sitting at San Jose, in 1853, Solomon A. Sharp of San Francisco, in the midst of an argument, was given to understand by Judge Heydenfeldt that the Court did not agree with him. He continued his argument in spite of admonitions from the bench, until finally told in plain terms that the Court was confirmed in its opinion, when he ceased to struggle, remarking, "Well, it's an honest difference of opinion." "Yes," said Judge Heydenfeldt, in his polite and quiet way, "but it's a very material one." The learned counsel showed no further sign of life.

It so happened that Solomon A. Sharp, of whom I have another laughable incident to give in another chapter, in connection with Hon. E. D. Wheeler, met that gentleman for the first time on the occasion just mentioned. These names will supply me with pleasant themes, but, not following them now, the occurrence in the Supreme Court at San Jose recalls another worth the telling. A young lawyer was arguing his first demurrer. It was in the old Twelfth District Court, and Hon. Edward Norton, afterwards a Supreme Judge, was on the bench. An adverse decision followed the young attorney's argument; still, he would not sit down. For some minutes he wrestled with the bench as if determined to change the judicial mind. "Young man," said Judge Norton, some what sternly for one so kind, "do you want to quarrel with the

court." "Not at all, sir," was the quick answer. "Very well; that is right," said the Judge gently. "You might as well learn right now that it is folly for a lawyer to quarrel with the court, for in controversies of that kind the court always has the advantage." The young man thereupon accepted the situation. He always liked Norton, and followed his advice.

Justice Alexander Anderson, who has been referred to, was an able jurist, who had, before coming to California, represented Tennessee in the United States Senate. Another Alexander Anderson, a Virginian, was once a bright light of the bar in northern California. He arrived here in May, 1854, and only seven months later, in his forty-sixth year, perished, with a large number of victims, at the most terrible boiler explosion that has ever occurred in this State—that of the steamboat Pearl, at Sacramento. His law business had called him to the Supreme Court at the Capital. His brother, John Anderson, is a lawyer at Nevada City.

The youngest Justice and the youngest Chief-Justice of all who have ever sat upon our Supreme bench, was Hugh C. Murray. Born in St. Louis, Missouri, April 22, 1825, of Scotch extraction, he was reared at Alton, Illinois, where he received a limited education and read law in a lawyer's office. When twenty-one he joined the army, and served during the Mexican war as lieutenant in the Fourteenth Regular Infantry. After that war he returned home and was admitted to the bar, but at once set out for California. Going to Panama by steamer, then, unable to get a better passage, he took a sailing vessel for San Francisco. The sailer proving intolerably slow he got off with others at Cape St. Lucas and walked the long distance thence to his destination, which he reached in September, 1849. He at once commenced the practice of law. Quite soon he was very busy, but, in a few months, the legislature elected him one of the associate justices of the Superior Court of the city of San Francisco, a court that after dispensing justice for a few years, was itself dispensed with by act of law. Murray had brought with him from the east no fame or influence or means, but on the bench of the old Superior Court he displayed so broad a knowledge of law and such superior qualities as a Judge that his appointment to the Supreme bench by Gov. McDougal in October, 1851, in place of Nathaniel Bennett, resigned, was a fulfillment of the hearty wish of the bar. He became Chief Justice upon the resignation of Hon. H. A. Lyons in 1852 and was elected his own successor by the Democracy. In 1855 he was re-elected Chief Justice by the Native American party. He died of consumption, in Sacramento, while still Chief Justice, on September 18, 1857. He had reached that high station at the age of twenty-eight, having become an Associate Justice two years earlier. Murray possessed a patient and powerful mind, capable of the severest investigation. Judge W. T. Wallace, who was Attorney-General when Murray died, declared

that the latter was gifted with an intellect that could grasp the mightiest subject; an analysis that solved, as if by intuition, the most intricate legal problems. His associate on the Supreme bench, who succeeded him as Chief Justice, testified to his quick perception, his moral courage, his justness, his frankness and fidelity, and declared that his loss was irreparable. He was, withal, a dignified and impressive speaker on the stump. In his day candidates for the bench were not exempted from the custom of active, open electioneering in behalf of their party and themselves. I heard Murray on the stump at Sacramento in 1855. His utterance was distinct, deliberate; his voice strong and very agreeable to the ear and he wore an easy dignity that seemed to reconcile his candidacy to his surroundings. He was then speaking for the new American party then about to sweep the State. "Fellow citizens," he said, "the Whig party is dead, and has been dead for ages; and the Democratic party, if not dead, is in the last throes of expiring agony." This sounded very well, indeed, and the "agony" part was given in a way that evoked loud laughter. But I felt like calling on the ermined orator to explain. His words, rolled out so grandly, were neither true of the one party, which wasn't quite dead then, nor of the other, which isn't dead yet.

Judge Murray's most elaborate opinion was his last—that in *Welch* vs. *Sullivan*, reported after his death, in 8 Cal., 155. Judges Terry and Burnett, who concurred in the judgment, slightly modified it at the next term—see 8 Cal., 511.

"Can you tell me who is that elderly man in the party opposite?"

"Ah, yes. And my answer will be a surprise."

We were having an after-dinner chat in the parlor of a city hotel—my friend being a distinguished man of affairs from the East. The "elderly man in the party opposite" had been talking with some gentlemen for quite a while, all standing by an open fire, and, by his tranquil bearing and benevolent aspect, had attracted the attention of the stranger.

"Well, tell me who he is?" I was asked again.

"That is Peter H. Burnett, the first Governor of the State of California," was the reply.

"Indeed! Let's see—how long has California been a State?"

"We were admitted in '50—September 9th."

"A long time ago," mused my friend, "and there stands your first Governor!"

"Yes. Did you ever see a better preserved man? He is eighty years of age, full of years and full of honors. He has also been a successful lawyer and a Supreme Judge."

"What can you tell me of him?"

"A great deal. If you can spare the time I will promise to interest you." "Go on," he said, and I proceeded leisurely.

"I have to speak of a man who has been pre-eminently the architect of his own fortune, and who enjoys a spotless fame. The State has had sixteen Governors. These have been, naming them, not in the order of merit, but according to their periods, Peter H. Burnett (whom you are now observing) John McDougal (with one 'l,' mind you), John Bigler, J. Neely Johnson, John B. Weller, Milton S. Latham, John G. Downey, Leland Stanford, Frederick F. Low, Henry H. Haight, Newton Booth, Romualdo Pacheco, William Irwin, George C. Perkins, George Stoneman and Washington Bartlett. The list, on the whole, is creditable to a young commonwealth of heterogeneous elements, and shows two or three strong and well equipped intellects. McDougal——"

"I knew him," interrupted my friend. "Where?" "In Washington." "Not so, dear sir; you confound Governor McDougal with the accomplished Senator. Didn't I tell you to mark the single 'l?' McDougal, Downey and Pacheco were elected Lieutenant-Governors, and filled out the vacated places of Burnett, Latham and Booth. Governor Burnett was the only one who ever stepped voluntarily from that high post to private life. Latham, after an incumbency of ten days, was accredited by the legislature to serve out the remainder of the senatorial term, made vacant by the tragic death of David C. Broderick. He had lately beaten the then Governor, John B. Weller, for the Democratic nomination for Governor, and now again prevailed against him in the short, sharp fight for Broderick's vacant seat. Pacheco became Governor when Booth went to the Senate for a full term, after having been Governor for two years."

"Let me ask," my friend inquired, "the politics of these men?"

"Governors Burnett, McDougal, Bigler, Weller, Latham, Downey, Haight, Irwin, Stoneman and Bartlett were put in office by the Democratic party; Stanford, Low, Booth, Pacheco and Perkins by the Republicans, and Johnson by the Americans, or Knownothings.

"The patriarch standing there has always been cautious, reflective, laborious, and in morals stainless. His age I have told you. The majority of the restless, chafing spirits who helped to make politics in our early days an excitable and perilous pursuit, were from the Southern States. As if in compensation, it would appear, Providence gave the State in the person of it, first pilot, a Southern man of pacific soul, who through business vicissitudes, party strife and social upheavals, ever kept the even tenor of his way.

"Governor Burnett is a native of Tennessee. His father was a farmer and carpenter. The name for generations had been Burnet; the Governor was the first of the family to add a t, and all his brothers followed suit. His motive was to make the name more complete and emphatic. In youth the

precepts of one of his ancestors were imbedded in his moral being, namely: 'Pay your honest debts; never disgrace the family; help your honest and industrious kin.' His early manhood was spent in Missouri, chiefly in mercantile pursuits, in which he failed and which involved him in large indebtedness. That he might be able to cancel his obligations and restore his wife to health, he looked to the new Northwest as far back as 1843, in which year he took his wife and six children in ox teams to Oregon when the right to that territory was disputed by the United States and Great Britain. He lived in Oregon five years, aided in establishing the provisional government and cultivated land. He came to California in 1848, and after working in the northern mines for a few weeks settled at Sacramento and entered on law practice. He had been admitted to the bar in Tennessee. He became soon after his arrival the lawyer and agent of General John A. Sutter, the great landlord of Central California, and found the employment very profitable. Removing to San Francisco, where his family rejoined him, he opened a law office. His profession, his manners, his business judgment and habits of life made him speedily and favorably known. In the first Gubernatorial campaign the candidates were not nominated by regular conventions, but put forward by public meetings. Colonel J. D. Stevenson called a Democratic meeting on Portsmouth Square, and upon his nomination Peter H. Burnett was declared the Democratic nominee for Governor. Other meetings proclaimed John W. Geary (Democrat), W. S. Sherwood (Whig), John A. Sutter and W. N. Steuart (Independents). The people gave Burnett 6,716 votes, Sherwood, 3,188, Sutter 2,201, Geary 1,475, Steuart 619. Governor Burnett was inaugurated in December, 1849. Public life proved distasteful to him and he resigned in January, 1851, when the legislature was sitting at San Jose. He then resumed law practice in partnership with William T. Wallace and C. T. Ryland, who were destined to be his sons-in-law and distinguished in the history of the State. In 1852 he paid to his old business partners in Missouri the last dollar of his debts, which had aggregated $28,740, and has never since been financially embarrassed."

"How was he as a Governor?"

"His admistration was quiet and prudent. I recall nothing of striking interest which marked it. He was a business Governor. I now recollect that his last message closed with a recommendation that the law be repealed which provided that no action should be maintained for criminal conversation or seduction. He urged its entire repeal, in order, he said, that the law might throw around the chastity of our wives and daughters that protection which ought to be afforded by every civilized country. He was the first to urge the exemption of homesteads from forced sale and attachment."

"I presume he is the Nestor of your bar?"

"No; it has been many years since he was identified with our bar. He

stopped law practice in 1854 and entered on a wide course of reading. He made his first sea voyage in 1856, visiting New York City in company with his son-in-law, Mr. Ryland. He has since made two other visits to the East by sea. His last two public speeches were made in opposition to the great Vigilance Committee in 1856. In 1857 he was appointed a Supreme Judge by Governor Johnson, and filled out an unexpired part of a term, nearly two years. In 1863 he, with others, founded the Pacific Bank. For many years he was its President, resigning a year or two ago. He then laid down all business cares, and he has since led a life of strict privacy."

"Is he wealthy?"

"He has an ample fortune?"

"I judge he is entitled to it?"

"Truly so. He published in book form a few years ago the recollections of his life. In it you will find this rule laid down for the guidance of bankers and all business men. 'If a man *once* goes through insolvency or bankruptcy, or compromises with his creditors, or indulges in unreasonable expenses, he is unworthy of credit.' He says the exceptions to this rule are about one in ten. He thinks, also, that in banking the temptation to do wrong is less than in almost any other secular pursuit."

"As to his political views?"

"His father was a Whig, but the son was in boyhood made a Democrat by Duff Green's editorials. But, as he grew older, he records, in the book alluded to, and studied more deeply the science of government, he found cause to doubt the practical result of our republican theory as it now exists. He has always desired to give our theory a full and fair trial, being satisfied that so long as it can be honestly and efficiently administered, it is the best form of government for the greatest number. It is especially adapted to a young people free from extreme want, and therefore independent and virtuous. But when the population becomes dense, dependent and suffering, and for that reason more corrupt, then will come the genuine test of our existing theory; and he thinks that, without a thorough and radical amendment, it must fail; that the three principles of universal suffrage, elective officers and short terms, in their combined legitimate operation, will in due time politically demoralize any people, and that the masses will never permit a sound conservative amendment of our theory, except by revolution, which he believes will occur within the next fifty years. It may require several revolutions in succession. This he considers most probable.

"He expressed these views in 1880. In 1861, he had issued a pamphlet on the condition of the country, in which it was evident that the 'sunset of life gave him mystical lore.' He voted for Abraham Lincoln at his second election."

In turning away from this venerable, retired lawyer and banker, let me give a few passages from his book mentioned in the foregoing conversation:

If an intelligent stranger from another planet, were to visit the earth, and were the flags of all nations placed before him, he would unhesitatingly select the Stars and Stripes as the most brilliant and magnificent of them all. No one can ever look upon that flag and forget it. Besides, it is the symbol of the first great nation that ever established civil and religous liberty in its fullness and perfection. Whatever defects may exist in our theory or government can be corrected even at the expense of revolution, but the unity and integrity of the nation can never be destroyed. The day of weak, defenseless States has passed away forever. Only great Governments can succeed now or hereafter. If our country should err for a time and commit temporary injustice, we must trust her still, and patiently and lovingly wait for her returning sense of justice, as a dutiful son would for that of his father or mother. He who trusts the ultimate justice of his country will seldom be disappointed.

I never would eugage in newspaper controversies or personal squabbles. If I was unjustly censured, I paid no attention to it, and gave myself no trouble about it. In this way I have mainly led a life of peace among my fellow men. I have very rarely had the sincerity of my motives called in question. The general course of the press toward me has been impartial and just. I have never claimed to be a *liberal* man, as most people construe that most indefinable term; but I have scrupulously sought to be just to all men. The character of a just man is enough for me. I esteem and reasonably desire the approbation of good men, but I love the right more. I can do without the first, but not the last.

All the close observations of a long and active life, have satisfied me beyond a doubt of the wisdom and truth of the sentiment, written some thousands of years ago, and found in the grand old Bible, "*Give me neither poverty nor riches.*"

CHAPTER IX.

Niles Searls—A Career to Animate the Young and Poor—A Start at the Bottom of the Ladder—Unloading a River Steamboat in '49—"Waiting" for an Opportunity at the Bar—On the Bench of Nevada County—Settling the Law of Mining Claims and Water Rights—A Succession of Honors—Chief Justice of the Supreme Court—Personal Notes and Pleasantries.

It was in the middle of October, 1849. The place was Sacramento. The present Chief Justice of the State of California had just found employment at unloading a river steamboat. And at that salient point the eye is first arrested in glancing along a career so eloquent of encouragement for honest youth.

He was a lawyer, even then; but very young, and had come by the Pioneer Stage Line of Turner & Allen, from St. Louis, with just money enough to see him through to the land of gold. Dr. R. H. McDonald and Louis Sloss were among his fellow-passengers. He walked along the streets of the rudely-built "City of the Plains" in as serious study as he has ever betrayed, even on the bench of justice. What was he to do! He inquired, curiously, the rental of vacant rooms, and found that $250.00 a month was the lowest figure at which he could obtain a law office. Lacking that sum by just $249.50 he concluded to defer to a more auspicious season resumption of professional business. Then he wandered along the river levee, until he found this "job," where he has just challenged our attention.

His pay was one dollar per hour. Three months earlier John Bigler, afterwards Governor of the State for two terms, had done the same service in the same town at *two* dollars per hour. Bigler gave better satisfaction. At the expiration of Mr. Searls' first hour the boss approached him and said: "You don't understand this business; here is your dollar for what you have done." His occupation gone, he went about the city front in pursuit of some new industry. He was struggling for life. Just then he was not thirsting for professional fame. Approaching a restaurant which bore in front the legend, "Waiter wanted," he entered. One hour thereafter he was installed. In this capacity the constant young man, forgetting his past dreams, and all unlettered as to his destiny, worked steadily away for some six months.

"Give me some pork and beans," said a strapping stalwart from the mines, as he took his seat in the restaurant one day, "and what will you

have," he asked his companion in the same breath. As they partook of their substantial meal they engaged in lively conversation. Said one of them: "If I had a lawyer worth a d——, I could win that suit." The waiter did not fail to hear this. He approached the pair as they arose, and said: "I have heard what you have been remarking about your law matters. I would like to try that case for you. I am a lawyer myself, and am *waiting* for a chance to get into business." The astonished stranger, impressed with his manner, engaged him in conversation, and the quick result was the translation of Niles Searls from the restaurant to the courtroom. He tried that case and won it, and received a fee of $300. He had got leave of absence for a day, without acquainting his employers with the reason for his departure. The next morning he presented himself at the caravansary and announced that he desired to quit work. "What is the matter?" he was asked. "We like you very much. Anything wrong?" "On the contrary," he answered; "everything is all right, but I want to go up country." And he went, his employers throwing an old shoe after him, for luck.

This paragraph in Mr. Searls' history was not without many parallels in the lives of California pioneers. Daniel Webster Virgin, while attending the Sacramento High School, maintained himself by waiting on the table at the Casco House. He afterwards became a District Judge of Douglas County, Nevada. His fellows at the old High School will remember him, and of these are Judge John K. Alexander, Auguste Comte, Joseph M. Nougues, and other prominent lawyers. Another leading lawyer, who attained a District Judge ship in California, had worn the white apron in Sacramento. The Hon. Charles L. Scott, who so long ago represented California in Congress, and is now United States Minister to Venezuela, once kept a mush and milk stand at Campo Seco. A leading merchant, and one of the richest men living in San Francisco, once manufactured pies at a crossing of the American River, as told me by one of his customers, Dr. Washington Ayer.

With the greater part of his three hundred dollars in his pocket, Mr. Searls went to Nevada City and commenced the practice of law. Some years later when occupying a high position on the bench, and trying a case with a jury, he noticed one of the panel eyeing him intently. When the trial closed, the juror with the inquisitive eye approached him, and asked: "Judge, ain't you the feller that used to "serve" us in Sacramento?" "I'm the man," said the Judge; and they went out and celebrated.

Judge Searls had been in Nevada city only five days when he found himself a candidate for Alcalde. Two days later the election came off. Both honors and emoluments were attached to this office. Its jurisdiction, however, was vaguely defined, though very broad. Charles Marsh, a leading citizen who had brought water into the town, warmly espoused the cause of

Judge Searls in this contest for Alcalde. But our candidate was defeated by ten votes out of several thousand cast.

In 1852 Mr. Searls was elected District Attorney of Nevada county. In 1855 he was elected, on the American or Knownothing ticket, District Judge of the Fourteenth Judicial District, comprising the counties of Sierra, Nevada and Plumas, and served a full term of six years. He was renominated by the Democrats, and was defeated by the Hon. T. B. McFarland, now an Associate Justice of the Supreme Court. In 1864 he closed his law business and went back to New York, where he followed the life of a farmer for six years. In 1870 he returned to his old mountain home in California, and resumed the practice of his profession. In 1877 he was elected to the State Senate on the Democratic ticket, and served for one session, his official term being abridged by the new constitution. A political foeman to Governor Perkins, he was yet appointed by the Governor a member of the Debris Commission, and was President of the Board when the Act creating it was declared unconstitutional, in 1880.

When Judge Searls went on the bench there was a great deal of important litigation in the counties comprising his district, appertaining mainly to water rights and mining claims. The questions involved were new, and the conditions required the application of new rules and principles. It may almost be said that the law applicable to these conflicting rights, and to their peculiar properties, had to be devised and created by the judiciary. A class of titles and claims of rights existed, entirely unknown to the common law. To reconcile and adjust them required on the part of the bench more than ordinary breadth of intellect. Mere knowledge of the law, as it was written, though essential, was not enough. It was no ordinary work to administer the law, and, as it were, *make* it at the same time. There was another difficulty to overcome, which challenged a cool brain and a steady will. The bar of the counties named contained many men of strong intellect and brilliant parts, but the prior administration had been lax. Inefficiency and irregularity in practice had grown up, and it was absolutely essential to the ends of justice that this should be corrected. In all respects Judge Searls was equal to the occasion. It is claimed for him on high authority, that, while on the bench, he accomplished more than any judge in our history in settling and arranging the law relating to mining claims and water rights. He was always courteous and dignified—never tyrannical or oppressive. He always demanded the respect due his office, and gave impartial attention to all suitors.

Judge Searls was born in Albany county, New York, December 22d, 1825. His father was a farmer in easy circumstances, and of pure English extraction. His mother was a Miss Niles, of a well known family in his native county, the Niles beinges of Scotch descent. Abram Searls, the father of Niles Searls, removed from New York to Prince Edward district, Canada, where

he purchased land and settled with his family. Niles Searls attended school in Canada, mainly at Wellington, in Prince Edward's county. After five years' study, his father sent him, at his own request, back to his own native county in New York, where he attended the Rennsselaerville Academy for three years. He then entered the law office of O. H. Chittenden of Rennsselaerville, where he remained one year preparing himself for the profession. Just at that time John W. Fowler, a noted lawyer and orator, established at Cherry Valley, New York, the State and National Law School, an institution which for many years cut a conspicuous figure in legal annals. Some of the best minds of the California bar were trained at this school. Among Mr. Searls' fellows were Hon. Chancellor Hartson, and ex-Lieutenant Governor Machin. Judge Silas W. Sanderson and the late Judge Brockway afterwards attended the same school. Mr. Searls graduated from this institution after two years' study. His old schoolmates speak of him as having been an indefatigable student and one of the brightest minds of their class. He excelled in mathematics and scientific branches of study, and was an omnivorous reader. He was admitted to the bar of the Supreme Court of the State of New York, May 2d, 1848, and went West, traveling through Kentucky, Illinois and Missouri, practicing a short time in the latter State. He is a California pioneer, as shown by the opening sentence of this chapter.

In the spring of 1885, Judge Searls was appointed by the Supreme Court one of the three Supreme Court Commissioners, under an act of the legislature then recently approved. This Commisison was an auxiliary court in intent and effect, and was created on account of the accumulation of business in our highest tribunal, threatening to block its action. The Judge had labored most efficiently for two years on this Commission, when, on April 19, 1887, he accepted from Governor Bartlett the appointment of Chief Justice of the Supreme Court, made vacant by the death of Hon. Robert F. Morrison. The Governor in this instance showed the good judgment which always marked his public acts, the appointee having the general confidence of the people and the press, and being very acceptable to all the other supreme judges. His ripe experience at the bar and long identification with the judiciary of the State, added to other qualities and capabilities, peculiarly endow him for the highest seat of justice. In mind and body he gives promise of many years of efficient service in his distinguished but laborious office. *Finis coronat opus.*

The Chief Justice is a man of strong character, he has a handsome presence, and engaging manners, an unbending will, and great pertinacity in investigation; a remarkable faculty of grasping a whole case; and sees at a glance the relative bearing of each particular part. He is eloquent on occasion, ready at repartee and has won many triumphs before juries, gaining their confidence by the evident frankness and fairness of his statements. As a citizen he is

held in universal esteem, being liberal to a fault, pure in his private life, and always ready to lead any enterprise *pro bono publico.* He is a man of bright wit and broad knowledge. Like nearly every good lawyer, he has a humorous vein and a large fund of anecdotes, and likes a practical joke. He once fined Francis J. Dunn $50 for contempt of court—the contempt being tardiness. Dunn was an able, though eccentric and dissipated man, of whom many good things are said. "I did not know I was late, your honor," said Dunn. "I have no watch, and I will never be able to get one if I have to pay the fines your honor imposes upon me." (He had been fined before). Then, after a little reflection, Dunn said, "Will your honor lend me $50 to pay this last fine?" "Mr. Clerk," said Judge Searls, "remit that fine. The State can afford to lose it better than I can." And the fine was remitted.

He was in the East just at the close of the war, and visited "Dixie" with a party of friends, including the late George A. Lancaster and the late Asa D. Nudd. At one town which they reached on Sunday they visited a colored Sabbath School. Lancaster introduced the Judge as a clergyman, and he was invited to take charge of the school for that occasion. He accepted the situation, and, it is said, acquitted himself with distinguished credit.

Judge Searls married, in his native county in 1853, Miss Mary C. Niles, sister of his last law partner, ex-Supreme Judge Niles. He has two children, sons, one of them a lawyer, lately associated with him professionally, and the other a mechanical engineer.

CHAPTER X.

A. P. Catlin, of Sacramento—An Historical Chapter—The Squatter Riots of 1850—Broderick's Struggle for the United States Senate—The Peck-Palmer Bribery Trial—Memorable Meeting Between E. D. Baker and C. H. S. Williams—Locating the State Capital—Attempts To Extend the San Francisco City Front—The First Vigilance Committee of the Bay City—Trial of "The Hounds"—Impeachment of State Treasurer Bates—Long Litigation over the Town of Folsom—Allusions to Prominent Men of Early Times.

All of the eminent men thus far observed belonged originally to the bar of our metropolis, or early became identified therewith, excepting the present Chief Justice. In looking out again, from the central point of view, over the array of leadership in the interior, there rises to the mind, at the capital city, a notable figure that will repay the most intelligent study. The subject of unqualified respect throughout the State his fame is yet peculiarly associated with Sacramento, to which he has held even when she sank under floods or disappeared in tempests of fire. Author, too, of the act locating the seat of government permanently, after its long unrest, the fancy, by a little indulgence, sees him pictured to coming times as standing under the dome of the Capitol, and upholding its historic arches on Atlantean shoulders.

A. P. Catlin was born at Tivoli, Dutchess County, New York, in January, 1823. Thomas Catlin, first of the name known in America, came from the county of Kent, England, in 1643, and settled in Hartford, Connecticut. His posterity for five generations, including Pierce Catlin, father of A. P., were born in Connecticut. David, A. P. Catlin's grandfather, was a captain in the Connecticut militia, and was in the action in which General Wooster was killed—the attack by the British General, Tryon, on the town of Danbury. He died at the age of ninety-three. His son, Pierce Catlin, was a school teacher, then a wagonmaker, afterwards a farmer. He died aged eighty-four. A. P. Catlin's ancestors on his mother's side were Germans. The first of the line came to America and settled in Dutchess County, New York, April, A. D. 1700.

A. P. Catlin graduated at Kingston Academy, Ulster County, New York in 1840. He studied law in Kingston, three and a half years, in the office of Forsyth & Linderman, both of whom were distinguished lawyers of eastern New York, and was admitted to the bar of the Supreme Court of New York

at Albany (Nelson, Cowen and Bronson, Justices), on the 12th of January, 1844; and to the old Court of Chancery as a solicitor by Walworth, Chancellor, on the 16th of the same month. He practiced about four years in Ulster County, where he frequently met as antagonists, in forensic battle, John Currey, afterwards Chief Justice of our Supreme Court; William Fullerton, the Judge Fullerton afterwards distinguished as counsel in the Beecher trial; T. R. Westbrook, later one of the Judges of the Supreme Court of New York; and other young attorneys who afterwards made their mark in the Empire State. In the spring of 1848 he removed to the City of New York, and formed a partnership with George Catlin. Before leaving Ulster County he had successfully conducted an important litigation, in which he had for his client the Spanish Consul, resident in the City of New York, who had been sued in the State courts of Ulster County upon a contract liability. Mr. Catlin pleaded the consular privilege of answering only in a federal court, a privilege which was vigorously disputed, and he succeeded in ousting the State court of jurisdiction.

On the 8th of January, 1849, he sailed in the brig David Henshaw for San Francisco, arriving in that port on the 8th of the following July. Here, in the brief sojourn of a month, he witnessed the organization of the first Vigilance Committee, the formation of the revolutionary court that tried the "Hounds," their trial, and concurrent scenes. That court was constituted of Dr. William M. Gwin, James T. Ward, and Thaddeus M. Leavenworth. The first two were elected by the acclamation of a crowd of citizens on Portsmouth Square, to sit with Leavenworth, who was the Alcalde and the only lawful authority. The Alcalde at first refused to recognize his associates in any capacity other than as mere *amici curiæ*. Dr. Gwin declined to act unless he and his associate, Ward, were acknowledged as of equal authority with the Alcalde. The latter functionary was compelled, by the open threats of the excited citizens, who suspected him of partiality to the "Hounds," to yield the point. Some ten or twelve of the defendants were convicted and sentenced to imprisonment for various terms, the highest being fourteen years. But there was no prison. The excitement of which the court was born had passed away before the trials were concluded, and this tribunal was powerless to enforce the execution of its decrees. The prisoners were, however, delivered to the commander of the United States sloop of war Warren, and were soon after discharged, as it was understood, by order of the Secretary of the Navy. T. M. Leavenworth, after whom Leavenworth street was named, had formerly been an Episcopal clergyman at Staten Island, New York. He came to California as Chaplain of Stevenson's Regiment, and had been appointed by competent authority, Alcalde of San Francisco. Catlin was personally acquainted with him, through letters of introduction from some of his old parishioners, and sympathized with him in the severe ordeal to which

he was subjected by the Vigilance Committee; and endeavored to support his authority. The Alcalde desired to appoint Mr. Catlin counsel to defend the "Hounds," and offered to pay for the service by grants of city lots, which he had unquestioned power to make. Catlin could not accept the employment, for the reason that at this time he was under a double contract with the master of the ship David Henshaw, and five of her sailors—first, that the sailors would work for the captain thirty days in putting his cargo ashore, and next, to take the sailors with him (Catlin) to the mines, and share with them in his proposed mining adventure, for which he had brought from New York a costly outfit of machinery. Hall McAllister conducted the prosecution and Judge Barry the defense of the prisoners.

Mr. Catlin reached the mines in the vicinity of Mormon Island, Sacramento County, in August, 1849. He passed the following winter there, engaged in mining and practicing law before Duncan, the Alcalde of that district. Upon his arrival there he found that office held by a son of Esek Cowen, who was formerly one of the Justices of the Supreme Court of New York, and who wrote a useful treatise upon Justices' Courts. Upon the resignation of young Cowen, Duncan was appointed by Judge Thomas, Judge of First Instance, and his authority was recognized as absolute in all cases by a large population, and over an extended territory without limit of jurisdiction as to value or character of property involved, until the legislature in April, 1850, provided for justices of the peace. Returning to Sacramento in May, 1850, Mr. Catlin there met John Currey. They immediately formed a co-partnership, and opened a law office. Among the leaders of the Sacramento bar at this time were Murray Morrison, E. J. C. Kewen, Colonel Zabriskie, Jos. W. Winans, J. Neely Johnson, John B. Weller, M. S. Latham, John H. McKune and Philip L. Edwards. This partnership continued for a short time. The climate prostrated Mr. Currey, who soon retired to San Francisco.

Mr. Catlin witnessed the squatter riots, and the conflict on the corner of Fourth and J streets, between the authorities of Sacramento City and the rioters, on the fourteenth of August, 1850. On that day Woodland, the City Assessor, was killed, and Biglow, the Mayor, was mortally wounded. Others were killed in the same fight, among them Maloney, the leader of the squatters. Dr. Charles Robinson, who afterwards became Governor of Kansas, was severely wounded. On the following day, in a continuation of the same fight, a few miles out of the city, McKinney, the Sheriff of the county, and several others were killed. (The widow of McKinney afterwards married Mr. Wright, a hardware merchant of Marysville. Mr. John A. Paxton, the banker, married her sister). The excitement was great, and the city authorities, fearing an assault from the friends of the rioters, who were supposed to be gathering in the country and mining sections for that purpose, made their situation known to the authorities at San Francisco. John W. Geary, then

Mayor of the last named city, (afterwards Governor of Pennsylvania, and Major General in the Union army) came to their assistance with two San Francisco military companies, one of them commanded by the late Captain W. D. M. Howard. It soon proved that the assistance was not needed, and that rumors operating upon an excited and terrified populace had greatly exaggerated the supposed dangers.

Late in the Fall of 1850 Mr. Catlin closed his law office in Sacramento, and returned to Mormon Island, being employed to settle the affairs of the Connecticut Mining and Trading Company, which was the successor in interest of the famous store and business of Samuel Brannan, and to attend to the mining interests which he had acquired in that vicinity in the summer of 1849, and winter of '49–'50. Just then Wm. L. Goggin, the agent of the Post-office Department for this coast, visited Mormon Island for the purpose of establishing a Postoffice there. He requested Mr. Catlin to furnish a name for the office. Mr. Catlin had already formed the "Natoma" Mining Company, adopting that name from the Indian dialect, it signifying "clear water," and a tradition that such had been, among the Indians, the name by which that locality had formerly been known. Goggin adopted the name, and that section of Sacramento county was officially named "Natoma township."

Mr. Catlin was always a Whig, as long as there was a remnant of the old party. He was placed on the Whig ticket as a nominee for the Assembly in 1851, and was with the whole ticket defeated at the September election, when Pierson B. Reading was defeated by John Bigler for Governor. In the following year he was nominated for State Senator, and was elected at the presidential election, when General Scott was the Whig candidate for President. He served in that capacity for two years, the sessions of the legislature being held at Vallejo, Benicia and Sacramento. During those two years he rendered important service in many matters of legislation. He introduced a homestead bill, the same as that which afterwards became law, but which was then, after a hot contest, defeated by the casting vote of the Lieutenant Governor. His own constituents of Sacramento were faithfully served in much needed local legislation, and in the important matter of the State Capital. He was the author of the law, making Sacramento the permanent seat of government of the State.

The final anchorage of this ark of the political covenant, which had floated from San Jose, its original seat, to Vallejo, thence to Sacramento, back to San Jose, again to Vallejo, thence to Benicia, where it was found by the members elect on the first of January, 1854, was the result of the determination and sagacity of the Sacramento Senator. During the session of 1853, the early part of which was spent at Vallejo, and the remainder at Benicia, he made no open, decided movement in behalf of Sacramento. The time was unpropitious for many reasons, among which was the fact that

Sacramento during the most of that winter, was submerged by a flood. The Benicians procured the passage of a bill by a two-thirds vote, making Benicia the seat of government. They entertained the mistaken notion, that it could not be removed by less than the same vote. This idea arose from the fact that the constitution had fixed the seat of government at San Jose, and provided that it should so remain until removed from that place by a two-thirds vote of the legislature. In the first removal to Vallejo this vote had been obtained; but it was always contended, by the San Joseans, until the question, years afterward, was decided against them by the Supreme Court, that this constitutional requisition of a two-thirds vote to remove from San Jose, had not been satisfied, because the passage of the removal act had been procured by means of a contract on the part of General Vallejo to provide the State with a suitable capitol building, which contract had not been performed. By some curious process of reasoning, the Benicians appropriated this idea to their own use and benefit, and relied upon it with seeming composure. At the opening of the session in January, 1854, a strong Sacramento lobby, furnished liberally with the means of paying expenses by an appropriation by the City Council, went to Benicia, confident of their ability to procure the passage of a resolution to hold the session at Sacramento. They did not think it possible to procure the passage of an act *fixing* the capital at Sacramento while the legislature was in session at Benicia, but were of the belief that it was necessary first to get the legislature to hold the session at Sacramento, and that during such session an act making Sacramento the permanent seat of government could be passed. Senator Catlin, upon whom they mainly relied, did not concur in this opinion, and advised against the temporary expedient proposed. He urged his constituents to labor for the passage of a bill fixing the seat of government at Sacramento after the close of the pending session. In this he was overruled. The Sacramentans were twice beaten during the month of January in vigorous efforts—first by a concurrent resolution, and next by a joint resolution to adjourn and meet at Sacramento. They retired from the field, and went home thoroughly disheartened, and with little hope of ever seeing their city made the capital of the State. Catlin requested them not to return; informed them that he intended in due time to make another effort, in which their aid was not needed, and which their presence would thwart, by causing extra activity and exertion on the part of the Benicia lobby, which had been too powerful for them in the contests which had just ended.

Early in February Mr. Catlin introduced the bill for the act, which is now the law, and which is found in the statute of 1854, page 21, of which the first section reads: "From and after *one day after passage of this act* the permanent seat of government of this State shall be, and the same is hereby

located at, the City of Sacramento, in the County of Sacramento." The second section repealed all other acts establishing the seat of government. The peculiar provision providing for the *time* when the act should take effect, unlike any ever seen in a statute, was the Senator's invention, to avoid a difficulty which had before been experienced from parliamentary motions extending the time for the final vote beyond the day named for removal. Upon the introduction of the bill, Charles H. Bryan, Senator from Yuba, arose and moved that the bill be rejected—a motion known in parliamentary law, though rarely used. He said "it was an insult to the Senate for the Senator from Sacramento to bring that measure again before the legislature after it had been twice defeated." In reply our friend reminded him that it was the first time that a bill for an act had been offered, and the first time that the full merits of the question of *permanently* locating the seat of government had been presented. The measure was assailed with more violence than argument. It is sufficient to say that, after encountering some narrow escapes in its progress to a third reading, the bill became a law on the 25th of February. It received the signature of Governor Bigler the moment it was delivered to him. The following day was the last the legislature could legally sit at Benicia. It merely met and adjourned, to meet at the new capital on the 1st of March, 1854. The people of Sacramento did not receive the intelligence until after the bill had passed, and were much astonished at so suddenly receiving the boon which they supposed was irrevocably lost and for which they had made a four years' struggle.

The constitutionality of the act was tested, and was affirmed by the Supreme Court. Charles H. Bryan, the Senator who had so savagely opposed the act, was then on the Supreme bench, and held that the act was constitutional.

At this session, and while the legislature was yet at Benicia, occurred one of the most remarkable trials on record, though very little record of it remains. A prolonged and determined effort was made to elect David C. Broderick, Northern Democrat, United States Senator. It was claimed by the Whigs, of whom there were seven in the Senate, and by the supporters of Dr. Gwin, Southern Democrat, that as the term for which Broderick was a candidate did not commence until after the next session of the legislature, it would be an unconstitutional act to elect at that time, and so take the election from the body to which it rightfully belonged. This argument had no weight with the supporters of Broderick, who had a large majority of friends in the Assembly, but, as it turned out, only one-half of the Senate. At that time the legislature could be called immediately into joint convention by a concurrent resolution. The struggle, therefore, was to put such a resolution through the Senate. Broderick's election would, at any time during the session, have resulted in twenty-four hours after the adoption of such a

resolution by the Senate. The forces upon this question stood so evenly divided in the Senate that Broderick lacked but one vote, and this it was impossible to obtain. The contest continued through the greater part of the session, and the utmost vigilance was required on the part of those who opposed the election. There were exceedingly few of the Senators whose firmness on either side of the question could be doubted. The position of each one of them was made known by more than one test vote. The situation was such that if any one of them had, in his own conscience, been convinced that it was his duty to change, it would have worked his political ruin to follow his conscience.

Peck, one of those who had steadily voted against going into joint convention, was Senator from Butte county; a country merchant, of little experience in public affairs. At one of the most critical periods of the senatorial contest, Senator Peck arose to a question of privilege. He charged that Joseph C. Palmer, who was the head of the most important banking institution in San Francisco, and an active friend of Broderick, had attempted to bribe him with an offer of $5,000, to vote in favor of going into joint convention to elect a United States Senator. A resolution followed, summoning Palmer to answer for a breach of the privilege of the Senate, and ordering his arrest. A day was fixed to hear the matter. General Charles H. S. Williams, one of the ablest lawyers ever in this State, was retained as Palmer's counsel, and Colonel E. D. Baker was engaged by the friends of Peck.

It was evident that a mighty struggle was to take place when such giants took the field. Peck's statement was made on the 19th of January, and the trial was concluded on the 3d of February. A large number of witnesses were examined. Palmer escaped through a single dexterous movement of his counsel. It had been informally agreed by all the Senators who were political debaters, that they would permit the trial to proceed without interference on their part, except to vote upon questions as they arose, without debate, and that they should act the part of decorous and impartial judges. Colonel Baker, an orator of profound thought and of more eloquent expression than any of his day and generation, (see Chapter I) was yet no match for General Williams in the management and conduct of a trial. When all was ready and the Senators had settled in their seats and duly put on the air of judges, Palmer was called to the bar. As the accused approached the Secretary's table, General Williams requested, in a quiet and matter-of-fact way, that he be sworn. The Secretary administered the oath, no objection coming from any quarter. Palmer immediately proceeded to relate his story, and had proceeded but a few moments, when it was clearly manifested to the sense of every one present that the act of allowing Palmer to be put on the stand as a sworn witness, was a grave oversight. But it was then too late to repair the error. Palmer swore that he met Senator Peck on the steamer at

the time stated by Peck, and that the latter had in explicit terms proposed to him, Palmer, to vote for Broderick if he, Palmer, would give him $5,000, which proposition he, Palmer, courteously declined, and that was all there was of it.

Thus the character of the investigation was at once changed. Palmer became the accuser of Peck, and was on the stand as a sworn witness in support of his charge. This was before the law permitted a party to be a witness in his own behalf in either a criminal or a civil case. Peck had made his statement upon his honor as a Senator, and in no sense as a witness, except in so far as his constitutional oath of office bound him to speak the truth. He was not required to be sworn as a witness. He was a poor, obscure, uninfluential, and comparatively friendless, country member. Palmer was a power in the State. Under these circumstances this strange trial proceeded. There was, of course, no witness to the interview, and, therefore, every fact tending to support the statement of either party became important.

At the close of the testimony, some two days were spent by the Senate in determining whether Colonel Baker should have the opening and close of the argument, or whether General Williams should have that privilege; and some half dozen votes, by yeas and nays, are recorded in the journal, upon various propositions regulating the order of the summing up, without coming to an agreement, until at last the chivalrous spirit of Colonel Baker prompted him to request that General Williams should have the opening and close.

There was one striking feature of this remarkable controversy. While it was fought with the utmost tenacity on both sides, there was an entire concurrence on the part of those opposing the election and supporting Peck—that Broderick had no lot or part in the alleged attempt to bribe, and that he was as unconscious of any proceedings of that character being taken in his behalf as if he had been at the bottom of the sea.

The speeches of Colonel Baker and General Williams occupied two days. The former never, in all his brilliant career, made a more powerful address. And yet no remnant of it has been preserved. The extraordinary circumstances of the case challenged his powers in all their versatility. Palmer and A. A. Selover reeled under his invective. The "Selover Route" from San Francisco to Benicia has not faded from the memory of those who heard Baker then.

The Senate went into secret session, and there voted without debate. It was in a serious dilemma. There did not appear to be much doubt of Peck's honesty—none whatever of his imprudence in blurting out such a charge against a man of Palmer's standing, with no witness to prove it. The journals show that the Senate extricated itself as follows. Hall, Democrat, of El Dorado, moved the following resolution:

Resolved, That the statement made by the Hon. Senator from Butte, Mr. Peck, alleging against J. C. Palmer an attempt to commit bribery, has not been sustained by the evidence adduced in the investigation.

Many attempts were made to modify the original resolution offered by Hall, but it passed by a vote of 21 to 7. Catlin was among those voting in the negative. Immediately upon the adoption of the resolution Crabbe, Whig, of San Joaquin, offered the following:

Resolved, That this decision of the Senate in this case is not intended in any degree to reflect upon the honor and dignity of Mr. Peck.

This received 17 votes, with but one (Mr. Mahoney, Democrat of San Francisco), against it; ten Senators not voting. Whether Peck or Palmer won the fight has never been determined. The case offers some solemn lessons to young statesmen, as well as to members of the third house. Never attempt to bribe anybody. If you are offered a bribe, decline it, and, instead of pocketing the money, pocket the insult as quietly as circumstances will permit, unless it should happen (which is quite improbable) that you are able to prove the offer by other evidence than your own statement.

During the session of 1853 Mr. Catlin rendered important service to the city of San Francisco, and, in fact, to the whole State, in contributing largely to the defeat of the scheme to extend the city front 600 feet further into the bay. The city front was established by an act of the legislature passed in 1851; and another act in the same year authorized the construction of wharves at the end of the streets, not exceeding 600 feet beyond the water front boundary line. Certain parties claimed title to a tract 600 feet wide extending (a semi-circle) from North Beach to Mission Bay, in front of the established boundary line; and the scheme involved the repeal of the act of 1851, and the extension of the city front so as to take in the tract so claimed. The parties interested acknowledged that the State had some interest in the matter, and offered the State one-third of the property. Gov. Bigler was persuaded to believe, and honestly believed, the plan unobjectionable, and that it would be the means of relieving the State treasury from its then impoverished condition, and so he earnestly supported it, not only in his annual message, and in a special message to the legislature, but gave to it all his personal influence, which was very great, especially with the members from the interior and mountain counties. The measure also enlisted a powerful support in San Francisco, as millions depended upon its success. The whole extension tract was laid out in city lots, and the claimants had speculated largely in the sale of them.

The whole matter was referred in the Senate to a select committee, of which Mr. Catlin was a most industrious and active member. An investigation was held, and all questions, such as nature of the title claimed, effects upon the harbor, etc., were inquired into. Mr. Catlin was a known and

avowed opponent of the measure, and to him was committed the duty of writing the report, which duty was so well performed that it absolutely killed the scheme outright.

Governor Bigler was so disappointed and indignant, that he publicly proclaimed in the lobby of the Senate that he would take the stump in the ensuing season and advocate the measure "from San Diego to the Oregon line." But he did not, and he never afterwards advocated an extension of the city front. Every argument advanced in support of the scheme was overthrown, and the evil consequences which would surely follow its success were forcibly set forth in this report. It saved the city and harbor from vast injury, and time has verified the wisdom of those who set their faces against the accomplishment of this scheme. For strength of argument and deep research into the many vital questions affecting that controversy, this report, which may be found in the journals of the fourth session of the legislature, will bear favorable comparison with any public document in the archives of the State.

In 1854, after service in the State Senate for two years, Mr. Catlin's standing in the Whig party was such that he was tendered one of the nominations for Congress, but he declined it, and promoted the nominations of General (then Major) G. W. Bowie and Calhoun Benham. The Democratic party was then divided, but the Whigs were solid and hopeful. Milton S. Latham and James A. McDougall were then in Congress, and were renominated by the Freesoil wing of the Democracy. Latham refused to stand. Phil. T. Herbert and J. W. Denver were nominated by the Musical Hall or Chivalry wing. At the commencement of the canvass the latter apparently had not any chance of success, but later on it became known that they had received the secret nomination of the Knownothings, then first organized, and being a secret order. Their election was nevertheless a surprise to the State.

J. Neely Johnson, a Sacramento lawyer, was nominated and elected Governor by the regular Knownothings in 1855. During the short life of this party, whose existence practically ended at the close of the legislative session of 1856, Mr. Catlin eschewed public affairs, and devoted himself to his profession and his mining interests.

In the summer of 1856 a convention composed of about forty persons, constituted of "Old Line Whigs" and ex-Knownothings, nominated a ticket for the legislature, upon which they placed Mr. Catlin and Robert C. Clark (the latter afterwards County Judge and later Superior Judge), as Whigs, with two ex-Knownothings. During the Knownothing regime Colonel Philip L. Edwards had maintained a club of Old Line Whigs, of which Catlin and Clark were members, and which *boasted* 500 members. The two nominees, with little faith in the strength of the nomination, and both averse to making a canvass, which is always demanded in Sacramento county, at first resolutely declined, but were afterward persuaded and flattered into ac-

cepting the nominations. They were elected (to the Assembly) together with one other on their ticket—John H. McKune, afterward District Judge —while one of the Democratic nominees prevailed over Dr. Powell, the lowest on the combination ticket. Dr. Powell is dead. He practiced medicine, but was an inveterate politician. He was one of the most entertaining stump speakers of his day.

That legislative session opened in January, 1857. The most stirring and important event of the session was one in which Mr. Catlin acted a conspicuous part—the impeachment of Henry Bates, the State Treasurer. Early in the session vague rumors prevailed that all was not right in the treasury. At the instance of the Treasurer's friends a joint committee of both Houses counted the coin in the treasury on the 13th of January, 1857, and reported that, since the first of that month, the Treasurer had taken from the general fund $124,000 and forwarded the same to New York to meet the semi-annual interest, to become due on the first of July next ensuing, upon the funded debt of the State, and that $130,000 in coin remained in the treasury. These two sums would make the Treasurer's account good, according to the Controller's books. His action in sending so large a sum to New York more than four months before it was necessary, was excused by the committee as an overzealous act in the interest of the State; and was openly commended by the *Democratic Journal*, the organ of the Democracy at the capital, as a provident act, by which the legislature was prevented from squandering the money! The Assembly was largely Democratic, and was, apparently, satisfied with these explanations. Bates was a Knownothing. But there were a few members, prominent among whom was Mr. Catlin, who assailed this report, and openly expressed doubts as to the existence of the facts upon which it was based. It was verbally stated, in behalf of the Treasurer, that the $124,000 was sent to New York through Wells, Fargo & Co., a statement calculated to allay suspicion as to the safety of the funds, and one quite necessary to allay such suspicion, by reason of the fact that twice before—once under a former Treasurer, and once under Bates himself, when the transmission of the money had been intrusted to Palmer, Cook & Co.—default in the payment of the interest had been made. It resulted from the debate that the Assembly, by resolution, immediately placed Mr. Catlin, much against his will, at the head of a select committee of three, with full power to send for persons and papers, and to investigate and speedily report upon the whole subject. He was thus suddenly placed in a position where he was made to assume the responsibility of charges which had been insinuated, rather than specifically made; and this, by the majority who believed in and supported the report of the Joint Committee. His position was critical. If he failed the Treasurer would triumph; and he, Catlin, would suffer heavily in public estimation. At this time he had never seen Bates, and never met him per-

sonally until the latter afterwards appeared before the committee. The Treasurer's friends, at first, were not at all alarmed. Their confidence that no discoveries could be made detrimental to him was manifested in newspapers, and in many other ways. But Mr. Catlin soon, through the favor of a prominent banker, now deceased, and through other sources, became possessed of information which enabled him to summon witnesses, by whose testimony he completely uncovered the most carefully concealed but most stupendous frauds. This testimony positively established the fact that the joint committee, in the count of the 13th of January, had been deceived; that fully one-half of the coin found in the vaults on that occasion had been temporarily supplied by outside parties and had been withdrawn the next day. It was also proved that the $124,000 payment was a pretence; that it had not in fact been sent to New York, but was a fraudulent contrivance to account for so much money previously abstracted from the Treasury. It appeared that an entry was made on the Treasurer's books on the 10th of January, stating that the money was sent to New York by Wells, Fargo & Co. This was the entry that met the eye of the joint committee on the 13th. After it was known that Wells, Fargo & Co. denied having received or sent the money, the name of "Wells, Fargo & Co.," was carefully erased and the name of "Pacific Express Co.," written over the erasure. This "company" was an ephemeral concern, of which the chief clerk of the Treasurer was President and manager. It was also proved by testimony that could not be denied, that during the whole time of the Treasurer's administration, Palmer, Cook & Co. had nearly all of the public moneys; that in July, 1856, when by the Controller's books there should have been about $250,000 in coin in the vaults, there was in fact only about $16,000 there, and that was removed and deposited with Wells, Fargo & Co. under a scare on the part of the Treasurer, who one day heard that the Vigilance Committee was on the way up the river to capture the State Government. Such a conquest, by the way, if it had happened before the Treasurer removed the funds, would have exposed the nakedness of the treasury.

It is due to the memory of the unfortunate Treasurer to say that it did not appear that he had personally profited a cent by his defalcations, which, by Mr. Catlin's report, amounted in the aggregate to the sum of $200,000, during the brief period of one year. He was a physician by profession, with little experience in, and no taste for, public affairs. His nomination had been procured, against his own wishes, by Palmer, Cook & Co., one of the members of which firm was his boyhood companion and friend. He had accepted the office with reluctance, and had, in fact, with an apparent unconsciousness of wrong, allowed that firm to administer it. He had implicit confidence in their financial soundness, and in their promise to make good the moneys used by them when required. This promise could not be fulfilled, as the banking

house was in fact then insolvent, and its necessities compelled it to abandon the Treasurer to his fate, after making the best fight possible to protect him by a concealment of the defalcation. The end can be told in a few words. Upon the reading of Catlin's report to the Assembly, on the 9th of February, the Treasurer was invited to make any explanations he desired at twelve o'clock the next day. This he declined, stating that important business required his immediate departure for San Francisco, and asking delay. The response to this was the unanimous passage of a resolution impeaching him for misdemeanors in office, and the appointment of a Board of Managers, of which Mr. Catlin was one, to prepare articles for presentation to the Senate. Before these articles could be prepared he resigned his office. The resignation was accepted by the Governor, and a successor appointed and installed in office—an operation that was accomplished in less than twenty-four hours. Upon the hearing before the Senate, Bates was represented by a strong array of counsel, among whom were Charles T. Botts and Joseph W. Winans. The only defense made was that the accused, being out of office, was not subject to judgment of impeachment. The managers contended that he was impeached by the Assembly while in office, and could not escape a trial by resigning his office, and this view was sustained by the Senate, and the judgment usual in such cases was pronounced.

It was at this session that Broderick and Gwin were both elected United States Senators. Mr. Catlin voted for neither of them, but with sixteen others voted for Henry A. Crabbe and James W. Coffroth.

In March, 1872, Mr. Catlin was appointed one of three members of the then State Board of Equalization, and served as such until April, 1876. The most effective powers conferred on the board by the legislature were, after a prolonged contest, declared unconstitutional by three of the five judges of the Supreme Court, which led to the abolition of the board. During this period he was in the active practice of his profession, but found time to perform prodigious labor in the board named.

In 1875 Mr. Catlin was brought forward as a candidate for Governor before the Independent State Convention, but was defeated by the combined votes of the supporters of John Bidwell and Mr. Estee, which, on the final ballot, were cast for General Bidwell. In 1878 he was nominated by the joint convention of the Republicans and Democrats of Sacramento county, as delegate to the Constitutional Convention, but in consequence of the recent death of his wife and other causes, he declined the nomination. In 1879 he was one of the nominees of the Republican party for one of the seven Justices of the re-organized Supreme Court, and was defeated with all but one on his ticket.

Mr. Catlin's legal practice has been varied and extensive in the United States District and Circuit Courts in this State, in the courts of San Francisco,

in Sacramento and adjoining counties, and in the State Supreme Court. While in the active business of his profession he found time to perform to the satisfaction of the proprietors of the old Sacramento *Union*, the duties of chief editor of that paper at different times for considerable periods, and more particularly from September, 1864, at the commencement of the second Lincoln campaign, to April, 1865. His political articles were generally acknowledged to be just and fair by the Democratic opponents of the war, against whom they were aimed. He criticised Seward's English diplomacy, and condemned the surrender of Mason and Slidell. He supported Juarez through all his trials, and justified the execution of Maximilian in an editorial entitled "The End of a Tyrant," which attracted wide attention from its sentiments and style of expression. It was copied in Spanish in leading Mexican papers. In the course of ten years he successfully defended the Sacramento *Union* in eight different actions for libel.

Among the most notable and important litigations successfully conducted by Mr. Catlin, was the Leidesdorff ranch case. The title of the Rancho Rio de los Americanos, in Sacramento county, was confirmed by the Land Commissioners in 1855, *with specific boundaries*, and by the United States District Court in 1857. The Attorney General of the United States had dismissed an appeal in the case. These boundaries included the town of Folsom and the improvements of the Natoma Water Company upon several thousand acres of land. The water company and the inhabitants of Folsom engaged Mr. Catlin to examine the title, and he having pronounced it good they purchased the lands occupied by them of the executors of Folsom, and paid for them. Soon afterwards, in 1858, Hon. Jacob Thompson, Secretary of the Interior, summarily, and as Mr. Catlin always contended, without authority, set aside the survey of the rancho, which survey had strictly followed the boundary lines specified in the decree of confirmation, and ordered a new survey in a particular manner, by which the town of Folsom and the lands of the water company were excluded. There was no recourse against the executors of Folsom; and the parties who had thus lost their lands and their money naturally looked to Mr. Catlin for relief. He first contested the new survey in the Land Department, and afterwards in the United States District Court. He succeeded in setting aside the Thompson survey; but the one which followed it was but little better. It restored part of the lands to the water company, but still left out the town of Folsom. He succeeded in setting aside this survey and procuring a decree establishing the original survey, under which his clients purchased. From this decree the Government appealed, and the case came up for argument in the United States Supreme Court at the December term, 1863. Mr. Catlin went to Washington, was admitted to the Supreme Court on motion of Judge Jere Black, and after waiting four months reached the argument of the case. He was heard for

the greater part of two days. The case was exceedingly complicated, and the principles applicable to it were unsettled. The form of the survey was at first sight objectionable, and he entered upon the argument with the whole court against him, except Judge Field, who, as a Judge of the Supreme Court of this State, had become familiar with the principles of law applicable to the case. Mr. Catlin won six of the nine Justices over to his views, and obtained a decision affirming the original survey, upon which the patent subsequently was issued. Thus was finally settled the title, and a litigation was terminated, to which Mr. Catlin had devoted six years of earnest work. His clients had acted upon his advice in purchasing the property. He felt the weight of the obligation, and made good his purpose of maintaining the soundness of his opinion by a long struggle against the government, in which he overcame obstacles which would have discouraged a less determined nature. Like Mr. S. M. Wilson, he was on the losing side of the great issue between the farmers and the miners, being one of the six counsel for the Gold Run Mining Company in the trial of 1882, involving the rights of hydraulic miners. He conducted the examination of the witnesses upon some of the important branches of the case. His argument was confined to the facts, and did not deal with the law of the case. He contended that the testimony showed that the defendant's mining operations did not contribute in any appreciable degree to the injuries complained of.

Mr. Catlin is a man of indefatigable industry, of very sound judgment, and great power of investigation. He is one of the safest of counselors, unswerving in his fidelity to his clients, and a good man every way. In speech and argument he is slow but earnest. He has had little to do with criminal business. Having a good memory he can tell a thousand interesting reminiscences of early times in California. He is slow to anger, has no vices, possesses a generous nature, and, although little given to sport or humor, and having a serious, stern, almost morose look, is gentle in spirit and as tender as a woman. He is careless about money matters, doesn't think of his own needs—of what he shall eat, or what he shall drink, or wherewithal he shall be clothed. But this is hardly a blemish in *him*. A man of pure life, broad knowledge, and strong brain, he still holds a good clientage, and is the junior by some years of a score of men who are leaders at the bar of the State. He owns a very fine library, in which he takes more delight than in society, politics, or external nature. A California pioneer, familiar with all the motley scenes of time's latest drama, he is just touching upon the borders of a serene old age, the venerated confidant of the public, "Whole in himself, a common good."

CHAPTER XI.

John T. Doyle—Some Interesting Cases in New York and California—The Suit of Gov. Price, of New Jersey, against Squire P. Dewey and Gen. E. D. Keyes—The Convivial Wit, Sam. Ward—History of the "Pious Fund" of the Catholic Church—A Notable Argument—Peter Donahue Brought to Terms—R. J. Vandewater Taken At His Word—A Judicious Friend of Young Men—The Story of Col. C. P. Eagan, United States Army—Some Interesting Personal Points.

John T. Doyle was born in New York City. His father had come thither from Ireland in 1815, himself a remarkable man with an original mind. He, the father, opened a bookstore in New York City and made a competency. His place was a literary center, and the circle of his friends was very large. He became widely known for his unfailing humor, his urbanity, his gifts of conversation, and his critical knowledge of books. Closing his business in 1851, he removed with his family to San Francisco, and died there at a great age. But he never got old. He could tell a story with a most solemn face. He loved to go to theaters, was fond of young people, ardent and sunny in temperament, full of romance, a passionate lover of the beautiful and poetic, and drank "the wine of life" to the very last.

John T. Doyle graduated from Georgetown College, District of Columbia, in 1837, taking the first honors. He studied law under Dudley Selden in New York City, where he commenced practice in 1842. There he formed a partnership with Eugene Casserly, which lasted a few years. In 1850, being in bad health, he turned away from the profession, and accepted the position of superintendent of the Nicaragua Canal Company, of which the elder Vanderbilt was the chief spirit. After remaining in Nicaragua eighteen months, he returned to New York. In 1851 he came to San Francisco with his father's entire family, excepting his younger brother Emmet, who had arrived in 1849.

Mr. Doyle's long life at the bar in San Francisco was broken by his removal to his native city, whither he went in 1856 and where he remained about three years. During that period he was in partnership for a time with Mr. Rapallo, afterwards a Judge of the New York Court of Appeals, and Horace F. Clark, a son-in-law of the elder Vanderbilt. He also served for awhile as assistant district attorney. A great case which he successfully

defended in New York will be noticed below. Returning to San Francisco in 1859, he resumed law practice there, and has ever since been one of the largest figures at that bar. Since his first arrival in 1851, he has been in partnership, at different times, with Eugene Casserly, with Janes & Barber, with Janes, Barber & Noyes, with Janes, Barber & Boyd, with Barber, Scripture & Bugbee—his firm now being Doyle, Galpin & Scripture, (Philip G. Galpin and Henry D. Scripture).

In 1876 Mr. Doyle was appointed by Governor Irwin one of the Commissioners of Transportation (Railroad Commissioner), his associates being General George Stoneman (afterwards Governor) and Isaac W. Smith. That was generally applauded as an able and faithful and industrious commission. The report submitted by it to the legislature at the close of the year 1877, was the product of the most patient investigation. It covers, with its tables and exhibits, a large octavo volume of nearly 500 pages. Mr. Doyle made railroad problems, questions of fares and freights, etc., a serious study for many years. On all matters affecting railroads he came to be popularly regarded as being better informed than any other man in the State. He was known as a strong anti-railroad man, and a stern anti-monopolist. He was prominent in the Committee of One Hundred during the excitement in regard to the possible occupancy of Goat Island by the railroad company, in 1871.

Mr. Doyle is a fine representative of the leaders of the New York bar. The conditions of law practice in that great city are such as to develop a class of minds not seen elsewhere. He has a strong, fertile, and acute brain, is thoroughly grounded in the law, is quick, sharp, ready and full. He is a clear and logical reasoner, has an eminently practical mind, and is a genius in the line of devising remedies. His addresses to the bench are models of legal argument, and if he is stronger before juries, as many say, it is because of his rich and perennial humor. He is fluent in speech, forcible, hardly eloquent, never repeats and never hesitates. He does not select his words or phrases in advance. In addressing a jury Mr. Doyle has a habit of singling out one man, as soon as he catches one interested, and talking to him alone for several minutes at a time. He keeps the jury in good humor. His facts are presented with admirable system, and in a very entertaining way. When he has a case naturally dry and tedious he informs it with life and refreshes it from his inexhaustible fund of merriment. A wonderful intuition is his. Both bench and bar have the greatest respect for his genius, and no intelligent stranger can talk with him half an hour without being impressed with the dignity of his intellect.

Perhaps the greatest law suit which ever engaged his attention was that of Rodman M. Price against Squire P. Dewey and other prominent citizens of San Francisco. This was in New York City. Price, whilom Governor of New Jersey, was, during the Mexican war, and some years after the ac-

quisition of California, a purser in the United States Navy. His vessel entered San Francisco harbor about the time of the conquest, and Price came ashore and walked about and around the little city with his eyes wide open. He bought real estate, and was soon a rich man, but kept his place in the navy for some years longer. Returning to the Eastern States early in 1850, he left his power of attorney with Edmund Scott. In the summer of 1851, he was in San Francisco a few months, and again departed, having substituted General E. D. Keyes, of the army, as his attorney-in-fact in place of Scott, who was about to visit South America. The next year Scott returned, and Price gave a new power of attorney to Keyes and Scott jointly. In the spring of 1853, Price held thirty-one pieces of real estate in the heart of the city, including the old postoffice. They were assessed low—in the aggregate, $73,400, and were heavily mortgaged; besides Price had a large floating unsecured indebtedness. The first of July was approaching, when a law would take effect, permitting foreign creditors to attach real estate. Keyes and Scott apprehended that their principal would be swamped by foreclosures and attachments, and they determined to "clean up" before July first. They sold all the property for $135,000, to Theodore Payne and Squire P. Dewey, the purchasers to assume the mortgages. The property speedily rose in value, and Price's indignation at the sale rose in proportion. He declared that the property had been needlessly sacrificed. Some two or three years later he commenced suit for damages in New York City, against Payne, Dewey, Keyes and Scott, alleging that they had conspired to defraud him of his property, and laying his damages at $500,000. Dewey being then in New York City, Price had him arrested just as he was about to take the steamer for Europe. He was released on bail in the sum of $25,000.

The trial of this case was a great and costly struggle. Mr. Doyle, who was then, as intimated, residing in New York City, was attorney for Dewey. He had a commission directed to Robert F. Morrison (since Chief Justice of the Supreme Court), who took, on behalf of the defendants, the depositions of prominent citizens of San Francisco. These included Judge M. H. McAllister, Hall McAllister, Horace P. Janes, James T. Boyd, Elisha Cook, Horace Hawes, A. J. Bowie, John Caperton, Milo Hoadley, A. G. Abell, Michael Reese, James Lick, Judge Edward Norton, Colonel E. D. Baker, Lafayette Maynard, Benjamin Davidson, George W. Wright, George Gordon and C. V. Gillespie. The interrogatories and cross interrogatories were all framed in New York, the former numbering 103, the "cross" 144.

Price's principal friend in the fight was Sam. Ward. This man was a member of a New York banking house, a great wit, a most engaging talker, and of distinguished good fellowship, peculiarly so on convivial occasions. He once was United States Minister to Brazil, and afterwards passed most of his time in Washington. Judge Field speaks of him favorably in his auto-

biography. Ward, too, had lived in San Francisco, was acquainted with Price's affairs, and knew all the parties to the suit under notice. He made a strong affidavit in the case on the side of his friend Price. He swore that the property was worth when sold $300,000, and that Payne and Dewey had realized from a sale of five-sixths of it, in six week's time, a profit of $300,000. He implicated Michael Reese in the alleged conspiracy, and said some severe things about General Keyes. The latter made a counter affidavit, in which he hit back with vigor, as this short extract will illustrate:

"And deponent further saith that, from July 1, 1853, to January 1, 1854, his intimacy with said Samuel Ward was greater than it had ever been before with any man for the same length of time. Deponent saw him almost daily, and was so charmed with the liveliness of his wit, his knowledge of languages, his skill in gastronomy, his rotund, expansive appreciation of good wine, his easy practice of those flattering arts which enable him to spend so much money while he earns so little, that deponent was allured by him to slide away from the wonted austereness of his life and to give up much of his time to feasting and vain discourses, greatly to deponent's reproach as a sedate citizen, and, as he fears, to the hazard of his soul."

The pleadings, testimony, etc., in this case were printed, and comprise several large volumes. To come to the result, it was a signal victory for Mr. Doyle's client. It was about the year 1880 that Governor Price visited San Francisco again, and renewed the litigation, seeking to set aside the conveyance to Payne and Dewey, and also suing Dewey for libel. He failed again, and went back to the State which had once made him its Governor, a poor man.

Mr. Doyle's celebrated cases are too numerous to name. I come to the great effort of his life. This was over the Pious Fund.

"In the ages of faith, before the day
When men were too proud to weep or pray,"

the Catholic church of Mexico owned a very large amount of real and personal property in that country, which had been contributed by different individuals and societies, for the propagation of the Catholic faith among the inhabitants of Upper California and Lower California, for the endowment of the church in those territories, and for the maintenance of its ministers. This vast property became known as the "Pious Fund of the Californias," and the most munificent contributions thereto were made on the 8th day of June, 1735, by the Marquis de Villapuente, and his cousin, the Marchioness de las Torres de Rada. Their gifts, made by a joint deed, consisted of 450,000 acres of land, many farmhouses, chapels of worship, furniture, stores, merchandise, grain, large bands of sheep, hogs, horses, mules, cows and horned cattle. The lands conveyed, which were valued at the time at $400,000, came to be worth many millions.

I take this impressive narrative from the record in the case:

The piety and benevolence of the Marquis Villapuente have had few parallels in history. It is recorded of him, in Alegre's "History of the Society of Jesus in New Spain," published in 1739, that he contributed to every pious enterprise, thanking the Almighty for every opportunity to do good. It was his rule, in relieving temporal wants, never to forego spiritual comfort. He was the apostle of many peoples and nations. His beneficence penetrated all the continents. He remitted to Africa large sums to ransom Christian captives, and founded at Algiers a hospital for their succor and spiritual consolation. He expended $100,000 for the building of churches and support of missionaries in China and Japan. In Macao he founded a home of mercy for the rescue of foundlings found in the streets. He supported, by the expenditure of enormous sums, flourishing churches in the kingdoms of Travancor, Ternate, Madure and Coromandel. In the Philippines he founded a presidio of Boholan Indians as a protection against the attacks of the Mohammedans. The Church of Pondecheri, in the East Indies, was built by him. He sent large sums of money to Jerusalem for the ornament of the holy places and the security of pious pilgrims. In Europe he defrayed the whole expenses preceding the beatification of the venerable Father Luis de la Puente; rebuilt and re-endowed the College of Santander; built and endowed the College and Church of the Cave of Manessa; laid the foundation of a College of Missionaries at the castle of Xavier, in Navarre; served Philip V with a regiment of 570 men, armed and maintained at his own expense, for nearly a year and a half, for which service the King tendered him the viceroyalty of Mexico, and which he declined. In America he gave daily alms to the poor and afflicted, bestowed numerous dowries on virtuous maidens, chapels and pious works, spent $80,000 in building the convent of St. Joseph, of the Barefooted Franciscan Friars, at Tacubaya, and over $200,000 in missions, vessels, and other necessities of California. He founded in Arizona the two missions of Busonic and Sonoydad, changing the name San Marcelo, by which the latter was called, to San Miguel, from devotion to the latter saint; contributed $10,000 to the college of Caraces; $10,000 to that of Havanas; and another $10,000 toward founding a house of religious exercises in the City of Mexico.

Living to extreme old age, he made a pilgrimage to the house of Nazareth and the city of Loretto, in a garment of coarse cloth, under a vow not to shave his beard till he had offered up his devotions in that sacred place; distributed alms on every hand, made munificent offerings to the Holy Virgin; visited Rome, returned to Spain, and there gave away all the rest of his vast property, even down to his cloak; he then sought hospitality in the Imperial College at Madrid, where he made his vows with tenderness and devotion, to the edification of the whole court. He died on the 13th day of February, 1739.

The "Pious Fund," thus swelled by the munificence of the Marquis and Marchioness named, was held in trust by the Jesuits, who had charge of the Missions of California down to 1768, when, by order of the Spanish Crown, they were expelled from Mexico and California. The Missions were then turned over by the viceroy, first, to the Franciscan order; later, one-half to that order, the other half to the Dominican friars. In April, 1772, Lower California was assigned exclusively to the Dominicans, and Upper California to the Franciscans. The Crown fully recognized that it held the "Pious Fund" as a sacred trust, and devoted the income and product, through the ecclesiastical authorities, to the religious uses designed by the donors.

When Mexico became independent, her government succeeded as trustee

of the "Pious Fund." In 1836 the fund was, by act of the Mexican Congress, turned over to the Bishop of the Californias, Pope Gregory XVI having erected the two territories into an Episcopal Diocese. In February, 1842, by another decree of Santa Anna, all the property of the trust was sold for the sum represented by its income (capitalized on the basis of six per cent per annum) and the proceeds were paid into the public treasury, the government obligating itself to pay six per cent on the capital thereof thenceforth.

The property was bought (the bulk of it) by the house of Boraio and the Messrs. Rubio Brothers for two millions of dollars, to which was added over one million dollars previously borrowed by the government from the fund—making the total amount on which the government bound itself to pay six per cent per annum interest in perpetuity, exceed three millions. The Bishop of California remonstrated earnestly against this last decree, as being in violation of his rights and the law of 1836. In 1845 the General Congress restored to the Bishop and his successors the properties of the trust *which had not been sold.* When California passed under the American flag, payments from the "Pious Fund" by the Mexican government to the Catholic church here totally ceased.

By the convention of July 4, 1868, between the two Republics, the American and Mexican Joint Commission was constituted, to sit at Washington, and pass on all claims presented by citizens of either country against the government of the other. In the Fall of 1870, a memorial was presented to this body by Archbishop Alemany, Right Rev. Thaddeus Amat, Bishop of Monterey, and Right Rev. Eugene O'Connell, Bishop of Grass Valley, on behalf of the Catholic church in California, asking that an apportionment be made between Upper and Lower California, of the interest accrued on the "Pious Fund" since the treaty of Queretaro, and payment to the petitioners, in trust for the church, of the amount due the latter in this State. Mr. Doyle was the counsel for the church. He went to Washington and tried the case before the commission. He found opposed to him the ablest talent. The Mexican government had engaged Caleb Cushing and sent Don Manuel Aspiros to assist him. Mr. Doyle had, as attorney for the church magistrates, laid this claim before the Department of State eleven years previously, and this was one of the principal claims for the settlement of which the joint commission was created. He appeared before this latter body without any original documents, those papers all being in the archives of the Mexican government, but he was thoroughly fortified with evidence and argument. The eminent counsel for Mexico moved to dismiss the claim as stating no cause of action. Mr. Doyle then supplemented his lengthy memorial with an elaborate statement and argument of forty printed pages. These and his other briefs in the case have been published, but copies are very rare. In his first argument he states that he examined carefully every book, document, and scrap of Mexican history that he could find, hav-

ing the least bearing on the subject, including many public documents not to be found in published works. It was ably urged, on behalf of Mexico, that the Bishops of the church in California were not the proper parties to make the demand; that the "Pious Fund" had been confiscated to the Mexican government; that the claim was barred by article XIV of the treaty of peace, which released Mexico from all claims of United States citizens; and, further, that the Archbishop and Bishops claimant, being local corporations, could not claim property outside of their dioceses. In reply, Mr. Doyle argued (to reverse the order of these propositions) that all corporations are local in the same sense—viz., that they have some local *habitat*, and derive their corporate powers from some local law—but they may own property, and maintain and defend suits outside of the territory of the States which create them. There is no distinction in this respect between religious corporations and those organized for trade. If property belonging to an English Cathedral Church is wrongfully removed to the United States, the Bishop of such church, or the diocesan authority, entitled to the custody of its temporalities, can recover it in any United States court of competent jurisdiction. Besides, this is not a question of corporation law. The Bishops claimant, whether incorporated or not, can rightly press this claim, because they are the constituted authorities of the church. As to the claim being barred by the treaty, Mr. Doyle showed that Mexico was released by that compact only from such claims as had not *then* been decided against her, and which arose *previously* to the *date* of the treaty (February 2, 1848). At that date this claim was not a claim by citizens of the United States; it was by persons who were *then Mexican citizens*—the church of California being *then* part of the church of Mexico, and its political status being that of a Mexican citizen. This status was changed by the treaty—at the *ratification* of the treaty. *Then* it ceased to be Mexican and became American, and *thenceforth only* did its demands on Mexico become claims of United States citizens.

As to confiscation, Mr. Doyle traced the history of the fund from the time it was taken from the original trustees down to the decree of October, 1842, under which it was incorporated into the public treasury. In that decree Santa Ana declared it was the intention of the government to "fulfill most faithfully the beneficent objects designed by the founders, without the slightest diminution of the properties to the end," and "without any deduction for costs, whether of administration, or otherwise." Neither the Spanish nor Mexican government ever claimed the right, or exercised the power, of diverting the fund from its original purpose.

From this printed argument I take this specimen of unpretentious, vigorous style:

> History furnishes frequent instances where the poverty of the public treasury, the rapacity of the monarch, or the cupidity of a favorite, has led to the spoliation of chari-

ties and other church properties. Such acts have usually been cloaked under the disguise of reform of abuses, or excused by the plea of great public necessity. The atheistical zealots of the French revolution were, I believe, the first to invent the idea that property dedicated to such uses was public or national property; but their acts in confiscating and treating it as such were condemned by the voice of all Europe, and repudiated, so far as possible, by France herself as soon as she began to recover from her delirium. Partisans, writing what they call history, have sought to excuse such acts in various ways, and philosophers have sometimes viewed them leniently, discovering in their remote consequences public benefits proceeding from individual wrong; but I am not aware of any instance where an independent tribunal, constituted to administer justice, has ever given them its sanction, or regarded them otherwise than as acts of mere arbitrary power, without legal justification.

In dealing with the proposition that the Bishops were not the proper parties to present the claim, Mr. Doyle displayed rare powers of argument and gave signal proof of the truth of his own statement, that he had given to this great cause the unwearied investigation of years. He evinced close acquaintance with ecclesiastical and profane history, declared the canon law applicable to the case, showed that the Bishops claimant were the only persons who could properly present the claim, and, in the course of his argument, took occasion to thus tersely restate his case:

Mexico, holding the Pious Fund of California upon trust for the use and benefit of the Catholic Church of California, being both *sovereign* and *trustee*, and having the entire power over the trust, not amenable to any court or tribunal, formally determines to appropriate the whole means and property to her own use, and substitute for it her own obligation to pay interest on the capital at six per cent. per annum, thenceforth. She is both purchaser and seller, fixes the price, the credit and the rate of interest without consulting the *cestui que trust*. The latter is powerless to resist the proceeding. All she can do is to demand performance of the promise which, without her consent, has been substituted for her tangible property. Her chief magistrates, recognized over and over again by Mexico, as representing her in this regard, are here demanding on her behalf the enforcement of the obligation; if they are not the proper parties to do so, it is not easy to see who are. * * * The Bishops represent fairly the numerous body of Christian people over whom their spiritual jurisdiction extends, and would for that reason be competent plaintiffs on behalf of the whole body, even before a court of equity, where technical rules are rigidly enforced. Tribunals like the present, (the joint commission) are not trammeled by such rules, but proceed upon the broad foundation of substantial justice.

Don Manuel Aspiros made an ingenious plea on behalf of his government, showing great learning; but in his reply Mr. Doyle politely revealed its utter fallacy. When he had done with his adversary, the *disjecta membra* of the Mexican lawyer's argument presented a sorry spectacle. Mr. Doyle recovered for his clients, at the end of this long and hard fought fight, nine hundred and six thousand dollars. He was amply rewarded for his great services, being paid a more than princely fee.

Mr. Doyle has strong convictions, is a good friend and an implacable enemy. Of warm impulses, he is yet very arbitrary. He has been a hard

worker through life, and is exact and methodical about everything. He has the truest judgment, is plain and concise in statement, intrepid in assertion and in action. His information is very wide, his memory excellent, he has rich classical stores, is one of the best of Latin scholars, and has a Latin quotation ready for any emergency. Horace is his favorite Latin author; he quotes him *ad libitum*. He has a great turn for mathematics. In diplomacy he would win great distinction. As a negotiator he is the peer of Lloyd Tevis. He negotiated the sale of the San Jose Railroad by Dame and McLaughlin, the builders, to H. M. Newhall, Peter Donahue and C. B. Polhemus. He represented the purchasers, and urged upon them to reduce rates. They declined, but he gave them no peace till they yielded, and they soon saw the wisdom of the policy.

This firm counselor held Peter Donahue's power of attorney, when that gentlemen went East, during the conflict between the two gas companies of San Francisco, now many years ago. He effected a compromise between, and a consolidation of, those companies. A very respectable bill was that which he presented to Mr. Donahue on the latter's return, for he knows how to charge. Mr. Donahue declined to pay the whole of it, and Mr. Doyle would not abate one cent. He did not want to sue Mr. Donahue, and for some time did not know what course to pursue. Learning that an act was about to pass the legislature, granting Mr. Donahue and associates a street railroad franchise in San Francisco, Mr. Doyle hastened to Sacramento, and quietly got an eight hours clause inserted in the proposed measure. A few days later he received a check for his full demand. Then he lost his interest in the eight hours clause, and the bill passed without it.

He handed R. J. Vandewater a large bill, one day, in his (Doyle's) office. Vandewater said it was unreasonable, extortionate, and surprised him—one-half of the charge would be too much. But he would leave it to Mr. Doyle's sense of propriety. He asked Mr. Doyle to sit down and make out a check for whatever sum he thought was just, after having heard his (Vandewater's) protest. "Recollect what I have said, and make out the check, and I will sign it," said Vandewater. Mr. Doyle sat down and made out a check for the full amount of his bill. Vandewater signed it and left the office, to which he never returned.

This bar leader has materially helped many youths, and advised, encouraged and guided them. Many lawyers look back to his office as the place where they first opened their books, and found help in study. He has no patience with stupidity, and when he finds a boy is dull he lets him severely alone. He is very much attracted by brightness and alertness in boys. In this connection may be told a pleasant story, and a true one of the relation once existing between him and a little boy who is now a Colonel in the United States Army. The boy's parents were poor people, living in New

York City. He was a bright lad employed in a lawyer's office. Mr. Doyle took a fancy to him and brought him to San Francisco at his own request and that of his parents, and employed him in his office here. Fearing the young man might get beyond his (Mr. Doyle's) control as he grew up, and might fall into bad company, Mr. Doyle exacted a promise on honor that at any time he required it, the lad would return to his parents. Finding better employment for him than in a law office, he got him the situation, and thereafter the young man worked his own way and pushed on by his own merit. After some time Mr. Doyle thought his young friend was getting on too fast (wherein he may have done him injustice) and reclaimed his promise to go back to New York. The latter begged hard to be released from his obligation, but Mr. Doyle said: "You gave me your honor, my son: I expect you to keep your word." The boy was only about fourteen, but he was made of the right stuff, and he answered, "I'll keep my word, sir." He went to his parents. Subsequently he returned to this State on his own responsibility, and shaped his own fortunes. What he owed and owes to Mr. Doyle were the opportunity of first coming to the region of his prosperity, and the good will and friendship which Mr. Doyle has ever since felt for him. Reference is here made to Colonel C. P. Eagan, U. S. A.

Mr. Doyle is a capital diner-out; indeed, in that delectable role, he would not suffer eclipse in the presence of Sam Ward himself. There his wit sparkles and his information pours continuous. His stories and his sallies are entirely free from blasphemy, vulgarity, or slang. Social, but not much given to club life, he likes a fine dinner, is an excellent judge of wine, and is very hospitable. He has a keen appreciation of the very best in everything. His library is a wonderful repository of varied lore. In the rarity and beauty as well as the value of its volumes, it has few parallels. Of course, he loves Shakespeare; he has every edition of the master's works. His "Don Quixote" is a marvel, too; he has the text of one of the best editions, bound up with the illustrations of *all* the editions, and the work is so skillfully done as to suggest but one original and complete book.

His father, having the most absolute confidence in his integrity and ability, left his entire estate to him by will. He (John T.) called the natural heirs together, and said he should hold the estate in trust, and make an equal distribution, which he did. In association with his father, Governor Haight, Eugene Casserly, and others, he bought the Pulgas rancho and sold it in small parcels. He straightened out the title, laid out Menlo Park, and built a fine residence there. He married, in New York City, about 1856, Miss Pons, a French lady, a native of Lyons. The lady is living, and there are five sons and three daughters—all of whom speak French as fluently as their mother—if I said as fluently as their father, it would be the same. Mr. Doyle is very strong in his family ties—perhaps a more intelligent and happy

family group cannot be found than his. He has one brother, already mentioned, and a sister—the widow of Eugene Casserly. At the age of sixty-seven years, with an estate worth half a million dollars, he still holds to the work of his life, and comes to San Francisco every other day from his home at Menlo Park. There he has a lovely villa, with some 400 acres of rich land. A few years ago he bought a vineyard near Mountain View, Santa Clara County, and has been making the finest wine in the State, as the sales in the market attest. He also planted 150 acres more with the choicest cuttings. He superintends his vineyards personally. His main object in this industry is to lengthen his own life, to give to his boys healthful employment while he survives, and to leave them a noble heritage.

CHAPTER XII.

Alexander Campbell—A Reputation Early Won at the Brooklyn Bar—District Attorney of King's County, New York—Another California Pioneer—Peculiar Controversy Over the Office of County Judge in San Francisco—A Dejected Grand Jury—References to Some Celebrated Cases—His Address in the Fair Murder Trial—Personal and Professional Traits.

I come to one who long enjoyed the distinction of being the first criminal lawyer at the San Francisco bar. In the public mind he was associated with criminal trials, and it is true that he had shown himself at his best in that role; but this was because he had more business, and, therefore, more opportunity, in that department of law. Of course a lawyer, even of the first class, cannot always, nor often, control the course or character of his professional work. The people have much to do with deciding whether a lawyer must confine himself to a special line of cases. As was observed of McAllister, they frequently persist in assigning a lawyer to a specialty, when he has none. An advocate may, and often does, at the outset of his career, by a masterly effort, establish a local reputation for special aptitude and ability in a particular line, when he is really entitled to a more catholic judgment, a broader fame. He will inevitably become involved with his cause, and the more close his devotion to any cause, the more apt is he to be assigned to the class to which such cause belongs. If he signalize his entry upon the active duties of his profession, by a powerful prosecution or a brilliant defense of a great criminal, he will win the reputation of a criminal lawyer, and will be fortunate if afterwards he can build up and wield a general practice; while if it be a great land case that shall disclose the riches of his intellect and the stores of his erudition, he will probably do a land business, if not a "land office business," the remainder of his life. But those whose lots are cast in sparsely settled communities, where the division of labor is never strongly marked, are not so affected.

It is not by his own preference that ex-Judge Campbell has devoted most of his time to criminal practice. It is distasteful to him to be assigned to any specialty. He loves the law in its integrity, and disclaims having special fitness for any particular branch. It is not strange, however, that having been called, in very early manhood, to be the public prosecutor in the

great center of American life, criminal practice should thereafter engage his principal attention.

Alexander Campbell was born in Jamaica in the year 1820. That beautiful little island has been the birthplace of a number of great men. There was born Sir James Scarlett, Lord Abinger (1769–1844), represented as one of the most popular and prosperous advocates of his day; who enjoyed for many years, in London, a practice of £10,000 per annum. He was Solicitor General (1829) and Chief Baron of the Exchequer (1834). There was born Robert Charles Dallas (1754--1824), a British author, an extensive writer on history, natural history, biography and fiction. He was once the warm friend of Byron, but the two came to disagree. There, too, was born the brother of the last named, Alexander James Dallas, father of George Mifflin Dallas, Vice President of the United States during the Mexican war. He became one of the most distinguished of American lawyers. He was born the same year with "Bobby" Burns, and died in 1817. He was Secretary of the Treasury. His law reports are the oldest in the United States except Kirby's. Lord Mansfield declared them to be "creditable to the court, the bar and the reporter." This Dallas drew up the marriage contract between Jerome Bonaparte and Miss Patterson, of Baltimore, in 1803.

Mr. Campbell's father was a Scotchman, as was the father of Robert and A. J. Dallas, and was a planter in Jamaica. Upon the abolition of slavery in the island, he removed with his family to Canada. He sent Alexander to England, and gave him what is sometimes called here a grammar school education. The young man went to Brooklyn, New York, when he was sixteen years old. The oft-used expression "architect of his own fortune," may be applied to him, if to anybody—which I sometimes doubt. He did not inherit a dollar. Not to dwell upon his youthful struggles, he is found honestly and earnestly acquiring a knowledge of law. At his majority he is admitted to practice, and for some years follows his profession successfully, attracting the notice of his seniors by his correct judgment, and his lucid, impressive method of argument. Before he is 30 years old he has been City Attorney of Brooklyn, and District Attorney of King's County. In the latter office he has won a reputation for being an indefatigable, sometimes a fierce, prosecutor of public offenders, whether they operated singly or in bands, cliques or rings.

Mr. Campbell first came to San Francisco in August, 1849. He had been practising at the bar a little over a year when he became County Judge in a novel way, or rather at the end of a novel legal controversy. William H. Clark, another pioneer, was regularly elected County Judge at an election appointed by law. On the very day of the election, while the voting was in progress, the legislature, then sitting, passed a law repealing the act under which the election was being held, and conferred upon the Governor the

power to appoint a County Judge. The Governor approved this repealing act *on the same day*, and a few days thereafter appointed Alexander Campbell County Judge. A conflict arose between Messrs. Clark and Campbell, which was carried before the Fourth District Court by *quo warranto*, and thence on appeal to the Supreme Court, resulting in a triumph for Campbell; it being held that the repealing act took effect *on the day of the election* and before the voting terminated, and that the election was therefore void. The decision of the Supreme Court in this case was rendered by Judge S. C. Hastings, Judge Lyons concurring. There were only three members of the court at that day. Judge Bennett, the remaining member, expressed his dissent, declaring that the repealing act did not take place until the day after the election, and that, therefore, the result of the election could not be disturbed by the legislative enactment. It was agreed that the repealing act took effect from and after its passage. Judges Hastings and Lyons held that it took effect the very moment the Governor signed it. Judge Bennett held that an act taking effect from and after its passage, does not become operative until the next day after its passage. (First Cal. Reports, 406).

By virtue of his position as County Judge, Judge Campbell was Presiding Justice of the Court of Sessions, which tribunal was composed of the County Judge and two Justices of the Peace as Associate Justices. While the Court of Sessions was sitting one day—present, Alexander Campbell, presiding Judge, and Edward McGowan, associate—an event occurred which probably has no parallel in legal annals. It was the ninth day of September, 1851. The grand jury came into court, and through their foreman, presented and read a written request to be discharged, on the ground that the executive, Gov. McDougal, had pardoned "a certain criminal, a notorious enemy of peaceable men." The court refused to discharge the jury. Judge Campbell remarked that if the jury were to be discharged upon the ground set forth in their report, the court could not refuse, if requested, to discharge the next grand jury; and the next; and not only that, but every officer of the law might, with the same propriety, desert his post and abandon his duties, and so leave the country in anarchy. The grand jurors, having relieved themselves in some measure, returned to their duties.

Judge Campbell resigned his seat on the bench about six months before the expiration of his term, and was succeeded by Judge T. W. Freelon. He resumed law practice, which he pursued until the organization of the Vigilance Committee of 1856, when, as Dickens said of London, in describing the religious riots, "the city rose like a great ocean." On account of his opposition to that organization, he withdrew to the Sandwich Islands, for a year. He returned and resumed practice in 1857. From that time until 1881, when he again removed from the city, he was a conspicuous figure at the metropolitan bar.

It is pleasant to see a lawyer now and then break the monotony of his professional life by touching other fields—as those of literature and science. But Judge Campbell has never done this. He has never employed his pen to probe any theme; he has never spoken on any subject but law, with a single exception, when he appeared on the lecture platform in Oakland for the benefit of a religious organization. He is a great reader of miscellany, doing his reading at night. Walter Scott is his favorite author.

He is not a hard worker, nor a close student. He funded in early manhood a large store of information—legal and miscellaneous—a store which always honors his drafts. Of course, like any lawyer worthy of the name, he keeps himself well posted on the Supreme Court decisions, but that is about all the regular legal reading he does. It cannot be said that he ever neglects his case, but he relies chiefly on his native tact and the abundant resources of his mind. He has also, as was said of Burke, great "resources of countenance."

Among the more noticeable of the cases in which he has been engaged, may be mentioned the Black will case; the Harry Byrne will case, in which Matilda Heron was the contestant; the impeachment of Judge Hardy, 1862; the breach of promise case of Clark vs. Reese; the case of the People vs. Clark; the two trials of the Brotherton brothers, for forgery; and the two trials of Laura D. Fair for the murder of A. P. Crittenden; the case of Kalloch, indicted for the murder of Charles De Young of the San Francisco *Chronicle*; and the case of Spreckles, indicted for assault to murder M. H. DeYoung, surviving proprietor of the same paper.

The case of Clark vs. Reese was brought by a widow against, perhaps, the then richest man in the State. Campbell represented the plaintiff, and McAllister the defendant. Campbell managed it superbly, fighting at a great disadvantage. He made a fine argument, and gave McAllister a surprise he had not before experienced. The defendant, refusing to answer certain questions, Campbell moved for judgment against him for the whole amount sued for—$100,000—and pressed his motion with ability and persistence. McAllister was compelled to ask an adjournment, which was granted him. The next day Reese answered the questions. The plaintiff recovered judgment for $6,000, which was paid. Judge Campbell's fee was $1,500. He was called into the case by John Lord Love, who was attorney of record, and who received a similar amount. The plaintiff got the residuum—$3,000. She and her lawyers reversed Napoleon's maxim, "Divide and conquer;" they conquered and divided.

The case of the People against Captain Clark, of the ship Sunrise, was tried in the United States Circuit Court before Judges Sawyer and Hoffman in 1873. The defendant was charged with cruelty to his seamen. Some of his crew told harrowing tales. Great excitement pre-

vailed in the community. The proprietors of a San Francisco journal engaged General Barnes as special counsel to assist the United States District Attorney; Judge Campbell and Milton Andros defended. Judge Campbell's speech to the jury was published at the time. It shows what a brilliant advocate can say for a bad cause. The defendant was convicted, but the argument of his chief counsel was the most ingenious and powerful I have ever heard at the criminal bar, except that of the same advocate on the trial of Mrs. Fair. The case referred to of the Brotherton brothers was the most important forgery trial that ever occurred in California.

The Fair murder case has been touched in the chapter on Byrne. Laura D. Fair, a lawyer's widow, was twice tried in San Francisco on an indictment for the murder of a leading member of the bar—A. P. Crittenden. On the first trial, in 1871, Harry H. Byrne was District Attorney, and Elisha Cook and Leander Quint appeared for the defendant. The latter was convicted of murder in the first degree, and was sentenced to be hanged. She secured a new trial, and on the second trial, in 1872, D. J. Murphy was District Attorney, while N. Greene Curtis and Leander Quint represented the defendant. Between the two trials, Byrne on the one side, and Cook on the other—two of the best minds at the bar—had died. On both trials Alexander Campbell assisted the District Attorney in the prosecution. His speech to the jury on the first trial was reported *verbatim*, with all the proceedings, and published in pamphlet. This speech is worthy of study by the law student. It is in Campbell's best vein; is bold, argumentative, manly and powerful; shorter than any other of the four speeches in the case, but just long enough, and delivered, as is his custom, without notes. His fame as an advocate will rest chiefly upon this effort. It does not contain a single quotation from poetry or prose. It is entirely divested of foreign ornament, but in itself is polished, symmetrical, complete. It is distinguished for its impassioned invective against free love, its skillful analysis of the character of the defendant, and its dreadful anathemas upon her plea of insanity, which he declared to be "a defense shameless, disgraceful, and destitute of any element which could commend it to the heart or judgment of any honest man."

This veteran advocate is a man of lightning perceptions—courageous, forcible, impressive, apt at citation, plausible in his theories, clear and strong in thought and voice, and animated in delivery. He finds attentive hearers in his juries. He gives no thought to the arts and tricks of practised speakers. Seneca's precept seems to be ever before him—"Fit words are better than fine ones." Very rarely does he turn aside from the realm of reason to the domain of feeling, yet can he, and sometimes does, touch with rare skill, the chords of sympathy, and sound the depths of the soul. More than once have I seen warmth, earnestness and power breathe about him, as he poured

forth a copious flow of that clear language which has been well said "to spring spontaneously from definite and precise ideas." Before a jury his movements and gesticulation are unrestrained; his voice pleasant, yet not musical, and his expression clear and condensed. He is the most unaffected of men. No man has less vanity. He never courts the reporters—never, by glance or movement, does he betray a consciousness that he is observed. Always confident and intrepid, but not reckless, "he looks forward to a coming argument as to a delightful pastime"—as Sheil said of O'Connell.

It is recorded that the famous John Sergeant of Philadelphia, in addressing a jury, seemed to take the jury into his confidence, and to ask their confidence in return. One of his competitors said that Sergeant "virtually got into the jury box, and took part, as it were, in the decision of his own case." I have seen Alexander Campbell do this. He virtually shakes hands with each juror. But this habit of "getting into the jury box" is more successful when done "virtually"—in another word metaphorically—than when done in physical reality. Hon. W. W. Foote, since Railroad Commissioner, once put himself into the jury box in San Francisco—not "virtually" or metaphorically, but actually—and this is what became of him, as very cleverly reported at the time. It occurred during the trial of the widely renowned Jimmy Hope for burglary, in the Superior Court, T. W. Freelon, Judge.

Mr. Foote, in speaking for the defense, had not proceeded far before he was reminded by the court that he was transgressing a court rule. "How so?" he asked in surprise. "You are standing inside the jury box," replied his honor. "And I claim I have a right to stand anywhere I want to," rejoined the attorney. "But my order is that you cannot," came next from the court. "I must be near the jury. I cannot talk unless I am," the lawyer persisted. Then said the Judge, "There is a place for the court; the clerk and bailiff have their places, the counsel theirs, and the jury its place. That is my rule, and I must see it observed, in this case, as in all others." "But, your honor, so long as I have no means of harming the jury, and my intentions are honorable——" "I can make no exception," said the court, sternly. "But I except! We except, your honor!" shouted Mr. Foote, triumphantly, and a glad light stole into his eyes at the thought that there remained yet another chance to except, even after his argument was begun. But he had to stay outside the rail? Yes.

Alexander Campbell, Henry Edgerton and William Higby were counsel for the State on the impeachment trial of District Judge James H. Hardy, in 1862. The accused was removed from office. At the next session an act was passed, under which the counsel named were paid one thousand dollars each. A few years later Campbell and Hardy were associated as counsel for the defendant in an important criminal case.

In 1881, Judge Campbell removed to Arizona, where he soon put him-

self at the head of the bar, and disabused the popular mind of the idea that he was a legal specialist. After five years in that region, he came back over the California line, and settled at Los Angeles. He has been for many years the regular counsel of the proprietors of the San Francisco *Chronicle*, and that continued engagement has caused his conspicuous reappearance in the metropolitan courts from time to time. He is married and has two grown sons in San Francisco, one of whom follows his profession and bears his name, as was observed of Judge Heydenfeldt.

CHAPTER XIII.

A Chapter of Pleasantries—Wit and Humor of Bench and Bar—Sallies of Judge E. D. Wheeler—Judge Stanly's Order to "Burn That Petition"—An Elaborate Conundrum—Characteristic Conduct of a Jury of Lawyers—A Constable With More Pomp Than Discretion—Anecdotes and Recollections of Ogden Hoffman, A. P. Van Duzer, Solomon A. Sharp, J. B. Townsend, M. C. Blake, William M. Zabriskie, C. T. Ryland, Joshua W. Redman, William Daniels, J. B. Murdock, and Others.

The law is reckoned a stern science; and it is certainly such to those attorneys who have not much to do. It is found to be tolerable by those whose tables are covered with fresh briefs of their own. Its jealousy, however, is proverbial. It has been called "an accumulating science" and those lawyers "accumulate" most who most propitiate it. It settles estates, dispenses fortunes, treats domestic woes, personal grievances, secures or denies individual liberty, affirms contracts, punishes crimes, upholds honor, protects life, sanctions death. But notwithstanding its solemn offices, it puts no mournful impress upon the hearts of its votaries—its humblest servants or its proudest embassadors. The average lawyer is a man of good cheer. When his aspect is grave his heart is light. Often, on the trial of a weighty cause, the shafts of wit will fly, not alone between counsel, but between counsel and the bench. It would seem strange that a court-room could be the scene of merriment, considering the serious nature of the business there transacted. The fact is, however, that more genuine wit has been heard, more hearty laughter has been evoked, in crowded courts than in club rooms, dining halls or legislative assemblies. We like to laugh at the blunders of others, and the more solemn the occasion the more ludicrous appears the blunder. The court-room is pre-eminently the place for such things. It is either a witness, a juror, a clerk, a bailiff, a lawyer, or the judge himself—sometimes several of them together—to whom the mishap is due.

"Go and get me 5th Howard," said a distinguished San Francisco counselor one day in 1865, in the Fourth District Court. He was "distinguished" hardly more for his ability than for his eccentricity, and he stopped in his argument to address these words to his clerk. He wanted the case of Nevitt vs. Natchez Steam Packet Company, reported in 5th Howard's Mississippi Reports, page 196; but he simply told his clerk to "get 5th

Howard." Now, there are Howard's Mississippi Reports, Howard's New York Practice Reports, and Howard's United States Supreme Court Reports; and the clerk, when he had rushed, out of breath, into his employer's library, soon found on the shelf one 5th Howard, and clutching it hastily, returned to the court. But it was not Howard's Mississippi; it was a New York Howard. Taking the book from his clerk's hands, the counselor, bending over his memoranda, observed: "Your Honor, I will now read you the case of Nevitt vs. Natchez Steam Packet Company, reported in 5th Howard's Mississippi, page 196." Then he slowly opened his book, and turned to the page. Instead of being the case of Nevitt vs. Natchez Steam Packet Company, it was Hernstein vs. Matthewson. Looking at the cover, he found it was a New York Report. "Your Honor," he said, "I sent my clerk for the authority I wanted, telling him distinctly it was 5th Howard's Mississippi, and he has brought me 5th Howard's New York Practice. I think he did this mean act with malice aforethought. My experience with law clerks is that they are fit for nothing but to draw their salaries and eat free lunches." He took a breath of relief, and proceeded with his argument, the court having made a note of the absent book.

The late Solomon A. Sharp, once State Senator, and who held other high honors in San Francisco at various times, and who enjoyed a fortune for many years before his death, was not noted for his alertness of movement. He was also inclined to procrastination, being seldom ready to try a cause until after several postponements. One day, in the Nineteenth District Court, Judge E. D. Wheeler presiding (I coupled these names on page 85), a cause, in which Mr. Sharp was for the defendant, was called for trial, and Mr. Sharp astounded the attorneys present, and especially the plaintiff's counsel, by promptly responding "Ready." He was eager for the fray that time, although the case had never been reached for trial before. This was something the plaintiff's counsel had not anticipated. That unhappy man urged a postponement as persistently as he could, but having no legal ground, he did not say anything to the point. Mr. Sharp insisted on a trial, saying his witnesses were in court, and he called attention to the fact that no legal excuse was presented by the other side for not being ready. Then Judge Wheeler came to the relief of the plaintiff's attorney: "Mr. Sharp, I never knew you to be ready before. The plaintiff's counsel could not have foreseen this exigency. You have taken him, as well as the court, by surprise. Let the trial be postponed for ten days." There was a general laugh, but Mr. Sharp declined to even smile until he got outside the court-room.

Judge Wheeler said many good things on the bench. His humor, which was of the quiet order, would peep out in his most important opinions. It was really entertaining to listen to him when he rendered a decision. In nine cases out of ten these were oral, and in many instances were delivered

without notes. They were certainly models in style, and manner of their rendition. He had all the facts in his memory, and weighed them calmly. His intonation was that of conversation in an assembly of friends. The mirth with which they were usually touched did not detract at all from their gravity, because introduced in happy illustration. It, of course, greatly heightened the pleasure of the listener. No judge whom I have ever heard render an oral opinion, not even Hoffman or McKinstry, was more lucid in exposition than Judge Wheeler.

"Gentlemen of the bar," said this judge on taking the bench one motion day, "only short arguments will be heard; motions will 'go over' very easily this morning. I want to 'go over' myself."

Judge J. B. Townsend, who had been practicing at this bar for thirty years, and who, while being recognized as an able lawyer, had, strange to say, very slow movements of mind, appeared before Judge Wheeler one motion day, and the motion calender being called, ten were answered ready. Usually, ten "ready" motions can be disposed of in one or two hours. But Judge Townsend had the first motion, and another "slow coach" was the opposing counsel. Some of the attorneys who had other motions began to leave the chamber.

"Are you ready, Judge Townsend?" Judge Wheeler inquired.

"Yes, your Honor," said Judge Townsend slowly.

"No other motion will be taken up to-day," Judge Wheeler remarked, and settled himself in his chair, the picture of resignation, or, like "patience on a monument, smiling at grief."

In the month of August, 1868, one Alfred Moulin was indicted by the grand jury of this city and county on nine indictments for libel, the parties defamed being Ogden Hoffman, Stephen J. Field, Delos Lake, Robert F. Morrison, Hall McAllister, George C. Gorham, George E. Whitney, Andrew B. Forbes and William F. Babcock. Now these are no diminutive names, it will be agreed. Moulin was a "crank," and the history of his long and strange experience in our state and federal courts, in admiralty, in criminal libel, in contempt, etc., would make quite a book. The nine indictments against him, for some unexplained reason, lay pigeonholed for nearly three years, the accused being on $9,000 bail, when, on July 10, 1871, he appeared in the County Court, and made motions for the dismissal of all the indictments. In support of his motions he held in his hand a printed petition of formidable proportions, which, not being vain of his elocutionary powers, he requested the clerk to read. The clerk read:

To the Hon. John A. Stanly, Judge of the County Court in and for the City and County of San Francisco. The People of the State of California, plaintiffs, vs. Alfred Moulin, defendant. On nine indictments for libel. Petition and complaint. Your petitioner, Alfred Moulin, being duly sworn, respectfully represents: That he is the

defendant in the above entitled cases, and that he is and has been a resident of this city and county for the period of twelve years last past. That on or about the 28th day of August, 1868, Ogden Hoffman, Stephen J. Field, Delos Lake, Robert F. Morrison, Hall McAllister, George C. Gorham, George E. Whitney, Andrew B. Forbes, William F. Babcock, Henry H. Byrne, John Middleton and others, willfully, wrongfully, maliciously—

The Judge interrupted and said: "This is sufficient, Mr. Clerk. Burn that petition, and enter an order that the motion is denied, because the petition is couched in terms disrespectful to, and contemptuous of, the court and its officers."

The clerk obeyed promptly, tearing the petition into slips and throwing them into the stove.

In the United States Circuit Court, before Judges Sawyer and Hoffman and a jury, in 1873, in the course of the trial of Captain Clarke of the "Sunrise," for cruelty to sailors, the defense called a seaman to testify to the Captain's reputation for kindness and humanity. On cross-examination by General W. H. L. Barnes, the following was elicted:

"Did you ever hear Captain Clarke's reputation for kindness and humanity talked about on the Mary Bently? (A former vessel of Clarke's.)

"Yes."

"Whom did you hear talk about it?"

"Well, Tom, for one."

"Who was Tom?"

"A sailor. Don't know his full name."

"Did you hear anybody else talk about it?"

"Yes."

"Whom?"

"All the sailors."

"What did they say?"

"When I used to take them grub."

"What did they say?"

"They said it was good."

"What was good?"

"The grub."

Joseph Smith was arraigned at the opening of the term of the Municipal Criminal Court, San Francisco, November, 1872, on an indictment for burglary. Having no counsel, the court tendered him the services of Mr. Charles Aiken, which were accepted. When the case was called for trial, December 6, 1872, George W. Tyler appeared for the prisoner. Mr. Aiken addressed the court at some length upon the situation, concluding with this elaborate conundrum: "Can an impecunious prisoner, who has counsel appointed for him by the court, and who afterwards comes into possession of funds, throw off on the lawyer who was ready to defend him for nothing, and secure the

services of another by the payment of a comfortable fee?" An affirmative response from Judge Blake caused the counsel to withdraw, and Mr. Tyler started in to earn his "comfortable fee."

That is one of the ways in which the rights of American citizens are trifled with in this part of the country.

In the last named court, July 19, 1873, the case of a certain prisoner being called, and no response being made, the court said:

"Are the parties ready?"

"I am ready, your honor," said the Assistant District Attorney.

After a moment's silence the prisoner arose in the dock and said, "I am not ready, your honor. My best witness is out of the city, but will be here in a few weeks."

"Have you a lawyer?" inquired the Judge.

"Yes, your honor."

"Who is he?"

"Mr. Aiken," (above mentioned).

"Then you had better let Mr. Aiken speak for you," suggested the Judge.

Thereupon that counselor arose slowly and said, finely: "Your honor, I was appointed by the court to defend this man, but I have maintained silence to see if some 'shyster' would not claim the case. None having done so, I suppose the prisoner has no money, and that I will really have to defend him." The trial was then commenced.

In the San Francisco Police Court, August 28, 1869, a prisoner on trial for vagrancy introduced in defense a lawyer, who, among other things, testified that he had been counsel for the accused in establishing the latter's right to an estate in the Probate Court. He said that when he took hold of the estate it was worth $1,600. He was asked how much the estate was worth when he got through with it. The question was objected to as being impertinent, and the objection was sustained.

In the Justice's Court, at San Francisco, 1866, the Justice being Mr. Alfred Barstow, since associated in law practice with Hon. A. L. Rhodes, ex-Chief Justice of the Supreme Court, an Irish woman brought suit against a wealthy man to recover a small sum alleged to be due for washing clothes. A jury being demanded by the defendant, it was agreed between counsel that the constable (Samuel C. Harding) should summon the jurors from the bystanders. The constable accordingly summoned his men from those in and about the court-room, and it so happened that every man cited was a lawyer. The return of the constable showed service upon D. J. Murphy, Samuel Platt, George J. Wight, Judson Haycock, Wm. M. Zabriskie and others, all lawyers. The legal aspect of the jury being discovered and alluded to by counsel for plaintiff, it was agreed by counsel for both parties that the jury

—the first twelve called—should be accepted, and each juror was pleased to waive his rights, feeling himself to be in familiar, if not good company. On the close of the examination of the first witness, who was the plaintiff herself, Mr. Zabriskie, who was a prominent criminal lawyer and foreman of the jury, took the witness in hand, and put about twenty questions to her, consuming some twelve or fifteen minutes. Then the legal juror next to Zabriskie imitated his example, and took nearly as much time. The other jurors in turn followed suit, until the poor woman had been exhaustively examined by twelve jurors, and two hours had been consumed. Another witness was called, and when the counsel in the case had got through with him, the impatient woman looked at her attorney and the jury with a look of appeal, but the relentless Zabriskie soon dashed her hopes by putting a hypothetical question, and as he awaited an answer he ran his fingers through his hair, pushed up his coat sleeve some inches, disclosing his immaculate cuffs, and by his manner generally betrayed the utmost satisfaction with the situation, and his indifference to the lapse of time. Then, as that and the next two questions were being put and answered, there was a whispered and somewhat excited conversation between the plaintiff and her counsel. Soon the latter arose, interrupted Mr. Zabriskie's examination, and abruptly spoiled the programme of the legal conspirators on the jury—thus:

"Your honor," said he, "as the defendant has employed able counsel and brought several witnesses into court to resist the plaintiff's demand, I have sent for additional witnesses myself, whose appearance I first thought unnecessary. I have seven witnesses altogether, and the defense may have as many. I make no objection to the jurors putting questions to the witnesses, but I do not think it is 'in accordance with the eternal fitness of things' to pursue such a course on this trial. Our demand is just but very small, and we have concluded to make the defendant a present of it rather than suffer the penalty of sitting here and seeing fourteen witnesses examined at the rate of three a day. Your honor will please dismiss the case at plaintiff's cost. I will pay the jury's fees out of my own pocket." As the plaintiff left the court-room precipitately the Justice said, "The case is dismissed." The plaintiff's counsel stepped up to the jurors to pay their fees, and said: "Haven't you fellows any better business talent?" The jurors accepted the two dollars each, and sent the total to the plaintiff, who thus, out of her lawyer's money, came within one dollar of "getting even."

A certain "small farmer" near the town of Sonora woke up one fine morning, and found that the grass had been cut from an inclosed plot during the night. Going into town, he found some freshly cut grass in front of a hay dealer's premises, and had the hay dealer prosecuted for larceny. The accused, on his examination before the Justice of the Peace, showed that he

was on a ranch ten miles off when the grass was stolen. His counsel asked for his discharge.

"Go slow," replied the Justice. "Let him first show who did steal it."

"Your honor," said the counsel, "I will effect my client's release by habeas corpus. I never could get justice in this court."

"No, sir," replied the Justice. "You never shall have justice in this court, while I am here."

In the Municipal Criminal Court, San Francisco, February 21st, 1873 (the Judge being M. C. Blake, who was Mayor ten years later), W. D. Sawyer, counsel for John E. Dunn, convicted of robbery, and arraigned for sentence, asked a postponement of sentence, to enable him to prepare an argument on a motion to vacate the verdict. He remarked, incidentally, that every one was presumed to know the law, but this was a fiction; it was well established that a great many do not know the law, and their ignorance was not their fault. Judge Blake conceded that no one knew the law—not even judges—except those on the Supreme Bench.

Thus will the gravest magistrate sometimes unbend. Judge Blake seemed, in his quiet way, to enjoy it, when the laughter of the lawyers present assured him that he had made a "palpable hit." The prisoner's counsel proceeded, and said something about his client having been neglected and deceived by his friends. District Attorney D. J. Murphy (interrupting): "The counsel cannot seriously hope to have the verdict set aside. He is, no doubt, appealing to time, in the hope of getting his fee in the case. I will not object to indulging him a while longer."

The passing of sentence was postponed for a few days, during which time the fee is thought to have been paid, as the motion to vacate the verdict was not further pressed.

Justice of the Peace Ford, of Martinez, who held that distinguished office at an early day, thought it essential to the dignity of his tribunal that it should be formally opened by constabulary proclamation. On one occasion the constable felt more than usually well, and opened court in these stirring accents: "Hear ye! Hear ye! the Honorable Justice's Court of Martinez is now open, pursuant to adjournment. Everybody will come to order, and everybody, whether they are plaintiffs or defendants, shall have fair play and an equal show!" The Justice called the constable to him, and officially rebuked him. "What do you mean," said he, "by such talk as that? What will become of my business if I give the defendant an equal show with the plaintiff. I am not safe with you here." Thereafter the constable's formula was shorter. Judge Dwinelle, of the old Fifteenth District Court, in whose district was Martinez, more than once told this story on Justice Ford, in presence of the latter, who always insisted however, that it was a base calumny.

In the case of somebody against John H. Moses, tried in the brave days

of old (about 1851) before Justice William Daniels, at San Jose, J. B. Murdock for plaintiff, Wm. T. Wallace (since Attorney General and Chief Justice) for defendant, the plaintiff obtained judgment, an erroneous entry of which led to a tedious complication. As was frequently done at that time in Justices' Courts, the judgment was written up by the attorney for the prevailing party. In this case, Murdock entered judgment against Moses Scott instead of against John H. Moses, his mistake arising from the fact that Moses Scott was a witness on the trial. Wallace discovering the error, informed the Justice that he would be sued for damages if the defendant's property should be sold on execution upon such a judgment. The Justice refused to issue execution, or to correct the judgment. In his despair Murdock concluded to appeal from his own entry. The appeal came before the County Court, Joshua W. Redman, Judge. Murdock had the court against him all the way through, being told that he could not take advantage of his own error. He left the court-room abruptly, with an expression of contempt. The court directed the baliff to call Mr. Murdock back. In another miuute Murdock entered the court-room, and approached the immediate precincts of the judicial presence, with hat against his breast, bowing and smiling, and marveling whether he would be lightly rebuked or heavily fined.

"You seem agitated, Mr. Murdock," said the justice. "I only called you back to remind you that there is an old proverb, which has been made one of the rules of this court. 'If a man burns himself, he may have to sit on the blister.' Good-day, Mr. Murdock."

And Murdock withdrew, with grave mien.

A certain rawbone Jack was once the rawbone of contention (replevin) in San Jose, in the court-room of William Daniels, J. P., an old Englishman, before mentioned, who had settled in that locality A. D. 1846. C. T. Ryland, since a leading banker, but long a prominent lawyer and politician, appeared for plaintiff, and Mr. Sanford, Santa Clara's first District Attorney, a fluent, flowery speaker, and a wit of no mean order, represented the defendant. Sanford was partially deaf. The evidence being all in, Ryland "waived the opening," whereupon, and while Sanford was arranging some papers, the Justice announced judgment for the plaintiff, and the Constable immediately delivered the animal to that party, who rode off upon him. Sanford, not hearing the words of the Justice, and assuming that they referred to Ryland's offer to waive the opening, arose with deliberation to speak. He had proceeded some few minutes, to the great amusement of his opponent, when the Justice stopped him and said:

"Mr. Sanford, there is no use in your arguing the case. I have already given the plaintiff judgment."

Sanford (with that look of disgust which too often is seen on the lawyer's face when subjected to judicial outrage)—"The —— you say!"

"Come to order, sir. Court is about to try another case," said the Justice.

"Is this the truth?" asked Sanford, turning to Ryland.

"Yes; and my man has the mule two miles from here by this time," answered Ryland.

"Well, your honor," said Sanford recovering, "I would bow to your decision, if it were properly amended."

"How is that?" asked the Justice.

"My client," continued Sanford, is fond of the beautiful jackass which has been taken from him. If the plaintiff will return him, I will give him instead an animal of much more positive and prominent qualities in the assinine line—a very jewel of a jackass—that is, with your honor's acquiescence."

"Why should I acquiesce?" asked the Justice again.

"Because," said Sanford, "the jackass that I should deliver, is the astute judge of this court."

A severe fine was promptly imposed, but never paid. The matter was pleasantly adjusted the same day at a bar of a different sort.

A special policeman convicted of assault and battery, in striking a prisoner on the head with his club, not necessarily or in self-defense, appeared before the Police Court, San Francisco, August 29, 1873, to receive sentence. Colonel A. P. Dudley, his counsel, moved for a new trial, on the ground of newly discovered evidence. He made an earnest appeal for the intelligent consideration of the court on behalf of the officer, who, counsel said, had been misrepresented while endeavoring to perform faithfully his arduous and difficult duties. The counsel twisted off into a tirade against the Prosecuting Attorney, who, he said, had hunted down a fellow officer of the law—in this instance with a vindictive spirit. Said the Colonel, concluding: "Well might this excellent policeman exclaim, in the language of great Cæsar, when stabbed by the chief among his supposed friends in front of the Roman Capitol, *Et tu, Brute!*" The Prosecuting Attorney was partially stupefied with astonishment for a moment, and then a cloud of ferocious indignation overcast his classic features, as he sprang to his feet and demanded the protection of the court from such infamous abuse. His honor commanded the Colonel to arise, and show cause why he should not be punished for contempt in stigmatizing an officer of the court as a brute! The culprit was somewhat disconcerted, but managed to stammer out an apology, to the effect that the expression which had given offense was merely a Latin quotation, which he had heard some time in his school days, and was a mild rebuke uttered by Cæsar to his friend Brutus—whom he was accustomed to call Brute, in a jocular strain, for short—when the latter stabbed him in the back. Brutus was an eminent lawyer of old times, and an honorable man, and the compar-

ison conveyed in the quotation which had unfortunately wounded, was not intended to disparage his friend, the Prosecuting Attorney, for whom he entertained the most profound regard. (*sic.*) T. W. Taliaferro arose in support of the offending lawyer, and intimated that he was familiar with the circumstances referred to by Colonel Dudley, and that the remark attributed to Cæsar was merely uttered in the manner of earnest inquiry. It might be literally translated, Who threw that last brick? The court remarked that the explanation was timely, full and satisfactory. The Prosecuting Attorney accepted it as complete, but he expressed his disapproval of the habit indulged in by some lawyers of dragging in *double entendre* quotations from the dead languages This scene was reported at the time, and in reproducing it I have used most of the reporter's words.

"Your honor," said a witness on the stand in the Police Court of San Francisco, August 8, 1873, "the Prosecuting Attorney is trying to confuse me by surrounding my statement with legal vermifuge?"

"I think a little vermifuge will not hurt him, your honor," said the Prosecuting Attorney; "he is evidently trying to worm himself out of a fix," "If the attorney for the people," said the Court, "proposes to step from the domain of law into that of medicine, he will please not ask the court to furnish him with his first patient." "I'm through," said the people's advocate, and the witness left the stand.

In 1853, Colonel James once defended in the San Francisco Court of Sessions—T. W. Freelon, Presiding Judge—a man charged with assault with a deadly weapon. The accused and the person assaulted were both Irishmen. They having been old acquaintances, and their families being neighbors, their friends negotiated a treaty between them, which they ratified. It was agreed that the complaining witness would be as light as possible in his testimony, and the whole prosecution, so far as the witnesses were concerned, was decidedly weak. "Patrick," said Colonel James to the complaining witness, "now, didn't you tell the defendant here before he struck you, that he was a d—— Irish ————?" "Faith," answered Patrick, "and I did not. How could I, when I'm one myself!"

In the early days of San Francisco, Joseph Hetherington shot and killed Dr. Baldwin, on an open lot at North Beach, in a dispute about their rival claims to the land. He escaped conviction, but afterwards, having killed another physician—Dr. Andrew Randall—in the bar-room of the St. Nicholas Hotel, July 24, 1856, he was hanged by the Vigilance Committee one month later. When he was tried for the murder of Dr. Baldwin, Harry Bryne was District Attorney. In his closing speech for the prosecution, Bryne became very animated and severe. He expressed regret that no witness had been found who could give an exact recital of the circumstances and manner of the killing. "O, that Dr. Baldwin were here!" he exclaimed, looking fiercely at

Hetherington. "O that for one hour he could have revival from the grave, and tell us of the deep damnation of his taking off! O that I could call Dr. Baldwin!"

The court bailiff, who was usually half asleep, was roused from his lethargy by Bryne's ringing tones, and catching only the words "call Dr. Baldwin," promptly opened the door, went outside, and cried out: "Dr. Baldwin! Dr. Baldwin! Dr. Baldwin! Come into court!" Then stepping back into the court-room, he announced, "There's no answer!" A solemn stillness pervaded the chamber as the bailiff made this strange invocation to the grave, but when he returned and said, "There's no answer!" the scene presented an aspect so ludicrous that even Bryne, who had been interrupted in the heavy part of his work, had to cast the shadow from his brow, and join in the general glee.

Judge Ogden Hoffman has been on the bench of the United States District Court in San Francisco for *thirty-seven consecutive years!* He is of a distinguished family, son of a great lawyer, has a fine mind, received an excellent education, and, when we consider the length of his judicial tenure and the stirring period in which it has been cast, we see how large a theme the local historian must find in his career. I will only tell now one thing of him, and it will be at the expense of the Hon. A. P. Van Duzer. Mr. Van Duzer was then Assistant United States District Attorney, an efficient man in that place; indeed an efficient man at the bar, as well as a public speaker of no mean powers. Enjoying the respect of his professional brothers, he yet supplies them with amusement, at times, by his peculiarity of speech, manner and habit. Mr. Van Duzer was prosecuting before Judge Hoffman and a jury, a man indicted for selling unstamped matches. He seemed more than usually anxious to convict his man. His voice was loud, his sentences rolled out upon each other in pell-mell succession, his gesture was fierce, his eyes were on fire, his whole aspect inspired fear. Standing on tiptoe, with his right hand lifted on high, and his shirt collar unbuttoned, he reached the climax of his wrath: then, descending, as it were, from the empyrean to the dull earth again, he brought his clenched fist down upon the table with an energy that seemed to come from more than mortal power. The whole jury shuddered. The table cracked, the pyramid of books toppled over, hats were hurled to the floor, and the inkstands emptied their contents, as if in black wrath, into the lap of the defendant.

Just then, Judge Hoffman in a spirit of mercy, interfered. "Mr. Van Duzer, he said, "do you think that your argument has been helped by these extraordinary exploits? If you imagine that *noise* is an element of argument, I wish you would send out and get a Chinese gong; I would prefer to hear that." Mr. Van Duzer said he was through, and the case was given to the jury.

CHAPTER XIV.

Stephen J. Field—A Wonderful Life Story—Vicissitudes and Trials and "Hairbreadth 'Scapes"—Collisions with the Bench—Expulsion from the Bar, and Reinstatement—Extraordinary Scenes in Court and Legislature—Duel with Judge Barbour—Relations with David C. Broderick—Legislative and Judicial Record—Amusing Incidents and Anecdotes, and a Capital Sensation—References to Leading Men of the Past and Present, with A Glance at the Early Marysville Bar.

It pleased my friend, Judge Robert Thompson, of San Francisco, after reading all of the preceding chapters, to say that their interest was heightened by variety of style, no two being alike in this respect. Whether or not the present narrative shall deserve to be included in this judgment, it will be found to signally eclipse all others in crisis and adventure.

The Rev. David D. Field, an eminent New England divine, who died about the year 1862, lived to see five sons attain enviable distinction. These were David Dudley Field, the great bar leader of New York, who is still in his professional harness at the age (in 1887) of eighty-two years; Cyrus West Field, who brought Europe and America to speaking terms with the electric current; Jonathan Field, once president of the Massachusetts State Senate; Stephen Johnson Field, the jurist, and Henry Martyn Field, who like his father, reached eminence in the pulpit, and who, in addition to his clerical duties, has for many years conducted and edited the New York Evangelist.

"One o'er another rose their heads in tiers,
Steps for their father's honorable years."

All of these are living except Jonathan. The stock is Puritan. It will be seen hereafter, however, how entirely exempted is Judge Field from all that is puritanic, using that word in its popular sense.

Judge Field was born in Haddam, Connecticut, November 4, 1816. His grandfathers on both sides were American army officers in the revolution. This reminds me of an expression which fell from a would-be statesman of San Francisco, on the stump, when trying to persuade the people to send him to Congress a second time. Laboring to convey the idea that his ancestors on both sides had fought in the Revolutionary army, he said: "My forefathers fought and bled in the Revolutionary war *on both* sides. They fought at Brandywine on one side, and at Yorktown on the other side." He was not re-elected.

Rev. Dr. Field removed from Connecticut to Massachusetts and settled at Stockbridge, when his son Stephen was but three years old. Ten years later, Stephen accepted an invitation from Rev. Mr. Brewer and wife,

missionaries to the Levant, to go with them to the scene of their future labors. Mrs. Brewer was his sister, and her invitation being emphasized by the advice of his father and his eldest brother, he sailed with the missionary couple December 10, 1829, and arrived at Smyrna, February 5, 1829. He was abroad two and a half years, passing his time at Smyrna, Athens and other famous cities which had survived buried empires, visiting also the islands of the Grecian Archipelago. He acquired the modern Greek, and a fair knowledge of the French, Italian and Turkish tongues. His brother David had advised him to this course with a view to seeking a chair in an American university as Professor of Oriental Languages and Literature. He was in Smyrna when the city was visited by a fearful plague in 1831. In the fall of that year the cholera came upon the city. Mr. Brewer displayed signal courage and devotion in that trying period, going all over the place, visiting the sick, giving spiritual consolation and also the material help of medicines with which he kept his pockets filled. Young Stephen followed him wherever he went, also a medicine bearer.

Having been thrown in contact while abroad with people of many religious creeds and faiths, all of which presented to his eye evidences of sincerity in belief, as well as of humanity and true devotion, the boy returned home with his hold upon Puritanism entirely loosened. He had been taught, for so his parents thoroughly believed, that the New England Puritans had the only true religion. He now concluded that there was other food for the soul, and ever since, his early conclusion being strengthened by mature reflection, he has shown a lofty tolerance in religious matters. In tracing his career and noting the exceptional activity, courage and persistence which marked it, it would seem proper to call him a greater man, if not a greater lawyer, than his eminent elder brother. He has struggled against greater disadvantages, he has overcome more stupendous obstacles, he has accomplished more difficult undertakings, he has risen to a more enduring fame.

Entering Williams College in 1833, he won the highest honors, delivering the Greek oration in the junior exhibition, and the valedictory, upon his graduation in 1837. In the following spring he became a law student in his brother David's office in New York City. He was admitted to practice in 1841—the period of his study in law having been broken for a time by his service as a teacher in the Albany Female Academy. Even there he improved his spare moments and obtained assistance in his law studies from his brother's friend, John Van Buren, then Attorney General. As soon as admitted to the bar his brother received him as a partner, and they had a cordial business and brotherly union of seven years.

When the Mexican war broke out, David Dudley Field strongly advised his young brother to go to California. He, David, had made himself familiar

with the geography and even the political history of the Pacific coast, and had contributed to the *Democratic Review* two articles on the "Oregon Question." [See *Democratic Review* for June, 1845, and November of that year.] In conversation with his brother Stephen about the probable results of the war, he said: "If I were a young man I would go to San Francisco. I am satisfied that peace will never be concluded without our acquiring San Francisco harbor, and I believe a great city will spring up there." He was not aware, probably, that the foremost man of the nation (in political power), the President of the United States, was of the same opinion. I had it from Charles T. Botts, who came here from Virginia in 1849, and who had, before coming, an interview with President Polk, that the President declared privately that he would not consent to any treaty of peace between the United States and Mexico, and that all the influence of his high office would be exerted against a peace, unless it was a peace that gave us California.

Impressed, as he always was, with his brother's advice, the young lawyer determined to first make a visit to Europe. So, dissolving the partnership, he crossed the Atlantic in June, 1848. In December of that year in Paris, he heard of the discovery of gold in California. This country had come under the American flag. He at once concluded to visit it, but remained in Europe, sightseeing, for about nine months, then returned to New York. It was now October 1, 1849, and six weeks later he sailed for California by the way of Panama. He arrived in San Francisco December 28, 1849, just in time to be a pioneer. He got into lodgings with three dollars left him, two of which he was compelled to part with the next morning for the cheapest breakfast he could order.

He was buoyant in spirit, although out of money and in a new land, far distant from his home and kindred. The day was beautiful—in very midwinter—the air was exhilarating, everybody was active and happy, and the common salutation was, "What a glorious country!" Passing along Clay street, when near Kearny, he noticed a sign with very large letters, "Jonathan D. Stevenson. Gold Dust Bought and Sold Here." "Hello, here is good luck!" he thought. His brother David had given him a promissory note which he held against Col. Stevenson for $350, stating that he understood the Colonel had become rich in California, and if this were true, to ask him to pay the note. Taking the piece of paper from his otherwise empty pocketbook, he entered the place where gold dust was bought and sold. He was recognized and cordially received. In talking about the "glorious country," the Colonel let fall the welcome information that he had made $200,000. The note was presented and paid with interest in full—$440. [Colonel Stevenson is still living in San Francisco, active and in good health, practicing law. After many sweeping reverses of fortune, he is again well to do. He is eighty-eight years old.]

Hiring a room, about 15x20, at the corner of Montgomery and Clay streets, our resolute pioneer put up his shingle. It cost him $300, the bulk of his little capital, to pay one month's rent. This was money thrown away. He received no client callers, except one man, who paid him eight dollars for drawing a deed. He tells us that, in fact, he was in no frame of mind for business, being so excited by the stirring life around him that he passed most of his time on the streets and in saloons, listening to the stories of people from the mines. San Francisco was given a short trial. In less than three weeks from the time he landed here the young lawyer took the steamboat for Sacramento. His objective point was the new town of Vernon, a little further up the river, at which point he had been advised to enter upon an active practice of law by Simmons, Hutchinson & Co., of San Francisco, to which firm he had brought letters of introduction. Finding that Vernon consisted of a single shanty surrounded by a vast expanse of water—the country was then flooded—he pushed on to Nye's Ranch, near the mouth of the Feather river. There he found a bustling camp of several hundred men, and concluded to pitch his tent. An auctioneer was selling town lots. The lawyer asked him the price. The lots were 80x160, the same as in Sacramento, and the uniform price was $250. "Suppose a man puts his name down and afterwards does not want the lots?" asked the lawyer. "Oh, you need not take them if you don't want them," replied the auctioneer. "I took him at his word," said the newcomer afterwards; "I wrote my name down for sixty-five lots, aggregating in price $16,250."

He had only about $20 left of what Colonel Stevenson had paid him, but he became at once the lion of the hour, the capitalist of the community. The proprietors of the land who had just bought it from General Sutter, but who had not yet got their deed, showed the newly arrived capitalist marked attention. Two of their number were French gentlemen, and finding their new acquaintance spoke their tongue, they became the more appreciative.

From the beauty and healthfulness of the spot, and its admirable location, our far-seeing friend was satisfied as to its future. Messieurs Covillaud and Sicard, the two French gentlemen named, became his friends and clients, and he wrote for them the first deed or law paper ever recorded affecting property in Marysville. General Sutter, then living at Hock Farm, six miles distant, signed this deed, which conveyed several leagues of land.

So the attorney went to work at once. On the next day after his arrival, in the evening, a public meeting was held to decide if a town government should be established. It was decided in the affirmative after a speech by Field, predicting a brilliant future for the place.

Who named Marysville? Women will tell fibs as well as men. I have been assured by several of the sex that the beautiful city where the Yuba

and Feather meet, was named after their mothers or their aunts. They had better not tell Judge Field so, for he knows all about it. On January 18, 1850, the people of the new town, then called by some Nye's Ranch, by others Yubaville, established a town government, electing an Ayuntamiento, or Town Council, First and Second Alcaldes and a Marshal. Judge Field was elected First Alcalde by a majority of nine votes. It was urged against him that he was a newcomer. He had been there only three days, while his opponent had been there nine days. This opponent was Mr. C. B. Dodson, who a few years ago was still living at Geneva, Illinois. In the evening another public meeting was held to hear the result of the election. It was resolved at that gathering to give the new town a name. The competing cognomens were "Yubafield," "Yubaville," and "Circumdoro." But at the last moment an old man arose, and said that there was an American lady in the place, the wife of one of the proprietors (the French gentleman, Covillaud). Her name was Mary, and in her honor he moved that the place be called "Marysville." This was at once agreed to amid hearty cheers, and with not one dissenting voice. Mrs. Covillaud was one of the survivors of the Donner party, whose frightful sufferings in the Sierra Nevada mountains, in the winter of 1846-7, must be still widely remembered.

As the constitution of the State had gone into effect, although the State had not been admitted into the Union, everybody recognized the instrument and a session of the legislature was then sitting under its provisions, and had just elected a full set of State officers. To make his calling and election sure, the new Alcalde obtained from Governor Burnett a commission as Justice of the Peace, the two offices amounting to one and the same thing in jurisdiction, except that the duties of Justice of the Peace were accurately defined.

The first case that he tried deserves notice, as it presents a scene in striking contrast with the exalted station of a Justice of the United States Supreme Court, to which our Alcalde was destined to attain. He had no courtroom for a short time and tried this first case in the street. Two men met him, one leading a horse; the one holding the halter said: "Mr. Alcalde, we both claim this horse, and want you to decide who is entitled to it." The Judge administered an oath to the strangers and examined them fully. He was lawyer for both of them and Judge between them. The questions being all put and answered, the Judge said: "It is very plain, gentlemen, that, as between you two, this man, (pointing to one of them) owns the horse." "But," said the loser, "the bridle belongs to me. Does he take the bridle, too?" "Oh, no, the bridle is another matter," replied the Judge. Then the owner of the bridle, who had lost the animal, asked his adversary: "How much will you take for the horse?" Two hundred and fifty dollars," was the prompt answer. The two agreed then and there, and the purchaser

engaged the Alcalde to draw a bill of sale, and he wanted one that would "stick." The paper was given, charges paid, and both parties left apparently satisfied. The fees were an ounce of gold dust ($16) for trying the case and an ounce for the bill of sale.

A few weeks after his arrival at Marysville, he was very glad that he had put his name down on that auctioneer's list for sixty-five lots—and he was very glad that the auctioneer had not treated it as a joke. Within ninety days he had sold over $25,000 worth of real estate, and had a good majority of his lots left. He had brought from San Francisco frame and zinc houses, which yielded a rental of over $1,000 a month. His fees as Alcalde were large, and at one time, not to mention his real estate, he had $14,000 in gold dust of his own in his safe. About that time he employed as a clerk George C. Gorham, then 17 years of age. He found Gorham a quick youth and a trusty agent, and has been his faithful friend ever since.

Leaving the office of Alcalde, Judge Field had just entered actively upon the practice of law when he was nominated for the Assembly. He never knew who put him in the field, but he found himself in, and he made a memorable fight. He had had a rupture with the District Judge, William R. Turner, which has had no parallel in controversies between bench and bar, and which will be noticed hereafter. As a candidate for the legislature he openly announced that his purpose was to reform the judiciary and to have Judge Turner removed from the bench of that district. Judge Turner, in return, threatened to drive the would-be lawmaker into the Yuba river. Yuba county then embraced, in addition to its present area, the present counties of Nevada and Sierra. Many interesting incidents of this animated canvass are preserved. At one place in the mines he arrived on the scene just in time to save an innocent man from being hanged. He treated the lynch jury many times to the best wines and cigars that could be got, and appealed to their hearts while tickling their appetites.

He, being an independent candidate, had to bear all the expenses of the campaign, which were very heavy. Here is the way he entertained the boys in Downieville and what he had to pay for it. This bill was only one of a large number sent to him afterwards at his home in Marysville:

MR. S. J. FIELD,

TO ORLEANS HOUSE, Dr.

To 460 drinks	$230 00
275 cigars	68 75
	$298 75

Downieville, October 9, 1850.

[Indorsed,]

We hereby certify that the within amount is correct. P. L. MOORE, WM. S. SPEAR.

Received payment of the within bill from Stephen J. Field.

J STRATMAN.

October 14, 1850.

He was elected by a large majority. Immediately he commenced the preparation of a bill relating to the judiciary. The legislature met at San Jose the first Monday in January, 1851. Judge Field was appointed on the Judiciary Committee. To this committee he submitted his bill, and they approving it, it became a law. Its essential features have ever since been preserved, and are now to be found in our Code of Civil Procedure. Besides creating eleven judicial districts, it defines the jurisdiction and powers of every judicial officer in the State, from Supreme Judge down to Justice of the Peace. He also introduced a bill dividing the county of Trinity, and creating that of Klamath, and another bill dividing the county of Yuba and creating that of Nevada, and not forgetting his old enemy (and the sequel will show what cause he had to be mindful of him), he secured the formation of a new Eighth district out of Trinity and Klamath, and had the counties of Yuba, Sutter and Nevada united into a Tenth Judicial district. So Judge Turner, as Judge of the Eighth Judicial district, had to change his territorial base, and go to Trinity and Klamath, then very sparsely settled counties. Not yet feeling that he had got even with his old foe, he presented petitions from many of the leading citizens of Yuba county, praying for Turner's impeachment and removal from office, on the grounds of incompetency, ignorance, and arbitrary and tyrannical conduct. As an impeachment trial would necessitate a considerable extension of the session, and the members generally desired to get home, the proposed impeachment was indefinitely postponed by a majority of three votes, Judge Field not voting.

Judge Field introduced and secured the passage of the California Practice Act, now known as the Code of Civil Procedure. He adapted it from the New York Code of that name. We are in like manner indebted to him for our Criminal Practice, now our Penal Code. In this work he altered and reconstructed over three hundred sections of the New York Codes and added over one hundred new sections.

Of course, our Civil Procedure and Penal Codes have been greatly amplified since they left his hands, in the shape of the Civil and Criminal Practice acts. The State of Nevada and the surrounding territories adopted these laws regulating civil and criminal procedure before they were translated and elaborated into our own Codes.

As an illustration of the respect which Judge Field exacted from his co-legislators, on account of his clearness of judgment and constant industry, it may be stated that the Criminal Practice act, as introduced by him, was never read before the Legislature. The rules were suspended, and the bill read by its title and passed. It narrowly escaped hostile action from the Governor. It comprised over six hundred sections, and on the last day of the session the Governor told Judge Field that he could not sign it without reading it, and it was to late for him to do that. The Judge urged him to sign it, representing

that it was essential to the harmonious working of laws already passed. "You say it is all right?" asked the Governor. "Yes," answered the Judge and the signature was given which made it a law.

The Civil Practice act provided most liberally, and in pursuance thereof the Civil Procedure Code now provides most liberally, for exempting certain property from sale or seizure for debt. It exempted furniture and books of $100 value; necessary wearing apparel, and provisions for one month; farming utensils; two oxen, two horses (or two mules), and their harness, and one cart or wagon, with one month's food for such animals; a mechanic's tools, the instruments and chests of a surgeon, physician, surveyor and dentist, and their professional library; lawyers' libraries; miners' rockers, spades, wheelbarrows, furniture, etc., and one month's provisions; two oxen, two horses (or two mules) and their harness, and one cart or wagon, by the use of which a cartman, teamster or other laborer habitually earns his living; and all arms and accoutrements required by law to be kept by any person. But no article should be exempt from an execution issued on a judgment recovered for its price, or upon a mortgage thereon.

"I never could appreciate," said Judge Field, "the wisdom of that legislation which would allow a poor debtor to be stripped of all needed articles of his household, and of the implements by which alone he could earn the means of supporting himself and family, and of ultimately discharging his obligations. It has always seemed to me that an exemption from forced sale of a limited amount of household and kitchen furniture of the debtor, and of the implements used in his trade or profession, was not only the dictate of humanity, but of sound policy." The Civil Practice act also contained the most important legislation ever passed in behalf of the mining interest—namely, a provision that in actions respecting claims, the courts should recognize the customs, rules and usages established by the miners themselves, when not in conflict with the constitution and laws.

Our legislator also secured the passage of an act making it impossible for judges to disbar attorneys without a hearing. This was, no doubt suggested to him by his war with Judge Turner. He also drew the charters of the cities of Marysville, Nevada and Monterey. His other legislative work was important. When the legislature adjourned, he tells us, he was a ruined man in a pecuniary sense. He could hardly pay his passage. After his expulsion from the bar by Judge Turner, he commenced speculation, and sowing to the wind he reaped whirlwinds. When he returned to the city which he had practically founded, he had only a few cents in his pocket, and he was minus all his property and in debt to the depth of $18,000. No old Californian will be surprised at this. It was in keeping with the average Californian's experience. "My dear Mr. Peck," he said to the proprietor of the United States Hotel (whom he could have bought out twenty times over, one year before),

"will you trust me for two weeks' board?" Whether from innate nobility or motives of business policy, I do not know, but at any rate Peck answered "Yes;" and he added, "for as long as you want." And Peck sent a man and had the law-maker's trunks brought from the steamboat, and made him at home.

Now in a little room, with a pine table and a cane bottom sofa, and the bills which had just passed the legislature and the statutes of the previous session for a library, thus humbly, thus bravely, did he take again to his profession. There was an unfinished, unfurnished loft over his office, in which he slept. The cot he slept upon he bought on credit. On this he spread a pair of blankets. His pillow was his valise. His washstand was a chair without a back. He managed to secure a tin basin, a pail, a piece of soap, a toothbrush, a comb, and a few towels. He was his own hewer of wood and drawer of water.

Just as he was about to re-enter actively on law practice, Judge Field's name was brought before the public again as a candidate for the State Senate, In convention he was beaten for the nomination by two votes. Accordingly, he resumed his seat on that cane-bottomed sofa beside his little pine table. He did not use that rude furniture long, nor did he pass many nights in the loft. Soon the luxury of fine apartments for both office and lodgings was attained. Within two and a half years he paid off all his indebtedness, which, with interest, exceeded $38,000. His great success drew him closer to his profession, and he resisted every suggestion or invitation to run for office. Marysville had grown into an attractive and busy city of twelve or fifteen thousand people, and being at the head of navigation, was the emporium whence a vast country drew its supplies. It had an able bar. Judge Field practiced in Marysville, and also in all northern California. For some years he had the most lucrative practice in the State, outside of San Francisco. I have examined all the California Reports, and find that during the period of about seven years—between his leaving the legislature and his going on our Supreme bench—he had more causes in our Supreme Court than any other lawyer. And his success on appeal was almost phenomenal. He was successful in nine out of every ten cases. Wherever the Reports show Stephen J. Field was for the appellant, the judgment was reversed, and where he was for the respondent, the judgment was affirmed—that is, that was the rule, and the exceptions were few.

Among Judge Field's associates at the Marysville bar during this period were Richard S. Mesick, afterwards District Judge in Storey County, Nevada, now a rich lawyer in quiet practice in San Francisco; Chas H. Bryan, who died in Virginia City, Nev.—he was once on our Supreme bench; Jessie O. Goodwin, afterwards Speaker of the Assembly, District Attorney, and State Senator; Gabriel N. Swezy, afterwards in both branches of the Legislature;

General William Walker, the "grey-eyed man of destiny," the foremost filibuster of all the world; John V. Berry, whom a druggist poisoned by mistake; E. D. Wheeler, since State Senator, and District Judge in San Francisco, now residing there; T. B. Reardon, since District Judge in Nevada county, who (sitting for Judge Dwinelle) tried Mrs. Laura Fair, on her second trial, and who died at Oroville; Isaac S. Belcher, since District Judge and Supreme Judge, and now a Supreme Court Commissioner; E. C. Marshall, since a member of Congress, and later Attorney General, and a brilliant member of the bar, and at least fifty others, including Charles E. Filkins, Charles Lindley, Henry P. Haun, N. E. Whitesides, since speaker of the Assembly, F. L. Hatch, George Rowe, William C. Belcher, Charles E. DeLong, afterward minister to Japan, and Henry K. Mitchell, who has now long been prominent in law and politics in Nevada.

William R. Turner, who had just been appointed Judge of the District Court of the Eighth Judicial District, which embraced Yuba County, opened his court in Marysville on the first Monday in June, 1850. Among those who waited upon him a few days before, to pay their respects, was Stephen J. Field, who handed him his latest copies of the New York *Evening Post*, which journal was then the organ of the Freesoil party. From this fact Judge Turner, who had lived in Texas, and was a pro-slavery man of narrow mind and violent temper, inferred that his northern visitor was an Abolitionist, although he was in error on this as on many other points about him —all of which he found out in time. The New York lawyer was about to revisit his old home, leaving his affairs in a very prosperous state, when his friend, General Sutter, insisted that he should postpone his departure long enough to be his counsel and assist his attorney in the case of Cameron against Sutter, just instituted in Judge Turner's court. The request was complied with, and during the first week of Court the case of Cameron vs. Sutter was called. Judge Field's associate made a preliminary motion, which Judge Turner denied. Jessie O. Goodwin, who sat near, passed Judge Field the Practice act, and pointed out a section bearing on the question. Judge Field arose, and asked permission to read the section. Judge Turner replied: "The court knows the law; the mind of the court is made up; take your seat, sir." Judge Field was amazed, but said, respectfully, that he excepted and would appeal. Judge Turner then, in loud and angry tones, said: "Fine that gentleman $200." Judge Field's next was, "Very well," or "Very well, sir." Judge Turner immediately added, "I fine him $300, and commit him to the custody of the Sheriff for eight hours." Another quiet, "Very well," came from Judge Field. Then Judge Turner exclaimed, excitedly: "I fine him four hundred dollars and commit him twelve hours." Judge Field then remarked that it was his right by statute to appeal from any order of his honor, and that it was no contempt of court to give notice of an

exception or an appeal, and he asked the members of the bar present if it could be so regarded. Judge Field had better tell the rest himself:

Upon my statement, he flew into a perfect rage, and in a loud and boisterous tone cried out, "I fine him five hundred dollars and commit him twenty-four hours—forty-eight hours—turn him out of court—subpoena a posse—subpoena me." I left the court-room. The attorney in the case accompanied me, and we were followed by the deputy sheriff. After going a few steps we met the coroner, to whom the deputy sheriff transferred me. * * The attorney, who was much exasperated at the conduct of the judge, said to me, as we met the coroner, "Never mind what the judge does; he is an old fool." I replied, "Yes, he is an old jackass." This was said in an ordinary conversational tone; but a Captain Powers, with whom Turner boarded, happened to hear it, and running to the courthouse and opening the door he hallooed out: "Judge Turner! Oh, Judge Turner! Judge Field says you are an old jackass." A shout followed and the Judge seemed puzzled whether or not he should send an officer after me, or punish his excitable friend for repeating my language. Toward evening the deputy sheriff met the Judge who asked him what he had done with me. The deputy answered that I had gone to my office and was still there. The Judge said: "Go and put him under lock and key, and if necessary put him in irons." The deputy came to me and said: "The Judge has sent me to put you under lock and key; let me turn the key upon you in your own office."

Asking the deputy to show his warrant of commitment, and finding that he had none, the lawyer became indignant, and told the officer to go away. Saying, "I will lock the door anyway," the officer did so and retired. A writ of habeas corpus was immediately sued out and forthwith executed, and that same evening the County Judge, Henry P. Haun, afterwards United States Senator, promptly discharged the lawyer, there being no warrant in the officer's hands. While Judge Field was treating a crowd of excited friends that night—which cost him $290—Judge Turner came on the scene, on fire with fury, and applied vile and obscene epithets to the County Judge, saying that he would teach "that fellow" that he was an inferior judge. The wrathful magistrate was hung in effigy that night on the public plaza. He said this was Judge Field's work—another mistake. The story of this extraordinary "contempt" case is a long one, but I can reduce it and not spoil it. On the day when the court next opened, Judge Turner made an order that Judge Field be expelled from the bar for suing out the habeas corpus; also expelling Samuel B. Mulford and Jesse O. Goodwin for being witnesses on the return—on the pretense that they had, all three, "vilified the court and denounced its proceedings." He also fined the County Judge $50 and ordered him imprisoned forty-eight hours for discharging Judge Field from arrest. The County Judge paid his fine and left the courtroom, and the Sheriff took Judge Field into custody. The latter immediately sued out another writ of habeas corpus, and while before Judge Haun and his associates of the Court of Sessions arguing for his discharge, the sheriff entered and declared his intention of taking Judge Field from the courtroom

and Judge Haun *from the bench*, and putting both in confinement in pursuance of Judge Turner's order.

There was an extraordinary scene in Court. Judge Haun told the sheriff that the Court of Sessions was holding its regular term; that he (the sheriff), was violating the law, and that the Court must not be disturbed in its proceedings. The sheriff returned to Judge Turner and reported the situation. Judge Turner ordered a posse to be summoned, asking those in the courtroom to serve on it, and directed the sheriff to take Judge Haun and lawyer Field by force; and, if necessary, to put Judge Haun in irons—to handcuff him. The sheriff and his posse soon rushed into the Court of Sessions, forced the attorney from the courtroom and were just about to give the unexampled exhibition of tearing a magistrate from his seat, when Judge Haun stepped to a closet, and drew from it a navy revolver, cocked it and leveling it at the sheriff, declared he would kill him if he approached nearer. He also fined the sheriff $200 for contempt of Court, appointed a temporary bailiff, and directed the latter to eject the sheriff and his party from the chamber. The new bailiff acted promptly, the bystanders responded to his call, and the intruders withdrew. Judge Haun then laid his revolver on his desk, enquired if there was any further business, and there being none he adjourned the court. To further curtail the account, it may be stated that before the Supreme Court, Judge Field was successful as usual. That tribunal entirely undid Judge Turner's work. His orders imposing fines were reversed, and Messrs. Field, Goodwin and Mulford were restored to the bar. Judge Turner refused to obey the mandate of the Supreme Court for the restoration of the attorneys. He issued an address to the public, to which the three attorneys and five others replied, the reply declaring that Judge Turner was a man of depraved tastes, of vulgar habits, of an ungovernable temper, reckless of truth when his passions were excited, and grossly incompetent.

Judge Turner then threatened to publicly insult Judge Field, and then to shoot him if he resented it. Judge Field repaired to San Francisco and took counsel of Judge Nathaniel Bennett. The latter gave some advice, which if acted on, would hardly have tended to promote Judge Turner's well being. Being unused to arms, and reared to do without them, Judge Field did not like to "heel" himself, to use the word of that day, but he was told and he believed that his life depended on it, and accordingly he purchased a pair of revolvers, had a sack coat made with pockets in which the weapons could lie and be discharged without taking them out, and by practice made himself a good shot. Then he sent by Ira A. Eaton, a message to Judge Turner, which was substantially, "I desire no trouble with you, but I will not avoid you; I have heard of your threats, and if you attack me or come at me in a threatening manner I will kill you." They often met, in many places, but no words

passed. Judge Field when he saw his foe always grasped his pocketed arms and kept a sharp lookout. He says he felt that he was in great danger, but that after a time there was a sort of fascination in this feeling. He does not think that Judge Turner would have shot him down deliberately, when sober, but that, when in drink, and in presence of lawless crowds who heard his threats, it would have taken but little to urge him on.

All this happened, be it remembered, six or seven months before the legislature, through Judge Field's influence, removed Judge Turner to the snows of Trinity. In the meantime the disbarred attorney was ruined in business. He was not permitted to practice in the District Court, despite the Supreme Court mandate, and if he had been, his relations with the court were such as to keep clients away from him. As appears above, he returned from the legislature in debt.

Why did not the Supreme Court compel obedience to its mandate? It happened thus. The disbarred attorneys having been admitted to the Supreme Court, which entitled them to practice in all the courts of the State, Judge Turner made an order for them to show cause why they should not be again expelled. They showed cause enough, but it was not received, and a second order of expulsion was entered. From his very position he was enabled to keep the attorneys lively, and for a time to ruin their business. Another mandate was obtained from the Supreme Court for their reinstatement. They then asked for Judge Turner's punishment, but the Supreme Court declined to punish him on the grounds that he had recognized the first mandate by making a second order of expulsion, after an order to show cause, etc. Very nice point, eh?

Judge Turner, after being removed to Trinity, served out his term, and at its close was a candidate for re-election. His opponent being declared elected by one vote, he contested, and it went to the Supreme Court. Judge Field was then on the latter bench, but he did not participate in the hearing or decision, and Justices Terry and Baldwin gave the office to Turner. The latter then sent a friend to Judge Field to inquire if he would be reconciled. Judge Field said no; that the world was wide enough for both; and each would go his own way. The next day Judge Turner stationed himself where Judge Field had to pass to go into court, and as his old adversary approached he called out: "I am now at peace with all the world; if there is any man who feels that I have done him an injury, I am ready to make amends. Judge Field looked at him a moment, then passed on. The same thing occurred the next day. That was the last time the two judges ever met. Judge Turner served out his term and was again elected. In 1867 Mr. C. Westmoreland, member of the Assembly from Trinity, offered resolutions looking to Judge Turner's impeachment for high crimes and misdemeanors. Mr. West-

moreland made a speech severely arraigning the Judge for his many acts of tyranny, and the most shameless conduct. The resolutions were adopted, but before the appointed committee took action, Judge Turner resigned, and not long afterward died.

At the end of this extraordinary and protracted struggle, Judge Field found that his triumph had cost him his fortune and his business. Yet his reputation as a lawyer had increased, and as soon as it was seen that he had fair play at court his practice again became large. Judge Turner being removed to another district, and a new (Tenth) being created, comprising Yuba, Nevada, and Sutter counties, the Governor commissioned Gordon N. Mott Judge of the new court. Judge Mott was the personal and political friend of Judge Field, who urged him for the place. He died in 1887, at quite an advanced age, in San Francisco.

Judge Field now had clear sailing. The County, District and Supreme Courts all respected him highly, and all concurred in the popular judgment that he had the first legal mind of that day, in his section, if not in the State. But his career was again to be broken—again was he to collide with the bench. Judge Mott had been appointed to hold until the next election, which only gave him about ten months on the bench. William T. Barbour was elected to succeed him. Judge Mott refused to vacate his seat, on the ground that under the law his successor could not be chosen until the election in the fall of 1852. Judge Field endorsed this view, and an agreed case between Judges Mott and Barbour being presented to the Supreme Court, Judge Field argued it for the former. Judge Barbour prevailed, and, taking offense at Judge Field for his support of Judge Mott, he determined upon revenge. He openly declared his enmity to Judge Field, who was the leading practitioner! How we have advanced since that that day! The period for which Judge Barbour had been elected was the remainder of Judge Turner's term, Judge Mott having been appointed to serve out a part of the same term until an election was held. Judge Barbour's remainder was one year. He was then elected for a full term of six years. Judge Field had opposed him with all his influence, and so widened the breach between them. Upon being informed that Judge Barbour had made some bitterly vituperative remarks about him, Judge Field waited on him and asked him substantially: "If so, why so?" He was not daunted by the prospect of another long war with the court, and he did not propose to be compelled to take his shingle to some other part of the State. As before, so then, and so throughout his career, his physical and moral courage was and has been little less conspicuous than his legal talent.

At the meeting between him and Judge Barbour hard words passed. Judge Barbour refused to explain, and verbally invited him to a settlement "in the usual way amomg gentlemen." This was promptly accepted by

Judge Field, who then and there named Judge Mott as his friend. In half an hour Charles S. Fairfax, as the friend of Judge Barbour, waited on Judge Mott to arrange for a hostile meeting between their principals. Mr. Fairfax insisted that Judge Field had given the challenge, and as there was no writing to throw light on the point, the seconds could not agree. Judge Field directed Judge Mott to waive the point.

At several stages in this controversy it threatened to culminate in tragedy, but, on the whole, as we look back, it presents a ludicrous aspect. Having admitted, for argument's sake, that he was the challenging party, Judge Field had to let his adversary choose the weapons and the time and place of meeting. Mr. Fairfax stated that the time was that evening, the place a certain room, twenty feet square, the weapons Colt's revolvers and bowieknives. Thus armed, the principals were to be placed at opposite sides of the room, face to the wall, and at the word, they were to turn and fire, then advance and finish the conflict with their knives. Judge Mott said he would not consent to these terms, because they were unusual, unprecedented and barbarous. Mr. Fairfax admitted it, but said he was following his principal's directions. He then asked Judge Barbour to modify them, but that gentleman refused. On receiving Judge Mott's report, Judge Field said that Judge Barbour was a coward, and would not fight at all; that his terms were those of a bully playing a game of bluff. He told Judge Mott to accept the terms by all means. This being done, Judge Barbour said he would waive the bowie knives, and he soon followed this by a second message, that it would not do to fight in the room agreed on, as the firing would attract a crowd. All his modifications were accepted, and the parties "met" the next morning in this comic way: Two stagecoaches were to leave Marysville for Sacramento as usual. Judge Barbour was to take one of them and Judge Field was to go in a private conveyance, and both were to alight at a specified point, and walk to a retired spot close by and have it out. Judge Field, accompanied by Judge Mott, reached the appointed place first and waited for the stages. Soon one arrived and stopped, but no person alighted. In a few minutes the second stage arrived, stopped, and Judge Barbour and Mr. Fairfax got out. Judge Barbour then exclaimed that he was a judicial officer, and as such he could not engage in a duel. I now quote Judge Field: "At the same time he would take occasion to say that he would protect himself, and, if assaulted, would kill the assailant. With these words, leaving Fairfax standing where he was, he walked over to the first stage, and, mounting rode on to Sacramento. Seeing Fairfax standing alone on the ground, I sent word that I would be happy to give him a place in my carriage—an invitation which he accepted, and we then drove to Nicolaus, where we breakfasted, and thence returned to Marysville."

Judge Mott, in a pleasant talk of old times I had with him in 1882, said

that this whole affair was still quite fresh in his memory; that Judge Barbour, on getting out of his coach, declared, excitedly, that he was going forward to the other one, and he called on the passengers to "take notice if that damned rascal (pointing to Judge Field) attacked him, he would kill him." Stepping in front of Judge Barbour, Judge Mott said: "Hold! Judge Field will not attack you, sir." He also told Mr. Fairfax that this was strange conduct on the part of his principal. Mr. Fairfax, astonished and mortified, joined Judges Field and Mott, as before stated. Judge Mott further said that while he was trying to get Judge Barbour to change the first terms of the duel, he determined, without consulting Judge Field, to take the latter's place in the fight if Judge Barbour insisted on the bowie knives, because the difficulty was on his (Judge Mott's) account. The terms, as finally agreed on, were that the parties were to be stationed one hundred yards apart, each armed with as many Colt's revolvers as he chose to carry, to fire upon each other at the word, and to advance at pleasure and finish the conflict. Probably the original distance did not scare Judge Barbour much, but it was "advancing at pleasure and finishing the conflict" that made him remember his judicial position.

Some sharp squibs appeared in the Marysville papers at Judge Barbour's expense. He demanded the name of the author of one of them. The editor would not reveal it, but Judge Field, hearing of the demand, told the editor to give his (Judge Field's) name as the author, which was done. Next morning, while the lawyer was in front of his office picking up chips to make a fire, Judge Barbour came suddenly upon him, placed a cocked navy revolver near his head, and said "Draw and defend yourself!" Judge Field replied, "You infernal scoundrel, you cowardly assassin! You come behind my back, and put your revolver to my head and tell me to draw! You haven't the courage to shoot! Shoot and be d—d." Judge Barbour then walked away. Perhaps he again recollected that he was a Judge.

"For a long time afterwards," says Judge Field, "he expressed his bitterness towards me in every possible way. He did not take Turner's plan of expelling me from the bar; but he manifested his feelings by adverse rulings. In such cases, however, I generally took an appeal to the Supreme Court, and in nearly all of them procured a reversal. The result was that he suddenly changed his conduct and commenced ruling the other way. While this was his policy there was hardly any position I could take in which he did not rule in my favor. At last I became alarmed, lest I should lose my cases in the appellate court by winning them before him."

This was in 1853. In 1854 Judge Barbour asked Judge Field to be reconciled to him. The latter consented, but said he did not want to hear any explanations for past conduct. Soon, however, Judge Barbour commenced explaining and regretting, etc., and in 1856 he wrote Judge Field a letter of

regret for past actions, "trusting that this explanation may be satisfactory." He died in Virginia, Nevada, about 1866.

Judge Field had personal and political relations of close friendship with David C. Broderick. This sprang from another personal quarrel. Judge Field's address, on moving Judge Turner's impeachment in the legislature of 1851, called forth a savage and abusive reply from B. F. Moore, assemblyman from Tuolumne county. In rising to speak, Mr. Moore opened his drawer, took out two revolvers, cocked them and laid them in the open drawer before him! He interspersed his offensive remarks with the declaration that he was responsible for what he said, there or anywhere. Judge Field wrote him a note demanding an apology or "satisfaction," and asked Samuel A. Merritt, of Mariposa, to deliver it, but that gentleman declined on account of the constitutional provision against dueling. Judge Field said that this provision of the constitution was not self-operative, and there was no statute on the subject. He had about concluded that he could not find a proper friend to act as his second, when one night he met David C. Broderick, writing at his desk in the senate chamber. They barely knew each other, but Broderick, who was then President pro tem. of the senate, looked up and said, "Why, Judge, (they called him judge then, because he had been Alcalde) you don't look well; what is the matter?" Judge Field answered that he had not a friend in the world. "What is it that worries you?" asked Broderick. The particulars were given him in full. On hearing them Broderick said: "My dear Field, I will be your friend in this matter; go at once and write a note to Moore, and I will deliver it myself." The note was soon in Broderick's hands. He presented it to Moore, who said that he expected to be a candidate for Congress, and on that account could not fight a duel, but he was willing to meet Judge Field at any time and place. Broderick replied that a street fight was not exactly the thing among gentlemen; but, if that was the best that Moore could do, he should be accommodated. An hour later Moore concluded to fight a duel. He named Drury P. Baldwin as his second. Brokerick, after satisfying himself by experiment that Judge Field was a good shot, called on Baldwin for an answer to the hostile note. Baldwin said Moore had concluded to do nothing further in the matter. "Then," said Broderick, "as soon as the House meets Judge Field will rise in his seat, and refer to the attack on him, and to the language of Moore, that he held himself responsible for what he said and state that respect for the dignity of the house had prevented him from replying to the attack at the time in the terms it deserved; that he had since demanded satisfaction of Moore for his language, and that Moore had refused to respond, and will thereupon pronounce him a liar and a coward."

"Then Judge Field will get shot in his seat," said Baldwin.

"In that case there will be others shot, too," said Broderick.

Broderick then told his principal of this interview, and asked, "Will you act as I said you would?" "Most certainly; never fear for me," was the reply. When the house opened, Judge Field was at his desk. Near him Broderick was seated, surrounded by eight or nine of the latter's personal friends, armed and ready. The journal being read, Judge Field and Mr. Moore rose and said at the same time, "Mr. Speaker." The Speaker recognized Mr. Moore, and Judge Field sat down. Mr. Moore then read a written apology, which General John C. Addison had prepared and prevailed upon him to read. It settled the business.

The session of the legislature at which occurred the scenes just described, terminated in May, 1851. Before returning to Marysville, Judge Field spent some days in San Francisco, and during his stay he visited Broderick several times at the latter's hotel, the Union, at the northerly corner of Kearny and Merchant streets, now a part of the Old City Hall. (The old gilt letters, big and bright, "Union," may yet be seen on the Kearny street front, after a lapse of thirty-six years.) On one occasion, when the two friends were at the bar of the hotel, taking a glass of wine, Broderick suddenly threw himself before Judge Field and grasping him, pushed him out of the saloon into an adjoining room. As soon as he could get his breath, Judge Field said, "What does this mean, Mr. Broderick?" Broderick then explained his sudden and violent movement. As they stood at the bar, "Vi" (Vicessimus) Turner, a brother of Judge Field's old enemy, represented as a desperate man, entered the saloon and, seeing the Judge, threw back his Spanish cloak, drew a revolver and leveled it at him. Broderick saw the act, quickly interposed his own body, and the man put up his pistol and withdrew. Oh, those were the days—for the men who were spoiling for a fight! Vi Turner was not only not arrested but the affair only caused a three minutes' flutter. The friendship between Judge Field and Mr. Broderick was broken when Buchanan and Douglas became estranged. Mr. Broderick opposed Judge Field's elevation to the Supreme Bench. After that event they never conversed together; "but I could never forget his generous conduct," says Judge Field, "and for his sad death there was no more sincere mourner than I."

The Broderick-Terry duel recurs to mind, just here, by reason of Judge Field's relations with both combatants. His friendship for Broderick has just been dwelt upon. With Judge Terry he was associated two years on the Supreme bench of the State. The celebrated duel took place in September, 1859. Judge Field was then visiting his Eastern friends. "I was absent from the State at the time," says Judge Field, "or I should have exerted all the power I possessed by virtue of my office to put a stop to the duel. I would have held both the combatants to keep the peace under bonds of so large an amount as to have made them hesitate about taking further steps; and, in the meantime, I should have set all my energies to work, and called

others to my aid, to bring about a reconciliation. I believe I should have adjusted the difficulty."

In the fall of 1857 Judge Field was elected, as the Democratic nominee, a Justice of the State Supreme Court. In the canvass before the people he had two opponents—his old friend Nathaniel Bennett, Republican, and J. H. Ralston, American, or Knownothing. He had struck that "tide in the affairs of men, which, taken at the flood, leads on to fortune." His majority over Judge Bennett was 36,272; over Judge Ralston, 36,148; over both, 17,204. In September, 1857, immediately after his election, and about three months before his term was to commence, for which he had been chosen, Hon. Hugh C. Murray, Chief Justice, died, and Hon. Peter H. Burnett, Associate Justice, was appointed Chief Justice. To the vacancy thus caused by Judge Murray's death and Judge Burnett's advancement, Judge Field was appointed by Gov. J. Neely Johnson, an old Whig and Knownothing opponent of his. He accepted and took his seat on the Supreme bench, October 13, 1857, nearly three months earlier than he had anticipated. When he took his seat upon the bench—and I distinctly recall it as a memory of my boyhood—Judge Field possessed the expressed confidence of not only his own party, but of the opposition. His reputation as an enlightened leader of his profession had spread to all parts of the State, and the general hope and conviction were that he would be, not a partisan, but a thoroughly upright and honest judge. He went upon the bench with the "All Hail!" of the bar, and was greeted as a veritable "Daniel come to judgment."

A few months after he went upon the bench of the State Supreme Court the legislature passed a Sunday law, or an act for the better observance of the Sabbath. The question of the policy of such a law had not figured in the preceding political campaign. The same canvass which resulted in the choice of the members of the legislature for that session also placed Judge Field on the Supreme bench. That legislature (1858) was Democratic in both branches. There was little excitement over the efforts to enforce the first Sunday law, compared with that which a much later and similar enactment provoked. One Neuman, an Israelite, a clothing dealer, being arrested and imprisoned for violating the new law, was brought before the Supreme Court on habeas corpus. That tribunal was then composed of Judges David S. Terry, Peter H. Burnett and Stephen J. Field. The law was declared unconstitutional, Judge Field dissenting. The latter discussed the law as a moral, sanitary and business measure. He declared that in its enactment the legislature gave the sanction of law to a rule of conduct which the entire civilized world recognized as essential to the physical and moral well-being of society. He should be quoted on this important question:

Upon no subject is there such a concurrence of opinion among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor

One day in seven is the rule, founded in experience and sustained by science. There is no nation, possessing any degree of civilization, where the rule is not observed, either from the sanctions of the law or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule *founded upon a law of our race.*

The legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of the opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinion into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in judgment upon its action. It is not for the judiciary to assume a wisdom which it denies to the legislature, and exercise a supervision over the discretion of the latter. It is not the province of the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the constitution.

In this dissenting opinion, Judge Field then proceeds to argue that the law was in the interest of labor; that its aim was to prevent physical and moral debility; that in this aspect it was beneficent and merciful. (See ex parte Neuman, 9 Cal. 502.) Three years later the legislature passed a Sunday law substantially the same as that of 1858. That body was Republican in both branches. The first Sunday law was approved April 10, 1858; the second, May 20, 1861. This second act, which was, as stated, substantially the same as the act of 1858, was declared constitutional by the Supreme Court. Judge Field was still on the bench, and had been reinforced by Judges Joseph G. Baldwin and W. W. Cope, who succeeded Judges Terry and Burnett. Judges Field, Baldwin and Cope were of one mind—that the law was constitutional (see ex parte Andrews, 18 Cal., 680); and they emphasized and reaffirmed this judgment in ex parte Bird (19 Cal., 130). These two decisions of Judges Field, Baldwin and Cope have been repeatedly commented on and approved by their successors on the Supreme bench. (See Cohen vs. Wright, 22 Cal., 321; Jackson vs. Shawl, 29 Cal., 271; ex parte Shrader, 33 Cal., 282.) It is to be recorded here that this Sunday law, which became a part of our Penal Code, was repealed by act of February 8, 1883.

The opinions of this jurist, delivered while on our State Supreme bench, are comprehended in fifteen volumes of the California Reports—numbers seven to twenty-one inclusive. They have been commented on and approved by Mr. Emory Washburn, Professor of Law in Harvard University, (see *American Law Register* for June, 1862), by Judge Dillon, a leading and universally approved American law writer, by Professor John Norton Pomeroy, who has ably sketched Judge Field's career as legislator and jurist, by the late Judge Joseph G. Baldwin, one of the most fertile legal minds, who said that "Judges reposed confidence in his opinions, and he always gave them the strongest proofs of the weight justly due to his conclusions," and by many other authorities on legal science. Says Professor Pomeroy: "I was told by a gentleman who has for many years been employed by a leading law

publishing house of Boston as its traveling agent through all the States of the Mississippi and Ohio valleys, that, when he first began his work, the New York Reports were universally sought for in every State; but that of late years the demand had changed from the New York to the California Reports. Everywhere through the Western and the Northwestern States the profession generally wished to obtain the California Reports as next in authority to those of their own State."

This gratifies our State pride; and to whom do we owe it more than to Judge Field? He had been longer on our Supreme bench than any other man; his decisions had been less disturbed and more respected by his successors than those of any other judge, and, being grounded in immutable principle, they have all the strength and majesty of authority.

Judge Field was commissioned by President Lincoln a Justice of the Supreme Court of the United States, on March 16, 1863. He took the oath of office, May 20th, following. He was assigned to the Tenth Circuit, then comprising California and Oregon, Nevada being afterwards included. He is therefore from necessity, what in earlier days he was from inclination, a great traveler. Before the overland railroad was completed he traveled over 12,000 miles a year; since that event, over 8,000 miles a year. Formerly he was required to hold court in San Francisco one term, annually, and also sit with the United States Supreme Court at Washington, each winter. Since 1869, under a law creating the office of Circuit Judge, he has held court in San Francisco every other year. All of his original associates on the United States Supreme bench have passed away, except Judge Miller. Ever since he entered upon his high office he has regularly attended the terms of court, and done his full share of the work.

In the Milligan case, which went up from the Circuit Court in Indiana, on habeas corpus, it was held (Justice Davis writing the opinion) that military commissions organized during the war, in a State not invaded nor engaged in rebellion, in which the Federal Courts were open and in the undisturbed exercise of their judicial functions, had no jurisdiction to try a citizen who was not a resident of a State in rebellion, nor a prisoner of war, nor a person in the military or naval service. This was a five-to-four decision, Judge Field turning the scale. He was also one of five against four in the Cummings case, in which it was held that a State could not exact an oath for *past* conduct. Judge Field wrote the opinion in this case. He said therein that "Test oaths in England and on the continent of Europe have always been limited to an affirmation on matters of present belief, or as to present disposition towards those in power. It was reserved for the ingenuity of legislators in our country, during the civil war, to make test oaths reach to past conduct."

He also wrote the opinion in the Garland case. Here, again, were five judges against four. Mr. Garland is now Attorney General of the United States. He represented Arkansas in the Confederate Congress. In July, 1865, he received from the President of the United States a full pardon. He could not take the oath of office prescribed for attorneys of the United States Supreme Court. He asked to be permitted to practice without taking the oath. The court held that he could freely do so, his pardon having released him from all penalties and disabilities.

On the Chinese question Judge Field's views are on record. They are identical with those of Judges Sawyer and Hoffman—namely, that the whole power over the subject lies in the federal government. (See the chapter on Judge Sawyer.)

On January 13, 1866, at Washington, while opening his mail, which lay on a center table, Judge Field noticed among the papers a small package about an inch and a half thick, three inches wide, and three and a half inches long. It was stamped, addressed "Hon. Stephen J. Field, Washington, D. C.," and was marked "Per Steamer." It bore no trace of hand writing. The Judge's name had been cut from a volume of the California Reports, and pasted on. The words "Washington D. C.," and "Per Steamer," had been cut from a newspaper. On the other side were the words in print: "From Geo. H. Johnston's Pioneer Gallery, 645 and 649 Clay Street, San Francisco." Thinking it was a present for his wife, who was then in New York, he concluded to partially open it to satisfy himself on that point. Tearing off the paper and raising the lid of what appeared to be some sort of a little box, he was struck with its black appearance inside. "What is this?" he said to Judge Delos Lake, of San Francisco, who was making him a call. Judge Lake also suspected something wrong, and quickly said, looking over his friend's shoulder; "Don't open it—it means mischief." Judge Lake took it in his hands, and, treating it with the utmost tenderness, carried it over to the capitol and showed it to Mr. Broom, one of the clerks of the Supreme Court. They concluded to try to explode it. They dipped it in water, let it soak for some minutes, then took it into the carriageway, under the steps leading to the Senate chamber, and threw it against the wall, shielding themselves behind one of the columns. The blow exposed the contents. Twelve pistol cartridges lay imbedded in glue; a bundle of sensitive friction matches, a strip of sandpaper, and some fulminating powder were ingeniously placed—the whole contrivance being so arranged that opening the lid would ignite the matches, which, in turn would explode the cartridges. It was sent to the War Department, and General Dyer, Chief of Ordnance, had it examined. A detailed description of it was returned to General Dyer by Major Benton.

This murderous instrument was evidently sent to the Judge by some man

in San Francisco, who had been disappointed by some decision. On the inside of the lid was pasted a slip cut from a San Francisco paper, of October 31, 1864, stating that Judge Field had on the day previous decided a certain case, but this availed nothing so far as the discovery of the bloody-minded inventor was concerned. He was never found out. Not even an arrest was made in connection with the affair, although the San Francisco police and many detectives spent months in trying to find a clue.

Judge Field was married in San Francisco, in 1859, and his wife, who was Miss Sue V. Swearingen, is still living. There has been no issue of the marriage.

About the year 1880 Judge Field had printed, in a neat little volume of 250 pages, his autobiography. This was to preserve the record of his eventful life, and was distributed to his intimate friends, only thirty copies having been printed. A year later an octavo volume of 464 pages was given to the profession by Chauncey F. Black and Samuel B. Smith, of New York City. It is a compilation made by political and personal friends of judge Field, is an account of his work as a legislator and judge, and gives copious extracts from his many opinions. It is preceded by an introductory sketch by John Norton Pomeroy, and contains also an elaborate article by John T. Doyle, of the San Francisco bar, on the Electoral Commission of 1877, and Judge Field's connection therewith.

Here is a pleasant extract from the autobiography, and it may be well to rest at this amusing point in a life that has been so attended with personal peril, or as Judge Field would term it, the fascination of peril. The Judge was at a dinner at Welcker's, in Washington, given by Ward, the celebrity who cuts some figure in the chapter on John T. Doyle:

On the occasion mentioned some of the brightest spirits of Congress were present As we took our seats at the table I noticed on the menu a choice collection of wines—Johannisberg among others. The dinner was sumptuous and admirably served. Our host saw that the appropriate wine accompanied the successive courses. As the dinner progressed, and the wine circulated, the wit of the guests sparkled. Story and anecdote, laughter and mirth abounded, and each guest seemed joyous and happy. At about eight, song had been added to other manifestations of pleasure. I then concluded that I had better retire. So I said to my host that if he would excuse me I would seek the open air, and I left. Just at this moment Mr. Rodman M. Price, who had been Governor of New Jersey, made his appearance, and exclaimed, "How is this? I was invited to dinner at eight, producing his card of invitation. "Look again," said Ward, "and you will see that your eight is a five." And so it was. "But never mind," said Ward; "the dinner is not over. Judge Field has just left; take his seat." And so Price took my place. He had been traveling in the Southern States, and had been an observer of the proceedings of various State Conventions then in session to frame constitutions under the Reconstruction acts, which bodies he termed "Congo Conventions." To the amusement of the party he gave an account of some curious scenes he had witnessed in these conventions, and wound up his stories by expressing his opinion that the whole reconstruction measures would soon be "smashed up" and sent to "kingdom come" by the

Supreme Court. The loud mirth and singing attracted the attention of news hunters for the press—item gatherers—in the rooms below. Unfortunately one of these gentlemen looked into the banquet room just as Price predicted the fate of the reconstruction measures at the hands of the Supreme Court. He instantly smelt news, and inquired of one of the waiters the name of the gentleman who had thus proclaimed the action of the court. The waiter quietly approached the seat of the Governor, and whilst he was looking in another direction, abstracted the card near his seat, which bore my name. Here was, indeed, a grand item for a sensational paragraph. Straightway the news gatherer communicated it to a newspaper in Washington, and it appeared under an editorial notice. It was also telegraphed to a paper in Baltimore. But it was too good to be lost in the columns of a newspaper.

The account then shows that Mr. Schofield, member of Congress from Pennsylvania, introduced into the House a resolution directing the Judiciary Committee to inquire into this matter, and report whether the alleged offender ought to be impeached. An exciting debate followed, and the resolution was adopted by a vote of 97 to 57. Some members stated that they voted for it because it was due to the Judge that he should be vindicated. Judge Field says that he has never been able to appreciate the force of this reason. The committee, before reporting, was discharged from further consideration of the matter.

CHAPTER XV.

Henry E. Highton—A Strong Original Character—Scion of a Line Distinguished for Mental Activity—Pluck and Patience in Early Years—A Life full of Achievement—Some of his Great Causes Stated—The Denis Kearney Agitation—A Defence Turned into a Prosecution—The Impeachment of Mayor Kalloch—The Dawson Injunction Case of "Church and State"—Public Service on the Bulkhead Question—Commanding Views on Social and Political Problems—A Chapter of Many Useful Lessons.

In the Supreme Court at Sacramento, on a day of the June Term, 1866, immediately after the adjournment, one of the judges, passing from the bench into the midst of the crowded bar, took the hand of a young man who had occupied the session with an argument characterized by great force and ingenuity. "Henry, I'm paid now," he said, and his gratification was manifest in his voice and countenance.

The general eye was on them and it seemed as if the Bench and Bar were then shaking hands. They were representative men, thus face to face in that distinguished place and presence. The judge was Oscar L. Shafter, the lawyer was Henry E. Highton. One is now no more; the other is still in the long prime of service.

It had been under the eye of Shafter, not yet a judge, that Highton pursued his studies in law. And in the man of counsel the student had found, too, a personal friend of rare constancy, "the best friend that man ever had," as he sadly testified some years later, when his friend died. The veteran had watched the tyro's indefatigable quest of knowledge, and it had been his pleasure to open to him the riches of his own store. And now on the occasion alluded to, it did him good to acknowledge the satisfaction of an ample reward.

Mr. Highton's career furnishes a fine illustration of the power of labor, when intelligently directed. He came to this country, a boy pioneer, without a friend or a dollar, resolved, even then, to make his mark at the bar, and for six years followed a laborious life in the mining regions. Slowly and carefully, under adverse conditions, he prepared himself for the legal profession, and at the first favorable opportunity entered upon the practice. By the most patient and unremitting effort, he gradually acquired business and reputation, pressed steadily towards the front, and finally took his place beside the first men at this bar. He was no child of chance or pet of fortune—he worked his way. In his brave struggles, so signally crowned with triumph, he is to be likened not to one who climbs a ladder but to one who ascends to

the summit of an Egyptian pyramid, and finds beneath him a foundation which trembles only with the quaking of the earth.

Henry Edward Highton was born in Liverpool, England, July 31, 1836. On his father's side he came from old Leicestershire lineage, while his mother's family have been settled in Yorkshire for many generations. His father Edward Rayner Highton, was born in Leicester, September 11, 1811—a fellow countryman of our Baker, and born in the same year with that great lawyer, orator and soldier. In his native country the elder Highton held many military and civic positions, and there, as well as in this, his adopted land, his name and fame are inseparably blent with movements for municipal betterment and for the reformation of criminals, especially juvenile delinquents.

In 1866, this gentleman, at the request of friends, gave to the public in pamphlet form, "Some General Observations on Matters of Public Interest, with special reference to the Municipal Government of San Francisco." Therein he urged the adoption of the "Family System" in our Institutions for the reform of juvenile delinquents. He declared that whenever brute force was employed to maintain discipline in a reformatory, it indicated a failure in the system pursued. He took occasion to condemn the now venerable "Consolidation Act" of San Francisco, as opposed to the Anglo-Saxon spirit, so practical and jealous of governmental interference; the limitations of that act having referred the minute details of municipal government to the State legislature. The effect, he said was not to check fraud; it enlarged the lobby of the legislature, and there was a great deal of legislation hostile to the city. A detective police force, if necessary, he pronounced to be a necessary evil, a most efficient instrument of tyranny, the means it uses to discover crime being too apt to encourage the lowest forms of vice. To quote: "Its operations have, therefore, under popular forms of government, been generally limited to tracing out political offenders and the perpetrators of those exceptional crimes which had been planned with unusual sagacity and executed with uncommon dexterity. The pompous mystery which artfully shrouded its operations in former days, to the terror of the simple and the exaggeration of its own importance, has long since been dissipated with many other professional mysteries which are now but subjects for ridicule along with the parochial Dogberrys and Bumbles of a past age."

The Highton family name is interwoven with modern English history and English classics. The Rev. Henry Highton, fellow of Queen's College, Oxford, was long a master of Rugby School, where he was educated, and where his brilliant parts attracted the attention and won the especial favor of the accomplished scholar, Dr. Arnold. He translated the Greek Testament, contributed largely to *Nature*, a leading scientific journal, became Head Master of the Cheltenham School or college and won the friendship of Dean

Stanley, of Matthew Arnold, of the recent Archbishop of Canterbury and of other distinguished men. Another Edward Highton was a celebrated engineer, associated with the younger Brunel in the construction of docks in Cardiff, Wales. He distinguished himself in railroad construction in Austria being one of the framers of the Austrian railway system. For some years before his death, he was the telegraphic engineer to the London and Northwestern Railway. He was author of a work on the telegraph, and many improvements in the electric telegraph are encomiastically credited to him and his brother Henry (above mentioned) in the Encyclopedia Britannica.

John Highton, the paternal uncle of our friend under review, was a famous classical scholar, rector of a church in Leicester, a grand, good man, whose death evoked popular lament and whose life is commemorated by a shaft of marble, typical of the durability of his influence upon his age. A second Edward Highton is now vicar of Bude, Cornwall. Another relative, Edward Gilbert Highton, M. A., was long a Queen's Counsel in London, He was a contributor to the London *Times*, and connected with various literary societies. I could recall and record much more under this head, taking my readers through the Peninsular war, opening before them "Stanley's Life of Arnold," handing them volumes of sermons, etc., all in proof and illustration of the intellectual activity of the Highton stem.

Henry E. Highton's education was commenced at the school of Rev. J. C. Prince, in St. Anne street, Liverpool. During his stay at that institution he took every prize for classics offered to his class. The intention was to complete his education at Rugby, where the Rev. Henry Highton was one of the masters, but this was intercluded by his father's emigration to the United States. It was in 1848 when the elder Highton came to America with his son, the latter then aged twelve years.

It was the parental wish to consecrate young Henry to the pursuit of law, and nature herself acquiesced in the design. A brilliant career at the bar was to be his destiny, which he seems to have early foreseen, and the youth evinced his aptitude for the science—just as Pope "lisped in numbers, for the numbers came." Said the poet Bryant, alluding to his father: "He taught my youth the art of verse, and in the bud of life offered me to the Muses." Mr. Highton may refer to his father with a kindred feeling. By the light of sun, or lamp, or candle, behind the white cliffs of Albion, on the deep, and in the bosom of the broad continent which is the land he loves best, his legal studies, under intelligent parental direction, were never intermitted. His father was never a lawyer, but by his broad reading and grasp of mind was well qualified to teach the young legal idea "how to shoot." I have heard the old gentleman speak, with paternal pride, of his son's early promise, and of the faith in his future which the boy kindled in the breasts of some of England's learned men. Said the Rev. Mr. Prince to the father, when the latter

was about to start with his son for the New World: "Your boy is especially adapted for the legal profession; why not leave him in England? I will take charge of him. I feel he will become Lord Chancellor."

It was at Milwaukee, Wisconsin, that the father and son first settled on this side the water. There the young man was placed in the office of a leading lawyer. After a few months the gold fever began to rage throughout the country, and the ambitious and adventurous youth, not thirteen years of age, started across the plains for California. Not to touch the incidents of his toilsome and eventful trip, he rested, on September 3, 1849, at Weavertown, three miles from Placerville, then called "Hangtown." From that date until the spring of 1856, with the exception of a few months passed at Sacramento, he lived in "the mines," engaged in various occupations, working a great part of the time at actual mining in the placers, like many others who afterwards attained distinction at the bar. During this period while his character was forming amid shifting scenes, mushroom settlements and anomalous communities, he kept his mind and heart on the law, studying it in a desultory way, but not altogether without system.

Mr. Highton came to San Francisco in 1856, being then twenty-one years old. He came without means, and knew no one here except Dr. C. C. Knowles, the dentist, who took great interest in him and showed him much kindness. Shortly after the organization of the Vigilance Committee of that year, he became a friend and associate of the late Frank Soule, who, with William Newell, owned the then San Francisco *Chronicle*, which died a few years later. He was made first reporter on that paper, after the fashion of those days, his duties being afterward enlarged. He gathered local items, reported law proceedings and public meetings, and condensed news from interior journals and from Eastern, Australian, and Chinese newspapers, which arrived in large batches. After two or three months of this service, he wrote leading articles for the old *Chronicle*, contributing also to the *Golden Era* and the *Spirit of the Times*. During the legislative session of 1859, he was the Sacramento and legislative correspondent of the San Francisco *Herald*, and after the close of the session wrote for that paper a series of articles on the manufacturing interests of San Francisco and upon other topics. Meanwhile he pursued his law reading at night.

Then he devoted himself entirely to his legal studies for one year, and, on, July 3, 1860, he passed his examination and was admitted to practice by the Supreme Court, on the report of a committee composed of General Thomas H. Williams and John B. Felton. He answered correctly every question, including the catch query or pons asinorum: "What is the difference between the undivided moiety of the whole and the whole of an undivided moiety?"

By the advice of Oscar L. Shafter he commenced the practice of law at Sonoma, then just incorporated. In the fall of 1860 he returned to San

Francisco and began law practice there. In 1861 Mr. Shafter (who had not then been on the bench) visited the East, leaving to Mr. Highton several important causes to try in the District Courts, under the supervision of James McM. Shafter and Judge Heydenfeldt. In 1862 Mr. Highton was, for a few months, in partnership with Judge O. C. Pratt and the late H. K. W. Clarke. To the latter's widow, a lady of remarkable intellect and attainments, whose latter years were attended by great physical and mental suffering, he subsequently rendered important services. For a few months, also, in 1864–5 he was in partnership with William P. Daingerfield and J. Douglas Hambleton. These were his only partnerships. Afterwards, for a year or more, he was employed specially in certain matters by Hall McAllister, who became his warm and constant friend. He is much indebted to Mr. McAllister for his introduction to general practice.

At times, his successful conduct of great criminal cases has left an impression on many that his specialty is that branch of the law. But he, like McAllister, has *no* specialty. Indeed, he has no fondness, although great fitness, for criminal business. He has repeatedly refused to take part in the *prosecution* of a capital case, and has made this a rule of his professional life.

Mr. Highton has never held, or aspired, to a public office, or been a member of a political convention; yet he has great public spirit, which has been often signally displayed, as will be seen.

In 1860, the late John B. Felton, and Levi Parsons (the latter had been a District Judge in San Francisco), attempted to secure the passage by the Legislature of what was known as the "Bulkhead Bill." The proposed measure would have given the whole water front of San Francisco to a corporation of French capitalists, represented by the then powerful firm of Pioche, Bayerque & Co. (See the chapter on John B. Felton.) The boldness and magnitude of the scheme alarmed the metropolis. A "Citizens' Anti-Bulkhead Committee" was formed, with Lafayette Maynard as chairman. Mr. Highton joined this body, and was forced by circumstances and the partiality of friends into a prominent position. He wrote the memorial to the Legislature, the address to the senate, and various other documents against the measure, contributing to the local press many articles on the subject, which were published as "leaders." After the mission of the committee was accomplished by the defeat of the bill, he prepared the congratulatory address to the people of the State, of which many thousands of copies were distributed. The committee, through Mr. Maynard, presented to him a fine gold watch, "as a mark of appreciation of his services against corrupt legislation." At the next session of the legislature the bill passed both houses, but was killed by the vote of Governor Downey. Shortly afterwards the Governor visited San Francisco, and the people turned out en

masse to receive him. A torchlight procession escorted him to the old American Theatre (where the Halleck block now stands), and there Mr. Highton presented and read the resolutions drawn by Hon. W. J. Shaw and accompanied them with a vigorous speech.

He was the author of the resolutions read and adopted at the great Union mass meeting at the corner of Montgomery and Market streets in San Francisco, in April, 1861. Several other prominent men had submitted resolutions to the committee having the meeting in charge, and some of them were very lengthy. Mr. Highton's draft was preferred, and I give it here as a happy example of condensation and exact expression:

Resolved, That the full and fair development of American civilization, and the extension of civil and religious liberty throughout the world, require the perpetuity of the American Union and the protection of the American government against any and all assaults, whether of foreign or domestic foes.

Resolved, That the allegiance of an American citizen to the federal government is superior to all other obligations, and binds him in law and in honor to aid in the suppression of rebellion and in the enforcement of the laws.

Resolved, That in the present crisis in the history of our country, our reason, our hearts and our arms are with the constitutional authorities of the land, and that we pledge ourselves now and in every emergency to stand by the Union of these States and the government which has been instituted for the perpetual preservation of that Union in peace and in war, without reservation, qualification or condition, and at any sacrifice of life or property.

After the anti-bulkhead victory, Mr. Highton was urged by Lafayette Maynard and others to run for the State senate, but he told them he wanted no office, and the best service his friends could render him was to send him law business.

In 1862 he delivered the annual address before the State Agricultural Society. In 1864 he made several elaborate public speeches in support of General McClellan for the presidency, which were published substantially as delivered, and which dealt mainly with financial and constitutional questions. In 1865-6 he wrote various articles and documents against the reconstruction policy of the Republican party, holding that the war had been conducted on the theory, to which he assented, that the federal Union and the States were legally indestructible, and that when the war ended, the legal status of the Southern States remained unchanged. The first use of the term "rehabilitation" in this connection is attributed to him. He declared that rehabilitation, and not reconstruction, was the proper policy. In 1869 he delivered the Fourth of July oration at the California Theater, San Francisco, when Governer Seward was present, and a happy allusion of his to the distinguished guest caused the whole audience to spring to their feet and break into cheers. In 1870 he delivered the Fourth of July oration at Stockton. Both of these last mentioned addresses were strictly non-partisan, and were well received by the entire press.

In 1874 Hon. John A. Stauly, then County Judge of San Francisco, charged the grand jury to investigate the matter of the failure of Mayor James Otis and Treasurer Charles Hubert, to count the money in the county treasury, as required by law. This was regarded by many as an attack upon the Mayor, and a public indignation meeting was held, at which strong resolutions were passed supporting the Mayor and condemning Judge Stanly. A noteworthy incident of the occasion was the appearance of honest old Monroe Ashbury, who had been invited to speak, but who surprised the assemblage by openly indorsing the County Judge. A few days later an immense public meeting was held to express approval of Judge Stanly's course. Two-thirds of the taxable property of the city was represented, and a majority of the leading lawyers and of the judges on the bench were present. Mr. Highton was the speaker of the evening, and his address was enthusiastically received. Resolutions were passed sustaining Judge Stanly, and demanding the return to the treasury of about a million and a half dollars which had been deposited in a private bank by the Tax Collector. Within a day or two thereafter, the money was returned, with the exception of between two and three hundred thousand dollars, which was subsequently lost.

Mr. Highton was an early opponent of Chinese immigration. He took a firm stand on this question in 1857, and at various times since has given public expression to his views. After President Arthur's veto of the Chinese bill Senator Ingalls, of Kansas, who had voted against the bill, addressed a letter to a gentleman of this city, in which he expressed his sentiments on the Chinese question, and declared that the vetoed bill was a deliberate affront to a great nation. The letter was handed to Mr. Highton, who wrote a lengthy reply to the Senator, which was published and widely read. While holding tenaciously to the policy of Chinese exclusion, he is yet uncompromisingly opposed to all violence to Chinese residents. He has said strong things against the Chinese, but has also declared that the whole power of the government should be employed, if necessary, to prevent the slightest personal harm to the Chinese among us, or the invasion of a single one of their legal rights. While acknowledging that the working classes have long had good cause for complaint against corporations and capitalists, he yet firmly opposed the movement under Denis Kearney. He successfully defended John Hayes for throwing Kearney from the platform at Platt's Hall, at a meeting called to consider the relations between the city and the Spring Valley Water Works. This was a long and exciting trial. It was admitted that Hayes did assault Kearney as a matter of fact, but Mr. Highton maintained that the act was committed in defense of the rights of popular assemblage and free speech, and supported his position by many historical and judicial precedents.

He has always regarded his six years' labor in the mines as of incalculable benefit to him, and credits it with his physical development. It embraced

the plastic period of youth, made him an American at heart and imbued him with a vital sympathy for the working classes. He believes that men's lives are valuable in proportion to the amount of useful work which they do. He thinks that American civilization is the highest, and that the American system of government is the most potent to produce the best results. His faith in the people is thorough and profound. He and the late Judge Lake, both Democrats, opposed the action of the San Francisco League of Freedom in its aim to obstruct the old Sunday law; they held such action to be anti-American and illegal, because the law whether right or wrong as a political measure, had been declared constitutional by the Supreme Court. Mr. Highton spoke on the subject at Platt's Hall. He has been a member of the Democratic State Club since its organization, but has little to do with party management, except in his own way, which is particularly independent. He is Jeffersonian, strongly sympathizing with that class of Democrats not numerous in large cities, but to be found in force in agricultural communities. He is an open enemy to the machine politicians.

He is thoroughly identified with the anti-monopoly principle *within* the Democratic party, and effectually contributed in the year 1882 to the introduction of that principle into the platform of his party and the political canvass. He made no speeches, but wrote a "Declaration of principles," and a letter to the delegates to the State convention, of which many thousand copies were circulated. He wrote the platform adopted by his party club and approved by other clubs, and which was a vigorous and manly protest against monopoly and bossism. To the same end he has steadily and consistently used his influence personally with his large acquaintance throughout the State. He is recognized as distinctively Californian, with the Western habit of thought, and a strong love for his State and country. He is a life member of the California Pioneers.

In August, 1874, Mr. Highton married the second daughter of the late P. M. Scoffy, long a merchant in New Orleans and San Francisco, who died highly respected and much beloved, in 1875. His wife is an amateur artist of decided merit. She has painted a number of fine pictures, one of which, a large painting of Mount Shasta, was exhibited at the the rooms of the Art Association. He has no children. He is a member of the Episcopal Church, and a constant attendant at Trinity. He has no patience with infidelity, or atheism, and has frequently spoken in favor of religious organizations, outside of his own church.

Mr. Highton has tried, either alone or as leading counsel, many important cases in every branch of his profession, especially jury cases, but he prefers controversies involving intricate commercial questions. He once kept a set of books for three years in order to know how to comprehend accounts. There are leading cases of his in the Supreme Court Reports, in which his name

does not appear, because he was employed as counsel and was careless about getting his name into the published volumes. In his early practice he wrote many briefs for other able lawyers. No less a man than Delos Lake said on one occasion: "A legal opinion from Mr. Highton has as much weight with me as a decision of the Supreme Court."

Here are some observations upon Mr. Highton's intellectual qualities—an interesting compendium, kindly furnished me by his father:

"From earliest days he was remarkable for his persevering avidity to *know*, and for his logical deductions. The first intimation I had of his being able to read was when he was about five years old, when he read to me with ease and perfect, intelligent intonation, an article in *Chambers' Journal*. I was in favor of retarding his precocious intellectual development, but with some 'letter blocks' which were in the nursery, and some miscellaneous scraps and simple books, he had acquired the art of reading, with no other aid than the occasional attention of a relative, who assisted him to get rid of his importunities.

"He was an inchoate lawyer from his infancy. Tenacious, argumentative, quick in appreciation of points, and detection of fallacious sophisms; clear in conception and rapid in generalization; impatient of injustice, but cautious and wary to correct. His desultory education was rather an advantage. The trammels of a system would probably have repressed some of his best qualifications as a forensic lawyer, and the danger which might have been apprehended was averted by his acute and minute observation of details, which is remarkable. He has one of the most retentive and capacious memories, which, with his quickness of application, supplies him with an unusual fund of resource in difficulties. A 'legal' client, for he had been constantly 'at law' with somebody, and who was also a very successful speculator and financier, once told me, that, in all his experience, he had never found a lawyer with so many legal resources. His forte, if he can be said to have one, where the aptitude is so general, is in simplifying complicated details, whether in mercantile transactions, or in analyzing circumstantial evidence. His greatest fault is in a sometimes almost wearisome exhaustion of legal points, but he is never garrulous. He is chivalrously faithful to his clients, and, in fact, fidelity is a prominent characteristic in all his relations with others.

He has an unusually well balanced mind. Mr. Fowler, an eminent phrenologist, who came to examine heads in an institution under my charge, told me, after examining him, that he had the best balanced head, according to the principles of phrenology, that he had ever examined. The only dominating indication being 'love and approbation' and 'self-esteem,' which he said might be a useful lever in the direction of his mind.

Let me preserve here a condensed history of the celebrated impeachment case of Mayor Kalloch, in connection with some others of the many remarkable cases Mr. Highton has tried in our courts.

In the fall of the year 1879, Rev. Isaac S. Kalloch, pastor of the Metropolitan Baptist Church, was elected Mayor of San Francisco under very extraordinary circumstances. Local politics were then strangely complicated. Three party organizations contended for municipal control—Republican, Democratic, and Workingmen, the last named having, for a brief spell, absorbed the bulk of the Democracy. The Republicans elected their candidates with the exception of their nominee for Mayor. The Board of Supervisors

was unanimously Republican, but Kalloch was chosen to preside over them as Mayor by the Workingmen, with the help of independent voters who sympathized with him in his sufferings, he having, a few weeks before, been shot and seriously wounded by Charles DeYoung, senior proprietor of the San Francisco *Chronicle*. The minister Mayor, at the time of his election, was lying prostrate from the effect of his wound. After his recovery and induction into office he continued to be, as he had been for a year previously, a bold and eloquent, if not a reckless and defiant, advocate of the Workingmen's cause. Throughout his official term there was unrelenting hostility between him and the Board over which he presided. The city was agitated over the long and violent controversy, the poorer classes—the army of the discontented, not to say lawless—rallying around and applauding the Mayor, who, like his coadjutor, Dennis Kearney, constantly fulminated against wealth and aristocracy. That was a critical time in the city's history. Kalloch from his pulpit, Kearney from his sand-lot platform, and the press from its broad vantage ground of view, long kept the public heart in ferment. Turbulent meetings were frequent, bodies of idle men paraded the streets by day, a large element of the population was on the eve of open revolt against social order, threatening alike with mob violence the palaces of the rich and the dens of the Chinese. Trade was in great measure paralyzed, property values depreciated, and capital became thoroughly alarmed.

For this state of affairs the Board of Supervisors, and behind them, perhaps, one-half the population and the bulk of the mercantile community, held Mayor Kalloch largely responsible, by reason of his frequent and violent public utterances. It was determined by the Board to take official notice of his course. At its meeting, April 28, 1880, the judiciary committee presented a lengthy paper recommending that judicial proceedings be instituted to have the Mayor removed from his office. To condense this document, it set forth that the Mayor had exhorted and advised the lawless and discontented elements to form processions and parade the streets; that he had threatened mob violence to individuals and insurrection against the laws; that under the pretence of counseling the vicious and turbulent against mob violence, he had insidiously advised them to be in readiness for bloodshed and the overthrow of lawful authority. "To report the language used by Isaac S. Kalloch, Mayor, would render it necessary to embody the whole of all his public addresses, for after a very careful and critical reading and analysis of the language used, both in public speeches and official communications, we find," said the committee, "abundant reason to express our regret and the public indignation at his conduct while filling the position to which we believe an unfortunate occurrence elevated him, and in which position his example and influence have been and are more heinous, prejudicial and injurious to this community than those of the brutal and degraded persons who have been

arrested and convicted for the unlawful acts which he aided and abetted." The paper was throughout dressed in words of most scathing denunciation. The resolution calling for the Mayor's impeachment was put by him from the chair without remark and without any manifestation of feeling, and was adopted by a unanimous vote.

There were two methods of removing public officers—one by summary process, the second by indictment. Under the latter no officer had ever been pursued in San Francisco, while under the first mode, a City and County Assessor and a Coroner had been removed from office. This method, adopted by legislative act in March, 1874, and afterward expressed in a section of the Penal Code, provided that when a complaint in writing, and verified by oath, is presented to a District Court against an official for violation of law, the Court shall cite the accused to appear in not less than five nor more than ten days and at some time not more than twenty days from the date of filing the complaint, the Court shall proceed to hear the evidence upon the accusation. If the complaint is sustained by the testimony, a decree shall be entered removing the accused from office and giving judgment for the complainant for $100 and costs. This was the mode of proceedure adopted in the case of Mayor Kalloch. One week after the Board of Supervisors had resolved to take action against the Mayor, as stated, a mass meeting of sympathizers with the latter was held, which was largely attended and illuminated by bonfires. At this meeting a score of prominent citizens figured as officers and speakers and a vigorous letter from Henry George was read, but perhaps four-fifths of the large audience belonged to the "sand-lot" element. Resolutious extravagant in expression, were adopted with one voice, wherein the Board of Supervisors was denounced as "partisan and corrupt," while the party chiefly concerned was styled "our worthy and honored Mayor, the most upright, honorable and just official that has ever presided over the municipality of San Francisco."

The character and temper of this meeting, were reflected best, perhaps in certain resolutions (not the regular series just referred to) offered by one O'Leary which were adopted amid lusty yells. To make them intelligent it must be stated that Dennis Kearney, the "Sand-lot" apostle, and founder of the Workingmen's Party of California, had recently been imprisoned for the use of incendiary language, his sentence by the Police Court having been affirmed by a judge of the Superior Court. The Supreme Court afterwards discharged Kearney. O'Leary's resolutions will be found diverting, if not coherent:

"*Whereas*, When the bloated and sensual lecherer becomes gorged by his debaucheries, his foul imagination still remains as an appetizer to desire, and in order to appease his sensual cravings, he turns his foul, soul-destroying gaze on the holiest and purest objects; and

Whereas, We recognize the incarceration of Dennis Kearney as an outrage on truth and Justice and on everything that is made holy and sacred by Constitutional rights and privileges, and tradition springing from the genius of our institutions; therefore be it

Resolved, That we, the citizens of San Francisco in mass meeting assembled, look upon the blind goddess of this city as nothing more than a vile strumpet, who has yielded to the sensual embrace of political thieves and panderers to the unholy ambition of corporation nobs.

Resolved, That we solemnly protest against the longer retention of Dennis Kearny behind prison bars, for we look upon his imprisonment as unconstitutional and unwarranted and we pray that the Supreme Court will loosen his bonds and let him walk forth a free citizen."

Three days later the complaint to remove the Mayor from office was filed in the Superior Court. It was signed and verified by citizen J. A. Cooldige; the special counsel engaged by the Board of Supervisors to prosecute the case being Darwin & Murphy, and W. H. L. Barnes. The document was lengthy, and its specific charges were that the Mayor in his inaugural address, did wantonly, maliciously, and without cause or reason, impeach the honesty and integrity of the people of the city, by the use of the following language: "The people expect their officials to steal. * * * They are disappointed if they do not. If a man passes through the fire of official temptation unscathed, and comes out poor, he will get his reward from men from whom better things might be expected, in the sarcastic reflection, 'You were a fool not to make better use of your opportunities.' There must go with this another reflection equally mortifying to our pride, and equally unpleasant for me to make, that we are, perhaps, the only civilized community on earth where it is absolutely no bar to a man's social recognition or respectability for it to be known that he has stolen himself rich;" that, thereafter in a public speech while Mayor he said: "The people of this city have become so utterly demoralized that they attribute a mercenary motive to every man's action when it does not suit them;" that he had advised the forming of processions and parading the streets by a class of turbulent men who had assembled for unlawful purposes, and which class in public meetings used language blasphemous, incendiary, and calculated to provoke a disturbance of the peace; that he had at divers times "endeavored to encourage and incite certain persons to keep and maintain themselves in such a manner as to be able to commit an outbreak against the law whenever he should so advise;" that he had falsely accused various branches of the city government of dereliction of duty and corruption in office, for the purpose of weakening their influence and destroying their efficiency, so that he might strengthen his own power for the accomplishment of his own unlawful ends, and his private purposes; that he had incited the poor to mob violence against individuals, and to insurrection against the state and national governments; that on one occasion he told his followers at one of their public meetings, that

he was "powerless to help them," and exhorted them to "*do no illegal thing until you hear from me again.*" Great stress was laid upon this last expression of the Mayor by those prosecuting him, as showing that he was liable at any moment to head an outbreak against the laws, while his friends insisted that it only signified that if the discontented classes were determined upon disorder or, to use a larger word, revolt, or, a yet larger word, revolution, he charged them to listen to him in a final appeal, before they "crossed the Rubicon."

The complaint further averred that the Mayor had willfully violated certain statutes of the State, passed for his official government and control, in that he asked and recieved "emoluments, gratuities and rewards," for obtaining positions for divers persons in various city offices, making for himself thereby "extortionate gains and profits," and that, in willful violation of such statutes, he demanded and received "free passes" from railroad companies.

On behalf of the Mayor, Mr. Highton, as his leading counsel, fought this proceeding with characteristic zeal and tenacity. His first movement was a motion to the presiding judge of the Superior Court, to transfer the case from the department to which it had been assigned, to the tenth department of the court; this court having twelve judges, sitting separately in as many departments. His motion was based upon the grounds that the case was, in legal definition, a "special proceeding," and the court had established a rule that special proceedings should be heard before the tenth department. This case had been assigned to the fifth department, whose province (not by statute, but by court rule and practice) was to hear and determine equitable cases, actions on contract, for damages, and divorce.

The motion to transfer seemed reasonable and proper. Its true "inwardness," however, was probably dictated by professional strategy, as the judge of the tenth department had been elected to his office by the aid of the full Workingmen's Party vote, while the judge of the fifth department was a strong opponent of that organization. The motion was denied—the Mayor's enemies deriving much amusement from what they called Mr. Highton's attempt to "pick his own judge." Mr. Highton next asked that the case be heard in bank and that there be a full bench. This application was denied on the grounds that there was no power in the presiding justice or elsewhere to compel the attendance of the judges, and that any one judge might prevent a trial by absenting himself; but it was ordered that the trial should proceed before as many of the judges as could be induced to attend. Accordingly, Mr. Highton having meanwhile presented a written demurrer to the complaint, five of the twelve judges—Cary, Halsey, Sullivan, Ferral, Latimer—assembled, May 27, 1880, to hear and determine the case. The public attendance was very large, and the proceedings drew the notice of many other communities. Mayor Kalloch was present, lounging in a chair with eyes

closed most of the time—his appearance and bearing thus strikingly contrasting with his impetuous nature.

On behalf of the defendant, Mr Highton made the point that the Court did not have jurisdiction over the case. The law under which the procceding was instituted, clothed, in express terms, only District Courts with authority in such cases. A new constitution of the State had recently been adopted, wherein it was provided that the District Courts, all of which it abolished, should be succeeded by Superior Courts having the same jurisdiction. Mr. Highton argued that the law aforesaid (statute of 1873-74), was annulled by the new constitution, which instrument abolished the Courts to which it applied—that the powers of the District Court, touching this proceeding, had not been transferred to the newly created Superior Courts; that the section of the new Constitution relating to the impeachment of officers, was not self-executing, and required legislation to put it in operation. That the acts of the Mayor set forth in the complaint were not official acts, but were committed by him, if at all, as an individual. The charges were: 1. Incendiary language; 2. Corrupt procurement of places in city offices; 3 Accepting free passes on railroads. Mr. Highton argued that to effect the Mayor's removal from office for these acts, he must first be indicted for crime and convicted by a jury. He read a list of the statutes relating to the office of Mayor, showing all the duties imposed by law upon that office, and contended that no act complained of was a violation of official duty; that a broad line must be drawn between official acts and private acts. The Mayor might commit burglary and yet he could not be removed from office for that act by summary process. His removal might follow a conviction of crime, but the Act of 1874 only contemplated misdemeanors committed in the actual performance of official duty. He cited the case of *ex-parte* Harrold, (47. Cal. 149.) in which the Court held that a County Clerk who refused to comply with a law requiring him to reside at the County seat, did not thereby neglect an official duty.

The leading opposing counsel against Mr. Highton, at the close of the latter's argument on this especial point (Gen. Barnes) suggested that "as much stress was laid upon the question of jurisdiction it might be well to have that question determined in the first instance." After a recess Gen. Barnes replied to Mr. Highton, and the latter briefly closed the argument. After consideration between the Judges, the Court announced that: "The demurrer on the point of jurisdiction was overruled, and we will proceed to-morrow on your second point." The second point was this: That the acts complained of, were not committed by the Mayor in his official capacity; if at all. After further argument the Court, four of the five judges concurring, sustained Mr. Highton's position and dismissed the proceedings, thus establishing the rule that the language of the statute is to be

confined to the neglect of official duties. Judge Latimer dissented on the ground that Section 19 of Article XII of the Constitution, (declaring that accepting of free passes on railroads by any public officer should work a forfeiture of his office) was self-operative.

Kalloch died in Washington Territory in 1887. He had left the ministry and become a lawyer.

In the case of Dawson vs. Scott et al., the plaintiff, Rev. T. Madison Dawson, was pastor of a Presbyterian church in East Oakland, Alameda County, California. He suffered through an affair of the heart, and had the good sense to withdraw from the ministry. His withdrawal, which was in the shape of a letter to the Moderator of the Presbytery, was unanimously accepted by that body and his name was erased from the roll of ministers. Thereafter the Presbytery sought to arraign and try him on charges of immoral conduct. He refused to appear, and applied to the Nineteenth District Court (E. D. Wheeler, Judge), for an injunction restraining the Presbytery from taking any proceedings against him. An interesting conflict followed between ecclesiastical and civil authority.

The Presbyterian Church is an incorporated association of persons united for religious purposes, under an established system of discipline and government, prescribed in 1821 by the General Assembly of the Church. The perpetual officers are bishops, pastors, deacons, and elders, and the church is governed by subordinate councils under the General Assembly. The Presbytery is the second council in the order of progress from the church body to the General Assembly, and a quorum of its members consists of three pastors, and an unlimited number of ruling elders. It has power to remove and ordain, to admonish, suspend and depose ministers. Where a scandal is loud and action imperative, the Presbytery may be called together by anonymous complaint. While the Presbytery has jurisdiction over ministers, the body of the church deals with members. When an accusation against a minister is filed, he is cited to appear. If he refuses to appear he is cited a second time; if he still refuses to appear, he is suspended and cited a third time. Still refusing to respond, he is deposed. No appeal can be taken to the General Assembly, when the accused has failed to appear.

On August 7, 1875, Dawson aforesaid withdrew from the ministry as stated. On August 23, 1875, he was anonymously accused before the Presbytery of grave offences, the accusation being presented over the name of "Common Fame." He then applied to the Court for an injunction against the Presbytery. Mr Highton wrote the complaint and conducted the case. Ex-Governor Haight, who belonged to that church, appeared for the Presbytery. The complaint alleged that great publicity attached to investigations before the Presbytery—that the numerous newspaper organs of the church

published full proceedings, and the daily press also; that if the Presbytery was allowed to try the plaintiff and pass judgment upon him, his standing in the community would be depreciated, and it would be difficult if not impossible for him to obtain a livelihood—the "Common Fame" indictment charging him with most unseemly behaviour and the grossest immorality. Mr. Highton on the hearing, argued that the charges involved moral turpitude, and not questions of theological faith or discipline; they were not ecclesiastical, but affected the character of the individual; that the action of the Presbytery was arbitrary, and that that body arrogated to itself the functions of a civil tribunal. The counsel dwelt with emphasis upon the admitted fact that Dawson had withdrawn from the ministry, and his name had been struck from the church rolls. He declared that Dawson was a stranger to the Presbytery, as much so as anyone outside of the church, and that there was no instance of an ecclesiastical body usurping and exercising jurisdiction over strangers. Religious societies were amenable and subordinate to the Courts—as much so as the Masons, Odd Fellows, Red Men and the social clubs.

Gov. Haight, for the Presbytery, contended that it was an unheard of thing for a Court to interfere with ecclesiastical authority in matters of church discipline. He appealed to the well defined principle of law that an action could not lie to *prevent* libel or slander. The redress for slander or libel was an action for damages. The Presbytery had a perfect right to try Dawson, notwithstanding his resignation. The government deals with man's body and estate, but not with his religion. If the Presbytery wanted to try Dawson against his wish, and when he was no longer a minister of the gospel, it was its exclusive privelege to do so, and no civil tribunal had any right to interfere.

Mr. Highton replied that the case before the court involved civil rights; that a man's reputation was his property. "Suppose," said he, "that the Presbytery would prefer charges against me, and I refused to respond, and they tried and convicted me. No matter what my standing in my profession might be, I would be a ruined man. Is it not a monstrous doctrine that the courts could not protect me? —that the separation of Church and State is so complete that the courts could not interfere and save me from outrage?" Counsel insisted that there was noquestion of conscience before the Court, but the question was one of property. He insisted, and quoted authorities to show, that reputation was property.

The injunction against the Presbytery was granted by the Court and the matter there ended, no appeal being taken.

Dennis Kearney, the San Francisco agitator, and father of the Workingmen's Party of California, which sprang up in 1878, and lived a couple of years, inaugurated his long continued agitation by a speech in Dashaway

Hall, San Francisco, Wednesday evening, September 7. 1877. The first "Sandlot" meeting was held on the spacious open grounds near the City Hall, on the following Sunday. Kearney was the "Orator of the day." "It is said in some places that I made myself heard," declared Dennis, in a note to a San Francisco daily paper, March 6, 1882.

The communistic feeling, which is rooted in a large element of our population, found savage expression in San Francisco, in July, 1877, under the stimulus of unusually hard times. The local riots of that month were only suppressed after the law and order elements of society had organized under the generalship of the Mayor, and in addition to their moral weight, had given physical support to the police on the field of actual encounter.

Many entertain the belief that Dennis Kearney was the instigator of those riots; but as it has been just observed, he began his career as an agitator Sept. 7. 1877, whereas the riots occurred two months earlier. So that really Kearney was the creature, instead of being the author of that agitation, albeit his is the central figure as we look back to those troublous times. For several years Kearney, by his harangues delivered almost nightly to turbulent and applauding multitudes, kept San Francisco in a ferment of excitement, some of the effects of which were to frighten away millions of capital, to paralyze many industries, and if not to make the rich richer, certainly to "make the poor poorer." Proclaiming against the despotism of capital, he was ready to enthrone the tyranny of the mob. Insisting upon, and freely indulging in, "free speech," he boldly denied that privilege to all who stood in his way. So violent became his public utterances, and so threatening to civil order was the conduct of his army of followers, that the legislature, in response to popular appeal, passed, and the Governor approved, a bill punishing the abuse of free speech, which measure was styled the "Gag Law" by those for whose amendment it was designed. On one occasion, Kearney declared from the platform in a public meeting, the chairmanship of which he had usurped, that "no politician in office shall speak at a meeting at which I preside."

In the spring of 1878, as, indeed, for several years prior and subsequent, the people of San Francisco were disturbed by the question of water supply. The prices for water fixed by the Spring Valley Water Company, which supplied the various departments of the city government and the great bulk of the inhabitants, were generally regarded as excessive. Among the propositions discussed for the adjustment of the difficulty was one to condemn and purchase all the works and other property of the Spring Valley Company. The belief becoming general among tax-payers that if this were done the Company would be paid millions of dollars above the value of their property, a loud popular protest went up against the proposition. On March 16, 1878,

at two o'clock in the afternoon, a large public meeting was held in Platt's Hall to express the popular opposition to the proposed purchase. The meeting was called by several citizens, none of whom, take note, had any affiliation or sympathy with Kearney or the so-called Workingmen's Party. The attendance was very large. The committee of arrangements had selected Monroe Ashbury for President. Mr. Ashbury was an old citizen, universally honored, and had held several important local offices; but he was not the right man to meet the unforeseen crisis which was at hand. He was both honest and firm, but his firmness was that of a man of peace. He could not be driven from any position which he had deliberately taken, but he was too slow and deliberate in taking position. He was the imprudent selection of the committee. The occasion called for a bold Captain with a heart of oak. In the felt presence of such a man the disorderly scenes to be noticed would not have been.

The meeting, for some unexplained cause, was not called to order until a quarter of an hour after the appointed time. The hall was full and the audience restive, especially that portion composed of Kearney's contingent, present in large force. The chairman of the committee proposed Mr. Ashbury for President and declared him elected. Mr. Ashbury was present, but just then there were loud calls for Kearney, who took the platform, and Mr. Ashbury did not appear. Before Mr. Ashbury had been proposed, Kearney had taken the platform in response to calls, but left it at the request of the committee in charge. There is hardly a doubt that if Mr. Ashbury had been nominated earlier, had promptly responded, and had exhibited a firm attitude, all would have been well. But, as he afterwards testified, he considered the meeting had been packed, that its objects had been defeated, and he declined to serve as chairman. This unfortunate decision left the resolute intelligence of the committee represented at the meeting without a leader; and, seizing its opportunity, the Sand Lot instantly asserted sway. Kearney himself put the question as to whether *he* should be president. A loud response went up from his men, massed in the center of the hall, and he declared himself elected.

Several speeches then followed, one of them being made by Rev. H. Cox. (Mr. Cox, State Senator, Edward Nunan, and Eugene N. Deuprey, then a rising young lawyer, had been selected by the committee as the speakers of the occasion). Senator Nunan next presented himself and was introduced to the assemblage by Rev. Mr. Cox. Kearney then declared that Nunan should not speak—that no politician in office should speak at a meeting at which he, Kearney, presided. Bedlam then broke forth, and a general row was only prevented by the police who made several arrests. During the dispute between Kearney and Nunan as to the latter's right, or rather power, to speak, Mr. John Hayes, an old citizen, one of the family after whom

Hayes Valley and Hayes Street were named, went upon the platform and said to Kearney, "If you do preside over this meeting, you don't run it." Then, getting behind the "President," he pushed him off the platform into the music stand. Hayes was arrested, and Kearney and Nunan continued their dispute with voice and gesture for twenty-five minutes. Finally, Nunan was prevailed upon to retire, in the interest of peace. After a short speech from a legal light of the Sand Lot, Kearney declared the meeting adjourned, and it dispersed. Three weeks later, April 7, 1878, the trial of Hayes on a charge of battery upon Kearney, was commenced in the Police Court.

The instances are far too numerous to be noted, where peaceable and reputable citizens have been called upon to administer chastisement in cases where the law failed to prescribe any punishment; but in such instances, the result has nearly always been that the party who sought to right his wrong was himself punished by the law. Hayes of course committed an assault upon Kearney. The defence, it would seem, would have to plead that the provocation was great if not irresistible. All classes of society agreed that Hayes would be convicted of assault, and would be fined—the better classes hoping that the fine would be the lightest permissible. But Mr. Highton, who appeared for the defence and also in reality in behalf of society and the public, took the bold and novel ground that Kearney was the aggressor; that *he* had *first* committed a technical assault upon John Hayes *and upon every other citizen* who had entered Platt's Hall to further the object of the meeting; and that when Hayes pushed him from the platform, he, Hayes, acted *in self defence*, and in defence of those who had called the meeting.

Although this was only a case of battery in an inferior criminal court, it makes, by reason of the principle involved and the able and ingenious manner in which the defence was in effect turned into a prosecution, a bright chapter in Mr. Highton's forensic career. The evidence was interesting, the arguments able and instructive, and the case merited a full report, for wide dissemination in printed volumes.

Mr. Highton probably never achieved a more notable triumph. Immediately upon the close of the argument, the magistrate, Hon. Davis Louderback, rendered his decision as follows:

Under the circumstances of the case, I think the conduct of Dennis Kearney, in seizing the organization and controlling the proceedings of that meeting, was unjustifiable and illegal. I think the law views his act as an intrusion and a violation of the rights of those persons who originated the meeting, and the right of the people peaceably to assemble for a lawful purpose. This shove was given evidently, not for the purpose of an assault, but in assertion of the rights of the meeting. He did not beat him or strike him; but gave him a shove in the excitement of the moment, to assert his

right and his protest against Kearney's illegal acts. Under the circumstances, I think it does not constitute a battery, or an assault, and the case is dismissed.

The result of this trial was received with great satisfaction by the large majority of citizens. It won for Mr. Highton (who would accept no fee) the earnest plaudits of the press and people, and added largely to his fame as an advocate.

The two principal criminal trials with which Mr. Highton has been connected, presented interesting coincidences. Both grew out of assaults upon the proprietors of the San Francisco *Chronicle*, and both resulted in the acquittal of the accused. The first was the murder case of Isaac M. Kalloch, son of Mayor Kalloch, whose impeachment case has already been stated. In this, Mr. Highton was leading counsel for the defense. The accused, whose father had been severely arraigned by the *Chronicle* as being corrupt personally and officially, followed Charles de Young, the senior proprietor, into his business office and shot him down. This was in 1880. In the other case, assault to murder, the accused, A. B. Spreckles, also invaded the *Chronicle* business office and shot M. H. de Young, the sole proprietor, inflicting serious wounds. He, too, claimed to have taken arms in vindication of his father and family. This was in 1885, and in this case Mr. Highton was associated for the defence with Hall McAllister. The coincidences failed in the property qualifications of the two accused, Kalloch being a poor man and Spreckles a Croesus. Both trials progressed at great length, amid deep public interest, and in each case there was a general verdict of not guilty.

This advocate has never been charged with fighting cases by other than open methods and in open court. His sympathies have always been with the best elements in the community, politically, socially, and professionally. Having, for some years in his early manhood, been connected with the press, in all its departments, he has never underestimated its power or its usefulness, nor resorted to the publication of cards, nor engaged in unseemly squabbles with newspapers. And he has always favored a just and impartial administration of the law, through the regularly constituted authorities and not by irregular methods. In a full tide of practice for thirty years he has never had any trouble with the courts. When he has argued a case, the verdict of his brethren of the bar who have heard him, has been that he has covered all the ground. He leaves nothing unsaid, but his statement and argument are deliberate and his manner diplomatic and impassive. His notable defenses in the ten or twelve leading murder cases of this State, have inevitably spread his fame abroad as a master in that line of practice. But, with a single exception, he has never defended a party for crime who belonged to the criminal classes. Indeed, of his full practice the criminal department has not exceeded one-and-a-

half per cent, and with the opening of the year 1887 he ceased to accept employment in any criminal business whatever.

Platt & Rich, a Virginia City, Nevada, firm failed in business, owing San Francisco merchants, who, by reason of non-residence, could not attach, more than $100,000. Judgments against them, alleged to be the result of collusion, were obtained, and all their assets were advertised for sale under execution. Mr. Highton went to Virginia City, filed two bills in equity, in the names of twenty-four importing houses in San Francisco, and, after long arguments before Judge Rising, in which he was opposed by the best legal talent in Nevada, he secured an order enjoining the sales, and ultimately captured for his clients the entire assets, amounting to some $46,000.

In 1867 one Schmedberg was by a decree of the Fourth District Court, Hon. E.D. Sawyer, Judge, directed to make a bill of sale of the bark Cesarewitch. A most interesting case was this. Being then a Justice of the Peace I took voluminous testimony in it, having been designated as referee at the instance of Messrs. Hall and Cutler McAllister, to whom ex-Judge George Turner was opposing counsel.

Judge Sawyer's decree omitted the usual proviso that, if Schmedberg refused to execute the bill of sale, the clerk of the court should do so in his stead (which under the law would answer all purposes). Schmedberg did refuse to obey the decree, and was sent to jail for contempt. He employed Mr. Highton to obtain his release. Having moved for Schmedberg's discharge in the Fourth District Court, Mr. Highton was informed by Judge Sawyer that no argument would be heard. "Mr. Schmedberg," said the Judge, "will stay in jail until he either signs the bill of sale or rots." Mr. Highton then took his client by habeas corpus before the Supreme Court, and, after argument, the prisoner's discharge was ordered by that tribunal. Meeting the District Judge a few days thereafter, Mr. Highton said: "Judge, if you should come upon Schmedberg in the street, hold your nose and cross to the other side."

Mr. Highton argued all the questions in the Dupont street cases, before the Nineteenth District Court in connection with Judge Garber and Thomas B. Bishop. These cases grew out of the widening of what is now Grant Avenue, San Francisco. He participated in the argument of the actions to enjoin the collection of the Kearny street widening tax, and to recover the taxes already collected. He made arguments in both the District and Supreme Courts.

In Brumagim vs. Bradshaw et al., an ejectment case of great importance for land on the Potrero, San Francisco, after an adverse decision by the Supreme Court, separate petitions for a rehearing were prepared by S. M. Wilson and Mr. Highton, and a rehearing was granted. The original decision was reversed.

It was for a long time the custom of certain practitioners in San Francisco to induce sailors and passengers to libel every vessel that entered this port, with a view to securing lucrative compromises. In the spring of 1869 thirty-nine passengers libeled a certain ship from Australia, and Dickson, DeWolf & Co., the consignees, determined to make this a test case, and employed Mr. Highton to defend. The trial lasted several weeks, and resulted in the defeat of the libelants, who, at the end of a long and able opinion by Judge Hoffman, were awarded one dollar each, without costs. In this case there was an interesting obstetrical question raised, and Mr. Highton's examination of medical and scientific witnesses was, for the ingenuity and research it displayed, warmly commended.

The case of Kinsey vs. Wallace was an action for damages for a malicious attachment. The jury gave a verdict for plaintiff, represented by Elisha Cook, for $7,600. Judge Dwinelle, of the Fifteenth District Court, refused a new trial. On appeal Mr. Highton argued the case in the Supreme Court for the defendant, who was the appellant. That court ordered that a new trial should be had unless the plaintiff remitted $4,000 of the sum awarded by the jury. This was an unusual decision after a verdict and denial of a new trial by the court below.

In the contest between S. F. Hopkins, the brother, and Mrs. Mary F. S. Hopkins, the widow of the railroad magnate Mark Hopkins, who left an estate of about thirty millions of dollars, Mr. Highton was the leading attorney and counselor of petitioner. He succeded in having the widow removed from the administration of the estate on the ground that she was not competent to manage so vast a trust.

Mr. Highton has been of late years an attorney for J. B. Cox in the latter's long litigation with Charles McLaughlin, who became a millionaire as a result of extensive contracts for railroad buildlng. Cox slew McLaughlin in the latter's office, in San Francisco, on December 13, 1883, after the litigation between them had been pending for years and had been taken to the Supreme Court three times; and he has since continued the suit against the large estate of the deceased. The killing of McLaughlin was not witnessed by any third party. A charge of murder against Cox was dismissed by a Police Judge on preliminary examination, on the ground of self-defense, Mr. Highton and D. M. Delmas appearing for the accused. Cox was a contractor under McLaughlin. As originally commenced, one of the objects of his suit was to enforce a lien for work and materials, and there were other defendants with McLaughlin. But at last the relief sought was for a personal judgment against McLaughlin. The latest decision in this tedious and sanguinary litigation, was made by the Superior Court of San Francisco, (Hon. J. F. Sullivan presiding), on the 4th of October, 1886. It was there found that Cox (and his associates, to whose interests he had succeeded), had done work

for McLaughlin, under contract, of the value of $285,918.49, and that there had been paid on account of this, $187,690, and judgment was entered in favor of Cox and against Kate D. McLaughlin, as executrix, for $98,228.49, and a large amount of accumulated interest. The case is again on appeal.

During a period of several years, between A.D. 1862 and A.D. 1867, there were seizures in great number, of imported merchandise, by the customs authorities of San Francisco, New York, Boston, Philadelphia, and New Orleans. These seizures embraced among other articles, champagnes, red wines and white wines. It was sought to have these importations confiscated for alleged undervaluation. In San Francisco the litigation resulting was long and bitterly contested. The cases were severely pressed by Hon. Delos Lake, U. S. Attorney, with whom Milton Andros was associated as special counsel for the Government. Hall McAllister and Mr. Highton defended for the claimants. Perhaps Mr. Highton's best, as well as his most earnest and elaborate argument in these contests, was made in the case of "The United States vs. 180 cases of White Wine," in the U. S. District Court, Hon. Ogden Hoffman, Judge. The wine was Chateau du Vigneau, owned by the Viconte de Pontac. It was seized under a suspicion of fraud, on July 29, 1865, being the first and only seizure of that kind of wine. It had been passed by the Government appraisers. Not until the 5th day of February, 1867, over eighteen months after the seizure, was any testimony obtained in support of the charge of undervaluation. The case was tried before a jury, Mr. Highton's argument being upon the facts, and made on March 26, 1867. This argument was fully reported and sent in pamphlet form over the United States and Europe. The verdict was for the Government, under the instruction of the court, but the cause was so stubbornly contested that the trial was followed by a settlement of all kindred cases then pending.

Let me close this chapter with some passages from one of the latest, and probably the finest of Mr. Highton's orations, that delivered in 1883, August 24th, at the laying of the corner-stone of the Garfield Monument in Golden Gate Park, San Francisco. The ceremonies were conducted by the Knights Templar of the United States, then in triennial conclave. As the occasion was rare in other respects, so the audience was one of the grandest ever addressed by man, numbering, it is believed, sixty thousand people. I quote from the oration:

It is often said that the age of great oratory, of great poetry, of great dramatic works, is over. In a certain sense the assertion is true. The world of fact, with its ever-developing possibilities, has taken the place of the world of the imagination. The human mind, trained and educated by the very process of acquisition, is no longer compelled to evoke from its own mystic depths, the thought that stirs, the imagery that thrills, the dark phantoms that tear, the human heart. We live, nevertheless, in a period of terse and inspiring eloquence. Nature, with its innumerable forms of grace and beauty, addresses hourly an illuminated and enfranchished intelligence. Law, with its myriad

voices, tells us of order and of applied justice that exclude the arid theory of chance True science, often confounded with the mere assumptions and formulas of mental egotism, spreads from pole to pole exact and useful knowledge. Discriminating history gathers up the records of the past and warns and instructs us by its lessons. The acts, the ideas, the words, of men are heralded through all the zones. And while, in the wondrous increase of organized communities, individual importance is being steadily diminished, unrestricted intercourse is blending humanity into a net-work of relations, which transcend governments and territorial divisions, and, in the midst of strife and apparent confusion, are solving the most difficult problems that have been transmitted to us through the statesmen and philosophers of six thousand years. It is not surprising that, in such a complex aggregate of realities, in which the miracle of the Creation is perpetuated and expanded, the genius of fiction, the productions even of the loftiest intellects of all time, are eclipsed. Civilization at once epitomizes and magnifies the grandest concepions of the poets. The daily achievements of man upon land and sea, the diversified industries in which he is employed, the advance of liberty through all the grooves of trade and commerce—multiplying the comforts and elevating the general level of population—constitute a ceaseless oration, which excels the measured rhetoric of Demosthenes and of Pericles. And every man who is not a drone and an incubus, one of the supernumeraries of society, is himself an actor from the cradle to the grave in a perfect drama, which depends upon no legend for its origin, which will end only when the consummation of humanity shall be accomplished, whose Author and whose Finisher is God.

This glittering pageant, which is born not all of joy nor all of sorrow, and in which the diversities and even the antagonisms of every part of the Union are grouped and harmonized, is full of an intense significance which History will apprehend and describe, and which it is my duty to the extent of my ability to interpret.

In the presence of this vast multitude, the oldest of human institutions and the newest phase of civilization have met together, and Free Masonry, type of the severe and of the antique, has exercised a normal function by co-operating with civil society in a simple act, designed to mark a great calamity and a great triumph. The calamity was the death by violence of a man who had been elected President of the United States, and who was in himself an illustration of the excellence of our national institutions ; the triumph is that of constitutional freedom and order in a continental Republic.

We are assembled here, not under the invocation of a barren science that would emasculate the world of all that is not visible or susceptible of explanation through an arrogant human intelligence, but in the name of God, the Supreme Architect of the Universe, the Creator of Heaven and Earth, the Source and Origin of the forces and laws that have developed and shaped both men and nations, to place on the extreme western verge of the American continent the foundation of a durable memorial to human progress as illustrated by American institutions and by the American people. A stone, accepted by the builders, though formally dedicated to the memory of the dead, has yet become the chief corner of an arch that extends from where the roar of the Atlantic sounds in the ears of the descendants of those who gave their life-blood to the Revolution to where the soft whispers of the Pacific tell of peace and harmony that overspread the nation. The monument at Bunker Hill, on which, from base to apex, the patriotism of Webster was poured, gives bond for the enduring gratitude of the American people to those who laid the corner stone of the Republic, and now, on the opposite shore, we propose to erect a monument, which, through an individual life and death, shall attest to all future generations the completion of its structure. The sun, pursuing its majestic course across the sky, shall bathe them both in meridian splendor, and, when its

last beams play upon the summit of the column at Bunker Hill, its full refulgence shall yet irradiate the bronzed features of our martyred President, whose personal career ended with the assured perpetuity of the Union, through the consent of ALL his countrymen.

* * * * * *

I have said elsewhere that the Government of the United States is not sectarian, but that is not Pagan, and it is not atheistic. I take the liberty, and most appropriately as it appears to me in this presence, not only of repeating but of enforcing the observation. In the name of him whose memory we this day revere, I protest against the atheistic tendencies of the age, and I assert that a reverent consciousness and application of the limitations which surround our reasoning powers are practically important in the conduct of life everywhere, and above all in American communities. Even superstition is preferable to the moral and mental autopsies of narrow-headed competitors with the Almighty. The two ends of mortality are enclosed by the sphere of eternity. Applied to the standard of the Infinite the human mind is measured by the inch, and those productions which to itself appear the greatest, are often mere plays upon thought. The thankful recognition of existing truths is one thing—overweening self-confidence or inflated vanity is another. The people *can* govern themselves within the limits I have sought to describe or to suggest, but their entire strength could not alter a single law that flows either directly or mediately from the Creator. Lying and stealing could not be converted into virtues by all the voters in the United States. Their combined power could not prevent the ebb or flow of a single tide, or prolong the life of the smallest insect that had existed for its allotted time. Their will, aided by all the resources of science, could not arrest the fleeting breath of their President, made sacred to them not merely by his office, but by his personal sufferings. In truth, the only power man has over the most vital issue here is to mitigate pain and to anticipate death. I am deeply convinced that, in the training of our mental faculties, nothing can be more essential than to avoid that which, though it may be realized and acted upon as a fact, is beyond analysis and explanation, and that this proposition is pre-eminently true of American communities, in which mental activity needs to be controlled by discipline and stability. We must realize, and act upon the belief, that the foundation of all things material and immaterial is not abstract law, divorced from a law-giver; not self-generating, independent force; but GOD, a PERSONAL WILL, penetrated by the perfect attributes of LOVE, JUSTICE and TRUTH, of which the whole universe is but the multiform expression. This is the rock upon which, and upon which only, self-government can securely repose; this is the plain and massive corner-stone of the Republic.

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I have one thought still to utter, and then I am done. It bears upon the future of our country. We must purify our party methods by a resolute submission to the people, and by the cultivation of habits of settled industry and thrift among the young. Woman must be enfranchised by industrial education. Men must be taught to respect themselves. It must be understood that all corruption tends towards violence—that fraud and force are the correlatives of each other. Office seeking is the bane of youth and the badge of degradation to the old. It means too often the struggle of incompetence and laziness to live in luxurious ease, and to obtain without effort in natural channels the fruits of labor. It should be discountenanced and abandoned.

In short, the end of all the festivities and of all the ceremonies of this Conclave Week should be better lives, and the increase of that natural and unselfish patriotism which does not evaporate in excitement, but settles into a clear appreciation of the real work the fathers of this Republic did, and into an intelligent comprehension of the obligations of the citizen and of the system of our government. The span of human life is

short, but it may be fitted into that bridge of constructed progress upon which the grand army of toilers is ceaselessly marching into a world unseen and unknown but whose foundations are in the heavens; a world of new facts, but where principles are unchanged; a world where clogs and fetters shall fall away, and opportunities multiply and expand; a world where the actual labors of the past, still exerting their influence upon earth, shall yet propel individual souls forward and yet forward, towards the fulfillment of their parts in the Providential design; a world where minds shall enlarge and become more and more illuminated, and hearts shall swell and throb with purer and purer love, and the chorus of the morning of Creation shall be revived in the joyful strains of a perfected humanity.

CHAPTER XVI.

The Shafters, Par Nobile Fratrum—Bar Leaders Who Led in the East and in the West—Oscar L. Shafter's Advice to Law Students—On the Supreme Bench of California—His Genial Nature and Thoughtful Religious Views—Henry E. Highton's Eulogy—Judge McKinstry's Estimate—James McMilian Shafter—A Distinguished Name in Law, Politics and Legislation—An Example of Devotion to Learning, Agriculture and Industrial Development—The Constitutional Convention of 1878—A Pen Portrait by Rev. Dr. Bonte—Notes of Trenor W. Park, C. H. S. Williams, Edward Stanly, and the Great Law-Firm of Halleck, Peachy and Billings.

They came not with the Argonauts. Amid that hot and hasty host, spurred by adventure and reckless of result, they had and sought no place. When Marshall's cry, "Eureka!" resounded around the globe, electrifying the continents and the islands of the sea, the men we are now to study listened to the proclamation as it echoed through their native hills, but stood "unshaken" and "unseduced." Not unconcerned, not insensible to the possibilities, nor deaf to the promises of the hour; but the fever of youth had abated, the first hard struggles of manhood were over, they were in the meridian of life, had won reputation, were raising families, and were quietly and surely extending their fame. With sympathetic heart and philosophic eye, they saw the mighty human tide roll westward. They waited and watched. Soon they beheld the first fruits of the great movement, and were satisfied.

"They came, the founders of a state,
The men with spirit brave and free,
Who snatched the magic wand of fate,
And shaped their own high destiny."

Oscar L. Shafter, like Joseph G. Baldwin, came to California in 1854; like Baldwin, he had given the new Dorado the benefit of the sober second thought; like Baldwin, all of his children were born before his removal; like Baldwin, he was destined to adorn the highest judicial station in the new State; and, like Baldwin, the length of his official service was four years. These little coincidences seem to be worthy of mention, as the characters and politics of the two men presented a striking contrast, and we are to have the pleasure of seeing Baldwin later on.

Oscar Lovell Shafter was born on the 19th of October, 1812, at Athens, in Vermont, which Dr. Bellows, in his centennial discourse on the Life and Works of Channing, declared to be "the most American of American States." His grandfather, James Shafter, was a revolutionary hero, being conspicuous in freedom's army at Bunker Hill, and Bennington and Saratoga. For twenty-five years he was a member of the Vermont legislature. His son,

Oscar L. Shafter's father, became the Judge of his county, a member of the Constitutional Convention of 1836, a legislator of his State, and an unsuccessful candidate for Governor. His business was that of a farmer and merchant. Our subject was educated at Wilbraham Academy, Massachusetts, and the Wesleyan University. After a brief experience in a law office in Vermont, he entered Harvard University, from which he was graduated as a law student in 1836. He immediately commenced law practice at Wilmington, Vermont. I sketch him as a Californian, and therefore epitomize his career in his native State. Like his father, he became a candidate for Governor, and, like him, was unsuccessful. His party—the young Liberty party, so called, also presented his name for Representative, and afterwards for Senator in Congress. He was an original abolitionist, not bigoted, however, in his views. He saw that the institution of slavery challenged the serious attention of the statesman, and presented a question upon which the most wise and magnanimous might disagree. He fought the institution until its downfall; then his joy over the freedom of the slave was tempered by his sympathy for the dethroned slaveholder, who once proud and powerful, suddenly found himself reduced to poverty and distress. In early boyhood he lost his mother, who is represented as a woman of superior endownments, majestic in form, with a countenance of infinite expression, and possessing rare conversational and social qualities. In 1840 he married Miss Sarah Riddle. There were eight children of this marriage—seven daughters and a son.

After eighteen years' practice, in which he won his way to the front rank of the bar in Vermont, he determined to remove to San Francisco. His family was large and his fees were small. There was not much litigation in that old land of settled titles and "steady habits." His friend, Trenor W. Park, had preceded him, and built up in the new city on the Pacific a very extensive law practice. Park was a member of the great law firm of Halleck, Peachy, Billings & Park. The magnitude of the business dispatched by this firm in the course of a few years was astounding. Although comprising four young, active and ambitious members it needed further aid and counsel. At the suggestion of Mr. Park the firm sent to Oscar L. Shafter an invitation to join them as office lawyer and adviser. As the invitation was accompanied by an offer of $10,000 per annum, it was promptly accepted. Mr. Shafter, leaving his family at home, proceeded to San Francisco, where he arrived November 13, 1854, and immediately entered upon the duties of his profitable engagement. He kept the position but one year, when the firm was dissolved by the withdrawal of Mr. Park. The latter, with Mr. Shafter and General C. H. S. Williams, formed a new firm, under the name of C. H. S. Williams, Shafter & Park—the initials of General Williams being used in the firm name because there was another Williams at this bar at that time. The late William Hayes was clerk for the new firm.

During the year of Shafter's connection with the firm of Halleck, Peachy, Billings & Park, he kept a private journal, which is still preserved, in which he recorded his daily thoughts upon all kinds of subjects—books, law, men, society, climate, scenery, etc. This journal reflects an analytical, philosophical mind. About November, 1855, William Hayes quit the service of C. H. S. Williams, Shafter & Park, and formed a partnership with Hon. Edward Stanly. Stanly & Hayes had offices in Naglee's building, Merchant street, near Montgomery, and their offices adjoined those of Mr. Shafter's firm, which had removed there from the rooms ever since occupied by Colonel J. P. Hoge. Both of the firms named were conspicuous in the long litigation and complicated troubles which resulted from the failure of the great banking house of Adams & Co. Shafter was counsel for the house. Park was the especial friend and adviser of Alvin Adams. Williams was counsel for Palmer, Cook & Co., another powerful banking house, which also failed. It had been agreed between Williams, Shafter & Park that each should retain his own clientage obtained before the partnership, without accounting to the firm for the receipts.

This was a perfectly organized law office, having its bookkeeper and cashier, its corps of clerks for the various departments, all under a competent head, and its own private notary. At the end of the first year's business, in 1856, this firm had realized the sum of $110,000 above all expenses. And the expenses, it will be seen, must, considering the times, have been enormous. In addition to the large sum named, each partner took in many handsome fees from his own particular clients. In 1856, James McM. Shafter arrived from Wisconsin, whither he had emigrated from Vermont some years before. He had won some fame as a lawyer in Wisconsin, and had been the candidate of a defeated party for Lieutenant Governor of that State. He was received here as a big legal gun. By the mediation of his brother, a partnership was at once formed between James McM. Shafter and E. B. Mastick. This association was very brief, and upon its termination, James McM. Shafter was employed as an assistant by Williams, Shafter & Park. This firm made a powerful combination. Trenor W. Park was an able and adroit business manager. He had little to do with the preparation and presentation of causes. He was an active man, who loved outdoor life, and had a wonderful faculty of acquiring business. He amassed great wealth here, which he took back with him to Vermont, where he resumed his residence. The same is to be said of Billings. Park aspired to the United States Senate before withdrawing from this State, and hoped to represent Vermont in that body. He was small in stature, dressed well, and surveyed all things with the eye of keen and close calculation. John G. McCullough, once Attorney General of California, married his daughter, and followed him to Vermont

Shafter, "the middle man" of this firm, was its balance. He was wise in council and impressive in the forum, a man of erudition, a thorough lawyer; massive in intellect as in physical build; in habits maintaining regularity; frugal, abstaining from drink, but a hearty eater, and a firm chewer of tobacco. He was a man of unflagging industry. His life was a laborious one, and presents another example of the rewards which patient and intelligent and unremitting effort will secure. It was his invariable practice, before his family came from the East, to be at his office at seven o'clock in the morning, going at once into his library. From that hour until late at night, except when in court, he kept at work. There were few families here in those days—the community was made up chiefly of single men and men who had left their household gods in other lands. A large amount of law business—office business, matters of counsel, etc., was done at night. This was to accommodate business men who in those rushing days hated to leave the precincts of trade while daylight lasted. The principal law offices were kept open until ten and eleven o'clock P. M. Shafter was the first to reach and the last to leave the office. In 1856, his family joined him, and thereafter he arrived later and departed earlier. General C. H. S. Williams, the other member of the firm, was a lawyer of the first class, but was prone to bacchanalian pleasures; too often erratic he was always conscious of his great powers, and sometimes, after a long "rest," he would work up his causes with marvelous application. He died by his own hand. The record of his life is invested with much interest. About 1857 General Williams retired from the firm, which immediately received the accession of James McM. Shafter and Solomon Heydenfeldt, and business was continued under the firm name of Shafters, Park & Heydenfeldt. Not long afterwards Judge Heydenfeldt (who had been upon the Supreme bench) withdrew, and the firm became Shafter, Park & Shafter. About this time Shafter wrote in his diary:

"At home, the familiarity that I had attained with the routine of questions ordinarily litigated, and, perhaps, the firmly established position that I had secured among the lawyers of Vermont, left me, with my easy and sluggish temperament, with no incentive to exertion, except a simple desire for further excellence. But here constraint and unremitted occupation furnish new inducements, which supercede all inclination to indolence by intense activity and the higher modes of moral and intellectual life."

Under a severe and solemn exterior was concealed in Oscar L. Shafter a great vein of humor. He was a man whom the lighthearted and gay would avoid, not knowing him, but he was as fond of a joke, and loved to tell or hear a good story as much as anybody. And, it may be said, he was not over punctilious in the kind of stories he told. However, he was certainly of a reflective, philosophic cast of mind. He was particularly familiar with English literature, as his brother James is with history. In conversation, he

was flowing, happy, kind, genial, informed. Especially at home, at night, when he would talk about the poets, or upon any topic which he might pick up as a theme of discourse, he would be listened to with the same close attention which the professional lecturer exacts and appreciates. The learned divine, Hamilton, of Oakland, had it from Shafter's children that they, on such occasions, "lived upon his words and looked upon him with an almost idolatrous reverence." In the treatment of all subjects he was comprehensive. He surveyed and took in the whole theme. He was fond of philosophizing on all current questions that presented novel points. He dealt in principles; and it was from rigid application of principles, and broad generalization, that he arrived at his conclusions. Before a jury, his style was a little stilted. In equity, he was ornate, pleasing, finished, forcible. While his methods at the bar—his investigation, his preparation, his presentation—were the admiration of his associates and of the judiciary, it must yet be recorded that his judicial career was a disappointment to the profession—that is, his judicial successes were not commensurate with his triumphs at the bar. In January, 1864, nearly ten years after his arrival in California, he took his seat, the elect of the people, on the Supreme bench of the State, as an Associate Justice. His decisions are comprised within eleven volumes of the Reports, volumes 24 to 34, inclusive. During that period some nine hundred decisions were reported, of which Shafter wrote one hundred and forty. His first opinion excited considerable amusement among lawyers, by reason of his unwitting frequency of repetition of the appellant's name. The appellant was one Bruzzo, convicted of murder in the second degree. The judgment was properly affirmed, but Judge Shafter, in an opinion of seven pages, comprising 252 lines, used the name "Bruzzo" 57 times, being an average of once to every four lines. In some places it was used in every line for many lines in succession. (People vs. Bruzzo, 24 Cal., 41.)

His decisions, in their conclusions, have been rarely questioned. The late John W. Dwinelle declared that "they presented constantly the ruling presence of that faculty which combines the similar and rejects the dissimilar, and descends from the general to the specific." Judge Shafter was elected for a term of ten years, but, after serving four years, he was constrained, by a consciousness of failing powers, to resign. On December 31, 1867, he withdrew from official as well as from professional life forever. He began the year 1868, in one sense, a free man, but he was a ruined man. Softening of the brain had stealthily approached. As Rev. Horatio Stebbins somewhat magniloquently expressed it, "He could no longer grasp the isolated fact, and bind it in eternal fealty to its principle." Having accumulated a considerable fortune at his profession, and being now threatened with a total eclipse of his powers, he had no incentive to effort. He crossed the Atlantic, visited the great capitals and classic spots of Europe, and died at Florence, Italy,

after five years wandering, January 22, 1873. His remains were brought back to this State and were interred at Oakland on Sunday, March 24, 1873, the funeral taking place at the First Congregational Church. On that occasion Rev. Mr. Stebbins, who had been an intimate friend of Shafter and had studied his character, made some touching and thoughtful remarks. He represented the distinguished dead as having been "a man of good sense—practical, yet with wide discourse of intelligence and reason; calm, unimpassive, yet of fine sensibility and true poetic feeling; and his whole nature, by the eternal weight of moral gravity, swinging toward the truth." On the following Sunday, Rev. Mr. Hamilton, of the Independent Presbyterian Church, of Oakland, delivered a memorial discourse.

"At the noon of his powers, and after he had come to this State, I hear him accusing himself of having too much neglected the reading of his Bible, and expressing his wonder at the power with which is utterances came home to his heart in his peculiar circumstances here. He tells us also of a new light of immortality breaking in upon his mind on one occasion while he knelt in prayer. Here is proof, also, of the keen appreciation with which he read the Divine Word, in a comment on that verse of a Psalm which reads, Stand in awe and sin not; commune with thy own heart upon thy bed and be still. He wrote: 'Crawl not like a worm—stagger not like one in delirium—fly not like a coward, but stand erect and firm. But stand in *awe*. How much is there to awe the heart of man in the visible creation, in the earth and in the heavens, but in the contemplation of himself there may be revealed to him deeper mysteries and a yet greater glory visiting him with an awe yet more profound.'"

The following appears in a letter of Judge Shafter's to his family, written for the benefit of his only son, who afterwards died at the age of seven years:

"I trust that my boy will be a *good* lawyer, which is the same thing as saying, I trust he will be a good man—free from all chicanery, honest in his dealings with court and jury, and perfectly truthful in all his relations to his clients. There is no calling in which a strict obedience to the maxim that "honesty is the best policy" is more available. A rogue of an attorney is sure to reveal himself in his true character, and then there comes all at once from all honest men a retribution of distrust, aversion and contempt; and no matter what may be his learning or his talents, a withdrawal of business inevitably follows the withdrawal of confidence."

In his journal, after commenting upon a life of Lord Mansfield, which he had been reading, he says:

"I began with the most general principles of the science of the law, and from them proceeded to principles that were relatively subordinate to them and so on through series after series of dependent truths until the final details had been examined and exhausted. In other words, I began with the genera, from them proceeded to an examination of the different *species* included in each *genus*, and from them to individual truths of which those species were severally constituted. It will be obvious to every one that the memory must be most powerfully aided by this method of study. The principles of law, though in one sense their name is legion, all bear relations to each other, and, taken together, form a system; and, if once mastered in those relations, so long as one of these principles is retained by the mind the principle of association gives signal aid in recalling the others. I have for the last fifteen years prosecuted all my professional studies on the above plan, and although my memory is not remarkably tenacious, I have

had no difficulty in remembering, when once acquired, all the details of legal truth that can be brought within the scope of legal principles. When I read a new decision, I always ask myself the question: 'Whereabouts in the system of the law does the result ascertained belong?' In the twinkling of an eye its appropriate place is at once suggested to my thought, and I put it in its place, and I stop and look at it there, and I find by experience that it is very apt to stay there without watching until I want it."

The following letter, written by Judge Shafter in San Francisco to his wife in Vermont, was read by Rev. Mr. Hamilton on the occasion of his memorial discourse before mentioned. It gives me pleasure to hold up here a production so full of pathos, tenderness, sympathy, meditation, and religious philosophy.

SAN FRANCISCO, July 28, 1855.

Yours and E.'s of the 24th of June is received this day, and brings me good news, for it assures me that you are all alive and well. I have received, since I have been here, so much bad tidings from home, that I open every letter with fear. But I trust that the full measure of chastisement is filled, and that the residue of wrath will be mercifully restrained, until, at least, our bleeding wounds shall have time to heal and the failing heart to recover its constancy, firmness and repose. The bitter agony, the deep, uncontrolled and uncontrollable wailing, the ceaseless repinings, are over with me. But still, I remember what I never can and never desire to forget. In the hurry of business, in the excitements and exhaustion of daily labor, my thoughts are with the dead; and at night, in the silence of my bed chamber, they fly away like the dove from the ark of Noah, and seek the babes and strive for communion with them, in the habitations where they all dwell together. Their deaths have taught me lessons, and have suggested and forced upon my attention views of life and death, of the present world and of that which is to come, to which I have long been measurably inattentive. With my general theological opinions you are acquainted—they have undergone no essential modification or change. They are the opinions which the lamented Dr. Channing has so fully illustrated in his sermons, and of the profitableness of which his whole life was a beautiful and all but faultless exhibition. Those doctrines reveal God to us as our Father—our *Father* in the highest and profoundest import. They further inculcate that he has a will concerning us—they give to that will the authority of law—they recognize human obedience as a duty, and make certain fixed consequences result from obedience and another set of consequences the unchangeable and inevitable fruit of transgression. They teach us that the conditions of happiness in the future life are the same as those of the present; that death is a natural change only, and that the soul enters upon the future life with the same character it bore when it left this, and that in the world to come it will advance, if it advance at all, by the same means that it works out its own character and tone in the world that now is. But these doctrines further reveal to us that in the progression of the eternities of God the soul will, of its own intelligent election, cease from its warfare against its own highest good, and ceasing to do evil will learn to do well—*at last*. In these views there are presented most powerful motives to present obedience; whatever purification from sin and its contaminations is accomplished here, but hastens the hour of contemplated regeneration hereafter—while every evil act performed here, every evil thought indulged here, but delays and postpones the period of redemption. This theory of rewards and punishments recognizes the great primary truths of human accountability—presents adequate encouragements to virtue and discouragements to vice, invests the soul with all needful powers for the achievement of its own highest good, and by making the ultimate attainment of

that good an universal truth, vindicates at once the goodness and the wisdom of God in man's creation. E. asks, "Why are the young and beautiful snatched away and the aged permitted to remain?" It is a question that has often, very often, been asked before, and the most satisfactory answer that I have ever heard is that it is *the will of God.* We are born to die, and to die is but to live again. We live here, then, simply that we may live hereafter, and that final, that higher, better and truer life is sure to follow life here, irrespective of its *duration.* The little child whose space is told by months alone is as sure of its immortality as the grown man who dies weary and worn with the weight of years. The latter dies amid the shadows of evening following the endeavor and the exhaustion of a lengthened day; the former in the dewy freshness and soft effulgence of the early morning—this is the only difference. God wills it, and my daughter must reflect that He doeth all things well. I am more than gratified that you have learned what it is the end of all time to teach, the futility of earthly hopes, and that all substance, all reality, are beyond the bourne to which we hasten! Yet life here should not be set down as unimportant and valueless, for it is one of the appointments of God, which He has brightened with prospects and ennobled with duties, and they should be cheerfully and faithfully performed. They press upon us from day to day; we wake to them every morning; they challenge our attention and our efforts every moment, and wait patiently upon our slumbers during the silence and darkness of night; they should be performed cheerfully, courageously and in the patience of hope. There is impiety in saying "I am weary of life." While it is continued, it should be cherished and improved. Viewed in its just relations to that which is to come, its importance is magnified, and its deeper import fully revealed.

In the Supreme Court, November 23, 1873, an interesting sketch of Judge Shafter's life and "an analysis of his intellectual and moral character," prepared by John W. Dwinelle on behalf of the bar, was read by ex-Chief Justice S. W. Sanderson, and was spread upon the minutes of the court. It was also, by order of the court, published in the reports. In the Twelfth District Court remarks were made, January 27, 1873, by Henry E. Highton and Louis Shearer. Mr. Highton spoke as follows:

He looked great and he was great. Whether he addressed a Court on a complicated question of law, or a jury on issues of fact—but especially in the former situation—he was always sure of an audience. Here in this Court room, I can recall his massive head and his grand face, marked with the furrows of thought and the lines of a strong individuality, as with perfect self-possession, which rarely forsook him, and with Shakespearean richness of language and imagery he depicted to twelve enraptured jurors, the nature and importance of circumstantial evidence. I can remember, with startling vividness, the intense dramatic power as distinguished from the melodramatic *semblance* of power, with which he adjusted the governing facts to the governing principles of his case, until the mental picture literally glowed before his auditors. These were the Angustan days of our local bar. Randolph and Lockwood, McDougal and Williams, Baker and Tracy, gave to our forensic contests rare life and earnestness. But in the crowd of able men—some of them still connecting the old generation and the new—who then adorned the profession, Judge Shafter stood probably the central figure. In closeness of logic, in extent of erudition, in verbal eloquence, in wit, in humor, in satire—in any one of these varieties of power, he may have been equalled possibly, but not excelled. In all combined he was assuredly without a peer. His faculties were large and precisely balanced. His learning was deep and thorough, and in the crucible of his brain all obscurities vanished. His language was affluent and flowed from him in an uninter-

rupted stream, but every phrase embodied a thought and every thought was a link in the chain of a compacted argument. His illustrations and metaphors were numerous, but unforced, and they poured themselves naturally into his speech from the resources of a most retentive memory and vivid imagination. He often talked about law almost in blank verse. And yet he was never charged with diffuseiveness, or with false or improper reasoning. He kept his subject and his object continuously before him, and, though his faculty for combination was so great that he could be rarely anticipated, he never sat down until every point he sought to make was definitely and completely revealed. In the mixed science and art of pleading he became almost as profound as Gould, the condensed Chitty of America. And, having thus explored the channels through which the law flows, he carried his explorations to the very source from which they were fed. He was no "case lawyer"—that half-made up creature of the modern codes—but a lawyer so full in his knowledge and so accurate in his conception of principle, that the cases were the mere filling-in of his arguments. He worked steadily, and prepared systematically for the numerous trials in which he was engaged, but he relied on the merits of his cause, and scorned the petty stratagems and bald pretences, through which genuine capacity is so often counterfeited. He possessed remarkable continuity of thought, and was capable of perfect abstraction when examining a legal question. He wrote with order, perspicuity, and facility. His early opinions, when on the Supreme Bench, exhibited the superiority of his integrity to all partisan influences, and also, perhaps, to too great an extent, the extreme nicety of his analytical faculty, but he soon acquired a terse and pointed judicial style of composition, which is a model for his successors. He was a man who had little regard for reputation, which is usually determined by mere accident, caprice or prejudice; but he had much regard for character. He was not "careful for the shadow of a great name." His thoughts ran far below the shallow politics of the day, and the false issues upon which partisans are frequently divided. He was disgusted with the corruptions of party, and he fully appreciated—what his own life and death so clearly demonstrated—the shortness of the public memory and the illusiveness of popular favor. To legislative honors, therefore, for which he was often pressed, he would not aspire; and though he would have restored to the Senate of the United States something of its ancient renown, he never cared to go there. He coveted no dignity, even in the line of his profession, and he ascended the Supreme Bench with unaffected reluctance. There was in his nature a rich vein of romance, and heroism. He was constitutionally fervent, but was schooled to self-repression and to the casual acquaintance or superficial observer, betrayed little of the real treasures of his intellect and heart. But let him read to an appreciative friend, or among his own relatives, some story of disinterested sacrifice, or noble daring, and his eye would glisten, and his voice tremble, until it became apparent that his inmost being was shaken. I have seen him so moved that his face shone with "the noble rage of battle," or quivered with almost womanly tenderness. His personal characteristics were most attractive. He had an inexhaustible fund of stingless humor, and was as thorough in enjoyment as he was in labor. He was very patient and self-contained with all men, but very genial with the young. He was firm in his own opinions, but tolerant even to the prejudices of others. He abhorred scandal, and spoke no evil even of his enemies. He disliked the pretensions and hypocrisies of conventional society and, apart from his business, lived a very secluded and domestic life. He was in the strictest sense exact. He gave to all men their own and required his own from them. And he was neither ostentatious nor prodigal in his charities. He never reached the public through the coarse modes and thin disguises of our periodical philanthropists. He encouraged neither idleness nor vice, and he investigated before he gave. But he missed no opportunities, at whatever cost, to make

legitimate investments in humanity. He had in him the elements that make a man and prepare an immortal. He was great in mind and great in heart. And somewhere among the stars, in increased strength and beauty, his soul and spirit live, undisturbed by physical pain and weakness. While he fulfils his mission there, his influence shall survive here, even though his memory fail among men.

Judge McKinstry responded as follows :

I have had occasion to study the peculiarities of the more distinguished members of the bar, and of Judge Shafter I observed that his logical arrangement was always happy, the language which clothed his argument generally, if not always, appropriate. Ordinarily, his words were the simplest and purest English, but he could indulge in quaint and sudden turns of expression which recalled for an instant the latent humor of the man, and were sometimes wonderfully efficient, presenting a moral demonstration in a single picturesque phrase. He was ever prepared to illustrate his theme by the results of a most extensive and varied reading. He was, in short, a learned lawyer of an older school, whose mind had been thoroughly trained and shaped in the principles of the common law, and he resorted to codes and statutes only to ascertain how far the common law had been departed from. Yet, in a proper way, no one was more progressive than he, none more capable of applying principles—in themselves unchangeable, because based upon immutable justice—to the complicated relations of our day. He was a man of independent views and heart. His political opinions were avowed openly, and urged strenuously at a time when they had been adopted by but a very small minority; his moderation and magnanimity in the hour of triumph might well have been imitated by those who had become convinced of the correctness of such principles only when their triumph was imminent. My personal intercourse with Judge Shafter was always pleasant. I recall his genial manner in private life, at the bar his courtly bearing to bench and counsel. He was a most successful man, in a worldly sense. He was most successful, not only in such sense, but in that he had established a distinguished name long before he had ceased an active participation in the busy scenes of professional life. It was very sad to hear that his great reputation—a splendid column—towered toward the last amidst the majestic ruins of the intellect which had builded it. But his friends may well believe that this best of memorials will continue to stand—*monumentum aere perennius*—while learning and ability shall be respected in the profession he adopted.

Although, as stated, Judge Shafter had his humorous side, not many of his jests are remembered, for this was not one of his distinguishing features. He was once addressing Judge Edward Norton, in the Twelfth District Court, and was pressing with much pertinacity a defence quite technical. Judge Norton, interrupting him, said : "Mr. Shafter, it seems to me that that is a very nice distinction which you are laboring upon." Shafter replied: "Your honor! That science of which you, on the bench, and I at the bar are alike earnest votaries, what is it but the science of distinction?"

Judge Shafter was made, a good many years before his death, an LL.D., by the College of California, which was founded by Professor Henry Durant, and which was the forerunner of the State University. He was always an active friend and helper of education. He was a very careful business man, but gave liberally in charity. It should be stated that upon the death of Judge Shafter, the New York *Evening Post*—Bryant's paper—published some original and affecting lines to his memory.

Judge Shafter's widow removed to Boston, in the enjoyment of a considerable fortune, the product of her husband's professional practice, which was all accumulated in San Francisco. The oldest daughter married Mr. Charles Webb Howard, of San Francisco. This is the "E" (Emma) to whom the Judge referred in his letter given in full above. The second daughter, Mary, is the wife of Mr. John Orr, of Orr & Atkins, of San Francisco. This lady, in addition to beauty of feature and graces of manner, is a woman of wide information and great strength of character, and inherits in a great measure her father's qualities of mind.

Judge Shafter was sadly disappointed for a long time in having born to him no boy to perpetuate his name. Devoted to his daughters, he yearned for a son for many years, until, at last, one arrived. It was a cruel visitation that took from him this boy at the age of seven years. About the year 1856 a gentleman who was an assistant in his office became a father of a girl. The morning after the event, Mr. Shafter (he was plain Mr. then) went up to his employee's desk while he was engaged in writing, and placing his hand upon his shoulder and calling him by his first name, said :

"Well, ——, they tell me there is a new arrival at your house !"

"Yes, Mr. Shafter ; that is a lively truth."

"And they tell me it is going to wear a sun bonnet," said Shafter.

"Yes, Mr. Shafter ; that is true, too. This comes from my being in your office—from my intimacy with you."

"I should prefer," retorted Shafter, after a moment's surprise, "that you would attribute it to your wife's intimacy with—*mine.*"

Whereupon, Shafter, Park and the assistant aforesaid, all took a fresh "chew" of tobacco from a big box which they kept in common.

JAMES MCMILLAN SHAFTER, brother of the preceding, is probably the only man living who has won distinction in three widely separated commonwealths. In all he has been alike conspicuous in law, politics and legislation. He was born in Vermont, May 27, 1816. Upon graduating from the Wesleyan University, Middletown, Connecticut, he commenced law practice, having prepared himself for the profession while a student at the University. He was soon elected a member of the lower branch of the Vermont legislature and served a term. From 1842 to 1849 he was Secretary of State. In the latter year he fell in with the great current of life rolling westward, but stopped in Wisconsin, where he remained six years. In politics he was a Whig, and, so far as political advancement was concerned, he found that Wisconsin was a less favorable field than Vermont. His district was strongly Democratic, the heavy German element then siding with that party. In 1851, however, he was elected to the Wisconsin Assembly, and was made

Speaker. In 1852 he ran for Congress. So marked was the popular recognition of his ability and integrity that, although defeated, he received a thousand more votes than General Scott, his party candidate, for President. He was nominated again for the next term, but declined.

In 1855 Mr. Shafter was invited to California by his brother, who was doing an immense business in partnership with General C. H. S. Williams and Trenor W. Park. He had just been nominated for District Judge, and it was generally agreed that he would be elected, but, acting on his brother's advice, he declined the nomination, and came to California, reaching San Francisco, December 15, 1855. To illustrate the extraordinary alertness of both mind and body, which has always distinguished him, it may be stated that he landed from the steamship at six o'clock in the morning, visited his brother's office, engaged lodgings, formed a partnership with E. B. Mastick, and at ten o'clock of the same day was at work reforming pleadings in a leading case.

Mr. Shafter's association in business with Mr. Mastick did not last long. His brother's firm offered him a tempting salary to assist them, and he accepted it, entering their office within a few months after his arrival. About 1857, on the withdrawal of General Williams from the firm, a new association was formed between Oscar L. and James McM. Shafter, T. W. Park and Solomon Heydenfeldt, under the firm name of Shafters, Park & Heydenfeldt. Not long afterwards Judge Heydenfeldt withdrew, and the firm became Shafter, Park & Shafter.

In 1862–63 Mr. Shafter represented San Francisco in the State Senate. He was made President pro tem., and presided over the High Court of Impeachment, which removed Judge James H. Hardy from the bench of the Sixteenth judicial district. He was a leading member of the Constitutional Convention of this State in 1878. He was, afterward, among the strongest opponents of the instrument which was framed by that body and adopted by the people. A member of the Judiciary Committee, his views upon the very interesting question of Judge Fawcett's right to a seat in that body, commanded wide attention. Judge Eugene Fawcett, an able lawyer, was elected a delegate to the convention from Santa Barbara county. He was, at the time, the Judge of the District Court of the First Judicial District. The old constitution provided that district judges, while such, were ineligible to hold any other *office*. The question was, "Was the position of member of a Constitutional Convention an *office?*" Judge Fawcett's seat was contested, and the matter was referred to the Judiciary Committee. It provoked warm discussion in the committee and in the convention. The majority reported in favor of awarding the seat to Judge Fawcett, and the report was adopted. Mr. Shafter wrote a minority report, which was signed by him and two others. In this paper he presented a masterly argument in

support of his view—that if Judge Fawcett were admitted he would be holding two offices at the same time. Judge Fawcett claimed that this was in no sense an office in the meaning of the constitution, and that even if it was, the people had the right to say who should represent them in a convention to frame an organic law; that if the people of one generation had a right to dictate to the people of the next they had a right to say how and what their descendants should do, and we would virtually have no power to alter or amend the organic law.

Mr. Shafter expressed his unqualified dissent from this doctrine, and pronounced it unfounded and dangerous. In this report he incidentally declared that the opinion of the Supreme Court in the case of the People vs. Provines (34 Cal., 520) was not sound and was not entitled to very favorable consideration. (This opinion, by Judge Sanderson, established the right of the Police Judge of San Francisco to appoint policemen.) Mr. Shafter said it controverted the soundness of a long and unbroken stream of California decisions.

The first leading case in which Mr. Shafter was engaged was that before alluded to, upon which he went to work on the morning of his arrival here —the case of Birrell vs. Schie, which went to the Supreme Court and is reported in the ninth California, page 104. The principle was here established that the *debt* can be followed through several successive mortgages, notwithstanding the discharge of all those intermediate, and the taking of new obligations surrendering and canceling the old. In the same volume of reports is the case of McMillan vs. Richards, in which the nature and law of mortgages as they exist in this State, the necessary incidents of redemption from foreclosure sales, the effect of protest upon payment were clearly fixed. The examination of authorities and the brief upon the prevailing side were made and prepared by Mr. Shafter, jointly with his brother and Judge Heydenfeldt. In Seligman vs. Kalkman (8 Cal., 207), which was conducted by Mr. Shafter through all the courts, it was decided that no title passed in case of a purchase of goods by an insolvent who knew of his own insolvency at the time. The doctrine of this case was subsequently modified by the court. In Green vs. Palmer (15 Cal., 411), Mr. Shafter succeeded in overturning a decision of Judge Norton, of the Twelfth District Court, and procured from the Supreme Court a decision which amounts to a treatise upon the subject of redundancy in pleadings. The opinion in this case was written by Justice Field. He has been prominent in many other cases involving principles of pleading and construction of statutes, in which his views were accepted by the court, and have become settled doctrines. In 1861, while in the State Senate, Mr. Shafter made an effort to have enforced the constitutional principle that all property should be taxed. Failing in that he instituted the action of the People vs. Shearer, Assessor of Marin county, to have the claims

to the possession of lands, the title to which was in the government, assessed and taxed like other property. He conducted this case, and procured a decision requiring the taxation of these lands against the claimants, notwithstanding that the title was in the government.

The last case of importance tried by Mr. Shafter before a partial withdrawal from practice was the matter of the probate of the will of James Black of Marin county. Black's estate was valued at $800,000. He left a widow and a grown daughter, the wife of Dr. Birdell of San Francisco, the child by a former wife, who was a native Californian. He bequeathed his large property to his wife, but had some years before presented to his daughter a farm and made her advances—the whole amounting in value to $100,000. The daughter contested the will, alleging her father's unsoundness of mind. Mr. Shafter, with Judge J. B. Southard and Mr. J. M. Seawell appeared on her behalf, while the widow had for counsel Mr. S. M. Wilson, Alexander Campbell, now of Los Angeles, and Sidney V. Smith. There were three long and exhaustive trials of this celebrated contest in Marin county, the jury disagreeing each time. The case was then removed to San Francisco and tried before Judge M. H. Myrick, then our Probate Judge. This last trial lasted three weeks and resulted in the breaking of the will, and the estate, after many generous slices had been cut out of it by counsel, was divided between the widow and daughter.

Mr. Shafter has always manifested a lively interest in agricultural pursuits. He has been President of the State Agricultural Society, and in September, 1878, he delivered a long and thoughtful address before that body. He is an owner and breeder on a large scale, of blooded horses, cattle and other stock. Simple in his tastes, plain in his speech and dress, regular in his habits, he has been a toiler all his life. He believes in work, and has repeatedly offered prizes to young people to encourage them in their struggle, and to impress upon their mind a sense of the beauty and dignity of labor. One of his cleverest and most characteristic acts in this line was the plate presented by him to a young lady at the State Fair in 1880—a prize won by her for baking the best loaf of bread, there being many contestants from all parts of the State. On presenting the prize Mr. Shafter said :

I do not think that baking a loaf of bread is the highest duty of a girl, but I do think that to become an accomplished housewife is not only one of the first, but one of the most imperative duties of women ; and it is to direct attention to, and to create in you a belief of this fact, that I offer you this premium.

I have called you ladies. What is your title to this appellation? There are titles of birth, place, honor and worship ; these are of right. There are also titles of courtesy, and in this country lady is one. It is true there are some who strive to confine this title to those esteemed of the highest in social position. But this assumption is denied by most, and the title is generally applied to all respectable women of tolerable manners. But I feel constrained, young ladies, to put you upon a higher plane than most, and to assert

for you the highest and most time honored claim to this honorable name. Indeed, you alone inherit it from that time when the memory of man runneth not to the contrary. Some hundreds of years before our era the Greeks and Romans made large conquests in Asia, the birthplace of the human race. They brought back to Europe the spoil of nations, captives, theology, and the productions of nature, including animals, fruits and grain. It was in this way that wheat was diffused throughout Europe, and soon furnished bread for all. While the warlike men from the north of Europe were making their excursions by land and sea, the mistress of the household cared for the wild brood which remained. She prepared the stores of hard bread, which the men carried away, and welcomed their return with a full supply of the staff of life. In this boisterous banquet, from her own baking she caused a manchet of bread to be placed at each seat, or sent the loaves of bread around in baskets to the feasters. To mark her high office she was denominated *ladie*—the breaker, dispenser, and, with slight assumption, the maker of bread. I have caused the legend "Bread Maker" to be engraved upon this piece of plate, and I trust the lady, Miss Clara A. Murphy, seventeen years of age, a resident of Brighton, county of Sacramento, into whose hands I now place it, will always retain and exhibit it as evidence of actual merit and honorable distinction.

Some time after the death of Judge Oscar L. Shafter, the Hon. Charles K. Field, an eminent lawyer of Vermont, died in that State. In a notice of Mr. Field by a Vermont journal, allusion was made to James McM. Shafter as "the last of that generation of men composed of the Bradleys, the Kelloggs, the Shafters and the Fields, who for more than half a century gave eminence to the bar of Windham county, and whose names will always shine in the galaxy of Vermont's distinguished men."

This coming to the eye of Mr. Shafter, in San Francisco, recalled to him a host of memories of the bar leaders of his native State, and exacted from him a fervent and affecting response:

"Though personally as far removed from Vermont as our national barriers will permit," he wrote to the journal referred to, "I cannot pass this notice—this echo from home—in silence. As to the dead of the generation of men you name, after making all allowance for the glamour which time and distance always lend, the grandeur of their living presence comes back to me with such force that I place them among the best of those whose memory Vermont should cherish, with pride for their ability and reverence for their virtues. When I left Vermont Mr. Field was but arrived at the zenith of his life. I do not doubt that he went forward from that time. It was my good fortune to be his intimate acquaintance. His nature at the core was gentle and genial. His wit and sarcasm on more than one occasion made me their object of attack; but always humorous and witty, and always for honest advice or wise reproof."

After brief allusions to Mr. Field's brother, Roswell M., and General Kellogg, Mr. Shafter pays tribute to a political foe:

"Among these men was one, not only in age, but in soundness of judgment, learning and versatility of talent, who was justly to be called the Nestor of our tribe—the Hon. William C. Bradley. In all my observation I have never met one who was in himself the embodiment of so much humor, wit, pathos, power of statement and true eloquence, as Mr. Bradley. It is one of my few unsatisfactory recollections of Vermont, that the misfortune of deafness, and his political opinions deprived the State and nation of the full benefit of Mr. Bradley's extraordinary powers."

Next, with emotion deep and strong, tempered by manly sense and marked by philosophic reflection, he speaks of

"A dearer one,
Still, and a nearer one
Yet, than all others."

"Of my brother I cannot permit myself to speak—at least, not as his memory deserves. He was a scholar from his youth and a ripe and good one; not, perhaps possessed of the highest and keenest perception, he had the higher possession of a solidity of judgment and such extraordinary powers of abstraction, concentration and generalization, as are rarely exhibited in one person. After he had gone through his examination of a question, it was his habit to call me into his room, and go over his process and conclusion with me. Almost invariably, at least to my vision, the 'hay, wood and stubble of false doctrine,' had disappeared as in fire, and nothing but the imperishable monument of truth and justice remained.

"If my brother and myself have done any good in our day and generation (I may speak for both), we acknowledge that we are indebted to the parents God gave us, and to the schools and moral and social influences of our early home, which taught us to live honestly, soberly and industriously, and, if we could not ourselves become great, in the language of the Vermont constitution, to honor those only 'most noted for wisdom and virtue.' It has ever been our maxim that it was not necessary for us to hold office nor even to be happy, but it was necessary *to be right*.

"I have a deep abiding hope for the great future of California. I believe and hope its earth will finally cover me. But when that day comes (and you admonish me that I am the last of my generation), I know that my love for Vermont and the heart upon which it is written will fall into dust together."

In this connection may be appropriately quoted some words uttered by Mr. Shafter concerning his brother on another solemn occasion. He addressed the Supreme Court of California, in March, 1881, on presenting the memorial resolutions of the San Francisco Bar Association relative to the death of Hon. John W. Dwinelle. After dwelling upon the character and career of Mr. Dwinelle, and after referring to some others of those who had departed forever from prominent places at this bar, Mr. Shafter said:

"My brother, an ex-Justice of this court, smitten by disease, the result of loyal, inordinate labor in his profession, died in a foreign land. His prayer for death, if it was the will of God, rather than life with mental aberration, was not answered. The cup of bitterness was commended to his lips. Unhappy paradox! outliving the death of all that was himself."

The following, which appeared anonymously while Mr. Shafter was attending the Constitutional Convention of 1878, I have ascertained was from the pen of Rev. J. H. C. Bonte, then an Episcopal divine of Sacramento, now Secretary of the Board of Regents of the State University. It is a portrait taken of this eminent lawyer while he was making an argument in the Fawcett case before mentioned:

Shafter himself is a part of his argument, so that even the stenographer must fail. His effort, like that of Freeman's, was wholly ignored by the other side, and for the same reason—it was unasailable. Shafter was gentle with Edgerton's luckless attack on

a clause in the minority report. He was reluctant to hurt, and moderated his blow in consciousness of his strength. He demonstrated the legislative character of the convention. The convention is, as it were, a Senate; the electors are the Assembly. The convention originates the constitutional enactments—the electors by ballot, complete or veto the measure. The legislative analogy is complete, and the result the same. The convention is one house, the electors the other. He echoed the judgment of the world when he said that the great majority of lawyers are less competent than enlightened laymen to build a constitution. A constitution is especially a popular enactment, embodying the popular thought; it must, therefore, be expressed in a language understood by the people. The popular acceptance of the meaning of the words must interpret the intent. The object of all our enactments in this direction was to confine judges to their judicial duties. The land had been sufficiently cursed by judge-made law.

I am not giving his argument, but a few flashes. The action of Shafter's mind exacts marked attention. He packs his speech with solid shot, and he is rapid because he feels that there is no other way of delivering his enormous cargo. He is massive in person and in thought, and he walks through his adversaries' arguments as an elephant through a canebrake As I imagined, he drives his points after the manner of the piledriver. The course of his argument is like that of a glacier—it fills every nook, expands and contracts without breaking; it moves on, crushing and pulverizing everything in its way. An iron will, invulnerable courage, reckless independence, terrible calmness, intimidating reposefulness, preside over his reasoning. But he is also gracious, and comes down to common apprehension. He is versatile and affluent in thought. He utters sententious argument in brief parenthesis. He is a philosopher as well as a jurist. He is a humorist, but his humor is ponderous and elephantine—the gambols of the lamb in the person of the elephant. Therefore, his humor crushes. The sportive leaps of the elephant are as dangerous to man as his wrath. He is modest, but also aggressive; his satire and irony lacerate and enter joints. He is strong in his personal magnetism. Fortunately, he is genial and winsome, or men could not live with him. His simplicity covers him as with a garment of beauty. But the greatest element of his genius is his impressibility; the age he lives in and its past touch him on all sides. The ruling traits of his character are to be found in his practical wisdom—the art of combining and keeping things in their places—a sense of the mutual dependence of parts—the element of man that corresponds to the law of gravitation in nature. Shafter is not an orator in the old sense of the term—he is more—he is a seer. He is not only a jurist—he is more—he is a statesman.

It may be sandwiched in right here that Mr. Shafter is fond of music, and in 1861 was President of the Handel and Haydn Society, which, embracing several hundred members, used to treat the public to "The Creation," "The Messiah," and other oratorios. He took a deep interest in the success of that once flourishing association, and met with it regularly. As I was a member too, in that long ago, I am happy to notice, as he no doubt is, the revival of this Society under the admirable presidency of Hon. Joseph D. Redding.

Mr. Shafter married Miss Julia Hubbard at Montpelier, Vermont, October 28, 1845. After a happy union of over twenty-five years, she died in this State February 11, 1871. There are living three grown children of this marriage—Payne J., James C., and Julia R. Shafter. The wide and rich

domain owned by Mr. Shafter in Marin county was acquired by him in 1856. It comprises 25,000 acres. Upon it are 2,000 head of live stock, including a large number of the most valuable cows to be found in any country. He is now living in San Francisco, and practicing law in connection with C. H. Parker and F. H. Waterman, but visits his estate every week. His little municipality in Marin county is probably worth half a million of dollars. He has some other property. He is said to be an expert on the subject of fine points in stock—but the stock he believes in goes on legs. He owns no mining stock. His opinion of *stocks*—especially mining stocks—is not flattering. Here is his view of the subject, and, with these words from his mouth, I bid him good-by:

"I have no words of blame for those who choose to invest their money in the turn of a card, or what is, at best, the same thing—a turn in the stock market. I leave them to state the moral character of the act, but I ask them: Would it not be, on the whole, better to invest such ventures in starting some honest man in business for which he was fitted, or inaugurating some industry, which by giving employment to only a dozen girls shall save them from a shadow that follows like a doom? This class of fortunes excites hatred. The wretch who holds aloft a light to mislead the good ship freighted with wealth, and bearing in her bosom untold love, hopes and sympathies, that he may steal her cargo and strip her deck, is not worse than he who wilfully misleads by false signs the weak and despairing in the stock speculations of our day. Poverty, suicide and sedition follow them; but who ever saw any great industry undertaken by such wealth? Young men, remember that in heaven's chancery, one honest heart, and in political economy, one dollar earned by honest labor, are worth more than all these men and their wealth together."

CHAPTER XVII.

James A. Waymire and M. A. Wheaton, of San Francisco, and John K. Alexander, of Monterey—Waymire's Early Life in Oregon—On the "Stump" at Nineteen—His Military Record—Courage and Coolness in Encounter—On the Bench and at the Bar in San Francisco—Mr. Wheaton's Genius for Mechanics—A Leading Name in Patent Practice—The Great Patent Case of N. W. Spaulding vs. The American Saw Company—The Case of Levi Strauss & Co., vs. King & Co., in New York City—Judge Alexander's Popularity—A Gold Miner in Calaveras—In the Schools of Sacramento—District Attorney and Superior Judge—A Compliment from the Supreme Court.

James Andrew Waymire, Judge of the Superior Court, San Francisco, in 1882, was born forty years prior (December 9th), in Buchanan county, Missouri. His father, Stephen K. Waymire, was a carpenter and a farmer, owning 160 acres of land on the Missouri river, near a small village. In 1843 the village was laid out into the town of St. Joseph, which, by 1860, had attained a population of 8,000, and now has become a flourishing city. Stately buildings cover the old Waymire farm, making the land that was almost unsalable in 1842, worth now thousands of dollars per acre. Judge Waymire's paternal ancestors came from Germany, near Saxe-Weimar, about the year 1732, and settled in Pennsylvania. Subsequently a portion of them removed to North Carolina, and afterwards, in obedience to the law of emigration, drifted westward by way of Indiana and Ohio to Missouri. His mother, Mahala E. Gilmore, was of Irish origin. His maternal grandfather, James Gilmore, was a Virginian by birth, but became a pioneer of Kentucky and Missouri. On both sides there were representatives of the family in the wars of the Revolution and of 1812, and also in the Indian wars. In 1808 one branch of the Waymire family established a settlement near Dayton, Ohio, where their descendants still live, numbering several hundred.

In 1845 Stephen K. Waymire, moved by the restless, spirit of the Western pioneers, started overland to Oregon with his family in a company of which his brothers Frederick and John, with their families, were members. Oregon was then an almost unknown land, and there was not even an established wagon road connecting it with the inhabited portion of the States. After crossing the Missouri river, Stephen K. was thrown from his horse and died from injuries caused by the fall. His widow, with her boy, James, returned to her father, who resided in Buchanan county, Missouri. Frederick and John became successful as pioneer farmers and business men in Oregon. The former was an active member of several sessions of the legislature and of the

convention that framed the State constitution in 1857. He died in 1872. John built the first wharf at Portland, and became a merchant at Dallas, Polk County.

In 1852 James Gilmore, with his family, including the widow Waymire and her son James, emigrated overland to Oregon. The boy made himself useful on the plains by helping to drive the loose cattle, riding horseback most of the way. Though under ten years of age, he had learned to write well enough to keep an interesting diary of the overland journey. The immigrants formed a settlement near Roseburg, in what afterwards became Douglas county, Oregon. Schools and churches were established as necessary accompaniments of the colony. At these James was a constant attendant, particularly distinguished for his studious habits. His grandfather had an excellent library of standard books, including the histories of Rollins, Gibbon, Hume, "Marshall's Life of Washington," "Weem's Life of Marion," "Plutarch's Lives," "Franklin's Works," "Clarke's Commentaries," Pilgrim's Progress," and volumes of essays, speeches, poetry, etc. These books were the constant delight of the boy student. Although there was plenty of work to do on the farm (fencing, plowing, chopping wood and caring for the live stock), and he was always ready to do his part, the long winter evenings afforded ample opportunity for reading. Lamps were an unknown luxury, and candles were an extravagance sparingly indulged. But pine knots were plentiful and to be had without cost. By their cheerful light, James would often read until urged to bed by some older members of the family. He read history with map and notebook at hand. At fourteen years of age he was quite clever as a writer of both prose and verse. At seventeen he had acquired a fair knowledge of mathematics and Latin with the rudiments of Greek, and had learned phonography. After reaching fourteen years of age he was unwilling any longer to be dependent upon his relatives for support, and began making his own way in the world. His first earnings were by chopping cordwood. At fifteen he was a full hand in the harvest field, in making rails and other farm work. The next year, having acquired a hors and saddle, he obtained employment during the summer at $2.50 per day in driving cattle to Washington Territory. In 1860, before he was eighteen, he taught school at $50 per month and "boarded round" with the scholars.

This being the first presidential election at which the people of Oregon were privileged to vote, and on account of the slavery excitement, great interest was felt. Young Waymire, though not old enough to vote, made speeches for Lincoln, having become a zealous Republican by his historical studies and from reading the Douglas-Lincoln speeches, lectures of Channing, the *Tribune*, the proceedings of Congress, etc. Most of his relatives were pro-slavery in their views. In September and October he assisted in reporting the proceedings of the Oregon Legislature for the *Oregonian* and

other newspapers. This was the session at which Colonel E. D. Baker was elected United States Senator after an exciting contest. The young reporter made the acquaintance of Baker and became a great admirer of his genius. It was at Colonel Baker's suggestion, that he resolved to study law, and upon the adjournment of the legislature he set about it by taking "Hoffman's Legal Studies" as a guide, intending to read the introductory works there recommended while preparing for and passing through college. For years it had been his ambition to graduate at Harvard, and as he had no rich relations to help him through, he resolved ot earn the necessary funds.

The winter of 1860 was devoted to study, as usual, and early in the summer of 1861 he resumed schoolteaching. But the mutterings of civil war were soon heard. There was a very bitter feeling prevalent on the Pacific coast towards the "Lincoln Government." Influential politicians favord the establishment of a Pacific Republic in aid of the Southern Confedracy that had already been organized. It became necessary to create a strong public opinion in favor of the Union. For this purpose a great many mass meetings were held throughout the State, and at several of these Mr. Waymire was an earnest and acceptable speaker, deprecating war but declaring his readiness to bear his part. The firing on Sumter shocked the country, but it was hoped war would yet be avoided. Then came the disaster at Bull Run in July and the war feeling reached fever heat. All the available troops of the government were needed at once. Augur, Sheridan and other veteran officers with their commands were immediately withdrawn from service on the frontiers of Oregon, Washington and Idaho, and sent to the new field of operations. It was necessary to have volunteers to take their place, so as to prevent the organization of a separate government on the Pacific coast and to protect the frontiers from the Indians. A cavalry regiment was organized as soon as possible and within a few months was ready for service. Waymire might have obtained a commission, but knowing his ignorance of military matters he preferred to learn by experience. Adjourning his school, where he was earning a good salary, he invested part of the money intended for college expenses in a horse and equipments, and enlisted as a private soldier on his nineteenth birthday. His company, with two others, were sent on an expedition, during the year 1862, under command of Colonel R. F. Maury, to protect the frontiers and the overland immigration. They went east to Fort Hall, on the Snake river, and returned to winter at Fort Walla Walla. During the winter, Waymire, having procured the necessary books, kept up his studies. In February, 1863, he was promoted a Corporal. In March of the same year he was surprised by an order directing him to report for duty on recruiting service, and on April 23rd he was further surprised by receiving a commission as second lieutenant. Rejoining his command, he accompanied

an expedition by way of Lapwai, Salmon river and Boise to Fort Hall. At Brunneau river there had been some depredations committed by the Snake Indians upon the immigrants. Lieutenant Waymire was sent with twenty men and two Nez Perce scouts to pursue the savages and punish them. By rapid marches up the river, he surprised a camp of the Indians, located in a deep canyon. Opening fire upon them from adjacent rocks, he drove them into the river, and across it. Plunging into the swift stream four feet deep, his little command waded across, pursued the enemy up the opposite heights, killed a number of them, captured their horses, and, returning, destroyed their camp, which contained a large supply of ammunition. In this affair, the lieutenant became engaged in a personal fight at close quarters with three Indians, two of whom he had wounded, but not enough to disable them. They were firing at him with revolvers, when timely aid arrived, and ended the contest.

During the winter of 1863 Lieutenant Waymire's company (D, Captain Drake) was quartered at Fort Dalles. There were several other companies at the same garrison. Waymire was adjutant of the command. He became interested in the profession of arms, and added to his library a number of standark works on the art of war. He also continued his course of reading in law.

In February, 1864, General Alvord, commanding the department, issued an order directing Lieutenant Waymire, with twenty-five men of his company and ninety days supplies, to proceed to the south fork of the John Day's river and encamp at some point best calculated to enable him "to protect the whites against the incursions of the Indians." There had been many raids upon the frontier settlers of that vicinity, extending over a distance of 100 miles ; and this young officer, but a little over twenty-one years of age, was expected to protect that long line of settlements in a mountainous country with twenty-five men! He was left to act upon his own judgment. He proceeded at once to the south fork of the John Day's river, where he established a camp designating it "Camp Lincoln." With twenty men of his detachment he hastened on to Canyon City (a mining town) twenty miles beyond, for the purpose of investigating the situation of affairs. There he learned that a band of savages had recently killed some miners in the vicinity and driven off a number of horses southward over the Blue Mountains. The winter quarters of the Indians were unknown, and the lieutenant saw at once that the only way to protect the settlers was to make an aggressive fight against them in their own country. Accordingly he prevailed upon the miners to raise a volunteer company to assist him in a pursuit of the Indians. A company of 54 men were organized with C. H. Miller (afterwards famous as the poet "Joaquin" Miller) as captain. This force of 74 men followed upon the trail of the savages across the mountains. It was in March, and

the winter's snow was still deep on the ground. During the first 13 days there was a snowstorm every day. The men slept at night without tents, and on waking in the morning usually found several inches of snow on their blankets. The lieutenant fared the same as the men. The supplies were carried upon pack animals. The horses fed upon such dry grass or brush as they could get from under the snow. The command moved southward to Stein's Mountain near Harney Lake. Here the snow ceased and cold rains began to fall. Some of the men became sick with the measles. The march was rendered so severe by the weather and sickness that 22 of the miners returned home discouraged, leaving but 32 of their company in the field. With these and his own detachment of 20 the lieutenant pushed on beyond Stein's Mountain, and on April 6th suddenly came upon a village of the enemy situated near a mountain gorge. This was late in the afternoon. An attack was immediately made and the entire population fled to the mountains, leaving everything behind except their horses and their arms. At three o'clock next morning the lieutenant with his command was in hot pursuit of the savages. After a march of about 20 miles southward, he was confronted by a large force of them on foot and mounted, well armed and prepared for a fight. They numbered from 300 to 500. Then ensued one of the most stubbornly contested battles in the history of the frontiers. It lasted from eleven A. M. until nightfall. The Indians, by reason of their fresh horses, greatly superior numbers and intimate knowledge of the ground, had so much the advantage that it is wonderful they did not massacre the entire party of soldiers. By a series of skilful maneuvres, Lieutenant Waymire succeeded in inflicting severe punishment upon the enemy with a loss on his part of only five men and a few horses. More than this, however, he ascertained the home of the Indians, thus enabling the General commanding to plan successful campaigns for the future. For this service he was complimented in general orders, and some years afterwards (1872) received a letter from General Alvord, containing the following paragraph:

"I always remember you as the pioneer of Crook's expedition to southeastern Oregon. When General Steel left New York in 1865, I saw him off and urged him to make a winter campaign in that region. He did so and sent Crook to carry out the policy." [General Crook with an ample force of men in 1866–7 conquered a lasting peace with these Indians,]

Relative to this affair the Adjutant General of Oregon, in his report to the legislature, said:

"The report of Lieutenant Waymire, of Company D, First Oregon Cavalry, will be found very interesting, and his encounter with the Snake Indians near Harney Lake, was undoubtedly the hardest fought battle in which our troops participated, and evinces a courage and coolness on the part of the lieutenant and his brave followers worthy of notice. Should any future occasion call

him again into the battlefield, I have no doubt, judging from the past, he would rank high as a military leader."

Lieutenant Waymire returned to Camp Lincoln with his command, and reported the result of the raid to headquarters. An expedition was immediately fitted out, consisting of three companies under Colonel Drake, to operate against the Indians. Waymire's detachment joined this expedition, and he served as adjutant of the command. Being a summer campaign, the Indians were able to keep out of the way, and little permanent good was accomplished, though there were several skirmishes, in one of which Lieutenant Watson and five soldiers were killed.

In the autumn of 1864 a regiment of infantry was called for by the general government, to be raised in Oregon. At the request of Governor Gibbs, Lieutenant Waymire was assigned to duty to assist in organizing the regiment. After the fall of Atlanta and the successful march to the sea, it became evident that the war was so far ended that there was no longer any danger on the Pacific coast. Thereupon Lieutenant Waymire tendered his resignation and, at the request of the Governor, it was accepted by General McDowell.

The young soldier, turning away from arms, became private secretary to the Governor of Oregon and devoted all his spare time to the study of the law. For two years following he had several hours a day for study, with the advantage of attendance at the courts and the advice of leading members of the bar. He also had access to the Mercantile Library—an excellent collection of miscellaneous books—of which he was librarian part of the time. In his law studies he was greatly assisted by the advice of Judge Deady, of the U. S. District Court, and the discussions of a law club of which he was a member. He reported the proceedings at a special session of the legislature in 1865 for the *Oregonian*, the principal newspaper of the State. He also wrote for the press and delivered several lectures.

In February, 1867, he was tendered a commission as second lieutenant in the First United States Cavalry. Alaska had just been acquired and the army had been increased. It was a common opinion that in future it would be necessary to maintain a large regular army. Under such a policy promotion would be rapid. With these expectations Waymire accepted the commission and came to San Francisco to be examined. The board, of which General French was President and Major Hasbrouck a member, gave him a thorough examination, doubting his capacity on account of his youthful appearance. He had no difficulty, however, in answering their inquiries. General French subsequently told Governor Woods that the board were greatly surprised at the young man's knowledge of military matters. The new lieutenant was assigned to M Company, stationed at Camp Lyon, Idaho Territory. He joined it at once and was assigned to duty as Quartermaster and commissary of the post. General Crook was then in command of the

district of Owyhee. He was soon after assigned to the command of the department, and General Elliott, then lieutenant colonel of the First Cavalry, succeeded to the command of the district. The Indians were very troublesome, and the troops were actively engaged against them, but Lieutenant Waymire's duties kept him at the post. Under his management the expenses of the post were greatly reduced. In May, 1869, the company was ordered to Arizona and about the same time Waymire was promoted to first lieutenant. But Congress had begun to reduce the army, and seeing little prospect of attaining any considerable rank during an ordinary life time, and knowing that every year he remained in the army would make it more difficult to live outside of it, he resolved to take final leave of it and to enter upon the practice of the law. Accordingly, he tendered his resignation, and it was accepted in September, 1869. All together he had been in the military service about five years and a half.

Shortly after this he resumed his law studies at Salem, Oregon, and at the request of James Anthony, one of the proprietors of the old Sacramento *Union*, he spent the winter of 1869-70, reporting the proceedings of the Senate of California for that paper. In September, 1870, he was admitted to the bar by the Supreme Court of Oregon after the usual examination in open Court. In the same class with him were John B. Waldo, afterwards a Judge of the Supreme Court and Raleigh Stott, since Judge of the Circuit Court. He commenced practice at once in Salem.

During the summer of 1871 there was a call for a meeting of citizens to consider the propriety of levying a tax sufficient to maintain free schools for six months in the year. The principal tax-payers were opposed to the proposition, and a great deal of interest was felt in the matter. Mr. Waymire was among the advocates of the tax, and, after a struggle, the proposition prevailed. Subsequently he was invited to address a teachers' association, and he delivered a lecture in which he reviewed with great thoroughness and ability the question of the right of the government to provide for and regulate the education of the young. The paper, being printed and extensively circulated, attracted attention, and by the force of its arguments was of great service in forming a public opinion that soon caused the enactment of laws establishing a greatly improved system of education.

Again yielding to the call of the *Union* he reported the Senate proceedings at Sacramento during the session of 1871–2. This was the session at which the Codes were adopted, and the change afforded a good time for beginning law practice in this State. At these sessions he had formed the acquaintance of nearly all the public men of the State, and had made many warm friends, among whom were Senators Perkins, Irwin, (since Governor) Curtis, Farley (since United States Senator), and M. P. O'Connor. At the

close of each session a vote of thanks for faithful reports was passed, and at the close of the session of 1871--2, a resolution was adopted allowing the reporter $420 ($3.50 per diem) as compensation for his work. This he declined to accept, on the ground that being in the service of private individuals he had no right to receive pay from the State. In May, 1872, the judges of the California Supreme Court appointed him phonographic reporter of that tribunal. In this position he served for three years. During that time he heard and took notes of all the arguments made before the court. He analyzed every opinion and prepared reports of all the cases decided. These reports were first printed in the *Union*, and most of them—with additions or other improvements in some instances—were subsequently embodied in the volumes of Reports from Nos. 41 to 49.

In 1873 Mr. Waymire delivered the oration upon Memorial Day, at Sacramento. Taking for his subject, "Sentiment in Politics," he demonstrated in a most pleasing address the utility and the necessity of "giving a right direction to the sentiments of a people and opening proper springs of feeling in the heart."

This address was published in the *Union* June 1st. Following is an extract:

"It is a happy feature of our form of government that it affords an ample field for the exercise of all the faculties of man. Sentiment is not one of the materials out of which legal judgments are constructed; it cannot enter the temple of justice, for there the blind deity stands with the poised scales which nothing but reason can turn. But in the legislative halls, where the lawmakers consider the expediency as well as the justice of a measure; in the pulpit, where the sublime truths of Christianity are inculcated without restriction; in the free press, upon which the people depend so largely for information and counsel, and especially in the popular forum, where that great controlling power we call public opinion is concentrated and directed to some special purpose, sentiment, feeling, all the hidden springs by which men are moved to action, are called into play. We can all feel the fires of patriotism enkindled within us when we hear the inspiring strains of some grand national air, listen to the eloquence of "thoughts that breathe and words that burn," or recount the glorious achievements of a favorite hero; but not all of us can go with Aristotle, Plato, Locke, and Bacon into the mysteries of metaphysics, or explore with Newton, Humboldt, Herschel and Agassiz the wonders of nature; or follow and appreciate the profound reasoning of a Mansfield or a Marshall. Who in all the civilized world is not familiar with the names of Alexander, Cæsar, Cromwell, Washington and Napoleon; of Demosthenes, Cicero, Pitt and Webster; or of Homer, Virgil, Shakespeare and Schiller? How few comparatively, know anything of the patient men who have devoted their lives to the development and perfection of the arts and sciences to which every one of us is indebted for the comforts of daily life; or of their colaborers who have dedicated themselves to the cold logic of the law—that intricate fabric which permeates and sustains all society, and which everybody is presumed to know, but which, in fact, nobody does know. A learned Judge, who has been a score of years a student of legal lore, gives days, and weeks, and even months to the investigation of some knotty question of law affecting vital interests of the public; and at length his opinion, clear, compact, fit to stand as a precedent for all time is announced; but it attracts the attention of a small audience only, even in the community it most

concerns. A popular orator, in a political campaign or upon the floor of Congress or of Parliament, makes a ringing speech, mixing sentiment with his logic, and instantly his name is upon everybody's lips, and his words, borne upon the numberless wings of the press, become the rallying cry of hosts. He who wins universal fame deals not with the reason of men only, but with some common impulse as well—some feeling or aspiration of the human soul."

In the same address he urged conciliation toward those who were on the other side in the civil war, saying:

"They are now no longer a foe, but fellow citizens, friends, brothers; and as once we stood up against each other, they clad in gray and we in blue, so now we are ready in response to the call of a common country—whether in the interest of the South or of the North—to stand together, shoulder to shoulder, under the broad folds of that dear old flag which was the flag of their fathers as well as ours—the price of commingled blood—and which we trust is to be the flag of our children and of their children to the remotest generations."

Mr. Waymire removed to San Francisco in July, 1874, and has been engaged in the practice of the law since May, 1875, when he resigned the office of reporter. His practice has been of a general character, embracing a wide range of important law points. In the preparation of his cases he is painstaking and industrious. Whenever the importance of the questions involved has justified the labor, he has made it a practice to write careful briefs and have them printed. He has been engaged in many important cases. In 1877 General Meyers, Consul General to Shanghai, China, employed him to prepare charges against Hon. George F. Seward, Minister to China. General Meyers had been suspended from office by Seward because he had reported certain irregularities in office on the part of the Minister. The evidence accumulated by Meyers was documentary in most part, and quite voluminous. This was analyzed by the attorney, and charges were prepared and printed. With this preparation and a brief by Mr. Waymire, General Meyers went on to Washington, where he employed Matt. Carpenter and Robert Ingersoll, to prosecute the case before Congress. After a long contest, Mr. Seward was recalled and the impeachment proceedings were abandoned.

To mention some of the cases, in which Judge Waymire has been engaged, that of Barton vs. Kelloch, involved the construction of the constitution as to the time of holding the elections; in the People vs. Houghton the Supreme Court declared a Swamp Land act to be unconstitutional; Mohrenhaut vs. Bell involved title to 26,000 acres of land in Sonoma county; in the South Mountain Consolidated Mining Company he represented the creditors in an application for an assessment of $300,000 on the stockholders; in the People vs Parks, the Drainage act was declared unconstitutional and nearly a million of dollars was saved to the State; In the San Francisco Gaslight Company vs. Dunn, the city's contract with the gas company was declared void; the Pioneer Woolen Factory vs. Dunn, involved the validity of the Bayly ordinance.

The case of the People vs. Parks (58 Cal., 526) is one of the most important in the Reports. There had been a law passed by the legislature levying a tax of five cents on the $100, for the purpose of building dams to stop the flow of debris from the mines worked by hydraulics. At a subsequent session the legislature, under the lead of Senators W. H. Sears, W. W. Camron and others, sought in vain to repeal this law, and there was great public excitement over the matter. Several ineffectual attempts were made to get the question of the constitutionality of the law before the Supreme Court. See Camron vs. Weil (57 Cal., 547) and Camron vs. Kenfield (57 Cal. 550). Those cases failed on questions of practice. Finally, the question was squarely presented in People vs. Parks, and the court decided the act was unconstitutional. The only point upon which a majority of the judges agreed was that the act in attempting to confer upon executive officers the power to form drainage districts involved a delegation of legislative functions and was, therefore, void. This point was raised by Mr. Waymire. The original argument on this point in the report of the case in the volume referred to, is well worth examination.

Judge Waymire went upon the bench of the Superior Court, by the appointment of Governor Perkins, October 17, 1881, to fill a vacancy. His appointment was greeted with the general approval of the bar.

His industry on the bench was generally remarked. The patience with which he would weigh masses of evidence, and the subtlety which he would bring to the examination of nice points of law, were very pleasing, especially to lawyers of large practice. In his fourteen months on the bench he rendered eleven hundred opinions, a large proportion being on demurrer, but all on questions which counsel had made the subject of argument. Of thirty appeals from his judgments only three appeals were sustained.

At the end of Judge Waymire's short term as Superior Judge, he was nominated by his party for re-election. The Republicans were divided in San Francisco at that time, on local issues, but he was presented for re-election by both factions and unanimously. He was defeated by a small majority, owing to a change in the German vote. In consequence of an agitation of the Sunday law question, that vote seemed to be cast almost solidly for the Democratic nominees, State and local, political and judicial, in 1882. It was in that campaign that Charles Kohler, the large producer of native wines, and President of the "League of Freedom," went over to the Democracy from the Republicans, with a large following. Mr. Kohler, however, desired to see Judge Waymire re-elected. The lawyers supported the Judge with general concurrence; Hall McAllister and other bar leaders publishing a card in his behalf. Although defeated, he received the highest vote of all the Republican candidates in that contest, and ran over 3,000 votes ahead of his party candidate for Governor.

Resuming his profession, he expected that the work of building up a business anew would be the engagement of years. But hardly a year had passed before his practice was so extensive that in comparison with it, his business before going on the bench was small.

The litigation which has since made his name most familiar to the public was that of the so-called railroad tax cases. He had been the attorney of Hon. John P. Dunn when the latter was Auditor of the City and County of San Francisco, in matters affecting the public, and was again called into counsel by Mr. Dunn, when he had passed from the Auditor's office in San Francisco to that of State Controller. One hundred cases had been instituted in thirty-three counties of the State, by the District Attorney, against the Central Pacific and Southern Pacific Railroad Companies. These suits were brought to recover sums of money claimed to be due as delinquent taxes, and the aggregate amount was over one million dollars. They were all, on motion of the defendants, transferred to the United States Circuit Court at San Francisco, for the reason that they involved questions arising under the federal constitution.

Controller Dunn employed Judge Waymire with others to assist the Attorney General in pressing these suits to judgment. The Railroad Companies had paid in a little over $200,000, after the suits were begun. The State lost these suits, both in the Circuit Court and in the United States Supreme Court. However, the attorneys sued out writs of error to the Supreme Court of the United States, and before the decision of that tribunal, succeeded in collecting $800,000 from the defendants.

In February, 1883, Judge Waymire was elected by the Encampment of the Grand Army of the Republic a member of the Veterans' Home Association of California for a term of five years. This institution has established and maintains a home for disabled ex-soldiers at Yountville. In March of the same year he was chosen a director of the association named, and served as chairman of the executive committee until March, 1885, when he was elected president of the association. He has been twice re-elected as president. It was his suggestion that the Federal Government was memorialized to establish a Branch of the National Soldiers' Home on the Pacific Coast. He was appointed to urge the enactment of the necessary law to that end. After several years of correspondence with members of the Board of Managers, and with Senators and Representatives in Congress, he had the satisfaction of seeing a law passed which appropriated $150,000 to build the Branch Home. In November, 1887, a site was selected near Santa Monica, where buildings will soon be erected, with accommodations for 2,000 old soldiers. He was also a delegate to the National Encampment of the Grand Army, held at Portland, Maine, in June, 1885. In January, 1887, as President of the Veterans' Home Association of California, he issued in pamphlet a report of the

transaction of this association. It was addressed to the Governor of the State, because it was from the State that the institution derived most of its revenue; and it covered the transactions of the association from the beginning, as no report thereof had before been issued or prepared.

In the recently tried case of Shultz vs. McLean, before the Superior Court of San Luis Obispo County, Judge Waymire and Mr. T. C. Van Ness were associated for plaintiff. It was one of those cases in equity, so hard to win, in which the plaintiff seeks to have a deed given by him set aside, as having been obtained by fraud. The plaintiff prevailed in this suit, however, recovering title to 22,000 acres of land.

John McBrown, the well known farmer of Marin and Contra Costa Counties, now deceased, was one of the best clients of Judge Waymire, who now has in hand the settlement of the large estate left by that gentleman.

In addition to his professional successes, Judge Waymire has made some fortunate ventures in San Francisco real estate. His home, however is now in the town of Alameda, where he has a fine dwelling in the midst of four acres of land attractively improved. Upon this he has expended $30,000. He has a wife, two sons and two daughters, having married at Lafayette, Oregon, on June 22, 1865, Miss Virginia Ann Chrisman, a Virginia lady, who, like her husband, is of German ancestry.

Our annals have now and then disclosed the pleasant example of a lawyer on the bench, so intrenched in the respect and confidence of the bar and people of his district, as to seem to hold his office by a tenure dependent solely upon his own will. Such an instance was presented in the late Robert C. Clark, of Sacramento; another, in the late Samuel B. McKee, of Alameda; and a living illustration is seen in the Superior Judge of Monterey.

John K. Alexander was born October 8, 1839, in Rankin county, Mississippi, of American parents. His paternal ancestors were Scotch, and on his mother's side they were English and German.

Brandon, a little town, was the county seat of Rankin county, and John K., was born there during the flush times of the "Brandon Bank" when money was plenty, although it was of the "rag" variety. The elder Alexander was then, as he continued to be for a long period, there and in California, a contractor and builder, and did a large business until the financial crisis, that followed the flush times aforesaid, threw him into a sea of troubles, and, not being able, by opposing, to end them, he removed with his family to Jackson, Mississippi. There he followed his trade for some eight years. In November, 1849, leaving his family, a wife, two sons and a daughter, at Jackson, he started for California, arriving in the following January, and settled at Sacramento. From the time he left his family until July, 1854, his

son John K. attended both public and private schools at Jackson. In that year the family circle was complete again, at Sacramento. There John K., very soon after his arrival, entered a public grammar school, which he attended until the fall of 1857. Then, his father being interested in a gold mine in Calaveras county, he was offered an opportunity to make his first money, and embraced it. He worked in the mine (the Woodhouse Quartz Company's claim) for about one year, laboring hard, to his great advantage physically. Returning to Sacramento, he brushed up his boyish scholarship, applied for admission to the High School, and, on examination, was admitted. He remained in that school for two years, serving one term as vice-principal. Then graduating, he commenced the study of law in the office of Geogre R. Moore, who was a good lawyer, with a large business. He studied later under Harrison & Estee. He took up the study of the law gravely, seriously, with a good conception of its perplexities and accumulations, conscious that it challenged the thoughtful investigation of the best quality of mind, and expressing, very quietly but with the conviction that he could accomplish it, his intention to succeed. He was admitted to practice in the Supreme Court, October 7, 1862, upon motion of Morris M. Estee and after examination in open court.

In 1863 he formed a partnership with his old instructor, Mr. Moore, which lasted until the latter's death. Mr. Moore, who had watched with interest his studious and painstaking qualities, had perfect confidence in his competence, and threw the burden of the business upon him. This was of immense service to him. He came to owe much to Mr. Moore, whose advice and prompting greatly aided and stimulated his labors while he studied, and which have continually advantaged him at the bar and on the bench.

After Mr. Moore's death, Mr. Alexander continued the practice alone, doing a good and paying business until the fall of 1868 when he formed a partnership with Hon. John W. Armstrong. This firm was dissolved upon Mr. Alexander's taking the office of District Attorney in 1870.

In the campaign of 1867, which resulted in the election of Henry H. Haight as Governor, Mr. Alexander was a conspicuous political figure at the capital, being chairman of the largest Democratic organization in that section. Two years later his party nominated him for District Attorney, and he was elected in a Republican county over his Republican opponent, M. C. Tilden, by 684 majority. He served one term, two years, with more than average success, and was then nominated by his party for County Judge. But he had to run against that popular veteran, Hon. Robert C. Clark, who held a continuous estate in that office until it was abolished by the constitution of 1879. He had also to stand up against the popular current on which Newton Booth was just then careering towards the chair of State.

Being defeated in that contest, before re-entering professional harness, he went with his family to the Eastern and Southern States, to revisit the friends and scenes of his boyhood, and generally to see the country and its wonders. Returning, after three months' absence, he formed a partnership with A. C. Freeman, who has since become widely known as a law writer and compiler. He materially assisted Mr. Freeman in the preparation of the work on "The Law of Judgments."

In August, 1874, he dissolved with Mr. Freeman and on account of ill health removed to Salinas City, the Monterey county seat, where he opened a law office. He had not been there long when the Board of Supervisors employed him in several important matters of public business. Among these was the case against Robert McKee, ex-county Treasurer, on his bond, and one against M. A. Castro, ex-Tax Collector, also on his bond; and in a criminal action against the latter, and W. H. Rumsey his deputy, which grew out of the burning of the courthouse. In these bond cases he recovered judgment and secured the money for the county. He was very successful in his new home, and, although often pressed to re-enter politics, he refused, and attended strictly to his law business. But, in 1879, being nominated by his party for Superior Judge, he could not resist the allurements of the highest judicial rank in the State under that of Supreme Judge. His pride was his profession, which was worth more to him, in a money sense, than the salary of Superior Judge. But he accepted the nomination tendered him, and was elected by 359 majority. He was re-elected in 1884, though the State and the County went for James G. Blaine for President.

His candidacy in 1879 was induced by a request in writing, signed by 100 of the leading citizens of Monterey County differing in politics, but all moved by a fear that the candidate of the Workingmen's Party would be Superior Judge. He was afterwards nominated by the Democratic Convention, and the nomination was endorsed by the Republicans. He was elected over two opponents, for besides the candidate of the Workingmen (N. G. Wyatt) the New Constitution Party, another ephemeral organization, presented a nominee in the person of an old bar leader of that region, Hon. D. S. Gregory, since Superior Judge of San Luis Obispo County. Judge Alexander's reply to the request of citizens in 1879 was as follows:

SALINAS CITY, July 9, 1879.

Messrs. James W. Finch and others. Gentlemen: I have the honor to acknowledge the receipt of your very complimentary letter, requesting me to become a candidate for superior judge of Monterey county. I am deeply sensible of the compliment you pay me, and my sense of obligation is intensified by the high character and standing of those whose names are appended to the request. I am also gratified to find that the list embraces the names of

citizens of all political parties. A judicial office is in its very nature non-partisan, and for that reason it has been the study of statesmen to divorce the selection of the judiciary from all political partisanship and elevate the administration of justice high above the plane of party strife.

To assume the judicial ermine and wear it worthily requires the abandonment of all party bias and personal prejudice, a possession of educational qualifications, "clean hands and a pure heart." While I do not claim for myself the full measure of fitness for the position of superior judge, and have grave doubts as to my qualifications for that responsible position, permit me to say that from the time I entered upon the study of the law, now more than fifteen years, it has been my ambition to worthily fill an honorable judicial position—an ambition which in the ethics of the profession has always been deemed laudable, because its possession affords in some manner a guaranty of a profound study of, and respect for, the science of government and administration of justice.

In view of these considerations, and with profound gratitude for the confidence expressed and the honor conferred by your request, I respectfully consent, and announce myself as a candidate for the office of superior judge; and if the partiality of my fellow-citizens should call me to fill that position, I shall bring to the discharge of its important duties at least an earnest desire and determination to perform them honorably, faithfully and impartially; and inasmuch as a new constitution has been ratified and will soon be the supreme law of the land, by the act of the sovereignty, it may not be improper for me to add that it ought not and should not be subverted by legislation, or nullified by hostile judicial interpretation, and if I am elected to the superior judgeship I shall take an oath to maintain and support the new organic law, and I shall do it; and when called upon I shall so construe and interpret it as to carry out the letter and spirit of its provisions.

Again expressing to you my sincere thanks, I subscribe myself,

Your obedient servant,

JOHN K. ALEXANDER.

Judge Alexander, while cautious, careful and methodical, is yet a man of dispatch. No case stands on his calendar more than three months. Practitioners in his court know nothing about "the law's delay" or the "insolence of office." He maintains the utmost order and decorum, and has had no trouble or unpleasantness with any attorney or litigant. Not one of his judgments has been reversed, although very many appeals have been taken from them. The first murder case tried before him, that of the People against Iams, is reported in 57 Cal., page 115. Therein the Supreme Court unanimously and highly complimented him. The official reporter, Mr. George H. Smith, sets forth Judge Alexander's charge to the jury in full. This is a

fine legal paper, and adds to the value of the Reports. The Supreme Court, in their opinion affirming the judgment of Judge Alexander, declare: "We are obliged to say, in justice to the learned Judge who presided at the trial, that the charge to the jury is a very clear and able statement of the law of homicide. It is a long charge, completely covering all the points in the case, and is, in our opinion, entirely correct."

Although arriving in this State at an early day, and for a time working in the mines, Judge Alexander never contracted any vice, but has always lived a pure life. His temperament is calm and judicial. While free from asceticism he does not frown upon reasonable conviviality and social cheer.

The Judge has long been a Mason. He is a Past Master of Salinas Lodge No. 204, and a member of Salinas Chapter, of Royal Arch Masons. He married at Petaluma, August 2, 1865, Miss Sallie B. Carothers, and has two sons, Elmer P., and Roy L. He is a member of the San Francisco Bar Associatiou, whose rooms in the Supreme Court building he finds a most congenial place of retreat and conference in his frequent visits to the metropolis. He has a younger brother, Daniel E., practicing law at Sacramento, and one still younger, Frank A., a farmer. He lost at Sacramento, many years ago, soon after graduation and marriage, an only sister, one of the most interesting and amiable young women I have ever had the good fortune to meet. I may be permitted to recall her memory, and drop a tear to the long ago when I attended the school with her and her brothers.

The fiftieth anniversary of the marriage of Mr. and Mrs. B. F. Alexander, the venerable parents of Hon. John K. Alexander, was observed on the fifteenth of June, 1887. Mr. and Mrs. Alexander were married five days before Queen Victoria succeeded to the throne, and when Martin Van Buren was President of the United States, and came to California from Mississippi in January, 1850. Until recently they lived in Sacramento, where their son, the distinguished judge, was once District Attorney as stated. Their home is now on their farm, Laurel ranch, near Menlo Park, where the day and evening on the interesting occasion referred to, were given to the entertainment of their friends, very many of whom are among the leading lawyers and business men of San Francisco. Mr. B. F. Alexander is a retired contractor and builder.

The Del Monte Hotel at Monterey, after which the present structure of that name is modeled, was totally destroyed by fire on the first of April, 1887. This was a direct loss to the owner, The Pacific Improvement Company, of $450,000, besides subjecting the company to many suits by guests to recover damages for the destruction of wardrobes and jewelry. The company soon came to believe that Edward T. M. Simmons had started the flames, in revenge for having been discharged from clerical employment in the hotel. It prosecuted him for arson. After a trial, the jury promptly acquitted him,

and he instituted suit against the company to recover $100,000, for alleged damages to his character. His strong point was the promptness with which the jury had declared him not guilty. D. M. Delmas, who had with his usual cleverness defended him in the arson case, was his attorney in this suit for damages. Hall McAllister conducted the case for the company, which answered that it had "probable cause," etc. A verdict was rendered for the Company after a trial of fifteen days. On this interesting question of probable cause, it is well to preserve in this connection Judge Alexander's charge to the jury. The case was not appealed, and I take the more pleasure in laying before the profession this statement of law as it came from one who (in the case of Iams before mentioned) won such emphatic applause from the Supreme Court. Judge Alexander charged the jury in this case as follows:

In the present case the proposition of probable cause is involved and this is a matter of law, and is entirely with the Court, and I instruct you that if you believe that certain facts are established by the testimony, that then probable cause is shown. The Court tells you what is probable cause, as applied to various assumed facts, and you apply this rule to the facts which you find from the testimony produced. The single duty which the law casts upon you is to ascertain the facts, and the duty imposed upon the Court is to give you the law and also to define one of the special defences set up in this case.

It is charged that the defendant in this case wilfully, maliciously, and without probable cause, caused the arrest, imprisonment and prosecution of plaintiff. It is admitted that the defendant caused or procured the arrest, imprisonment and prosecution of the plaintiff, and your next inquiry will be, was there probable cause shown for the action of the defendant? The question is, was the charge made maliciously and without probable cause? In trials of this nature it is of infinite consequence to mark with the utmost precision the line to which the law will justify the defendant in going, and will punish him if he goes beyond it. On the one hand, public justice and public security require that offenders against the law should be brought to trial and to punishment, if their guilt be established. The interests of public justice require that parties who, in good faith, and upon grounds believed at the time to be sufficient, attempt to bring supposed offenders to just accountability, should not be mulcted in damages merely because the accused party had ultimately succeeded in obtaining an acquittal of the charge. Courts and juries and the law officers whose duty it is to conduct the prosecution of public offenses, must, in most instances, if not in all, proceed upon the information of individuals, and, if these actions are too much encouraged, if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavor to promote the public good. The informer can seldom have a full view of the whole ground and must expect to be frequently disappointed by evidence which the accused only can furnish. Even if he possessed the whole evidence, he may err in judgment, and in many instances the jury may acquit, when to his mind the proof of guilt may be complete.

On the other hand, the rights of individuals are not to be lightly sported with, and he who invades them must take care that he acts from pure motives and with reasonable prudence and caution. For the integrity of his own conduct, he is responsible, and his sincerity must be judged of by others from the circumstances under which he acted. If without probable cause, he has inculpated another and subjected him to

injury in his person, character or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice. But, though malice may be proven, yet if the accusation appear to have been founded upon probable grounds of suspicion, sufficiently strong in themselves to warrant a reasonably prudent or cautious man in the belief that the person accused is guilty of the crime charged, he is excused by the law. Both must be established against him, that is, malice and the want of probable cause; of the former the jury are exclusively to judge and determine; the latter is a mixed question of law and fact. What circumstances are sufficient to prove probable cause, must be judged of and determined by the court; but to the jury it must be referred, whether the circumstances which amount to probable cause are proved by credible testimony or not.

What then, is the meaning of the term "probable cause?" We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a reasonable, cautious and prudent man in the belief that the accused is guilty of the offence with which he is charged.

I do not think that I can add anything to the exposition I have given, not only of the extent to which a citizen should be protected in making such charges as may lead to the enforcement of our penal laws, in cases where their infringement comes within his notice, and the extent to which they should be upheld by Courts and juries, when they act honestly and from pure motives, but also of the care and caution which they should exercise if they would find themselves justified in making such charges, should they prove unfounded. The rule, as I have already stated, is that the circumstances must be such as in themselves would induce a reasonable, cautious and prudent person to believe that the crime of which the party is accused has been in fact committed by him, and such as he might have known by reasonable inquiry. If the facts and circumstances known to him were such as to induce a reasonable, prudent and cautious man to believe and he did from these circumstances actually believe, that the crime charged had been in fact committed by the party, that is probable cause, and the party preferring the charge is excused by the law, even though the party accused may have been acquitted and proven to have been innocent. If it should turn out that the defendant in this case was entirely mistaken, that Mr. Simmons was innocent, that the witnesses by whom the defendant expected to prove the charge had deceived it, or that it mistook the bearing and weight of the circumstances upon which it relied; yet if defendant really believed such testimony, and it was of such character, that, laid before an ordinarily reasonable, cautious and prudent man, he would believe that the crime had been committed, the defendant could lay the charge before a magistrate, and should it turn out unfounded, be protected by the integrity of its purpose and the honesty of its motives. I will say here that no evidence is ever introduced before a jury as to what is the measure of a prudent, reasonable and cautious man. The ordinary measure of a prudent, reasonable and cautious man, you are yourselves to determine. As jurors, you are presumed to be reasonable, prudent and cautious men. You determine that for yourselves, as you understand the term, and then apply it as you interpret it.

If the defendant, for instance, had reason to believe and did believe, that the crime of arson had been committed by the plaintiff, from facts and circumstances that would have justified a reasonable, prudent and cautious man standing in its position in so believing; if it made and caused to be made such inquiry as a cautious and prudent man would make, and ascertained such facts and circumstances as would have induced a reasonable man to believe said crime had been committed by the plaintiff, that would have been probable cause for it, and it might act upon it with safety. If the acts of the

defendant in this respect can be justified on that ground, that is the end of this case and your verdict should be for the defendant.

If on the other hand, you find from the evidence that the defendant did not make such inquiry into the facts as a reasonable, prudent and cautious man would have made, and that, if it had made such inquiry, it would have discovered evidence which would have justified a reasonable man in believing that plaintiff was not guilty of the charge made, then I instruct you that the failure of defendant to make such inquiry, if it did so fail, shuts it off from resorting to that defense. The defendant cannot justify itself upon the ground of probable cause, unless it made such inquiry into the facts and circumstances as a reasonably prudent man would have made under the circumstances.

There is another proposition in the case, standing upon an independent footing, and which can be considered independently of any of the propositions discussed. That is that the party who made the complaint and caused the arrest, acted upon the advice of counsel. This, when satisfactorily proven, constitutes a special and complete defence, in actions of this character, and the advice of a lawyer of standing, honestly taken, upon a full statement of the case, may constitute a justification which would not otherwise exist. If a party having fully and fairly investigated a case, and possessed himself of its material facts, for the purpose of honestly taking a legal opinion upon it, and then fairly and honestly stating all of the facts and circumstances of which he is possessed, to a qualified and competent lawyer, for the purpose of ascertaining whether a crime had been committed, and whether a prosecution should be instituted, and the lawyer advises him upon these facts that they do establish a crime, and he believes and acts upon that advice, I instruct you that the advice of counsel thus given is a defence, and the defendant may justify himself upon it. It is sufficient for him to show that he stated the facts of the case which he had ascertained, as I have already suggested, by a fair and honest statement to the lawyer, as well the circumstances which tend to exonerate, as those which tend to convict, and that upon the whole case he was advised by the lawyer, that a prosecution should be instituted, and that upon that he acted, such advice of counsel, thus acted upon, constitutes a defence. If you believe that the defendant made and caused to be made the inquiry in question as to the facts connected with the alleged crime of the plaintiff—that it made all the inquiry which a prudent and reasonable person would make for the purpose of possessing himself of all the facts of the case, and represented them both pro and con in good faith to a competent attorney, for the purpose of taking a legal opinion, and by that attorney was honestly advised that a prosecution should be instituted and could be maintained, I instruct you that such a statement and action upon such advice, is a defense to this action, and that your verdict must be for the defendant. If you believe upon the other hand, that the defendant withheld or concealed testimony, or that the defendant, in investigating the facts of the case, did not make such research as a cautious and prudent man would make, but only possessed itself of such research and reports as would not of themselves be sufficient to induce this belief in a reasonable, cautious and prudent man, and placed such partial facts before the attorney and that the attorney acted upon them; that such facts were so meagre and imperfect as to deceive the attorney; I instruct you that such advice, procured upon such a statement, does not constitute a defense to this action, and the prosecution cannot be justified upon advice thus obtained. So much gentlemen, for the question of probable cause. I believe that is all that is necessary for me to say upon that branch of the case. If the defendant acted in good faith and upon proper inquiry as already defined in making its complaint, your verdict should be for the defendant,

Should you find that defendant, having possessed itself of the general facts of the case, to the extent which I have indicated, and placed them honestly before a competent

lawyer, (although it may have been mistaken and these facts might not have existed), if it stated the testimony from which it had reason to believe the facts would be established to its attorney, and was advised by him that it had good grounds to act as it did, and upon such advice so taken, acted, your verdict should be for the defendant.

To find for the plaintiff, you must find in his favor upon all of these propositions; you must find that the defendant did not have probable cause for making the complaint, and did not act under the advice of a competent attorney, honestly and fairly obtained; should you find for the defendant on any one of these propositions, your verdict will be for the defendant.

Should you find for the plaintiff upon the questions thus far considered, your next inquiry will be as to the measure of damages. And first, as to the question of malice as connected with the question of damages. In most cases that are brought for *torts*, the law, from the wrongful act, presumes the malice without reference to the spirit or purpose of the act. This is termed malice in law, and when established, is sufficient to entitle a person to recover his actual damages.

Besides this malice which the law implies from the wrongful act, without reference to the purpose of the wrongdoer, there is malice in fact, when the wrongful and unlawful act is committed for the purpose and with the intent to injure. In this case the law requires that the malice be proven. I instruct you that from the absence of probable cause you may find, as a matter of fact, malice or not. The law does not conclusively presume it, but, from the fact of the prosecution, where probable cause does not exist, the jury may find that there was malice. Malice, in fact, is always to be proved by testimony. It is not to be presumed. It is shown by testimony of the nature and character of the trespass complained of.

If the defendant manifests a hostile, malignant purpose, an intention to injure; if it shows a vicious, wrongful disposition, that it is not merely a mistake, to the extent of acting unjustly, but that it is done with a vicious heart, and for the purpose of injury, then you may assess punitive damages.

But, if you find that there was no probable cause, and find from the absence of probable cause, malice, then your verdict will be for the plaintiff, and the damages which you will assess will be conpensatory for what injury plaintiff has sustained, for the actual sufferings he has undergone, and the actual loss which he has sustained from the wrong committed. That is the measure of damages, where no element of actual malice entered into the act complained of. But, if beyond this, you find that the acts were done with a wicked purpose, with an intention to injure, and that that was a principal or controlling purpose on the part of the defendant, in causing, without probable cause, the arrest, in such a case the law permits you to impose punitive or exemplary damages. The question of compensation does not enter into that, but you will impose them in the nature of a fine, as a warning to others, and a civil punishment to the party who has been guilty of such a wrong. But, before damages of this character can be given, a purpose to injure as well as a want of probable cause, must be established by the plaintiff. For malice in law, the damages are compensatory only. For malice in fact, you may add to compensatory damages such exemplary damages as may serve as a warning to other wrongdoers.

It was a genuine surprise to his brother lawyers who heard it, when the unassuming gentleman to whom I will now direct the reader's attention, testified on the witness stand on a certain occasion, "I have had more cases in the Supreme Court, and won more, than any other lawyer during my period at the bar."

It was not vainglory. His record was not known to those present. He was a much younger man than now, and his quiet way of commanding success had betrayed no concern for his fame. He was now on the witness stand as a lawyer, called to testify on the subject of a lawyer's charge for professional services, and the attorney whose cause his testimony damaged, thought to subject him to a severe ordeal.

It was in the course of a vigorous cross-examination that he was led to the utterance above quoted. Other lawyers there were who could point to more cases as theirs in our highest court, taking all the Reports together, but our lawyer witness expressly limited his statement to the period between his admission to the bar and the date of his testimony. We shall find it worth our while, pretty soon, to particularize and examine some of the many cases to which he made this general reference.

Milton A. Wheaton was born in Oneida county, New York, November 14, 1830. He is of an old American family. His father was a wagon maker, and had the reputation of being able to make anything in the way of mechanical construction. His genius in this line became the inheritance of the son, as has been repeatedly evidenced by the latter's masterful grasp of patent cases.

The son went to school in his native county and entered Hamilton College, which is there located, in the year 1851. He had maintained himself by working on farms since he was twelve years old. At fourteen, he made butter and three kinds of cheese, besides milking the cows. In winter he was always at school, and at all times he was eager for books, possessed by the idea of getting an education. He withdrew from Hamilton College, after less then two years of study there, to accompany an uncle to California. An older brother had come to this State in 1850. Some young friends had returned home after a year in the new gold mines, with purses of about $2,000 each. Their good fortune and his uncle's invitation induced the student to leave his college, to which he never returned. He arrived in San Francisco by way of Panama on May 5th, 1853. He went at once into Butte county. The first work he did was chopping wood for a steam mill. Near the mill stood a dead forest of enormous sugar-pine. This he felled and cut up, at four dollars a cord. Out of the top of one of these pines he got twenty-one cords. In the next summer, (1854) he did teaming and freighting, and hauled lumber for Philip Cain & Co. In the summer of 1855, he commenced the study of law at

Sacramento, in the office of Carter & Hartley, and on the 15th of September, 1856, he was, after examination, admitted to the bar by the Supreme Court. In January, 1857, he began practice in Suisun, Solano county. For eight years he made his home there in the heart of a very fertile section of the State, where land titles were generally unsettled, and the practice was very remunerative to good lawyers. During this period Mr. Wheaton had a brief partnership with John Doughty, who afterwards left the law and became a clergyman of the Swedenborgian church. He is the same gentleman who has now for many years so worthily filled the pulpit of his church in San Francisco. Mr. Wheaton had no other partnership than this. In looking over his early successes at the bar we again see the fruit of patient struggle. He had no bad habits. He loved work and study. His cast of mind was practical and serious. And he kept faith. He acquired as great a reputation in the conduct of land cases, as he later won in San Francisco in the widely separated department of patent practice.

Mr. Wheaton's first appeal to the Supreme Court was in a case of his own. The suit was commenced in the then District Court of the Seventh District, on August 1st, 1859, and was determined in the Supreme Court, in October, 1861. Scott, Vantine & Co. and one Dimock were creditors of H. C. Brown, of Solano County, and the firm named brought an attachment suit against Brown. Eleven days after this suit was instituted, Dimock purchased Brown's property against which the attachment was directed, and in turn sold it to Mr. Wheaton, who was his attorney and also attorney for Brown in the attachment suit. All of these parties had personal knowledge of the issuance of the attachment. When Brown made the deed to Dimock, it was under advice of Mr. Wheaton, who, on the same day filed a demurrer for Brown in the attachment suit. He had examined the public records and found there was no judgment against Brown, and that no copy of the writ of attachment had been filed in the Recorder's office. Eighteen days later, on September 24th, Scott, Vantine & Co. had judgment against Brown and placed an execution in the hands of the sheriff, who levied on the property in question and advertised it for sale. Mr. Wheaton then commenced suit in the same Court to enjoin the sale as creating a cloud upon his title to the property. The District Court dismissed the complaint and he appealed.

In this his first appeal he had for his adversary John Currey, who was even then distinguished in the profession. Mr. Wheaton's point was that there had not been any valid attachment of the property. It is to be added here that after the deeds had passed from Brown to Dimock, and Dimock to Wheaton, the Sheriff filed a copy of the attachment in the Recorder's office. Mr. Wheaton urged that this was a void act, as the Sheriff had previously returned the original writ to the Clerk's office. John Currey, against this, contended that the attachment was levied in accordance with the statute;

that the filing of the copy of the writ with the Recorder after Brown's deed to Dimock, was effectual because, by the doctrine of relation, "where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other act shall have relation."

Judge Stephen J. Field delivered the opinion of the Supreme Court and Judge Joseph G. Baldwin concurred. It was decided that the filing of the copy of the writ with the Recorder, after the original had been returned to the Clerk's office, was ineffectual for any purpose. Nor was the deed from Brown intended to defraud Scott, Vantine & Co., as he made it in payment of his debt to Dimock. The Supreme Court reversed the judgment of the District Court, and directed that court to enter a decree for Mr. Wheaton in accordance with the prayer of his complaint. The property involved was worth $5,000. (Wheaton vs. Neville *et al.*, 19 Cal. 42).

The case of Hidden vs. Jordan, 21 Cal. 93, is a leading authority on trusts. In November, 1857, the plaintiff was in possession of a tract of land in Solano County. The title was claimed by others and a litigation between all the parties was settled by plaintiff's admitting the opposing title and agreeing to purchase it. The deed of this title was executed to the defendant Jordan, who paid $6,000 in cash and his note for $1,780, payable in August, 1858, with interest at one per cent and secured by mortgage on the premises. The plaintiff continued to occupy and cultivate the farm. Of the $6,000 cash paid by defendant, the plaintiff contributed $2,000; and he, plaintiff, thereafter turned over to the defendant the entire rents and profits of the land during the years 1858, 1859 and 1860, and from time to time also passed to defendant the plaintiff's promissory notes, as the interest accrued on the $4,000 cash contributed by defendant. The plaintiff took up some of these notes.

In November, 1858, plaintiff sued the defendant in the District Court, complaining, after setting forth the foregoing facts, that the defendant claimed to be the owner of the land in his own right by virtue of his deed. The plaintiff alleged that when the deed was executed, there was a parol agreement between plaintiff and defendant that the former should repay to the latter, within two years, all the money the defendant had contributed to the purchase, with interest, and also pay the note which defendant had executed for the balance due; and that upon such repayment in full, Jordan was to deed the land to plaintiff; and that the note executed by defendant had already been paid from the proceeds of the crops of the land. The plaintiff further averred that he had tendered to defendant the full amount of money advanced by him, with interest as agreed upon, and defendant had refused to receive it; and he prayed that he be allowed to pay the money into court and that defendant be decreed to execute to him a deed of the land.

The defendant answered, denying all the material allegations.

The judgment of the District Court was, that defendant deed to plaintiff an undivided one-third of the property, and account to him for one-third of the rents and profits, less one-third of the amount of the note executed by defendant and since paid; that all the notes between the parties be given up and cancelled, and that defendant repay to plaintiff the $75 paid by the latter as interest.

Both parties moved for a new trial which was denied, and plaintiff appealed from the judgment and from the order refusing a new trial. Mr. Wheaton was counsel for the appellant, and Joseph W. Winans for the respondent. Judge W. W. Cope delivered the opinion of the Supreme Court, Chief Justice Field, and Justice Norton concurring. It was held that the appellant was entitled to the whole of the land. The parties had made an agreement, and the fact that this agreement related to a matter of trust and confidence, coupled with the fact that plaintiff had paid part of the purchase price, was undoubtedly sufficient, said the court, to avoid the Statute of Frauds. "What the defendant undertook to do was to purchase the land; not a part of it, but the whole; not for himself, but for the plaintiff; and what he is attempting to do is to deprive the plaintiff of the benefit of the purchase. This, according to the decision in Bartlett vs. Pickersgill (2 Eden 515), he might succeed in doing if the whole of the purchase money had been paid by himself; but, as the plaintiff paid a portion of it, he, plaintiff, is entitled to have the agreement enforced. * * * The plaintiff cannot be required to take less than the whole, for that was his bargain; and to allow the defendant to force him into the position of a joint purchaser, would be to sanction and legalize a fraud."

The next sixteen volumes of the Reports abound with Mr. Wheaton's cases. He made the appeal in Ellis vs. Jeans, his old antagonist before named, John Currey, having been associated with him in the trial of this case in the District Court. When it reached the Supreme Court in October, 1864, (and this was the third time it appeared there), John Currey was one of seven able men who composed that reorganized tribunal, and Mr. Wheaton made the argument for the appellants. In the decision, of course Judge Currey did not participate.

The action had been commenced away back in February, 1856. It was ejectment, 500 acres in Solano. There were several defendants. The plaintiff claimed under the title of Vaca, whose name is kept green by one of the Solano villages. The defendants derived title from the same source, excepting one of them (Jeans, whose name is fastened to the case), who exhibited no title. The title of the defendants was older than that of the plaintiff, the first deed in their deraignment having been executed by Vaca in 1849, while the first deed in the plaintiff's chain had been given by the accommodating Vaca in 1850. But this deed of 1850 was recorded in 1850, while the deed of 1849 was not recorded until 1856.

The judgment of the lower court was in favor of the plaintiffs and against all the defendants jointly. On appeal Mr. Wheaton urged that the judgment was erroneous because it was a fact admitted that the plaintiff himself was in full possession of one hundred and eighty acres of the land at the time of the judgment and for years before, while the Court assessed the plaintiff's damages through the whole interval and on the whole area. The Supreme Court sustained this objection of Mr. Wheaton's. The Court, speaking through Justice Shafter, said, "This finding upon the subject of damages was undoubtedly erroneous, both in fact and in law. It is true that the defendants, in their answers, deny the plaintiff's title to the whole or any part of the five hundred acres; but it is also true that the plaintiff could not recover damages for the use of land, of which the defendants had never dispossessed him."

P. W. S. Rayle, of Napa, counsel for the plaintiff, upon this, offered to file a release of all damages, and asked that the judgment of the District Court be permitted to stand, with damages released. Mr. Wheaton objected. He said the judgment had been reversed, not only for excessive damages, but for the further reason that the judgment had found that the defendants had dispossessed the plaintiff of the whole of the 500 acres, contrary to the admitted fact that he was in possession of 180 acres thereof. Mr. Rayle now offered to release the 180 acres from the operation of the judgment. Mr. Wheaton objected again, that there was nothing before the Supreme Court to show the location of the 180 acres occupied by the plaintiff. Mr. Rayle asked that the evidence in the trial below be looked into, and suggested that a survey be ordered to ascertain the lines, but the Court said that to grant this would be to exercise original rather than appellant jurisdiction. A new trial being ordered, this tedious case was tried twice more in the lower Court. Each time the jury disagreed. It was then compromised.

Mr. Wheaton removed to San Francisco in the year 1865. Just afterward the Supreme Court passed on an appeal which he had taken some time before leaving Solano county. It was the case of Long vs. Neville, and the appellate court, in its opinion, written by Chief Justice Sanderson, stated very clearly, and I believe for the first time, the class of cases in which notice of *lis pendens* must be filed. The plaintiff sued two men named Hull in ejectment. They made default and he obtained judgment against them for the possession of the land, and placed a writ of *habere facias possessionem* in the hands of the sheriff. But the sheriff refused to execute this writ because the parties sued were not then in possession, although another, one Brown, had come into the occupancy of the land, and held it adversely to plaintiff. The interesting fact was, that before plaintiff, in the ejectment suit, had recovered judgment, R. B. Ellis, who also claimed the land, had dispossessed the same defendants, by the hands of the same sheriff, in a suit under the act concerning

forcible entry and unlawful detainer. The sheriff, on receiving the second writ (in ejectment) refused, as stated, to execute it against the new comer, Brown. The plaintiff, by Mr. Wheaton, sued the sheriff for damages. Losing his case in the District Court, he appealed. The Supreme Court at first affirmed the judgment; sustaining the sheriff on the ground that no notice of *lis pendens* was filed in the ejectment suit. But Mr. Wheaton urged a rehearing, taking the position (against the opinion filed by the Court), that notice of *lis pendens* is not requisite or proper in ejectment suits, but that such notice is essential only in actions affecting land titles. He argued that judgment in an action of ejectment did not operate to transfer or establish title, but possession only; that the title remained precisely where it was before. In this view he prevailed, the Supreme Court granting a rehearing, and reversing the judgment of the Court below. (Long vs. Neville, 29 Cal. 132).

In the case of Cannon vs. Stockman (36 Cal. 535), another of Mr. Wheaton's appeals, the District Court instructed the jury that, the action being to recover land, and the defendant pleading the statute of limitations, it was necessary for the defendant to show that he had been in the continued exclusive possession for five years *next preceding* the commencement of the suit. Mr. Wheaton pointed this out as error, and the appellate court very positively sustained his objection. He had also asked the lower court to instruct that "A party in possession of premises, claiming to own the same, may buy his peace by purchasing any outstanding title, or claim of title, without admitting such title or claim of title to be valid." This instruction the court refused to give, and on appeal, the refusal was pronounced to be "clearly error." "The instruction asked, states the law correctly," observed the Supreme Court, by Chief Justice Lorenzo Sawyer, "and it should have been given in this case, for it was particularly applicable." It was decided in this case, that "when a party has been in the adverse possession for five years, he thereby acquires a title," fee simple, "and if after he has thus become vested with a right, he is ousted, even by the party holding the paper title, he can recover on his title acquired by his adverse possession at any time within five years after such ouster." The late Judge T. M. Swan was associated with Mr. Wheaton in this case, but only in name. Mr. Wheaton did the work and pressed the successful appeal alone.

It was in the year 1868, three years after his removal to San Francisco, that Mr. Wheaton began his active and long career in what has since been his chief line of practice. I refer of course to his acknowledged leadership in patent cases. His connection with the great suit of N. W. Spaulding & Co. vs. Tucker & Putman, agents of the American Saw Company, was an example of that "tide in the affairs of men, which, taken at the flood, leads on to fortune."

Nathan W. Spaulding, Assistant United States Treasurer at San Francisco from May 5th, 1881, to August 20th, 1885, came to California in the year 1851, from Maine, where he was born September 24th, 1829. At a comparatively early date in his long career, remarkable for achievements in business and invention, he made the discovery, of which the litigation now to be noticed was a product. It was at Sacramento in 1859, where he had a shop for the repair and sale of saws. The discovery was an improved method for fixing teeth in circular saws. Inserted tooth saws had been known for many years to possess great advantages over solid tooth saws. Teeth made separate from the saw plate could be tempered better and formed into better shape for fast and easy cutters than when made out of and being a part of the saw plate itself, and could be replaced when damaged. But these and other advantages of inserted tooth saws could not be made available, on account of the tendency of the saw plate to crack from the corners of the sockets in which the teeth were inserted. These sockets had always had square corners. Mr. Spaulding by experiment found that a blow from a sledge would not crack the saw plate, but that the fracture occurred while the saw was in motion, subjected to the various strains, called by experts the side strain, the twisting strain and the splitting strain. He found by careful investigation that the strain and constant vibration incident upon the use of the saw, caused crystalization of the metal at this point, and with a powerful glass minute crystals and fractures could at first be observed which soon developed into cracks that before long ruined the saw plate. No such defects proceeded from any other part of the socket. The happy thought occurred to the inventive mind in search of ways and means to accomplish ends, that if the point of difficulty was in all cases at the angle of the socket what would be the result if there were no angles? Numerous practical tests were made to demonstrate the truth of the idea, and the problem was solved. He simply made the corners of the socket round, or as Mr. Wheaton expressed it in one of his briefs, he used circular lines in forming the junction of the base and sides of the sockets, or, as the letters patent afterwards stated, he used circular lines for the sockets at the base or other places therein where the pressure or force applies. A beautiful effect was secured, a great result was accomplished, no less than a perfect protection against the cracking of the saw plate. A revolution was wrought in the manufacture of lumber. At the trial of Spaulding's patent cases many of our largest and most practical millmen testified to the great improvement made by Mr. Spaulding which in some instances increased the output of their mills twenty-five per cent. When we consider the colossal proportions of the industry and capital affected we may form some conception of the value of this discovery.

Mr. Spaulding's application to the Government for a patent was at first rejected, as I find on reading the brief of counsel referred to, which is a very

interesting and comprehensive paper. The nature of the invention was not grasped. But when proof was introduced to them showing the great effect produced by the use of circular lines in a saw socket, they looked deeper. A discovery of incalculable value was apparent. The letters patent applied for were issued. A flow of gold came in to the inventor from appreciative mill owners. The American Saw Company, having its headquarters at New York City, sent to the Pacific Coast a large lot of saws equipped according to the new method and proceeded to undersell the patentee in this market. Mr. Spaulding, as soon as he could, put a stop to this, by injunction suit. Other infringements followed by William Tucker and S. O. Putnam, and others. Mr. Spaulding sued these parties in their individual capacity, but always declared that they were the agents of the American Saw Company, and that that company made their fight in this great suit.

There never has been in our courts a series of law suits more persistently or bitterly contested; unlimited capital and talent and every thing that either could control to break down Spaulding's patent were arrayed on one side, while the other was nerved by the consciousness of right, and a bulldog determination to sustain a principle, on the part of both client and counsel.

It is reported that over $70,000 was expended by the parties thereto in these contests. Over two hundred witnesses were examined in one of these suits; these witnesses were brought to court from all over the United States and some from Canada. The mountains of all New England were rummaged, the rivers dredged, old wells cleaned out, and obscure memories were dug up and made to do duty for the defence. Saw teeth were altered to conform to the desired shape, and everything else was done that craft could do to defeat the Spaulding patent, regardless of expense.

It is a curious fact that Mr. Spaulding had been turned away by several of the most eminent of our lawyers, to whom he had successively applied to take his case, before a friend directed him to Mr. Wheaton. The latter, it has already been perceived, was not known as a patent lawyer; indeed, he had as yet no practice in that line, and his name had not been seen in the Patent Office at Washington. But it was known to some who had met him on other fields of trial, that he was not only a sound and safe lawyer, but possessed genius in mechanical construction. So, when the perplexed inventor was telling to Abner Doble one day, the difficulty he had in obtaining a competent lawyer, "Go to Wheaton," said Mr. Doble; "he knows something about patents. And he is a mechanic, and a good lawyer." The inventor found that this was true. He had not met Mr. Wheaton before, but his visit to him on that occasion was the beginning of a protracted connection as lawyer and client, and of a personal friendship which has been close and unbroken.

In this suit against the emissaries of the American Saw Company, Mr. Wheaton had Hall McAllister for his adversary. George Gifford, of New York City, since deceased, but then probably holding the first place at the American Bar in patent cases, was also employed for the defense, and devoted himself to the examination of witnesses before masters in chancery in eastern cities. In this way was the evidence taken, the suit being in equity in the United States Circuit Court at San Francisco. The question was, Had there been a public use of Mr. Spaulding's discovery before? In gathering evidence and attending examinations in the East, Mr. Wheaton expended $5,000 of his client's money in a period of six weeks. As will be granted, it was an arduous and costly controversy. In the cloud of witnesses for the defense was R. M. Hoe, patentee of the Hoe printing press. He testified that R. M. Hoe & Co. had made use of the same thing on which Mr. Spaulding had received letters patent, in the year 1837. This and all like evidence was really destroyed by Mr. Wheaton's cross-examination. When the evidence was all in and reviewed he was enabled to argue logically that rounding the junction of the base and sides of the sockets was an original conception of his client's, and was a very great and valuable improvement upon the saw, and patentable. It came within that class of improvements which are called combinations, the form being one of the elements of the combination. He argued his side of the case alone, and showed that where form is employed to produce a new effect, it is as much a subject of a patent as any other device.

I will offer in evidence here this extract from his exhaustive brief:

"We are saying, perhaps, more than we ought to, upon the question of the patentability of the plaintiff's improvement. That he has made a very great improvement upon saws is undisputed. If he was the first inventor or discoverer of that improvement, then his patent is valid, and meets the full requirements of the law, however experts, skill and ingenuity may try to confound that improvement with other things of older date. The mechanical inventor's skill is mechanical skill, and nothing else, and in law all abstract principles are considered old, and every real invention (which does not include accidental patentable discoveries) is made up of old principles, old materials, and mechanical skill, and generally is only new combinations of old devices. The farthest limit of invention only includes the taking of materials furnished by nature and working them into such combination and shape that by them we can grasp principles and agents in nature, and render them subservient to the uses of man. The inventor does nothing but put into new forms and use old principles and old materials. He creates nothing. He uses nothing but materials and mechanical ingenuity, which is only another name for the higher order of mechanical skill."

Hall McAllister presented a full and learned brief in reply. He fought this case with all that "Satanic industry" which Gen. W. H. L. Barnes once referred to him as possessing. (Argument in Jessup Will Case, before Superior Court, Judge Coffey, at San Francisco, 1888.) In his brief in this battle of the saws, Mr. McAllister introduced Satan, by the way. He undertook to be very severe on the patentee personally, but it is noticeable that one of his

headings, in italics, reads: "Spaulding's indefatigable assiduity in his applications for a patent illustrates the tenacity of his character." Mr. Spaulding has been heard to say that he considered this a large compliment from a great legal light. And this counsel's personal thrusts are relieved by the humor that is wont to parallel his reason—as this:

"We claim *form* is of the essence of this invention, and plaintiff should be confined to his particular form. If he is not to be controlled by his diagrams, then every possible form of teeth for saws inserted on circular lines is embraced by this patent.

A quarter circle; a semi-circular tooth; an entire circular base; an oval-shaped tooth; segments of circles; all are embraced. It is an elastic patent, a bed of Procrustes which will fit everything. It is indefinite shape on circular lines; it is a circular, or semi-circular, or partially circular, configuration. It is a conformation with round corners. It is an indescribable circumference, or fraction of a circumference. It is a curve, or roundlet, or cycloid, or zone, multiform and heterogeneous. If we may compare small things with great, it is well described by Milton in his account of that shape which Satan encountered as he explored his solitary flight towards the thrice three-fold gates of Hell:

> The other shape,
> If shape it might be called, that shape had none
> Distinguishable in member, joint or limb."

The result of this suit was a judgment for Mr. Spaulding, fully sustaining his patent. In a recent conversation with Mr. N. W. Spaulding, of which Mr. Wheaton was the subject, the great inventor bore strong testimony to the high character of his counsel and to the latter's genius for the line of law business in which he has become so celebrated. Mr. Spaulding is not given to exaggeration, far from it, but has a most discriminating mind and is judicious in statement. His encomiums were pleasant to the ear, and I remarked to him that his was strong praise indeed, coming from one who knew well whereof he spoke. "Why shouldn't I speak well of him," he replied. "He is both lawyer and mechanic. He has great inventive genius. He understands his business and tries his cases admirably. He argues with power and his briefs are very fine. You have seen a fine buggy horse that would'nt pull well when harnessed with another. Wheaton has a peculiar way of getting at the core of a thing, and he must have his way in trying a case. After he had won all my cases, I went to him and asked him how much I owed him. He said, 'You don't owe me anything!' He recognized that in conducting my business to a successful issue he had thoroughly equipped himself as a lawyer in patent cases, and that his fame and fortune were assured. Of course I had paid him considerable money during the progress of our litigation, but I expected to pay him a great deal more."

Mr. Gifford, the leading patent lawyer of the East, before named, and opposed to Mr. Wheaton in this litigation, afterward sent the latter a handsome retainer in another patent case, which, however, was never tried. Indeed, Mr. Wheaton's fame in this line of cases very soon became as wide as the continent. He is called to other States frequently to try some

important patent case, and in the course of his practice he has argued quite a number of causes before the United States Supreme Court. At present he has cases pending in Boston, Chicago, and St. Louis. I cannot omit special mention of the case of Strauss vs. King & Co. Mr. Wheaton won this case for Levi Strauss & Co., in the United States Circuit Court for New York, before Judge Blatchford, now of the United States Supreme Court. The litigation was over a patent on an invention used in riveted goods, principally in heavy duck overalls worn by hunters. J. W. Davis, a tailor, a resident of the State of Nevada, invented this contrivance and obtained letters patent. He assigned his patent to Levi Strauss & Co., of San Francisco. Their suit against King & Co., who were merchants of New York, was, of course, to put a stop to infringement by the latter. The witnesses examined in this case numbered 400, and there were over 3600 pages of printed testimony, besides a large number of exhibits.

Mr. Wheaton was united in marriage with Miss Carrie C. Webster, at Suisun, December 24, 1862. She died in July, 1873. On September 24, 1876, Mr. Wheaton married Miss Dora Perine, also of Suisun. This lady lives and they have two daughters. A son by the first wife is now a young man. A comfortable home on the California street hill, has been the family dwelling since the year 1876. Mr. Wheaton has a moderate fortune. His law offices are spacious and elegantly furnished, his library being one of the largest and most select.

CHAPTER XVIII.

S. C. Hastings, First Chief Justice of the Supreme Court—Founder of Our Only College of Law—His Early Career in Older States—Chief Justice of Iowa, and Member of Congress—A California Pioneer—Attorney-General in 1851—His Judicial Opinions—Beginning of His Great Wealth—A Philosopher With a Midas Touch—Perennial Humor—A Practical Joke on James B. Haggin and Lloyd Tevis—How the Latter Got His Start—Interesting Facts About Haggin and Tevis—A Story on Hastings By the Elder Baldwin—Original and Amusing Views Touching Our Last War—References to William H. Seward, Jefferson Davis, Lewis Sanders, Jr., William M. Lent, Dr. J. D. Whitney and others.

A generation has passed away since, from the bench, Judge Hastings spoke the oracles of the law; and there are few of our oldtime lawyers who will be able to recall his last appearance in court. But the high stations to which he attained, the distinguished relations which he once bore to the profession in two States, the large place which he continues to fill in the business world, and his munificent gift to this commonwealth of its only college of law, which will make his name familiar to remote posterity, entitle him to a prominent chapter in this volume.

Judge Hastings was born in Jefferson county, New York, November 22, 1814. His father, Robert C. Hastings, removed in early life from Boston, his native city, to Rhode Island, thence to central New York. He there married Miss Patience Brayton, whose family had been among the earliest settlers of that region. There were seven children of this marriage, all of whom attained majority.

The elder Hastings died on a farm near Geneva, New York, when his son was ten years old. The family then removed to St. Lawrence county. There this son attended the Gouverneur Academy for six years, being under the special instruction of two tutors—graduates from Hamilton College. At the age of twenty, he was tendered and accepted the position of principal of Norwich Academy, in Chenango county, New York. This institution had gone into a sort of decline, but was inspired with new life under the administration of its young principal, who introduced the Hamiltonian system of instruction and the Angletean system of mathematics, and other branches of education. At the end of one year he resigned and went to Lawrenceburg, Indiana. There he pursued the study of law, first in the office of Daniel S. Mayor, afterwards in that of Hon. Amos Lane. He had, before removing from Norwich, read law for a few months in the office of Charles Thorpe,

Esq., of that town. In the exciting Presidential campaign of 1836, he was editor of the Indiana *Signal*, and in that capacity gave a cordial support to Martin Van Buren. In December, 1836, he was admitted to the bar by the Circuit Court, at Terre Haute, Indiana, Judge Porter presiding.

In January, 1837, he removed to Burlington, in what is now the State of Iowa, then known as the Black Hawk Purchase. He soon located at a little hamlet, which has grown into the city of Muscatine. All that vast region was then under the jurisdiction of the courts of the Territory of Wisconsin. Having, after another examination, been again admitted to the bar, Mr. Hastings commenced practice. He was soon appointed a Justice of the Peace by Governor Dodge, of Wisconsin Territory. He used to say that his jurisdiction covered the whole western territory, extending even to the Pacific ocean. He was a man of large stature, capable of great physical endurance, shrewd, energetic, alert in mind and body, simple in his tastes and habits, peculiarly adapted to the border, and was not to be found wanting in the ebb and flow of frontier life. When Iowa was admitted as a State, he was, probably, the best known and most popular of her citizens.

As Justice of the Peace, he had but one case to try during his term. It was a criminal charge. He found the accused guilty of stealing $30 from a citizen, and $3 from the court, and sentenced him to be taken by the constable, to a grove near by, to be there tied to a tree, and to receive on his back thirty-three lashes—thirty for the theft from the citizen, and three for that from the court—then to be transported across the river to the Illinois shore, and banished from Iowa forever, The sentence was executed under the eye of the court, in the presence of a large crowd of people.

When the Territory of Iowa was created in 1838, Mr. Hastings was elected, as a Democrat, a member of the lower branch of the legislature. He continued to represent his county, in either the House or Council, at every session of the legislature until the admission of Iowa as a State, in 1846. At one session he was President of the Council. He was usually a member of the Judiciary Committee, and as such did effective service in the shaping of important legislation. He reported from that committee the statute which was afterwards, for many years in Iowa and in Oregon, known as "The Blue Book." During this period occurred the conflict between Iowa and Missouri, known as the Missouri War. The authorities of Clark county, Missouri, in the collection of State taxes had invaded the Territory of Iowa, being ignorant of the exact location of the dividing line between the State and Territory. An open rupture followed, Governor Boggs, of Missouri, and Governor Lucas, of Iowa, calling into the field their militia. The legislature of Iowa being in session, Mr. Hastings left his seat in the council to assume command of an armed force, composed of the "Muscatine Dragoons," and three other companies of militia. It was in the middle of a bleak winter;

the troops had no tents, no forage for their horses, little food and clothing, and no arms, except pistols and bowie knives. It was anything but a formidable invading force. The expedition was not fruitless, however. The Sheriff of Clark county, Missouri, who was especially obnoxious to the invaders, was captured without bloodshed, taken back to Iowa, and lodged in the Muscatine county jail. Major Hastings was about returning with his force to Missouri, where a pitched battle would probably have been fought, as the Missouri militia had prepared to meet him, but peace was suddenly declared between the two powers, and the Iowa army was disbanded. Its leader was then appointed a Major on the Governor's staff.

Lilburn W. Boggs, the Governor above referred to, lived a long, honorable and eventful life. After the Missouri-Iowa trouble, he met Major Hastings many times in California. Here, on neutral soil, the two old enemies often went through the ceremony of burying the hatchet. Governor Boggs, a native of Kentucky, was born in 1798. He was in the war of 1812, a mere boy. He was at the battle of Thames, or Tippecanoe. His second wife was granddaughter of Daniel Boone. About 1825 he removed to western Missouri. He selected the site of the old town of Independence, of which, it is said, he was for many years the merchant, lawyer, doctor and postmaster. He was in the Council of Missouri Territory, then in the Senate of the State, then Lieutenant Governor, then Governor. He came to California, at the head of a large party, in 1846, settling first at Sonoma, where he became Alcalde, and afterwards in Napa valley, where, for many years, he carried on, on an extensive scale, the business of farming and importing blooded cattle. He died in 1861, leaving a widow, several grown children and many grandchildren. His widow died in 1880.

In 1846, upon the admission of Iowa into the Union, Major Hastings took his seat as her first Representative in the Lower House of Congress. This was the Twenty-ninth, or Mexican war, Congress. There was only one member of that body younger than he. He there met John Quincy Adams, Abraham Lincoln, Stephen A. Douglas, Andrew Johnson, and others of national fame. At the end of his congressional term, he was appointed by the Governor Chief Justice of the Supreme Court of Iowa. This position he occupied only one year. The year 1849 had arrived. He had won high political honors, but had amassed little money. What means he had been able to accumulate, he had invested in unproductive lands in Iowa. He was beginning to realize the hollowness of fame and the substantiality of coin. The news from the far West stirred him. The spring of '49 found him in the new Dorado among the earliest of the Argonauts. His short term as Chief Justice of Iowa had just ended, and he had left his family in that State, and had made the journey overland, bringing with him very little means.

"There is a tide in the affairs of men
Which, taken at flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries."

Judge Hastings came to California at some sacrifice, much inconvenience and with some misgivings; but he came at just the right time, and he found opportunities which he improved. He settled at Benicia. About six months after his arrival, he was chosen by our first Legislature, (December 20, 1849), Chief Justice of the Supreme Court, his associates being Henry A. Lyons and Nathaniel Bennett, both of whom are deceased. He was glad to accept this honor, as it would make him widely known in the new State and the salary was greater than that which he had surrendered in Iowa. His term was two years, which he served out. His opinions from the bench will be noticed hereafter.

Judge Hastings stepped from the Supreme bench into the office of Attorney General, to which the people elected him in the fall of 1851. He made no speeches in the campaign, but his Whig opponent, who was quite an orator, canvassed the State. The salary of a Supreme Judge at that day, $10,000 per annum, proved to be a poor support for a professional man with a large family. While on the bench, of course, Judge Hastings was debarred from practice, and at the end of his term he was in very straitened circumstances. As Attorney General, he was enabled to conduct some law business on his own account. He soon entered upon a career of prosperity and the attainment of wealth.

The foundation, the nucleus of Judge Hastings' colossal fortune was the money which he received in the shape of law fees while Attorney General. He held this office two years, and then continued law practice. He also became a member of the Sacramento banking firm of Henley, Hastings & Co. This firm failed, but Judge Hastings himself was not much hurt by it. About this time he began to get remittances from Iowa, from the sale of his lands.

Although he was to become lord of a large landed estate, quite a long time elapsed, after his arrival here, before he invested in real property. He loaned his money on undoubted security, at three to five per cent. per month interest. After leaving the office of Attorney General, he followed his profession a year or two, meanwhile keeping large sums of money out on loan, then gave up professional life for good. He now turned his attention to city lots and country lands, gradually acquiring about one hundred pieces of real estate in San Francisco, and bought large tracts in Solano, Napa, Lake and Sacramento counties. In 1862, he was worth $900,000, which he owed chiefly to appreciation in real estate. Twenty years later he was worth two and a half millions of dollars. The San Francisco property, standing in his name down to December, 1887, was valued at $150,000, he having, about ten

years before, conveyed to his son, C. F. D. Hastings, in trust for all his children, city realty of the assessed value of half a million. Besides making other munificent provisions for his children, he presented to his two eldest sons an extensive and fully stocked farm in Solano county. In Napa county he reserved three large estates, enriched with vineyards, prolific in their yield of the choicest grapes. In other counties he turned his attention to the growing of wheat and wool on a large scale.

Judge Hastings was the first of our capitalists to erect dwellings for the poor of San Francisco. About A.D., 1861, he put up a large number of cheap structures of four rooms each, in the south end of the city, which he rented for ten dollars per month—a figure surprisingly low for that day. The houses were always in demand. I do not know how much philanthropy had to do with this act, but as a business venture it was a great success, the rent of the houses—small as it was—yielding a heavy interest on the invest ment—much larger than could be obtained from costly business structures.

Judge Hastings was married to Miss Azalea Brodt, at Muscatine, Iowa, in 1845. She, with her children, joined her husband at Benicia in 1851. At that town the family home was located for many years. Mrs. Hastings died at Pau, in the south of France, in 1876. There were eight children of the marriage—Marshall, C. F. D., Robert P., Douglas, Clara L., Flora A., Ella and Lellia. All are living, except Marshall and Douglas. I might well be forgiven for a moment's affectionate pause at the mention of Marshall's name. He had long passed his majority when called away. The heir of great wealth, he was yet never conceited, arrogant or puffed up. He was no money worshiper. He selected his companions without regard to their purses. His genuine friends were a host. They still remember his genial and generous qualities, and

"Pray for his gallant spirit's bright repose."

In founding the college of law which bears his name, Judge Hastings secured his fame for many coming generations as a friend of learning, and did an act which will ever inspire his children and his children's children with honorable pride. For the establishment of this institution, the only law college in the State, he paid into the State treasury, in 1878, the sum of $100,000. He made it a condition that no more than the amount of interest, which would accrue from that sum at seven per cent per annum, should be expended for compensation to instructors. Also, that the privileges and benefits of the college should not be confined to such students as intended to follow the legal profession, but should be freely extended to all. He has declared his conviction that the study of law by the students generally in all our institutions of learning would greatly contribute to the security of free government and to the advancement and elevation of the people.

In order to formally accept the donation and to carry out the views of the donor, the legislature of 1878 passed an act creating the college. By that act the officers were declared to be a Dean, Register and eight Directors—the Directors being named as Joseph P. Hoge, W. W. Cope, Delos Lake, Samuel M. Wilson, O. P. Evans, Thos. B. Bishop, John R. Sharpstein and Thoman I. Bergin, and the Dean and Register to be appointed by the Directors. The act provided further that the college should affiliate with the University of the State and be the law department thereof; that the sum of seven per cent. per annum upon one hundred thousand dollars should be paid by the State, in *two semi-annual* payments, to the Directors of the college, and that any person might establish a professorship in his own name, by paying to the Directors thirty thousand dollars.

The Directors very appropriately asked Judge Hastings to take the position of Dean, and he complied. After some years he relinquished this post and his son Robert P. was made his successor therein, the Judge taking the Professorship of Comparative Jurisprudence. Thirty dollars is the limit of expense to the student—$10 for each year, or for admission to each class. This college althongh technically a part of the State University, is wholly located at San Francisco. Its students are accorded the privileges of the San Francisco Law Library, and many of them pass their hours of study in the hall of that institution. The act of the legislature, before referred to, declares that students who receive diplomas from the law college shall be entitled to practice in all the courts of the State, subject to the right of the Chief Justice of the Supreme Court to order an examination, as in other cases.

Judge Hastings was never particularly adapted to the legal profession, although he has given signal proof of his partiality for it, selected it in youth for his life pursuit, and was enabled through its instrumentality to lay the solid foundation of a great fortune. He was not cut out for either a lawyer or a judge. He is nervous, impatient, too eager to have done with the work on hand—not given to sounding the depths of inquiry. As a speaker he is ready, pointed, earnest, and exacts respectful attention, but has none of the arts or graces of the orator or rhetorician. His opinions from the bench read well, but are abbreviated, and for that cause are of little value to the lawyer or law student. They are "opinions" in too strict a sense—conclusions almost barren of exposition. His decisions in the Iowa Reports number forty-four, all rendered in one year and reported in the First Iowa, while those in California are thirty-two in two years, and all in the First California. In Iowa he did his full share of the work of the court; in California he did much less than his proportion, Judge Bennett doing most of the work. His opinions in the two States are of about the same average length—less than one octavo page of goodsized type. Of course the merit of a judicial opinion is not proportionate to its length. Some Judges (as a

New York jurist once said of a certain lawyer) in trying to be tediously clear, are clearly tedious. But it is not probable that a Supreme Judge can dispose of seventy-six appeals, take them as they come, without encountering questions which challenge profound study, specious propositions which demand subtle analysis, and confused masses of evidence which require patient sifting and arrangement—in other words, without having occasion, now and then to write an opinion, which is not an opinion merely, but an exhaustive dissertation as well. A high appellate judge should have the ability, as he will certainly find the occasion, to "hold a thought," as did Socrates, and "inspect it as a mineralogist inspects a mineral—to strip off layer after layer of logic as one peels off the plates of mica from a specimen."

But Judge Hastings' native tact and shrewdness always made him a welcome associate on important trials. He was a good man to counsel with in complicated cases. He was "smart," to use a word frequently applied to lawyers. In the preparation of a case, as well as in court during the trial, he was full of happy suggestions. Sometimes quaint, there was always something in his hints and promptings, and they were generally followed with happy results. The first volume of Iowa Reports shows that, before he went on the bench of the Supreme Court of that State, he was counsel in half of the cases appealed to that tribunal.

Our hale old pioneer Judge is very tall in stature, and powerfully built; athletic, hardy, quick in movement, of dark complexion, has a finely shaped head and a countenance open, lively and playful. He is keen witted and keen eyed, light hearted, full of fun and has extracted from *existence* a vast deal of *life.*

He has a large number of men and many agents employed on his farms and in his various enterprises, but he is constantly swinging around the circle of his possessions to give them his personal oversight. His large responsibilities are not cares to him. With all his push and activity there is a good deal of the philosopher about him. His business sagacity is extraordinary. He has a Midas touch. His enterprises and investments have always been fortunate, sometimes against the judgment and protests of his friends. He has always let mining stocks severely alone.

The Judge has spent considerable time in travel and observation abroad. When Governor Seward, after leaving the office of Secretary of State, made, in 1869, a trip to Alaska, which territory had just been acquired by the United States through his diplomacy, Judge Hastings, who was an old friend of Seward, accompanied the latter, at his invitation. He reciprocated this attention when Governor Seward tarried at San Francisco on his voyage around the world. During their stay of two weeks the Governor and his party were the guests of Judge Hastings, and were present at

the marriage of the latter's eldest daughter to Colonel Catherwood. It was then agreed between Governor Seward and Judge Hastings that, upon the completion of the former's world voyage, the two should meet at New York City and sail for the North Sea, to explore the northwest coast of Norway. Upon his return to New York City, the Governor by letter requested the Judge to meet him, and suggested that they, before setting out on their voyage to the North Sea, pass a few months at Auburn, the Governor's home. The Judge repaired to New York City, where he learned the fact of Governer Seward's death at Auburn. He then returned to California. He was a great admirer of Seward, although they differed in both politics and religion. He regarded the "Sage of Auburn" as the greatest ethnological philosopher of his time.

Judge Hastings' conversation is charged with wit and pleasantry. His humor is perennial. He is as fond of a joke as was the elder Judge Baldwin. He has said more good things than did Judge Baldwin, although his pleasantries are on the whole below the Baldwin standard and will have shorter life. I am reminded of the brief partnership in law between Baldwin and James B. Haggin, who has of late years devoted himself chiefly to breeding and speeding blooded horses. Haggin is a true lawyer, well grounded in the living principles of the science. He withdrew from practice about the same time Hastings did, and for the same reason; he had realized more than his wildest dreams in the line of money getting, and had survived all incentive to forensic effort, all ambition for professional fame. Baldwin & Haggin had their office in Court Block. That other Midas, Lloyd Tevis, Haggin's business partner, had an office adjoining, and Hastings' office was next to that of Tevis. Haggin and Tevis married sisters, accomplished and queenly women, daughters of the late Colonel Lewis Sanders, a Mississippian, who, very many years ago, gave Jefferson Davis his first "send off" in political life; he was very influential in Mississippi politics, and was the spokesman of Davis in the convention which nominated the latter for Governor. Haggin & Tevis are also partners in business—that is, they have pooled their capital—and have been thus together for thirty-two years! They are also warm personal friends, and are both Kentuckians. All resemblance between them here ends. Haggin is silent, phlegmatic, cold, imperturbable. He never laughs, and rarely smiles. Tevis—who, by the way is admitted to the bar also — is a man not far removed from Hastings. He is vivacious, talkative, active, ubiquitous. His skill as a financier, his business diplomacy, tested in conflicts between great corporations, and his brilliant triumphs in the commercial world, have crowned him the monarch of moneyed men. From this it might appear that if either were given to speculation, it would be Tevis, but not so. He feels his way as though he were blind; while the silent, unrufffled

Haggin has made many uncertain ventures in mining stocks. They turned out well, however. Haggin, in 1862, sold out to William M. Lent his Gold & Curry stock—*feet* they called it then—at an immense advance upon his investment. Then Tevis, who had been long disquieted, was happy again. "He did magnificently," said Tevis; "still, my advice to him was correct. We are doing a splendid business, and a safe business. We ought to let mining stocks alone."

Tevis is the head of the great banking and express business of Wells, Fargo & Co., but as he is also, or was, a lawyer, he is in a measure my property, and so long and close were his relations with Hastings that, before returning to my subject, I cannot forbear telling how Tevis got his start in life.

Lloyd Tevis came overland to California in 1850. He pitched his tent at Sacramento. "I owe my fortune in life," I have heard him say, "to my good penmanship." He had no money, and just then felt a woe-begone sensation which he has never experienced since. He was a rapid and beautiful penman. He now writes too much to write well—more, probably, than any other man in California, and sometimes his signatures, as President of Wells, Fargo & Co., are burlesques upon the old-time autograph. In his strait in 1850 he thought of the County Recorder's office. Happy idea!

"Can I get some copying to do?" he said to the Recorder, as he entered the latter's office next morning. "I am a rapid penman, and would like to give you a specimen of what I can do."

The Recorder said nothing for a moment, for the applicant immediately commenced writing his "specimen."

Write on! Write plainly, and swiftly, and roundly, and grandly, young applicant! It is written, plainly and swiftly and roundly and grandly, in the book of fate—what?

We shall see.

"Your penmanship, would, I think, be satisfactory to anybody," said the Recorder, slowly examining the proffered specimen; "but [it looked like a big *But*] I have three deputies, whom I pay $300 a month each, and, while my business is good, my deputies can do it all. I want no more help."

If Tevis had walked out of the office, mad, without saying "Good-day!" that might have been his last opportunity.

He didn't.

"Will you permit me, sir," he asked, "to come to the office every morning and write up the deeds, mortgages, etc., which the deputies may have left over on the close of the previous day? If there should be no extra work, of course I will get nothing; if the deputies leave over anything for the next day, I will do it and leave my compensation to you."

"That is all right," said the functionary.

Tevis asked for and received a key to the office, and next morning he inserted that key in its appropriate lock at seven o'clock. The deputies were to arrive at nine A. M. It was their custom to place in a certain tin box all papers left over for record on the following day. Tevis took every paper from that receptacle—there were ten or a dozen of them; he opened his big record book, and—then and there he started on his grand triumphal financial march through life. When nine o'clock and the deputies arrived there was nothing to be recorded. Things were at a standstill until fresh conveyances came in.

This happened every day for a week or so, and the deputies, listless and lazy, not warned of the catastrophe impending, rather liked the help of the young intruder, and welcomed his daily presence. Alas, poor scribes!

"Now, Mr. Recorder," said Tevis one fine afternoon, just after the office had closed, and all the deputies had departed, "I hope you will let me make you a proposal."

"Go on," was the reply.

"For a week or so I have done nearly all the work of this office. I *can* do *all* of it. Your clerical assistance now costs you $900 a month. How long can you afford to pay such salaries? Do you expect the flush times will last forever? Hear me. I will do the work of your three deputies—all of it—for the pay of *one*. What say you?"

"You will do all the work of this office for three hundred dollars per month?" queried the official.

"Yes, sir," said Tevis; "and do it better than it has been done."

He was "engaged."

In that office he patiently and diligently labored until his employer's "little, brief authority" ended—over a year. He laid away $250 per month; and when his clerical services were wanted no more, he was a capitalist in miniature—and from the miniature he speedily developed into the colossal. Mr. Haggin just then joining him with a little money, they made a loan of one thousand dollars at ten per cent. per month, upon which they collected *five thousand dollars interest* before the principal was paid.

"When I came to California," said Tevis one day, to some friends, "young, poor, ambitious, I had to decide whether I would strike for political fame or for money. I concluded to go for money." He went for it.

When the war of the Rebellion was at its most rebellious latitude and longitude, intense animosity toward Southern men resident in San Francisco was cherished by a large part of the community. Southerners here—among whom were some of the wealthiest citizens—were alarmed for the safety of all they held dear. General George Wright, afterwards lost on the Brother Jonathan, then commanded this department. The leading Southern men,

mostly large taxpayers, held a conference, at which it was agreed that an address or memorial should be sent to General Wright, in which the peaceable inclinations of Southerners here resident should be set forth, coupled with a request for security against mob violence. Lloyd Tevis was appointed to draft this paper. The memorial, as written by him, covered thirty-six pages of letter paper. At the request of Tevis I delivered this paper to General Wright. I forget what the General said upon receiving it, and do not know that he answered it. When Tevis handed it to me he said: "I have written these thirty-six pages without once putting a blot upon the paper or running my pen through a single word.

To return to Judge Hastings and at the same time not part company with Haggin and Tevis for a moment longer, a practical joke recurs, played by the Judge on his two friends, about A. D, 1861, my authority being a former agent of the party of the first part. Messrs. H. and T. while not churchmen, are churchgoers, very regular in their habits, and watchful of their reputation for morality and virtue. From long before sunset to long after sunrise they are at their homes. Each is a model paterfamilias. At the time referred to, Judge Hastings, who never cared much for appearances, was lodging in a plainly furnished room in one of his shanties on Virginia street, his family being at Benicia. Haggin and Tevis had occasion to visit their office one night, and Hastings dropped in upon them. About ten o'clock all three started up Washington street in company (no cable lines then). When the entrance to the Bella Union Melodeon then on Washington street, fifty feet west of Kearny—was reached, Hastings stopped and said blandly: "I say, Haggin, you and Tevis come in here with me just for a little while."

"What is it?" they asked

"I want to show you something artistic," replied Hastings; "come in; we'll not stay long ; I'm going up the hill with you."

He pulled them in. They followed their leader right up to the front row of seats. There were no vacant chairs, which added greatly to the Hastings' enjoyment. Just then the curtain rose on one of the sensual scenes of the programme, and voluptuous arms and so forth dazzled every eye. The scene was "Cupid taken captive by Hyella," so gracefully paraphrased by Tom Moore from the Latin of Andreas Negerius.

"As fair Hyella, through the blooming grove,
A wreath of many mingled flowerets wove,
Within a rose a sleeping love she found,
And with the twisted wreaths the baby bound.
Awhile he struggled, and impatient tried
To break the rosy bonds the virgin tied,
But when he saw her bosom's milky swell,
Her features where the eye of Jove might dwell,

And caught the ambrosial odors of her hair,
Rich as the breathings of Arabian air,
'O, Mother Venus,' said the raptured child,
By charms of more than mortal bloom beguiled,
'Go seek another boy, thou'st lost thine own.
Hyella's bosom shall be Cupid's throne.'"

The representation was soon over, and Haggin and Tevis suddenly realizing where they were, looked at each other and bolted, Hastings following. The latter would not accept any rebuke from his companions. He always insisted that the scene presented to them was full of beauty and suggestion.

The elder Judge Baldwin used to tell this on Hastings :

The latter was residing at Benicia, but he kept a barrel of money with Tevis in San Francisco. One day when he had been taking some very agreeable medicine for a cold, and felt somewhat exalted, he was approached by a carpenter he knew and asked for a loan of a thousand dollars to enable the petitioner to open a well appointed carpenter shop, and establish himself in business in good style. He promised to do the favor. The next day when he was looking at worldly affairs with other eyes, as it were, the carpenter waited on him and reminded him of his promise. Insisting that he did not recollect the occurrence of the previous day, the Judge being importuned, very reluctantly gave his check on Tevis for a thousand dollars. The happy carpenter after expressing his thanks once for each dollar, went home, put on his best coat and hat, and started for the wharf to take the river boat for "the city." While waiting on the wharf he looked at his check. It bore no signature.

The omission was never rectified.

When the late war broke out in this country, Judge Hastings very sententiously stated his position. He was in favor of both secession and coercion. "I believe a State has the right to secede," he said, "and I believe the other States have a right to whip her back." Judge Baldwin and other Southern friends of his could not see just where the laugh came in here.

"Haggin," said Hastings one day, during the war, the event of which was just beginning to cast its shadow before, "I'll tell you how this country might be reunited and its great armies provided for at the same time."

[Grant had not yet climbed to the top of the ladder on one side, and Stonewall Jackson still survived on the other. It will be remembered that some wise statesmen, before the war closed, thought they foresaw danger to the political and social states from the sudden disbanding of the armies, and sending the soldiery without employment into every nook and corner of the land.]

Haggin quietly inquired: "How?"

"Let the South consent to have its army incorporated with that of the North, and let the North consent to have Stonewall Jackson placed at the head of the combined forces." He paused.

"What to do?" asked Haggin.

"To lead them into Canada," he continued, "and to wrest from Great Britain every inch of land held by her on this continent. It could be done, and Uncle Sam would be rich enough to give every soldier, and every soldier's widow and orphan not only a farm, but a whole township. What do you think of it?"

"I don't intend to think much about it," said Haggin.

Judge Hastings has done considerable for education and science. He contributed to the foundation of St. Catharine's Convent and School at Benicia. He is a life member of the Society of California Pioneers and the Academy of Sciences. The two volumes of "Botany of the Pacific" were issued at his expense and that of a few other wealthy citizens of this State, whom he induced to contribute. He did this at the request of Professor Gilman, Sir Joseph Hooker and Dr. Asa Gray. His zeal and liberality were warmly acknowledged by Dr. J. D. Whitney in his prefatory note to the second volume. He is a good Latin scholar, a great reader, and has gathered together books of every class, from every clime and of all ages. His library is large, well selected and contains a great number of rare works. He has now practically retired from the busy world, and his travels are probably over. He has become thoroughly weaned from Benicia and has settled himself down for the balance of his days at Lakeport, Lake county. He is President of the principal bank of that section, the Bank of Lake. The duties of this position engage very little of his time. His visits to San Francisco are few. A great deal of his life is passed on the beautiful lake and the delightful places of resort which distinguish that part of the State. His sprightly talk and genial manner make his presence always welcome wherever he goes.

During his last stay in London, after returning from a ramble over "the continent," the Judge, who had become very widely known in "modern Babylon," was waited on by an enterprising young knight of the quill, who expressed his readiness, desire and ability to trace the Judge's pedigree to the fountain head in remote antiquity. He asked to be permitted to write the family history—complete in one volume. Compensation, £100. He was authorized to go ahead. In due time he presented himself before the Judge with manifold manuscript. He was requested to run over the long lineage orally—the manuscript would be read at leisure. The antiquarian promptly commenced with the beginning and progressed down to a time within the memory of men still living. There were two sons of a certain baron of fabulous wealth, named Rutherford. [The Judge afterwards named Rutherford's Station, Napa county, after this ancestor.] The eldest son, who,

according to custom, inherited everything, went abroad on a voyage of years, leaving all his possessions in charge of his younger brother. Upon his return home he found that, as the agent of Judge Heydenfeldt's father did a century later, his brother and confidant had sold him out entirely and emigrated to America——"

"Stop right there! Stop!" said Judge Hastings. "You have traced me to a thief. I want to hear no more. Here's your money, but stop."

This is a good place for me to stop also.

CHAPTER XIX.

Rufus A. Lockwood and Edmund Randolph—Lockwood's Strange Career and Tragic End—Changes His Name—Rash Enlistment as a Common Soldier—A Longshoreman in San Francisco—A Lawyer's Janitor at Ten Dollars Per Day—Leading the San Francisco Bar—Sudden Departure for Australia—Herding Sheep as a Penance for Sins—Return to this Country—Before the United States Supreme Court—A Picture by Hon. Newton Booth—Edmund Randolph's Brilliant Record—A Man of Splendid Visions—The great case of the New Almaden Quicksilver Mine—Caustic Treatment of the Millionaire Lawyer, Frederick Billings—Connection with Walker's Scheme of Empire.

"Who is Lockwood?" inquired the banker Palmer of General McDougall and Judge Hastings, at San Jose, in 1851. The legislature was then sitting in that town, and the great firm of Palmer, Cook & Co. was seriously concerned with the business of the session. Mr. Palmer was on hand—an influential member of the Third House. His firm being, either by ownership or claim, interested in a large slice of San Francisco, and being involved in heavy law suits, which called for the aid of the ablest counsel, Mr. Palmer, one night in his room, in the course of a conversation with his two visitors above named, handed to each a marginal slip from a newspaper, with the request that they would write the name of the man who was, in their opinion, the best land lawyer who had nailed his shingle to the Golden Gate. Both General and Judge, distinguished at the bar, wrote at once the name Lockwood.

"Who is Lockwood?" asked the banker, for both banker and lawyer were newcomers. "He is the man you want," they assured him. So he was, and so they found him to be.

"Who was Lockwood?" A quarter of a century has elapsed since he lay down to his final rest—upon the ocean's bed.

His life was stranger than fiction. Born under an evil star, with a noble nature to be ever thwarted, a powerful intellect to be ever set on fire by the fever of his blood, it was his destiny to wander over earth and ocean, pursued as it were by some fiend of darkness, from the outset of his career to that supreme hour when the waters of the Atlantic closed over his body, to bring, let us hope, a calm to his storm-swept soul.

On the steamship Central America, in the fall of 1857, his troubled life was ended. He was going from San Francisco to New York. A friend who knew his misfortune and who believed the proposed trip to the East was suggested by eccentricity, rather than by the demands of business or health, urged him not to go. "I will stay if you insist," he answered, "but I feel

that I shall go mad if I do." He went. When the tempest was toying with the vessel, and the passengers were at the pumps, he, after doing duty some time, stopped and went up to the cabin. An officer ordered him back. He replied: "Sir, I will work no more." He died as he had lived, an enigma. Entering his stateroom he closed his door upon the scene, shut his eyes upon the light of life, and went down with the wreck.

The true name of Rufus A. Lockwood was Jonathan A. Jessup. Lockwood was his mother's family name. He was born in Stamford, Connecticut, in 1811. At eighteen he entered Yale College. For about one year he was diligent in his studies and advanced rapidly. Suddenly—a step in keeping with his after life—he left college and entered as a sailor on a United States man-of-war. The vessel made a short voyage to the Bahamas, and returned to New York City. There he deserted and there he first took the name of Lockwood. On the return voyage he had determined to desert, if possible, because one of his messmates had been tied up and flogged. Working his way to Buffalo, on the Erie canal, he proceeded by schooner to Chicago.

This was in 1830, and Lockwood was nineteen. He had no money and knew nobody. Meeting a farmer from Tippecanoe county, Indiana, he was engaged to teach school at Romney, a hamlet in that county. He taught at Romney and Rob Roy, an adjacent village, alternately for about one year, and devoted his time out of school to the study of medicine. He had some slight trouble with his patrons at Rob Roy, and, without notice to any one, started one bitter cold day, over an eight mile stretch of snow for Romney, where he arrived at night with hands and feet badly frozen. When he got well he resumed teaching at Romney, and joined a debating society, in which his argumentative powers first excited remark. Now, also, he commenced to read law. It is said that he almost literally committed to memory the text of Blackstone. He removed to Crawfordsville, opened a school and continued his law studies. Here he had another quarrel—with the principal of a rival school. It didn't lead to much, being a newspaper controversy. He was admitted to the bar by the Circuit Court of Crawfordsville, and, though penniless, got married and went to Thorntown, Boone county, to practice. He was soon sued by his landlord, and pleaded as a setoff an unpaid tuition bill. He was his own lawyer and lost his case. He wanted to appeal, but could not give a bond. He and his bride soon found themselves without a bed, that useful article of their scanty household goods having been sold by the constable under execution issued on his landlord's judgment. "I never knew how my wife lived at Thorntown," he said many years afterward. "I know I lived on potatoes roasted in the ashes."

He lost his second case, also, but having for a client somebody else this time, an appeal bond was filed, and Lockwood made his first appearance in

the Supreme Court of Indiana. Being first examined and admitted to practice in that tribunal, he argued his cause in a style so masterly as to win the encomiums of the bench. (See Polk et al. vs. Slocum, 3d Blackford, 421.) But for several years he struggled on, with little business. His home, too, if such it could be called, was unhappy. His only pleasure was in study.

In 1836, Albert S. White, a prominent lawyer of Lafayette, Indiana, offered him a partnership, which he accepted. In that year he made a remarkable and successful defense of J. H. W. Frank, a young editor who had killed John Woods, a well known merchant. The slayer and the deceased belonged to opposing political parties. They were strong partisans, and party lines were sharply drawn in the community. The difficulty grew out of a wager won by Frank. It seemed impossible to get a jury that would agree. Lockwood made an argument of nine hours, which has been pronounced "the best jury speech ever made on this continent—or any other." He secured an acquittal, and won great popularity. He was now only twenty-six years old, and, his partner being elected to Congress, he, for the first time since he ran away from college, took a long breath in the consolation of success.

His hands were full and his mind comparatively calm for several years. This period must have been an oasis in his life.

But in 1842, a business depression, such as every now and then visits every community, came upon his section. He had invested in lands, which now would not sell for enough to pay his debts. He scraped together what money he could, gave all to his creditors, except a few hundred dollars, placed his son in a Catholic school in Vincennes, and struck out for "parts unknown," not even letting his family know his purpose. He went to the City of Mexico, where he was a stranger in a strange land. He studied the civil law and the Spanish language, was taken sick, could get nothing to do, and after a stay of a few months, went to Vera Cruz, which he reached with $2 in his pocket. He risked this little balance at monte, and won $50, with which he went to New Orleans; thence to Natchitoches. There he resumed his true name of Jessup, and continued the study of the civil law, which was in vogue in that State, and the Louisiana code. After a year he went to New Orleans and applied for admission to practice in the higher courts of Louisiana. He passed the examination, but just as the oath was about to be administered to him, he saw in the court-room the man who had sued him and caused his bed to be sold under execution. Before he left Indiana he had availed himself of several opportunities to wreak his vengeance upon this man, and now, fearing that his old enemy would expose his change of name, he left the room without taking the attorney's oath. A few day's later a prominent Indiana lawyer met him on the street in New Orleans, very inelegantly clad. He asked a loan of $20 to redeem his trunk. The Indianian

proffered $10—all he had on hand. Lockwood declined it, saying it was of no consequence. The same day he enlisted as a United States soldier, received $20 bounty, and was sent into Arkansas. Edward A. Hannegan, then United States Senator from Indiana, who had formerly known Lockwood, heard of the latter's latest freak, and sent him an order of discharge, signed by President Tyler. He also remitted to him $100, and urged him to go home to his family. Lockwood did so, and resumed law practice at Lafayette. His lands had been making money for him in his long absence by largely appreciating in value, and he soon paid off the balance of debt he had left behind three years before.

In 1849 Lockwood lost an important will contest. He thoroughly believed that the alleged will should not be admitted to probate, and, moreover, being a strong hater, and one of the principal legatees named in the proposed document having provoked his wrath some time before, he went into the trial with a determination unparalleled. He addressed the jury during the whole sessions of the court for three days. The verdict was against him, and when he heard it he struck his fist violently on the table, declared that he would never try another case in that court, and left the room in great excitement.

Then he turned his eyes toward California. A friend, Mr. E. L. Beard, was also looking this way. The two came—Beard, through Mexico; Lockwood, around the Horn. It would seem that when Lockwood first thought of emigrating to California the disgust which he felt over his defeat, just mentioned, made him despise his profession; for, instead of packing his law books, he determined to bring a large stock of liquor in small bottles and retail it to miners. He abandoned this notion, however. His strange record has not this blemish. Beard settled at a fine spot, the Mission San Jose, in the southern end of Alameda county. One day he heard a bugle blast! He listened and heard it again. "That is Lockwood!" he said. It was he. It had been agreed between Beard and Lockwood, in Indiana, that both should provide themselves with a bugle of a certain kind, in order that when either should come upon the other in the unknown Dorado of the West, he might fittingly announce his approach. Thus met the friends at the Mission San Jose. Beard had established a comfortable home, and Lockwood looked as if he needed its hospitable shelter. He was dirty, tired, hungry, wet and sick. He had got lost on the Alameda mud flats, and had tramped all night long. He now met a friend, in time of need, but was he at home?

Alas, poor wanderer, you have no home! Hot fugitive from fate, not yet is respite found! No mighty voice cries out, reprieve! Not yet, not yet, looms up the long sought goal! Rest you awhile, then journey on upon your lifelong tramp!

"Is it true, O Christ in heaven, that the bravest suffer most?
That the strongest wander farthest, and more hopelessly are lost?
That the measure of man's merit is capacity for pain,
And the sadness of the singer gives the sweetness of the strain?"

Having recuperated, Lockwood came to San Francisco. On the ocean voyage he had studied medicine, and tried to forget the law. He did not, however, ask for a diploma. He treated himself at his friend Beard's house, the day he arrived there. He bled himself, and found relief, after a regular physician had told him that if he did so, in his then condition, it would be certain death.

In San Francisco, he went into the law office of the eccentric Horace Hawes, and asked for a clerkship. He was thirty-nine years old, a great genius of the law, and he wanted a clerkship! He got it. Hawes examined him, but not very exhaustively—he soon made a discovery. It was agreed that Lockwood should perform the double office of clerk and janitor—time, six months; terms, ten dollars per day, to be paid daily. Those were flush times, be it remembered. Here was an association to make men wonder, if not weep. Eccentricity was the only peculiarity common to both. Hawes was rich; Lockwood was in rags. Hawes was supremely thoughtful of self; Lockwood supremely negligent. Hawes was an iceberg; Lockwood, a pillar of fire.

Lockwood gambled off his daily wages, but faithfully performed his duties, and when his six months were passed, he was offered a partnership. He refused promptly, and, in language not heard before by his employer, he expressed his disgust with his experience in that office. By this time Lockwood had come to be well known to the bar, and concluded to re-enter the ranks. He soon revealed himself. In the summer of 1851 he formed a partnership with Frank Tilford and Edmund Randolph. Randolph was from Virginia, by way of Louisiana; Tilford came direct from Kentucky. They were able lawyers and knightly men. Tilford had just left the office of Police Judge, then called Recorder, and had just also been defeated for Mayor by a small majority, by T. Butler King, the Whig candidate. He afterwards, having practiced law at a dozen different points on this coast, permanently settled at Denver, Colorado, where he died in 1886. Randolph died in San Francisco in 1861. I will devote half of this chapter to him.

These three men made as powerful an alliance as was ever effected at this bar. It was the leading firm for a time, but its time was short. While it held together, it brought the most important suit instituted here for many years—Metcalf vs. Argenti and others. The defendants were members of the Vigilance Committee of 1851, and, deputied by that body, had searched the premises of the plaintiff. The latter asked $50,000 damages. The legality and propriety of the organization and acts of the Committee were involved,

and as the vast majority of the citizens either belonged to or sympathized with the Committee, the trial of this cause was watched with universal interest.

The first trial of this cause was commenced on Saturday, August 15, 1851. On Tuesday the trial was interrupted and suspended by the tumult consequent on the rescue of Whittaker and McKenzie by the Governor and Sheriff from the Vigilance Committee, which afterwards re-took the men and hanged them. The evidence was closed on Thursday evening, and on Friday the jury were addressed by Mr. Randolph for the plaintiff, and Isaac E. Holmes for the defendants. On Saturday morning, August 23d, Lockwood closed the argument for the plaintiff in a speech of four hours. The jury disagreed, as they also did upon a second trial.

At the close of his short partnership with Tilford and Randolph, which he abruptly terminated, Lockwood took one of the strangest steps of his strange life. Just as he had put himself at the head of the profession here, and his fame had spread over the State, he walked out of his law office and went to the water front, where, for several weeks he worked as a longshoreman. A client who needed his professional service persuaded him to quit this new employment, Lockwood insisting that his fee should be in the shape of daily wages. Shortly thereafter he became the regular counsel for the great banking and real estate firm of Palmer, Cook & Co., before mentioned, and obtained a large practice. His receipts for a year or more were very large, but they went to the gambling table. It is said, however, that about this time he sent ten thousand dollars to Senator Hannegan, of Indiana, in return for the one hundred dollars that gentleman presented him a few years before, when he had been discharged from the army.

In the summer of 1853, Lockwood took a new departure—for Australia. He knew no one there and did not take a dollar with him. He remained about two years. He could not practice his profession because of a law requiring seven years' residence. He acted as a lawyer's clerk, a merchant's book-keeper, and a herder of sheep! From the first named occupation he was discharged for not copying into a brief a paragraph which he said was not law.

On his return here in 1855, he said his trip to Australia was the sanest act of his life; that he wanted to do some great penance for his sins and follies and to put a great gulf between him and the past. Indeed, a change for the better was noticeable in him. He stopped the habit of gambling, and was calmer in thought and manner. His high sense of professional honor was strikingly illustrated by his refusal to take a large fee to defend the famous "Peter Smith titles," owing to the fact that he had once expressed the opinion that these titles were invalid.

In the fall of 1855 Lockwood went to Washington, and in December of that year he made a long argument in the United States Supreme Court, in the case of Field vs. Seabury. Returning in the spring, he continued practice here until the fall of 1857, when—and while on another trip to the East on business—he perished as before stated on the steamship Central America.

I get my facts for this sketch from a most interesting and finely written notice of Lockwood, contributed by Hon. Newton Booth to the *Overland Monthly* in 1870, and copied by the *Albany (N. Y.) Law Journal.* Therein is presented this picture of Lockwood's personal appearance in 1855:

"Height, above medium ; figure, large and ungainly ; movements, awkward ; complexion, sallow and tobacco smoked ; eyes, dark and deep, with dilating pupils edged with yellow—cat eyes in the dark ; hair, dark brown, sprinkled with gray ; head, feet and hands, large—the left hand webfingered ; features, not irregular, but without play or mobility, with a fixed expression of weariness ; dress, careless, almost slovenly ; age, fifty years, bearing the burden of four score."

Hon. Newton Booth is a master of the art of expression, and his fame as a public speaker and the general tone of his addresses have associated him in popular thought with the legal profession. In his article on Lockwood, he writes as a lawyer might, and very felicitously. But the ex-Governor declared to me in Sacramento, in June, 1882, that he had never been a lawyer.

This fine view of Lockwood in the argument of the case of Field vs. Seabury, in the United States Supreme Court, is from the article referred to, which was written about two years before the author became Governor of California:

"More than the usual number of spectators were present, and there was something more than curiosity to hear this lawyer, who had often been heard of, but never before heard in that court. The consciousness of this curiosity and expectation embarrassed him in the opening of his speech, but his mind fairly in motion soon worked itself free, and his phlegmatic temperament glowed to its core with flameless heat. For two hours he held the undivided attention of the court in an argument that was pure law. He had that precision of statement, skill and nicety in the handling of legal terms, which modulate the very tones of the voice, and by which lawyers instinctively measure a lawyer—that readiness which reveals an intellectual training that has become a second nature—that self-contained confidence that is based on the broadest preparation—that logical arrangement which gives the assurance that back of every proposition is a solid column to support it if attacked—and that strength and symmetry of expression which carry the conviction that behind utterance there is a fullness of knowledge that floods every sentence with meaning, and an unconscious reserve of power which gives to every word a vital force."

EDMUND RANDOLPH was the scion of a long, puissant line of men, commencing with the pioneers of American freedom. He left an antique home, flooded with revolutionary glories, and came to the remotest dominion of the republic, himself a pioneer in the work of founding a free empire upon virgin soil. Bringing with him the stimulus of a high ambition and the heritage of ancestral fame, he approved himself the heir of moral excellence and of great intellectual power.

He was born in Richmond, Virginia, in the year 1819. He attended the ancient and celebrated college of William and Mary in that State, one of his fellow students being the Hon. Archibald C. Peachy, who came to be for many years a prominent and wealthy lawyer of San Francisco, and who died in June, 1883. As Randolph sat at his desk in that historic institution of learning, his eyes daily fell upon one of the noblest triumphs of the sculptor's art—a tablet of carved marble erected to the memory of his remote ancestor, Sir John Randolph. Sir John came from England to Virginia early in the last century. His first son, John, was the great-grandfather of the California lawyer. His second son, Peyton Randolph (born in Virginia, 1723, died in Philadelphia, 1775), was twice President of the Continental Congress. Sir John's grandson, Edmund, grandfather of my present subject (born 1753, died 1813), was Governor of Virginia, Attorney General of the United States under Washington, and succeeded Jefferson as Secretary of State. A fine portrait of him may still be seen in the Attorney General's office at Washington.

Between the first Edmund Randolph and his grandson of the same name came Peyton Randolph, named after the patriot before mentioned. This second Peyton Randolph was also a lawyer of distinction. He married Maria Ward, the only girl whom the eccentric John Randolph of Roanoke ever loved—according to his own confession. [It may be stated here that the families of Sir John Randolph and John Randolph, of Roanoke, were not related.] Maria Ward was a noted belle; perhaps the most beautiful and accomplished American woman of her day. Lewis and Clark, in their explorations of the great unknown west in 1803–4, named a river "Maria," after this maiden. Maria Ward was the mother of Edmund Randolph, our subject.

Upon graduating from William and Mary College, Edmund Randolph attended the University of Virginia for one year, chiefly as a student of law. Then removing to New Orleans, he obtained, by appointment, the office of Clerk of the United States Circuit Court for the circuit of Louisiana. Pursuing his legal studies, he was, after a few years, admitted to practice, and followed the profession in the Crescent City until 1849. He married in that city the daughter of a leading physician, Dr. Meaux—a lady whom he had met in Virginia some years before. He arrived in California in 1849. A

few weeks later, he was elected to represent San Francisco in the lower branch of the legislature—at the first session of that body, which opened at San Jose, December 15, 1849. This body met to organize a State government. It was known as the "Legislature of a Thousand Drinks." This title was not given it on account of the intemperate habits of the members, as popularly supposed, but owing to the words invariably uttered by Senator Green of Sacramento, when inviting friends to his sideboard: "*Walk in, gentlemen, and take a thousand drinks!*"

In one of the museums of London may be seen crayon sketches, by an English artist, of all the members of the legislature at this session. Every man had a "flop" hat and a "hickory" shirt. Mr. Randolph was a leader of the lower house throughout the session. State officers and United States Senators having been chosen, he was appointed, with John Bigler, to wait upon the Provisional Governor, General Riley, and inform him of the organization of the State government. The committee requested General Riley to turn over to the State Treasurer the "civil fund," aggregating $1,300,000, collected by the United States army and navy officers, without legal authority, since the acquisition of the country. General Riley refused to do this, but turned the fund into the federal treasury, although he had paid therefrom the expenses of the State Constitutional Convention. The Legislature was accordingly compelled to borrow money, issuing bonds bearing three per cent. per month interest.

The journal of the Assembly for this first session shows that Mr. Randolph and the late A. P. Crittenden were among the most industrious members. But both gentlemen favored the adoption of the civil in preference to the common law. That the common law prevailed is due to Judge Nathaniel Bennett, perhaps, more than to any other person, he being then a State Senator. After the close of his legislative term Mr. Randolph never held public office, but frequently appeared in political conventions and on the "stump". He was a devoted and conspicuous practitioner at the San Francisco bar until his death. Early in 1851 he formed the partnership with R. A. Lockwood and Frank Tilford, already stated in this chapter.

The greatest cause in which Mr. Randolph was ever engaged was the most important civil action ever tried in California. It was a contest between the United States Government and the assigns of Andres Castillero, and involved the title to the great Almaden quicksilver mine, in Santa Clara county, together with two square leagues of land adjoining the mine. The whole property in dispute aggregated in value several million dollars. Mr. Randolph was introduced to the case by his lifelong friend, A. P. Crittenden, who was attorney for the "Fosset" claim to the mine, those representing the Fosset claim, of course, desiring to see the government triumph over Castillero.

The history of the discovery of this remarkable mine and the twenty years' litigation which followed it, would make a volume in itself. It is full of interest. The mine was discovered by Andres Castillero, a wealthy Mexican, in the year 1845, when California was a Mexican territory. After the acquisition of this country by the United States, Congress having established in San Francisco a Land Commission to settle private land claims in California, a petition was filed by Castillero with this commission, September 30, 1852, asking that his claim to the New Almaden mine, and two square leagues of adjoining land, be confirmed to him. Halleck, Peachy and Billings were petitioner's attorneys. The claim was opposed by the United States through the U. S. Land Agent. The Land Commission confirmed Castillero's title *to the mine*, but denied him *the land.* On appeal to the United States District Court, a great legal battle ensued. Both parties were appellants and both respondents, neither being satisfied with the decision of the Land Commission. On behalf of Castillero appeared Reverdy Johnson, Judah P. Benjamin and Archibald C. Peachy; on the part of the government, Edwin M. Stanton and Edmund Randolph. The full proceedings of this trial were printed by order of the government. They comprise five large octavo volumes. Mr. Randolph's closing argument for the government covers three hundred printed octavo pages.

It will be borne in mind that Castillero claimed the mine, *and* two square leagues of land; the Land Commission confirmed to him the mine, *wtthout* the land. To the outsider who knows nothing about the equities of this case, this might seem to be a fair compromise. But it satisfied neither party. The government was not willing to take the land and surrender the mine, and Castillero was not satisfied to take the mine and give up the land. The decision of the United States District Court was affirmatory of that of the Land Commission—the *mine* to Castillero, but *not* the two square leagues of land.

The case was taken to the Supreme Court of the United States and that tribunal decreed that Castillero was not entitled to either the mine or the lands. But before it was argued in that august tribunal Randolph died. He had received a fee of $5,000, and expected a large sum in addition. The United States being his clients and the property at stake being of such immense value, he felt that his services, covering some four years' time, would receive princely remuneration. However, the $5,000 paid him as a retainer, was all that he received. After his death his widow presented a claim to Congress for $75,000. A petition accompanied the claim signed by fifty leading lawyers of San Francisco setting forth that Mr. Randolph's life was sacrificed to this case, and that considering the magnitude of the interests involved and the length of the controversy, the sum asked by his widow was reasonable. On final settlement the government paid Mrs.

Randolph $12,000, making $17,000 paid for Mr. Randolph's services. The government paid Mr. Randolph's coadjutor, Edwin M. Stanton, $25,000, although the whole burden of the case was upon Mr. Randolph.

The counsel on the opposing side, Reverdy Johnson and Judah P. Benjamin, received $35,000 each, this fact being disclosed in a letter from Mr. Johnson to Hon. T. J. Durant, of Washington. In that letter Mr. Johnson stated that the great labor of collecting the evidence for the government in the New Almaden case devolved wholly upon Mr. Randolph; that the latter argued the case at great length and with great ability; and prepared an elaborate brief, which, after his death, was used on appeal in the United States Supreme Court. Mr. Johnson added that he would not perform the services rendered by Mr. Randolph for less than $25,000.

In the judgment of Mr. Randolph's friends Congress would have allowed the whole of the demand of $75,000, but for the opposition of Senator Edmunds. Senator Edmunds has the reputation of a great lawyer, as well as statesman, and, of course, his influence is potential. It is said that his opposition to the claim of Mrs. Randolph was inspired by Frederick Billings. Mr. Billings was at the time, and is still, one of Senator Edmunds' constituents—a lawyer, a railroad magnate, a bondholder—possessed of a colossal fortune, a man not to be despised by any means. He had been a member of the firm which brought the Castillero suit, and which had been antagonized by Mr. Randolph during the many years of litigation which followed. Whether Mr. Billings believed that Mr. Randolph had not earned his fee, or rather his widow's demand, or whether he permitted a personal grievance to influence his action, it is not for me to say. But I am strongly reminded of the case of Kittleman vs. Cunningham, which was tried in San Francisco during the New Almaden controversy, and a year or two before Mr. Billings bade farewell to this State.

The case of Kittleman vs. Cunningham was tried before Judge Edward Norton and a jury in 1859 or 1860. It involved the title to the fifty-vara lot on the northeast corner of Montgomery and Bush streets, on which Platt's Hall now stands—property of great value even at that early day. Edmund Randolph was counsel for the plaintiff, and Eugene Casserly and Delos Lake for the defendant. Both parties relied on Alcalde grants. Kittleman's was the oldest, but subsequent to the issuance of his grant, the Alcalde had, for some reason, canceled Kittleman's title, by crossing it off his official books and issuing a new one to Cunningham. The case turned upon the point as to whether Kittleman had been placed in juridical possession of the lot before the cancellation of his grant by the Alcalde. It seemed to be conceded, as a legal proposition, that if he had been put into actual possession the lot was his, and the subsequent action of the Alcalde could

not deprive him of his title, and that in such case the verdict must be for the plaintiff.

A most desperate struggle of witnesses was made upon this point. Randolph, for Kittleman, placed his main reliance upon the testimony of Peter Sherreback, who was syndico of the pueblo of San Francisco at the time of the issuance of the Kittleman grant. On this point, Peter swore positively to the fact, with day, date and circumstances—that he took Kittleman to the lot, and publicly delivered seizin thereof, with all the usual ceremonies, and left him therein and thereon, in the sole and undisputed occupancy of the same. On cross-examination, spreading over more than a day, the defense was utterly unable to shake the witness in this seriously important statement. As a last and desperate resort, it was resolved to impeach the testimony by proving him to be untrustworthy, and so break him down. For this purpose, a cloud of witnesses was produced and sworn, and among them Mr. Frederick Billings, then a member of the law firm of Halleck, Peachy & Billings, a leader of the bar, as well as the very creme de la creme of social life. Mr. Billings was a most elegant man in his dress and deportment, and this time came to the witness stand as if just out of a bandbox. He was a trifle pompous in manner, and for a self-made man, was thought by some to be a little "stuck up." Mr. Billings being duly sworn was asked the usual questions to impeach the reputation of a witness for truth and veracity.

"Do you know Peter Sherreback?" "Do you know what is his reputation among his neighbors and those who know him best, for truth?"

Answering both of these questions affirmatively, he was asked: "Is that reputation good or bad?" Mr. Billings answered that it was bad; whereupon the final question of the formula in such cases was put: "From that reputation would you believe him under oath?" He answered that he would not. Mr. Billings was then turned over to Mr. Randolph for cross-examination.

Mr. Randolph seemed especially displeased at the testimony of the witness and held him upon the rack of cross-examination for a half hour or more.

"Do you know Peter Sherreback intimately, Mr. Billings?" he asked.

"Well, somewhat," was the reply.

"Visit his house often?"

Now, it must be known that Sherreback was a poor man, and of quite a different social stratum from Billings—in fact, altogether beneath the latter from the standpoint of polite society. And the cross-examination had made but little progress before the elegant lawyer and society leader was visibly squirming out of any social intimacy with the man whose reputation he had been called on to impeach.

"Mr. Billings, have you ever dined with Sherreback?" queried his tormentor.

"Ah, no! No! Never!"

"Spent much time with the family?" "Do you go there of evenings?" "Does Sherreback spend much time at your house?" "Ever visit you?" "Or dine with you?"

All these interrogatories Mr. Billings answered with warm promptness. "No." "Certainly not." "Of course not." "Of course he don't dine with me—how could he?"

"You speak, Mr. Billings, of knowledge of Mr. Sherreback's reputation among his neighbors and those who know him best. Which one of his neighbors have you been intimate with, and how intimate have you been with such neighbor?" "Do you meet Sherreback and his family often in the society which you frequent?" "What opportunities have you had of becoming intimate with him or his reputation?"

Under this style of examination Mr. Billings chafed, and explained, and qualified, until it was clearly seen that whatever the facts of Sherreback's reputation might be, Mr. Billings wanted it distinctly understood that he did not associate, and never had associated, with any such common and vulgar people as poor old Sherreback. He had never visited, dined, wined, or consorted with them, or any of them, or any such. His associates were of quite another class.

When Randolph came to sum up to the jury, he again paid his respects to Billings, and with considerable acrimony, taking the ground that the witness was prejudiced and had testified unfairly; that he, Billings, had no doubt known Sherreback in early times when they had met on terms of social equality; that Billings had grown rich and great, had got upon a higher level of society, and was ashamed of those of his old friends and associates who had been less fortunate. "You saw, gentlemen of the jury," he said, "how ready the witness Billings was to swear to his knowledge of poor old Sherreback, and to defame him. But when I sought to get at his opportunities of knowledge, he was off in a moment. He was not willing to admit that he ever associated with, or visited people, in that humble sphere of life. He denied his old friend Sherreback, and seemed to be ashamed to admit that he had ever seen, much less been intimate with, so poor a man. The wealthy and elegant gentleman of to-day would not have the fine society in which he moves to know the lowly inauguration of his magnificent career. It would never do, gentlemen; it would *never* do. He has trained himself to forget what the world doesn't know—that he was not always rich, powerful and great. Ah! gentlemen of the jury, the world is like the sea, and the people are like the fishes. The finny inhabitants of the waters are divided into grades and classes. There are fish that swim

along almost upon the very surface of the sea, and disport themselves in the sun-pierced waves, bright, joyous and happy forever. Others have harder lives and are obliged to swim in deeper and darker waters. Lower and lower down are other grades till the very bottom is sounded. Of all the fish of the ocean, the one that sinks to the greatest depths is the codfish. To reach it the fisherman will cruise far out of sight of land, and use his largest lines and heaviest weights. I have heard it said by those who have been on the banks of Newfoundland, that when one of these fish is hooked far down toward the bottom and raised to the surface, if it chances to get off the hook, it never returns to its old location at the bottom. When the tremendous pressure of hundreds of fathoms of water under which he had lived has been removed, he swells up so that he cannot get back to the lower regions to which he belongs, but is compelled to wiggle about among strangers on the upper crust of piscatorial society till he dies."

Mr. Billings did not hear the burst of laughter which followed, as he had unceremoniously left the courtroom when he saw that something unpleasant was coming.

The learned counsel opposed to Mr. Randolph—Mr. Casserly and Judge Lake—were unable to persuade the jury that their client's cause was just, and a verdict followed in favor of the plaintiff. After Mr. Randolph's death, however, a new trial was granted, and the defendant finally prevailed.

Randolph had little wit, but fullness of sarcasm. He never told a "joke." At college, whenever "one of the boys" would say a good thing, Randolph would ask, seriously, "What does *that* prove?" He once said a good thing himself, however, about a certain judge, on the bench, noted for his fluency of speech. This judge was delivering an opinion, and Randolph was impatiently waiting to commence the trial of a cause. The judge rolled out sentence after sentence and period after period with magnificent volubility, and it seemed that the end would never come. In the midst of this judicial display, Randolph turned to Tully R. Wise, and inquired, sotto voce, "Did it ever occur to you what a great man Judge—— would make, if he only stuttered?"

But Randolph, it must be said, had a one-sided mind. He never took in the whole situation. Looking at him in the New Almaden case the most prominent fact is his tireless industry. Coming from the South, and being impetuous in temperament, it is a marvel that he could bestow upon any cause the patience, industry and labor which he gave to that case. He was a genius, but he was not a legal genius. He was not a powerful reasoner. He was not logical. I cherish his fame, but I am speaking the conclusion of the bar-leaders who knew him best. He was full of poetry and enthusiasm, yet at the same time, strange to say, he was a hardworking man. He won public admiration, yet he had few intimate friends. He was

not companionable. In his family, however, he was almost worshipped.

He was a man of splendid visions. He took a deep interest and an active part in General Walker's scheme for the conquest of Nicaragua. Walker was a born leader of men, but he succumbed fully to Randolph's influence. Randolph, like Bishop Whitefield, sincerely believed that no southern country could be developed without *slave* labor. He hoped to see a central empire established between the western continents, of which Walker would be the executive head, and he, Randolph, the great Chancellor. His dream came nearer fulfillment than is generally supposed. The United States did not interfere with Walker's operations, and there is hardly room to doubt that with Vanderbilt's aid the great filibuster would have won an honorable name in history. Vanderbilt had a magnificent grant from the Nicaraguan government, giving him the exclusive right to transport passengers and freight across the isthmus, and also entitling him to a large land grant on both sides of the great highway. This splendid franchise Walker, in an evil hour for himself, wrested from Vanderbilt and conferred upon the Morgans of New York city.

When Walker's last stronghold was taken, it was found that the besieging force was composed principally of white sailors! They were in the pay of Vanderbilt!

Randolph delivered to the Society of California Pioneers, September 10, 1860, the ablest historic address ever uttered on this coast. In it he referred to the fate of his friend Walker, and also to the end of Henry A. Crabbe, who had led a filibustering party into Mexico:

> Longings still unsatisfied led some to renew their adventurous career upon foreign soil. Combating for strangers, whose quarrels they espoused, they fell amid the jungles of the tropics and fatted the rank soil there with right precious blood. Or upon the sands of an accursed waste, were slaughtered by inhuman men, who lured them with promises and repaid their coming with a most cruel assassination. In the filthy purlieus of a Mexican village, swine fed upon all that murder left of honored gentlemen, until the very Indian, with a touch of pity, heaped up the sand upon the festering dead and gave slight sepulture to our lost pioneers.

An old friend of Randolph, and long one of the brightest lights at the criminal bar, thinks that Randolph would have made a great judge. If it be true that Randolph was disposed to look at only one side of a case, it is difficult to see how he could have made a great or a good judge. It seems to me that his peculiar province was that of Attorney General; his client, the State.

He was inclined, in the conduct of a cause, to seize upon something that would lead to invective. He was more powerful in invective than any other lawyer among his contemporaries. He suffered intensely from dyspepsia all his life. This gives the key to his character. He had a great deal of simplicity, and at times could be most winning among his acquaintances, as he

uways was at home, yet generally his manner was repellant. In arguing a ase, if there was no cause for invective, he would find an occasion. He ad a fine command of language, yet was not fluent in speech. He would tter a sentence, then hesitate, as if in thought, before proceeding. At imes, however, he would seem to be on fire, and pour out his words in unnterrupted flow.

In the great New Almaden case, the claimant against the government alled to the witness stand His Excellency, Castillo Lanzas, a man for twenty ears prominent in Mexican affairs, and who had represented Mexico at sevral foreign courts. Mr. Randolph embraced the idea that this man was an mpostor. Accordingly, to prove his theory, he took the witness, on cross-xamination, over his entire public and private life. He asked him *why* he estified in English, *how* he acquired English, where he went to school, the urriculum of his college, the offices he had held, the functions of all the departments of the government of Mexico, the names of the Presidents of Mexco and the United States for the previous ten years, etc., etc. His cross-examination of Senor Lanzas lasted *fourteen days*, during which period he put o the distinguished Mexican *six hundred and fifty-seven questions.* At last e asked the witness whom he knew in San Francisco.

The Senor replied that he was a stranger here, but he knew one *Arce.* Mr. Randolph had this Mr. Arce put on the witness stand.

"Do you know that man?" he said quite abruptly and pointing to the reat Mexican.

"Yes."

"Who is he?"

"That is Senor Castillo y Lanzas, ex-Minister from Mexico to the court f St. James."

"Well, now, who are you, sir? who are *you?*" said Randolph sternly.

Personally, Mr. Randolph was a magnificent man. He stood six feet igh, was "straight as an arrow," had an abundance of dark brown hair and eard, very fair complexion, a dark eye and small hands and feet. His feaures were as finely cut as the lines of a cameo. He died at the age of fortywo years from a disease of the stomach. Besides his widow he left two laughters, one of whom became the wife of a farmer in West Virginia.

CHAPTER XX.

Joseph G. Baldwin—Something of the Delightful Author of "Party Leaders" and "Flush Times in Alabama"—Career as Lawyer and Judge—A Great Wit and Brilliant Man of Letters—Humor Overflowing from the Bench—Contrasted With Stephen J. Field—A Bout With Tod Robinson—Skildmore's Equitable Defense—Anecdotes of Francis J. Dunn—References to S. S. Prentiss, Chapman Johnson, and Other Great Men of Older Lands, and to Judge Alexander W. Baldwin, of Nevada.

We have the testimony of that learned jurist, Stephen J. Field, and that peerless orator, S. S. Prentiss, and many others capable of wise criticism, in support of Judge Baldwin's unsurpassed brilliance as a wit and humorist, his grace and power as a writer, his ability as a lawyer, and his wisdom as a judge. When Prentiss was about to embark on his last earthly journey—from New Orleans to Natchez—he, feeling that he was passing to another life, bade his friends good-bye, and, turning to Colonel Alexander Walker, of the *Delta*, said: "Be sure to write my love to Joe Baldwin. I have written my last on earth. A great man is Joe. He has no superior as writer and lawyer. He comes the nearest to my idea of an universal genius."

Judge Field, in his autobiography spoken of in Chapter XIV, makes this allusion to his old judicial comrade: "My friendship for Baldwin commenced long before he came to the bench, and it afterward warmed into the attachment of a brother. He had a great and generous heart. There was no virtue of which he did not possess a goodly portion. He was always brimful of humor, throwing off his jokes, which sparkled without burning, like the flashes of a rocket. There was no sting in his wit. You felt as full of merriment at one of his witticisms made at your expense as when it was played upon another. Yet he was a profound lawyer, and some of his opinions are models of style and reasoning. The opinion of the Supreme Court of California in Hart vs. Burnett (15 Cal., 530), prepared by him, is without precedent for the exhaustive learning and research which it exhibits upon the points discussed."

Let us see what manner of man was this.

The father of Joseph G. Baldwin was a native of Connecticut, and at an early age removed to Virginia, residing first at Staunton and finally settling at Lynchburg. He was devoted to mechanical invention, possessed of great ingenuity, yet was not practical, and his labors yielded him nothing. Some of his inventions, however, were turned to account by others. The old man,

always in humble circumstances, yet lived quietly and without excitement, and attained the age of ninety years.

Joseph G. Baldwin was born at Staunton, Augusta county, Virginia, January 22, 1815. His precocity was extraordinary. When twelve years of age he was a deputy clerk of the District Court of his county. Here he received lessons in the clerical details of law practice, which were of service to him in after life. At seventeen years of age he took editorial charge of a newspaper in Buchanan, Rockbridge county. Two years later he removed to Alabama, "impelled" as he tells us in his "Flush Times," "by the gentle momentum of a lady's slipper." He does not, however, disclose who was the fair girl who disappointed him. It was—I have it from an authentic source —a Miss Menzies, who afterwards married a son of Chapman Johnson. This Chapman Johnson was the leader of the Virginia bar, and possibly the greatest lawyer of his day and generation in the civilized world, Chief Justice Marshall excepted.

While deputy clerk and editor young Baldwin had improved his leisure hours by reading law, for which he evinced a fondness at a very early age ; and, having law practice in immediate view, he went to the town of De Kalb, Alabama, where he continued his law studies and impatiently awaited his opportunity for admission to the bar. At De Kalb he met S. S. Prentiss. Between the two a very cordial friendship sprang up, which proved enduring. Baldwin had met one great soul congenial to his own. Some twenty years later, on the shores of the Pacific, he came in contact with another kindred genius—John B. Felton—afterwards his son-in-law. Upon attaining his majority, Baldwin removed again—this time to Sumpter county, Alabama, where he was admitted to the bar, and where he entered upon his professional career with rare pluck and enthusiasm. He represented that county in the State legislature. In politics he was a Whig. Henry Clay was to him, so he declared in his "Party Leaders," "the greatest orator, and, except Washington, the wisest statesman and most useful citizen this country ever called into her service."

In 1844 Baldwin was nominated by the Whigs as one of their presidential electors. He "stumped" his section of the State in that campaign. In 1849 his party nominated him for Congress. He was defeated by 250 votes by Colonel S. W. Inge, who, two years later, and in advance of Baldwin, removed to San Francisco.

In Alabama Baldwin won a great reputation. He was known as a great jury lawyer. (In California he did not often appear before juries.) He had a large practice. The time which he could spare from his professional duties he devoted to literature. The product was his celebrated "Flush Times," a volume which has been the delight of two generations and which seems destined to enjoy a lasting popularity. "It was," said his

friend Howard, of Los Angeles, "the first literary essay of a mind crowded with thought and replete with exquisite imagery—the primitive yield of a rich virgin soil—the gleeful bubbling of a full, and, till then, undisturbed fountain. * * * Apart from the emanations of convulsing wit that scintillate and sparkle along each page, this work has a higher charm of pure classic diction. It contains no violation of the most rigid literary taste, or the most elevated chastity of thought, and it almost groans under its affluence of cunning fantasies of language, and merry conceits and adroit suddenness of situations."

While in Alabama, Baldwin also gave to the world his "Party Leaders," being "Sketches of Thomas Jefferson, Alexander Hamilton, Andrew Jackson, Henry Clay, and John Randolph of Roanoke, including Notices of Many Other Distinguished American Statesmen." This work and its predecessor just mentioned, have enjoyed such wide fame that it would seem idle to more than mention them. In his "Party Leaders," however, there occur passages in regard to the character of Randolph of Roanoke, which have been applied by those who knew Baldwin, to the latter himself. The quotation from this noted work, given below, was, upon Baldwin's death, reproduced by the accomplished editor of the now defunct Sacramento *Union*, "not only as a specimen of Baldwin's serious style, but on account of its partial applicability to his own intellectual traits:"

RANDOLPH OF ROANOKE.

He has had the misfortune which attaches to most men of fertile wit and brilliant powers. Men seem unwilling to accord multiplicity of gifts to any man. The same depreciating incredulity which "shook its head at Murray for a wit," and which made Elizabeth pronounce Bacon "a man of parts, but not deep in law," has denied to Randolph, because of his showy qualities, the possession of stronger and higher powers. But we think that this judgment is partial and unjust. True, he had a most extraordinary endowment of wit and the lighter graces. He was, beyond all comparison, the wittiest man of his time. He overflowed with wit. He wasted more wit than men, characteristically witty, gave out. Sheridan had not the same ease and flow of wit; the same spontaneity, aptness and raciness. Randolph's wit was much more than humor. It was a refined, wire-edged and diamond pointed common sense; a sharp and shrewd sagacity, which, while it had the edge of sarcasm, had, also, the force of argument. Randolph had the rare faculty of interpreting for the crowd; of translating in better and apter language the thoughts passing in the mind of the hearer, who was delighted to find that Randolph was only thinking his thoughts. His verbal aptness was astonishing. When anything was to be characterized by an epithet, he at once characterized it by a word or phrase so striking and pat, that it created the surprise and pleasure which are the most marked effects of wit. He had the same aptness of quotation. No man made the resources of others more subservient to his own purposes. He did not merely appropriate. He gave a new value to the quoted sentence. There was as much genius in the selection and application as in the conception and expression of the idea. His ingenuity was very great. He had the faculty of seeing remote analogies and correspondences, and of accumulating around a dry, isolated and uninviting topic a multitude of images, facts,

suggestions and illustrations. His memory was upon the same scale. It was comprehensive and retentive, taking in the whole superficies of the subject and the minutest details. His information extended to a large variety of subjects. In polite learning, especially in the standard works of English literature, he was accomplished beyond most of the literati of his country; and his taste and appreciation of the latent and patent beanties and excellences of the great classics were unsurpassed. Had he turned his attention to literature as a pursuit, it is not going too far to say that he would have enriched, not merely American literature, but the English tongue, with some of the rarest contributions made in his day by genius to letters. He mastered history with like ease. He was supposed to have a more minute and accurate knowledge of geography than any man of his country; and he even committed the book of heraldry of England to memory, and could repeat the annals of the noble houses of that kingdom in their details. But, most largely developed of all his faculties, probably, was his quick, clear and deep comprehension. His finely-toned and penetrative intellect possessed an acumen, a perspicuity which was as quick and vivid as lightning. His conclusions did not wait upon long and labored inductions. His mind, as by an instinctive insight, darted at once upon the core of the subject, and sprang, with an electric leap, upon the conclusicn. He started where most reasoners end.

In concluding his essay upon Jefferson and Hamilton, Baldwin says:

There is enough of glory for them all. Honor to every hand that was raised in that holy fight! Honor to every tongue that spoke a word in season for the faith! Honor to the PEN that drew the declaration which pronounced us free! Honor to the LIPS, afire with liberty, that seconded and supported its adoption! Honor to the stainless SWORD of the boy-votary, who, side by side with Washington, through the long war, strove to make that declaration good! And honor in the highest, save to God, to the AUGUST CHIEF who was the presiding genius over camp and council; winning our freedom in the field and perpetuating it in the Cabinet!

And this of eloquence:

The highest eloquence is the demonstration of the heroic. Such eloquence is, at last, but the self-manifestation of the heroic spirit in its highest form. All heroic minds are thus eloquent, whenever the qualities that make them heroic are aroused and called into vigorous action. Eloquence is the spirit of the man in operation. When such a soul acts it is eloquent in deeds; when it speaks, it is eloquent in words. Chatham and Mirabeau, Demosthenes, Henry, Jackson, Clay, Calhoun, alone in the Senate opposing the Mexican war, and Washington when aroused, as on the field of Monmouth, possessed this eloquence in an eminent degree; and when it is called into exercise common greatness shrinks appalled and cowed before its imperial authority. It is the rarest and most infallible of the gifts and marks of greatness; for it displays in a burst of passionate energy the highest properties of man—great will, great courage, great intellect—the forces that command and subdue mankind.

Judge Baldwin married in Alabama a Miss White, by whom he had six children—four boys and two girls. He removed with his family to San Francisco in 1854. Arriving at a comparatively early day, bringing an enviable reputation as a lawyer and man of letters, and finding here a considerable number of active professional and business men from the States of his nativity and adoption, he quickly secured a good practice. He always had a predilection for politics. The old Whig party having disappeared, the

Northern Whigs becoming Republicans, and the Southern Whigs Democrats, Baldwin was no exception to the rule. He acted with the Democratic party from the time of his arrival in California until his death. In September, 1857, Hugh C. Murray, Chief Justice of the California Supreme Court, died. Peter H. Burnett, appointed by Governor Weller, acted until the next election, when Joseph G. Baldwin, who had received the Democratic nomination, was chosen by the people.

Judge Baldwin was on the bench of the California Supreme Court from October 2, 1858, to January 1, 1862. On leaving the bench he resumed law practice in San Francisco. Two years later he visited the East—the war then raging—and endeavored to procure a pass to go through the Union lines to see his aged father. He failed in this, and returned to this State without having seen the old gentleman, from whom he had parted nearly thirty years previously. After his return from the East, Judge Baldwin passed his time in San Francisco and Virginia City, following his profession in both places. These were "flush times," and, like most eminent lawyers who were here at that date, he reaped a golden harvest. His oldest son, Alexander W. Baldwin, was then a leading lawyer of Virginia City. The precocity inherited by the latter, and his extraordinary success at the bar, were fittingly mentioned by Judge E. W. McKinstry, from the bench, November 17, 1869. A. W. Baldwin was killed in that month by a railroad accident, in Alameda county, California. Although but twenty-eight years of age, he was then Judge of the United States District Court for the State of Nevada. Judge McKinstry, then County Judge of San Francisco, upon adjourning his court out of regard for the memory of this young jurist, remarked as follows:

As we approach the evening of life, we become accustomed to seeing those who began the day with us grow weary and drop out of the line of march. But when a man who commenced his career long after most of us, and yet who lived long enough to take an active and prominent part in the contest of life, is called away, we are startled and rudely awakened as from a dream, and learn that the worldly life we are pursuing, and with which, from habit, we have become so familiar is not unending. And when we see the victim of a catastrophe like that which has occurred so young, who has attained that wealth and honor which is supposed ordinarily to be the reward of half a century of labor, we become more impressed with the lesson, and more impressed, too, when death comes in so unexpected a guise. The applications of modern science and the useful arts are intended to add to and increase the comforts and luxuries of peace. Yet when carrying death so suddenly, so unexpectedly, they become more effectually destructive than the most terrible weapons of war. Judge Alexander W. Baldwin commenced his career at an age when most members of the profession commenced them as undergraduates in our universities. And I recollect very well it was the proud privilege of his father—the distinguished gentleman who presided over the Supreme Court of this State—to hear from the lips of his son, then a lad of eighteen years, an argument which, for clearness of statement, logical arrangement and attractive eloquence, perhaps was never surpassed in his subsequent life by the gentleman just deceased.

At a very early day he went over to Nevada, and was there associated with Senator Stewart in the practice of his profession. In 1854 he was chosen one of the Presidential Electors in that State. In 1865 he was made United States District Judge for the State of Nevada at an age which I believe is unprecedented, unless, perhaps, in the case of Judge Hoffman, who was also appointed at an unusually early age.

Now, it seems to me particularty fitting and appropriate when a man as distinguished as the late Judge Baldwin, is called away from our midst, that the members of the bar should unite in that testimonial of respect for his memory, which they are accustomed to render in honor of the memory of the distinguished and illustrious members of the profession to which we all belong.

Judge Baldwin had three other sons, all of whom were unusually gifted, exhibiting at an early age quickness and originality, and remarkable facility with the pen. All died in the dawn of manhood. A strange fatality seemed to wait upon the family for some years. Between 1873 and 1877 occurred the deaths of the elder Baldwin, his eldest son, Judge A. W., his three other sons, Joseph G., Jr., John W., and Sidney, and his lamented son-in-law, John B. Felton. The widow and two daughters, one the widow of Felton, survive.

Judge Baldwin's distinguishing faculty as a lawyer was his logical power. He was a strong man as a reasoner. In argument he spoke the words of truth and soberness, and in a matchless manner. His facility of illustration challenged admiration. In this, his perennial wit and humor were always serving him. In reply he was masterly. The *reductio ad absurdum* was his forte. Rarely in California, but many times in Alabama, he displayed his powers before a jury. He would often compress a whole case in an epigram, or would throw off a sentence that would illuminate a principle. Rapid in thought, clear in vision, he comprehended a case at first glance. Understanding it, he made others understand it by his illustration. And who could step into a law library and find so many authorities on a given point and digest them and apply them so quickly as he?

The great defect in his oratory was his voice. It was not agreeable and was not under control. He was S. S. Prentiss, without that marvelous voice. His sentences were rounded, pointed, polished, smooth-flowing, his wit more than abundant, his memory excellent, his information wide; in conversation he was irresistible—but on the platform he could not *talk* like Prentiss or Baker. Who could? Given a mellifluous voice, Baldwin would have made a great popular forensic orator. He had all the qualities but one. Before a court, no crowd present, speaking to legal questions, his manner was good and his voice was not noticed. With a *voice* that could *thrill*, he would have been a man of the masses—lacking it, his empire was chancery, and his unconquerable weapon was the pen.

Baldwin's fame as a jurist will rest chiefly upon his opinion in Hart vs. Burnett, before mentioned. I have quoted Judge Field to show the learning and research which that opinion exhibits.

Baldwin's opinions cover several volumes of the California Reports. Sometimes overruling prior decisions, they remain themselves unquestionable. They partake much of the quality of his style as a writer, and are consequently sprightly and vigorous. His unfailing fountain of humor bubbled over even on the bench. Off the bench it was characteristic and universal. His jests, anecdotes and stories still pass current among the bar, retaining the full force of their original interest.

The annals of the law have developed a great deal calculated to excite merriment, and Judge Baldwin, although he was a profound lawyer, yet did his full share towards investing this stern science with the light mantle of mirth.

The case of Knowles vs. Inches, reported in the twelfth volume of California Reports, page 213, was an action in equity to restrain the defendants from prosecuting certain suits in San Francisco courts, and from leasing and conveying certain real estate in dispute. The plaintiff based his prayer for equitable relief upon the allegation that there had been a long course of vexatious litigation between the parties, resulting in judgment for plaintiff, but that the defendant threatened to prosecute further actions against the plaintiff to harass and annoy the latter. The plaintiff's prayer was denied and he appealed. In deciding the cause in the Supreme Court, Judge Baldwin said.

We must reprehend the practice, which is too common, of stuffing a transcript with irrelevant and unnecessary matter. The present case affords a remarkable illustration. The transcript contains some 233 pages, when everything essential to a review of the case might easily have been given in fifty. Besides the delays, unnecessary expense and labor thus created, the points are hid in this superfluous matter, and it frequently becomes more difficult to find out what they are than to decide them when found. The Practice act, so far from sanctioning any such course of proceeding, by implication rebukes it. Instead of copying into a statement for a new trial, or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose. * * *

This case was referred to a referee, who, in his report, gives the history of the litigation, which, for variety and extent is unexampled, considering the small value involved, This history, indeed, might afford an illustrative appendix to Scott's account of the celebrated suit of Peter Peebles vs. Plainstaines, or Dickens' report of the case of Jarndyce vs. Jarndyce. Indeed, it would appear that the only use to which the parties designed to put this lot was to make it the foundation of a lawsuit, which they have erected upon it; an edifice divided from cellar to garret into all manner of secret chambers, involved passages and dark entries. The real parties to the controversy seem to have been too few in number to keep up the strife, and hence both sides have called in a relay of fresh partisans to figure in the fight, having impressed them by means of sham deeds and fraudulent conveyances. Perjury is charged, with no lack of nervous expressions, upon the respective sides, and the lower arts of forensic warfare, such as snap judgment and partial statements of facts, as we are informed by counsel, give character and variety to the proceeding. Ten solid pages of transcript paper, closely written, are taken up by the able gentleman, who acted as referee, in giving a mere analysis of the leading facts of these fierce forensic conflicts; the whole narrative of

which, unabridged, exceeds by a few pages Sir Walter Scott's account of Napoleon's first campaign in Italy. Fearing, probably, that the litigation might, in some way, be brought to an untimely close in the lifetime of the litigants, the respondents are accused, with some reason, of adopting the economical plan of dividing out the subject into small parcels and suing for this lot by *inches*.

We cannot take time to review this protracted controversy, and to follow its mazes through all its ramifications; nor is it necessary, for a single point is conclusive. We regret that we have no power to put a stop to this comprehensive and embarassing litigation, and that we must turn a deaf ear to the pathetic appeal of the appellant's counsel, "not to suffer his clients to be lawed to death;" but, though it is the interest of the republic that there should be an end of litigation, and not less the interest of these parties, yet the rules of law forbid our putting an end to it this way.

Judgment was affirmed on the ground that chancery could not interfere in the controversy, until after a trial at law, adjudicating the title—to which trial all claimants must be parties.

In his opinion in the case of the City of Oakland vs. Carpentier (13 Cal., 550), in referring to the charter of the *town* of Oakland (which is to be found in the laws of 1852, page 180), Judge Baldwin said: "The charter is, perhaps, the most defective on the statute book, and this is saying a great deal. A perverse ingenuity seems to have been exercised to make it as lame and loose as possible. The joint labors of Malaprop and Partington could scarcely have made such a collocation or dislocation of words and sentences. Among other things, it gives the Board of Trustees power "to *license and suppress* dramshops, horse-racing, gambling houses, houses of ill-fame, and *all indecent and immoral* practices, shows and amusements."

Further on, quoting from the charter, the Judge styled it "a jumble of incoherent and contradictory verbiage."

This Judge made an apt observation regarding the celebrated case of Archy, the negro slave, who was brought into this State by his master, Charles A. Stovall, of Mississippi, in October, 1857. The slave deserted his master, and was brought before the Supreme Court on habeas corpus, the writ being sued out by Stovall. The Supreme Court—Baldwin was not yet on that bench—decided that Stovall was not entitled to the black man either by constitutional right or on the grounds of comity between the States, because Stovall was neither a traveler nor visitor, he having remained in this State an unusual time, having engaged in business here, and having even hired out his slave. "But," said Judge Burnett, "there are circumstances connected with this particular case that may exempt him (Stovall) from the operation of the rules we have laid down." These circumstances were comprised wholly in the fact that this was the first case of the kind that had come before the court. It was a case of "I'll let you do it this time, but look out hereafter." The slave was delivered to his master. The opinion in this case is the most remarkable to be found in the reports. Judge Baldwin said of it: "It gives the law to the North, and the nigger to the South."

A certain lawyer once told Judge Baldwin a clever joke upon a brother attorney named Balder. He thought it was particularly good and that it would apply to Judge Baldwin as well as Balder, but for the fact that the names were dissimilar.

"Don't let that annoy you a minute," said Baldwin, "I will get my name changed by an act of the legislature."

Baldwin proposed at one time to write sketches of this Bar. How admirably he would have executed the task!

Francis J. Dunn was in early times a leader of the Northern California bar. He was a brother of a distinguished Illinois judge. A vain, eccentric, dissipated, cross, petulant man was he, rude towards his brother practitioners, and when a judge decided a case against him, he beeame insolent to the bench. Niles Searls, now Chief Justice of our Supreme Court, when County Judge of Nevada county, had the temerity to decide a cause against Dunn, and the latter appealed to the Supreme Court. In his brief Dunn was particularly caustic upon the County Judge. In delivering the opinion of the Supreme Court Baldwin rebuked Dunn severely for the language of his brief. A few weeks later Baldwin and Dunn met in Nevada City.

"Baldwin," said Dunn, "I think you were unnecessarily severe upon me in your decision the other day."

"Do you think it was decent," asked Baldwin, "to reflect as you did upon the integrity of a judge?"

"What did I say?" asked Dunn.

"You said this," said Baldwin, repeating an expression of Dunn's in his brief.

"Did I?" asked Dunn.

"Yes, and you put this in," said Baldwin, giving another impolite quotation.

"Is that so?" inquired Dunn.

"Yes," said Baldwin, "and you put this in," giving another quotation.

"Well," said Dunn, drawing in a long breath, "I must have been drunk!"

"But you didn't put *that* in," said Baldwin.

Just here I recall one of the many good things that are told about Dunn.

He was found by some miners once, in midwinter, lying by the roadside between two mountain towns, covered with snow, unconscious and almost frozen to death. Being lifted up, rubbed and brought to his senses, he was asked: "Who are you?"

"I am Francis J. Dunn," he promptly replied, with his returning breath, "the best mining lawyer in the State of California."

It was very funny to see Judge Field, his associate on the Supreme Bench, turn upon Baldwin his severe countenance at times. Judge Field, who bore himself with great solemnity, betrayed constant uneasiness lest his witty and brilliant brother should break out into some overt impropriety of sport. And Baldwin would enjoy the sufferings of the Chief Justice all the more.

On one occasion the eccentric and crude Skidmore, of Marin county, was arguing a case. He was himself appellant and had been sued in ejectment. Skidmore had interposed an "equitable defence" as he designated it, which was that the land in dispute was, in point of fact, no part of the patented Mexican grant, as alleged by respondent, but that the government surveyor had corruptly run his lines so as to embrace the land in controversy, which was in the occupation of the appellant; and it was charged in the "equitable defense" that the surveyor was paid $1200.00 for this fraudulent survey. In the midst of Skidmore's argument, Judge Baldwin stopped him, and in an attitude of earnest inquiry said: "Let me see if I understand you. You say that the land in controversy never belonged to the respondent and is no part of his original Mexican grant?" "Yes, sir." "And that the surveyor deliberately ran his lines wrongly so as to include this land?" "Yes, sir," said Skidmore. "And that respondent paid the surveyor $1200 for doing this?" "Yes, sir," said the counsel. "Then," continued Baldwin, maintaining his serious air, "Why didn't you pay him $1300 to leave your land out." Skidmore incautiously answered, "I didn't have the money, your honor." "Ah!" then said Baldwin, "there was no lack of diligence on your part."

The loud laughter that followed was quickly checked by the frown of the Chief Justice.

Baldwin was once badly disturbed by Tod Robinson, father of C. P. Robinson, and once District Judge at Sacramento, and, later, Supreme Court Reporter. Robinson, when he would warm up, was a fine talker. This occasion was also in the Supreme Court, when Baldwin was on the bench. A certain constable given a writ of execution against the property of a defendant in a suit, levied on and sold property belonging to a man who was no party to the suit. The latter sued for damages, and instead of suing the constable alone, made the sureties on his official bond co-defendants also. He recovered damages in the District Court against all the defendants and the latter appealed. Robinson appeared in the Supreme Court to uphold the judgment obtained in the District Court. Baldwin interrupted his argument to inquire if the counsel had ever considered the distinction between acts done *virtute officii*, and acts done *colore officii*. "It seems to me," he observed, "there would be as much propriety in joining the constable's

bondsmen with him, in a suit against him for damages for assault; as much propriety as joining them in this action."

With great deliberation, Robinson responded: "Your Honor has announced a principle that I have been contending for all my life." At this there was eager attention to hear more. Robinson proceeded on the correctness of the position stated by Baldwin, arguing against himself, and then, suddenly, and with impressiveness in his voice and gesture, he said: "But, Your Honor, there is just one trouble *we* have—there are just 400 adjudicated cases against us and *not one* in our favor."

Baldwin was cut, but Robinson went on and made further argument in support of the principle stated from the bench, but soon he repeated: "But, your Honor, there is just one trouble we have. There are just 400 decisions against us, and not a single one in our favor." He argued for some time further, during which he gave the quoted words frequent iteration. At last Baldwin, interrupting, said, "Well now, Judge Robinson, if you will just repeat that 400 times, we'll be even on the authorities."

Judge Baldwin was kind in his wit—remarkably so—but he could resent insolence in fitting terms. He was a most amiable man, but nobody was rude to him twice.

The Hon. Edward Stanly married his sister. When Stanly was running for Governor, he made the usual stumping tour, and one of the burdens of his speech was that he never sought office, but that he had always been importuned to *take* office, much to his annoyance. In an opposition paper, Baldwin drew a graphic picture of Stanly being chased out of three States and several Territories by people who wanted to run him for office. Baldwin signed this article "Jack Cade."

For several years before his death he lived with his son-in-law Felton, at the latter's residence in Oakland. Unlike Felton, Baldwin cared nothing for the pleasures of the table, except the post-prandial talk. He hardly knew what plates were placed before him. But when the cloth was cleared he was all youth and jollity. It was a genuine treat to sit at the table with Baldwin and Felton. Either one was perennial in wit and in that lore which entertains and charms.

Baldwin died at the age of forty-nine years. He had been for some time engaged in gathering materials for a history of California, but had not progressed far with his manuscript. He was unusually lively at the dinner table the day before his death. That evening in the midst of animated conversation, he suddenly put both hands to his cheeks and said: "My jaws pain me—they feel stiff." He had recently undergone a surgical operation and thought he had passed it triumphantly. But he had the lockjaw. The next day he was silent forever.

CHAPTER XXI.

Davis S. Terry of Stockton—A Life Cast Amid Stirring Scenes—In the Texan Army Under Sam Houston—At Monterey Under Taylor—Chief Justice of the Supreme Court—Arrest and Imprisonment by the Great Vigilance Committee—The Duel With United States Senator, David C. Broderick—Graphic Narrative of the Historic Encounter By an Eye-Witness--In the Confederate Army—A Command Under Maximilian in Mexico Declined—References to D. W. Perley, J. Neely Johnson, Henry Edgerton, Volney E. Howard, R. P. Hammond, Samuel H. Brooks, Calhoun Benham, Thomas Hayes, Joseph C. McKibben, David D. Colton and Leonidas Haskell.

Whoso attempts to follow this remarkable man through the tempest-vexed voyage of his life will be cast ofttimes between Scylla and Charybdis; and may esteem himself fortunate if he escape the perils of the pursuit. With a purpose to close the ear to the voices of prejudice and passion, and to do exact justice alike to the living and the dead, he may yet set his sail with trepidation.

David Smith Terry was born in Todd county, Kentucky, March 8, 1823. His ancestors migrated many generations ago from Ireland and Scotland to the State of Virginia. One of the family, Nat. Terry, was a famous Colonel in the American revolutionary army. He was taken prisoner by the British, and suffered a long and cruel imprisonment in Charleston. Being exchanged, he participated in many important engagements, and at the siege of Yorktown. David Smith, Judge Terry's maternal grandfather, after whom he was named, was also a revolutionary hero. He refused to release his father's brother, to whom he was strongly bound by ties of affection, and whom he had taken prisoner at King Mountain.

Our friend's father was a cotton planter in Kentucky, and afterward in Mississippi. Removing to Texas before the acquisition of that vast empire by the United States, he died there, immediately after his arrival, in 1835. The widow died a year later.

The following glimpse of David S. Terry's boyhood days is caught from a letter penned to his wife in a painful crisis many years ago. It was published in the *Sun* of July 2, 1856, and the occasion will appear hereafter:

"By the death of my mother, I was left, at the age of thirteen years, to my own guardianship, my only counselor, who had influence with me, being my brother, who was but two years older than myself. From that age I counted myself a man, and associated with men—aye, and played a man's part in the struggle which secured the independence of Texas.

Acknowledging no control upon my actions, I could not sink from the soldier into the schoolboy; so, what education I have acquired—above what a boy of twelve years gathers at common schools—I acquired by reading at home all the books I owned or could borrow, during the time I was not engaged on the frontier."

The adventurous youth served in the Texan army under Sam Houston, taking part in the battle of San Jacinto. When Texan independence had been achieved, he commenced the study of law at Houston, and was there admitted to the bar. When war opened between the United States and Mexico, he was among the first to enlist; he was with Taylor "at Monterey, where we won the day."

In 1849 he led a company of Texans across the plains to California, having, en route, two fights with Indians, who killed only one of his men, and who were made to deeply lament having formed his acquaintance. His first pursuit in California was mining in Calaveras county; this he followed for a few months only, and, before the *annus mirabilis* had passed into history, he was in active law practice at Stockton, where, after the lapse of thirty-eight years, he may be found to-day! But the interim—how vast!

In 1850 he was defeated for Mayor of Stockton by Samuel Purdy, who afterwards became Lieutenant-Governor. In the same year he formed a law partnership with D. W. Perley, which continued until 1855. In the fall of the latter year he was elected, on the Native American ticket, a Justice of the Supreme Court for the short term—four years—Hon. Hugh C. Murray being elected at the same time, by the same party, Supreme Court Justice for the long term—six years. He took his seat on the Supreme Bench in January, 1856. His decisions are reported in volumes five to fourteen, inclusive, of the California Reports. They are terse, logical and generally sound. A strong state's rights opinion of his will be found in the ninth volume—Warner vs. the Steamer Uncle Sam. On the death of Chief Justice Murray, which occurred on September 18, 1857, Judge Terry became Chief Justice.

An extraordinary adventure marked the first year of his judicial tenure. It was the year of the great Vigilance Committee. He was an open foe to that organization, and believed it should be suppressed by the military power of the State and nation. Governor J. Neely Johnson, by proclamation, declared the city of San Francisco in a state of insurrection, but was overwhelmed by the force of adverse public opinion all through the State. His applications to General Wool and to President Pierce for federal military aid to disperse the Committee were denied. Some state arms had been shipped from Sacramento on a schooner to be used by state troops in San Francisco, but a party of Vigilantes, under J. L. Durkee (he still lives) seized the vessel in the strait between San Pablo and San Francisco bays. The Committee, in

investigating the matter of this shipment of arms, desired to take the evidence of one Reuben Maloney who was believed to know all about it, and who, being a strong enemy of the Committee, refused to attend and testify. It was determined to take him by force, and S. A. Hopkins, Vigilance Sergeant, and two men, were ordered to that duty. They found Maloney in a room with Judge Terry and a friend. The Judge told them that they should not make the arrest in his presence. Hopkins withdrew with his men, and procured reinforcements. Returning in quest of Maloney, he met him on the street, proceeding to the State Armory, accompanied by Judge Terry and friends, armed with guns. The arrest being resisted, Hopkins seized Judge Terry's gun, and the Judge instantly stabbed him in the neck, inflicting a terrible wound. The Judge was promptly overpowered, disarmed, and was incarcerated in "Fort Gunnybags." He was held a close prisoner for seven weeks, and, after undergoing a long trial, during which he took down himself the evidence of witnesses, he was released, owing to the recovery of Hopkins and the prospect of an early voluntary disbandment of the Committee.

I have it from a citizen who was prominent in the councils of the Committee, that Judge Terry's life hung upon that of Hopkins. Some urged his execution without regard to Hopkins' fate, and, strange to say, among these radicals was one who has been in responsible official station in this city for a great part of the time since that exciting juncture.

It was during this imprisonment that Judge Terry wrote to his wife the letter from which an extract has been given, and from which I desire now to make a further quotation :

> If I felt guilty of any crime I would not falter, but upon this point I am invulnerable. I know that I acted not from any feeling of malice towards any human being, but solely from a regard to a sacred principle—from the desire to prevent the consummation, in my presence, of an act which, though it may have been attempted from good motives, and would certainly have worked no injury to the community, as the man sought to be removed was a bad man—was, nevertheless, a violation of the constitution of this State, which I had sworn to support, as well as the constitution of the United States, to secure the blessings of which to their posterity both of my grandfathers fought and bled, and toiled and suffered.
>
> I was educated to believe that it is the duty of every American to support the constitution of this country; to regard it as a sacred instrument, not to be violated in the least provision; and, if necessasy, to die in its defense. The meanest criminal is, under that provision, guaranteed the same rights as the noblest citizen, and cannot, without a violation of its provisions, be deprived of his liberty except by legal process. It was at this holy principle, and the obligations of my oath, I looked, and not at the demerits of the man—whom I know to be a bad man ; and I believe even those who are my selfconstituted judges will do me the justice to think I would not defend that man for his own sake.

While Judge Terry was in confinement, the Texas Legislature adopted a memorial to Congress asking that body to interfere in his behalf. Hon. M. H. McAllister, Judge of the United States Circuit Court refused to issue a writ of habeas corpus for the prisoner, being "unwilling to provoke the animosity of the people."

The California Democracy, which up to the year 1859 had always been violently disturbed by faction, in that year split absolutely in two. David C Broderick led the Douglas or anti-Lecompton wing, while David S. Terry was a warm supporter of the administration of President Buchanan. On the 24th of June, 1859, in a political speech before the Administration State Convention at Sacramento, Judge Terry, then Chief Justice of the Supreme Court, alluded to the opposing wing of the party as "a miserable remnant of a faction sailing under false colors, trying to obtain votes under false pretences." "They have no distinction," he proceeded; "they are entitled to none. They are the followers of one man—the personal chattels of a single individual whom they are ashamed of. They belong, body and soul, to David C. Broderick. They are yet ashamed to acknowledge their master, and are calling themselves, forsooth, Douglas Democrats," etc.

The words quoted gave offense to Broderick, who, when he read them the next morning at the breakfast table of his hotel in San Francisco, remarked that he "had considered and spoken of Judge Terry as the only honest man on the Supreme bench, but he took it back." This was said in angry tones addressed to a friend sitting by him, but was heard by D. W. Perley, Judge Terry's former law partner, who was at the table, and who, after informing Broderick that he would call him to account for the words used, left the room. The same day Perley sent a hostile note to the Senator, who replied, somewhat oddly, that "he could not, *at the present time*, afford to descend to a violation of the constitution and the state laws." He said further, "If compelled to accept a challenge, it could only be with a gentleman holding a position equally elevated and responsible; and there are no circumstances which could induce me even to do this during the pendency of the present canvass."

On the day after the election, Judge Terry resigned his seat on the Supreme bench, repaired to San Francisco, and sent a note to Broderick, demanding a retraction of the words given above. Broderick asked that he set forth the language objected to. This was done. Broderick then wrote the words as he remembered them, but substantially as he had been reported, made no retraction, and added that Judge Terry could decide whether the language was offensive. Judge Terry thereupon sent through Colonel Calhoun Benham, a premptory call to the "field of honor." It was accepted, the duel was fought, Broderick was mortally wounded at the first fire and died three

days later, and his death opened a mighty gulf of hate between Northern and Southern men in California.

Judge T. H. Rearden, in a sketch of Broderick, written for my book, "Representative Men," 1870, observed: "The train of events which seemed to make the death of the Senator the irresistible necessity of the tragedy, pointed to Dr. Gwin rather than to Judge Terry, as his veritable opponent. It was not on the same plane with Terry that Broderick's acts were projected. The offense rankling between them was an episode rather than the absorbing emotion, and the frightful unities of the drama would seem to have been better met, had Gwin rather than Terry pointed the pistol that finished the career of our hero."

As twenty-eight years have elapsed since the famous duel occurred, and as our State numbers among its population many thousands of intelligent young people, even voters, who were not then born, it will be appropriate to give an account of the meeting, and I can do no better than use that which appeared in a city paper at the time, a graphic and dispassionate statement by an enlightened and sharp sighted eyewitness. It will follow this sketch.

In the narrative it is denied that Judge Terry made a loud remark as Broderick fell. It was widely reported that he said: "The shot is not mortal; I have struck two inches too far to the right." A remark was also by somebody gratuitously put on Broderick's dying lips, universally believed and circulated all over the country—this: "They have killed me because I was opposed to the extension of slavery and a corrupt administration." Our historian, Hittell, declares that the fallen man said nothing of the kind.

In 1862, Judge Terry went to the Southern States, passing through Mexico, and joined the Confederate army. After serving awhile on the staff of Gen. Bragg, he organized a regiment in Texas, which he commanded in several battles. At the close of the war he commanded a brigade, a separate command. He was rigid in discipline, and severely punished raiding. An officer sent to inspect the condition of the troops in his department eulogized Terry's discipline. A brother of Judge Terry's, Colonel Terry, of the Texas Rangers, was killed at Green river.

When the war closed he went to Mexico. Maximilian offered him a high military command, which he declined, and devoted himself to cotton raising for two years, but with no success. Then, in 1869, he returned to California. After a short stay at White Pine, Nevada, he settled down, in 1870, in his old town, Stockton, where he has since continuously resided.

He was a member of the last Constitutional Convention, serving as chairman of the Committee on the Legislative Department, and as a member of the Committee on Judiciary. He was author of the clause declaring the responsibility of bank directors to depositors. He took the stump in support of the new constitution; declined a nomination for Supreme Judge on the

ticket of the New Constitution party. He was a candidate for presidential elector on the Democratic ticket in 1880, and was the only nominee on that ticket defeated, the vote being close, and he falling behind, owing, it is supposed, to his name being scratched by old friends of Broderick. He asks for nothing, but freely contributes time and money to his party.

He has generally been fully occupied with professional duties, and has now a large practice in the counties of San Joaquin, Merced, Stanislaus, Fresno, Tulare and Kern. He was employed in all the extensive litigation affecting water rights in Fresno and Tulare. He is the principal counsel for the defense in capital cases through the six counties named. The case of young Granice, convicted of murder in the second degree, in killing Madden, in Merced county, will be remembered. Madden was editor of the *Express*. Granice was twice convicted and was in the State Prison, under a sentence of thirty years, when Judge Terry secured his freedom on a technicality. The prisoner was indicted for manslaughter, and being convicted, the Supreme Court granted him a new trial. Again placed upon trial on the same indictment, and the evidence being all in, the District Attorney, in conformity to the Code, moved that the jury be discharged and the prisoner remanded, to await indictment for a higher crime, the testimony going to show that the charge should be murder. This was done. The prisoner was afterwards indicted for murder, and was convicted of murder in the second degree, and sentenced as stated. The Supreme Court held that the discharge of the jury was equivalent to an acquittal.

The prominent lines of Judge Terry's character are unmistakable and well known to a broad acquaintance. He has great aggressiveness and undaunted firmness of purpose. He never quails, even before a raking fire. A man of strong friendships, it quite naturally follows that he has also strong prejudices; but he is easily placated, and in the path of mercy a little child could lead him. He is generous. His nephew and partner, who was long an inmate of his home, and who has given me a glimpse of his private life, speaks of him in terms of tenderness. His political foeman, Henry Edgerton, stated to me his belief that it would be an impossibility for David S. Terry to do an act of dishonor. His charities have been many but never ostentatious; in this respect his left hand has not known what his right hand has done. He is very impressive and effective before juries, but in his addresses in the courtroom, as elsewhere, as, also in conversation, he never attempts ornament, but rather disdains it. His speech is plain, but uttered with the force of frankness, the eloquence of a chaste simplicity, and the precision that is the birthright of a masculine intellect. False pride, shuffling and cant he opposes with the full impulse and momentum of his nature. He is of giant physical stature. Standing six feet three inches in height, with Atlantean shoulders and sinews, a weight of 225 pounds, finely

preserved, and looking ten years younger than his real years, Nature seems to stand up and point to him, "and say to all the world, *This is a man!*"

The Judge married, in 1852, Miss Cornelia Runnels, a niece of Hiram Runnels, an early Governor of Mississippi, who was a warm adherent of Andrew Jackson. (Runnels once fought a duel with Volney E. Howard, who afterwards became a resident of Los Angeles. General Howard's life was saved by a buckle on his suspender, which turned his adversary's bullet.)

The lady just named was one of the most remarkable women this country has produced. Her fortitude in the face of inconstant fortune often evoked the applause of her husband's foes. Circumstances making it impracticable for her to accompany him when he drew his sword for the "lost cause," she followed on a steamer to San Blas, and thence pushed on overland through Mexico to Texas. Twice on the way she was robbed by bandits, but each time the robbers were apprehended by Mexican officers, and her property was restored to her. On the journey her infant babe died, and she carried it for two days on horseback before she found a spot to give it Christian sepulture. She joined her husband in Texas, and, with the exception of this brief separation, was his constant companion through all the vicissitudes of his eventful life, until her death a few years ago.

A son of our subject, who had attained considerable reputation at the bar, died at Stockton, April 1, 1885, while still a young man. He had been a member of the legislature, District Attorney of his county, and Grand Chancellor of the Knights of Pythias.

On January 7, 1886, at Stockton, Judge Terry married again, the lady being the plaintiff in the celebrated case of Sharon vs. Sharon, in which he had been her counsel. She had won her case in the Superior Court, and it was pending on appeal, but Mr. Sharon had died on November 13, 1885.

I now give the narrative alluded to, of the great duel. A few sentences of explanation, in parentheses, are my own:

THE BRODERICK-TERRY DUEL.

SAN FRANCISCO, Sept. 14, 1859.

MR. EDITOR: I accept the medium (kindly offered) which your columns afford, to place on record a clear, comprehensible and unadorned statement of the late unfortunate "meeting" between the Hon. David C. Broderick and Chief Justice Terry. I will premise that I was on the ground as a spectator. I knew nothing of the preliminaries, and was so ignorant in this respect, that up to the moment the adversaries took position on the field I was unaware of the distance determined upon, and was impressed that the principals were to *wheel and fire*. With this exordium I presume your readers will perfectly understand that my statement is one of fact, given under the conviction that I am performing a high and solemn duty.

At six o'clock (on the morning of September 13, 1859), a large party of gentlemen

in buggies and other conveyances, arrived near Mr. Davis' ranch, about one mile and a half to the south of the southernmost extremity of Lake Merced. At this point, all having indefinite notions of the place of meeting, they were met by a carriage returning, containing two partisans of Mr. Terry, who seemed to have been searching unsuccessfully for the rendezvous, and to have given it up. The whole procession was about to return to town, when Dr. Hammond (Dr. William Hammond) in a gig, was seen to approach in the direction in which we had come. Knowing that the doctor was one of Mr. Terry's physicians, we felt satisfied that the place of meeting could not be far distant. We determined to follow the doctor, and therefore all wheeled conveyances. The doctor hesitated when he saw that he was acting as *cicerone* for a procession of duel-ground hunters, and I descended from my wagon to approach him, under the misapprehension that the doctor was Major Hammond, former Collector of the Port, (now, and ever since A. D. 1878, President of the San Francisco Board of Police Commissioners). The close resemblance of the brothers will make this *faux pas* excusable. In order to pass off the mistake with a flourish, I approached the retiring parties and made some seasonable inquiry. The malignant feeling of some men against Mr. Broderick can be imagined, when, during the conversation, one of the two occupants of the coach expressed a wish that he would be carried from the field a corpse. Of course, so diabolical a hope, given in uncouth terms, could only emanate from a source lost to all virtuous feeling or manly consideration.

The doctor proceeded, and the crowd followed. In a few minutes we arrived at Davis' ranch, where our leader stopped. The whole procession hitched up their animals, and I approached the bluff ranchero, who was feeding his cattle, in order to gain some information.

In answer to my inquiries, he said that no carriages had passed his house during the morning except the one we had overhauled. At this moment a very curious conversation took place between Mr. Davis—who was dressed in a cotton blouse and equipped with a large sized pitchfork—and an individual who had evidently driven all night in search of the field.

"Have you any whiskey in your house?" inquired the newcomer.

"I have not," answered the ranchero.

"It might be serviceable on this occasion," said the other.

"Whiskey is only serviceable or of use on proper occasions; this is not one, and therefore, if I had it, I would not produce it."

About this time several vehicles came flying through the pass, and stopped at a place some distance beyond where we were. I soon became satisfied that these men were the important ones of the occasion. Mr. McKibben, (Joseph C. McKibben, ex-Member of Congress—see page 15) ex-Sheriff Colton, (David D. Colton, father-in-law of Mr. Crittenden Thornton, and since deceased), Senator Broderick and one or two personal friends descended from their vehicles. Judge Terry, who was accompanied by Calhoun Benham and Colonel Thomas Hayes, of San Francisco, as seconds, S. H. Brooks, State Controller-elect, as field counselor (now United States Treasurer at San Francisco) and Dr. Aylette as surgeon and general adviser—for the doctor is said to be a most experienced duelist—thereupon arrived, and all jumped from their conveyances.

The field, the entrance to which is a few hundred yards south of Davis' house, was entered through a gap between two hills. A fence had to be jumped before reaching the grounds. The dell where the duel was fought was surrounded by hills and undulating ground. Egress can be had from it—as far as I noticed—only by two level outlets, viz: through the opening leading to Davis' ranch, and directly south from the ground itself, up a gulch. How far this gulch runs I know not, but it appears to me to connect with

a ravine encircliug the easternmost hill, forming the amphitheater where the tragedy was enacted.

Immediately upon the arrival of both principals and their seconds, which was almost instantaneous, Mr. Broderick proceeded up the gap and occupied his side of the field. Mr. Terry and his friends did the same. The armorer, with the cases of pistols, took position at the northern point of a triangle formed by Broderick on the east, Terry on the west and the armorer on the north. The empocketed plain in which the affair occurred permitted of about sufficient level ground for the requirements of the occasion.

When all hands arrived on the ground, I counted (not a particular count) seventy one men, including principals, present. Mr. Terry's seconds and advisers were constantly with him. I noticed particularly that when Benham and Aylette were attending to "outside" matters, Brooks kept close to his friend, and conversed with him in a lively tone. On the other hand, Mr. Broderick seemed to be absorbed with matters disconnected with the issue, and was talking earnestly with Mr. Haskell, (Leonidas Haskell, a wool dealer, and politician of influence, in whose dwelling at Black Point, Broderick died), and a gentleman whose name I am unacquainted with. During this time Mr. Broderick was cool and selfpossessed. His antagonist seemed agitated, and measured the ground in his direction with an uneasy and anxious tread. The seconds approached the armorer, examined the weapons, turned several times, and pointed to the white marks that had been placed on the field to establish the distances. Mr. McKibben, in examining the pistols, snapped a cap, with an air of satisfaction. He seemed to look as if the pistol suited him. Some conversation was had. Mr. Benham (or Aylette, I am not certain which) approached Terry, said something to him, iu reply to which Terry seemed to smile, and became more calm than before. As the affair was approaching the crisis, every eye was turned on the combatants.

Mr. Broderick's friends held a short and earnest conversation, and retired. Mr. Brooks did the same with Mr. Terry, and moved to one side. An official expression notified the combatants to take their respective positions. The distance was marked white, and appeared to an observer murderously close. In fact, more than one man present uttered the ejaculation that it was downright murder to allow men to shoot at each other at so short a distance. The principals, however, took their positions. Mr. Broderick divested himself first of a dark brown paletot, and cast his eye along the ground separating him from Mr. Terry.

At this moment I took pains to closely scan the countenances of both combatants. Mr. Terry's lips were compressed, his countenance darkly sallow, and his whole appearance betrayed that of a man without fear, as well as without religious constraint. Wan and attenuated, he stood a stolid monument on the field of strife. Mr. Broderick could not have been distinguished by the stranger as a principal. With his hands folded behind him he held earnest conversation with Mr. Haskell. He would occasionally turn, scan the crowd and rest his eye upon some recognized countenance. The muscles of his face were strong, and his visage unrelaxed in every particular. His lips, when not conversing, were compressed, and his whole bearing was that of a man who was about to meet a great issue, and who was firmly prepared for it.

Having digressed somewhat, in order to give my readers a full account of what occurred, I return to the principals and their seconds at the point where I left them.

Messrs. Broderick and Terry, being divested of their overcoats, were told by Mr. Benham to take their positions. The seconds then arranged about the weapons—how this was done is unknown to others—and Mr. Benham, taking a pistol, proceeded to Judge Terry, and placed it in his hand. The latter took the pistol in his left hand, passed it behind him, connected both hands, stood for a moment in that position, and

then rested his weapon on his left hand in front. Mr. Broderick, on being handed his pistol, anxiously examined it, and at intervals measured with his eye the ground between himself and his adversary. He seemed to take much pains in examining the pistol. At length he braced himself up and took his position. A frock coat which he wore seemed to trouble him somewhat, and he endeavored more than once to bring the front tails closer together. Had a pin been offered him at this moment, I believe he would have used it. Terry, in the meantime, with the barrel of his weapon resting on his left arm, held his eyes fixed on the figure of his antagonist. Before the word was given, Mr. Benham approached Senator Broderick, who had handed his watch, money, etc., to Mr. McKibben, and felt his clothes, and examined with his hands the body of the principal. A nod of satisfaction showed that he had found nothing concealed beneath his vestments. Mr. McKibben then went towards Judge Terry. The latter handed to his second, Mr. Benham, a watch, pocket articles and a quantity of money. Mr. Benham received the watch, but the money, with a flourish, he scattered over the ground. Mr. McKibben then examined the person of Judge Terry, expressed himself satisfied, and took position to the right of Mr. Broderick, and immediately opposite Mr. Colton. The seconds of Judge Terry occupied similar positions, with Mr. Benham on a line with Mr. McKibben, and Mr. Hayes on a line with Mr. Colton—all the parties forming a sexangle.

The parties thus placed were left for about five seconds; Mr. Broderick, in the meantime, as before stated, examining his weapon. Mr. Benham produced a number of papers and read from one the conditions of the duel. The word fell to Mr. Colton, Broderick's second. He advised the parties, with an example, how he should call it. He said: "Gentlemen, I will give the word as follows: Gentlemen, are you ready? When both have answered ready, I will say, fire, one, two, with a pause between each word." Mr. Benham, for the benefit of his principal, repeated the word. The arrangement seemed to be perfectly understood, and all parties assumed their positions; Mr. McKibben uncovering his head.

We have before said that Mr. Broderick seemed to know the importance of the issue, and seemed nerved to meet it. Up to the time the pistol was handed him he appeared the cooler and more collected of the two. But after examining the pistol he seemed to become uneasy. He betrayed nothing like lack of courage; but in measuring the stock of his pistol with the conformation of his hand, he presented to the observer an unsatisfied appearance. This was shown by more than one movement. His right leg—the fore one—sank below a bracing attitude, seeming as if he was fighting on downhill ground. It was the general expression of all within my hearing that Mr. Broderick's position, either from his constitutional nervousness, or from a want of confidence in the equality of the chances between the two combatants, was unfavorable to his success. All agreed that his personal bravery was patent. There was no weakening; but there was an anxious solicitude in his deportment that placed him at great disadvantage.

At precisely fifteen minutes to seven o'clock, as the sun was endeavoring to force his smiling beams through a succession of clouds that were passing south over the head of Mr. Broderick—the solemn moment on which all were satisfied a life depended—Mr. Benham gave a rapid glance to the sky, detected something to the disadvantage of his principal, and approached the latter, who wore a large, rather stiff-brimmed wool hat, and had drawn the front of it over his eyes. After Judge Terry's second had caught his eye, the front was turned up. Mr. Colton then, in a clear and distinct voice, called out the word. He made considerable pause between each announcement—a pause that can be compared to the time elapsing between the strokes of the cathedral clock bell, perhaps not so great.

When Mr. Colton asked, "Gentlemen are you ready?" Mr. Terry instantly replied

'Ready,'' without moving or relaxing a muscle. Mr. Broderick, however, as I said before, spent several seconds in examining the stock of his pistol, which did not seem to fit his hand. When, at length, he answered "Ready," he did so with a gesture, nodding his head and inclining his body towards Mr. Colton. Between the words "Fire !—one! two," both parties shot. Mr. Broderick fired first, and at about the last enunciation required to convey the word "one." Mr. Terry shot in a space of time afterwards which it would require in music for a quaver. The word "two" was scarcely started upon when the Judge fired. Mr. Broderick's shot was spent in the ground some four or five yards in advance of him. Judge Terry's took effect in Broderick's right breast, above the nipple.

Immediately upon receiving his antagonist's fire, Mr. Broderick raised his right arm still grasping the pistol. It was the impression that he had been shot in the shoulder. His arm was contracted, and he made a spasmodic effort to brace himself up. The leaden messenger, however, had gone to a more sensitive and vital spot. After endeavoring to summon the will to resist the pressure that was bearing him down, the head dropped in a recumbent position over the right shoulder, the knees bent outwardly, and at length, gently and calmly as a child retiring to rest, he eased to the earth, pressing his right breast with the hand still holding the pistol, and lying on his left side.

Judge Terry, in the meantime, maintained his position, keeping his eye constantly in the direction of the fallen man. In a few moments he was told that his antagonist could not rise, and he thereupon left the field. It has been said he made a loud remark when Broderick fell. He did not. Whatever he said to his second was not heard by the spectators.

I now close this extended and detailed account. I give it as a statement of facts, in the order in which I saw them, hoping that I might thereby correct erroneous impressions, and give all an opportunity of judging, from the events that occurred.

CHAPTER XXII.

Elisha W. McKinstry, D. M. Delmas and Others—Judge McKinstry's Long Period on the Supreme Bench—An Estimate of Him as a Judge, By Henry H. Reid.—The Splendid Career of Mr. Delmas—Notices of William J. Shaw, Henry H. Reid, Lansing B. Mizner, George R. B. Hayes, William M. Pierson, T. C. Van Ness, Judge James V. Coffey, Joseph W. Winans, Hon. William M. Stewart, T. E. K. Cormac, August Comte, Joseph M. Nougues, John Garber, Barry I. Thornton, Thomas B. Bishop, John C. Hall, Arthur Rodgers and Eugene N. Denprey—A Story of Horace W. Carpentier.

It is a commanding name that crowns this final chapter, and there are judicious observers who will say it is a case of putting the first last. Be it so or not, it is only chance that has reserved ultimate place to so eminent a man, and to one or two of those whose names will follow close upon his. Not surer in his grasp of legal principles than Field, or Baldwin, or Murray, (the Bar probably places him next to these) he yet fills a larger place in our judicial history. His period on the Supreme bench has been continuous since January, 1874, and has now about doubled that of any other man. His has been the voice of the Court in the adjudication of the greatest causes, those which have involved the largest pecuniary interests, and those which have enlisted the passions of the people, notable among which are the local option case of 1874, the Kearney habeas corpus of 1878, and the water rights case of 1886. So, by reason of length of service and enduring work, ELISHA W. MCKINSTRY has made a name that will probably live longest of all thus far inscribed on the shining roll of our Judiciary.

This gentleman was a District Judge in 1852! It was in the district, under our first system, comprising Solano and contiguous counties. Before that, being a California pioneer, he was in our first legislature, representing Sacramento in the lower branch, P. B. Cornwall being one of his eight colleagues. By the next succeeding legislature he was elected Adjutant General at the age of 24 years, Thomas B. Van Buren nominating him in the Senate and Jesse D. Carr in the Assembly. He left this office to go on the bench. At the end of his term as District Judge he was re-elected, in September, 1858. He went to Washoe in the flush times, and in 1864, he and John R. McConnell and W. C. Wallace (not W. T.) were the Democratic nominees for Supreme Justices of the State of Nevada, all being defeated. Returning to California, and locating at San Francisco, he was, in October, 1867, elected by the Democracy, County Judge for a term of four years from January 1,

1868. In October, 1869, he was elected Judge of the Twelfth District Court, as an Independent candidate, over the regular Democratic nominee, R. R. Provines. In 1873, again as an Independent candidate, he was elected a Justice of the Supreme Court, over Samuel B. McKee, Democrat, and Samuel H. Dwinelle, Republican. On September 3, 1879, under the new constitution, which, among many other things, re-organized the Supreme Court, he was re-elected a Justice of that tribunal, and under the classification by lot, which the constitution directed, he and Hon. J. D. Thornton drew the longest terms, eleven years each.

Judge McKinstry was born in Detroit, Michigan, and is, in 1888, sixty-two years of age. The following estimate of him as a judge, I drew from a lawyer admirably qualified to speak on the subject, Mr. Henry H. Reid of San Francisco:

I consider Judge McKinstry one of the best judges that have sat in our Supreme Court—and I do not forget Field or Baldwin in saying this. He possesses a wide and exact knowledge of the law—its history and its great principles. In addition to his familiarity with legal rules and precedents, he has the tact and instincts of the scholar. Hence, the aptness of his illustrations, drawn from his store of historical information and literary acquirement. In the consideration of a case presenting important and difficult questions of law, enveloped in a mass of complicated and confused statements of facts, he brings to his task a mind capable of grasping it as a whole, of resolving it into its essential elements, of stating the real questions presented and demanding to be decided, and then applying the true legal principles to their elucidation. He has a keen perception of the ludicrous,—loves a good joke even on the bench, if it be timely and apt. At the same time he appreciates the necessity for preserving diguity and decorum in judicial proceedings. Satire is a weapon of which he is master. Instance, his opinion in Houghton vs. Austin, 47 Cal., (pp. 669-71) denying the petition for rehearing filed by Creed Haymond. (Read in the light of Haymond's subsequent history, the opinion becomes doubly interesting). His statement of the law and his reasoning throughout, in *Ex Parte* Kearney, which excited much angry comment at the time (even from some who ought to have known better, *e. g.* Delos Lake) I regard as wholly admirable.

In *Ex Parte* Wall, 48 Cal., 279, the great local option case of 1874, is a most able exposition of the law, as to when a legislative enactment shall be deemed void, as attempting to delegate legislative power, or as valid because merely postponing the time of its taking effect, that is, to the happening of a contemplated event. In the one case, the legislature has decided upon the expediency of the law for itself; in the other, it attempts to delegate the power and shift the responsibility to others.

In the People vs. Hibernia Savings and Loan Society, his opinion is a model of clear statement, and his conclusions are as unanswerable as a mathematical demonstration.

Of his opinion in the great case of Lux vs. Haggin, the questions involved in it being of the most vital importance, and argued by some of the ablest lawyers of the State, two or three times over it is praise enough of its learning and the powers of perspicuous statement and lucid exposition which it displays, to say that it is worthy of a place beside Judge Baldwin's famous opinion in Hart vs. Burnett, 15 Cal., 607. In the petition for rehearing filed by Garber, Thornton and Bishop, in Lux vs. Haggin, (after the second decision of the Court being delivered by McKinstry), it is said:

"The elaborate and exhaustive opinion of Mr. Justice McKinstry, concurred in by the majority of the court, whether it shall stand as the final judgment in the cause or not, certainly constitutes a contribution of inestimable value to the discussion of the important questions involved in the controversy. It is the most elaborate presentation of the arguments in favor of the prevalence of the common law doctrine of riparian rights in California which has yet been made, or which will probably ever be made.'

Senator Matt. H. Carpenter, who stood in the front rank of lawyers of national reputation, and who knew whereof he spake, said of the judicial opinions of Chief Justice Gibson, of Pennsylvania, that to read and thoroughly understand them, would make of the student a profound lawyer. So, we may say, that he who reads and masters the opinions of Justice McKinstry, will acquire a knowledge of the law of the State of California as it exists to-day, and of the history of its growth and development, which is now unfortunately too seldom possessed by the members of our bar.

I turn from a great magistrate to a great advocate.

D. M. DELMAS was born in France, of French parents, April 14, 1844. It is pleasant to state his nativity and ancestry, because our old ally has been very chary in her contributions to the American bar, contrasting strikingly, in this respect, with her neighbor across the channel. In Mr. Delmas, born in the land of Aguesseau, is presented a revival of that great advocate. He is a giant in every department of legal practice. His father, Antoine Delmas, came to California in 1849, settling in San Jose, where he still lives. The son, who had arrived in the latter part of the year 1854, entered, four years later, Santa Clara College, an institution which is among the best treasures of the State, and in which many of our most honored citizens have been educated. Mr. Delmas graduated in 1863, receiving the degree of Master of Arts, with the highest honors of the college. He graduated from the Law Department of Yale College in 1865, and in September of that year was admitted to the bar of the Supreme Court of Connecticut, returning shortly thereafter to San Jose. In February, 1866, he was admitted to the Supreme Court bar in this State, and, in May of that year, opened an office in San Jose with Hon. B. D. Murphy, who has since been Mayor of San Jose and State Senator from Santa Clara county. The partnership, though the realization of a boyhood dream, formed during the college life of these two gentlemen while in Santa Clara, was little more than a nominal association. Mr. Murphy, being possessed of an independent fortune, never entered upon the discharge of the active duties of a lawyer. Of these early days at the bar Mr. Delmas thus expressed himself to a friend some years ago:

"When I commenced the practice of the law my path was by no means strewn with roses. From my father I had received a pretty fair education, and I determined that the tax upon him should cease when I entered upon the practice of my profession. I left home, in May, 1866, with just two double eagles in my purse, and in my heart the determination that thenceforth I would be dependent upon none but my own resources. That resolution I have adhered to, but it would be idle to deny that I did so at the cost of many hours and days of suffering. Too young, inexperienced and unknown to command a retainer in important cases; too proud (a foolish pride, perhaps) to commence with the

gratuitous defense of paltry criminals, I was soon brought to the end of my scanty store of money and to the melancholy contemplation of a bottom of a purse unreplenished by the fruit of my labors. To keep from actual want, I taught school for six months in the winter of 1866. In 1867, a committee of citizens invited me to deliver the address on the Fourth of July. With this invitation came the dawn of better days. The address was delivered. It was warmly applauded. It secured me, a few days afterwards, the nomination for the office of District Attorney at the hands of the Democratic County Convention. I was elected. The office, in those days, was a very lucrative one; besides, it brought me in contact, in one way or another, with nearly every man of mark in the county. From that time on, I certainly have had no right to complain of the frowns of our great mistress, the Law."

No lawyer in this State possesses broader knowledge or is a greater master of his profession than he. As an advocate he is the admiration of the bar itself. His remarkably clear vision, his subtle intellect, his piercing judgment, his power of statement, have been applauded by the veterans of the profession. Before a jury he is argumentative or pathetic, as the occasion demands. Unlike some other advocates of brilliant parts, he keeps in mind the fact that "the jury are sworn to make a *true* deliverance, and to address their passions alone is equivalent to asking them to violate their oaths." Mr. Delmas is very painstaking in the preparation of causes and very skillful in their management—assiduous, tenacious. He has great capacity for applying himself to his subject. In the matter of evidence, his method is noticeable. His system is to make himself, before the case is answered "ready," accurately, mathematically if possible, master of all the facts of the controversy, and, especially, of those which are favorable to his adversary. Upon the trial, he takes full notes of everything that is said or done. It is an article of faith with him to state evidence to the jury with absolute accuracy; and he almost invariably prefaces this argument with a courteous invitation to his adversary not to hesitate to interrupt and correct him in case he should inadvertently fall into an error. It is certainly noteworthy, that, although English is an acquired tongue, and he was a perfect stranger to it for the first ten years of his life, he speaks it better than any other lawyer in the State. Judge Archer of San Jose, having said to me that the eloquent Edgerton, whenever he had an opportunity to hear Mr. Delmas argue a case, would always embrace it, just to listen to this great advocate's elegant and exact diction, I afterwards received conformation of this statement from Mr. Edgerton in person.

Mr. Delmas has long been a regent of the University of California. He was President of the Day on the occasion of the inauguration of Hon. Horace Davis as President of the University, March 23, 1888, and delivered the address of welcome.

Mr. Delmas is a son-in-law of Col. Joseph P. Hoge. He removed to San Francisco in 1882, taking his large law library with him, the most

valuable in the State, excepting two or three already possessed in that city.

In addition to extended professional fame, an ample fortune has rewarded his industrious and honorable life. He owns among other possessions a fine residence in the town of Santa Clara, surrounded with attractive grounds, and a noble building in San Jose named Paul Block in honor of one of his sons.

I am about to rest from my work. Others would have done it better, but they, too, must have left it incomplete. The theme is expansive. BENNETT and CASSERLY, COOK and YALE, CADWALADER and MCDOUGALL, COFFROTH and LATHAM, SANDERSON and MCCONNELL, what a chain of brilliants their names present! They are all gone, while HOFFMAN and CURREY, and WALLACE are still achieving! Every name tells of a history that has invested our bar annals with exceeding interest.

It is a lengthening roll. JOSEPH W. WINANS! The death of this leader on March 31, 1887, closed an unbroken career, at the bar of this State, of thirty-seven years. Coming to California in 1849, from New York City, (where he was born July 18, 1820) he established himself at Sacramento. There his plastic hand did much to shape the local government in its various departments. In association with John G. Hyer (Winans & Hyer) he held the principal law practice which centered at the capital before the great flood. Removing to San Francisco in 1862, he formed the law partnership with D. P. Belknap which continued uninterruptedly to his death.

His life, remarkable for usefulness and honor, and eminently successful from all points of view, was full of profit to others, its deep, broad and fertilizing current rolling like some "exulting and abounding river, making its waves a blessing as they flow."

In him the judicious patron and critic of art, and the well-informed man of letters, genial in his companionship, and delightful in his conversation, stood forth commandingly; yet were they comprehended in the larger stature of the lawyer, who loved his profession first and held it as a great, continuous trust. The soaring soul was controlled by a purpose true.

There is WILLIAM J. SHAW, a most interesting man, with a most interesting history. He has been so long in voluntary retirement that his very name is unknown, perhaps, to more than a few of the army of young men who have passed from the Hastings Law College to the practice of the profession which Mr. Shaw so signally adorned. An allusion of mine to him as belonging to the bar of California drew from him the statement that "he had not taken a fee, nor offered to, in the last twenty-six or seven years." This was in October, 1886. "It is only, perhaps," he continued, "on the doctrine of *semel abbas, semper abbas*, that I may be classed as a member of the bar of California."

Mr. Shaw is a California pioneer, a bachelor, and has been in the enjoyment of a large fortune as long as any one can remember.

He is a square man, sensible and charitable, and well thought of by all who know him. He was a Democratic State Senator from San Francisco, away back in 1856 and 1857, when they had annual sessions and two-year terms; and again in the biennial sessions of 1867–'68 and 1869–'70. In the legislature he always had important chairmanships, was remarkably industrious, and his work was wise.

He voted for Gwin and Broderick when the two rivals were elected United States Senators in 1857. A few days after that unlooked for consummation, the senate was compelled to adjourn for a day or two on account of a majority of its members repairing to San Francisco to attend receptions of the elect, but Mr. Shaw was one of those who remained at his post. He was author of the resolutions passed at the great anti-bulkhead mass meeting in San Francisco, in 1860.

Mr. Shaw is a deep thinker, possesses broad culture and has traveled extensively abroad. Now and then he used to give his reflections to the people in a speech or lecture. His latest public appearance, I believe, was as the Orator of the Day, at the annual celebration of the Pioneers, in 1876.

There is HENRY H. REID, born at Babylon, N. Y., March 14, 1845, a farmer's son, of Scotch-English lineage. He graduated from Columbia College Law School in 1868. After a short practice in New York City, he removed, in the fall of 1871, to Norfolk, Virginia, where he soon won a firm place in the esteem of the people and secured a valuable clientage. He quickly stepped into the front rank of the Norfolk bar, while, apart from the profession, his scholarship and address made him the soul of literary and social circles. It was in 1873 that he commenced practice at the San Francisco bar, and he has since followed it there continuously.

Mr. Reid has the impulses and intuition of the true lawyer. His perception is fine, his grasp of mind broad and firm, and his analysis thorough. An unassuming gentleman, he yet has great professional pride, which is closely related to his high sense of personal honor and his superior legal attainments. It is the pride of the master. His examination of a difficult law question leads inevitably to its elucidation. His memory is true, he has remarkable power of statement and illustration, and rare perspicacity; is persistent in inquiry, and confused heaps of facts unfold into system and harmony before his searching and patient survey. Albeit his temperament is one of reserve, his breadth of knowledge and his poise of judgment have challenged the attention of the bench and of the profession generally.

A mere lawyer is only half a man, says high authority. Mr. Reid is not a lawyer merely. His mind has many sides. He has a rich fund of general knowledge. Since early boyhood he has been a great reader and close

student. His conversation shows his familiarity with the best writers of every era, revealing, also, the well-informed man—wise in thought, full of happy suggestion, and of ever-present wit.

"Reading maketh a full man," said Bacon; "conference a ready man, and writing an exact man. Histories make men wise; poets, witty; the mathematics, subtle; natural philosophy, deep; morals, grave; logic and rhetoric, able to contend." In Mr. Reid these effects all stand out prominently, yet he never airs his learning. To the mediocre and commonplace he is indulgent. He will even let a driveler button-hole him, and in learned company where he is *primus inter pares*, he wears with exceptional modesty the honors which come to him at "the feast of reason and the flow of soul."

Mr. Reid indulged his literary taste to a limited extent in New York and Norfolk, contributing to the columns of leading journals; but in California, while still pursuing a wide range of reading, he has seldom turned his pen to themes other than the law. However in my book, "California Anthology," [1880,] are selections from his writings here, one being a tribute to the versatile genius of Oliver Wendell Holmes.

In person Mr. Reid is of large and compact build, and of striking personal appearance. As his mental stature is imposing, so he is a strong man physically, and while of gentle disposition and temperate habits, is full of grit and stands by his convictions.

Mr. Reid is a man of family, and lives in the City of Alameda. I referred to this beautiful city as being a town, in the notice of ex-Judge Waymire. It developed into a city after I commenced the writing of these chapters.

There is JAMES V. COFFEY, the admirable JUDGE, who comprehends within himself nearly all the qualities that go to make up that solemn yet beautiful character. Having impressed his mind on the legislation of the State, while the head of the San Francisco delegation in the Assembly, he has since so crowned the bench with honor as to establish this as his peculiar station. "Friend, go up higher!" is the general voice. I ask the reader to look back to page 196, and read a brief quotation from remarks on Judge Shafter by Rev. Mr. Stebbins. That the description fits Judge Coffey, too, especially the last fifteen words, can be testified to by a great cloud of witnesses. And this Judge seems to learn by heart every one with whom he is called to deal, possessing so deep an insight into human character that he might be called the Professor Fowler of the bench, although he does not need such close contact as the latter exacts with his human subjects.

Nearly all of Judge Coffey's period on the bench has been passed in the Probate department of the Superior Court of San Francisco. A large volume of his probate decisions has just been published, reported by Timothy J. Lyons and Edmund Tauszky. The Judge is a bachelor, a native of New York City, came to California in 1852, and is now 41 years of age.

GEORGE R. B. HAYES, whose masterly conduct of the plaintiff's case in Colton vs. Stanford, et al., 1884–85, won the admiration of the entire bar, is a native of Belfast, Ireland, and was born May 22, 1847. He was educated at Chichester Academy in that city, and came to California in August 1863; admitted to practice in our Supreme Court April 5, 1869; and has been engaged in a general practice ever since, excepting a period of three years during which he was absent from the State. He was a member of the Assembly from San Francisco at the session of 1869–'70, when he was a member of the judiciary committee and chairman of the committee on military affairs. He was one of the Fifteen Freeholders elected on November 2, 1886, and who framed a new charter for San Francisco, which instrument was rejected at the polls. For some years past he has been one of the most active and prosperous practitioners at the San Francisco bar. He has long been associated in business with John A. Stanly, once County Judge of San Francisco, and Thos. B. Stoney, once County Judge of Napa. He qualified himself for the bar in the law office of his uncle, the late William Hayes.

The transition seems natural, from Mr. Hayes to his bosom friend, Mr. WILLIAM M. PIERSON. When, a good while ago now, the attorneys of all the San Francisco banks united in a written opinion that the Bank Commissioners of the State were not vested with power to examine such banks as came strictly in the commercial class, Mr. Pierson led them into a discovery of their error. See the case of Wells, Fargo & Co. vs. E. J. Coleman, et. al. 53 Cal., 416, in which Mr. Pierson appeared for the State in the place and at the instance of the Attorney-General. Mr. Pierson was born at Cincinnati, Ohio, on February 3, 1842, and is a lineal descendant of Aneke Jans, the Trinity church [N. Y.] grantor. He arrived in California on Independence Day, 1852, studied law in the offices of Nathaniel Bennett, Annis Merrill and Henry H. Haight; was admitted to practice in April, 1862, after examination, and at the age of twenty years, under a special act of the legislature authorizing it, and practiced in partnership with Mr. Haight until the latter became Governor of the State in December, 1867. He was a State Senator from San Francisco, 1875–1878. He introduced a bill limiting the grounds of divorce to adultery only, which was not passed. Another bill of his to compel newspaper proprietors to retract false and defamatory articles, passed the Senate by 25 to 10, on March 13, 1876, Donovan, Edgerton, Haymond, Hilborn, Laine, Rogers and Shirley being among those voting aye, and Bartlett, Howe and Roach among the noes. This bill was indefinitely postponed in the Assembly, on the recommendation of the judiciary committee, John R. McConnell, chairman. Mr. Pierson has been very successful in the practice and enjoys a considerable fortune, his own accumulation.

JOHN GARBER, HARRY I. THORNTON, and THOMAS B. BISHOP, born respectively in Virginia, Alabama, and Massachusetts, will have large attention from me if I ever come back to my present theme. These gentlemen have been associated together in law practice ever since A. D. 1880. They are all of one political faith, and their political foeman, John Currey, who has been Chief Justice of our Supreme Court, regards this law firm as the strongest in the State. My notes show that Judge Currey so expressed himself to me on January 16, 1883. Well, the firm certainly has not lost strength since then.

CAPTAIN T. E. K. CORMAC of San Francisco, is another whose rare good fortune in practice has known no retiring ebb since its first flow in 1880. The Captain was born in the British Isles, and is the attorney for the British Consulate in San Francisco. He was a cadet in the Naval Academy near Trieste, and afterwards served for some years in the Austro-Hungarian army, as a lieutenant. He was admitted to the bar in Boston, Massachusetts, and practiced there a few years before removing to California. For four years —1883–1887—he was one of the attorneys of the Public Administrator of San Francisco, Hon. P. A. Roach. He owns a fine home in Sausalito, and valuable timber lands in Mendocino County. The Captain is a bachelor, a cultured, traveled man, and as judicious a critic and as liberal a patron of art as was the late Joseph W. Winans. His age is 44 years.

MR. JOHN C. HALL and MR. ARTHUR RODGERS compose a San Francisco law firm that has had an exceptionally large and lucrative practice ever since it was formed. Mr. Rodgers was the first graduate of the University of California, to become a regent of that flourishing institution of learning. He was legal adviser of the late Governor Washington Bartlett, and is one of the executors of the latter's will. He was born in Tennessee in August, 1848, and came to California in 1864.

Mr. Hall was born in Wisconsin, Feb. 2, 1847, was admitted to the bar of the Supreme Court of Minnesota, in March, 1867, and came to California in October, 1871. Before settling in San Francisco, he passed a year in Plumas County. I have this incident of his brief practice there: It occurred on a trial in a Justice's Court in Indian Valley, Plumas County, before a jury composed mainly of Germans, of little education. The opposing counsel had thought proper to air his learning and had treated his illiterate hearers to much Latin. Mr. Hall, replying, rolled off sentence after sentence in German, using that tongue exclusively. His adversary stopped him and appealed to the statute which prescribed that court proceedings should be conducted in English. Mr. Hall changed his speech to English, with the excuse that the other attorney had seen fit to speak in a dead tongue, and should not object to being answered in a live one. His object was attained —the jury took the side of the tongue they understood.

Some of the lawyers who in boyhood, before 1860, attended the Sacramento High School, will also furnish most interesting subjects for notice in the by-and-by. A few are named on page 93. WILLIAM S. WOOD is of this number. He was a strong and eloquent debater even then and his success in life was generally predicted. He acquired a fortune at the bar in Virginia City, Nevada, and has had a large practice in San Francisco since 1879.

AUGUSTE COMTE, after representing Sacramento in the Assembly and in the Senate, turned away from the law and followed merchandizing for several years. But he long ago returned to the profession, and ever since has had a large practice. He is a graduate of Harvard.

JOSEPH M. NOUGUES, who was City Attorney of San Francisco in 1870–71, has since continuously maintained a lucrative law business; in addition to which, he has of late years been occupied in the development of a gold mine owned by him in El Dorado County. This mine was, from 1851 to 1855, the joint property of Mr. Nougues' father and brother, and Col. E. D. Baker. Mr. Nougues himself became the owner and resumed its development after work had been suspended for some thirty years. It is yielding largely of the precious metal.

Mr. T. C. VAN NESS, who has taken a very prominent place at our bar, and who leads all others in the line of insurance cases, inherited like McAllister, a name distinguished in bar annals. His father was an early time Mayor of San Francisco, and his grandfather was Governor and Chief Justice of Vermont, and U. S. Minister to Spain. Mr. Van Ness himself was born in New Orleans, La., in 1847, came to San Francisco in 1855, (his father having arrived in 1850), and is a graduate of the Santa Clara College. His course of reading for the bar was pursued privately at home, as outlined for him by Judge James D. Thornton. He has practiced continuously since his admission to the bar of the Supreme Court, in July, 1879. While he has had peculiar and unbroken success in insurance cases, his practice is general, except that he avoids criminal business. A sister of Mr. Van Ness is the wife of Hon. Frank McCoppin.

EUGENE N. DEUPREY, who has long been an active practitioner at the San Francisco bar and who has won great reputation in the conduct of criminal cases and contests in probate, displays equal ability in all other branches of practice. Few, if any of our bar leaders possess a more vigorous intellect than this gentleman, and we have no more effective speaker, either in Court or before the masses. Mr. Deuprey constantly exhibits an exceptional delight in the profession, especially in the trial of hard-fought causes. He is one of the youngest of our bar leaders, having been born in Louisiana in 1850.

LANSING B. MIZNER, of Benicia, is, I believe, the oldest member of the bar in the State north of San Francisco, and has been in general practice since 1850. On the rejection of the Mexican grant to the Soscol rancho, the people of Benicia were left without title to their lands and houses. Mr. Mizner at once set about correcting the trouble and prepared a bill which passed Congress, donating all the land in the town to the parties in possession. As State Senator he also secured the necessary legislation to enforce the national laws, and took several cases which arose on the construction of those laws to the Supreme Court, and was successful in all of them. He has been connected with all the more important litigation arising in Solano and Contra Costa counties for twenty years past. In 1866 he was admitted to the bar of the United States Supreme Court.

Mr. Mizner was born in Illinois, Dec. 5, 1825; was educated at Shurtleff College at Alton, in that State; passed four years, 1839–1843, in New Granada, being attached to the American legation; and served through the Mexican war as a soldier in the American army. He is a California pioneer. Standing over six feet high, of large, sinewy and symmetrical frame, of striking countenance and looking a decade younger than his real years, he is personally one of the most imposing figures at the California bar. His continuous success and the high standing he has maintained in one community for a generation, testify amply to his great strength and ability as a lawyer, and his excellence as a man. He has a large fortune, of which a good part lies in San Francisco, to which city he repairs every few days.

HON. WILLIAM M. STEWART, United States Senator from the State of Nevada, was, during two considerable and widely separated periods, a prominent member of the California bar—in the early years, in the northern mines, and latterly in San Francisco. He has displayed remarkable and unbroken vigor of both body and mind, through a long and active career. He was born in New York in 1827, graduated from Yale College in 1849, and in that year came to California. Reserving him, also, for future notice, I will only tell this story of him now, which I had many years ago from his brother-in-law, Hon. W. W. Foote:

Dr. Samuel Merritt, of Oakland, having law business in Virginia City, went there and retained Mr. Stewart. He was stating his case, when he was asked if he had a witness to some alleged fact. He answered "Yes." Proceeding further, he was again asked if he had a witness to prove something else. Saying yes, he resumed, and making another statement, Mr. Stewart a third time inquired "Have you got a witness to prove that?" He answered: "No." "*Then go right out and get one!*" said the lawyer.

I want to end with another story, and the following looks up smiling from a mass of like material on my table. They tell it on Horace W.

Carpentier, one of our oldest and richest lawyers. To appreciate it, one must know that Mr. Carpentier is a large landowner and has been a party to many suits involving the title to extensive tracts of territory.

A settler in a southern county of California who obtained a government patent, said he was not yet satisfied, but would *perfect his title.* Coming to San Francisco he called on Mr. Carpentier and offered him $100 for his deed of the same land. "I don't own it," said Carpentier, "I have no land in that county." "But you *may* have a claim to it some day," said the settler, "and I am willing to pay you $100 for your bargain and sale deed now." Carpentier took the money and executed the desired conveyance. "Thank you," said the settler, "now I *am* safe."

Another? Very well.

Richard H. Daly, of Mariposa, (he had been an alcalde, and they called him Judge), was an eccentric and erratic but most interesting character—one of those anomalous souls whose amusing aptitudes enliven the annals of our early bar. He once defended a man charged with stealing a horse, and he aimed at proving an alibi. A certain man, who was not above suspicion, testified strongly against the prisoner. Daly determined to "break him down," if possible. On cross-examining the witness, he asked:

You are a vaquero? Answer—Yes.

A native Californian? Yes.

Very fond of riding mustangs? Yes.

Sleep in the saddle? Yes.

Throw the lasso? Yes.

Wear spurs? Yes.

Smoke cigarettes? Yes.

Blow the smoke through your nose? Yes.

Stand aside, said Daly; *you'd* steal a horse anytime.

And the witness stood aside.

Of course Judge Daly cleared his man. Such stories are not told unless they speak also of happy results.

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