U. S. Supreme Court

PART I.

Hon. Joseph Cox, of Cincinnati.

The New York State Bar Association, in connection with the American Bar Association, have made arrangements to celebrate on Tuesday, February 4, 1890, in Metropolitan Opera House, New York, the one hundredth anniversary of the organization of the Supreme Court of the United States.

A banquet will be held in the evening. The addresses on this occasion will doubtless add much to our knowledge of the early history of the Supreme Court, and bring forth many interesting facts connected with its organization and the many prominent men who took part as delegates, judges and advocates. The origin of that Court, its growth and progress, and the many distinguished men who from time to time have been connected with it in various capacities, and the many important questions which have been adjudicated by it, would form the grandest theme for the pen of the historian of the Republic.

The field is a broad one and the material abundant for the most voluminous history, but a small margin of it can be gone over within the limits of an evening's essay. The object of this paper is simply to give a brief resume of its origin and sketches of some of the distinguished men who have adorned it in the last century.

The old *Article of Confederation* between the colonies had no institution of this kind which would sit in supreme judgment over the laws enacted by Congress, or settle the conflicting rights between States, or citizens of one State with those of another, and enforce them by adequate remedies; and this was felt as a great want during the period of its existence, and hence when, after the Revolution a new Republic was to be formed, the wisest men of that convention devised a government with a legislature to enact laws, a court to construe them, and an executive to enforce.

As to the judicial, they provide, Article 3, Section 1: The judicial powers of the United States shall be vested in *one Supreme* Court, and in such inferior courts as the congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2 extended the judicial power to all cases in law and equity, arising under this constitution, the laws of the United States, and all treaties made, or which shall be made, under this authority; to all cases affecting ambassadors and other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to all controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the *same* State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects. In all cases affecting ambassadors, other public ministers or consuls, and those to which a State shall be a party, the Supreme Court shall have original jurisdiction: in all cases mentioned, appellate jurisdiction, both as to law and facts, with such exceptions and under such regulations as congress shall make. The trial of crimes (except in cases of impeachment) to be by jury, and to be held in the State where committed, but when not committed within a State, in *such place* as congress may by law direct.

The plan of judicial power was reported to the convention by a committee of five of the most able lawyers of that body—John Rutledge, of South Carolina; Edmund Randolph, of Virginia; Nathaniel Gorham, of Massachusetts; Oliver Ellsworth, of Connecticut; and James Wilson, of Pennsylvania, and it was adopted as part of the constitution. To carry this constitutional provision into effect, the Senate of the Congress under the constitution, on the 7th of April, 1789, appointed Messrs. Ellsworth, Patterson, Maclay, Strong, Lee, Bassett, Few and Wingate a committee "to bring in a bill for organizing the Judiciary of the United States," and on the 12th of June, 1789, Mr. Lee, on behalf of the committee, reported a bill which was read a first time, and Monday, June 27, assigned for a second reading. The consideration of the bill on its second reading occupied the Senate daily until and including the 3d of July, and on the 6th it was ordered to a third reading, on which the discussion lasted six days, and finally, on the 13th, after various amendments, it passed that body by yeas 14, and nays 6.

In the House the bill had its first and second reading July 20. After various discussions for a number of days, and continuous from time to

time, with various amendments, it was passed by the House on the 17th of September, 1789. The bill as amended was returned to the Senate, sundry of them being disagreed to, and subsequently the House acceded, and the bill became a law. The act provided for six Judges—a Chief Justice and five associates—the salary of the Chief Justice at $4,000 per annum, and that of the associates at $3,500.

This act was approved by President Washington on the 24th of September, 1789, and on the same day he sent to the Senate the name of John Jay, of New York, for Chief Justice, and for associates, John Rutledge, of South Carolina; William Cushing, of Massachusetts; Robert H. Harrison, of Maryland; James Wilson, of Pennsylvania, and John Blair, of Virginia, who were unanimously confirmed. Mr. Harrison resigned, and James Iredell, of North Carolina, was appointed in his place.

Edmund Randolph, of Virginia, was appointed Attorney-General.

The first session of the Court was held in the city of New York, in February, 1790; present, Chief Justice Jay, and Justices Cushing, Wilson and Blair.

Judge Rutledge did not take his seat, but resigned the next year, and Thomas Johnston, of Maryland, was appointed November 9, 1791, in his place.

Very little business was transacted at the first term, except the adoption of rules of the Court for process and admission of attorneys to the bar. The first Chief Justice, John Jay, was one of, if not the most distinguished lawyer and judge of his time. At the time of his appointment, he was not quite forty-four years old, and had practiced law, filled positions on the bench and high public offices for twenty two years. An important event in his life cannot be too strongly recommended to all young lawyers. At the beginning of his professional career, he was an active member of a Moot Club formed by the young lawyers of New York, at which legal questions were discussed with all the interest of real cases. From that club emanated such lawyers as Jay, Chancellor Livingston, Judge Duane, Gouverneur Morris, Peter Van Schaick, Bevans, and many others. He was one of the Committee of Fifty in New York in 1774, to consult on measures proper to be taken in consequence of the conduct of Great Britain toward the Colonies, and the report from his pen recommended the Congress of Deputies for the thirteen colonies, which resulted in the Congress at Philadelphia, September 5, 1774, of which he was a member in his twenty ninth year; and he was placed on a committee and drafted the address to Great Britain. He was on the committee which reported the necessity of the colonists to take up arms; on an address to the people of Canada, Jamaica and Ireland; a member

of the Colonial Convention of New York; of the Constitutional Convention of New York; and mainly drafted her first constitution, which existed for fifty years. On the organization of the courts under it, he was appointed the first Chief Justice of the Supreme Court.

Between the adjournment of the conventions and the organization of the new State government, he was a member of the Council of Safety, to whose hands was committed the absolute sovereignty of the State.

Re-appointed Chief Justice in 1777, he held his first court at Kingston, when the large army of Burgoyne was approaching Albany, and his act was regarded as treason by the British, but with true courage he took his seat, and charged the grand jury to enforce the principles of the new constitution and laws thereunder.

While holding the office of Chief Justice he was elected to Congress, and three days after taking his seat was elected president of that body. In 1779, he was appointed to the Spanish Mission to act in conjunction with the French Minister to draw Spain into the confederacy against Great Britain. He found Spain willing to aid us, but as a consideration she wished us to surrender to her the right to navigate the Mississippi river. This Jay peremptorily declined, saying, "Poor as we are, yet as I know we shall be rich, I would rather agree with them to buy at a great price the whole of their right on the Mississippi, than sell a drop of its waters. A neighbor might as well ask me to sell my street door."

Spain, therefore, refused to honor drafts of our government, and Jay himself accepted all drafts to the amount of $238,000. Franklin made arrangement to have them paid, and wrote to Jay to return, saying, "Spain has taken four years to consider whether she would treat with us or not. *Give her forty, and let us, in the meantime, mind our own business.*"

He was next appointed, with Franklin, Adams, Jefferson and Laurens, on a commission to negotiate a treaty of peace with Great Britain.

The appointment was distasteful to him, as he was instructed to undertake nothing without the counsel and concurrence of France, and to govern himself by the advice and opinion of the Minister of France. He, however, went to Paris when the preliminary articles of peace were signed, November 29, 1782, the draft of which was in his own handwriting.

Returning to New York, February 24, 1784, Congress appointed him Secretary of foreign affairs, and New York elected him to Congress. In company with Hamilton and Madison, he wrote and published *The Federalist*, that most important instrument in the vindication and adoption of the new constitution. He continued to act as Secretary of foreign affairs until appointed Chief Justice of the U. S. Supreme Court.

While Chief Justice, he was, in April, 1794, appointed Minister to

England, which he accepted without vacating his seat on the bench, but never afterward officiated as Judge.

He participated in a treaty with England, known as Jay's treaty, which became a great subject of criticism, for which he was severely denounced by Pinckney, Rutledge, and other prominent public men, and Jay was most bitterly assailed. Then there was talk of bringing him to the guilotine. His effigy was paraded through the streets, labeled, "Come up to my price and I will sell you my country," and it, with a copy of the obnoxious treaty, was burned in front of his house. Jefferson, in one of his letters, called him "*A rogue of a pilot*, who had run the vessel of state into the enemy's port." And Hamilton was burned in effigy for sustaining Jay. But after careful examination, Washington signed the treaty, and it went into effect.

While in England, Jay was elected Governor of New York, and resigned the Chief Justiceship, and was again elected Governor, his term ending on July 1, 1801. He declined a renomination, and was appointed Chief Justice of the United States, by John Adams, and confirmed by the Senate. In tendering him this, President Adams wrote: "It appeared to me that Providence had thrown in my way an opportunity, not only of marking to the public the spot where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against the increasing dissolution of morals."

But Jay declined it, and removed to his seat at Bedford, fifty miles from New York, where in the tranquility of his home he lived till his death, in 1829. When he thus retired he was but fifty-six years old, but what a busy and useful life!

At home, surrounded by his family, he was on the 14th of May, 1829, attacked with palsy, and died in three days after, in the eighty-fourth year of his age.

When Jay resigned the Chief Justiceship, in 1795, Washington appointed in his place another most prominent and remarkable man, John Rutledge, of South Carolina. He was characterized by his biographer "as at once the Adams and Patrick Henry of South Carolina, chief among the South Carolina leaders, first in station, in influence and talent, amid the brilliant galaxy of patriots who adorn the revolutionary annals of his State." He received the best education afforded in his State, and began the practice of law at twenty-two, and by his precocious brilliancy rose with a bound to the top of his profession. He was a born lawyer. His knowledge of principles was profound, his appreciation of details accurate and immense.

He was born in South Carolina, in 1739, the oldest of seven children,

the youngest of which, Edward Rutledge, was one of the signers of the Declaration of Independence.

With Gadsden and Lynch he was elected, in his twenty-sixth year, to represent South Carolina in the General Congress, which met in New York October 25, 1765. There he evinced, it is said, one of those firm and unyieldy tempers "which opposition and resistance serve only to strengthen." His eye was never accustomed to look back, nor his foot to retrograde. From that day down to the close of the struggle he was the firm, vigorous and uncompromising champion of the rights of the colonies; always in advance of the popular movement; always the advocate of the boldest measures, and always the formidable opponent of the royal authority.

In 1774, with Edward Rutledge, Henry Middleton, Christopher Gadsden and Thomas Lynch, he was appointed to meet the delegates of the colonies in General Congress. In the convention, when they were appointed, it was sought to pledge the delegates to the support of their colony to the Bostonians in resisting England. Rutledge, in tones of burning eloquence, resisted this, and demanded that he and the other delegates go *untrammeled*. In the midst of his speech an opponent demanded: "What shall be done with the delegates if they betray their constituents, and pledge the colony to a course inconsistent with the public interest?" Rutledge turned on him, and, with a passionate gesture and an eye flashing indignation, exclaimed, "*Hang them! hang them!*" The delegates were not pledged, and history records that none of them betrayed their trust.

Patrick Henry said of that Congress: "If you speak of *eloquence*, John Rutledge, of South Carolina, is the greatest orator; he shone with supreme luster. If you speak of information and sound judgment, Colonel Washington is unquestionably the greatest man on the floor."

He was returned to Congress in 1775.

A new constitution for South Carolina was adopted in 1776, and Rutledge was a prominent member of the convention, and he was chosen President of the first general assembly, and it made his younger brother, Hugh, Admiralty Judge.

He was president and commander-in-chief when Fort Moultrie was attacked by the British. General Lee said it was a slaughter pen, and advised Rutledge to abandon it. Rutledge replied, "While a soldier remained alive to defend it he would never give his sanction to such an order." "Well," replied Lee, "they will knock your fort about your head in half an hour." Lee wished Moultrie to evacuate the fort. Rutledge wrote him: "You will not evacuate it without an order from me. *I would sooner cut off my head than write one.* J. RUTLEDGE."

"Do not be too free with your cannon. *Keep cool and do mischief.*"

During most of the Revolutionary struggle he was Governor and Commander-in-Chief of the State, and for a time himself and his council were clothed with absolute dictatorship, and although the Americans were often defeated, and he was driven by the British from South Carolina, he never despaired, but continued to rally and inspire with hope all around him, until the arrival of General Green resulted in the liberation of South Carolina. General Green, in testifying to the character of Rutledge, says he "was aided by the influence of Governor Rutledge, who is one of the first characters I ever met with."

His term of Governor having expired, he was elected a member of Congress, and took his seat May 2, 1782. He was at once placed on the most important committees, and especially to visit and address the States on the condition of public affairs. He served in Congress till 1783. In 1784, he was elected Judge of the South Carolina Court of Chancery, which he held until 1791, when he was elected Chief Justice of the Supreme Court of Judicature of the State.

While he was one of the Chancellors of South Carolina, and without resigning his position, he served as a delegate from South Carolina in the convention to frame the Constitution of the United States, and he and Robert Morris conducted General Washington to the chair when he was elected President; and he was an active and influential member, both on committees and in debate.

He received the unanimous vote of South Carolina for Vice President, with Washington for President.

In the appointment by Washington of Judges of the Supreme Court, his name was next after Jay, and he was unanimously confirmed. He resigned his seat on the Supreme Bench in 1791, and Thomas Johnson, of Maryland, succeeded him.

Rutledge opposed bitterly the treaty made by Jay with England, which excited much enmity to him; but this did not seem to offend Washington, who, on the resignation of Jay as Chief Justice, immediately, July 1, 1795, appointed him as his successor, and wrote him a highly complimentary letter from Philadelphia, desiring him to be in that city by the first Monday in August. He accepted the appointment, and held court in Philadelphia at the time stated. But a tremendous fire was made at him for his opposition to Jay's treaty, and he was attacked in the most violent manner in public and private and through the newspapers. He was called "*a driveler and a fool*," "*the country was ruined and disgraced*" by his appointment; his private character was attacked, and he was told "*to save himself from disgrace by declining it.*" Language was used too gross to be repeated. He was defended with equal zeal by his friends.

John Marshall wrote: "*He is a gentleman of great talents* and decision and vigor."

Washington was not affected by the opposition to him, but invited him to dine at his house, and on the opening of Congress sent in his name to the Senate for confirmation, but on the 15th of December, 1795, the Senate, by a small majority, refused to confirm the nomination.

But while his nomination was yet pending, that brilliant intellect was fast giving way. Scarcely had news of his rejection been announced when it was learned that he had become insane, the result of disease incurred by many years' exposure in the service of his country in the swampy districts of his State, when it was overrun by the British. Just before his rejection a renewed attack prostrated him on his way to hold Circuit Court in North Carolina. This was conveyed by letter December 1. The remainder of his life was a blank, with both body and mind wrecked. He died in the Summer of 1800, aged sixty-one years, and was buried in St. Michael's churchyard in Charleston.

Soon after the rejection of the nomination of Judge Rutledge, Washington sent in for Chief Justice the name of Patrick Henry, who declined, and then he appointed Judge William Cushing, the senior Judge in commission then sitting in the Court. The nomination was at once unanimously confirmed, but he preferred the less prominent post of an associate. It is said that Judge Cushing received the first intimation of the appointment at a diplomatic dinner, when Washington bowed to him in a stately manner, and pointing to a vacant chair said, "The Chief Justice of the United States will please take the seat at my right." He held the office for about a week, though Washington urged him to keep it, and then resigned.

At the time of his appointment he was sixty-four years of age. Judge Cushing was a graduate of Harvard College, and the son and grandson of Judges of the Supreme Court of Massachusetts, and his great grandfather was also a Judge. His first position was Probate Judge of Lincoln county, and he, on the retirement of his father, after twenty-eight years' service, was appointed to fill his place in the Supreme Court. He presided most of the time at the State convention to ratify the U. S. Constitution. After Jay's departure for England in 1794, he presided in the Supreme Court in his place. He was a man of remarkably strong and clear mind, great ability and learning, and profoundly read in the law, as well as history and literature. He died September 13, 1810, in the seventy-ninth year of his age.

On the resignation of Judge Cushing, Oliver Ellsworth was appointed Chief Justice. His commission was dated March 4, 1796, and he took his seat on the 8th. At the time he was appointed he was Senator in

Congress from the State of Connecticut, and had voted against the confirmation of Judge Rutledge as Chief Justice.

He was not less renowned than his predecessors. Born in Connecticut, April 29, 1745, at seventeen years old he entered Yale College, but left that and graduated at Princeton, in 1766. Admitted to the Bar at twenty-three, he began the practice at Hartford. He rose rapidly in high estimation, and had a lucrative practice. He was appointed State's Attorney for the district of Hartford, and held it during the Revolutionary War. He also represented his town in the general assembly. In 1778, he was eleeted to Congress, and abandoned, it is said, the most luerative practiee in Connecticut. His colleague was Roger Sherman. He was appointed a member of the Committee of Appeals, composed of the best lawyers in Congress, whose duties were entirely judicial, to hear and determine eases of appeal from sentences of courts of admiralty. He remained a member of Congress until July 11, 1783. The journal of Congress during these times shows that he was an exceedingly active and useful member. He was again chosen, but declined to serve. The next year Congress appointed him Commissioner of the Board of Treasury. This he also deelined.

He was a member of the Supreme Court of Errors of Connecticut—1784—the next year a Judge of the Supreme Court, and for several years afterward. In 1787 he was appointed, with Roger Sherman and William Samuel Johnson, a delegate to the eonvention to form a plan for a federal government. Here his influence was felt in a powerful way. He took a strong part in favor of sustaining the power of smaller States against the larger, insisted that unless those rights were fully preserved *the government would be nothing more than a rope of sand.* And we are indebted to him that eaeh State has an equality of representation in the Senatc. The discussion on this subjeet was long and earnest by the ablest minds of the convention, and forms the most interesting pages in the second volume of the Madison Papers. He opposed giving the power to the President to nominate Judges, insisting that the Senate should nominate, giving a negative to the President.

His name does not appear to the constitution, as he was absent from the convention the last month, but he highly approved it and reeommended its adoption in the convention of Connectieut to ratify it, of whieh he was a member. On the adoption of the constitution, he and William Samuel Johnson were chosen the first Senators to represent Connecticut in the Congress. He was one of the eight Senators who met at the time fixed, March 4, 1789, in Federal Hall, New York, to start the new government in operation, and waited patiently until the 6th of

April for a quorum. He remained a member of that body for sevne years.

He was appointed chairman of the Senate committee to bring in a "bill to organize the judiciary of the United States." He was assigned to the greater part of the work, and the bill as reported, was from his pen. He was in the Senate the warm approver of the Jay treaty, and this drew down on him the animosity of the opposition. Wolcott, in a letter to Hamilton, exclaims: "*A driveler and a fool appointed chief justice.*" "*Faction is to be counted at so great a sacrifice of consistency,*" cried another. Another calls on the Senate "to stand firm and correct the President's error of judgment by rejecting him." But his appointment was confirmed at once by the Senate with unanimity.

At the same time he took his seat on the bench Samuel Chase also took his as an assistant.

Chief Justice Ellsworth occupied the bench till November, 1799, when having been appointed February 27, 1799, envoy to France, he proceeded on his mission as Jay had done before, without resigning his seat, but he held his last term of Court in August of that year.

With his colleagues he succeeded in making a formal treaty with France, and then resigned his commission as Judge and returned, and although in feeble health, he was in 1801 called by Connecticut among the assistants of her council and ex-officers, Judge of the Supreme Court of Errors, a position which he had resigned eighteen years before. He was appointed Chief Justice, but declined to serve on account of ill-health. After a severe illness of eight days, he died November 26, 1807, aged sixty-three years.

Judge James Wilson, of Pennsylvania, one of the first associates, was a native of Scotland, who emigrated to Philadelphia in his twenty-first year. He was a distinguished scholar, professor of law in the Philadelphia College, an active participant in the revolutionary struggle, a member of Congress during part of the Revolutionary War, and one of the signers of the Declaration of Independence, and an influential member of the constitutional convention. He occupied a seat on the bench till 1798, when he died at the house of his friend and colleague, Judge Iredell, at Edenton, N. C., while on a judicial circuit in that State, and is buried by the side of Judge Iredell. He was succeeded by Bushrod Washington, a nephew of General Washington, who had studied law under Judge Wilson, and who took his seat in February, 1799. Judge Patterson, of New Jersey, retained his seat till his death in 1806, when he was succeeded by Brockholst Livingston, of New York.

Thus ended the career of the original Supreme Court, appointed previously to 1800. But here I must stop. Important as had been the

questions before that Court, and distinguished and truly great as were almost all its members, it was really in a formative state in public estimation until the appointment of John Marshall as Chief Justice. On the resignation of Chief Justice Ellsworth, President Adams nominated John Marshall, of Virginia, who was commissioned January 31, 1801, age forty-six, and took his seat on the bench in February of that year. The only remaining member of the Court appointed by Washington was William Cushing, of Massachusetts; the other members were William Patterson, of New Jersey, Samuel Chase, of Maryland, Bushrod Washington, of Virginia, and Alfred Moore, of North Carolina, appointed to fill the vacancy by the death of Judge Iredell. The long career of John Marshall of thirty-four years as Chief Justice, dying in 1835, at the age of eighty years, is the history of his country, the elucidation and crystalization of the principles of the constitution in language so clear and classical, and logic so irresistible as to place him at the head of those wise and learned Judges, who have from the earliest time been the preservers of human rights.

Sketches of the Supreme Court of the United States

In the Time of Chief Justice John Marshall, from 1801 to 1835.

PART II.

For the purpose of interesting the legal profession and the public in the celebration of the one hundredth anniversary of the organization of the Supreme Court of the United States, proposed to be held in the City of New York on the 4th of February last, I wrote an article on the subject which was published in the Cincinnati *Daily Commercial Gazette*, and subsequently in the *Weekly Law Bulletin*, of Columbus, February 5, 1890. That article was a brief sketch of the organization of the Court and the Judges down to the appointment and commission, January 31, 1801, of John Marshall, of Virginia, as Chief Justice, leaving the Court to consist of him as Chief, and as associates, William Cushing, of Massachusetts, William Patterson, of New Jersey, Samuel Chase, of Maryland, Bushrod Washington, of Virginia, and Alfred Moore, of North Carolina. A number of the members of the Association who became interested in the subject of the article suggested that I continue it to the present time, in a paper to be read before this Association.

In attempting this, I found that it led into so extensive a range of historical reading as to give me but faint hope of doing so to the satisfaction of myself or the Association, with the multiplied other duties incumbent on me. No one who attempts it but will be astonished at the numerous facts and fancies which crop out in historical researches.

Like the explorations and deep sea soundings of our coast surveys, one is constantly bringing up to the surface strange specimens, which interest and amuse, but at the same time defy all scientific knowledge to analyze or classify. In matters relying entirely on past history, I cannot claim originality, but only an effort correctly to summarize important events recorded by others; nor will the magnitude of the subject permit

me to bring it down to the present, as suggested. I can only sketch briefly some important events in the life and Chief Justiceship of John Marshall and some of his associates, referring those who desire to pursue the subject to the very interesting sketch of the life of the Chief Justice by Judge Joseph Story, to the "Life and Letters of Judge Story," by his son, where he has given most vivid sketches of his contemporary judges, to *Van Santvoord's* lives of the Chief Justices, to *Marshall's Life of Washington*, the writings of Jefferson, especially the Ana, and his life by Rayner, *a very interesting* series of articles in the *second and third volumes* of the *Southern Law Review* New Series, entitled "The Dartmouth College Cases," to Conway's life of Attorney-General Edmund Randolph and to the United States Supreme Court reports from Cranch to the present, to Judge Hoadley's address at Cincinnati on the life of Chief Justice Salmon P. Chase, and to the eloquent address by Mr. Baker on the life of Chief Justice Morrison R. Waite, in the proceedings of this Association for 1888, to the life of Judge *John McLean* in the "*National Portrait Gallery*," *Noah H. Swayne* and *Stanley Matthews* in the Biographical Encyclopædia of Ohio, and to *Moses Coit Tyler's* life of Patrick Henry. These will afford most interesting readings. In reading the inner workings of the government and lives of prominent characters who have come down to us in history magnified by some great event or deed, one will be surprised to find how many petty jealousies in great minds, personal rancors, dark intrigues and selfish aspirations, history in its general statements has covered over, in order to make the personnel of the act stand out in a supreme and commanding light. And looking around at the men of his own times and comparing them with those of the past, one will be convinced of the truth of a statement which the venerable Scotchman, Dr. Bishop, President of Miami University, was wont to enforce frequently on the students of that institution, that "human nature was the same in all ages of the world, and the average man of two thousand years ago was an exact counterpart of the average man of today." In the appointments which Washington made of the members of the Supreme Court he was continually hampered with these obstacles. And nearly every appointment was subjected to some criticism. While all acknowledged that these men had been conspicuous for ability and patriotism, not only in their own respective States but also in the General Government, yet in the temper of the times, and division of political sentiment, their very prominent positions and high talents made them the more signal objects for attack.

Not only so, but the Government was new, the Court unorganized, the principles of the Constitution contested, and it was a difficult matter to obtain lawyers of sufficient ability who were willing to relinquish good

practices in order to take the position with its moderate salary, and apparently hopeless prospect of obtaining reputation in it. During the whole of Washington's administration he was handicapped by the contentions of his Cabinet. Between Jefferson, Secretary of State, Hamilton, of the Treasury, and Randolph, Attorney-General, there was, to say the least, a want of unity of feeling and of views, which kept each alert, watching the movements of the other. The "*Anas*" of Jefferson and the personal history of each, illustrates that, and shows that not only was there bitter opposition to the appointees of Washington, and that, revered as his name is now, he was abused then without stint, in language even worse than now applied in heated political canvasses.

Jefferson, on retiring from the Cabinet in 1793, drew it very mildly as compared to others when he wrote of Washington, who was then but *sixty-one years* of age, "His memory was already sensibly impaired by age, the firm tone of mind for which he had been remarkable was beginning to relax, its energy was abated; a listlessness of labor, a desire for tranquility had crept over him, and a willingness to let others act and even think for him," and charges him with writing letters to Adams and Carroll "over which, in devotion to his imperishable fame, we must forever weep, as monuments of mortal decay.".

Judges were no more spared then than now. He charged John Jay, whom Washington appointed Chief Justice, as being "a Rogue of a Pilot who had run the vessel of State into the enemy's port." By others, Jay was denounced as a "driveler and a fool, and the country was ruined and disgraced by his appointment."

The administration of Washington was bitterly attacked in a paper edited by a Frenchman, and these articles were charged to have been from the pen of Jefferson. To these were most able and caustic replies, which were attributed to John Marshall, then at the head of the Bar of Virginia, and a strong personal and political friend of Washington. This led to a bitter feud between Jefferson and Marshall, which ended only with their lives. Marshall supported Aaron Burr for President, putting his preference for Burr upon the ground "that the morals and principles of even Aaron Burr were purer than those of Jefferson."

Jefferson at 81 wrote: "Judge Marshall makes history descend from its dignity, and the ermine from its sanctity, to exaggerate, to record and to sanction a forgery," and Marshall eight years later fired a parting volley at the ashes of his dead antagonist.

They were both of Welsh extraction, firm and ardent in their affections and hates, but neither given to enduring hatred. "Jefferson forgave all but Marshall; Marshall spared the world his enmity and lavished it on Jefferson." Neither ever forgave or spoke to the other.

And so between Jefferson and Patrick Henry. He charged that Henry was a mere declaimer, a man of no education, no lawyer, had no business as such, but that for the first four years in which he pretended to practice, kept the bar of his father-in-law's tavern and lived on him. While history, and the letters and papers and account books of Henry show that not only was he a speaker of unapproachable eloquence, but a man of fine business qualifications and common sense, and in the four years in which Jefferson charged he had no legal business, the number of cases in which he appeared in various courts was over 1300, while that of Jefferson was less than 500, and that out of his practice Henry paid mortgages on his father's home and purchased a handsome estate for himself. On the rejection of Judge Rutledge as Chief Justice, Washington tendered it to Patrick Henry, who declined it. It was tendered by Washington because he had great regard for his ability, and because he wished his powerful aid in support of the Government. He had before that tendered him in succession the position of Attorney-General, Secretary of State, Minister to England, all of which he declined for the double reason, first, that he had strongly opposed the adoption of the Federal Constitution, and although willing to render support and obedience to it, had determined not to hold office under it, and because his practice at the Bar was very large, he had amassed a large fortune, and had determined not again to enter politics. Thereupon Jefferson sneeringly wrote that "Washington had tried to draw Henry into his camp by offering him every position he knew he wouldn't accept." But Henry had for a number of years been a member of the General Assembly of Virginia, had drawn the first protest of the Colonies against the Stamp Act, had been with Peyton Randolph, George Washington, Richard Bland, Benjamin Harrison and Edmund Pendleton (the first minds of Virginia), member of Congress at its first meeting at Carpenter Hall in 1774, and again in 1775, and was appointed Commissioner of Indian affairs; the confidential friend of John Adams, who regarded him as the ablest man on the floor; had been Governor of Virginia five times, the first under the Colonial rule, and unanimously re-elected the sixth time, but declined it and retired from official life, until elected a member of the Convention of Virginia called to ratify the Federal Constitution. But after all these tenders of high position and refusals, his patriotism could not refuse the final request of Washington, to become a candidate for the Legislature of Virginia, in order to thwart the designs of certain prominent men there, who sought to bring the power of the State to oppose acts of the General Government. He became a candidate for this, canvassed the district and spoke eloquently in favor of standing by and supporting the General Government; was elected, but died before taking his seat.

It is a strange and yet sad thing to look over these rancors and jealousies of distinguished men in the organization of the government.

It is a very common remark that the Judiciary of the States should not be elected by the people, but appointed by the Governor in the same manner as the Judges of the Supreme Court of the United States are appointed by the President. But the history of that Court proves that all the appointees were of the same political party as the appointing power, and none of them would have been appointed had he held opposite views.

John Marshall was of the party of Washington and Adams—a Federalist, believed in the Federal Constitution, and the Government organized under it, and his appointment by John Adams in 1801 as Chief Justice of the Supreme Court was the most fortunate and proper one which could have been made, although he had much opposition and many enemies. His appointment was urged by John Quincy Adams, son of the President, who when it was made, said, "if neither of us had ever done anything else to deserve the approbation of our country and of posterity, I would proudly claim it of both, for the act of my father and myself."

His life has been grandly sketched by Justice Joseph Story, who sat on the bench of the Supreme Court with him for twenty-four years. It should be read *in extenso* by every lawyer. I can but give a brief synopsis. His grandfather was a native of Wales, who settled in Westmoreland County, Virginia, in 1730, and married Elizabeth Markham, a native of England. His eldest son, Thomas, removed to Fauquier County, Virginia, and was employed by George Washington in surveying the extensive lands of Lord Fairfax in the western part of Virginia. They had been near neighbors from birth, associates from boyhood and always friends. *John Marshall* was the son of Thomas, and the eldest of a family of fifteen children, and was born at Germantown, Fauquier County, Virginia, September 24, 1755. Shortly after his birth his father removed to near the Blue Ridge, a country of grand beauty and renowned for its healthfulness. Here John remained till his fourteenth year. He evinced most surprising love for learning. His father's house contained the books of Milton, Shakespeare, Dryden, Pope and the principal classics, and it is said that at the age of twelve he had transcribed all of Pope's Essay on Man and committed to memory many of its most interesting passages. During life he retained this love for poetry and general literature. At fourteen he was placed under the tuition of a clergyman named Campbell, and had for a fellow student James Monroe, afterwards President of the United States. He remained here a year, and then continued classical studies another year with Mr. Thompson, a

Scotch clergyman. He never graduated at college. He was eighteen years old when the stirring contest between Great Britain and the Colonies began, and his first appearance after the intelligence of the battle of Lexington, was as Lieutenant of a militia company in Fauquier County. His captain being unable to be present, Marshall walked ten miles to the place of rendezvous, announced to them that he had come to meet them as fellow soldiers who were likely to be called upon to defend the country and their own rights, invaded by the British, that there had been a battle between the Americans and British at Lexington, the Americans being victorious, but that more fighting was expected, that soldiers were called for, and it was time to brighten their fire-arms and learn to use them in the field; and if they would fall in line, he would put them through the new manual. He is described at that time as "about six feet high, straight and rather slender, showing little if any rosy red, yet good health, the outlines of his face nearly a circle, and within that, eyes dark to blackness, strong and penetrating, beaming with intelligence, and good nature: an upright forehead, rather low, was terminated in a horizontal line by a mass of raven black hair of unusual thickness and strength. The body and limbs indicating agility rather than strength, in which, however, he was by no means deficient. He wore a purple, or pale blue hunting shirt, and trousers of the same material, fringed with white; a round black hat, mounted with a buck's tail for a cockade, crowned the figure and the man." He drilled the men, addressed them for an hour on their duty to the country, challenged an acquaintance to a game of quoits, closed the day with foot-racing and other exercises, and then walked back the ten miles to his father's house. When General Washington took command of the American Army in the Revolution, Thomas Marshall went with him as Colonel of the Third Virginia Regiment, and his son John as Lieutenant of a company, and was promoted to a Captaincy. Both served under the immediate orders of Washington during the darkest days of the country. They were in the first battle on the soil of Virginia; at battles of Monmouth, Brandywine, Morristown, Germantown; during that terrible Winter at Valley Forge, and supporting Wayne in his charge at Stony Point. When the Army was in Winter quarters he applied with renewed diligence to the study of the law, and in the year 1780 attended the law lectures of Chancellor Wythe at William and Mary's College and was admitted to the practice of the law, but again returned to the Army and remained in it till the surrender of Cornwallis and the close of hostilities, when he began the practice and soon rose to distinction at the Bar in Richmond, Virginia. He was elected to the Legislature repeatedly, to the convention called to ratify the Constitution of the United States, where he dis-

tinguished himself by the strength of his argument in supporting it. As a lawyer, he stood at the head of the Bar and was employed on one side or the other in almost every important case in Virginia, and in that State was recognized as the leader of the Federal party, which was the party which supported the Constitution of the United States. Washington tendered him the position of Attorney-General of the United States, and also of Minister to France, but he declined both, as it would interfere with his extensive law practice. He subsequently, at the urgent request of President Adams, accepted the mission to France in an important epoch of both countries. Invited by Washington to Mt. Vernon and at his urgent request, he and Bushrod Washington were elected to Congress from Virginia to assist in arresting the swelling tide of opposition to the Government. On arriving at Philadelphia, the seat of government, he writes, "A Virginian who supported with any sort of reputation the measures of the government was such a *rara avis* that I was received with a degree of kindness which I had not anticipated." President Adams tendered him a place on the Supreme Court made vacant by the death of Judge Iredell, of North Carolina, but he declined it. In Congress he distinguished himself on several important occasions by his consummate judicial arguments. One of his most celebrated speeches written out by himself will be found in a note to Bees Reports, page 266, also in the appendix to fifth Wheaton's Report, and in Wharton's State Trials, page 443.

President Adams appointed him Secretary of War and subsequently Secretary of State, both of which he filled. Appointed by President Adams Chief Justice, he was commissioned on the 31st of January 1801, and took his seat in February. The Court had been in existence eleven years, but as yet had not been one of great importance, as in that time less than one hundred cases had been heard. Its minutes covered about two hundred pages, and its reported decisions but five hundred pages of Dallas' Reports. The Reports of all the Courts of America to that time scarcely numbered a dozen volumes. The reported decisions of all the *Circuit and District Courts* of the United States filled only two hundred pages of Dallas' Reports.

In this condition of the Court, Marshall took his seat as Chief Justice. The nation was the first in the world to be governed by a written Constitution, and this Constitution and the laws made in pursuance of it were to be passed upon by this Court.

Marshall took no part in forming the Constitution, except that as a member of the Virginia Convention he urged its adoption by that State, but for the term of his judicial life that Constitution was made what *he saw fit to make it*, by the decision of that Court of last resort.

With Story, the greatest of his associates, it was said the test in all cases was "the *policy* of the law is so and so;" Marshall would say, "I have not looked into the cases, but I think the law *ought* to be so and so," or as Story put it, "while I am compelled to creep from point to headland, Marshall puts *out to sea*." The first volume of Cranch's Report contains the work of two years, reporting twenty-five cases, all but one from the pen of Marshall. Among them is the celebrated case of Marbury *vs.* Madison, in which for the first time it was decided "that it was the duty of the Judiciary to decide an act of the Legislative body *invalid*, if *clearly* repugnant to the Constitution"—a decision which at that time was reached after great consideration, elaborately prepared, and received with different judgments of its correctness by many of the ablest men of the Nation. It is very remarkable at the present time, that there should have been a doubt as to the correctness of such a decision, under a Constitution which defined the power of the Court as extending to all cases in law and equity, etc., arising under the Constitution and laws of the United States, and which provided that the *Constitution* and the *laws made in pursuance* thereof, etc., shall be the *supreme* law of the land; and the Judges in every State shall be bound thereby, anything *in the Constitution or laws of any State to the contrary notwithstanding.* It seemed certainly very clear that while the Legislative body was clothed with authority to enact laws, the question as to whether they were made in *pursuance to the Constitution* was one to be finally determined by the Judiciary. Still more remarkable is it, that in our own State, in the Legislature of 1807–1808, a resolution was introduced to impeach Calvin Pease, Presiding Judge of the Third Circuit Common Pleas, and Judges Huntington and Tod, a majority of the Judges of the Supreme Court, who had decided that an act passed by the Legislature was void as being in violation of the Constitution of the United States.

Before the next session Judge Huntington was elected Governor, and resigned his seat in the Supreme Court. The impeachment, however, was not dropped, but at the succeeding session a committee was appointed to inquire into the official conduct of Messrs. Huntington, Tod and Pease, which reported articles of impeachment against Tod and Pease, but not against Huntington.

The charge against Pease was for deciding an act of the Legislature unconstitutional, and against Tod, that he, as a Judge of the Supreme Court, affirmed the same doctrine. In his answer, Judge Tod admitted that he had so decided, and was of the same opinion now, and asserted it as his right and duty to determine cases brought before him as Judge according to the conviction of his judgment, and vindicated the purity of his motives and the uprightness of his judicial conduct. The trial

continued several days, but resulted in his acquittal. But the Legislature, still determined on a victim, brought Judge Pease to trial. His answer was substantially the same as that of Judge Tod. He also was acquitted, but on one of the charges it was a close vote, 15 being for conviction and 9 for acquittal; but as it required a two-thirds vote to convict, he escaped by one vote. As to the right of a Judge to so decide, the vote stood 18 for and 8 against.

Judge Pease was subsequently elected Judge of the Supreme Court of the State, and for many years adorned it with great ability and learning; and thus the sober second thought vindicated the integrity of the Judges and the correctness of the decision they gave, and the doctrine they held has remained not only unquestioned to this day, but affirmed by repeated decisions of all our Courts. It will be impossible within the limits of this paper to go into any extended statement of the many great cases decided by the Supreme Court while being presided over by Chief Justice Marshall. They embrace almost every question which could arise in the formation of a great country under a new fundamental law, and he was emphatically "*the expounder of the Constitution.*" These most important questions were argued before him by the most eloquent and learned lawyers of the time, among which may be mentioned Webster, Pinkney, Wirt, Dexter, Sergeant, Binney, Clay, Taney, Martin, Wickham and Mason, and his decisions established principles which are accepted today as undoubted law. Thirteen hundred cases were disposed of by the Court during his term, and for years he prepared the larger share of the opinions. His enemies declared that in some of them he was not as careful as a discreet Judge ought to be to find out whether *his* opinions were those of the *majority* or the *minority* of the Court, and Jefferson in a letter to Ritchie, of June 25, 1820, said of him, "an opinion is huddled up in conclave, and with the silent acquiescence of lazy or timid associates, by a crafty Chief Judge, who sophisticates them to his mind by the turn of his own reasoning." To judge how unjust was this charge against the courage and industry of his associates, one has only to glance at the array of distinguished judges who sat with him during these years.

William Cushing, of Massachusetts,	was on the Bench	from	1789 to 1810
William Paterson, of New Jersey,	"	"	1793 to 1806
Samuel Chase, of Maryland,	"	"	1796 to 1811
Bushrod Washington, of Virginia,	"	"	1798 to 1829
Alfred Moore, of North Carolina,	"	"	1799 to 1804
William Johnson, of South Carolina,	"	"	1804 to 1834
Brockholst Livingston, of New York,	"	"	1806 to 1823
Thomas Todd, of Kentucky,	"	"	1807 to 1826

Joseph Story, of Massachusetts,	was on the Bench	from	1811 to 1845
Gabriel Duvall, of Maryland,	"	"	1811 to 1835
Smith Thompson, of New York,	"	"	1823 to 1845
Robert Trimble, of Kentucky,	"	"	1826 to 1829
John McLean, of Ohio,	"	"	1829 to 1861
Henry Baldwin, of Pennsylvania,	"	"	1830 to 1846

None of these, his associates, were men who would silently acquiesce in decisions which would *not* reflect their views, nor were any of them so lazy or timid as to sit silently by and permit a "crafty Chief Judge to sophisticate the law to his own mind." And an examination of the reports will develop very many dissents, and separate expressions of opinion on different points.

Brief sketches of the lives of these associates will convince the most skeptical that they had been well chosen, not only for their well tested ability in former important public positions, but also for their integrity and unquestioned patriotism, and sustained their reputation well on the Bench.

William Cushing, of Massachusetts, was a graduate of Harvard College, practiced law successfully for a number of years, first a Judge of Probate. His father had held the office of Judge of the Superior Court for twenty-eight years, and on his resignation, William was appointed to fill his place and was the only member of the Court who in the trying Revolutionary times adhered to the American side and was made Chief Justice of the Supreme Court, which he filled for fourteen years. Elected a member of the Convention to revise the laws of his State, the bill of rights of which declared that "*all men are born free and equal*," he held in a charge to the jury that this, in effect, *entirely abolished slavery*, and thus it *came to an end in Massachusetts*.

He was Vice President of the Convention of his State to ratify the Federal Constitution, presided most of the time, and voted for its adoption. On the organization of the Supreme Court of the United States, in 1789, he was appointed by Washington a Judge next to the Chief Justice, and presided as Chief during the absence of Chief Justice Jay as Minister to England, and, upon Jay's resignation in 1796, was appointed in his place by Washington and unanimously confirmed by the Senate. He held the office for one week and resigned, preferring to sit as associate; Washington reluctantly accepted it, but would not appoint any one over him. He remained on the Bench till his death, in 1810. He possessed a remarkably strong and clear mind, of great ability, profoundly read in the law, of unbending firmness and integrity, which inspired universal confidence.

William Paterson, of New Jersey, was on the Bench thirteen years,

and so high was his reputation for learning and ability that on the resignation of Chief Justice Ellsworth it was almost universally believed that he would be appointed to fill the vacancy, and Marshall being consulted by President Adams, recommended him. But the President objected because his appointment would perhaps wound the feelings of Judge Cushing, who was the senior Judge and his intimate friend. Before his appointment, Judge Paterson had been a member of the Provincial Congress of New Jersey, of the United States Congress six years and also of the Convention which adopted the Constitution of the United States, a Secretary of the United States for New Jersey, a member of the committee which drafted the Judiciary Bill, and afterwards Governor of New Jersey. He was appointed Judge in 1793 to fill the vacancy occasioned by the death of Judge Johnson, of Maryland. He was regarded as undoubtedly one of the ablest members of the Court, and some of his opinions are among the best specimens of the Old Court.

Samuel Chase, of Maryland, appointed by Washington in 1796, served till 1811, received a good classical education, admitted to the bar, and began practice in Annapolis. In 1774, chosen member of the Continental Congress, re-elected in 1795, one of the signers of the Declaration of Independence, remained in Congress till 1798, Chief Justice of the Criminal Court of Baltimore, and in 1791 Chief Justice of the Supreme Court of Maryland. He was of sanguine temperament, bold, fearless, undisguised, independent in language and action, pure in his motives and unswervable in his purposes. Judge Story said of him, "the elements of his mind are of the very first excellence; in person, in manners, in unwielding strength, in severity of reproof, in real tenderness of heart, and above all, in intellect, he is the living, I had almost said the exact image of Samuel Johnson; I like him hugely." He was one of the Sons of Liberty, who in Maryland forcibly seized and destroyed the newly imported stamps of the British Government and burned in effigy the British stamp distributor, a member of the Maryland Convention which ratified the Federal Constitution. His expositions of law were forcible and luminous, and his manner impressive and commanding. Possibly too much so, as from his ardent temperament and intense patriotic feeling he drew upon himself much bitter opposition from his political opponents who strove to drive him from the Bench. In 1804, John Randolph procured the passage of a resolution in the House of Representatives inquiring into his official conduct. This resulted in articles of impeachment being preferred against him, and the trial before the Senate was pressed with the greatest vindictiveness. The principal charge against him was one which, under the rulings of our Courts for many years, would seem almost incredible as the foundation for an im-

peachment. It was that "he refused to permit eminent counsel to argue the law to the jury in a criminal case, informing them that they could argue the facts, but that the Court would give them the law." The counsel became highly indignant and left the court room, when the Judge informed them that he could attend to the interest of their client in their absence and he would be as well defended as if they were present. The trial lasted before the United States Senate from January 2, 1805, till March, when not sufficient votes could be obtained against him for a conviction. He remained on the Bench till his death in June, 1811, but his fiery temperament had cooled and he lost much of his power.

Bushrod Washington, of Virginia, was the favorite nephew of General Washington, being the son of his eldest brother, John A. Washington. Educated partly under a private tutor, he completed his studies at William and Mary's College, Virginia, where he became acquainted with John Marshall, between whom grew a friendship which lasted till death. He served under General Lafayette when Cornwallis invaded Virginia, and the following winter went to Philadelphia and studied law under Judge James Wilson, whom General Washington pronounced the best lawyer in America. Returning to Virginia, he was elected a member of the Legislature and served in the Convention which ratified the Federal Constitution. He reported two volumes of decisions of the Supreme Court of Virginia, and was a prominent and accurate lawyer. He was appointed Judge of the Supreme Court by President Adams in 1798, and served till his death in 1829, more than 30 years. General Washington made him one of the executors under his will, devised to him Mount Vernon, and into his possession came all the private papers of the General. These he turned over to Chief Justice Marshall, and from them he wrote his admirable life of Washington. His remains were deposited in the same vault with those of the General. Judge Story writes, "his mind was solid, rather than brilliant, sagacious and searching, patient in inquiry, forcible in conception, clear in reasoning; the *fear of man never fell on him, the love of justice was his ruling passion, the master spring of all his action.*"

Of *Alfred Moore*, of North Carolina, very little is known. He was appointed to fill the vacancy made by the death of Judge Iredell, at the close of 1799; remained on the Bench but a few years, and was succeeded by

William Johnson, of South Carolina, who was born in 1771, graduated at Princeton College, studied law under C. C. Pinckney, and admitted to the Bar at the age of twenty-two. Three times elected member of the Legislature, the last time speaker; retiring from political life he became Judge of the Circuit Court, and in 1804 was appointed by President Jef-

ferson Judge of the U. S. Supreme Court. He was a man of considerable learning, but Judge Story said that "his opinions are wanting in exactness, as if he were confused and unable to put his thoughts together satisfactorily to himself." He was the staunchest of Union men in the days of nullification in his State. He was on the Bench till his death in 1834.

Brockholst Livingston, of New York, was one of the three celebrated Livingston brothers. Born in 1757 he took an active part on behalf of America in the Revolutionary struggle, and was for years a prominent and successful advocate at the Bar of New York. He was an accomplished scholar, an ingenious and learned lawyer. He was one of the Judges of the Supreme Court of New York and sat with Kent and Thompson till 1806 (when this Court was aeknowledged the ablest in America), when he was appointed Judge of the United States Supreme Court, where he remained till his death in March, 1823, at the age of 66. As a Judge, he ranked very highly, both in the State and Federal Courts. He was succeeded by

Smith Thompson, who had sat with him in the Supreme Court of New York. He took his seat in 1821 and held it till his death in 1843, and his numerous opinions in the published Reports fully sustain the high charaeter given of him while on the Bench of New York.

Thomas Todd, of Kentucky, was born in Virginia in 1765, and emigrated to Kentucky in 1786. He soon after was admitted to the Bar, and was appointed Clerk of the Federal Courts, and after the creation of the State was chosen Clerk of the Court of Appeals, in 1801 Judge of the Court of Appeals, and in 1806 Chief Justice. His appointment to the United States Supreme Court was made by Jefferson on requesting the delegates in Congress from the circuit to name to him their first and second choice. He was the first or second choice of every delegate, and was accordingly appointed in 1807, and served till his death in 1826. His learning was of a solid cast, great patience and candor in investigating questions, clearness of judgment, and unflinching adherence to his opinions. He was not excelled in his knowledge of the local laws of Kentucky, and was regarded as authority in that matter by his fellow Judges. He was sueceeded by

Robert Trimble, of Kentucky, who died after two years from his appointment. He had been a Judge of the Court of Appeals of Kentucky, declined the position of Chief Justice, retired from the Bench and devoted his time entirely to the practice until appointed by President Adams to the United States Supreme Court. He was learned in the law, an able and discriminating Judge, and during the short time he was on the latter Bench maintained the high reputation he had on that of Ken-

tucky. His opinions were clear and comprehensive and enriched by a vast fund of learning. He was succeeded by

John McLean, of Ohio, March 7, 1829. He was the descendant of an Irishman who had emigrated to America before the War of Independence, and was born March 11, 1785, on a small farm in Morris County, New Jersey. When four years old his father removed to Morgantown, Virginia, then in a year to near Nicholasville, Kentucky, and in two years after, to Mayslick, where he resided till 1797, when he removed to Ohio. John went to such schools as he could find in the neighborhood when he could spare time from work, as the family was very poor. He was strong and hearty, cleared land for the neighboring farmers, and earned good wages for that time. At eighteen he was employed in a subordinate position in the Clerk's office of Hamilton County, joined a debating society and studied law under Arthur St. Clair, son of General and Governor St. Clair, who was then one of the ablest lawyers in the Territory. Admitted to the Bar in 1807, he established himself in Lebanon, Ohio, where he soon succeeded in obtaining a lucrative practice. Elected to Congress in 1812 by a large majority, and re-elected in 1815. In 1816 elected Judge of the Supreme Court of Ohio, where he served six years till appointed by President Monroe, in 1822, Commissioner of the General Land Office. So well did he fulfill the duties of this office that the President, in 1823, appointed him Postmaster-General, which he held the balance of his term. He made a complete revolution in that office, and established such a system as placed it in successful operation as one of the most important departments of the Government. When General Jackson succeeded to the Presidency, he desired Judge McLean to retain his department, but he declined. He then tendered him the Secretaryship of War and the Navy, but he declined both. He appointed him to the Bench of the United States Supreme Court, which he accepted. Judge McLean was a man of most magnificent presence, with a massive head and classic outline of features. He was about six feet four inches tall, broad of chest and strong limbed. He was in personal appearance the most dignified and majestic personage who ever sat on the Bench. Of pure and incorruptible integrity, high Christian character, great patience, studious habits, he brought to the Bench a dignity and character comparable with its high position. In addition to his decisions in the General Reports of the Court, he published several volumes under the title of "*McLean's Reports.*" He remained on the Bench thirty-two years, till his death in 1861.

Joseph Story, of Massachusetts, was appointed in 1811, and remained till his death in 1845. He was born at Marblehead, Massachusetts, September 18, 1779, graduated at Harvard College in 1798, studied law

under Judges Sewall and Putnam, removed to Salem, where he began the practice; member of the Legislature for three years, of Congress for two years, and then again in the Legislature of which he was Speaker, which he resigned in 1811 to take a seat in the United States Supreme Court, to which he was appointed by President Madison. For the first five years at Salem his practice was quite limited, and he was very despondent of success. Complained greatly of his isolation on account of his political views. He was a Republican or Democrat, and writes, "All the lawyers and Judges in the County were Federalists, and I was the first that obtruded upon it as a political heretic. The wealth, rank, talent, civil and literary character of the State was the same." He, at several times, almost came to the conclusion to remove to Baltimore, or some other Southern city more congenial with his views, and corresponded with different persons for that purpose. But yet he remained at Salem and persevered at the law till appointed Judge of the Supreme Court of the United States at the age of thirty-two years. This appointment, it is said, was made by a mere accident. Judge Cushing had died in 1810, and it was claimed his successor should be from Massachusetts. The range was very limited, nobody thought of Judge Story. Mr. Madison appointed Levi Lincoln, who had been Jefferson's Attorney-General and Acting Secretary of State, but he was compelled to decline, because of blindness creeping on him. He then appointed John Quincy Adams, and he declined for the reason which he gave that "his tastes and mind were not judicial and he preferred to retain his position as Ambassador to St. Petersburg." In this dilemma, Mr. Bacon, a member of the House, from Massachusetts, suggested the name of *Joseph Story*. To the surprise of everybody he was appointed and confirmed, and took his seat November 11, 1811. Judge Story was perhaps the most learned and scholarly Judge who ever sat on that Bench, and while there his industry was untiring in gathering from every field of knowledge, so that his acquisitions were really marvellous. In addition to his labors on the Bench he drew many of the most important laws of Congress, lectured on law and on scientific subjects, wrote learned and voluminous essays and sketches upon almost all subjects. His legal works, so full of references to the Roman laws and of all nations, are well known to the profession, and all have, or should read, his "*Commentaries on the Constitution*," "*Conflict of Laws*," "*On Bills and Notes*," "*Equity*," and "*Equity Jurisprudence*," "*Partnership*," while his voluminous letters published by his son give us insight to all the men and events of his life. He examined every question in its every aspect, and exhausted all learning and authority upon it, and when his mind was made up on any subject, however much he may have differed from any other person, he

had the courage to announce and act upon it with a firmness which few men possess.

Gabriel Duval, of Maryland, was appointed by President Madison in 1811, in place of Judge Samuel Chase. He had long been known as an eminent lawyer of that State, was Associate Judge of the General Court of that State for six years, Comptroller of the Treasury of the United States, and afterwards Chief Judge of the County Courts, Chancellor, and Judge of the Court of Appeals of Maryland. He sat on the Bench until the fifteenth of March, 1826, when he resigned on account of the infirmities of age. President Jackson appointed as his successor Roger B. Taney, of Maryland, but the Senate at the last moment of its session indefinitely postponed the matter, which was understood as a rejection, and he then appointed Philip P. Barbour, who was confirmed and took his seat.

Henry Baldwin, of Pennsylvania, was on the sixth of June, 1829, nominated by President Jackson to fill the vacancy occasioned by the death of Bushrod Washington and was confirmed by the Senate, the two Senators from South Carolina alone voting against him on account of his well known views in favor of a protective tariff.

Judge Baldwin was born in New Haven, Connecticut, in 1779, and graduated at Yale College in 1797, having as classmates Chief Justice Williams, Roger M. Sherman and Professor Silliman. He was distinguished there for great force of character, and left with a high reputation for scholarship, industry and integrity. He studied law with A. J. Dallas, at Philadelphia, and on admission to the Bar settled at Meadville, Pennsylvania, but ere long increasing business drew him to Pittsburgh, as a larger sphere for his abilities. Here he rose rapidly, although under very adverse circumstances. He was a new man among many competitors. His social and personal habits, then none of the best, and his convivial associates, very indiscriminate in character, drew much comment on him. After fighting a duel with a brother lawyer who had styled him "*Caliban*," he found himself at last recognized as one of the leaders of the Bar. He was an untiring student, slept but little, and was so completely absorbed in his profession that it is said there were but few topics on which he could not present the authorities by name and volume.

In 1817 he was elected to Congress by a large majority and continued for three terms. He was a strong protective tariff advocate, and his report and speech on that subject in 1820 ranked among the most effective efforts in that body. His seat in Congress was, however, like that of many others, a poor investment pecuniarily. He had been largely engaged in the rising manufacturing interest of Pittsburgh, and

in extensive purchase of lands, and his long absence in Congress caused these interests to be neglected and he became heavily involved, which was a matter of serious injury to him for years afterwards.

He was one of President Jackson's earliest and most ardent supporters, and it was supposed that he would be appointed one of his Cabinet; but the death of Judge Washington occurring, he was appointed to that position which was more agreeable to his tastes and ability. He entered on his new duties with great learning, unwearied industry and conscientiousness, but his great losses in business preyed heavily on his spirits, and his latter years were clouded by misfortunes. He died on the 22nd of April, 1844, at Philadelphia, after a brief illness from paralysis. "He was," said Chief Justice Taney, "full of the learning of the law, strikingly familiar with its records and decisions in ancient as well as in modern times." The Federal and State Bars united with great unanimity in tribute to his great learning, industry and pure sterling qualities.

A full account of his life and character may be found in Vol. 6, Pennsylvania *Law Journal*, page 1, and in the report of the Bar meeting of the Supreme Court of the United States in Third Howard's Report.

The greatest and most trying event in the judicial career of Chief Justice Marshall was the trial of Aaron Burr for treason in the United States Court at Richmond, Virginia, in 1807. It was a case in which the passions and political prejudices of the whole country were aroused on one side or the other, and every motion and decision of Judge Marshall was scanned with intense interest. The high position which Burr had filled in the country, the great talent he had evinced, the magnificent array of counsel on both sides, Wirt, Wickham, Martin, Mason and others, the well known anxiety of the administration for his conviction, the animosity existing between Jefferson and Marshall, all tended to clothe it with unusual magnitude. A writer present at the trial said, "it was a strange scene to witness the prisoner and the Judge, each so striking in appearance, so strangely confronted, and as people said, two such pairs of eyes had never looked into one another before." The popular will demanded conviction, and in the Court room all the pressure which counsel dared to use was brought to bear on the Court to that end, but the important record of history is, that no greater display of legal skill was ever witnessed in our land nor was ever any greater evidence of judicial knowledge and rectitude. *The scales of justice amid all the excitement were held with an absolutely even hand.* Burr was acquitted. Enemies of Marshall during the trial used every possible means to malign him. He was charged with having dined with Burr and his counsel during the trial, with all manner of corruption, and denounced as the most dishonest and corrupt Judge who ever sat on a Bench, and

that his name would go down to posterity with loathing and disgust. I have a full file of the trial published from day to day in the "*Aurora*," a newspaper published in Philadelphia, which exhibits this intense hatred of him in editorials and communications nearly every day during the trial. From the issue of April 14, 1807, I quote the following, taken from the Virginia *Argus*, published at Richmond. "It is reported, and we are sorry to say that the fact appears indisputable, that Colonel Aaron Burr and the Chief Justice of the United States dined together at Mr. Wickham's since his examination, and since His Honor had himself decided solemnly that there were probable grounds to believe him guilty of a high misdemeanor against the United States." "We are astonished that Mr. Marshall did not perceive the extreme indelicacy and impropriety of such respect being paid him by the Judge who is to sit hereafter in his trial."

At this dinner Burr is said to have offered the toast "*To the Union of all honest men.*" The editor adds, "who this alludes to the editor can not say, but it must be *one* of the party."

On the seventeenth of same month appear columns of the same character. It says Burr's "bail in $5,000 were Thomas Taylor, *son-in-law to John Brown, private secretary to Judge Marshall* during his mission to France, and John G. Gamble, a member of his family on the same memorable occasion." "I can find no reason why the Chief Justice of the United States should pollute the ermine of justice by coming into contact with an acknowledged criminal. Does he think it will console the last hours of Aaron Burr should he unfortunately be compelled to pronounce the awful sentence of death on him to address him in these words—I have partaken of the rites of hospitality with you—I sympathized in your sufferings, it now remains for me to pass the sentence of the law, or is it, that spurning the opinion of the public, and disregardful of his office, and weary of the long protracted indulgence or patience of his country, he is at length determined to *throw off the mask* and avow himself the open supporter of an expiring faction."

Again, "a Judge may blunder certainly on the Bench, may know nothing of the law, or by his aristocratic or monarchical opinions may pervert what he knows, to the ruin of *his employers, the people.*"

"So great is the sanctity of a *Judge*, we are told that nothing can injure it but *actual villainy.*"

That these attacks were not unnoticed by him may be strongly read in the latter part of his charge to the jury, in which he said, "*That this* Court dares not *usurp* power is most true, that it dares not *shrink* from its duty is no less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without

self reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the *world*, he *merits the contempt* as well as the *indignation* of his country, who can *hesitate* which to embrace." The calm judgment of posterity has embalmed his name as the greatest and wisest Judge, and his decisions have preserved the Constitution from nearly a hundred years of assault. These decisions, and the great work in which he labored with a loving heart, "The Life of *Washington*," will defend him against all attacks which have been or may be made against him. When seventy-four years of age he was chosen as a member of the Convention to revise the Constitution of Virginia in 1829. He took an active part in it and spoke with great fervor on two questions, "the basis of representation," and "the tenure of judicial office." These had both greatly distracted the public mind. "Advert, sir," he said, "to the duties of a Judge." "He has to pass between the government and the man whom that government is prosecuting, between the most powerful individual in the community and the poorest and most unpopular."

"The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience. I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful people was an ignorant, a corrupt, or a dependent judiciary."

He presided for the last time in the Supreme Court in the session of 1835, then in his 80th year. He had outlived all the Judges who sat with him the first ten years of his service.

Shortly after, his health failed, and on advice of his physician he was taken to Philadelphia by his three sons for treatment. Here he lingered till the sixth of July, 1835, when conscious of his approaching end, with his faculties unimpaired to the last, he expired. His remains were borne back to Richmond, Virginia, and there interred. At the opening of the next session of the Court a most eloquent and impressive eulogy was paid to him by Henry Clay, and most affectionately responded to by Judge Story, the senior Judge who had occupied the Bench with him 24 years. "This Hall," he said, "will never again be honored by his presence. But so long as it remains devoted to the administration of public justice, so long will it preserve the best records of his fame. He who in future ages shall here seek for his monument need but look around and before him. The voice of the eloquent and the learned,

which will here pronounce his name, will never fail to breathe forth at the same time his most effective praise."

These statements were responded to by the Bar of every State, but in none more eloquently or appropriately than by that of Charleston, South Carolina, in which it declared that "Though his authority as Chief Justice of the United States was protracted far beyond the ordinary term of public life, *no man dared to covet his place or express a wish to see it filled by another.* Even the spirit of party respected the unsullied purity of the Judge, and the fame of the Chief Justice has justified the wisdom of the Constitution and *reconciled the jealousy of freedom to the independence of the judiciary.*"

On the 10th of May, 1884, a bronze statue to his memory, the work of the son of his great friend Story, was unveiled near the west front of the Capitol at Washington. The funds for it had been contributed half by the Bar of Philadelphia and Richmond, Virginia, and the other by Congress.

The ceremony took place in presence of both Houses of Congress, the chief officers of the Government, the descendants of the Chief Justice and a large concourse of citizens. Addresses most appropriate were delivered by Hon. William H. Rawlins, of Philadelphia, and by Chief Justice Waite, of this State, who in character and ability was one of his most fitly chosen successors, and who for fourteen years with great talent, integrity and spotless purity adorned the Bench, until in the language of Mr. Baker (his life-long neighbor, who so fittingly read his biography to this Association in 1888,) "the rhythm of his richly rounded life was complete, and in the early hours of the morning of March 23, 1888, he peacefully passed to the life beyond."

Well may the study of these lives in detail be commended to all, to presidents and all rulers, to judges and lawyers and people of every vocation in life, for they are the incentives, the inspirations to toil on and up, heeding neither toil, nor poverty, nor contumely, for these but strengthen and bring victory to him who, conscious of his own rectitude, strives to perform his duty as God gives him to see that duty.