AN ADDRESS

ON THE

History of the Supreme Court,

DELIVERED IN THE

HALL OF THE HOUSE OF REPRESENTATIVES, FEBRUARY 4TH, 1889,
AT THE REQUEST OF THE MEMBERS OF THE COURT AND OF
THE BAR, IN COMMEMORATION OF THE FIRST OCCU-
PANCY BY THE COURT OF THE NEW SUPREME
COURT BUILDING, MARCH 5TH, 1888.

By HON. KEMP P. BATTLE, LL. D.,
President of the University of North Carolina.

[PUBLISHED BY REQUEST OF THE COURT.]

INTRODUCTION.

BY HON. THOM. S. KENAN

The people regard with favor every effort to preserve the history of the State, and of its separate civil and military departments of government. A notable illustration of this is the process of restoring the records of our Colonial times, which is now being conducted by the authority of an act of the Legislature, and under the wise and careful supervision of the Secretary of State.

Believing it to be desirable to present to the public, in an accessible form, the history of our Supreme Court, the members of the Bar, at a meeting held in this city not long since, invited the orator of this occasion to prepare an address to that end. His familiarity with the subject-matter, and his ability to deal with it, warrant me in saying that their selection was an admirable one, and that the discharge of the duty thus imposed will meet with entire approval. I take pleasure in presenting to you, ladies and gentlemen, the Hon. Kemp P. Battle, President of the University.

ADDRESS.

Mr. BATTLE said:

Gentlemen of the Supreme Court Bench and Bar, Ladies and Gentlemen: In tracing the history of the Supreme Court of North Carolina, we find that its origin is not the Act of 1818, which established it on its present basis, but that it properly begins with the first organized government in our State. I shall not attempt, however, to give in detail the successive struggles by which, from feeble beginnings, has been evolved this great tribunal, which controls so largely the peace and happiness of our people. I can attempt only a general review.

There are no records of any courts in the Provincial period under Governor Drummond, prior to the assumption of the government by the Lords Proprietors, and for some years after the grant of their charter. I have no doubt of there having been such, because English people, whenever and wherever they settled—in the forests of Germany before the dawn of history, in the lands wrested from the painted Britons, in the wilds of America and Australia, South Africa and India—have never failed, moved by divinely-implanted love of order, which has made them great, to have the germs of an executive, legislative and judicial power; but the records of those courts have been, probably, forever lost.

It might have been expected that there would have been inaugurated for the judicial system a copy—at least, a likeness—of

the English system, but the grant of Carolina to the Lords Proprietors in 1663, enlarged in 1665, substituted for the king, as the fountain of all justice, eight sub-kings. They were vested with all the royalties, properties, jurisdiction and privileges of a county palatine, as large and ample as the county palatine of Durham. The Bishop of Durham possessed in old times an *imperium in imperio*. He created barons, appointed judges, convoked Parliaments, levied taxes, coined money, granted pardons, erected corporations, and, although his powers had, to some extent been curtailed by Edward I. and Henry VIII., many of them survived even to the reign of William IV. The Proprietors claimed, in fullest extent, the exercise of these prerogatives. After four years of provisional government, with entire confidence of success, they proceeded, in 1769, to put into operation the extraordinary scheme called the Fundamental Constitutions of Carolina, fondly described by them as the "Grand Model." There could not possibly be a more striking proof of the truth that all good government are slow growths, the product of the struggles and compromises on intelligent and well-meaning men, than this abortive product of Locke's metaphysical brain. Locke was a learned philosopher, and most of the Lords Proprietors were men of large experience and ability in various fields of human activity, one of them, Shaftesbury, of extraordinary genius, but their attempt at government was so unsuited to the people for whom it was intended, that it met with their scorn and resistance, and the historian's ridicule.

These Fundamental Constitutions of Carolina were elaborately framed, on this principle, that the Proprietors had kingly authority,

and were not subject to the Crown in the exercise of their government. The Supreme Courts created by that instrument were to be presided over by one of them in person or by deputy. Contrary to the statements of the historians of our State, this system was not entirely abrogated until the entire transfer of their jurisdictional rights to the Crown.

The Grand Model, which it would be an insult to Sir Thomas More to call utopian, sought to organize eight grand courts, one of super-eminent greatness, consisting of the Proprietors themselves, presided over by the oldest, who was styled the Palatine, another name for king, as the word is derived from palatium, a royal residence. Each of the other seven proprietors had likewise a court of which he was the chief judge, with six counsellors, as assistants, chosen in an elaborate manner, which I have not time to describe. It is interesting that these tribunals are copied after those which prevailed in the Roman empire. Their names and functions were:

The Chief Justice's Court, having charge of appeals in civil and criminal cases; the Constable's Court, having charge of military matters; the Admiral's Court, having charge of maritime affairs; the Treasurer's Court having charge of matters relating to the revenue and finances; the High Steward's Court, having charge of commerce and trade, external and internal; the Chamberlain's Court, having charge of matters of heraldry and ceremony, and matrimonial matters. There was to be no appeal from any of these courts. A quorum was to be the Proprietor and three counsellors, but the Palatine Court could authorize special cases to be tried by any three.

There was likewise authorized a Chancellor's Court of one of the

Proprietors and his six counsellors. Its jurisdiction was terrific. It extended to all invasions of the law, of liberty, of conscience, and of the public peace under pretense of religion, and of the license of printing. It was evidently designed to have the terrible powers of the King and his Council, which, under the name of the "Star Chamber," did such bloody work in the effort to crush liberty in England. The inferior courts were to be a county court of the sheriff and four justices, with general civil and criminal jurisdiction, and a precinct court of a steward and four justices, with criminal jurisdiction in cases other than capital, and ill civil cases other than those concerning the nobility.

Trial by jury was authorized, but a majority carried the verdict.

Some curious provisions of a general nature were made. For example, it was provided, as among the Romans, that "it shall be a base and vile thing to plead for money or reward." "To avoid multiplicity of laws, which by degrees always change the right foundations of the original government," "all statutes were to be *ipso facto* null and void at the end of 100 years after their passage." Further, it was enacted that "since multiplicity of comments as well as of laws have great inconvenience and serve only to obscure and perplex, all manner of comments and expositions on any part of the Fundamental Constitutions or any part of the common or statute laws of Carolina are absolutely prohibited." But among these and other like senseless provisions was found one in advance of the age. While Claverhouse was dispersing conventicles and John Bunyan and other brave spirits were languishing in prison, no man could be

persecuted for his mode of worshipping God in Carolina.

The Proprietors met at the Cockpit on October 21st, 1669, and organized themselves under the Grand Model. The aged George Monk, Duke of Albemarle, was by seniority the first Palatine, John, Lord Berkeley, Lord Lieutenant of Ireland, was chosen to be first Lord Chancellor, and Anthony Ashley Cooper, then Lord Ashley, afterwards Earl of Shaftesbury, was chosen the first Chief Justice of Carolina.

In the following year, 1670, Earl Clarendon being in banishment, and Sir Wm. Berkeley Governor in Virginia, six Proprietors met. The Duke of Albemarle had answered his final roll-call, and Lord Berkeley was Palatine in his stead. Each appointed his deputy, Berkeley choosing Samuel Stephens, who thereupon became the first Governor under the Constitution. Shaftesbury, the Chief Justice, gave his appointment to Mr. John Willoughby, who thus became the first, so far as is known, of the learned and dignified line of Chief Justices in our State. The other deputies, including Willoughby, became the Council, which, besides having other functions, became the upper house of Assembly of Albemarle. The Proprietors, regretting that they could not put the Grand Model completely in operation for want of landgraves and caciques, instructed the Governor and Council to come as near to it as possible. The Governor, with the consent of the Council, was authorized to establish courts and appoint judges.

Under these *express* instructions, to make as near approach to the Constitution as circumstances would admit, we find that the Governor and Council acted as the Court of Chancery, with almost

arbitrary powers. They exercised the functions of an appellate court, not only as to questions of an equitable nature, but questions of common law and even fact. The Chief Justice, being a deputy of the Proprietors, was a member as of course, but not necessarily the Chancellor.

The supreme common law court was called the General Court, in which the Chief Justice presided, with an indefinite number of assistants, appointed by the Governor and Council. Sometimes the members of the Council were assistants. What powers these assistants had does not appear. They probably were merely advisors of the Chief Justice (who received his appointment from, and held at the will of the Proprietors), as the assessors in Roman Courts counseled the proctor. This seems clear from the fact that the early instructions to the Governor required that they shall be "able and judicious persons," and it was only about forty years afterwards, in 1724, that they shall be "learned in the law." Certainly in early days they were not, except in rare instances, lawyers. In 1728, Governor Burrington quarreled with the Chief Justice, and sought to neutralize his authority by claiming judicial powers for the assistants. The Assembly stoutly contended, through John Baptista Ashe and Cornelius Harnett, the elder, that the Chief Justice was supreme, and that assistants only had power to inform and advise, "exactly as masters in chancery informed and advised the Chancellor." This view prevailed, although Burrington argues his point with ability. Again, I find when the Chief Justice was absent another was specially commissioned, the assistants not being allowed to hold the court.

The assistants were allowed no salary or fees.

What we call "counties" were, until 1788, called "precincts," while a number of precincts constituted the larger jurisdictions of Albemarle and Bath counties. I do not find the County Courts, contemplated by the Fundamental Constitutions, ever had an existence. The Precinct Courts were established at once, and under the name, subsequently given, of Courts of Pleas and Quarter Sessions, continued until abolished by the Constitution of 1868.

It is not certain that the earliest Chief Justices were lawyers. The title, "Captain" John Willoughby, does not suggest Coke or Littleton. He seems to have been a man of force, as we have an accusation against him before the Lords Proprietors that he was a "person who runs himself in many errors and *praemunires* by his extra judicial and arbitrary proceedings in the courts." It is charged that he refused to grant an appeal to Thomas Eastchurch, saying that his courts "were the court of courts and jury of juries." As to the truth of the charge we must suspend judgment until the other side be heard from.

The earliest record of any General Court that we have, in 1694, at the house of Mr. Thomas White, shows that it was held by the whole Council, with Mr. John Durant as assistant. The Chief Justice was likewise the executive, Hon. Thomas Harvey, Esq., Deputy Governor, the Governor of Carolina being at Charleston. Whether he was a lawyer does not appear. The assistants were Hon. Francis Tomes, Benjamin Lakar, Major Samuel Swann, Daniel Akehurst, Secretary, Esq., Lord Deputies. The cases brought before the Court were escheats, laying out roads, attachments, actions in debt, assumpsit, detinue, trespass, *quare clausum fregit*. Criminal cases were

also tried. They sat also as a court in chancery.

An instructive case, illustrating not only the court practices, but the business habits of the people, was that of Hopkins *v.* Wm. Spragg—Attachment.

The Provost Marshal, as the executive officer of the Court was called, returned attachment on six sheep, one pair of steel yards and one loom, one cow and yearling, one cow and calf, with whatever of estate of Spragg was in the hands of Christopher Butler; also £3 5 shillings in bonds of Lawrence Misell. The plaintiff declared that Spragg was indebted to him in 1,400 lbs of merchantable pork, agreed to be paid for; 14 sheep sold by plaintiff to defendant; that defendant was willing to surrender the 14 sheep in satisfaction, but Christopher Butler, by persuasion, prevented the same, and then, with intent to defraud said Hopkins, purchased all the defendant's estate; whereupon, Butler comes and defends the suit.

A jury is impaneled, who find for the plaintiff. The Court orders that the Marshal make payment to the plaintiff of the 1,400 lbs. of pork of the goods attached, being appraised according to law, with costs of suit, and the surplus, if any, to return to Butler.

Whereupon, Butler craves that further proceeding be stayed until the full hearing of the whole matter be had at the next Court of Chancery. Butler, and Mr. Stephen Manwaring as his surety for the appeal, give bond in the penal sum of 2,800 lbs. of pork.

At the Court of Chancery, the same officers being present, with Col. Thomas Pollock, a Lord Deputy, and Col. Anthony Daws, as assistants, being added, it is recited that Christopher Butler, appearing

and pretending title to the goods of Spragg, having obtained an injunction, has not filed any bill. It is decreed that the suit be dismissed. Evidently, Butler appealed for delay only. I find other appeals where there was no pretense of an equitable element.

I will give a criminal case—an indictment for murder—which shows the rudeness of the practice in that day. It is charged that "Thos. Denham, Gent., with a certain weapon, commonly called or known by ye name of catt of nine tayles, feloniously and maliciously did strike, beat, wounded and killed" one Hudson, who, by reason of aforesaid mortal strokes and wounds, did depart this life.

Richard Plates, *Att'y Gen'l.*

Jury find "guilty of manslaughter."

The record states that Thomas Denham, having been convicted of manslaughter and "saved by his Book" (a curious entry for pleading the benefit of the clergy), "ordered, that Thomas Denham be burnt in Browne of left thumb with a hott iron having y[e] letter M, and pay all costs, and upon his petition, the court in chancery doth reprieve said sentence until her Majesty's pleasure be further known."

It seems here that the Governor and Council, sitting as a Court of Chancery, granted the reprieve. The power of reprieve was originally granted to the "Governor and Council." It is likely that the same body acted in an executive capacity at one moment, and, without leaving their seats, resolved itself into a Court of Chancery. The functions of the two were therefore sometimes confounded. Long afterwards we find that the Governor and Council prescribed days for holding court, generally the week after the session of the

General Court.

It will be noticed that the reprieve was "until her Majesty's pleasure be known." This seems inconsistent with the claim of the Lords Proprietors to absolute rule, *"jura regalia,"* in Carolina. History shows that there was great discontent with the practical independence of the Crown granted by the charters of Charles II. *Quo warrantos* were sometimes threatened for annulment of the grants, and the Proprietors found it necessary to make some concessions of their princely claims long before they sold their rights to the Crown. At one time the General Court refused to grant an appeal to the Privy Council, but afterwards it was deemed best to allow it, though so grudgingly that they refused to stay execution pending the appeal.

The oath required of the judges was short and to the point: "You shall doe equall Right to ye poore and rich after your conning, witt & Power. You shall not be councell of any quarrell hanging before you."

We have no records of the General Court during the troublesome times of the so-called Cary Rebellion and the Tuscarora War. The record of one held in 1713, for the Province of North Carolina, is printed in the Colonial Records. This is like our modern courts. The Deputy Governor and his Council, with one or two assistants, are no longer the judges. In their place we find the Hon. Christo. Gale, Chief Justice, and Thos. Miller, Capt. John Pottiver and Anthony Hatch, Assistant Justices. Gale was a lawyer, though Urmstone, the missionary (not a good witness, however, as a rule), says that he was in England only a lawyer's clerk. The others were plain justices of the

peace. At what time these changes occurred does not appear. This constitution of the court continued for many years.

The pleadings are more accurately drawn, though the spelling does not improve. For example, we have "enorminous" for "enormous," "abrobrious" for "opprobrious," "dispositions" for "depositions." Lawyers are more numerous. The principals are Edward Moseley, Thos. Snoden, and Edward Donwich, who is her Majesty's Attorney General. The place of meeting is Captain John Hecklefield's, in Little River. The Assistant Justices are sometimes styled "Associates." Instead of appealing to the Courts of Chancery to set aside judgments, motions are made before the Court itself for arrest of judgment. The points made by Edward Moseley in *Cary* v. *Took* would do credit to a modern lawyer with his unlimited access to books.

It is to be remarked in passing that the Colonial Records show that the act of the General Assembly, expressly declaring that the common law is and shall be in force in this government, except the "part of the practice in the issuing out and return of writs and proceedings in the Court of Westminster," &c., which Hawks and others say was first passed in 1715, was certainly passed as early as 1711.

Christopher Gale is the most imposing figure in the early judiciary. His portrait, with his dignified countenance and flowing wig, shows judicial serenity equal to his contemporaries in England. The missionary, Urmstone, whose grumbling spirit and vituperative pen destroy his credibility, cannot help admitting that he had gained great esteem, and was regarded as an oracle. Everard and Burrington

praise him at time, and when he opposes their schemes violently denounce him, as they did all other officers not agreeing with them. But the vestrymen of his church indorse his piety, the members or the lower house of the Assembly his learning and integrity, and the Lords Proprietors give him their support. My opinion inclines to Gale.

Whoever has held the great office of Chief Justice deserves at least that his name shall be recorded. I therefore state that Tobias Knight, the same who was accused of complicity with the pirate Teach, or Thache (pronounced Tack), known as Blackbeard, who was, however, acquitted, was in place of Gale, who vacated his office by going to England. Then came Frederick Jones, who, I am grieved to say, unjustly detained money, paid to him in lieu of bail, which his executors were forced to disgorge. Then came Gale again, during whose second term the court was for the first time held in a court-house, in Edenton, formerly Queen Ann's Creek. In 1724 the terrible Burrington assumed the power of ejecting him and appointing Thomas Pollock, but the indignant Proprietors quickly reversed his action, ejecting Burrington and installing Sir Richard Everard as his successor. At the Court in 1726 ten assistants sustained the Chief Justice, while three indictments were found against the late Governor for trespass, assault, misdemeanor and breach of the peace, which the accused contemptuously ignored until after the second term; the Court, in despair of enforcing its authority, ordered *nolle prosequis* to be entered. It was high time for the Lords Proprietors to surrender a trust which they had so shamefully mismanaged.

In 1728 the Proprietors transferred to the Crown the jurisdiction over all the territory covered by the charters of 1663 and 1665, and seven-eighths of the title to the land, Earl Granville retaining his interest in the soil, which was in 1744 conveyed to him in severalty. The jurisdiction was not formally assumed until 1731, when Burrington, the first royal Governor, replaced Everard. There was no change, therefore, in the court system until the latter date, Gale continuing to be Chief Justice, and having constantly stormy disputes with the Governor. He was superseded by William Smith, who is described as having been educated at one of the English universities and having been a barrister at law for two years. The royal instructions to the Governor show a desire to have a better government. The Governor was forbidden to displace a Judge, without good cause reported to the King or the Commissioners for Trade and Plantations. Justice was ordered to be dispensed without delay or partiality, and the privilege of the writ of *habeas corpus* was enjoined. Appeals from the Court to the Governor and Council were allowed in cases of over £100 value, and thence to the Privy Council in cases over £300.

Burrington, in an official report, gives a very intelligent account of the court laws of his day. The Chief Justice was paid a salary and fees for forty-one several acts, the scale of which may be estimated from issuing a writ being 3 shillings, filing a declaration or plea 2 shillings and 6d., &c. The Clerk's fees were about the same as those of his chief. The fees were payable in Proclamation money, or in certain commodities at prescribed rates, *e. g.,* tobacco at 11 shillings per 100 lbs, corn at 2 shillings per bushel, wheat at 4 shillings per

bushel. The Clerk, Wm. Badham, reports that in 1772 the salary of the Chief Justice was £60 per annum, and fees about £100. The later rose to £500. Attorney General Little in 1731 estimates his own fees at £100, and the Chief Justice's income at £500 or £600, of which £60 was salary. The depreciation in Proclamation money varied very much at this time—according to Burrington the pound sterling being eight to one, but according to the Assembly only five to one.

Governor Burrington's friendship with Chief Justice Smith was of short continuance. We soon find the latter proceeding to England bearing complaints of the Governor's tyrannical and overbearing conduct, one witness swearing that he had in the presence of the Court ordered the marshal to arrest and imprison him. The Governor endeavored to break the force of his attack by writing to the Board of Trade that Smith was "the jest and scorn of the men who perverted him," "a silly, rash boy, a busy fool and an egregious sot," "ungrateful, perfidious scoundrel, and as much wanting in truth as understanding."

These are hard words to be said of one presiding in the highest court of the land, but the Chief Justice repaid the Governor with such compounded interest that Gabriel Johnston was soon seated in the executive chair, and Smith resumed his seat on the bench.

During Smith's absence in England, Burrington appointed John Palin as his successor, and on his resignation from ill health, Wm. Little, Gale's son-in-law, who died in two years and was succeeded by Daniel Hanmer, who in turn was soon ousted by the triumphant Smith. Those were sad times. In addition to the outrageous violence

of the Governor, the lower house of the Assembly unanimously voted that Chief Justice Little was guilty of oppression and extortion, while Chief Justice Hanmer was imprisoned for perjury, which his friends charged was procured by the vindictive malice of Chief Justice Smith. Sixteen members of the Assembly charged Smith with grievous exactions and extortions and offered to prove the charges if time should be given for procurement of the witnesses. And still people prate of the glorious old time ! Even the old song, which tells of the miller's stealing corn and being drowned in his dam, and the weaver's expiating the theft of yarn by being hung in his web, and of the little tailor who went down below gripping tightly the purloined broadcloth under his arm, neither, however, meeting justice at the hands of the law—even that old song, bearing most cogent testimony of wide-spread corruption, has the effrontery to begin:

> "In the *good old Colony times,*
> When we were under the King!"

We now approach an important epoch in the history of our Colonial law. For many years the judges had been endeavoring to mould our judicial system after the English pattern—a court in bank, where all the pleadings were made up, sending out its judges periodically for trials of questions of fact in the neighborhood where the parties and witnesses reside. The first circuit ever attempted was Edenton and Newton, in Hyde County. The increase of population on the Cape Fear, the Neuse and the Tar, made it proper to take steps to accommodate those localities. Governor Johnston and his

able Council were leading spirits, determined, if possible, to introduce the English system more fully, with Newbern as the new Westminster and to adopt that town as the capital of the Province.

A formidable obstacle was in the way of this improvement. The Lords Proprietors had granted each of the six precincts of old Albemarle County, Currituck, Pasquotank, Perquimans, Bertie, and Tyrrell, five members of the Assembly, while the others had only two. Such inequality may seem atrocious to us, but there were scores of worse inequalities among the boroughs sending members to the British House of Commons; and we are familiar with diminutive Delaware having the same political power in the Federal Senate as her big sister New York, with population thirty-five times greater. Certainly the inhabitants of those counties clung tenaciously, without sense of shame, to their privilege; and their thirty members, being a majority of the House, voted solidly against transferring the seat of government from Edenton.

Governor Johnston determined to carry his point by surprise. He prorogued the Assembly, appointing the new place Wilmington, as far as possible from the Albemarle, and the time, the latter part of November, when the swamps and low grounds were usually deep in water, and the Albemarle members, nearly all planters, were engaged in driving their hogs to market or curing their slaughtered carcasses for future use. He reckoned correctly that they would be slow in making the long and toilsome journey, and incurring danger of financial ruin by leaving their farms at a most critical period. By his advice, the southern members, taking advantage of their absence at

the opening of the term, resolved that, by analogy to the British House of Commons, in which forty members constitute a quorum for transacting business, fourteen and the Speaker should be a quorum, and proceeded to reduce the representation of those counties to two each, fixed the seat of government at Newbern and passed the court bill of 1746. They thus added one more to the instances of good measures, like the union of England and Scotland, and the *habeas corpus* act, passed by unworthy means.

By virtue of this act Newbern took the place of Westminster. All writs, plaints, and process were to be commenced in the Supreme or General Court then, and all the pleadings and proceedings thereon were to be carried on until the case was at issue, and then the court issued out writs of *nisi prius* and subpoenas for witnesses to attend at the proper places.

These *nisi prius* courts were to be held by the Chief Justice twice a year at Edenton, in the Northern circuit, at Wilmington on the Southern circuit, and in the court-house in Edgecombe in the Western circuit.

The supreme and principal Court of Pleas for the Province was to be held twice a year in Newbern, and was to be called by the old name, the General Court. The Court consisted of the Chief Justice, appointed by the Crown, and three Associates to be appointed by the Governor, the Associates to have the powers of Associates in England, and to hold the court in cases of the sickness or disability of the Chief Justice, or when he was a party.

The criminal cases were to be tried in courts of Oyer and Terminer and General Jail Delivery, to be held by the Chief Justice or

some person specially commissioned.

The Courts of Chancery were to be held in Newbern on the second Tuesdays after the General Courts.

The County Courts were to have cognizance of all cases above 40 shillings, and not exceeding £20 Proclamation money, of all petty larcenies and misdemeanors, with right of appeal to the General Court.

This act was a great improvement on the old system. It contains many provisions of the court acts of North Carolina of our day. I conjecture it was drawn by Moseley, then Chief Justice, or by him and Samuel Swann, both of whom were able and experienced lawyers. They, with Enoch Hall and Thomas Barker, were appointed the same year to revise and publish the Acts of Assembly in force. Hall and Barker seem not to have acted, and Moseley died in 1749, so the work is called Swann's Revisal, or "Yellow Jacket."

The admirers of Archibald MacLain claim for him the authorship of the much-lauded court law of 1777, which claim is, I think, successfully disputed by the admirers of James Iredell the elder in his behalf. The codifiers of the Revised Statutes of 1836 give the credit to the unknown author of the court law of 1767, but an inspection of the Acts of 1746 shows that its authors should have equal praise.

The acts met with vehement opposition at home and in England. The Board of Trade submitted the question as to their loyalty to the eminent law officers, both afterwards conspicuously adorning the Chief Justiceship of the King's Bench of England, Sir Dudley Ryder, Attorney General, and Wm. Mansfield, afterwards Lord Mansfield,

Solicitor General. Their opinion was that the acts were passed "by management, precipitation and surprise, when very few members were present, and are of such a nature and tendency and such an effect and operation that the Governor, by his instructions, ought not to have assented to them, tho' they had passed deliberately in a full Assembly."

Whereupon, the agent for North Carolina craved leave to appear by counsel, Mr. Hume Campbell and Solicitor Sharpe. Their argument was ably replied to by Mr. Joddrell, counsel for the Albemarle counties.

This argument was had in 1751, five years after the passage of the act. Three years after this the Board of Trade made its decision against the acts, on the ground that they encroached on the King's prerogative. In consequence of this unaccountable and criminal neglect during all the years from 1746 to 1754, the six counties regarded not only these, but all other acts of Assembly, as illegal, and refused to recognize them in any way, because passed by an unlawful Assembly. Juries refused to attend the courts in Edenton, and there was practically no recognized government in the Albemarle country. Bishop Spangenberg, the Moravian, reports that "perfect anarchy prevailed. As a result, crimes are of frequent occurrence." This is not an unusual example of the misgovernment of North Carolina during the Colonial period.

The Assemblies under Governor Dobbs showed determined purpose to secure administration of the law, intelligent and honest. To secure independence they enacted that the Associate Justices should hold office during good behavior, which had been the rule in

England since the Act of Settlement in 1701. To secure legal ability and interest in the Province, they enacted that no one should be an Associate Justice unless he should have been an outer barrister of five year's standing in England, or an attorney of seven years' practice in this or an adjoining Colony, and also have been a resident here for one year.

This excellent law was vehemently objected to by the Crown officers of the Board of Trade, and was repeatedly disapproved by the Crown. The Assembly stood firm, so that occasionally there was an interval of anarchy between the notice of the disapproval and the passage of the new law. Riotous assemblies were had, jails broken into, malefactors set at large, and violence and robbery were frequent and unpunished. Attorney General Robert Jones piteously complains that the rioters of Granville had notified him that they intended to petition the Court to silence him, and if they refused, to pull his nose.

The flimsy reasons given for the disapproval of these acts bring out clearly the strength of the position taken by the Assembly. They were:

1. That the qualifications prescribed for the Associates were an unconstitutional restraint on the power of the Governor, who held his power of appointment under the Great Seal.

2. That they practically prevented anyone from England being appointed an Associate Judge.

3. That it was manifestly improper that the Associates should hold during good behavior, while the Chief Justice held at the pleasure of the Crown.

4. That the acts create the offices of Associate Justices, leaving the Governor only the form and name of commissioning them.

5. That it delegates to them, in the absence of the Chief Justice, the whole right of jurisdiction, which right can only be delegated by the Crown.

6. That by the extending the circuit over 1,900 miles a year, a disability of attendance is created.

7. That the Chief Justice in distant and desert places will be deprived of recourse to books to enable him to make a right decision.

In 1760, Governor Dobbs was moved by the urgency of the Assembly and prevalence of anarchy, with the approval of Chief Justice Berry, and the Attorney General Childs, who had given a different opinion when in England, to sign a court law substantially the same as that disapproved by the Crown. For this he was severely censured by the King and Council, and the laws were disallowed; wherefore, in 1762, the Assembly receded from the obnoxious provisions. A "Supreme Court of Justice" was established in the district of Edenton, Newbern, Wilmington and Halifax, to be composed of the Chief Justice and one Associate, and in the Salisbury district of the Chief Justice and an assistant Judge.

In 1767, a new and more elaborate court system was adopted for five years. The Province was divided into five judicial districts, Hillsboro being added to those heretofore mentioned. In each was a court held by the Chief Justice and two Associates, the latter appointed by the Governor and allowed £500 a year, for payment of which a special tax on each wheel of a pleasure carriage, and on law suits, was laid. Martin Howard was Chief Justice, and Richard Henderson and Maurice Moore were appointed Associate Justices.

This system was an essential departure from the English system. Instead of the judges trying questions of facts only in the districts, leaving the questions of law to be heard before all the judges sitting in bank at Newbern, all the members of the Court went to the courthouse of each district and there heard both questions of fact and questions of law. The *Nisi Prius* Court and the Appellate Court

were held in the same town by the same judges, and during the same term. A great defect was, that one Judge, in the absence of the others, had all the powers of the Court.

The salary of the Chief Justice was £26, and of the Attorney General £16, the Associate Justices £41 13s. 4d., Proclamation money, for each court.

The act was not renewed. After the expiration of the five years' limit, the Governor and Council insisted on exempting from the attachment laws the estate of those who had never resided in the Province, and to confine them to cases of those debtors who had absconded from the Province with the intent to avoid payment of their debts. The Lower House unanimously resolved that the right to attach the estates of foreigners had long been exercised by the inhabitants of the Province; that it had been found greatly beneficial to its trade and commerce, and the security of the property of inhabitants, and that they could not, by any public act of theirs, relinquish this right, abandoning the interest of their constituents, and the peace and happiness of the Province. The Governor urged them to provide compensation, at least for those appointed by him especially to hold courts of Oyer and Terminer and General Jail Delivery, but they firmly declined. They claimed that such commissions could not be valid without the aid of the Legislature; that calamitous as the circumstances of a people might be, from the interruption both of criminal and civil jurisprudence, the House judged the misery of such a situation vanished in comparison with a mode of redress exercised by courts unconstitutionally formed. The various arguments of the Assembly on this question show ability and a fixed determination to secure for themselves the untrammeled right to pass laws suitable to the circumstances of the Province.

In consequence of this disagreement, our Province was without higher courts from 6th March, 1773, to December 24, 1777, which period is excepted out of the statute of limitations by the court law of 1777. Martin attempted to inaugurate criminal courts by special commission, under the royal prerogative, Samuel Cornell

being, *pro hoc vice,* appointed Chief Justice, but such strong exceptions were made to the commissions that the scheme was not pressed. There is abundant evidence of the crime and turbulence resulting from the suspension of the courts. It was not long, however, for in August, 1775, the State Congress at Hillsboro adopted a provisional government in preparation for the war of independence, and the functions of the judiciary were exercised by the stern hand of the Committees of Safety.

It only remains, before leaving the Colonial history of the Supreme Court, to give a list of the Chief Justices after Wm. Smith, who left for England in 1740. John Montgomery received the temporary appointment, which, on Smith's death, three years later, was made permanent. He was succeeded in 1744 by Edward Moseley, a man of great ability, who for forty-four years preceding his death, in 1749, with rare ability and weight of character, was ever foremost in public and in private life, in working for the material interest of the Colony, in battling for the rights of the people, in courageously withstanding the tyranny of the executive. After Moseley was Enoch Hall, whose good character receives the praise of Governor Dobbs, while his knowledge of the law receives his depreciation. On his visiting England in 1760, Eleazer Allen and James Hazell held the office successively. I know nothing of Allen. McCullock, the elder, estimates Hazell as a creature of Johnston, not bred to the law and without the least knowledge therein. Peter Henly was next in office, a man of uprightness, according to the Lower House of the assembly. On his death in 1758, James Hazell was again the *locum tenens,* until the arrival of Charles Berry. He seems to have been a fair and upright Judge until he came to a tragic end in 1766, by suicide in a fit of temporary insanity, it is said, brought on by brooding over the displeasure of Tryon because the slayer of an English officer in a duel was not convicted in his court.

Martin Howard, the next Chief Justice, was a firm supporter of the royal prerogative. For his advocacy of the Stamp Act, while a Judge in Rhode Island, his home was burnt and he was forced to flee for his life. Unusual obloquy has been heaped upon his name; but as

he was allowed to reside on his plantation in Craven County, where he claimed to have made two blades of grass grow where one grew before, unmolested, until the middle of September, 1777, and was on friendly terms with Judge Iredell, I surmise that much of the odium against him must be attributed to party feeling. His legal reputation was high.

Judges Moore and Henderson espoused the cause of the Colonies, and the former was active as a legislator in Revolutionary times. Moore seems to have been an able lawyer. Henderson turned his attention to land speculation, and certainly had ambitious views, as history shows. A son of the former, Alfred Moore, became a Judge of the Supreme Court of the United States, and a son of the latter, Chief Justice of the Supreme Court of our own State.

The Constitution of the free State of North Carolina was adopted on the 18th of December, 1776. The framers had no conception of any system in which the judges of the supreme or appellate court should not themselves sit in the trial of causes. There is no provision in it regarding a Superior Court Judge. It is the legislative, executive and supreme judicial power that are to be kept separate. The General Assembly is to elect Judges of the Supreme Court of law and equity and Judges of the Admiralty. It is the Judges of the Supreme Court who are to have adequate salaries. It is certain that the Constitution contemplated that the Supreme and Superior Court Judges should be the same persons, as in Colonial days and as in England.

Under the Colonial government, the Chief Justice was the highest judicial power; yet he was a member of the Council, and therefore an influential part of the executive department. As the Council was the upper house of the General Assembly, he was likewise an influential part of the Legislature. The Governor not only could disapprove acts and dissolve and prorogue the Assembly, but had large weight in the appointment and control of the Council, and thus had power in the Legislature. Moreover, being a member of, and presiding over, the Court of Chancery, he was an important

factor in the judicial department. In fact, complaint was made against Governor Johnston that he acted as Chancellor when the court was not in session. Hence, we find the prohibition of the intermingling of the three departments of our government inserted in the Declaration of Rights. But the framers of the Constitution had had so much experience of the arbitrary conduct of the Governor and Judges that they made the executive and judicial branches almost entirely dependent on the General Assembly, the annually-elected agents of the people. I will not stop to show this as to the Governor. The statement is abundantly evident as to the judges. They held office during good behavior, but they could be removed by repeal of the law authorizing the court. They were to have adequate salaries, but the Assembly had the sole decision as to what was adequate. The Assembly, without the intervention of a grand jury, could prosecute them by impeachment for alleged maladministration or corruption.

The Constitution of 1835 remedied at least two of these defects. By the amendments then adopted, the salaries of the judges could not be diminished during their continuance in office, and the Senate only could try impeachments, two thirds being required for conviction. The judges were still removable by repeal of the law under which their offices were held. It was not until 1868 that the Supreme Court was made a part of the Constitution, so as to secure entire independence. It is a strong proof of the firmness and integrity of our judges since 1777, as well as the conservatism of our people, that those officers never hesitated to do their duty, even when in opposition to the will of the Assembly, and the people sustained them. They have repeatedly declared null laws framed by the body which could have docked their salaries and even abolished their offices. They have not hesitated to incur temporary unpopularity in defence of principles of lasting value.

On November 15, 1777, the new court law was adopted. It is so nearly a copy of the act of 1767 as to suggest the probability of having been drawn by the same lawyer. The term "Superior Court" was used when it was manifestly proper to use the constitutional term "Supreme Court," which would not have been a misnomer, as it had

supreme jurisdiction. In another section the draftsman forgot to omit the words "or commander-in-chief" after the word Governor, as should have been done. In the oath are phrases copied from the old oath, which are out of place in a government where the judges are in no danger from the arbitrary action of the executive.

The few changes were undoubtedly for the better. Two judges were required to declare questions of law, or demurrers, cases agreed, special verdicts, bills of exception to evidence, and motions in arrest of judgment. The licensing of new attorneys was taken from the Governor and given to at least two judges. The salary was increased to £100 for each term attended, or £50 in case of non-attendance from necessity, and no fees were allowed.

It shows the continued domination of English ideas that the establishment of courts of equity was delayed for five years. As the departments of government were obliged, under the Constitution, to be kept separate, the General Assembly could not, even if it desired, have conferred equitable jurisdiction on the Governor and Council, as in Colonial days, nor was the creation of new offices in accordance with their views. The expedient of making the same officer a judge at one hour, of law, and at another, of equity, was not obvious to the legislative mind until 1782.

The act of 1777 followed that of 1776 in dividing the State into six districts, the Courts for which were to be held at Wilmington, Newbern, Edenton, Hillsboro, Halifax and Salisbury. In 1782 the district of Morgan was added, and in 1787 that of Fayetteville, making eight in all. The Attorney General, as in Colonial times, attended all the Courts in behalf of the State. The people of the counties of New Hanover, Onslow, Bladen, Duplin and Brunswick attended Court in Wilmington; of the counties of Craven, Carteret, Beaufort, Johnston, Hyde, Dobbs and Pitt, in Newbern; of the counties of Chowan, Perquimans, Pasquotank, Currituck, Bertie, Tyrrell, Hertford and Camden, in Edenton; of the counties of Halifax, Northampton, Edgecombe, Bute, Martin and Nash, in Halifax; of Orange, Granville, Wake, Chatham and Caswell, in

Hillsboro; of the counties of Rowan, Anson, Mecklenburg, Guilford, Surry, and Montgomery, in Salisbury; of the counties of Burke, Wilkes, Rutherford, Washington, Sullivan and Lincoln (Washington and Sullivan being in what is now Tennessee), in Morgan, now called Morganton; the people of the counties of Richmond, Cumberland, Sampson, Union and Robeson, in Fayetteville.

A full Court consisted of all three Judges and Attorney General. One Judge could hold the Court, but it required, as before stated, two Judges to sit as an appellate or Supreme Court. For trial of criminals beyond "the extensive mountains that lie desolate between the inhabited parts of Washington (in Tennessee) and the inhabited parts of Burke," it was provided by act of 1782 that one of the Judges, and "some other gentleman commissioned for the purpose," should hold Court at the county seat of Washington (Jonesboro), for that county and Sullivan, the Judges and Attorney General to have two-thirds of the allowance given for holding the other Courts.

The first Judges elected were Samuel Ashe, of New Hanover; Samuel Spencer, of Anson, and James Iredell of{469} Chowan. After riding one circuit Iredell resigned his seat, and John Williams, of Granville, took his place in 1777. Iredell was a very able lawyer, of a judicial temper, afterward fully demonstrated on the Supreme Court Bench of the United States, to which he was appointed by Washington. Ashe held his office until 1795, when he was elected Governor; Spencer until his death in 1794; Williams until his death in 1799. For thirteen years, at a most critical period of our history, during the throes of the Revolutionary War, during the chaotic days of the nerveless confederacy succeeding, when the exhausted people, staggering under broken fortunes and a worthless currency, were bringing into order the State whose liberties they had won, during the stormy discussions preceding the adoption of the Constitution, which many thought would bring back the galling tyranny of Tryon and Martin—during all these times of despondency and poverty, of dissension and furious party spirit, these three were the entire judiciary—Judges at *nisi prius* and Judges in bank, Judges of law and

Judges of equity, Judges of the Superior and Judges of the Supreme Court.

The calm judicial demeanor, the superiority to the passions which tear the breast and influence the actions of clients and their lawyers, was not in those days, nor long afterwards, expected of the Bench. Fierce sarcasms, like those of Ellenborough and Chase, and foul curses, like those of Thurlow, could be paralleled at many courts in England and America. It was not until 1796, that a Judge in North Carolina was forbidden to express to the jury his opinion of the facts, and this practice inevitably provokes the wrath of lawyers. It is not wonderful that our judges had the faults of their day. Moreover, neither one of the judges had properly much training in the law before his election to the Bench. Ashe was a lawyer, but the character of the practice and the turbulence of the times did not allow much devotion to his profession. Spencer had been Clerk of Anson Court and certainly had been a lawyer only a limited time, if at all. Williams had been a carpenter, and though possessed of good judgment and highest character, was unlettered. The troublous times of the Revolution afforded little opportunity for the Judges to perfect themselves for their judicial duties. Having witnessed with their own eyes the despotic conduct of Governors and other royalist officers, their feelings were warmly enlisted against the establishment of a strong general government. Some of the lawyers who practiced before them were well read in literary as well as legal lore, ardent Federalists, and at least two of the most prominent, Maclaine and Hay, were high tempered, and when irritated, had tongues sharp as a scorpion's sting.

The estimate placed by these gentlemen on the Judges, is extremely unfavorable. Maclaine and Hay spoke of them with bitter contempt. Davis refused the offer of the District Judgeship of the United States, because of the paltry salary, though he was "anxious to escape from the d—d Judges." Hooper narrates the following, which I quote as showing our improvement in judicial dignity:

"Court went on in the usual dilatory mode. Great threats of dispatch accomplished in the usual way. Much conversation from Germanicus (Spencer), on the bench; his vanity has become insufferable, and is accompanied with overbearing insolence. Maclaine and he had a terrible 'fracas.' Germanicus with those strong intuitive powers with which he is inspired, took up Maclaine's defense in an ejectment and run away with it before it was opened. Maclaine expostulated, scolded, stormed, called names, abandoned the case. I prevailed, Spencer made condescensions, hostilities ceased and peace was restored."

Hay made before the Assembly of 1785, accusations against the Judges for the following offences. I copy verbatim from a letter of Hooper:

"1. High fines and shameful appropriations of them.

"2. Admitting new and illegal prosecution (depreciations, &c.)

"3. Banishment of Brice and McNeill.

"4. Dispensing with laws (the Newbern case).

"5. Negligence of their duty and delay of business.

"6. Ill behavior to Mr. Hay at Wilmington."

As to these charges, the Attorney General (Moore) said that some of them were quite new to him. Judge Ashe refused to notice these at all, and said that "he has clear hands and a pure heart."

Hooper says Hay "boils with as much fury against the judges as Saul against the Christians." He adds that "the ridiculous pursuit of Hay's ended as he expected. It was conceived in spleen and conducted with such headstrong passion that after the charges were made evidence was wanting to upset them." On the whole, we must conclude that the judges were not as learned or as dignified as our standards require, but they were by no means as deficient as the critical Federalist lawyers painted them. There were bad manners on both sides. That Spencer had talent and influence is proved by the continued hold he retained on the affections of the people of the State, especially of his intelligent constituents of Anson. It is proved by the evident respect shown to him and his opinions by such men as

Iredell and Johnston and Davie in the Constitutional Convention of 1788 as well as by his strong arguments against certain clauses of the Constitution. I regret to say that tradition sustains the charge against his private character as to his anticipating, in his mode of living, the practices of Brigham Young, but I find no tangible charge of corruption in office. I am fortunate in being able to give a contemporary newspaper account of his death, the most peculiar in all the history of the taking off of great men:

"In extreme old age he was placed in a chair in his yard under a shady tree. A red cap protected his bald pate from the flies. The humming of bees and the balmy sunshine brought a gentle slumber upon him and caused him to nod. A large turkey gobbler mistook his nod for a challenge to fight, and smote with heavy spur the old man's temple. Suddenly awakened by the blow and resounding flaps of hostile wings, the venerable judge lost his balance, and fell heavily to the ground and was dead." The inhabitants of the valley of the Pee Dee will tell you that the gobbler was his murderer. My newspaper states that he was killed by the shock of the fall. Let each of you make his own deduction, according to his views of *potentia proxima* and *potentia remotissima*. The only judge cognizant of the facts died before rendering a decision.

Samuel Ashe was undoubtedly a man of force, strong in intellect and will, though his taste did not lie in hard study of the law. He had the confidence of his contemporaries during his nineteen years of judicial service, and after his elevation to the executive chair. The wrangling with the bar and between the judges, so often imputed to Spencer and Williams, were not imputed to him, though the charge that his hatred of Tories swerved him from perfect impartiality, in cases in which they were parties, may probably be true. Williams was in all likelihood the most unlearned of the three, but he has left behind him, especially among his neighbors in Granville in and around the village named in his honor, an unspotted reputation for integrity and charitable conduct.

These, our earliest judges, are entitled to the eminent distinction of contesting with Rhode Island the claim of being the first in the United States to decide that the courts have the power and duty to declare an act of the Legislature, which in their opinion is unconstitutional, to be null and void. The doctrine is so familiar to us, so universally acquiesced in, that it is difficult for us to realize that when it was first mooted, the judges who had the courage to declare it were fiercely denounced as usurpers of power. Speight, afterwards Governor, voiced a common notion when he declared that "the State was subject to three individuals, who united in their own persons the legislative and judicial power, which no monarch in England enjoys, which would be more despotic than the Roman Triumvirate and equally insufferable." In Rhode Island the Legislature refused to re-elect judges who decided an act contrary to their charter to be void. In Ohio, in 1807, judges who had made a similar decision were impeached, and a majority, but not two-thirds, voted to convict them. As I have mentioned, the action of the court was the foundation of one of the charges brought by Hay. He accused them with dispensing with a law—the "Newbern case." This was the case of *Bayard* v. *Singleton,* in ejectment, which our judges had the nerve, as early as May Term, 1786, to refuse to dismiss, as ordered by act of Assembly, on affidavit of the defendant that he bought the land in suit under confiscation sale. The judges were sustained eventually by public opinion. Iredell wrote a strong pamplet vindicating the power of the judiciary. New York follows with a similar decision in 1791; South Carolina in 1792; Maryland in 1802; the Supreme Court of the United States, in *Marbury* v. *Madison,* in 1801.

The Constitution contemplates that, as in England, the office of Attorney General should be of great importance. In his mode of election, and in the mandate as to adequate salaries, he is classed with the Governor and Supreme Judges. It is very doubtful whether the act of 1790, which provided for a Solicitor General for one-half of the counties, and that of 1806, which reduced the Attorney General to little better than a Solicitor for the metropolitan circuit, were not in this respect unconstitutional. They were certainly extra-

constitutional. The early Attorneys General were equal if not superior to the Judges as lawyers. Waightstill Avery, who first held the office, was an accomplished and able man, the worthy ancestor of one of our present judges. On his resignation from ill-health in 1779, James Iredell succeeded and served until 1782. His successor, Alfred Moore, resigned in 1790 in disgust at being required to surrender to Edward Jones, the Solicitor General, half of the honors and emoluments of his office. The office lost none of its dignity by next devolving on the greatest criminal lawyer of that day, John Haywood.

We now resume the legislative history of the Supreme Court:

In 1790 the eight judicial districts were separated into ridings, the districts of Halifax, Edenton, Newbern and Wilmington constituting the Eastern, and those of Morganton, Salisbury, Fayetteville and Hillsborough constituting the Western riding. An additional Judge, Spruce McKay, whose advent was hailed by the lawyers deservedly with joy, was elected. Two judges in rotation, with the Attorney or Solicitor General, were assigned to hold the courts in each riding. This law was, as to the appellate functions of the court, worse than the old. The uniformity secured by having the same Judges for all the State was lost, and the miserable spectacle of diverse decisions by different supreme tribunals of the same question was not only possible but frequent. Delays from difference of opinions were unavoidable. For example, take the case of *Winstead* v. *Winstead,* in 1 Haywood, where the question was whether levy on the land of husband and sale after death divests dower. The court was composed of Williams and Haywood. They agreed that the levy did not divest dower but concluded to write their opinions afterwards. Williams failed to send his opinion, so the case was continued, and in October, 1796, came before McKay and Stone. McKay stated that he was not ready to decide the question. Afterwards, at another term, when Williams returned, the case came up again, and he was inclined to change his opinion; so the case was continued again. The final entry is that it went off the docket without decision, whether because the widow Winstead died of old age does not appear. It was

impossible for the ablest and best balanced judges to give satisfaction under these adverse circumstances, so there was wide-spread anxiety to procure a change. For eight years of this period, too, these judges, as I have said, were authorized to express their opinion of the facts to the jury, and as there was no appeal from their decisions, their power was certainly inconsistent with free institutions. It was greater even than in Colonial times, because then the Court of Chancery, and appeal to the King in Council, were checks to unfair decisions.

The student of history sees repeated instances of God's evolving good out of what appeared at the time an unmixed evil. The corrupt conduct of one of our most trusted and beloved public servants proved a partial remedy for our ruinously inefficient judicial systems.

It was found, amid universal horror, that James Glasgow, a Revolutionary patriot, so popular that a county had been called in his honor, Secretary of State since the adoption of the Constitution, by annual election, had been for years confederating with John and Martin Armstrong and others, in cheating the State by the issue of fraudulent bond warrants.

To secure the punishment of these criminals, the General Assembly, probably deeming it more convenient to have the trial at the place where was the Secretary's office, was induced to create an extraordinary court. It was to consist of at least two of the Judges, who were to meet at Raleigh for the purpose of trying this prosecution. While so convened they were authorized to hear appeal of causes accumulated in the district courts. They were to meet twice a year, and to sit not exceeding ten days at each term. Both the Attorney and Solicitor Generals were ordered to prosecute, and a special agent was authorized to prepare and arrange the evidence and attend the trial, the solitary instance in our history of the employment of a public "attorney," charged with the functions of an English "attorney," as distinguished from the barrister. The act was to expire at the close of the session of the General Assembly next after June 10, 1802.

Notwithstanding the fact that Judge Haywood, moved by a fee of $1,000, which was of seductive magnitude in that economical period, resigned his judgeship to appear as counsel for the defence, the accused were convicted. We find the name of Greene replacing that of Glasgow in our list of counties, and the black lines of expulsion drawn around his name on the books of the venerable order of Masons.

The General Assembly were persuaded to grant the continuance for three years longer of such part of the act as provided for the meeting of the judges for hearing appeals, and to give the court a name, viz., the "Court of Conference." The suspicion that the lawyers were pushing this measure for their own emolument, endangering the passage of the bill, the astounding provision was inserted, as a rider, that "no attorney shall be allowed to speak or admitted as counsel in the aforesaid court." I have called your attention to the fact that a similar ebullition of vulgar prejudice may likewise be found in the Fundamental Constitutions, drawn by the great philosopher John Locke, the ignorant legislators and the learned metaphysician both guilty of the extreme folly, first, of endeavoring to shut out light from the minds of the judges, and, secondly, of supposing that such childish provisions could outwit the lawyers. I hope this August assembly will pardon me for saying that this "Locke on the human understanding" was exceedingly weak.

By the act of 1804, the Court was made a permanent court of record, the judges were ordered to reduce their opinions to writing, and to deliver the same *viva voce* in open court.

In the following year the name was changed to that contemplated by the Constitution, the Supreme Court. An executive officer, the Sheriff of Wake, was given to it and the limit to the duration of the term was removed.

In 1806, a great change was made in the Supreme Court system, for the purpose of relieving the people of long journeys for the purpose of attending to their court business. In modern days we cannot realize the evils in this respect under which our ancestors

suffered. My old grandmother, who was married in 1788, said to me: "Talk about your bridal tours—in my day we had none. The only bridal tour I ever heard of was riding to the nearest judge to sign away the wife's land." Brides whose honeymoon devotion was equal to the sacrifice, were forced to traverse many scores of miles to reach a judge or a county court. Superior Courts, by the new law, were to be semi-annually held in each county. The counties were grouped into six circuits, called also ridings, but the judges were to ride in rotation. In other words, the existing system was adopted. Two new judges were created and four new solicitors. The Supreme Court now consisted of six, but two continued to be a quorum. The preamble of the act asserts that the old system caused such delays as often amounted to denial of justice, and the change was a great relief.

As the judges for the last six years had not elaborated their opinions in such manner as met the approval of the profession, a law was passed in 1810 requiring them to write out their opinions "at full length," which mandate many young students of the law think was in after years occasionally obeyed with too much conscientiousness. For this additional labor they were to be paid £50 ($100) per annum. They were at the same time to elect out of their number a Chief Justice. John Louis Taylor was the first and only judge that held this honorable office. The Governor was required to procure for the court a seal, with suitable devices and motto. Any party to a suit in the Superior Court was given right to appeal to the Supreme Court on questions of law.

For fear that the requisitions as to the opinions would not be carried into effect, in the following year it was provided, in substance, that the decisions of the court should have no validity until the opinions should be delivered publicly and in open court, stating at length the ground of argument upon which the opinions are founded and supported, and also copies of the same delivered to the clerk.

This completes the legislation prior to the creation of the present organization of the Supreme Court. Although the meeting of the judges at the seat of government to hear appeals was a great improvement on the preceding plan, it was impracticable to secure

best results, "while the Supreme Court was held by any two of six judges, coming to their labors after long journeying over horrible roads at the rate of three or four miles an hour, and yearning for a needed rest at home. Some of those judges were exceedingly able lawyers. Five of them—Taylor, Hall, Henderson, Ruffin, and Daniel—were eminent members of the new court. Besides these there were others worthy to sit with them; for example, Alfred Moore, afterwards appointed to the Supreme Bench of the United States, and Henry Seawell, one of the strongest criminal lawyers we ever had. Duncan Cameron, of large brain, who, abandoning law to be president of the chief bank of the State, became one of the most astute financiers of the land; David Stone, called from the bench to be Governor and United States Senator. But they did not have the opportunity for profound and uninterrupted devotion to the study of the principles of the cases before them, and that undivided responsibility which stimulates to highest exertions.

I have been somewhat minute in my notices of Ashe, Spencer and Williams, because they were the first judges, and because they sat together for seventeen years of the most important period of our history, ending five years after the adoption of the Federal Constitution. It would be a grateful task to give similar notices of their successors. Even the anecdotes of them which have been handed down should be recorded; such, for example, as that of the simple-minded Lowrie, from the foot of the Blue Ridge, on his first trip to Edenton, stopping a lawyer in his argument, because, from his seat on the bench, he could look out on the bay and see the behavior of two vessels in a gale of wind. "Stop, Mr. Attorney, this Court sees one ship going one way and another going right opposite in the same wind and the Court does not understand it." And when taken on a visit to one of the vessels, stamping his foot on deck, with some alarm, saying, "I declare, men, I believe she's hollow." But I must content myself with giving, in the appendix, a list of the judges, with the dates of the beginning and ending of their terms.

HISTORY OF SUPREME COURT

The year 1818 is the great epoch in the history of the Supreme Court, when we consider the stern economy prevalent in the Legislature of that day, and the general prejudice against enlarging the official class, especially when lawyers only were to be visibly benefitted, the creation of these new judges, at an aggregate expense of $7,500, to perform their duties at a place remote from the constituents of the members, is most surprising, and shows that there were very enlightened and influential men in the Legislature in 1818.

I find in that body J. J. McKay of Bladen, Zebulon Baird of Buncombe, M. J. Kenan of Sampson, R. M. Saunders and Bedford Brown of Caswell, James Iredell the younger of Chowan, John Stanly, Wm. Gaston and Viser Allen of Craven, John Winslow of Cumberland, Louis D. Wilson of Edgecombe, John B. Baker of Gates, David F. Caldwell of Iredell, Simmons J. Baker of Martin, Wm. B. Meares of New Hanover, A. D. Murphy, James Mebane and Willie P. Mangum of Orange, Chas. Fisher of Rowan, and other strong men, a goodly array of leaders of the people. Their meeting at this time was not the result of accident. It was a time when there was wild excitement about internal improvements. The great Erie Canal was in progress. The time was approaching when Governor De Witt Clinton, with a company of great officials, traveled in a canal boat from Buffalo to New York, and amid thunders of cannon passed into the ocean water, brought from Lake Erie. The spirit of canal and river improvements spread like a prairie fire in a windstorm. In North Carolina there were dreams of navigating our streams from near their sources to the ocean. Raleigh was to receive the vessels of Pamlico Sound up Neuse River and Walnut Creek to the crossing of Rocky Branch by the Fayetteville Road. Boats were to ascend and descend the Cape Fear and Deep Rivers to the Randolph hills. The produce of the Yadkin Valley, from the foot of Blowing Rock, was to cross over by canal to Deep River and be exported from Wilmington, and the puffing of steamboats was to echo from the mountains which look down on the headwaters of the Catawba and the Broad. In vain a Chatham member vowed that in dry times a terrapin could carry on his back a sack of flour perfectly dry down Deep and Cape

Fear rivers to Fayetteville. All warnings were unheeded. Civil Engineer Fulton was brought from Scotland at a salary of $6,000 to make Asheville, Raleigh, Morganton, Wilkesboro, Rutherfordton, Gaston and Louisburg, seaport towns. The Western people, cut off by long roads of mud and jagged rocks, clamored for State aid. The Eastern people, having by the old Constitution the Legislature by two thirds majority in both branches, most of them having every access to markets, sat heavily on the treasury box, and hence provoked a demand for a change of the Constitution. This eastern and western question aroused the fiercest passions and sent to the Legislature the ablest men.

This body of enlightened representatives, the General Assembly of 1818, by the triumphant vote of 42 to 16 in the Senate, and 73 to 53 in the House, gave to the State the priceless blessing of a Supreme Court, and manned it with excellent Judges. The constitutional mode of voting for officers was, until 1835, by ballot. John Louis Taylor, Leonard Henderson, John Hall, Archibald D. Murphy, Henry Seawell and Bartlett Yancey were placed in nomination; Henderson and Hall were elected on the first ballot, and Taylor on the second. The great lawyer, Archibald Henderson, of Rowan, was nominated, but withdrawn, as he was unwilling to come in competition with his brother.

The measure was strongly recommended by Governor Branch, who gave his personal observation of the evils of the old system.

The creation of the Supreme Court was a wide departure from the old English system, and from that of our general government, in that its judges do not try cases in the courts below. The English system adopted in 1873 is, in great part, similar to ours. It is easy to see that Congress will adopt our plan before many years. It was feared by many that the efficiency of our judges would be impaired by not having their minds kept alert by occasional friction in actively-

contested jury trials. These fears have not been realized. Amid all the changes and excitements, in peace and war, for seventy years, the Court has, as a rule, with only an occasional transient exception, possessed the full confidence of the people. From the beginning its authority has been extraordinary, being accepted, with rare questioning, not only by this State, but by the tribunals of other States. Under the old system there were very able judges. At one time on the appellate bench we had men of such uncommon strength as Taylor, Hall, Seawell, Ruffin, Daniel. At another period sat together Taylor, Hall, Seawell, Cameron—an aggregate of talent and learning equal to the best bench of any State. But there was not that regularity of attendance, that continuity of work, that sense of individual responsibility which leads to best results. Under the new organization the great principle of division of labor, which has done so much in modern times for promotion of science and the arts, was adopted for our judiciary. The new judges were given salaries ample to enable them to discard all other pursuits, and devote themselves solely to the final settlement of disputed questions involving the lives, the fortunes, the happiness of the people. This grand and sacred trust could not be shirked or shared with others; they had every incentive and full opportunity and leisure to make themselves experts in their professions, and to labor continuously to acquire new learning and greater wisdom. They were placed on high in sight of all the people. The ablest men, with sharp and critical eyes, watched their actions, ready to detect a failure or reward success. They had an opportunity seldom vouchsafed to men to win the admiration and gratitude of their fellow-citizens by intelligent and faithful work. On

the other hand, if, by ignorance or rash spirit of innovation, they should lose the public confidence, the representatives of the people, who, under the Constitution of 1776, had full power over them, would return to the old system, to their eternal disgrace.

It was fortunate for the new experiment that, owing to miry and rocky roads, infrequent bridges and rough ferries over dangerous streams, and long distances from the seat of government, the members of the bar could not generally follow up their cases and argue them before the new tribunal. A few eminent lawyers found it profitable to devote most of their time specially to this practice. The spectacle, so often seen in these days of rapid transit, of counsel from a village where there is no law library, hurrying into the court-room, after a restless night on the cars, beginning his speech by apologies for want of preparation, was never seen in the early days of the Court. The Nestor of the Bar and distinguished ex-member of the Court (Judge Reade), once satirized this practice with that peculiar cayenne pepper pungency which so often made ignorant pertness of the bar flinch and false witnesses quail, and even pierced to the marrow a presumptuous "D. D.," who, in a commencement address, assailed the honor of our profession. The Supreme Court bar, composed of such lawyers as Peter Brown, Moses Mordecai, Wm. Gaston, Geo E Badger, Thomas Ruffin, the elder, Archibald D. Murphy, Archibald Henderson, Henry Seawell, Gavin Hogg, Duncan Cameron, Joseph Wilson, James Martin, prepared with careful study their arguments, cogent in logic and mighty in language, and fortified by{483} precedent. The judges, aided by this presentation of all the

strength of both sides of the case, deliberated with patient care, decided with conscientious desire for the truth, and wrote their opinions elaborately and clearly, for the guidance and instruction of the profession. Such have been the uniform ability, learning and integrity of the members of the Court from the beginning, their freedom, as a rule, from partisan bias, that the people have, as we have seen, with wonderful unanimity, made it part of the fundamental law, one of the corner-stones which support our fabric of government, one of the main props of our social system.

I will not describe in detail the constitution of the court. That can be found in the Constitution of the State and the code of laws. It is, however, a part of my duty to chronicle the principal changes from time to time in its functions.

The number of the judges continued to be three until the Constitution of 1868 increased it to five. The Convention of 1875 reduced it again to three. Experience demonstrated that the business of the Court, settling the litigations of a million and a half of people, was vastly greater than existed for six hundred thousand people in 1818. It was and is a common belief that the late Justice Ashe had his life shortened by labors too arduous for his constitution. By an extraordinary majority, the number, in 1888, was by constitutional amendment increased again to five.

Another change is in the mode of appointment of the Chief Justice. Until 1868 the designation of the judge who was to perform the honorary function of presiding was left to the judges themselves. From the beginning the safe rule was adopted, that the oldest in office should be chief. Henderson and Hall naturally yielded to

Taylor, who had been for eight years Chief Justice with entire acceptability over the old court. When Ruffin, after serving as Chief Justice for nineteen years, resigned and came again to the bench in 1858, after the death of Chief Justice Nash, some were of opinion that he would be allowed to resume his old{483} headship, but Pearson's claim to it under the unbroken rule was allowed without objection. By the Constitution of 1868 the appointment of the Chief Justice is vested in the people. The Constitution of 1876 continues the provision, as well as the designation of the associates as "justices" instead of "judges." The salaries of the judges are exactly as fixed in 1818. Men have come and men have gone; population has increased threefold; periods of prosperity have been followed by awful financial crashes and prolonged depressions in industrial efforts; near three thousand miles of railway have permeated our land, annihilating distance and economizing time, like the genii of oriental stories on their magic tapestry; the men of the mountains and the men of the seaboard have become next-door neighbors; markets, once possible of access only over roads almost impassable, and many days of toilsome and dangerous journeying, have been brought to our doors; the cultivated land has vastly increased in area; factories are humming, and mines are being dug; yet there stand the same old figures, 2500, as if engraved on adamant, unchanged, though representing much diminished purchasing power. The General Assembly, to all appeals to their liberality, make the answer that the salary is sufficient to attract the best legal talent and experience; and it is no flattery in me to say that the answer cannot be " traversed,"

however we can "confess and avoid" it.

When I say that the salary has not been advanced for seventy years, I am not unaware that in the dark days of our great civil war it was nominally raised. For the year 1864 it was $3,000 per annum, and after January, 1865, it was ordered to be $7,000 per annum, but it was payable, by the terms of the law, in Confederate currency, and thus, in effect, in defiance of the Constitution, it was greatly lowered. Applying the scale of depreciation, we find that the salary for 1862, was $1,354 15; for 1863, $283 20; for 1864, only $117; and for the first quarter of 1865, the installment of $1,750, dwindled down to $17.50. At the end of 1861, it would buy 320 barrels of flour; at the end of 1862, 250 barrels; at the end of 1863, 30 barrels; at the end of 1864, 17 barrels. The installment of $1,750, payable 1st April, 1865, would buy 3 barrels. The steadfastness and pluck with which the judges performed their duties with this meager allowance are worthy of all praise.

The time of meeting of the Court has been several times altered. The first term began on the 1st January, 1819, and after that on the 20th days of May and November. This was the next year changed to the third Monday in June and last Monday in December. Soon after, the second Monday in June was substituted for the third, and these continued to be the days of the opening of the Court until the first Mondays of January and July were prescribed in the Constitution of 1868. The Constitution of 1876 omits this provision, and the General Assembly of 1881 fixed the openings on the first Mondays of February and October, as at present. In 1846 the lawyers of the western portion of the State induced the General Assembly to order a

term of the Court to be held in Morganton on the first Monday in August for all cases in the counties west of Stokes, Davidson, Union, Stanly and Montgomery, and for cases from these counties, with consent of both parties. The experiment was not satisfactory to the Court or to the profession. Owing to a want of a law library, "Morganton decisions," as they were called, were regarded as less certainly sound than those at Raleigh. The Constitution of 1868 fixed the sessions of the Court "at the seat of government;" that of 1876 leaves the sessions at "the city of Raleigh, until otherwise ordered by the General Assembly."

The judges of the Court, under the Constitution of 1776, were to hold office during good behavior, and were elected by the General Assembly. These provisions were not changed in 1835. Vacancies during the recess of the General Assembly were filled by the Governor and Council, until{486} the end of the next session. Under the Constitution of 1868 and 1876, the election is given to the people, the term of office is eight years, and vacancies are filled by the Governor alone, until the next general election. What will be the ultimate result of periodical dependence on the will of the people, time will show. One effect is obvious. All the judges as a rule belong to the same political party, whereas the old Court had generally representatives of the two leading parties. It is beyond my province to discuss the propriety of these great changes. Our ancestors in Colonial days yearned and struggled for the life tenure as necessary for the independence of the Court. Whether tenure at the will of the people will prove to be better than was the tenure at the will of the

Crown or the Governor, experience will decide. And whether the transfer of the election of the judges from the General Assembly practically to the nominating conventions, will be an evil, must be left to the future.

By the supplemental act of 1818, if a judge of the Supreme Court should be incompetent to decide a case on account of personal interest in the event, or some other sufficient reason, the Governor was authorized to give a special appointment to a Judge of the Superior Court, requiring him to sit with the other judges *pro hac vice*. Under this law Judge Murphy acted at June Term, 1820, in place of Judge Henderson, who had been counsel in important cases before the Court. The validity of the will of Moses Griffin, under which the Griffin Free School in New Bern was established, was maintained by this Court. The law was repealed in 1821.

Since 1834 two judges have been authorized to hold the Court, "in case one of the judges is disabled from sickness or other inevitable cause," and this continues to be the law in substance, *The Code* changing "sickness" to "illness," for what reason I know not. It has been the practice to regard the death of a judge as a disability. This is in the spirit of its act, though hardly written in its letter, as at death the judgeship ceases and there is no judge who can be the subject of disability. An interesting question would arise if a judge should, without any inevitable cause, but from sheer obstinate neglect of duty, fail to take his seat. It would seem that the other judges must await the removal of the offender by impeachment, or possibly two-thirds of both houses of the General Assembly might regard such contumacious refusal, proof of "mental inability." I suppose, of

course, this law will be amended so as to require three instead of two out of the five justices to be present in order to constitute a court.

It was not until 1808 that there was any attempt made by law to furnish the people with the decisions of their highest legal tribunal. In that year the Clerk of the Supreme Court was directed to furnish the Secretary of State a report of the decisions of the preceding four years, and annually those made thereafter. There was no appropriation for the cost of publication, but advertisement was to be made for a printer to do the work at his own expense in consideration of the copyright for seven years, the State to have sixty-six copies free. In 1813, the same niggardly offer was made to the Clerk of the Court, the copyright being extended to the time granted by the laws of the United States. I think these laws led to no result, the reports of that day being published on private account.

In 1818 the Supreme Court was authorized to appoint a Reporter at a salary of $500, on condition he should furnish the State, free of charge, eighty copies of the reports, and the counties sixty-two copies. I presume, though it is not expressly so said, that he was entitled to the copyright. Afterwards he was allowed to print 101 copies for the State and counties at the public expense, and was allowed a salary of $300, and the copyright. In 1851 his salary was raised to $600, and the number of copies for the State increased, so as to supply the libraries of the different States and Territories, and a few others. In 1871 the office of Reporter was abolished, and the duties and emoluments given to the Attorney General. Afterwards the salary was increased to $1,000, and the State assumed all the

expense of printing, distributing and selling the reports in excess of those donated, and covered into the treasury the receipts of sales, less five per cent commission for selling. The office of Reporter has always been considered a very honorable one, and has been much sought after by aspiring lawyers. The list of reporters in the appendix shows the truth of this.

Of these, Murphy was one of the most energetic and useful men the State ever had in legislative and judicial capacities. He was an enlightened laborer for public education and internal improvements. He collected valuable historical material for writing a history of the State, for the expenses of which he was authorized by law to raise $15,000 by a lottery, but it was not successful. His collections passed into the hands of President Swain, and much of them may be found in issues of the *University Magazine* published in his day.

Dr. Hawks gave up a brilliant career at the bar for the Christian ministry, became an eminent divine, and an author of valuable historical works. Devereux was forced to surrender a large practice in order to take charge of great estates which he had inherited. Ruffin and Battle became Judges of the Supreme Court. Badger's great career as a lawyer, Judge, Secretary of the Navy, United States Senator, is well known. James Iredell, the younger, had been Speaker of the House, Judge, Governor, and Senator of the United States. Perrin Busbee was an able lawyer, one of the leaders of the Democratic party, and in the line of promotion to the highest offices. Jones was a sound lawyer, and a popular Whig. Winston, to be distinguished from Patrick H. Winston, of Bertie, was regarded as one of the most learned in law and history in his day. Phillips had

been Speaker of the House of Commons, refused the tender of a Supreme Court judgeship, and was afterwards Solicitor General of the United States. McCorkle was a big-brained lawyer. I will{489} not describe Shipp, Hargrove, Kenan and Davidson, first, because they are still alive, and, secondly, they held their post as Reporters by virtue of holding the higher office of Attorney General. This I will say, however, that if they had not towered high as lawyers, among the leaders of their respective parties, they would not have been chosen for the highest non-judicial law office in the State. The wonderful improvement in the style of the printed volumes was begun by Attorney General Kenan.

The Clerks of the Supreme Court hold a most responsible office. Questions of great complexity are frequently referred to them. The duties require an excellent memory and business head, good knowledge of the law, great accuracy, perfect integrity, untiring patience, and unfailing courtesy.

The Court has been fortunate in its choice of officers. Their names are: Archibald D. Murphy, Wm. Robards, Edmund B. Freeman, Wm. H. Bagley, Thos. S. Kenan (the present incumbent). The Clerk at Morganton was Jas. R. Dodge.

While they all met the approval of the Court, for their intelligence and fidelity, I notice specially Edmund B. Freeman, as having been identified with the Court for a third of a century. The following lines by Mrs. Mary Bayard Clarke, though not historically perfectly accurate, are very touching:

"The old Clerk sits in his office chair,
And his head is white as snow;
His sight is dim and his hearing dull,
And his step is weak and slow;
But his heart is stout and his mind is clear
As he copies each decree,
And he smiles and says as the judges pass,
''Tis the last court I shall see.'
But he lingers on till his work is done,
To pass with the old *regime,*
When he lays his pen, with a smile aside,
To stand at the Bar Supreme;
For the old Clerk dies with the Court he served
For forty years save three;
And breathes his last as the judges meet
To sign their last decree."

The Court was authorized to appoint a Marshal in 1841. Previous to that time the Sheriff of Wake was its executive officer at the term held in Raleigh. The Sheriff of Burke was always its officer at the Morganton term. The names of the marshals were: J. T. C. Wyatt, James Litchford, David A. Wicker, Robert H. Bradley (the present incumbent).

It may interest you to know that Mr. Litchford, when pursuing, in early life, his business as tailor, had an apprentice boy, who, in company with several companions, threw stones at the house of one who had offended them. Dreading prosecution, he left Raleigh for a western home. In 1867 he returned as President of the United States. It was Andrew Johnson.

There have been important changes in the jurisdiction of the Court from time to time.

By act of 1799 the Court therein organized had jurisdiction of questions of law or equity which any judge on the circuit was unwilling to decide, or on which there was a disagreement between the judges.

By act of 1810, any party dissatisfied with the ruling of the Superior Court had a right to remove it to the Supreme Court. By the act of 1818 the judges were to have all the powers of the Superior Court Judges, except that of holding a Superior Court. Any party could appeal from the final judgment, sentence or decree of the Superior Court on giving security to abide the judgment or decree of the Supreme Court, which was authorized to give such judgment as should appear to them right in law, to be rendered on inspection of the whole record. Equity cases could be removed to the Supreme Court for hearing, upon sufficient cause appearing, by affidavit or otherwise, showing that such removal was required for purposes of justice, but no parol evidence was received before the court, or any jury impaneled to try issues, except witnesses to prove exhibits or other documents. Under this provision it became customary to remove all important equity causes, so that the Superior Court Judge escaped the responsibility of giving any opinion in the matter. The Constitution of 1868 and that of 1876 put a stop to these proceedings by confining the jurisdiction of the Supreme Court to appeals on matters of law or legal inference. In 1830 original and exclusive jurisdiction was given to this Court for vacation and repeal of grants and letters patent, for fraud, false suggestion or other cause, but this power was also swept away by the same constitutional

provision. The provision of the Constitution giving to the Court original jurisdiction to hear claims against the State, and to report their decisions to the General Assembly, has been construed by the Court to embrace only cases involving questions of law.

These are the principal changes made, specially by law, in the functions of the Court. But there was a mighty mass of changes in the character of their work thrown on the judges, by the Constitution of 1868, and the transplanting to North Carolina the Code of Civil Procedure, first elaborated in New York. The Constitution of 1776, even as amended in 1835, was founded on the assumption that the agents of the people, the General Assembly, would be honest and have such stake in the soil that they could be intrusted with powers almost unlimited. They could tax any subject to any amount, and exempt any subject from any tax at all. They had boundless right to pledge the State credit. They had, as I have shown vast powers in the control of the other departments of government. They had full discretion as to nearly all subjects of legislation.

The Constitution ratified in 1876, which is merely an amendment of that of 1868, is founded on the assumption that the representatives may be untrustworthy. Hence, the executive and judicial departments are made really independent of the legislative. Hence, there are limitations on the taxing power, and on the power of pledging the State credit. Hence, are made a part of the fundamental law numerous provisions, declaring what the General Assembly must do, what it may do, and what it may or may not do. Many provisions seem properly to belong to the statute books, to be modified or amended whenever the interests of the people require.

The General Assembly of 1868, being composed largely of the dominating spirits of the Constitution of that year, adopted the Code of Civil Procedure, framed to carry into effect the modern innovations in judicial proceedings, without attempting to harmonize them with the former habits of our people. Many of the members of the General Assembly, accustomed to the freedom allowed by the old Constitution, framed and voted for enactments without such careful compliance with the minute provisions of the new instrument as judges are bound to exercise.

Moreover, the amendments to the Constitution of the United States, recently adopted, contain guarantees of privileges and immunities to the freedmen which, from life-time experience of different relations, it was difficult to understand and appreciate thoroughly, and which it required the Supreme Court of the United States to elucidate and settle.

Then, too, the difference of opinion between President Johnson and Congress as to their respective powers in restoring the States which attempted secession, the subversion of the State government set in motion by the authority of the President, and the substitution of one under authority of acts passed by Congress, led to discussions and recriminations, alienations and discord, and in certain localities even to strife.

All these innovations and experiments, and political and constitutional difficulties, threw vast responsibilities and peculiar perplexities on the Court, whose action, while not escaping adverse criticism, was, in the main, conservative and wise. The judges,

trained under the old Constitution and legal procedure, have not obstinately impeded the legislative will, however unpalatable. As interpreted by them and amended by the Assembly, the changes seem acceptable to the lawyers, whose practice has been mainly under them. The decisions of the Court on questions growing out of the reconstruction laws have been sustained by the highest tribunal of the land and acquiesced in by all. Neither the people nor the Assembly have resented the frequent declaration of unconstitutionality of legislative acts. On the contrary, the people applauded some of these decisions as preserving them from burdensome taxation.

Another ordeal in the history of the Court, which few tribunals ever pass through unscathed in character, was the civil war. I think it may be said of our Supreme Court that it did not on the one hand so share in the prevailing excitement as to arrest improperly the laws in aid of the war power, or on the other to embarrass the military authorities by unreasonable interference. In defiance of unpopularity and even threats, when the most desperate exertions were put forth in the unequal contest, writs of *habeas corpus* issued by the judges were executed in camps within the sound of the enemy's cannon. And so decisions in favor of military powers of the Confederate Government are such as have been approved by the judicial authorities in favor of the military powers of the United States. The Constitution of the Confederacy on this subject is identical with that of the United States.

I witnessed an interesting scene in the Convention of the reunited Episcopal Church, held in Philadelphia in October, 1865. A proposition was made to petition Congress to exempt candidates for the ministry from military service in future wars, and it seemed to

meet with favor. One of the members from the South, a Judge of the Supreme Court of North Carolina, arose and opposed the resolution in strong language and convincing reasoning, sustaining the right of the government in times of war to the service of all its citizens, and their duty to render such service. The speech made a great impression on account of its being from a Southern man, and also because of the evident familiarity of the speaker with the whole question. It was telegraphed to the leading papers of the North. The resolution was killed at once. The speaker was Judge Battle, giving his carefully prepared opinion on the substitute case of Gatlin *v.* Walton, in which it was decided that Congress can conscript a man who has furnished a substitute under a former law; that one Congress cannot bind a subsequent Congress, or even itself, from calling out, if necessary, all the able-bodied men of the land, and is the sole judge of such necessity.

That the Court has given satisfaction, on the whole, to the profession and the people, is shown, as I have stated, by the strong hold it has upon their respect and confidence. It has been diligent in expounding the principles of the common law and applying them to the facts of the cases before them. When the principles of the common law or of equity, as established in England, are not suited to the condition of a new and unsettled country, it has changed them under the doctrine, *cessante ratione cessat ipsa lex*.

It would be most interesting and profitable to show, in detail, the various departures from English precedents, and the causes therefor, such as "waste" and "pin-money trust," "wife's equity for a settlement," "past performances," "cy pres," "purchasers seeing to the application of purchase money," and so on. It would be equally interesting, but presumption, perhaps, to discuss whether the Court

might not advantageously have refused in other cases to follow English precedents, which they admitted to be bad law; but these inquiries belong, more properly, to the history, of the law than of the Court. Certainly, I have not time to go into them now.

In the appendix will be found a complete list of the judges since 1818, grouped into four periods, the first ending with the vacation of all the offices of the State in April, 1865; the second ending with the close of the provisional government inaugurated by President Johnson, July 1, 1868; the third ending with December 31, 1878, during which there were five judges; the fourth coming down to January 1, 1889, during which period there were three Judges.

I will give short notices of those of the judges who have passed away, more particularly of those who were longest members of the Court and had most to do in molding its character. I begin, of course, with the first Chief Justice, John Louis Taylor.

It would be difficult to imagine how a man could have had a better training for the position of Chief Justice than John Louis Taylor. He was at his election forty-nine years old; was educated at the College of William and Mary, an institution of high character in those days, the college of Jefferson, Madison, Monroe, Winfield Scott and Bishop Ravenscroft, and above all of Chief Justice Marshall. He was one of the leaders of the bars of Fayetteville and Newbern, until elevated to the Bench in 1798. He rode the circuit for twenty years, and was a faithful attendant on the Court of Conference. As already stated he was made Chief Justice of the Supreme Court of 1810-'18. He showed his devotion to his profession by publishing, in 1802, reports of cases determined in the Superior Courts of North Carolina, and in 1814 two volumes of "biographical sketches of eminent judges, opinions of American and foreign jurists, and additional reports of cases determined in our courts," under the title of the "North Carolina Law Repository," and afterwards a third work, containing reports of cases adjudged in the Supreme Court of North Carolina from 1816 to 1818. A charge to the grand jury of Edgecombe was of such excellence as to be published at the request of that body. In conjunction with Henry Potter and Bartlett Yancey,

he, at the request of the General Assembly, revised the statute laws of the State and enumerated the statutes of Great Britain in force in North Carolina. In early life he had been an active member of the General Assembly. His judicial labors had been eminently satisfactory. His opinions showed that he possessed a style not only clear but eloquent. His literary taste was conspicuous; his manners elegant and winning.

John Hall, of Warrenton, was by two years the senior of Taylor. Like him, he was trained at William and Mary College. Unlike him, however, he did not have the gifts for rapid success at the bar. He won his way by persevering industry and faithfulness to duty, by constant study, and strictest integrity. He was elevated to the Bench in 1800, and held his place continuously until called to the new Supreme Court. He was not brilliant, but he was eminently a safe lawyer. He had a clear vision for the true points of a case, and had a wide-spread reputation for good sense. His language was plain, but clear and forcible. He was forced by disease to resign a year before his death.

Leonard Henderson, of Granville County, son of Judge Richard Henderson, of Colonial times, was seven years older than Taylor. He was, sometime in early manhood, Clerk of the Court for the district of Hillsboro, an office of considerable dignity. His reputation as a sound and able lawyer, and his popular manners, led to his election as Judge in 1808. During his eight years' service, he gave eminent satisfaction. The public favor towards him and Hall was shown by his election to the new Court on the first ballot over Taylor, Seawell Murphy and Yancey, among the ablest lawyers of that period. He was Chief Justice from 1829 to his death in 1833.

Chief Justice Henderson had a vigorous, self-reliant mind, well stored with the principles of the law. He brought the questions before him to the test of sound reasoning. He was a conscientious seeker for the truth, and had great weight as an upright and wise Judge; but in culture and genius, and love of, and capacity for, labor,

was decidedly inferior to his successor. His genial manners and kindly temper gained him great favor with the public.

When these great men one by one passed away, leaving legacies of sound opinions for the better understanding of the law, the Court had a good measure of popular favor. It was raised to still loftier fame by their immediate successors. Providence vouchsafed to us judges of equal integrity, of still greater ability, and a longer term for efficient work. For sixteen years—1882 to 1848—Ruffin and Daniel sat together on the bench; for eleven years of this time Gaston was their coadjutor. No State of the Union, perhaps, not even the United States, ever had a superior Bench; few ever had its equal. At home and abroad their decisions, as a rule, had the weight of established and unquestioned law.

Of the three the Chief Justice was, undoubtedly, the ablest lawyer. He was in his prime, forty-six years old, when he entered on his great judicial career. He was a graduate of Princeton. He had an exceedingly strong mind, untiring industry and uncommon powers of labor. When interested in great cases he would work all night, without dropping his pen, and be none the worse in health for it. When at the bar, traveling by night, he attended the courts of Person and Granville and the Circuit Court at Raleigh in the same week, a mule, instead of a locomotive engine, being his motive power. He read much and retained all he read. He had been a judge in 1816, and again of the Superior Court in 1825. He had, as president, extricated the old State Bank from its troubles. He had experiences in the General Assembly, and presided as Speaker of the House. In all these positions it was his habit to treat thoroughly and exhaustingly every subject which came before him. His opinions are elaborate and learned treatises on the questions involved. What Judge Pearson said of his opinion in Hoke *v.* Henderson, "that mine from which so much rich ore has been dug," may with equal truth be said of hundreds of others. Hard cases were not quicksands of the law to him. With inexorable logic he carried out the principles of the law, in criminal and civil cases, without being swerved by appeals for relaxation on grounds of hardship. Without hesitation he joined

Gaston in sending Madison Johnson to the gallows, on the doctrine that preexisting malice is presumed to be continued down to the killing, notwithstanding intervening provocation, although many of the ablest members of the bar agreed with Daniel's dissenting opinion. He never doubted, in excluding evidence of the violent character of the deceased, in Barfield's trial for murder, although Battle's dissenting opinion has been since recognized as good law. I saw him in the Convention of 1861, fiercely indignant at the proposition to abolish corporal punishment. His reply to the argument that it was an outrage to whip a free man, was with bitter emphasis: "Whip a free man! No! Whip a rogue! WHIP A ROGUE!" I saw him sentence a young white fellow, of eighteen years old, in Alamance County Court, for stealing money out of a dwelling-house. "Young man, in consideration of your youth, the Court will deal leniently with you, in the hope that you will reform and lead a better life." I watched the boy's face. It brightened as he heard these words, but it was only for a moment, for the Chief Justice added: "Sheriff, take him to the whipping-post and give him thirty-nine lashes on the bare back." He was not a cruel man, but the doctrine, *justitia fiat, ruat cælum,* was a reality to him. For twenty-three years he was, as the presiding officer of the Court, the greatest factor in molding the law of the State. After resigning his post, at the age of sixty-five, he was, six years afterwards, induced by an almost unanimous vote of the General Assembly again to take a seat on the Bench, but in eighteen months he finally retired to the charge of his farm, complying, however, with occasional calls for his services on critical occasions.

Joseph John Daniel, of Halifax, was likewise in the prime of life, about the age of the Chief Justice. He had a large brain, but lacked ambition. To the business in hand he addressed himself with conscientious industry and rare ability. But he cared nothing for winning reputation by exhaustive discussions of collateral points not before the Court. He wrote not treatises on the general subject. He had a wonderful memory, probably a more extensive and accurate

knowledge of history, especially of the law, than any man in the State, but he made no display and left no written record of it. His early training was at our State University. His opinions are short, but clear and strong and lucid, distinguished for lucidity and terseness. In private life he was singularly unostentatious and charitable and generous. He had only one fault, a habit contracted in early days. Uncle Toby's recording angel was often called on to blot out the careless words which the accusing spirit carried up to Heaven's chancery. I give one case in point to relieve the tedium of my narrative. He was once in church, at which he was a regular attendant, in company with Judge Ruffin, when the inexorable collector, with the inevitable plate, came to his seat. He felt in all his pockets but could only find a $5 gold piece. "Ruffin, lend me a quarter." The Chief Justice shook his head. "Lend me a half." A second shake intimated that this coin could not be had. "Lend me a dollar," and when his companion for the third time expressed his inability to supply his wants, he slammed the gold piece into the plate, saying in desperation" D—n you, go !"

Notwithstanding his failing, Daniel was conspicuous for his obedience to the "Golden Rule." He is said not to have had any eloquence as an advocate, but made his way by learning and diligence.

William Gaston, the third member of the Court, and the oldest of the three, although he had not the reputation of Ruffin for learning in the law, nor of Daniel for learning in history, yet, for a broad, statesmanlike view of legal principles and acquaintance with literature, was unexcelled. He was more of a statesman and had greater oratorical gifts than either. As a member of Congress he impressed Webster and Clay and others as one of the great men of the nation. His long service in our General Assembly and in{500} the Convention of 1835 was distinguished by the liberal and intelligent views he took of all public questions. He was in 1818 the author and able advocate of the Supreme Court bill. His name was given to a western county because, although he was an eastern man, he had the pluck to advocate a convention for doing justice to the west. It was given to a town on Roanoke river, which had visions of

future greatness, because, though his constituents lived on navigable water, he advocated giving State aid to the improvement of the interior streams. It was his personal example which made our people lose their fear of Catholics, and his eloquent advocacy that removed the anti-catholic clause from the Constitution. Beginning the practice of the law at the age of twenty in 1798, the year of Taylor's election to the Bench, he had a successful career as a practitioner, for thirty-five years, before being called to the Bench. He brought to the aid of the Court his extraordinary popularity, and elegant literary style, large legislative experience, and extensive learning in the law.

All the three judges had great natural intellects—all had industry, all had unimpeachable rectitude of purpose, all of them had the unlimited confidence of the bar and laity, all of them were of a conservative temperament, all of them were filled with the desire to decide correctly the cases brought before them, and to give right reasons for their decisions. Their personal relations were harmonious. Orange was then a western county, so that Ruffin was a western man; Daniel a middle county, and Gaston an eastern man. They represented the two great parties of the day. These three great men had just the qualifications and habits to strengthen the Court.

On the resignation of Ruffin, Frederick Nash, under the rule of seniority in service, became Chief Justice, and held the office until his death in 1858. After sixteen years service as Superior Court Judge, he was elevated to the Supreme Court at the age of sixty-three. Succeeding Gaston, and sitting with Ruffin and Daniel, whose powers had been increased by years of study of great questions and practice in writing opinions, his reputation was subjected to a most trying ordeal. He proved himself a sound and able judge, and his lofty character, in which all the virtues were harmoniously blended, his great popularity, gained by his unfailing courtesy and kindly heart, continued and strengthened the public confidence in the Court. As Mr. F. H. Busbee well said in an address in presenting a portrait of the Chief Justice to the Court, "clear in his conception of the law, well-versed in its precedents, of singular felicity of language and

chasteness of expression, with a simplicity and terseness. that would have honored Westminster Hall, he has left opinions which may well bear comparison with those of his great co-laborers."

Before coming to the Bench, Chief Justice Nash had large public experience. He had a full practice at one of the most cultured bars of the State, that of Newbern. He distinguished himself for his readiness, courtesy, firmness and strictest impartiality in the difficult post of Speaker of the House of Commons. In all respects, he was a wise and well-balanced man.

The successor of Nash, Chief Justice Pearson, acted a great part in the legal history of our State. He was a judge for forty-two years continuously, with the exception of the eight months' vacancy in 1865. Of these, thirty years were spent on the Supreme Court Bench; during twenty of them he was Chief Justice. He entered on his judicial career at the age of thirty-one, after a few years' service as a legislator and a large practice at the bar. His mind was singularly clear, strong, incisive, bold and independent. While he had no appearance of self-conceit, he had perfect confidence in his own conclusions. He had no ambition to excel in literature or politics. He despised verbiage, surplusage, shams. He was impatient of efforts to shine in oratory or accumulations of learning. I tried a flight of eloquence on him once. I saw his eyes begin to look deadly, and I fell to earth at once. I recall his disgust at the sight of a distinguished lawyer carrying into court a wheel-barrow full of books, with which to fortify his argument. He was kind in complimenting a clearly-cut, well-prepared argument, but a speech designed for the glory of the speaker was apt to meet with a sarcasm. His mind was steeped in law. He loved clearness and strength. He was fond of meeting legal difficulties by homely comparisons and phrases. The story of the Memphis lawyer weakening the force of one of his opinions by repeating to the jury a long array of his homely illustrations, may have been true. His wit consisted in unexpected application of legal language to non-legal subjects. Governor Caldwell said to him, when they were both young, "Pearson, why did you let the Bishop confirm you? You know you are not a fit member of the church." "Well,"

replied he, "when I was baptized, my sponsors stood security for me. I thought it dishonest to hold them bound for me, and I surrendered myself in discharge of my bail." I said to him once—he was always friendly and kind to me—Judge, please decide a question of law for me: I have two brothers paying me a visit. One is named William and the other Wesley. A lady in town has sent an invitation to 'Mr. W. Battle.' Whom shall I advise to accept it?" "Well, on the principle that every deed is construed most strongly against the grantor, I decide that both should go."

These stories bring out another phase of his character. He was wonderfully genial and kind, especially to young men. This trait made him idolized by his law students. It entered into his decisions. He was watchful for circumstances which could mitigate murder to manslaughter, which could make a case one of larceny rather than one of highway robbery. His leaning was towards mercy.

The Chief Justice became a power in the State. His learning and acuteness and industry made him famous as a lawyer. His students spread abroad his fame as a law-teacher.. When he was nearing his three-score and ten years, his popularity became suddenly eclipsed by his rulings in the cases against Kirk and Bergen. I will not, of course, enter on a discussion of these matters. He has placed on record in the 65th volume of the Reports an unequivocal denial of all charges that he was actuated by any motive but carrying out what he considered his duty under the law. His four associates united in declaring that his rulings had their concurrence, and after his death leading members of the bar bore admiring testimony to his character, and his old law-students, among the most eminent citizens of our State, reared in Oakwood Cemetery, near Raleigh, a monument to his memory.

Associated with Chief Justice Pearson for many years was William Horn Battle, of Orange. He was closely connected with the courts of the State for over a third of a century, beginning with his joint reportership in 1834, and ending in 1868, when, in common with all candidates not nominated by the then dominant party, he

failed of re-election. His re-publications of annotated editions of the early Reports, his labors as Reporter and in preparation of the Revised Statutes of 1835 and his Revisal of 1873, and also of the four volumes of his Digest, gave him a thorough knowledge of the statute law of the State and decisions of the courts. He began his judicial labors in 1840, when 38 years old; was a Judge of the Superior Court for about twelve years; this period of service was broken into by a short term on the Supreme Court Bench in 1848, by appointment of Governor Graham. He had a continuous service on the Supreme Court Bench, from his election in 1852, excepting the short interval of 1865, when all the offices were vacated, for sixteen years. From 1845 to his removal to Raleigh in 1868, and for two years before his death, he was principal of a law school and nominally Professor of Law in the University, but received no salary from the institution, and was not responsible for the discipline. After his retirement from the Bench in 1868, he practiced law in Raleigh, and was for a short time President of the Raleigh National Bank. During the last twenty years of his life, he took great interest in the legislation of his church, being a delegate to its Diocesan and General Conventions. In lieu of any observation of my own, I give an estimate of his judicial character in the words of Mr. Justice Merrimon, extracted from his address at the meeting of the Supreme Court Bar after his death in 1879:

"Judge Battle was a well-read, painstaking and sound lawyer. He was well grounded in the great principles of the law, and was specially familiar with the law and judicial decisions of our own State. Indeed, there has been no lawyer more learned than he in the laws of this State. He was exceedingly fond and proud of his profession; he upheld its honor always and everywhere, and he was an honor to it.

"He was a learned, patient and upright judge. His judicial opinions were well considered and able, some of them strikingly so, and they afford an enduring monument to his memory, while they reflect high distinction on the Bench of the State."

Let me add, for the edification of the younger members of the bar, an anecdote of Judge Battle. In his early days at the bar he was not successful in getting practice. In fact, he said that but for the

encouraging words of his wife he would have abandoned the profession in despair. The depression of spirit on this account preyed on his health. His physicians, according to the practice of the old school, advised a whiskey toddy before breakfast. He tried the remedy for some days. One morning, while dressing, he suddenly said, "I have resolved not to take another glass of whiskey." His wife said, "Why? I thought it was doing you good." "Perhaps you are right," said he, "but I found myself dressing fast in order to get to my drink, and I know, by that, it is dangerous." Such was his dread of that terrible poison, which has slain hundreds of our bright and promising lawyers, some of them, even in early life, the leaders of the bar.

Matthias Evans Manly was the last of the old ante-war Court. He was a strong-minded and able man. Like Judges Pearson, Battle and Ashe, he graduated at our University, all of them among the best scholars of their classes. Being a good mathematician, he was employed, after graduation, as an assistant in the mathematical department, and on a vacancy in the professorship, offered to take charge of the department. Although deemed qualified, his youth was considered an objection, and Dr. James Phillips was elected. He then addressed himself to the law, and soon reached the top of his profession. His judicial career extends from 1840 to 1865, twenty-five years, during nineteen of which he was on the Superior Court Bench. He was elected to the Supreme Court in 1859, on the final retirement of Judge Ruffin.

Judge Manly was a very sound and well-read lawyer. He had not the manners of a successful politician. He forced his way by unbending principle, unwavering faithfulness to duty, intellectual force and dauntless pluck. When on the Superior Court Bench he had the undoubting confidence of all in his ability and learning and love of justice. But he sometimes lost patience with the prolixities and wranglings and apparent endeavors to take advantages, of which members of the bar in their zeal are sometimes guilty. His language and manner were, on such occasions, more caustic than was

agreeable to the victims. I saw him once administer a rebuke to two of the most eminent practitioners of the State. "I do not sit here," he fiercely said, "to listen to the angry wranglings of attorneys. They must cease." There was no more indecorum during that term.

Judge Manly was on the Supreme Court Bench only about six years. During most of this time, while the great civil war was raging, the number of cases before the Court was greatly diminished. He had not, therefore, the opportunity of rivaling the reputation of the greatest judges of the old Court, but his opinions are clear and forcible, and show that he was a learned and able judge. He was Speaker of the State Senate in 1866. The General Assembly for that year elected him Senator of the United States, as a colleague of Wm. A. Graham, but neither was allowed to take his seat. He died on June 10, 1881, with the universal respect and confidence of the people.

It is not within my plan to give notices of the living, so I will only mention that after a distinguished career at the bar, in Congress and in the Supreme Court, which he reached after serving about four years as a Superior Court Judge, Edwin Godwin Reade, now most ably presiding over a national bank, is the last survivor of the judges of our highest tribunal elected by the General Assembly. Of those elected by the people three have gone to their final homes. Of these Nathaniel Boyden came to the Bench at a greater age than any other of all the judges—at three score and sixteen. He had been an active member of the bar for forty-eight years, had been a member of the State and Federal legislatures, but had never held a judicial office. He had a mind of a high order, was a most adroit, zealous and successful practitioner, possessed abundant learning in the law, and was a conspicuous figure in the *nisi prius* courts of the State. If he had come to the Supreme Court Bench at an earlier age, and had larger practice in its duties, he would have won high distinction as a judge.

Thomas Settle was eminently fitted for political life. He had great force of character, uncommon oratorical powers, a bold and independent spirit, a high order of ability, and exceedingly agreeable manners. The campaign between him and Zebulon B. Vance for governor in 1876, will long be remembered for its brilliancy, only

equaled, according to tradition, by that between Graham and Hoke in 1844. He was a successful practitioner in the courts, winning fame as Solicitor of his circuit in the prosecution of criminals. He was a ready and accomplished presiding officer of our State Senate and House of Commons. His heart was not in the judgeship, as was shown by his twice resigning his seat in order to enter the political field. His opinions, though pointed and clear, do not show the learning and logical powers of the old-time judges. He had the ability, however, to become a great judge, if his ambition had taken that direction.

Thomas Samuel Ashe, a lineal descendant of one of the first three Supreme Court Judges of free North Carolina, was after the best type of our great judges. After an eminent career at the bar and in the State Legislature, and as Confederate States Senator and member of the Lower House of Congress of the United States, he came to the Supreme Bench by popular election in 1878, at the age of sixty-six. He died in February 1887, after eight years' service. He threw his whole strength into his work. He endeavored to make up for the time lost from the law while engaged in exacting legislative duties, and time-consuming practice in the Superior Courts, by close and unremitting study, trenching on the hours needed for repose. He succeeded in adding to his already great reputation for ability, and by the strength and learning displayed in his opinions he won a place little inferior to the best of his predecessors. It is believed that the severe labors his conscientiousness forced on him shortened his life.

Judge Ashe was one of a type not often found among us in these nervous and impetuous days—the old school gentleman. He was tall, stately, dignified, courteous, respectful to all, and exacting respect from all. Washington was of that pattern, and General Lee, and

Governor Graham, and General Samuel F. Patterson, and Chief Justice Nash. It is impossible to imagine an unworthy act by such men. But under his self-contained exterior was abundance of fire, and under his grave manner abundance of humor. I have never seen the fire flash, but I have seen the humor play over his countenance like sheet lightning over a summer cloud. I recall his hearty laugh when he told me how, after the University had conferred the degree of Doctor of Laws (LL. D.) on himself and Judge Dillard, he went into the latter's room and found him investigating a knotty case, lately argued before the Court, and saluted him thus: "Good morning, Doctor Dillard." "What do you mean," replied he, looking up from his papers and books. "What do you call me doctor for?" "Haven't you read in the morning paper," said Judge Ashe, "that the University has made us Doctors of Laws?" "Well!" said Dillard, gloomily, "am I not a great Doctor of Laws, when I cannot, for the life of me, tell whether old Mibra Gulley ought to have brought this action before the Clerk or in term? I must say that I have not as much respect for the Trustees as I had before the degree was conferred." (See 81 N. C., 356.)

For the encouragement of those *twigs* of the law whose early success is impeded by bashfulness—a rare quality, however, in these spouting days—permit me to state that, when Mr. Ashe made his first speech—it was at Hillsboro court—his fright was so great that his tongue refused to go further than "Gentlemen of the Jury." He was about to take his seat in despair, when Mr. Priestly Mangum, the County Solicitor, arose and said: "May it please your Worships, I request the gentleman to stop a moment, to allow me to call some

witnesses to go before the Grand Jury." This kindly interruption gave the young attorney time to recover his self-possession, and he made a creditable appearance.

Judge Dillard, recognized as one of our ablest lawyers, told me that his (Dillard's) first case was in Danville, Va., where the pleadings were required to be drawn out in full. He declared on a promissory note, "payable 90 days after date." These words were carelessly omitted in his declaration, and the consequence was a fatal variance in the proof. Said the Judge: "I took a non-suit, paid the costs ($13.50) out of my own pocket, and got more profit out of that expenditure than out of any I have since made. I was afterwards careful never to make a mistake." I feel sure the Judge will pardon me for putting on record this incident, on account of its valuable lesson to those whom he loves so well, the young men of the bar.

Mr. Chief Justice: In conclusion I return to you and your associates, and to the members of the bar, my thanks for the great honor you have conferred on me in assigning to me the preparation and delivery of this address. It has been to me a labor of love. From boyhood I have had the strongest veneration for the Supreme Court of North Carolina. Far back in my memory, on the borderland of childhood, in the days of Devereux and Battle, I can see the neatly written copies by my mother, as amanuensis, of the opinions of Ruffin, Daniel and Gaston, and I can recall her voice as she praised their greatness and by these praises sought to arouse the ambition of her children. A collateral benefit of the establishment of the Court has been the elevation of the bar of the State, by their constantly

having before their eyes the highest standard of legal learning, tireless industry, and inflexible rectitude. The labors of the students are stimulated by the hope of winning the encomiums of the examining judges, the labors of the lawyers are stimulated by the hope of winning the decisions of the Court, the Superior Court Judges are urged to greater diligence and care by fear of their reversals. The aspiring spirits fix their eyes on the lofty prize of a seat on the Bench, and, thanks to a justice-loving people, strive to gain it, not by the politician's wiles, but by becoming conspicuous for legal learning and spotless character. It is a glorious thing that all our people have an assured confidence that the mantles of our great and good judges of the past have fallen on men worthy to wear them, on men who will leave the Court to their successors, fixed in the hearts of the people, as firmly as are the eternal principles of *Magna Charta* and the Bill of Rights, of which it is the trusty guardian.

APPENDIX No. 1.

LIST OF JUDGES FROM 1777 TO 1ST JANUARY, 1819.

THE FIRST PERIOD,

Begins in 1777 and ends in 1790, during which the number Of the Judges was three.

Samuel Ashe, of New Hanover, elected in 1777, was in office in 1790.

Samuel Spencer, of Anson, elected in 1777, was in office in 1790.

James Iredell, of Chowan, elected in 1777, resigned in 1778.

John Williams, of Granville, elected in 1778, was in office in 1790.

THE SECOND PERIOD,

From 1790 to 1806, when there were four Judges.

Samuel Ashe, elected in 1777, resigned in 1795.

Samuel Spencer, elected in 1777, died in 1794.

Jno. Williams, elected in 1778, died in 1799.

Spruce McKay, of Rowan; elected in 1790, was in office in 1806.

Jno. Haywood, of Halifax; elected in 1794, resigned in 1800.

David Stone, of Bertie; elected in 1795, resigned in 1798.

Alfred Moore, of Brunswick; elected in 1798, resigned in 1799.

Jno. Louis Taylor, of Craven; elected in 1798, was in office in 1806.

Samuel Johnston, of Chowan ; appointed in 1800, resigned in 1803.

John Hall, of Warren; elected in 1800, was in office in 1806.

Francis Locke, of Rowan; elected in 1803, was in office in 1806.

THE THIRD PERIOD,
From 1806 to January 1,1819, when there were six Judges.

Spruce McKay, of Rowan; elected 1790, died 1808.

John Louis Taylor, of Craven; elected 1798, elected to Supreme Court in 1818.

John Hall, of Warren; elected 1800, elected to Supreme Court in 1818.

Francis Locke, of Rowan; elected 1803, resigned 1814.

David Stone, of Bertie; elected 1806, resigned 1808.

Samuel Lowrie, of Mecklenburg; elected 1806, died 1817.

Blake Baker, of Warren; appointed 1808, commission expired 1808.

Leonard Henderson, of Granville; elected 1808, resigned 1816.

Joshua Granger Wright, of New Hanover; elected 1808, died 1811.

Henry Seawell, of Wake; appointed 1811, commission expired 1811.

Edward Harris, of Craven; elected 1811, died 1813.

Henry Seawell, of Wake; appointed in 1813, resigned 1819.

Duncan Cameron, of Orange; appointed 1814, resigned 1816.

Thomas Ruffin, of Orange; elected 1816, resigned 1818.

Joseph John Daniel, of Halifax; appointed 1816, elected to Supreme Court 1818.

Robert H. Baker, of Lincoln; appointed 1818, resigned 1818.

Blake Baker, of Warren; appointed 1818, died 1818.

The fourth period, as given in Second Revised Statutes, embracing the names of the Superior Court Judges since 1818, does not come within the scope of my narrative.

APPENDIX No. 2.

List of Judges of the Supreme Court Since 1818.

HISTORY OF SUPREME COURT

THE FIRST PERIOD,

John Louis Taylor, of Craven, Chief Justice; elected 1818, died January, 1829.

Leonard Henderson, of Granville, Chief Justice, 1829 to 1833; elected 1818, died August, 1833.

John Hall, of Warren; elected 1818, resigned December, 1832.

John DeRosset Toomer, Cumberland; appointed June, 1829, resigned December, 1829.

Thomas Ruffin, of Orange, Chief Justice, 1833 to 1852; elected 1829, resigned November, 1852.

Joseph John Daniel, of Halifax; elected 1832, died February, 1848.

William Gaston, of Craven; elected 1833, died January, 1844.

Frederick Nash, of Orange, Chief Justice, 1852 to 1858; appointed May, 1844, died December, 1858.

William Horn Battle, of Orange; appointed May, 1848, resigned December, 1848.

Richmond Mumford Pearson, of Yadkin, Chief Justice, 1868 to 1865; elected December, 1848, office vacated April, 1865.

William Horn Battle, of Orange; elected December, 1852, office vacated April, 1865.

Thomas Ruffin, of Orange; elected 1858, resigned fall of 1859.

Matthias Evans Manly, of Craven; appointed 1859, office vacated April, 1865.

THE SECOND PERIOD,

From January, 1866, when the Judges elected by the General Assembly, organized by the authority of the President, began their service, to the close of June Term, 1868, when their offices were vacated by virtue of the Reconstruction Acts of Congress.

Richmond Mumford Pearson, of Yadkin, Chief Justice; elected 1866, office vacated July, 1868.

William Horn Battle, of Orange; elected 1866, office vacated July,

1868.

Edwin Godwin Reade, of Person; elected 1866, office vacated July, 1868.

THE THIRD PERIOD,

From July 1, 1868, when the Justices under the Constitution of 1868 began service, to 1879, when the number was reduced from five to three.

Richmond Mumford Pearson, Chief Justice; elected 1868, died January 5, 1878.

Wm. Nathan Harrell Smith, of Wake, Chief Justice; appointed January, 1878, term expired January 1, 1879.

ASSOCIATES JUSTICES

Edwin Godwin Reade, of Person; elected 1868, term expired January 1, 1879.

Wm. Blount Rodman, of Beaufort; elected 1868, term expired January 1, 1879.

Robert Paine Dick, of Guilford; elected 1868, resigned 1872.

Thomas Settle, of Rockingham; elected 1868, resigned 1871.

Nathaniel Boyden, of Rowan; appointed 1871,died November 20, 1873.

Wm. Preston Bynum, of Mecklenburg; appointed 1873, term expired January 1, 1879.

Thomas Settle, of Rockingham; appointed 1872, resigned 1876.

Wm. Turner Faircloth, of Wayne; appointed 1876, term expired January 1, 1879.

THE FOURTH PERIOD,

From January 1,1879, to January 1,1889, during which the number of Justices was three.

Wm. Nathan Harrell Smith, Chief Justice; elected 1878, re-elected 1886.

ASSOCIATE JUSTICES

Thomas Samuel Ashe, of Anson; elected 1878, re-elected 1886, died February 4, 1887.

John Henry Dillard, of Rockingham; elected 1878, resigned February 11, 1881.

Thomas Ruffin, of Orange; appointed 1881, resigned 1883.

Augustus Summerfield Merrimon, of Wake; appointed September 29,1883, elected 1886.

Joseph Jonathan Davis, of Franklin; appointed February 4, 1887, elected 1888.

Alphonso Calhoun Avery, of Burke; elected 1888.

James Edward Shepherd, of Beaufort; elected 1888.

APPENDIX No. 3.

LIST OF REPORTERS OF CASES DECIDED PRIOR TO JANUARY, 1819

Judge John Haywood, from 1789 to 1806 (1st and 2d Haywood Reports).

Judge F. X. Martin, from 1795 to 1797 (1st and 2d Martin's Reports).

Judge John Louis Taylor, from 1799 to 1802 (Taylor's Reports).

Duncan Cameron and William Norwood, from 1802 to 1805 (Conference Reports).

Judge John Louis Taylor, 1813 to 1816 (Carolina Law Repository, 2 vols.)

Judge John Louis Taylor, 1816 to 1818 (Term Reports).

Judge A. D. Murphy, 1804 to 1813, and at July Term, 1818 (1st and 2d Murphy).

APPENDIX No. 4.

List of Reporters Since 1818.

Archibald D. Murphy, 1819 (3 Murphy).
Thomas Ruffin, January Term, 1820 (1st part of 1st Hawks).
Francis L. Hawks, 1820 to 1826.
Geo. E. Badger, with Devereux, January Term 1826 (1st part of 1st Devereux).
Thomas P. Devereux, 1826 to 1834.
Thos. P. Devereux and Wm. H. Battle, 1834 to 1840.
Wm. H. Battle, January Term, 1840, (1st part of 1st Iredell).
James Iredell, 1840 to 1852.
Perrin Busbee, 1852 to 1853.
Quentin Busbee, Fall Term, 1853 (2d part of Busbee). Hamilton C. Jones, 1853 to 1863.
Patrick H. Winston, Sr., 1863 to 1864.
Samuel F. Phillips, 1866 to 1870.
James M. McCorkle, 1871.
Wm. M. Shipp, Attorney General, 1872.
Tazewell L. Hargrove, " " 1873-1876.
Thos. S. Kenan, " " 1877-1884.
Theo. F. Davidson, " " 1885.

HISTORY OF SUPREME COURT

ERRATA.

Page 449, line 7, for "express" read "cypres," and line 24 "proetor."
Page 452, line 11, for "Browne" read "Brawne."
Page 453, line 5, for "conning" read "cunning."
Page 457, line 3, for "dam" read "pond."
Page 457, last paragraph insert "Chowan."
Page 460, line 3, for "loyalty" read "legality."
Page 467, line 20, "on" instead of "or."
Page 470, line 16, for "Davis" read "Davie."
Page 475, line 17, for "bond" read "land."
Page 479, line 10, "period" after "court," followed by "W."
Page 479, line 21, "Vine" instead of "Viser."
Page 479, line 4 from bottom, "poured" for "passed."
Page 480, line 21, "easy" for "every."
Page 486, line 24, "Murphey" for "Murphy."
Page 494, line 14 from bottom, "part" for "past."
Page 511, line 6 from bottom, "Burton" for "Baker."