

CHARLES MASON—IOWA'S FIRST JURIST.

BY HON. EMLIN M'CLAIN.

An interest, almost as romantic as that which attaches to the discoverer or the pathfinder, surrounds the pioneer law makers of a new community. They introduce into the wilderness the essential element of civilization—order in civil affairs. The law maker considers the circumstances and the needs of the people who are associating themselves together under new surroundings to build up a state, and aims to provide for their present and future civic welfare. The judge attempts, while administering justice between litigants, to mold the system of law which he finds at hand so that it shall be suited to and keep pace with the anticipated growth of the institutions under which the people are to live. Each is conscious of a freedom and responsibility in determining what shall be the tendency of the course of development which can be enjoyed to but a slight degree by those who follow him.

The constitution maker, the legislator, the codifier in a new state, each has some of the opportunities for indulging in philosophical considerations as to the functions of government and the proper relations of the subject to the state which furnished such intellectual delight to Plato, Locke and Bentham, coupled, however, with the responsibility for keeping his theorizing within the bounds of practicable administration which those theorists lacked in their abstract speculations. That which has become obsolete in the systems of law which serve for models can be pruned away and plainly desirable reforms can be introduced, without the controversy involved in changing an established order of things. It is easy at the beginning to abolish the peculiarities of sealed instruments; to wipe out absurd fictions as to the status of married women; to eliminate the complicated rules of evidence depending upon the technical doctrine that

a party cannot be a witness; and to bring the rules of pleading which have been perpetuated from a time when functions of court and jury were very different, into harmony with the present methods of trying cases. So the judge can refuse to follow precedents which have become objectionable, and set up new guide-posts. Thus it was that the Supreme Court of the Territory of Iowa could hold a note under seal to be a negotiable instrument and the Supreme Court of the State could find that cattle running at large were "free commoners," the uniform rule of the common law in this respect to the contrary notwithstanding. The credit for ability and originality still given in many of the states to the early courts as compared with the courts of a later day in the same states is largely due, no doubt, to the opportunities they had, rather than to the inferiority of the later judges; nevertheless, the early judges who could rise superior to the difficulties with which they were necessarily surrounded when able lawyers were few and law libraries were limited, could appreciate the necessities of a rapidly developing country and could foresee the outcome of problematical changes, are justly entitled to the greatest praise.

Judge Mason, as the Chief Justice and most influential member of the Supreme Court for the Territory of Iowa, and as the draughtsman of the first code for the new State, is entitled to the great distinction of having done the most notable and satisfactory work in both of these fields. The object of this paper is to point out some of the particulars in which the excellence of his work is shown and thus help in forming a just estimate of his character and ability as a jurist.

Charles Mason's education and training were not such as to specially prepare him for the technical work of a judge. If he succeeded in that work, it was rather by reason of natural qualities of mind than special attainments, either as a student or a practitioner. Perhaps the requirements for a position on the bench of the new Territory were not so exacting as those of a similar position during a later period in the

history of the State; but as will appear when the work he did is noted hereafter in detail, he dealt successfully with technical questions of procedure as well as with general principles of law.

Entering West Point as a cadet in 1825, when nearly twenty-one years of age, he graduated in 1829 at the head of his class, Robert E. Lee and Joe Johnson, both subsequently noted confederate generals, being members of the same class, and on graduation he was assigned to the engineering corps. He served for the two years following as assistant professor of engineering at West Point and then resigned from the army. It should be said in connection with this reference to his military experience that at the beginning of the War of the Rebellion Judge Mason tendered his services to the Governor of Iowa in connection with the raising of troops for the defense of the Union, but for some reason—perhaps because younger and more ambitious men were pressing for recognition—he was not given an opportunity to turn his military training to account in the service of the country; and beyond acting as one of the commissioners appointed in 1861 by the Legislature to control a State war fund, he had no part in the military history of the State. He was in politics a Democrat, but his opinion in the first case decided by the Territorial Supreme Court in which it was held that there could not be slave property in Iowa (the case of Ralph, hereafter referred to) would indicate that he was not a sympathizer with the pro-slavery attitude of his party.

Mason had studied law while a professor at West Point, and after resigning from the army he practiced at Newburg, New York, for two years, and then for two years in New York City. Here he was a contributor to the *Evening Post* under William Cullen Bryant, and for a year or more he was managing editor of that paper while Bryant was absent in Europe. Then he came to Burlington, served a year as district attorney while Des Moines county was still a part of

Wisconsin, and was appointed by the President in 1838 as Chief Justice of the Supreme Court of the newly formed Territory of Iowa. This position he held for nine years, and until the creation of a State Supreme Court on the admission of Iowa to the Union. Immediately after leaving the supreme bench he was selected by the Legislature to act as one of three commissioners to prepare a code for the State, which was adopted in 1851. The thirteen years of his life, therefore, from the time he was thirty-four years of age, cover the period of his activity as a public jurist and it is to this period that the present paper relates. It is enough to say of his subsequent life that for the following four years he was United States Commissioner of Patents, and from the expiration of this term of service until his death in 1882 he was actively engaged in the management of various and important financial enterprises at Burlington.

In relation to the work of the Territorial Supreme Court as a whole, the significant thing seems to be that there was so little of it. At the first term, July, 1839, but one case was decided, so far as reported, and though that case was one of great public importance the report of it, arguments included, occupies but seven pages. At the December term ten cases are reported as decided, and in all of these Judge Mason wrote the opinions. Of the following July term, twenty-one cases are reported, in all of which, save four, and these of small importance, Mason wrote the opinions. Indeed, in the whole seven years of its existence the court decided only one hundred and ninety-one cases, and in only twenty-five of these were opinions written by either of the other two judges. Chief Justice Mason must have been largely predominant not only in the labors but in the judgments of the tribunal.

It will be interesting now to notice some of the questions which came before this court, and how Judge Mason dealt with them. The first one involved the interesting question of the status of a slave under the laws of the territory.

Ralph, a colored man and formerly a slave in Missouri, had been allowed to come to Iowa under a contract to pay a stipulated sum for his own freedom, but this sum not being paid within the time agreed upon, the former master commenced proceedings to recover possession of him, and Ralph was delivered by the sheriff of Dubuque county to the master for transportation to Missouri. The colored man took legal steps for release, it being claimed for him that by the terms of the Ordinance of 1787 for the government of the Northwest Territory, which ordinance had been extended over Iowa, and by Congressional legislation, slavery was prohibited in the Territory; and further that the master, by permitting the slave to come into Iowa where slavery was not recognized, virtually manumitted him and could not afterwards recover him as a fugitive under the so-called fugitive slave law. On the other side it was contended that the congressional declaration of 1820, known as the Missouri Compromise, which prohibited slavery in the territories north of latitude thirty-six degrees and thirty minutes was not intended to operate without further legislation, and that even if it was intended to so operate it was not effectual to work a forfeiture of previously existing property in slaves. In the opinion Judge Mason declares that the Missouri Compromise was intended of its own effect to terminate slavery in the territory described, and that, when the slave was allowed to become a resident of Iowa, property in him ceased to exist. The opinion contains no elaborate or ostentatious declaration of general principles; but the questions in controversy are clearly stated, and the validity of the Missouri Compromise as a prohibition of slavery in the free territories is fully announced. The conclusion of the court in the whole matter is thus tersely stated: "When the slave-owner" seeking to retain the custody and control of his slave "illegally restrains a human being of his liberty, it is proper that the laws, which should extend equal protection to men of all colors and conditions, should exert their remedial interposition." It is to be remembered that Chief

Justice Taney and a majority of his associates on the bench of the Supreme Court of the United States in the famous Dred Scott case subsequently declared the Missouri Compromise invalid and denied any legal status in the free territories to one who had been a slave. The correctness of this conclusion of the federal court as a principle for the guidance of the administrative branch of the government was one of the burning issues of the presidential campaign of 1860, and as a result of the election of President Lincoln the entire theory of the majority of the court was overthrown and cast aside. The former slaves were treated as men with rights, in accordance with the views of Judge Mason, and not as the mere chattels which Chief Justice Taney had declared them to be.

In an action on a promissory note under seal *it was held without discussion of authorities that the affixing of a seal to such an instrument did not prevent its being made a negotiable instrument under the terms of the laws of Michigan on the subject, and that a subsequent statute of the Territory of Iowa allowing fraud to be pleaded as a defense to a negotiable note did not apply to a note already executed before the statute was passed, even though the note was under seal. This conclusion is based on the language of the Ordinance of 1787 which declares in general terms that "no law ought ever to be made or have force in the said Territory that shall in any manner interfere with, or affect private contracts or engagements, *bona fide* and without fraud, previously formed;" and *incidentally* the prohibition in the federal constitution against the impairing the obligation of contracts was referred to. It was found that the suit by the holder, though he took the note before the passage of the Iowa statute, was, however, brought in the name of the payee, and therefore on the authority of a Delaware case it was decided that the defense of fraud might be pleaded.

*Temple v. Hays & Hendershott, Morris, p. 9.

In another case* the fundamental principle, so often announced in later decisions, that the Supreme Court, having no power to try an issue of fact before a jury or send it to a district court for such trial, could not interfere with the verdict of the jury in the lower court on the facts, was laid down. Another principle, often since recognized, was announced, that a strong case must be made out to authorize the Supreme Court to interfere with the exercise of discretion by the lower court in refusing to grant a new trial.

In a suit against the Commissioners of Dubuque County† the court had to deal with a county seat election contest and discussed elaborately the want of power on the part of the Supreme Court to issue writs of mandamus and other such writs not pertaining to the exercise by that court of its appellate powers.

Another case involved‡ a question of great moment in the young commonwealth. By act of Congress it had been provided in 1807 that settlers on public lands without right previously acquired from or recognized by the United States should be subject to the penalty of a forfeiture of all rights in such land and removal by the marshal. When the Territory of Iowa was organized, there were within its limits over twenty-five thousand people who lived on public land, none of them, except the few who had title in portions of the so-called Half-breed Tract, having any title or right recognized by the federal government to the lands on which they lived. The claims of these squatters to the occupancy of and improvements on their respective tracts were treated, however, among themselves as subject of sale and purchase, and the question was whether such transactions were of any validity. The court concerned itself very greatly (and very properly) with the effect upon the welfare of the people which would result from holding such transactions illegal, and it sought for and found a theory

*Brazelton v. Jenkins, Morris, p. 15.

†United States ex rel. Davenport v. Commissioners of Dubuque County, Morris, p. 31.

‡Hill v. Smith, Morris, p. 70.

upon which they could be sustained as lawful. It is said that Congress could never have intended "to disturb the peaceable and industrious husbandman whose labor was adding so much to the public wealth, changing the barren wilderness into fertile fields, and calling into almost magic existence whole states and territories, whose prosperity and power are constantly adding so much to the strength and glory of the nation." The whole opinion is an example of the ingenuity which a court may properly resort to in order that justice and not injustice shall result from the administration of the law.

In another case *this question was considered, whether aside from special authority in some statute a partnership could sue in its firm name. The court deliberately and avowedly disregarded the precedents of common law practice and held that such a method of bringing suit was allowable, and established that as the rule for Iowa.

Indeed this liberal spirit in the interpretation of the law is fully exemplified in many of these decisions. Without further citation of particular cases it will be sufficient to notice a few examples. In condemning the attempt to defeat a criminal prosecution on a mere technicality the Chief Justice, speaking in the first person, declares that "I would give the accused every reasonable opportunity to enable him to vindicate his innocence, be liberally indulgent to his objections, to whatever might have a tendency to convict him unjustly, but never, unless from necessity, open an aperture through which guilt and innocence may alike escape with impunity." And he continues: "I know a somewhat different rule was early adopted in the English courts and has been followed with rather a blind acquiescence in most of the States of the Union. The rule originated when the laws of England were written in blood, and was the result of the humanity of her judiciary, struggling to weaken or evade the san-

*Johnson & Co. v. Smith, Morris p. 105.

guinary edicts of tyrants. The judges had no power to annul or even to mitigate the law which affixed death as the penalty for many of the minor offences, but they could and did give the accused the benefit of delay, and even of ultimate escape, by sustaining objections to indictments for formal and trivial defects. If they could not modify the severity of punishments too severe, humanity prompted them to diminish their certainty. With us the case is very different. Following the dictates of humanity and sound policy, we have gone far to revolutionize the penal code of our ancestors. Our legislators recognize the maxim that certainty of punishment is better than severity. Under these circumstances it seems to me the courts should do all they justly can to render punishment the inevitable consequence of transgression. Instead of blindly adopting rules dictated by humanity, under circumstances so totally different, we should apply the principles of reason to our own laws and present situation."

In the same strain of respect for common sense in the administration of the law and regard for reasons that shall appeal to all, the following language is used in another case where a convicted criminal sought to escape punishment because of an alleged want of technical verbiage in an indictment: "This perhaps may be thought a deviation from the ordinary current of judicial argument, but if it be so we think it a deviation on the side of reason. Courts should accommodate their decisions, so far as is compatible with justice, to the common sense of mankind, if they would secure for the law its ablest guardian—public respect. There is some reason to apprehend that criminal justice has been already in some instances so disguised by technical refinements and subtleties, as to become a subject of ridicule to men whose minds are unbiased by their peculiar education or interests. This feeling ought not to be increased by increasing the cause, but on the contrary, where the current of authority is not too strong, we should seize all occasions to bring back

the rules of decision to such a standard as the common reason of mankind may sanction and approve."

In regard to the weight to be given to precedent this forcible language is used under similar circumstances: "Where authorities are thus discordant, we should resort to principle by which to guide our decision. In fact it seems to me that reason should in such cases be appealed to in the first instance, relying upon authority to direct us only where our natural guide becomes incompetent. To bow blindly to any decisions, however respectable, is to subject ourselves to the risk of misapplying those decisions, of improperly engrafting them upon statutes different from those to which they naturally apply, and at all events of keeping alive abuses and absurdities which such a course will inevitably create and perpetuate in any branch of science. Frequently, at all events, we should, in nautical language, 'take an observation' to determine by the fixed and unvarying lights above whether some uncalculated current of authorities is not drifting us from the great object we are endeavoring to reach—the administration of justice. This is more particularly important when we are founding a judicial system for an independent community. The decisions of other courts should be treated with high respect, but they should be regarded in the light of wise counsellors rather than that of arbitrary sovereigns."

All the opinions above referred to or quoted from are by Chief Justice Mason. They illustrate the homely good sense and sound legal discretion constantly made use of by him in administering the law. They show that he wielded a trenchant pen and was capable of stating his views with such terseness and clearness as to leave no doubt as to his conclusions or the soundness of the reasoning on which they were based. In construing a statute he says of the legislators that in "lugging in" a certain provision "by the head and shoulders they have spoken so as not to be misunderstood." And on his part he never exhibited any hesitation in taking the bull by the horns when a difficulty was to be handled.

It is not extravagant to say that in the vigorous manner of so treating legal difficulties as to reach sound results Chief Justice Mason is to be likened to Chief Justice Marshall of the United States Supreme Court. Each came to his position without great reputation as a jurist; each had successors who surpassed him in technical knowledge; but neither was ever surpassed on the bench which he graced, as a great expounder of the law in its formative condition when reason rather than authority must furnish the best guide to wise conclusions.

Distinguished as were the services of Judge Mason on the bench, his most marked influence on the laws of the State was exercised in drafting the first code of the State, the so-called Code of 1851. The Revised Statutes of the Territory, published in 1843, compiled by a joint committee of the Legislature and arranged by the Secretary of the Territory, was a mere aggregation of existing statutes, under general headings selected with more or less discretion as the case might be, and arranged in alphabetical order. The results of this plan were in some instances truly wonderful. You find for example edifying chapters on Abatement, Agent, Auctioneer, Acts Amended, Blacks and Mulattoes, Chancery, Dogs, Right, Gaming, Immoral Practices, Grocery License, Laws, Prairies, Right, Stallions and Jacks, Wolves, and Worshipping Congregations; and you marvel at the high regard for consistency and convenience which seems to have dominated the minds of the compilers in selecting the titles and thus determining the order of the contents. It must have required the concurrent wisdom of master minds to collect provisions as to commissioners to sell county lands, a superintendent of public buildings at Iowa City, and commissioners to sell town lots in Iowa City, all under the head of Agents; to arrange in another chapter designated as Acts Amended, various provisions relating to taking up strays, fixing terms of court, regulating criminal procedure, and sales under execution; to place provisions re-

lating to the offense of swearing within the hearing of a religious assemblage in the chapter on Immoral Practices and those as to the disturbance of a religious meeting by profane swearing, vulgar language or immoral conduct in a chapter on Worshipping Congregations in a distant part of the volume; to bring together two different codes for the government of the militia, one of which wholly superceded the other; to treat Bills of Exchange in one place and Promissory Notes in another; to treat the Action of Right as a substitute for ejectment and again among the R's; to insert in the chapter headed Repeal, and regulating the effect of the repeal of a statute, a section repealing "An act respecting seals"; to collect statutes as to Roads in one place and insert elsewhere as the sole topic under Supervisors a section as to penalties for refusing to work on the roads, while provisions as to Road Tax were placed in a chapter between Trespassing Animals and Townships; and to treat Boats and Vessels in one chapter and Watercrafts, Lost Goods and Estrays in another.

By an act of the First General Assembly of the State convened in January, 1848, in extra session, a commission was appointed consisting of "Charles Mason, Des Moines County, William G. Woodward, Muscatine County, and Stephen Hempstead, Dubuque County" "to draft, revise and prepare a code of laws for the State of Iowa." The commissioners were directed to "prepare a complete and perfect code of laws, as nearly as may be, of a general nature only, and furnish a complete index to the same when completed." The task thus set before the commissioners was certainly one of great magnitude for even an infant commonwealth, and it was discharged "as nearly as might be" by the preparation of a code of three thousand, three hundred and sixty-seven sections, covering as printed four hundred and sixty-nine pages of ordinary law-book size, which was reported to the Legislature in 1851 and adopted as the Code of Iowa.

Although Mr. Woodward was charged with the duty of

superintending the publication of the Code and the preparation of marginal notes and index, it is nevertheless generally understood that Judge Mason, who was the chairman of the Commission, did the principal part of the work of compilation, and the quality of the performance is such as to reflect great credit upon the author. Indeed, the person who wrote the Code of 1851 is to be spoken of in that connection as an author, rather than a compiler; for while he had before him the volume of compiled laws already described, and several volumes of session laws of succeeding Territorial and State legislatures, he managed to condense and re-write the matter in such a masterly style that while preserving the essence of the statutory law as it had already been enacted, he gave it a form entirely different from that of the verbose and stilted statutes in which it had originally been embodied.

The notion that a statute will be defective and inadequate unless full of repetition, reduplication and tautology, seems to have obtained a strong foothold in the popular mind, yet experience shows that language which is simple and direct, and which states one thought but once and in as few words as possible, is least likely to cause confusion when it comes to be construed. This was certainly Judge Mason's idea, for the Code of 1851 is a model of plain and unambiguous statement, in direct and clear language, of the rules and legal propositions which are attempted to be laid down. So satisfactory has been the work done, that while these sections have been overlaid with subsequent legislation, they have been largely retained in the Revision of 1860, the Code of 1873 and the Code of 1897, as the best statement of that portion of the law which they were intended to cover.

But Judge Mason did not confine himself to a mere condensation of the existing statutory law. Legal reform was in the air, and during the year in which the first Code Commission of Iowa was appointed, the New York commissioners, led by the great statutory law reformer, David Dudley Field, had reported the first New York codes. The codes prepared

by Mr. Field were not fully accepted by the New York legislature, either then or subsequently, but many of his cherished reforms were incorporated into the written law, and the code of procedure was fully adopted. It was but natural that Judge Mason should feel the influence of this movement, which, commencing in New York, rapidly extended westward and radically affected the legislation of all the newer states, culminating eventually in California, where the Field codes so-called were substantially adopted in a body. In Iowa the movement for complete codification of the law never got beyond the code of procedure and the criminal code. No attempt was made either by Judge Mason or succeeding codifiers to embody any considerable part of the general principles of the law in statutory form. It is doubtful if such an attempt would have been wise. As a matter of fact the difficulties of applying the terms of a statute are found to be quite as great as those in applying the general rules of the unwritten law. But the reform movement did result elsewhere and also in Iowa in remedying some of the most striking defects of the system of law derived by the American colonies from England, and those reforms were introduced by Judge Mason in the Code of 1851.

It must not be assumed that the Code of 1851 was a copy of, or substantially derived from, any code found in any state. The general principles of law reform as they had been discussed in New York and elsewhere were recognized, but the result was the production of the Iowa author, and not a mere adaptation of the work of another.

One of the notable results of giving to the work of codification an intelligent interest and judgment, and of keeping touch with similar undertakings elsewhere, was the abandonment of the alphabetical arrangement of subjects which had been followed in the Revised Statutes of 1843, and is still followed in compiling the laws of some of the states, and an introduction in its stead of a classification based on an intel-

ligent analysis of the subject matter of the law. This arrangement has been preserved in subsequent codes, and we have the general division into four parts—public law, private law, civil procedure and criminal law. The classification may not be scientifically accurate, but it is practical and convenient as compared with the old alphabetical plan.

To sum up as a whole Judge Mason's services to the State as a codifier, it is enough to say that he introduced the scientific arrangement of the subject-matter, executed the work in a skillful and scholarly manner, set a precedent for the embodiment of statutory enactments in plain, direct and intelligible English, and furnished the model which has been followed in subsequent State codes.

TERRITORIAL EXTENSION OF IOWA.—The General Assembly of this State has memorialized Congress for an extension of territory on the northwest boundary. Our present western boundary from the junction of the Big Sioux river with the Missouri, is defined by the course of the former, up to latitude 43 deg. 30 min. The design of the memorialists is to take up the northern boundary line from this latter point to the Big Sioux river, and continue it upon that parallel until it intersects the Missouri river. The projection of this line would strike that river about 200 miles above the mouth of the Big Sioux, nearly opposite the Mankisitah, or White Earth river, which runs nearly a due east course, and heads directly on a line with the South Pass of the Rocky Mountains, about one degree of latitude north of Fort Laramie. This is a large tract of territory, portions of it exceedingly rich and valuable, and is well watered by the Vermillion, or Wadshesha river, the James river, and its tributaries, five considerable streams, dignified with the name of rivers, the Wanauri river, the Nawii, and several smaller streams.—*Quasqueton (Iowa) Guardian, February 28, 1857.*

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