

# Great Names and Rattling Skeletons

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## A CAUTIONARY TALE

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by Richard Acton

**I**N HIS 1895 "Inaugural Lecture on the Study of History," the British historian Lord Acton — my great-grandfather — said: "Guard against the prestige of great names; never be surprised by the crumbling of an idol or the disclosure of a skeleton." When researching Iowa history, I did not dream that the first session of the Supreme Court of the Territory of Iowa in 1838 would be an excellent illustration of his warning.

I had become interested in Iowa's pioneer lawyers and wanted to learn about the first meeting of the territorial supreme court. I did not think that this research would be particularly difficult or particularly exciting. In the event, I found myself in an enthralling maze. At length I arrived at answers to my original questions, only to discover that fascinating further questions arose about supreme court cases throughout the territorial period.

I thought an obvious place to seek information about the beginning of Iowa's supreme court was a weighty 1916 tome by Edward Stiles called *Recollections and Sketches of Notable Lawyers and Public Men of Early Iowa*. In it I found an account in 1882 by the ubiquitous Theodore S. Parvin, who would figure prominently in my quest. "The first term of the Supreme Court . . . was held at Burlington on the 28th of November, 1838," Parvin wrote. "James W. Woods was the senior member of the bar. . . . He had the only case before the first Supreme Court. . . . I was the

youngest of the twenty [lawyers] admitted at that first session, and the case was called immediately after our admission, and because I was the youngest Woods came up and tendered me the honor, as was customary for many years, of making the argument. I made the argument and won the case — the first speech made in the Supreme Court of Iowa. After announcing its decision, the Court adjourned," Parvin continued, "and the Judges came down and congratulated me on my maiden effort."

Theodore S. Parvin (1817–1901) had a remarkable career. Private secretary to Iowa's first territorial governor in 1838, he served also as district attorney, county judge, corresponding secretary of the State Historical Society of Iowa, and editor of *The Annals of Iowa*. His greatest contribution was to Freemasonry. Grand secretary for many years, he founded the superb Masonic Library in Cedar Rapids.

Every aspect of Parvin's career qualified him as a highly credible witness to Iowa's first supreme court session. But one feature in his story puzzled me. What on earth was this business of the senior member of the bar honoring the junior by letting him make the argument, "as was customary for many years"? No doubt early Iowa had its own quaint legal customs, but would clients *really* have tolerated employing senior lawyers at considerable expense only to find an inexperienced junior arguing their case? Parvin had not related what his case involved, nor where it was heard. I

decided I must do more research.

I found that in 1886, Parvin had given another account of the first court session in an "Address at the Bar Re-Union at Des Moines." He confirmed the date of the session as "that early morn of November the 28th," 1838. The court appointed a clerk and court reporter and admitted the twenty attorneys. Parvin related that the "one case before the court. . . . was a case of larceny (for stealing a rifle)." Parvin again stated that Woods, the senior member of the bar, had invited him to argue the case. "We were successful and cleared the rascal," Parvin wrote, "and while the court and bar were congratulating us upon the success of our maiden effort at the bar, the defendant made off, and with him the stolen rifle, which was to have been [Woods's] fee." He recorded that the court had convened "in a small room of a dwelling house."

In "The Early Bar of Iowa" (1894), Parvin gave a similar account — the date, the number of lawyers admitted, and the case of the stolen rifle are the same. But a new puzzle developed — about the meeting place — when I read his words, "The first session of the Supreme Court met in the parlor of a tavern." Two years later, in his *Who Made Iowa*, Parvin wrote that "the Supreme Court . . . held its first session in the parlor of one of the pioneers, the good lady having put her house in order for the purpose." While it is possible by a strained construction to reconcile all three of Parvin's descriptions of the first meeting place, it seemed more likely that these discrepancies showed Parvin to have a fallible memory. I dismissed the inconsistencies and accepted the rest of his story.

Later I happened to be reading "Statesmen and Politicians in Early Iowa" in *The Annals of Iowa* (1945) by the Reverend Charles E. Snyder. Snyder could not have been a greater Parvin fan, for he wrote: "Theodore S. Par-

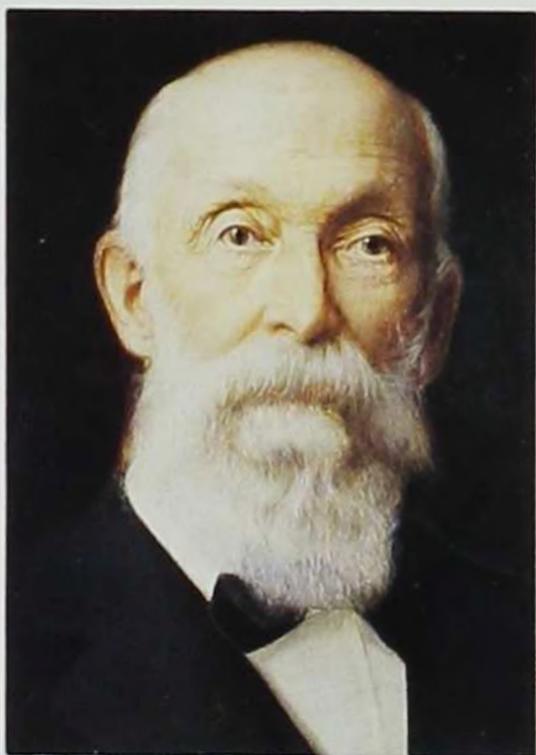
vin. . . . said that the two greatest men in Iowa history were Charles Mason and James W. Grimes. I submit that Parvin's name must be added for a third. Parvin was a large part of the history of Iowa." As Mason was chief justice throughout the territorial period and laid the foundation of Iowa law, and Grimes was an immensely distinguished governor and senator, including Parvin in this company was high praise indeed.

A sentence later in the article made me sit up with a jolt: "The Supreme court held its first session at Burlington, November 26, 1838, the only business being an order for a writ of error . . . and the admission of twenty young lawyers to practice." November 26 was two days before the date Parvin repeatedly had given as the opening of the supreme court. Furthermore, a writ of error did not sound like the criminal appeal of the stolen rifle that Parvin insisted had been the first and only case. Why had such a devotee of Parvin contradicted him so? Clearly I needed to dig deeper.

Next I turned to an article in a 1939 *Palimpsest*, "The Supreme Court in Session."

It made two points about the date that apparently showed Parvin right. According to the article, Parvin had recorded the supreme court meeting as November 28 in his 1838 diary. Furthermore, the Iowa legislature had passed a law that provided: "the first session of the supreme court of the Territory shall be held at the city of Burlington, on the twenty-eighth day of November one thousand eight hundred and thirty eight." The article also mentioned that the *Iowa Territorial Gazette and Burlington Advertiser* of December 1, 1838, had reported that "twenty members of the bar had been admitted to practice," but that "no further business seems to have been transacted."

November 28 thus appeared to have been the date. But now there were three different



Attorney Theodore S. Parvin

versions of what had been before the court — Parvin's rifle case, Snyder's writ of error, and "no further business."

Under the gaze of Theodore S. Parvin, whose portrait dominated the library of the State Historical Society in Iowa City, I reached for the *Iowa Territorial Gazette and Burlington Advertiser* of Saturday, December 1, 1838. It reported: "In accordance with an act of the Legislature recently passed, the Supreme Court of Iowa Territory met in this place on Monday last." The article named the judges, officials, and the lawyers admitted. No case was mentioned. Saturday, December 1 . . . Monday last. I did some hasty arithmetic — that meant the supreme court met on Monday, November 26. That couldn't be right. If it was "in accordance with an Act of the Legislature recently passed," as the newspaper had reported, it *had* to be November 28 as the law had ordained. Newspapers can be wrong. The next place I had to look was Parvin's diary.

The Masonic Library in Cedar Rapids keeps the diary. Parvin's entry for November 28, 1838, read:

"Court — P.M. the Supreme Court of the Territory organized. Judge[s] Mason Williams and Wilson present. Bayless app[ointed] Cl[er]k & Weston Reporter — 20 Lawyers admitted I among the number." But why was there no mention of his great rifle larceny triumph?

It was the entry for the very next day, November 29, that was really disturbing. "Court, prisoner trial I assisted in the defence — my first criminal case — Jury brot in a verdict of guilty of larceny." Across the margin of November 29 Parvin had written, in different ink: "First Case — Iowa." If there was a jury, this must have been a district court trial. To assist in losing a larceny case in the district court could hardly be further from personally

winning a larceny appeal in the territorial supreme court. Surely no lawyer would describe a district court case as "my first criminal case" or "First Case — Iowa" if he had already won a criminal appeal in the supreme court.

I was completely confused. Then I learned that in Des Moines the State Archives of the State Historical Society holds the original handwritten *Supreme Court Order Book: 1838–1853*, covering the entire territorial period. I rushed to Des Moines.

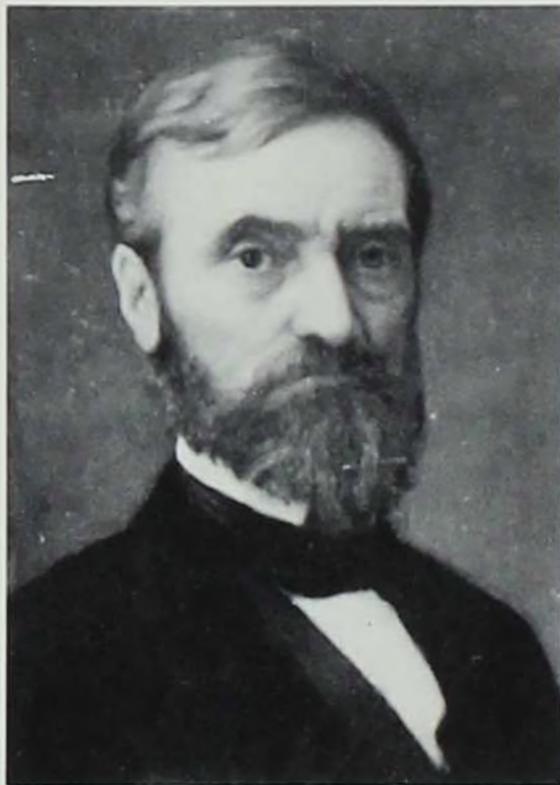
Page 1 of the *Supreme Court Order Book*

began: "At a Supreme Court of the Territory of Iowa begun and holden at the Court House in Burlington in and for the Territory aforesaid, on, Monday To wit the 26th day of November AD 1838." The three supreme court justices were present. Twenty lawyers including Parvin "were duly admitted . . . according to law." The court appointed a clerk and reporter. Finally, in a civil case later reported as *Gordon and Washburn v. Higley*, the court granted a procedural writ of error. The lawyers who appeared were Rorer and Starr. Immediately below the entry about

the writ of error was written: "Ordered that this Court adjourn sine die," signed "Charles Mason Chief Justice." Page 2 of the *Supreme Court Order Book* commenced "the first day of July AD 1839."

Thus the official record of the supreme court gave November 26 as the date of its first session. The chief justice had signed under that date. The Burlington newspaper corroborated that date. I could only conclude that Parvin's private diary entry was wrong. Furthermore, there was no rifle larceny case at the first session, and Parvin did not make the first speech.

Parvin undoubtedly was a very important man. The memories of the important and unimportant alike can play tricks, and fifty years later old men can forget. No doubt the



Chief Justice Charles Mason

young Parvin was a busy secretary to the governor, Robert Lucas. Presumably he made the entry in his diary for November 28 sometime after the supreme court sat. The law had specified November 28 as the date for the first term. Parvin must have assumed the court had indeed sat on the specified date and entered this in his diary accordingly.

But the contemporary records showed he assumed wrong, which raised awkward questions. As the supreme court met two days before it should have by law, where did that leave the writ of error it ordered? And far more importantly, what about the twenty lawyers admitted to practice "according to law" two days before the law specified? Why had Chief Justice Mason, another of the great men of early Iowa, anticipated the correct date by two days?

The bill fixing November 28 as the date for the first session of the supreme court was passed by the House of Representatives on Saturday, November 24, and by the Council of the Legislative Assembly on Monday, November 26. The governor did not approve the bill until the morning of Wednesday, November 28 — the day the supreme court was supposed to sit. Did Chief Justice Mason *assume* the governor had signed the bill on November 26, *assume* the bill specified November 26, and then just go ahead and hold the first session on the twenty-sixth? Why on earth didn't he double-check? Furthermore, when the court sat on the wrong day, at least two of the lawyers present could have pointed out Mason's error. One of the lawyers was the chairman of the House Judiciary Committee —

none other than the young James Grimes, the third of the Reverend Snyder's great men of early Iowa. As chairman, Grimes must have known the date in the bill. The other was the governor's private secretary — none other than Theodore S. Parvin — who surely knew the governor had not yet signed the bill. It seems that Chief Justice Mason, at the very least, made a glorious muddle.

But it may have been much more than that. Besides fixing the date of the first supreme court session, the bill had one other important feature. Before a lawyer could appear in the supreme court, he had to "upon motion, be qualified and admitted." By being admitted to practice *before* the appointed day, all twenty lawyers may have been admitted to practice unlawfully. Does that mean that every single case won by each of these lawyers in the supreme court might have been successfully challenged — on the grounds that the winning lawyer had not conformed with the law requiring his admission to the supreme court? Should all the lawyers have been readmitted? To avoid doubt, should a special statute have been passed by the legislature to ratify their admission retrospectively?

One hundred and fifty years later, these questions probably are of greater significance to historians than to lawyers. For the former, Theodore S. Parvin has shown feet of clay, while Charles Mason seems to have brought forth a rattling skeleton. Indeed, this saga illustrates another saying of my great-grandfather, Lord Acton, about the study of history:

"No trusting without testing." □

#### NOTE ON SOURCES

Lord Acton's quotations are from his "Inaugural Lecture on the Study of History," *Lectures on Modern History* (New York, 1912). Sources by Theodore S. Parvin are "The Early Bar of Iowa," *Historical Lectures Upon Early Leaders in the Professions* (Iowa City, 1894); *Who Made Iowa?* (Davenport, 1896); and "Thomas S. Wilson," *Iowa Historical Record*, 10-12 (1894-96). Other sources include "An Act to Fix the Time for the First Session of the Supreme Court of the Territory of Iowa . . .," *Laws of Iowa, 1838-39* (Dubuque, 1838-39); "An Act to Divide the Territory of Wisconsin and to Establish the Territorial Government of Iowa," Benjamin F. Shambaugh, *Documentary Material Relating to the History of Iowa*, 1 (Iowa City, 1897); *Morris Reports*, 1 (1838-46); *Journal of the House of Representatives of the First Legislative Assembly of the Territory of Iowa, 1838-39* (Dubuque, 1839); "Laws of Iowa 1838-39," vol. 1, H.R. File No. 8 (State

Archives, State Historical Society of Iowa, Des Moines); Benjamin F. Shambaugh, *Executive Journals of Iowa* (1838-41) (Iowa City, 1906); John C. Parish, *Robert Lucas* (Iowa City, 1907); *Supreme Court Order Book: Vol. 1, 1838-1853* (State Historical Society of Iowa, Des Moines). Sources cited in this article include Edward H. Stiles, *Recollections and Sketches of Notable Lawyers and Public Men of Early Iowa* (Des Moines, 1916), 560-66, 569-70; "Hon. T. S. Parvin's Address at the Bar Re-Union at Des Moines, June 8th, 1886," *Iowa Historical Record*, 1-3 (1885-87), 305, 309-10; Rev. Charles E. Snyder, "Statesmen and Politicians in Early Iowa," *Annals of Iowa*, 27 (1945-46), 15-36; Jack J. Johnson, "The Supreme Court in Session," *The Palimpsest* (1939), 191-95; *Iowa Territorial Gazette and Burlington Advertiser*, Dec. 1, 1838. Complete citations are in the *Palimpsest* production files, State Historical Society of Iowa.