

IN MEMORIAM.

JOHN H. MULKEY.

PROCEEDINGS IN THE SUPREME COURT OF ILLINOIS AT THE
OCTOBER TERM, 1905, OF THAT COURT.

The Hon. JOHN H. MULKEY, a former justice of this court, died at his home in Metropolis, Illinois, on July 9, 1905. At the October term of this court, 1905, the following memorial proceedings were had:

The Hon. James C. Courtney addressed the court, as follows:

May it please the Court—I have been deputed by the members of the bar where Judge JOHN H. MULKEY resided and where he died, to formally present to this court the melancholy intelligence of his death and also to present the following memorial adopted by the bar of Massac county on the occasion of his death, and ask that the same be spread upon the records of this court. The memorial is as follows:

Resolved, That in the death of Judge JOHN H. MULKEY, which occurred at the family residence in the city of Metropolis, Massac county, Illinois, at six o'clock P. M., July 9, 1905, this bar and the bar of the State of Illinois has lost one of its ablest and best lawyers. From 1860 to the day of his death he commanded the universal respect and confidence of the bench and bar, and was during those years assigned a front place among us in his chosen profession. He was a painstaking, laborious student of the law, and came

to the trial of his cases well armed with the law and ready with the facts, and was therefore a dreaded foe in a trial by those whose fortune it was to appear on the opposite side. As an advocate before a jury he was clear and possessed a power of persuasion rarely equaled, and before a court presented an analysis of his propositions and problems which the judges never failed to appreciate, and with it all there was a suavity of manner that secured for him a respectful consideration of all he offered. He was a man of culture; was fearless, eloquent and of quick perception and an excellent judge of human nature, and possessed a varied and practical experience in the affairs of mankind. In all the walks of life he impressed himself upon those around and with those he had to deal. He was most eminently fitted by nature for the bench, and when once placed in that position he rapidly passed from the court of common pleas to the circuit court bench and then on to the Supreme bench, where he proved to be the peer of the ablest of his associates of that distinguished court, and while there he erected to his memory an endearing monument in the clear, concise and carefully prepared opinions which bear his name. He was a great lawyer, a pure judge, an excellent citizen and a devoted friend, and an encourager of the good and true and pure, and because he was this, we, his brethren of the bar, regret his loss and sympathize with his family and friends."

May it please the Court—This is no time or place for fulsome flattery. Why should the honored dead be flattered? To carve the way in life's great battle to a seat upon this bench is a distinction and an honor of itself, making all flattery needless and unwelcome. Truthful and unexaggerated eulogy ought always to be commended.

Judge MULKEY occupied a seat on this bench for nine years. He was elected June 4, 1879, and succeeded David J. Baker, who was elected to fill his place June 4, 1888. He was in the fifty-sixth year of his age at the time of his election to a seat on this bench, just passing the meridian of life, in the full maturity of his mental powers. Only one judge now occupies a seat here who was an associate of Judge MULKEY, and, sad to think, only three judges of this court now live who sat with him on this bench sixteen years ago. All but these are gone.

Judge MULKEY was indeed a self-made man. In his early manhood he followed the occupation of a tailor. He was in the thir-

tieth year of his age before he was admitted to the bar, but he rose to distinction as a lawyer with marvelous rapidity. He possessed a wide and varied knowledge of the law in all its branches. Judicial opinions proclaim the law and stand for labor and thought. To analyze conflicting evidence, to distinguish analogous cases, to weigh the strength of competing principles, to observe with the very command of the soul the springs of human conduct and thereby deduce the true rule of action, requires a high order of mind. Judge MULKEY possessed these attributes in a high degree, and his opinions display the workmanship of a master hand. They, indeed, present the law in vigorous logic and with an elegance and charm of diction not easily excelled. But he was, indeed, a great lawyer withal. He was greatly my senior in age, but it was my good fortune to be associated with him as assistant, and I have met him as an adversary in the conflicts at the bar. Here he was a formidable opponent, indeed. In the arena of battle at the bar he was alert, self-possessed, full of resources, aggressive, his mind like a jewel cut with many facets, catching light from all sides, he seldom or never lost a good cause. Unlike many lawyers, he did not investigate the law alone and leave the facts to take care of themselves. It is irksome to investigate and fill the mind with uninteresting details and cold facts, and many lawyers shirk this duty. Not many years ago I chanced to meet an aged judge who had occupied a seat on the bench of the Supreme Court of Louisiana in the ante-bellum days. He remarked that the great lawyer, Judah P. Benjamin, often appeared in that court. I pressed him to divulge the secret of that great lawyer's power and success. The aged jurist answered, unhesitatingly, that the secret of Benjamin's power and success was his familiarity with the facts and a clear and simple statement of the facts to the court. And Judge MULKEY, like Benjamin, never lost sight of the necessity of a thorough understanding of the facts.

There are lawyers who have gained renown in the contest at the bar by striking blows that cut keen, like a sharp scimitar. There are others that the drossy age often dotes on, who sneak and slip through by the pull of wealth or politics without any attempt at all. Judge MULKEY was one who sent his arguments home to the hearts of court and jury by striking sledge-hammer blows, like a giant in battle. But, strange to say, after leaving this bench he took but little, if any, interest in the law, but devoted quite all his time to

the subject of religion. He became a most ardent Roman Catholic and spent a great part of his time in religious devotion. For several years before his death he was an invalid, caused by a fall in which his hip was permanently dislocated. A few days before he died, together with a distinguished member of the bar, I visited him. He talked with the greatest unconcern about death. He indicated the time for his departure, telling us that he would not live longer than about ten days, and he seemed anxious to go. As we arose to depart he fondly bid us adieu, showering his blessings upon us. About ten days afterward the end came. He died, indeed, a firm believer in the Christian religion and the immortality of the soul. At his death he was surrounded by a loving family of children, attended by a faithful and devoted wife, passing away at the ripe age of four-score years. It was on a beautiful day in mid-summer time, in a beautiful cemetery, where the tall weeping cedars, like sentinels, seemed to stand guard over the city of the dead and where the growing flowers shed sweet fragrance abroad. There, on that beautiful day, many judges and lawyers of southern Illinois gathered together; a throng of people was there; a requiem was sung, and Judge MULKEY was laid to rest. And from his grave may the violets spring.

Mr. JUSTICE MAGRUDER, speaking in behalf of the court, made the following remarks:

I served with Judge JOHN H. MULKEY, as a member of this court, from November, 1885, to June, 1888, at which latter date he retired from the bench. This association with him led to a knowledge of his excellence as a man, and to an admiration for his ability as a jurist. His fine character and his clear, keen intellect are well deserving of the beautiful tribute, which has here in our presence been this day paid to his memory.

Judge MULKEY became a member of the Supreme Court of this State in June, 1879, and served one term of nine years thereafter. He was chief justice of the court from June, 1885, to June, 1886. The opinions of the court, written by him, may be found in volumes 92 to 125 inclusive of the Illinois Supreme Court Reports.

The logical faculty was pre-eminently his; and his powers of reasoning and analysis are illustrated in those of his opinions, which relate to the construction of wills. He illumined, with wonder-

ful clearness, the abstruse and intricate rules of law, which concern the vesting and distribution of estates, and grow out of the disposition by will of landed properties. A notable specimen of this feature of his work is seen in the case of *McCartney v. Osburn*, 118 Ill. 403.

His opinions show that he had great reverence for the constitutions of the State and of the national government. He respected the will of the people, as embodied in the acts of their representatives, but deplored any attempt to ignore, or break away from, constitutional restrictions. He recognized to the fullest extent the doctrine that, in a republic like ours, liberty is best regulated, when it is restrained within the limits, prescribed by a written constitution. Only thus can the rights of the people be protected from the encroachments of partial laws and the invasions of mob violence. In *Village of Hyde Park v. City of Chicago*, 124 Ill. 163, he said: "The voice of the people is all-powerful, when expressed in pursuance of laws that are passed in obedience to the constitution. But until the people vote to amend or change the constitution in the mode, which they themselves have designated, they, as well as their officials, are bound to obey its mandates." In *Dolese v. Pierce*, 124 Ill. 149, he said: "The highest and most sacred function of this court is to protect and enforce the constitution, regardless of all real or imaginary inconveniences that may result from doing so."

During the service of Judge MULKEY in the court many questions arose concerning the proper construction of the act, organizing the Appellate Courts, and the proper rules to be applied in the conduct of the proceedings provided for by that act. A series of opinions, written by him upon this subject, as found in the volumes of the Reports already mentioned, settled and fixed the practice in Appellate Court matters to the great assistance of both bench and bar. No greater service has been rendered to the profession than his expressed views upon this important branch of the legal system in Illinois. Verification of the statement thus made may be found by a perusal of such cases as *Fitzsimmons v. Cassell*, 98 Ill. 334, and *Cothran v. Ellis*, 125 Ill. 502.

Judge MULKEY had in him a vein of quiet humor, which often relieved the tedium and dryness of legal and judicial labor. In a proceeding where an attorney was charged with misappropriating property, and excused his doing so by insisting that he was acting

merely as trustee, and not as attorney, Judge MULKEY in a dissenting opinion said: "This defense so forcibly reminds me of the old story of the profane bishop, who had the good fortune to be a duke also, I cannot refrain from telling it. An acquaintance, who happened to overhear him using profane language, asked him how it was that he, being a bishop, could be guilty of swearing. 'Ah, my friend,' replied his reverence, 'I swear as a duke, and not as a bishop.' 'But,' retorts the other, 'when the devil comes to get the duke, what will become of the bishop?'" The application is manifest. When his satanic majesty calls for respondent, the trustee, what will become of respondent, the attorney?

Judge MULKEY was a soldier in the Mexican war. One day, while we were in session at Mount Vernon, he received a communication from Washington, written by the member of Congress from his district, informing him that, under congressional enactment, he was entitled to a pension of \$8.00 per month for services in the Mexican war. This unexpected increase in his income seemed to amuse him, and with that genial courtliness, which marked the bearing of a gentleman of the old school, he told us of his enlistment in the army, when a young student of the law, of his journey to New Orleans and thence across the gulf to a Mexican port, of his sea-sickness on the water and his hardships on the land.

But, above all and better than all, Judge MULKEY was a deeply religious man. There predominated in his nature a reverence for the supernatural. A sublime faith in the unseen and eternal controlled and regulated his life. He was a good man, and a great lawyer. We bemoan his loss, and extend our heartfelt sympathies to his family.

I suggest that an order be entered, spreading the memorial and resolution which have been read, upon the records of the court.

Mr. CHIEF JUSTICE CARTWRIGHT thereupon ordered that the resolution and memorial proceedings be spread at large upon the records of the court.

REPORTS
OF
CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE
SUPREME COURT OF ILLINOIS.

VOLUME 217.
CONTAINING CASES IN WHICH OPINIONS WERE FILED AT THE
OCTOBER TERM, 1905.

ISAAC NEWTON PHILLIPS,
REPORTER OF DECISIONS.

BLOOMINGTON, ILL.
1906.