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Let them decide as they honestly believe, and then if they are wrong, their errors may be pardoned ; not contrary to their own opinion, when even correct decision, the result of accident, is not a subject of approbation. Such are the rules, which reason and experience dictate, and which equity and common law daily and hourly violate.¹

J. A.

ART. II.—MR. JUSTICE STORY'S FUNERAL DISCOURSE ON
PROFESSOR ASHMUN.

A Discourse pronounced at the Funeral Obsequies of John Hooker Ashmun, Esq., Royal Professor of Law in Harvard University, before the President, Fellows, and Faculty, in the Chapel of the University, April 5, 1833. By JOSEPH STORY, LL. D., Dane Professor of Law.

THE occasion, which has brought us together, is full of melancholy interest. It is not, that it is new ; for the annals of time are crowded with memorials of the dead ; with repetitions of sorrows, which know no end ; and with renewals of anguish, which continually find utterance upon the departure of the good, the wise, and the great. It is not, that there is even any thing unusual in the present event, or beside the general course of human experience ; for when has the time been, in which youth and manhood have not dropped into the grave in all the pride of their power, and the affluence of their hopes?— We have seen the aged linger on to the last syllable of their recorded time ; and we have seen the bud of beauty nipped and withered in the first faint blushes of its dawn. These are common events, so common, indeed, that they scarcely attract more than

¹ Different States, as the evils of exclusion become more and more apparent, carve out exceptions and modifications of the rule suggested by the hardship of some particular case. Virginia has recently given common law courts the power of extracting testimony before obtainable only by equity. A further improvement would be, to increase the powers of equity and to change and alter its rules.

With limited access to the best works on chancery jurisprudence and to chancery reports, the writer of this article may have occasionally erred in his statements of the law, but occasional inaccuracies will not, as he apprehends, interfere with the main argument.

a transient notice; and so that they strike not within our own immediate circle of friends, we gaze on them for a moment with subdued thoughtfulness, and then press on to our own accustomed duties;—we return to our homes, and the sadness has passed away from our hearts.

Such is human life—I will not say, such is human infirmity—it is doubtless in the wisdom of Providence, that it should be so. If with such constantly recurring scenes of death on every side, our sympathy should always hover round the mourners; if we should partake of all their agonized feelings, and dwell, as they dwell, on the vanity of all human pursuits, and the desolateness of all human hopes; if we should take counsel, like them, only from our own dark meditations upon the frail tenure of our existence, and the utter worthlessness of every thing on this side of the grave; who does not perceive, that we should be unfit for all the active duties of life; that we should be absorbed in one unchanging reverie; that our affections would soon be exhausted, or extinguished; that our families and friends would soon cease to be felt, as the exciting source of our highest enjoyments; and that we should fly to forests and caverns, to impenetrable shades, and secret recesses, that we might bury ourselves from every thing but our own thoughts, and become as unfit for this earth, as it would then seem unfit for us?

On the other hand, we are not permitted to be insensible of the dangers, that every where surround us. We become daily touched with the sense of human infirmity. We learn the salutary lesson, that Providence has allotted to each of us his own sufferings; that there is no exemption of age, or rank, or station; and that, however often we may have occasion to lift our souls in grateful prayer for past blessings, there is a common doom appointed for all. The stream of time has always flowed on, and ever will flow on, noiseless but irresistible, to the ocean of eternity.

Thoughts, like these, if rightly improved, have a natural tendency to make us wiser, and holier, and better. They enable us to feel, as it were, the yet distant evils; to administer to the calamities of others with a soothing kindness; to warm, as well as to exalt, our own virtues; and to cherish habitually that compassionate tenderness, which, when the day of our own visitation shall arrive, will be found one of the surest sources of

earthly comfort. They prepare us also for the higher consolations of religion; for those sublime views of another and a better world, which Christianity has unfolded with such inexpressible glory, — ‘when this corruptible shall put on incorruption, and this mortal shall put on immortality.’

And the day of our own visitation is arrived; — Death has entered into our little academical circle, and struck down one of its choicest ornaments and supports. His cold and lifeless remains are now before us. We are gathered in this consecrated temple, to perform his funeral obsequies; to devote a brief space to the recollection of his character and virtues; and then to consign these perishable relics to the home, where they shall rest, until that hour, when

‘The trumpet shall be heard on high;
The dead shall live — the living die.’

I feel, my friends, how utterly inadequate I am, under such circumstances, to the performance of the task assigned me. What can I say, that has not been said a thousand times before? What can I suggest, which has not already suggested itself to your own hearts in a more touching form, and with a more homefelt pathos? Alas! the language of bereavement has long since rung out all its melancholy changes. The mourners have daily woven anew the texture of their sorrows, that they might more diligently employ their nightly vigils in separating the threads, and moistening each with their tears.

It has been said with great force and truth, that

‘Our dying friends come o’er us like a cloud,
To damp our brainless ardors, and abate
That glare of life, which often blinds the wise.’

But they often subserve another, if it be not a holier purpose. By severing every earthly tie, they compel us to rely wholly on the past; to treasure up in our memories every little incident, that we may be enabled to preserve, however faintly, some faithful resemblance of our departed friends. We are thus driven back to trace out every striking feature of their minds and characters; to recall every fleeting association; and thus by placing the lines in their due order, to draw out a softened image of every excellence, until at length it seems to breathe with the warmth and freshness of life. Painful as is the first effort, the very employment soon becomes the minister of good;

and like an angel of mercy, it comes with healing in its wings. It is one of the beautiful illustrations of the compensatory power of Providence, that sorrow is thus enabled to extract a secret cure from its own bitterest meditations.

And may I not say, how much there is in such a thought peculiarly appropriate to the present occasion? However deep may be our affliction in our present loss, the past is full of brightness, and the evening shuts not down in a settled and appalling gloom. We can look back upon the life of our departed friend with an approving consciousness.— We can see much to love, admire, and reverence in his character, and nothing to awaken regret for error, or apology for frailty. Such as he was, we can bear him in our hearts and on our lips with a manly praise. We can hold him up as a fit example for youthful emulation and ambition; not dazzling, but elevated; not stately, but solid; not ostentatious, but pure.

Of his life there are but few incidents, and these may be briefly told; for in a life not long, but uniform and consistent, filled up in the regular discharge of duty, and in the quiet occupations of a profession, little will be found to attract notice, or invite curiosity. He, who has marked out for himself a course of habitual diligence and virtue, who has no ambition, except for wisdom, and no love of power, that he may reap the ordinary rewards of popular favor, even if he does not pass his days along the sequestered paths of life with a noiseless tenor, has little to engage the vulgar gaze, and can furnish no eccentricities to gratify the idle, and no follies to console the indolent. Such a man addresses himself to higher objects and more enduring aims. He seeks to be what he ought, and is not content to dream on through life, the shadow of greatness, or the finger-point of scorn.

Our departed friend, John Hooker Ashmun, was born in Blandford in Massachusetts on the third day of July, 1800. His father was the Honorable Eli P. Ashmun, a distinguished lawyer of the Hampshire bar, who for several years represented that county in our State Senate, and afterwards represented this Commonwealth in the Senate of the United States. It was my good fortune to know him in the latter station, which he filled with great dignity, ability, and public respect. He retired voluntarily from public life, either from a superior

attachment to his profession, or from ill health, and died about the year 1819. His mother was the daughter of the Reverend John Hooker, a distinguished clergyman of Northampton, from whom he derived his name. His mother died, when he was quite young; so that he early lost that maternal care, which is always deeply felt, and is so generally irreparable; though it was in his case fortunately supplied by another, towards whom he entertained during his whole life a very tender regard. At an early age he was put under the instruction of a Mr. Grosvenor, who kept a private school at Northampton, with whom he made such proficiency, that at nine years of age he was deemed an extraordinary Latin scholar. He was afterwards removed to Blandford, and was there fitted for college by the Rev. Mr. Keep of that town. At the age of twelve he was deemed well qualified to enter upon the usual collegiate studies; but he was kept back until the succeeding year by the prudence of his father. He was then matriculated, and remained three years at Williamstown College; and then joined the Junior Class in Harvard University, and took his first degree at the annual commencement in the year 1818. During his residence at this University he does not appear to have exerted himself with any uncommon ardor in his studies. His own account of the matter seems to have been, that though the labors required of him would not have cost him much effort, he had little relish for them; and his extreme youth rendered them less attractive and less instructive, than they would otherwise have been; so that much of his time passed without any correspondent improvement, and his chief improvement was in mathematics. It is not improbable too, that, entering at an advanced standing, he did not easily acquire that intimacy with his classmates, which was calculated to nourish his ambition; and that he felt something of that estrangement, which rarely fails to be the accompaniment of young persons engaging in new studies with those, who have already caught, as it were, the genius and inspiration of the place by an earlier union in common pursuits.

As soon as he was graduated, he entered upon the study of the law in the office of his father; whom, however, he had the misfortune soon afterwards to lose; and he then completed his studies under the care of the Honorable Lewis Strong of North-

ampton. It was about this period, that he became intimately acquainted with the late Judge Howe, then a resident in the same town, whose very high professional attainments and untimely death are yet fresh in the memory of all of us. In due time he was admitted to the bar; and henceforth he devoted himself with intense zeal and strenuous industry to the noble Science of the Law, his favorite, and, I had almost said, his all-absorbing study. His career was soon marked by deserved success; and before he left the bar, in which he was then accustomed to practise, he stood in the very first rank of his profession, without any acknowledged superior. It is well known, that Judge Howe had established a Law School at Northampton of very high character; and during the last year of his life Mr. Ashmun, although quite young, was associated in his labors; and on his decease, in connexion with that accomplished statesman and jurist, the late Mr. Mills, he continued the establishment with unabated celebrity and success. In fact, from the ill health of Mr. Mills, the principal instruction in the School devolved almost entirely on Mr. Ashmun; and with his characteristic vigor he rose in energy, as the pressure demanded more various and exhausting labors.

Upon the reorganization of the Law Institution in this University, in the year 1829, Mr. Ashmun was invited by the unanimous vote of the Corporation to the chair of the Royall Professorship of Law. This tribute to his extraordinary merit occurred under circumstances as gratifying as any, which could well attend any similar appointment. The office was not wholly unsought on his own part; but it was wholly unexpected. It was a spontaneous movement of the Corporation itself, acting on its own responsibility, upon a deliberate review of his qualifications, and after the most searching inquiry into the solidity of his reputation. The choice was fully justified by the event. The honors of the University were never more worthily bestowed, never more meekly worn, and never more steadily brightened. He remained in the conscientious discharge of the arduous duties of this station with an unflinching fidelity to the last. He might almost be said to have died with his professional armor on him. Scarcely a fortnight is now elapsed, since his voice was heard in the forum, mastering a case of no inconsiderable nicety and importance; and only on

the day before his death, he was meditating new labors, and laying before me the scheme of our future juridical instructions.

I need hardly say in this place with what distinguished ability he filled the professor's chair. His method of instruction was searching and exact. It disciplined, while it awakened the mind. It compelled the pupil to exert his own powers; but it brought with it the conscious rewards of the labor. His explanations were always clear, and forcible, and satisfactory. Although his learning was exceedingly various, as well as deep, he never assumed the air of authority. On the contrary, whenever a question occurred, which he was not ready to answer, he had no reserves, and no concealments. With the modesty, as well as the tranquil confidence, of a great mind, he would candidly say, 'I am not lawyer enough to answer that.' In truth, his very doubts, like the doubts of Lord Eldon, and the queries of Plowden, let you at once into the vast reach of his inquiries and attainments. There is not, and there cannot be a higher tribute to his memory, than this, that while his scrutiny was severely close, he was most cordially beloved by all his pupils. He lived with them upon terms of the most familiar intimacy; and he has sometimes with a delightful modesty and elegance said to me, 'I am but the eldest Boy upon the form.'

He had for more than eight years been in a state of declining health, the victim of a constitutional disease, slow and silent in its approaches, which deluded our hopes, and lulled our fears, and was most insidious in the very hours, in which it moved the heart with unusual cheerfulness. It may be truly said, in the language of one of the most eloquent of modern statesmen on a similar occasion, that it pleased the Almighty, 'to make his shortened span one long disease.'¹ No man could have resisted it with a more firm yet gentle spirit. He saw the danger without dismay, and struggled to meet and overcome it. Whatever medical skill could bring to his aid to alleviate, or subdue it, was faithfully administered. Without being confident, that he should triumph over this constitutional infirmity, he seemed constantly encouraged by the consciousness, that it was worth the trial. No man ever bore himself through

¹ The Right Honorable George Canning's Epitaph on his eldest son.

every change of its aspect with a more uncomplaining moderation, or more unshrinking fortitude. He sought concealment of his sufferings; and was even sensitive to inquiries on the subject. He buried in his own bosom both his hopes and his fears; and seemed, most of all, anxious to avoid giving trouble and inconvenience to others. There were periods, when the disease seemed to have in a great measure lost its potency; and there were other periods, in which it seemed to move on with a hurried process to an immediate catastrophe. Yet in every vicissitude the same imperturbable resolution and the same unrepining calmness marked his conduct. His intellectual energy seemed rather heightened, than impaired, by the gradual diminution of his physical strength. Its activity seemed to furnish a salutary stimulus, if it did not administer a necessary aliment to his existence. I have sometimes been led to doubt, whether, if he had had less professional excitement, he would not earlier have fallen a victim.

Although, for the few last days, it was obvious to those of us, who had most intercourse with him, that he could not live many weeks, or at least many months; yet the actual occurrence of his death was a calamity so sudden and startling, that all of his friends were awakened (as it were) from a dreadful dream. He was himself without the slightest suspicion of the impending event. He sought repose at the usual hour, on Sunday evening, being for the first time watched by the care of an interesting friend, without any wish expressed on his own part. He retained his senses almost to the last, and sunk away in a gentle, child-like sleep, without the smallest struggle, and almost without observation. At the very moment when he was breathing his last breath, the first beams of the morning were beginning to blend their beautiful and softened lights. His spirit, as it bore itself away from the earth, seemed almost to whisper in our ears the affecting aspiration of the Psalmist, 'Oh! that I had wings like a dove; for then would I fly away, and be at rest.'¹

Such is the simple narrative of the life of Mr. Ashmun, and such the enviable felicity of his death. Yet, brief as was his career, there was much in it calculated to awaken our admiration,

¹ Mr. Ashmun died on Monday morning, the first day of April, 1833.

as well as to engage our affections. Few men have impressed upon the memory of their friends a livelier sense of excellence and unsullied virtue. Fewer have left behind them a character so significant in its outlines, and so well fitted to sustain an enduring fame.

My own acquaintance with him commenced only with his residence in Cambridge. But ever since that period I have counted it among my chief pleasures to cultivate his friendship, and justify his confidence. Engaged, as we have been, in kindred pursuits and duties, it has been almost of course, that our intercourse should be frank, as well as frequent; and I feel a pride in declaring, that we have worked hand in hand with the most cordial fellowship, and with a union of opinion, which nothing but the strongest mutual attachment could have successfully cherished. I can, therefore, with all sincerity of heart join the general voice of his afflicted relatives and friends in bearing testimony to his rare endowments and exalted merits.

In the private and domestic circle he was greatly beloved, as well as respected. He was confiding and affectionate; and, as an elder son, occupying the place of a parent, he indulged a truly parental kindness towards the younger branches of the family, mixed up with the eager solicitude and sympathy of a brother. In his feelings he possessed an enlightened benevolence, and a warm sensibility; and was gratified by an opportunity to advance those, who were within the sphere of his influence. He was a man of the most inflexible honor and integrity, a devout lover of truth, conscientiously scrupulous in the discharge of his duties, and constantly elevating the standard of his own virtue. His candor was as marked, as his sense of justice was acute and vivid. He held in utter contempt that low and grovelling spirit, which contented itself with common observances, so as not to offend against the established decencies of life; which was sordid, as far as it dared; and mean, as far as it was safe. And yet the voice of censure rarely escaped from his lips; and he seemed solicitous to moderate the language of the sentence, even when truth demanded that he should not withhold it. He habitually softened the lineaments of the portraits, which he had no wish to gaze on, or to sketch.

He had also, as might easily be gathered from what has been already said, a deep sense of the value and importance of reli-

gion, though from his ill health he was of late years compelled to abstain a good deal from its public solemnities. In his opinions he was unequivocally a Unitarian, without the slightest propensity to proselytism or bigotry. His great aim was to be good, and not merely to seem so. He had a profound feeling of his responsibility to God for all his actions, and clung with devout reverence to the doctrines of life and immortality, as revealed in the gospel. His opinions on these subjects were not built upon transitory emotions; but they grew up, and mingled with all his thoughts, and gave to them a peculiar transparency and force. They imparted a serenity and confidence, which may be truly enumerated, as among the choicest of human blessings.

In his general deportment he was modest and reserved, less desirous to please, than his high powers would have justified, and never eager either for contest or victory. On this account, as well as on account of his thoughtful aspect, he was often supposed, on the first approaches, to be cold or indifferent, having little relish for social scenes and the lighter pleasures of life. This was far from being true; for among those, with whom he was intimate, no man was more social in his temper, more indulgent in playful and delicate humor, or more familiar in easy conversation. His abstinence from general society was partly from choice, and partly from duty. Besides ill health, he felt another disadvantage from the infirmity of a slight deafness, with which he had been long afflicted. Time, also, was to him inestimable. It was a prize, not to be thrown away, but to be employed in intellectual advancement, in widening and deepening the foundations of his constantly accumulating knowledge. Though he read much, he thought still more; and there was a freshness in all his views, which stamped them at once with the impress of originality.

But it is chiefly in a professional point of view, that he should be remembered in this place, as at once an ornament to be honored, and an example to be followed. If we look at his years, it seems almost incredible, that he should have attained so high a distinction in so short a period. Let it be recollected, that he died before he had attained the age of thirty-three; and that he had then gathered about him all the honors, which are usually the harvest of the ripest life.

The law is a science of such vast extent and intricacy, of such severe logic and nice dependencies, that it has always tasked the highest minds to reach even its ordinary boundaries. But eminence in it can never be attained without the most laborious study, united with talents of a superior order. There is no royal road to guide us through its labyrinths. They are to be penetrated by skill, and mastered by a frequent survey of landmarks. It has almost passed into a proverb, that the lucubrations of twenty years will do little more, than conduct us to the vestibule of the temple; and an equal period may well be devoted to exploring the recesses. What, then, shall we think of a man, who in ten years had elevated himself to the foremost rank, and laid the foundations of deep, various, and accurate learning? What shall we think of a man, who, at that early period, was thought as worthy, as any one in the profession, to fill the chair just vacated by the highest judicial officer of the Commonwealth in the full vigor of his own well-earned fame?

There were yet difficulties to be overcome in the case of Mr. Ashmun, which bring out in stronger relief the traits of his professional character, and invest it with a peculiar charm and dignity. He was defective in some of the most engaging and attractive accomplishments of the bar. Owing to ill health, he could not be said to have attained either grace of person, or ease of action. His voice was feeble; his utterance, though clear, was labored; and his manner, though appropriate, was not inviting. He could not be said to possess the higher attributes of oratory, copiousness and warmth of diction, persuasiveness of address, a kindling imagination, the scintillations of wit, or the thrilling pathos, which appeals to the passions. Yet he was always listened to with the most profound respect and attention. He convinced, where others sought but to persuade; he bore along the court and the jury by the force of his argument; he grappled with their minds, and bound them down with those strong ligaments of the law, which may not be broken, and cannot be loosened. In short, he often obtained a triumph, where mere eloquence must have failed. His conscientious earnestness commanded confidence, and his powerful expostulations secured the passes to victory. It has been said, and I doubt not with entire correctness, that in the three interior counties of the state, to which his practice extended, he

was, during the last years of his professional residence, engaged on one side of every important cause. Certain it is, that no man of his years was ever listened to with more undivided attention by the court and bar, or received from them more unsolicited approbation. If, to the circumstances already alluded to, we add his ill health and deafness, his professional success seems truly marvellous. It is as proud an example of genius subduing to its own purposes every obstacle, opposed to its career, and working out its own lofty destiny, as could well be presented to the notice of any ingenuous youth. It is as fine a demonstration, as we could desire, of that great moral truth, that man is far less, what nature has originally made him, than what he chooses to make himself.

If I were called upon to declare, what were the most characteristic features of his mind, I should say they were sagacity, perspicacity, and strength. His mind was rather solid, than brilliant; rather active, than imaginative; rather acute in comparing, than fertile in invention. He was not a rapid, but a close thinker; not an ardent, but an exact reasoner; not a generalizing, but a concentrating speaker. He always studied brevity and significance of expression. And hence his remarks were peculiarly sententious, terse, and pithy; and sometimes, quite epigrammatic. He indulged little in metaphors; but when used, they were always direct, and full of meaning. Few persons have left upon the minds of those, who have heard them, so many striking thoughts, uttered with so much proverbial point, and such winning simplicity. They adhered to the memory in spite of every effort to banish them. They were philosophy brought down to the business of human life, and disciplined for its daily purposes. He possessed in a remarkable degree the faculty of analyzing a complicated case into its elements, and of throwing out at once all its accidental and unimportant ingredients. He easily separated the gold from the dross, and refined and polished the former with an exquisite skill. He rarely amplified by illustrations; but poured at once on the points of his cause a steady and luminous stream of argument. In short, the prevailing character of his mind was judgment, arranging all its materials in a lucid order, moulding them with a masterly power, and closing the results with an impregnable array of logic. I had almost forgotten to add, that

when about a year ago the legislature of this Commonwealth authorized the formation of a new code of our laws, he was selected, in connexion with two of our most distinguished jurists, to give it its appropriate form and body. To such a task, what rare qualifications must be brought! If I have but succeeded in impressing upon others my own deep sense of his capacity for the task, who is there, that will not join me in lamenting his death, as a public calamity?

I must close these hasty sketches, thrown together in the midst of various cares, and with the languor of a drooping spirit. And yet I would not close them in the language even of gloom, and far less of discontent. In the natural course of events, indeed, the thought might have been indulged, that our respective places would be changed; and that he might be called upon at some future time to perform a kindred office for one, who had cherished his friendship, and partaken of his labors. To Providence it has seemed fit to order otherwise. Nor can we justly mourn over the loss of such a man, as those, who are without hope or consolation. Thanks be to God, in the midst of our sorrows there yet spring up in our hearts the most soothing recollections, and the most sublime contemplations. He is but removed before us to a more exalted state of being, immortal and unchangeable. We have nothing to regret but for ourselves. The tears, that fall upon his grave, are unstained by any mixture of bitterness for frailty, or for vice. The circle of his life was not large, but it was complete. If he had lived longer, he might have reared more enduring monuments of fame for posterity; but his virtues could not have been more mature, or more endeared. They are now beyond the reach of accident, or question. They are treasured up among the records of Eternity. He lived, as a wise man would aspire to live. He died, as a good man would desire to die. Well may we exclaim: 'How beautiful is death, when earn'd by virtue!'