

## PROCEEDINGS

IN MEMORY OF

### ASSOCIATE JUSTICE JOHN M. BERRY.

The Honorable **JOHN MCDONOUGH BERRY**, senior associate justice of the supreme court of Minnesota, died at his home in Minneapolis, on the eighth day of November, 1887, in the sixty-first year of his age, and the twenty-third year of continuous service on the bench of the court, where he sat for the last time on June 15, 1887.

Judge Berry was born at Pittsfield, in Merrimac county, New Hampshire, on the eighteenth of September, 1827. He was prepared for college at Phillips (Andover) Academy, was graduated from Yale College in, 1847, was admitted to the bar in July, 1850, and began the practice of law at Alton, Belknap county, where he remained for two years. In the year 1853, after a two years' sojourn at Janesville, Wisconsin, he became a citizen of this state, making his home at Faribault. In 1879, he removed to Minneapolis, where he resided until his death.

He was a member of the territorial legislature in 1856-7, and chairman of the judiciary committee of the house of representatives, and was chairman of the same committee of the state senate in 1863 and 1864, and was a member of the board of regents of the state university in 1860 and 1861. He was elected an associate justice of the supreme court in 1864, and qualified and took his seat on the tenth day of January, 1865, and was continued in office, by successive re-elections, until his death. His first reported opinion is in the case of *Bidwell v. Madison*, 10 Minn. 1, (13,) and the last in the case of *Wyvell v. Jones*, 37 Minn. 68, filed June 8, 1887.

On the seventeenth day of December, 1887, Hon. S. J. R. McMillan, as chairman of a committee of the bar of the state, presented to the supreme court, then in session, the following memorial resolution, and moved that it be entered in the records of the court:

#### MEMORIAL.

Since the opening of the present term of the supreme court, the earthly career of Hon. John M. Berry, the senior associate justice of the court, has terminated. As members of the bar of Minnesota, we desire to express our deep sorrow on account of his death, and testify of our respect and veneration for his memory.

In the early part of his professional career, he was called to the bench, and for nearly twenty-three years he held the high and responsible position which was made vacant by his death.

By his natural endowments and intellectual discipline and attainments, he was peculiarly fitted for judicial life. His learning and ability were quickened in their exercise by a strong sense of justice, and an ardent love for the equity of the law. Free from prejudice and undue intellectual bias, he sought only for the truth in his conscientious discharge of his official duties.

In his long judicial career he has indelibly impressed upon the jurisprudence of the state his own wisdom and ability, and the purity and uprightness of his own character.

Honorable, generous and kind, he was loved and respected by all who knew him. In his death our state has lost one of its ablest judges, our profession one of its brightest ornaments, the community a useful and upright citizen, and his family a devoted husband and father.

Removed from earth in the midst of his labors and usefulness, we mourn his loss, and extend our sincere sympathy to his family in their sad bereavement.

We respectfully request the court to direct that this expression of our respect for our departed friend be entered upon its record, with such other proceedings as may be had in connection therewith, and that a copy thereof be transmitted to his family.

Judge **MCMILLAN** then addressed the court as follows:

I met Judge Berry on his first visit to Minnesota in 1853. He soon thereafter took up his residence in the southern part of the territory, which was then attracting the attention of the country, and soon filled up with an intelligent and thrifty population. He afterwards changed his residence to Faribault, where he continued to reside until his removal to the city of Minneapolis. During the early period of his residence in the territory I knew him only as a professional brother, esteemed in the community and giving assurance of early distinction and success.

Called by his fellow-citizens to represent them in the legislature, at a period in our history when we were laying the foundations of our political institutions, he took a prominent position in the body of which he was a member, and among other measures of public importance accomplished by him, he was influential in obtaining legislation which preserved and resulted in augmenting the resources of the state university, of which he was afterwards a regent, and in which he retained a deep interest throughout his life. It was not, however, until he entered upon his judicial office that I became intimately acquainted with him. For the first ten years and more of his judicial life I had the honor of being associated with him in his judicial duties, and I count this intimate association with him, and his friendship which continued till his death, among the richest treasures of my life.

If there is any place or relation in secular life which reveals the mental and moral characteristics of a man to his associates or to himself, it is the consultation room of an appellate court, and here our beloved friend appeared to the most advantage. He was thorough and diligent in his investigations, and calm and free from excitement in his deliberations. No prejudice or pride of opinion clouded his mind, perverted his judgment, or prevented his reception of the truth. His understanding was comprehensive and clear; his judgment was sound and accurate. With a sacred regard for individual rights, without respect of persons, he sought the right and justice of the matters submitted to him. His intellectual taste was cultivated and refined, and his reading varied and extensive. He was an intelligent observer of men and things, and his knowledge of affairs was extensive and practical. In his judgment of others he was charitable and kind. Honorable and upright in his conduct, generous and broad in his sympathies, unselfish and sincere in his feelings, he was true and faithful in his friendships. His tastes were simple, his manners unaffected; he was approachable by all.

In his family he was tender, devoted and affectionate.

His labors are over, his life work is done. In the fruit of his labors he has left to the state and to the profession a rich and enduring legacy. We will honor his name, cherish his memory, and commend his example to those who shall fill our places in the profession we love.

Hon. **ISAAC ATWATER** then presented to the court the following memorial resolution of the bar of Minneapolis:

IN MEMORY OF THE HONORABLE JOHN MCDONOUGH BERRY.

The bar of Minneapolis, assembled for the purpose, adopt this as their memorial to the worth, the integrity, the purity, and the learning which were embodied in the character of Judge John M. Berry, late an associate justice of the supreme court of Minnesota.

His continuous service in that exalted position, for a period covering nearly a quarter of a century, gave him an opportunity such as few men may enjoy for exhibiting both his native talents and his stores of learning; while, at the same time, it tested his ability to exercise without despotism the great powers with which a republic clothes its judiciary. How well he improved the opportunity, and endured the ordeal, is attested by the large place he held in the affections and esteem of the people of this state. In their exchange of opinions, he has for years been an example of high excellence as a jurist, a scholar, and a citizen. Knowing him, as we have, not only as the judge, but as our townsman and our friend, it is our pleasant privilege on this occasion to join in these encomiums. His affability of demeanor, and his solicitous respect for the rights and feelings of his fellows, bespoke a warm, true heart, and endeared him to us as a neighbor.

The wealth of judicial learning with which his opinions as a judge were enriched will long, in the future as it has in the past, awaken the emulation of other ardent students of the law. His sterling independence and integrity, his well-balanced intellect, and his robust common sense, were his guides through many judicial mazes, and prompted him continually in the practical application of his professional knowledge to the myriad phases of the new cases presented to the bench. The young state of Minnesota needed such advisers and guides in the formative period of her polity and jurisprudence, and she was fortunate in securing the services, among others, of a Berry.

His opinions crowd the pages of twenty-six volumes of the reports of decisions of her court of last resort, and they largely illustrate the rapid development of all the material, industrial, commercial, and political interests of the commonwealth in her earliest years.

While mourning his loss to the state, we shall, as his townsmen, point proudly to his monument, one more enduring than marble shaft or granite tomb,—one reared by himself, and fixed forever in the very structure of the state,—the monument of his invaluable contributions to our jurisprudence.

Hon. **GORDON E. COLE** then addressed the Court as follows:

*May it please the Court:*

In the rush and whirl of this busy world of ours, the removal of any man, no matter how commanding his intellect, how correct his morals, or conspicuous his station, creates but a ripple upon the current, and the tide of human life sweeps onward with no perceptible change in its flow. But sometimes a person disappears whose absence creates an aching void, which seems to leave that segment of the world in which he lived and moved, cold and desolate, a less desirable residence for friends and family. Such a loss, it appears to me, the bench he adorned, the bar which esteemed him, the family which adored him, the friends who loved him, have sustained in the death of Judge Berry.

For thirty years, on the bench and in the forum, I have known our lamented friend as intimately as it often falls to the lot of one man to know another. The most conspicuous trait of his character, which his intimate friends knew and prized, was a fund of genial humor, whose

unceasing flow made his companionship more delightful than that of most men. There was a flash and sparkle of wit, which, in the intervals of dry discussion of legal problems, constantly diffused its radiance. He was a true and loyal friend, and a charming companion. As a Christian gentleman, while scorning all sham and cant, his belief in the fundamental facts on which Christianity rests, was as fixed and positive as that of any man I ever knew, while the quiet and unobtrusive benevolence which has so often lent a needed assistance to those of his friends and acquaintances less fortunate than himself will never be forgotten by the recipients of his aid.

His official life almost spans the arch which circles our history as a state. He may be almost said to have rocked the cradle of the infant commonwealth, and to have done more than any other man in shaping her rising destinies. Whatever of material prosperity has followed from the selection of a north and south line, as the western boundary of the new state which was erected out of the old territory of Minnesota, is largely due to his pen and voice.

As a lawyer and judge, Judge Berry was not what might be called a book or case lawyer. A fine classical and legal education had made him a good scholar and a good lawyer. His range of general reading was extensive, and his knowledge of law accurate. But he was more fond of reasoning from those general principles which he had acquired by a youth of hard study, than of an appeal to the musty precedents of the law books, although his habits of industry did not permit him to neglect these. An authority, to carry with it his judgment, must have been sustained by logical reason, and commended itself to his sense of equity. A precedent, as such, had no charms and no terrors for him. He had little reverence for the authorities, merely because they were such.

He was a man of thought rather than of action. For the fierce conflicts and rough jostling of frontier practice, he had little taste. His mind was that of a judge, rather than of an advocate. Thoroughly honest in all his thoughts and actions, and possessed of a moral courage, which, while it never led him outside of the line of his duty to espouse or advocate untried or doubtful experiments, yet in that line never failed him in the discharge of those duties which fell within his appropriate sphere of action. A restless reformer he could never have been. His innate modesty ever shrunk from notoriety. The Socratic mode of inquiry, by which, while apparently seeking for information, he detected and exposed the fallacies which underlie much crude and illy considered thought, was with him a favorite weapon.

This gentle and kindly friend, this genial humorist, has gone, and going has left a sweet memory behind him.

"Like the vase in which roses have once been distilled,  
You may break, you may shatter the vase if you will,  
But the scent of the roses will hang round it still."

His body is gone; the vase is broken which contained these delightful qualities; but the sweet savor of his wit, the memory of the kind friend and cheerful companion, of the good judge and citizen, will linger in this room, once made so cheerful by his presence, so long as his surviving associates on the bench and at the bar shall continue to carry on the work which he has resigned.

Hon. **CHARLES E. FLANDRAU** then addressed the court as follows:

*May it please the Court:*

I came to assist at the obsequies of Judge Berry as a listener, to hear the strong points of

his character pictured by the members of the bar and this court, not intending to add anything myself; but, on reflection, I think it not altogether inappropriate that I should say a few words.

Judge Berry and myself were contemporaries in our arrival in the territory of Minnesota. He located in one part of the territory, and I in another, distant from each other, and we have never been inhabitants of the same locality in the thirty-five years which have passed since our arrival; consequently, my intercourse with Judge Berry was more official than social; but it has been sufficiently intimate to impress me with a profound respect for his many excellent qualities as a judge and a man. He possessed the gravity of demeanor which is demanded by the proprieties of the bench, and, at the same time, that seriousness of deportment was ever ready to relax, and yield to the influence of good fellowship for which the western bar is celebrated; he possessed a line sense of humor, and was a genial companion. Judge Berry was a man of more learning than is usually found among western lawyers. He was devoted to his profession, and preferred the honors that are its incidents to its emoluments. Our almost perfect state law library, in which the bar takes such just pride, is much indebted to his learned and judicious selection. He was one of the most conscientious judges it has ever been my experience to practise before. The decisions of all courts will be subjected to criticism by those whose interests they affect adversely, but I never heard, during all the long period of Judge Berry's administration, a suggestion from any source that he had not been actuated solely by a desire to arrive at the just and legal result in every decision in which he participated.

I might enlarge upon the good qualities of our deceased judge and friend, but it would be only a repetition of what has been said in the several memorials which have been presented by the bar associations. No eulogy could be pronounced upon Judge Berry in which I would not heartily concur.

In the infancy of our history I occupied a position upon the supreme bench of the territory and state. That time might well be designated as the crude and disorderly period of the administration of the law. We were compelled from the necessity of the case to make the law, rather than to interpret and construe it. Under the territory we were without the guiding light of a constitution, save the organic act; and in the earlier days of the state, with the heterogeneous character of our people and our bar, our labors were largely experimental and original in their character. Judge Berry was called to the bench just about the time when the administration of justice was assuming its normal status, and his well-trained mind found a splendid field for its exertion in moulding the jurisprudence of a new empire.

It was a very serious question in the constitutional convention of the state, whether the judges should be elected, or appointed for life or during good behavior, and the dominant opinion was in favor of the life tenure. I was in accord with the majority, but, having a very extensive acquaintance with the bar of the territory,—in fact, knowing nearly every member of it,—I feared that there did not exist, at that early day, sufficient material to fill all the judicial offices with credit and satisfaction as a permanency, and this view obtained. So we adopted the elective system, and it is a very satisfactory reflection that the people have, with very rare exceptions, shown great wisdom in their selection of our judges; and whenever a judge has proved himself worthy of the choice, they have re-elected him term after term, practically inaugurating the life tenure. Judge Berry was a conspicuous example of this determination of the people to retain their worthy representatives on the bench.

There is a moral in such a life as that of our beloved and lamented judge, and those who follow in his footsteps will do well to emulate his noble example.

Other remarks were made by Hon. ISAAC ATWATER and Hon. EUGENE M. WILSON, at the conclusion of which

Chief Justice GILFILLAN, in behalf of the court, responded as follows to the addresses of the bar:

*Gentlemen of the Bar:*

On behalf of the court, I thank you for your graceful and just tributes to the memory of our deceased associate.

Mr. Justice Berry was the second of the members of this court who have died in service. A little more than six years ago, Mr. Justice Cornell, then one of the judges of the court, died. Now, Judge Berry, who had long been one of his associates in judicial station and labors, has also gone, while in the exercise of his duties upon this bench. He had been on the bench nearly twenty-three years, more than twice as long as any other judge of the court, except one.

It was a long term of faithful, laborious service. Twenty-six volumes of reported decisions are witnesses to the fidelity, industry, and ability with which he discharged the duties of his office. His influence in moulding the jurisprudence of the state, in some measure crude and unformed when he came upon the bench, has by far exceeded that of any other judge, and it will continue for many years to come.

The judge who for a considerable time occupies a place in the court of last resort in a comparatively new community, makes his impress upon the future of the state and society more than almost any other man. True, it is usually done quietly, without display, and almost imperceptibly, as the dew falls, or the trees grow. His decisions concern men in all their daily lives and business, and establish their code of business morality. He marks out the path in which those who come after him in the judicial office, or in the profession of the law, must follow.

It was fortunate for the people and the state that Judge Berry came upon the bench when he did, and remained on it so long as he did; and that he possessed so largely the qualities that so peculiarly fitted him for the duties of the office. Patient, judicial, impartial, clear-sighted, his was the mind to adopt and establish safe, wise, and conservative rules. He was always careful and painstaking in the examination of cases before him, conscientiously devoting to their consideration great labor and research, and giving to them a logical mind well stored with legal learning.

But what need that I speak of these things to you? They are well known to you all. No one can now or hereafter occupy worthily a place at the bar in this state, or in the future fit himself in it for the profession of the law, without having these qualities of Judge Berry as a magistrate brought daily to his attention, without making part of his necessary learning the decisions announced and put in form by him.

He had other qualities, fully known only to those who were so fortunate as to be in some degree intimate with him, and which endeared him to them. He was too modest to bring his personal traits much to the notice of any but his personal friends. He always shunned, almost dreaded, anything like ostentation and notoriety. His tastes and habits were almost quaintly simple. He had no ambition, as that word is commonly understood. He cared nothing for, but rather avoided, preferment. When offers of such, that would have tempted most men, were made to him, he not only declined them, but felt so little interest in such proffered honors that he rarely alluded to them, even among his most intimate friends. But he had a nobler ambition—that to

fulfill his whole duty to the utmost of his ability.

He knew himself more thoroughly and accurately than most men know themselves—knew where his strength lay, and what was the bent and capability of his mind. His proper place was on the bench, and he knew it; and no temptation, however brilliant and dazzling, could ever for a moment cause him to waver in that knowledge. So, when on one occasion there was offered him a place in another sphere, a place that many court and few would decline, but which he knew he was not so well fitted for as for the bench, he declined it without hesitation,

He was a diligent and careful student, not only of the books pertaining to his profession, but of those of the best kind belonging to general literature. To his familiarity with law books the state and the profession are indebted for the selection and arrangement of the excellent law library in this building. He gave to it a great deal of time and labor, and it twice grew to be almost perfect for its size, under his superintending care.

Not only in his judicial duties, but in various branches of knowledge, he was a thinker, original in his modes and lines of thought. Though fond of books, especially those of a rare kind, no author that he read could affect the independence of his reasoning and judgment on the matters treated of.

You, gentlemen, know how courteous and respectful he always was in his personal and official intercourse with all. In the closer intercourse with us, his associates on the bench, he was uniform in his kindness and good nature. Constant association and frequent discussion upon differences of opinion are apt to reveal, at times, infirmities of temper, if there be any. During twelve years of such association, meeting him daily for the greater part of the time, nothing, so far as apparent to me, ever ruffled the evenness and gentleness of his temper; nothing ever occurred, however various the opinions or earnest the discussions on them might be, to leave even a momentary bitterness behind. We all remember, with pleasure touched with sadness, his cheerful daily greeting, his pleasant smile and harmless jest; and we recall how true and steadfast and sympathizing a friend he was, ever ready to counsel and assist.

And now that his life has closed, it can be said of him with more truth than of most men, that his was a useful, well-spent life; a life devoted to the laborious, conscientious discharge of his duties to his fellow-man. What higher praise can be said of a man than that he has faithfully done his duty?

Your memorials, gentlemen, will be entered by the clerk in the minutes of the court for the day.