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JAMES IREDELL: LAWYER, STATESMAN, JUDGE.
1751-1799.

"The character of this excellent man has been too little known. Similar has been the fate of many other valuable characters in America. They are too little known to those around them, their modest merits have been too familiar, perhaps too uniform, to attract particular and distinguished attention."

James Iredell was born in Lewes, Sussex County, England, October 5, 1751. His father, Mr. Francis Iredell, a merchant of Bristol, married Margaret McCulloch. The family were allied by blood to Sir George Macartney, the Earl of Wigton, the Fergusons, McCullochs, and, by marriage, to Governor Lyttleton. Henry McCulloch was connected with the Government of the Province of North Carolina, where he owned large landed estates. Through the influence of relatives and friends, James Iredell was appointed Comptroller of the Customs at Port Roanoke (Edenton). It was said at the time "The office is genteel, requiring little or no duty, so that he will have time to apply himself to business; it is worth upwards of one hundred pounds sterling a year." . . . Iredell appropriated a large portion of his salary to the support of his father and mother, thus "illustrating in a forcible manner his filial piety and generous nature." He sailed for his new home with nothing but his commission and letters of introduction from friends in England to several gentlemen in Edenton, arriving at the latter place "near the close of the year 1768." His biographer

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says of him: "He was then just seventeen years old, at that age when pleasures are enjoyed with the keenest relish. Frank, ingenuous, of pleasing appearance, winning manners, and educated in the best schools of England, he was kindly received and warmly welcomed."

The society of Edenton furnished to Iredell a social circle of cultured and refined hospitality into which he at once entered. It is with Iredell's preparation for his work as a lawyer, statesman and judge that we are specially concerned, thus precluding an entrance into the interesting and charming story of his personal and social life further than illustrates his public career.

Very soon after his arrival he began the study of law with Mr. Samuel Johnston, a lawyer of learning, a man of deep and extensive reading, of singular purity of life and patriotic service. "Every moment of leisure was devoted to his legal studies and to such intercourse with intelligent gentlemen and cultivated ladies as was calculated to refine and improve. He was a diligent student; he copied Mr. Johnston's arguments and pleas in important cases. He read carefully and attentively the text-books, referring to the authorities quoted, and collecting and digesting kindred passages from all writers within his reach; he attended the courts, returned to his chamber and wrote out arguments of his own, applicable to the cases he had heard stated."¹ A few extracts from his "Journal" will give us a fair view of the young Comptroller preparing himself for the career which, all unthought of, awaited him. On August 22, 1770, he writes: "Indolence in any is shameful, but in a young man quite inexcusable. Let me consider for a moment whether it will be worth my while to attempt making a figure in life, or whether I will be content with mediocrity of fame and circumstances. . . . But nothing is to be acquired without industry; and indolence is an effectual bar to improvement. . . . I have not done as much as I ought to have done; read a little in Lyttleton's Tenures and stopped in the middle of his Chapter

¹The writer has, for his information, relied largely on McRee's "Life and Correspondence of James Iredell." Except as otherwise indicated quotations herein given, are taken from it.

on Rents; whereas I ought to have gone through it; it would have been better than losing three or four games at billiards. N. B.—If you do play billiards make it a rule not to lengthen.”

We learn from his journal that, while studying Lyttleton, he did not neglect polite literature. “I have been reading a volume of the Spectator, which is ever new, ever instructive, ever interesting. I hope they will be transmitted, with honor, to the latest ages. . . . Strength of reason, elegance of style, delicacy of sentiment, fertility of imagination, poignancy of wit, politeness of manners, and the most amiable pattern of human life appears through the whole, in so conspicuous a manner, as at once to improve and delight. . . . Resumed my Spectator; read a great many entertaining and improving things, particularly Mr. Addison’s Discourses on Fame, in the fourth volume, which are incomparably elegant and sublime. Surely the writings of such great, learned and good men are more than a counterpoise to the libertine writings of professed Deists, whose immoral lives made them dread an encounter hereafter.” He continues in this strain of reflection regarding the infidelity so prevalent at that time, concluding with these words, which are of special interest, giving expression to a principle which controlled his private and public conduct throughout his life: “At a time when licentiousness is at an amazing and dangerous height, we shall be careful to guard against popular prejudice, though we must not blindly oppose the public voice because it may appear too tumultuous. Let us do things impartially and not oppose, or condemn any conduct on the whole on account of a few improper circumstances attending it.”

He was a diligent student of the “Tenures.” On July 31, 1771, he writes his father, “I am too often troubling you, but I will hope for your excuse of this last request, as it will be of particular, perhaps necessary, service for me. It is that you will be so obliging as to procure Dr. Blackstone’s Commentaries on the Laws of England and send them by the first opportunity. I have, indeed, read them by the favor of Mr. Johnston, who lent them to me, but it is proper that I should read them frequently and with great attention. They are books admirably

suitied for a young student, and indeed may interest the most learned. The law, there, is not merely considered as a profession, but a science. The principles are deduced from their source and we are not only taught, in the clearest manner, the general rules of law, but the reasons upon which they are founded. . . . Pleasure and instruction go hand in hand, and we apply to a science, difficult, indeed, at best, with less reluctance, when by a well-directed application we may hope to understand it with method and satisfaction. I would take leave to add one more desire that you would be pleased to send me *The Tatlers* and *Guardians*—the *Spectators* I have, and these, with the others, will afford me agreeable desultory reading.”

Mr. Iredell received, December 14, 1770, from Governor Tryon a license to practice law in all the inferior courts of the Province. On the 26th of November, 1771, he was licensed by Governor Martin to practice in the Superior Courts and duly qualified at the April Term, 1772. During the intervening year, “with healthy but vehement ambition,” he prosecuted his studies and regularly attended the courts. “Books he had not, save a volume or two stuffed into his saddle bag with a scanty supply of apparel. . . . Iredell early fixed his eyes upon the glittering heights of his profession and so self-assured was he of his capacity and industry that he never faltered in his purpose—he was resolute to win; and with such men to resolve is to compel success. If unemployed in the Court House he peopled his chambers with judge, jury and spectators, he argued cases before his imaginary court and reported his own arguments.”

The journal, during this year, leaves the reader in doubt whether he was more assiduous in his devotions to Miss Hannah Johnston or to the great Commentator. That he wooed both successfully is evidenced by the fact that on January 18, 1773, he was united in marriage to this estimable lady who “supplemented what he needed. . . . She was his constant monitor, adviser, banker and trusted friend. . . . Their lives, united in one stream, flowed onward softly and gently.” Their correspondence when, because he was engaged in the practice

of his profession, and, later, in the discharge of his high official duties, they were separated, is both interesting and instructive. Iredell's grandfather was a clergyman of the Church of England. His early religious training and his associations impressed their influence upon his mind and character. He was given to religious contemplation, often writing "reflections" upon religious subjects quite remarkable for a young man of eighteen. Within a year after coming to Edenton he writes down his Sunday "thoughts," concluding, "I am not ashamed to think seriously of religion, and hope no example will induce me to treat it with indifference."

The disputes between the Royal Governors and the people in North Carolina began at an early day. They continued to grow in number and intensity. Though a King's officer, Iredell soon became imbued with the views of the American leaders; felt that his future was identified with their future, and determined to participate in their defeat or success, to share in their disgrace or glory. He soon formed intimacies with the leading men of the Province, men whose thoughts were to irradiate subsequent darkness, and whose voices were destined to cheer and sustain the people in the hour of disaster. Ere long he began with them an active correspondence, and his part was so well supported that a learned gentleman and most competent judge writes: "He was the letter writer of the war. He had no equal amongst his cotemporaries."

As early as September, 1773, he published his first political essay, saying, among other things, "I have always been taught and, till I am better informed, must continue to believe, that the Constitution of this country is founded on the Provincial Charter, which may well be considered the original contract between the King and the inhabitants." "In the quiet retreat of his study, with nought to stimulate but the promptings of his own honest heart, and, perchance, the smile of his noble wife, with patient toil, Iredell forged and polished the weapons of debate; if others fixed his mark he recked not who claimed the honor of the cast."

Mr. Iredell, at this time, began a correspondence with Wil-

liam Hooper, discussing the questions then engaging the attention of thoughtful men. On April 26, 1774, Hooper writes him, "Every man who thinks with candor is indebted to you for the share you have taken in this interesting controversy. . . . You have discussed dry truths with the most pleasing language, and have not parted with the most refined delicacy of manners in the warmth of the contest. . . . I am happy, dear sir, that my conduct in public life has met your approbation. It is a suffrage from a man who has wisdom to distinguish, and too much virtue to flatter. . . . Whilst I was active in contest, you forged the weapons which were to give success to the cause which I supported. . . ."

The first Provincial Congress "called by the people themselves," in defiance of the threats of the Royal Governor, met in New Bern, August 25, 1774. Iredell's friends, Johnston, Hewes, Thomas Jones and Hooper were conspicuous members. John Harvey was "Moderator." The first of Iredell's political efforts which have been preserved was addressed to "The Inhabitants of Great Britain." "The Address" is set out in full in "McRee's Life and Correspondence," and contains an able and elaborate statement and defence of the cause of the Americans—tracing the history of their first coming and settling—the provisions of their charters and the violations of them by the King and his Parliament. Iredell, soon thereafter, settled his accounts and closed his career as Collector, to which position he had been promoted. After the 4th of July, 1776, he was deeply interested in regard to the form of Government to be adopted by the State. During these years Iredell had attended the courts, when open, and had given diligent attention to the practice of his profession. After the adoption of the Constitution (November, 1776) and the inauguration of a State Government, a judicial system was established—"Iredell drawing the first court law." At the session of the Assembly, November, 1777, the State was laid off into three districts, and Samuel Ashe, Samuel Spencer and James Iredell were appointed judges. The appointment of Iredell was brought about by William Hooper, who writes, 23rd of December, 1777, "Before this reaches you, you will have

received the information of being promoted to the first honors the State can bestow. . . . You will be at a loss to conjecture how I could have been accessory to this step, after you had been so explicit to me on the subject. Be assured that I was not inattentive to your objections, nor did I fail to mention them and urge them with sincerity to every person who mentioned you for the office to which you are now designated. . . . I expostulated with them upon the impropriety of electing one who, in all probability might decline, and leave one of the seats of justice vacant. . . . Their reasoning prevailed and you have now the satisfaction of an unrestricted choice. The appointment has been imposed upon you, and therefore you are at perfect liberty to act or not." Archibald Maclaine wrote: "I can only say that if it would answer your purposes as fully as it would please your friends and the public, it would give me real satisfaction." When it is remembered that, at this time, Iredell was twenty-seven years old, that only ten years prior thereto he had come to the State unknown, without any ties of family or other influences, his election, unsought and against his inclination, to the highest judicial position in the State, makes manifest that, by his personal conduct and character, as well as his learning and ability, he had strongly impressed himself upon the people and their representative men. William Hooper was a lawyer of learning and experience, as were other members of the Assembly. Maclaine, a member of the Assembly, expressed the opinion of his associates: "However arduous the task you have undertaken, we have the most hopes from your judgment and integrity, and these hopes are strengthened by your diffidence. . . . The members of the Assembly, in appointing you, thought, with great reason, that they effectually served themselves and their constituents. As to myself, I confess I was actuated by duty to the public, having been taught that your promotion would more effectually serve them than you."

Iredell accepted the judgeship at much sacrifice, financially, and to his personal comfort. He rode one Circuit—during which his letters to his wife give an interesting account of the country through which he traveled, going as far west as

Salisbury, and the experience of a judge "on Circuit" at that early period. On June 16, 1778, he sent his resignation to the Governor, who accepted it "with much reluctance, as you can well conceive, well knowing your place can not be supplied by a gentleman of equal ability and inclination to serve the State." He continued the practice of the law until, on July 8, 1779, he was tendered and accepted the position of Attorney General. Hooper writes, expressing pleasure that he had consented to accept, saying: "I have the happiness to assure you that the leading characters in this part of the country (Capé Fear) speak of you as a capital acquisition to our courts, and exult that there is a prospect of offenders being brought to due punishment without the passions of party or the prejudice of individuals swaying the prosecution." Iredell traveled the Circuit, attending the courts in the discharge of his duties, receiving a large share of civil business. His letters to Mrs. Iredell give an interesting and often amusing account of his experiences. Iredell resigned his office in 1781. Writing to his brother, Rev. Arthur Iredell, July, 1783, he says: "Since then I have been only a private lawyer, but with a show of business very near equal to any lawyers in the country."

After the ratification of the Treaty of Peace and the withdrawal of troops from the State, the people began the work of restoring their fortunes and enacting laws suited to their new political condition. Differences, more or less fundamental, which had manifested themselves during the war, became more radical—dividing the leaders into parties. Iredell concurred with the conservatives, Johnston, Hooper, Maclaine, Davie, Spaight and others, in opposition to Willie^{1a} Jones, Thomas Person, Samuel Spencer and their associates. The former insisted that the State should carry out in good faith the terms of the Treaty, and adopt such measures as were necessary for that purpose—enforce contracts and maintain a strong Government. While Iredell neither held nor sought any public position, he was in touch, through correspondence and otherwise, with those with whom he was in agreement in opinion. He prosecuted the practice of his pro-

^{1a} Pronounced as if spelled Wylie.

fession with industry and success, ranking easily with the leaders of the bar. The more radical sentiment in the State was disposed to magnify the power of the Legislature and oppose any restriction upon it by the enforcement of constitutional limitations, especially by the courts. In an address to the public, Iredell set forth his views regarding the enforcement of constitutional limitations upon the Legislature. Referring to the convention (November, 1776), which formed the Constitution, he says: "It was of course to be considered how to impose restrictions on the Legislature, that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, which was not to be trusted without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under the effects. We felt, in all its rigor, the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust, as well as the grossest folly, if in the same moment, when we spurned at the insolent despotism of Great Britain, we had established a despotic power among ourselves. . . . I have no doubt but that the power of the Assembly is limited and defined by the Constitution. It is a creature of the Constitution. . . . These are consequences that seem so natural, and indeed so irresistible, that I do not observe that they have been much contested. The great argument is, that, although the Assembly have not a right to violate the Constitution, yet if they in fact do so the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But in the meantime their act, whatever it is, is to be obeyed as a law; for the judicial power is not to presume to question the power of an Act of Assembly." He proceeds, with remarkable clearness and force, to give expression to the line of thought which has since been pursued by the courts, both State and Federal, upon this much-discussed and ever present question. It must be remembered that this argument

was written before any court had held that it was within the power and therefore the duty of the judiciary to refuse to enforce statutes passed in violation of constitutional limitations. The question had been mooted and, in a few cases passed upon, prior to the date of Iredell's argument (1786), but had not been published beyond the jurisdiction in which they were decided.^{1b} Richard Dobbs Spaight, while a member of the convention at Philadelphia (August 12, 1787), in a letter to Iredell, refers with disapproval to the action of the judges in holding an act depriving litigants of trial by jury² unconstitutional. On August 26, 1787, Iredell answered Spaight's letter at length, saying: "In regard to the late decision at New Bern, I confess it has ever been my opinion that an act inconsistent with the Constitution was void; and that the judges, consistently with their duties, could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the Legislature, and with which every existence of those powers must be compared." After answering other objections advanced by Spaight, he meets his apprehension that the power will be abused, saying: "If you had seen, as I did, with what infinite reluctance the judges came to this decision, what pains they took by proposing expedients to obviate its necessity, you would have seen in a strong light how little probable it is a judge would ever give such a judgment when he thought he could possibly avoid it. But whatever may be the consequences, formed as our Constitution is, I can not help thinking they are not at liberty to choose, but must in all questionable instances decide upon it. It is a subject indeed of great magnitude, and I heartily lament the occasion for its discussion. In all doubtful cases, to be sure the act ought to be supported: it should be unconstitutional beyond dispute before it is pronounced such."

The convention at Philadelphia, having submitted the new Constitution to the Legislatures of the States, Iredell at once entered upon the task of securing its adoption by the people of

^{1b} Haines: "Conflict over Judicial Power," p. 30; Columbia University Studies in Political Science, Vol. XXXV, No. 1.

² Bayard v. Singleton, 1 Martin, 42.

North Carolina. In no State was the opposition more pronounced or determined. The popular leaders of the dominant party were active in their opposition, one of the most prominent declaring that "Washington was a d—n rascal and traitor to his country for putting his hand to such an infamous paper as the new Constitution." Another, said to have been the most popular leader in the State, seriously insisted in the convention upon rejecting it without any discussion, saying that he had made up his mind and was sure that others had done so. "Of all those who were most active in pressing upon the people the adoption of the Constitution, Mr. Iredell was undoubtedly the most able and energetic."³

At the session of the Legislature, November, 1787, Mr. Johnston was elected Governor and Mr. Iredell a member of the Council—he was also appointed a commissioner to revise and collect the Acts of the General Assembly then in force. A convention of the people was called to meet at Hillsborough, composed of delegates from the several counties and the borough towns. Iredell was elected from Edenton. On January 8, 1788, he published a pamphlet, entitled "Answer to Mr. Mason's Objections to the New Constitution Recommended by the Late Convention at Philadelphia," by "Marcus." He stated each of Mr. Mason's "objections" in their order and in the same order sets out his "answer." It is not within the scope of this sketch to undertake a review of Mr. Iredell's "answer" to the celebrated paper of Mr. George Mason. The pamphlet made a favorable impression, and strongly affected Iredell's future career. The correspondence between Iredell and William Hooper, William R. Davie and Maclaine furnishes an interesting view of the condition of public sentiment in the State in regard to the new Constitution. Davie and Spaight, delegates to the Philadelphia Convention, and Maclaine, Samuel Johnston, and John Steele, Judge Spencer, Willie Jones, Dr. Caldwell, McDowell, were among the ablest delegates, who, together with Iredell, represented the conflicting opinions in the convention which met June 21, 1788. The debates were conducted with ability and

³ McRee, Vol. I, 184.

dignity and, at times, with much asperity. While Davie, Spaight, McLaine and Johnston bore their share, Iredell was the acknowledged leader for ratification. The proceedings of the convention are published in Elliott's Debates. The opposition could not be overcome and, on the final vote, the Constitution was rejected by a vote of 184 to 84. While Iredell was defeated, he made many friends and advanced his reputation in the State. The requisite number of States having ratified the Constitution, the new Government was organized April 30, 1789, North Carolina taking no part, but remaining a free sovereign, independent State.

It appears from the letters of the Honorable Pierce Butler, Senator from South Carolina, who writes from New York August 11, 1789, that Iredell's reputation had extended beyond the borders of the State. "The Southern interest calls aloud for some such men as Mr. Iredell to represent it—to do it justice." Dr. Hugh Williamson writes at the same time, "The North Carolina debates are considerably read in this State [New York] especially by Congress members; some of whom, who formally had little knowledge of the citizens of North Carolina, have lately been very minute in their enquiries concerning Mr. Iredell. By the way, I have lately been asked by a Senator whether I thought you would accept a judge's place under the new Government if it required your moving out of the State, as we are not in the Union." A second convention met at Fayetteville November 2, 1789. Iredell was not a candidate for election as a delegate. With but little debate the Constitution was ratified and amendments proposed. A bill was passed establishing a University, the names of Samuel Johnston and James Iredell being placed at the head of the list of Trustees.⁴

Maclaine writes Iredell December 9, 1789: "What would you think of being the district judge?" On February 10, 1790, without solicitation on his part, Mr. Iredell was nominated by President Washington, and unanimously confirmed by the Senate, one of the associate justices of the Supreme Court of the United States. He was just thirty-nine years old. "It is said that Wash-

⁴Battle's History of the University, 82r.

ington derived his conviction of Iredell's merits from a perusal of the debates in the North Carolina Convention and the famous reply to George Mason's objections."⁵ Butler wrote Iredell, February 10th: "I should have been happy to have had you in Congress. The Union will no longer be deprived of your aid and the benefit of your abilities. . . . I congratulate the States on the appointment and you on this mark of their well-merited opinion of you." Iredell, acknowledging the letter from the President with his commission, writes: "In accepting this dignified trust, I do it with all the diffidence becoming the humble abilities I possess; but, at the same time, with the most earnest resolution to endeavor by unremitting application a faithful discharge of all of its duties in the best manner in my power." Judge Iredell was assigned to the Southern Circuit and entered upon his work immediately.

A suit was instituted, at this time, in the State Court against Iredell and his co-executor upon a bond given by their testator to a British subject. His co-executor pleaded the "Confiscation Act," in which Iredell refused to join. By direction of Justices Wilson, Blair and Rutledge a writ of *certiorari* was issued to the State Court, which the judges refused to obey. As an indication of the hostility to the new Government in the State, the General Assembly adopted a resolution declaring that "The General Assembly do commend and approve of the conduct of the judges of the Courts of Law and Courts of Equity in this particular."⁶ At the same session the House of Commons, by a vote of 25 to 55, refused to adopt a resolution requiring the Governor and other State officials to take an oath "to support the Constitution of the United States."

At the April Term, 1792, of the Circuit Court at Savannah, Judge Iredell delivered a charge to the grand jury which so impressed the members, that they unanimously requested its publication. A number of his "charges" in other circuits were published at the request of the jury. At the June Term, 1792, at the Circuit Court at Raleigh, N. C., Judge Iredell, with Dis-

⁵ Carson's History of the Supreme Court, 155.

⁶ State Record, 441; 865; 1080; 1082.

trict Judge Sitgreaves, was confronted with a delicate question. Congress had enacted a statute directing that the invalid pension claims of widows and orphans should be exhibited to the Circuit Courts; that those to whom the court granted certificates should be placed on the pension list, subject to the review of the Secretary of War. Conceiving that the duties thus imposed were not judicial in their character, and therefore not authorized by the Constitution, which carefully separated the powers and duties of each department of the Government, Judge Iredell prepared a remonstrance, addressed to the President, in which he said: "We beg leave to premise, that it is as much our inclination as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles of humanity and justice, which the actual question undoubtedly is. But however lamentable a difference really may be . . . we are under the indispensable necessity of acting according to the best dictates of our own judgment." He therefore set forth at length the reasons by which he had been brought to the conclusion that he could not, with proper regard to his duty, execute this statute, concluding, "The high respect we entertain for the Legislature, our feelings as men for persons whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on this, as well as on many other occasions, have induced us to reflect, whether we could be justified in acting under this act personally in the character of Commissioners during the session of a court; and could we be satisfied that we had authority to do so we would cheerfully devote such part of our time as might be necessary for the performance of the service." The other justices addressed similar letters to the President. Congress soon thereafter "made other provisions for the relief of pensioners." Judge Iredell, until the act was repealed, heard a large number of petitions as Commissioner. He writes Mrs. Iredell from Hartford, Connecticut,

September 30, 1792: "We have a great deal of business to do here, particularly as I have reconciled myself to the propriety of doing the invalid business out of court." In *United States v. Ferreria*,⁷ Chief Justice Taney says of the action of the court: "The repeal of the act clearly shows that the President and Congress acquiesced in the correctness of the decision that it was not a judicial power."⁸

Following the refusal to permit Georgia to intervene in the Brailsford Case in the Circuit Court, the State filed a bill in equity in the Supreme Court, alleging that the title to the bond, upon which the action in the Circuit Court was brought was by virtue of an act passed during the war, confiscating and sequestering the property and debts of British subjects, in the State. The court was asked to enjoin the plaintiffs from proceeding, etc. Each of the judges wrote opinions. Iredell observed that he had sat in the Circuit Court and refused the motion of the State to intervene. He said that the court could not with propriety, sustain the application of Georgia, because whenever a State is a party, the Supreme Court has exclusive jurisdiction of the suit. The State, therefore, did not have a complete and adequate remedy at law. "Every principle of law, justice and honor, however, seem to require, that the claim of the State of Georgia should not be indirectly decided or defeated by a judgment pronounced between parties over whom she had no control, and upon a trial in which she was not allowed to be heard." He was of the opinion that an injunction should be awarded to stay the money in the hands of the marshal until the court made further orders, etc. The court was divided in opinion, the majority holding that an injunction should issue until the hearing. At the February Term, 1793, a motion was made by Randolph to dissolve the injunction; Iredell was of the opinion that the motion should be denied. He held, that for several reasons, the State could not sue on the bond at law, asking: "How is she to obtain possession of the instrument without the aid of a court of equity?"—pointing out the prac-

⁷ 13 Howard, 51.

⁸ See note to *Ferraria's Case*, 13 How. 52.

tical difficulties which she would encounter in securing the bond. To the suggestions that the State could bring an action of assumpsit for money had and received against Brailsford, which he termed "the legal panacea of modern times"—he conclusively answers that while the action "may be beneficially applied to a great variety of cases, it cannot be pretended that this form of action will lie before the defendant has actually received the money"—and this Brailsford had not done. He suggests that the injunction be continued, and an issue be tried at the bar to ascertain whether the State of Georgia or Brailsford was the true owner. Although a majority of the judges were of the opinion that the State had an adequate remedy at law, the course suggested by Iredell was substantially pursued. At the February Term, 1794, an amicable issue was submitted to a special jury.

In *Chisholm v. Georgia*,⁹ standing alone, Iredell enunciated and, with a wealth of learning and "arsenal of argument," maintained the position that a State could not be "haled into court" by a citizen of another State. The question arose upon an action of assumpsit instituted in the Supreme Court against the State of Georgia, process being served upon the Governor and the Attorney-General. The State refused to enter an appearance, but filed a remonstrance and protest against the jurisdiction. The Attorney-General, Randolph, representing the plaintiff, lodged a motion that, unless the State entered an appearance and showed cause to the contrary by a day named, judgment by default and enquiry be entered, etc. This motion was argued by Randolph, the State not being represented. Each of the justices filed opinions. Iredell first analyzed the provisions of the Constitution conferring jurisdiction upon the court in controversies wherein a State was a party. He quotes the language of the Judiciary Act distributing the jurisdiction in such cases. He dwells, somewhat, on the meaning which should be given to the word "controversies" in the Constitution, with the suggestion that the use of this word indicated a purpose to so restrict the causes in which jurisdiction was conferred as to exclude actions at law for the recovery of money. He proceeds to consider the

⁹ 2 Dallas, 419.

question whether it is necessary for Congress to prescribe a method of procedure in controversies wherein the State is a party. He argues that, while the judicial department of the government is established by the Constitution, the Congress must legislate in respect to the number of the judges, the organization of the Supreme and such inferior courts as may be established, etc. He quotes the 14th Section of the Judiciary Act, in which power is conferred upon the courts to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and "agreeable to the principles and usages of law"—noting the fact that "neither in the State, now in question, nor in any other in the Union any particular legislation authorizing a compulsory suit for the recovery of money against a State was in being, either when the Constitution was adopted or at the time when the Judicial Act was passed," and concludes that any principles of the common law, a law which is the ground work of the laws in every State in the Union, and which, so far as it is applicable to the peculiar circumstances of the country, and when no special act of legislation controls it, is in force in such State, as it existed in England at the time of the first settlement of this country; that no other part of the common law of England can have any reference to the subject, but that which prescribes remedies against the Crown. Thus he is brought to the decision of the real question in the case. It is manifest that, if, until Congress has prescribed some mode of procedure by which, in controversies wherein the State is a party, the court must proceed by a mode "agreeable to the principles and usages of law," and to find such principles and usages, resort must be had to the common law, the question necessarily arises whether the States of the Union, when sued, are to be proceeded against in the same manner as, by the common law, is prescribed for proceeding against the Sovereign. It is just at this point that the line of thought between Iredell and Wilson divides. The former says: "Every State in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as

the United States in respect to the powers surrendered; each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: of course, the powers not surrendered must remain as they did before. . . . So far as the States, under the Constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires." It will be observed that Iredell is not, at this point in the argument, discussing the question, whether it is within the power of Congress to prescribe a mode of procedure for bringing a State into the Federal Court to answer for a money demand by a citizen of another State. The argument is that, until it has done so, the only method of proceeding against a State is that prescribed by the common law for proceeding against the sovereign. It therefore becomes necessary to follow the argument and establish the proposition that, prior to the formation and ratification of the Constitution, each State was a sovereign, and that in ratifying the Constitution it did not part, in respect to the mode of proceeding against it in a controversy in the Federal Courts, with its sovereignty. He proceeds to give an interesting history of the method of procedure at the common law against the King. The history of this branch of the law in England, although very interesting, has no permanent interest to the student of American Constitutional law. He thus concludes this branch of the discussion: "I have now, I think, established the following propositions: 1st. That the court's action, so far as it affects the judicial authority, can only be carried into effect by acts of the Legislature, appointing courts and prescribing their method of procedure. 2nd. That Congress has provided no new law, but expressly referred us to the old. 3rd. That there are no principles of the old law to which we must have recourse that, in any measure, authorizes the present suit, either by precedent or analogy."

This conclusion was sufficient, from Iredell's point of view,

to dispose of the case before the court, but Judge Wilson, who wrote the principal opinion for the majority, threw down the gauntlet and challenged the basic proposition upon which Iredell's argument was founded. Here we find laid down the line of cleavage between the two schools of thought upon the fundamental conception of the relations which the States bore to the Federal Government. Iredell was a Federalist, Wilson a Nationalist. Wilson opened his opinion with these words. "This is a case of uncommon magnitude. One of the parties to it is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still: nay, and, perhaps, be ultimately resolved into one no less radical than this—do the people of the United States form a nation?" Iredell was not a man to conceal or fail to express his opinions when either propriety or duty demanded their expression. Meeting his associate upon the "main question," he says: "So far as this great question affects the Constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I should not shrink from its discussion. But it is of extreme moment that no judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies; this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution that it may not be improper to intimate that my present opinion is strongly against any construction of it which will admit, under any circumstances, a compulsive suit against the State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words or an insurmountable implication (neither of which I consider can be found in this case) would authorize the deduction of so high a power."

It is not within the purpose or scope of this sketch to enter into any discussion of the merits of the great question involved in this battle of the giants or of the manner in which they sustained their conclusions. It is, however, a part of the history of the controversy, and of the times, that two days after the opinion was filed, sustaining the jurisdiction, by a majority of the court, the Eleventh Amendment was introduced into Congress. It is significant that the language of the Amendment is declaratory of what, in the opinion of Congress, was the correct construction of the Constitution. It was essentially a reversal of the decision of the court and writing into the Constitution the dissenting opinion of Justice Iredell. "It was proposed by Mr. Sedgwick, a representative from Massachusetts, but was passed as amended in the Senate by Mr. Gallatin."¹⁰ The words are: "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or proceeded against one of the United States by citizens of another State or by citizens or subjects of foreign states." It is a singular fact that, although Hamilton, in the *Federalist*, and Marshall and Madison in the Virginia Convention had expressed the opinion maintained by Iredell, neither he nor either of the other justices referred to such opinions. Mr. Carson, writing of the opinion of the court in *Chisholm's case*, says: "From these views Iredell, alone, dissented in an able opinion of which it has been said that it enunciated, either directly or by implication, all the leading principles which have since become known as State Rights Doctrine and which as a mere legal argument was far superior in clearness of reasoning to Wilson or Jay. He confined himself strictly to the question before the court, whether an action of assumpsit would lie against a State."

"The rough substance of my argument in the suit against the State of Georgia," bearing date "February 18, 1793," as penned by the author is before me. The writing is neat, the headings carefully arranged, and a few erasures—interlineations—show care and caution in the form of expression. The argu-

¹⁰ Watson's Const. 1535.

¹¹ History of the Supreme Court, 174.

ment covers twenty-three pages—the paper is well preserved and the ink fresh. The concluding words are: “This opinion, I hold, however, with all the reserve proper for one which, according to my sentiments in the case, may be deemed in some measure extra-judicial. With regard to the policy of maintaining such suits, that is not for this court to consider, unless the point in all other respects was very doubtful. Policy then might be argued from with a view to preponderate the judgment. Upon the question before us I have no doubt. I have therefore nothing to do with the policy. But I confess, if I was at liberty to speak on that subject, my opinion on the policy of the case would also differ from that of the Attorney-General. It is, however, a delicate topic. I pray to God that if the Attorney-General’s doctrine as to the law be established by the judgment of this court, all the good he predicts of it may take place and none of the evils with which, I have the concern to say, it appears to me to be pregnant.” Of this opinion, Mr. Justice Bradley, in *Hans v. Louisiana*,¹² said: “The highest authority of this country was in accord rather with the minority than with the majority of the court . . . and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usages—and because the letter said that the judicial power shall extend to controversies between a State and citizens of another State, etc., they felt constrained to see in this language a power to enable the individual citizen of one State, or of a foreign State, to sue another State of the Union in the Federal Courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies by subjecting sovereign States to actions at the suit of individuals (which he showed conclusively was never done before), but only, by proper legislation, to invest the Federal Courts with jurisdiction to hear and determine controversies and cases between the parties designated that were properly susceptible to litigation in courts. Adhering to the mere letter it might be so; and so in fact the Supreme

¹² 134 U. S. 14 (1889).

Court held in *Chisholm v. Georgia*, but looking at the subject as Hamilton and Mr. Justice Iredell did, in the light of history and experience, and the established order of things, the views of the latter were clearly right—as the people of the United States subsequently decided.”

Even with the Eleventh Amendment incorporated into the Constitution, the question of the suability of the States has not been put at rest, as shown by numerous decisions of the Supreme Court. The entire ground has been “gone over” in the opinion of Mr. Justice Brewer and the dissenting opinion of the present Chief Justice in *South Dakota v. North Carolina*.¹³ Even where both parties are sovereign States, in the attempt to enforce a money demand practical difficulties present themselves, as is manifest from the latest declaration of the court in *Virginia v. West Virginia*.¹⁴

In *Penhallow v. Doane*,¹⁵ Iredell wrote an interesting opinion in which he discussed the relation which each of the original colonies bore to each other prior to the formation of the Confederation and the power conferred on the Confederation to establish Courts of Admiralty, and the effect of the judgments of such courts in prize cases. It is not practicable to make extracts from this opinion, but the following is of especial and permanent interest: “By a State forming a republic I do not mean the Legislature of the State, the executive of the State or the judiciary, but all the citizens which compose that State, and are, if I may so express myself, integral parts of it. . . . In a republic all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community which forms such body politic.”

In *Talbot v. Jansen*,¹⁶ an interesting question was presented in regard to the right of expatriation and how it was accomplished. Iredell wrote an opinion in which he discussed the law

¹³ 192 U. S. 286.

¹⁴ 221 U. S.

¹⁵ 3 Dallas 54.

¹⁶ 3 Dallas 133.

of nations, etc. Upon the right of expatriation and the limitations upon its exercise, the opinion is interesting and enlightening.

In the case of *Hylton v. The United States*,¹⁷ involving the question whether a tax on carriages was a direct tax, Iredell wrote a carefully guarded opinion concurring with the other justices that the tax in question was not a direct tax within the meaning of the Constitution. He says: "There is no necessity or propriety in determining what is, or is not, a direct or indirect tax, in all cases. Some difficulties may arise which we do not at present foresee." His caution has been justified by the history of the attempt to settle this much vexed question.

At the Spring Term, 1793, of the Circuit Court at Richmond, before Jay, Iredell and District Judge Griffin, the celebrated case of *Ware v. Hylton* was heard. During the war the Legislature of Virginia passed an act confiscating the debts of British subjects and directing the payment of such debts to the loan office of the State. The defendant, who owed a bond to the plaintiff, a British subject, had made a partial payment in accordance with the statute. Suit was brought on the bond. The defendants were represented by Henry, Marshall, Innis and Campbell. Iredell writes to Mrs. Iredell, from Richmond, May 27: "We began on the great British cases the second day of the Court, and are now in the midst of them. The great Patrick Henry is to speak today. I never was more agreeably disappointed than in my acquaintance with him. I have been much in his company and his manners are very pleasing and his mind, I am persuaded, highly liberal. It is a strong additional reason I have, added to many others, to hold in high detestation violent party prejudice."

The discussion was one of the most brilliant exhibitions ever witnessed at the bar of Virginia. Mr. Henry spoke for three consecutive days. The case was argued upon appeal at the February Term, 1796, of the Supreme Court. Iredell wrote an opinion concurring with the majority of the court that the Treaty

¹⁷ 3 Dallas 171.

¹⁸ 3 Dallas 199.

of Peace enabled the creditor to sue for the debt, but was of the opinion (dissenting) that the recovery should be confined to the amount that had not been paid into the loan office.

Chief Justice Jay having resigned, and the Senate having refused to confirm the nomination of Judge Rutledge, there was much speculation as to who would be appointed. Governor Johnston wrote Iredell: "I am sorry that Mr. Cushing refused the office of Chief Justice, as I don't know whether a less exceptionable character can be obtained without passing over Mr. Wilson, which would perhaps be a measure that could not be easily reconciled to strict neutrality." Iredell writes Mrs. Iredell a few days after: "Mr. Ellsworth is nominated our Chief Justice in consequence of which I think that Wilson will resign. . . . The kind expectations of my friends that I might be appointed Chief Justice were too flattering. Whatever other chance I might have had there could have been no propriety in passing by Judge Wilson to come at me."

Iredell rode the Middle Circuit during the spring of 1796. His charge at Philadelphia was published at the request of the grand jury. At the August Term, 1798, in the case of *Calder v. Bull*,¹⁹ Iredell set forth very clearly his view respecting the power of the judiciary to declare invalid acts of the Legislature and the limitations upon such power. He says: "In a government composed of legislative, executive and judicial departments, established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be that whatever the Legislature chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that under such a government any court of justice would possess the power to declare it so. . . . It has been the policy of all the American States, which have individually framed their State Constitutions, since the Revolution, and of the people of the United States when they framed the Federal Constitution to define with precision the objects of the legislative power and

¹⁹ 3 Dallas 386.

to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a State, violates those constitutional provisions, it is unquestionably void; though I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislatures of the Union shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is in their judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed on the subject; and all that the court could properly say in such an event would be that the Legislature had passed an act which, in the opinion of the judges, was inconsistent with the principles of natural justice." It is doubtful whether this principle, peculiar to American constitutional law, has been more accurately stated in any of the discussions which have been had upon this question.

Judge Iredell rode the Eastern Circuit with Judge Wilson. He was much pleased with the people of New England, receiving many courtesies from them. He writes from Boston that he soon found himself "engaged for every day in the week—sometimes different invitations on the same day—Judge Lowell has been particularly kind to me." His charge to the grand jury at Boston was published by request as "Uniting eloquence with exhaustive knowledge and liberality." From Boston he writes: "I have constantly received distinction and courtesy here, and like Boston more and more. . . . it is scarcely possible to meet with a gentleman who is not a man of education. Such are the advantages of schools of public authority, every township is obliged to maintain one or more to which poor children can have access without any pay." He writes from Exeter, New Hampshire: "I met in Boston with a gentleman who lives in Newbury Port, of the name of Parsons, who appears to me to be the first lawyer I have met with in America, and is a remarkably agreeable man." This was Theophilus Parsons, later Chief Justice of Massachusetts. He writes that he had dined with the Committee and

Corporation of Harvard College, "being seated next to the Lieutenant-Governor, the famous Samuel Adams, who, though an old man, has a great deal of fire yet. He is polite and agreeable."

On May 27, 1797, Judge Iredell delivered a charge to the grand jury in Richmond, Virginia, which was "animated, perhaps too warm." At that time the grand jury frequently made presentment of matters which they regarded as worthy of public attention, although not the subject of criminal prosecution. They presented "as a real evil the circular letters of several members of the last Congress, and particularly letters with the signature of Samuel J. Cabell endeavoring, at a time of real public danger, to disseminate unfounded calumnies against the happy Government of the United States, thereby to separate the people therefrom and to increase or produce a foreign influence ruinous to the peace, happiness and independence of these United States." Mr. Cabell made an angry retort, attacking the jury, judge and the Supreme Court. He proposed to bring the matter before Congress as a breach of privilege. Mr. Jefferson urged Mr. Monroe to call it to the attention of the Legislature. Just what they proposed to do with the jury or the judge does not very clearly appear. Judge Iredell published a card in which he said that the charge was prepared before he reached Richmond and had been delivered in Pennsylvania and Maryland; that he was not acquainted with Mr. Cabell and knew nothing of the letters referred to by the grand jury. He concludes, "With regard to the illiberal epithets Mr. Cabell has bestowed not only upon me, but on the other judges of the Supreme Court, I leave him in full possession of all the credit he can derive from the use of them. I defy him, or any other man, to show that in the exercise of my judicial character I have ever been influenced in the slightest degree by any man either in or out of office and I assure him that I shall be as little influenced by this new mode of attack by a member of Congress, as I can be by any other." The political feeling in the country and especially in Virginia was at that time very bitter. Governor Johnston, Judge Iredell's brother-in-law, and always his wise friend, writing him in regard to this incident, said: "The answer was very proper if proper to give it

any answer at all." He further said that, which every judge knows, from experience, to be true, "I am sensible of the difficulties with which a man of warm feelings, and conscious integrity submits to bear, without a reply, unmerited censure; yet I am not certain but that it is more suitable to the dignity of one placed in high and respectable departments of state, to consider himself bound to answer only when called upon constitutionally before a proper tribunal."

Iredell rode the Southern Circuit during the spring of 1798, suffering much fatigue and discomfort. At the February Term, 1799, of the Supreme Court, he sat for the last time. He filed "one of his best and most carefully written opinions" concurring with the conclusion reached by the other Judges in *Sims v. Irvine*.²⁰ He held the Circuit Court at Philadelphia at which term several of the insurgents were on trial for treason. In his last charge to the grand jury he dwelt at much length on the law of treason and the Alien and Sedition laws. It is manifest that Iredell, as were many others, was deeply impressed with the belief that French philosophy and infidelity, coupled with the revolutionary proceedings in that country, were finding defenders in America, seriously threatening the peace of the country and the dissolution of the Union. He was a Federalist and joined with the members of that party in their reverence for Washington, sustaining his administration. He disliked and distrusted the French leaders and their principles. His charge was filled with warning against the influence of principles and conduct, which, in his opinion, were involving the American people in the French revolution, and the disturbed relations of that country with England. His concluding words in his last charge to a grand jury are interesting and illustrative of the condition of his mind. He says: "If you suffer this government to be destroyed what chance have you for any other? A scene of the most dreadful confusion must ensue. Anarchy will ride triumphant, and all lovers of order, decency, truth and justice be trampled under 'foot. May that God whose peculiar province seems often to have interposed to save these United States

²⁰ 3 Dallas 425.

from destruction, preserve us from this worst of all evils, and may the inhabitants of this happy country deserve His care and protection by a conduct best calculated to obtain them." The grand jury, requesting the publication of the charge, say: "At a time like the present when false philosophy and wicked principles are spreading with rapidity under the imposing garb of liberty over the fairest country of the old world, we are convinced that the publication of a charge fraught with such clear and just observations on the nature and operation of the Constitution and laws of the United States will be highly beneficial to the citizens thereof." As an illustration of the condition of public sentiment, Governor Johnston writes Iredell who, having concluded the trials in Philadelphia had come to Richmond, "I am glad that you have got away from the land of *treason* to the land of *sedition*—the change is something for the better." Chief Justice Ellsworth, riding the Southern Circuit, writes Iredell from Raleigh, N. C., June 10, 1799: "My opinion, collected from some gentlemen who have been lately traveling in that State, (Virginia), and others who were at the Petersburg races, presents a melancholy picture of that country. These gentlemen returned with a firm conviction that the leaders there were determined upon the overthrow of the general government. . . . That the submission and assistance of North Carolina was counted on as a matter of course." The Chief Justice, however, adds: "As it was shortly after the election, these may have been the momentary effusions of disappointed ambition."

Thirty years of constant and wearing work, coupled with the climate in which he lived and the long journeys on the Southern Circuit, which he rode four times in five years, had impaired Judge Iredell's health. He was unable to attend the August Term, 1799, of the Court. His illness increased until on October 20th, 1799, at his home in Edenton, he passed away, in the forty-ninth year of his age. His friend, the Rt. Rev. Charles Pettigrew, testified of him: "In the run of above twenty years I have often heard high encomiums on the merits of this great and good man; but never in a single instance, have I heard his character traduced, or his integrity called in question."

His biographer—from whose excellent work I have largely drawn in the preparation of this sketch—says that with Judge Iredell's papers is an original "Treatise on Evidence," "an . . . Essay on the Law of Pleading," and one on the "Doctrine of the Laws of England concerning Real Property so far as it is in use or force in the State of North Carolina,"—the two last unfinished.

When it is remembered that he came to America at seventeen years of age—with neither wealth nor family influence—that his opportunities and sources of study were limited by the condition of the country, that for seven of the thirty years of his life here the country was engaged in war, we can in some degree appreciate the immense labor which he performed and the results which he accomplished. His life is a tribute to the teaching and example of his parents—the influence of those with whom he was brought into association in his adopted home—his industry, talents, patriotism, and lofty principles of honor and integrity.

Judge Iredell left one son, bearing his name, who became a lawyer of learning and distinction, Judge of the Superior Court, Governor, and United States Senator. He was for many years Reporter of the Supreme Court of the State and author of an excellent work on "The Law of Executors." He died during the year of 1853. His descendants are among the most honorable, useful, and patriotic citizens of the State.

It has been the purpose of this sketch to set forth, in the space which could be allotted, a short survey of the judicial work of Judge Iredell. His early death cut short a career on the Bench, full of promise of enlarging scope and usefulness. That he would have continued to develop his high judicial qualities and, if permitted, shared with the "Great Chief Justice" the work of laying deep and strong the foundations of American Constitutional Law cannot be doubted. His opinions upon Constitutional questions evince a very high order of judicial statesmanship.

H. G. Connor.

Wilson, N. C.