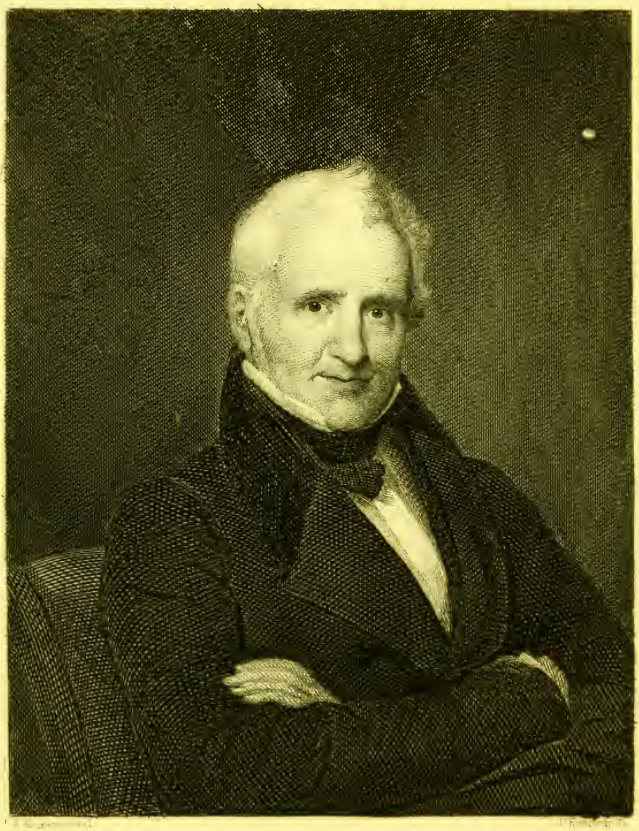
1845

John H. Morison, Life of the Hon. Jeremiah Smith, LL.D. 247



Jeremiah Smith

LIFE OF

JEREMIAH SMITH.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.
MDCCCXLV.

LIFE

OF THE

HON. JEREMIAH SMITH, LL.D.

MEMBER OF CONGRESS DURING WASHINGTON'S ADMINISTRATION,
JUDGE OF THE UNITED STATES CIRCUIT COURT,
CHIEF JUSTICE OF NEW HAMPSHIRE, ETC.

BY JOHN H. MORISON.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.

1845.

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more favorable turn, that the good sense of the people will ever lead them to cherish national feelings and national institutions. It is idle to expect it, it is unnatural. The very end and design of national institutions, is to counteract the local and selfish spirit of the people. Man is a gregarious animal, it is true; but nature leads to small herds. Experience evinces that there is nothing so contrary to common sense, so repugnant to the principles of justice, freedom and humanity, but will pass at certain junctures, when the infatuation of party rage has turned the giddy brains of the unthinking multitude. This party spirit, like the poor, we have always with us. It will be, as it always has been, in the power of bold ambitious demagogues to ride the people, by persuading them that they are in danger of being ridden. Nothing is more easy than to inflame the passions of the multitude; it is easy to acquire their confidence, and easy to lose it. While in favor, there is nothing which the popular leader may not say or do; and when not in favor, the wisest man in the state is the man who has the least influence."

This interest in political matters gradually diminished, as Judge Smith became more absorbed in his judicial duties, and in his letters for several years, I find hardly a passing reference to the political events of the day. Among other things, he amused himself by writing a few articles for the Anthology. He was first applied to in August, 1805, by the Rev. Joseph S. Buckminster, who in his letter, says, "Your manuscript volumes are well known by some of your friends here, to contain many titbits of literature,

which would be highly relished, if they could be permitted to garnish the pages of the Anthology." To this Judge Smith replied, 13th December, 1805. "I have pretty many trifles of the kind you allude to, but as the Anthology grows better, (it evidently does,) and my manuscript trifles grow worse, you will readily perceive there is little prospect of their ever meeting. But still I am desirous of adding something to the pages of the Anthology. This new zeal is produced by reading the Massachusetts Term Reports, by G. Williams. I have a fancy to try my hand at a review of this work. It is somewhat in my way. If no other person attempts it, and it meets your editor's plan, I will for next month, or the month after, send something which may be committed to the press or the flames, according to the verdict of the critics thereon. Let me hear from you. If I do not, this new zeal will soon flag. If you approve, I shall stand engaged to make the attempt.

"I have finished your Fawcett, and like him. He, however, reminds me of Horace Walpole's criticism upon Johnson. 'He illustrates till he fatigues, and continues to prove after he has convinced: he charges with several sets of phrases of the same calibre.' But still he is a man of genius, a philanthropist, and a poet, and I should be gratified by the perusal of the second volume. I shall return it the first opportunity with Walker, who is well enough, and no better — nothing striking. He does not interest, amuse, or much inform me. I do not rise from him much dissatisfied with myself, or much pleased with him; ergo, he is not a good preacher. You see we Exeter peo-

ple are always ready to favor preachers with our opinions. It is no small proof of our benevolence, for we have hitherto derived no advantage from it; and you may add, 'nor we.' "

Mr. Buckminster's answer is dated December 18. "My dear sir: I was highly gratified by learning that you had not forgotten me, nor the Anthology, nor literature, in the intervals of relaxation from the *Musæ severiores;* for it seems, as long as you had that vile judge's coif about your ears, it was impossible to make you hear even the sweet sounds of flattery. I am exceedingly happy that you propose to review Williams's Reports, and still more so, that you have already read them; let not your ardor cool, I pray you, and believe me, the editors are fully sensible of the honor of the proposal. I am requested also to urge you to send a review of Tucker's Blackstone. If you do not own the book, it shall be sent on to you. Remember you have said, that whatever your hands find to do, you do with all your might, which we shall interpret, 'with all despatch.'

"You are right in your conjecture respecting Fawcett; he is no mean poet. But it is remarkable that this man, who drew fuller audiences than any rational preacher, before or since; whom Mrs. Siddons regularly attended, to learn elegance of gesture and elocution, and who was decidedly at the head of pulpit talents among the dissenters of Great Britain, abdicated his power at its very height, and is now retired as a private gentleman, in the neighborhood of London, where, with a handsome fortune, I doubt not, he feeds upon more substantial food than popularity.

With your leave, I think that Walpole's remark, when applied to Johnson's style, is utterly false, because it is so very true of Fawcett's; and every one must see that these two styles are utterly dissimilar. Walpole was a kind of quidnunc in literature, and, as I suspect, incompetent to relish the heavy but admirable proportions of Johnson's style.

"I am sorry to close so soon, but I am called out. I can only say, do not suffer your zeal to subside. '*Ne exudas magnis.*' Mr. Ames [1] has not engaged to accept; it is a great deal to be able to say he has not yet refused. Yours, with respect. J. S. B."

The review was forwarded in February, 1806, with the accompanying note. "Dear sir: I have just finished my critique on Williams's Reports, and send it because I can bear it no longer in my sight. I am heartily sick of it, of Williams, judges, law, and everything but the Anthology and its friends. If I did not think it would do some good, I would not send it at all. I have aimed at utility, and therefore have not spared labor; I hate a flimsy, general criticism. I have tried to make it such as will be read; and yet, if you knew how many severe things I have omitted, how many hard things I have softened, and flattering things I have inserted against my own opinion, as your attorney-generals draw the indictments, your opinion of my good humor and politeness would probably be somewhat increased. It being a new thing, I have indulged myself in taking broad ground. I could easily have written a book; my mind has

[1] Fisher Ames had just been chosen president of Harvard College.

teemed with conceptions, such as they are. I am like a bottle filled with new fermentable liquor. I have been ready to burst. Probably you will think this 'have been' requires to be put into the present tense. I entrust it to your critical tribunal, as Puff did his tragedy to the players, with permission, which they used freely, of cutting out *ad libitum*. I have not noted my authorities for many of the sentiments and even the language in the margin, because I did not think it proper. The learned reader will easily know that many of the sentiments are not my own; they will stand the test."

The review[1] here spoken of, is written with great spirit, and attracted no small attention in its day. The criticisms, though severe, were of the kind to be useful, both to the judges and the reporter. The importance of law reports is thus regarded: "A correct history of what passes in courts of justice is of incalculable advantage. With a single exception, it is the best of all books. It perpetuates the labors and sound maxims of wise and learned judges. It serves to make the path of duty plain before the people, by making the law a known rule of conduct; and, for the same reason, it diminishes litigation. It has a tendency to limit the discretion of judges, and consequently increases liberty. Maxims of law are like landmarks.

"Limes agro positus litem ut discerneret arvis."

In respect to the style of reports, it is said, "Prolixity fatigues, while extreme brevity leads to ob-

[1] Review of first volume of Williams's Massachusetts Reports, contained in the Monthly Anthology for March, 1806.

security. But there is a conciseness which is no enemy to perspicuity, and a prolixity which confounds instead of enlightening. Perhaps it is not in the power of a reporter to say just enough for some readers, without saying too much for others. But we are decidedly of opinion that modern reports are, in general, too prolix. Expunge from them everything not material to the statement of facts, everything from the arguments which does not bear on the question, and everything given for the reasons of the decision which is wholly foreign or irrelevant, and many a huge folio would dwindle into a duodecimo. The eight or ten volumes of Vesey, Jr., would be reduced to two or three; Dallas would be reduced one half; Wallace to a few pages; Cranch would make No. 1 of Vol. I.; and Root would entirely disappear."

The writer, however, does not attribute all the blame to the reporter. "We are also of opinion," he adds, "that the arguments of some of the judges might have been condensed with advantage to the public, and without doing any injury to the arguments themselves. We are not agreeably impressed with 'wordy eloquence' from the bench, still less with attempts at eloquence without success. As the style of laws should be concise, plain and simple, so decisions of courts, which declare the law, should be neither tumid, diffuse, nor rhetorical. The language of judges should correspond with the dignity of the office, and with the majesty of the subject. Great ornament is as ill becoming in the style of a 'reverend judge,' as a black gown turned up with pink is unbecoming his person. The sages of the law

should not for a moment be suspected of sacrificing precision to the harmony of periods. Lord Mansfield was a scholar and an orator; but his eloquence at the bar, in the senate, and on the bench, were as unlike each other, as the eloquence of which we complain is unlike either. When our judges shall have taken as much pains in forming opinions in the cases before them, as Lord Mansfield always did, and shall have spent as many years in the acquisition of polite and elegant literature as he did, we will not object to their being as eloquent on the bench as his lordship. It will no doubt subject us to the suspicion of dulness; yet we shall not scruple to declare, that, in a judge, we prefer labor to genius, and painstaking to ingenuity."

He then illustrates his remarks by comments on particular cases, and adds: "Other decisions might be mentioned as exceptionable; but we forbear entering further into the subject. If the learned judges should be disposed to think that we have already gone too far, we trust that we shall have their forgiveness, when they consider that we have differed less in opinion with the court than they have differed from each other. We can assure them, that the observations we have made have not proceeded from a desire, on our part, to depreciate their learning or talents, for which we have the most cordial respect; nor with a view to lessen the value of Mr. W.'s labors; for we believe they will prove advantageous to the public, and honorable, we sincerely wish we could add profitable, to him; but principally that we may have an opportunity of expressing our sincere

conviction, that our system of jurisprudence is radically defective, and that we shall never have any thoroughly-examined and well-digested determinations — decisions which will stand the test of time, and serve as permanent and fixed rules, so long as the judges, the depositaries of our law, are wandering through the state, without any fixed or permanent place of abode.

"The old proverb, that a rolling stone gathers no moss, is not more true than that a court, constantly in motion, settles and establishes no principles of law. When the principal business of a court is to travel, and to retail the law in every county town, is it reasonable to expect deep research, nice discrimination, or copious discussion on legal questions? Let our readers figure to themselves our supreme judicial court in session at Lenox, for example. Questions of law and trials of fact are blended together on the docket. Amid the tumult and bustle necessarily incident to trials by jury, counsel occupied and teased with clients, witnesses, &c., it is easy to see how questions of law will be argued, even by eminent counsel. The judges, long absent from their families, can hardly be supposed to be perfectly at ease in their minds. Denied all access to books, and fatigued with the labors of the day, and liable, from their situation, to constant interruptions, they cannot so much as have an opportunity of communicating their sentiments, or of hearing one another's reasons. On Saturday morning they must pronounce judgment. Under such circumstances, is it not cruel to exact an opinion, and ridiculous to expect a mature and well-digested one? The first

thoughts which occur to a sensible, and, if you please, to a learned lawyer, on legal questions, may be reasonable, we grant; but they may not be so reasonable, so just, as after-thoughts. The conjectural positions of natural reason, if not fortified by precedents, if not confirmed by elementary writers, or if they are not the result of much previous study and patient investigation, are always to be distrusted. A judge should think reasonably, but he should think and reason as one long accustomed to the judicial decisions of his predecessors. He should be well versed in history, and especially in the history of the constitution, laws, manners, and customs of his own country. The study of New England antiquities, if we may be allowed the expression, is a necessary qualification of a New England judge.

"We believe it is in the power of the legislature to lay the foundation of a system of jurisprudence which in a few years may even equal that of Great Britain. To accomplish this, it is indispensable that the trial of facts and law should be separated. The former should be in each county, and the latter in one, or, at most, in two or three stated places. There is, in the nature of things, no more reason why questions of law should be determined in each county, than that the statutes should be framed and enacted in each county. County lines have nothing to do with either; and it is just as proper that the legislature should be ambulatory, as that a court, not of trials, but of law, should be so."

Most of the suggestions thrown out in this article, with respect to the judiciary of Massachusetts, and the mode of reporting cases, have been since adopted, to

the great and manifest improvement of both. What influence the article itself may have had, it is not possible to determine. The following letter from Mr. Buckminster, shows how it was received at the time.

April, 13, 1806. "Dear sir: It is not less in consequence of my own inclination, than in pursuance of the request of the Anthology Club, that I have now set down to return you thanks for the communication with which you favored us, and which has appeared, (I hope to your satisfaction,) in the last number of the Review. It excites great speculation here, especially among the bar, and there is not a dissentient voice on the subject of its great excellence and importance. The lawyers were, at first, sadly puzzled. Some attributed it to Mr. Parsons, others to Charles Jackson; but at length some of the wisest of them were satisfied, from internal evidence, that it was Judge Smith. S. thinks this cannot be true, for 'Smith and he are very good friends, and he would not have spoken of him in such terms.' The expression, 'wordy eloquence,' he takes to himself. You have put your hand to the plough, and must not look back. Pray favor us with something else — Wilson's works, if possible. You know not under how great obligations you have laid us."

Twenty years after this correspondence, Judge Smith, wrote the following sentence: "Mr. Buckminster, (all the world knows, I mean the younger,) in his words, looks, manners, but especially in the pulpit, had a spirit beatified before its time." How beautifully does this describe the impression made by Mr.

"knitting-work to put down the New England law, where we have allowed it to take the place of the English." In 1816 he said, "I am inspired with zeal to examine New England histories, memoirs, records, with a view to her jurisprudence." He began to prepare them in 1836, and left behind many sheets of notes and references; but only a few pages were written out in full.

"I propose," he said, "to make some remarks on the science of jurisprudence. I shall confine my observations to the laws of New England, as she was before the separation from Great Britain; and here Massachusetts will be chiefly regarded. She is justly entitled to this distinction, on account of the priority of her settlement, and still more on account of the superior character of her first and present inhabitants. I shall hope to be pardoned, if I indulge freely in observations and remarks not strictly, perhaps, connected with the New England jurisprudence. This science embraces the constitution, as well as the laws of the country or place, and, limited to New England, it comprehends the nature of her connexion with, and dependence on, the parent state. The common law she brought with her, as her birthright; and the statutes and ordinances she framed for herself. Restricted to the narrowest limits, the subject is an exceeding broad one, almost entirely new, and would call for more time, more study, and far more talents than I possess.

"It is impossible here not to be reminded of the loss, an irreparable one it must be felt by all who would prosecute these inquiries, in the death of Mr.

Parsons. He died in 1813. He had made considerable progress in his studies before the war with Great Britain. He was highly favored in a most able instructer, and at his death was certainly better skilled in the New England law, than any other man on either side the Atlantic. It is much to be regretted that he left behind him so little of the great stores of the law peculiar to New England, which his diligent and discriminating mind had been collecting and digesting for nearly half a century. It was my good fortune to become acquainted with this truly great man and learned lawyer at the time I commenced my law studies; I cannot suffer this occasion to pass, without expressing my heartfelt acknowledgments of his kindness. He was ever ready to assist such as manifested a desire for instruction. This part of his character, I believe, has not had that justice done to it which, in an eminent degree, it deserved. I will not say that Theophilus Parsons was the greatest lawyer that ever lived; but I risk nothing in saying that he knew more of the New England law, which existed while we were British colonies, than any other man that has lived, or perhaps that ever shall live. Some of his learning has been preserved in the reports; but much the greater part of his, and nearly all that of the lawyers and judges that went before him, is now irretrievably lost to the community.

"It is a great error to suppose the New England common law, properly so called, from the advances made in all branches of knowledge, is of no importance in New England at this day. For what is the

common law of which we speak ? It is made just as the English common law was made ; a collection of the general customs and usages of the community ; maxims, principles, rules of action, founded in reason, and found suitable to that first condition of society ; if not created by the wisest and most favored, sanctioned and approved by them. Here, every member of society is a legislator ; every maxim, which by long usage acquires the force of law, must have been stated, opposed, defended, adopted by rulers and judges, slowly and at first timidly, but so acceptable that all approve. If the custom be of a more doubtful class, again debated, criticised, denied, but finally confirmed and established. These principles, after all, may not be wise and salutary maxims ; but they have all the wisdom that the people of all classes (every man having precisely the weight and influence he deserves,) can give them. Farther advances in knowledge and experience may demonstrate their unfitness and inutility ; then they will be modified, and silently changed. The legislature can abrogate this law, as they can the rules of their own making. But it would be well for the people if they would first take the trouble to understand it. No man acquainted with the common law can look into our statute-book, and not see that the framers of the statutes, in many cases, were ignorant that the common law contained precisely the same provision ; and in many cases, a provision different and better adapted to the wants of society. The new law must be repealed at the next session, because not congenial with the manners, habits, sentiments, feelings and wants of society."