JUDGE ISAAC C. PARKER[1]

By HARRY P. DAILY

(No man of his time exerted a greater civilizing influence on the domain that is now Oklahoma than Isaac C. Parker, who was appointed United States Judge at Fort Smith at a time when anomalous conditions prevailed in the Indian Territory. While his administration touched the affairs of Arkansas his wide jurisdiction over the whole Indian Territory engaged the greater part of his duties as judge and the functioning of his court was a potent influence in the regulation of affairs in what otherwise would have been in many ways a lawless section of country. It is fitting that the great service of Judge Parker in this country should be brought to the attention of a generation that knows little of our indebtedness to this illustrious officer. Even in the town in which he lived and presided with distinction the only visible memorial is a meagre little marker in the National Cemetery. It is to be hoped that the bar and citizens of this state will cooperate with those of Arkansas in erecting a fitting memorial to the memory of this man. The paper recently prepared by Mr. Harry P. Daily, President of the Arkansas Bar Association, and read before that body, is a most timely contribution to this subject.) [EDITORS]

"One of the Greatest of American Trial Judges!"

These words spoken of the subject of this sketch were not lightly uttered. They will be found in Volume 1, page 69, note 25, of the famous Sixteenth Edition of *Greenleaf on Evidence.* They represent the calm, deliberate judgment and commentary of John Henry Wigmore, then Professor of Law at Northwestern University Law School, and editor of the above edition.

Isaac C. Parker was born in 1838, in Belmont County, Ohio. In 1859 he began the practice of law in St. Joseph,

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[1]Address read by President Harry P. Daily at the Thirty-fifth Annual meeting (1932) of the Bar Association of Arkansas.

Missouri, and became city attorney in the following year. He held this position until he was elected prosecuting attorney for Buchanan County, and upon his retirement from that office became circuit judge for the Twelfth Judicial Circuit of Missouri, serving two years. Thereafter he was elected to Congress twice, his second term expiring in 1875. He was a Democrat in his early manhood, and was president of the first Stephen A. Douglas Club organized in Missouri. With the outbreak of the Civil War he joined the Republican party and was one of the presidential electors for Missouri, who cast that state's vote for Lincoln in 1864.

This, in brief, was the professional and public life of Parker down to his appointment as judge of a tribunal unique in the United States.

In 1875 President Grant appointed Parker chief justice of the newly created Territory of Utah. Before the Senate could act on the appointment the president withdrew it, and appointed Parker United States district judge for the Western District of Arkansas. This second appointment was promptly confirmed.

The appointment was unusual. Parker, at the time, was a citizen of Missouri, and had just completed his second term as congressman from that state. The times were unusual. Arkansas was passing through the throes of reconstruction. It had witnessed, only a short time before, the split in the Republican ranks in the state which resulted in the so-called Brooks-Baxter War. It was doubtless this factional split in the Republican party which led President Grant to select a man from without the state, not identified with either wing.

No man ever came to judicial office under more trying or unfortunate circumstances. A triumphant and righteously indignant Democracy had secured control of the state government, which had been denied to it by force of arms through a period of years. The term "carpet-bagger" was anathema in the ears and hearts of the majority of the white inhabitants of the district. The fact that Parker had been selected from without the state, coupled with the fact that he had received the endorsement of the senators from Arkansas, both of whom were "radical" Republicans, and the further fact that his predecessor had been forced to resign, was enough to make thinking men pause and wonder if another mere "carpet-

bagger" had been foisted upon them.

Parker's predecessor had been a weak, vacillating judge. There had been much criticism of his regime and of the wasteful and inefficient methods of his court. Prisoners languished in jail, trials were few and far between, and the expense of the court incident thereto was terrific. It is a matter of tradition, perhaps of record, that the bar was either sullen or openly rebellious.

It was under these unpropitious circumstances that this young lawyer, barely thirty-seven years old, assumed the duties of judge of a trial court with the most extraordinary jurisdiction this country has ever known.

This was the immediate background. We must go further back than this, however, if we are to appreciate and appraise the career of this man and the functions which he was called upon to perform.

A conflict had arisen in the early history of the nation between certain of the southeastern states and those five tribes of Indians which, collectively, came to be known as the Five Civilized Tribes—Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles. These Indians had built up a semi-civilization which was of as high an order as that of the whites with whom they came in immediate contact. By treaty, chicanery, and coercion, these Indian tribes were persuaded, or forced, to remove from their homes in Georgia, Tennessee, Alabama and Florida, and to trek to that land beyond the Mississippi which lay just west of the western border of Arkansas. Here they set up anew their homes and their tribal governments, in a section which was destined to become known, first, as the Indian country, and finally as the Indian Territory. This movement was completed in the forties. From that time until the outbreak of the Civil War these Indians went their own way, bothering no one, and largely undisturbed in working out their own peculiar problems. There were garrisons of soldiers on the outskirts of the region at Fort Smith, Fort Towson, and elsewhere. There may have been grandiose schemes of individuals in connection with these Indians, and some threats and rumors of wars among the civilized tribes, and with the more savage Indians to the west, but, by and large, it was a peaceful region.

The great conflict drew these people into the maelstrom.

The Creeks sided with the Union, freed their negro slaves, and accepted a perfect equality with them, resulting in a racial admixture with very evil propensities. Most of these half-breeds seemed to inherit all of the vices of both races and none of the virtues of either. The Choctaws embraced the side of the South, and raised a regiment or two of soldiers. Chief Ross, of the Cherokees, attempted to preserve neutrality, and he carried on diplomatic correspondence with both sides. His efforts were only partially successful. The young Cherokee bucks would not be restrained, and for years following the end of the war there was a Ross faction and a Ridge faction. This resulted in at least one notable trial in Parker's court. At the close of the war all of the five civilized tribes again became wards of the nation, but the peace and quietude of their territory had been disturbed.

The states which bordered on this region were the scene of much fighting and reprisals of a guerilla nature. Some of those engaged on both sides of this irregular warfare were mere pillagers and robbers. With the close of hostilities the worst of these, as well as some who were merely adventurers, sought refuge or habitation with the Indians. This was the beginning of that movement which brought about the conditions that produced the great court.

A few years after the close of the war, the cattle trail from Texas up to the new railroad towns in Kansas was crossing the western edge of the Indian country. The movement was epic. It has been celebrated in song and story, but it produced, along with its glory and its glamour, a fringe of parasites—cattle rustler, bad man, murderer. These, in turn, sought refuge in the Indian country to the east.

Then came the railroads across the Territory itself. With them came another influx of whites, some good, some very bad, all a possible source of conflict with the Indians, to whom the country belonged.

The Indians had their own tribal customs, laws, and courts. The customs and laws had no binding force upon the whites, and the Indian courts had no jurisdiction over them. It was a condition which grew more and more aggravated and fed upon itself. The knowledge spread that here was a sanctuary for the lawless whites, a place where the red man's law was inoperative as to the whites, and where the white man's law was not enforced—a sort of no man's land.

The freedmen, or former slaves, added to the problem. For a number of years these various races—red, black, white, and mixed—were coming into constant contact with no law actually functioning in case of disputes, except the law of the tooth and the talon. Mixed and mingled in this mass was a very large proportion of what Judge Parker was ultimately to term "criminal intruders."

Years before Judge Parker's appointment the Congress had provided that the Western District of Arkansas should include, in addition to designated counties in Arkansas, "the country lying west of Missouri and Arkansas known as the Indian Territory."[2] The Congress had also conferred upon the District Court for the Western District of Arkansas the jurisdiction elsewhere exercised by the circuit courts.[3] Other federal statutes provided, in substance, that the general laws of the United States providing for the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States should extend to the Indian country, provided that same should not be construed to extend to crimes committed by one Indian against the person or property of another Indian.[4]

A mere reading of the above does not quite convey the significance of these statutes. This federal district court, with federal jurisdiction over approximately one-half of the State of Arkansas, exercised over that half of Arkansas the same jurisdiction ordinarily exercised by federal district and circuit courts throughout the nation. It was a strictly limited jurisdiction. Cases which arose under it, in those days, were comparatively few in number, and the criminal cases were of minor importance. But over that wide expanse of territory, which extended from the western boundary of Arkansas to the shadow of the Rocky Mountains, this court exercised in criminal cases all of the jurisdiction ordinarily possessed by all the courts of a state, except where the crime had been committed by an Indian against the person or property of another Indian. Here was a territory greater in extent than the entire area of the State of Arkansas, over which a single court, presided over by a single judge, was to exercise all of the

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[2]Revised U. S. Statutes, Sec. 533.
[3]*Ibid.*, Sec. 571.
[4]*Ibid.*, 2145, 2146. Also *ex-parte Mayfield*, 141 U. S., 107, and *Lucas vs. United States*, 163 U. S., 612.

jurisdiction over crimes which is now exercised by the seventy-five, or more, district courts of the State of Oklahoma. This was not all; by a peculiar quirk of the federal law the judgments of this court in these cases were final.[5] During the first fourteen years of Judge Parker's reign there was no appeal from a judgment of conviction in his court. This was true even in capital cases. When once he had pronounced the sentence of death upon a convicted murderer or ravisher, there was no hope for the condemned man, unless the President of the United States granted executive clemency. One is reminded of that famous argument between the Judge and the Bishop. The Bishop asserted that his power was the greater because, while the Judge could merely say, "You be hanged", the Bishop could say, "You be damned." The Judge's retort, "Yes, but when I say 'You be hanged' you are hanged", has lost much of its force in this country in modern times. When Judge Parker said that a man should hang, usually he was hanged.

Judge Parker assumed the duties of judge of this unusual court on the 10th day of May, 1875, and for more than twenty-one years he continued to preside over its daily sessions. When he commenced his Gargantuan task he was barely thirty-seven years old. He died in the full vigor of manhood at the age of fifty-eight. Naturally, the twenty-one years spent in the arduous tasks of such a tribunal made their impression and mark upon the man, and upon the judge. Yet, from a few things which have come down to us from the early years of his service, we know that always here was a man. We have seen that the community and the bar were naturally critical at the time of his appointment. Before the end of a year the editor of a Democratic newspaper had commented upon the great change which had come over this court since an industrious, upright and courageous judge had taken charge. From that day until the day of his death the respect and admiration of the community in which he lived grew until it amounted almost to veneration.

Judge Parker seemed to realize, from the very first, that justice delayed is justice denied. He recognized, as few judges have ever recognized, that just as the sixth amendment to

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[5] *Cross vs. United States*, 145 U. S., 571; *United States vs. Sanges*, 144 U. S., 310; *Yarbrough vs. United States*, 110 U. S. 651; *exparte Kearney*, 7 Wheaton, 38-42.

the Constitution of the United States guarantees to the innocent accused "the right to a speedy and public trial by an impartial jury," so common sense dictates that the guilty accused should be subjected to the same character of speedy trial.

At the beginning of his service there were but two terms of court, the May and the November terms. One term merged into the other with no apparent break. The court was never at recess until all business had been disposed of. Court opened at eight in the morning and closed when dark came. The only recognized holidays were Christmas and Sundays. In no other manner could Judge Parker have disposed of the tremendous volume of cases which was constantly pressing upon him. The law's delays were simply non-existent in his court.

The conditions which first confronted him doubtless seemed exceptional at the time. It was necessary to dispose of the cases which had accumulated during the effortless years which preceded his appointment. As term succeeded term, however, it became increasingly evident that his was an endless task that grew, instead of diminishing, with the years. This was partly due to a constantly increasing influx of whites into the Territory, but the major reason was the effectiveness of the court itself and the high example of energy, tirelessness and courage set by its judge. More and more often, the criminal was detected, arrested and brought to the bar of justice. Under his tutelage a public conscience was gradually aroused, witnesses became less timid, officers more diligent and effective, juries more prone to convict. A man with less energy than Judge Parker would have tired and then slowed down. A man without his rugged constitution would have broken under the physical strain. A man with less courage would have been more circumspect and less effective.

Judge Parker had all these qualities to a marked degree. There was one other thing which sustained him and held him to his task throughout the years—a very high sense of duty to those Indians whom he felt his court had been created to protect. He knew the history of the tribes and was familiar with the events which had led to their forcible removal to the Indian Territory. He knew that before their removal they had been compelled to yield to mass aggression. Indeed, that story had been written in the early opinions of the Supreme Court of the United States. Judge Parker was determined

that in their new home they should not be cowed, intimidated, robbed or murdered by individual ruffians. On his deathbed he had this to say on that subject:[6]

> "Don't understand that what I say about these ruffians is directed against the Indians. Twenty-one years' experience with them has taught me that they are a religiously inclined, law abiding, authority respecting people. The Indian race is not one of criminals. There have been sporadic cases of crime among them, it is true, but as a people they are good citizens."

He also said on that occasion:

> "The territory was set apart for the Indians In 1828. The government at that time promised them protection. That promise has always been ignored. The only protection that has ever been afforded them is through the courts. To us who have been located on this borderland has fallen the task of acting as protectors."

These words shed light upon the judge as well as upon the man; they make plain what otherwise might be obscure. If the executive officials had been lax, the judge was determined that this should not be true of his court and its enforcement officers.

This brings into view another body of men—the two hundred deputy marshals of his court whose duty it was to find and arrest the desperate criminals who lurked in the Indian country. These deputies became a distinctive body of men. Their task was no light one. In the north of the Territory were the Boston Mountains, and to the south were the Winding Stair and the Kiamichi, while scattered between were many hills and canebrakes, which gave ready refuge to those "on scout." Game was still plentiful, and water and firewood could be found in every hollow. There was a border class of confederates who gave assistance and warning to the criminals, even though they were not active members of the gang. Fear made all timid citizens hesitant to give information or assistance. Many a wanton, unprovoked, and unpunished murder had shown that there was a real basis for that fear. As time went on it became more and more apparent that these officers

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[6]*Fort Smith Elevator*, September 18, 1896.

solved the crimes and brought in their man. A certain *esprit de corps* grew up, and it is clear that this was due to the fact that these officers realized that their efforts were not in vain. If they took desperate risks, at least they were rewarded by seeing that the men whom they arrested were promptly tried, with a large percentage of convictions. Nothing so destroys the morale of this class of officers as the futility of ferreting out crime, followed by its going unwhipped of justice. Sixty-five of these marshals died in desperate conflicts with outlaws while Judge Parker was on the bench, but there was always a live comrade to take up the search and to bring the murderer to trial in his court. It is a significant fact that these men, in their own minds, ceased to be mere deputy marshals. To this day the few survivors speak of themselves as "Men Who Rode for Parker."

Statistics are tiresome things, yet the statistics of Judge Parker's court have been much paraded in print, and have given rise to the view among the unthinking that here, perhaps, was another bloody Jeffreys. It is true, that during the twenty years from 1875 to 1895 over thirteen thousand criminal cases were docketed in his court. Seventy per cent, or more than nine thousand of the defendants in these cases, were convicted by a jury or entered pleas of guilty. Three hundred and forty-four of those accused were tried for capital offenses. One hundred and fifty-one were convicted and sentenced to be hanged. Eighty-three of these were actually executed, while the sentences of the majority of the balance were commuted by the President, usually to life imprisonment. We have already seen the conditions which brought about this tremendous array of cases. The really striking thing about these statistics is how any one man could have disposed of this vast volume of business.

Eighty-three men whom Judge Parker sentenced to die paid that extreme penalty, or four for every year of his judicial life. Yet he was not wedded to the idea that capital punishment was the proper thing. His views on that subject were expressed in the following words:

> "I favor the abolition of capital punishment, provided there is a certainty of punishment, whatever that punishment may be. In the uncertainty of punishment following crime lies the weakness."

What manner of man was this, who for so many years

was a veritable ogre to the vicious and criminal elements of the Territory? Was he a harsh, cruel man, who, because of his judicial contact with crime, had lost all of the finer sensibilities? Had he no milk of human kindness in him?

We can best judge by the impression which he made on his fellow townsmen at the time, and particularly the impression which he made toward the close of his career, when his reputation as an inflexible, indeed, as a "hanging," judge had spread far beyond the limits of his jurisdiction.

A lawyer now prominent at the bar, who was a young lawyer in Judge Parker's court, had this to say: "He was the kindest and most considerate judge to the young lawyer whom I have ever seen upon the bench."[7]

To the children of that day he was the very embodiment of that patron saint of childhood made famous by the "Night Before Christmas." White of hair and beard, with pink cheeks, and slightly rotund, he had a twinkle in his eye and a little contagious chuckle, which always made them think of Santa Claus.

Judge Parker meticulously observed the proprieties of his judicial position with regard to politics. Yet during the last four years of his life, and while he sat upon the federal bench, he held an office given to him by the voters of the little city in which he lived. There was no politics in this. The community was overwhelmingly Democratic, still Judge Parker, a Republican, was twice nominated, and twice elected without opposition, to the school board of the City of Fort Smith. The tribute was to the man and not to the position he held. It was a recognition not only of his sterling qualities, but also of his affectionate interest in the children of the town.

A St. Louis reporter, who came to interview him and to write his story, took away this verdict of his fellow townsmen: "He is a good man." Everything they had to say about him boiled down to that. The truth is that he was stern and inflexible on the bench, because he was convinced that in that way, and in that way alone, could crimes of violence be stamped out. He did not lack sympathy. He simply refused to waste it on the murderer. Instead, his heart went out to the family of the victim.

He was a companionable man. The merchants up and

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[7]Henry L. Fitzhugh, a member of the Fort Smith bar.

down the main street knew him, and he was interested in their business and in the gossip of the day of the small border town. He liked people and they liked him. The cases which came to his court were so largely from the Indian Territory that he felt that the proprieties did not require him to live aloof. On the contrary, he led a social life in a simple fashion. He loved to visit his neighbors, to have them visit him, and to attend the civic and social functions of the town.

In 1889, and again in 1891, the Congress passed Acts which had a profound effect on Judge Parker's court. The first of these Acts is cited as the Act of Feb. 6th, 1889.[8] Section six of this Act authorized the granting of a writ of error to the Supreme Court of the United States in all criminal cases tried before any United States trial court where there had been a conviction carrying a death sentence. The language used in the Act was general. It was universally recognized, however, that the primary purpose of this Act was to provide an opportunity for a review of the numerous capital cases being tried in Judge Parker's court. This Act was followed by the Act of March 3rd, 1891.[9] Section Five of this second Act authorized a direct review by the Supreme Court of the United States in all cases tried in the district or circuit courts of the United States where there had been a conviction for a capital, or otherwise infamous, crime. These two Acts made it possible, for the first time, to secure a review of that vast number of homicide cases, and cases involving other crimes of violence tried in Judge Parker's court.

Notwithstanding these Acts, his court continued to be unique in its vast territorial jurisdiction,[10] and unique because of its jurisdiction to try what, for a better term, might be called "State" crimes, as opposed to "Federal" crimes. As a result of the two Acts mentioned, we find the Supreme Court of the United States, during a period of five years, writing opinions upon a great number of questions of criminal law which never before, and never afterward, did or could reach that court. Except for those opinions, the picture of Judge Parker's court and the conditions with which he dealt would largely have come down to us through word of mouth.

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[8] 25 *Statutes at Large*, 655.

[9] 26 *Statutes at Large*, 826.

[10] The territorial jurisdiction was reduced by the Act of January 6th, 1883 (22 *Statutes at Large*, 400.)

On Feb. 2nd, 1891, the Supreme Court of the United States handed down the first two opinions in cases reaching it from Judge Parker's court under the Act of 1889. Both of these were murder cases. They are reported as *Alexander* vs. *United States,* 138 U. S., 353, and *Crampton* vs. *United States,* 138 U. S., 361. In one case the judgment was reversed, and in the other case the judgment was affirmed. The defendant in each case was represented in that court by Augustus H. Garland, former Governor and Senator from the State of Arkansas, and former Attorney General of the United States in Cleveland's cabinet. The government was represented by Solicitor General Taft, afterward Judge of the Court of Appeals for the Sixth Circuit, President of the United States, and Chief Justice of the Supreme Court. Certainly, both the defendants and the government were ably represented.

During this period of five years fifty written opinions were delivered by the Supreme Court of the United States in criminal cases which had been appealed from Judge Parker's court. In all of these cases the defendant had been convicted of a crime committed in the Indian country. Only one of these cases involved what might be termed a "Federal" crime. The defendant in one of the remaining cases had been convicted of assault with intent to kill, in another of rape, and, in the remaining forty-seven, of murder.

The bad man of the West has often been portrayed in fiction as a picturesque figure—a sort of Rob Roy or Robin Hood. Even Theodore Roosevelt, who saw deeper than this, has written that the environment of the western bandit was such that he was not as degenerate as the modern city gangster.[11] Neither of these thoughts is borne out by a scrutiny of these cases appealed from Judge Parker's court. In a few instances the homicide was the result of a quarrel or of an enmity more or less justified, and the accused was an ordinary citizen led astray by grievances, real or fancied. But in the great majority of instances the murderer was the member of a gang, and robbery or larceny was his motive, and apparently murder was his sport. The real truth is that gang murder is always sordid, and the characters involved depraved. There is little to choose between the thugs of India, the Apaches of Paris, the banditti of Sicily, the modern gangster and racketeer, and

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[11] *Camp Life and the Hunting Trail.*

those desperadoes who were brought to bay in Judge Parker's court. Wherever such gangs have been permitted to flourish they have become a menace to life and property, and, when not controlled and stamped out, to civilization itself.

The thought has been suggested that Judge Parker regarded his court as having been established for the protection of the innocent, unoffending Indian, and this was true. An examination of these cases shows that he held no maudlin sympathy for the criminal Indians. They received exactly the same treatment at his hands as other criminals. But he was fair, and the Indians came to know that he was fair, and acted accordingly.

One of the most notorious gangs finally brought to justice in his court was the Buck gang. It was led by a renegade Indian. Robbery was its avocation, mass rape its recreation. Its members were finally overpowered after a desperate battle with deputy marshals. Its latest victim was a white woman. It took all of the cool courage of the deputies to prevent the neighboring Creek Indians from hanging the captured men to the nearest trees. They were peculiarly wrought up because the chief offender was an Indian. That the Indians desisted from mob violence was due, in part, to the statement made to them by the marshal in charge, that Judge Parker's court was always in session and that it functioned. The members of the Buck gang were promptly indicted, promptly convicted and sentenced to hang. The conviction was affirmed without opinion by the Supreme Court of the United States under the style of *Buck et al.* vs. *United States,* 163 U. S., 678. On a day fixed by Parker, all five members of the gang paid the extreme penalty from the same gallows—a sordid, gruesome story, but a more fitting sequence than that to the recent Massie episode.

Many of Judge Parker's criminal cases were reversed after the right of appeal was given; and this fact, coupled with an intemperate outburst of his, gave rise to the impression among some that he was either unversed in criminal law, or that he had become a judicial tyrant because of his long uncontrolled power. Neither view was correct.

The outburst should be analyzed first. A defendant had been tried in his court whose real name was Goldsby. Under the alias of Cherokee Bill this desperate character had become the leader of a gang of outlaws. He was finally captured and

brought to trial for an unprovoked and wanton murder, which he and a companion in crime, Verdigris Kid, had committed while engaged in the daylight robbery of a store. This man was a fiend incarnate. He described himself as half Indian, half negro, and half white. At the time of his sentence it developed that he was many times a murderer. After his conviction the case was taken by writ of error to the Supreme Court of the United States. Pending the appeal, Cherokee Bill was in confinement in the federal jail at Fort Smith, along with a score of other convicted murderers. In some manner unknown, he secured a pistol and a hatful of cartridges. A jail delivery was averted by the courage of one of the deputies, whom Cherokee Bill shot down in cold blood when the deputy refused to surrender the keys to the jail. A riot in the jail and a mob outside were only prevented by courage and coolness of officers and citizens. Judge Parker was in St. Louis at the time, on one of his very rare vacations. When the news reached him, he was reported by a St. Louis newspaper to have railed at the law's delays, and to have commented adversely on the failure of the Supreme Court of the United States to expedite criminal cases in that court. His remarks on this occasion should never have been made, but they represented the natural reaction of the man to a delay which had allowed this known fiend to add one more victim to his slaughter house.

Once more Cherokee Bill was tried and convicted for murder, and, once more, he appealed. The conviction in the first case was finally affirmed by the Supreme Court of the United States, and is reported as *Goldsby, alias Cherokee Bill,* vs. *United States,* 160 U. S., 70. The opinion discloses a fiendish murder followed by a fair and impartial trial, in which there was no error. Parker's outburst was, indeed, not becoming his judicial position, but certainly it can be forgiven, if not justified.

Was Judge Parker well versed in criminal law? In measuring his knowledge in the light of reversals it is necessary to bear in mind that most of the criminal cases from his court were cases of first impression in the Supreme Court of the United States. That court had hitherto dealt with but few murder cases, and, on many of the questions involved, the highest courts of the states had differed. This is aptly illustrated by the opinion in the case of *Davis* vs. *United*

States, 160 U. S., 469, where the conflicting state authorities on the question of the burden of proof, where insanity is a defense, are cited and reviewed. The case was reversed, but a second conviction was affirmed in *Davis* vs. *United States,* 165 U. S., 373.

Candor compels the statement that Parker's charges to the jury were too long. He was prone to emphasize first the government's and then the defendant's theory of the case. His affirmances illustrate that he often used strong statements favorable to the prosecution which would have been error except for the fact that they were cured by equally vigorous statements favorable to the accused. It was difficult for Judge Parker to frame his charges in colorless language.
27—Chronicle of Okla. Ems
In *Allen* vs. *United States,* 164 U. S., 492, Parker charged the jury that the flight of a defendant after a killing was an evidentiary fact which the jury might consider as tending to establish guilt. This charge was approved. In *Hickory* vs. *United States,* 160 U. S., 480; in *Alberty* vs. *United States,* 162 U. S., 499; and in *Starr* vs. *United States,* 164 U. S., 627, an almost identical charge brought about reversals, because in each of these cases Parker added the expressive Biblical quotation, "The wicked flee when no man pursueth, but the innocent are as bold as a lion."

A number of Parker's reversals by the Supreme Court called forth vigorous dissents by Justices Brewer, Peckham, and Brown. The truth is that Parker was in advance of his time. He sized up situations in criminal cases which some of the cloistered members of that august tribunal could not appreciate. For instance, in *Brown* vs. *United States,* 164 U. S., 221, Parker had admitted testimony of defendant's witnesses touching the reputation for bad character of a government witness. There was proof of the good reputation of this witness, and cross-examination had developed that the reputation of the witness for bad character might have been inspired by the very desperadoes of the neighborhood. In his charge Parker said:

> "This reputation must grow out of the dispassionate judgment of men who are honest men and good men, able and competent to make a judgment of that kind. It is not the judgment of the bad people, the criminal element, the man of crime, that is

to fasten upon a man and blacken his name."

The majority of the Supreme Court thought that this, and similar comments, constituted reversible error.

Mr. Justice Brewer wrote a vigorous and caustic dissent, in the course of which he said:

> "I dissent. * * * Because this part of the charge is, as a whole, unobjectionable. The testimony referred to was admitted, and therefore held to be competent. The rule of law in reference to impeachment was correctly stated, and the objectionable matter was prefaced by a declaration of the court that it gives a matter of admonition. That admonition was just and sound. Reputation is the general judgment of the community in respect to the witnesses whose reputation is challenged, and is not made up by the flippant talk of a few outlaws."

Mr. Justice Brown and Mr. Justice Peckham concurred in this dissent.

The case in Judge Parker's favor does not rest alone upon dissenting opinions. That he was in advance of the thought of his time in criminal cases is clearly shown by his reversal in *Crain* vs. *United States,* 162 U. S., 625, and the subsequent history of that case. In the Crain case the same three justices, mentioned above, dissented, but the majority opinion, written by Mr. Justice Harlan, used this strong language in reversing Parker:

> "Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty."

This language would lead one to believe that there had been some serious infringement of the rights of the defendant in the trial of the cause; some serious departure from settled principles which had probably resulted in an unjust conviction. Thus spoke the Supreme Court of the United States in April, 1896, only a few months before Parker was stricken with his last illness.

In 1914, or eighteen years after Parker's death, the identical question of law again reached the Supreme Court of the

United States in *Garland* vs. *State of Washington,* 232 U. S., 642. In this latter case that high court said, with reference to its own previous decision in the Crain case:

> "It is insisted, however, that this Court in the case of *Crain* vs. *United States,* 162 U. S., 625, held to the contrary." * * *
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> "Technical objections of this character were undoubtedly given much more weight formerly than they are now." * * *
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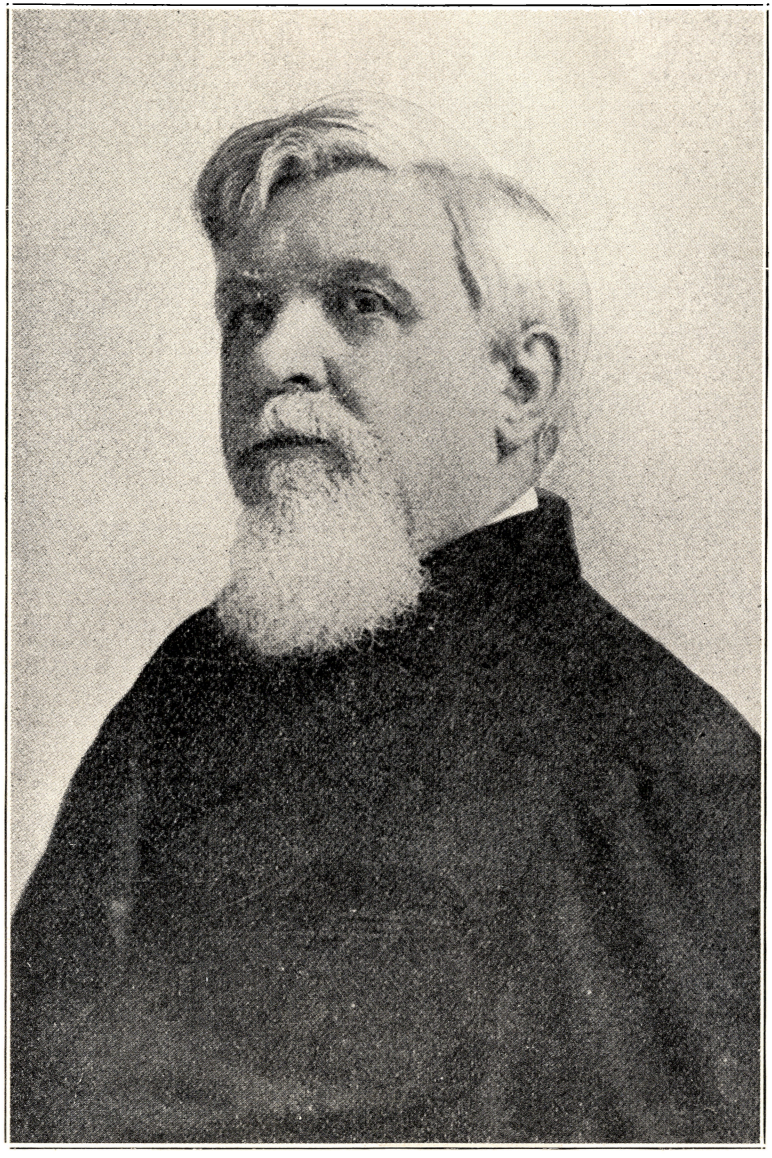
> "Holding this view, notwithstanding our reluctance to overrule former decision of this court, we are now constrained to hold that the technical enforcement of formal rights in criminal procedure in the Crain case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled."

The Act of Congress of March 1, 1889, 25 Statutes at Large, 783, had created a United States Court in the Indian Territory with jurisdiction over minor offenses, but not over those punishable by death or imprisonment at hard labor. Six years later, by the Act of March 1, 1895, 28 Statutes at Large, 693, it was provided that this Territorial Court should, after September 1, 1896, have jurisdiction of all offenses committed in the Indian Territory, thus depriving Parker's court of its unusual jurisdiction. This latter Act was passed in the spring of 1895, and, a few months later, Judge Parker was stricken with his first and last serious illness. The law became effective in September and he died in November. Thus, in the fall of 1896, Parker and his court passed out together. The coincidence was so striking that gossip had it that he died of a broken heart because he had been shorn of his power. The truth was different.

From a personal standpoint Judge Parker looked forward with relief to the respite from his arduous toil. The strain, the confinement, and the labor of the years had been too much, even for his iron constitution. Like the runner at Marathon, he finished the race, but he collapsed at the end.

It was a state funeral, as nearly as the little city where he had lived knew how to make it. Notable personages came from far and near. Public and private business was suspended. Flags stood at half mast. The National Cemetery,

where he was buried, was too small for the thousands who accompanied his body to its last resting place. The most fitting and appropriate tribute of all came when Chief Pleasant Porter, of the Creeks, placed upon his grave a simple garland of wild flowers.



JUDGE ISAAC C. PARKER