REMARKS

UPON A RECENT OPINION

OF THE

HONORABLE OSWALD THOMPSON, ESQ.,

PRESIDENT OF THE

COURT OF COMMON PLEAS,

IN A PART OF THE

DIVORCE CASE

OF

GRISWOLD vs. GRISWOLD,

June Term, 1852, No. 19.

CASTING DOUBT AS TO WHETHER A DECREE WAS MADE BY THE SAID COURT IN THAT CASE.

BY THEODORE CUYLER,

Counsel of the Libellant,

THE REV. R. W. GRISWOLD.

PHILADELPHIA:

KING & BAIRD, PRINTERS, No. 607 SANSOM STREET.

1857.

ERRATA.

On p. 10, 10th line from top, for "important, having," &c., read "important, *the record* having," &c.

On p. 12, in several places towards bottom of the page, for *Mr.* Griswold, read *Mrs.* Griswold.

On p. 22, 12th line from top, for "were given by me personally," read "were *not* given by me personally."

On p. 71, 7th line from top, for illogical*ly* read illogical.

REMARKS UPON A RECENT DECISION.

A RECENT case in the Court of Common Pleas of Philadelphia, commonly known as "The Griswold Divorce Case," has been the subject of some comment by the public and the bar; and I have understood that my name has occasionally been mentioned professionally in connexion with it, in a mode which neither personally nor professionally is quite agreeable to me. As counsel of Dr. Griswold, and in my own right, I deem it well, in turn, now to take my action and to make my remarks upon the case.

The only part of the question, however, which I propose to consider, is this, "Whether or not the Rev. Dr. Griswold did, some few years ago, under my advice and action as counsel, obtain a decree of divorce from a lady called Charlotte Myers, and whom, for the purposes of this argument, I am ready to concede was his wife."

I am led to make the remarks which I do, in consequence of a decision of the Court of Common Pleas, made on the 18th April, 1857, deciding—not, indeed, that no such decree was ever made—but deciding, undoubtedly, (though the Court says that they have had much difficulty in coming to any conclusion,) that they have had no such *sufficient evidence* of any decree having been made as would make it their duty to record that fact on their minutes. This kind of decision, while it decides nothing positively, leaves, by its negative action, the whole question as to whether a decree of divorce was obtained, in a state which (*if* Dr. Griswold's first marriage was an obligatory one) would be an uncomfortable state of doubt to all persons concerned: and, under any circumstances, is so to me perhaps as much or more so than to any one else.

I put before the public and the bar both the opinion of the Court and the *entire* evidence on which that opinion was given; and I add some remarks of my own upon both.

To understand even the single point of fact which I propose to consider, it is necessary for me to state, in a preliminary way, that on the 25th of March, 1852, the Rev. Dr. Griswold, being then domiciled in this city, applied, through his then counsel, the late Mr. Ingraham, to the Court of Common Pleas for a divorce from a lady between whom and himself a marriage service had been per-

formed, but with whom he had at no time ever long lived, and between whom and himself there was an entire estrangement and personal separation, though there had been at no time any active hostility either open or private.

The lady being then in Charleston, S. C., where she had always resided, and Dr. Griswold being here, he addressed her a letter proposing a divorce on the grounds of desertion. The reply to his letter was from her counsel, and as follows:—

"CHARLESTON, March 16, 1852.

"*Dear Sir*:—Your letter to Mrs. Griswold, of the 12th inst., contained so much matter that she felt the necessity of advice, and called on me, as a person already acquainted with the circumstances, which delicacy would confine as much as possible to the knowledge of those who are interested

"I am authorized to say that she will conform to your plan of divorce, by *making no resistance*, if the libel is confined simply to the charge of desertion; on condition, however, that your daughter be permitted to remain under the tuition and guardianship of herself and her aunts, not to be removed from their guardianship or control during her minority, unless with her own free will and consent. This condition appears to me so reasonable, in connection with the antecedent relations of the parties, that I anticipate no objection. I hope that everthing may be satisfactory in the winding up of this singular domestic drama, and am, dear sir, yours very truly,

J. L. PETTIGRU."

The petition for divorce was accordingly filed by Mr. Ingraham, setting forth desertion as the ground of divorce; and evidence was taken tending to prove it. No counsel appeared at any time for the lady. On the case being called up, the Court was not satisfied with the evidence of desertion which was presented; that is to say, they did not think that it was plainly enough shown to them—and in the *positive* manner in which it ought to be—that the desertion was not owing to Dr. Griswold's own fault; and to relieve this difficulty the lady made the following declaration in her own handwriting, "and intended," as Judge Thompson tells us, "to remove the objection made to the proceeding."* It was in the form of a letter addressed to one of her own friends in New York.

"NEW YORK, Sept. —, 1852.

"*Dear Sir*:—I will not deny that I left R. W. Griswold for reasons the result of feelings on my part satisfactory to myself, which I do not choose to disclose; and which I still deem satisfactory to myself, though a court of law might deem them insufficient to justify or excuse me in separating myself from him. I have also no difficulty in saying that my intention when I left him was not to return to him, and my course and present position are founded on this determination, which still continues. I have left him, therefore, at full liberty to pursue such legal measures as he may be advised, and which, upon their communication to me, I have not in any way impeded or resisted.

CHARLOTTE A. GRISWOLD.

"To HAMILTON R. SEARLES."

* Printed Opinion of 15th March, 1856.

After this paper was filed and certain other testimony taken, the Court expressed its sufficient, though rather reluctant satisfaction; and declared that as a special case—one very peculiar in its circumstances, and not to pass into a precedent—they would grant the decree. The Court Docket contains after this the following entries, to the last two of which, especially, I beg attention.

"*December* 31, 1852: Rule to show cause why divorce should not be decreed."

"*September* 23, 1853: Resp'd *appeals from decree* of Court. Affidavit filed; recognizance entered; surety approved."

"*June* 24, 1854: Rule to show cause *why decree* should not be *rescinded*."

No entry, I concede, of the making absolute of the rule, dated December 31, 1852, that is to say no entry, in ordinary form, of the decree was made by the clerk on his minutes, and a large part of the record itself has been confessedly lost or mislaid. It is not necessary to suppose—as was at one time charged—that it had been stolen by any one, as a large part of the record has been lately found by Judge Allison in his own possession in his court drawer; where it had been lying, undisturbed, as would seem, for about four years.

The abovementioned rule, (of June 24, 1854,) taken on behalf of the lady, to show cause "why *decree* should not be *rescinded*," was heard at length in the spring of 1856. The grounds of the application as set forth in her petition and evidence, and as attempted to be maintained by her counsel, being, of course, not that no decree had been made, but that a decree had been obtained by fraud. Judge Thompson decided that all these allegations of fraud were unfounded. This was enough, of course, to make him dismiss the application. His Honor, however, going beside the reasons that the lady in her petition had averred as ground of action, or in her evidence had attempted to prove, and beside that which had been relied on by her able counsel, Mr. David Paul Brown, in the argument, saw proper to speak as follows:—

"*The main ground*, however, upon which we feel obliged to refuse the present motion, is the uncertainty which exists as to the fact of any decree of divorce having been entered by the Court. There is no *entry* of such decree either upon the minute book, or upon the motion list of the court, nor do the docket entries in the case show that such a decree was entered. Whether the papers originally filed and the testimony and exhibits, which the rule of court requires to be annexed thereto before the case is submitted to the Court for its consideration, would show any thing in regard to the decree, we are entirely unable to say. By some strange fatality, incident, perhaps, to the manner in which our records are kept, those papers have disappeared from the office of our prothonotary, and their contents cannot be sup-

plied. The Judges have no recollection which would enable them to speak on the subject of the decree, further than of the fact, that *they regarded the evidence, as it was presented to them, as sufficient to entitle the libelant to the usual rule to show cause why a decree should not be granted* It is, of course, impossible to rely upon the recollection of counsel for that as to which our records are silent, and when we find that there is nothing upon our record to show, that notice of the rule to show cause was ever served upon the respondent, or advertised so as to give notice of such rule, without which service or advertisement no decree could be entered without a violation of our rule of court, it seems to us that the preliminaries to the granting of a decree are entirely wanting. When it further appears that the rule referred to was not placed upon the list of motions, to be disposed of in the usual manner, the doubt as to the decree being made is so much increased, that we are compelled to take the only safe course, which is to regard that which does not appear, as that which does not exist We are informed by the testimony, that the libelant acted as though he had in his possession some evidence of a decree having been made in his favor. What that evidence was, we have not been informed, nor have we the means of ascertaining. It does not appear by any evidence, that even a certificate of the decree was given by the prothonotary, nor if such a certificate was obtained, upon what it was founded. In this absence of all evidence of any proceeding beyond that which appears of record, we are compelled to decide that there is no sufficient evidence of a decree of divorce having been entered, and consequently the motion to vacate that which has not been shown to exist, cannot be sustained, and the rule must be dismissed."

This "main ground," as I have said, and now repeat and aver, was not taken, by the petition, evidence, or on the argument, as a substantive ground, nor indeed as a ground at all. The petition and evidence are on file and speak for themselves. It would have been plainly absurd to ask in them or in the argument for the *recision* of a *decree* on the ground of fraud, or on any other ground, *if no decree existed or appeared.** And when the Court set forth as ITS "main ground" of discharging the rule, a ground which only tended to show that the application of Mr. Brown was unnecessary, misconceived and almost ridiculous, my excellent opponent was probably as much surprised as, from a different cause, or rather a variety of causes, I was. Every ground of fraud which he *had* taken was ignored, and a ground set forth as the "main ground," which not only he had *not* taken, but which he could not possibly have taken while taking such a proceeding at all.

I am not denying that this point was a very proper point, in the state in which the docket appeared, to have been inquired into by the Court: undoubtedly it was so, and if either member of the Court had proposed it during the argument, as a matter which though not

* The lady's petition contains most allegations that could be conceived of, and the evidence taken under it attempted to prove some things quite beside even all these allegations: but although in two places in the petition there is a (parenthetical) doubt as to any grant of a decree, of which, "if" it was made, she says, in one place, she never had "*official* notice," the petition itself is founded on the allegation of a fraudulent decree, and ends with the prayer "that the Honourable the Judges may order that the proceedings and *decree* of divorce, voiding the said marriage between the said parties, be *annulled*, on the ground *that the same was obtained by fraud and imposition on this Honourable Court.*"

occurring, (as if well founded, it ought to have occurred, to Mr. Brown, and have saved the Court any application by *him* at all,) had occurred to *them* as one fit for consideration, I should then have asked to adjourn the case, and to prove that this main ground had no existence in fact at all, whatever show of ground it might have had in the "strange fatality" by which a careless clerk omitted to make his entries, and was likely to have in public estimation in the still stranger accident by which, without being at all aware of the fact, one judge had a good half of a record in his own personal possession at the same moment that the court-room was ringing with charges, *countenanced by Judge Thompson*, that it had been stolen by some party interested, to suppress it. But the Court did not call my attention to this ground, and Judge Thompson gave his opinion as I have above stated: herein, as I conceive, having for once, in a *very few times indeed*, in his cautious and most commendable judicial life, fallen within the category mentioned by Lord Bacon; that, I mean, of the "*over*-speaking judge," which, as the sequel of my remarks perhaps will show, Lord Bacon rightly declares "is no well-tuned cymbal." Whatever better book the excellent President of the Common Pleas might have been reading—and I doubt not he did read ONE much better—before coming to his court on the morning of March 15th, 1856, he had not, I say, been reading the Essays of Sir Francis Bacon. His eye had not, at least, rested upon the Fifty-sixth Essay; the essay "OF JUDICATURE," an excellent essay, which reminds all judges, present and to come, that it is no grace to a judge *first* to find that which he might have heard in due time from the bar;" and tells them that "the parts of a judge in hearing are four; to direct the evidence; to moderate length, repetition or impertinence of speech; to *recapitulate, select and collate* the material parts of *that which hath been said*, and to give the sentence;" and that "Whatsoever is *above these is too much.*"

It was from Mr. President Justice Thompson's having forgotten or left at home his judicial phylacteries on that morning; from his doing more than re-capitulating, selecting and collating the material parts of what was said, and from his therefore doing "too much;"—from *his* "first" finding that which, if it had been proper to have found at all, he would have heard of "in due time," and when Mr. David Paul Brown was the counsel, would have heard in very quick time, "*from the bar:*"—from this cause I say it is that the Court has had all the difficulty, which they declare in their last opinion* has distressed them, in deciding one part of this Griswold case. And this it is, I think I will show—with, I hope, a right spirit and a desire to read no improper glosses upon Lord Bacon,

* See Public Ledger, or Pennsylvanian, of 20th April, 1857.

to any Court, present or to come, as to the limits of judicial responsibility and the proprieties of judicial office and expression—which has been the cause of a decision as much in the face of evidence as was ever given by so upright and excellent a Court.

Notwithstanding, therefore, that the lady's application had failed, and all the grounds of fraud which she had set forth were declared by the Court to be without proof, I still, in consequence of the passage in Judge Thompson's opinion, which I have quoted on page 3, thought proper to proceed to rectify the difficulty suggested by him, one which *I* knew arose from a clerical error alone. On the 18th September, 1857, I accordingly took this rule; st. rule,

"To show cause why the Prothonotary of the Court should not be directed to make on the Minute Book, and also on the Docket of the Court, now as of day of , *nunc pro tunc*, the entry of the making absolute of a certain rule to show cause why a divorce shall not be decreed in this case." (The rule already mentioned on p. 3, and dated on the Clerk's Minute Book as having been taken December 31, 1852.)

Evidence which I give below was submitted to the Court on this rule; and the question which I ask the bar and my friends, and Dr. Grisworld's friends—and the public, who more than any of us are concerned in the matter of a right administration of justice—now to consider is, whether that evidence shows a sufficient ground for making the entry which I asked. My *rule*, it will be observed, asked for no entry of a decree as of any particular date. It asked simply for the declaration of the Court that it had in fact made a decree *at some date*, and the question on the rule and evidence under it simply was, *did the Court ever at any date make, rightly or wrongly, regularly or irregularly, a decree in the case of Griswold* v. *Griswold.*

But in justice to a gentleman who has been much misrepresented, let me first say, that whether any decree was or was not at any time obtained, Dr. Griswold was distinctly *informed*, rightly or wrongly, by carelessness or with care, *that a decree had been obtained;* and that whatever blame may attach to any body in Philadelphia, none belongs to HIM or to his New England connexions.*

* This matter, I appreherd, is, in a legal point of view, not important; for the record of the Common Pleas, even in its present state, with an appeal from a decree, a return by the Court acknowledging a decree, and a motion to rescind or vacate a decree, is a sufficient evidence, *on Dr. Griswold's side of the case*, of a decree for any purpose of law whatever, whether of personal defence or of succession and property.

On the 1st of November, 1852, Dr. Griswold, being then in this city, left with me, as the evidence shows, the following written

DIRECTIONS FOR MR. CUYLER.

Direct *Letters* to RUFUS W. GRISWOLD, as soon as there is a decision, send despatch, as follows:

Decree Granted. November , 1852,

OR

Decree Refused. November , 1852.

THO. CUYLER.

To SAMUEL P. DINSMORE,
Editor of the Bangor Mercury, Bangor, Maine, *and*

To RUFUS W. GRISWOLD,
146 East 20th st., one door east of 2nd Avenue, New York.

Washington House, November 1, 1852.

On the 18th of December, 1852, Mr. Dinsmore, as is shown by an original telegraph which had been recovered from the Philadelphia office, was thus telegraphed by a note written by one of my then clerks or students, and signed by me.

TELEGRAPH.

(*Confidential.*)

SAMUEL P. DINSMORE,
Editor of the Daily Mercury, Bangor, Maine.

In the case of G. *v.* G., decision has been given for the plaintiff, and he has his decree.

T. CUYLER.

Philad., Dec. 18, 1852.

Dr. Griswold, therefore, stands absolved for believing that there was a decree: and I take all the responsibility except that which properly belongs to the Court or to its President: which last I desire he or it may have exclusively.

The evidence put before the Common Pleas, on the hearing of my rule of the 18th September, 1856, *all of which*, so far as it relates to the matter of a decree, *I here print*, was of two kinds:

I. That of yet existing RECORDS, st. the record of an appeal to the Supreme Court, and other entries yet preserved in the Court books.

II. The depositions of witnesses (including that of Mr. David, the Deputy Prothonotary,) having knowledge of the making of the decree.

We have then, first,

THE RECORD OF THE APPEAL TO THE SUPREME COURT.

Consisting of several parts, as follows:—

ORDER OR PRECIPE OF HENRY M. PHILLIPS, ESQ.

CHARLOTTE A. GRISWOLD,
Plaintiff in Error,
vs.
RUFUS W. GRISWOLD,
Defendant in Error.
} S. C. Dec. Term, 1853.

Charlotte A. Griswold appeals from THE DECREE of the Court of Common Pleas Philadelphia County.

Issue certiorari to the Court of Common Pleas for the City and County of Philadelphia, to remove record and proceedings in suit for divorce, Rufus W. Griswold *versus* Charlotte A. Griswold. J. 52, 19. Returnable the 2nd Monday of December, 1853.

HENRY M. PHILLIPS,
Att'y for Plaintiff in Error.
Per H. T. C.

To R. TYLER, ESQ., P. S. C.

AFFIDAVIT OF THE LADY.

C. A. GRISWOLD, Plaintiff in Error,
vs.
R. W. GRISWOLD, Defendant in Error.
} S. C. Dec. Term, 1853.

Charlotte A. Griswold, being duly sworn, doth depose and say, that the appeal entered in the above case is not purchased, sued out, nor intended for delay, but because *she firmly and verily believes that injustice has been done.*

CHARLOTTE A. GRISWOLD.

Sworn and subscribed before me, this thirteenth day of September, A. D. 1853.

WILLIAMS OGLE, *Alderman.*

ENRTY OF SURETY.

GRISWOLD
vs.
GRISWOLD.
} Court of Common Pleas.
(Divorce.)
J. 52, 19.

David Pesoa, 160 South 2d street, approved as surety, on appeal to Supreme Court, in $100.

September 19, 1853.

WM. D. KELLY.

CERTIORARI OR COMMAND FROM SUPREME COURT TO THE COMMON PLEAS.

Eastern District of Pennsylvania, Sct.

The Commonwealth of Pennsylvania, to the Justices of the Court of Common Pleas for the County of Philadelphia, Greeting: We being willing, for certain causes, to be certified of the proceedings in the matter of the appeal of Charlotte A. Griswold from YOUR DECREE in the case of Rufus W. Griswold *vs.* Charlotte A. Griswold, sur proceedings in divorce, J. 52, 19, before you, or some of you, depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court, to be holden at Philadelphia, in and for the Eastern District, the second Monday of December next, so full and entire as in our Court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right, and according to the laws of the said State ought.

Witness the Honourable Jeremiah S. Black, Esq., Chief Justice of our said Supreme Court, at Philadelphia, the twenty-third day of September, in the year of our Lord one thousand eight hundred and fifty-three.

Allowed.

R. TYLER, *Prothonotary*.

ENDORSEMENT ON THE ABOVE.

17. *December Term*, 1853.

Supreme Court, in the matter of the appeal of Charlotte A. Griswold from THE DECREE in the case sur divorce, Rufus W. Griswold *vs.* Charlotte A. Griswold.

Certiorari to the Court of Common Pleas for the County of Philadelphia. Returnable the second Monday of December, 1853.

Rule on the appellee to appear and plead on the return day of the writ.

(J. 52, 19. Divorce Common Pleas.)

H. M. PHILLIPS.

Ret'd. Dec. 19, 1853.

RETURN OF THE COURT OF COMMON PLEAS TO THIS WRIT.

To the Hon. Judges within named, the within record, with ALL things touching the same, we send *as we are commanded.*

So answers,

OSWALD THOMPSON, [SEAL.]
JOS. ALLISON, [SEAL.]

We have, next, in the category of this same sort of evidence—I mean Record evidence—an application made a year later by different counsel—proceeding each in his own separate mode of acting—but both acting equally in behalf of the lady—to *rescind the decree.*

The petition of the lady for this relief contains at its close the following prayer:

"That the Honorable the Judges may order *that* the proceedings and *decree* of divorce, *voiding the* said marriage between the said parties be annulled on the ground that the same was obtained by fraud and imposition on this Honorable Court."

The Entry on the Court Minutes stands thus:

SATURDAY, JUNE 24, 1854.

CORAM JUDGES THOMPSON AND KELLY.

"J. 52. 19: *Div. Griswold* v. *Griswold.* On motion of *David Paul Brown, Esq.*, rule on libellant to show cause *why decree* in this case should not be *rescinded.*"

The Entry on the Docket, as I have already stated, is thus:

"June 24, 1854. Rule to show cause why *decree* should not be rescinded."

We come now to the testimony of witnesses, the *whole* of whose evidence, on this point, I now give, along with some other, (not now important, having much of it been found in Judge Allison's private drawer, but which I give in order to prevent mutilation) as to the loss of the record.

DEPOSITIONS.

Depositions of witnesses produced and examined on the part of respondent, sur rule of Court, before D. P. Brown, Jr., Commissioner, at his office, 45½ South Fifth Street, Philadelphia, on the 15th day of September, 1856, between the hours of 11 A. M. and 1 o'clock P. M., and at subsequent times.

AMOS BRIGGS, Counsellor at Law, being duly sworn according to law, deposes and says: During the years 1852 and 1853, I was in the office of Mr. Cuyler, and assisting him in his business. I assisted him chiefly in the practical details, such as preparing the pleadings, giving notices, taking and arguing rules, &c. Mr. Cuyler tried all the cases, and I argued nearly all the motions and rules. I have no recollection of giving a notice of a rule for divorce in the case of Griswold *v.* Griswold. I may have given it, but I have no recollection of it. It would be difficult for me to isolate a particular case, and recollect the giving of notice, the lapse of time is so great. I don't know that I could recollect any particular case in which I gave notice. *I have no reason to suppose the usual rule of the office was departed from in this instance.* I do not mean to say that I served all the notices personally. I prepared them, it was my DUTY to see *that they were served. Sometimes I served them myself, and sometimes gave them to an errand boy in the office to serve.*

Question.—Have you any recollection of the decree in the case of Griswold *v.* Griswold, if so please to state it?

Answer. The only recollection that I have of it, is, that on a certain Saturday, I can't exactly designate the time, I saw lying on the desk, as I had occasion to be in the office of the Prothonotary of the Court of Common Pleas on other business, on Mr. David's desk—where he is, *what purported to be a decree,* endorsed, Griswold *v.* Griswold. I did not examine it minutely. I knew that the case had been pending for some time, and took it for granted that it was the decree. *I made some remark to the clerk in reference to it, but don't know what was his reply. I left the office with the impression that that was the decree.* I alluded to it to the clerk as being the decree. I could not fix the time

with any certainty, it was during the time I was in Mr. Cuyler's office, and while Mr. Griswold was pressing that the decree should be made. It was a number of months before I left Mr. Cuyler's office, and I left there in December, 1853. *I am distinct in my recollection that the paper was endorsed as the decree in the case of Griswold* v. *Griswold.* I fix it as being on Saturday, because I remember it was regular motion day—rule day.

Question.—Is it not from the circumstance that you understood it to be a decree made on that day, that you are in part now able to say that it was on a Saturday that you saw it there?

Answer.—I certainly understood it to be a decree made that day. I had no doubt of it then, and have no doubt now. As Saturday was rule day, that is one reason why I am confident it was Saturday.

AMOS BRIGGS.

CROSS-EXAMINATION, BY DAVID PAUL BROWN.

Question.—Can you come near the time by any association at which you saw the decree, as you think.

Answer.—I don't know that I can refer to any thing that would bring me to the precise time. I have not a shadow of a doubt that it was on Saturday, but what Saturday I cannot tell.

Question.—Do you remember any characteristic of this paper which you took to be a decree of divorce?

Answer.—No, Sir; except that it was folded and endorsed. I had certainly no doubt but that it was the decree.

Question.—Do you remember what was the endorsement?

Answer.—Griswold *v.* Griswold, it was folded as papers usually are preparatory to filing.

Question.—Was that the only endorsement as far as you remember?

Answer.—It was also endorsed, Decree of Divorce. I am under the impression it also contained an endorsement of the date of filing, but of that I am not so certain.

Question.—Do you remember what date it bore?

Answer.—It might have been that day, and it might have been some day before.

Question.—Had it the initials of the Court or Judge?

Answer.—I have no recollection of that. I do not mean to say that it had not; I have been speaking of the endorsement merely. All that I know is this: that on a certain Saturday, as I am confident, I saw a paper, a Court paper, as I then believed and now believe, endorsed, Griswold *v.* Griswold; Decree of Divorce, lying by itself on Mr. David's desk, before him. To what date it referred I cannot say. My supposition then was that it was a minute of a decree made that day. But this was mere supposition, it may have very well have been a minute of a decree made on a prior day, and may have been taken off the files in order to make a certificate from it, or for some other purpose; or may have been picked up from the floor and laid there. On these points, that is, for what purpose it was lying there, or when the decree was made, I know nothing at all. The paper was lying there by itself. Mr. David had no docket or minute book before him, that I remember, except the

execution docket that I put before him. He was not the court clerk, nor was the paper on the court clerk's desk. Dr. Griswold had been attending the office very frequently before, and urging the disposition of the case. I speak, however, with regard to his anxiety to have the case disposed of from the common understanding that prevailed in the front office. I never exchanged half a dozen words with him in my life, except the usual compliments, as I did with other clients as they entered the office. ☞ *My recollection about the paper being endorsed as a decree of divorce in the case of Griswold* v. *Griswold is distinct.* I have not a shadow of doubt about that. ☜

Question.—Was this a mere casual glance at the paper, or was it connected with some business at the time?

Answer.—A mere casual glance. I was behind the railing at Mr. David's desk, at his right hand. I think I took him the execution docket, it was a docket of some kind, and was getting him to issue a writ. While he was making the docket entry it was that I saw the decree. It laid somewhat beyond his left hand, on the upper part of his desk. I did not touch it, and could not without reaching over the docket in front of him, or walking behind him around expressly for that purpose, which I did not do.

Question.—How long do you suppose you were in the immediate neighborhood of the paper?

Answer.—Say two or three minutes.

Question.—Had you, Mr. Briggs, any especial knowledge of the details and progress of the Griswold case as related to proceedings in Court, documents, records, &c.?

Answer.—No, Sir! At the same time I wish to qualify this answer; I may have filed possibly a majority, or possibly all the papers in the case. It was my business to attend to that department of the office. I docketed all the cases or saw that they were done—the dockets and evidence were under my custody. If Mr. Cuyler wished to know any thing particularly of the pleading in a case he came to me for that information. It would be impossible to give a detailed statement or history of any isolated case.

Question.—Who was the Prothonotary of the Court at that time?"

Answer.—Mr. George Carpenter.

Question.—Do you know, Mr. Briggs, of any certificate of a divorce having been applied for at that office for Mr. Griswold?

Answer.—No, Sir!

Question.—Do you know, Sir, of any notice, and if any, what notice, having been given to Mr. Griswold, of the filing of the supplemental libel.

Answer.—No, Sir, I don't know of such notice.

Question.—Do you know, Sir, of any notice, and if any, what notice, having been given to Mr. Griswold, of the rule to show cause why a decree of divorce should not be decreed?

Answer.—I have no recollection of such notice.

Question.—Do you know, Sir, of any notice having been given, and what notice, of the examination of witnesses on the supplemental libel, to Mr. Griswold?

Answer.—I do not.

RE-EXAMINATION OF AMOS BRIGGS.

Question.—Was not your glance at this paper, lying upon Mr. David's table, long enough to enable you to read the endorsement?

Answer.—Oh, yes, Sir; and to read the contents if I had open it.

Question.—Among the large number of cases in which you gave notices of motions and rules while you were in Mr. Cuyler's office, can you at this distance of time isolate any one, and tell whether notices were given it or not?

Answer.—No, I could not. I was thinking of that while Mr. Brown was asking that question.

Question.—Are you at all near-sighted, Mr. Briggs?

Answer.—No, Sir; not in the least.

Question.—Have you, from any fact which you recollect or otherwise, any impression on your mind that there was any departure from the ordinary and proper rules and regularity of Mr. Cuyler's office in any part whatever of this case?

Answer.—I cannot, as I have said, isolate one case from another; nor state any thing about one case more than another. Mr. Cuyler had a multitude of cases while I was in the office. Supposing every thing to have been perfectly regular, I should not be able to remember any particular. I have no knowledge of any thing omitted or done wrong in the case: more than in any other case. AMOS BRIGGS.

Sworn and subscribed to, this 19th day
of December, 1856, before me,
DAVID PAUL BROWN, JR., *Commissioner.*

Wednesday, Dec. 31*st*, 1856, 10 *A. M.*

EDWARD W. DAVID, being duly affirmed according to law, testifies as follows:

I have been for about twelve years a clerk in the office of the Prothonotary of the Court of Common Pleas. Mr. George Carpenter's term of office expired in November, 1853. During his administration I had the desk of the chief clerkship in the office. I very well remember that there was such a case as Griswold *v.* Griswold, a divorce case. My attention was attracted to the case, while it was in progress, particularly, because I knew Dr. Griswold as a literary man by reputation. I had his "Poets of America" in my library, and felt an interest in him from the knowledge I had of him as a literary man. I recollect that I took the trouble to read a portion of the testimony; a thing I very seldom do. The testimony I speak of was part of the Examiner's report on file. If my memory serves me, I think the principal ground was desertion. I have an indistinct recollection of making out the certificate, *from the fact that I recollect the paper was laid before me having the Judge's initials, being the "Decree of Divorce." I have no doubt that I did make out the certificate.* It is my recollection that the allowance of the decree was not on the back of the report as is usual, but on a separate paper.

George L. Dougherty was the Court Clerk under Mr. Carpenter's administration. I have *frequently* heard counsel come in and complain of *omissions* to make entries and of errors. And I have heard Mr. Dougherty make excuse to those who complained, that he had not received

from them the term and number. *Mr. Dougherty had an office of his own, and considerable business of his* own *which might account for his not giving his full attention to the business of the Court.* My attention was called to these errors and *omissions* by complaints that *were made to me as chief clerk of the office.* In looking at the Minute Book I have observed large spaces between the dates as if left open for the insertion of matters afterwards: which seems to me to be very irregular. I do not know Dr. Griswold personally On reflection I have no doubt that I made out the certificate. EDW. W. DAVID.

Affirmed and subscribed to, this 31st day
of December, 1856, before me,
DAVID PAUL BROWN, JR., *Commissioner.*

October 24th, 1856.

THEODORE CUYLER being duly sworn according to law deposes and says:—I was counsel for the libellant during a portion of the procedings in this case. The first professional act done by me in connection with the case, was the filing of the supplemental and amended libel, by leave of Court, and I have been professionally connected with the case from that time until the present. The Court granted leave to take additional testimony in the case, and after that testimony had been closed, I handed it to the Court attached to the record, and accompanied it with such remarks as I deemed appropriate in submitting the case to the judgment of the Court. After the lapse of some time, I called the attention of the Court (Judges Thompson and Allison being on the bench) to this case, and asked them if they had arrived at any conclusion. A short conference between the judges ensued, and then Judge Thompson announced the decision to be favorable to the granting of the divorce. Accompanying it were a few remarks explanatory of the reasons. I then took the customary rule to show cause why a divorce should not be decreed. I cannot now say with distinctness how the notice of that rule was given. Such notices in my office are usually given by a clerk in my employ, and the lapse of time is such now, that the gentleman who was then with me cannot say from his memory. It must however have been such as was satisfactory to the Court, *for I have a clear and distinct recollection of the calling up of the rule; of its being ordered to be made absolute, and of the proclamation being made by the crier.* Some considerable time after the appeal had been taken, (but how long I cannot now state distinctly,) I for the first time became aware that it was said that the record was deficient; and that it did not appear that the decree had been entered. I examined the docket and found that it did not even exhibit the rule to show cause why a divorce should not be decreed. I spoke to Mr. Gibson, the Prothonotary, on the subject, and he referred me to Mr. George L. Dougherty, who had formerly been, but was not then, the Court Clerk of the Court of Common Pleas. I called upon Mr. Dougherty, and called his attention to it. He went to the office of the Court, and examined with care, he found the rule regularly taken and regularly entered on the minute-book of the Court, but that he had neglected to enter it upon the current motion list, as it was *his duty* to have done, and *in consequence of that,* that there was a *lack of that customary entry which is made by*

the Judge on the making absolute of a rule. He then entered from the minute-book upon the appearance docket of the Court, the rule which had been taken, which was all that he could do, his memory of course not enabling him to supply any subsequent step. While I am not positive of it, it is my imperfect recollection and belief, *that I made a separate memorandum of the rule and of its being made absolute, had the Judge to put his initials and gave it to the Clerk*, a step made necessary and proper by the failure of the Clerk to enter the rule upon the current motion list. When I say it is my indistinct recollection, I mean to be understood as saying that it is my INVARIABLE rule to do so *under similar circumstances*, and that added to that, I have some recollection of having done so in this instance. I am confident that I followed the rule to show cause with diligence, and that the same was disposed of on its regular return day.

CROSS-EXAMINATION by D. P. Brown, Esq.

Question.—Was there any notice given to the respondent of the supplemental interrogatories and the examination to which you have referred ?

Answer.—I know of none EXCEPT that constructive notice which arises *from the posting of the interrogatories according to the rule of Court.* I may add that the lady had previously written a letter which was on file in Court, declaring in substance that she had knowledge of Dr. Griswold's proceedings, and that she desired to make no opposition to the attainment of the divorce which he sought. In all my proceedings in the case I was greatly *influenced* by that letter, for it induced me to the belief that the lady was not less willing than was Dr. Griswold himself, that the proceedings for the divorce should be successful.

Question.—Was not that letter, Mr. Cuyler, antecedent to the application to file supplemental interrogatories, and had it not therefore relation to a prior condition of the stated proceedings ?

Answer.—It certainly was antecedent to any connection on my part with any part of the case, but I did not regard the proceedings subsequent to my connection with the case as in any way varying the substantial grounds upon which the divorce was sought. I understood her letter as saying in substance, that to a divorce sought on the ground of desertion she desired to make no opposition, and that was the ground upon which I asked for the divorce.

Question.—Had you any knowledge of the circumstances in which that letter was obtained, or through which it was produced at that time ?

Answer.—I certainly had not. I found it on file and knew of no unusual circumstances attending it.

Question.—Did you take out or enter a rule why supplemental interrogatories should not be filed, or did you enter them upon motion ?

Answer.—I entered them upon motion asking leave of Court.

Question.—Did any body appear before the Examiner on behalf of the respondent at the time the supplemental examination took place upon the interrogatories administered ?

Answer.—No, Sir. No counsel appeared on her behalf.

Question.—Do you remember when your supplemental petition was filed?

Answer.—No, Sir.

Question.—Was this supplemental examination upon your new petition?

Answer.—*It was upon the whole, embracing the new.*

Question.—Was there any notice of the supplemental libel?

Answer.—No, Sir. I have no recollection of any.

I know of Dr. Griswold having made a copy of the record.* Prior to my arguing the case before the Court, I handed Dr. Griswold the papers in answer to a request to that effect from him, and he made a copy of them all. It is my impression that he made that copy in my office. I have seen a copy since which I believe to be that same copy. It is a copy which now remains on file in the office of the Court of Common Pleas. I cannot positively swear that that is the same copy, but I believe it to be so. The copy which was made was of the papers down to the time of the submitting the cause to the Court. I have no reason to doubt the entire accuracy of the copy to which I refer.

At the close of the remarks which I made to the Court when I submitted the cause to their consideration, *I handed the papers, the record, up to the Judges on the Bench—Judges Thompson and Allison, and they took it.* This is in accordance with the usual practice of the Court in all cases of Divorce, and is required I believe by an express rule. The Court did not express its opinion upon the application until after a considerable period of time had elapsed. Then, at the close of an argument of another cause, I called their attention to this case, stating the solicitude of my client, and asking if they had made up their minds in the case. The same judges were then upon the bench. They held a short consultation with each other, and then Judge Thompson expressed their opinion to be favorable to their granting the divorce. Their attention was called to this case unexpectedly to them, and I think they had not then the record of the case before them. On the argument of the motion to vacate the papers could not be found, but some days after that argument, I was sent for by Judge Allison as I understood, who exhibited to me most of the papers in the case, stating to me that HE had found them among his papers; I think he said in a drawer. *When I handed the record to the Court, it was, I believe, the entire record as it then existed. What Judge Allison exhibited to me,* was the part now in the office. I am confident of it. *I have no knowledge of the record ever having come out of the possession of the Court into the hands of any person whatever in the state in which it was delivered to them by me.* These papers which Judge Allison exhibited to me, consisted of the supplemental libel, of all the testimony taken subsequently to that libel, and of the original letter of Mrs. Griswold Myers, which had been made part of the record prior to the supplemental libel. Witness being shown papers marked I,

* This part of the testimony as far as p. 19, is not now important, as the Court allowed copies to be substituted of all the record prior to the decree; but as the loss of the record, was at one time a matter about which much comment was made, I here print it, as showing the true history of *that* matter.

says :—*these papers contain the substance of the portions of the record of which they purport to be copies. I believe them to be correct copies.**

Witness being shown the following letter :—

Philadelphia, June 17, 1853.

My Dear Sir:—

Your favour covering draft for five hundred dollars was duly received.

I am happy in the assurance that any service I may have rendered, ministered to your comfort and happiness.

In a few days I hope I may be able to advise you that the other matter, relative to your daughter is settled in a manner agreeable to your feelings and wishes. Such a result seems probable.

Truly Yours,
THEO. CUYLER.

Dr. Griswold.

Says this is an original letter of mine to Dr. Griswold, it bears date the 17th June, 1853. The fee mentioned in this letter was for services rendered in this case. It was not a charge made by me to Dr. Griswold for those services, but was a voluntary expression by him of his satisfaction of them *for conducting the case to a conclusion. That conclusion by which I mean the Decree of Divorce had been obtained long prior, and I had several times received from Dr. Griswold letters apologizing for his delay in sending me the professional compensation.*

Cross-Examination by D. P. Brown.

Question.—Can you tell me when that record was copied by Dr. Griswold ?

Answer.—I cannot, except that it was prior to the original agreement by which I mean the agreement to induce the Court to grant a divorce.

Question.—Can you tell us about how long ?

Answer.—It must have been a very short time, for it was after the closing of the testimony, and before I submitted it to the Court.

Question.—Where did he copy it ?

Answer.—I am not positive, but I believe in my office.

Question.—What did he do with the copy ?

Answer.—He took it away with him.

Question.—Did he compare it with you or exhibit it to you after taking it ?

Answer.—I have no recollection of his having compared it, or exhibiting it to me.

Question.—How did he get the original to copy ?

Answer.—From me. I gave it to him. I received from Judge Thompson all the papers prior to the supplemental libel under these circumstances. When first applied to by Dr. Griswold, I spoke to Judge Thompson, telling him I had been applied to, and asking him the position of the case. He said the evidence did not as it appeared to him make out the ground of desertion with sufficient clearness to justify the Court in making a decree. I asked him to suspend a decision, and to permit me to see if further testimony might not relieve the difficulty, he kindly

* These are the copies which the Court ordered to be substituted, and which at present make the record.

agreed to do so, and handed me himself the papers. These were the papers prior to the supplemental libel. The papers subsequent to those I gathered from the Prothonotary and from the Examiner, prior to the argument of which I have spoken.

Question.—Did you give a receipt for any of those papers?

Answer.—I think I gave a receipt.

Question.—Who took up those papers on the receipt, in other words did not Dr. Griswold take up the papers on the receipt from the prothonotary?

Answer.—No sir, he did not. I took them up.

Question.—Did not those papers remain in your hands until you presented them to the court?

Answer.—I am confident they did.

Question.—When did they next come into your hands?

Answer.—I never saw them again until Judge Allison sent for me, as I have already stated.

Question.—Did you ever apply for a certificate of the decree, and, if so, when?

Answer.—I cannot say if I did or did not.

Question.—When did you first learn that Dr. Griswold was married again?

Answer.—I saw his marriage in the newspaper, and then for the first learned that he had even contemplated marriage.

Question.—Have you any letter or copy of a letter in which you announce the decree of divorce to him?

Answer.—I have not, but I did advise him both of the favorable decision of the court and of the decree.

Question.—Did you advise him by letter?

Answer.—I did—you may say by letter.

Question.—Of which you have no copy?

Answer.—Of which I have no copy.

Question.—When did you first learn that Dr. Griswold was married again?

Answer.—I saw his marriage in the newspaper, and then for the first learned that he had even contemplated marriage.

Question.—Have you any letter or copy of a letter in which you announce the decree of divorce to him?

Answer.—I have not, but I did advise him both of the favorable decision of the court and of the decree.

Question.—Did you advise him by letter?

Answer.—I did—you may say by letter.

Question.—Of which you have no copy?

Answer.—Of which I have no copy.

Question.—Have you seen that letter since?

Answer.—I think Dr. Griswold read to me, in my office, one of the letters.

David Paul Brown here calls for those letters referred to in the preceding answer.

Mr. Cuyler states that he is informed that Dr. Griswold says he handed that letter to his brother-in-law, Mr. McCrellis, of Bangor, Maine, who at his (Dr. Griswold's) request had made search for it without finding it.

Call renewed for the letters.

Question.—At the time of the argument, on the motion to rescind, were there not some delays for the purpose of enabling Dr. Griswold to obtain his papers from New York, or some suggestion that it would be necessary that they should be procured?

Answer.—I do not remember that there was any actual delay after the case was commenced. I think there was a suggestion for a postponement before the case was begun, based upon the absence of Mr. Kemball in Europe, upon a proposition to take his testimony.

Question.—Were the documents or papers received from New York during the pendency of that proceeding?

Answer.—I do not recollect any, except a telegraphic message on the subject of Dr. Griswold's clerical character, which was in answer to an inquiry caused by a remark of Mr. Sherman in his opening.

Question.—How long after that argument was the copy of the record received from Dr. Griswold?

Answer.—I cannot say how long, but some time after. While the argument was progressing I stated, upon Dr. Griswold's authority, that he had such a copy in New York. By my direction he telegraphed to his friend, Mr. Hynsdale, of New York, to go to his study, get it, and transmit it forthwith, Mr. Hynsdale was not able to find it, or else the drawer was locked,—he telegraphed one of those things in answer.

Question.—What is Mr. Hynsdale's first name?

Answer.—I think it is Theodore.

Question.—Did you learn where Dr. Griswold got those copies?

Answer.—I think he went to New York himself and got them after the decision. I don't know from what particular place.

Mr. Wallace here calls on the respondent to produce the copy.

EDWARD M. HEIST, being duly sworn according to law, disposes and says:—I belong to Morse's Telegraph Office that transmits telegraphs North and South. I am a clerk in the office. A telegraph despatch (ante p. 7) being shown to witness, in these words—st., and produced by him, he says this is a paper found recently among the old papers in the office, and found in what is called the battery where we file away old papers It was received by me at the counter on the day of its date, Dec. 18th, 1852, for transmission to Samuel P. Dinsmore, Bangor, Maine, $1.55 being paid for its transmission—and it was transmitted immediately. It is against the rules of the office to part with original papers, but a copy is hereto annexed.

EDW. M. HEIST.

Sworn and subscribed to, this 16th day of
Nov. 1856, before me.

DAVID PAUL BROWN, Jr., *Commissioner.*

JOSEPH A. BONHAM, a witness called on the part of respondent, being duly affirmed according to law, testifies as follows:—

I am a member of the bar; I was admitted in September, 1853; read law with Theo. Cuyler, Esq., in Walnut St.; was in the office between three and four years. I was a free student in Mr. Cuyler's office, and it was my duty to do whatever he required of me—I have frequently assisted in taking testimony in court for Mr. Cuyler; I almost always attended Mr. Cuyler in the trial of cases whether I took testimony or not; it was my duty to carry his bag and books for him to court, and I usually remained in court to hear the issue of everything he was concerned in.

I have seen a telegraphic message, at the Telegraph Office, directed to Mr. Dinsmore, at Bangor, State of Maine. (See ante p. 7.) It was handed to me by one of the operators at the office some ten days since; the message is in my hand writing; *it is correct in its statements* to the

best of my knowledge and belief; from my recollections *I was aware of its correctness when* I *telegraphed the fact.*

I believe, *from my recollections,* that the Telegraph Message *was written by me in the court room; I am satisfied of that—written at the Court House room and handed to Mr. Cuyler for his signature there;* it is signed by Mr. Cuyler; *I believe that I wrote that upon the disposal of the case in court and after hearing its disposal.* I am satisfied that the Telegraph Message was not written in the office but in the Court room.

JOSEPH A. BONHAM.

Affirmed and subscribed to, Nov. 28th, 1856.
DAVID PAUL BROWN, ESQ., *Commissioner.*

Monday, Nov. 17*th,* 1856.

THEO. CUYLER, *Recalled.*—Since my last examination I have had the opportunity of examining papers and letters, which enable me to speak with much more precision in this case. These papers and letters were written at the time the proceedings in Dr. Griswold's Case of Divorce were taking place. I am enabled by reference to them *to fix dates with entire confidence as to the accuracy of these dates.* They also embody my contemporary knowledge and statement of the facts. And thus enable me to be more precise in my statement in these respects. The papers I now produce.

[*Dr. R. W. Griswold to T. Cuyler.*]

New York, 18*th Nov.*, 1852.

MY DEAR SIR:

I enclose the exhibits originally offered in my case. I hoped it would never again be necessary to show them to any one.

I shall await very anxiously the next proceedings in the case.

In haste, yours, very sincerely,
RUFUS W. GRISWOLD.

THEO. CUYLER, ESQ.

[*Same to Same.*]

New York, Nov. 29, 1852.

MY DEAR SIR:

I was very glad to receive your letter of yesterday, and am sorry that I have not a copy of any thing I ever wrote to Mrs. Griswold. I hope, however, that this will not affect my interest. I shall see you as soon as possible after the result, whatever it may be.

Yours, very truly,
RUFUS W. GRISWOLD.

[*Same to Same*]

New York, Dec. 4, 1852.

MY DEAR SIR:

A week has passed since my case was submitted to Judge Thompson, and his decision is so long delayed, that I cannot help the worst apprehensions as to the result. I pray you advise me of what has been done, what is the prospect, and when you think I may expect a decision.

It strikes me that my interests are continually endangered by delay—the case becomes an old story, is regarded with indifference, and is likely to be decided adversely, and with very little of the consideration it would have received the night on which you were heard on the subject.

Pray you send me a line by the return mail. When there is a decision, write per

Morse's Telegraph, (and do *not* prepay) directing to Twentieth Street, one door east of Second Avenue.

Yours, very truly,
RUFUS W. GRISWOLD.

THEO. CUYLER, ESQ.

[*Memorandum for Telegraphing.*]

Direct *Letters*,
Dr. Rufus W. Griswold, New York.

As soon as there is a decision send dispatch as follows:

Decree granted, November 1852,

Or, Decree refused, November 1852.

THEO. CUYLER.

To Samuel R. Dinsmore, Editor of the Bangor Mercury, Bangor Maine.

And to Rufus W. Griswold, 146 East Twentieth Street,
one door east of Second Avenue, New York.

Washington House, November 1, 1852.

These letters I received from Dr. Griswold, in due course of mail from the dates they bear. I have found them in a recent thorough examination for papers. I am enabled now to say, after reading these letters, that the argument in Dr. Griswold's case, to which I had referred in the previous part of my testimony, took place towards the close of the month of November, 1852 Early in the month of November, 1852, Dr. Griswold was in the City of Philadelphia, was aware that his case was ready for a hearing, and was about to be submitted to the Court. He then left with me directions for informing by telegraph himself and his friend, Mr. Dinsmore, of Bangor, Maine, of the result of his case. I have also in the recent search found these direction, and have now produced them as above. I have also seen an original Telegraphic Message, bearing date *Dec.* 18*th*, 1852, the body of it in the handwriting of Mr. Bonham one of my students, I believe; the signature of it is in my handwriting. The Message is addressed according to the instructions which I have just produced, to Mr. Dinsmore. *I have no doubt but that this Message was sent by me on the day it bears date. And I have as little doubt that whatever I stated at the time either by Telegraph or letter was the literal and exact truth.* I have also had the opportunity of reading certain letters which I now produce,* and which I have no doubt are original letters coming from the possession of Dr. Griswold. One of them dated "Sabbath, 19th December;" another dated "Monday morning," and another dated "Bangor, December 20, 1852."

I keep in my office a letter list, in which it is the duty of those who deliver letters to enter the date and the name, and the address upon the letter. I believe it to be always accurate, so far as it goes; that is,

* These letters being long and of a somewhat private kind are not here printed. The only object of them was to show that, which from their dates they clearly did, that information had been previously given to Dr. Griswold's friends in Bangor, Maine,—that a decree would probably be given on the 18th December, 1852; and also to show that a rule to show cause had been taken returnable to *that* day and that the clerk's entry of the 31st Dec., as the date of the rule, was a clerical error.

perhaps there are occasional neglects to enter, but what is entered is correct.

By reference to that list I perceive I wrote to Dr. Griswold, Dec. 12*th*, 1852; *I have no copy of that letter; Dr. Griswold has made very diligent search for it, but finds that it was* sent to Bangor, Maine, and *hitherto has not been found; I believe the contents of that letter to have been information to Dr. Griswold that the court had pronounced a favorable opinion in his case, and that the former preliminaries which precede the formal entry of the decree under our practice would be finally disposed of on Saturday, the* 18*th of December.*

Question.—Have you such absolute confidence in the accuracy in all particulars, and especially in the matter of dates, and the exact legal meaning of terms you used such as "Decree," as to be able to state here that what you wrote or telegraphed was literally and exactly correct; and that if on any point, and especially the point of date, and more especially of the date of a rule, to show cause why a decree of Divoroe should not be granted, your statements by telegraph or letter are at variance with the Clerk's minutes on the Minute Books, that your statement is correct, and the Clerk's Minutes or Docket incorrect?

Answer.—☞ *Whatever I wrote or stated contemporaneously, was the truth; if contradicted by any entry of the Clerk, I feel assured that the Clerk was in error.* ☜ I beg leave to add that I am often careless in placing the term and number to a rule, the reason being, that taking them often in open Court where I have not access to my Docket, I am not able from memory to supply them. I am also not in the habit of placing the date to papers intended to be filed in Court, my opinion having been that they speak from the date of their record, or time of filing. It might easily occur under such circumstances, that the Clerk not being furnished with the term and number, nor date, might postpone the entry of a rule until he should find or be supplied with the term and number. ☞ I desire to state in the most unqualified terms, from clear and distinct recollections, the making of the final decree and the proclamation which attended it, and my conviction that the date of that decree was the 18th day of December, 1852.

I am convinced that the 18th day of December, 1852, was the return day of the rule to show cause. I advised Dr. Griswold several days previously to that, and as I believe by my letter, mailed Dec. 12th, of the favorable opinion expressed by the Court, and that he would have his decree on the 18th. When I first came into the cause, Judge Thompson stated to me that the evidence of the case as submitted to him by Mr. Ingraham, did not exhibit the fact of desertion with sufficient clearness to sustain a decision in Dr. Griswold's favor by the Court. This was before I argued the case. It has frequently occurred to me, as I suppose it has to other gentlemen of the Bar in active practice, that I have failed to give the Clerk the memorandum of a rule to show cause, at the time I obtained the Rule, and I may add in reference to the particular rule to show cause in this case, that I infer that by reason of the omission of Term and Number, the Clerk failed to enter it at once by two circumstances, viz.,

first, that he omitted to enter it in the Current Motion List, and second, that he omitted to enter it on the Certiorari and Divorce Docket.

He did not place it on that docket until more than two years afterwards, and then only upon my calling his attention to the omission, as I have already stated. I have seen the Minute Book, and I know the day of which the Clerk has entered the rule to show cause.

Question.—When you speak of not delivering a minute to the Clerk of rules to show cause, or other rules until after the day of the rule granted, do I understand you to speak of rules clearly audible and certainly granted in open Court?

Answer.—Unquestionably so. I speak peculiarly of rules taken in that way.

I have already stated that notice of rules were given by me personally, but usually by clerks in my office, understanding rules in my office, *which rule it was understood were to be rigidly observed. I have no reason to suppose that there was any departure from the ordinary rules of the office in this case.*

THEO. CUYLER.

Sworn and subscribed to this day,
17th November, 1856, before me,
D. P. BROWN, *Commissioner.*

GEORGE L. DOUGHERTY, a witness for Libellant, being duly sworn according to law, deposes and says:

Question.—Have you any recollection in regard to the case of Griswold *v.* Griswold in the Common Pleas: a divorce case, June Term, 1852, No. 19. If so, state fully what you remember, and state particularly what you remember about dates; state also what was Mr. Cuyler's usage in regard to dating and putting term and number to his memoranda given to you while clerk for entry?

Answer.—I remember that there was such a case as Griswold *v.* Griswold, a divorce case, and that Mr. Cuyler was counsel, but in the immense number of entries which were made by me while I was clerk, I cannot remember any particulars of this case, nor any precise dates. I remember this however very well, that Mr. Cuyler seldom if ever put term or number to his memoranda handed to me while clerk, and that by omissions in this respect, I was involved in frequent trouble and at a loss where to post his rules in the proper docket. I sometimes had to wait until I could see him and get the proper information, or get it otherwise. I generally, however, entered them on the minute book as soon as I received them, *but I cannot say that he gave me the memoranda of the rules the day he took the rule.* Gentlemen of the Bar, while I was clerk, *varied in some degree one from another in their habits about these matters;* some being particular and accurate and giving me no trouble, and involving their cases in no risk, others being in degrees the reverse. *Mr. Henry M. Phillips was particular,* so Mr. St. George T. Campbell. I never remember any trouble with Mr. D. P. Brown. But with one exception, none was so much the worse as Mr. Theo. Cuyler; and in the excepted case the gentleman was not more so. Mr. Cuyler

might have taken a rule one day, and *come in days afterwards and put the paper on my desk without explanation.* I do not know that he did so in the specific case, but he might have done so. In thus speaking of Mr. Cuyler's habits, I confine myself entirely to his habits of intercourse with me as clerk. I do not mean to be at all taken as speaking of his professional habits generally, or of his habits of doing other professional business, or of giving notices to his clients or opponents, where the entire responsibility was with him or his own clerk. I mean only to say that he expected me as desk clerk to take trouble that he ought to have taken himself as counsel. I meant to make my minutes right in the matter of dates as in all other things; but *I had an immense number of entries to make, and had frequently to make them when pressed for time and under other unfavorable circumstances.* I don't know that they are wrong in anything, but they may be. If they are, the fault has probably been with the bar from the causes I speak of; for unless the memoranda are properly endorsed with term and number, and given to him at the right time, it is absolutely impossible for any clerk to do his duty with the certainty of being right in it without an amount of trouble, which he could not take, and is not bound to take. *I am not surprised to hear that in any case of Mr. Cuyler's a question has arisen as to date of entry.* I should from his usage already mentioned be *more slow to* speak with confidence *of the accuracy of an entry made by me in a case of his, than I would in the case of most other gentlemen of the bar.* With this explanation, I can only refer to the records for what is upon them.

CROSS-EXAMINATION by D. P. Brown, Esq.

Question.—When did you become Court Clerk, Mr. Dougherty, and how long did you remain so?

Answer.—I became Court Clerk on the 1st of December, 1850, and remained so for three years, up to the 1st of December, 1853.

Question.—When was your notice first directed to the case of Griswold *v.* Griswold. What did you know of it, and what portion of the record fell within your notice or duty?

Answer.—My notice was first directed to the case when the first motion in it was made in open court. My special notice was directed to it when it became a matter of notoriety on the motion to vacate the decree. I did not know any thing remarkable in the case, though, if I remember, it was a somewhat tedious one. It was my business to make motions on the minute book, and to docket all motions made in open court.

Auestion.—Of what and when was the record made; upon whose authority, and from what document, and how, when, and by whom furnished?

Answer.—No formal record was ever made up, that I know of, by any one, though there may have been. It would not have been my business to make it.

It was Mr. David's business to make out certificates of divorce. The entries on the minute book, and dockets of motions made in open court, which may be called the record, were made, I believe, mostly by me; and

the entries in the case of Griswold *v.* Griswold were made on the same authority as I usually make entries in other cases; that is to say, on the authority of counsel or memoranda furnished by themselves, sometimes having a judge's signature or initials, or on the order of Court, or frequently from the judge's entries made by themselves on the argument or motion list. The memoranda are frequently furnished by counsel, and I presume were so furnished in this case, but I remember nothing of this case especially, more than of others; I speak from presumption.

Question.—Were you present regularly on Saturdays during your time of service; and if so, do you know of any application for a rule to show cause why a divorce should not be decreed, or of any decree furnished on such alleged order?

Answer.—I made it my rule, if at all possible, to be present on Saturday, because it was my busiest and most important day, and I was present, *when not sick*, or unavoidably *absent.* I cannot single this case out from other cases and say what motions were made in it. For the proceedings, I can only refer, as I have already stated, to the record.

Question.—State what entries were made in relation to either of these matters; when and where made; at whose instance, and under whose authority?

Answer.—For that I must refer to my former answer. The minute book will show them. The entries were made sometimes in the court-room, and sometimes in the Prothonotary's office. They were made, so far as it was practicable for me to make them, on the day of the motion, but were not always so made, as counsel did not furnish me the requisite memoranda on the day the motion was made. It sometimes happened that I had not time on that day; sometimes the amount of business was very large in one day, and I could not do it on the same day.

RE-EXAMINATION.

Question.—Can you, Mr. Dougherty, state, from your memory, what entries were made in any divorce case whatever during the term of your clerkship.

Answer.—I cannot tell what motions were made except by looking at the books that are in the clerk's office, and open to every body as well as to me.

GEO. L. DOUGHERTY.

Sworn and subscribed to, Jan. 12th, 1857.

DAVID PAUL BROWN, JR.
Commissioner.

It will be seen by the remarks and course of the depositions, that one point which was recently made by my colleague, in the argument of my rule of September 18th, (see ante, p. 6,) was the *date* of the decree: he contending on the evidence of my telegraph and letters, that it should be as of the 18th of December, 1852, although the clerk's Minute Book, if correct, would show that even the "rule

to show cause why a decree" should not be granted was not taken until the 31st of December, some days after. (See ante, p. 3.)

The opinion given by the court renders it unnecessary that I should much discuss this point of date, as the court refused to enter on its minutes a decree as of *any* date, or even of a *blank* date, which my rule of 18th September, (taken before I had been able to recover my telegraph and while I was uncertain of the date) contemplated: and which my colleague, who argued the case, was willing to accept, if the court thought that the 18th of December was not the day.

I shall say something, however, about this date hereafter, and I now therefore put before my reader, as I did before the court, a few illustrations taken from Mr. Dougherty's own Minute Books of the manner in which he kept his Minute Books. I might give many more. Those I do give are only a few illustrations, hastily observed in two Minute Books, just before the argument began, and now put before the reader just as they were put before the court. I refer to the Minute Books by page and number. The books can be seen of every one, without fee: and any one who does look at them, will see not only the specific and acknowledged blunders of *commission* that I speak of, but will see also that Mr. Dougherty left at the end of his entries of almost every day, a page or more to make other entries, but which never to this day, judging from the blanks yet remaining, have been made. What errors of *omission*, which in the way that the court finally decided my rule, is the only important point in issue between me and it, Mr. Dougherty made, no man living, of course, can tell. *Omitted* entries, like dead men, tell no tales. But even the few illustrations which I here give, illustrations of blunders of commission, will show how far Mr. Dougherty merited the character of a careful or accurate clerk, and how far either his entries or his non-entries should balance positive testimony. I remark on the matter hereafter. I am now merely putting before my reader the evidence in the case, the same evidence that I put before the court. Here it is, on the matter of the clerk's entries.

BLUNDERS IN THE CLERK'S MINUTE BOOK, No. 13.

Page 6. An entry begun and not finished.

" 65. Six entries upon all sorts of subjects, all made as of *October* 25, 1851, over which we find this comment "*Error*, should be entered *November* 1, 1851."

" 109. An entry under date of Nov. 28th, 1851, over which is this comment, "*Error*, should be 26th," showing that the entry was made two days too late; (a case exactly, as I suppose, like Dr. Griswold's entry of the 31st.)

" 123. An entry made by the clerk of his own case as counsel.

" 137. An entry over which is recorded, "Error," particulars not given.

Page 160. Similar entry,—"Error," no particulars.
" 166. Do. do. do. do.
" 243. Do. do. do. do.
" 277. "*Error*, see page 277;" an entry made on the 18th March, 185?, which "Error" shows ought to have been made on the 13th; three days before.
" 330. An entry made under date of April 7*th*, 1852, over which is this comment, "Error, April 8*th*, 1852."
" " Exactly similar entry.
" 365 to 372. ☞ Fifty entries ☜ made as of April 23d, 1852, and as of things done before Judge Allison, which a subsequent and interposited entry shows were done on a different day, (April 24th,) before a different court.
" 367. An entry regularly made and struck out as a blunder.
May 22, 1852.* Do. do. do.
May 24, 1852. Great blanks left in the middle of the days proceedings, obviously to enter matters which ought to have been entered, but which to this day have not been.
June 8th. Same thing to a less extent.
May 29th, 1852. An entry over which is recorded, "*Error*," particulars not given.
July 23d, Do. do. do. do. do. do,

MINUTE BOOK, No. 14.

Page 40. Entry begun but never finished.
" 49. "Error," no particulars given.
" 55. An entry as of October 19th, 1852, over which is this comment, "Error; next day."
" 67. "Error," no particulars given.
" 86. Do. do. do.
" 88. Mr. Dougherty as clerk making entries of his own cases as counsel.
" 105. Entry begun but never finished.
" 117. "Error," no particulars given.
" " Do. do. do.
" 135. Do. do. do.
" 144. Do. do. do.
" 145-151. Great blanks left in the middle of the day's proceedings, obviously to enter matters which ought to have been entered, but which to this day have not been.
" 151. Entry begun but never finished.
" 185. An entry regularly made and struck out as a blunder.
" 280. An entry made as of March 5, 1853, over which is this comment, "Entered before," no particulars as to *when*, or anything else are given; but by searching it appears that it was entered on p. 276, two days before.
" $338\frac{1}{3}$ and $338\frac{2}{3}$. Entries which are obviously post entries; the entries of a *preceding* day, being, it is perfectly clear, made after those of the subsequent days had been finished.
" 432. Nearly a whole page of entries made by somebody else than the clerk: apparently by counsel.
" 510. Obviously Post entries. No names of judges given. Entry begun but never completed.
" 529. Entry of a grant of a charter all struck out and this comment endorsed, "*Inadvertently* entered."

* After page 403 the Minute Book has never been paged at all, of course nothing after that page can be found in it by the Index, which has not been brought up.

October 19, 1853.* A direction written in lead, by counsel or party to the Prothonotary to insert certain matters which he had apparently omitted to insert.

" 29, 1853. "Error," no particulars given.

November 5, 1853. An entry made under date of November 5th, 1853, over which is this comment, "Error, *should be November* 19, 1853."

In addition to these various blunders of the court clerk not having reference to this particular case, it was shown, that *in this particular case, he had never put the "rule to show cause why a divorce should not be decreed" upon the current motion list at all.* or under any date whatever: a most important omission, as I shall hereafter show, and one which makes a complete explanation of the fact of there being no *record* of the making absolute of the rule to show cause, in other words of the decree of divorce.†

The evidence above given comprehends all the direct evidence as to fact or date of the decree. I deem it proper, however, to add the rest of the depositions, in order that all the evidence which was taken, having reference in any way to the decree may appear: and in order that Dr. Griswold and his New England friends may stand absolved of anything which is properly chargeable to *others*, and not properly nor at all chargeable to either him or them. As I have said before there was a decree, and I informed Dr. Griswold and his friends that there was. The responsibility of that I assume, myself, fully, entirely and alone; and I leave it to the *bar* here and everywhere else to decide on the evidence already given, whether I assume more than I can bear. The evidence now given, as I have said, is merely directed to the moral part of the case so far as it concerns Dr. and Mrs. Griswold, who of course stand quite absolved.

November 25, 1856, 10 *o'clock, A. M.*

Sumuel P. Dinsmore being duly sworn according to law, deposes and says:—I reside in New York City. I have resided until lately in Bangor, Maine. I came on here at the request of libellant's counsel, for the purpose of being examined in this case. I studied law in Bangor with Mr. William H. McCrellis, the brother of the lady who is married to Dr. Griswold. I lived with him for the last eight or ten years in the same family with him. I came to New York in September last. I have been for the most of the time almost an inmate of Mr. McCrellis' family.

* The paging of Docket, No. 14, stops with page 562. Of course the Index has not been brought up, and nothing can be found by it after page 562.

† For non-professional readers it may be necessary to state, that when "a rule to show cause is granted," it is "returnable," as lawyers say, to some subsequent day; by which we mean that it will be heard and decided or disposed of on that day. The duty of the clerk is to enter or make a list of all these rules on a book called the "Current Motion List; a book which the court takes up before them, and calling the cases out, one after the other, enters on it, in their own hand, what is done with the rule. The clerk, as I have said in the text, omitted to put this case on the Motion List. (See my testimony ante, on pp. 14 and 15.)

Mr. McCrellis is a lawyer, and has been a distinguished advocate of the State of Maine, and attorney of the State for the County of Penobscot, where he resides. He had much repute as a man of great legal acumen. He was the protector and had the supervision of his sister who married Dr. Griswold. She was his only sister. He has always had a very affectionate interest and regard for her. She went to school at his expense, and she has resided for the last twenty years with him. Their parents are both dead. She has resided with him for the last twenty years except when she has been travelling or visiting, when it has always been at his expense. He has always been her adviser and counsel. Witness being shown the legal telegraph (printed ante, p. 7,) says:—A despatch to this purport was, *I believe*, received at Bangor, at my office, on the day *of its date, Dec.* 18, 1852. *I was in Boston at the time.* Mr. McCrellis was there also. I sent the despatch on my return to Bangor. I had been previously apprised, previously to the eighteenth, that a despatch would be sent to me from Mr. Cuyler to be handed to Miss McCrellis, informing of the *result, whatever it might be, of this hearing in Philadelphia—this was to settle it one way or the other.* I saw the despatch in two or three days after its date on my return to Bangor, on the mantlepiece at Mr. McCrellis' house, and before the marriage of Miss McCrellis to Dr. Griswold. Both Mr. and Miss McCrellis had seen it, and were both expecting it—a despatch of such purport. Dr. Griswold informed them that there would be a despatch announcing the result. They had had some solicitude on the subject; the ceremony had been put off once because the decree had not been obtained at the time expected. Mr. McCrellis was in a state of mind about it that would dispose him to scrutinize the matter carefully. He was satisfied that the decree had been granted.

I have an impression from my contemporary recollections and all the facts about it, that there was a letter from Mr. Cuyler, though I do not think I ever saw it, of the same purport and date as that despatched. I am quite confident the letter was dated or written on the eighteenth; that it was addressed to Dr. Griswold, forwarded to Miss McCrellis, and by her endorsed to her brother, then in Boston, and it was upon *the assurance of that letter* that Mr. McCrellis consented to the marriage of his sister to Dr. Griswold, he having then, or previously, in his possession a copy of the record of the case as it stood at the time of granting the decree. I heard these things spoken of at the time and since. I was on terms of such intimacy that all these things were discussed in my presence, and I *was consulted upon* them from time to time. A day had been previously fixed for the marriage, of which some *few* of the friends of Miss McCrellis had been advised, among the number myself, and Miss Eliza W. Bruce, an intimate friend of Miss McCrellis. It was put off because no intelligence of the decree had arrived. This directed our attention entirely to this affair at Philadelphia, and on the arrival of Mr. Cuyler's letter and despatch, we were all rejoiced. Dr. Griswold immediately came to Bangor, and the marriage took place upon the assurance of this letter and despatch.

I am acquainted with the hand-writing of Miss McCrellis. The letter dated "Sabbath 19th" and "Monday morning," are in her hand-writing.* I have read the Exhibit, dated Bangor, Nov. 21, 1856, signed C. P. Roberts.† Mr. R. is a man of great accuracy; of very tenacious memory and cautious in his statements. What he states comports with my recollections, so far as I know of the facts, and the facts that followed on this tally with it exactly when Mr. Roberts informed me that papers and letters had been received during my absence, and mentioned that one had been sent for by Miss McCrellis—a despatch addressed to me from Philadelphia; and in the multiplicity and importance of Mr. McCrellis' affairs at Boston, for they were very weighty concerns, it would not be unlikely that the letter would be mislaid, or if he had brought it home in any of his coat-pockets, the letter being of a private nature it would not be preserved in any of the files of papers in his counting-room I think Mr. McCrellis acted more likely on the letter than on the despatch. As I remember the letter, as having heard them speak of it at the time, it was a congratulatory letter; just such a letter as counsel would naturally address to his client on the auspicious result of a suit. If the letter was in existence no one would know where to find it; Mr. McCrellis is a man of immense concerns, going about from Bangor to St. John, New Brunswick, Montreal and Sherbrook, Canada East, and Quebec, Canada East, carrying large quantities of papers with him. I know they have made all search for the letter, and have been very solicitous to find it, but have not found it.

My memory about it is, that this letter and despatch were on or about the eighteenth. A day or two afterwards I came to Bangor. I was shown this despatch, and I got certificate of notice of intentions for the marriage.

SAMUEL P. DINSMORE.

Sworn and subscribed to this 25th day
Nov'r, 1856, before me,
DAVID PAUL BROWN, JR., *Commissioner.*

* See ante, page 21, note.

† OFFICE OF BANGOR DAILY AND WEEKLY JOURNAL,
Bangor November 21, 1856.

In December, 1852, being then connected with the editorial department of the Daily Mercury with Mr. S. P. Dinsmore, in his absence a telegraphic despatch was transmitted to him and opened by me, which was confidential, from T. Cuyler, Philadelphia, and which stated that in a case of G. *v.* G. a decision had been given the plaintiff, and that he had his decree. This is the substance of the despatch according to my best recollection. Having to-day seen a copy of a despatch, found in Philadelphia, signed by T. Cuyler, and dated December 18th, 1852, stating that in the case of G. *v.* G. decision had been given for the plaintiff, and he has his decree, directed to Mr. Dinsmore, I have no doubt it is the same despatch opened and read by me, as before stated. That despatch was put aside by me to await Mr. Dinsmore, but it being sent for by Miss McCrellis, now Mrs. Griswold, I sent it to her.

C. P. ROBERTS.

Subscribed and sworn to before me,
JAS. S. ROE, *Jus. Peace.*

Mr. Dinsmore adds:—It may appear strange to you that Mr. McCrellis did not insist upon seeing a copy of the whole rolls including the decree, but in similar proceedings in the State of Maine, the whole matter is finished when the decision comes from the lips of the judge. It is minuted on the docket—the clerk extends it at once in a book of records, that book is the record of the case—the papers in the case are comparatively of no consequence after that, and counsel feel that their whole duty is done when they hear the decision from the lips of the judge. We are never troubled with a loss of the records in the case, because the records are in the books. SAMUEL P. DINSMORE.

Attest. D. P. BROWN, *Commissioner.*

COMMISSION.

Interrogatories to be administered to witnesses, on behalf of libellant, on commission to Bangor, Maine.

1. State your name, profession, and place of residence.

2. Have you any knowledge of any communication by letter or telegraph from Philadelphia, in regard to a decree of the Court there in the case of Griswold *v.* Griswold? If so, state what you know fully and particularly, and if you have any such letter and telegraph in your possession or control, append the same to this deposition—and if you have not the same in your possession or control, state what has become of it, if any was written or sent.

3. Do you know any other matter or thing material to the interests of the parties libellant, or respondent, in this case? If so, state the same fully and particularly, as if thereunto required.

CROSS-INTERROGATORIES by David Paul Brown, Esq.

4. *Cross-examined.*—If you answer that you have knowledge of a communication by letter or telegraph, as inquired of in the second Interrogatory in chief, state by whom it was written or signed—and particularly what was its date, and when it was received, and by whom.

WILLIAM H. MCCRELLIS, a witness produced, sworn, and examined on the behalf of the petition.

To the first Interrogatory he says:—

My name is William H. McCrellis; I am a lawyer retired from practice for some six years past; my residence is at Bangor.

To the second he says:—

I do know of two such communications, one by letter and one by telegraph; both were from Philadelphia, and in relation to a decree then in case of Griswold *v.* Griswold, a divorce case pending in some court in that city. The letter purported to be, and I have no doubt was, signed

by Theodore Cuyler, Esq., of Philadelphia, addressed and sent to Dr. Rufus W. Griswold, of New York, and by him, as I understood and believed at the time, and now believe, forwarded to my sister, then Miss McCrellis, and by her forwarded to me, then being temporarily at Boston. This *letter was dated, I think, Dec.* 18*th*, 1852, and informed Dr. Griswold, that a decree of divorce had been granted in his case, and offering Mr. Cuyler's congratulations on the termination of the suit in his favor. I arrived home, at Bangor, about Dec. 24th, I think, and then my sister showed me a telegraphic despatch, which she stated had been received by her from Mr. Dinsmore's clerk in his absence; that despatch *was dated Dec.* 18*th*, 1852. Both letter and despatch announced in unqualified terms that a decree of divorce had been granted by the Court. I have seen what purports to be a copy of a despatch recently found in the Telegraph Office in Philadelphia, which is as follows:—

"SAMUEL P. DINSMORE,
"Editor of the Daily Mercury, Bangor, Maine.
"Confidential.
"In the case of G. *v.* G., decision has been given for the plaintiff, and he has his decree. T. CUYLER.
"Philadelphia, Dec. 18th, 1852."

And have no doubt that that is a true copy of the despatch exhibited to me by my sister, as before stated. I am sure it is substantially a copy of it.

Previous to the receipt of these communications, letters had been received which induced us to expect that a divorce would be decreed on the 18*th of December.*

I was at that time the sole adviser and protector of my sister, knew of Dr. Griswold's former marriage, and that proceedings were pending on his petition for a divorce, and without clear and satisfactory assurance that he was liberated from his former wife, I should not have consented to my sister's marriage, nor would she have married him without such assurance.

I have believed, and do still believe, though on this point my recollection is not so distinct as on others, that I once had a *certificate of divorce* in that case *under the seal of court, in my possession, and of a date prior to my sister's marriage.* I do know that I had in writing from Philadelphia, and from Mr. Cuyler, the most positive assurance that the divorce had been decreed before my sister's marriage, *an effectual, positive, and legal decree, as the word decree is used in courts of law.* I have not in my possession or control either said letter or despatch. I do not know where either is. I have made diligent search among all my papers for all the before-named papers, and have not been able to find any of them and believe them all to be lost. I have no recollection of seeing either the letter or despatch since the time I read them, and have no knowledge what became of them. I have been absent from my home a large portion of the time since, engaged in extensive business

operations at various points distant from each other, passed a considerable portion of my time in travelling between these points, and have taken care of no papers but those of pecuniary importance.

To the third he says:—

After my sister's marriage she resided with Mr. Griswold in New York, under every appearance of comfort and respectability, until proceedings were commenced to set aside his divorce on the ground, that it was obtained by fraud. I then invited her to make my house her home until those proceedings should be terminated, which invitation she accepted, and still resides with me separate from Dr. Griswold, awaiting the result.

CROSS-EXAMINATION.

To the Cross-interrogatory he says:—

I have stated fully my knowledge and information relating to the subject matters of this interrogatory in my former answers, and have nothing to add.

W. H. McCRELLIS.

Answers of CHARLES P. ROBERTS, a witness produced, sworn and examined on behalf of the petitioner.

To the first Interrogatory he answers and says:

My name is Charles P. Roberts, I am by profession a lawyer, but for several years have been engaged as editor of a newspaper. My residence is at Bangor.

To the second he says:—

In December, 1852, I was associate editor with S. P. Dinsmore, Esq. of the Daily Mercury, of Bangor, and during his absence from Bangor, I opened a telegraphic despatch sent to the Mercury office, addressed to him, from Philadelphia, and signed by Mr. Cuyler, in which it was stated, that in case of G. *v.* G. a decision had been rendered for the plaintiff, and that he had his decree. Soon after it was received, Miss McCrellis sent to inquire if any despatch from Philadelphia for Mr. Dinsmore had been received, and I sent it to her, and that is the last that I ever saw or knew of it. That is the only despatch that I ever saw or have any knowledge of from Mr. Cuyler to Mr. Dinsmore. I have seen what purports to be a copy of a despatch recently found in the Telegraph Office in Philadelphia, which is in these words:—

"SAMUEL P. DINSMORE,

"Editor of the Daily Mercury, Bangor, Maine.

"Confidential.

"In the case of G. *v.* G., decision has been given for the plaintiff, and he has his decree.

T. CUYLER.

"Philadelphia, Dec. 18th, 1852."

And have no doubt that it is a true copy of said despatch so opened by me.

W.

To the third he says:—
I know nothing further.

CROSS-EXAMINATION.

To the Cross-interrogatory he says:—
I have answered fully so far as my knowledge extends in relation of all mattersinquired of in this Interrogatory. As to all other points in relation to the despatch and its contents, except the date, my recollection is distinct and clear; its date I could not testify to positively, but I know it was received in the early part of the winter of 1852–3.

C. P. ROBERTS.

Answers of ELIZA W. BRUCE, a witness produced, sworn and examined on the behalf of the petitioner.

To the first Interrogatory she says:—
My name is Eliza W. Bruce, and I reside in Bangor.

To the second she says:—
In December, 1852, I was on a visit at a friend's in Waltham, Mass., and while there corresponded with Miss McCrellis, who was an intimate friend at that time. I think, about a week before her marriage to Dr. Griswold, I received a letter from her, in which she stated "all is at last settled," and quoted from a letter which she stated Mr. Griswold had received from Mr. Cuyler and sent to her, and which she had sent to her brother, who was then in Boston. The precise language of the extract I do not recollect; its purport I do, and it was this, that all was settled, and Dr. Griswold was now at liberty to carry out such plans as he pleased. I knew that Mr. Cuyler had the management of the business, and when I read that extract from his letter, I was satisfied that a divorce had been decreed. I put that letter from Miss McCrellis with other letters, and, in October last, when looking over my letters, for the purpose of destroying such as were of no use, I read it again, and regarding it as no value I burned it. I never saw any letter or telegraph from Philadelphia in relation to the matter.

To the third she says:—
I know nothing further.

Such was the evidence which was put before the court as to the fact and date of the decree. I have printed it all. There was no evidence taken on the other side, nor any attempt to impeach the credibility either of myself or of the other witnesses; the most important of whom, Mr. Briggs, Mr. David, Mr. Bonham and myself, are all officers of the Court of Common Pleas, amenable as such to it, for any statement or acts unbecoming attorneys at law:—nor was the accuracy of any of the records which I have printed in the preceding pages in any way questioned.

Now, I ask, whether on the testimony as contained between page 8 and page 28, the fact of a decree *at some date* is or is not proved fully. Let us examine it.

Mr. Bonham, now a member of the bar, and then a student of law, and understanding enough to know what a decree was, says:

"I almost always attended Mr. Cuyler in the trial of cases, whether I took testimony or not; it was my duty to carry his bag and books for him to court, and I usually remained in court to hear the *issue* of everything he was concerned in. I have seen a telegraphic message, at the Telegraph Office, directed to Mr. Dinsmore, at Bangor, State of Maine. (See ante, p. 7.) It was handed to me by one of the operators at the office some ten days since; the message is in my handwriting; *it is correct in its statements* to the best of my knowledge and belief; from my recollections *I was aware of its correctness when I telegraphed the fact.* I believe, *from my recollections*, that the Telegraph Message *was written by me in the court room; I am satisfied of that—written at the Court House room and handed to Mr. Cuyler for his signature there;* it is signed by Mr. Cuyler; *I believe that I wrote that upon the disposal of the case in court and after hearing its disposal.*" (Ante, pp. 19–20.)

Mr. Bonham was therefore *in court.* *His* business (as one of my students) he says, was to attend me in the trial of cases, and to remain in court to see "their *issue*," i. e. to see in what way they resulted. He was in court at the issue of this. He declares that he wrote the body of the telegraph in and from the court room, and as he believes "upon the *disposal* of the case in court and after hearing its *disposal.*"

My own testimony, which *I* cite merely as corroborative, but which having been positive and uncontradicted, *the court* was bound by *its oath of office* to receive as of a higher force, accords with Mr. Bonham's. Here is a part of it:

"*I have a clear and distinct recollection of the calling up of the rule; of its being ordered to be made absolute, and of the proclamation being made by the crier.*" (Ante, p. 14.)

And in another place, (ante, p. 22.)

"I desire to state in the most unqualified terms, from clear and distinct *recollections*, the making of the final decree and the proclamation which attended it, and my *conviction** that the date of that decree was the 18th day of December, 1852."

Here, then, we have evidence of what *the court* did in the *court room*, in the *judicial hours and course.*

Mr. Amos Briggs, at that time in my employ, (then and now a member of this bar,) tells us further and very positively, that at a later hour of some Saturday, he saw a paper endorsed "Decree of Divorce," on the desk of Mr. David, the deputy prothonotary. Here is his testimony:

"On a certain Saturday, I can't exactly designate the time, I saw lying on the desk, as I had occasion to be in the office of the Prothonotary of the Court of Com-

* I beg the reader's attention to my discrimination in the use of words here, "recollections" and "convictions." I shall remark on it hereafter.

mon Pleas on other business, on Mr. David's desk—where he is, *what purported to be a decree*, endorsed, Griswold *v.* Griswold. I did not examine it minutely. I knew that the case had been pending for some time, and took it for granted that it was the decree. *I made some remark to the clerk in reference to it, but don't know what was his reply. I left the office with the impression that that was the decree. I alluded to it to the clerk as being the decree.* I could not fix the time with any certainty, it was during the time I was in Mr. Cuyler's office, and while Mr. Griswold was pressing that the decree should be made. It was a number of months before I left Mr. Cuyler's office, and I left there in December, 1853. *I am distinct in my recollection that the paper was endorsed as the decree in the case of Griswold* v. *Griswold.*" (Ante, pp. 10 & 11.)

And again,

"On a certain Saturday, as I am confident, I saw a paper, a Court paper, as I then believed and now believe, endorsed, "Griswold *v.* Griswold, Decree of Divorce," lying by itself on Mr. David's desk, before him. To what date it referred I cannot say. My supposition then was that it was a minute of a decree made that day. But this was mere supposition, it may very well have been a minute of a decree made on a prior day, and may have been taken off the files in order to make a certificate from it, or for some other purpose; or may have been picked up from the floor and laid there. *My recollection about the paper being endorsed as a decree of divorce in the case of Griswold* v. *Griswold is distinct.* I have not a shadow of doubt about that." (Ante, pp. 11 & 12.)

And to clinch matters completely—to show that there could have been neither fraud nor accident—Mr. DAVID, the Deputy Prothonotary, a person perfectly well known to this whole bar, a man of property, integrity, of immense experience in all of our court offices—who has been in one department or other of these offices for about three times as long as any member of the Common Pleas has been upon the bench they now sit on—far more familiar with routine than any one of them, and who knows Judge Thompson's initials and handwriting as well as any man can know the handwriting of another, declares on oath that he recollects the paper was laid before him, "*having the Judge's initials*, being the Decree of Divorce;" and he has "no doubt" that he made out the certificate.

Mr. McCrellis, too, in his testimony, while he states that he does not recall so distinctly as he does the facts of my letters and the telegraph, swears to some recollections of a certificate under the court seal. See his testimony, p. 31. Indeed, to a man like himself, an acute and practised lawyer, a man who had taken the trouble to have a copy of the whole record up to this date, and disposed to scrutinize everything unfavorably and closely, nothing short of a certificate under the court seal would have been satisfactory. There is every probability, taken in connection with Mr. David's testimony, that he had a certificate.

Here then, if the fact that a decree of a court, which a careless clerk omitted to record, can be established out of the mouths of three or more witnesses, the fact of a decree in the case of *Griswold* v. *Griswold*, is established.

But it is equally established, I submit, by records which were never lost, and by irresistible presumption which arise from them. It is conceded that if no cause was shown to the contrary, the court would have *entered* the decree if it had been properly asked for by me. This is a *datum and concessum* in the case, undisputed by any body. It is equally conceded that they granted a rule to show cause why a decree should not be given. It is equally granted, and is plain that the lady had consented to a decree, and had aided Dr. Griswold in all preliminary steps; and that *at the time of this* rule, December, 1852, was willing to have the decree granted. *At a later date*, indeed, a year later nearly, in September, 1853, (urged during her summer visit North by influence which it is not within my purpose here to consider,) she pursued a different course, but as Judge Thompson has truly said, "The only reasonable explanation of this is, that *since that period* her mind had become much more excited against the libellant, or her views so greatly changed that she now sees things through an entirely different medium." In December, 1852, if she had "any cause to show," she was not disposed to show it. She may have been unwilling to show it, or afraid to show it, or terrified into not showing it—the reason of her non-action is not here important—*but as a fact* she would not have showed it. That is clear enough; and if notice of a rule had been given to her, and the formal entry of a decree asked for, the decree would undoubtedly have been given. These facts I assume are clear.

Now let us look at the PRESUMPTIONS which would arise from the ordinary conduct of professional men.

And first, so far as I myself am concerned. Here was a case which had been a difficult one in its origin, which Mr. Ingraham my predecessor had rather failed in; to which I had given much time; where the court had once made objections; where I had succeeded in removing these objections; where I had obtained all requisite assents, and where the court was not in the least troubled by any evidence of collusion; where they had examined all the papers, and were satisfied to grant the decree upon the usual *forms* being complied with; where I had been considerably out of pocket in paying court fees which would now be returned to me; where my professional character would be elevated by success, and my client would handsomely remunerate me, when I could inform him that the decree was obtained. There, too, was Dr. Griswold writing to me, (see ante, pp. 20 and 21,) and keeping the matter ever in my mind, if the considerations I have mentioned would not have kept them there without him. Now I ask any man to tell me *why* I did not give that notice and ask for the entry of that decree? Every difficulty had been overcome. I had, so far as any one can see, but to

put forth my hand and to take the decree. That is conceded by court, counsel, and every one. Now, unless I was fallen into the *lunes;* unless a complete syncope, stasis or *deliquium mentis*, greater than ever befel any man out of a mad house, took place in my professional life at that exact and single moment; *how* did it happen that I did not complete a matter brought through great difficulties to this verge of happy completion, and when a complete and happy completion was so certain and so easy to be obtained?

One rule of the law of presumption, is that *Posteriora a prioribus presumuntur;* and if there had been no evidence by witnesses of a decree, if there had been no "appeal" by the other side "from a decree," or no motion by them to "rescind *a decree;*" (matters I shall speak of directly,) and no action of the court in either case acknowledging a decree, a strong presumption of a decree would arise from that which is a perfectly good ground, and indeed one of the best grounds of legal decision, I mean the *ordinary course of human action*, that I had obtained that which was so easy of obtainment, and that which my pride, my interests, my duty, the solicitations of a most intelligent and watchful client were all urging me to obtain, and between which and me there was not a single obstacle.

2. Then look at the presumptions which arise from *opposite* quarters, and from different segments of these opposite quarters, but all tending to the same conclusion.

First of all comes the client herself on her application for appeal, swearing that she "firmly and verily believes injustice has been done to her;" injustice of course in that *a decree had been given against her.* In any common matter where a woman was concerned, in any matter relating to property, I should regard her representation for an appeal, even on oath, as of no great importance, though certaintly of some importance. A lady who was suing about property—for a piece of wild land that she never saw, and perhaps did not care about — might well enough perhaps, swear ignorantly and carelessly; but no man who knows what a *woman* is—what she becomes when she becomes a wife—what she becomes when that tie which God then made, is attempted to be violently sundered; no man, I say, who knows what marriage makes a woman, and what divorce makes her, will believe that this lady, and her friends for her, had not watched with the most painful and intelligent anxiety every *step* of this history, from the very moment that the Sheriff of Charleston waited on her on the 31st day of March, 1852, with this paper of frightful import, this command of the law; a writ to appear in her proper person before the judges of this commonwealth, in their Court of Common Pleas at Philadelphia,

and "to show cause, if any she had, why she should not be DIVORCED from her husband Rufus W. Griswold." The *last* thing that any woman who has once been married is likely to cease to know while the vital spark of heavenly flame remains at all within her breast, is whether she is a wife or a *divorcée*. The counsel who was speaking in the case in my behalf might well say as he did, "If I had been a physiologist—if I had been a haimatologist—a philosopher such as Wordsworths, one who could 'peep and botanize upon his mother's grave,' I should like to have seen that little lady in the entry of her house in Charleston as the Sheriff was reading that paper to her. Her heart, I will undertake to say, beat under her corsettes more quickly than it ever beat before since it was a fœtal heart, and if I could have put my fore-finger upon her radial, I should have found its throb as big as the carotid's. It is vain to say that this lady, or her friends, did not know what was going on, and what was done. *She did know, or they knew for her.*"

Her representation on oath that there was a decree is therefore important.

Nor was this the only pre-requisite for the appeal. She had to procure surety for prosecuting it. She was a stranger here; and had to take more than usual trouble to get it: she goes, as the record shows, to a Jewish neighbor, Mr. Pesoa, and he comes to court and goes through the ceremony of being bound as surety. I think that this Jewish gentleman, taught as a precept of religion, that sureties shall "smart," and those only "who hate surety-ships shall be sure," would not probably have become a surety for anybody, if it was all unnecessary and worse than unnecessary, a gross mis-proceeding.

Then comes Mr. Henry M. Phillips' act. What does Mr. Phillips do? He issues a precipe entitling it an appeal from a *decree* and goes to all this trouble, according to the suggestion of the court, for something worse than nothing.

Now I need not speak of Mr. Henry M. Phillips to this community or to this bar. There may be at our bar—I do not know that there are—a few men whose minds and course of studies may make them more conversant with great legal principles, or more profoundly versed in the science and the books of the law; but I say confidently that there is not one man who is a more wary and advised practitioner of law: I doubt if there be one who is so much so. His experience has been very large: it has been largely in courts where men become proverbially ready, sharp, eager to look for, and quick in discovering anything like flaws, or omissions, or informalities of any kind: for in those courts lives and freedom depend often upon nothing but flaws, and omissions, and informali-

ties. Now if there was no decree, how did Mr. Phillips come to commit the gross blunder of taking an *appeal from a decree* instead of coming forward to oppose a decree? What made him think there was a decree? There was confessedly no *entry* of a decree on the Minute Book, or on the docket, which he had necessarily to see if it had been only to get the term and number of the case from which he was about to enter the appeal. The answer is plain, Mr. Phillips knew, as a matter of fact and from some other source that there was a decree, and I leave others to say whether it is or is not probable, *that at the time that Mr. Phillips took his appeal, the paper which I received from the court with a judge's initials, which Mr. Briggs swears so positively he saw the outside of, and which Mr. David swears as positively that he saw the inside of, signed by the judge, was still in existence, and a part of the record.* Mr. Phillips saw from that, I presume, that there was a decree. Being, as is testified by Mr. David, a loose paper, it was probably lost on this very occasion of pulling the record out and about. Else Mr. Phillips was in court and heard the decree. It is certain he knew it as an indisputable fact from some source other than the record; for the record did not show it, and his interests and objects would have been vastly better answered if he could have denied a decree than by confessing and attempting to reverse one. To suppose that he grossly mistook his interests and mistook his objects, is to suppose against all probability. Here then, from this quarter presumption comes to aid the case.

Then comes *nearly a year after*, on the 24th June, 1854, (ante, p. 10,) Mr. David Paul Brown, proceeding in a totally different manner from Mr. Phillips; not "appealing" from a decree as illegally granted on fair evidence; not taking or trying to take things into the court above, but asking the same court that made it, to *rescind* a decree as fraudulently obtained. Now here are two gentlemen—who had no consultation I believe in this matter, and one whom I think considers that the usual proprieties of professional intercourse had not been entirely respected by Mrs. Myers Griswold, proceeding in entirely different modes of procedure; (Mr. Brown's proceeding being to a certain extent by way of reproach to Mr. Phillips's)—both proceedings, however, different in all their supertructure, being founded on the common basis of the existence of a decree, and without that foundation, both of them having been wholly *un*founded, misconceived, and the result of gross professional blundering. Can it be that both these sharp and experienced lawyers, proceeding disconnectedly, and in ways different from each other, have committed the same blunder, where if no decree was entered, there was nothing to induce them so to proceed at all? a case, be it observed,

not where there had been a decree entered and afterwards struck out by the clerk's ordinary comment of "Error," or "*Inadvertently* entered," or by his more summary process of an erasing dash of his pen; but where there was no entry of any sort whatever, anywhere, that even looked *like* an entry of decree, or could by oversight be mistaken for such, and where, unless there was a *record of the decree among the papers once on file and now lost*, there was everything to lead those counsel to the belief that no decree had been made, and nothing at all to lead them to the belief of the contrary fact.

Here then comes in force another maxim of the law about presumptions, "*A posterioribus priora præsumuntur:*" and if no presumption as to the fact that a decree *would* be obtained, could be made from the probabilities of *my* action, the strongest would exist from the action of the other that a decree *had* been obtained. May not the confessions and actions of a party and of acute counsel, when such confessions and actions are against their own or their client's interest, be relied on as containing nothing which is not true, and which they were not compelled to admit? Let Mr. Phillips be asked now by any one, whether there was or was not a decree in this case? I should have called him as a witness but for his professional privilege and relations.

And what can be said of the *action of the Court of Common Pleas itself?* My recent rule was heard before Judges Thompson and Allison. Now by adverting to the records already printed, at page 9, it will be seen that these are the same judges who, when commanded by the Supreme Court on the 23d of September, 1853, to send up the record containing their "DECREE in the case of Rufus W. Griswold v. Charlotte A. Griswold," do under their own hands and seals, send the record "with *all* things touching the same AS we are commanded." So, too, Judge Thompson was on the bench, (see ante, page 10,) and one of the two judges who, on a motion of Mr. Brown, ten months afterwards, allows a rule on Dr. Griswold to show cause why the "decree should not be rescinded." The President of the Court was therefore on the bench on each important occasion.

Now without supposing that the Court of Common Pleas, or its excellent President, who as its ordinary spokesman chiefly represents in it to public view, is more alive to appeals and reversals than other courts or than other presidents, or is highly morbid on that subject, I may say, at least, that appeals and writs of error are things which no judge is particularly fond of, or which even careless judges sign without looking at, and having a little feeling pass through their minds. The case of Griswold v. Griswold was a peculiar one. The libellant was a distinguished literary man, known

as well as any literary man in the United States; the respondent was a woman of fortune. It was a special case in many ways: the court has professed to remember many incidents of the case. How did they come to make a return of a decree if no decree at all was ever given. It was *their official duty* to know *as a matter of fact*, whether a decree had or had not been given. That is the official duty of every court called on to send up a decree. The court above can *know* nothing about the matter; which, until the record is sent up, rests entirely in the breasts of the Court below. If *they remember* the decree it is well, and they may sign the return at once. If they do not remember anything about it, or are even doubtful about it, *their duty is to look at their records and to inform themselves.* Undoubtedly the court at this time, I mean when they sent up the record with "*all* things as they were commanded," had reason to believe and did believe there was a decree; or else they were guilty of an act of carelessness equivalent to official negligence and fault. It will not do for these Honorable Justices to say that the command of the Supreme Court was enough to make them *presume* a decree. The Court above, as I have said, can know nothing with certainty on the subject. And if it was enough to let or to make the Court of Common Pleas presume it then, it is enough to let me and Dr. Griswold and every body else presume it now. Those judges knew perfectly well that the Supreme Court when sending the certiorari which I have printed at the top of page 9, was proceeding on *the belief that there was a decree*, and they knew as well, that if there was no decree *of any kind*, and the matter was a mere mistake, it was *their duty* to inform the Supreme Court of that; and to wait for a *mandamus*, if the Supreme Court in spite of the information still chose (which it would not have done) to have the record. Cases indeed have arisen, and sometimes do arise, where it is difficult to say whether there is "a decree" or not; that is to say, whether there is such a decree as may be appealed from it, st., "a final decree." The difficulty turns on the nice distinction between final decrees and interlocutory decrees. But there is no doubt whatever that where there is no decree at all, the lower Court has no more right to send up a record in obedience to a certiorari obviously based on the mistaken belief of a decree, and so to send the Superior Court on a fool's business, than a man who has the use of his eyes, would have a right to lead one who has not, into a bog before him, only because the latter ignorantly asked to be led forward, supposing it to be his way. Every presumption therefore arises, as a matter of fact, from the return of Judges Thompson and Allison to the Supreme Court of a decree, that there was a decree; for every presumption arises as a matter of fact, that those Judges knew what they were doing, and what they were signing, and that in important

official documents, they did not act carelessly nor sign in violation of their official duty. I will speak of the presumption of *law* directly.

Then, as I have already said, we have the same thing repeated ten months afterwards, on the application by Mr. Brown for his rule to *rescind* a decree for fraud. A motion to *rescind a decree for fraud* is quite an unusual application. It always implies perhaps some little want of caution in the court itself. It proceeds, at any rate, on the assumption that the court has been duped: and is calculated somewhat to arrest attention. Undoubtedly the Court would not have granted such a rule except upon having first *heard* proper grounds laid by affidavit, and without hearing the rule distinctly enunciated. There are men at our bar—to its discredit be it spoken—who do make applications to the courts in such a slovenly, unprofessional, indistinct, hugger-mugger kind of style, that it is difficult sometimes for either Court or Bar to know what it is they are doing or what it is that they want; and the Court, simply to get rid of them, may perhaps grant a preliminary rule; hoping that by the time it is to be argued, the applicant will be warmed up into enough zeal to be heard and understood. But the author of THE FORUM is not among this number. Nobody ever charged him with indistinctiveness of utterance or want of proper pomp or circumstance. He stands in his place at the bar; he is clear, and deliberate: he transacts professional business while in the court-room in a professional way. When therefore Mr. David Paul Brown made, as the Records (see ante, p. 10,) show that he did make, a motion in the case of "Griswold v. Griswold, *Div.* J. 52, 19," to show cause why the decree should not be rescinded, the Court heard Mr. David Paul Brown distinctly, and knew what Mr. David Paul Brown asked for, and what they themselves were granting, and knew that they were granting a rule nisi to rescind a *decree* in the divorce case of Griswold v. Griswold, which it was admitted and believed they had granted not very long before.

Need I say that in either of these cases—I mean in the case of the appeal or in the case of the motion to rescind—a hesitation—an intimation of doubt from the Court *as to the fact of a decree*,—a question or *half* a question—a look, even if it had came with the refraction of the judicial spectacles—would have been enough to have sent either Mr. Phillips or Mr. Brown on a different track?

> "Hadst thou but shook thy head, or made a pause,
> Or turned an eye of doubt upon my face."

Counsel so quick of apprehension as either of these, would have been deterred from proceeding, more quickly than the king who used those lines.

"No decree? Indeed! So much the better—the very thing I want. Then I will oppose the libellant to so much the more advantage: I am to oppose then, the getting of a decree not got, and not to reverse or to rescind one already obtained." The learned counsel would have accepted the intimation with alacrity.

In what precedes I am not saying that the action of Mr. Phillips and of Mr. Brown, and of the Court itself, on these different and diverse occasions would, under all circumstances, amount to absolute and conclusive proof of a decree. If it could be shown *how* this blunder could have occurred, to different counsel, under different circumstances, and to the Court itself, on two different occasions, my argument would have less weight; but this is not shown, nor attempted to be shown; and the acts stand forth, according to any theory but that of a decree, as acts of professional and judicial stupidity and blundering; and, therefore, of professional and judicial neglect and fault. Every one must judge for himself how likely such counsel and such a Court as our excellent Court of Common Pleas are to be open—each and all of them—to such imputations.

The presumptions that I have thus far spoken of as arising from the Court's acknowledgment of a decree, I speak of as presumptions from which a decree may be presumed, viewing the matter as a mere question of fact and independently of any intendment of *law*. But how, as a question of law, does the matter stand? The theory of the law is, that the Court preserves its record in its breast; that it always knows what has been previously done in a case. Judicial persons may be said, like other persons, to be estopped by a specific recital: and when a Court in a subsequent solemn proceeding admits, and in fact recites, a judicial act as having been previously done by them, undoubtedly, if afterwards, while the proceeding remains in full force, no evidence of that fact appears, the intendment of the law is, not that the act was not done, but that the evidence of it has been lost; in other words, that there has been a diminution of the record. And I cannot conceive how—with an appeal which but for their act could not have been taken, standing in force, full before their eyes; when there has been no confession to the Court above of any blunder, nor any application to have the record sent back to them—the Court of Common Pleas is in a state of even preliminary competence to question the fact of a decree at all. If they leave things in their present condition they ought not, I think, to be surprised, if the Supreme Court, on coming to hear the appeal—which if not withdrawn, they will hear—takes occasion to administer a pungent rebuke for the mode in which, professing

to send *a decree*, they have sent up something which they themselves declare that they are unable to regard as any decree at all.

The point of law which I here take is not new. The value of a *recital*, in subsequent judicial records, of a fact in a preceding part of the record, (the preceding part being lost,) was fully considered and conclusively settled in *Cromwell* v. *The Bank of Pittsburg*, decided by Judge Grier, and reported in 2nd Wallace, Jr., 569, and since confirmed, after solemn argument, by the Supreme Court of the United States, 16th Howard, 571. In that case, the docket, supposed to contain the entry of judgment, was lost, just as the record was here. There was, indeed, no specific or usual evidence at all of an entry of judgment by the court. But an execution had issued, *reciting the fact of a previous judgment*, and this was held by both courts to be enough. If an execution, issued by the party *interested to sustain* the judgment, be evidence of a judgment, the rest of the record being lost, I may safely rely on the *appeal*, in this case, and the motion to *rescind* the decree, taking both of them, at different times, by the party *interested to deny* the decree, and who would be last to confess its existence, unless its existence was a fact.

Now what is there on the other side of the question.

I. *The fact that the Clerk made no entry of a decree.*

The answer to this is plain. The clerk did not even make an entry of the "Rule to show cause," upon the "Current Motion List." This entry it was his clear duty to have made. The preparation of that List belongs to him exclusively. He makes it from his *Minute-Book*, on which, as is incontestible, there was entered the record of a rule to show cause, which he ought to have transferred, but which he omitted to transfer. He had undoubtedly *proper* materials for *this* entry. I mean the entry on the "Current Motion List." In the very outset of the matter, then, he committed a blunder whose effects were almost sure to follow the case throughout. It was a blunder at the source of things. The motion not being on the "Current Motion List," no entry was made on that *book*, as is usually done. No entry was therefore made in a shape to be preserved. I was obliged, as I testify, to have an entry made on a loose slip of paper, liable to be lost, and which, as much of the record has been lost, we may infer was lost with it. Mr. David's testimony is express as to the way in which the decree was entered. (p. 13.)

"It is my recollection that the allowance of the decree was not on the back of the report as is usual, *but on a separate paper*."

Mr. David herein confirming a fact which I had previously sworn to, and shown the cause of. Here is my testimony: (pp. 14, 15.)

"While I am not positive of it, it is my imperfect recollection and belief, *that I made a separate memorandum of the rule and of its being made absolute, had the Judge to put his initials and gave it to the Clerk*, a step made necessary and proper by the failure of the Clerk to enter the rule upon the Current Motion List. When I say it was my indistinct recollection, I mean to be understood as saying that it is my INVARIABLE rule to do so *under similar circumstances*, and that added to that, I have some recollection of having done so in this instance."

Then, moreover, the Clerk was a grossly careless clerk. His admitted blunders of *com*mission show this. (See ante, pp. 26, 27.) Mr. David, his official superior, thus testifies of him. (pp. 13, 14.)

"George L. Dougherty was the Court Clerk under Mr. Carpenter's administration. I have *frequently* heard counsel come in and complain of *omissions* to make entries and of errors. And I have heard Mr. Dougherty make excuse to those who complained, that he had not received from them the term and number. *Mr. Dougherty had an office of his own, and considerable business of his* own, *which might account for his not giving his full attention to the business of the Court.* My attention was called to these errors and *omissions* by complaints that *were made to me as chief clerk of the office.* In looking at the Minute Book I have observed large spaces between the dates, as if left open for the insertion of matters afterwards: which seems to me to be very irregular."

The Clerk of the Court, then, had a law office of his own; and was considerably engaged in business of his own; and this at a time when more than all his time would hardly have performed the business of the Court. He was present, he himself says, (p. 25,) when not sick OR "*unavoidably* absent." Unavoidably absent? How many times he was *unavoidably absent* he does not inform us: nor what he means by unavoidably absent. A man who had urgent *professional* business keeping him often in his office, would be very often "unavoidably absent" from other places. *My* duty was done when in open Court I obtained an order for a decree of divorce and had it signed, as Mr. David swears it was signed, (see ante, p. 13) by the Judge; and when I gave it to the Court clerk, if he was there, or, if he was not at his desk, when I put it on his desk for him when he came there, certainly I was under no obligation during Court hours to dog him about till I found him. *His business was to be at his post;* and I here deny for myself and the whole bar, that it is any part of the lawyer's duty to see that the clerk makes his entries in any case. The counsel has no more right to be watching or instructing the clerk, than the clerk has a right to be watching or instructing him. Nor is the attorney responsible for the clerk's absence, any more than he is for his heedlessness or his incapacity. It is just as likely as not, and more so, that Mr. Dougherty was not in his place at all when the decree was made, and that the paper which Mr. Briggs swears *he* saw, and that Mr. David swears that *he* saw, was never seen at all by the person whose duty it was to have seen it before either of them; and this because he was "unavoidably absent," when he should have been rigorously present.

The mere omission of such a clerk to record what the court did, is a matter of very little weight.

II. *Then it may be said that my telegraph announces a decree as of the* 18th, *when the clerk's entry shows that even the rule to show cause was not made till the* 31st. Certainly, if the clerk's entry is right as to the date of the rule to show cause—and there were not, as I have sometimes thought there probably was, two decrees in the case—I was wrong in announcing a decree on the 18th; but it by no means follows that there was not a decree on a later day.

Let us look at the evidence.

And first I say that I believe that the clerk's entry *is* wrong as to date. His Minute Book shows that vast numbers of his entries were made after the day of the transactions that they profess to record. How could it be otherwise than that they should be thus made? The clerk says in his evidence, that he made them all in the court room, or in the Prothonotary's office. Any, and every lawyer knows, that the entries of the day are made by no clerk, all of them, in the court room. He could not make them all there. He is constantly interrupted, and many of these entries are quite long. He must make them after court hours, or before them on the next day. The Court of Common Pleas begins at 10 o'clock and sits till 3. On short winter days—and this was in December, the shortest season in the year—a man doing professional business of his own, as Mr. Dougherty was, would have no time to be at the Prothonotary's office before 10 o'clock, A. M. At 3, P. M., when the court adjourned, he went home to dine, and as every member of this bar knows, could have had no means of working after 4 o'clock—soon after which time it was dark, in December—at the Prothonotary's office where gas has never yet been introduced, and where candles are not allowed, even if his own business had given him time to do work, which certainly, as he was at the same time doing business of his own, it did not. The necessary result was, that Mr. Dougherty's entries were constantly in arrear. His Minute Books show this incontrovertibly and on their face. He left blanks which he filled up as he found time, from the loose memoranda which had been handed to him. He would, therefore, as his budgets of blunders show that he constantly did so, enter things of wrong days: entering them sometimes too soon and sometimes too late. (See ante, pp. 26, 27.) If the error was important enough to be found out in time by counsel, and he was informed of it, he would enter, as he does, (see ante, pp. 26, 27.) "Error;" "should be," &c.; "Entered inadvertently." If it was not found out it remains an error to this day. A vast majority of them, it is probable, would never be observed at all, as would have been the case in Griswold v. Griswold, but for a literary difficulty between one party to the case, and some people in New York.

This, then, was the way in which this clerk made his entries. And I leave it to others to say, whether in this particular case the clerk has not entered as of the 31*st* of December, a rule which he should have entered as of the 8th. Let one accustomed to writing for the press or to "reading proof," and who knows how constantly the figures 3 and 8 are mistaken for each other, and how readily the long stroke of the *t*, especially if uncrossed might be read for the figure 1, while the *h* of the 8*th*, might be mistaken for *st*, let such a one say if what I wrote for "8th December," or even the clerk's own endorsement of this date of filing, could not, very easily be misread for the 31st of December, in the haste of a late afternoon of the very last day of the year, when the clerk was entering up his pile of arrears, so as to begin, at least the first day of the new year free from them? Let my reader, especially if like myself he does not excel in penmanship, try the matter, if he understands me, with his own pen, and estimate the probabilities. Mr. Bonham testifies quite strongly that the *decree*, as distinguished from the mere readiness to grant it if no cause was shown to the contrary, was on the 18th. Here is his testimony, (pp. 19, 20.)

"I almost always attended Mr. Cuyler in the trial of cases whether I took testimony or not; and I usually remained in court to hear the *issue* of everything he was concerned in. I have seen a telegraphic message at the Telegraph Office, directed to Mr. Dismore, at Bangor, State of Maine. (See ante, p. 7.) It was handed to me by one of the operators at the office some ten days since; the message is in my hand writing; *it is correct in its statements* to the best of my knowledge and belief; from my recollections *I was aware of its correctness when I telegraphed the fact.*

I believe, *from my recollections*, that the Telegraph Message *was written by me in the court room; I am satisfied of that—written at the Court House room and handed to Mr. Cuyler for his signature there;* it is signed by Mr. Cuyler; *I believe that I wrote that upon the disposal of the case in court and after hearing its disposal.* I am satisfied that the Telegraph Message was not written in the office but in the Court room."

Look, too, at all the probabilities of the case; will the reader please to turn to Dr. Griswold's letters to me as printed on pages 20 and 21. It appears, as he will see by them, that on the 4*th* of December, 1852, the case had been then submitted for a week and more to the court, and that Dr. Griswold was then waiting anxiously for some information from the court as to its preliminary decision. Now I think any one will admit that after such a letter as that of Dr. Griswold to me of Dec. 4th, I would have availed myself of the same day that the court made known its general satisfaction with the case and its readiness to give a decree if no cause was shown to the contrary—to take the usual rule "to show cause:" after this intimation about which there is no doubt,* it was a rule of course.—Of

* See Judge Thompson's printed opinion, (ante, p. 4,) where he says: "The judges have no recollection which would enable them to speak on the subject of a decree *further* than *they regarded the evidence as it was presented to them as sufficient to entitle the libellant to the usual rule to "show cause why a decree should not be granted."*

course I would have taken the rule at once. This would be according to ordinary and natural action. Every man at this bar will say this. Now, in a case of which the court had been perfectly possessed long before by Mr. Ingraham, and in which the chief or only question which I had to do with in my argument was whether the letter of Mrs. Myers Griswold to Mr. Searles, printed ante at the foot of p. 3, sufficiently proved desertion,—a single and a small point—I ask, is it likely that this court, so quick in apprehending the point of a simple case, and so prompt, as we all know it to be in dispatching business, took *a whole month*, that is to say, from a week before the 4th of December, 1852, until the 31st of December, to come to a conclusion? Does this stand to probability? Let the bar who know the conscientious and excellent habits of the court in the disposition of business answer!

What then are the probabilities of its having been on the 8*th*? They are great. December 4th, the date of Dr. Griswold's urgent letter to me was Saturday. The letter, mailed at New York, was of course not received by me till Monday: probably on my return from the morning's business. On Tuesday, (as the Minute Books of the Quarter Sessions show) Judge Thompson was not in the Common Pleas at all. I would not have made the application to know what was done, except when he was on the bench. The President of the court usually announces its conclusions. He is its ordinary spokesman. It was with him that my relations, so far as they were with one member of the court more than with another, had chiefly been. The same was true of Mr. Ingraham's. Indeed Mr. Ingraham had twice called at the judge's own house, to speak with him upon the special nature of the real grounds of the proceeding. The President of the court seemed to have a special custody of it. On *Wednesday*, which was the 8*th*, he was on the bench, as the Minutes show, and on the very first day after receiving Dr. Griswold's urgent letter, that Judge Thompson's presence in court allowed, I went, as I suppose into court, stated the urgency of my client, heard with joy the conclusion to which the court had come, and took with promptness the rule to show cause returnable, as is usual, at ten days, that is to say on Saturday the 18*th*, and the conclusion that the date of my memorandum was the 8th and not the 31st of December, is rendered still more probable that the 31st was a Friday, not a rule day, and that Judge Thompson, as the Minutes show, was not in court on that day at all.

It is proved by the testimony of several persons, and by contemporary documents, (see ante, p. 21,) that prior to the 18th, I had communicated to the parties that the Court had arrived at a favorable conclusion, and that a *decree* of some sort—and unless

cause was shown to the contrary by the other side, a favorable one —would be made on that day; that is to say, the 18th. This is one of the uncontested and incontestable facts of the case. It stands to probability, as I have said, supposing me to have acted on the principles that commonly govern professional men, that I took my rule to show cause upon the first intimation from the Court that they were ready to grant it. My duty, my interests, the urgency of my client, the ordinary course of my professional action, all make this probable. Now if the Court never made this intimation or favorable expression of opinion until the 31st of December, can it be conceived that I was such a fool as to commit myself in writing to so gross a mis-statement as that they had finally decided it on the 18th. Did I not know that Dr. Griswold, if told that he was actually and fully divorced, might at any moment, marry again; and was I ignorant of the consequences in which I should involve both myself and him by his doing so, if he was still a husband? If the Court, I say, gave no expression of opinion until the 31st, *can it be*, while I was entirely in the dark as to what they were going to decide,—in a case where in an earlier stage of it they had rather come to an adverse opinion—and where, on the 18th, I could know nothing, nor even infer anything favorable—that I took this frightful leap in the dark, and where I could not but know that there was just as likely to be a precipice as a plain before me? Any theory, therefore, but the one that there was a decree, and that this decree was on the 18th, reverses all probabilities. I am supposed not to ask for a decree when I could get it, and when every motive prompted me to get it; and I *am* supposed to announce that I have it, at a time when I had it not, and when I was absolutely ignorant whether I ever could obtain it. Can any cause be assigned why any man out of Bedlam or Blockley, should have acted in so mad a manner? All question of veracity and character I throw out of the case. I put it upon the probabilities as inferable from human conduct.

And how does Mr. Dougherty himself speak of his own entries. With great candor and modesty, he says:

"I *meant* to make my minutes right in the matter of dates as in other things; but I had an immense number of entries to make, and had frequently to make them when pressed for time and under other unfavorable circumstances. I don't *know* that they are wrong in anything, but they *may* be."

Without doubt, as every one at the bar knows, the Clerk of the Common Pleas does, even when he gives all his time to his clerical business, discharge it under unfavorable circumstances. When "Courts," as Mr. Brown says in his Forum, "sit in pig-sties," and when the Clerk sits in a place whose dignity and convenience is proportionate,—crowded up, with books and papers flying over his

head the whole time that he is in Court, interrupted and pulled at by twenty members of the bar at once; when he leaves the Court room to go to a dark, dirty, crowded office, where a hundred people are jabbering around him, and every one who chooses may pull his papers from their files, it is not wonderful that he should not always discharge his duties with an accuracy that belongs to perfection alone. In Mr. Dougherty's own habits, therefore, or in his misfortunes or necessities, or "unfavorable circumstances," there is enough to account both for omissions and for mis-entries. But *he* states a cause in *my* habits also. I had previously stated it myself, (see ante, p. 22,) as follows:

"I beg leave to add that I am often careless in placing the term and number to a rule, the reason being, that taking them often in open Court where I have not access to my Docket, I am not able from memory to supply them. I am also not in the habit of placing the date to papers intended to be filed in Court, my opinion having been that they speak from the date of their record, or time of filing. *It might easily occur under such circumstances*, that the Clerk not being furnished with the term and number, nor date, might *postpone* the entry of a rule until he should find or be supplied with the term and number."

Mr. Dougherty states it more fully, and with the important reserve that he makes, to wit., that he confines his statement merely to my habits of intercourse with him as clerk,* I am willing to let him have the benefit of it in accounting for a mistake which he hardly has denied.

"In the immense number of entries which were made by me while I was clerk, I cannot remember any particulars of this case, nor any precise dates. I remember this, however, very well, that Mr. Cuyler seldom, if ever, put term or number to his memoranda handed to me while clerk, and that by omissions in this respect, I was involved in frequent trouble, and at a loss where to post his rules in the proper docket. I sometimes had to wait until I could see him and get the proper information, or get it otherwise. I generally, however, entered them on the Minute Book as soon as I received them, *but I cannot say that he gave me the memoranda of the rules the day he took the rule.* Gentlemen of the Bar, while I was clerk, *varied in some degree one from another in their habits about these matters;* some being particular and accurate and giving me no trouble, and involving their cases in no risk, others being in degrees the reverse. *Mr. Henry M. Phillips was particular;* so Mr. St. George T. Campbell. I never remember any trouble with Mr. D. P. Brown. But with one exception, none was so much the worse as Mr. Theo. Cuyler; and in the excepted case the gentleman was not more so. Mr. Cuyler might have taken a rule one day and come in *days afterwards* and put the paper on my desk without explanation. *I am not surprised to hear that in any case of Mr. Cuyler's a question has arisen as to date of entry.* I should from his usage already mentioned be *more slow to* speak with

* See his testimony on p. 24. "In thus speaking of Mr. Cuyler's habits, I confine myself entirely to his habits of intercourse with me as clerk. I do not mean to be at all taken as speaking of his professional habits generally, or of his habits of doing other professional business, or of giving notices to his clients or opponents, where the entire responsibility was with him or his own clerk. I mean only to say that he expected me as desk clerk to take trouble that he ought to have taken himself as counsel."

confidence *of the accuracy of an entry made by me in a case of his, than I would in the case of most other gentlemen of the bar.*"

There is no reasonable ground, therefore, to doubt that the true date of the rule to show cause was the "8*th* of December, a date which through my rapid and perhaps not very legible writing, or from my not leaving a memorandum of the rule on the exact day when I took it, or from some other cause, the clerk has mistaken for the 31*st* December."

I have gone—very unnecessarily for the purposes of this pamphlet—into all this discussion about the *date* of the decree. My rule, as given on p. 6, involved, as I have several times said before, no necessary question of date, but one only of fact, and the recent act of the Court in *discharging that rule*, decides,—whatever may be *said* in the *opinion* itself, that there is no sufficient evidence that a decree was given on any day, or in other words, given at all. Now, I say confidently, that while on the evidence a doubt may be raised as to the *date* of the decree, that is to say, whether it was before or after the 31st of December,—a matter which rests chiefly on the accuracy of what I wrote, none whatever can be made as to the *fact* of the decree at *some date*. I have already stated the testimony; including my own. Will it be said that my veracity *as a witness* is impeached by the fact that I telegraphed that the decree was on the 18th, and that some doubt exists on that point? Let us consider that point.

I have no where stated in my testimony, from my *recollections*, that the decree was on that day. I do distinctly state, in two different places, (p. 14 and p. 22,) and I go out of my way in one of them (p. 22,) to state my recollection of the *fact* of the decree. In one I say:

"I have a *clear and distinct recollection* of the calling up of the rule; of its being ordered to be made absolute, and of the proclamation being made by the crier."

In another I go out of my way and say:

"I desire to state in the *most unqualified terms*, from clear and *distinct recollections*, the making of the final decree and proclamation which attended it; and my *conviction* that the date of that decree was the 18th December, 1852.

The fact of a decree, at some date, I swore to then, and will ever swear to, as a fact which I do distinctly and clearly remember. My ability to speak of the date, as will be seen by any one who reads my testimony, is derived only from my recovered telegraph. I stated, after seeing that paper, my "*conviction*" that the decree was on the 18th of December, and that the 18th of December was the return day of a rule which had been taken on the preceding 8th. It is a "conviction;" an inference of my judgment and knowledge of my own habits, and not like the other

matter—st., the fact of a decree at some date—a "clear and distinct *recollection*." My "conviction" is founded on grounds, some of which I have put before my reader; on the great improbability that I could have been ignorant of what was done by the Court in a case of mine; that I could have supposed that they had given a "decree" when they did nothing at all, or only expressed a readiness to grant a rule to show cause; that I signed a paper addressed to a *client* without knowing what was in it; and on the improbability that my clerk would, *exactly at the same time*, have made the identical blunders also. Still, all these I concede—viewing the matter simply as a lawyer, on the evidence, and independently of my own consciousness—are *possibilities;* using the term in its *extreme* sense, and as meaning something entirely without the region of *all* probabilities: my expression of my "conviction" implies nothing in the nature of recollection.

My testimony therefore I believe stands just as I meant it to stand, and is quite unimpeachable for any discrepancy or for any mis-statement.

But *my* testimony is not important on any point, except that of date; a matter, which by taking my rule in blank, I show that I never meant to insist on. The *fact* of the decree is clearly proved by Mr. David, the very best person to prove it—the deputy Prothonotary—by all the presumptions of the case, and by the yet existing records of the appeal and the motion to rescind. The whole of my testimony may be struck out, the clerk's entry as of the 31st may be admittted to be correct, and the fact of the decree remains proved, though it was of course after the 31st of December; perhaps about the 10th of January.

If the clerk's entry of the date of the rule to show cause is *right*, what does it show? This, plainly: that although, on the 18th, I had *supposed* that there was a decree, or not supposing it, had ignorantly or wilfully telegraphed and wrote that fact,—that now, on the 31st, I was in my senses or in my conscience again, and was proceeding by a rule to show cause exactly, as if I had never telegraphed or written anything on the subject; in other words, that notwithstanding I had previously telegraphed that all was ended, I was proceeding still in exactly the way in which I would proceed if all was *not* ended, and was marching in the track straight forward to a conclusion still.

If the clerk's entry of date be *wrong*, then there is no reason to doubt that the entry was on the 18th, for there is no testimony but his entry to conflict with Mr. Bonham's and my testimony, and the probabilities derived from the Court's habits in despatching business, to prove that it was of a later date.

III. *A third reason which may be urged to shew that no decree was ever made at any date, is the alleged want of existing proof that notice of the rule to shew cause, was ever actually and in form served upon the lady.* This fact, an assumed one I think, seems to have weighed much with the Court.

This fact is relied on, not to shew that the decree was *irregular*, but as a ground of inference, from the assumption, of the Court's not usually granting decrees except upon a previous proof of actual service, that no decree was made *in fact* or at all. The argument based on it, assumes. of course ; 1st, That the Court would, under *no circumstances whatever*, consciously deviate from its ordinary rule ; 2d, That the Court cannot have deviated from it by mistake or inadvertence.

Now I say by way of reply :

1st, There is strong proof of *actual* service. Mr. Briggs, who was at this time my clerk, while he says that he has no recollection of any service, states such facts, as leave no sufficient reason to doubt the fact of an actual service. Here is his testimony on this point. (See ante, pp. 10, 12, and 13.)

"During the years 1852 and 1853, I was in the office of Mr. Cuyler, and assisting him in his business. I assisted him chiefly in the practical details, such as preparing the pleadings, giving notices, taking and arguing rules, &c., I have no *recollection* of giving a notice of a rule for a divorce in the case of Griswold *v.* Griswold. I may have given it, but I have no *recollection* of it. It would be *difficult for me* to isolate a particular case, and recollect the giving of notice, the lapse of time is so great. I don't know that I could recollect *any* particular case in which I gave notice. *I have no reason to suppose the usual rule of the office was departed from in this instance.* I do not mean to say that I served all the notices personally. I prepared them, it was my DUTY to see *that they were served. Sometimes I served them myself, and sometimes I gave them to an errand boy in the office to serve.*"

And so when examined again :

Question, by Mr. Brown :—Do you *know*, Sir, of any notice, and if any, what notice, having been given to Mrs Griswold, of the rule to shew cause why a decree of divorce should not be decreed ?

Answer.—I have no recollection of such notice.

Question, by Mr. Cuyler :—Among the large number of cases in which you gave notices of motions and rules while you were in Mr. Cuyler's office, can you at this distance of time isolate *any* one, and tell whether notices were given of it or not ?

Answer—No, I could *not.* I was thinking of that while Mr. Brown was asking that question.

Question.—Have you, from any fact which you recollect or *otherwise*, any *impression* on your mind that there was any departure from the ordinary and proper rules and regularity of Mr. Cuyler's office in any part whatever of this case ?

Answer.—I cannot, as I have said, isolate one case from another ; nor state any thing about one case more than another. Mr. Cuyler had a multitude of cases while I was in the office. Supposing every thing to have been perfectly *regular*, I should not be able to remember any particular. *I have no knowledge of any thing omitted or done wrong in this case : more than in any other case.*"

My own testimony shows that the rules of my office about notices were very strict. Of course in any office, where any business at all is done, those rules *must* be strict. Business could not proceed at all unless rules on *this* subject were strictly observed. In my testimony I speak as follows: (See ante, pp. 14 and 23.)

"I cannot now say with distinctness how the notice of that rule was given. Such notices in my office are usually given by a clerk in my employ, and the lapse of time is such now, that the gentleman who was then with me cannot say from his memory. It must however have been such as was satisfactory to the Court, *for I have a clear and distinct recollection of the calling up of the rule; of its being ordered to be made absolute, and of the proclamation being made by the crier.*"

And again;

"I have already stated that notices of rules were not given by me personally, but usually by clerks in my office, under standing rules in my office, which rules it was understood were to be *rigidly observed.* I have no reason to suppose that there was any departure from the ordinary rules of the office in this case."

It would have been altogether strange if Mr. Briggs had been able to remember how he served such a notice. He served, I suppose, from ten to twenty notices every day of his life, and he could as well recall the colour of last year's clouds, on any given day, as tell, at the distance of four years, how in each of thousands of services, he had made every one of them. There was nothing in the case to make the recollection of how he gave the notice more strong than in any other case. The lady was here or about here a great deal of the time. If here, notice would have been served on her as it would have been served on any citizen of the place; and if she was at Charleston, it would have been served just as services are made on people out of Philadelphia, a class of services made by every lawyer in active practice, every day of his life, and sometimes many times a day. It was Mr. Briggs' *duty* to make the service. He says, in terms, that "supposing everything to have been *regular*, he would not be able to remember any particulars;" implying very strongly, that if he had violated his duty, and any thing had been "irregular," he would have remembered it. The service of notices was, with him, a mere matter of routine: a dull, daily "duty." The omission to make a service, would have been the exception, and that would have been remembered: the making of the service was the rule, and not remembered. Is this remarkable? Does not every one know, that matters which are matters of routine make little or no impression?

"*Horatio.* Hath this fellow no feeling in his business? He *sings* at *grave digging.*
Hamlet. *Custom* hath made it in him a property of *easiness.*
Horatio. The hand of *little* employment hath the *daintier* sense."

2d. Then let me ask how it was that the lady came to take the appeal, and also to move for a recission of the decree? If there was a *decree*, there is an end of the question; for as I have said, the fact of want of notice is not suggested as proving an irregular decree, but as proving from the presumption of the Court's habits, the improbability of any decree at all. What led the lady into believing that there was a decree, but either the fact of a decree learned as a matter of fact, or her actual reception of a *notice* that one would be granted, unless she shewed cause to the contrary, and her conclusion from that notice, as she did not appear and did shew no cause, that one had been granted?

3d. Why did I not give that notice? What earthly reason existed in this case—above all cases—why if necessary, or deemed so by the Court, I did not give it? Can any man suggest a reason?

4th. Will it be said that no proof of service was filed? How does any body know that? If the whole record was still in existence, and no such proof formed part of it, it might properly be said. But when the greater part of the record has been lost, without fault of Dr. Griswold, what can you infer because such a paper is not now forthcoming? If indeed the record could be traced, on the last occasion when it was ever seen whole, into Dr. Griswold's custody, or into that of Dr. Griswold's counsel,—you might *in odium spoliatoris*, make any inference against him. But both the positive testimony and all the probabilities of the case, shew that the loss of the entire record—not only of that which actually came into his hands, but of the few remaining pieces also—is *attributable to nobody so much as to Mr. Justice Allison*. Here is the positive testimony. (See ante, p. 16.)

"On the argument of the motion to vacate, the papers could not be found, but some days after that argument, I was sent for by Judge Allison as I understood, who exhibited to me most of the papers in the case, stating to me that HE had found them among *his* papers; I think he said in a drawer. *When I handed the record to the Court, it was, I believe, the entire record as it then existed. What Judge Allison exhibited to me*, was the part now in the office. I am confident of it. *I have no knowledge of the record ever having come out of the possession of the Court into the hands of any person whatever in the state in which it was delivered to them by me.* These papers which Judge Allison exhibited to me, consisted of the supplemental libel, of all the testimony taken subsequently to that libel, and of .the original letter of Mrs. Griswold Myers, which had been made part of the record prior to the supplemental libel.

No doubt at all Judge Allison lost, or caused to be lost, the record so far as it is lost. It is certain that in March, 1856, parts of it were found by him, in a detached state, in his own private drawer, covered with dust, and under circumstances which made it certain that they had been in his possession for a long time. Now, what

was Judge Allison doing, at any time after a case was at or near its conclusion, with detached *parts* of a record? What *could* he have been doing with them? And when it is known that he must have had the *whole* record in November, 1852, so far as it then went, in order to decide, as it is certain he did do, whether the preliminary rule to show cause should be granted—the inference is plain that *he* or his brother Judges, and no one else, must have lost or caused to be lost, the parts that are now wanting. The record was left by him apparently in his drawer in the Court room, in one of the most public buildings in the whole city; a room to which, unless this court room is unlike all the other city court rooms, many persons have access out of court hours and court seasons—in which I believe elections and town meetings are frequently held, all kinds of chairmen and secretaries usurping the judicial seats, and using the judicial drawers and paper—a room which long since these papers were left there forgotten, has been within a few feet of two of the most frightful conflagrations which ever befel our city, when the halls and offices of justice, were the refuge of every sort of people, and where infuriated and drunken firemen, and low women were mixed up in them in a scene of orgies which resembled nothing I should suppose but a scene of the nether world. Does any one wonder that a record, once whole, left in such a place for about four years, should at the end of it, come out somewhat less than whole? Mr. Justice Allison, I say, last had this record, as far as it went, in November, 1852. What did I want, or Dr. Griswold want, or any body else, except the Court, want with the earlier parts of the record, after the rule to show cause was granted, if the rule as it is certain, was never opposed? And still more, if as the Court seem to think, it was never called up? It remained of course with Judge Allison; and when he thus kept in his possession the entire body of the record which preceded the rule to show cause, he left the Prothonotary's files in such a state, that the rule, the proof of its service, and the record of its disposition, were all of them without anything to be attached to: and if they were without proper endorsement of term and number, as Mr. Dougherty says that my papers usually were, were almost certain to be lost, owing to their loose and slight character, as mere slips of paper. That there was a paper regularly filed, containing a record of the rule to show cause, no one doubts. But has any one found *it*? The proof of service was in the same isolated condition, and has from the same cause, I doubt not been lost. I am not meaning by any thing here said, to reflect upon Mr. Justice Allison, for an omission incident to a lapse of memory alone, or to a slight want of mechanical particularity. I know how severely the Court is taxed about the custody of original

papers, which under our cheap system of jurisprudence and as a convenience to suitors, the Judges take home to study instead of putting parties to the cost of furnishing copies. Few Judges, I believe, are more careful in general about all these matters than the excellent Judge of whom I here specially speak. And with counsel more careful than myself, and who went as many do, beyond their duty in looking at Court entries, made on the final *disposition* of their cases, it is possible the accident would not have occurred at all.

5th. Finally let it be conceded that no service of a notice of a rule to show cause why a divorce should decree, was actually and in form made, after the granting of the rule, as is done in ordinary cases, which of course are adverse proceedings. What then? Was such actual subsequent service so vital, as that it cannot even with the strong evidence already given, be inferred that a decree was made without it?

Now let it be observed, that this whole case from one end of it to the other was special. In regard to the whole matter of notice to the lady, it was especially special. She had consented to a divorce, so far as anybody could consent to anything. She did much more than consent; she aided and supplied a defect of testimony by a confession under her own hand.* It might have been objected, indeed, that it was a case of collusion, and except that the real grounds of the case were outside the evidence, it would have been so like one, as to have been endangered for that cause. But no objection is, or has ever been made by the court on the score of collusion; the objection is that the lady had no actual, formal and specific notice of any rule to show cause, &c., and that without proof of such notice, so regular is the court in always doing business in one exact way, and so observant is it always of what it does do, that it would not, and could not have made a decree without proof of such notice. That is the argument. Such service of such a rule, is undoubtedly proper to be gone through with in form in any common case, *even when there is really a consent on the other side.* But this was not a common case. The lady was, *on the record*, almost as much an actor as Dr. Griswold himself. Her counsel, Mr. Petigru, had declared by writing shown to the court, and *then* on file, in March 1852, "She will conform to your plan of divorce by *making no resistance;*" and the lady had by a document also on the record, all in her own handwriting, declared to Mr. Searles in a paper obviously meant for the court, and which was shown to the court, that she had left her husband not meaning to

* This declaration was obtained at Judge Thompson's suggestion, and for the purpose of helping out defective evidence; it being perfectly understood that the lady would sign or do anything to assist the object of the libel.

return to him, and left him "at full liberty" to pursue such legal measures as he might be advised to pursue, and which she declares had been already "communicated" to him: and which she did not mean to impede or resist. Let the legal reader weigh these documents in this connection; I mean as a waver of all further notices. Here they are; I have printed them once; and to save the reader turning back, here print them again.

"CHARLESTON, March 16, 1852.

"*Dear Sir:*—Your letter to Mrs. Griswold of the 12th inst., contained so much matter that she felt the necessity of advice, and called on me, as a person *already acquainted with the circumstances, which delicacy would confine as much as possible to the knowledge of those interested.*

"I am authorized to say that *she will conform to your plan of divorce by making no resistance*, if the libel is confined simply to the charge of desertion; on condition, however, that your daughter be permitted to remain under the tuition and guardianship of herself and her aunts, not to be removed from their guardianship or control during her minority, unless with her own free will and consent. This condition appears to me so reasonable, in connection with the antecedent relations of the parties, that I anticipate no objection. I hope that everything may be satisfactory in *the winding up of this singular domestic drama*, and am, dear sir, yours, very truly,

"J. E. PETTIGRU."

"NEW YORK, Sept. —, 1852.

"*Dear Sir:*—I wlll not deny that I left R. W. Griswold for reasons the result of feelings on my part satisfactory to myself, which I do not choose to disclose; and which I still deem satisfactory to myself, though a court of law might deem them insufficient to justify or excuse me in separating myself from him. I have also no difficulty in saying that my intention when I left him was not to return to him, and my course and present position are founded on this determination, which still continues. I have left him, therefore, at full liberty to pursue such legal measures as he may be advised, and which *upon their communication to me*, I have not in any way impeded or resisted.

CHARLOTTE A. GRISWOLD.

"To HAMILTON R. SEARLES."

Now, in *such* a state of things—so very unusual a state of things—what propriety was there in giving a notice of a rule to show cause at all? Indeed there was no necessity of taking even the rule, though it was well enough to take *that* in order that the record might on its face be regular, and the usual *form* of making a decree in divorce, which is by making "absolute" a "rule to show cause," might appear to have been followed. The record, in a great majority of all our divorce cases, makes no mention whatever, of the MODE in which service of the rule was made: *or even that it has been served at all;* the clerk's entry almost invariably, as will be seen by looking at the "Certiorari and Divorce Docket" of the Common Pleas, being simply "Rule for Divorce," entered as of one date and about ten days after, "Rule absolute." Whether notice of the rule was actually given; whether it was waved, and if it was waved, whether it was waved in advance of, or subsequently to being granted—whether service was accepted, or finally whether notice was neither given, waved, nor accepted, does not in a majority of

cases, appear by any entry whatever, of the clerk on his docket. This I assert as a fact, and the docket will sustain my assertion. So that the fact that no record of filing proof of service appears, militates not at all, against the presumption of making absolute the rule, or in other words, of a decree. None of this machinery is required by the act of Assembly,* which is the only guide in the matter, greater than the court itself. The act does require a libel, and a subpœna and service (of some kind,) of the *subpœna*, and proofs. These are obligatory; but it requires no more; though it gives power to the court to make preparatory rules and orders "*in the cause.*" It simply enacts, Sec. 8, "that it shall, and may be lawful, for the said courts after hearing any cause commenced before them by this act to determine the same, by either dismissing the petition or libel, or sentencing and decreeing a divorce," &c.

Certain rules of court—no rules ever formally promulged by this present Court of Common Pleas, until long since this case, but coming down to it from a former court, which interpreted them conclusively as meant only for general cases, by dispensing with the observance continually in all others,—these rules do require a rule to show cause and service of it. But *all* rules of court are meant—unless it be specially declared otherwise—for general cases and not for exceptional and special ones. The court rules on the subject of divorce, require a rule and service in ordinary cases; *i. e.* in cases which are either really, or so far as the record shows, adverse or opposed proceedings; and not cases where, as in this *very unusual* one, there was proof on file of a dispensation with all notices. If the court could "jump" the whole matter of collusion—as they did—the case was not one in which they need have afterwards or further boggled.

The only *use* of notice of a rule to show cause was that the party might come in and "resist." But she had declared that she did not mean nor wish to resist; but would help the divorce "by making *no* resistance." She says that she had already had "communication" of everything in advance, and declared that she wished to *impede* nothing that Dr. Griswold chose to do. What has this court already said, on the motion to "vacate," about these wavers."

"It was strenuously urged," says Thompson, P. J.,† "on the part of the respondent, that none of the proceedings in the case have been regular, that the cause stated in the libel was utterly untrue, *and that the proceedings were carried on while the respondent was kept in ignorance of them.* That by this manner of conducting the case the libellant had imposed upon the court and fraudulently obtained a decree in his favor.

These positions are not, however, sustained by the evidence which has been submitted to us. It appears clearly by the written evidence, that the respondent had notice, not only of the intended application of the libellant before his suit was commenced, but

* Act of 1815. † Printed opinion of 15th March 1852.

that the subpœna, with a copy of the libel was served upon her, and that, relying on the advice of her counsel, (not her present counsel,) she intentionally disregarded the notice, *and permitted the cause to proceed as it might against her.* It further appears by the respondent's own showing, that one of the difficulties which embarrassed the case, and prevented for a time any action of the court, was removed by her own declaration, made in her own handwriting, and intended by her to be used in order to remove the objection made to the proceeding. In this letter, which is now before me, having been discovered since the argument, the respondent not only admits the truth of the complaint contained in the libel, that she left the libellant for reasons satisfactory to herself, but that her intention was not to return to him and that her course was founded on that determination, which still continued, leaving him *at full liberty to pursue such legal measures as he might be advised to adopt.*

Prior to the appearance of this letter, testimony had been taken *ex parte* and submitted to the court. At a subsequent period, certain other evidence was adduced, which in connection with the letter just referred to, and with the fact that the respondent had full opportunity to take any defence that she might deem proper, *satisfied the court that such grounds were presented as would justify the further action that tended to a final determination of the case.* The many and gross charges which are now made against the libellant, and which the evidence taken upon this motion is adduced to sustain, all of which were as well known by the respondent before her declared acquiescence in the course adopted by him, as now, were never breathed by any one. The court was permitted to act, as though the case was in all respects fair and free from any collusion or fraudulent design. It becomes, then, a question of serious import, whether under any such circumstances a court ought to listen to the party who claims to impeach the proceedings, either upon the ground of collusion, to which, *if it existed*, she was *a party*, or of fraud which she knew of and declined to expose.

As to the alleged collusion, it does not satisfactorily appear that it existed in such form as to demand our attention upon that ground. The proceedings were commenced and carried on adversely with full notice to the respondent. She was required to appear, but did not. The charge of desertion was distinctly stated in the libel filed and the truth of the charge was attempted to be sustained by evidence. Her declaration that the charge was true and the desertion persisted in, and that she had left the libellant to his legal remedies, cannot be regarded as collusion. A party to a suit who has a defence, but who chooses not to use it, cannot be said to collude with the party suing. He would not be listened to upon such a suggestion. *Rights may be waved without subjecting the party to any imputation. So a defence may be waved or a proceeding acquiesced in without any impropriety.*

If "a proceeding may be acquiesced in," as Judge Thompson, rightly says it may be, "without any impropriety;" and if the lady "*permitted*," as Judge Thompson rightly says she did permit, "the cause to proceed, *as it might*, against her," of what use or propriety, I ask once again was a notice to her of any rule to show cause at all?

Notice to the lady after what she had written, signed and sent, for the obvious purpose of dispensing with trouble to the libellant, and further feeling to herself, would have been disrespectful and unkind to her. Unforseen and sad circumstances, rendered a divorce, matter of *right*, with Dr. Griswold; but it did not follow that he had a right, as a man of humanity, to agitate and make sick a nervous and unfortunate woman by firing off notices at her, of steps which were but intermediate to a result which she anticipated, had sanctioned, and was doing, and had done all she could, to aid.

Nothing but an absolute necessity, under some law that the court could not dispense with, and which itself would dispense with no form under any circumstance of substance, would have made such a thing either decent or allowable.

In my opinion it would have been entirely regular in form, and proper every way to have made the rule absolute without any actual subsequent service of it at all. But suppose it would not have been so. Is the presumption of the court's always doing what is regular, and never doing anything else, so powerful as to rebut all the evidence which has been given in this case of a decree in fact? May not the court sometimes make a mistake, in the observance even of its own rules and its own practice? Might it not very well, in a case where there was no opposition have made a rule absolute, when, if there had been opposing counsel and it had acted on the case only after argument, it would not have done so? May not a court sometimes mis-apprehend counsel and suppose that something which they require to be done in a special form, has been done in that special form, when in fact it has not been done in a form *so* special? May not counsel sometimes mis-apprehend the court and answer that things have been done in a certain way, when if he had rightly understood the court, by which I mean had understood them as *they* meant to be understood, he would have answered somewhat differently? Take this very case and pre-supposing, I mean, no service of the rule subsequent to its being granted. Had the court on the return of the rule asked me: "Has the lady notice of the rule, sir?" I might not unnaturally have answered, "Yes, your Honor, she has." "What kind of notice, sir? Personal notice?" "Yes may it please the court, she has acknowledged notice of everything in the case, under her own hand."

The court would perhaps have supposed that I meant an acknowledgement after the issuing of the rule, while in fact I should have meant an acknowledgement in advance; which might have been, in my opinion, as good or better than any other. Of course, I am not here saying that actual personal, subsequent notice of this rule was not given; I feel almost sure that it was.

This argument, that there could have been no decree of any sort, right or wrong, regular or irregular, from the (assumed) fact that there was no proof of a sufficient service, and from the courts presumed correctness of every sort, its correctness of intention, and its correctness of actual action, under all and every circumstance; is, if you grant that there was neither service, nor *any sufficient waver of it*, a fair presumption, as a *prima facie* presumption.

But when encountered as it is in this case, by such various and cogent evidence of a decree in fact, the argument pushes it to the

extent of a presumed infallibility. And how, *if there was no decree*, can any such kind of argument be made in regard to this Court, and in *this case*, above all others? If the Court never made any decree at all, then the Court committed a great blunder, not to say a great indecorum likewise, in sending to the Superior Court, as they did, a record purporting to contain a decree; and another blunder, just as bad, nine months afterwards, in granting a rule *nisi* to rescind a decree which they never gave. I have great faith in the care with which our Court of Common Pleas, transacts all business of form. Much of my argument is based upon the assumption of its uniform correctness in formal proceedings. I argue, directly, with as much zeal as the Court at page 4, does, impliedly, in favour of its presumable care and correctness. But I argue in a different way, and I certainly hope for the honor of an excellent Court, that I argue with a better success. If there was no proof of actual service of the rule to show cause actually filed, it may, as *I* suppose and argue, have arisen from a want of usual or proper precaution on my part: and if the service was made, and a decree actually entered on proof made, though not filed, the decree was good enough. If the proof was filed and not docketed, it was a mere misprison, as *I* suppose and argue, of the Clerk; and if he had entered the decree, was a matter of little moment. Even if no service, in form, was made of the rule after granting it, the Court, as *I* suppose and argue, did nothing worse than regard a waver of notice in advance as equivalent to proof of service subsequently; a small irregularity at best; if indeed it was any irregularity at all. Neither witness, counsel, nor court, according to my mode of argument is convicted of any thing beyond a want of the *greatest* caution, in a case where every thing appeared to be done so entirely by mutual consent, that prudence was disarmed, and even ordinary caution might have naturally been dispensed with as unnecessary. But the Court's style of argument makes me the grossest liar on earth, makes Mr. David a liar, only less gross, while Mr. Henry M. Phillips and Mr. David Paul Brown, both of them, come out as professional blunderers; and the whole concludes —as, after *thus* presenting four gentlemen of his own bar, Mr. Justice Thompson was bound in humanity, I think, to make it conclude, with a double stultification, by the President himself, of his own Court; our ancient and honorable jurisdiction of the Common Pleas of Philadelphia.

Such, essentially, as presented in this pamphlet, was the case as presented to the Court of Common Pleas on the recent argument, some time I think in March last upon my rule to enter as of day of a decree *nunc pro tunc*. I have presented in

this book, as I have several times said, the evidence on this point just as it was presented to the Court. I have given but an outline of the argument, which was at much length, and I believe left nothing uncovered. The first and main position was, that the fact of a decree of divorce *at some date:* and the chief evidence relied on to show this, was, according to my apprehension of the argument, the *record* evidence, and the evidence of presumptions derived from the appeal. Certainly this was prominent ground of the argument. The question of the *date* of the decree, was a second question, wholly independent of the first one, the question of fact, and was stated with entire distinctness, I think, not to rest on the same sort or the same amount of evidence as did the *fact* of the decree. The *fact* it was contended was clearly proved by evidence, no where opposed: the date, while it was strongly asserted to be proved, as of the 18th December, 1852, rested, it was admitted on Mr. Bonham's testimony and upon the accuracy of my telegraph and of my "convictions;" and the counsel distinctly put it to the Court that if they did not adopt the 18th December, as the date, then that they might adopt whatever other date they saw fit: If they gave a decree, it was their duty, not Dr. Griswold's, to fix the date of it. Even if he had not so put it to the court, it was the obvious suggestion from the form of the rule, in blank, and the character and weight of the evidence; quite different in respect to the two points. I shall speak of all this matter by and by. In the mean time I have the satisfaction to put before my readers the opinion of Judge Thompson, printed from his own manuscript, with no other alterations than the italicising of certain parts to which I shall beg special attention, nereafter, and the insertion in parentheses of the names of the witnesses to whom he refers.

THOMPSON, P. J —The present application embraces two distinct motions:
1st. To supply the missing portions of the record by sworn copies.*
2nd. To enter a decree of divorce *as of the 18th day of December*, 1852, *nunc pro tunc.*
The disposition of the latter motion has not been *unattended with difficulty.* With every desire on the part of the Court to relieve *Dr. Griswold* from the embarrassing position in which he is placed, we have *endeavored to remove from our minds any impressions or recollections* which might affect the case, and have confined our attention solely to the evidence submitted for our consideration. This evidence consists of the depositions of witnesses, and of the writings and records which have been produced.

It is admitted that the record, as kept by the Clerk of the Court, is inconsistent with *the* parol evidence, and *the* question is, whether the latter is sufficient to establish the falsity of the former? The record shows that the Rule to show cause why a divorce should not be granted, was entered on the 31st of December, 1852. If this entry be correct, no decree could have been previously made. To prove the incorrectness of this entry, and the fact of a prior decree having been made, the testi-

* The Court having granted this part of my motion, I have had no occasion to speak in this pamphlet on this point. There is no difficulty about *it.*

mony of *several* witnesses has been introduced. The first witness (Mr. Bonham) testifies, that on the 18th of December, 1852, he was in court, when a decision and decree were made by the Court, and that he immediately, as directed by the libellant's counsel, announced that fact by a telegraphic dispatch to the libellant, in Boston. That he did so, is shown by the production of the order signed by the counsel, from the telegraph office. It also appears that a letter was sent by which the libellant's counsel (Mr. Cuyler) communicated to his client the same information. It is quite evident, that on the 18th of December, 1852, something was said by the Court in relation to this case. *Sometime prior to the entry of the rule to show cause why the divorce should not be granted, the Court expressed their views in relation to the case as it then stood, and said that they considered, under the circumstances of the case, the evidence sufficient to authorize a decree.* It is contended, by the counsel for the respondent (Mr. David Paul Brown), that this expression of opinion, and nothing more, occurred on the 18th day of December, 1852, and that it was a mistake to regard it as a decree. Another witness (Mr. Briggs) testifies, that on a Saturday, the precise date he is unable to fix, he saw upon the desk in the prothonotary's office a paper, endorsed with the name of the case, and having the word "decree" upon it. The deputy prothonotary (Mr. David) testified, that he had *some* recollection of having seen a paper *having a judge's initials* to it, and that he had *a recollection* of having given a *certificate* of the decree. The remaining testimony on this point is that of the libellant's attorney, who expresses *a strong recollection* of the fact of the decree having been made, and a proclamation also, according to the practice of the Court, *and that on the* 18*th of December*, 1852.

Upon this evidence, together with some additional testimony as to the receipt of the certificate and the telegraphic dispatch, by the persons to whom they were sent, but by whom those papers have been mislaid or lost, the Court is called upon to say whether there is sufficient proof of a decree having been made, upon the return of the rule to show cause why a divorce shou'd not be granted, *with the required notice of such rule having been served on the respondent, and whether that took place on the* 18*th of December*, 1852.

If the decree had been made by the Court without the preliminary rule to show cause, though it would have been irregular, we should feel bound to have it entered upon the record, now, as it was made. But it is *not* alleged that any decree was made until *all* the requirements of *our rules of Court* had been complied with: on the contrary, the libellant's attorney, in his testimony, states that, after the Court had intimated a favorable opinion, he took the rule to show cause why the decree should not be entered.

The record of the Court shows that such a rule was taken on the 31st of December, 1852, so that the *fact* of the *rule* having been taken is not questioned, but the date of the rule, as it appears upon the record, is alleged to have been falsely entered.

Now, *the* question is, whether the evidence given proves *the falsity of the entry?* The clerk (Mr. Dougherty) who made it, can say nothing as to the date. It *appears* among the regular business of the day on which it bears date, and appears perfectly regular. All the suggestions made, as to the want of precision in keeping the minutes of the daily business of the Court, or of the careless manner in which counsel frequently present their motions to the clerk, afford nothing more than an inference that *possibly* a mistake may have been made, without showing the *probability* of it. This alone is not sufficient to affect a record which bears all the appearance of regularity. ☞ Nor does the testimony of the witnesses who speak of the certificate, and the paper endorsed as a decree (Mr. David and Mr. Briggs), fix the *time* at which they severally witnessed the matters to which they testify, so as *to conflict* with *the date of the record.* Mr. Briggs *may* have seen the endorsed paper, *as he states*, and the deputy Prothonotary (Mr. David) *may have given a certificate*, but unless they show that those things occurred prior to the 31st of December, 1852, the correctness of the record is not thereby assailed. ☜ Neither the certificate nor the endorsed paper can be now produced, and but little reliance ought to be placed upon the memory of a clerk (Mr. David), speaking at the distance of more than four years from the event, when it is evident that he entirely *forgot* to enter

upon the docket which was kept by him, either the fact of a decree having been made, or of a rule having been granted, or any other matter from which he was justified in giving such a certificate.

The testimony given by the libellant's counsel (Mr Cuyler) is entitled to a respectful consideration. It is to be remembered, that *the* question is *only* as to *time*—whether, on the 18*th day* of *December*, 1852, a decree was made? This witness (Mr. Cuyler) speaks *with much certainty* of his recollection of the FACT of a decree having been made, but what effect has his testimony as to the *time?* The decree spoken of by him is alleged to have been made *subsequent* to the rule to show cause. He expressly says, that the evidence of the service of notice of that rule upon the respondent must have been satisfactory to the Court, otherwise the decree he speaks of would not have been made. *This amounts to an assertion* that evidence of the *service* of notice was submitted by him to the Court. No trace, however, of this notice is to be found on record. In considering the weight to be given to this testimony, as bearing upon the question of time, it is to be observed, that the witness had no *recollection* of the time of entering the rule to show cause, different from the date of said rule upon the minute book, *until* the telegraphic dispatch was discovered, or certain letters were sent to him, which had passed between the friends of the libellant, which disclosed the date of 18th December, 1852, as the time at which the information relating to the decision, or decree, had been communicated to them. The witness (Mr. Cuyler) had *previously* noticed that no entry of the rule had been made upon the docket of the Court, though entered in the minute book; and he caused the entry to be made upon the docket *without objecting that the date of* 31*st of December*, 1852. was not the *correct* date. When, however, the date of the telegraph was fixed, it was not unnatural to refer the recollections of events to that as the proper time. But are the recollections of a witness, as to one class of events, to be relied on as sufficient to falsify a record, when other circumstances of equal moment, quite as likely to make an impression on the memory, and more easily to be proved, are entirely forgotten, or are unaccounted for? I mean the circumstances attending the giving notice of the rule to show cause to the respondent. She resided at Charleston. The *notice*, if given, *must* have been given either by publication in a newspaper, or by actual service upon her. If it was by publication, nothing could be more easily proved: the newspaper would show it. If actual personal notice was sent to the respondent, by whom was it sent? Some agent must have been employed, who was he? How was he employed to serve the notice? And in what manner was the proof of service established? If these matters, so *vital* to a decree, and the *omission of which is not pretended*, cannot be recalled by the memories of those who recollect seeing certain papers in the Clerk's office, and hearing a decree given in Court, or by the counsel under whose personal direction they must have been attended to, how can those recollections be relied on, in opposition to what appears to have been fairly entered upon the record?

The entire want of recollection of a fact so *essential* to the libellant's case, and which must have caused the kind of trouble by which it would naturally have been impressed upon the memory, together with the absence from the record of any minute of the service of such notice having been proved or filed, leaves the mind *embarrassed* with a serious *doubt*, as to the fact that *such notice* was ever given in any manner. The entry of the rule to show cause, either upon the 31st of December, 1852, as it appears on the minute book, or at any prior period, shows that any decree which was moved for, was *intended* to be taken under the Rule of Court which requires the notice to be given either by publication or by personal service. There is *nothing* to show that this requisite for obtaining a decree was *dispensed with*, and the *entire want of explanation* or of evidence on this subject, has weighed more heavily than anything else in coming to a conclusion upon this motion. We cannot interfere with a record which is *apparently correct*, unless clearly convinced that a mistake exists; and after weighing the testimony submitted with the strongest inclination to do that which *truth* requires, we are unable to decide that the alleged error exists. This is *not* like the case of an *omitted* judgment, where all the proceedings show that a judgment should have been entered, or where the subsequent entry of a

judgment *nunc pro tunc* is entirely consistent with the record of the case; but it is an application so to ALTER the RECORD as to make IT consistent with an alleged judgment, the evidence of which, depending upon the recollection of witnesses after the lapse of several years from the period referred to, is countervailed to such an extent by other circumstances, as to leave us in doubt, to say the least, of the propriety of relying upon it. For these reasons, the application to enter the decree as of December 18, 1852, cannot be granted.

So much of the application as relates to supplying the missing portions of the record in the case, by filing sworn copies, we have no hesitation in granting. These records seem to have been copied out of Court, and perhaps the material parts, if not all the missing portions, can thus be furnished.

Such was the opinion.

And the first reflection, I should think, which will strike every one, is a *moral reflection;* a reflection as to the position in which *the Court*—as a controlling power over the bar, and the conservator of professional morals, and of public and private safety, so far as professional men have anything to do with either—stands, by the way in which it *leaves* things. I am not going to speak of the manner in which Mr. David's testimony is disposed of. I assume the whole matter for myself. In speaking, in my testimony, of the decree, I *swear* as follows:

"I have a clear and distinct *recollection of the calling up of the rule;* of its being ordered to be made absolute, and of the *proclamation being made by the crier.*" (Ante, p. 14.)

And in another place (ante, p. 22), I go out of *my way*, and swear:

"I *desire* to state in the most *unqualified terms*, from clear and distinct *recollections*, the making of the final decree, and the *proclamation* which attended it."

So, also, the testimony shows (p. 17) that the following original letter was produced:

Philadelphia, June 17, 1853.

MY DEAR SIR:—

Your favor covering draft for five hundred dollars was duly received.

I am happy in the assurance that any service I may have rendered, ministered to your comfort and happiness.

In a few days I hope I may be able to advise you that the other matter, relative to your daughter, is settled in a manner agreeable to your feelings and wishes. Such a result seems probable.

Truly Yours,

THEO. CUYLER.

DR. GRISWOLD.

Of which letter I speak, under oath, as follows (p. 17):

"This is an original letter of mine to Dr. Griswold. it bears date the 17th June, 1853. The fee mentioned in this letter was for services rendered in this case. It was not a charge made by me to Dr. Griswold for those services, but was a voluntary expression by him of his satisfaction of them, *for conducting the case to a conclusion. That conclusion, by which I mean the Decree of Divorce, which had been obtained long prior.*"

I say nothing here about my telegraph of 18th December, nor about the letter which Mr. McCrellis says I wrote on the same day, informing him that there was a decree. The letter is not produced, and it is *possible* that Mr. McCrellis, not being aware of our Pennsylvania practice, may have read my word "decision" for "decree." In regard to the telegraph, the body of it is all written by Mr. Bonham, then a mere student of law, the signature alone being in my hand. It *may* be that Mr. Bonham misunderstood me, and wrote "decree" when I had not told him to do so, and that I signed, in haste and without reading it, what he wrote. It *may* be, that knowing Dr. Griswold's anxiety, I gave to Mr. Bonham a slip of paper with my signature in blank, telling him to go to Court, see what was done, and to telegraph; and that *he* misapprehended what was done, and wrote more than he ought to have written. And finally, it *may* be that I actually *did*, on the 18th December, *mistake* the expression of a favorable opinion for a decree, and that I *did* suppose that the Court meant actually to make a decree, when they only meant to say they *would* grant one, if, on specific notice to the lady, no cause was shown against it—a thing rendered more possible by what I might very well have believed, st., that the letters of Mr. Petigru, and of the lady, rendered all usual forms of rule and service unnecessary. All these things, as I have said once before, are possible; though, as facts, I do potently and powerfully disbelieve every one of them.

There are many suppositions which can be made about my telegraph and letters; no one of them, indeed, creditable to my caution or intelligence, but no one necessarily nor deeply involving my *moral* character. But what can be said about such testimony as that printed on the preceding page, when, *avoiding* all statement of the date of the transactions, I say, as there stated, st., "I have a *clear and distinct* recollection of the calling up of the rule, of its being ordered to be made absolute, and of the proclamation being made by the crier." And again, when, after speaking about other things, in regard to which alone I was questioned, I go out of way, and say, "I *desire* to state, in the *most* unqualified terms, from clear and distinct recollections, the making of the final decree and the *proclamation* which attended it." It is merely foolish to talk about *mistakes* here. If there is a mistake, is it that sort of mistake which the laws of all countries call perjury, and which sends the party "mistaking" to the penitentiary? Mistake! It can be no "mistake" about anything. It cannot even be a mistake of law. I do not swear to recollection of a "decree." That would leave open the question of law, as to what sayings and doings by the Court and crier make a decree in law. I swear, in the most unqualified terms,

to a clear and positive recollection of *facts*, which, if true, no one will deny, make a decree. It is a lie, and a "lie with circumstance," if there was no decree. And what shall be said about the *fee* of five hundred dollars? If I was mistaken on the 18th December, in supposing that a decree had been granted on that day, the taking, on the 31st December, thirteen days afterwards, of a rule to show cause why a decree should not be granted subsequently, shows that I had recovered of my mistake on that 31st; and if I got no decree on the return of that rule, say about 10th January, nor afterwards, how—in taking that fee, and with that fee still in my pocket, where it still is, *so far as the Court knows*—do I, as an honorable barrister, stand to my client, Dr. Griswold? Let my blunder or carelessness —if it was a blunder or carelessness—as to what the Court did on the 18th of December, 1852, go! A very disgraceful blunder, and very culpable negligence—if it was blunder or negligence at all—it was, considering that on that day I had been admitted to the bar just eleven years, two months and eleven days! But let it go! The other part *can't go*. There is the gravamen of my reflection on the court. I put my finger upon those facts: the facts—my swearing, in 1856, to my distinct recollection of facts which prove a decree; and of my receiving, in June, 1853, five hundred dollars, as a fee for getting a decree, and keeping this large sum of money all the while from that time till now. Does the Court, after this sort of falsehood (false swearing), and this sort of dealing with a client, by an attorney—an officer of the Court, amenable to the Court for all professional impropriety—say that they can find no sufficient evidence of a decree, and say—nothing more? It may be very creditable to Mr. Justice Thompson's heart, as a man. I cannot trust myself to consider how it becomes him, as a magistrate —how it consorts with his duty, as the presiding officer of a high tribunal of justice. It may be kind to me—it is "very, very kind." It is more than unkind to the public. Are professional men, standing, as all professional men do, in a relation of confidence to clients, not only to blunder and dash about recklessly in the most important concerns of life, but also to lie and betray confidence, and receive money for lying and betraying confidence, and to swear to lies through thick and thin, and to remain professional men still, *in full standing and honor?* The profound silence of the Court, if they deny the fact of a decree, is remarkable. No act of discipline! No word of admonition! No suggestion about the return, with interest or without it, of this large fee, as the very least acknowledgment of a fault which nothing could repair! "O tempora! O mores! Senatus hæc intelligit: consul vidit: hic tamen vivit: vivit? immo vere; etiam in senatum venit; fit publici consillii par-

ticeps. Vivit, non ad deponendam, sed ad confirmandam audaciam. * * * Non deest reipublicæ concilium, *neque auctoritas hujus ordinis.* Vos! vos! judices, dico aperte, deëstis."

2. The next remarkable thing about the opinion as a whole, is, that while the Court labours a great deal in replying to some other evidence, it does not make one single remark upon the RECORD evidence; the evidence I mean of its sending up to the Supreme Court, a record which professed to contain a *decree*, and of its granting several months afterwards, a rule *nisi* to *rescind* a decree. Now let any man turn back to pages 8, 9 and the top of page 10, and look at that evidence, and refer to the argument from p. 37 to p. 45, upon it as to the presumptions in law and fact which come by illation from it; and say whether this is not as strong or stronger evidence and argument as to the fact of a decree than all other evidence and argument in the case. This evidence is the strongest evidence I think in the whole case. It comes, every part of it, from the acts of the other side, or the other side's counsel, both interested against Dr. Griswold; or from the Court itself, which is impartial. It is open to no imputation of having been made for the exigencies or post litem motam. Without any doubt whatever, if the Court made no decree, it did, in both these last-mentioned acts, do that which was more or less irregular, which shows a want of perfect memory, and which it would not have done if it had then thought as it now thinks. It made, in short, two mistakes. How is it that the Court can argue so long, and laboriously and ingeniously and ably about the bad memory of witnesses and the irregularity of counsel, and not say anything about its own bad memory and its own irregularities; necessary consequences of *its* conclusions, not of mine. The opinion of Mr. Justice Thompson says truly in the beginning of it, that the evidence consisted of the depositions of witnesses, *and* of writings and RECORDS which have been produced. It examines critically all the parol testimony, so far at least as it relates to *date*, and there ends! but says not one single word upon the other kind of testimony—the records;—no more than if neither it nor Judge Thompson had ever existed at all.

And now let us take up this opinion a little in detail. I take up sentences pretty much in the order of the opinion, though throughout the whole of the document there seems to me a great want of the order or at least of the clear and definite division, and neat, clean statement of each thing separately, which usually marks Judge Thompson's opinions. In some paragraphs, particularly towards the close, there is "a mass of things but nothing distinctly." One thing seems run into another thing in a way which makes it difficult to comment on each paragraph. However, whether with order or

without order, my comments upon the parts extracted will show how entirely unlike Judge Thompson's ordinary opinions this one is; how greatly he has, in fact, misconceived the main point which the Court was called on to decide, and yet how here and there he comments confusedly, on evidence in a way which has imperfect application to any other point; how frequently he mis-states the evidence, (unintentionally, I fully concede;) and how illogically or inconsequential his reasonings frequently are.

Judge Thompson says that the application was:

> 2nd. To enter a decree of divorce *as of the* 18*th day of December*, 1852, *nunc pro tunc.*

This was *not* the application. The rule as I have said some half dozen times speaks for itself. Here it is:—

> "To show cause why the Prothonotary of the Court should not be directed to make on the Minute Book, and also on the Docket of the Court, now as of day of , *nunc pro tunc*, the entry of the making absolute of a certain rule to show cause why a divorce shall not be decreed n this case."

And what certain rule was this? Undoubtedly the very rule entered by the Clerk as of December 31st: and any entry of the making absolute of the rule would necessarily be as of a still later date than the 31st. Further therefore than that the rule necessarily implied a date later than that of 31st December, the matter of date had nothing to do with the rule. On the contrary, the rule was left with blanks for the date, because from the beginning, my colleague was in great doubt about the matter of date; and would not attempt to fix any. There was indeed a 3d rule, taken afterwards, totally distinct from the rule above given, to show cause why the date of *the rule to show cause* should not be entered as of the 8*th* of December instead as of the 31*st*. It was, as I have said, a rule independent of the rule for the entry of the decree nunc pro tunc: and could have been perfectly well refused, while the other might have been as perfectly well granted. There was no dependence or mutual connection between them.

The course of the evidence and argument is plain. The first and main thing which I desired to establish was *the fact* of a decree at some date. The date was a subsequent matter. Undoubtedly I tried to establish it as of the 18th of December; trying to overcome, if I could overcome the Clerk's entry of the 31st. But I was not so dull as not to see that the two things, I mean the fact and the date, were different things, and rested on different testimony; there having, in fact, been *no* evidence that the decree was on the 18th December, 1852, except my telegraph of which it was a circumstance which arrested attention at once that the body of it was not written by me at all, nor by any lawyer, but was written by a student of law who

of course was yet both ignorant and inexperienced; and that the letters in which it was said I had communicated the *same thing* under my own hand could not be found, and therefore could not be examined. Mr. McCrellis's recollection of seeing a certificate as of a date before his sister's marriage is stated by him expressly not to be of the most distinct kind. On the other hand, there was the entry of a Clerk presumably right until it was shown that the Clerk was *oftener* wrong than right.

A vast portion of the evidence, and all its positive and strongest part related to *fact* alone. What had the Records produced to do with any thing else? They neither established, nor tended to establish, nor were produced to establish date. And Judge Thompson truly says:

> Nor does the testimony of the witnesses who speak of the certificate and the paper endorsed as a decree (Mr. David and Mr. Briggs), fix the time at which they severally witnessed the matters to which they testify, so as *to conflict with the date of the record*, [i. e., the record of the date of the rule to show cause, 31st December.] Mr. Briggs *may* have seen the endorsed paper, *as he states*, and the deputy Prothonotary (Mr. David) *may have given a certificate*, but unless they show that these things occurred prior to the 31st of December, 1852, the correctness of the record is not thereby assailed."

Perfectly true all this. And again he says in speaking of my testimony:

> "This witness (Mr. Cuyler) speaks *with much certainty* of his recollection of the FACT of a decree having been made, but what effect has his testimony as to the *time?* The decree spoken of by him is alleged to have been made *subsequent* to the rule to show cause. He expressly says, that the evidence of the service of notice of that rule upon the respondent must have been satisfactory to the court, otherwise the decree he speaks of would not have been made."

Not less true all this! And the result of his Honor's observation should have been "all this evidence goes to *fact* not to date." and his conclusions, if quite convinced that my telegraph was wrong, should have been that there was a decree, but that the date of it was after the 31st December, instead of before it. If Dr. Griswold was re-married (or, to speak safely, married) prior to the decree, and *not privately* married again afterwards—as it may happen to be discovered that he was, the result would be that he would have to be married now. My wonder is how "burning" all the time as children say, coming so near as he does in several places to a conception of what the first question before him was, his Honor should have so completely missed it in the end.

2. My next critcism is of a different kind. His Honor declares in the opening of his opinion:

> "We have *endeavored to remove from our minds any impressions or recollections* which might affect the case, and have confined our attention solely to the evidence submitted for our consideration."

In speaking of "impression or recollections" in contrast with "the evidence submitted to our consideration" it is clear, that his Honor means *personal* "impressions," and *personal* "recollections," "Personal impressions?" "Personal recollections?" These are unusual words to be found in judicial opinions. If personal impressions or personal recollections are the proper elements of the judicial judgment, why are they thus discarded in a case, which as the opinion tells us "has not been unattended with difficulty?" And if they are not, as past all question they are not? why does Mr. Justice Thompson speak of them at all? Does he mean that after his reader shall have read and considered all the *argument* contained in his opinion, and shall find that *this* is wanting and inconclusive, he shall come back? "Oh yes!" But Judge Thompson, had "personal knowledge, and personal recollections of the case?" Does Judge Thompson mean this? I should think he does, if he has considered what he wrote, and means anything. And by what right does Judge Thompson thus speak? He must excuse me. His Honor, before whom I have practiced in my office, during the whole time in which he has been exercising his, will believe in my disposition I am sure, to respect the judiciary every where, irrespective of the various degrees of capacity or learning in the men who compose it. He will believe, I hope, that by no one more than by me shall be sustained for ever, all "those pleasing illusions" which make us regard every court as the awful Impersonation of Justice, and as such to be treated with the respect that is due to a power ordained, undoubtedly, of God. Let our courts and our judges have all the decent drapery—Heaven knows that in these days it is less than enough!—which they can gather and hold about them; and let "all the superadded ideas furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked shivering nature, and to raise it to dignity in our own estimation," remain—so long as the judiciary and the judges remember that they are the judiciary and the judges. Mr. Justice Thompson shall have from me, his full share of it all,—while he sits upon the seat of judgment. But if Mr. Justice Thompson is so unfortunate as on any occasion to do so unusual a thing for him as to forget himself, and thinks proper to come down a few steps from his judicial platform, and without going into the witness box, sees fit to exercise the art of judicial ventriloquism, uttering ambiguous sounds, that come as *if* from that place, but do not come from there at all, he will excuse me I hope, if I do step up a single step upon the same platform from which he descends, and do come a little nearer him, than as an utter-barrister, I otherwise should presume to do; and bending forward with proper respect, do, with at least, a

thumb and forefinger, take leave to raise his ermine from his back and see whether he is a judge in proper costume or a witness in unconscious disguise. I ask then what such words mean in a judicial opinion? "Impressions?" "Recollections?" Impressions about whom? Recollections as to what? Such expressions if they are meant to convey any idea, are meant to convey an idea of something unfavorable; and by what right I again ask does a judge convey such ideas without a single specification of person, place, time or manner? I must be excused for not being willing to leave a general remark of this kind unnoticed to produce itse ffect, when the effect, if any, must be, bad; and what I have to say is that if Mr. Justice Thompson, either for the court or for himself, meant to intimate that he had an unfavorable 'impression' about *me*, professionally, or about anything done, or omitted to be done by me professionally, in any part of this case, I am here to hear him when he pleases, and I hope to answer him. Does he remember Mr. Webster's reply to Mr. Calhoun, who "had intended to say something, *if time had allowed*, about their respective opinions in regard to the war." "If time had allowed?" said Webster, "Sir, time does allow, time must allow." . . . Let Mr. Justice Thompson bring his "impressions" and his "recollections," forth. Let him take the *responsibility of an accusation*. Let him state his facts. He shall have his own time, and his own hour, though he has let both the proper time, and the proper hour pass! There are some birds in the air which are often hovering, but seldom lighting. If such hover over me, refusing to light and let me see whether they be volucres obscœnæ, or the reverse, I must be excused for sending my shot as strong I can send it, to bring them down.

The idea of a Court referring to its personal recollections for no purpose as far as they show, except to claim the grace of not being governed by them, is new. There is no grace in discarding them; for the Court has no right whatever to use them. How is a judge's recollection, let me ask, to be impeached? Does he expect counsel to call members of the bar to show a fact well known perhaps to the whole bar, that his memory is naturally bad, or perhaps that disease or bad habits have made it so? *When* are these recollections to be announced? Before any testimony is taken, and in order to show that all testimony is useless? For doing less than this Judge Chase was impeached. Or will the Judge wait until a case has been half heard and then announce his recollections? sending the case back—only to come back and forward at every term—till by a course of experiment upon the comparative strength of testimony and memory, enough of the former has been accumulated to pull the case through the mire in which it has got stalled? Or will he hold a profound silence—as the best Judges including those of the Common Pleas

often do—during the whole argument, and first announce his memory in announcing his judgment? leaving of course the defiant suitor to ask, "Why did the Judge not tell this before. I collected testimony to answer my opponent's case, not the Judge's; to answer a case which I could see and not one which I could neither see nor conjecture the existence of. I had more and enough to overcome all that the Judge remembers, if the Judge had informed me that he remembered any thing."

The Court of Common Pleas must excuse me for the freedom with which I speak on this matter. Such principles of decision as they seem to make a merit of discarding, strike at the root of all law. I know no precedent for them but one—that is in a recent case in an ecclesiastical body, hardly to be called a court at all,* and it is to the infinite credit of that body that being taught by a lawyer what the true principles of *judicial conscience and judicial judgment* are, they had magnanimity enough to retrace their steps, and confessing their fault to both one another and the public, to restore to his high ministry and usefulness, a repentant brother who, overtaken in a fault, had on his first discovery of it, himself come forward to confess it and to ask their discipline.

3. "It is admitted that the record, as kept by the Clerk of the Court, is inconsistent with *the* parol evidence, and *the* question is, whether the latter is sufficient to establish the falsity of the former?"

It is not and was not admitted, nor was this the question. It is and was admitted that the record as kept by the clerk of the date of the rule to show cause is inconsistent with a *portion* of the testimony, Mr. Bonham's chiefly, and the question whether the latter was sufficient to establish the falsity of the former, was but *a* question in the case, and one but secondary both in time and importance to what was more entitled to be called *the* question, st. whether the Court ever made any decree at all.

4. "Sometime *prior to the entry of the rule* to show cause why the divorce should not be granted, *the Court expressed their views* in relation to the case as it then stood, and said that they considered, under the circumstances of the case, the evidence sufficient to authorize a decree."

Where in any part of the evidence does this appear? It appears no where; and as a fact I deny it to be true. It stands to every probability of the case, that with such letters as Dr. Griswold was writing to me, (see ante, p. 20, 21,) I took the rule to show cause why a divorce should not be granted, *immediately* upon the Court's expressing their views and saying that they considered the evidence sufficient to authorize a decree. That was the natural, usual and

* The House of Bishops of the Episcopal Church.

proper time ; and there was the gad of Dr. Griswold's letter of December 4th, if I had needed any other spur than my own sense of proper duty and his anxiety, well known to me by a hundred communications, and by many personal calls at my office to expedite matters as much as possible. I have already considered the matter—see ante, pp. 48, 49.

Supposing the fact of a decree to have been made out, and as a secondary and subsequent point to that, the first and main question, my colleague for me contended that this rule was taken on the 8th of December, and that *this* was the day when the Court had expressed their opinion that the evidence was sufficient to authorize a decree. Mr. Brown, as the Court says,

"Contended that this expression of opinion, and nothing more, occurred on the 18th day of December, 1852, and that it was a mistake to regard it as a decree."

The difficulty which met Mr. Brown was, that he required as a preliminary to this conclusion, the fact that such an expression of opinion had taken place some days prior to my taking the rule; a matter of which there was no evidence whatever, and which, as I have said, was against all the probabilities of the case. Mr. Justice Thompson, mistaking, as I have said, for the main point, a secondary point, and being under an "impression," I doubt not, that I had fallen into a mistake in telegraphing a decree when there was none, supplies from his "recollection"—or no recollection as I conceive it to have been—the wanting evidence, and then Mr. Brown's conclusion comes. I ask any body to show me any thing, in any part of the evidence, by which the statement that "*sometime prior to the entry of the rule to show cause why the divorce should not be granted, the Court expressed their views in relation to the case as it then stood, and said that they considered, under the circumstances of the case, the evidence sufficient to authorize a decree*"—is proved or can be inferred to be true.

5. "The deputy prothonotary (Mr. David) testified, that he had *some* recollection of having seen a paper *having a judge's initials* to it, and that he had a *recollection* of having given a *certificate* of the decree."

This is not Mr. David's testimony. Here is his testimony: See ante, p. 13.

"I have an indistinct recollection of making out the certificate, *from the fact that I recollect the paper was laid before me having the Judge's initials, being the "Decree of Divorce." I have no doubt that I did make out the certificate.* It is my recollection that the allowance of the decree was not on the back of the report as is usual, but on a separate paper.

Mr. David testifies not to "some recollection," but as I apprehend, to a complete recollection "of having seen a paper having

the Judge's initials, being the "decree of divorce." He has "some" or to use his own terms, an "indistinct recollection" of making out the *certificate*, from the fact that he does recollect—meaning of course that he recollects, distinctly, the fact of seeing the paper having the Judge's initials and being a decree of divorce. The term "recollection" as applied by him to the certificate is obviously not quite philological. He explains himself immediately, when he says "*I have no doubt* that I made out the certificate. What he means is, that he is convinced that he must have made the certificate, because he remembers, with entire distinctness, the fact that "the paper was laid before him having the Judge's 'initials,' being the decree of divorce," for him to make it from.

6. "The remaining testimony on this point is that of the libellant's attorney, who expresses *a strong recollection* of the fact of the decree having been made, and a proclamation also, according to the practice of the Court, *and that on the* 18*th of December*, 1852."

It is to be regretted, I think, in a case where the testimony was all in writing—that the Court, if it undertakes to recapitulate the testimony of the witnesses, should not, in stating the nature of recollections spoken of by them in their testimony, use the terms which the witnesses themselves use in speaking of them. "*Strong* recollection" is a term of uncertain meaning. It is often—perhaps generally used, I think,—to signify a recollection which, though not feeble, is yet not quite clear and distinct. Now I no where "express a strong recollection" of any thing. What I *testify* as to the fact of the decree is this:

"I have a clear and distinct recollection of the calling up of the rule; of its being ordered to be made absolute, and of the proclamation being made by the crier." (Ante, p. 14.)

And in another place (ante, p, 22),

"I desire to state in the most unqualified terms, from clear and distinct recollections, the making of the final decree and the proclamation which attended it."

As to the date of the decree I have, as I have already stated, (see ante, p. 52,) no where attempted to fix a date from recollection. I do on p. 22, after the finding of my telegraph, express my conviction not my "recollection" that this was the day: on p. 21, I say that I have "*little doubt*" that the telegraph contained the exact and literal truth. I was no where interrogated, and I no where answered as to "recollections" about date; though I was interrogated and did answer—as on page 22—about my "confidence" in

the accuracy of my written statements which I made about dates. When therefore Mr. Justice Thompson says, as he does above, that I "express a 'strong recollection' that the decree was on the 18th December, he states what, if his pressing engagements had given him leisure to examine the evidence with his usual care and discrimination, he would have seen he was quite mistaken in.

So, when he says that, "in considering the weight to be given to this testimony, as bearing upon the question of time, it is to be observed, that the witness had no *recollection* of the time of entering the rule to show cause, different from the date of said rule upon the minute book, *until* the telegraphic despatch was discovered, or certain letters were sent to him, which had passed between the friends of the libellant, which disclosed the date of 18th December, 1852, as the time at which the information relating to the decision, or decree, had been communicated to them,"—he says what proceeds upon a false assumption: an assumption that I had given my recollections about date at all. Had his honor put the word "conviction," or "belief," or "freedom from doubt," or "confidence," he would have put a word warranted by the evidence; and his remarks might or might not go a good way to prove that my convictions, or belief, or confidence, were without proper foundation; but this would have no influence upon that which was really the first and main point in the case, to wit: the weight to be given to testimony which gives my "clear and distinct recollections," as distinguished from all convictions. The process which his honor attempts, is to discredit my "recollections" about every thing, although, as he considers the question of date chiefly, and as my recollections had reference to fact alone, independent of date, he had no great object in doing so. And he does it by wrongly assuming me to give "recollections" about *certain* particulars, where I give no "recollections" at all, and then showing *that these* recollections—which *he* gives *me*, but which *I* did not give the *Court*—are open to doubt, he argues that my recollections about other particulars—what were, in truth, the only "recollections" in the case—are open to equal doubt. The process is quite ingenious, and has but one defect—that of a false premise.

7. "Upon this evidence, together with some additional testimony as to the receipt of the certificate and the telegraphic despatch, by the persons to whom they were sent, but by whom those papers have been mislaid or lost, the Court is called upon to say whether there is sufficient proof of a decree having been made, upon the return of the rule to show cause why a divorce should not be granted, *with the required notice of such rule having been served on the respondent, and whether that took place on the* 18*th of December*, 1852."

I have already said that the Court here mistakes what was before them. The sentence, if it had stopped where my italic letters begin, would have been what my rule and argument called on the Court primarily to consider: and if it had added, "And if we decide this point affirmatively, another question is, when that took place, and whether on the 18th of December, 1852?"—the truth would have been complete.

8. "It is *not* alleged that any decree was made until *all* the requirements of *our rules of Court* had been complied with."

What is this that I read? If I had not seen it written in Judge Thompson's own hand, I would not have believed that the Court could have possibly said such a thing. As a fact, it is wholly incorrect. While it was alleged, and attempted to be proved (see ante, p. —), that *all* the requirements of the rules of Court had been complied with, it was equally alleged, or rather argued, that it was no matter whether they had or not. The argument having been, 1st, That if, in fact, the Court made a decree, whether, according to their rules of Court or against them, Dr. Griswold had a right to have this fact appear on the record; else the record was no record, and that which it did do, it omitted to record;—a view adopted by the Court, which says: "If the decree had been made by the Court without the preliminary rule to show cause, though it would have been irregular, we should feel bound to have it entered upon the record, now, as it was made." 2nd, That, in point of fact, the rules of Court on the subject of notice, which was the only question really raised on the rules, had probably been complied with, in form, by an actual personal notice of the rule, after its being granted. And, 3rd, that whether this form had been gone through with or not, was a matter of no kind of moment, as the lady, by the letter of her counsel, Mr. Petigru, to Dr. Griswold, and of herself to Mr. Searles, had dispensed with the necessity of notices. This last was the main point of the argument; and how the Court can say that it was "not alleged that any decree was made until *all* the requirements of our rules of Court had been gone through," I am wholly unable to comprehend. Immediately after saying this, the Court does indeed say, "On the *contrary*, the libellant's attorney, in his testimony, states that, after the Court had intimated a favorable opinion, he *took the rule to show cause* why the decree should not be entered;" and if the inference from this "on the contrary" —that is to say, the contrary of a compliance with "*all* the rules of Court"—is, that the rules of Court require nothing but the rule "to show cause why the decree should not be granted," allowing a waiver in advance of service, the Court is correct. It was not, I concede, alleged that the rule to show cause was dispensed with.

9. "Now, *the* question is, whether the evidence given proves *the falsity of the entry?*"

The question was no such thing, under favor of the Court; though undoubtedly the Court make it *the* question, and, so far as any distinct enunciation is concerned, the only question.

10. "It is to be remembered, that *the* question is *only* as to *time*—whether, on the 18*th day of December*, 1852, a decree was made?"

The Court must be good enough to excuse me; and when, for the half-dozenth time, the worthy President shows that he has misconceived the case that I meant to bring before them, must absolve me from the offence of vain repetitions, if, for a half dozenth time, I record the mistake. Whether a decree was made on the 18th day of December, was *not* the only question; nor was it the chief question. It was a question contingent upon the decision of another prior and more important question, which was raised by rule, but not considered by the Court.

11. "The decree spoken of by him is alleged to have been made *subsequent* to the rule to show cause. He expressly says, that the evidence of the service of notice of that rule upon the respondent must have been satisfactory to the Court, otherwise the decree he speaks of would not have been made. *This amounts to an assertion* that evidence of the *service* of notice was submitted by him to the Court."

It amounts to no assertion at all—that is to say, to no assertion as to a recollected fact. Assuming, as I did, that the Court would not have probably made a decree without sufficient notice of some kind, I *argue*, that the proper prerequisites had been complied with, because, as a fact, I did recollect the making of the decree. In my evidence, I say in terms (see p. 14):

"I cannot now say with distinctness how the notice of that rule was given. Such notices in my office are usually given by a clerk in my employ, and the lapse of time is such now, that the gentleman who was then with me cannot say from his memory. It *must* however have been such as was *satisfactory* to the Court, for I have a clear and distinct recollection of the calling up of the rule, of its being ordered to be made absolute, and of the proclamation being made by the crier."

I inferred the one thing because I remembered the other, and assumed the general regularity of the Court's mode of doing business. But to say that it amounts to an *assertion* that evidence of the service of notice was submitted to the Court, is untrue.

The court would have been equally *satisfied*, I suppose by a waiver of notice, as by a service of it, and that as I suppose, is what probably took place. My testimony was perhaps open to remark, for attempting anything like an argument when on oath; but it is not open to impeachment which was Judge Thompson's purpose apparently, from the fact that I had "asserted" anything which Judge

Thompson, asserts for me, following his assertion with an effort at impeachment, as follows:

13. "No trace, however, of this *notice* is to be found on record."

Proof of the waiver of notice *is* found, I conceive, on record. Mr. Petigru's letter, and Mrs. Griswold's letter to Mr. Searles were both on record, when the decree was made. But suppose that they were not, and that no trace of either notice or waiver of notice was to be found of record. What then? Does that prove that no decree was made. The whole loose record has been lost, and we know not what was in it. That no entry was made on the docket, is a fact of no weight. Such an entry is seldom made. Take up any of the Certiorari and Divorce Dockets. Say that of December, 1854. Here are some of the cases, which speak for themselves.

47. Harbeson *v.* Harbeson, Feb. 27, 1855. Rule for Divorce, March 10, 1855. Rule absolute.
41. Krauz *v.* Krauz, Jan. 25, 1855. Rule for Divorce, Feb. 10 1855, Rule absolute, (Divorce decreed.)
38. Bosler *v.* Bosler, Dec., 16, 1854. Rule for Divorce, Dec. 30, 1854. Rule absolute.
34. Miles *v.* Miles, June 16, 1855. Rule for Divorce, June, 23, 1855. Rule absolute.
33. Bodine *v.* Bodine, May 26. Rule for Divorce, June 9th. Rule absolute. (Divorce decreed)
28. Keyser *v.* Keyser, Jan. 27, 1855. Rule for Divorce, Feb. 3, 1855 Rule absolute. Divorce decreed.
25. Sevenson *v.* Sevenson, Same kind of entry.
23. Berrel *v.* Berrel, Do.
22. Smith *v.* Smith, Do.
18. Garnet *v.* Garnet, Do.

Whether any proof of service of the rule to show cause was given in any one of these cases, and if any, what proof; whether by witnesses examined viva voce at the bar, as would be quite allowable, or by writing, read and filed or not filed; whether notice was accepted as it was, I think, in Peace *v.* Peace, and I know it to have been in at least one other case; and whether generally all notices were waived either in advance or subsequently, the Docket leaves us in entire ignorance. In the whole term, indeed, I find, but one single case, where the Docket records that entire compliance with *all* the terms, the want of which entire record in the case of Griswold *v.* Griswold, the court seems to consider, damns all the positive testimony to a decree of any date. It is the case of Hardy *v.* Hardy, No. 27, where the entry *is* full and thus:

April, 4, 1857, Rule for Divorce.
April, 25. *Proof of service filed*, rule for Divorce, absolute, and *proclamation made.*

But such minute entries are unusual.

14. With a view so far as I can understand, of showing that my "recollections" (convictions) as to the date of the decree were wrong, the Court says:

"The witness (Mr. Cuyler) had *previously* (to the discovery of the telegraph) noticed that no entry of the rule had been made upon the docket of the Court, though entered in the minute book; and he caused the entry to be made upon the docket *without objecting that the date of* 31*st of December* 1852, was not the *correct* date."

On this I remark, that *I* had not previously noticed the fact at all. My testimony is (p. 14) that after the appeal had been taken "I for the first time became aware *that it was said.*" "It was others who had noticed it: and I do not see with what force Judge Thompson impeached even my "convictions" as to the date from the circumstance that before I found my telegraph, and before any question of date had ever been raised, I did not inform the clerk that an entry *apparently* regular was in fact of a wrong date. I supposed of course that the date was right: for I had nothing, until a later day, to make me think it wrong.

15. His Honor then goes on in, I think, a confused kind of reasoning, arguing that Mr. Bonham's and my recollection about date is wrong because I do not remember any thing about the serving of a notice; and mixing up my conviction and Mr. Bonham's recollection about the date of the decree with Mr. Brigg's and Mr. David's memories about entirely different facts, which they both say they do remember, and the want of memory of all of us about other facts which so far as any of us, except Mr. Briggs, is concerned, none of us had any thing to do with.

Here is the passage:

"But are the recollections of a witness, as to one class of events, to be relied on as sufficient to falsify a record, when other circumstances of equal moment, quite as likely to make an impression on the memory, and more easily to be proved, are entirely forgotten, or are unaccounted for? I mean the circumstances attending the giving notice of the rule to show cause to the respondent. She resided in Charleston. The notice, if given, must have been given either by publication in a newspaper, or by actual service upon her. If it was by publication, nothing could be more easily proved; the newspaper would show it. If actual personal notice was sent to the respondent, by whom was it sent? Some agent must have been employed. Who was he? How was he employed to serve the notice; and in what manner was the proof of service established? If these matters, so vital to a decree, and the *omission of which is not pretended*, cannot be recalled by the memories of those who recollect seeing certain papers in the Clerk's office, and hearing a decree given in Court, or by the counsel under whose personal direction they must have been attended to, how can those recollections be relied on, in opposition to what appears to have been fairly entered upon the record?"

That neither I, Mr. Bonham, nor Mr. David remember how the service of the rule to show cause was made, is not at all surprising. We had none of us anything to do with that matter. Mr. Briggs in his testimony, says, it was *his* duty to serve all notices which

were to go from my office, (see p. 10). Those mechanical details, I could not attend to, and I so state in my evidence, (p. 14). Mr. Bonham had *his* department, which was to attend me at court and take testimony, (p. 19), and of course Mr. David the deputy prothonotary had nothing to do with my business in this way, whatever. How does such argument contradict my convictions about date? and the very positive testimony of Mr. Briggs and the sufficiently positive testimony of Mr. David about other facts? The argument *assumes* of course, that a notice in form was given: It speaks of this as "vital," and as a matter whose "omission is not pretended." Again, I say that I have never regarded such notice in form as "vital," at all. Notice was waived in advance; and the omission, if not "pretended," was and is asserted as having been very possible and entirely cured by the letters on file.

16. The Court goes on:

"The entire want of recollection of a fact so essential to the libellant's case, and which must have caused the kind of trouble by which it would naturally have been impressed upon the memory, together with the absence from the record of any minute of the service of such notice having been proved or filed, leaves the mind *embarrassed* with a serious *doubt*, as to the fact that *such notice* was ever given in any manner."

"The entire want of recollection of a fact," by witnesses of whom but one had any thing to do with the fact, if it was a fact in the form assumed, ought to leave the mind embarrassed by very small doubt about any thing spoken of by any of them, that one excepted; and how far as to that one, his failure to remember a matter of hourly routine, which it was his duty to do, and which he says he has no reason to think he left undone, should leave the mind embarrassed by doubt as to a different kind of fact, to his distinct recollection of which he swears positively, and over and over again, I submit to others. And finally, suppose that such notice was never given; but was waived. What then? why has Judge Thompson never once replied to the argument pressed upon the court at the hearing over and over, about the effect of the letters of Mr. Petigru and Mrs. Myers Griswold as a waiver of notice?

17. "The entry of the rule to show cause, either upon the 31st of December, 1852, as it appears on the minute book, or at any prior period, shows that any decree which was moved for, was *intended* to be taken under the Rule of Court which requires the notice to be given either by publication or by personal service."

It shows, I apprehend, no such thing: nor any thing but that I desired to have the docket entries in the form shown at p. 81, to be a usual form, to wit, on such a day, "Rule to Show Cause," and on such a subsequent day, "*Rule absolute. Divorce decreed.*" I took the rule, showed, as I suppose is very probable, the letters; relying

on them as a waiver in advance of notice, and had the decree, without the *unusual* circumstance of a record as to the manner in which the party had been informed about the rule to show cause. And suppose I did, when I took the rule, *intend* to give an actual notice subsequently to taking it. Might I not very well on further consideration have changed my mind, considering that the letters made such notice a useless form?

18. "There is *nothing* to show that this requisite for obtaining a decree was *dispensed with*, and the *entire want of explanation* or of evidence on this subject, has weighed more heavily than any thing else in coming to a conclusion on this motion."

What is this? Nothing to show that this requisite was dispensed with. If the letters of Mr. Petigru and Mrs. Myers Griswold, at p. 3, are *nothing* to show this, the Court is right. Otherwise they are wrong.

19. "After weighing the testimony submitted with the strongest inclination to do that which *truth* requires, we are unable to decide that the alleged error exists."

I wish that the Court had said "the strongest inclination to do that which *it* (the "testimony") requires. Having spoken of "impressions" and "recollections" which they had been *endeavouring* to remove from their minds, the sentence is peculiar. The law and the testimony was all the Court had to consider; and the *truth*, independent of these, was what they had no concern with. Have they undertaken to administer it? I should be happy to know. If they have, they have committed a violation, *in fact*, of their judicial oaths.

"20. "This is *not* like the case of an *omitted* judgment, where all the proceedings show that a judgment should have been entered, or where the subsequent entry of a judgment *nunc pro tunc* is entirely consistent with the record of the case; but it is an application so to ALTER the RECORD as to make IT consistent with an alleged judgment."

This remark would be true, if the point before the Court had been that which the opinion presents as "*the* point" and the "only" point. But the case presented by my rule on p. 6, was not only "like the case of an omitted judgment," but, if the evidence is true, was the very case of an omitted judgment. That rule called for no application to "*alter* the record;" though a different rule, taken at a later date, in a separate and independent form, and so taken for the purpose of letting the Court, if it saw fit, make the first rule absolute and discharge the other, did ask an alteration of the record.

The Court seems to have entirely over-looked the form of my rules, and to have thought that the question was one of date chiefly or merely. With such a view one can understand how they pass in profound silence the whole matter of the RECORDS as set out on pages

8, 9 and 10; and the argument upon them from page 37 to page 45; and how though, while they admit that Mr. Briggs *may* have seen a paper endorsed decree of Divorce, and Mr. David *may* have given a certificate of Divorce, they yet give the opinion that they do.

Now, what is the cause of this extraordinary opinion. How does it come that a gentleman of so much intelligence as Judge Thompson and of such sincere desire to decide rightly *all* his cases has made so great a mistake as he has here; a mistake involving nothing less than a misconception of the whole matter put before him.

I will endeavour to state how it has come.

But first let me say, that no one need suppose that I wish to inspire any one with dissatisfaction or distrust in the general administration of public justice in the Common Pleas. Far from it. To the uncommon merits of that Court in every way—(I may say, at least speaking generally, "in every way,")—I am happy to bear, unaffectedly and with warmth, my testimony. If any Court in this city has as much labour to undergo as it has, no Court in this Commonwealth or in any Commonwealth, in peaceful times of the State, has ever had to perform its duties under circumstances which have required greater vigilance, discretion and firmness. Almost ever since the present Judges have been in office at all, they have been engaged with cases of contested elections and of the feuds of faction; cases which excite the passions of many more than the mere parties to the case, and in which no means, either to carry results or to avoid results, or to control results, are stopped at. Every thing, for whole months when this Court has been trying cases of this class, has seemed to me to have been "full of traps and mines;" beneath and on every side of them. They have been administering justice in the midst of "a chaos of plots, and counter-plots." And if the Court did not live habitually in the presence of all the gods, and prudence never forsake it, it could not have supported itself for one month as it has done for six years, with honor and stability in such scenes of public and private intrigue.

Of the excellent President of the Court, no man at the Bar of Philadelphia *can* speak otherwise than with respect and affection. He has the first requisite of a good Judge: He is a good man. His purity, his integrity every way, no one has questioned or can question. His constant and earnest love of justice, and his devotion to the judicial business are radiant, and known to all. This last is only too great and such as excites anxiety in the minds of well wishers to the public good that his health may sink under the burden that it brings. His faculties of mind—his legal and his general attainments—are sufficient, and finely harmonized; and if in his opinions he seldom rises to the illuminated heights of abstract jurisprudence, he

possesses an intelligence in the concrete, which is much better for all that it concerns him to decide or his suitors to know. His patience in the hearing of causes is very great, and equalled only by the conscientious pains with which he usually investigates them at home: while for judicial manners, the reflection of a delightful temper and well principled consideration for every one, no man that in my time has sat upon the bench has equalled him. None, any where or at any time need exceed him. Philadelphia is fortunate in this excellent magistrate. She has been greatly indebted to him. He has brought a measure of order and decorum into a jurisdiction from which both seemed for some time to have departed for ever. He has done all that any man can do to keep the bar to the standards of decency, integrity and knowledge which become it, and to which he will keep it if it has not already drifted past the power of any court's recovery. I entertain for him the highest and the warmest respect both private and professional. He has good associates no doubt, but to the character and habits of the President, the value of any such jurisdiction as that of the Common Pleas very largely and chiefly depends.

But while I thus admire the judicial excellence of this Court, I do not admire the only defects which so far as I know deprive its President of the just praise of being a perfect judge.

The first of these defects, in my humble opinion, is an excessive personal sensibility to the reputation of his own Court; a morbid desire that it shall be held in public estimation never to make a mistake; a super-sensibility to what other people think or say of him or it; and hence that which I shall hereafter speak of it, a hypersusceptibility to what the Supreme Court does about the judgments of the Common Pleas. All this no doubt springs from a virtue as a root: and it has all tended, on the whole, to excellent effects. But in this excess it is the taint of a virtue, and in itself a fault.

A *second* of these defects is an occasional disposition, *in order*, as he thinks, more surely to arrive at truth, to be governed by evidence which does not form what has been called "a proper ground of belief in the conscientious exercise of the judicial function." When we hear a Judge, after telling the public of the "difficulties" with which a decision has been attended, speak of the struggles which this Court has had to remove from their minds personal "impressions" and personal "recollections," and of their *endeavours* to decide a case uncontrolled by either; when immediately afterwards we find him talking about deciding a case according to the "*truth*," instead of talking, in the usual dialect of judges and lawyers, of deciding it according to "the law and the evidence;" and most of all, when comparing his opinion with the testimony, we find that he has

thrown one good half—the best half of it—overboard, and that his conclusions seem to be out of all square with what remains—we become somewhat alarmed.

The defect I speak of may very likely be a defect of the most deeply conscientious men. Doubtless it is so. One portion of the "religious public" has lately had a signal instance of it in a most learned, and intelligent ecclesiastical tribunal: whose mistake on this subject called forth from a member of our own bar some remarks the finest on this topic which have appeared since Jeremy Taylor's voice was heard in the "Ductor Dubitantium." The reader will thank me for quoting a few of them.

"The moral faculty or conscience is an intellectual as well as an active power. It requires instruction to enable it to distinguish between right and wrong, and between truth and falsehood; and it requires more instruction to distinguish between truth and falsehood in regard to another, than it does in regard to one's self; for, as to one's self, the materials for the distinction are within us, and the vigor of the moral faculty is by nature greater, and requires less knowledge and instruction for our own government of ourselves. But when this faculty estimates what is due to the persons and rights of others, and most especially when it is exercised in the administration of justice between private persons, or between a private person and the public, unless it be duly instructed both in the true ground of moral distinctions, and in the true and only reliable sources from which materials for applying the distinctions are to be derived, its judgments are sometimes so wide from their proper end, as to favor the wrong rather than the right, and to substitute injustice for justice. It is unnecessary to go further in illustration of the remark, than to point to the error often shown in our courts, of jurors whose consciences, they say, are adverse to the execution of some particular law of the land, that has been settled by public constitutional authority, which they are bound to obey, and has been enforced with general approbation for a course of years. And it is even a more common occurrence to find that jurors, after being sworn to decide a cause upon the evidence that shall be given to them, have carried into the box opinions, notions, which they call belief, derived from conversations, reports, and rumors, which they think oblige them in conscience to disregard the evidence they hear in court.

"Are judges of a legal tribunal, in the due exercise of an enlightened moral faculty, when they decide a cause committed to them between an individual and the public, in reliance on any ['impressions' or 'recollections,' or] statement of facts, from any quarter whatever, however probable in their nature, however apparently sustained by numbers, when these facts are not shown to the tribunal on the trial by competent witnesses examined in the cause, and with the opportunity of cross-examination by the party to be affected by them?

"Is the confidence which a judge may choose to place in such a statement, entitled to the name of *belief*, the credit which we give to something we do not ourselves know, upon the authority by which it is delivered? What in the eye of a judge who duly exercises his moral faculty, is the authority by which it is delivered? Just nothing at all. It may be an authority for private opinion, in many instances a very frail one, in some a very dangerous one, if opinion is to be followed by immediate and final action; but for judicial belief, belief that is to affect the judicial action of a judge or tribunal upon the character or the rights of another person, it is no authority whatever. *As an assurance of the truth*, to affect a case presented for judicial action, it is utterly worthless."

Without being so bold as to say that *if* the "endeavour" of the Court of Common Pleas, referred to in their recent opinion, to remove its so called "recollections" was *un*successful, these recollec-

tions "as an assurance of truth are utterly worthless," I may take leave to illustrate the concluding portion of these quoted remarks, by con-columning Mr. Justice Thompson's statements publicly expressed from the Bench, and in print, as to the Courts recollections at *different epochs*. The Common Pleas is fortunate enough to be able to reverse in their own case—I wish they could do it for others!—a law of human infirmity, by which we usually recollect at an *earlier* date, and have "*no* recollections" at the *later* one.

[Defective] state of the Court's recollections on the 15th of March, 1856. (See ante, pp. 3, and 4.)

"The Judges have *no recollection which would enable them to speak on the subject of a decree*, further than of the fact that they regarded the evidence, as it was presented to them, as sufficient to entitle the libellant to the usual rule to show cause why a decree should not be granted."

[Improved] state of the Court's recollections on the 18th April, 1857. (See ante, p. 64.)

"We have *endeavoured* to remove from our minds any impressions or *recollections* which might affect the case and have confined our attention solely to the evidence submitted for our consideration."

The other and last quality to which I allude as a characteristic of this upright Judge, I am happy to be spared the necessity of myself describing. The gentlemen who was my opponent in this case, Mr. David Paul Brown, has lately given to the world two excellent volumes called "The Forum," in which we have the characterization of many living Judges. In Mr. Brown's "full practice of forty years," it may be supposed that he has seen a large number and a great variety of judges. He speaks of the merits of them all: and very seldom of any thing but their merits. Each is presented by him in illustration of some of the virtues, and quite enough of them, in apparent illustration of them all. But *one* quality which, with the "understanding" that Mr. Brown makes, may be regarded as a virtue also, he considers has never, by any judge in Pennsylvania, been illustrated so distinctly as by the now President of the Common Pleas. Of the Honourable Oswald Thompson, Mr. Brown thus writes:*

"He has one quality, however, said by Burke to be the usual concomitant of greatness, and which no doubt springs from the strict purity of his motives, and the sincerity of his opinions, and that is, OBSTINACY, or, as it is called in *more courtly language* firmness. He generally *adheres to his opinions;* certainly from no selfishness or want of magnanimity, but because he firmly believes those opinions to be right. And although Lord Mansfield has ob-

* The Forum, Vol. 2, page 183.

served that, 'It is much more magnanimous to retract than to persist in error,' let us say what we may, a proper tenacity of opinion is assuredly preferable to a vibratory, vacillating judge, who changes his mind as freely and as frequently as his apparel, and with much less regard for appearances. A learned though eccentric judge of our own state, has well said, 'That obstinacy and firmness spring from the same root; it is obstinacy when the cause is bad; firmness when it is good,' and WITH THIS UNDERSTANDING in its application to Judge Thompson, let us CALL it firmness."

To the first and third, chiefly, of these qualities, which have been sometimes the occasion of remark at our bar as being the only unfortunate characteristics of a judge who with many more defects would still be conceded by the whole bar, to be on the whole, an admirable magistrate—I believe is to be attributed the very great mistake which the Court of Common pleas made in deciding this part of the case of Griswold *v.* Griswold.*

The original case of Griswold *v.* Griswold was a special case. As Judge Thompson says in his opinion, (see ante, p. 65), the court had come to the conclusion that "under the *circumstances* of the case" they would grant the rule for a decree. A case of legal 'desertion,' I have no doubt was and is made out upon the *record.* On that point I beg to be distinct; but it was perfectly understood in fact that desertion was not the motive ground of the application. The Court knew this from the beginning; and Judge Thompson has stated it repeatedly from the bench since. Those "circumstances," as Mr. Pettigru calls them in his letter, printed on p. 2, "which delicacy would confine as much as possible to the knowledge of those interested," were the "circumstances," which influenced to some extent the Court; and under which as they say they had resolved to grant the rule. I am not saying that the court was not satisfied with the case as appearing on the record and evidence; and still less that they were not bound to be satisfied with it; as I say that undoubtedly they were: but I say with confidence that the Court came to its conclusion reluctantly, and under the circumstances; that is to say they in reality, relied much more on the fact somehow vented and by no one denied, that there was a more true ground of relief outside the record and not desirable or decent to be put *in* it. There were no other "circumstances," to influence the

* I know not how entirely and cordially the intelligent associate who sat with the President on this occasion may have agreed with him in his conclusion, or how far to some reluctance of Mr. Justice Allison so to agree is to be attributed the mention of that "difficulty," with which the President says the disposition of the rule had been attended. The "Opinion" of course is the President's and as to the distinctness of his views there is no doubt. It is on this account that I refer so specially to him.

Court at all. The argument which went through the Court's mind, I suppose to have been of this kind: "Here is a special kind of desertion; quite unlike cases of brutal mal-treatment and abandonment. We never had such a case of desertion before. Is it desertion at all? We have some doubts—considerable doubts—too great perhaps to allow us, on the evidence presented, to act, without much more advisement. However there is another ground not denied, which, if true, is undoubtedly a good ground. It is a case of misfortune every way. Many reasons make it desirable to have any ground but that of desertion kept off the record. If we refuse the decree, we shall drive Dr. Griswold to bring it forward. The case, as it is on the record, has much strength, perhaps, and probably sufficient strength, though not all that we should like. The lady not only consents to a divorce, but joins in aiding her husband's efforts to get one. It is her suit as much as his. There will be no appeal, no writ of error, no question, here or any where, as to what we do. It will pass sub silentio. *Under the circumstances* we will grant it." All this was perfectly natural, perfectly legal, perfectly judicial. But lo! within the time allowed for an appeal, Dr. Griswold gets into a quarrel with a so-called "literary" woman named Ellet in New York, whom he had slighted by putting her in an *obscure place* in his "*Female Poets*," instead of putting her, as he ought to have done, in a very prominent position in a book of "The Female *Prosers*" (of whom, past all doubt, in the way of rhyming, she is the chief;) and every thing *is* called into question, and into malignant question. An appeal is taken; and here is a case going to the Supreme Court, in which the doings of the Common Pleas are likely to be called into sharp question with no knowledge of the "circumstances" upon which alone, they had, in point of fact themselves acted. That the decree would have been reversed, I do not at all believe, and never have believed. But Mr. Justice Thompson rightly did believe that the Supreme Court could never tell *why* he had decided as he did. He underrated the strength of the record case, which in my opinion was and is impregnable; and which, if it had not been, his *instinctive* sense of legal right and judicial safety,—as strong, often, and generally safer than the conclusion of developed reason,—would have prevented him from granting the rule to show cause, as he did do. But disposed as this Court always is, to decide upon the *true and real* grounds of every case, it was always conscious I presume that it had really and mentally decided the case on grounds outside of the record; in other words upon the "circumstances:" and on this account as I believe, the court, and its President especially, was reconciled in thinking that the final act of passing a decree had never yet been made. The discovery was as much of a personal relief, as in a ju-

dicial matter, a judge may ever be supposed to feel: and this appears the more probable since the omission of the clerk to make the entry of the decree occupied his Honor's eye so completely, that his visual power never took in at all the record of "an appeal from a decree," or of "a motion to rescind a decree," both of them standing full before his eyes, and right beside the spot where *he* could see the omission only.

I am not meaning to call into question the magnanimity of the Court, in any way. Not at all. All that I say is, that with a very proper, but only too great a regard to the public reputation of this Court of which he is a safeguard and an ornament, the President was hardly conscious how completely he was going out of his way to commit himself as I have said (see ante, pp. 3 and 4) he did on a point not raised as a point at all by either the *rule to rescind* or the argument on it. His declarations as given in the extract on those pages from his opinion, were caught up by the press every where. They were the "opinions" of Judge Thompson. The sequel is told by Mr. Brown, "He generally adheres to his *opinions*. He is *obstinate*."

This defect in the judicial character of this excellent Judge, I believe to be an intellectual one merely. I am sure it is not a moral one. However true of most men it may be, that,

> "To observations which *ourselves* we make
> We grow more partial for the *observer's* sake."

I do not believe it to be true in any way of Mr. Justice Thompson. Mr. Brown who speaks with such plainness of the defect, assigns the true cause to it. "He *believes* those opinions to be right."

Could Mr. Justice Thompson, after once having seen a point in one light, ever see that he had seen it under a false light, no man living, as I believe, would do more to repair his own unconscious mistake. But he cannot after he *has* fully committed himself. He can no more, by resolutions of an open mind, obviate this mental quality, than "by taking thought" he could add a cubit to his stature. It is with him, I presume, a cerebral idiosyncrasy, a special configuration; such as, in different forms, all of us have in some one and generally much worse shape. The phenomenon is one not unknown to physiologists in the case of the organ of physical vision. Many cases are well attested, I believe, of men who after looking for some time at a specific object, and having it once fixed on the eye, never ceased to see it afterwards, no matter at what else they were looking. The retina would not give up its impression. The spectrum remains.

I am happy to admit further that in very few cases could such a quality, existing to so strong a degree as this quality does with the

President of the Common Pleas, do so little harm in a judicial magistrate. His reserve, his prudence, his equanimity and his freedom from all perturbations of temper, with his deep conscientiousness and uniform intelligence prevent him from very often committing himself otherwise than exactly as he ought to do. But as I have said the quality has exhibited itself often enough to make it a feature in most efforts at a judicial characterization of him.

Mr. Brown quoting Mr. Burke, observes that "obstinacy" is said by him to be the "usual concomitant of greatness." Mr. Burke's language is a little more discriminating, and quite as flattering to Mr. Justice Thompson. I am happy to quote it. "Almost the whole line of the great and masculine virtues," says Burke, "constancy, gravity, magnanimity, fortitude, fidelity and firmness, are closely allied to this disagreeable quality." Of all these virtues Mr. Justice Thompson has given in his six years of judicial administration, frequent proof, and never more honorable proof than of late. His "fortitude, fidelity and firmness," as exhibited in a single case, are enough to entitle his judicial career to the praise of a great one, if he never had exhibited these qualities before, or never could again. But all this does not prevent the "quality," to which this "almost whole line of manly virtues is allied," from being, not only "a disagreeable quality," but as Mr. Burke further says it "certainly is, a GREAT VICE, and frequently the cause of great mischief."

In Dr. Griswold's case the mischief is not likely to be great. So much doubt, I have been always informed, rests upon the fact whether the marriage ceremony between him and the lady from whom in 1852, he sought to be divorced, made any legal marriage at all; so strong is my legal conviction, that with the existing appeal and other matters of record recognising and proving a decree, there is proof enough of a decree, for any purpose of importance, and so very guarded is the language of the Court in refusing my recent rule—they not having at all decided nor even said that no decree was ever made, but only that they are unable now to enter a decree as of December 18th, 1852, "unless *clearly* convinced" that there was a decree on that day; a point which they are "unable to decide" positively at all—that practical embarrassment would be avoided even if no decree could be yet obtained; which I expect with entire confidence there will be. But whatever may be the final result, I have deemed it my duty to a client, now and thus to put in a permanent form the documents and evidences connected with this part of the transaction. It is due to *him*. Through every part of the transaction I have received from Dr. Griswold unwavering and honorable confidence. A doubt as to the regularity of any thing

that I have done, has never once I well know entered *his* mind; nor word of censure once escaped *his* lips. It is due to the *literature of the country*. Dr. Griswold by the very nature of his literary office, and by his open and often indiscreet contempt for literary pretension, where ever found, has been so unfortunate as to involve himself in occasional literary feuds: but no man has more honorable, more devoted and more constant friends; and the history of American literature will never be written in time to come without distinguished eulogy upon his name and services. "Time, in whose airy train, if passions and prejudices revel at the commencement and false opinions crowd about the middle part, JUSTICE ever walks slow and late, bringing up the close—will dispense a retribution that is not by measure: and the reputation which began in self oblivion will ultimately be all the more potent for its having first been pure."

THEO: CUYLER.

Philadelphia, June 1, 1857.