in question, nor do they like to be shorn of any of their prerogatives.

The position of counsel denying the authority of the court to try the defendant, and coming from one who had himself been upon the bench, seemed startling to the court and an insult to the administration of justice, and judging from the remarks of the judge and his inattention to the argument, was regarded as little less than treason against good government. The effect upon the spectators was quite as startling. If the postulate assumed and maintained in the argument, were true, then indeed the lives of the people were at the mercy of the assassin. As the argument proceeded, a ripple of excitement was noticeable, such as is only too apparent in the early stages of mob violence.

The argument occupied the entire morning session of the court with such reluctant attention of the judge as courts usually give to attorneys when presenting questions of law which have been mentally adjudicated.

The hour for the afternoon session arrived. The court room, as in the morning, was filled with eager spectators, but the judge did not put in an appearance. Hours of deepest anxiety passed—the entire afternoon waned away—and still Judge Black did not resume his place on the bench. The morning hour for opening court dawned upon an excited and disappointed audience. The offices of the court and lawyers in the case indulged in remarks not at all complimentary to his honor. I think it was not until the following morning that court was opened, and all this time, as was customary in such cases, the jury was kept in confinement in charge of the sheriff. In the exercise of a broad Chistian charity, it is but fair to presume that the judge all this time was prevented from resuming his duties by circumstances beyond his control, but the citizens, especially those who were clamoring for a speedy sentence consigning the defendant to the penitentiary, and the members of the bar, owing to the fact, perhaps, that the country was new and largely destitute of those Christian influences that adorn older settlements, did not exercise this broad Christian charity.

On the reassembling of court it did not need the argument of counsel for the prosecution to be convinced that it had ample power to pass judgment against the defendant. Hence the motion for a new trial and in arrest of judgment was overruled, to which an exception was taken and the case removed to the supreme court of the territory. Judge Black wrote out at some length his decision overruling the motion, had it printed in booklet form, and this he exhibited to his friends with much apparent satisfaction—stating that it had been submitted to the attorney general of the United States, and approved by him. At the time the legislature repealed the criminal code, it re-enacted the common law of England—to take the place of the repealing statute, and here, it was contended, the authority was found for punishing Hargus for the crime of manslaughter.

In my argument I had insisted that defendant could not be punished under the common law, for the reason that at common law a man in England convicted of this crime, in case he could read and write, was entitled to "benefit of clergy," and by this he could escape the penalty by being branded, and in this country, no such recourse was available. The defendant could not apply to clergy, as in a legal sense there was no clergy in this country, nor could a distinction be made in our courts between those who could read and write and those who could not. Hence the common law could not aid the court or invest it with power to punish in the absence of the statute.

But this question decided adversely in the district court, would soon be reviewed and passed upon by the supreme court. This court was composed of Augustus Hall, chief justice, Eleazer Wakeley and Samuel Black, associate justices. Wakeley was appointed from Ohio and I think, on the organization of Nebraska as a territory, and by President Pierce, while Hall and Black were appointed by Buchannan in 1858—the former just having served a term in congress from Iowa, and the latter was from Pittsburg, Penn., where he was known as one of the leading criminal lawyers of that part of the state. Hall and Black had never met until about the time of the Hargus trial, when they met on the street in Nebraska City and were introduced. Each was known by friends to be exceedingly clever and witty. Black had been an officer of rank in the military service during the war with Mexico, and at the final capitulation of the Mexican army he entered the City of Mexico. After the introduction and exchange of the usual compliments, Black still holding Hall's hand, said to him with much gravity of manner: "Will you allow me to ask you a question?" "Certainly," Hall replied. "Are you at all related to the Halls of Montezuma?" Hall replied that he had not that honor, and then said: "Will you allow me to ask you a question?" Black replied, "Of course." "Are you at all related to the Blacks of South Carolina?" Black acknowledged his defeat and they separated. Trusting that this digression will be excused, I will resume.

The defendant was at a disadvantage in the supreme court, as one of the judges had already decided the case and if either of the others agreed with him, the case was lost to the defendant. Just such a case had never before been in any court, as it was the first time in the history of legislation that an entire criminal code of a state or territory had been repealed without a saving clause to protect pending prosecutions. The members of the bar had been interested in the question with a divided sentiment. The attorney for the defendant realized fully the gravity of the position which he had assumed. Not only was his reputation as a lawyer at stake, but he had incurred a grave responsibility by placing the defense wholly upon the repeal of the statute, when he could, on the facts, have shown many mitigating circumstances that induced the crime, tending to exonerate Hargus, which were especially applicable in that then new county with a strong public sentiment aginst "claim jumping."

In the preparation of his brief for the hearing before the supreme court, an ample law library was necessary, and such was not to be found in Nebraska. He went to Columbus, Ohio, where in the state library, he spent three weeks, and returned well fortified with treatises and commentaries by able law writers upon the effect of a repealed criminal statute on pending prosecutions without a saving clause, and also supreme court decisions in cases of misdemeanors arising under special statutes repealed, all sustaining the position assumed by counsel before the court. These authorities during the argument before the supreme court seemed offensive to one of the judges. When a page of the printed decision of this judge was read and contrasted with the law as laid down by Dwaris in his great work on statutes, the printed decision of the judge being in direct conflict with the law as given by these writers of acknowledged merit, then it was that this judge said from the bench that he would not sit and hear his decision villified in this way. He was coolly told that as he had once decided the case, he was at liberty to retire as there would be a quorum left. The prosecution was not prepared to meet these overwhelming authorities, and while both Mason and McLellan made able arguments, they evidently were much embarrassed by their crushing effect. The case was taken under advisement by the court, and during the term a decision was rendered reversing the judgment of the court below with an order discharging the defendant, the court holding that by reason of the repeal of the statute without a saving clause, the court had no power to try and punish the defendant.

JOHN F. KINNEY.

San Diego, Cal., October 1, 1901.

Note—Hargus soon aftewards removed to New Mexico and died some years ago. Black was colonel of a regiment in the civil war, and was killed in a charge. Hall died while chief justice, before Nebraska became a state. Bradford removed to Colorado very soon after the session of the legislature referred to, was delegate in congress from that territory, and also became district judge, and has since died. Mason died in Lincoln, where he was prominent for many years before his death, as a leading lawyer of the state.