JAMES KENT AND JOSEPH STORY.

There is no purpose here of writing a biographical sketch of either of the two distinguished men whose names are at the head of this paper—much less of both of them. A few suggestions connected with the life of each will serve the present purpose. All lawyers concede that James Kent and Joseph Story were both very learned lawyers and remarkable men. But few have secured the confidence of their fellow citizens and become distinguished so early in life. Kent was born sixteen years before Story, and lived more than two years after his death. Kent graduated at Yale before he was eighteen years of age, and was one of the founders of the "Phi Beta Kappa" society. Story graduated at Harvard before he was nineteen years of age. Both continued to study classical and literary works after graduation. Both were admitted to the bar at the age of twenty-two. Story was elected to the legislature of Masachusetts at the age of twenty-six, and Kent was elected to the legislature of New York at the age of twenty-seven. Story was elected to Congress, as a Republican, at the age of twenty-nine, and Kent was a candidate for Congress on the Federal ticket and defeated at the age of thirty. About the same time Kent was made Professor of Law at Columbia College and continued in that position for five years. At the age of thirty-two Story was again elected to the lower house of the legislature of Massachusetts, and made the speaker of that body; and afterwards, and in the same year, he was appointed by President Madison, as Justice of the Supreme Court of the United States, and took his seat in January, 1812. At the age of thirty-three, Kent was again elected to the legislature, and in the same year he was appointed Master in Chancery, and the year following he was made Recorder of the City of New York—both of which positions he held until at the age of thirty-five he became a member of the old Supreme Court of the State of New York. At the age of thirty-seven, Mr. Justice Story wrote the opinion of the court in the great leading case of Martin v. Hunter, 1 Wheaton 304, 323-362—settling the question of the appellate jurisdiction of the Supreme Court of the United States in certain cases decided in state

courts of last resort. That may perhaps be regarded as his ablest opinion. At the age of forty he wrote a concurring opinion of forty-six pages in the celebrated Dartmouth College Case, 4 Wheaton 518, 666-713, which some have claimed to be equal, if not superior, to the leading opinion of Chief Justice Marshall in the same case. Pages 624-654, *Id.* The Chief Justice cited no authority, except two references to Blackstone, while the opinion of Mr. Justice Story is enriched by the citation of numerous English cases applicable to some of the questions involved. At the age of forty-one Kent was made Chief Justice of the old Supreme Court of New York; and he continued to hold that position until he was made Chancellor of the State of New York at the age of fifty-one; and he continued to hold the office of Chancellor until he was compelled to retire at the age of sixty, by reason of an absurd statute then in force in that state. Thereupon, and after sixteen years of service in a court of law, and nine years service in a court of equity, he was again made Professor of Law in Columbia College; and as such, he carefully wrote and delivered to the students the sixty-seven lectures—now known as Kent's Commentaries —all of which were published for the benefit of the profession on or before 1830. At the age of fifty, Story was made Professor of Law at Harvard University at an annual salary of $1,000, and for sixteen years he gave as much time to teaching law students and writing law books as his official duties would permit. The College of Law grew very rapidly from one to one hundred and fifty-six under his instruction. During that time he wrote, in the order named, one volume on the law of Bailments, two on Constitutional Law, one on the Conflict of Laws, two on Equity Jurisprudence, one on Equity Pleading, one on Agency, one on Partnership, one on Bills of Exchange and one on Promissory Notes. Such work was suddenly brought to a close by a fatal illness at the age of sixty-six. A few days after his death, September 10, 1845, Kent wrote to Mrs. Story this touching tribute: "The death of your husband and my friend, Mr. Justice Story, has filled me with the deepest commiseration and sorrow. His image is constantly before me, and I respectfully beg leave to mingle my grief and sorrow with yours. He was one of the rarest and best friends I had the honor and happiness to possess. He has done more by his writing and speeches to diffuse my official and professional character (far indeed beyond my deserts) than any living man. My obligations to him are incalculable. Permit me to add my grateful sense of his inestimable worth and value, in the purity of his life, his domestic and social

virtues, his generous and liberal feelings, the inexpressible charm of his conversation, his varied accomplishments, his wonderful diligence, his profound learning and his transcendent genius." This, manifestly, refers to the fact, that some of Story's books were not only in popular use by the bench and bar in Great Britain, but were translated into German and French—and in them were frequent references to opinions of Kent—especially while at the head of the Court of Chancery in New York. So popular was Story's Equity Jurisprudence in Great Britain, that an "English Edition" of it was published in London by a barrister who had graduated at Oxford, and was a member of the Inner Temple, London, as late as 1884, with all American references eliminated. But there are eminent lawyers and judges in England who have a higher opinion of Kent as a jurist than of Story. This is apparent from a letter which I hold, of which the following is a copy:

"2 December, 1898.

"DEAR CHIEF JUSTICE:

"I have read with great interest your sketch of Scott and Marshall. I knew little or nothing of Marshall's life tho' I valued his great judgments very highly. I always look upon him *and Kent as two of the greatest judges* of whom I know anything. They seem to me to be *far greater men than Story although not so widely known here as he.* Thanking you for your courtesy in sending me your Brochure, I remain,

Yours very faithfully,

NATH'L LINDLEY,
Master of the Rolls."

The writer of that letter has since become Lord Lindley and a member of the Judicial Committee of the Privy Council. His works on the Law of Partnership and the Law of Companies are well known to the American Bar. Lord Chief Justice Denman once wrote to Chancellor Kent, "acknowledging the indebtedness of the legal profession throughout the world, to him for his able Commentaries." 2 Barb. Ch. R. 646. The reason why Kent stands so high in the estimation of lawyers, is well stated by himself. In speaking of his work as a member of the Supreme Court of the state, he said "Many of the cases decided during the sixteen years I was in the Supreme Court were labored by me most unmercifully, but it was necessary under the circumstances, in order to subdue opposition. We had but few American precedents. Our judges were democratic, and my brother Spencer particularly, of a bold, vigorous, dogmatic mind and overbearing manner. Eng-

lish authority did not stand very high in those early feverish times, and this lead me a hundred times to attempt to bear down opposition, or shame it by exhaustive research and overwhelming authority. Our jurisprudence was, on the whole, improved by it. My mind certainly was roused, and was always kept ardent and inflamed by collision."

In speaking of his work as Chancellor, he said: "I took the court as if it had been a new institution, and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable under our Constitution. This gave me grand scope, and I was checked only by the revision of the Senate, or Court of Errors. I opened the gates of the court immediately, and admitted, almost gratuitously, the first year, eighty-five counsellors, though I found there had not been thirteen admitted for thirteen years before. Business flowed in with a rapid tide. The result appears in the seven volumes of Johnson's Chancery Reports."

Such study for twenty-five years upon the bench, during the formative period of the common law and equity jurisprudence in the state of New York, by a mind so richly endowed, necessarily resulted in a profound knowledge of numerous branches of the common law. Upon such questions, Lord Lindley's opinion of Kent's and Story's comparative merits, are entitled to great consideration; and perhaps ought to be controlling. But it does not follow that Story was inferior as a lawyer and judge. Men necessarily differ, and when their life work differs so widely, they cannot be said to be equal. One may be greatly superior upon certain subjects, and the other upon certain other subjects. Coke declared in his time, that: "If all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law of England is." Certainly no one will claim that Kent or Story knew all the law, in his time.

Story was a member of the Supreme Court of the United States for a third of a century; and for more than twenty-three years of that time, an associate and intimate friend of that pre-eminent constitutional jurist—Chief Justice Marshall, who desired to be succeeded by him as Chief Justice. His opinions in that court are contained in thirty-four volumes of its reports; and besides, his opinions in the inferior Federal courts are contained in eleven volumes of reports. His judicial work was largely devoted to Federal questions, and upon such questions neither Lord Lindley nor Lord

Chief Justice Denman, nor any other English judge or barrister, would, without special study of our dual system of state and national government, claim to be a competent expert. On his death, Chief Justice Taney paid him a beautiful tribute, and, among other things, said: "He had, indeed, all the qualities of a great judge; and we are fully sensible that his labors and his name have contributed largely to inspire confidence in the opinions of this court, and to give weight and authority to its decisions." Perhaps his law books of greatest merit are his two volumes on Constitutional Law and one volume on the Conflict of Laws. This last volume was dedicated: *"To the Hon. James Kent, LL. D."* The first case in the Supreme Court of the United States under the interstate commerce clause of our National Constitution, arose before Chancellor Kent, in 1819. Ogden v. Gibbons, 4 John. Ch. 150. Ogden filed a bill in equity to restrain Gibbons, of Savannah, Georgia, from navigating any waters within the jurisdiction of New York between that State and New Jersey, with boats moved by fire or steam. by reason ot rights claimed by Ogden under several transfers and acts of the legislature of New York, purporting to give Livingston and Fulton the *exclusive* right of navigating in all such waters with boats so propelled, for a term which would not expire until 1838; and which right had been assigned to Ogden. The defense was the unconstitutionality of such acts of the legislature. At the hearing Chancellor Kent sustained such exclusive right and held such acts of the legislature valid, and made the temporary injunction perpetual. Ogden v. Gibbons, *supra.* That judgment was affirmed by the Court of Errors of New York in 1820. Gibbons v. Ogden, 17 John. 488. On writ of error that judgment was reversed by the Supreme Court of the United States, which unanimously held, that such acts of the legislature of New York, were repugnant to the constitutional clause in question, so far as they prohibited vessels licensed according to the laws of the United States for carrying on the coasting trade, from navigating such waters by means of fire and steam. Gibbons v. Ogden, 9 Wheaton 1-240. The logic of the opinion of the court by Chief Justice Marshall, is to the effect, that interstate commerce is trade—traffic and commercial intercourse between individuals in different States and includes navigation and transportation. In other words, it consists, in part, at least, in the purchase or obtaining of goods or property in one State and transporting the same to another State; and the sale or disposition of the same in such other State; and that the whole transaction is a unit which concerns the people of more

than a single State; and hence the "power" to "regulate" the same, was, by the Constitution of the United States, expressly delegated to Congress, and to that extent, the same was surrendered by the several States. Sect. 8, Art. 1., Con. U. S. This is made plain by a great number of adjudications since made by that same court —two only of which are here cited. Bowman v. Chicago, etc. Ry. Co., 125 U. S. 465; Lisy v. Hardine, 135 U. S. 100. See 2 Story on Con. Law, Secs. 1056-1067. That decision in Gibbons v. Ogden, was a death blow to what was previously miscalled state rights—so far as the regulation of "commerce with foreign nations, and among the several states" was concerned. It was made in 1824 by an able court composed of seven members—two of whom were Federalists and five Republicans appointed as follows: John Marshall and Bushrod Washington by President John Adams; William Johnson and Thomas Todd by President Jefferson; Gabriel Duvall and Joseph Story by President Madison and Smith Thompson by President Monroe. The leading opinion by Marshall, C. J., covers thirty-six pages, and the concurring opinion by Mr. Justice Johnson seventeen pages. The decision and opinion of Chancellor Kent, in the case, was based upon the theory, that in the absence of adverse legislation, by Congress, the state legislature had the sovereign power to exclude all "commerce with foreign nations and among the several states," except such as was carried by vessels specifically authorized by the State. And yet Kent was an ardent Federalist who rejoiced when Jefferson was defeated by John Adams for the presidency; and had carefully studied the writings of John Jay, James Madison and Alexander Hamilton as they appear in the Federalist. January 21, 1830, he wrote to Daniel Webster: "That the President (Andrew Jackson) grossly abuses the power of removal is manifest, but it is the evil genius of democracy to be the sport of factions. Hamilton said in the Federalist, in his speeches, and a hundred times to me, that factions would ruin us, and our government had not sufficient energy and balance to resist the propensity to them, and to control their tyranny and their profligacy. All theories of government that suppose the mass of the people virtuous, and able and willing to act virtuously, are plainly utopian, and will remain so until the Saturnian age." That he had great admiration for Hamilton, who was six years his senior, is manifest from an address delivered by him to the Law Association of New York City, October 21, 1836, and which may be found in 2 Columbia Jurist, 113. Hamilton had incurred the special ill-will of Burr, who belonged to the opposite political party, by inducing

the New York delegation in the House of Representatives in February, 1801, to cast the vote of that state, on the thirty-sixth ballot, for Jefferson, instead of Burr, for President of the United States; and by opposing Burr for Governor of New York in the summer of 1804, until at last Burr challenged Hamilton to fight a duel which was accepted, and the latter was fatally wounded and died July 12, 1804. The pretext for the challenge implicated Kent as much as Hamilton, and consisted of a published statement over the signature of "Dr. Charles D. Cooper," in which it was said, that: "General Hamilton and Judge Kent have declared, in substance, that they looked upon Mr. Burr to be a dangerous man, and one who ought not to be trusted with the reins of government." Some ten years after the death of Hamilton, and after Burr had returned from Europe, in a dilapidated condition and resumed his practice of the law, and Kent had become Chancellor of the State, he chanced one day to see Burr in Nassau street in the City of New York, and although on the opposite side of the street, he could not restrain his impetuosity, and rushed across and shook his cane in Burr's face and exclaimed with a voice choked with passion: "You are a scoundrel, sir!—a scoundrel!" After a little hesitation, Burr raised his hat, and making a sweeping bow, exclaimed: "The opinions of the learned Chancellor are always entitled to the highest consideration." The acknowledged genius of Burr was never shown to better advantage.

The opinion and decision of Chancellor Kent in Ogden against Gibbons, should not surprise any one, since the question was then new and profoundly intricate—so much so that many of the decisions of the Supreme Court of the United States upon interstate commerce questions since, have been by a divided court. Besides, that decision, as well as the decision of the Supreme Court of the United States in the same case, is another evidence that State and Federal judges, may, as a general rule, be relied upon to declare the law as they conceive it to be, regardless of the party affiliations of the judges making the decision. Moreover, Kent did not have the aid of the very able argument of Mr. Webster, who appeared for the first time in the case after it had reached the Supreme Court of the United States.

December 12, 1847, Kent died at the ripe age of eighty-four. At a meeting of the bar of the City of New York, it was resolved, among other things, "that all will unite in deploring the loss of him, who for a long series of years has been the unquestioned head of American jurisprudence." 2 Barb. Ch. R. 648. It was there

said by Ogden Hoffman, on behalf of the committee presenting the resolutions: "I would love to linger upon the purity of his character, the truthfulness of his mind, the honesty of his purposes, upon the childlike simplicity of his manners, the trusting confidence of his friendships, the gushing tenderness toward those who had been his companions at the bar, and the sharers of his toils; a tenderness extended as I have known and felt, even toward their sons, whose career he would watch and guide with a solicitude almost parental. I would love to linger on his devotion to the honor and character of our profession—upon the joy which every act or decision, that advanced or elevated it, would inspire—upon his honest and virtuous indignation at every deed that soiled the ermine of the judge, or stained the gown of the advocate." In closing this article, which is already too long, I am gratified to know that James Kent and Joseph Story are among the twenty-nine who have a place in the Hall of Fame recently constructed at the University of New York. Ninety-seven of the one hundred electors voted; and of the votes cast, Kent received sixty-five and Story sixty-four. I am pleased to know that I, as one of the electors, cast a vote for each of them. The analysis of the vote shows that presidents of colleges and universities cast thirteen votes for Kent and fifteen for Story; that professors of history, and scientists cast eighteen votes for Kent and seventeen for Story; that publicists, editors and authors cast thirteen votes for each of them, and that justices of the state and national courts cast twenty-one votes for Kent and nineteen for Story. To my mind, each excelled the other in certain directions; and each is entitled to the praise he has received. Certainly, I should hesitate before declaring that either was superior, as a jurist, to the other.

John B. Cassoday.