

“CUSHMAN KELLOGG DAVIS”

BY

GILBERT J. CLARK

FOREWARD

BY

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1.

In 1895, Gilbert J. Clark, a Kansas City lawyer, published two volumes of profiles of prominent lawyers under a grand title: *Life Sketches of Eminent Lawyers, American, English and Canadian, to Which is Added Thoughts, Facts and Factiæ*. This was not a solitary venture. Clark wrote and edited his “life sketches” with the “kindly aid of some fifty lawyers and judges.” He believed that they could instruct and inspire his readers.¹ Two epigraphs establish his aims:

“It is well to read carefully and frequently the biographies of eminent lawyers. It is good to rise from the perusal of the studies and labors, the trials and conflicts, the difficulties and triumphs, of such men in the actual battle of life, with a secret feeling of dissatisfaction with ourselves. Such a sadness in the bosom of a

¹ The biographical sketches and memorials of individual lawyers and judges on the MLHP have a related function: to encourage and ease the writing of future legal histories. A base of biographies may assist later legal historians in researching broader topics such as the rise of legal specialties, the emergence of the large firm, etc.—in other words, it may aid them, in a small way, in identifying and illustrating changes in professional behavior. And biographical sketches add colorful background to the drama of the case study.

young student is like the tears of Thucydides, when he heard Herodotus read his history of the Olympic Games, and received the plaudits of assembled Greece. It is the natural prelude to severer self-denial, to more assiduous study to more self-sustaining confidence." *George Sharswood: "Professional Ethics."*

"Give the *essence* of the man's history, *condensed* to the very utmost, the dates, his birth, death, main transactions—In short, the *bones* of his history; then add reference to the books and sources, where his history and character can learned farther by such as wish to study it." *Thomas Carlyle.*

Only one of the 146 profiles was of a lawyer from Minnesota: Cushman Kellogg Davis, at that time a powerful United States Senator. Clark's sketch of Davis had three parts: an introductory paragraph outlining major events in Davis's life to that point, followed by excerpts from a speech Davis made on the Senate floor about railroad strikes in 1894, and concluding with Davis's suggestions on conducting cross-examination.

2.

Clark writes that Davis had "delivered many lectures, upon historical subjects, which rank him among the first in literary circles of the country, the best known of which is "Modern Feudalism" (1870)." To understand the significance of this particular lecture not only to Davis's political career but also to the agrarian uprising of the 1870s, we turn to William Watts Folwell:

In the course of [Governor Horace] Austin's administration this opposition was re-enforced by a new contingent of young Republicans, many of whom had seen service in the Civil and Indian wars and were seeking political reward as their due for patriotic labors and sacrifices. "The Ramsey dynasty has ruled long enough," was their talk. The old clique of state and federal officers had fed quite long enough at the public crib. It was time

for the young Republicans to have a hand and a share. A willing and capable leader was needed, and he appeared. At the close of the war there settled in St. Paul a young lawyer named Cushman Kellogg Davis. He was born in Jefferson County, New York, in 1838, was graduated from the University of Michigan, and served with credit in the line of a Wisconsin regiment and on the staff of General Gorman. He was well-enough learned in the law, possessed the power of ready and acute analysis, and was a master of clear and eloquent statement.

He rapidly built up a remunerative law practice and interested himself the while in public affairs. He served as a member of the Minnesota House of Representatives in 1867 and, by the grace of Senator Ramsey, became United States district attorney for the state in the year following. Intent on higher things, he did not work for state or local office, but practiced law, enlarged his acquaintance, and watched the signs of the times. In 1870 he wrote and delivered before the literary societies of the state university and elsewhere an address entitled "Modern Feudalism," a searching, profound, and almost prophetic arraignment of corporation evils and dangers. It gained for its author a reputation more than local for discernment and courage. In fact, this address made so favorable an impression on the Grangers that their leaders debated among themselves the proposition to nominate Davis for governor at the Owatonna convention. After some dalliance with them, he decided to stay in the old Republican ship.²

Writing almost a century after Davis delivered this lecture, historian William Appleman Williams recognized and admired its impact:

The convergence of agricultural complaints against the metropolis also manifested itself in the growth of the Grange movement in states like Iowa and Minnesota. The key organizer in Iowa was William D. Wilson, and the effort in Missouri was given an important boost when [Norman J.] Colman began to

² William Watts Folwell, III *A History of Minnesota* 81-82 (St. Paul: Minnesota Historical Society Press, 1969)(Rev. ed.)(published first in 1926)(citing sources).

support the Grange in his widely circulated *Rural World*. The single most significant statement of the Western attitude, however, was made by an exceptionally talented young Minnesota Republican named Cushman Kellogg Davis. His major speech of 1870, in which he discussed the rise and nature of metropolitan power in terms of “modern Feudalism,” was one of those classic performances that produced an instant response and a long-term effect. Unless that power was checked, he warned, the trust—or corporation—would quickly dominate the life of the American majority just as the baron earlier ruled the European serf. The tariff and transportation problems were symptoms of the new system, and the citizen had to control the new center of power as well as deal with its specific actions. As for the leaders of his own Republican party, Davis warned them that they would go under unless they responded to the just demands of the majority.

The analysis won such a generally favorable response that, as Davis later noted, it shortly made him Governor of Minnesota. The conservatives who initially dismissed the analogy with feudalism as “rank radicalism” reconsidered even before that development, for Davis had given exceptional expression to a common feeling and attitude.³

3.

The stage for Davis’s speech on the strikes of 1894 was set two years earlier. There was considerable labor strife in 1892, followed by the financial Panic of 1893, and the tumultuous Pullman Strike the next year. Rebecca Edwards describes this spike in industrial conflicts in her acclaimed *New Spirits: Americans in the Gilded Age, 1865-1905*:

³ William Appleman Williams, *The Roots of the Modern American Empire: A Study of the Growth and Shaping of Social Consciousness in a Marketplace Society* 145-146 (New York: Random House, 1969)(citing a commentary Davis wrote on a copy of his speech in the Davis papers in the Minnesota Historical Society). On Williams, see David S. Brown, *Beyond the Frontier: The Midwestern Voice in American Historical Writing* 127-46 Chicago: Univ. Chicago Press, 2009).

In 1892, the year before the depression hit with full force, Americans had already witnessed showdowns in the steel mills of Pennsylvania and the mines of Idaho, along with a general strike in New Orleans and smaller ones in such diverse locations as Buffalo, New York, and Tracy, Tennessee. The first full year of the depression, 1894, brought two more large-scale labor conflicts. In April 125,000 Pennsylvania coal miners walked off their jobs (the United Mine Workers' official membership rolls counted 20,000). The strike spread to mines in Illinois, West Virginia, Ohio, and elsewhere. Two months later the American Railway Union (ARU) announced that its members would no longer carry Pullman cars, in sympathy with workers at Pullman's Illinois plant who had walked out after wage cuts of 25 to 40 percent. (There had been no corresponding cut in their rents for company-owned housing, nor in shareholders' dividends). Eugene Debs had purposely built the ARU as a broad-based, industrywide union, having witnessed past defeats when brakemen, switchmen, and engineers tried to negotiate separately. The strategy worked brilliantly. On June 26 ARU workers all over the Midwest began shunting Pullman cars to the sidings. By the following day traffic on twenty railroads had slowed to a near halt, and at passenger stations as far apart as Delaware and California, Pullman cars ceased to run.⁴

In the midst of this crisis, from stage right, entered Senator Davis, whose performance was lauded by William Watts Folwell:

Brilliant as Senator Davis' professional and official career was, it is likely that he will be best known in history by a series of extraordinary addresses and orations. Although he was without resonance of voice and commanding personality, he was a consummate rhetorician. His published books will also add to his fame, the principal ones being *The Law in Shakespeare* and *A*

⁴ Rebecca Edwards *New Spirits: American in the Gilded Age, 1865-1905* 236-37 (New York: Oxford Univ. Press, 2006). On the Pullman strike, see generally Richard Schneirov, Shelton Stromquist & Nick Salvatore eds., *The Pullman Strike and the Crisis of the 1890s: Essays on Labor and Politics* (Urbana: University of Illinois Press, 1999).

Treatise on International Law. One typical example of his wisdom and his courage ought to be on record in every history of his state. In the year 1894 there were numerous railroad strikes. A resolution was introduced into the United States Senate by Senator Kyle of South Dakota to prohibit the issue of civil or criminal process against strikers for obstructing railroad traffic if they did not interfere with the movement of mails. Some committee, presuming to act for a body of strikers in Duluth, asked Senator Davis by telegraph to vote for the resolution. His instant reply was: "I have received your telegram. I will not support the resolution. It is against your real welfare. It is also a blow at the security, peace, and rights of millions who never harmed you or your associates. My duty to the Constitution and the laws forbids me to sustain a resolution to legalize lawlessness. The same duty rests upon you and your associates. . . . You are rapidly approaching the overt act of levying war against the United States, and you will find the definition of that in the Constitution. . . . You might as well ask me to vote to dissolve the Government." ⁵

Davis's speech to the Senate on "The Great Railroad Strike of 1894" was political and, while it may have been hugely popular, it was also divisive, infuriating radical fringe groups, who called for his "impeachment." ⁶ It was not particularly eloquent, and one wonders why, of Davis's many orations, Clark felt the following "extract" met his goals of instruction and inspiration.

4.

The last section of Clark's sketch is an excerpt from suggestions Davis once gave on the art of cross examination. It was published first in Judge John Wesley Donovan's *Tact in Court*, which went through many editions from 1885 through the early 1900s. Davis had three rules, but Clark reprinted only two. Missing is the third:

⁵ William Watts Folwell, *supra* note 2, at 250-51.

⁶ Martin Ridge, *Ignatius Donnelly: Portrait of a Politician* 334 (Chicago: University of Chicago Press, 1962)(citing newspaper sources).

3. Never misstate or overstate testimony to a jury, in summing up. You will always be detected by some juror and he will resent your attempt to “play him for a fool.”⁷

5.

When Clark compiled his book of sketches, lawyers who were U. S. Senators could maintain private law practices. Some appeared before the courts. Davis was one. Clark writes that Davis’s “practice in the State and Federal courts has been large, not abating because of his duties as Senator. He appeared as counsel six times within a year in as many different cases in the United States Supreme Court in 1890.” Davis is listed as counsel in *Jones v. Van Doren*, 130 U.S. 684 (1889); *Hennessy v. Bacon*, 136 U.S. 638 (1899) (appeal from the Circuit Court of the United States for the District of Minnesota denied, December 9, 1899; however, by order of January 13, 1890, it was re-docketed and submitted next term); *Brown v. Brown*, 136 U.S. 631 (1890) (appeal from the Supreme Court of the Territory of Dakota dismissed, April 24, 1890); and *Beaupre v. Noyes*, 138 U.S. 397 (1891).⁸

6.

The following article appeared first on pages of 244-47 of the first volume of Clark’s set. It is complete though reformatted. Other articles on Davis on the MLHP include memorials by George F. Hoar, “Cushman Kellogg Davis” (1903), and Clark Bell, “Cushman Kellogg Davis” (1900); Davis is also mentioned in the “Foreward” to Charles E. Flandrau, “Contempt of Court” (1895).

⁷ John Wesley Donovan, *Tact in Court* 86 (Rochester, N. Y.: Williamson Law Book Co., 1907)(6th edition). Davis’s three rules are posted separately on the MLHP in “Cushman Kellogg Davis: ‘Cross-Examination.’”

⁸ We are unable to identify Davis’s other cases before the Supreme Court at this time. Viewer assistance is requested.

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IN

LIFE SKETCHES

OF

EMINENT LAWYERS,

AMERICAN ENGLISH AND CANADIAN,

TO WHICH IS ADDED

THOUGHTS, FACTS AND FACETIÆ.

IN TWO VOLUMES.

BY

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AMERICAN, ENGLISH AND CANADIAN LAWYERS,”
IN TWO EDITIONS.

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CUSHMAN KELLOGG DAVIS, MINNESOTA.
(1838- —)

United States Senator for Minnesota. He was born in Jefferson county, New York, June 16, 1838. Moved with his parents when a child to Waukesha, Wisconsin; attended Carroll College, and graduated from Michigan University in the class of 1857; studied law and began practice in 1859 at Waukesha. He enlisted in the service of the war in 1862, and became First Lieutenant in the Twenty-eighth Wisconsin, and Acting Adjutant General for General Gorman; left the army on account of typhoid fever. He settled in the practice of his profession at St. Paul, where he has acquired the reputation of being one of the first lawyers of the Northwest. In 1867, he was a member of the Legislature, and from 1868 to 1875, United States District Attorney for Minnesota. In the fall of 1873 he was elected Governor of Minnesota, the youngest man ever elected chief executive of that State. He declined re-nomination. Elected United States Senator in 1887, and re-elected by the Legislature in 1893; made LL. D. by Michigan University in 1886.

He is the head of the popular law firm of Davis, Kellogg and Severance. His practice in the State and Federal courts has been large, not abating because of his duties as Senator. He appeared as counsel six times within a year in as many different cases in the United States Supreme Court in 1890. As a lawyer, he is quickly interested when there is an intimation of wrong in the complainant's story. He makes the grievances of others his own and sifts matters to the bottom.

He has found time during his official and professional life to devote much thought to literature, and has been a close and ardent student of Shakespeare, "The Law in Shakespeare," coming from his pen in 1884. He has also delivered many lectures, upon historical subjects, which rank him among the first in literary circles of the country, the

best known of which is “Modern Feudalism” (1870). He is a man of medium build, with a courteous demeanor, a kindly eye, and is an attentive listener.

The Great Railroad Strike of 1894.

“To talk about withholding the assertion of Federal authority till other means could be used for the settlement of the labor contest peacefully, is like proposing to have the proceedings at the battle of Gettysburg suspended until General Lee and the other confederate chieftains could arrange some program for the peaceful perpetuation of slavery and the definite recognition of the right of secession. What folly it is to adopt one moral standard for the sea and another for the land; and yet, if the offences against life, liberty and property committed by the Chicago rioters had been committed on the high seas, their perpetrators would have been condemned for piracy and dealt with accordingly. Look at the logic of the case from another side, five millions of the people of the United States, forty-five per cent, of the producing population of the United States, are farmers. If any one class of the community have a right to call themselves distinctively ‘the people of the United States,’ it is the farmers. Have the farmers asked for this strike? Do they sympathize with it? Were they consulted as to its beginning or as to whether it should be kept up? No! It is the farmer who suffers every day by it. He cannot send his produce to market. It perishes on his hands, while consumers are seeking a chance to purchase it. The farmer may always be looked for on the side of law and order and the perpetuity of popular institutions, as against every form of anarchy and oppression.”

— Extract from speech by Mr. Davis in the United States Senate.

Cross-Examination.

“1. Discount by at least twenty-five per cent. what your client says he himself will swear to.

2. Do as little cross-examination as possible. Never, on cross-examination, ask a question when you do not know what the answer must be if the witness is honest; and, if he is a liar, don't ask the question unless you are ready to ruin him with contradiction by facts in evidence, or by other witnesses. I have seen more good cases ruined by cross-examination, by the lawyer who ought to have suppressed his curiosity or vanity, than by any other cause.”

—Tact in Court, p. 86.



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