SUMMING UP FOR THE PETITIONERS IN THE MATTER OF CHARGES PREFERRED AGAINST ASA BIRD GARDINER, DISTRICT ATTORNEY OF NEW YORK COUNTY

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Summing up for the Petitioners in the Matter of Charges Preferred Against Asa Bird Gardiner, District Attorney of New York County by Various

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VARIOUS

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NOTE.

As the result of an investigation into the official conduct of Mr. Asa Bird Gardiner as district attorney of New York County, conducted by the municipal government committee of The City Club of New York, under the direction of the Council of the Club, several members of the committee presented to the governor, on the 31st of October, 1899, formal charges of misfeasance, malfeasance, and non-feasance in office against Mr. Gardiner. The governor appointed Ansley Wilcox, Esq., of Buffalo, a commissioner to take testimony in the matter, and assigned the attorney general of the state to conduct the investigation into the charge. Hearings before the commissioner in New York County began on the 6th of February, 1900, and were continued from time to time until the latter part of June, when counsel summed up, and the matter was left in the hands of the commissioner for report to the governor.

As the case of the petitioners was not fully developed until the end of the proceedings before the commissioner many members of The City Club may have failed to perceive the nature and the effect of the volume of testimony presented.

The Council of the Club has, therefore, printed the summing up in behalf of the petitioners, by Horace E. Deming, Esq., of New York City, in order that members of the Club and others interested may be informed of the basis for the demand that the district attorney of New York County should be removed from office.

In the matter of the charges preferred

against

ASA BIRD GARDINER, District Attorney of New York County.

BEFORE ANSLEY WILCOX, ESQ., JUNE 27, 1900.

MR. DEMING.—Art. X, Sec. 1 of the Constitution provides that the Governor may remove any Sheriff, County Clerk, District Attorney or Register in a county having a Register, "within the term for which he shall have been elected, "giving to such officer a copy of the charges against him, and "an opportunity to be heard in his defense."

To aid the Governor, but in no way to interfere with or qualify his power and duty under the Constitution, which indeed the Legislature could not do, the Public Officers Law (Art. II., Sec. 24) provides that the Governor may designate a Commissioner to hear and report the testimony when charges are preferred against one of the officers mentioned.

Charges were duly filed with the Governor in November, 1899, against Asa Bird Gardiner, Esq., District Attorney of the County of New York, and the Governor appointed your Honor as Commissioner to take and report the testimony, and designated the Attorney General to conduct the investigation into the truth of the charges.

The charges are dated October 30th, 1899. They are grouped under four general heads:—

Misfeasance, or misuse and abuse of official power.
Nonfeasance, or neglect of official duty.
Malfeasance, or wrongful acts.
Demonstrated moral and mental unfitness for the office.

It is claimed by the petitioners that the proofs taken before the Commissioner show such a course of conduct by the District Attorney, so many violations of his official duty by acts of omission and commission, so many instances of mental and moral unfitness on his part to perform the high and responsible duties of his office as to result in grave damage to the public interests, to bring ridicule and contempt upon the administration of criminal justice in the county and upon the community itself.

The charges when made were supported by various schedules covering occurrences between January 1st, 1898 (when the District Attorney entered upon his office), and October 30th, 1899, when the charges were signed. Since that time, however, the District Attorney has himself offered the entire period of his incumbency down to approximately the date of the last hearing before the Commissioner in May, 1900. This course of the District Attorney has furnished much additional proof in support of the charges. There has also been introduced in evidence, partly by the District Attorney and partly by the petitioners, proofs of a series of events occurring in March, 1900, in connection with the relations of the District Attorney's office with the March, 1900, Grand Jury.

When the District Attorney had finished his proofs, the petitioners attempted to prove a number of specific instances of conduct on the part of the District Attorney occurring subsequent to October 30th, 1899, which they claimed to be rebuttal

or cumulative and corroborative proof of the charges. This the Commissioner excluded, holding that it could not be admitted, unless the Attorney General should first make application to re-open the case, and the Commissioner, upon due consideration, should decide that such application be granted. Since the proofs offered were in each instance directly pertinent to one or more of the charges; and, further, since the District Attorney had been allowed to give evidence of his official conduct during the entire period of his incumbency the Attorney General was of opinion that there was no sound reason for the making of any motion on his part to re-open the case. He, therefore, declined to make such a motion.

Now I shall group what I have to say under these heads. I cannot undertake to give all the evidence, or even to give an approximate summary of all the evidence in support of the propositions we maintain.

I shall discuss, First: The District Attorney's conduct in the matter of dismissing indictments and discharging bail;

Second: The conduct of the District Attorney in enforcing the rights of the people as against sureties on forfeited bail bonds;

Third: The District Attorney's conduct in consenting to or in not opposing the withdrawal from Special Sessions of petty misdemeanor cases which were properly triable there;

Fourth: The unseemly conduct on the part of the District Attorney and his staff in their relations with the Court and the Judges, including the calendar quarrels, the arrest of the Court attendant, the mandamus proceedings against the Recorder, the preparation, presentation and conduct of cases, the calendar methods of his office, the delays in bringing cases to trial and the frequent failure to supply the Courts with sufficient business;

Fifth: The District Attorney's nullification of the Liquor Tax Law;

Sixth: The conduct of the District Attorney in the following specific cases:

People v. Greenberg,
People v. Walsh,
People v. Caplan,
People v. Forrest,
People v. Cleaveland,
People v. Butler and Holt,
People v. Henderson,
Matter of Stewart,
People v. Molineux;

Seventh: The conduct of the District Attorney in his relations with the Grand Jury and the Court and as to the investigations under his official charge in March, 1900, as disclosed by the minutes of the Grand Jury for March, 1900, made public as a part of the records of the Court of General Sessions by order of that Court, together with the testimony of the District Attorney himself and of other witnesses taken in this proceeding;

Eighth: The mental and moral unfitness shown by the foregoing, by his answer to the charges and by facts brought out on his direct and cross examination.

All statements of figures and statistics will be taken from the public official records and from the District Attorney's own answer or from the compilations and summaries furnished by him from his own office. Before taking up more in detail, the evidence under each of these four heads, it is proper for us to bear certain facts in mind.

The District Attorney's office has a staff of 120 employees.

Each one his personal appointee, including a staff of 23 trained lawyers, a chief Clerk's Department, containing 34 members, 10 stenographers and typewriters, 39 county detectives, 14 messengers and copyists. The annual salaries amount to $231,810. There are also members of the police force detailed for the District Attorney's service and he has control of a large contigent fund.

The District Attorney, then, is amply supplied at the public expense with means to perform the high and responsible duties of his office.

How has he performed them?

Let us now examine into the conduct of the District Attorney in the Dismissal of Indictments and Discharge of Bail.

The multitude of cases which in a county like New York are brought before the Grand Jury has led to the establishment of an elaborate system for dealing with them. Except in the rarest instances, complaints reach the Grand Jury for action only after passing through the District Attorney's office. Whether the complaint is made in the first instance before a committing magistrate and the accused is held for the action of the Grand Jury or the complaint is brought direct to the District Attorney, the District Attorney investigates the grounds of the complaint, the character of the offence charged, collects and arranges the evidence and makes out a list of the witnesses with their addresses (1). These papers, together with a carefully prepared indictment appropriate to the offence charged, he transmits to the Grand Jury with whom he arranges each day a calendar of cases for their action, issuing subpoenas for witnesses, etc.

Unless in the District Attorney's opinion his personal presence before the Grand Jury is needed, in addition to these

(1) Stenographer's minutes, pages 1701, 1702, 8982, 8983, 4126.

elaborate precautions, he is ordinarily not present; but he is always at hand to answer questions and to give information and advice, and whenever in his judgment his actual presence is at all desirable, he personally conducts the examination of witnesses before the Grand Jury (1). The finding of an indictment without the concurrence of the District Attorney or against his advice is practically unheard of (2). Beginning with January 1st, 1898, the District Attorney has taken still further precautions to insure that indictments are properly found, by making and enforcing a rule that, save in the rarest cases, no complaint will be presented by him to the Grand Jury unless it has been first approved by a committing magistrate (3).

The presumption, therefore, in New York County that indictments have been properly found upon adequate evidence would seem to be irresistible, and certainly the District Attorney can not be heard to deny it.

Prior to the year 1895, indictments and all papers referring to indictments were in the District Attorney's office, and were not accessible as public records.

Beginning with January 1st, 1895, there began to be official records in the office of the Clerk of General Sessions of indictments found and of their subsequent history. You can now trace the history of an indictment in that office as you can trace title to real estate in the Register's office. We are thus enabled, commencing with that date, to secure accurate official information.

When the present District Attorney entered upon his office January 1st, 1898, there were pending 1446 indictments found during the years 1895, 1896 and 1897. How did he dispose of

Stenographer's minutes :—(1) pages 3998-9, 4001, 4006, 4124; (2) pages 1702-3, 3997; (3) pages 3985, 3990.